

**IMMUNITY OF STATE OFFICIALS AND PROSECUTION OF
INTERNATIONAL CRIMES IN AFRICA**

By

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Chacha Bhoke Murungu
Pretoria, 23 May 2011.



Dedication

To my family

Declaration

I declare that the thesis titled **Immunity of state officials and prosecution of international crimes in Africa**, which I hereby submit for the degree *Doctor Legum* (LL.D), at the University of Pretoria, is my work and has not previously been submitted by me for a degree or examination at this or another university. Where secondary material is used, this has been carefully acknowledged and referenced in accordance with University requirements.

Chacha Bhoke Murungu

Signature.....

23 May 2011.

List of abbreviations

AU	African Union
BBC	British Broadcasting Corporation
CICC	Coalition for an International Criminal Court
DRC	Democratic Republic of the Congo
ECCC	Extra-ordinary Chambers in the Courts of Cambodia
EU	European Union
FRY	Former Federal Republic of Yugoslavia
ICC	International Criminal Court
ICJ	International Court of Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
ILC	International Law Commission
ILM	International Legal Materials
ILR	International Law Reports
JCE	Joint Criminal Enterprise
LRA	Lord's Resistance Army
MLC	Mouvement pour la Libération du Congo
NATO	North Atlantic Treaty Organisation
NGOs	Non-Governmental Organisations
IMT	International Military Tribunal, at Nuremberg
IMTFE	International Military Tribunal for the Far East, at Tokyo
Rome Statute	The Rome Statute of the International Criminal Court

RPF	Rwandan Patriotic Front
SADC	Southern African Development Community
SCSL	Special Court for Sierra Leone
SICT	Supreme Iraqi Criminal Tribunal
TRC	Truth and Reconciliation Commission
UK	United Kingdom of Great Britain and Northern Ireland
UN	United Nations
UNGA Res	United Nations General Assembly Resolution
UNSC Res	United Nations Security Council Resolution
USA	United States of America

Summary

This study deals with two aspects of international law. The first is ‘immunity of state officials’ and the second is ‘prosecution of international crimes.’ Immunity is discussed in the context of international crimes. The study focuses on Africa because African state officials have become subjects of international criminal justice before international courts and various national courts both in Europe and Africa. It presents a new contribution to international criminal justice in Africa by examining the practice on prosecution of international crimes in eleven African states: South Africa; Kenya; Senegal; Ethiopia; Burundi; Rwanda; DRC; Congo; Niger; Burkina Faso and Uganda. The study concludes that immunity of state officials has been outlawed in these states thereby rendering state officials amenable to criminal prosecution for international crimes.

The thesis argues that although immunity is founded under customary international law, it does not prevail over international law *jus cogens* on the prosecution of international crimes because such *jus cogens* trumps immunity. It is argued that, committing international crimes cannot qualify as acts performed in official capacity for the purpose of upholding immunity of state officials. In principle, customary international law outlaws functional immunity in respect of international crimes. Hence, in relation to international crimes, state officials cannot benefit from immunity from prosecution or subpoenas.

Further, the study criticises the African Union’s opposition to the prosecutions before the International Criminal Court (ICC). It argues that however strong it may be, such opposition is unfounded in international law and is motivated by African solidarity to weaken the role of the ICC in Africa. It concludes that the decisions taken by the African Union not to cooperate with the ICC are geared towards breaching international obligations on cooperation with the ICC. The study calls upon African states to respect their obligations under the Rome Statute and customary international law. It recommends that African states should cooperate with the ICC in the investigations and prosecution of persons responsible for international crimes in Africa.

At international level, the study reveals the conflicting jurisprudence of international courts on subpoenas against state officials. It argues that, state officials are not immune from being subpoenaed to testify or adduce evidence before international courts. It contends that issuing subpoenas to state officials ensures fairness and equality of arms in the prosecution of international crimes. It recommends that international courts should treat state officials equally regarding prosecution and subpoenas. It further recommends that African states should respect their obligations arising from the Rome Statute and that, immunity should not be used to develop a culture of impunity for international crimes committed in Africa.



List of terms

Immunity – State officials – Prosecution – International crimes – Subpoenas – *Jus cogens* – African Union – African jurisdictions – International courts – International Criminal Court.

Contents

Acknowledgments.....	ii
Dedication.....	vi
Declaration.....	vii
List of abbreviations.....	viii
Summary.....	x
List of terms.....	xii
Contents.....	xiii

Chapter 1 Introduction

1.1	An overview.....	1
1.2	Background to the study.....	3
1.2.1	Prosecution of African state officials: Sketching the problem.....	10
1.2.2	The controversy on immunity.....	16
1.3	Research questions.....	19
1.4	Assumptions.....	20
1.5	Research methods.....	21
1.6	Existing studies.....	23
1.7	Objectives of the study.....	26
1.8	Significance of the study.....	28
1.9	Limitations and delimitations of the study.....	28
1.9.1	Definition of state officials as per the Rome Statute.....	29
1.9.2	Crimes covered in this study.....	30
1.9.3	Temporal limit on crimes committed by state officials.....	32
1.10	Conceptual clarifications.....	32
1.10.1	Immunity.....	33
1.10.1.1	Scope of immunity of state officials.....	35
1.10.2	International crimes.....	37
1.10.3	Indictment.....	38
1.10.4	Prosecution.....	39
1.10.5	Subpoena <i>ad testificandum</i> and subpoena <i>duces tecum</i>	39
1.11	Chapter outline.....	40

Chapter 2

Developments of the law on immunity of state officials in international law

2.1	Introduction.....	43
2.2	Customary international law of immunity of state officials.....	44
2.3	Codification of immunity of state officials.....	50
2.3.1	Developments of the law on immunity before the Nuremberg Charter.....	51

2.3.2	Immunity in the Charter of the International Military Tribunal.....	52
2.3.3	Immunity under Control Council Law No.10.....	54
2.3.4	Immunity in the Charter of the International Military Tribunal for the Far East.....	55
2.3.5	Immunity in the statutes of international criminal tribunals.....	57
2.3.6	Immunity in the Rome Statute of the International Criminal Court.....	59
2.3.6.1	Drafting history of Article 27 of the Rome Statute.....	61
2.3.6.2	Controversy between Articles 27 and 98(1) of the Rome Statute.....	64
2.3.7	Immunity in the statutes of hybrid courts.....	70
2.3.8	Immunity as covered under treaties.....	73
2.3.9	International Law Commission and the question of immunity.....	78
2.3.10	The law on immunity as developed in non-binding instruments.....	81
2.4	Does immunity prevail over international law <i>jus cogens</i> on the punishment of international crimes?.....	84
2.5	Conclusion.....	92

Chapter 3

Jurisprudence of international courts on immunity of state officials

3.1	Introduction.....	94
3.2	State officials do not enjoy immunity from prosecution before international courts.....	95
3.3	Subpoenas against state officials before international courts –An unsettled field.....	106
3.3.1	Conditions for the issuance of subpoenas.....	112
3.3.2	The ICTY and the question of subpoenas against state officials.....	116
3.3.3	The ICTR and the question of subpoenas against state officials.....	132
3.3.4	The SCSL and the question of subpoenas against state officials.....	140
3.4	Conclusion.....	148

Chapter 4

The African Union, prosecution of international crimes and the question of immunity of state officials

4.1	Introduction.....	152
4.2	Cases before the International Criminal Court as at 2011.....	153
4.3	The African Union and legal framework on prosecution of international crimes in Africa.....	159
4.3.1	Protocol for the Prevention and Punishment of the Crime of Genocide, War crimes and Crimes against humanity and all Forms of Discrimination.....	162

4.4	The African Union concerns over prosecution of serving African state officials by the International Criminal Court.....	166
4.5	The African Union trend: A critique.....	177
4.5.1	African regional and sub-regional organisations supported the ICC.....	178
4.5.2	African states had hailed the establishment of the ICC.....	182
4.5.3	The Darfur situation was referred to the ICC by the United Nations Security Council.....	186
4.5.4	Darfur and the question of immunity of serving state officials.....	187
4.5.5	The Peace processes in African states and calls for deferrals.....	188
4.5.6	Some African states are parties to the Rome Statute.....	189
4.5.7	African states have the duty to prosecute and punish international crimes.....	190
4.5.8	African personalities occupy positions at the ICC.....	191
4.6	Conclusion.....	192

Chapter 5

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

5.1	Introduction.....	194
5.2	The practice at African national level: A general observation.....	195
5.2.1	Prosecuting state officials before national courts.....	195
5.2.2	Prosecuting state officials before foreign courts.....	203
5.3	Selected African national jurisdictions.....	205
5.3.1	Ethiopia.....	205
5.3.1.1	Judicial interpretation.....	214
5.3.2	South Africa.....	221
5.3.2.1	State practice.....	221
5.3.2.2	Judicial practice.....	224
5.3.2.3	Legal framework.....	224
5.3.3	Senegal.....	227
5.3.3.1	Legislative efforts.....	227
5.3.3.2	State and judicial practices.....	236
5.3.4	Kenya.....	239
5.3.5	Congo.....	248
5.3.6	Democratic Republic of the Congo.....	249
5.3.7	Rwanda.....	255
5.3.8	Burundi.....	263
5.3.9	Burkina Faso.....	265
5.3.10	Niger.....	268
5.3.11	Uganda.....	270
5.4	Conclusion.....	276

Chapter 6

Conclusion and recommendations

6.1 Introduction	279
6.2 Findings.....	279
6.2.1 International law <i>jus cogens</i> imposing obligation to prosecute and punish perpetrators of international crimes prevail over immunity.....	280
6.2.2 State officials do not enjoy immunity from being subpoenaed by international courts.....	282
6.2.3 There is no comprehensive regional framework to prosecute international crimes and outlaw immunity of state officials in Africa.....	283
6.2.4 The African Union’s opposition to the International Criminal Court violates international law.....	285
6.2.5 Immunity of state officials has been outlawed in some African jurisdictions....	286
6.2.6 The laws implementing the Rome Statute in some African states allow universal jurisdiction and retroactive application of punishment.....	287
6.3 Recommendations.....	288
6.3.1 Courts should hold that international law <i>jus cogens</i> prevail over immunity....	288
6.3.2 Courts should issue subpoenas against state officials.....	289
6.3.3 The African Union should adopt a regional treaty to prosecute international crimes and outlaw immunity, and such treaty should call for cooperation with the International Criminal Court.....	290
6.3.4 African states should ratify and implement the Rome Statute.....	291
6.3.5 States should allow universal jurisdiction based on territoriality and nationality principles, and should harmonise their laws with international law standards.....	292
Bibliography.....	294

Chapter 1

Introduction

1.1 An overview

Contemporary international law does not recognise immunity of ‘state officials’¹ as a defence from prosecution for international crimes. This is particularly true when individuals including state officials are charged before international courts. The position is widely accepted both under customary international law,² international law principles³ and treaties since the Peace Treaty of Versailles of 1919.⁴ The same is observed in statutes establishing international and hybrid courts dealing with prosecution and punishment of international crimes.⁵ It has also become accepted by national jurisdictions in the world, including African jurisdictions,⁶ that state officials do not enjoy immunity in respect of international crimes. However, international law is still unsettled on whether state officials enjoy immunity from prosecution for international crimes before foreign

¹ This study prefers the phrase ‘state officials’ to heads of state or governments. For the definition of this concept, see ‘conceptual clarifications’ below (part 1.10).

² *Case Concerning the Arrest Warrant of 11 April 2000 (The Democratic Republic of Congo v Belgium)*, (‘The Arrest Warrant case’), 2002 ICJ Reports, 14 February 2002, para 61.

³ See Principle III, Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal. Adopted by the International Law Commission of the United Nations, (Principles of the Nuremberg Tribunal), 1950, No.82; *Yearbook of the International Law Commission*, 1950, Vol. II, 374-378; *Report of the International Law Commission Covering its Second Session, 5 June-29 July 1950*, Document A/1316, 11-14.

⁴ MC Bassiouni (1999) *Crimes against humanity in international criminal law*, 505.

⁵ Art 7(2) of the Statute of the ICTY, UNSC Res. 808 of 22 February 1993 and UNSC Res. 827 of 25 May 1993; art 6(2) of the Statute of ICTR, UNSC Res. 955 of 8 November 1994; Art 27, Rome Statute; art 6(2), Statute of SCSL.

⁶ See, Sec 27, *International Crimes Act*, 2009 (Kenya); Art 4, *Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002* (South Africa); Sec 18, *Law No.33 Bis/2003 Repressing the Crime of Genocide, Crimes against Humanity and War Crimes* (Rwanda); Art 28, *Constitution of Ethiopia*, 1995; Article 4 of the *Criminal Code of Ethiopia*, 2005; Art 7, *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 2009, at Ouagadougou, by Decree No. 2009-894/PRES; Art 208.7 of the *Law No. 2003-025 of 13 June 2003, amending the Penal Code, Law No. 61-27 of 15 July 1961* (Niger).

jurisdictions.⁷ Probably, that is why the International Law Commission (ILC) is currently studying this aspect to date.⁸

Although there is no immunity of state officials before international courts, there is still much confusion in the jurisprudence of such international courts as discussed in this study⁹ namely, whether state officials are immune from being subpoenaed by international courts to appear and testify (*subpoena ad testificandum*) or to produce documents or adduce evidence (*subpoena duces tecum*). Examining the aspect of subpoenas against state officials to appear and testify or adduce evidence before international courts is just one of the purposes of this study.¹⁰

The other purpose, and which is largely the main focus of this study is to reveal the growing and persistent problem of African state officials who commit international crimes. This arises from the fact that, recently, African state officials have become amongst actors in international criminal justice, particularly before international courts, and national courts of European and even African states. In this regard, the objective is to recommend on how best the African states – under the African Union (AU) can prevent the problem of international crimes committed by African individuals, including African state officials. To be able to determine a solution, the study examines the current laws and practice governing immunity from prosecution for international crimes from international jurisdictions, African regional and sub-regional initiatives, and selected African national jurisdictions.¹¹ The discussion on national jurisdictions involves both

⁷ *The Arrest Warrant* case, para 58.

⁸ See, ILC, 'Provisional Agenda for the Sixty-first Session', Geneva, 4 May- 5 June, and 6 July -7 August 2009, UN General Assembly, UN Doc. A/CN.4/605, Agenda item No.8 'Immunity of state officials from foreign criminal jurisdiction'; ILC, Report on the Work of its 60th Session (5 May to 6 June and 7 July to 8 August 2008), General Assembly, Official Records, Sixty-third Session, Supplement No. 10 (2008), (A/63/10), Ch. X, paras 265-311.

⁹ See background to this study and Ch.3.

¹⁰ A subpoena is one of the ways to ensure appearance or attendance of the witness, and is governed by the Rules of Procedure and Evidence of international courts. See for example, Rule 54, Rules of Procedure and Evidence of the ICTY and ICTR respectively; Rule 54, Rules of Procedure and Evidence of the SCSL and Art 17 of the Statute of the SCSL; Rule 84 of the Internal Rules of the ECCC.

¹¹ African jurisdictions mainly considered by this study include South Africa, Uganda, Kenya, Ethiopia, Senegal, Congo, DRC, Rwanda, Burundi, Burkina Faso and Niger.

domestic and foreign jurisdictions. But, before going into details, setting background information is necessary, as presented in two parts below.

1.2 Background to the study

Today, more than in the past, state officials ‘commit international crimes.’¹² Truly, international crimes are committed not by states, but individuals, including state officials. Often, state officials do not commit crimes directly themselves. They are only responsible ‘indirectly’¹³ for their omission, tolerance, planning, aiding or abetting and complicity to crimes. When international crimes are committed, respect for human rights and humanity demands that the traditional principles of state sovereignty and the shield of ‘immunity’ of state officials be shattered. However, perpetrators of international crimes tend to invoke circumstances, including immunity to exclude their criminal liability. This study deals with this aspect of international criminal justice.

The first African former state official to be prosecuted by an international tribunal for international crimes is Jean Kambanda. Kambanda served as Prime Minister during the genocide in Rwanda. After pleading guilty to the charges of genocide and crimes against humanity, Kambanda was sentenced to life imprisonment.¹⁴ His official status as a Prime Minister served as an aggravating factor in the sentencing process.

The trial of Charles Taylor, former president of Liberia for war crimes and crimes against humanity committed in Sierra Leone, falls in the list of state officials prosecuted for international crimes. Taylor was indicted in 2003 when, like Milošević, he was also still

¹² A Cassese (2008) *International criminal law*, 2nd edn, 307-308.

¹³ See for example, *Prosecutor v Al-Bashir*, Case No. ICC-02/05-01/09, Warrant of Arrest for Omar Hassan Al-Bashir, Pre-Trial Chamber I, 4 March 2009, 1-8; *Prosecutor v Al Bashir*, Case No. ICC-02/05-01/09, 12 July 2010, Second Decision on the Prosecution’s Application for a Warrant of Arrest, Pre-Trial Chamber I, paras 1-44.

¹⁴ *Prosecutor v Kambanda*, Case No. ICTR-97-23-S, Trial Chamber I, ICTR, Judgment and Sentence, 4 September 1998. On what amounts to ‘life imprisonment’ before international tribunals, see, JD Mujuzi (2009) *Life imprisonment in international criminal tribunals and selected African jurisdictions –Mauritius, South Africa and Uganda*, 134.

in office as the President of Liberia, and his immunity as president was not recognised.¹⁵ The serving President of Sudan and, Minister for Humanitarian Affairs in Sudan have been indicted by the International Criminal Court (ICC) for genocide, crimes against humanity and war crimes committed in Darfur.¹⁶ Immunity of President Omar Hassan Al Bashir of Sudan was rejected for international crimes allegedly committed, even though Sudan is not a state party to the Rome Statute.¹⁷

Kenyan state officials, particularly, William Samoei Ruto (suspended Minister of Higher Education), Henry Kiprono Kosgey (Minister of Industrialisation), Francis Kirimi Muthaura (Head of Public Service), Uhuru Muigai Kenyatta (Deputy Prime Minister and Minister for Finance) and Mohamed Hussein Ali (former Chief of Police) are currently on trial before the ICC on charges of crimes against humanity which occurred during the post-election violence in Kenya.¹⁸

The Libyan leader, Muamar Gaddafi was investigated by the Prosecutor of the ICC for crimes against humanity. Two other state officials who were investigated are Saif Al-Islam Gaddafi and Abdullah Al-Senussi. After the investigations, the Prosecutor of the ICC alleged that there are reasonable grounds to believe that Gaddafi is responsible for

¹⁵ *Prosecutor v Taylor*, Case No.SCSL-2003-01-I, *Decision on Immunity from jurisdiction*, Appeals Chamber, 31 May 2004, paras 40-42 and 58-59. However, see arguments by the Defence Counsel, para 6 (a) & (d); art 6(2) of the Statute of SCSL.

¹⁶ *Prosecutor v Al Bashir*, Case No. ICC-02/05-01/09, Warrant of Arrest for Omar Hassan Al-Bashir, Pre-Trial Chamber I, 4 March 2009, 1-8; *Prosecutor v Harun*, Case No. ICC-02/05-01/07, Warrant of Arrest for Ahmad Harun, Pre-Trial Chamber I, 27 April 2007, 1-16; *Prosecutor v Al Bashir*, 12 July 2010, Second Decision on the Prosecution's Application for a Warrant of Arrest, Pre-Trial Chamber I, paras 1-44; *Prosecutor v Al Bashir*, Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir, 1-9; *Prosecutor's Application for Warrant of Arrest under Article 58 against Omar Hassan Ahmad Al-Bashir*, Office of the Prosecutor; *Prosecutor's Statement on the Prosecutor's Application for a Warrant of Arrest under Article 58 against Omar Hassan Ahmad Al Bashir*, Issued by the Office of the Prosecutor, The Hague, 14 July 2008, 1-5.

¹⁷ See, *Prosecutor v Al Bashir*, Case No. ICC-02/05-01/09, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Al Bashir, Pre-Trial Chamber I, 4 March 2009, paras 41 & 43.

¹⁸ *Prosecutor v Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, Case No. ICC-01/09-02/11, Decision on the Prosecutor's Application for Summons to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, Pre-Trial Chamber, 8 March 2011; *Prosecutor v William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, Case No. ICC-01/09-01/11-01, Decision on the Prosecutor's Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, 8 March 2011. The suspects entered their initial appearances on 7 and 8 April 2011. The ICC will conduct a confirmation of charges hearing later in September 2011 either to discharge them or to confirm the charges.

the commission of crimes against humanity committed in Libya since 15 February 2011, as indirect perpetrator, while Saif Al-Islam and Al-Senussi are allegedly responsible as indirect co-perpetrators.¹⁹ The investigations against Libyan state officials resulted from the United Nations Security Council resolution referring the Situation in Libya to the ICC.²⁰ The resolution mandated the Prosecutor of the ICC to begin investigation into the situation in Libya since 15 February 2011.²¹ In its operative paragraph 4, the resolution called for the investigation of those responsible for commanding military operations in Libya. Annextures I and II to the resolution named 16 state officials, including Muammar Gaddafi, who is allegedly responsible for ordering repression of demonstrators and human rights abuses. Although the list was intended for persons under travel ban and asset freeze, it possibly influenced the investigations by the Prosecutor of the ICC. For example, the Prosecutor of the ICC publicly named Muammar Gaddafi and his inner circle, as ‘individuals with formal or *de facto* authority, who commanded and had control over the forces that allegedly committed the crimes in Libya.’²²

On 16 May 2011, the Prosecutor of the ICC applied for the issuance of warrants of arrest against Muammar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi.²³ The Prosecutor submitted that the three Libyan state officials named above, are individually criminally responsible for crimes against humanity under articles 7(1)(a), 7(1) (h), and 25(3) (a) of the Rome Statute.²⁴ The application for the warrants of arrest indicates that they are allegedly responsible for the killing (murder), persecution based on political grounds and, state policy of systematic and widespread attacks against civilian

¹⁹ Situation in the Libyan Arab Jamahiriya, *Prosecutor’s Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, No. ICC-01/11, Public Redacted Version, Pre-Trial Chamber I (Judge Cuno Tarfusser, Presiding Judge, Judge Sylvia Steiner and Judge Sanji Mmasenono Monageng), 16 May 2011, 1-23, paras 1- 68.

²⁰ United Nations Security Council Resolution 1970 (2011), adopted by the Security Council at its 6491st meeting, on 26 February 2011, Doc S/RES/1970(2011), para 4.

²¹ Resolution 1970(2011), para 4.

²² Statement of the Prosecutor on the opening of the investigation into the situation in Libya, 3 March 2011, Office of the Prosecutor of the ICC, The Hague, 1-3, 2.

²³ Situation in the Libyan Arab Jamahiriya, *Prosecutor’s Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, No. ICC-01/11, Public Redacted Version, Pre-Trial Chamber I (Judge Cuno Tarfusser, Presiding Judge, Judge Sylvia Steiner and Judge Sanji Mmasenono Monageng), 16 May 2011, 1-23, paras 1- 68.

²⁴ Paras 1 - 3.

population, particularly demonstrators and alleged dissidents.²⁵ It is alleged that the attacks were carried out by the Libyan Security Forces (Military Intelligence and Police Force) under the authority of Gaddafi, in Tripoli, Benghazi, Misrata and other towns in the Libyan territory.²⁶ Should the Pre-Trial Chamber authorise warrants of arrest²⁷ and charges against Gaddafi and his colleagues, the issue of immunity attaching to them as state officials would not arise under operative paragraph 4 of resolution 1970(2011). This is so because of the current position of the ICC on immunity of state officials as was held in *Al Bashir* case.²⁸

Apart from these cases from Africa, it should be noted that state officials from other parts of the world have been prosecuted. For example, Slobodan Milošević, former President of the Federal Republic of Yugoslavia was indicted on 27 May 1999 for international crimes whilst he served as president.²⁹ Of course, Milošević was not the first person whose immunity as a state official had been ignored. Immunity of state officials had long been outlawed for international crimes since the establishment of International Military Tribunals at Nuremberg³⁰ and Tokyo³¹ respectively. Since then, contemporary international law no longer recognises immunity of a state official from prosecution for international crimes before international courts.

²⁵ Para 2.

²⁶ Para 1.

²⁷ As of 23 May 2011, the Pre-Trial Chamber of the ICC had not decided on the Prosecutor's application for issuance of warrants of arrest for Gaddafi and two other Libyan officials.

²⁸ *Prosecutor v Al Bashir*, Case No. ICC-02/05-01/09, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Al Bashir, Pre-Trial Chamber I, 4 March 2009, paras 41 & 43.

²⁹ *Prosecutor v Milošević*, Case No. IT-02-54-T, (Amended indictment), 21 April 2004, paras 1-79; *Prosecutor v Milošević*, Case No. IT-02-54-T, (Second amended indictment), 28 July 2004, paras 7-9, 24-110; *Prosecutor v Milošević and Others*, Case No. IT-99-37-PT, (Second amended indictment), paras 16-28; *Prosecutor v Milošević, Decision on Preliminary Motions*, IT-99-37-PT, Trial Chamber, 8 November 2001.

³⁰ Art 7, the London Charter of the International Military Tribunal (the "London Charter" or "Nuremberg Charter"), UNTS, Vol. 82. On Nuremberg Trials, see, G Mettraux (ed), (2008) *Perspectives on the Nuremberg Trials* 1-779.

³¹ Art 6 of the Charter of the International Military Tribunal for the Far East, Tokyo (The Tokyo Charter), 19 January 1946. See, N Boister and R Cryer (Eds), (2008) *Documents on the Tokyo International Military Tribunal: Charter, Indictment and Judgments*. On immunity, see, *Separate Opinion of the President of the Tokyo Tribunal*, 1 November 1948 in *USA et al v Araki et al*, in Boister and Cryer (2008) 632-639; *Concurring Opinion of the Member of the Philippines, Hon. Mr Justice Delfin Jaranila*, 1 November 1948, in Boister and Cryer (2008) 643-659, 652-654, paras 20-23; *Dissenting Judgment of the Member of France*, 12 November 1948, in Boister and Cryer (2008) 662-677, paras 1-22; *Opinion of the Member from The Netherlands, Mr Justice Röling*, in Boister and Cryer (2008) 680-707, paras 1-59.

The Milošević trial was later to be followed by that of his immediate successor as President of Serbia, Milan Milutinović. Milutinović had served as President of Serbia from 21 December 1997 until 29 December 2002. Milutinović was indicted for crimes against humanity and war crimes in respect of the conflict in Kosovo on 24 May 1999.³² He surrendered himself and was transferred to the ICTY on 20 January 2003. Although he was charged with such crimes under joint criminal enterprise with other officials from Serbia like Nikola Šainović (Prime Minister of Serbia and Deputy Minister of the FRY), Milutinović was acquitted of the crimes contained in the indictment because the prosecution failed to prove beyond reasonable doubt that he was responsible for the crimes.³³ Later, Radovan Karadžić, former president of the Serbian Republic from 12 May 1992 to 17 December 1992³⁴ was to be prosecuted by the ICTY.

Elsewhere, Saddam Hussein, former president of Iraq was prosecuted for crimes against humanity, found guilty, sentenced to death, and was executed by hanging. His defence of immunity as president of Iraq was rejected by the court.³⁵ In Cambodia, former state officials are on trial before the Extra-Ordinary Chambers in the Courts of Cambodia (ECCC) at Phnom Penh. They are charged with crimes against humanity, war crimes and genocide committed during Khmer regime in 1975-1979. In custody are former President Khieu Samphan, former Khmer Rouge's Minister of Social Action, Ieng Thirith, former Minister of Social Action who was arrested and charged in November 2007 along with her husband and ex-foreign minister, Leng Sary and Kaing Guek Eav (Duch), former head of Phnom Penh's Tuol Sleng, or "S-21" interrogation and torture centre.³⁶

³² *Prosecutor v Milutinović, Šainović, Ojdanić, Pavković, Lazarević and Lukić*, Case No. IT-05-87-PT, Third Amended Joinder Indictment, 26 June 2006, paras 1-102.

³³ *Prosecutor v Milutinović et al*, Case No. IT-05-87-T, Trial Chamber, Judgment, 26 February 2009, paras 273, 283-284.

³⁴ *Prosecutor v Karadžić*, Case No. (IT-95-5/18).

³⁵ See Case No 1, 'Al-Dujail case' where Saddam and 7 others allegedly ordered the killing of more than 140 Shiite villagers in al-Dujail. Saddam Hussein was held individually criminally responsible for such deaths pursuant to article 15 of the *Iraq Law No.10 of 2005* for crimes against humanity defined under article 12 of the *Iraq Law No. 10 of 2005* establishing the 'Supreme Iraqi Criminal Tribunal'.

³⁶ Decisions on the Khmer Rouge regime, available at <<http://www.eccc.gov.kh/english/default.aspx>> (accessed on 11 July 2008).

The preceding examples indicate that state officials have been indicted and prosecuted for international crimes before international and hybrid courts. It is not a new phenomenon for a state official to be prosecuted either before national courts or international courts or tribunals. History shows that state officials have been put on trial since King Charles I of England. John Laughland has documented all historical trials and rightly called them ‘political trials.’³⁷ Apparently, the first historical trial of a state official for acts committed in his official capacity whilst in office ‘was that of King Charles I of England in January 1649.’³⁸ King Charles I was tried by the High Court of Justice at the Palace of Westminster on allegations that, his army had committed ‘war crimes’ against civilians during the first and second English civil conflicts between 1642 and 1651. In his initial plea before the court, King Charles I challenged the legitimacy of the court. According to Laughland, the King said:

I would like to know by what power I am called hither...by what Authority, I mean, lawful... and when I know what lawful Authority, I shall answer: Remember, I am your King, your lawful King, and what sins you bring upon your heads, and the Judgment of God upon this Land, think well upon it....I shall not betray my Trust: I have a Trust committed to me by God, by old and lawful descent, I will not betray it to answer a new unlawful Authority, therefore resolve me that, and you shall hear more of me....Let me see a legal Authority warranted by the Word of God, the Scriptures, or warranted by the Constitutions of the Kingdom, and I will answer.³⁹

King Charles I did not recognise the legitimacy of the court. His arguments as observed above were based on the divine right of kings –that the King –cannot do wrong and cannot be tried before his own courts. That used to be common for the Kings to raise the defence of their authority before courts. The Trial of King Charles was followed by that of Louis XVI in France in December 1792 by the French National Convention.⁴⁰ Although his defence lawyer challenged the legality of the court, the challenge failed and Louis XVI was found guilty and executed. It thus shows how state officials did not accept to be prosecuted before courts, a fact still relevant to date that, when state officials are

³⁷ Laughland (2008) 1-315. In this part, the study relies on Laughland’s collected historical trials.

³⁸ Laughland (2008) 22-34, 22.

³⁹ Statement by King Charles I of England during his initial appearance in the trial on 20 January 1646, quoted in Laughland (2008) 26.

⁴⁰ Laughland (2008) 35-50.

charged with crimes, particularly international crimes, they tend to invoke immunity from prosecution. This continued until it was expressly stated after World War I in 1919 that a state official cannot benefit from immunity for international crimes. The Peace Treaty of Versailles of 18 January 1919 expressly outlawed immunity for Kaiser Wilhelm, then German Emperor.⁴¹ That was the first attempt in modern international law to outlaw immunity.

After World War II, the Nuremberg trials of 1945 were held for many German state officials on charges of international crimes (war crimes, crimes against peace and crimes against humanity).⁴² The Nuremberg Charter, as we have seen, had outlawed immunity of state officials.

Many parts of the World, particularly Europe,⁴³ Latin America⁴⁴ and Asia have witnessed prosecutions of state officials for international crimes. Although Europe, Asia and Latin America present very useful case studies on the question of prosecution of state officials for international crimes, this study deems Africa as a peculiar continent deserving particular attention.

With regards to Africa, one notes that African state officials have been subjects of international and national criminal prosecutions in respect of international crimes. Prosecutions have beset African state officials either in European or African domestic courts – such as those in Senegal, Ethiopia, France, Spain, England, and Belgium. Besides, prosecutions have taken place either in foreign national courts, domestic courts of a state official, or international courts and hybrid courts. These will be discussed later

⁴¹ The Versailles Peace Treaty, 18 January 1919, art 227.

⁴² Laughland (2008) 103-118; Bassiouni (1992) 586-589; Nuremberg Judgment, International Military Tribunal, 1946, reprinted in (1947) 41 *American Journal of International Law* 172, 220-221.

⁴³ For details and number of cases where state officials have been prosecuted in European domestic courts, see, EL Lutz 'Prosecutions of heads of state in Europe' in EL Lutz and C Reiger (2009) *Prosecuting heads of states*, 29-30; Laughland (2008) 1-315 (dealing *inter alia*, with trials of state officials in Greece, France, Germany, Finland, Norway, Hungary, Czechoslovakia, Romania and Turkey).

⁴⁴ For Latin America, see, NR Arriaza, in Lutz and Reiger (2009) 46, 51-52 (dealing with prosecutions of state officials in Chile, Guatemala, Brazil, Peru, Colombia, Mexico, Argentina, Bolivia and Uruguay); Laughland (2008)175-184.

in this study.⁴⁵ This relatively new trend in Africa merits a study on –how African states should address this problem. The following part presents how and where African state officials have been prosecuted, or are being prosecuted to date in relation to commission of international crimes. The discussion is only on those cases where African state officials have been indicted or charged with international crimes.

1.2.1 Prosecution of African state officials: sketching the problem

In addition to Charles Taylor before the SCSL, Omar Hassan Al Bashir and Muammar Gaddafi, and Kenyan former state officials before the ICC as noted above, Jean-Pierre Bemba Gombo (former Vice-President and Senator of the DRC) is currently on trial before the ICC in respect of war crimes and crimes against humanity committed in the territory of the Central African Republic. Bemba is the President of the Movement for the Liberation of Congo (MLC), a rebel force, which fought not only in the DRC, but also in the Central African Republic between 2002 and 2003.⁴⁶ Apart from these international criminal prosecutions of African state officials, there are also national criminal prosecutions involving some African state officials, which have taken place either in Africa or Europe. These are presented below.

In 1999, Beatrice de Boery (a relative of the victim called Laurence de Boery) and an association called *SOS Attentats* triggered the prosecuting authorities in France to indict the Libyan leader (head of state), Muammar Gaddafi. The proceedings were instituted against Gaddafi before the senior examining magistrate of the *Tribunal de grande instance* of Paris. Gaddafi was charged with complicity in murder and acts of terrorism committed against French citizens on board an aircraft on 19 September 1989 in the territory of Chad. They alleged that French courts have jurisdiction over crimes committed abroad and against French citizens, pursuant to Article 113-7 of the Criminal Code and 689 of the Code of Criminal Procedure. The case failed on the ground that ‘jurisdictional immunity of foreign [h]eads of [s]tate, including *de facto* [h]eads of [s]tate

⁴⁵ See Ch. 3 and 5 of this study.

⁴⁶ *Prosecutor v Bemba*, Case No. ICC-01/05-01/08, Warrant of Arrest for Jean-Pierre Bemba Gombo replacing the Warrant of Arrest issued on 23 May 2008, Pre-Trial Chamber III, 10 June 2008, 1-10.

who enjoy authority within and outside their country and are received as heads of state abroad, has always been accepted by the international community including France.⁴⁷ The Court of Cassation rendered its judgment in favour of Gaddafi based on customary international law according immunity to foreign state officials.⁴⁸ The court went further to hold that none of the conventions governing terrorism expressly provides for an exemption from immunity of a head of state.

The former President of Mauritania, Maaouya Ould Sid'Ahmed Taya, was also indicted in France in 2005.⁴⁹ Rwandan state officials have also been subjected to indictments in respect of international crimes committed in Rwanda in 1994. In 2007, a French judge, Jean-Louis Bruguiere indicted Rwandan state and military officials in connection with their alleged roles in the 1994 genocide in Rwanda. However, an arrest warrant was not issued against Paul Kagame due to his immunity from prosecution as president. In 2008, a Rwandan state official, Rose Kabuye, who had visited Germany on official mission, was arrested in Germany and extradited to France where she had been indicted in relation to her role in the genocide in Rwanda. 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.⁵⁰ Criminal proceedings in France were terminated by a court in Paris, and the Rwandan official was released. The prosecution of this Rwandan state official in France resulted in a diplomatic row between Rwanda and France whereby Rwanda denounced its relationship with France and joined the Commonwealth organisation. However, the French President, Nikolas Sarkozy visited Rwanda in 2010 in an attempt to restore diplomatic ties with Rwanda.

On 5 December 2001, a Prosecutor of the Republic of the Paris *Tribunal de grande instance* indicted Congolese senior officials alleging crimes against humanity and torture

⁴⁷ See, Gaddafi, France, Court of Appeal of Paris (*Chamber d'accusation*), 20 October 2000, Court of Cassation, 13 March 2001, 125 ILR 490-510, 496.

⁴⁸ *SOS Attentats et Beatrice Castelnau d'Esnault c. Gaddafi*, 125 ILR 490-510, 508, 13 March 2001.

⁴⁹ See, *International Federation of Human Rights Defenders (FIDH) and others v Ould Dah*, 8 July 2002, Court of Appeal of Nimes, 1 July 2005 (Nimes Assize Court, France).

⁵⁰ See, Amnesty International (2008) *Germany: End impunity through universal jurisdiction*, 70.

committed in the Congo against individuals having Congolese nationality. The indictments were against Denis Sassou Nguesso, President of the Republic of the Congo, General Pierre Oba, Minister for the Interior, Public Security and Territorial Administration, General Norbert Dabira, Inspector-General of the Congolese Armed Forces, and General Blaise Adoua, Commander of the Presidential Guard.⁵¹ The proceedings were later terminated after the International Court of Justice (ICJ) held that France had violated the sovereignty of Congo.

In 2009, a court in Paris, France, issued indictments against serving African presidents of Congo, Equatorial Guinea, Gabon, Cameroon, Togo and Guinea. The indictments alleged grand corruption by these African leaders. One of such state officials, Omar Bongo of Gabon, passed away later in 2009.

Robert Mugabe, the President of Zimbabwe was fortunately saved by a Magistrate's Court in England in January 2004 following a private application for his arrest and extradition by individuals in England.⁵² The Bow Street Magistrate's Court relied on customary international law protection on immunity of a serving head of state to reject the application against Robert Mugabe.⁵³ Regarding Robert Mugabe, it should be recalled that several civil suits were instituted in the courts of the United States of America on allegation of torture, but the Court of Appeals of the United States of America (for the Second Circuit) held that President Mugabe enjoyed an absolute inviolability and immunity from that country's courts.⁵⁴

⁵¹ *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.

⁵² *Re Mugabe*, ILDC 96 (UK 2004), 14 January 2004, Bow Street Magistrate's Court.

⁵³ See, Application for a Warrant for the Arrest and Extradition of Robert Gabriel Mugabe, President of the Republic of Zimbabwe, on charges of torture under Section 134 of the Criminal Justice Act 1988, Before Bow Street Magistrate's Court, 7 and 14 January 2004, Decision of Judge Timothy Workman, 14 January 2004. See also, DR Higgins (2009) *Themes and theories: Selected essays, speeches, and writings in international law*, 418.

⁵⁴ *Tachiona v Mugabe*, 169 F.Supp.2d 259, 309 (S.D.N.Y.2001). But, see also generally, the opposition submission in the Brief for the United States, in *Tachiona, On her own behalf and on behalf of her late Husband Tapfuma Chiminya Tachiona, et al; Petitioners v United States of America, On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit*, In the Supreme Court of the United States, No.05-879, April 2006 (in note 9 of the Brief).

On 23 December, 1998, the Spanish *Audiencia Nacional* decided in favour of the President of Equatorial Guinea, Mr. Obiang Nguema and other state officials.⁵⁵ In February 2008, the Spanish *Audiencia Nacional* saved President Paul Kagame of Rwanda by refusing a case against him on the basis of immunity from prosecution of a state official.⁵⁶ In February 2008 a Spanish Judge, Fernando Andreu, issued international arrest warrants against forty senior Rwandan officials for crimes allegedly committed in 1994. On 23 December 1998, the Spanish *Audiencia Nacional* rejected a complaint against the Moroccan state official, *Hassan II* on the basis of his immunity from prosecution.⁵⁷

Studies indicate that authorities in Belgium indicted some African state officials, at least before an amendment of 5 August 2003 to the Belgian Code of Criminal Procedure. For example, complaints were filed by private individuals in Belgium against African state officials: the President of Ivory Coast, Laurent Gbagbo; President of Congo, Denis Sassou Nguesso; President Paul Kagame of Rwanda, and the Central African President, Ange-Felix Patasse.⁵⁸ Former President of Chad, Hissene Habre, was indicted in Belgium on the passive nationality principle.

Abdulaye Yerodia Ndombasi, former Minister for Foreign Affairs of the Democratic Republic of Congo (DRC),⁵⁹ was indicted in Belgium for crimes against humanity. At the time of his indictment and issuance of an international arrest warrant against him, Mr Ndombasi was a serving DRC's Minister for Foreign Affairs. DRC instituted a case against Belgium before the ICJ⁶⁰ and the court held that Yerodia Ndombasi enjoyed immunity from prosecution under customary international law, and required Belgium to terminate criminal proceedings against him.⁶¹

⁵⁵ See, *Obiang Nguema and others*, 23 December 1998, *Audiencia Nacional* (Central Examining Magistrate No.5).

⁵⁶ See, *Rwanda*, 6 February 2008, *Audiencia Nacional* (Central Examining Magistrate No.4).

⁵⁷ See, *Hassan II*, 23 December 1998, *Audiencia Nacional* (Central Examining Magistrate No.5).

⁵⁸ For a detailed survey of indictments against African state officials, 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, REV 1, p.24-29 (the AU-EU Expert Report (2009)).

⁵⁹ *Public Prosecutor v Ndombasi*, 16 April 2002, Court of Appeal of Brussels, Belgium.

⁶⁰ *Arrest Warrant* case, 3.

⁶¹ *Arrest Warrant* case, paras 59 & 76.

Following the ICJ judgment in the *Arrest Warrant* case, the Brussels Court of Appeal held that cases of Yerodia Ndombasi and Laurent Gbagbo should be decided on the conditions of territoriality. It is observed that, in Belgium, proceedings against the above mentioned African state officials were terminated on the basis of immunity of state officials, and of course, due to the amendment of the law in Belgium requiring among others, the nationality link between victims of international crimes with Belgium.

However, in some African national jurisdictions immunity has not prevailed as a substantive defence from prosecution of state officials for international crimes. Mengistu Haile Mariam, former state official of Ethiopia was tried *in absentia*,⁶² convicted and sentenced to death by the Ethiopian High Court and Supreme Court for, crimes against humanity and genocide –committed in Ethiopia –during his leadership even though he currently lives in exile in Zimbabwe.⁶³

Although the Senegalese courts had ruled in 2005 that Hissène Habré enjoyed immunity from jurisdiction of Senegalese courts,⁶⁴ Senegal amended its Constitution in article 9 to confer jurisdiction on its courts to prosecute persons who commit international crimes namely, genocide, war crimes and crimes against humanity. Further, Senegal amended its Code of Criminal Procedure in article 669 to allow universal jurisdiction for international crimes. The effect of these amendments in the Constitution and Code of Criminal Procedure is to allow retrospective application of the penal laws in Senegal to persons who committed international crimes in the past. This reflects the presence in Senegal, of Hissène Habré, former president of Chad who committed crimes against humanity in Chad. It is understandable following this new law, courts in Senegal can prosecute Hissène Habré. This is contrary to what the Senegalese courts had held in 2005 that they

⁶² For details on crimes by Mengistu, see, Y Haile-Mariam, 'The quest for justice and reconciliation: The International Criminal Tribunal for Rwanda and the Ethiopian High Court' (1999) 22 *Hastings International and Comparative Law Review*, 675-679.

⁶³ 'Court sentences Mengistu to death' BBC News, 26 May 2008, available at <<http://www.news.bbc.co.uk/1/hi/world/africa/7420212.stm>> (accessed on 26 May 2008).

⁶⁴ *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 5.

could not prosecute Habré for crimes committed in Chad and that Habré had enjoyed immunity of state official for acts of torture committed in Chad.

The preceding cases against African state officials make it necessary to inquire how the African states under the AU perceive such prosecutions, or have reacted to the fact that some of the African state officials have been charged with international crimes committed in Africa. In 2009, the AU raised serious concerns that African personalities (state officials) have been subjects of criminal prosecutions before domestic courts of some European states,⁶⁵ notably Spain, France, England and Belgium as observed above. The AU perceives that African state officials have been selectively targeted, and that ‘[t]he African perception is that the majority of indictees are sitting officials of African states, and the indictments against such officials have profound implications for relations between African and European states, including the legal responsibility of the relevant European states.’⁶⁶ The AU-EU Expert Report of 2009 indicates the sentiments by the African Union that it is not happy with such prosecutions. In particular, the AU feels that,

Insofar as the indictment of sitting state officials is concerned, there is a disregard for immunities enjoyed by state officials under international law. Consequently, any such indictment severely constrains the capacity of African states to discharge the functions of statehood on the international plane.⁶⁷

The above position reflects that the AU prefers that immunity attaching to African state officials should be respected by domestic courts of European states. The AU has argued that, immunity of state officials is necessary for state relations and to enable such officials function undisturbed.⁶⁸ Further, the AU perceives that prosecution of African state officials in European courts violates state equality and independence of African states.⁶⁹ If that is the perception of the AU, then it makes it important to ask the following question: how should African states prevent and punish African individuals, including state officials who commit international crimes in Africa? This question begs for a

⁶⁵ See, the AU-EU Expert Report, (2009) para 34.

⁶⁶ Para 34.

⁶⁷ Para 38.

⁶⁸ Paras 35-36

⁶⁹ Para 37.

critical consideration of establishing legal and judicial mechanisms in Africa to prosecute and punish persons who commit international crimes.

But, there are currently no African regional legal and judicial or institutional mechanisms that can provide for the prosecution of individuals responsible for international crimes. This observation is striking especially considering that some African state officials have been indicted or prosecuted for international crimes. The prosecutions of Charles Taylor, Jean-Pierre Bemba Gombo, Jean Kambanda, Yerodia Ndobasi, Mengistu Haile Mariam, and Hissène Habré, the indictment of President Omar Al Bashir of Sudan, Kenyan state officials, Muammar Gaddafi and other Libyan state officials accused of international crimes before the ICC remain manifestly evident in Africa. The above is one aspect of this study. Another area which requires attention is the question of subpoenas against state officials in respect of prosecution of international crimes by international courts. This aspect is now examined by this study.

1. 2. 2 The controversy on immunity

Immunity of state officials is one of the controversial topics in international criminal law.⁷⁰ It has attracted attention for international lawyers.⁷¹ In analysing immunity, consideration must be given to international treaties, national laws and jurisprudence of international courts.⁷²

Immunity of state officials has long been treated differently by international and national courts. The concept of 'immunity of state official' does not have a uniform application

⁷⁰ MA Tunks, 'Diplomats or defendants? Defining the future of head-of-state immunity' (2002) 52 *Duke Law Journal* 651; P Mugemangango (2004) *Immunity from prosecution for genocide, crimes against humanity and war Crimes: The case of heads of state*, 1; WA Schabas (2007) *An introduction to the International Criminal Court*, 3rd edn, 231-232.

⁷¹ RA Kolodkin, 'Immunity of state officials from foreign criminal jurisdiction' Annex A to the Report of the International Law Commission, 2006, 436, para 1, available at <<http://untreaty.un.org/ilc/reports/2006/english/annexes.pdf>> (accessed on 28 August 2008); see also, Report of the Planning Group of the International Law Commission, ILC in its fifty-eighth session, Geneva, 2 August 2006, UNGA, (Doc. A/CN.4/L.704).

⁷² BE Carter, 'Immunity for foreign officials: Possibly too much and confusing as well' (2005) 99 *American Society International Law Proceedings* 230.

under international and national legal regimes especially as regards serving or former state officials. It is ‘a development with a parameter that is still unclear.’⁷³ It is not clear as to the extent of immunity.⁷⁴ The same is noted by Claire de Than and Edwin Shorts who observe that it is difficult to prosecute a serving state official even for international crimes.⁷⁵

State officials have some limited enjoyment of immunity from criminal prosecutions in foreign states for acts falling within the jurisdiction of such states. Nevertheless, if that continues, the immunity doctrine would prevent states from punishing perpetrators of serious international crimes thereby conflicting with an ever-increasing focus on the protection of humanity and the principle that immunity does not mean impunity in international law.

As noted above, immunity is not a defence for state officials charged with international crimes before international courts. However, as regards issues of subpoenas *ad testificandum* and *duces tecum* against state officials,⁷⁶ it is apparent that the practice and jurisprudence in the international courts dealing with international crimes is not uniform. On one side, international courts such as the ICTY, the International Criminal Tribunal for Rwanda (ICTR), and the Special Court for Sierra Leone (SCSL), have held that ‘serving’ state officials are immune from subpoenas *ad testificandum* and *duces tecum* issued by such courts. This is observed in the ICTY’s Appeals Chamber decisions in *Milošević*,⁷⁷ *Blaškić*,⁷⁸ ICTR’s Trial Chamber decision in *Nzirorera*,⁷⁹ and SCSL’s Trial

⁷³ JW Dellapanna ‘Head-of-state immunity-Foreign Sovereign Immunities Act-Suggestion by the Department of State’ (1994) 88 *American International Law Journal* 528, 531; DJ Bederman ‘International law advocacy and its contents’ (2001) 2 *Chicago Journal of International Law* 475, 479; VP Nanda ‘Human rights and sovereign individual immunities (sovereign immunity, act of state and diplomatic immunity)-Some reflections’ (1999) *ILSA Journal of International and Comparative Law* 467, 475-476; SV George ‘Head-of-state immunity in the United States Courts: Still confused after all these years’ (1995) 64 *Fordham Law Review* 1051, 1061; S Williams and L Sherif, ‘The arrest warrant for President Al-Bashir: Immunities of incumbent heads of state and the International Criminal Court’ (2009) 14 *Journal of Conflict and Security Law* 71, 74.

⁷⁴ JL Mallory ‘Resolving the confusion over head of state immunity: The defined rights of Kings’ (1986) 86 *Columbia Law Review* 169, 177.

⁷⁵ C de Than and E Shorts (2003) *International criminal law and human rights*, 52-53.

⁷⁶ Cassese (2008) 308-313.

⁷⁷ *Prosecutor v Milošević*, Case No. IT-02-54-T, Decision on Assigned Counsel Application for Interview and Testimony of Tony Blair and Gerhard Schröder, Trial Chamber, 9 December 2005, paras 2, 66 & 67.

and Appeals Chambers decisions in *Norman, Fofana and Kondewa*.⁸⁰ Yet, the same courts have also held that, state officials do not enjoy immunity from testifying or adducing evidence before such courts. This is clear in the Trial Chamber's decision in *Blaškić*,⁸¹ Appeals Chamber's decision in *Krištić*,⁸² Trial Chamber's decisions in *Bagosora*⁸³ and *Sesay, Kallon and Gbao*.⁸⁴ The above indicates a marked inconsistency in the jurisprudence of international courts on subpoenas against state officials. Given the inconsistency, it is necessary to ask whether immunity of state officials only relates to prosecution for crimes or it also extends to issues of subpoenas *ad testificandum* and *duces tecum*.

But see, *Prosecutor v Milošević, Request for Binding Order to be Issued to the Government of the United Kingdom for the Cooperation of a Witness pursuant to Rule 54bis*, 18 August 2005, para 19.

⁷⁸ *Prosecutor v Blaškić*, Case No. IT-95-14, *Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997*, 29 October 1997, Appeals Chamber, para 25.

⁷⁹ *Prosecutor v Karemera, Ngirumpatse and 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, paras 1-16; *Prosecutor v Karemera, et al., Decision on Joseph Nzirorera's Application for Certification to Appeal Decision on Joseph Nzirorera's Motion for Subpoena to President Paul Kagame*, 15 May 2008, paras 1-9; Testimony of Jean Kambanda in *Prosecutor v Bagosora et al*, Case No. ICTR-98-41-T, 11 July 2006, reprinted in Laughland (2008) 219-220.

⁸⁰ *Prosecutor v Norman, Fofana and Kondewa*, Case No. SCSL-04-14-T, *Decision on Motions by Moinina Fofana and Sam Hinga Norman for the Issuance of a Subpoena Ad Testificandum to H.E Alhaji Dr. Ahmad Tejan Kabbah, President of the Republic of Sierra Leone*, Trial Chamber I, 13 June 2006; *Separate Concurring Opinion of Hon. Justice Benjamin Mutanga Itoe on the Chamber Majority Decision on Motions*, especially paras 57-58, 83-93, 98 and 100. However, see the *Dissenting Opinion of Hon. Justice Bankole Thompson on Decisions on Motions by Moinina Fofana and Sam Hinga Norman for the Issuance of a Subpoena Ad Testificandum to H.E Alhaji Dr Ahmed Tejan Kabbah, President of the Republic of Sierra Leone; Prosecutor v Sam Hinga Norman, Moinina Fofana, and Allieu Kondewa*, Case No. SCSL-04-14-T, *Decision on Motions by the First and Second Accused for Leave to Appeal the Chamber's Decision on their Motions for the Issuance of a Subpoena to the President of the Republic of Sierra Leone*, 29 June 2006.

⁸¹ *Prosecutor v Blaškić*, Case No. IT-95-14-PT, *Decision on the Objection of the Republic of Croatia to the issuance of Subpoenae Duces Tecum*, Trial Chamber II, 18 July 1997, paras 1- 2, 24 & 31; *Prosecutor v Blaškić, Decision on the Admissibility of the Request for Review by the Republic of Croatia of an Interlocutory Decision of a Trial Chamber (Issuance of Subpoenae Duces Tecum) and Scheduling Order*, 29 July 1997, Appeals Chamber, para 2 (A)-(F); *Prosecutor v Blaškić, Decision on the Objection of the Republic of Croatia to the Issuance of Subpoenae Duces Tecum*, Trial Chamber II, 18 July 1997, para 32.

⁸² *Prosecutor v Krštić*, ICTY Appeal Chamber, *Decision on Application for Subpoenas decision*, paras 27-29.

⁸³ *Prosecutor v Bagosora et al*, Case No. ICTR-98-41-T, ICTR Trial Chamber, *Decision on request for a subpoena for Major J. Biot*, para 4; *Prosecutor v Bagosora et al*, Case No. ICTR-98-41-T, *Decision on Defence Request to Correct Errors in Decision on Subpoena for Major Biot*, Trial Chamber I, 29 August 2006, paras 1-3; *Prosecutor v Bagosora et al*, *Decision on Kabiligi Motion for Cooperation of the Government of France and Subpoena of Former Officers*, Trial Chamber I, 31 October 2006, para 2; *Prosecutor v Bagosora et al*, *Decision on Request for Cooperation of the Government of France*, Trial Chamber I, 6 October 2006, para 2.

⁸⁴ *Prosecutor v Sesay, Kallon and Gbao*, Case No. SCSL-04-15-T, *Written Reasoned Decision on Motion for Issuance of a Subpoena to H.E. Dr. Ahmad Tejan Kabbah, Former President of the Republic of Sierra Leone*, Trial Chamber I, 30 June 2008, paras 1-23.

1.3. Research questions

It is conceivable that African state officials have become subjects of criminal proceedings in domestic and international courts in respect of international crimes. This has caused concerns in Africa as to why African state officials have increasingly been prosecuted or indicted, particularly by international courts and domestic courts of European states. Whenever state officials have been prosecuted or indicted for international crimes, there has arisen a conflict between immunity of such officials and the duty to prosecute and punish perpetrators of international crimes. From the jurisprudence of international courts, while international law does not recognise immunity of state officials as a defence from prosecution for international crimes, it is still not clear whether state officials can be subpoenaed to testify or adduce evidence in international courts.

Drawing from the preceding discussion,⁸⁵ the following are key questions addressed by this study:

- (1) Between immunity of state officials from prosecution as a concept arising from customary international law and *jus cogens* requiring states to prosecute and punish perpetrators of international crimes, which rule should prevail over the other, and on what grounds?
- (2) Is there immunity attaching to state officials from subpoena *ad testificandum* and subpoena *duces tecum* in respect of prosecution of international crimes by international courts?
- (3) What is the practice on immunity of state officials and prosecution of international crimes in Africa?

Regarding the first question above, international law is well settled that there is no immunity for state officials charged with international crimes before international courts.⁸⁶ This is supported by customary international law and treaty law. However, immunity of state officials is also a rule of customary international law, especially where

⁸⁵ See also discussions in parts 1.2.1 and 1.2.2 above.

⁸⁶ See Ch 2 of this study.

state officials are subjected to foreign national jurisdictions, as evidenced in *Gaddafi*, *Mugabe* and the *Arrest Warrant* cases⁸⁷ even if such officials are prosecuted for international crimes, unless there are express treaty provisions outlawing immunity. The question of *jus cogens* and immunity of state officials is premised on the fact that there appears to be conflicting norms between immunity as recognised under international law on the one side, and on the other, international law *jus cogens* creating obligations *erga omnes* on prosecution and punishment of international crimes.

With regards to the second question above, an examination of the jurisprudence of international courts, particularly the ICTY, ICTR and SCSL is important. Such courts have addressed the issue of subpoenas. It is vital to examine how such courts have given conflicting positions regarding treatment of state officials insofar as subpoenas to testify or adduce evidence before such courts are concerned. The study analyses such different positions to suggest a more consistent and uniform standard of treating state officials when they are required to cooperate with international courts.

As for the third question, it is necessary to examine the law and practice on immunity in relation to prosecution of international crimes in Africa. The discussion is divided into two parts: one focuses at the African regional and sub-regional levels, and the other at national level. The purpose is to appraise the existing legal, judicial and state practice on prosecution and punishment of international crimes in Africa. Regarding the practice at national jurisdiction, an examination is made whether state officials can be prosecuted for international crimes before foreign jurisdictions or domestic courts. The above questions indicate the context within which this study discusses the subject of immunity of state officials and prosecution of international crimes.

1.4. Assumptions

This study proceeds with the following assumptions, informed by the above background and research questions:

⁸⁷ See part 1.2.1, notes 39, 45 and 53 above.

1. When weighed together, international law *jus cogens* imposing obligation *erga omnes* on international crimes prevail over the customary international law immunity of state officials. In other words, granting immunity to state officials who commit international crimes may be a breach of the state obligations under international law even though customary international law still recognises immunity of state officials before foreign domestic courts.
2. If international courts maintain that immunity of state officials does not bar criminal prosecution over such officials and at the same time hold that state officials enjoy immunity from being subpoenaed to testify or produce evidence, there would be conflicting positions by such courts.
3. If African states adopt laws providing for the prosecution and punishment of international crimes thereby outlawing immunity, there would be no perception that the existing international courts and European domestic courts are targeting African individuals, including state officials responsible for international crimes committed in Africa. This is because such states would be able to prosecute such individuals in national courts.

1.5. Research methods

In order to answer the propositions set in this study, the study employs a functional comparative method at a micro-level by looking at one specific matter –immunity of state officials –as a defence to prosecution or subpoenas in relation to international crimes. Moreover, descriptive, interpretive and historical approaches on immunity of state officials from prosecution are employed. This is arrived at by an extensive review of the available literature, and informal discussions with individuals having knowledge on the topic.

A large part of this thesis is based on desk-work research. Various sources of information on immunity of state officials and prosecution of international crimes were consulted. In the course of reviewing legal materials, research was conducted at various institutions: University of Dar Es Salaam; University of Pretoria; University of South Africa and The

Peace Palace Library at The Hague Academy of International Law, Netherlands. Inter-library loans of books from the following South African universities were helpful: University of Johannesburg; University of Cape Town; University of South Africa and University of the Witwatersrand.

In addition to desk-work research, field visits were conducted at the following international courts: the ICC, ICTY, SCSL and ICJ all based at The Hague. Visits to these courts were during the doctoral research scholarship at The Hague Academy of International Law. During the visits to such courts, it was possible to observe legal proceedings involving some state officials. In particular, I benefited by observing cross examination in the *Karadžić* and *Tolimir*⁸⁸ cases at the ICTY. I was also able to attend and observe examination in chief in the *Taylor* case before the SCSL.

In addition to observing cases, informal discussions were held with some relevant officials of the ICTY, ICTR, SCSL and ICC. Discussions were held with a Judge of Appeals Division of the ICC, a Judge of the ICTY, Outreach/Public Relations Officer at SCSL regarding the *Taylor* case, Legal Officer, and Senior Appeals Counsel, ICTR (the discussion was held at The Hague).⁸⁹ The purpose was to obtain views from such officials on aspects of this study by way of informal discussions in order to incorporate such information to the literature, especially case law already consulted. It was felt reasonable to conduct informal discussions because interviews would have inherent prejudice to the respondents' positions.

Apart from discussions held with court officials as indicated above, sometimes formal discussions were conducted with some experts in the field of international law.⁹⁰ Views from persons with whom discussions were held are incorporated into the information

⁸⁸ *Prosecutor v Tolimir*, Case No. IT-05-88/2, Case Information Sheet, ICTY Trial Chamber II, 26 February 2010, 1-5.

⁸⁹ For details as to the names of such officials, dates and place of discussions, see chapter 6, part 6.1, notes 1-8.

⁹⁰ I was able to receive comments and interact with different experts, particularly Prof John Dugard, Prof Erika de Wet, Prof Johan van der Vyver, Prof Sufian Hemed Bukurura, Prof Kofi Qashigah, Prof Francis Curtis Doebbler (by email), Dr Jackson Maogoto, Mr Bernard Dougherty (by email), and Dr George William Mugwanya.

obtained by way of secondary sources (books, articles, reports and resolutions). This brings a balanced legal opinion and arguments, and avoids bias on the topic.

The references used in this study are based on both primary and secondary sources of law. The sources as reflected in article 38(1) of the Statute of the International Court of Justice are the principal sources. These are ‘traditional sources’ of international law.⁹¹ Thus, treaties, customary international law and general principles of law, are regarded as primary sources of law, and judicial decisions and doctrines are considered secondary means. In addition, municipal law statutes (constitutions and relevant *Acts* on prosecution of international crimes, especially those implementing or incorporating the Rome Statute, the Geneva Conventions and the Genocide Convention, and Penal Codes of different states) are used. In the course of research, official laws from African states were consulted. However, it was necessary to seek assistance from French speaking persons to interpret some of the laws from African French speaking countries, particularly Senegal, Burkina Faso, Burundi and Niger.

1.6. Existing studies

The subject of immunity of state officials is widely covered by various authors.⁹² They all accept that immunity does not bar criminal prosecution of state officials.⁹³ As such, it

⁹¹ LJ van den Herik (2005) *The contribution of the Rwanda tribunal to the development of international law*, 7.

⁹² See for example, A Kesia-Mbe Mindua ‘The immunity of heads of state and government in international criminal law’ in CE Osuji (ed.), (2010) *Protecting humanity: Essays in international law and policy in honour of Navanethem Pillay*, Ch. 39, 729-748; J Stigen ‘Which immunity for human rights atrocities?’ in Osuji (above) Ch.40, 749-788.

⁹³ See, ILC, Report on the work of its 60th session (2008), paras 265-311; P Gaeta, ‘Official capacity and immunities’ in A Cassese, P Gaeta and JRWD Jones (eds.), (2002) *The Rome Statute of the International Criminal Court: A commentary*, Vol.1, 975-1002; O Triffterer, ‘Article 27’ in O Triffterer (ed.), (2008) *Commentary on the Rome Statute of the International Criminal Court: Observers’ notes, article by article*, 2nd edn, 779-793; WA Schabas (2010) *The International Criminal Court: A commentary on the Rome Statute*, 446-453; G Werle (2009) *Principles of international criminal law*, 2nd edn, 234-241; A Cassese (2008) 302-314; RV Alebeek (2008) *The immunity of states and their officials in international criminal law and international human rights law*; Y Simbeye (2004) *Immunity and international criminal law*, 1-173; Williams and Sherif (2009) 71-92; 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; L Buzzard, ‘Holding an arsonist’s feet to the fire -The legality and enforceability of the ICC’s arrest warrant for Sudanese President Omar Al-Bashir’ (2009) 24 *American University International Law Review* 897-941; D

would appear as if immunity is not necessarily a new phenomenon to write on. There could be ‘some truth’ to argue that way, but, it is not the case for this study. In fact, there is need for writing about immunity of state officials in relation to subpoenas to testify and adduce evidence before international courts dealing with international crimes. This is true especially when one considers the existing conflicting jurisprudence of international courts on subpoenas against state officials. This aspect has largely not been covered by most of the existing literature on immunity, except by Cassese⁹⁴ and Patrick Hassan-Morlai⁹⁵ who also, like this study, argue that state officials have the duty to testify or hand over evidence before international courts, and as such, they enjoy no immunity from being subpoenaed by international courts. Hence, relying on the jurisprudence from international courts, this study intends to provide a settled opinion that state officials do not enjoy immunity from testifying or tendering evidence before international courts with jurisdiction over international crimes.

Akande, ‘The legal nature of Security Council referrals to the ICC and impact on Al Bashir’s immunities’ (2009) 7 *Journal of International Criminal Justice* 333 -352; D Akande ‘International law immunities and the International Criminal Court’ (2004) 98 *American Journal of International Law* 407; D Akande, ‘The Bashir indictment: Are serving heads of states immune from ICC prosecution?’ *Oxford Transitional Justice Research Working Paper Series*, 30 July 2008, 3; YQ Naqvi (2010) *Impediments to exercising jurisdiction over international crimes*, 221-284; H Fox, ‘Some aspects of immunity from criminal jurisdiction of the state and its officials: The Blaškić case’ in LC Vohrah, F Pocar, Y Featherstone, O Fourmy, C Graham, J Hocking and N Robson (eds.), (2003) *Man’s inhumanity to man: Essays on international law in honour of Antonio Cassese*, 297-307; S Zappála, ‘Do heads of state in office enjoy immunity from jurisdiction for international crimes? The Ghaddafi case before the French Cour de Cassation’ (2001) 12 *European Journal of International Law* 595; A Cassese ‘The Belgian Court of Cassation v The International Court of Justice: The Sharon and others case’ (2003) 1 *Journal of International Criminal Justice* 437; A Cassese, ‘When may senior state officials be tried for international crimes? Some comments on the *Congo v Belgium case*’ (2002) 13(4) *European Journal of International Law* 855; M Fruilli, ‘The question of Charles Taylor’s immunity -Still in search of a balanced application of personal immunities?’ (2004) 2 *Journal of International Criminal Justice* 1118; JJ Wouters, ‘The judgment of the International Court of Justice in the Arrest Warrant case: Some critical remarks’ (2003) 16 *Leiden Journal of International Law* 265-267; DS Koller ‘Immunities of foreign ministers: Paragraph 61 of the Yerodia judgment as it pertains to the Security Council and International Criminal Court’ (2004) 20 *American University International Law Review* 7; SMH Nouwen, ‘The Special Court for Sierra Leone and the immunity of Taylor: The Arrest Warrant case continued’ (2005) 18 *Leiden Journal of International Law* 645-669; C Shreur and Swittich, ‘Immunity v accountability: The ICJ’s judgment in the Yerodia case’ (2002) *International Law Forum* 117; C Warbrick, EM Salgado and N Goodwin ‘The Pinochet cases in the United Kingdom’ in (1999) 2 *Yearbook of International Humanitarian Law* 91-117.

⁹⁴ Cassese (2008) 313-314.

⁹⁵ PMH Morlai, ‘Evidence in international criminal trials: Lessons and contributions from the Special Court for Sierra Leone’ (2009) 3 *African Journal of Legal Studies* 96-118, 108.

Another aspect that this study presents, contrary to a majority of the existing academic works, is the discussion on immunity of state officials and international crimes – with particular reference to selected African jurisdictions. The present study deals with a considerable number of current African national laws on the prosecution of international crimes whilst incorporating international jurisprudence. It must be acknowledged that as at 2011, there are only a few studies on prosecution of international crimes in specific African jurisdictions, namely, Kenya, Senegal and South Africa.⁹⁶ These provide very useful foundation on the discussion of prosecution of international crimes in those African states. But, there is no single study which covers all African states that have enacted laws to prosecute international crimes recognised under the Rome Statute at national level as at 2011. This is now the contribution and distinctiveness of the present thesis as it covers African national jurisdictions with laws implementing the Rome Statute, or other specific laws punishing international crimes thereby outlawing immunity of state officials (as observed in Chapter 5 of this study).

The existing studies on immunity of state officials fall within the following areas: focusing on specific cases or foreign jurisdictions⁹⁷; defending immunity of state officials by aligning with state sovereignty;⁹⁸ seminal works on the drafting history of the provisions outlawing immunity of state officials; rejecting immunity whilst contending that there are three traditional classes of state officials and; those rejecting immunity by subjecting it to international *jus cogens*. Most studies have addressed the question of immunity from prosecution for international crimes, by focusing on specific cases only,

⁹⁶ See, A Okuta, ‘National legislation for prosecution of international crimes in Kenya’ (2009) 7 *Journal of International Criminal Justice* 1063-1076; M Niang ‘The Senegalese legal framework for the prosecution of international crimes’ (2009) 7 *Journal of International Criminal Justice* 1047-1062; 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*, Ch. 10, 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; P Gaeta ‘Does President Al Bashir enjoy immunity from arrest?’ (2009) 7 *Journal of International Criminal Justice* 315-332.

⁹⁷ See for example, D Akande and S Shah ‘Immunities of state officials, international crimes, and foreign domestic courts’ (2011) 21 *European Journal of International Law* 815-852.

⁹⁸ CC Jalloh ‘Universal jurisdiction, universal prescription? A preliminary assessment of the African Union perspective on universal jurisdiction’ (2010) 21(1) *Criminal Law Forum* 1-65, especially at 29-42.

or the positions stated by courts.⁹⁹ Usefully, others have argued that immunity is relatively a norm of lower status which cannot prevail over international higher *jus cogens* creating international obligations to prosecute and punish perpetrators of internationals, including state officials.¹⁰⁰ This study shares this view because contemporary international law does not accept that state officials commit international crimes and hide behind immunity.

Other studies, such as that by Simbeye have argued that immunity should be respected, relying on state sovereignty.¹⁰¹ Contrary to this seemingly classical international law position, this study submits as accepted in contemporary international law that, immunity cannot be upheld for state officials who commit international crimes. Some authors have comprehensively treated the issue of immunity of state officials as an unacceptable defence for international crimes, by providing commentaries on the immunity provision under international treaties.¹⁰² Moreover, other studies have argued that immunity attaches to only three classes of officials: head of state; head of government and Minister for Foreign Affairs.¹⁰³ Whilst acknowledging such traditional classes of state officials, this study respectfully differs with that view and submits that the categorisation of state officials reflected in article 27 of the Rome Statute should be adopted.

1.7. Objectives of the study

There are several objectives of this study. The first objective is to examine the current problem of international crimes committed in Africa by individuals, including African state officials in order to support the establishment of legal and judicial mechanisms to prevent and punish international crimes in Africa. The examination of the problem is from precedents of international courts and national courts (domestic and foreign). Africa has so far produced a substantial or considerable number of cases involving state officials

⁹⁹ See, Gaeta (2009) 315-332; Williams and Sherif (2009) 71-92; Fox, in Vohrah, *et al* (2003) 297-307; Cassese (2002); Zappála (2001); Akande (2009) 333- 352; Akande (2004) and Fruilli (2004), all as indicated in note 84 above.

¹⁰⁰ Dugard (2005) 238-265.

¹⁰¹ Simbeye (2004) 109-110.

¹⁰² Schabas (2010) 446-453; Triffterer (2008) 779 *et seq*; Cassese *et al* (2002) 975 *et seq*.

¹⁰³ Naqvi (2010) 230-236.

that have been indicted and prosecuted by international criminal tribunals or national courts, yet there is no single mechanism at the African Union level to address the issue of international crimes committed by state officials. The Constitutive Act of the African Union, a treaty that could be relied on, does not explicitly provide for prosecution of state officials in cases of international crimes under article 4(h), even though article 4(o) of the Constitutive Act contains a principle that condemns and rejects impunity. This is why there is need for a study on immunity of state officials and prosecution of international crimes in Africa.

The second objective is to study and appraise the existing laws, judicial precedents and state practice in Africa on the question of immunity of state officials in relation to the prosecution and punishment of international crimes in Africa. In this regard, the study examines the laws implementing the Rome Statute and assesses whether such laws are compatible with the standards reflected in the Rome Statute, and other international treaties with specific reference to immunity of state officials and prosecution of international crimes.

The third objective of this study is to examine the jurisprudence of international courts to determine how such courts have rendered conflicting decisions on the immunity of state officials in relation to subpoenas *ad testificandum* and *duces tecum*. The examination is meant to find out whether state officials enjoy immunity from being subpoenaed to testify or adduce evidence before international courts. The purpose is to clarify that state officials are not immune from being subpoenaed by international courts.

Finally, the fourth objective is to clarify the legal position on the tension between immunity of state officials as a norm recognised under customary international law, and international law *jus cogens* imposing obligations to prosecute and punish persons, including state officials who commit international crimes thereby outlawing immunity of state officials in respect of international crimes.

1.8 Significance of the study

This thesis presents a study of the laws, judicial precedents and state practice on prosecution of international crimes in international courts and African national jurisdictions. It presents examples from African countries. This is important because most of the laws examined in this study, are new, and some have rarely received any notable commentary or acknowledgment by authors. The study fills this gap by discussing laws relevant to prosecution of international crimes and non-recognition of immunity of state officials from jurisdictions such as Niger, Burkina Faso, Rwanda, Uganda, Kenya, South Africa, Congo, Ethiopia, DRC, Senegal and Burundi – in addition to presenting a discussion on various provisions of African constitutions on immunity of state officials from criminal proceedings.

This study may also be useful to international and national courts (judges), international lawyers, academics and those interested in international criminal justice in Africa. It clarifies the question of subpoenas against state officials in relation to the immunity attaching to such officials and the need to punish persons responsible for international crimes.

Further, the study would contribute to international criminal law by presenting a position that should be adopted by courts dealing with international crimes, especially when such courts are faced with the duty to prosecute and punish perpetrators of international crimes on one hand, and on the other, the customary international law obligation to respect the norm of immunity of state officials. In addition, this study exposes international criminal law in relation to Africa. It also critiques African domestic criminal legal systems in respect of prosecution of international crimes.

1.9 Limitations and delimitations of the study

As for the limitations, it has been a challenge to access legal statutes on prosecution of international crimes or implementation of the Rome Statute from countries whose laws

are in languages other than English. However, concerted efforts were made to obtain original laws from African states, particularly, Rwanda, Senegal, Burkina Faso, Niger, Ethiopia, Kenya, Uganda and South Africa. Although the focus of this study is on Africa, not all African countries have been studied. It is not easy to access laws from many African states. Similarly, not many African states have enacted laws that have a bearing on immunity from prosecution for international crimes as such. Except Ethiopia, Burundi, Burkina Faso, Niger, Congo, South Africa, Senegal, Kenya, Rwanda, Uganda, Burundi, and DRC, it is difficult to draw substantial examples on the law and practice from the rest of African states. Further, although I was able to visit international courts in The Hague, a major part of this study is based on desk-research due to insufficient research funds for my study.

Further, this study does not cover the subject of immunity as generally known in international law.¹⁰⁴ The primary focus of the study is on immunity of state officials covering – functional immunity (*ratione materiae*) and – personal immunity (*ratione personae*). A broad conception of immunity is not covered by this study. Therefore, immunities attaching to the multilateral forces abroad; diplomatic and consular immunity; immunity of international organisations and state immunity are not the concern of this study.

Additionally, although this study makes reference to international law concepts of ‘universal jurisdiction’ and the ‘duty to prosecute and punish’ international crimes, such concepts are beyond the scope of this study.

1.9.1 Definition of state officials as per the Rome Statute

This study adopts the classification of state officials under article 27(1) of the Rome Statute. It regards all leaders that have governed states, even for a short period, whether as military rulers after overthrowing governments, or democratically elected civilian leaders, as falling within the same category of ‘state officials’. The choice is based on the

¹⁰⁴ On immunities, *see* Simbeye (2004) 1-173.

position the leaders have held in their respective states. For convenience and brevity reasons, and to avoid possible confusion, this study adopts the phrase ‘immunity of state officials’ to reflect all that is stated in article 27(1) of the Rome Statute. It is not in any way meant to challenge the clear and progressive description of the terms used in article 27(1) of the Rome Statute. Whilst acknowledging the traditional classes of state officials, this study does not agree with the very limited classification suggested by the ICJ in the *Arrest Warrant* case that only ‘diplomats’, ‘head of state’, ‘head of government’ and ‘Minister for Foreign Affairs’ are the recognised state officials.¹⁰⁵ Instead, the study adopts the categories of state officials recognised under article 27(1) of the Rome Statute. The list of state officials recognised under article 27(1) of the Rome Statute goes beyond that of traditional state officials as pointed out by the ICJ in the *Arrest Warrant* case. Contemporary international law recognises a wider array of state officials to include ‘head of state or government, a member of a government or parliament, an elected representative or a government official.’ This is the category preferred by this study.

However, one must note the difference between immunity of state officials before national and international jurisdictions. Whereas the classification of state officials preferred under article 27 of the Rome Statute is not the same as the one in national jurisdictions, especially considering that ‘Presidents’ are hierarchically at the apex of all state officials, this study does not intend to go into the details of the national jurisdictions on the matter, instead, it adopts international jurisdictions on the matter for consistency reasons.

1.9.2 Crimes covered in this study

With regards to the key focus on crimes, this study only intends to discuss immunity of state officials in relation to *international crimes* that are recognised in the Rome Statute of the ICC and the Genocide Convention: *genocide*; *crimes against humanity*, *war crimes* and *the crime of aggression*. As for the definitions of genocide, war crimes and crimes against humanity, regard should be had to the provisions of the Rome Statute and the

¹⁰⁵ *Arrest Warrant* case, para 51.

jurisprudence of international courts. These crimes are defined in articles 6, 7 and 8 and in the Elements of Crimes of the Rome Statute. In addition, statutes of international criminal tribunals such as the ICTR,¹⁰⁶ ICTY,¹⁰⁷ SCSL,¹⁰⁸ the Genocide Convention¹⁰⁹ as well as the Geneva Conventions and the Additional Protocols, provide clear definitions of these crimes. With regards to the crime of aggression,¹¹⁰ it should be noted that this is a crime whose definition was agreed during the Review Conference of the Rome Statute at Kampala in May-June 2010. The crime of aggression is defined to mean ‘the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.’¹¹¹ Except as otherwise indicated, this study does not intend to go into details in defining international crimes.¹¹²

This study does not attempt to deal with *non-international crimes* that are considered to fall purely within the national laws of states. For example, even though there are clear cases in Africa where former state officials have been tried or charged for corruption, financial crimes or abuse of office, particularly in Zambia, Malawi and Tanzania, such cases are not within the scope of this study.¹¹³ They could form a study of their own. The main idea is to focus on only prosecution of state officials for international crimes.

¹⁰⁶ Arts 2, 3 and 4, Statute of ICTR.

¹⁰⁷ See, arts 2, 3, 4 and 5, Statute of ICTY.

¹⁰⁸ See, arts 1, 2, 3 and 4, Statute of SCSL. The Statute of the SCSL does not deal with genocide.

¹⁰⁹ Art II, Genocide Convention.

¹¹⁰ Art 5(1) (d), Rome Statute.

¹¹¹ Art 8*bis*, paragraph 1, Rome Statute. This definition of the crime of aggression was accepted during the Review Conference of the Rome Statute of the International Criminal Court, held at Kampala, Uganda from 31 May to 11 June 2010, see ‘Amendments to the Rome Statute of the International Criminal Court on the Crime of Aggression’ Report of the Working Group on the Crime of Aggression, rc/wgca/1/Rev.2, Annex II, 7; Conference Room Paper on the Crime of Aggression, RC/WGCA/1/Rev.2, Draft Resolution on the Crime of Aggression, 7 June 2010, Annex I, 3. All these documents are available at <http://www.icc-cpi.int/iccdocs/asp_docs/RC-20-ENG-Annex.II.WGCA.report.pdf> (accessed on 14 August 2010).

¹¹² On international crimes, see generally, G Mettraux (2005) *International crimes and the Ad Hoc tribunals*, 1-442.

¹¹³ Former President of Zambia, Frederick Chiluba was prosecuted for corruption in Zambia after his immunity was removed by the Parliament. In Malawi, former President Bakili Muluzi was charged in 2005 for corruption and has denied charges of corruption. As of writing, Tanzanian former Ministers for Trade, Energy and Mining, Basil Mramba and Daniel Yona, are prosecuted for corruption and abuse of office respectively.

1.9.3 Temporal limit on crimes committed by state officials

In this study, the focus is only on those cases where international crimes were committed by a person while serving as ‘a state official’ and therefore that such person enjoys certain protection from the laws. However, if prosecutions were instituted after the person ceased to be a serving state official, the discussion is followed only to the extent that such person is recognised and categorised as a former state official, and that the crimes which such person committed whilst in office were not prosecuted. The reason for this choice of time period for crimes is attached to the discussion on the *functional* and *personal immunity* of the state officials. Thus, this study does not deal with such crimes – *even if international crimes* – as may have been committed when a person has already ceased to hold office. Equally, all crimes committed by an individual before being recognised as a state official are not covered in this study. In cases of crimes committed before or after a person is a state official, trials can obviously be instituted on his or her individual capacity on the basis of individual criminal responsibility, where the defence of immunity would not be relevant. Thus, this is the context within which the present study works.

1.10 Conceptual clarifications

The literature on the subject of immunity is diverse but confusing.¹¹⁴ The large body of literature on this topic does not share a common and consistent definition on immunity of state officials. There are a number of terms that have been used interchangeably with ‘immunity of state officials’. Verma observes: ‘the two terms ‘state immunity’ and ‘sovereign immunity’ have become interchangeable.’¹¹⁵ In the same way, Sinclair also writes that sovereign immunity in the strict sense of the term has to be taken to refer to the ‘immunity which a personal sovereign or head of state enjoys when present in the

¹¹⁴ See, G Robertson (2002) *Crimes against humanity: The struggle for global justice*, 403-426; SK Kapoor (2007) *International law and human rights*, 216-223; MN Shaw (2003) *International law*, 621-692; Dugard (2005) 238-265; I Detter (1994) *International legal order*, 456-463; R Higgins ‘Certain unresolved aspects of the law of state immunity’ (1982) 29 *Netherlands International Law Review* 265; H Fox ‘State immunity and the international crime of torture’ (2006) 2 *European Human Rights Law Reports* 142; L McGregor ‘State immunity and *jus cogens*’ (2006) 55 *International and Comparative Law Quarterly* 437-445; A Orakhelashvili (2006) *Peremptory norms in international law*, 320.

¹¹⁵ SK Verma (1998) *An introduction to public international law*, 155.

territory of another state.’¹¹⁶ The terms are even so confusing especially in domestic legislation of some states like the UK. *The State Immunity Act* of 1978 of UK defines and provides references to a state to ‘include references to-(a) the sovereign or other head of that state in his public capacity; (b) the government of that state; and (c) any department of that government.’¹¹⁷

The distinction is provided by Broomhall: ‘[i]mmunities attaching to diplomats, heads of state, and other officials are distinct from the State immunity that attaches to the state as such’¹¹⁸ The focus of this study is basically on immunity of state officials from prosecution for international crimes. Suffice it to only define or describe other concepts commonly used throughout the study. These concepts include ‘immunity’, ‘international crimes’, ‘functional immunity’, ‘personal immunity’, ‘indictment’, ‘prosecution’, ‘trial’, ‘*subpoena ad testificandum*’ and ‘*subpoena duces tecum*.’ These concepts are defined below.

1.10.1 Immunity

Immunity is defined by the *Oxford Advanced Learner’s Dictionary*, 7th Edition, as ‘the state of being protected from something.’¹¹⁹ The word immunity originates from the late Middle English, in the sense of ‘exemption from liability’. It derives from the Latin word ‘*immunitas*’, meaning ‘exempt from public service or charge’. In Kiswahili (spoken in East Africa), ‘immunity’ is termed ‘*kinga dhidi ya mashtaka*’¹²⁰ -which refers to - ‘*immunity from prosecution*’. Immunity in other words means exception, resistance, exemption, protection or invulnerability. It may also mean any exemption from a duty, liability, or service of process; especially such an exemption granted to a public official. According to the *Concise Law Dictionary*, immunity is defined to mean:

¹¹⁶ I Sinclair, ‘The law of sovereign immunity: Recent developments’ (1980) II *Hague Recueil des Cours* 113, 167.

¹¹⁷ Sec 14(1) of the *State Immunity Act*, 1978.

¹¹⁸ B Broomhall (2003) *International justice and the International Criminal Court: Between sovereignty and the rule of Law*, 128-129 (citing, J Brohmer, *State immunity and the violation of human rights*, 26-32).

¹¹⁹ *Oxford Advanced Learner’s Dictionary*, 7th edn, 776.

¹²⁰ See, art 46 of the Constitution of the United Republic of Tanzania, 1977, (The official version in Kiswahili, 2005).

A personal favour granted by law contrary to the general rule. An immunity is a right peculiar to some individual or body; an exemption from some general duty or burden; a personal benefit or favour granted by law contrary to the general rule. Freedom from liability; exemption conferred by any law, from a general rule.... [It can also mean] freedom or exemptions from penalty, burden or duty.¹²¹

Thus, by ‘*immunity from prosecution*’, the phrase does not mean anything but to ‘withdraw from prosecution.’ That can be exercised at any time in the course of the trial, but before judgment is delivered.¹²² Hence, it means an exception or bar to prosecution for crimes. According to Schabas, immunity is ‘a defence’¹²³ in international criminal law. This opinion is also shared by Van Schaack and Slye.¹²⁴ Thus, it is ‘somehow’ one of the defences to international criminal responsibility of individuals accused of international crimes. Whether this defence of immunity is valid under international law, is a contentious subject. But, suffice at this early point to regard it as ‘a kind of defence’ or ground that is commonly raised by state officials when such persons are subjected to international criminal proceedings.

Immunity may also be characterised as a barrier to individual accountability.¹²⁵ The descriptions of immunity as a defence or barrier to prosecution suit the interest of the study on international crimes and immunity. Immunity is a ground or defence that excludes criminal responsibility of an individual. In the words of Judge Jean Yves De Cara, ‘[i]mmunity has the effect of rendering inadmissible any action brought against the person who invokes it.’¹²⁶

¹²¹ PR Aiyar (2005) *Concise Law Dictionary: With legal maxims, Latin terms and words and phrases*, 3rd edn, 549-550; *Jashir Singh v Vipin Kumar Jaggi*, AIR 2001 SC 2734.

¹²² Aiyar (2005) 549-550.

¹²³ Schabas (2007) 231.

¹²⁴ B van Schaack and RC Slye (2007) *International criminal law and its enforcement: Cases and materials*, 865-874.

¹²⁵ DP Stewart, ‘Immunity and accountability: More continuity than change?’ (2005) 99 *American Society International Law Proceedings* 227-230, 228.

¹²⁶ See, Dissenting Opinion of Judge Jean Yves De Cara in the *Case Concerning Certain Criminal Proceedings in France (Republic of the Congo v France)*, *Provisional Measures*, Order of 17 June 2003, ICJ Reports (2003) 102, 122.

1.10.1.1 Scope of immunity of state officials

The immunity of state officials from prosecution for crimes is divided into two aspects: status or personal immunity (*ratione personae*) and functional immunity (*ratione materiae*). The two are central to this study. The question of immunity *ratione personae* arises particularly and most strongly in the case of state officials commonly with regards to International Criminal Court or tribunals, and even domestic courts.¹²⁷ Serving state officials may be rendered susceptible to the jurisdiction of international tribunals depending on the terms of the statutes of such tribunals.¹²⁸ However, the situation of immunity before domestic courts is more complex.¹²⁹

Personal Immunity (*ratione personae*) attaches to senior state officials, such as heads of state or government or Ministers of Foreign Affairs and other officials, while they are still in office. State as well as judicial practice indicates that this immunity applies even to international crimes, as held by domestic courts in cases involving Muammar Qaddafi,¹³⁰ and Robert Mugabe.¹³¹ But it is not yet clear whether immunity can protect state officials in respect of criminal prosecutions. According to Akande,

Judicial opinion and state practice on this point are unanimous and no case can be found in which it was held that a state official possessing immunity *ratione personae* is subject to the criminal jurisdiction of a foreign state where it is alleged that he or she has committed an international crime.¹³²

The position stated in the preceding paragraph is only true in respect of the serving foreign state officials as evidenced by the cases against *Qaddafi* and *Mugabe* in France and the US respectively. That position cannot be true in respect of former state officials from foreign states. Former state officials have been prosecuted in foreign criminal jurisdictions. For instance, as at 2011, Hissène Habré is likely to face trial in Senegal.

¹²⁷ Immunity does not exist for a former state official in respect of contractual obligations.

¹²⁸ Shaw (2003) 655-656.

¹²⁹ Shaw (2003) 655-656.

¹³⁰ French *Cour de Cassation*, 13 March 2001, Judgment No.1414, reprinted in (2001) 105 *Revue Generale de Droit International Public* 437; Zappala (2001) 596 (discussing the Gaddafi case).

¹³¹ *Tachiona v Mugabe*, 169 F. Supp. 2d 259, 309 (S.D.N.Y.2001).

¹³² Akande (2004) 407; Dugard (2005) 252; C Bhoke 'The trial of Charles Taylor: Conflict prevention, international law and an impunity-free Africa' Institute for Security Studies (ISS), ISS Occasional Paper No.27, August 2006, 8-10.

Manuel Noriega was prosecuted in the US and after his jail term, he was transferred to France to face charges.

Functional Immunity or *ratione materiae* attaches to official acts or functions of the senior state officials. This type of immunity may be invoked not only by the serving state officials but also by former state officials in respect of the official acts performed while they were in office. Such immunity cannot exist when a person is charged with international crimes either because such acts can never be ‘official’ or because they violate norms of *jus cogens*¹³³ and such peremptory norms must prevail over immunity.¹³⁴ It is appropriate to consider the question posed and answered by Broomhall in this regard:

With increasing potential of the application of international criminal law to individuals acting – or purporting to act – in an official capacity, the question arises whether such individuals should ever, and if so under what circumstances, be shielded from arrest and prosecution by doctrines of immunity...To acknowledge claims of immunity would in effect allow states to choose whether or not their agents would be responsible under international law, making regular enforcement (...) all but impossible.¹³⁵

An incumbent or former Minister for Foreign Affairs may be subject to criminal proceedings before properly constituted international criminal courts (with jurisdiction over international crimes).¹³⁶ Contemporary international law no longer accepts that a state official commit crimes and go unpunished. Moreover, some human rights norms enjoy such a high status that their violations, even by state officials, constitute an international crime. Thus, the doctrine of immunity cannot stand aloof from these developments. It is submitted that the preceding is, and should always remain the position in respect of international crimes such as genocide, crimes against humanity, war crimes, and the crime of aggression. However, as will be observed in Chapter 5 of this study, it is not entirely possible to prosecute a serving state official before his own domestic courts due to the immunity recognised in the constitutions.

¹³³ On *jus cogens*, see, NHB Jørgensen (2000) *The responsibility of states for international crimes*, 85-92.

¹³⁴ Bhoke (2006) 8-10. More discussion on this aspect is presented in Chapter 2, part 2.4.

¹³⁵ Broomhall (2003) 128.

¹³⁶ *Arrest Warrant* case, para 61.

1.10.2 International crimes

An international crime may be defined as – such crime which is prohibited by international law – and to which international law ‘attaches legal consequences –criminal proceedings and punishment.’¹³⁷ It is a breach of a rule of international law,¹³⁸ particularly *jus cogens*.¹³⁹ Some authors have cautioned that a definition of an international crime remains a matter of controversy.¹⁴⁰ Perhaps the best way is to note the difference between domestic crimes from international crimes. Balint observes that:

The first stage is to distinguish domestic crime from international state crime and thus to make a distinction between criminal justice and international criminal justice. The principle foundation for this argument is that any system of criminal justice must take into account the context within which the crime occurs and that the context, factors, and outcomes of state crime are different from that which may be termed ‘ordinary’ domestic crime.¹⁴¹

Hence, international crimes are crimes that are contrary to international law¹⁴² as opposed to domestic crimes which are only crimes contrary to national laws of a particular state. International crimes are committed against the international community, and as such, create obligations on all states to punish the perpetrators of such crimes. However, when recognised by law at domestic level, international crimes may also be contrary to national laws of states. International crimes may be punished both at domestic and international courts. Such crimes have the following features: they are breaches of a norm of fundamental character which attract criminal responsibility of individuals under international law; they are universally condemned by all states; they threaten international peace and security and; they violate *jus cogens* norms recognised under customary and conventional international law.¹⁴³

¹³⁷ M Boot (2002) *Genocide, crimes against humanity, war crimes: Nullum crimen sine lege and the subject matter jurisdiction of the International Criminal Court*, 15.

¹³⁸ Naqvi (2010) 21-32.

¹³⁹ S Kadelbach, ‘*Jus cogens*, obligations *erga omnes* and other rules –The identification of fundamental norms’ in C Tomuschat and JM Thouvenin (eds.), (2006) *The fundamental rules of legal order: Jus cogens and obligations erga omnes*, 21.

¹⁴⁰ Naqvi (2010) 21.

¹⁴¹ J Balint ‘The place of law in addressing internal regime conflicts’ (1996) 59 *Law and Contemporary Problems* 98-121.

¹⁴² Cassese (2008) 11-13.

¹⁴³ Naqvi (2010) 31.

As indicated above, international crimes are already defined in the statutes of international courts, the Genocide Convention, Geneva Conventions of 1949 and their Additional Protocols, 1977. Although the developments and drafting history of these international crimes may be important, it is not the concern of the present study because the purpose here is not to describe the crimes as such, but rather, to discuss immunity in relation to international crimes. The drafting history of these crimes is well covered by other scholars and the International Law Commission.¹⁴⁴

1.10.3 Indictment

The term '*indictment*'¹⁴⁵ as used in this study refers to a statement of formal charges against a person, charging that person with international crimes, and indicating the relevant international law provisions that have been breached by such person. The indictment also shows the particulars of the person charged, and circumstances under which a person so charged is alleged to have committed crimes. The purpose of an indictment is to inform both the accused person (the person charged with crimes) and the

¹⁴⁴ See generally, G Mettraux (2005) *International crimes and the ad hoc tribunals*, 23-264 (war crimes, crimes against humanity and genocide); M Politi and G Nesi (eds), (2004) *The International Criminal Court and the crime of aggression*, 1-189; WA Schabas (2010) *The International Criminal Court: A commentary on the Rome Statute*, 101-269 (genocide, crimes against humanity and war crimes); WA Schabas (2000) *Genocide in international law: the crime of crimes*, 1-101; see also, C Bhoke (2005) *Genocide: A critical analysis of the Darfur conflict in Sudan*, Ch 2 and 3 (LL.M Dissertation, unpublished), 5-35, (especially authorities cited in notes 18, 19 and 20 thereof); LJ van den Herik (2005) *The contribution of the Rwanda Tribunal to the development of international law*, 88-98; Report of the International Law Commission, 1996, art 17 and commentary thereof (genocide); Draft Code of Crimes against Peace and Security of Mankind, Text adopted by the International Law Commission at its 48th Session, 1996 and submitted to the General Assembly as part of the Commission's report covering the work of that session, (UN Doc. A/51/10); Y Dinstein and M Tabory (ed.), (1996) *War crimes in international law*, 1-469; K Dörmann (2002) *Elements of war crimes under the Rome Statute of the International Criminal Court: Sources and commentary*, 1-498; MC Bassiouni (2008) *International criminal law*, 3edn, Vol.1, 1-1035; O Triffterer (2008) *Commentary on the Rome Statute of the International Criminal Court –Observer's notes, article by article*, 2edn, 129-537; L May (2005) *Crimes against humanity*, 1-294; Y Sandoz, C Swinarski and B Zimmermann (eds.), (1987) *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, 1-1529; JM Henckaerts and L Doswald-Beck (eds.), (2005) *Customary international humanitarian law*, Vol. I-II, (Rules and practice).

¹⁴⁵ For an example of an indictment, see, *Prosecutor v Pavković et al*, Case No. IT-03-70-I, 25 September 2003, available at <http://www.icty.org/x/cases/djordjevic/ind/en/djordjevic_030922_indictment_en.pdf> (accessed on 27 September 2010).

court on the nature of the crimes charged, the person who committed such crimes, the law, and the legal responsibility of the person charged with crimes.¹⁴⁶

1.10.4 Prosecution

The terms ‘prosecution’ refers to the legal process under which a person is being prosecuted or tried by a court or tribunal. Prosecution begins from the time a person is formally charged, arrested, arraigned before the court, tried, convicted or discharged, and ends when a judgment and sentence are pronounced and imposed on the person charged with crimes respectively, including at trial or appellate stages.

1.10.5 Subpoena *ad testificandum* and Subpoena *duces tecum*

In international criminal law, a subpoena is an order of a court which seeks to instruct and compel a person to appear before it. It is usually in summons form. There are different types of subpoenas. A ‘*subpoena ad testificandum*’ is an order to appear in court and testify before the court for purpose of a trial (an order to testify before a court). This may be issued by the court itself or at the request of the accused person by filing a motion for the issuance of a *subpoena ad testificandum*. The summons to appear is usually issued as an alternative to the warrant of arrest.¹⁴⁷

A *subpoena duces tecum* is a court order issued against a person to produce or bring before the court documents or other items and materials that are required as evidence for the purpose of conducting a trial. Normally, a subpoena is backed by a penalty. Failure to comply with a subpoena issued by the court constitutes contempt of court, which can be punished with a fine or imprisonment.¹⁴⁸ Subpoenas can also be ordered by judges *proprio motu*, or upon request for subpoenas necessary for the investigation, preparation or conduct of trials.

¹⁴⁶ See, the requirements set under art 58(2) (a)-(d), Rome Statute.

¹⁴⁷ See, art 58(7), Rome Statute.

¹⁴⁸ See, *Prosecutor v Milosevic, Decision on Assigned Counsel Application for Interview and Testimony of Tony Blair and Gerhard Schroder*, 9 December 2005; See also, *Rule 77 of the Rules of Procedure and Evidence of the ICTY* (‘inspection of material’).

1.11 Chapter outline

This study is presented in six chapters. Chapter 1 serves as an introduction to the study, setting the background to the problem. It deals with the problem of commission of international crimes by African state officials. Further, it traces the lack of consistency in international jurisprudence on immunity of state officials in international courts, particularly with regards to subpoenas against state officials. It identifies issues addressed by the study. Such issues touch on the competing norms of *jus cogens* and immunity, subpoenas against state officials and the practice of African states on immunity of state officials in relation to prosecution of international crimes.

The law of immunity of state officials from prosecution for international crimes is traced from customary international law, treaties and statutes of international courts. This is presented in Chapter 2. The chapter argues that although immunity originated from customary international law, and as such, has some status as a norm, it nevertheless cannot prevail over many of the settled international treaties that call for prosecution of state officials who commit international crimes. Hence, the chapter discusses the conflicting norms of *jus cogens* and immunity.

Based on the jurisprudence of international courts, chapter 3 discusses the question of *subpoena ad testificandum* and *subpoena duces tecum*. It presents different positions the courts have taken on subpoenas against state officials in relation to immunity. Chapter 4 discusses the efforts to prosecute international crimes at African regional and sub-regional levels. It links the discussion on prosecution of international crimes with immunity of state officials. It presents the African perception against the ICC in the prosecution of persons who commit international crimes in Africa. The chapter criticises the AU decisions not to cooperate with the ICC on the prosecution of African individuals who commit international crimes.

Chapter 5 focuses on immunity of state officials and prosecution of international crimes in eleven African states. It discusses national laws and judicial interpretation on

immunity and prosecution of international crimes at domestic level. It explores the existing, and lack of legislation in this field of study in Africa. It highlights the current state practice from African states.

Chapter 6 contains conclusions and recommendations of the study. It affirms the assumptions underlying the study and answers the questions raised in the introductory chapter. It concludes that international law *jus cogens* imposing obligations *erga omnes* in respect of international crimes must prevail over immunity of state officials, and as such, state officials cannot benefit from immunity from prosecution. Further, it concludes that state officials do not enjoy immunity from being subpoenaed to testify or submit evidence before international courts with jurisdiction over international crimes. Furthermore, the chapter concludes that some African states have outlawed immunity attaching to state officials. This is found in the laws punishing international crimes in such states. Therefore, state officials in such states cannot benefit from immunity with regards to international crimes.

With regards to the AU sentiments against the ICC, the chapter concludes that such while such perception may be valid in some respect, it cannot be upheld in international law because most of the African states are states parties to the Rome Statute. Hence, such states have obligation to cooperate with the ICC. In fact, not all African states have accepted the AU decisions on non-cooperation with the ICC. It will be demonstrated that despite the AU decisions, Botswana and South Africa have expressed commitment to cooperate with the ICC.

Recommendations are directed at the African Union on the need to adopt a treaty on the prosecution of persons, including responsible for international crimes. This is in recognition of the persistent trend of commission of international crimes by African state officials, and the growing tension between the AU and the ICC in relation to international crimes. Further, recommendations are directed at certain individual African states in order to comply with their obligations arising from the Rome Statute. Also, the chapter recommends that, when conducting trials, international courts should treat state officials



equally in respect of prosecution and issuance of subpoenas. In this regard, courts should maintain consistency in their jurisprudence on subpoenas against state officials.

Chapter 2

Developments of the law on immunity of state officials in international law

2.1 Introduction

The purpose of this chapter is to trace and state the development of the law on the immunity of state officials in international law and then examine the question of immunity vis-à-vis international law *jus cogens* on the prohibition and punishment of international crimes. The main question is *whether immunity of state officials can prevail over international law jus cogens on the prohibition and punishment of international crimes*.

In the course of discussing the developments on immunity, the chapter traces the origin of immunity and its subsequent developments. Customary international law is discussed here as the origin of immunity of state officials. This is then followed by the discussion on provisions of the Charters of the International Military Tribunals at Nuremberg and Tokyo, statutes of international criminal tribunals and hybrid courts, the Rome Statute, codified international law treaties, the work of the International Law Commission and other non-binding instruments.

It is observed that all these documents contain clear provisions that immunity of state officials is not, or shall not be a bar to prosecution of international crimes nor a mitigating factor in the punishment.

2.2 Customary international law of immunity of state officials

Customary international law consists of the rules which become legally binding as a result of state practice over a period of time. A rule of customary international law is ‘created by widespread state practice (*usus*) coupled with *opinio juris sive necessitatis*, namely, a belief on the part of the state concerned that international law obliges it, or gives it a right, to act in a particular way.’¹ This position has been confirmed by the International Court of Justice in several cases.² State practice can be derived from official pronouncements of the governments to form rules of customary international law. *Opinio juris* is an opinion of an existence of law.³ It is a belief that the conduct is mandated by a legal obligation.

The rules regarding customary international law are codified in article 38(1) of the Statute of the International Court of Justice. According to article 38(1), customary international law is constituted through ‘evidence of a general practice accepted as law.’ Hence, two elements make up the existence of customary international law: general practice and *opinio juris*.⁴ The International Court of Justice (ICJ) has described the two elements forming customary international law as follows:

[F]or a new customary rule to be formed, not only must the acts concerned ‘amount to a settled practice’, but they must be accompanied by the *opinio juris sive necessitatis*. Either the States taking such action or other States in a position to react to it, must have behaved so that their conduct is ‘evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the

¹ UK Ministry of Defence (2004) *The manual of the law of armed conflict*, 5, (ss 1.12-1.12.2).

² *Asylum Case, (Colombia v Peru)*, Judgment, 20 November 1950, ICJ Reports (1950), 126; *North Sea Continental Shelf (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands)*, Judgment, 20 February 1969, ICJ Reports (1969), paras 70-78; *Case Concerning Military and Paramilitary Activities In and Against Nicaragua, (Nicaragua v USA)*, Judgment, 27 June 1986, ICJ Reports (1986), paras 183-186. But see *Prosecutor v Kuperškić et al*, Case No. IT-95-16-T, Trial Chamber II, Judgment of 14 January 2000, para 540.

³ M du Plessis, (ed.), (2008) *African guide to international criminal justice*, vii.

⁴ JE Ackerman and E O’Sullivan (2000) *Practice and procedure of the International Criminal Tribunal for the Former Yugoslavia*, 2-3; E Kwakwa (1992) *The international law of armed conflict: Personal and material fields of application*, 30. However, see, T Maluwa (1999) *International law in post-colonial Africa*, 5.

existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*.⁵

With regards to *opinio juris*, the ICJ has given guidance that:

Not only must acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The states concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency or even habitual character of the acts is not in itself enough. There are many international acts, for example in the field of ceremonial and protocol, which are performed almost invariably, but which are motivated only by considerations of courtesy, convenience or tradition and not by any sense of legal duty.⁶

In the *Asylum* case, the ICJ held that the party which relies on custom must prove that custom is established in such a manner that it has become binding on the other party, that the rule invoked is in accordance with a constant and uniform usage practiced by the states in question.⁷

Immunity of state officials has been characterised as emanating from customary international law.⁸ However, 'identifying customary rules in the field of international criminal law is a truly daunting task, particularly as most instances of state practice will occur in juridical outer space and out of judicial sight.'⁹ Nevertheless, in the context of immunity of state officials, state practice indicates that state officials were historically not subject to criminal responsibility for their actions, because of a merger of the sovereign and the sovereignty of the state.¹⁰ Geoffrey Robertson states that '[s]overeign immunity

⁵ See, Case Concerning Military and Paramilitary Activities in and Against Nicaragua (*Nicaragua v United States of America*), (*Merits*), ICJ Reports (1986) 44, para 77.

⁶ See, *Case Concerning North Sea Continental Shelf (Denmark, Germany v The Netherlands)*, 1969 ICJ Reports 3, 44 (Judgment of 20 February 1969).

⁷ *Asylum case (Colombia v Peru)*, ICJ Reports (1950), 276-277.

⁸ See, B Stern, 'Immunities for heads of state: Where do we stand?' in M Lattimer and P Sands (eds.), (2003) *Justice for crimes against humanity*, 73-106, 73 (wherein Stern says: 'Some of the tenets used in order to grant immunity to heads of state have their origin in customary international law...').

⁹ G Mettraux (2005) *International crimes and the Ad Hoc tribunals*, 13 ('identifying customary international law and the role of Judges in the customary process').

¹⁰ MC Bassiouni (1999) *Crimes against humanity in international criminal law*, 505-508 (stating that this is particularly true with respect to Monarchies as evidenced by Louis XIV's statement: '*L'etat c'est moi*' (meaning that 'the state is me' - my own translation).

followed in the first place from the divine right of kings: you could not put an infallible ruler on trial since, if you did, the verdict must always go in his favour'.¹¹ The concept of state officials is as old as the state itself. It is when the state existed that its heads also existed. The rule of immunity of state officials 'was derived from unlamented doctrine that the King can do no wrong.'¹² This could also emanate from the old maxim that the King cannot be sued in his own courts. According to Orakhelashvili, 'historically, the original concept of immunity of high level state officials, such as heads of state arose from the fact that they represent their states and to sue [them] was tantamount to suing an independent state.'¹³ This position finds further support from Peter Burns who writes that:

Heads of state and government policymakers, whether ruling as princes by divine right or as democratically elected representatives of the people, have with few exceptions been able to avoid responsibility for their conduct by wrapping themselves up in the blanket of state sovereignty, secure in the knowledge that no international mechanism existed to call them to account.¹⁴

However, reservations may be entered to the above stated position in that the state and its officials are two distinct entities which must not be confused. Arguably, the traditional doctrine of immunity from jurisdiction enjoyed by the state and the state officials is based on the principle of state dignity. This is a notion that a sovereign must not degrade the dignity of his nation by submitting to the jurisdiction of another state.¹⁵ Consequently, a state official is not to subject himself to a jurisdiction incompatible with his dignity and the dignity of his nation.¹⁶ Possibly, the moral comity of nations may be said to have contributed to the development of the head of state immunity. This is aptly put that 'do

¹¹ G Robertson (2002) *Crimes against humanity: The struggle for global justice*, 403.

¹² PA Gabin, 'Accountability of the president under the command responsibility doctrine', 9-10, available at <<http://www.supremecourt.gov.ph/publications/summit/Summit%20Papers/Agabin%20%20Accountability%20of%20the%20President.pdf>> (accessed on 28 August 2008).

¹³ A Orakhelashvili (2006) *Peremptory norms in international law*, 320; Y Simbeye (2004) *Immunity and international criminal law*, 105-109.

¹⁴ P Burns, 'An international criminal tribunal: The difficult union of principle and politics' (1994) 5(2-3) *Criminal Law Forum* 341-380, 342.

¹⁵ See generally, Dissenting Opinion of Judge Jean Yves De Cara in the *Case Concerning Certain Criminal Proceedings in France (Republic of the Congo v France)*, *Provisional Measures*, Order of 17 June 2003, ICJ Reports 2003, p. 123.

¹⁶ *The Schooner Exchange v McFadden* (1812), 11 US 137-138; *Mighell v The Sultan of Johore*, [1894] 1 QB 149.

unto others as you would have them do to you.’¹⁷ In this regard, each state upholds the immunity concept in the hope that its own head of state can be protected when out of his country.

Further, state officials are conferred the functional immunity as of right in order to allow them to perform their duties effectively under customary international law. It is perhaps not right to dispute that a state official benefits from absolute criminal immunity before the courts of a foreign state.¹⁸ Customary international law recognises certain ‘degrees of immunity from criminal prosecution for heads of state and other officials.’¹⁹ It is common that some states and national laws allow immunity to their own state officials or to officials from foreign countries.²⁰ According to Van Schaack and Ronald Slye,

Government officials under both domestic and international law may claim immunity from accountability for acts they commit while in office. Heads of state have enjoyed such immunity for centuries, due in large part to the conflation of the head of state with the state itself. Thus, head of state immunity was grounded in the more general notion of sovereign immunity. Sovereign and head of state immunity developed as doctrines rooted in the comity that one state owed another.²¹

There is a customary international law basis that ‘one state cannot exercise its jurisdiction over another’s sovereign, at least in ordinary crimes.’²² The absolute nature of the immunity precludes the application of any exception to that immunity, for example, based on the nature of the offence of which a state official is accused.²³ Nevertheless, it

¹⁷ D Aversano, ‘Can the pope be a defendant in American courts? The grant of head of state immunity and the judiciary’s role to answer this question’ (2006) 18 *Pace International Law Review* 495-529, 506.

¹⁸ DP Stewart, ‘Immunity and accountability: More continuity than change?’ (2005) 99 *American Society International Law Proceedings* 227-230, 229.

¹⁹ WA Schabas (2000) *Genocide in international law*, 316; *Attorney-General of Israel v Adolf Eichmann*, (1968) 36 ILR 18 (District Court of Jerusalem), para 28; *Attorney-General of Israel v Adolf Eichmann*, (1968) 36 ILR 227 (Supreme Court of Israel), para 14; *Prosecutor v Blaškić*, (Case No. IT-95-14-AR 108bis), *Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997*, 29 October 1997, para 41.

²⁰ *R v Bow Street Stipendiary Magistrate and Others, ex parte Pinochet Ugarte*, [1998] 4 All ER 897; [1998] 3 WLR 1456 (HL). *Contra, United States v Noriega*, 808 F. Supp. 791 (SD Fla 1992) –whereby Noriega –was not accorded immunity protection simply because the Executives did not consider him entitled to such protection.

²¹ B Van Schaack and RC Slye, (2007) *International criminal law and its enforcement: Cases and materials*, 865-866.

²² Schabas (2000) 317.

²³ See, Dissenting Opinion of Judge Jean Yves De Cara in the *Case Concerning Certain Criminal Proceedings in France (Republic of the Congo v France)*, *Provisional Measures*, Order of 17 June 2003, ICJ Reports 2003, 122.

should be noted that in contemporary international law, sovereign equality of states does not prevent state officials from being prosecuted in an international court, provided that such court has jurisdiction over former or serving state officials.

It is widely accepted that the doctrine of immunity is largely a matter of custom.²⁴ There is no specific international convention or treaty on this doctrine, ‘even though some international conventions or treaties refer expressly to the situations of a serving or former head of state.’²⁵ Schabas argues that ‘[i]mmunity of the heads of state, other senior government officials, diplomatic personnel and functionaries and experts of international organizations, exists by virtue of customary international law.’²⁶ Schabas supports this position by saying that it is codified in various treaties, and has been applied by the International Court of Justice in an important ruling dealing with a prosecution for genocide.²⁷

The International Court of Justice (ICJ) concluded that customary international law provided for a general rule entitling a serving foreign minister to enjoy full immunity from criminal jurisdiction before a foreign national court.²⁸ The ICJ held further that although various international conventions on the prevention and punishment of certain serious crimes impose on states obligations of prosecution or extradition, thereby requiring them to extend their criminal jurisdiction, such extension in no way affects immunities under customary international law.²⁹

²⁴ See *Amicus Brief in the Matter of David Anyaele and Emmanuel Egbuna v Charles Ghankay Taylor and others*, A submission from the Open Society Justice Initiative to the Federal High Court of Nigeria, Abuja Division, November 2004, p.16, paras 41-44 (on immunities-stating that “while the immunity of diplomats has always been regulated by its own regime, the immunity of heads of state appears to have been subsumed within state immunities until relatively recently, owing to the identification of the state with its ruler.”); D Akande ‘International law immunities and the International Criminal Court’ (2004) 98 *American Journal of International Law* 407; A Watts ‘The legal position in international law of heads of states, heads of governments and Foreign Ministers’ (1994) III 247 *Hague Recueil des Cours*, 19-130; JL Mallory ‘Resolving the confusion over the head of state immunity: The defined right of Kings’ (1986) 86 *Columbia Law Review* 169, 177; SK Verma (1998) *An introduction to public international law*, 155 (who states that this concept is imbibed in the customary international law). However, of recent years, this position appears to be modified by adoption of treaties, for example, the Rome Statute outlawing immunity of state officials.

²⁵ Stern in Lattimer and Sands (2003) 83.

²⁶ W Schabas (2007) *An introduction to the International Criminal Court*, 231.

²⁷ Schabas (2007) 231.

²⁸ *Arrest Warrant* case, para 58.

²⁹ *Arrest Warrant* case, para 59.

In an application for indication of provisional measures before the ICJ in the *Case Concerning Certain Criminal Proceedings in France (Republic of the Congo v France)*, the Government of Congo successfully pleaded customary international law of immunity of state officials in seeking an order of the court to stop France from investigating and prosecuting public officials of Congo for crimes against humanity and torture. These included H.E General Pierre Oba, Minister of the Interior, Public Security and Territorial Administration, and H.E Mr. Denis Sassou Nguesso, President of the Republic of the Congo. The Republic of Congo argued that such investigation, court processes and prosecution against its state officials amounted to ‘*violation of the criminal immunity of a Foreign Head of State –an international customary rule recognised by the jurisprudence of the Court.*’³⁰ Similarly, the Agent and Counsel of France admitted that:

There are no written rules deriving from any legislation relating to immunities of states and their representatives. It is the jurisprudence of the French courts which, referring to customary international law and applying it directly, have asserted clearly and forcefully the principles of these immunities.³¹

Much as the above position stated by the ICJ is respected, it should be known that immunity cannot be upheld for torture because immunity cannot apply to torture.

The principal source of international law regarding immunity of state officials from prosecution for international crimes in domestic and international courts is the international custom. However, rejection of the defence of immunity has also equally been characterised as having attained customary international law status. The ICTY has declared article 7(2) of the Statute of ICTY and article 6(2) of the Statute of ICTR to be ‘indisputably declaratory of customary international law.’³² These provisions provide a basis for non-recognition of immunity of state officials for international crimes.

³⁰ See, *Case Concerning Certain Criminal Proceedings in France (Republic of the Congo v France), Provisional Measures*, Order of 17 June 2003, ICJ Reports 2003, 102, paras 1-39, but see particularly, paras 1 and 28 (where the ICJ agreed that France had to respect the right ‘for the immunities conferred by international law on, in particular, the Congolese Head of State.’).

³¹ *Congo v France*, ICJ Reports 2003, para 33.

³² *Prosecutor v Furundžija*, Judgment (ICTY Case No. IT-95-17/1), (10 December 1998), para 40.

Contemporary international law limits the enjoyment of such immunities. An unconditional defence of immunity of state officials can hardly be justified nowadays³³ especially in this era of human rights agenda and protection of humanity from heinous crimes. As far back as 1946, the immunity of state officials was neither a substantive defence nor an absolute doctrine at all. Even if the doctrine of immunity of state officials would be viewed as emanating from the divine right of Kings, history has it that even the King himself was ‘still under God and the Law.’³⁴ It can also be argued that immunities under international law do not possess the same characteristics as peremptory norms,³⁵ particularly those that prohibit the commission of international crimes. This position remains contentious though. On one hand, ‘there is an interest of the community of mankind to prevent and stop impunity for perpetrators of grave crimes against its members, and on the other, there is the interest of the community of states to allow them to act freely on the interstate level without unwarranted interference.’³⁶ This debate is discussed at a later stage of this chapter.³⁷ Having set the customary international law nature of the immunity of state officials, it is important that the conventional international law on the doctrine be discussed.

2.3 Codification of immunity of state officials

In this part, the study presents various international law statutes, treaties, sources and efforts that have contributed to the development of the law on immunity of state officials through codification. In particular, international efforts to codify the law on immunity are presented in two dimensions: developments before the Nuremberg Charter and developments after the Nuremberg Charter. It is the understanding that major developments on the prosecution of international crimes ensued after World War I and World War II.

³³ Orakhelashvili (2006) 320.

³⁴ Lord Justice Coke proclaimed and declared to King James that ‘a King is still under God and the Law.’ This statement was considered by RH Jackson in his *Report to President Truman on the Basis for Trial of War Criminals* (1946) *Temple Law Quarterly* 19, 148, quoted in Stern in Lattimer and Sands(2003) 74.

³⁵ Orakhelashvili (2006) 354.

³⁶ *Arrest Warrant* case, para 75.

³⁷ See, part 3 of this chapter.

2.3.1 Developments of the law on immunity before the Nuremberg Charter

Before World War I, the international community had made very little efforts to prosecute leaders who were perpetrators of international crimes. Bassiouni observes that '[a]fter the First World War, the international community made some tentative attempts to deal with this problem, but no such effort were pursued vigorously and none was successful.'³⁸ Efforts to codify immunity of state officials started after *World War I*. The first efforts were evidenced by the signing of the *Treaty of Peace between the Allied and Associated Powers and Germany*, at Versailles, on 28 June 1919 (the Versailles Treaty). In its Part VII (on Penalties), the *Versailles Treaty* called for the trial of the former German Emperor under article 227 as follows:

The Allied and Associated Powers publicly arraign William II of Hohenzollen, formerly German Emperor, for a supreme offence against international morality and the sanctity of treaties.

Article 227 of the Versailles Treaty also addressed a request to the Government of the Netherlands for the surrender to them of the Ex-Emperor (William II) in order for him to be tried. Article 228 of the Versailles Treaty of 1919 provided that the German Government 'recognises the right of the Allied and Associated Powers to bring before military tribunals persons accused of having committed acts in violation of the laws and customs of war.'

The *Report Presented to the Preliminary Peace Conference by the Commission on Responsibility of the Authors of the War and on Enforcement of Penalties* at Versailles of March 1919³⁹ provided in its Chapter III (Personal Responsibility):

In view of the grave charges which may be preferred against—to take one case—the ex-Kaiser—the vindication of the principles of the laws and customs of war and the laws of humanity which have been violated would be incomplete if he were not brought to trial and if other offenders less highly placed were punished...

³⁸ MC Bassiouni, 'The time has come for an International Criminal Court' (1991) 1 *Indiana International and Comparative Law Review* 1, 2-4.

³⁹ Conference of Paris 1919 Carnegie Endowment for International Peace, Division of International Law, Pamphlet No.32 (1919), Reprinted in (1920) 14 *American Journal of International Law* 95 (Supp.), quoted in MC Bassiouni (1992) *Crimes against humanity in international law*, 553-556, 555.

All persons belonging to enemy countries, however high their position may have been, without distinction of rank, including Chiefs of States, who have been guilty of offences against the laws and customs of war or the laws of humanity, are liable to criminal prosecution.⁴⁰

The above provisions emphasise that the former German Emperor was to be tried despite his official rank and status as a head of state. However, this effort was not carried beyond its inclusion in a treaty. The Allies did not set up an international tribunal or seek to secure jurisdiction over Kaiser Wilhelm.⁴¹ According to De Aragao, Germany did not extradite its own nationals and also that the Government of The Netherlands refused to extradite Kaiser Wilhelm on the ground that he was charged with a ‘political offence’ exempt from extradition.⁴²

2.3.2 Immunity in the Charter of the International Military Tribunal

The defence of official capacity has effectively been rejected at least since the Nuremberg Trials.⁴³ On 8 August 1945, at London, the Government of the United States of America, the Provisional Government of the French Republic, the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Union of Soviet Socialist Republics signed an Agreement for the Prosecution and Punishment of

⁴⁰ Note that the United States of America had submitted its Memorandum of Reservations presented by the Representatives of the United States to the Report of the Commission on Responsibilities, 4 April 1919 in which it stated clearly that ‘The conclusion which the Commission reached, and which is stated in the report, is to the effect that ‘all persons belonging to enemy countries, however high their position may have been, without distinction of rank, including Chiefs of States, who have been guilty of offences against the laws and customs of war or the laws of humanity, are liable to criminal prosecution.’ The American Representatives are unable to agree with this conclusion, in so far as it subjects to criminal, and, therefore, to legal prosecution, persons accused of offences against ‘the laws of humanity’, and in so far as it subjects Chiefs of States to a degree of responsibility hitherto unknown to municipal or international law, for which no precedents are to be found in the modern practice of nations...’ See Bassiouni (1992) 558, (emphasis in square brackets supplied).

⁴¹ Bassiouni (1992) 465.

⁴² EJG de Aragao, ‘Setting standards for domestic prosecutions of gross violations of human rights through the ICC: International jurisdiction for wilful killings in Brazil?’ in M Editori (2005) *The International Criminal Court: Challenges and prospects*, Proceedings of an International Conference organized by the European Inter-University Centre for Human Rights and Democratisation (EIUC), 13-38, 15; JF Willis (1982) *Prologue to Nuremberg – The politics and diplomacy of punishing war criminals of the First World War*, 98 (ff).

⁴³ K Kittichaisaree (2001) *International criminal law*, 259.

the Major War Criminals of the European Axis⁴⁴ purportedly acting in the interests of all the United Nations and by their representatives duly authorised thereto to conclude that agreement. Article 1 of the Agreement on the Prosecution and Punishment of Major War Criminals of the European Axis provides:

There shall be established after consultation with Control Council for Germany an International Military Tribunal for the trial of war criminals whose offences have no particular geographical location whether they be accused individually or in their capacity as members of organisations or groups or in both capacities.

A Charter of the International Military Tribunal was annexed to the London Agreement signed on 8 August 1945. The Charter set down laws and procedures by which the *Nuremberg Trials* were to be conducted. Article 1 of the Charter states that: ‘in pursuance of the Agreement signed on 8 August 1945...there shall be established an International Military Tribunal for the just and prompt trial and punishment of the major war criminals of the European Axis.’ Arguably, that this particular provision is inconsistent with international law principles relating to presumption of innocence of an accused in that instead of employing terms like the ‘accused’ or ‘suspect’, the Charter rather deliberately used the term ‘criminals’ –which is a prejudgment of the persons that were to be tried before the International Military Tribunal. In article 2, it is observed that the Tribunal was to consist of four members (basically drawn from those states that signed the London Agreement). Article 3 of the Nuremberg Charter provides that the Tribunal and its members could not be challenged by the prosecutor, the defendants or counsel. This provision was arguably contrary to international law principles governing prosecution and punishment of international crimes in that it shows how the Tribunal lacked impartiality.

⁴⁴ See, Agreement by the Government of the United States of America, the Provisional Government of the French Republic, the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Union of Soviet Socialist Republics for the Prosecution and Punishment of the Major War Criminals of the European Axis, 8 United Nations Treaty Series 279. The Agreement was signed by Robert H. Jackson (for the United States of America), Robert Falco (for the Provisional Government of the French Republic), C Jowitt (for the United Kingdom) and I. Nikitchenko and A. Trainin (both for the Union of Soviet Socialist Republics); reprinted in Bassiouni as n. 221 above, 579-581; available also at the *Avalon Project at Yale Law School*, at <<http://www.yale.edu/lawweb/avalon/imt/proc/imtchart.htm>> (accessed on 8 November 2008).

Article 6 of the Charter of the International Military Tribunal provided for the international crimes namely: Crimes against peace; War Crimes and Crimes against humanity. Article 14 of the Charter of the International Military Tribunal created the Committee for the Investigation and Prosecution of Major War Criminals whereby it states that each signatory shall appoint a Chief Prosecutor for the investigation of the charges against, and the prosecution of, major war criminals. Of particular importance to this study is article 7 (on Jurisdiction and General Principles) of the *Charter of the International Military Tribunal* which provides:

The official position of the defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment.

Article 7 of the Charter of the International Military Tribunal provided a basis for the prosecution and punishment of the heads of state for international crimes. Following the above provision, trials were conducted at Nuremberg in Germany (The Nuremberg Trials) and a number of persons –some of whom were representatives of state or government departments –were tried and punished for international crimes committed during World War II. Michael Scharf writes that:

[A]lthough Hitler, Himmler and Goebbels escaped prosecution by committing suicide, many of the most notorious German leaders were tried before the Nuremberg Tribunals. The list of the Nuremberg defendants reads like a ‘Who’s Who’ in the Third Reich...⁴⁵

By 1946, when the International Military Tribunal was convened in Nuremberg, both Adolf Hitler and Benito Mussolini had died and thus no prosecutions for the heads of state took place in the International Military Tribunal.⁴⁶

2.3.3 Immunity under Control Council Law No. 10

The Charter of the International Military Tribunal was later to be followed by the *Allied Control Council Law No. 10 on the Punishment of Persons Guilty of War Crimes, Crimes*

⁴⁵ MP Scharf (1997) *Balkan justice: The story behind the first international war crimes trial since Nuremberg*, 9-11.

⁴⁶ Bassiouni (1992) 465-466.

against Peace and Against Humanity.⁴⁷ The law was enacted to give effects to the terms of the London Agreement of 8 August 1945, and the Charter issued pursuant thereto. Article II (1) of the Control Council Law No.10 provided for crimes against peace, war crimes and crimes against humanity. Article II (4) and (5) of the Law prohibited the granting of immunity to persons who committed international crimes in the following terms:

4. (a) The official position of any person, whether as Head of State or as a responsible official in a Government Department, does not free him from responsibility for a crime or entitle him to mitigation of punishment...
5. In any trial or prosecution for a crime herein referred to, the accused shall not be entitled to the benefits of any statute of limitation in respect to the period from 30 January 1933 to July 1945, nor shall any immunity, pardon or amnesty granted under the Nazi regime be admitted as a bar to trial or punishment.⁴⁸

After the efforts to prosecute state officials in Germany, there followed equal measures in the Far East after World War II. Below is a reflection on such initiatives.

2.3.4 Immunity in the Charter of the International Military Tribunal for the Far East

The Proclamation by the Supreme Commander for the Allied Powers issued on 19 January 1946 at Tokyo, in Japan declared that ‘there shall be established an International Military Tribunal for the Far East for the trial of those persons charged individually, or as members of organizations, or in both capacities, with offences which include crimes against peace.’⁴⁹ The constitution, jurisdiction and functions of such a Tribunal were set forth in the *Charter of the International Military Tribunal for the Far East* (the Tokyo Charter) which was approved by Douglas MacArthur, the United States Army Supreme Commander for the Allied Powers on 19 January 1946 at Tokyo.

⁴⁷ *Official Gazette of the Control Council for Germany*, No.3, Berlin, 31 January 1946.

⁴⁸ See art II (4) (a) & (5) of the *Allied Control Council Law No.10 on the Punishment of Persons Guilty of War Crimes, Crimes against Peace and Against Humanity*.

⁴⁹ See art 1 of the *Proclamation by the Supreme Commander for the Allied Powers*, Tokyo, 19 January 1946. The proclamation was ordered and signed by Douglas MacArthur (the Supreme Commander for the Allied Powers).

The *Charter of the International Military Tribunal for the Far East* provided that the tribunal was established for the just and prompt trial and punishment of the major war criminals in the Far East.⁵⁰ The first trial of the Tribunal was in Tokyo.⁵¹ Article 5 of the Charter provided jurisdiction over persons and offences. It stated that the Tribunal shall have power to try and punish Far Eastern war criminals who as individuals or as members of organisations, were charged with offences which included crimes against peace, conventional war crimes and crimes against humanity.

With regards to immunity from prosecution for international crimes, article 6 of the *Charter of the International Military Tribunal for the Far East* provided:

Neither the official position, at any time, of an accused, nor the fact that an accused acted pursuant to order of his government or of a superior shall, of itself, be sufficient to free such accused from responsibility for any crime with which he is charged, but such circumstances may be considered in mitigation of punishment if the Tribunal determines that justice so requires.

It may be recalled that the provision of article 6 of the *Charter of the International Military Tribunal for the Far East* is different from article 7 of the Charter of the International Military Tribunal for war criminals in the European Axis that led to the *Nuremberg Trials*. Whereas the Tokyo Charter provided for, and recognised immunity of state officials as a circumstance for mitigation of punishment subject to the discretion of the Tribunal, the London Charter on the other hand, did not recognise official status as a mitigating factor in the punishment of individuals.

Although the Tokyo Tribunal was empowered to try the Japanese state officials, General MacArthur agreed that the Japanese Emperor would not be brought to trial as a consideration for the Emperor to agree to end the war in the Far East.

⁵⁰ On the Tokyo War Crimes Tribunal, see, U Kei (2003) *Beyond the judgment of civilization: The intellectual legacy of the Japanese war crimes trials, 1946-1949*, 1-336; C Hosoya, N Ando, Y Onuma and RH Minear (eds.) (1986) *The Tokyo war crimes trial*, 1-226.

⁵¹ Arts 1 and 14 of the *Charter of the International Military Tribunal for the Far East*, Tokyo, 19 January 1946.

2.3.5 Immunity in the statutes of international criminal tribunals

The statutes of international criminal tribunals dealing with international crimes contain provisions outlawing immunity of state officials. These tribunals include the International Criminal Tribunal for the former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR). An attempt is made here to discuss relevant immunity provisions under the statutes of these international criminal tribunals.

The International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Federal Republic of Yugoslavia since 1991 ('ICTY') was established by the United Nations Security Council acting under Chapter VII powers of the Charter of the United Nations.⁵² The ICTY deals with the prosecution and punishment of persons responsible for war crimes, genocide and crimes against humanity.⁵³ Regarding immunity of state officials, the Statute of the ICTY provides that:

The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.⁵⁴

The history behind this provision is that during the discussions leading to the adoption of the statute, the Secretary-General of the United Nations had suggested that immunity should not be recognised for state officials. The relevant part of the Report of the Secretary-General to Resolution 808 of 1993⁵⁵ reads as follows:

Virtually all the written comments received by the Secretary-General have suggested that the statute of the International Tribunal should contain provisions with regard to the individual criminal responsibility of heads of State, government officials and persons acting in an official capacity. These suggestions draw upon the precedents following the Second World War. The Statute should, therefore, contain provisions which specify that a

⁵² See, UNSC Res 808(1993), adopted by the Security Council at its 3175th meeting, on 22 February 1993, UN. Doc. S/RES/808(1993) and UNSC Res. 827 (1993), Adopted by the Security Council at its 3217th meeting on 25 May 1993, UN. Doc. S/RES/827(1993); Art 1 of the Statute of the ICTY.

⁵³ See generally the Statute of the ICTY, art 2 (Grave breaches of the Geneva Conventions of 1949 'war crimes'); art 3 (violations of the laws and customs of war 'war crimes'); art 4 (genocide) and art 5 (crimes against humanity).

⁵⁴ Art 7(2), Statute of the ICTY.

⁵⁵ (S/25704 and Add.1), 25 May 1993.

plea of head of State immunity or that an act was committed in the official capacity of the accused will not constitute a defence, nor will it mitigate punishment...⁵⁶

As a result of the immunity provision in the Statute of the ICTY, former state officials who have been prosecuted before the tribunal, have not successfully pleaded immunity. This is observed in the cases involving Milošević,⁵⁷ Karadžić⁵⁸ and Kunarać.⁵⁹ Detailed discussions on the plea of immunity as raised by Milošević, Karadžić and Kunarać are presented in chapter 3 of this study.⁶⁰ Suffice here to indicate that immunity is not a recognised defence before the ICTY.

The International Criminal for Rwanda (ICTR) which was also established by the United Nations Security Council in 1994⁶¹ prosecutes and punishes persons responsible for genocide, war crimes and crimes against humanity. The tribunal was established for the prosecution of persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda between 1 January 1994 and 31 December 1994. Also, the ICTR was to deal with the prosecution of Rwandan citizens responsible for genocide and other such violations of international law committed in the territory of neighbouring States during the same period. The ICTR is governed by its statute, which is annexed to the Security Council Resolution 955 of 1994.⁶² The Statute of ICTR provides for punishment of international crimes.⁶³ With regards to immunity of state officials, the Statute of ICTR provides in its article 6(2) that:

⁵⁶ See, Report of the Secretary-General Pursuant to Paragraph 2 of the Security Council Resolution 808 (1993), UN Doc. S/25704 (1993), paras 55-56.

⁵⁷ *Prosecutor v Milošević*, Case No. IT-02-54-T, Decision on Preliminary Motions, Trial Chamber, Decision of 8 November 2001, paras 26-34.

⁵⁸ *Prosecutor v Karadžić*, Case No.IT-95-5/18-PT, *Decision on the Accused's Holbrooke Agreement Motion*, 8 July 2009, Trial Chamber of ICTY, para 5; *Prosecutor v Karadžić*, Case No.IT-95-5/18-PT, *Appeal of the Decision Concerning Holbrooke Agreement Disclosure*, 28 January 2009, ICTY Appeals Chamber, paras 8-12. See also, *Decision on Appellant Radovan Karadžić's Appeal Concerning Holbrooke Agreement Disclosure*, ICTY Appeals Chamber, 6 April 2009, para 17.

⁵⁹ *Prosecutor v Kunarać, Kovač and Vuković*, Case No. IT-96-23 –T and IT-96-23/1-T, Trial Chamber of ICTY, Judgment, 22 February 2001, para 494.

⁶⁰ See, Ch 3, part 3.2.

⁶¹ Resolution 955 of 8 November 1994, UN Doc. S/1994/955.

⁶² UNSC Res 955 of 1994 was adopted by the Security Council at its 3453rd meeting, on 8 November 1994.

⁶³ See generally the Statute of ICTR, arts 2 (genocide), 3 (crimes against humanity) and 4 (Violations of Article 3 common to the Geneva Conventions and of Additional Protocol II).

The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.

It is observed that immunity is outlawed by the Statute of the ICTR in respect of international crimes. Due to the immunity provision (as will be observed in chapter 3),⁶⁴ the ICTR has been able to prosecute individuals, including former Rwandan state officials for genocide, crimes against humanity and war crimes. For example, Jean Kambanda was prosecuted by the tribunal and sentenced to life imprisonment.⁶⁵

After the establishment of the two international criminal tribunals for Rwanda and the former Yugoslavia, a permanent international criminal court for the prosecution of international crimes was established. The following part discusses the law of immunity in the statute establishing the ICC.

2.3.6 Immunity in the Rome Statute of the International Criminal Court

On 17 July 1998, at Rome, Italy, the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court adopted the Rome Statute of the International Criminal Court.⁶⁶ The Rome Statute of the ICC was adopted against the background of putting an end to impunity for the perpetrators of the most serious crimes of concern to the international community as a whole on the ground that such crimes threaten the peace, security and well-being of the world. The Rome Statute provides for the independent and permanent International Criminal Court with jurisdiction over the most serious international crimes. The ICC is a contemporary and permanent forum for the prosecution and punishment of individuals who commit international crimes.⁶⁷ It is complementary to national criminal jurisdictions.⁶⁸ It has

⁶⁴ See Ch 3, part 3.2.

⁶⁵ See, *Prosecutor v Kambanda*, Case No. ICTR-97-23-S, Trial Chamber I, Judgment and Sentence, 4 September 1998.

⁶⁶ The Rome Statute of the International Criminal Court, Adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 17 July 1998, A/CONF. 183/9 (1998).

⁶⁷ For a drafting history of the Rome Statute and related jurisdiction, and other matters of the ICC, see generally, A Cassese, P Gaeta and JRWD Jones (eds.), (2002) *The Rome Statute of the International*

jurisdiction over persons responsible for the most serious crimes of international concern to international community.⁶⁹ Crimes within the jurisdiction of the ICC are genocide, crimes against humanity, war crimes and the crime of aggression.⁷⁰ The ICC has jurisdiction over such crimes only after 1 July 2002, the date the Rome Statute entered into force. However, the ICC has at present not yet been able to deal with the crime of aggression because, although states agreed on the definition of the crime of aggression at the Review Conference of the Rome Statute in Kampala in June 2010, the jurisdiction of the court over the crime of aggression has been suspended until after the next Review Conference to be held after seven years.

Regarding immunity, article 27 of the Rome Statute provides that:

1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in an of itself, constitute a ground for reduction of sentence.
2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.⁷¹

Thus, the above provision envisages that no one will ever escape from responsibility for international crimes within the jurisdiction of the ICC. From the experience in the former international criminal tribunals, no immunity may be claimed before an international

Criminal Court: A commentary, Vol. I, Sec. I 'The path to Rome and beyond', 3-145, but see also, Vol. II; J Crawford, 'The drafting of the Rome Statute' in P Sands (Ed), (2003) *From Nuremberg to the Hague: The future of international criminal justice*, 109-156; M Politi and F Gioia (eds.), (2008) *The International Criminal Court and national jurisdictions*, 1-171; BN Schiff (2008) *Building the International Criminal Court*, 1-257.

⁶⁸ See, Preamble to the Rome Statute, paras 10-11; arts 1 and 17, Rome Statute. On the principle of complementarity, see generally, JT Holmes, 'Complementarity: National courts versus the ICC' in Cassese *et al*, (2002) 667-685; WA Schabas, 'Complementarity in practice: Creative solutions or a trap for the court?' in Politi and Gioia (2008) 25-48; O Bekou, 'Complementarity and the ICC: A dangerous gamble?' in G Ulrich (ed.) (2005) *The International Criminal Court: Challenges and prospects: Proceedings of an International Conference organised by the European Inter-University Centre for Human Rights and Democratisation*, 64.

⁶⁹ For details on the jurisdiction of the ICC, see generally, WA Schabas (2007) *An introduction to International Criminal Court*, 3rd edn, 58-140.

⁷⁰ Arts 5(1), 6, 7 & 8, Rome Statute.

⁷¹ Art 27(1) & (2), Rome Statute.

tribunal. The immunities under international law for state officials are ‘compounded by the immunities frequently available under national legislation or constitutional law to a nation’s own head of state, high officials, members of parliament, or officials generally.’⁷²

Article 27(1) of the Rome Statute guarantees that norms of international criminal responsibility apply without any distinction for officials based on official capacity. By specifically referring to national or international law, ‘Article 27(2) ensures that the consequences of the responsibility recognized by Article 27(1) are not frustrated by claims of immunity or other procedures.’⁷³ As will be observed in Chapter 3 of this study,⁷⁴ the ICC has held that the case against Omar Hassan Al Bashir⁷⁵ that, immunity of a serving state official does bar criminal prosecution of such individual before the ICC. In fact, according to the ICC in the case against Ahmad Harun,⁷⁶ the position of a state official may be considered an aggravating factor even when issuing a warrant of arrest.

2.3.6.1 Drafting history of Article 27 of the Rome Statute

For a proper understanding of article 27 of the Rome Statute, one must consider its drafting history. Early writers on article 27 of the Rome Statute suggest that article 27 did not raise any substantive problems at the drafting process. Schabas states that ‘the issue was uncontested during negotiations and there were no problems reaching agreement on an acceptable text’⁷⁷ of article 27. Per Saland of Sweden was the Chairman of the Working Group on the General Principles of Criminal Law throughout the process

⁷² O Triffterer, ‘Commentary on Article 27’ in O Triffterer, ed., (1999), *The Rome Statute of the International Criminal Court: Observer’s notes, article by article*, 501; H Duffy and J Huston, ‘Implementation of the ICC Statute: International obligations and constitutional considerations’ in C Kress and F Lattanzi, eds., (2000) *The Rome Statute and domestic legal orders: General aspects and constitutional issues*, Vol.1, 29.

⁷³ B Broomhall (2003) *International justice and the International Criminal Court: Between sovereignty and the rule of law*, 138.

⁷⁴ See Ch 3, part 3.2.

⁷⁵ *Prosecutor v Al Bashir*, Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Al Bashir, Case No. ICC-02/05-01/09, Public Reducted Version, Pre-Trial Chamber I, 4 March 2009, 15, para 41.

⁷⁶ *Prosecutor v Harun and Muhammad Al-Adl-Al-Rahman*, Case No. ICC-02/05-01/07, ‘Decision on the Prosecution Application under Article 58(7) of the Statute’, paras 127 and 128.

⁷⁷ Schabas (2007) 231.

beginning with the UN Preparatory Committee of 1995 to the UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court. This Working group, among other things, was responsible for the drafting of article 27 of the Rome Statute. Thus, according to Per Saland:

The principle provided for in this article was uncontested throughout the discussions, and it was relatively easy to agree on its formulation. Mexico had some objections concerning the language in paragraph 2 but withdrew its reservations. Spain also had some problems. The Drafting Committee made some changes to the paragraph after its adoption in the working group.⁷⁸

However, before the present-day text of article 27 of the Rome Statute, several discussions on the text of the article had taken place since 1996. Most of these are presented and reprinted in a study by Cherif Bassiouni.⁷⁹ In 1996, the Preparatory Committee on the Establishment of an International Criminal Court had suggested the following:

193. Taking into account the precedents of the Nuremberg, Tokyo, Yugoslavia and Rwanda tribunals, there was support for the Statute to disallow any plea of official position as Head of State or Government or as a responsible government official; such official position should not relieve an accused of criminal responsibility. Some delegations thought that this issue could be included in relation to “defences”. The opinion was also expressed that further consideration would be useful on the question of diplomatic or other immunity from arrest and other procedural measures taken by or on behalf of the Court.⁸⁰

Again, the Preparatory Committee⁸¹ had proposed two different texts of the article on official capacity. The two texts read thus:

⁷⁸ P Saland, ‘International criminal law principles’ in RS Lee, ed.,(1999), *The International Criminal Court: The making of the Rome Statute, issues, negotiations, results*, 202.

⁷⁹ MC Bassiouni, (1998) *The Statute of the International Criminal Court: A documentary history*, 1-793. On this matter, this study relies on the documents reprinted in Bassiouni’s book.

⁸⁰ See, *Report of the Preparatory Committee on the Establishment of an International Criminal Court, Volume I, (Proceedings of the Preparatory Committee during March-April and August 1996)*, reprinted in Bassiouni(1998) 385-439, particularly, 415, para 193 “Irrelevance of Official position.”

⁸¹ See, *Report of the Preparatory Committee on the Establishment of an International Criminal Court, Volume II, (Compilation of Proposals)*, reprinted in Bassiouni (1998) 441-606, but see particularly, 484, Part 3bis. ‘General Principles of Criminal Law’, Section 1, Substantive Issues, Article B (e) ‘Irrelevance of Official Position.’

Proposal 1

[1. This Statute shall be applied to all persons without any discrimination whatsoever.] The official position of a person who commits a crime under this Statute, in particular whether the person acts as Head of State or of Government or as a responsible government official, shall not relieve that person of criminal responsibility nor mitigate punishment.

2. Immunity

In the course of investigations or procedures performed by, or at the request of the court, no person may make a plea of immunity from jurisdiction irrespective of whether on the basis of international or national law.

Proposal 2

Official capacity of the accused

1. The official capacity of the accused, either as Head of State or Government, or as a member of a Government or parliament, or as an elected representative, or as an agent of the State shall in no case exempt him from his criminal responsibility under this Statute, nor shall it constitute a ground for reduction of the sentence.
2. The special procedural rules, the immunities and the protection attached to the official capacity of the accused and established by internal law or by international conventions or treaties may not be used as a defence before the Court.

In 1997, the Working Group on the General Principles of Criminal Law had placed the provisions on irrelevance of official capacity under draft article 24 and suggested the following wording of the article:

Article 24 ‘Irrelevance of official position’

1. This Statute shall be applied to all persons without any discrimination whatsoever: official capacity, either as Head of State or Government, or as a member of a Government or parliament, or as an elected representative, or as a government official, shall in no case exempt a person from his criminal responsibility under this Statute, nor shall it [*per se*] constitute a ground for reduction of the sentence.
2. Any immunities or special procedural rules attached to the official capacity of a person, whether under national or international law, may not be relied upon to prevent the Court from exercising its jurisdiction in relation to that person.⁸²

⁸² See, *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, A/AC.249/1998/DP.6. But note that in the *Draft Report of the Inter-sessional Meeting from 19 to 30*

The above were efforts toward the final agreement on the text of article 27 of the Rome Statute of the ICC in 1998. However, given the different provisions on immunities under the Rome Statute, it is necessary to consider the provisions of article 27 and 98(1) of the Rome Statute which seem to be opposing one another other, although this is not always the case.

2.3.6.2 Controversy between Articles 27 and 98(1) of the Rome Statute

According to Schabas, ‘a literal reading of article 27(2) suggests that immunity cannot be invoked under any circumstances.’⁸³ Nevertheless, Schabas notes further that ‘it does not make sense that the [c]ourt can ignore the claim to immunity of a head of state or senior official from a non-party State.’⁸⁴ In fact, this is premised on the basis of article 98(1) of the Rome Statute which seems to contradict article 27(2) of the Rome Statute. There is a contrary view as expressed by other scholars. Dapo Akande suggests that, the UN Security Council can imperatively withdraw immunity from any person, in exercising its power under Chapter VII of the Charter of the United Nations by for example, passing a resolution referring a situation to the ICC as it did in its resolution 1593 of 2005 on the situation in Darfur.⁸⁵ To justify this position, Akande argues that operative paragraph 2 of the UN Security Council resolution 1593 (2005) had imperatively ‘lifted immunity’ by requiring the Government of Sudan to cooperate with the ICC.⁸⁶ It would seem that this has already been the position in respect of the events that led to the establishment of the ICTY, ICTR and SCSL.⁸⁷ The contrary position is that the Security Council did not create an express obligation on Sudan or other states; it rather ‘requested’ them to

January 1997 in Zutphen, The Netherlands, reprinted in Bassiouni (1998) 221-311, the irrelevance of official capacity was placed under *Article 18*, but it had been suggested that para 2 of this Article be subject to further discussion in connection with judicial cooperation, see Bassiouni (1998) 246; See also, *Report of the Working Group on General Principles of Criminal Law and Penalties*, (A/AC.249/1997/WG.2/CRP.2/Add.1), reprinted in Bassiouni (1998) 380.

⁸³ Schabas (2007) 232.

⁸⁴ Schabas (2007) 232.

⁸⁵ D Akande, ‘The Bashir indictment: Are serving heads of states immune from ICC prosecution?’ *Oxford Transitional Justice Research Working Paper Series*, 30 July 2008, 3.

⁸⁶ Akande (2008) 3.

⁸⁷ *Prosecutor v Milošević*, (Case No. IT-02-54-PT), Decision on Preliminary Motions, 8 November 2001, paras 26-34; *Prosecutor v Taylor*, (SCSL-2003-01-I), Trial Chamber’s Decision on Immunity from Jurisdiction, 31 May 2004, para 41.

cooperate. As such, the language used in operative paragraph 2 of Resolution 1593(2005) is soft and not mandatory to create obligations even to non-parties to the Rome Statute.⁸⁸

Applying literal interpretation, one may assert that the provisions of article 27(2) and 98(1) of the Rome Statute appear to be at odds. They raise a contentious subject matter on immunity enjoyed by state officials from non-parties to the Rome Statute. The Chair of the Working Group responsible for the drafting of Article 27 at the Rome Diplomatic Conference, Per Saland, suggests that ‘there may be a contradiction between that article and article 98(1), owing to the fact that each was negotiated by a different Working Group at the Conference.’⁸⁹

However, if the purposive interpretation is applied, there must not be such necessary contradiction at all. But, the question is whether article 98(1) acts as a bar to the execution by a state party to the Rome Statute of a request from the court to arrest and surrender an official from another state, or whether immunities cannot simply apply. According to Broomhall,

Article 27(2) makes clear that immunity under national or international law ‘shall not bar the court from exercising its jurisdiction...’ Article 98(1) instead pertains to the obligations under international law of the requested state, as well as to the exercise of jurisdiction by such states, rather than by the court. The Court may be free to act where states remained constrained by doctrines of immunity.⁹⁰

Broomhall adds that ‘[i]t should be noted that the paragraph [98(1)] refers to obligations under international law, meaning that national law pertaining to immunities will not be able to block cooperation with the Court except to the extent that it reflects the international law accounted for in this paragraph.’⁹¹ A close reading of article 98(1) of

⁸⁸ P Gaeta ‘Does President Al Bashir enjoy immunity from arrest?’ (2009) 7 *Journal of International Criminal Justice* 315.

⁸⁹ Saland in Lee (1999) 189.

⁹⁰ Broomhall (2003) 141.

⁹¹ Broomhall (2003)141-142.

the Rome Statute would suggest that only the court and not the requested state decides on the scope of the immunity in question.⁹²

Today, the preceding debate may lead to confusion on the understanding of the difference between articles 27 and 98 of the Rome Statute. There are conflicting positions regarding the interpretation of articles 27 and 98 above as demonstrated by Professor William Schabas and Professor Johan van der Vyver. Van der Vyver maintains that, ‘article 27 excludes immunity of state officials for crimes within the jurisdiction of the ICC. Article 98 simply upholds rules of international law which place obligations on states to surrender a suspect to the ICC.’⁹³ Hypothetically, if state A has custody of an accused person and is precluded by an international agreement to surrender a state official, state A cannot be compelled to violate that obligation. The accused may only be surrendered to the ICC when he is no longer serving as a state official as such. This interpretation is correct. But it is also important to note the views by Schabas as well. Schabas argues that article 27 denies the defence of official capacity and removes immunity of state officials from states parties to the Rome Statute. Article 98 deals with immunity attaching to diplomats and states. Hence, there is no incompatibility or inconsistency between articles 27 and 98 of the Rome Statute because article 27 governs the exercise of jurisdiction over individuals before the ICC while article 98 is applicable to the obligation of state cooperation with the ICC.⁹⁴ Further, article 27(1) of the Rome Statute denies the defence of official capacity to different categories of officials, thereby denying this defence to anyone who may try to invoke it. An interpretation is that the provision applies to all officials whether exercising *de jure* or *de facto* powers. With regards to the ICC, article 27(2) removes immunity from such officials of states parties to the Rome Statute. This is a clear literal interpretation of the provision.

⁹² See, a rule adopted by the Preparatory Committee for the ICC in the Finalised Draft Rules of Procedure and Evidence adopted on 30 June 2000, Chapter IV. Rule 195(1) grants States the right to provide information to the court relevant to any determination under Article 98.

⁹³ Comments by Prof Johan van der Vyver, 25 June 2010, at Pretoria.

⁹⁴ See, WA Schabas (2010) *The International Criminal Court: A commentary on the Rome Statute*, 446-453. Schabas argues that articles 27 and 98 are different and deal with distinct aspects relating to immunity and state cooperation.

A troubling question is whether article 27(2) applies to state officials from states that are not parties to the Rome Statute, for example, Sudan and Libya. This issue has generated debate amongst scholars. Two different positions are observed. Some suggest that article 27(2) cannot apply to individuals from states that are not parties to the Rome Statute. Yet, others hold a different view that if the Security Council can refer a situation to the ICC; the court is empowered to proceed against individuals, including state officials of non-parties to the Rome Statute. We examine these two positions here. Schabas argues that, ‘article 27(2) cannot apply to heads of state of non-party states, who retain their immunity under customary international law. Nor does it affect those who benefit from immunity as a result of the Charter of the United Nations, which is hierarchically superior to the Rome Statute.’⁹⁵ To this end, even when the ICC stated that the President of Sudan, Omar Al-Bashir does not benefit from immunity in respect of legal charges against him and before the ICC; it remains contentious whether the court was right to assert such view.

In the case of Omar Al Bashir, the Pre-Trial Chamber of the ICC should have applied article 34 of the Vienna Convention on the Law of Treaties, 1969, in determining whether article 27(2) of the Rome Statute applies to Sudan, and by extension, its state officials. It is obvious that the Rome Statute must be interpreted in line with article 34 of the Vienna Convention on the Law of Treaties, 1969 in respect of third states like Sudan which is not a state party to the Rome Statute. The effect of article 34 of the Vienna Convention on the Law of Treaties is that a treaty does not create either obligations or rights for a third state without its express consent. For example, Sudan is not a state party to the Rome Statute. So, how could article 27(2) of the Rome Statute apply to the Sudanese state official? Akande⁹⁶ argues that, resolution 1593 of 2005 which referred the situation in Darfur to the ICC conferred jurisdiction on the ICC over individuals responsible for the crimes committed in Darfur. Resolution 1593 required Sudan to cooperate with the ICC. Although there is no express paragraph in the resolution which allows the court to proceed against President Bashir of Sudan, an inference can be made that, despite being a

⁹⁵ Schabas (2010) 450.

⁹⁶ D Akande ‘The legal nature of Security Council referrals to the ICC and impact on Al Bashir’s immunities’ (2009) 7 *Journal of International Criminal Justice* 333, 340-341.

third state, Sudan is obliged under resolution 1593 to cooperate with the ICC in the prosecution of persons responsible for international crimes committed in Darfur. Hence, being a member of the United Nations, Sudan is obliged to accept and enforce the decisions of the Security Council.⁹⁷ One must recall that the referrals of the situations in Darfur and Libya followed the determinations by the Security Council that the situations constituted a threat to international peace and security. Thus, the referrals triggered the jurisdiction of the ICC over all individuals, including state officials responsible for the crimes in Darfur and Libya.

The preceding arguments do not provide any clear answer to the question whether the ICC can proceed against persons from states that are non-parties to the Rome Statute. It is illogical to suggest that by referring the Situation in Darfur to the Prosecutor of the ICC, the United Nations Security Council assumed that the ICC would apply article 27(2) of the Rome Statute and at the same time contend that article 34 of the Vienna Convention on the Law of Treaties, 1969, could apply in respect of the Rome Statute as a treaty as such. Even if there could be an implied waiver of immunity through the referrals by the Security Council, it remains contestable whether such is the clear position in international law.

If the Security Council refers a situation to the Prosecutor of the ICC, such referral does not alter an established rule under customary international law or the Vienna Convention on the Law of Treaties, 1969, particularly article 34 thereof. Arguably, the Security Council cannot contract on behalf of a state and therefore, it cannot under normal circumstances, cause an international treaty to be binding on a third state. In fact, the Security Council cannot change basic provisions in the Rome Statute even when it refers a situation to the Prosecutor of the ICC.⁹⁸ So, what would be the position regarding prosecution of perpetrators of international crimes, especially state officials in Sudan or Libya whereby the Security Council referred the situations in such states to the ICC? Should President Bashir or Col. Muammar Gaddafi benefit from immunity because

⁹⁷ Art 25, UN Charter, 1945.

⁹⁸ Schabas (2010) 451.

Sudan and Libya are not states parties to the Rome Statute? If this is to be maintained, there is a serious risk of tolerating or developing a culture of impunity in respect of international crimes.

It is argued here that the Rome Statute did not create the crimes within the jurisdiction of the ICC. The crimes are recognised under customary international law and therefore, they create a binding obligation on all states and individuals generally. In principle, one must not confuse responsibility of an individual for crimes as envisaged under article 27(2), and state cooperation (reflected in article 98 of the Rome Statute). It must be noted that only state cooperation is subject to the Vienna Convention on the Law of Treaties, but not whether an individual should be held responsible for crimes. This means that, individuals like President Bashir of Sudan or Col. Muammar Gaddafi of Libya can be held responsible, but Sudan and Libya may not be compelled to surrender them to the ICC due to the provisions of article 98 of the Rome Statute.⁹⁹ Hence, President Bashir and Muammar Gaddafi can be held responsible for international crimes before the ICC. This is the direct implication of the referral of the situations in Darfur and Libya to the ICC. In fact, in the case of Libya, resolution 1970(2011)¹⁰⁰ authorised the Prosecutor of the ICC to investigate the situation in Libya with a view to prosecuting the responsible perpetrators of international crimes. This has an effect that immunity attaching to Libyan leaders cannot be upheld.

While the Security Council referrals cannot change the general principle or rules on immunities described under article 27(2) of the Rome Statute,¹⁰¹ it is not a new phenomenon that the Security Council can take measures which can affect rules of customary international law, such as immunity of state officials. It is argued that rules of customary international law can be modified by an action of the Security Council. This is based on the fact that the Security Council can establish international criminal tribunals

⁹⁹ However, some scholars argue that article 27 of the Rome Statute cannot be used on Sudan which is a non state party to the Rome Statute. One anonymous examiner of this thesis holds this view because the Rome Statute is a treaty which binds only on states parties and not non-parties thereto. This argument, if followed, may lead to impunity for individuals from non-states parties to the Rome Statute.

¹⁰⁰ UNSC Res 1970(2011), para 4.

¹⁰¹ Schabas (2010) 451-452.

with powers over international crimes, and thereby outlaw immunity for anyone responsible for such crimes. For instance, the ICTY and ICTR were established for this kind of purpose, and it is not surprising that many state officials in the former Yugoslavia and Rwanda were prosecuted by these tribunals.

2.3.7 Immunity in the statutes of hybrid courts

Like in the statutes of international criminal tribunals and the ICC, the statutes of hybrid courts also contain provisions outlawing immunity of state officials responsible for international crimes. In this part, the discussion is followed on two hybrid courts: the Special Court for Sierra Leone and the Extra-ordinary Chambers in the Courts of Cambodia.

The Special Court for Sierra Leone ('the SCSL') was established by an agreement between the United Nations and the Government of Sierra Leone,¹⁰² after adoption of the United Nations Security Council Resolution 1315 of 2000.¹⁰³ The President of Sierra Leone at the time, Ahmad Tejan Kabbah, alarmed by the continued breach of the ceasefire agreement between the Government of Sierra Leone and the major warring rebel faction, RUF, asked the United Nations to help Sierra Leone establish a Special Court to try those suspected of committing international crimes.

The purpose of the Special Court for Sierra Leone is to 'prosecute the persons who bear the greatest responsibility for serious violation of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996.'¹⁰⁴ In Resolution 1315, the UN Security Council requested the Secretary-General, Kofi Annan, to negotiate an agreement with the Government of Sierra Leone with a view

¹⁰² Agreement between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court for Sierra Leone (16 January 2002), UN SC Res. 246, UN Doc. S/2002/246.

¹⁰³ UN SC Res.1315 (2000) of 14 August 2000, UN. Doc.S/RES/1315.

¹⁰⁴ Art 1(1), Statute of the SCSL.

to establishing a Special Court. The agreement was later implemented into Sierra Leonean law by the *Special Court Agreement (Ratification) Act, 2002*.¹⁰⁵

The SCSL is a hybrid court. It is composed of international judges and judges appointed by the Government of Sierra Leone. It also applies both international and Sierra Leonean law, and has international and national lawyers. The Statute of the SCSL allows the court to prosecute and punish war crimes and crimes against humanity but not genocide. As to immunity of state officials, the Statute of the SCSL provides that: 'The official position of any accused persons, whether as Head of State or Government or a responsible Government official, shall not relieve such a person of criminal responsibility nor mitigate punishment.'¹⁰⁶ As will be observed in chapter 3 and in the case against Charles Taylor,¹⁰⁷ it is article 6(2) of the Statute of the SCSL which denied Charles Taylor a claim of immunity from prosecution before the SCSL.¹⁰⁸ The Appeals Chamber of the SCSL dismissed on 31 May 2004, a Motion by Charles Taylor to quash his indictment and to set aside the warrant for his arrest on the ground that he is immune from any exercise of jurisdiction by the court by virtue of the fact that he was, at the time of issuing of the indictment and warrant against him, a head of state.

In Cambodia, the Extra-ordinary Chambers in the Courts of Cambodia (ECCC) were established in 2004 to try senior leaders of the Democratic Kampuchea for international crimes committed by the Khmer Rouge regime in Cambodia from 17 April 1975 to 6 January 1979. On 6 June 2003 the United Nations and the Royal Government of Cambodia entered into an agreement concerning the prosecution under Cambodian law of crimes committed during the period of Democratic Kampuchea.¹⁰⁹ The purpose of this agreement was to regulate the cooperation between the United Nations and the Royal

¹⁰⁵ Act No. 9 (2002), *Act Supplement to Sierra Leone Gazette*, CXXXIII (22), 25 April 2002.

¹⁰⁶ Art 6(2), Statute of the SCSL.

¹⁰⁷ See Ch 3, part 3.2.

¹⁰⁸ *Prosecutor v Taylor*, (SCSL-2003-01-I), Appeals Chamber's Decision on Immunity from Jurisdiction, 31 May 2004, para 41.

¹⁰⁹ See, the *Agreement between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea*, Done at Phnom Penh on 6 June 2003, available at <<http://www.eccc.gov.kh/english/default.aspx>> (accessed on 5 October 2008).

Government of Cambodia in bringing to trial senior leaders of Democratic Kampuchea. It was also to deal with leaders most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia committed between 17 April 1975 and 6 January 1979.¹¹⁰ The agreement recognised that the ECCC has jurisdiction over senior leaders of Democratic Kampuchea and those who were most responsible for the crimes referred to in article 1 of the Agreement.¹¹¹

On 19 October 2004, the Royal Government of Cambodia promulgated a *Law Approving the Agreement between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea*¹¹² in which it agreed to carry out all procedures necessary to implement the Agreement. In August 2001, the Royal Government of Cambodia enacted a *Law on the Establishment of Extra-ordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the period of Democratic Kampuchea*, which was amended in October 2004.¹¹³ The General Assembly of the United Nations welcomed the promulgation of this law on ECCC in its *Resolution 57/228* of 18 December 2002. The Law referred to senior leaders of Democratic Kampuchea as ‘suspects’ and stated that the Extraordinary Chambers shall be established in the existing court structure, namely the trial court and the Supreme Court of Cambodia.¹¹⁴ Further, the Law empowered the ECCC to deal with the crimes of torture, genocide, crimes against

¹¹⁰ Art 1, *Agreement between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea*, 6 June 2003.

¹¹¹ Art 2, *Agreement between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea*, 6 June 2003. The Agreement further recognises that the ECCC has jurisdiction consistent with that set forth in the Law on the establishment of the ECCC.

¹¹² NS/RKM/1004/004, Published on 21 October 2004, No. 254 Ch. L.

¹¹³ See, *Preah Reach Kram* NS/RKM/0801/12 dated 10 August 2001; NS/RKM/1004/006, adopted by the National Assembly of the Kingdom of Cambodia on 5 October 2004 in the 1st Session of the 3rd Legislature, and approved in its entirety by the Senate on 8 October 2004, in the 9th Session of the 1st Legislature, and pronounced as being fully in accordance with the Constitution by the Constitutional Council in its Decision No. 065/007/2004 KBTh. Ch. of 22 October 2004. The Law may be read at <<http://www.eccc.gov.kh/english/default.aspx>> (accessed on 5 October 2008).

¹¹⁴ Art 2, *Law on the Establishment of Extra-ordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the period of Democratic Kampuchea*, 2001.

humanity and war crimes.¹¹⁵ The Law on ECCC allowed the foreign judges to co-preside over cases before the ECCC.¹¹⁶

The Law establishing the ECCC provided for individual criminal responsibility in its Chapter VIII wherein article 29 relates to immunity of state officials from prosecution for international crimes. It provides expressly that:

Any suspect who planned, instigated, ordered, aided and abetted, or committed the crimes referred to in articles 3, 4, 5, 6, 7 and 8 [torture, genocide, crimes against humanity and war crimes] of this law shall be individually responsible for the crime. The position of or rank of any Suspect shall not relieve such person of criminal responsibility or mitigate punishment.¹¹⁷

It should be noted here (as indicated in chapter 3)¹¹⁸ that the jurisprudence of the ECCC does not reveal any case where immunity was pleaded by the state officials, accused for international crimes in Cambodia.¹¹⁹

2.3.8 Immunity as covered under treaties

It is important to understand that there are many international treaties outlawing the defence of immunity of state officials from prosecution for international crimes. In this part, the study analyses how various international treaties have addressed immunity. Such treaties include the Convention on the Non-Applicability of Statutory Limitations to War

¹¹⁵ Arts 4, 5 and 6, *Law on the Establishment of Extra-ordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the period of Democratic Kampuchea*, 2001.

¹¹⁶ For example, on 14 July 2008, His Majesty Norodom Sihamoni King of Cambodia, by a Royal Decree, NS/RKT/0708/857, appointed Mrs. Catherine Marchi Uhel (French national) as International Reserve Judge of the Supreme Court Chamber and Mr. Siegfried Blunk (German national) as International Reserve Investigating Judge vide article 1 of the Decree.

¹¹⁷ Art 29, *Law on the Establishment of Extra-ordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the period of Democratic Kampuchea*, 2001.

¹¹⁸ See Ch 3, part 3.2.

¹¹⁹ See generally, Criminal Case File No. 002/14-08-2006, Investigation No. 002/19-2007-ECCC/OCIJ, (Khieu Samphan), *Provisional Detention Order*, 19 November 2007; Criminal Case File No. 002/14-08-2006, Investigation No. 002/19-09-2007, *Provisional Detention Order*, ECCC-OCIJ, 19 September 2007, 1-5, paras 1-6; Criminal Case File No. 002/14-08-2006, Investigation No. 002/19-09-2007, *Provisional Detention Order*, ECCC-OCIJ, 19 September 2007, paras 1 and 2; Extra-ordinary Chambers in the Courts of Cambodia, Criminal Case File No. 002/14-08-2006, Investigation No. 002/19-09-2007, ECCC-OCIJ, *Police Custody Decision*, 12 November 2007, p.1-2; Extra-ordinary Chambers in the Courts of Cambodia, Criminal Case File No. 002/14-08-2006, Investigation No. 002/19-09-2007, ECCC-OCIJ, *Provisional Detention Order*, 14 November 2007, p.1-5, paras 1-11.

Crimes and Crimes against humanity, the Genocide Convention, the Convention against Torture, and the Convention on the Suppression and Punishment of the Crime of Apartheid.

The Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, 1968¹²⁰ was adopted in the spirit that war crimes and crimes against humanity are among the gravest crimes in international law; and that none of the previously existing solemn declarations, instruments or conventions relating to the prosecution and punishment of war crimes and crimes against humanity had made provision for a period of limitation. The objective of the Convention was that effective punishment of war crimes and crimes against humanity is an important element in the prevention of such crimes, the protection of human rights and fundamental freedoms and the promotion of peace and security; and the desire to affirm in international law that ‘there is no period of limitation for war crimes and crimes against humanity.’¹²¹

The Convention on Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity outlaws limitations to such crimes, irrespective of the date of their commission.¹²² In relation to immunity of state officials, the convention provides,

If any of the crimes mentioned in article I [war crimes and Crimes against humanity] is committed, the provisions of this Convention shall apply to representatives of the State authority and private individuals who, as principals or accomplices, participate in or who directly incite others to the commission of any of those crimes, or who conspire to commit them,

¹²⁰ Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, Adopted by the General Assembly of the United Nations on 26 November 1968, General Assembly Resolution 2391 (XXIII) of 26 November 1968; United Nations, *Treaty Series*, Vol. 754, No. I-10823. The Convention entered into force on 11 November 1970. Subsequent to this Convention, the Council of Europe elaborated a similar Convention titled, *European Convention on the Non-Applicability of Statutory Limitations to Crimes Against Humanity and War Crimes*, European Treaty Series, No.82, 25 January 1974, reprinted in 13 ILM 540 (1974), see also *Reports of the Consultative Assembly of the Council of Europe on the applicability of Statutes of Limitation to War Crimes and Crimes Against Humanity* (Doc. 1868 of 27 January 1965 and Doc. 2506 of 15 January 1969).

¹²¹ Preamble to the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, 1968, paras I-VII.

¹²² Art I (a)-(b), Convention on Non-Applicability of Statutory Limitations to War crimes and Crimes against Humanity, 1968.

irrespective of the degree of completion, and to representatives of the State authority who tolerate their commission.¹²³

By employing words such as ‘*representatives of the State authority*’ the Convention actually refers to public officials such as the heads of state. Thus, it does not recognise immunity of state officials as defence for prosecution and punishment of war crimes and crimes against humanity.

Another treaty which outlaws immunity of state officials in respect of genocide is the Convention on the Prevention and Punishment of the Crime of Genocide (the Genocide Convention).¹²⁴ The Genocide Convention provides that genocide, ‘whether committed in time of peace or in time of war, is a crime under international law which the contracting parties undertake to prevent and to punish.’¹²⁵ It recognises that persons committing genocide or any of the other acts prohibited under the convention shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.¹²⁶ Hence, by emphasising on the ‘*constitutionally responsible rulers*’ and ‘*public officials*’, the Genocide Convention envisages the state officials, and removes immunity of state officials as a defence for acts of genocide. Hence, state officials cannot invoke a defence of their status if charged with genocide.

Authoritative academic commentaries on article IV of the Genocide Convention reveal that the drafting history of article IV of the Genocide Convention ‘proved to be quite difficult, largely because it touched on related questions such as State responsibility.’¹²⁷ It must be recalled that the UN General Assembly Resolution 96(I) had specified in its language that persons responsible for genocide ‘whether private individuals, public

¹²³ Art II, Convention on Non-Applicability of Statutory Limitations to War crimes and Crimes against Humanity, 1968.

¹²⁴ Convention on the Prevention and Punishment of the Crime of Genocide, Approved by the General Assembly of the United Nations, on 9 December 1948. General Assembly Resolution 260 A (III) of 9 December 1948; United Nations, *Treaty Series*, Vol. 78, No. I-1021. The Convention entered into force on 12 January 1951.

¹²⁵ Art I, Genocide Convention.

¹²⁶ Art IV, Genocide Convention.

¹²⁷ Schabas (2000) 317.

officials or statesmen’, were to be punished for their acts.¹²⁸ It appears that the drafting history of article IV of the Genocide Convention had brought in different positions and debates by states, such as France, Norway, Sweden, Philippines, Finland, United Kingdom, India, Pakistan, United States of America, Syria, Lebanon, The Netherlands, and China.¹²⁹ States found it difficult to agree on the use of the proper terms, ‘*persons liable*’ or ‘*who is responsible*’ under acts envisaged in article IV of the Convention. This was mostly based on the public officials and their responsibility for genocide. While France considered that only rulers could be responsible, Norway believed that rulers could be judged only by an international court.¹³⁰ The Netherlands had preferred the use of the term ‘responsible rulers’ in the text of article IV of the Convention. Philippines had suggested that ‘constitutional monarchs who acquiesced in genocide shared responsibility.’¹³¹ The United Kingdom agreed that it was in favour of article IV of the Genocide Convention, but only, in its view, that the provision ‘applied to genocide committed by individuals and not governments.’¹³²

Finally, the *Ad Hoc* Committee responsible for the preparation of the Convention agreed that ‘[t]hose committing genocide or any of the other acts enumerated in article IV shall be punished whether they are constitutionally responsible rulers, public officials or individuals.’¹³³ It was later felt necessary that clarifications are made on whether article IV of the Genocide Convention applied to *de facto* and *de jure* rulers.¹³⁴ It would be meaningful to assert that both *de facto* and *de jure* rulers have the same responsibility, and therefore that, the defence of immunity does not apply to both cases.

¹²⁸ See, UNGA Res. 96(I).

¹²⁹ For a detailed discussion on the heated debate between such states, see, Schabas (2000) 317-320 (on the ‘drafting history’). This study adopts the position stated by Schabas in his authoritative book on genocide.

¹³⁰ Schabas (2000) 319 (referring to UN Doc.A/401 and UN.Doc.E/623/Add.2).

¹³¹ Schabas (2000) 318.

¹³² Schabas (2000) 319, citing UN.Doc. A/C.6/SR.93.

¹³³ This found way into the final text of the Convention, albeit with some modifications. It should be noted that the final provision was agreed as it reads in the present day article IV of the Genocide Convention. It appears that thirty-one members had voted in favour of the provision; one voted against it; and eleven members abstained. The US was one of those that abstained, arguing that the word ‘rulers’ as used in article IV of the Genocide Convention, could not be applied to heads of state, especially the President of the United States. See, Schabas (2000) 319.

¹³⁴ See, Benjamin Whittaker, ‘*Revised and Updated Report on the Question of the Prevention and Punishment of the Crime of Genocide*’, UN Doc.E/CN.4/Sub.2/1985/6, 23, para 50.

The Genocide Convention calls for prosecution of persons charged with genocide by a competent tribunal of the state in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to the contracting parties which shall have accepted its jurisdiction,¹³⁵ and further requires states to provide effective penalties for persons guilty of genocide.¹³⁶ In that sense, and given the contemporary settings, the Genocide Convention appears to refer to the United Nations specialised international tribunals or including domestic courts of states. It is not clear from the language of article VI of the *Genocide Convention* whether the drafters of the Convention had really intended for the ‘principle of complementarity’ as nowadays recognised under the Rome Statute.

Apart from the preceding treaties, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture),¹³⁷ is another treaty outlawing immunity. The Convention against Torture imposes obligations on states to take effective legislative, administrative and judicial measures to prevent acts of torture and that no exceptional circumstances whatsoever may be invoked as a justification of torture. Of importance, is the provision that ‘an order from a superior officer or a public authority may not be invoked as a justification of torture.’¹³⁸ From this, it is apparent that ‘*a public authority*’ would mean and include the state officials. Thus, no immunity is available for state officials who commit or order commission of torture as an international crime.

Further, the International Convention on the Suppression and Punishment of the Crime of Apartheid¹³⁹ does not recognise immunity for the crime of apartheid. The convention declares that ‘apartheid is a crime against humanity’¹⁴⁰ which violates the principles of

¹³⁵ Art VI, Genocide Convention.

¹³⁶ Art V, Genocide Convention.

¹³⁷ Adopted by the General Assembly of the United Nations on 10 December 1984, General Assembly Resolution 39/46 of 10 December 1984; United Nations, *Treaty Series*, Vol. 1465, No. I-24841. The Convention entered into force on 26 June 1987.

¹³⁸ Art 2(1)-(3), Convention against Torture.

¹³⁹ Adopted and opened for Signature, ratification by the General Assembly Resolution 3068(XXVIII) of 30 November 1973. The Convention entered into force on 18 July 1976, in accordance with article XV.

¹⁴⁰ Art I (1).

international law and urges states parties to the convention to declare criminal those individuals, organisations and institutions committing the crime of apartheid.¹⁴¹ The Convention defines the crime of apartheid in its article II. Regarding immunity, the convention provides that '[i]nternational criminal responsibility shall apply, irrespective of the motive involved, to individuals, members of organisations and institutions and *representatives of the state*, whenever they: commit, participate in, directly incite or conspire in the commission of the acts mentioned in article II of the Convention; or directly abet, encourage or co-operate in the commission of the crime of apartheid.'¹⁴² The obligation is further imposed on states to adopt legislative measures to prosecute, bring to trial and punish persons responsible for or accused of the crime of apartheid.¹⁴³ Basically, '*representatives of the state*' include the state officials in its wider scope and thus, they are not exempted from bearing responsibility for the crime of apartheid as an international crime.

Hence, from the above international treaties, it must be noted that the defence of immunity has been outlawed for such crimes as genocide, crimes against humanity, war crimes, torture and apartheid. In the international treaties discussed above, state officials are referred to as representatives of governments or the state.

Having discussed international treaties above, it is also important to examine how the International Law Commission has made contribution to the development of the law on immunity of state officials.

2.3.9 International Law Commission and the question of immunity

The International Law Commission (ILC), which is a body established by the United Nations General Assembly, has made important contributions to the developments in the codification of immunity of state officials. The United Nations General Assembly Resolution on Affirmation of the Principles of International Law Recognised by the

¹⁴¹ Art I (2).

¹⁴² Art III.

¹⁴³ Art IV.

Charter of the Nuremberg Tribunal¹⁴⁴ recognised the groundbreaking work of the ILC in respect of immunity. In this resolution, the General Assembly affirmed the principles of international law recognised by the Charter of the Nuremberg Tribunal and the judgment of the Tribunal. The General Assembly had directed the ILC to treat as a matter of primary importance, plans for the formulation, in the context of a general codification of offences against the peace and security of mankind and principles recognised in the Charter of the Nuremberg Tribunal and in the judgment of the Tribunal. Hence, on 29 July 1950, the ILC submitted to the General Assembly a Report on the Principles of the Nuremberg Tribunal (the Nuremberg Principles).¹⁴⁵ That report contained a development on immunity of state officials from prosecution for international crimes. In its Principle III, it provided that:

The fact that a person who committed an act which constitute a crime under international law acted as Head of State or responsible government official does not relieve him from responsibility under international law.

The ILC has addressed the immunity of state officials in various forms.¹⁴⁶ In this regard, various works of the ILC deserve attention.¹⁴⁷ The Draft Code of Offences against the

¹⁴⁴ UN Res. 95, 1 UN. GAOR (Part II) at 188, UN. Doc. A/64/Add.1 (1946).

¹⁴⁵ 5 UNGAOR Supp. (No.12) 11, UN Doc. A/1316 (1950).

¹⁴⁶ RA Kolodkin (2006), 'Immunity of state officials from foreign criminal jurisdiction' *Annex A* to the *Report of the International Law Commission*, 436-454, 441.

¹⁴⁷ See, *The Draft Declaration on the Rights and Duties of States*, art 2 and its commentary, *Yearbook of the International Law Commission*, 1949, 287; *The Draft Principles of International Law Recognised in the Charter of the Nuremberg Tribunal*, draft principle III and its commentary, *Report of the International Law Commission Covering its Second Session, 5 June-29 July 1950*, Document A/1316, 11-14; *Yearbook of the International Law Commission*, 1950, Vol. II, 192, 374-378; *The Draft Code of Offences against the Peace and Security of Mankind (1954)*, *International Law Commission Draft Code of Offences Against the Peace and Security of Mankind*, 28 July 1954, 9 UN. GAOR Supp. (No. 9), 11, UN. Doc. A/2693(1954), draft art 3 and its commentary, *Yearbook of the International Law Commission*, 1954, Vol. II, 119-120, especially art 3; *The Draft Code of Crimes Against the Peace and Security of Mankind (July 1991)*, *International Law Commission Report on the Draft Code of Crimes Against the Peace and Security of Mankind*, 19 July 1991, (UN.GAOR. Supp. No.10, UN. Doc. (A/46/10) 238, particularly draft art 13; *Draft Articles on Diplomatic and Consular Relations*, *Yearbook of the International Law Commission*, 1958, Vol. II, 89-105; *Yearbook of the International Law Commission*, 1961, Vol. II, 89-128; *Draft Articles on Special Missions*, draft art 21 and its commentary, *Yearbook of the International Law Commission*, 1967, Vol. II, 359; *Draft Articles on the Representation of States in their Relations with International Organisations*, *Yearbook of the International Law Commission*, 1971, Vol. I, 287; *Yearbook of the International Law Commission*, 1971, Vol. II, 101-110; *Draft Articles on the Prevention and Punishment of Crimes against Diplomatic Agents and other Internationally Protected Persons*, *Yearbook of the International Law Commission*, 1972, Vol. II, 309-323; and *Draft Articles on Jurisdictional Immunities of States and Their Property*, *Work of the International Law Commission*, 2004, Vol. I, United Nations, New York, 262.

Peace and Security of Mankind, (1996)¹⁴⁸ is more emphatic. It excludes the defence of immunity of state officials in the following terms: ‘the official position of an individual who commits a crime against the peace and security of mankind, even if he acted as head of State or Government, does not relieve him of criminal responsibility or mitigate punishment.’¹⁴⁹ The accompanying text of the commentary noted that the official position of an individual has been consistently excluded as a possible defence to crimes under international law.¹⁵⁰

As at 2011, the ILC is still considering a study on the immunity of state officials from foreign criminal jurisdiction. At its fifty-eighth session in 2006, the ILC considered the topic of immunity of state officials in its long-term programme of work. The General Assembly of the United Nations noted the decision of the ILC during its fifty-eighth session of 2006 in its resolution 62/66 of 6 December 2007. At its fifty-ninth session in 2007, the ILC decided to include the topic ‘*Immunity of state officials from foreign criminal jurisdiction*’ in its programme of work and appointed Mr Roman Kolodkin as Special Rapporteur on the question of immunity.¹⁵¹ The Special Rapporteur submitted his preliminary report on immunity in the sixtieth session of the ILC in 2008 whereby the ILC considered the preliminary report. At its sixty-third session, The General Assembly of the United Nations adopted a resolution on the report of the ILC on the work of its sixtieth session on 15 January 2009.¹⁵² During the ILC’s sixth-first session, the topic of immunity of state officials from foreign criminal jurisdiction was included in the provisional agenda for the sixty-first session convened at Geneva on 4 May 2009.

¹⁴⁸ Draft art 7 and its commentary, *Yearbook of the International Law Commission*, 1996, Vol. II, Part Two, 26-27.

¹⁴⁹ *Report of the International Law Commission on the Work of its Forty-Eighth Session*, 6 May – 26 July 1996, UN Doc. A/51/10, 39.

¹⁵⁰ *Report of the International Law Commission on the Work of its Forty-Eighth Session*, 6 May – 26 July 1996, UN Doc. A/51/10, 40. See also, *Report of the International Law Commission to the General Assembly on the Work of its Thirty-Eighth Session*, *Yearbook of the International Law Commission*, 1986, Vol. II (Part 2), para 170, 52; *Fifth Report on the Draft Code of Offences Against the Peace and Security of Mankind*, by Mr. Doudou Thiam, Special Rapporteur, UN. Doc.A/CN.4/404, *Yearbook of the International Law Commission*, 1987, Vol.II (Part 1), UN. Doc. A/CN.4/SER.A/1987/Add.1 (Part 1), 9-10.

¹⁵¹ At its 2940th meeting on 27 July 2007, Official Records of the General Assembly, Sixty-second Session, Supplement No. 10 (A/62/10), para 376.

¹⁵² Official Records of the General Assembly, Sixty-third Session, Supplement No.10 (A/63/10), (UN Doc.A/RES/63/123), Agenda item No.75.

However, at this session, the ILC did not consider the topic of immunity.¹⁵³ It is expected that the ILC will continue to discuss and consider this topic in its subsequent sessions.

2.3.10 The law on immunity as developed in non-binding instruments

In addition to the work of the ILC and the codification of the law on immunity in international treaties, one must note that other instruments which are not binding on states, have also called for rejection of immunity of state officials in respect of international crimes. These instruments include the Princeton Principles on Universal Jurisdiction and resolutions of the Institute of International Law.

The Princeton Principles deals with universal jurisdiction. Under the Princeton Principles, national courts may have the power to prosecute any person within their jurisdiction, who has committed an international crime contrary to international law.¹⁵⁴ The Principles are guidelines to national courts when prosecuting international crimes. Principle 2(1) outlines seven international crimes: piracy, slavery, war crimes, crimes against peace, crimes against humanity, genocide and torture. Regarding international crimes under international law as specified in Principle 2(1) above, the official position of any accused person, whether as head of state or government or as a responsible government official, shall not relieve such person of criminal responsibility nor mitigate punishment.¹⁵⁵

Apart from the Princeton Principles, one notes that the Institute of International Law has discussed the question of immunity of state officials in its various resolutions. Although such resolutions are non-binding, they constitute important doctrinal sources for the establishment of the content of international law in the field of immunity. However, the

¹⁵³ International Law Commission, 'Provisional Agenda for the Sixty-first Session', Geneva, 4 May- 5 June, and 6 July -7 August 2009, UN General Assembly, UN. Doc. A/CN.4/605, Agenda item No.8 'Immunity of State officials from foreign criminal jurisdiction.'

¹⁵⁴ DW Nabudere and BL Mukasa, *Comprehensive Research Report on Restorative Systems of Justice and International Humanitarian Law*, resulting from the *Proceedings of the International Conference on Restorative Justice and International Humanitarian Law*, held at Intercontinental Hotel from 17-20 August, 2008, Nairobi, Kenya. The report was published by Marcus Garvey Pan-Afrikan Institute, Mbale, Uganda, 7 September 2008, 31-36.

¹⁵⁵ Princeton Project on Universal Jurisdiction, Principle 5.

focus of the Institute of International Law appears to be in respect of immunity of state officials from jurisdiction of foreign states. The Institute of International Law is arguably favouring the serving state officials by guaranteeing them with a range of immunities, but not former state officials as such. The first of its work on the subject is its *Draft International Rules on the Jurisdiction of Courts in proceedings against foreign states, sovereigns and Heads of State*, which it adopted at its 11th session at Hamburg, Germany in 1891. The second is its resolutions on ‘*Immunity of Foreign States from Jurisdiction and Measure of Execution*’, and on the ‘*Contemporary Problems Concerning the Immunity of States in Relation to Questions of Jurisdiction and Enforcement*’, adopted respectively at its 46th (Aix-en-Provence, 1954) and 65th (Basel, 1991) sessions. Then followed its resolution on ‘*Public Claims Instituted by a Foreign Authority or a Foreign Public Body*’ adopted at the Oslo session in 1977.

On 26 August 2001, the Institute of International Law adopted a resolution on ‘*Immunities from Jurisdiction and Execution of Heads of State and of Government in International Law*’ at its session of Vancouver. This study examines this latter resolution extensively. In this resolution, the Institute of International law affirmed that special treatment is to be accorded to a head of state or a head of government, as a representative of that state and not in his or her personal capacity, because this is necessary for the exercise of his or her functions and the fulfilment of his or her responsibilities in an independent and effective manner. It is apparent that this reasoning is based on the well-conceived interest of both the state and the government of which the person is head and the international community as a whole.¹⁵⁶ The resolution contains 16 articles and provides for inviolability of a state official in a foreign state in the following terms:

When in the territory of a foreign state, the person of a Head of State is inviolable. While there, he or she may not be placed under any form of arrest or detention. The Head of State shall be treated by the authorities with due respect and all reasonable steps shall be taken to prevent any infringement of his or her person, liberty, or dignity.¹⁵⁷

¹⁵⁶ Preamble to the Resolution on *Immunities from Jurisdiction and Execution of Heads of State and of Government in International Law*, Adopted on 26 August 2001, Session of Vancouver, Institute of International Law (hereafter “the Institute of International Law 2001 Resolution on Immunities”).

¹⁵⁷ Art 1, Institute of International Law 2001 Resolution on immunities. See also, art 15 which guarantees the same rights in respect of the head of government. *But see*, art 13 (1)-(3) which states that: “[a] former

The resolution goes on to provide that in criminal matters the state official shall enjoy immunity from jurisdiction before the courts of a foreign state for any crime he or she may have committed, regardless of its gravity.¹⁵⁸ This seems to be contrary to the obligation imposed on states under the universality of the punishment of persons who commit international crimes. In article 3, the resolution states that in civil matters ‘the head of state does not enjoy immunity from jurisdiction before the courts of a foreign state, unless the suit relates to acts performed in the exercise of his or her official functions.’ Even in such cases, the state official shall enjoy no immunity in respect of a counterclaim. Nonetheless, nothing shall be done by way of court proceedings with regard to the head of state while he or she is in the territory of that state, in the exercise of official functions.¹⁵⁹ It is also an obligation that the authorities of the state ‘shall afford to a foreign head of state the inviolability, immunity from jurisdiction and immunity from measures of execution to which he or she is entitled, as soon as that status is known to them.’¹⁶⁰

However, the resolution provides further that the state official may no longer benefit from inviolability, immunity from jurisdiction, or immunity from measures of execution conferred by international law, where the benefit thereof is waived by his or her state. Such waiver may be made when the state official is suspected of having committed crimes of a particularly serious nature, or when the exercise of his or her functions is not likely to be impeded by the measures that the authorities of the forum state may be called upon to take.¹⁶¹ The resolution further provides that:

Nothing in this Resolution may be understood to detract from the obligations of the Charter of the United Nations, and the obligations under the statutes of international criminal tribunals as well as the obligations,

head of state enjoys no inviolability in the territory of a foreign state, nor does he or she enjoy immunity from jurisdiction, in criminal, civil or administrative proceedings, except in acts which are performed in the exercise of official functions and relate to the exercise thereof. Nevertheless, he or she may be prosecuted and tried when the alleged acts constitute a crime under international law, or when they are performed exclusively to satisfy a personal interest, or when they constitute a misappropriation of the state’s assets and resources. Neither does he or she enjoy immunity from execution.”

¹⁵⁸ Art 2, Institute of International Law 2001 Resolution on immunities.

¹⁵⁹ Art 3.

¹⁶⁰ Art 6.

¹⁶¹ Art 7.

for those states that have become parties thereto, under the Rome Statute of the International Criminal Court.¹⁶²

It is in article 11(1) above where the resolution does not recognise the immunity from international crimes. The resolution is without prejudice to the rules which determine the jurisdiction of a tribunal before which immunity may be raised, the rules which relate to the definition of crimes under international law, and the obligations of cooperation incumbent upon states in these matters.¹⁶³ Importantly, and of relevance to this study, the resolution provides expressly that ‘nothing in this resolution implies nor can be taken to mean that a head of state enjoys an immunity before an international tribunal with universal or regional jurisdiction.’¹⁶⁴ Thus, it is clear that no state official may enjoy immunity before properly constituted international criminal tribunals established to deal with international crimes.

All the preceding international treaties, instruments and statutes of international courts constitute a body of customary international law in the area of prosecution and punishment of international crimes and rejection of immunity. Having established and indicated various international law sources which reject immunity of state officials for international crimes, it is now important to address a vital question regarding the existence of immunity and international law *jus cogens* on the prohibition and punishment of international crimes.

2.4 Does immunity prevail over international law *jus cogens* on the punishment of international crimes?

Rules of *jus cogens*¹⁶⁵ are norms which have attained a binding peremptory character. As such, *jus cogens* are non-derogable rules of international public order, except that they can be modified by a subsequent norm of a *jus cogens* nature.¹⁶⁶ *Jus cogens* rules are

¹⁶² Art 11(1) (a)-(b).

¹⁶³ Art 11(2).

¹⁶⁴ Art 11(3).

¹⁶⁵ The rules of *jus cogens* are recognised under article 53 of the Vienna Convention on the Law of Treaties, 1969.

¹⁶⁶ Art 53, Vienna Convention on the Law of Treaties, 1969.

meant to protect the interest of international community.¹⁶⁷ They create obligation *erga omnes* to all states not to breach such rules. *Erga omnes* obligations are ‘obligations of a state towards the international community as a whole.’¹⁶⁸ *Jus cogens* operate as a concept superior to both customary international law and treaty.¹⁶⁹ It is accepted in international law that prohibition and punishment of international crimes is an obligation *erga omnes* arising from *jus cogens* nature of crimes. Such *jus cogens* international crimes include the crime of aggression, genocide, crimes against humanity, war crimes, slavery, torture, piracy, apartheid and terrorism.¹⁷⁰ The ICTY held in *Furundžija* that prohibition of torture has attained *jus cogens*¹⁷¹ and so did the ICJ in respect of genocide.¹⁷² The ICJ has further held that prohibition of genocide has attained a peremptory norm in international law (*jus cogens*).¹⁷³ Such prohibition is assuredly an *erga omnes* obligation, protecting essential humanitarian values.¹⁷⁴

Since it is apparent that immunity of state officials is a matter of customary international law,¹⁷⁵ can immunity prevail over international law *jus cogens* on the prohibition and

¹⁶⁷ For more on *jus cogens*, see, ME Villiger (2009) *Commentary on the 1969 Vienna Convention on the Law of Treaties*, 661-678.

¹⁶⁸ Case Concerning the Barcelona Traction, Light and Power Company, Limited (*Belgium v Spain*), Second Phase, Judgment of 5 February 1970, ICJ Reports 1970, 33, paras 33-34; Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, ICJ Reports 1951, 23.

¹⁶⁹ Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v Yugoslavia*), Preliminary Objections, Judgment of 11 July 1996, ICJ Reports 1996, para 101.

¹⁷⁰ MC Bassiouni, ‘International criminal justice in historical perspective: The tension between states’ interests and the pursuit of international justice’ in A Cassese (ed), (2009) *The Oxford companion to international criminal justice*, 131-142, 131.

¹⁷¹ *Prosecutor v Furundžija*, Case No. IT-95-17/I-T, Judgment, Trial Chamber, 10 December 1998, paras 137-139, 144, 153 and 156.

¹⁷² Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v Yugoslavia*), Preliminary Objections, Judgment of 11 July 1996, ICJ Reports 1996, para 101.

¹⁷³ Armed Activities on the Territory of the Congo (New Application 2002) (*Democratic Republic of the Congo v Rwanda*), Judgment of 3 February 2006, para 64; Case Concerning the Application of the Convention on the Prevention and Prohibition of the Crime of Genocide (*Bosnia and Herzegovina v Serbia and Montenegro*), Judgment of 26 February 2007, ICJ Reports 2007, para 161.

¹⁷⁴ Case Concerning the Application of the Convention on the Prevention and Prohibition of the Crime of Genocide (*Bosnia and Herzegovina v Serbia and Montenegro*), Judgment of 26 February 2007, ICJ Reports 2007, para 147.

¹⁷⁵ See part 2.2 of this chapter (on customary international law of immunity). But see also, *Gaddafi*, Court of Appeal of Paris, 20 October 2000, 119 ILR 490-508, 500 (submission by the Advocate General that ‘the principle of the immunity of Heads of State is traditionally regarded as a rule of international custom necessary for the preservation of friendly relations between states’).

punishment of international crimes? This requires an investigation of the tension, conflict or competition between the duty to prosecute and punish perpetrators of international crimes and the apparent customary international law norm of immunity of state officials. The two must be balanced carefully. On one hand, both customary international law and conventional international law have long recognised the *jus cogens* status of the prohibition of international crimes thereby calling for the punishment of individuals responsible for such crimes. On the other hand, there is another argument that since customary international law has recognised and protected immunity of state officials from prosecution – including for international crimes before foreign national courts, as evidenced in the judgment of the ICJ in the *Arrest Warrant*¹⁷⁶ and the French Court in *Gaddafi*¹⁷⁷ case, national courts should uphold immunity of foreign state officials, doing so under the state sovereignty, dignity of the state and its officials, comity and convenience.

By closely following the jurisprudence of courts and academic commentaries, it is apparent that in principle, immunity of state officials has been lifted at least on six grounds. Yasmin Naqvi summarises the six grounds, which this study adopts as follows: ‘(1) that treaty obligations to prosecute state officials accused of international crimes are incompatible with immunity; (2) that states have impliedly waived the immunity of their officials by signing treaties criminalising certain international offences; (3) that there is a rule of customary international law lifting functional immunity in case of international crimes; (4) that the *jus cogens* nature of international crimes trumps immunity; (5) that international crimes fall outside the notion of “acts performed in a sovereign capacity”; and (6) that the fundamental rights of victims are incompatible with immunities.’¹⁷⁸

It is argued that immunity of state officials cannot override the human rights and international law *jus cogens* that impose obligations on states to prosecute and punish persons responsible for international crimes. By ratifying international treaties prohibiting international crimes states normally signify their consent to be bound by the terms of

¹⁷⁶ *Arrest Warrant case*, para 58.

¹⁷⁷ *Gaddafi*, 125 ILR 490-510.

¹⁷⁸ YQ Naqvi (2010) *Impediments to exercising jurisdiction over international crimes*, 254.

such treaties. Considering that such treaties impose international obligations to prosecute and punish persons responsible for international crimes, it follows that any domestic or customary rules conflicting with such treaty obligations cannot and should not prevail. In the case against Augusto Pinochet, the court was convinced that since the crime of torture constituted an international crime, immunity was incompatible to the duty imposed on states to prosecute and punish perpetrators of torture. As such, torture could not be regarded as forming part of the functions of a head of state under international law. Accordingly, Pinochet would not be entitled to immunity.¹⁷⁹ Immunity cannot override the duty to prosecute and punish the crime of torture as reflected under articles 5(1),(2) and 7(2) of the Convention against Torture, 1984. The same is also observed in article IV of the Genocide Convention, 1948. Article 7(2) of the Statute of the ICTY, article 6(2) of the Statute of ICTR, 6(2) of the Statute of SCSL and article 27 of the Rome Statute also bolster the duty to prosecute international crimes as prevailing over immunity of state officials.

Immunity has not yet attained the *jus cogens* nature to override the duty to prosecute and punish international crimes.¹⁸⁰ It must be noted that the duty to prosecute and punish international crimes has acquired a customary international law status of *jus cogens* higher than that of the rule on immunity of state officials. In terms of hierarchy, international law *jus cogens* on the prohibition and punishment of international crimes enjoy a higher status than the rules on immunity which, are arguably, lower norms. Hence, the '*jus cogens* nature of international crimes overrides immunity.'¹⁸¹ In *Al-Adsani v United Kingdom*, it was posited that,

[T]he basic characteristic of a *jus cogens* norm is that, as a source of law in the now vertical international legal system, it overrides any other rule

¹⁷⁹ *R v Bow Street Magistrate, ex parte Pinochet (No. 1), Regina v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No.1)*, House of Lords 25 November 1998, 119 ILR51-248(Lords Nicholls of Birkenhead, Lord Steyn and Lord Hoffmann), 97-99, 104-107. See further, Lord Millet at 221-233.

¹⁸⁰ Pinochet case (No.3), [2000] 1 AC 147; Orakhelashvili (2006)354, but see the position regarding state immunity, *Al-Adsani v United Kingdom*, (2001) 34 *European Human Rights Reports* 273, 298-299; para 61; H Fox (2002) *The law of state immunity* 525; Committee Against Torture, 34th Session, Summary of Record of 646th Meeting, 6 May 2005, (CAT/C/SR.646/Add.1); *Bouzari v Islamic Republic of Iran* 124 ILR 427, para 73; *Greek Citizens v Federal Republic of Germany (The Distomo Massacre case)*, (2003) 42 ILM 1030.

¹⁸¹ Naqvi (2010) 268-276.

which does not have the same status. In the event of a conflict between a *jus cogens* rule and any other rule of international law, the former prevails. The consequence of such prevalence is that the conflicting rule is null and void, or in any event, does not produce any legal effects which are in contradiction with the content of the peremptory rule.¹⁸²

From the above, it seems that when two hierarchical norms compete or conflict, the solution is to resolve them by hierarchy, which means, only the superior norms must prevail. This ‘normative hierarchy’ tends to suggest that immunity rules must not override the *jus cogens* effects of international crimes.¹⁸³ But, this could lead to confusion as the two rules are inherently competing and conflicting.¹⁸⁴ Naqvi observes that ‘although personal immunity is not considered as peremptory in customary international law, the rule should always be respected because in such circumstances, “the need to avoid conflicts in international relations may be held to override the demands of justice.”’¹⁸⁵

Nevertheless, one must take the position that immunity should not be upheld in respect of prosecution and punishment of international crimes because customary international law, and largely conventional international law, has outlawed immunity of state officials. As I have already argued, ‘it would be important to know that as long as punishment of international crimes is concerned, there is no point in regarding heads of state as a special class that deserves protection different from any other private individual who commit the same international crimes.’¹⁸⁶

¹⁸² *Al-Adsani v United Kingdom*, ECHR, European Court of Human Rights 2001-IX 79, 21 November 2001, para 1 (Dissenting Opinion of Judges Rozaskis and Caflisch joined by Judges Wildhaber, Costa, Cabral Barreto and Vijić).

¹⁸³ For a contrary position, see LM Caplan, ‘State immunity, Human rights and *jus cogens*: A critique of the normative hierarchy theory’ (2003) 97 *American Journal of International Law* 741-781, 771; D Akande and S Shah (2011) 21 *European Journal of International Law* 815, 833-838 (arguing that the argument that *jus cogens* prevail over immunity is not persuasive. They contend that not all rules prohibiting international crimes have attained the status of *jus cogens*).

¹⁸⁴ Joint Separate Opinion in the *Arrest Warrant* case, para 75.

¹⁸⁵ Naqvi (2010) 271 (citation omitted).

¹⁸⁶ CB Murungu ‘Judgment in the first case before the African Court of Justice and 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.

In light of the above, it should be noted that a state official cannot commit international crimes and hide behind the cover of functional and private immunity even before his or her own national courts because international crimes are punishable by any state under universal jurisdiction. The point to be emphasised is that functional or private immunities are not acceptable as defences for prosecution of state officials who commit international crimes. It must be understood that ‘international law has long outlawed the defence of immunity of state officials for international crimes.’¹⁸⁷

According to the ICJ, functional immunity is not a defence from prosecution for international crimes.¹⁸⁸ As Judge Christine van den Wyngaert has observed, ‘international law does not prohibit, but instead encourages States to investigate allegations of war crimes and crimes against humanity, even if the alleged perpetrator holds an official position in another State.’¹⁸⁹ In the case against President Bashir, the ICC made it clear that immunity of a state official is not a defence for international crimes.¹⁹⁰ Equally, the

¹⁸⁷ See treaties discussed in this Chapter 2, especially art 7 of The London Charter of the International Military Tribunal (the “London Charter” or “Nuremberg Charter”), 8 August 1945, U.N.T.S, vol. 82; art 6 of the Charter of the International Military Tribunal for the Far East, Tokyo (The Tokyo Charter), 19 January 1946; Principle III, Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal. Adopted by the International Law Commission of the United Nations, (Principles of the Nuremberg Tribunal), 1950, No.82; *Yearbook of the International Law Commission*, 1950, Vol. II, 374-378; *Report of the International Law Commission Covering its Second Session, 5 June-29 July 1950*, Document A/1316, pp. 11-14; art 227 of the Versailles Treaty, 1919; art II (4) and (5) of the Control Council Law No.10 *on the Punishment of Persons Guilty of War Crimes, Crimes against Peace and Against Humanity*, *Official Gazette of the Control Council for Germany*, No.3, Berlin, 31 January 1946; art 7 of the 1996 *Draft Code of Offences Against the Peace and Security of Mankind*, (1996) *Yearbook of the International Law Commission*, Part 2, p. ii; art 6 of the Statute of ICTR, 1994; art 7 of the Statute of ICTY, 1993; art 27 of the Rome Statute of the ICC, 1998; art 6 of the Statute of the SCSL; art 29 of the *Law on the Establishment of Extra-ordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the period of Democratic Kampuchea*, 2001; art 15(3) of the *Statute of the Supreme Iraqi Criminal Tribunal*, 2005; Principles 5 and 14 of the *Princeton Project on Universal Jurisdiction*, developed by Jurists at Princeton University, USA; art 11(1) (a)-(b), *Resolution on Immunities from Jurisdiction and Execution of Heads of State and of Government in International Law*, Adopted on 26 August 2001, Session of Vancouver, Institute of International Law; Art II of the Convention on Non-Applicability of Statutory Limitations to War crimes and Crimes against Humanity, 1968; art IV of the Genocide Convention; art 2(1)-(3) of the Convention against Torture, 1984; art 2, *International Convention on the Suppression and Punishment of the Crime of Apartheid*, 1973; art 12 of the *Protocol for the Prevention and Punishment of Genocide, Crimes against Humanity, War Crimes and All forms of Discrimination*, International Conference of the Great Lakes, 2006.

¹⁸⁸ See, *Arrest Warrant Case*, para 61 of the judgment.

¹⁸⁹ See, Dissenting Opinion of Judge Christine Van Den Wyngaert, *Arrest Warrant Case*, 143-144, para 10.

¹⁹⁰ *Prosecutor v Al Bashir*, Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Al Bashir, Case No. ICC-02/05-01/09, Public Reducted Version, Pre-Trial Chamber I, 4 March 2009, 15, para 43.

same is found in the decisions of the ICTY, ICTR and SCSL.¹⁹¹ Elsewhere, the Iraqi Supreme Criminal Tribunal has decided that Saddam Hussein could not be entitled to immunity as president of Iraq.¹⁹² Hence, if there is a persistent invocation of immunity of state officials, it will lead to a culture of impunity whereby state officials would commit more crimes knowing that they are absolutely protected by law. Immunity of state officials must not apply to the prosecution and punishment of persons responsible for international crimes.

Further, it is argued that by being states parties to international treaties such as the Convention against Torture, the Rome Statute and the Genocide Convention, states have impliedly waived immunity attaching to their officials. By waiver of immunity here, it should be considered that states have imperatively renounced or disclaimed immunity attaching to their officials. The concern here is whether by ratifying international treaties rejecting immunity of state officials, state officials may be prosecuted for such crimes. Regarding torture, Lord Hutton rendered a very useful authority by stating that there is no question of waiver of immunity because immunity to which *Pinochet* could be entitled does not arise in relation to torture which is an international crime.¹⁹³

Customary international law does not recognise functional immunity of state officials responsible for international crimes.¹⁹⁴ It is trite that provisions of international treaties and statutes outlawing immunity have attained the status of customary international law.¹⁹⁵ The ICTY held in *Milošević*¹⁹⁶ that article 7(2) which outlaws immunity of state officials has attained the status of customary international law. If this is now an accepted

¹⁹¹ *Prosecutor v Milošević*, Decision on Preliminary Motions, Trial Chamber, Decision of 8 November 2001, paras 26-34; *Prosecutor v Kambanda*, Case No. ICTR 97-23-S, Judgment and Sentence, 4 September 1998; *Prosecutor v Taylor*, Case No. SCSL-2003-01-I, *Decision on Immunity from Jurisdiction*, Appeals Chamber of the SCSL, (31 May 2004), para 58.

¹⁹² See, *Judgment in the First Case, No. 1/9 of 2005 (the Al-Dujail Case)*. The court held that since World War II, immunities that protected former higher ranking officials from prosecution do not apply. Article 15(3) of the Statute of IST denied Saddam Hussein of immunity he had claimed. So, conclusively, the defence of immunity of state officials was not recognized by the Iraqi Special Tribunal.

¹⁹³ *Pinochet*, House of Lords, 119 ILR 202-221.

¹⁹⁴ Naqvi (2010) 262-268.

¹⁹⁵ See provisions cited in note 186 above.

¹⁹⁶ *Prosecutor v Milošević*, Case No. IT-02-54-PT, Decision on Preliminary Motions, Trial Chamber, 8 November 2001, paras 26-34.

position in contemporary international law, it is somehow difficult to reconcile this position with the one that immunity also arises from customary international law. It would seem that there is a conflict of two customary international law rules here. But, it is submitted that the rules found in treaty law which have attained customary international law should prevail of the rules on immunity arising from customary international law. Besides, it seems that immunity as a matter of custom only relates to foreign national courts and not international courts as such.

In international law, it is not acceptable that commission of international crimes can qualify as acts performed in official capacity. It was the position in *Pinochet* case that, torture is an international crime, which, if committed by a state official cannot form part of official functions of such official.¹⁹⁷

Finally, fundamental human rights of victims of international crimes are such high that they negate the rule of immunity of state officials.¹⁹⁸ Put simply, human rights demands that perpetrators of international crimes, however high they may be, be put on trial for their crimes. Hence to suggest that immunity of state officials may prevail over the demand for justice where human rights have been violated would be to ignore the rights of victims of human rights violations, particularly the right to an effective remedy and judicial protection. The Committee against Torture (CAT) has echoed this position in respect of the victims of torture in Canada, and pointed out that a state is under obligation to put in place effective measures to provide civil compensation to the victims of torture.¹⁹⁹

¹⁹⁷ *R v Bow Street Magistrate, ex parte Pinochet* (No.3), House of Lords 119 ILR 137, 139-157.

¹⁹⁸ Naqvi (2010) 281-286.

¹⁹⁹ Committee Against Torture, Summary Record of the Second Part (Public) of the 646th Meeting, 6 May 2005, CAT/C/SR.646/Add.1, paras C (4) (g) and D (5) (F), and 67 (apparently rejecting immunity from claim for liability for torture); see also, *Jones v Minister of Interior Al-Mamlaka Al-Arabiya AS Saudia (The Kingdom of Saudi Arabia) and others*, United Kingdom, EWCA Civ 1394 (2004).

2.5 Conclusion

In this chapter, the focus has been to try and trace the developments of the law on immunity of state officials. The analysis is from customary international law and codified international law. It has been revealed that apart from customary international law, immunity of state officials developed before and after the Nuremberg trials. It has been shown that international criminal tribunals (the ICTY and ICTR), the International Criminal Court, hybrid courts (the SCSL and ECCC) and international law treaties and non-binding instruments have played roles in the codification of the law on immunity of state officials.

Additionally, the International Law Commission has also contributed to the development of international law on immunity of state officials. In all the sources, it is evident that state officials are not immune from prosecution for international crimes. Conclusively, immunity of state officials from prosecution is well documented in both customary international law and treaty law.

The chapter has also examined the conflicting norms of international law *jus cogens* and immunity of state officials in order to determine which rule should prevail over the other. It is concluded that there is ample authority that *jus cogens* prevail over immunity which is founded in customary international law.²⁰⁰ Consequently, prohibition of international crimes (genocide, war crimes, crimes against humanity, torture, apartheid, piracy and the crime of aggression) has attained *jus cogens* status. As such, any perpetrator of these crimes cannot be entitled to immunity. In principle, immunity cannot override *jus cogens* in relation to international crimes. One cannot be allowed to commit international crimes and then claim functional immunity of state official because international crimes cannot be regarded as forming part of the functions of state officials. It is observed in *Pinochet* that the majority of the House of Lords supported the view that *jus cogens* enjoy supremacy over immunity, as such; immunity rules are lower norms even though they arise from customary international law. Hence, even if immunity of state officials were to

²⁰⁰ Orakhelashvili (2006) 355.

persist, it cannot operate if state officials have violated international *jus cogens*. Such violations would arise from committing international crimes such as the crime of aggression, genocide, war crimes, and crimes against humanity, torture, apartheid, slavery and terrorism.

Since this chapter has traced the law governing immunity in international law and has provided a general background to the rejection of immunity of state officials in respect of international crimes, the next chapter examines the jurisprudence of international courts in order to indicate how such courts have dealt with the issue of immunity.

Chapter 3

Jurisprudence of international courts on immunity of state officials

3.1 Introduction

This chapter deals with the jurisprudence of international courts on immunity of state officials in relation to international crimes. These courts include International Court of Justice (ICJ), the International Criminal Court (ICC) and International Criminal Tribunals. The practice at national courts is discussed in chapter 5. Regarding international courts, it is generally observed that immunity of state officials is neither a defence nor a mitigating factor in the prosecution and punishment of state officials. This position is widely accepted and upheld by international courts.

However, the controversy on immunity of state officials – and which is the main focus of this chapter – lies in the way state officials are treated by international courts particularly with regards to the question of subpoenas *ad testificandum* and *duces tecum*. In this regard, this chapter addresses the following question: *Does immunity of state officials cover criminal prosecution and subpoenas?* The preceding question relates to how international courts have approached the issue of immunity of state officials in relation to prosecution of international crimes.

The question of immunity of state officials from prosecution for international crimes has been treated differently by international courts. While international criminal law is clear in itself that no state official is immune from prosecution for international crimes, the jurisprudence of international criminal tribunals reveals that there is a disagreement as to the extent of immunity accorded to state officials. In other words, there is no uniform treatment or application of the immunity of state officials before international courts. The problem arises regarding issuance of subpoenas against state officials to testify or produce evidence before international courts. The jurisprudence of international courts indicates that such courts have adopted different positions on the extent and scope of

immunity accorded to state officials. It is not clear whether immunity of state officials extends to cover *subpoenas ad testificandum* and *duces tecum* or only to prosecution for international crimes. The position at international law in this regard is presented here as observed in the jurisprudence of international courts. But, before discussing subpoenas against state officials, it is necessary to indicate briefly, a settled position by international courts on immunity of state officials from prosecution for international crimes

3.2 State officials do not enjoy immunity from prosecution before international courts

Since the Nuremberg and Tokyo Military Tribunals, international courts – including hybrid criminal courts or tribunals – have taken a strong position that in respect of international crimes, immunity of state officials is neither a defence nor a mitigating factor in the prosecution and punishment of individuals respectively. This reflects contemporary developments on the question of immunity of state officials in international law. The Nuremberg Tribunal rejected the defence of immunity for many former German state officials,¹ and so did the Tokyo Tribunal.² Despite their work on prosecution and punishment of state officials responsible for international crimes during World War II, the Tokyo and Nuremberg Tribunals have been criticised as a manifestation of the victor's justice. It was only the powerful that judged the vanquished. The trials before such tribunals were only selective.³

After the Nuremberg and Tokyo Tribunals, new patterns of crimes were committed in different parts of the world. For example, Yugoslavia and Rwanda witnessed genocide, crimes against humanity and war crimes. These events culminated yet in the development of international criminal law. International Criminal Tribunals for the former Yugoslavia and Rwanda became necessary to address impunity. Until the establishment of

¹ Nuremberg Judgment, International Military Tribunal, 1946, reprinted in (1947) 41 *American Journal of International Law* 172, 220-221.

² See, U Kei, (2003) *Beyond the judgment of civilisation: The intellectual legacy of the Japanese war crimes trials, 1946-1949*, 4-6.

³ C Hosoya, 'The Tokyo trial from the perspective of international law' in C Hosoya, N Ando, Y Onuma and RH Minear (eds.) (1986) *The Tokyo war crimes trial*, 29-31; O Yasuaki, 'The Tokyo trial: Between law and politics' in Hosoya *et al*, (1986) 45-52.

international criminal tribunals in 1990s and the judgment of the ICJ in the *Arrest Warrant* case⁴ in 2002, the position regarding immunity of state officials remained the same. State officials charged with international crimes do not benefit from immunity from prosecution before international courts. To date, the position still remains the same. The adoption of the Rome Statute of the International Criminal Court in 1998 indicates that this position will continue to remain the same.

In the *Arrest Warrant* case, the ICJ addressed the issue of immunity of the then Minister for Foreign Affairs of DRC and held that in international law, ‘certain holders of high-ranking office in a State, such as the Head of State, Head of Government and Minister for Foreign Affairs, enjoy immunities from jurisdiction in other States, both civil and criminal.’⁵ It concluded that, when abroad the Minister for Foreign Affairs enjoys full immunity.⁶ The main position stated by the ICJ upholding customary international law of immunity of state officials is found in paragraph 58 of its judgment. However, the ICJ then specified circumstances where state officials cannot enjoy immunity.⁷ The court said, ‘[s]uch persons enjoy no criminal immunity under international law in their own countries’; they cease to enjoy immunity from foreign jurisdiction if it is waived by their state; immunity ceases to apply after a person ceases to hold office; finally, ‘an incumbent or former Minister for Foreign Affairs may be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction.’⁸ Such international courts include the ICC, International Criminal Tribunal for Rwanda (ICTR) and International Criminal Tribunal for the former Yugoslavia (ICTY).⁹

⁴ *The Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)*, Judgment of 14 February 2002, ICJ Reports 2002, 3.

⁵ *Arrest Warrant* case, para 51. Para 51 of the ICJ Judgment in the *Arrest Warrant* case is somewhat controversial especially if considered against the provisions of international criminal law statutes, particularly art 27 of the Rome Statute of the ICC. At the time of delivering its judgment in this case, the ICJ should have known the existence of art 27 of the Rome Statute of the ICC.

⁶ *Arrest Warrant* case, para 54.

⁷ *Arrest Warrant* case, para 61.

⁸ *Arrest Warrant* case, para 61.

⁹ For a critique on the ICJ Judgment in the *Arrest Warrant* case, see generally, A Cassese, ‘When may senior state officials be tried for international crimes? Some comments on the *Congo v Belgium case*’ (2002) 13(4) *European Journal of International Law* 855; JJ Wouters, ‘The judgment of the International Court of Justice in the *Arrest Warrant* case: Some critical remarks’ (2003) 16 *Leiden Journal of International Law* 265-267; SRS Bedi (2007) *The developments of the human rights law by the judges of the International Court of Justice*, 235; DS Koller ‘Immunities of foreign ministers: Paragraph 61 of the

The *Case Concerning Certain Criminal Proceedings in France (The Republic of Congo v France)* is another case where the ICJ had an opportunity to deal with the question of the immunity of state officials from criminal proceedings. The ICJ observed that the right that Congo had asserted was the right ‘to respect by France for the immunities conferred by international law on, in particular, the Congolese Head of State.’¹⁰ The ICJ has had yet another opportunity to deal with immunity in the *Case Concerning Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)*.¹¹ This case touches on the immunity of a former head of state of Chad, Hissène Habré regarding his extradition from Senegal to Belgium. Senegal argued before the ICJ that the courts in Senegal had ruled that immunity attaching to Habré as former president acted as a barrier for the court to allow his extradition to Belgium where he could face criminal prosecution for torture and other forms of crimes against humanity.¹²

Although the ICJ did not address the issue of immunity directly in its deliberations on the indication of provisional measures, it is expected that the court may consider the question of immunity in its final judgment, or that Senegal may address this issue in its written pleadings scheduled for 11 July 2011.¹³ Should the ICJ not pronounce on the immunity attaching to Habré, one would be tempted to adopt the position already stated by the ICJ in the *Arrest Warrant* case, especially paragraphs 58 and 61 where the court accepted that a former state official may be tried for crimes against humanity before a domestic court of a foreign state, but that, no rule of customary international law removes the immunity of a serving state official.

Yerodia judgment as it pertains to the Security Council and International Criminal Court’ (2004) 20 *American University International Law Review* 7; R Van Alebeek (2008) *The immunity of states and their officials in international criminal law and international human rights law*, 246; WA Schabas (2007) *An introduction to the International Criminal Court*, 3rd edn., 231-232; C Shreur and Swittich, ‘Immunity v accountability: The ICJ’s judgment in the Yerodia case’ (2002) *International Law Forum* 117.

¹⁰ *Certain Criminal Proceedings in France (Congo v France)*, para 28.

¹¹ *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 (hereafter *Belgium v Senegal*).

¹² *Belgium v Senegal*, paras 5, 26 and 35.

¹³ *Belgium v Senegal*, Order of 9 July 2009, ICJ, General List No.144, 1-2.

Apart from the ICJ, other international courts have held that immunity of state officials does not bar criminal prosecution of such officials before international courts. The Pre-Trial Chamber of the ICC had an occasion to pronounce on the immunity of state officials, particularly that of the serving president of Sudan, Omar Hassan Al-Bashir. The Pre-Trial Chamber considered the current position of President Omar Hassan Al Bashir – as head of state – which is not party to the Rome Statute. It held, such position ‘has no effect on the [c]ourt’s jurisdiction...’¹⁴ The Chamber reasoned that, in accordance with the preamble to the Rome Statute,¹⁵ one of the core goals of the Rome Statute is ‘to put an end to impunity for the perpetrators of the most serious crimes of concern to the international community as a whole, which “must not go unpunished.”’¹⁶ To achieve this goal, the Pre-Trial Chamber of the ICC considered the provisions of article 27 of the Rome Statute.¹⁷ The Chamber exercised jurisdiction over crimes committed in the territory of a state not party to the Rome Statute. The decision would have been otherwise had the Chamber applied article 34 of the Vienna Convention on the Law of Treaties, 1969 – which should have been that since Sudan is not a state party to the Rome Statute, no obligation is imposed on Sudan and its officials.

In the case against Ahmad Harun,¹⁸ the Pre-Trial Chamber of the ICC considered the position of Ahmad Harun as an aggravating factor to issue his warrant of arrest. Ahmad Harun is a current Minister of State for Humanitarian Affairs in the Government of Sudan. The Chamber noted that he is in the ‘inner circle of power’ in Sudan, and ‘holds the actual reins of power and control’ over government assets. The Chamber observed, because of his current position, Ahmad Harun ‘might benefit from a certain guarantee that he will not face justice.’¹⁹ Based on his position, the Pre-Trial Chamber ordered his

¹⁴ *Prosecutor v Al Bashir*, Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Al Bashir, Case No. ICC-02/05-01/09, Public Reducted Version, Pre-Trial Chamber I, 4 March 2009, 15, para 41.

¹⁵ See, Preamble to the Rome Statute, paras 4 and 5.

¹⁶ *Prosecutor v Al Bashir*, Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Al Bashir, Case No. ICC-02/05-01/09, Public Reducted Version, Pre-Trial Chamber I, 4 March 2009, 15, para 42.

¹⁷ Para 43.

¹⁸ See, *Prosecutor v Harun and Muhammad Al-Adl-Al-Rahman*, Case No. ICC-02/05-01/07, ‘Decision on the Prosecution Application under Article 58(7) of the Statute’, paras 59, 78-94 and 134-137.

¹⁹ Paras 127 and 128.

arrest. The ICC has not pronounced on immunity of state officials in the case against Jean Pierre-Bemba,²⁰ former Vice-President and Senator of the DRC. However, the decision in the case against Omar Al-Bashir holds strong position of the ICC regarding immunity of state officials charged with international crimes.

International Criminal Tribunals have denied the defence of immunity or official capacity of state officials in relation to international crimes. The ICTY has given its clear position on the question of the immunity of state officials. From the jurisprudence of the ICTY, it is firmly established that immunity of state officials is neither recognised as a defence nor a mitigating factor for the punishment of perpetrators who commit international crimes. The first high profile cases involving a head of state before the ICTY were those against Slobodan Milošević.²¹

Milošević was indicted and prosecuted for charges related to genocide, crimes against humanity and war crimes committed in Kosovo, Bosnia and Herzegovina, and Croatia respectively. In the course of trial, Milošević challenged the ICTY based on the official position or immunity of state official. The Trial Chamber of the ICTY held that article 7(2) of the Statute of the ICTY removed the immunity for Milošević stating that the provision has attained customary international law status. The Chamber also reasoned in line with the practice at the ICTR where Jean Kambanda, former Prime Minister of Rwanda, was prosecuted and sentenced to life imprisonment.²²

In another case, the Trial Chamber of the ICTY stated the position regarding the defence of immunity of state officials. It held categorically that:

Articles 1 and 7 of the Statute [of the ICTY] make it clear that the identity and official status of the perpetrator is irrelevant insofar as it relates to

²⁰ See, ‘Application for Warrant of Arrest under Article 51 for Mr. Jean-Pierre Bemba Gombo’, The Situation in Central African Republic, *Prosecutor v Bemba Gombo*, Case No. ICC-01/05-01/08, ‘Urgent Warrant of Arrest for Jean –Pierre Bemba Gombo’ (Under seal), Pre-Trial Chamber III, 23 May 2008.

²¹ *Prosecutor v Milošević*, Case No. IT-02-54-T, Second Amended Indictment “Croatia”, 28 July 2004, paras 1-110; *Prosecutor v Milošević*, Case No. IT-02-54-T, Amended Indictment “Bosnia and Herzegovina”, 22 November 2002, paras 1-79, and its annexures; *Prosecutor v Milošević*, Case No. IT-02-54-T, Second Amended Indictment ‘Kosovo’, 16 October 2001, paras 1-108, with annexures.

²² *Prosecutor v Milošević*, Decision on Preliminary Motions, Trial Chamber, Decision of 8 November 2001, paras 26-34.

accountability. Neither can obedience nor orders be relied upon as a defence playing a mitigating role only at the sentencing stage. In short, there is no privilege under international criminal law which would shield state representatives or agents from the reach of individual criminal responsibility. On the contrary, acting in an official capacity could constitute an aggravating circumstance when it comes to sentencing, because the official illegitimately used and abused a power which was conferred upon him or her for legitimate purposes.²³

Recently, Radovan Karadžić, former president of the three member presidency of the Serbian Republic of Bosnia and Herzegovina (*Republika Srpska*), who is being tried by the ICTY, raised a defence of immunity. But, the Trial Chamber of ICTY considered that it was ‘well established that any immunity agreement in respect of an accused indicted for genocide, war crimes and/ crimes against humanity before an international tribunal would be invalid under international law.’²⁴ An appeal against the Trial Chamber’s decision rejecting immunity argument was rejected by the Appeals Chamber of the ICTY.²⁵

So, at the ICTY, the defence of immunity of state official is invalid. It can be rightly said therefore, that, international crimes are committed by private individuals as well as state officials, and in reality, the official position does not hold substance in prosecution. Principally, as regards criminal responsibility for international crimes state officials are not different from private individuals. In this regard, the Trial Chamber of the ICTY held that ‘[w]hile crimes against humanity are normally perpetrated by State organs, [that is to say] individuals acting in an official capacity (...), there may be cases where the authors of such crimes are individuals having neither official status nor acting on behalf of a government authority.’²⁶ But, when an international crime is committed by a state official or by an agent of state, individual criminal responsibility does not preclude the

²³ *Prosecutor v Kunarać, Kovać and Vuković*, Case No. IT-96-23 –T and IT-96-23/1-T, Trial Chamber of ICTY, Judgment, 22 February 2001, para 494.

²⁴ *Prosecutor v Karadžić*, Case No.IT-95-5/18-PT, *Decision on the Accused’s Holbrooke Agreement Motion*, 8 July 2009, Trial Chamber of ICTY, para 5.

²⁵ *Prosecutor v Karadžić*, Case No.IT-95-5/18-PT, *Appeal of the Decision Concerning Holbrooke Agreement Disclosure*, 28 January 2009, ICTY Appeals Chamber, paras 8-12. See also, *Decision on Appellant Radovan Karadžić’s Appeal Concerning Holbrooke Agreement Disclosure*, ICTY Appeals Chamber, 6 April 2009, para 17.

²⁶ *Prosecutor v Kupreškić, Kupreškić, Vlatko Kupreškić et al*, Case No. IT-95-16-T, Trial Chamber of ICTY, Judgment, 14 January 2000, para 555.

engagement of the state responsibility. In fact, it may lead to state responsibility if the crimes are committed in a widespread or systematic way.²⁷ Hence, state responsibility can bear no relevance to the individual criminal responsibility for international crimes.²⁸

Like the ICTY, the ICTR has also addressed the question of official position of state officials in relation to international crimes. In 1998, the Trial Chamber of the ICTR tried and sentenced Jean Kambanda, a former Prime Minister of Rwanda to life imprisonment for genocide and crimes against humanity. Although Kambanda did not specifically raise the defence of immunity of state officials *per se*, it should be known that his official capacity as Prime Minister during the genocide in Rwanda, served as an aggravating factor in his sentence. This was despite his plea of guilty to all the charges.²⁹ Hence, it can be concluded that at the ICTR, article 6 of the Statute of the ICTR has prevailed and no official capacity is to be regarded or has been regarded as a defence or a mitigating factor in the punishment of individuals who committed international crimes in Rwanda.

With regards to hybrid international courts, the position is the same as those of international courts that no state official is immune from prosecution for international crimes. The Special Court for Sierra Leone (SCSL) has echoed that position in the case against Charles Taylor.³⁰ The Defence Counsel for Charles Taylor filed on 23 July 2003, a motion under protest and without waiving immunity accorded to a head of state requesting the Trial Chamber to quash the indictment and declare null and void the warrant of arrest and order of transfer and detention.³¹ The Motion asserted that Taylor enjoyed immunity from any exercise of the jurisdiction of the SCSL.³²

²⁷ *Prosecutor v Furundžija*, Case No.IT-95-17/1-T, Trial Chamber of ICTY, Judgment, 10 December 1998, para 142 ('Under current international humanitarian law, in addition to individual criminal responsibility, State responsibility may ensue as a result of State officials engaging in torture or failing to prevent torture or to punish torturers. If carried out as an extensive practice of State officials, torture amounts to a serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human being, thus constituting a particularly grave wrongful act generating State responsibility').

²⁸ *Prosecutor v Kunarać, Kovać and Vuković*, Case No. IT-96-23 –T and IT-96-23/1-T, Trial Chamber of ICTY, Judgment, 22 February 2001, para 493.

²⁹ *Prosecutor v Kambanda*, Case No. ICTR 97-23-S, Judgment and Sentence, 4 September 1998.

³⁰ *Prosecutor v Taylor*, Case No.SCSL-2003-01-I, Amended Indictment, 16 March 2006, 1-9, paras 1-34, and *Case Summary Accompanying the Amended Indictment*, 10-21, paras 1-48.

³¹ *Prosecutor v Taylor*, Case No. SCSL-2003-01-I, 'Applicant's Motion made under Protest and without waiving of Immunity accorded to a Head of State President Charles Ghankay Taylor requesting that the

Relying on the *Arrest Warrant* case decided by the ICJ, the defence counsel for Charles Taylor, Mr Terence Terry, raised a defence of immunity of state official that ‘as an incumbent Head of State at the time of his indictment, Charles Taylor enjoyed absolute immunity from criminal prosecution’³³ The defence argued further that, ‘[e]xceptions from diplomatic immunities can only derive from other rules of international law such as Security Council resolutions under Chapter VII of the United Nations Charter (“UN Charter”).’³⁴ It was also argued for Taylor that ‘the [i]ndictment against Charles Taylor was invalid due to his personal immunity from criminal prosecution.’³⁵ Furthermore, it was argued that by attempting to serve the warrant of arrest on Taylor, it prevented him from carrying out his essential duties as a head of state of Liberia.³⁶ Consequently, the defence requested the Appeals Chamber to quash the indictment, arrest warrant and all consequential orders and therefore to restrain the service of an indictment and arrest warrant on Taylor.³⁷

The Prosecutor of the SCSL argued in turn that, the motion brought by Taylor was premature and that Taylor could not evade the court processes by refusing to appear before the SCSL and at the same time also use the court processes by filing motion before it. The Prosecutor also distinguished the *Arrest Warrant* case because it concerned ‘immunities of an incumbent head of state from the jurisdiction of the courts of another state’, and therefore, argued that ‘customary international law permits international

Trial Chamber do quash the said approved Indictment of 7th March 2004 of Judge Bankole Thompson and that the aforesaid purported Warrant of Arrest and Order for Transfer and detention of the same date issued by Judge Bankole Thompson of the Special Court for Sierra Leone, and all other consequential and related ORDER(S) granted thereafter by either the said Judge Bankole Thompson or Judge Pierre Boutet on 12th June 2003 against the person of the said President Charles Ghankay Taylor be declared null and void, invalid at their inception and that they be accordingly cancelled, and, or set aside as a matter of Law’, of 23 July 2003. See also, *Prosecutor v Taylor*, Case No. SCSL-2003-01-I, *Decision on Immunity from Jurisdiction*, 31 May 2004, Preamble, para 1.

³² *Prosecutor v Taylor*, Case No. SCSL-2003-01-I, *Decision on Immunity from Jurisdiction*, Appeals Chamber, 31 May 2004, para 1.

³³ Para 6(a).

³⁴ Para 6(b).

³⁵ Para 6(d).

³⁶ Para 11(a).

³⁷ Para 8 (a) and (b).

criminal tribunals to indict acting Heads of State and the Special Court is an international court established under international law.³⁸

Also, the Prosecutor argued that the ‘lack of Chapter VII powers does not affect the Special Court’s jurisdiction over heads of State.’ Such reasoning was an analogy to the ICC which the Prosecutor contended, does not have the Chapter VII powers but it explicitly denies immunity of state officials for international crimes.³⁹ The Prosecutor argued that Taylor was indicted in accordance with article 1 of the Statute of the SCSL for the crimes committed in Sierra Leone, and as such, the SCSL had jurisdiction over Taylor.⁴⁰

However, it was then argued for Taylor that, following the decision of ICJ in the *Arrest Warrant* case, there was no doubt that ‘a head of state enjoys immunity from foreign jurisdictions and inviolability.’⁴¹ In this regard, the defence for Taylor equated the SCSL with a foreign national court, which was of course, a wrong assertion. The Appeals Chamber stated clearly that ‘since the Applicant [Charles Taylor] is subject to criminal proceedings before this court, processes issued in the course of, or for the purposes of, such proceedings against the Applicant cannot be vitiated by a claim of personal immunity.’⁴² The Appeals Chamber of SCSL added that as Taylor had ceased to be a president, the immunity *ratione personae* had also ceased to attach to him.⁴³

But, the decision of the Appeals Chamber of the SCSL simply ignored the authority and position stated by the ICJ in paragraph 58 of the *Arrest Warrant* case that a sitting head of state enjoys immunity from jurisdiction from criminal proceedings whilst in office. That was taken by the ICJ to apply even to an arrest warrant, and not necessarily the actual trial in court. Since the ICJ had given the position in 2002 and the Taylor case came into existence after that time (in 2003), one would have reasonably expected the

³⁸ Para 9 (a) - (e).

³⁹ Para 9 (e) - (f).

⁴⁰ Para 10(a) and (b).

⁴¹ Para 12 (a) – (f).

⁴² Para 58.

⁴³ Para 59.

Appeals Chamber of the SCSL to follow the position stated in paragraph 58 of the ICJ judgment in the *Arrest Warrant* case, especially considering the undisputed fact that at the time an arrest warrant against Taylor was issued, Taylor was still a sitting president of Liberia, and as such, and in accordance with the position stated by the ICJ, he enjoyed immunity from being served with such an arrest warrant or being indicted by the Prosecutor of the SCSL.

However, conventional international law which is settled in the field of immunity, does not allow immunity – an exception – to prevail over the duty to prosecute and punish individuals who commit international crimes. In fact, it should be noted that exceptions were also mentioned in paragraph 61 of the *Arrest Warrant* case that could allow Taylor to be tried by the SCSL in the sense that he had ceased to hold office as President of Liberia since August 2003. Hence, there is no doubt that the SCSL was right in proceeding against Taylor.

Apart from the SCSL, other courts such as the Extra-ordinary Chambers in the Courts of Cambodia (ECCC) and the Iraqi Supreme Criminal Tribunal, which have prosecuted senior state officials, have not recognised the defence of immunity of state officials. In the law establishing the ECCC, immunity of state officials is not recognised as a defence. It provides that '[t]he position or rank of any suspect shall not relieve such person of criminal responsibility or mitigate punishment.'⁴⁴

It is apparent that article 29 of the Law on the ECCC envisages that state officials can be prosecuted. The law designates '[s]enior leaders of Democratic Kampuchea and those who were most responsible'⁴⁵ for the international crimes as suspects. On the basis of this law, former leaders of Democratic Kampuchea have been indicted and are currently on trial and none of them has raised the defence of immunity of state officials. Such leaders

⁴⁴ Art 29, Law on the Establishment of Extra-ordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes committed during the Period of Democratic Kampuchea, 27 October 2004, as revised on 23 November 2004, (NS/RKM/1004/006).

⁴⁵ See, art 2, Law on the establishment of the ECCC.

include Khieu Samphan,⁴⁶ who was the head of state, and is prosecuted for crimes against humanity and grave breaches of the Geneva Conventions of 12 August 1949. Interestingly, the court considered the role of Khieu Samphan as a head of state, not as a mitigating factor, but as an aggravating factor in ordering his detention for purposes of being tried for international crimes. Chea Nuon,⁴⁷ former acting Prime Minister, is also charged with crimes against humanity and war crimes.⁴⁸ Equally, Ieng Thirith,⁴⁹ a former Minister of Social Action, is prosecuted for crimes against humanity before the ECCC.

In the Iraqi Supreme Criminal Tribunal, during the trial of Saddam Hussein it was argued for Saddam Hussein that, as President of the Republic of Iraq, and head of the Revolutionary Command Council, Saddam Hussein enjoyed immunity from criminal jurisdiction for any act done because such acts were considered acts of a sovereign state, based on article 240 of the Constitution of Iraq of 1970.⁵⁰ But, the court observed that since the crimes charged were crimes against humanity, it was impossible for any one of the defendants to benefit from immunity. The court drew examples from the Nuremberg Trials, article 7(2) of Statute of ICTY, and article 15(3) of the Statute of Iraqi Supreme Criminal Tribunal, 2005, which established that court and held that, since the World War II, immunities that protected former higher ranking officials from prosecution do not apply. Article 15(3) of the Statute of Iraqi Supreme Criminal Tribunal denied Saddam Hussein of immunity he had claimed.

⁴⁶ See, Criminal Case File No. 002/14-08-2006, Investigation No. 002/19-2007-ECCC/OCIJ, (Khieu Samphan), *Provisional Detention Order*, 19 November 2007.

⁴⁷ See, Criminal Case File No. 002/14-08-2006, Investigation No. 002/19-09-2007, *Provisional Detention Order*, ECCC-OCIJ, 19 September 2007, 1-5, paras 1-6.

⁴⁸ Criminal Case File No. 002/14-08-2006, Investigation No. 002/19-09-2007, *Provisional Detention Order*, ECCC-OCIJ, 19 September 2007, paras 1 and 2 (listing 'crimes against humanity' namely, murder, torture, imprisonment, persecution, extermination, deportation, forcible transfer, enslavement, and other inhumane acts, and 'war crimes' namely, wilful killing, torture, inhumane acts, wilfully causing great suffering or serious injury to body or health, wilful deprivation of rights to a fair trial, unlawful confinement, and unlawful deportation or transfer).

⁴⁹ See, Extra-ordinary Chambers in the Courts of Cambodia, Criminal Case File No. 002/14-08-2006, Investigation No. 002/19-09-2007, ECCC-OCIJ, *Police Custody Decision*, 12 November 2007, p.1-2. See also, Extra-ordinary Chambers in the Courts of Cambodia, Criminal Case File No. 002/14-08-2006, Investigation No. 002/19-09-2007, ECCC-OCIJ, *Provisional Detention Order*, 14 November 2007, p.1-5, paras 1-11.

⁵⁰ *Prosecutor v Saddam Hussein Al-Majid, and Others, Defendants' Preliminary Submission Challenging the Legality of the Special Court*, 21 December 2005, 1-24, paras 1-121.

In conclusion, in the preceding, it is observed that the international courts and international criminal tribunals, including hybrid criminal courts, the defence of immunity or official capacity of state officials is not a defence against prosecution. This is a settled position in international law.

From the preceding examples, it is noted that immunity of state officials is not a defence from prosecution, and is not a ground for mitigating punishment for state officials guilty of international crimes. However, international courts have ignored applications for the issuance of subpoenas *testificandum* and *duces tecum* in respect of the serving state officials. This, in turn, leads to an exploration of a very contentious subject of subpoenas in relation to the question of immunity attaching to serving state officials.

3.3 Subpoenas against state officials before international courts –An unsettled field

There are various ways to ensure appearance of suspects of international crimes or attendance of witnesses before international courts. The Rome Statute lists warrant of arrest and summons to appear before the Pre-Trial Chamber of the ICC as ways to secure attendance of persons before the ICC.⁵¹ The Trial Chamber of the ICC may require the attendance and testimony of witnesses and production of documents and other evidence by obtaining, if necessary, the assistance of states.⁵² From the provision of article 64(6) of the Rome Statute, the Trial Chamber of the ICC may seek state cooperation in obtaining evidence and testimony of individuals. This means that, where necessary, state officials, may also be required to cooperate with the ICC or accused persons during the conduct of trial or pre-trial interviews by the Prosecutor or the defence counsel for accused persons.

Voluntary surrender, appearance or attendance of an individual before an international court is another way of securing attendance of persons before international courts. The voluntary appearance is usually done through a summons to appear issued by an

⁵¹ Art 58(1) and (7), Rome Statute.

⁵² Art 64(6), Rome Statute.

international court.⁵³ Voluntary appearance to the court signifies that a suspect or potential witness cooperates with the court, and respects its order requiring him or her to appear before it.

If a person is accused of committing international crimes, he or she may voluntarily appear or surrender before an international court.⁵⁴ For example, in the ICC, three accused persons have surrendered voluntarily. Bahr Idriss Abu Garda, rebel leader in Darfur, Sudan, appeared voluntarily before the Pre-Trial Chamber of the ICC on 18 May 2009 following a summons to appear issued by the Pre-Trial Chamber of the ICC.⁵⁵ On 17 June 2010, two other suspects of war crimes, namely, Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus, surrendered before Pre-Trial Chamber I of the ICC.⁵⁶ Their voluntary appearance was in compliance with a summons to appear issued by the Pre-Trial Chamber on 27 August 2009⁵⁷ on the ground that there are reasonable grounds to believe that the two suspects are responsible for war crimes committed by attacking peace keepers in Darfur. In the ICTY, some accused persons surrendered voluntarily. For example, General *Tihomir Blaškić* surrendered voluntarily to the ICTY.⁵⁸

If a person voluntarily appears or attends before an international court, he is deemed to have waived his or her immunity conferred upon that person by national and international law. In other words, a person cannot voluntarily appear or attend before an international court and then claim immunity from appearing or attending before such court. The principle of estoppel will work counter any claim to immunity. Equally, any witness who

⁵³ Art 58(7), Rome Statute.

⁵⁴ On voluntary surrender, see Ch 4 of this study, part 4.2, and the three cases cited therein.

⁵⁵ *Prosecutor v Garda*, Case No. ICC-02/05-02/09, Summons to Appear for Bahr Idriss Abu Garda (Public), 7 May 2009, Pre-Trial Chamber, 1-10.

⁵⁶ *Prosecutor v Nourain and Jamus*, Case No. ICC-02/05-03/09, Pre-Trial Chamber I, 17 June 2010, Transcript (ICC-02/05-03/09-T-4-ENG ET WT 17-06-2010 1/27 SZ PT), 1-27.

⁵⁷ *Prosecutor v Nourain and Jamus*, Case No. ICC-02/05-03/09, Pre-Trial Chamber I, Second Decision on the Prosecutor's Application under Article 58, 27 August 2009, paras 1-35; *Prosecutor v Nourain*, Case No. ICC-02/05-03/09, Confidential Summons to Appear for Abdallah Banda Abakaer Nourain, 27 August 2009, paras 1-20; *Prosecutor v Jamus*, Case No. ICC-02/05-03/09, Confidential Summons to Appear for Saleh Mohammed Jerbo Jamus, 27 August 2009, paras 1-20.

⁵⁸ *Prosecutor v Blaškić*, Case No. IT-95-14-T, Decision of the President on the Motion filed pursuant to Rule 64, 3 April 1996. It is based on the voluntary surrender that the President (Antonio Cassese) granted bail to General Tihomir Blaškić.

voluntarily appears before an international court waives any immunity accorded to him or her. He or she cannot claim immunity after attending before the court. The same goes for the documents submitted to the court.

Regarding the voluntary appearance and issuance of subpoena, Judge Benjamin Mutanga Itoe has given a very useful statement. In principle, witnesses appear to testify on the prompting or at the request of the party seeking to rely on their evidence. The other extreme is where as Judge Benjamin Mutanga Itoe has observed, ‘a witness, as in this case, and in criminal proceedings, has been prompted and invited by the party seeking to rely on his evidence, and he either refuses to appear or testify on his behalf. The course of action that is open to that party is, (...) to apply to the Chamber under Rule 54 of the Rules of Procedure and Evidence, for the issuance of a subpoena to compel him to appear and to testify.’⁵⁹

Hence, if a person fails to attend voluntarily before the court to serve as a witness either for the Prosecutor or the accused (defence), or fails to produce documents to be used as evidence in court, the court may order issuance of subpoena to compel such person to appear and testify or to produce evidence before the court. Any failure to attend or produce evidence will be deemed contempt of court and may render such person to imprisonment or fine.

The focus here is on the coercive legal measures to compel persons, particularly state officials to appear and testify before international courts, or to produce documents or other evidence in such courts. These are called subpoenas to testify or produce evidence in court. In simple language, they are called summons to appear or to produce evidence or documents before international courts. Thus, ‘a subpoena is a due process compelling alternative which the court has recourse to as a last resort, after necessary and traditional

⁵⁹ *Prosecutor v Sesay, Kallon and Gbao*, Case No. SCSL-04-15-T, Trial Chamber I, 30 June 2008, A Separate Concurring Opinion of Hon. Justice Benjamin Mutanga Itoe on the Chamber’s Unanimous Written Reasoned Decision on the Motion for the Issuance of a Subpoena to H.E. Dr Ahmad Tejan Kabbah, former President of the Republic of Sierra Leone, paras 3-4.

ways of securing a witness have been utilised but in vain.⁶⁰ A subpoena is a compelling and coercive remedy sought by a person which seeks to rely on it. Normally, courts are reluctant to issue this form of remedy, or they issue it very cautiously on extreme cases, perhaps because of its inherent punitive nature if a witness fails to comply with it.

Subpoenas, apart from being governed by the Rules of Procedure and Evidence of international courts as such, they find basis in international human rights law as well, and in the Statutes establishing such international courts. For example, Article 17(4) (e) of the Statute of the SCSL requires that the accused shall be entitled to examine, or have examined the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her. This is also echoed in the Separate Concurring Opinion of Judge Benjamin Mutanga Itoe in *Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao*.⁶¹ International human rights law as said, also allows room for the accused persons to seek resort to subpoenas, by for example, according right to the accused person ‘to examine, or to have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.’⁶² The purpose here would seem to be giving right for the accused to fair trial and equality of arms in trial proceedings.

It is in respect of the subpoenas that there is a great controversy in the treatment of state officials, and their immunities regarding prosecution of international crimes. Essentially, a study of the jurisprudence of international courts regarding attendance or appearance of state officials before such courts leads to an investigation on whether the state officials are free from being summoned to appear and testify or produce evidence in such courts.

⁶⁰ *Prosecutor v Sesay, Kallon and Gbao*, Case No. SCSL-04-15-T, Trial Chamber I, 30 June 2008, A Separate Concurring Opinion of Hon. Justice Benjamin Mutanga Itoe on the Chamber’s Unanimous Written Reasoned Decision on the Motion for the Issuance of a Subpoena to H.E. Dr Ahmad Tejan Kabbah, former President of the Republic of Sierra Leone, para 13.

⁶¹ *Prosecutor v Sesay, Kallon and Gbao*, Case No. SCSL-04-15-T, Trial Chamber I, 30 June 2008, A Separate Concurring Opinion of Hon. Justice Benjamin Mutanga Itoe on the Chambers’ Unanimous Written Reasoned Decision on the Motion for Issuance of a Subpoena to H.E. Dr Ahmad Tejan Kabbah, Former President of the Republic of Sierra Leone, para 12.

⁶² See, Art 14(e), International Covenant on Civil and Political Rights, 1966.

To answer this question, one needs to understand whether state officials –whether serving or former –are entitled to immunity from subpoenas issued by international courts. This will then require an examination of whether immunity of state officials is only in respect of prosecution for international crimes before international courts, or it also extends to subpoenas issued by such courts. These are considered below.

Does immunity extend to Subpoenas and other court processes? It remains unclear in international law whether serving state officials are free from arrest warrants issued by international criminal courts or tribunals. But, the trend shows that it is possible even though enforcement of arrest warrants remains a major challenge. Vivid examples are the current incidents whereby the ICC issued warrants of arrest against the serving President of Sudan, Omar Al-Bashir⁶³ and Ahmad Harun, Minister of State for Humanitarian Affairs of Sudan (former Minister of State for the Interior of the Government of Sudan)⁶⁴ for genocide, war crimes and crimes against humanity committed in Darfur, Sudan. Can it be said that President Omar Al-Bashir of Sudan and Ahmad Harun, current Minister of the Government of Sudan have the duty to abide by the warrants of arrest issued against them whilst serving as a President and Minister of Sudan respectively?

Again, doubts still arise as to whether in international law ‘immunity of state officials’ only covers issues of prosecution alone and not those of subpoenas *ad testificandum* and *duces tecum* – whereby a state official may be summoned to appear before an international court as a witness or in order to secure a pre-testimony interview, or produce important documents that can be used as evidence in court.⁶⁵

It may be observed that state officials are inherently unequally treated, and double standards apply to them insofar as international crimes are concerned. At times, a state official is indicted, prosecuted and eventually punished, yet others are left immune. Thus,

⁶³ See, ‘The Situation in Darfur’, Warrant of Arrest for Omar Hassan Ahmad Al Bashir, *Prosecutor v Al Bashir*, Case No. ICC-02/05-01/09, Pre-Trial Chamber I, 4 March 2009, p.1-8.

⁶⁴ See, ‘The Situation in Darfur’, Warrant of Arrest for Ahmad Harun, *Prosecutor v Harun and Muhammad Al Abd-Al-Rahman*, Case No. ICC-02/05-01/07, Pre-Trial Chamber I, 27 April 2007, p. 1-16.

⁶⁵ For more on subpoenas, see generally, A Cassese (2008) *International criminal law*, 2nd revised edn, 313-313. The position stated by Cassese is that heads of state can be subpoenaed to appear or testify, or produce evidence before international criminal courts.

double standards apply to state officials generally. Examples to demonstrate this are discussed below.

Given the nature of ‘official position’ that a state official occupies in the government, being the head of state and some times, a head of the government and Commander –in–Chief of the Armed Forces, it is imperative that there are circumstances in which the state official finds himself or herself in a position to issue orders to his or her subordinates. These circumstances would be relevant. For instance, this would apply at the time of a protracted armed conflict between the government forces and armed groups or rebel forces in a state. In such situation, a head of state may give orders to the Minister for Defence, or Minister for Safety and Security – who, given their positions, could also eventually – issue orders to the Military Commanders or Inspector–General of Police to order their subordinates to protect the state against any attack, and to kill members of the rebel forces or any other party to the armed conflict. Further, it is obvious that state officials may give orders to the military commanders of armed forces to wage war of aggression against another state if there are reasons to believe that a state of war exists between such states.

Suppose in the course of defending the state, or in the course of an armed conflict such military commanders or Police officers commit acts that can be characterized as war crimes or crimes against humanity – crimes that are punishable under international law. If such crimes are committed, and the accused persons would want to invoke the defence of superior orders, and in so doing, they implicate the Ministers and President, by contending that they had received direct orders from the state officials, and that they want such state officials to be summoned to appear before a trial court and testify as witnesses whether they had issued orders or not, then it will be important for the trial court to issue subpoenas against such state officials.

It is in these circumstances where a military commander, who is subordinate to the president for example, may want the court to summon the sitting president to appear before the court with a view to testify as a witness for the accused (in this case a military

commander or one of the Ministers in the government), or being interviewed by the defence in order to help the defence make its case.

It should be known that Chief Samuel Hinga Norman, a Minister for the Interior during the time of war in Sierra Leone, was prosecuted for war crimes and crimes against humanity committed during an armed conflict in Sierra Leone, but he had contended that he was acting under orders from the President of Sierra Leone at that time, Dr. Tejan-Kabbah, and so, he wanted the Trial Chamber of the SCSL to issue a *subpoena ad testificandum* against the then sitting President Tejan-Kabbah, despite his immunity from criminal proceedings as provided under section 48(4) of the Constitution of Sierra Leone, 1991.⁶⁶

The above examples reflect on how delicate the question of immunity may be regarded by courts, basically, whether courts may be free to issue subpoenas against the serving state officials or not. This part will present a discussion on the questions of immunity in relation to subpoenas to the serving state officials. However, it is important to understand the conditions and circumstances under which subpoenas may be issued. The examples here are from the decisions of international criminal tribunals.

3.3.1 Conditions for the issuance of subpoenas

Subpoenas are governed by Rules of Procedure and Evidence as well as Statutes of the international courts. *Rule 54 of the Rules of Procedure and Evidence of the ICTY* and *ICTR* respectively, empowers judges to issue, on request or *proprio motu*, subpoenas which are ‘necessary’ for an investigation or for the preparation or conduct of a trial. Article 64(6) (b) of the Rome Statute empowers the Trial Chamber of the ICC to require the attendance and testimony of witnesses and production of documents and other forms

⁶⁶ *Prosecutor v Norman, Fofana and Kondewa*, Case No. SCSL-04-14-T, *Decision on Motions by Moinina Fofana and Sam Hinga Norman for the Issuance of a Subpoena Ad Testificandum to H.E Alhaji Dr. Ahmad Tejan Kabbah, President of the Republic of Sierra Leone*, Trial Chamber I, 13 June 2006, see the *Separate Concurring Opinion of Hon. Justice Benjamin Mutanga Itoe on the Chamber Majority Decision on Motions*, especially paras 57-58, 83-93, and 94-180.

of evidence by obtaining, if necessary, the assistance of states. *Rule 84 of the Internal Rules of the Extra-ordinary Chambers in the Courts of Cambodia* allows witnesses to be called to appear before the Trial Chambers to testify. In the SCSL, *Rule 54 of the SCSL Rules of Procedure and Evidence* gives the SCSL (a Judge or a Trial Chamber) the power to issue ‘such orders, summons, subpoenas, warrants and transfer orders as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial.’ Such orders clearly include issuance of a subpoena *ad testificandum* or *duces tecum*.

From the jurisprudence of international criminal tribunals, particularly the ICTY, ICTR and SCSL,⁶⁷ several conditions have to be satisfied before a court can issue *subpoenas ad testificandum* or *duces tecum* against a prospective witness, which, in view of this study, would certainly include sitting state officials. In *Prosecutor v Bagosora, Kabiligi, Ntabakuze and Nsengiyumva*,⁶⁸ the defence had requested the issuance of Subpoenas of Kofi Annan, Iqbal Riza, Shaharyar Khan and Michael Hourigan in accordance with *Rule 54 of the Rules of Procedure and Evidence of the ICTR*. The defence requested that three persons should appear before the Trial Chamber of the ICTR to give testimony, whereas the request in respect of Mr. Kofi Annan was that he should be compelled to submit to an interview. The Trial Chamber denied the motion to subpoena such officials. It stated the principles that:

The applicant for a subpoena requiring a person to give testimony or submit to an interview must show that three conditions are satisfied: (i) reasonable attempts have been made to obtain the voluntary cooperation of witnesses; (ii) the prospective witness has information which can materially assist the applicant in respect of clearly identified issues relevant to the trial; and (iii) the witness’s testimony must be necessary and appropriate for the conduct and fairness of the trial.⁶⁹

⁶⁷ See for example, *Prosecutor v Sesay, Kallon and Gbao*, Case No.SCSL-04-15-T, Written Reasoned Decision on Motion for Issuance of a Subpoena to H.E Dr Ahmad Tejan Kabbah, Former President of the Republic of Sierra Leone, Trial Chamber I, 30 June 2008, paras 15-17 and cases cited therein.

⁶⁸ See, *Prosecutor v Bagosora, Gratién Kabiligi, Aloys Ntabakuze and Nsengiyumva*, Case No. ICTR-98-41-T, Decision on Request for Subpoenas of United Nations Officials, ‘Request for Subpoenas of Kofi Annan, Iqbal Riza, Shaharyar Khan and Michel Hourigan Pursuant to Rule 54’ of 25 August 2006, Trial Chamber I, Decision of 6 October 2006 (Judge Erik Mõse, Presiding; Jai Ram Reddy; Sergei Alekseevich Egorov, Judges).

⁶⁹ See, *Prosecutors v Bagosora, Gratién Kabiligi, Aloys Ntabakuze and Nsengiyumva*, Case No. ICTR-98-41-T, Decision on Request for Subpoenas of United Nations Officials, ‘Request for Subpoenas of Kofi Annan, Iqbal Riza, Shaharyar Khan and Michel Hourigan Pursuant to Rule 54’ of 25 August 2006, Trial

Further, relying on the decision in *Prosecutor v Halilović*, it was held that ‘subpoenas should not be issued lightly’ and that a Chamber must consider ‘not only the usefulness of the information to the applicant but...its overall necessity in ensuring that the trial is informed and fair.’⁷⁰ The Trial Chamber of ICTR went on to refer to the decision rendered by the Appeals Chamber in *Prosecutor v Halilović* that:

The applicant seeking a subpoena must make a certain evidentiary showing of the need for the subpoena. In particular, he must demonstrate a reasonable basis for his belief that the prospective witness is likely to give information that will materially assist the applicant with respect to clearly identified issues in the forthcoming trial. To satisfy this requirement, the applicant may need to present information about such factors as the position held by the prospective witness in relation to the events in question, any relation the witness may have had with the accused which is relevant to the charges, any opportunity the witness may have had to observe or learn about those events, and any statements the witness made to the Prosecution or others in relation to them. The Trial Chamber is vested with discretion in determining whether the applicant succeeded in making the required showing, this discretion being necessary to ensure that compulsive mechanism of the subpoena is not abused. As the Appeals Chamber has emphasized, “Subpoenas should not be issued lightly, for they involve the use of coercive powers and may lead to the imposition of a criminal sanction.”⁷¹

In addition, the ICTR Trial Chamber observed that ‘Chambers have considered factors such as the specificity with which the prospective testimony is identified and whether the information can be obtained other than through the prospective witness.’⁷² Further, it is

Chamber I, Decision of 6 October 2006, para 3; *Prosecutor v Krstić*, Case No.IT-98-33-A, Decision on Application for Subpoenas, Appeals Chamber of ICTY, 1 July 2003, para 10; *Prosecutor v Halilović*, Case No.IT-01-48-AR73, Decision on the Issuance of Subpoenas, Appeals Chamber of ICTY, 21 June 2004, para 7; *Prosecutor v Bagosora et al*, Decision on Request for a Subpoena, Trial Chamber of ICTR, 11 September 2006, para 5; *Prosecutor v Karemera et al*, Case No.ICTR-98-44-T, Decision on Defence Motion for Issuance of Subpoena to Witness T, Trial Chamber of ICTR, 8 February 2006, para 4; See also, *Prosecutor v Bagosora et al*, Case No. ICTR-98-41-T, Decision on Ntabakuze Motion for Information from the UNHCR and a Meeting with one of its Officials, Trial Chamber I, 6 October 2006, paras 6 and 9 and accompanying text in fn 7 and 8 of para 6 thereof; *Prosecutor v Bagosora et al*, Case No. ICTR-98-41-T, Decision on Request for Cooperation of the Government of France, Trial Chamber I, 6 October 2006, para 2.

⁷⁰ See, *Prosecutor v Halilović*, Case No.IT-01-48-AR73, Decision on the Issuance of Subpoenas, Appeals Chamber of ICTY, 21 June 2004, para 7.

⁷¹ *Prosecutor v Halilović*, Case No.IT-01-48-AR73, Decision on the Issuance of Subpoenas, Appeals Chamber of ICTY, 21 June 2004, para 6; on the same conditions stated, see also, *Prosecutor v Bagosora and Others*, Case No. ICTR-98-41-T, Decision on Request for a Subpoena, Trial Chamber I, 11 September 2006, para 5; *Prosecutor v Bagosora*, Case No. ICTR-98-41-T, ICTR Trial Chamber, Decision on request for a subpoena for Major J Biot, para 2.

⁷² *Prosecutors v Bagosora et al*, Decision on Request for a Subpoena, Trial Chamber of ICTR, 11 September 2006, para 6; See also, *Prosecutor v Karemera et al*, Decision on Nzirorera’s *Ex Parte* Motion

generally accepted that, for a subpoena to be issued, there must be a ‘directness of a witness’s observation of events as opposed to being an eye witness to whom a subpoena is sought.’⁷³ However, where a state and witness are willing and cooperative with the court, no subpoena may be issued.

In conclusion, a person requesting a subpoena to be issued must demonstrate the following grounds: such person must show that he or she has exhausted reasonable attempts to obtain the voluntary cooperation of the witness intended to be subpoenaed. The applicant must show ‘legitimate forensic purpose’, that is to say, a reasonable basis for the belief that there is a good chance that the prospective witness will be able to give information which will materially assist the applicant in proving his or her case. Further, the information requested must be convenient to be obtained and helpful for the preparation of the trial. Also, such information to be sought from the prospective witness

for Order for Interview of Defence Witnesses NZ1, NZ2, Trial Chamber of ICTR, 12 July 2006, para 12; *Prosecutor v Milošević*, Case No. IT-02-54-T, Decision on Assigned Counsel Application for Interview and Testimony of Tony Blair and Gerhard Schroder, Trial Chamber of ICTY, 9 December 2005, paras 30 and 33, but see also, para 9 referring to *Rule 54bis* of the Rules of Procedure and Evidence of the ICTY.

⁷³ *Prosecutor v Bagosora et al*, Case No. ICTR-98-41-T, Decision on Request for Subpoena of Ami R Mpungwe, Trial Chamber I, 19 October 2006, para 2 (referring to: ‘*Prosecutor v Kršić*, Case No. IT-98-33-A, Decision on Application for Subpoenas, Appeals Chamber of ICTY, 1 July 2003, para 10; *Prosecutor v Halilović*, Case No.IT-01-48-AR73, Decision on the issuance of Subpoenas, Appeals Chamber of ICTY, 21 June 2004, para 7; *Prosecutor v Bagosora et al*, Case No. ICTR-98-41-T, Decision on Request for Subpoenas of United Nations Officials, Trial Chamber, 6 October 2006, para 3; *Prosecutor v Bagosora et al*, Decision on Request for a Subpoena, Trial Chamber, 11 September 2006, para 5; *Prosecutor v Karemera et al*, Decision on Defence Motion for Issuance of Subpoena to Witness T, Trial Chamber, 8 February 2006, para 4’); *Prosecutor v Bagosora et al*, Case No. ICTR-98-41-T, Decision on Request for a Subpoena, Trial Chamber of ICTR, 11 September 2006 (General Marcel Gatsinzi, former Chief of Staff of Rwandan Army); *Prosecutor v Bagosora et al*, Case No. ICTR-98-41-T, Decision on Request for Subpoenas of United Nations Officials, Trial Chamber, 6 October 2006, para 3; *Prosecutor v Bagosora et al*, Case No. ICTR-98-41-T, Decision on Ntabakuze Motion for Reconsideration of Denial of Issuance of Subpoena to a United Nations Official, Trial Chamber I, 12 December 2006, paras 2-4; *Prosecutor v Bagosora et al*, Decision on Request for a Subpoena Compelling Witness DAN to Attend for Defence Cross-Examination, Trial Chamber of ICTR, 31 August 2006 (eye witness of conduct by soldiers allegedly under the command of the Accused); *Prosecutor v Bagosora et al*, Decision on Request for a Subpoena for Major Jacques Biot, Trial Chamber of ICTR, 14 July 2006 (military observer present in Gisenyi from 6 to 13 April 1994); *Prosecutor v Bagosora et al*, Decision on Motion Requesting Subpoenas to Compel the Attendance of Defence Witnesses DK 32, DK 39, DK 51, DK 52, DK 311 and DM 24, Trial Chamber of ICTR, 26 April 2005; *Prosecutor v Bagosora et al*, Decision on Defence’s Request for a Subpoena Regarding Mamadou Kane, Trial Chamber of ICTR, 22 October 2004 (political advise to the Special Representative of the Secretary-General in Rwanda from December 1993 until May 1994); *Prosecutor v Bagosora et al*, Decision on Prosecutor’s Request fro a Subpoena Regarding Witness BT, Trial Chamber, 25 August 2004 (witness allegedly overheard statement made by one of the Accused); *Prosecutor v Bagosora et al*, Decision on Request for Subpoena of Major General Yaache and Cooperation of the Republic of Ghana, Trial Chamber, 23 June 2004 (subpoena to sector commander of UNAMIR).

must be of considerable and substantial assistance to a clearly identified issue that is relevant to the trial. And, the applicant must demonstrate a nexus between such information and the case against the accused person.⁷⁴ Sometimes, a subpoena can be issued on the basis that it is the ‘last resort’.⁷⁵

Having stated the above conditions for the issuance of subpoenas, it follows that this study must examine the practice regarding the questions of subpoenas against sitting state officials before international criminal tribunals. This is discussed below.

3.3.2 The ICTY and the question of subpoenas against state officials

The Trial Chamber of the ICTY prosecuted Slobodan Milošević and discussed whether a subpoena *ad testificandum* could be issued against Tony Blair and Gerhard Schröder. On 18 August 2005, the Assigned Counsel for Milošević had filed an *ex parte* application to the Trial Chamber for the testimony and pre-testimony interview of Tony Blair, the Prime Minister of the United Kingdom, and Gerhard Schröder, former Chancellor of the Federal Republic of Germany.⁷⁶ A week later, the Assigned Counsel for Milošević filed another application requesting the Trial Chamber of ICTY to issue a binding order against the Government of the Federal Republic of Germany, to require the Government of Germany to arrange for the Assigned Counsel for Milošević to interview, as with the UK, the

⁷⁴ See for example, *Prosecutor v Norman, Fofana and Kondewa*, Case No. SCSL-04-14-T, *Decision on Motions by Moinina Fofana and Sam Hinga Norman for the Issuance of a Subpoena Ad Testificandum to H.E Alhaji Dr. Ahmad Tejan Kabbah, President of the Republic of Sierra Leone*, Trial Chamber I, 13 June 2006, paras 57-180; *Prosecutor v Milošević*, Case No. IT-02-54-T, Trial Chamber of the ICTY, *Decision on Assigned Counsel Application for Interview and Testimony of Tony Blair and Gerhard Schroder*, 9 December 2005; *Prosecutor v Halilović*, Case No. IT-01-48-AR73, Appeals Chamber of ICTY, Decision of 21 June 2004.

⁷⁵ *Prosecutor v Milošević*, Case No. IT-02-54-T, Trial Chamber of the ICTY, *Decision on Assigned Counsel Application for Interview and Testimony of Tony Blair and Gerhard Schroder*, 9 December 2005. See also, F Gayner, ‘Subpoenas’ in A Cassese (ed.), (2009) *The Oxford companion to international criminal justice*, 524-525.

⁷⁶ *Prosecutor v Milošević*, Case No. IT-02-54-T, *Request for Binding Order to be Issued to the Government of the United Kingdom for the Cooperation of a Witness pursuant to Rule 54bis*, 18 August 2005, para 19 which requested the Trial Chamber of ICTY to ‘(a) order the Government of the United Kingdom to arrange for the Assigned Counsel and an Associate of the Accused to interview the United Kingdom State Official: the Prime Minister the Right Hon. Mr. Anthony Blair MP; and, (b) order the Government of the United Kingdom to make arrangements with the Assigned Counsel and an Associate for the Accused for the Witness... to give evidence in the defence stage of the trial of Slobodan Milosevic if the Accused decides to call the same as a witness.’

Germany state officials, as witnesses to give evidence at the defence stage in the trial of Milošević. The witnesses were Gerhard Schröder (former Chancellor), Helmut Kohl (former Chancellor), Joschka Fischer (former Minister of Foreign Affairs), Hans-Dietrich Genscher (former Minister of Foreign Affairs), and Klaus Kinkel (former Minister of Foreign Affairs).⁷⁷ Later, on 17 October 2005, the Assigned Counsel for Milošević restricted the witnesses to only two: Tony Blair and Gerhard Schroder, thereby leaving the rest of the German state officials initially named in the list of prospective witnesses as filed to the Trial Chamber.

The Assigned Counsel for Milošević argued that the two individuals (Tony Blair and Gerhard Schröder) possessed information that was necessary for the resolution of specific issues relevant to the Kosovo indictment against Milošević, and therefore, had requested the Trial Chamber to issue a binding order to the governments of the United Kingdom and Germany directing them to provide the witnesses, or a subpoena to Mr Blair and Mr Schröder to compel their attendance at Milošević's trial. The United Kingdom and Germany, through their legal counsel,⁷⁸ argued that calling Mr Blair and Mr Schröder as witnesses served 'no legitimate forensic purpose' and that 'the official capacity of the prospective witnesses entitles them to certain immunities which may prevent the issuance of a subpoena against them.'⁷⁹

The Trial Chamber of ICTY had to determine whether the applications filed by the Assigned Counsel for Milošević in accordance with *Rule 54bis* of the *Rules of Procedure and Evidence of the ICTY* required a subpoena *ad testificandum* to be issued, and whether – the status of the prospective interviewees or witnesses gave them immunity from a subpoena compelling them to attend an interview and, or to testify in a trial before the tribunal. The Chamber determined that the procedure to be followed when a state official

⁷⁷ *Prosecutor v Milošević*, Case No. IT-02-54-T, *Request for Binding Order to be Issued to the Government of the Federal Republic of Germany for the Cooperation of Certain Witnesses pursuant to Rule 54bis*, 26 August 2005, para 17.

⁷⁸ United Kingdom and Germany were represented by Prof Christopher Greenwood, QC, Mr. Chris Whomersley, and Mr. Dominic Raab, and Dr Edmund Duckwitz and Prof Christian Tomuschat respectively.

⁷⁹ *Prosecutor v Milošević*, Case No. IT-02-54-T, 'Decision on Assigned Counsel Application for Interview and Testimony of Tony Blair and Gerhard Schroder', Trial Chamber of ICTY, 9 December 2005, para 2.

is required to be interviewed is the subpoena *ad testificandum* ‘addressed to the individual official and not a binding order addressed to the official’s state.’⁸⁰ After setting and examining the conditions for the issuance of subpoena,⁸¹ the Trial Chamber concluded that such requirements were not met, and because the application had failed on merits, no issue of immunity of state officials would arise.⁸² To that extent, the Trial Chamber simply avoided addressing the question of immunity, but rather chose to reject the motions.⁸³ Hence, Tony Blair and Gerhard Schröder were not subpoenaed to appear for an interview by the Assigned Counsel for Milošević.

The Trial Chamber of the ICTY made an important and landmark contribution in the field on *subpoena duces tecum* in *Prosecutor v Blaškić*⁸⁴ in 1997. The position of the ICTY on *subpoena duces tecum* is discussed extensively below. Acting on the request by the Prosecutor, on 15 January 1997, the Trial Chamber II of the ICTY (Judge Gabrielle Kirk McDonald, Presiding) issued *subpoena duces tecum* against the Republic of Croatia and its Defence Minister, Mr. Gojko Susak, and to Bosnia and Herzegovina and the Custodian of the Records of the Central Archive of what was formerly the Ministry of Defence of the Croatian Community of *Herceg Bosna*, respectively, and ordered compliance therewith within thirty days. The requests for the ‘subpoenas were directed to Judge McDonald, who issued them in her role as the Judge confirming the indictment against Tihomir Blaškić.’⁸⁵

In so doing, the Trial Chamber ruled that the ICTY has the authority to issue binding compulsory orders to sovereign states and their officials, and that the Trial Chamber has an inherent power to issue binding and compulsory orders to sovereign states and their officials acting in an official capacity, where the state or official is the object of the order.

⁸⁰ *Prosecutor v Milošević*, Case No. IT-02-54-T, ‘Decision on Assigned Counsel Application for Interview and Testimony of Tony Blair and Gerhard Schroder’, Trial Chamber of ICTY, 9 December 2005, para 27.

⁸¹ Paras 34-47.

⁸² Para 67.

⁸³ Para 69 (b) and (c).

⁸⁴ *Prosecutor v Blaškić*, Case No.IT-95-14-PT, *Decision on the Objection of the Republic of Croatia to the issuance of Subpoenae Duces Tecum*, Trial Chamber II, 18 July 1997.

⁸⁵ Paras 1-2.

The Trial Chamber also determined that the Tribunal may issue orders to individual state officials requiring them to take actions within their official capacity.⁸⁶

While declaring ‘its readiness for full cooperation under the terms applicable to all states’, the Government of Croatia challenged the legal power and authority of the ICTY to issue a *subpoena duces tecum* to a sovereign state, and contested the naming of a high government official in a request for assistance pursuant to article 29 of the Statute of the ICTY, claiming that, in its view, such requests are only properly directed to a state.⁸⁷

The Trial Chamber considered its power to issue binding orders to states. Before doing so, it first had to determine the nature and purpose of the International Tribunal (ICTY). The Chamber determined that ‘the Tribunal is an independent international court created under the terms of Chapter VII of the Charter of the United Nations to bring justice, to contribute to the restoration and maintenance of peace in the former Yugoslavia and to deter further violations of international humanitarian law.’ It observed that it was established by the Security Council of the United Nations.⁸⁸ In considering whether the ICTY has inherent powers to issue subpoena *duces tecum* to a state, the Prosecution submitted that the ICTY ‘has implied and inherent powers necessary or essential for the effective performance of its functions.’ It contended that a teleological method of interpretation of the Statute of the ICTY is ‘appropriate and supported by the Appeals Chamber in its *Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction* in the *Tadić* case and the jurisprudence of other international tribunals.’⁸⁹ The Prosecution also submitted that ‘the international tribunal should be deemed to have these powers which, although not expressly conferred, arise by necessary implication as being essential to the performance of its duties’, and that, ‘the power to require the production

⁸⁶ *Prosecutor v Blaškić*, Case No.IT-95-14-PT, *Decision on the Objection of the Republic of Croatia to the Issuance of Subpoenae duces tecum*, Trial Chamber II, 18 July 1997. See also, *Prosecutor v Tihomir Blaškić*, Case No.IT-95-14-PT, *Decision on the Admissibility of the Request for Review by the Republic of Croatia of an Interlocutory Decision of a Trial Chamber (Issuance of Subpoenae Duces Tecum) and Scheduling Order*, 29 July 1997, Appeals Chamber, para 2 (A)-(F).

⁸⁷ Para 3.

⁸⁸ Para 23.

⁸⁹ *Prosecutor v Blaškić*, Case No. IT-95-14-PT, *Decision on the Objection of the Republic of Croatia to the Issuance of Subpoenae Duces Tecum*, Trial Chamber II, 18 July 1997 (Judge McDonald, Presiding; Judges Benito and Jan), para 24, (citing I Brownlie (1990) *Principles of public international law*, 690).

of evidence is part of the inherent powers of a judicial organ, as such powers are necessary and essential for the effective administration of justice.’ Further, it was submitted by the Prosecution that in establishing the tribunal, the Security Council clearly intended that ‘the International Tribunal would effectively discharge the responsibility assigned to it, the principle of effectiveness must govern whenever there arises a question of its competence in a particular area.’⁹⁰

On its part, Croatia argued that the Prosecution sought ‘a form of compulsory process that is unprecedented in international law’ saying the Statute of the ICTY did not provide that. Croatia stated that ‘there would be no violation of international if the word “subpoena” were simply inserted into the Statute.’⁹¹ Relying on the judicial precedents of the ICJ,⁹² the Trial Chamber concluded that ‘the power of the International Tribunal to issue a *subpoena duces tecum* to a state may similarly be implied if it is necessary in order to fulfil its fundamental purposes and to achieve its effective functioning.’⁹³ The Trial Chamber stated further that:

The International Tribunal is primarily, a criminal judicial institution, with jurisdiction over individuals charged with the most serious offences. It is imperative that a Trial Chamber, which must ultimately make a finding of the guilt or innocence of such individuals and impose the appropriate sentence as penalty, has all the relevant evidence before it when making its decisions.⁹⁴

Such reasoning by the Trial Chamber was informed by the decision of the Supreme Court of the United States of America in *United States v Nixon*⁹⁵ in which it was held that:

The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on the full disclosure of all the facts, within the framework of the Rules of

⁹⁰ Para 24.

⁹¹ Para 25.

⁹² See, *Reparations for Injuries Suffered in the Service of the United Nations Case*, 1949 ICJ Reports 171; *Effects of Awards of Compensation made by the United Nations Administrative Tribunal Case*, Advisory Opinion of the ICJ of 13 July 1954, 1954 ICJ Reports 47; *Certain Expenses of the United Nations Case*, 1962 ICJ Reports 151.

⁹³ *Prosecutor v Blaškić*, Case No. IT-95-14-PT, *Decision on the Objection of the Republic of Croatia to the Issuance of Subpoenae Duces Tecum*, Trial Chamber II, 18 July 1997, para 30.

⁹⁴ Para 31.

⁹⁵ *United States v Nixon*, 418 US.683, 709 (Supreme Ct.1974).

Evidence. To ensure that justice is done, it is imperative to the function of the courts that compulsory process be available for the production of evidence either by the Prosecution or by the Defence.⁹⁶

To found the legal basis for its decision, the Trial Chamber then considered *Rule 20 of the Rules of Procedure and Evidence* of the ICTY which provides, *inter alia*, that it is for the Trial Chamber to ensure that a trial is fair and expeditious. Considering that the Rules were adopted to give effect to the Statute of the ICTY, the Trial Chamber stated that ‘it is reasonable to expect that they should contain provisions intended to secure this particular aim.’ In the Chamber’s view, ‘the use of the words “necessary (...) for the preparation or conduct of the trial” in *Rule 54 of the Rules of Procedure and Evidence* must be interpreted in this light.’ From this, the Chamber concluded:

Hence, an order or subpoena for the production of evidence is appropriate where the fairness of the trial so requires. In addition, if it could not use the method of compulsion, the Trial Chamber would be unable to ensure that the trial proceed expeditiously. Furthermore, Article 21, paragraph 4(e) [of the Statute of the ICTY] provides that the accused shall be entitled “to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.” If third parties cannot be compelled to produce documents in their possession, the Trial Chamber would be unable to guarantee the rights of the accused.⁹⁷

Regarding compliance with its orders by states, the Trial Chamber stated that it considered, however, that, ‘the duty of States, government officials and individuals to comply with orders from the International Tribunal is the same, regardless of the stage of the proceedings at which the particular order is issued.’⁹⁸ Further, the Trial Chamber emphatically stated that:

The International Tribunal is also an international institution, whose jurisdiction –*ratione materiae*, *ratione temporis* and *ratione loci* –is such that the tangible evidence required for proof of the guilt or innocence of those persons appearing before it will often be in the possession of States. Many of the crimes listed in Articles 2, 3 and 5 of the Statute relate to the conduct of military operations and therefore the records of those

⁹⁶ *United States v Nixon*, 418 US.683, 230-231 (Supreme Ct.1974).

⁹⁷ *Prosecutor v Blaškić*, Case No. IT-95-14-PT, *Decision on the Objection of the Republic of Croatia to the Issuance of Subpoenae Duces Tecum*, Trial Chamber II, 18 July 1997, para 32.

⁹⁸ Para 33.

operations may constitute vital evidence. The fact that these are government documents should not automatically bar their production.⁹⁹

After examining the practice and law in different national jurisdictions¹⁰⁰ as well as the *Reparations case* decided by the ICJ, the Trial Chamber concluded that it has an inherent power to compel the production of documents necessary for a proper execution of its judicial function. It said, '[t]o hold to the contrary would prevent the International Tribunal from effectively redressing serious violations of international humanitarian law, its very *raison d'être*.'¹⁰¹ The Trial Chamber held that '[a] Judge or Trial Chamber must, therefore, have the authority to oblige States to submit whatever material is necessary to evaluate the case effectively and fairly.'¹⁰² It also declared that 'the effective functioning of the International Tribunal requires it to have power to issue binding orders to states for the production of all necessary evidence.

The Chamber observed that the provisions in the Statute and Rules demonstrate that express authority is given to the International Tribunal to direct mandatory orders to States. The authority was sought from articles 1, 15 and 18 of the Statute of the ICTY. Article 18 empowers the Prosecutor to initiate investigations, and to have the power to question witnesses, to collect evidence, and in carrying these functions, the Prosecutor may seek the assistance of the state authorities concerned. More importantly, the Trial Chamber found basis under article 29 of the Statute of the ICTY on cooperation and judicial assistance, to reinforce its position that the Tribunal has the ability to render binding orders, by requiring that states comply with any order issued by a Trial Chamber.

Further, the Chamber held that 'the issuance of *subpoena duces tecum* is expressly authorised in the Rules' and that 'Rule 54 reads: "At the request of either party or *proprio motu*, a Judge or Trial Chamber may issue such orders, summons, *subpoenas*, warrants

⁹⁹ Para 34.

¹⁰⁰ The Trial Chamber examined the practice on subpoenas in various states: The United States of America in *paras* 36-39 (Canada; England; Pakistan; Yugoslavia; France; Costa Rica; Germany and Spain).

¹⁰¹ *Prosecutor v Blaškić*, Case No. IT-95-14-PT, *Decision on the Objection of the Republic of Croatia to the Issuance of Subpoenae Duces Tecum*, Trial Chamber II, 18 July 1997, para 41.

¹⁰² Para 40.

and transfer orders as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial.’”¹⁰³

The Trial Chamber observed that the word ‘subpoenas’ was inserted into *Rule 54* in January 1995, when the *Rules* were revised at the Fifth plenary session in order to clarify and ensure completeness of the rules, and consequently, noted that, ‘given that the word ‘subpoenas’ appears beside orders, summonses, warrants and transfer orders, it would seem that *Rule 54* was intended to confer a general power.’¹⁰⁴ The Chamber then observed that ‘there can be no doubt that the Security Council intended that a Judge or Trial Chamber would issue orders to states, should such prove necessary.’ It added that, ‘the very fact there is an express duty upon states to comply with orders of the International Tribunal in Article 29 and in paragraph 4 of resolution 827 confirms that orders to states were envisaged.’¹⁰⁵ In this way, the Tribunal was regarded as a body capable of issuing binding orders to sovereign states.

The Trial Chamber stated that the issuance of a subpoena *duces tecum* is a valid exercise of the authority and power to issue binding orders. It concluded that, ‘the issuance of a subpoena *duces tecum* to a state for the production of government documents is nothing more than an order compelling the production of those documents. The International Tribunal has the inherent power and express to issue such orders. Resort to the mechanism of subpoena is provided for in Rule 54.’¹⁰⁶ The Chamber viewed Rule 54 as effectuating the duty of states and individuals to comply with orders of the International Tribunal.

Further, the Trial Chamber considered whether it had power to issue binding orders directed at government officials. In this regard, it observed, ‘[t]here is no doubt that a Judge or Trial Chamber may address individuals directly in a number of circumstances.

¹⁰³ Paras 45-46 (emphasis in the original).

¹⁰⁴ Para 47.

¹⁰⁵ Para 50.

¹⁰⁶ Para 64.

For example, under Rule 98, a Chamber may summon a witness to appear before it.¹⁰⁷ By virtue of articles 6 and 7 of the Statute of the ICTY, the Tribunal properly ‘has jurisdiction over individuals and it is their criminal responsibility that it is called upon to adjudicate, rather than responsibility of states.’¹⁰⁸ The Chamber observed, ‘it is a necessary exercise of the international Tribunal’s powers for it to compel an individual to produce information required for an investigation or trial.’¹⁰⁹ Importantly, the Trial Chamber held that government officials are not free from the issuance of a *subpoena duces tecum*. The Chamber boldly stated its position that:

In conclusion, the fact that a person identified by the International Tribunal as being in possession of important documents is an official of State does not preclude the issuance of a *subpoena duces tecum* addressed to him or her directly...It has been established that binding orders may be issued by the International Tribunal addressed to both States and individuals and there is, therefore, no reason why a person exercising State functions, who has been identified as the relevant person for the purposes of the documents required, should not similarly be under an obligation to comply with a specific order of which he or she is the subject.¹¹⁰

On the duty to comply with its orders, the Trial Chamber observed that, it has power to issue binding orders, including subpoenas, to states and individuals. The Chamber noted that article 29 of the Statute of the ICTY compels states to abide by the orders of the Trial Chamber.¹¹¹ In this regard, the Chamber observed that ‘sovereign immunity’ is not applicable here¹¹² and cannot preclude the International Tribunal from issuing binding orders to states, and equally, cannot protect states from complying with binding orders of the Tribunal.

With regards to individuals, the Trial Chamber observed that it ‘has power to issue orders to individuals in the execution of its mandate.’ Individuals are bound to comply with orders of the International Tribunal’ as ‘confirmed under Rule 77 of the Rules of Procedure and Evidence which provides for sanctioning of persons who refuse or fail to

¹⁰⁷ Para 65.

¹⁰⁸ Para 66.

¹⁰⁹ Para 66.

¹¹⁰ Para 69.

¹¹¹ Paras 72-73, 78.

¹¹² Paras 79 and 86.

“answer a question relevant to the issue before a Chamber.”¹¹³ Specifically, the Trial Chamber considered the official position of state officials to comply with subpoenas. It noted that:

As States can act only through their officials, a high government official who is subpoenaed in his official capacity to carry out obligations on behalf of a State would not be taking part in the proceedings as a private person but as an agent of the State (...) – the fear of harassment of diplomatic officials – is not valid for an international criminal tribunal established by the Security Council.¹¹⁴

The position stated by the Trial Chamber is that, ‘the *Statute* and *Rules* allow orders to be directly addressed to such officials.’ This is possible under articles 18(2) and article 19(2) of the Statute of the ICTY, as well as *Rules* 39 and 54 of the *Rules of Procedure and Evidence* of the ICTY authorising Judges to issue orders whenever necessary. To emphasise on this duty, the Trial Chamber held that, ‘considering that a State has a duty to comply, a government official to whom a subpoena *duces tecum* is issued in his official capacity has a corresponding duty to comply. Indeed, it would be anomalous to consider that his duty is less than that of the State from which he receives his authority, since a State may only act through its competent officials.’¹¹⁵

After such findings, and considering the role of the tribunal, as well as the need for issuance of *subpoenas duces tecum* and that of compliance by state officials and states with the orders, the Trial Chamber, acting pursuant to *Rule* 54 of the *Rules of Procedure and Evidence* of the ICTY, reinstated the *subpoenas duces tecum* issued on 15 January 1997 by Judge McDonald to the Republic of Croatia and the Croatian Minister Mr Gojko Susak, and ordered Croatia and Mr Susak to comply with the subpoena *duces tecum* within thirty days from the date of the decision on 18 July 1997.

Thus, the Trial Chamber of ICTY stated a great position on *subpoena duces tecum* to high state officials as well as their states in respect of international crimes. This study

¹¹³ Paras 87 and 89.

¹¹⁴ Para 89.

¹¹⁵ Para 91.

aligns with the reasoning and decision stated by the Trial Chamber (Judge Gabrielle Kirk McDonald, Presiding) in this case because the reasoning of the Trial Chamber is more progressive to the development of international law in the field of immunity of state officials and sovereign immunity. In conclusion, the position stated by the Chamber is that high state officials are not immune from *subpoena duces tecum* and must comply with the binding orders of the Trial Chamber or that of a Judge. A state is equally obliged as individuals. The key consideration for the issuance of a *subpoena duces tecum* as emphasised by the Trial Chamber is to allow fair trial for the accused persons.

However, the above position stated by the Trial Chamber, was later subjected to review by the Appeals Chamber, which rendered a less important judgment and indeed created a state of confusion in respect of the question of *subpoena duces tecum* to state officials and binding orders to states. The Appeals Chamber was moved by the Government of Croatia against the decision of the Trial Chamber regarding issuance of *subpoena duces tecum*. That is now discussed below.

On 25 July 1997, the Government of Croatia requested a review by the Appeals Chamber of ICTY of the *Decision on the Objection of the Republic of Croatia to the Issuance of Subpoenae Duces Tecum* rendered on 18 July 1997 by a Trial Chamber of the ICTY comprised of Judges McDonald (presiding), Elizabeth Odio Benito and Saad Saood Jan.¹¹⁶ It also requested the Appeals Chamber to quash the *subpoena duces tecum* issued by the Trial Chamber. Specifically, Croatia requested the Appeals Chamber to review and quash the decision of the Trial Chamber on the following grounds that the Chamber had ‘incorrectly determined that the Tribunal has the inherent power to issue binding and compulsory orders to sovereign States and their officials acting in an official capacity, when the State or official is the object of the order’; and that ‘[t]he Trial Chamber has incorrectly determined that the Tribunal may issue orders to individual State officials requiring them to take actions within their official capacity.’¹¹⁷

¹¹⁶ Para 1.

¹¹⁷ Para 2 (A)-(F).

From the above, Croatia challenged the legal power and authority of the International Tribunal to issue this compulsory order to states and high government officials. In this regard, Croatia challenged the power of a Judge or Trial Chamber of the ICTY to issue a *subpoena duces tecum* in general, and in particular, to a state; and the power of a Judge or Trial Chamber of the ICTY to issue a *subpoena duces tecum* to high government officials of a state; and the appropriate remedy to be taken if there is non-compliance with such *subpoenae duces tecum*.¹¹⁸

The Appeals Chamber determined that the review was admissible under *Rule 108bis of the Rules of Procedure and Evidence* of the ICTY on the grounds that Croatia was ‘directly affected by a decision of the Trial Chamber which holds that both Croatia and high officials of Croatia may be ordered to produce documents, in particular military records, before the Tribunal’ and that the issue whether ‘the Tribunal indeed has power to subpoena States and high officials of States is clearly an issue “of general importance relating to the powers of the Tribunal”, indeed it relates to the Tribunal’s very competence.’¹¹⁹

The Appeals Chamber did not find it necessary to quash the *subpoena duces tecum* addressed to Croatia and to Croatian Defence Minister, Mr Gojko Susak. Instead, it stayed the execution of the *subpoena duces tecum* pending the judgment of that appeal.¹²⁰ So, the Appeals Chamber granted the request by Croatia to review the Decision of the Trial Chamber of 18 July 1997, and suspended the execution of the *subpoena duces tecum* issued to Croatia and its Defence Minister.

In its judgment on the request by Croatia for review of the decision of Trial Chamber II of 18 July 1997, the Appeals Chamber rendered a judgment that detracted from the developments on the issuance of *subpoena duces tecum* to state officials. Its judgment is

¹¹⁸ See, *Prosecutor v Blaškić*, Case No. IT-95-14-PT, *Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997*, 29 October 1997, para 1.

¹¹⁹ *Prosecutor v Blaškić*, Case No. IT-95-14-PT, *Decision on the Admissibility of the Request for Review by the Republic of Croatia of an Interlocutory Decision of a Trial Chamber (Issuance of Subpoenae Duces Tecum) and Scheduling Order*, 29 July 1997, Appeals Chamber, paras 12-14.

¹²⁰ Para 15.

a surprising one, and is considered here. The first part of the judgment of the Appeals Chamber in the *Blaškić* case defines the term ‘subpoena.’

The Appeals Chamber asked whether the term ‘subpoena’ should be understood to mean an injunction accompanied by a threat of penalty in case of non-compliance, or whether it should follow the views propounded by the Prosecution before the Trial Chamber, and which was upheld by the Trial Chamber. In other words, whether the Appeals Chamber should regard subpoena as considered and taken by the Trial Chamber. It observed that the Trial Chamber had held that the word subpoena should be given neutral meaning of a ‘binding order’.¹²¹ It reached a conclusion that the term subpoena should be given a narrow interpretation and be construed as only referring to ‘binding orders addressed by the International Tribunal, under threat of penalty, to individuals acting in their private capacity.’¹²²

This study respectfully disagrees with the view taken by the Appeals Chamber (Judge Antonio Cassese, Presiding) in *Blaškić* case because, subpoenas can be issued, as rightly held by the Trial Chamber, against state officials as well as private individuals, and non-compliance with such orders leads to a penalty in terms of fine or sentence, for it is considered contempt of court.

In *Prosecutor v Blaškić*,¹²³ while overruling the decision of the Trial Chamber to issue a *subpoena duces tecum* to Croatia and its Defence Minister, the Appeals Chamber of ICTY held that subpoena ‘cannot be applied or addressed to states.’ The Appeals Chamber held that way for reasons it considered that, ‘first of all, the International Tribunal does not possess any power to take enforcement measures against states’, and that ‘this is not a power that can be regarded as inherent in its functions.’¹²⁴ It argued that ‘states can only be the subject of countermeasures taken by other states or of sanctions

¹²¹ Paras 20-21.

¹²² Para 21.

¹²³ *Prosecutor v Blaškić*, Case No. IT-95-14, *Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997*, 29 October 1997, Appeals Chamber, 18 July 1997, 110 ILR 609.

¹²⁴ Para 25.

upon them by the organised international community, that is, the United Nations or other intergovernmental organisations.’ This led the Appeals Chamber to conclude that in respect of states, subpoenas do not apply. Instead, only binding orders or requests are applicable.

On whether the ICTY can issue binding orders against states, the Appeals Chamber held that it ‘has no power to take measures against either a state or a state official acting in an official capacity.’ It ruled that the International Tribunal might issue an order requiring a state or state official to produce documents under threat of penalty failing compliance. In so doing, it agreed with the Trial Chamber and Prosecution.¹²⁵

The Appeals Chamber apparently recognised that ‘it is well known that in many national legal systems, where courts are part of state apparatus and indeed constitute the judicial branch of the state apparatus, such courts are entitled to issue orders [directed at] other organs, including senior state officials and the Prime Minister or the Head of State.’ It observed that way based on the principle that nobody, not even the Head of State, is above the law (*legibus solutus*).¹²⁶ However, what is surprising to international lawyers today, is when the Appeals Chamber held categorically that,

The international community consists primarily of sovereign States; each jealous of its own sovereign attributes and prerogatives, each insisting on its right to equality and demanding full respect, by all other States, for its domestic jurisdiction. Any international body must therefore take into account this basic of the international community. It follows from these various factors that international courts do not necessarily possess, vis-à-vis organs of sovereign states, the same powers which accrue to national courts in respect of the administrative, legislative and political organs of the State.¹²⁷

It is apparent that the Appeals Chamber suggested that only national courts have the power over state officials and not international courts as such. This seems to have a basis under the test question whether international law is really law properly so called. Again, the Appeals Chamber hinged on state sovereignty to protect states and their officials from

¹²⁵ Paras 26-31.

¹²⁶ Para 40.

¹²⁷ Para 40.

being subjects of orders of the ICTY. In its conclusion, the Appeals Chamber held that, ‘both under general international law and the Statute itself, Judges or Trial Chambers cannot address binding orders to State officials.’¹²⁸ It dismissed the possibility of ICTY ‘addressing subpoenas to state officials in their official capacity.’¹²⁹ By so holding, the Chamber emphasised that such state officials cannot be subject of subpoenas.

Based on the above, the Appeals Chamber quashed the decision of the Trial Chamber that issued a *subpoena duces tecum* to Croatia. The question that needs to be posed here is whether indeed ‘act of state’ and ‘state sovereignty’ are valid defences against issuance of *subpoenas duces tecum* to state officials. It is the view of this author that they are not. Insofar as there is potential evidence from state officials, courts should not be barred from summoning such officials to appear and produce documents or testify before them.

The position by the Appeals Chamber of ICTY that it has no power to issue subpoenas against states or its officials’ is surprising in international law because it denies the inherent jurisdiction of the ICTY. It can be said that the judgment of the Appeals Chamber in *Blaškić* case is a set back to international law in that it detracted from the already progressive development made by the Trial Chamber in the case regarding issuance of *subpoena duces tecum*. It is indeed surprising for the Appeals Chamber to have found that it lacked competence and authority to issue *subpoenas duces tecum* against state officials. This is so especially considering the fact that in *Prosecutor v Tadić*¹³⁰ it had inherent jurisdiction to deal with international crimes and try individuals responsible for such crimes.¹³¹

¹²⁸ *Prosecutor v Blaškić*, Case No. IT-95-14, *Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997*, 29 October 1997, Appeals Chamber, 18 July 1997, paras 43 and 44.

¹²⁹ *Prosecutor v Blaškić*, Case No. IT-95-14, Appeals Chamber of ICTY, para 38.

¹³⁰ See, *Prosecutor v Tadić*, Case No. IT-94-1-AR72, *Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*, 2 October 1995; (1996) 35 ILM 32, whereby the Appeals Chamber of ICTY had decided that it had jurisdiction to determine the validity of its own establishment.

¹³¹ See, H Fox, ‘Some aspects of immunity from criminal jurisdiction of the state and its officials: The *Blaškić* case’ in LC Vohrah, F Pocar, Y Featherstone, O Fourmy, C Graham, J Hocking and N Robson (eds.), (2003) *Man’s inhumanity to man: Essays on international law in honour of Antonio Cassese*, 298.

However, it should be recalled that, in 2003, the Appeals Chamber of the ICTY departed from the above myth and position held in *Blaškić* case, and stated categorically that the ICTY may compel senior state agents to testify before it, whether or not such agents witnessed the relevant facts in their official capacity.¹³² In fact, the Appeals Chamber in *Krštić* case clarified that the proper procedure to call the state official to be interviewed or testify as a witness before the Tribunal, is by way of issuing *subpoena ad testificandum* under *Rule 54 of the Rules of Procedure and Evidence of the ICTY*. It should be recalled that in this case, the applicant had applied for subpoenas to be issued against two state officials, both of whom were Officers of the Army of State –to attend an interview with defence counsel. Having determined that the Appeals Chamber was authorized by *Rule 54*, the Chamber held that ‘such a power clearly includes the possibility of a subpoena being issued against a prospective witness to attend at a nominated place and time in order to be interviewed by the defence.’¹³³

Therefore, the Appeals Chamber gave an order that a subpoena be issued against the two state officials as prospective witnesses to attend a location in Bosnia and Herzegovina at a time to be nominated by the defence in order to be interviewed.¹³⁴ Since the majority decision in the Appeals Chamber of the *Krštić* case, a number of Trial Chambers have issued ‘subpoenas to state officials for both testimony and pre-testimony-interviews.’¹³⁵ In this regard, the authority of the Appeals Chamber in *Blaškić* case should not to be followed. Instead, the position by the Appeals Chamber of the ICTY in the *Krštić* case

¹³² *Prosecutor v Krštić*, ICTY Appeal Chamber, Decision on Application for Subpoenas decision, para 27.

¹³³ Para 19.

¹³⁴ Para 29.

¹³⁵ *Prosecutor v Milošević*, Case No. IT-02-54-T, ‘Decision on Assigned Counsel Application for Interview and Testimony of Tony Blair and Gerhard Schroder’, Trial Chamber of ICTY, 9 December 2005, para 16, (referring to the following cases: *See, e.g., Prosecutor v Martić*, Case No. IT-95-11-PT, Decision on the Prosecution’s Additional Filing Concerning 3 June 2005 Prosecution Motion for Subpoena, 16 September 2005 (“*Martić* Trial Decision”); *Prosecutor v Halilović*, Case No. IT-01-48-T, Decision on Prosecution’s Motion for Issuance of a Subpoena Ad Testificandum and Order for Lifting *Ex Parte* Status, 8 April 2005; *Prosecutor v Strugar*, Case No. IT-01-42-T, *Subpoena ad Testificandum*, 28 June 2004; *Prosecutor v Blagojević*, Case No. IT-02-60-T, Order In re Defence’s Request for the Issuance of Subpoenas ad Testificandum, Orders for Safe Conduct and an Order for the Service and Execution of the Subpoenas and Orders for Safe Conduct, 5 May 2004; *Prosecutor v Brdanin and Talić*, Case No. IT-99-36-T, *Subpoena ad Testificandum*, 17 July 2003; *Prosecutor v Milošević*, Case No. IT-02-54-T, Decision on the Prosecution’s Application for Issuance of a Subpoena ad Testificandum for Witness K33 and Request for Judicial Assistance Directed to the Federal Republic of Yugoslavia, 5 July 2002).

and the subsequent cases as stated above must be followed as authorities on the question of *subpoenas duces tecum*.

Hence, it can be argued that the state official is no longer acting as an instrumentality of the state apparatus. For limited purposes of criminal proceedings, particularly in cases of subpoenas, 'it is sound practice to "down-grade" the state official to the rank of an individual acting in a private capacity and apply to him all the remedies and sanctions available against non-complying individuals.'¹³⁶

3.3.3 The ICTR and the question of subpoenas against state officials

Regarding issuance of subpoenas to serving state officials, the position of the ICTR, like that of the ICTY, is not uniform. The Trial Chambers of the ICTR have issued decisions that on one side reveal that subpoenas cannot be issued against serving state officials, and on the other, that, subpoenas can be issued against serving state officials. These are discussed here. On 19 February 2008, Trial Chamber III of the ICTR rendered a decision denying a motion to subpoena President Paul Kagame of Rwanda.¹³⁷ The Defence for Nzirorera had 'moved the Trial Chamber to issue a subpoena directed at the President of Rwanda, Paul Kagame, directing him to submit to an interview.'¹³⁸ In requesting for a subpoena, the defence for Nzirorera argued that President Kagame's testimony was certainly relevant and necessary to establish the role of the Rwandan Patriotic Front (RPF) leading to the assassinations of President Habyarimana, Emmanuel Gapyisi and Felicien Gatabazi. The defence argued that the 'evidence that the RPF was responsible for these acts were part of Joseph Nzirorera's joint criminal enterprise to destroy the Tutsi' and that 'it knows of no person other than President Kagame who can provide direct and conclusive evidence on these issues.'¹³⁹

¹³⁶ *Prosecutor v Blaškić*, Case No. IT-95-14, Appeals Chamber of ICTY, para 51.

¹³⁷ *Prosecutor v Karemera, Ntirumpatse and 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), paras 1-16.

¹³⁸ Para 3, quoting Joseph Nzirorera's Motion for Subpoena to President Paul Kagame, filed on 28 January 2008.

¹³⁹ Paras 3, 12 and 14.

The defence for Nzirorera demonstrated that it had made reasonable attempts and efforts to contact and obtain the voluntary cooperation of President Paul Kagame, but that, President Kagame refused to cooperate and reply to the letters sent on 2 September 2003 requesting him to testify about the RPF activities in Rwanda leading up to and including the assassination of President Habyarimana. The refusal to such request was made available by a letter from the Rwandan Ministry of Justice dated 25 January 2008.¹⁴⁰ The Trial Chamber agreed with the defence for *Nzirorera* that it had made reasonable attempts to obtain evidence and cooperation from President Kagame. However, the Trial Chamber set conditions for issuance of the subpoena. It stated that it was necessary that ‘in considering whether the prospective testimony will materially assist the applicant, it is not enough that the information requested may be “helpful or consistent” for one of the parties: it must be of substantial or considerable assistance to the [a]ccused in relation to a clearly identified issue that is relevant to the trial.’¹⁴¹

The Trial Chamber further stated that it must consider the specificity with which the prospective testimony was identified and whether the information could be obtained by other means. In this regard, the applicant had to demonstrate a reasonable basis for the belief that the prospective witness (President Kagame) was likely to give the information sought. After all the above conditions, the Trial Chamber stated that the indictment did not allege that the accused persons were responsible for the assassinations of Emmanuel Gapyisi, Felicien Gatabazi or President Habyarimana. Surprisingly, the Trial Chamber declared that the question of who is responsible for those assassinations was not clearly an issue in this case.¹⁴²

Based on the above position, the Trial Chamber denied the motion entirely. It is submitted that the Trial Chamber did not give much weight on the fact that it had found and agreed with the defence that President Paul Kagame had refused to cooperate with the defence, and therefore that, a subpoena was the only means to get evidence from President Kagame and, that voluntary cooperation by President Kagame had failed.

¹⁴⁰ Para 12.

¹⁴¹ Para 13.

¹⁴² Paras 15 and 16.

Besides, the Trial Chamber did not bother assigning any reason to its decision, apart from denying the liability of the RPF in the assassination of President Habyarimana.

Further, the Trial Chamber did not discuss whether the defence for *Nzitorera* had failed to demonstrate that there was a reasonable belief that President Kagame's testimony was likely to give the relevant information sought for by the defence. The Chamber only stated the pre-conditions without examining whether the defence had failed to prove that the information sought from President Kagame would also materially assist the defence. It is therefore reasonable to argue that the decision of the Trial Chamber was unreasonable because the defence for *Nzitorera* had made attempts to obtain information and cooperation from President Kagame but to no avail, and that, the requested information would have been of considerable assistance to the defence's case.

The decision of the Trial Chamber was such that it aggrieved the defence for *Nzitorera* thereby leading to an application for certification to appeal decision on the motion for subpoena to President Paul Kagame.¹⁴³ In the application, Joseph *Nzitorera* contended that the Trial Chamber 'erred in concluding that the assassinations of President Habyarimana, Emmanuel Gapyisi and Felicien Gatabazi are irrelevant to the case', and that the Trial Chamber 'applied the wrong standard for subpoenas for interviews – applying a higher standard for obtaining evidence than for the admissibility of evidence – when interpreting the requirement that the prospective testimony “can materially assist his case.”’¹⁴⁴ The Chamber denied Joseph *Nzitorera*'s application for certification of an interlocutory appeal stating that there was no serious doubt as to the correctness of the legal principles and that *Rule 73(B)* of the *Rules of Procedure and Evidence* had not been satisfied.¹⁴⁵

¹⁴³ *Prosecutor v Karemera, Ngirumpatse and Nzitorera*, Case No. ICTR-98-44-T, Application for Certification to Appeal Joseph *Nzitorera*'s Motion for Subpoena to President Paul Kagame, filed on 25 February 2008.

¹⁴⁴ *Prosecutor v Karemera, Ngirumpatse and Nzitorera*, Case No. ICTR-98-44-T, *Decision on Joseph Nzitorera's Application for Certification to Appeal Decision on Joseph Nzitorera's Motion for Subpoena to President Paul Kagame*, 15 May 2008, para 1.

¹⁴⁵ Paras 1-9.

Hence, regarding the issuance of a *subpoena ad testificandum* against the serving President of Rwanda, Paul Kagame, the position of the Trial Chamber of the ICTR is that he cannot testify before it unless conditions are met, which conditions are contestable because the defence for Joseph Nzirorera had proved that President Kagame had failed to voluntarily cooperate with it, and therefore, there is no other way he could provide information regarding the assassination of President Habyarimana except by way of subpoena.

Regarding the alleged responsibility of President Kagame for the assassination of Habyarimana, one must resort to what is clear from the records of the testimony by Jean Kambanda in the *Bagosora* case. When called in to testify as to the existence of the Tutsis and Hutus genocide, and as to the responsibility of the RPF in the assassination of Habyarimana, Kambanda told the court that he did not deny the genocide of the Tutsis and Hutus in 1994, but he pointed out that President Kagame was responsible for the Hutus genocide. In his testimony, Kambanda said:

The events that took place in my country were so serious and so difficult to understand that as a former prime minister, I had the duty to explain them and politically assume responsibility. That is what I recognise. I did not perpetrate any crimes. I did not send anybody to kill anybody. But I was an authority.....I am not one of those who deny the genocide of the Tutsis....I saw that people were hunted down and killed for what they were, specifically, because they were Tutsis....Unfortunately, Mr President, during the same period and under the same circumstances, I saw that people from the Hutu ethnic group were massacred because they were Hutus....They were hunted down and killed. If the first was genocide, then the second was too. So I believe there was a double genocide in Rwanda: genocide of the Hutus, and genocide of the Tutsis. Now, the question that arises is who perpetrated these genocides, and I have answers for that. Regarding the genocide of the Hutus, this is easy to demonstrate. It [is] much easier because one does not need a lot of information to know that the genocide of the Hutus was committed by the current president of Rwanda, his regime, his army, his militia. I have evidence which has been forwarded to you, Mr President.¹⁴⁶

¹⁴⁶ Testimony of Jean Kambanda in *Prosecutor v Bagosora, Kabiligi, Ntabakuze and Nsengiyumva*, Case No. ICTR-98-41-T, 11 July 2006. The text of the testimony is reprinted in J Laughland (2008) *A history of political trials: From Charles I to Saddam Hussein*, 219-220.

The above paragraph demonstrates that there were two sides of genocide: genocide of the Hutus and genocide of the Tutsis. While it is notable that the majority of the accused persons before the ICTR are Hutus, one needs to note that even the Tutsis may have been perpetrators of genocide in Rwanda, at least against the Hutus. Kambanda has put it more succinctly above. In normal circumstances, one would have expected the ICTR to summon or subpoena President Kagame to tell the truth and assist the court in knowing about the events that caused genocide in Rwanda, not only by the Hutus, but also the Tutsis as claimed by Kambanda who testified whilst being a prisoner, serving sentence in Mali.

It appears that President Kagame is responsible for genocide in Rwanda, particularly that of Hutus. This is supported by the international arrest warrant issued for nine senior Rwandan state officials, including Rose Kabuye, and others, who were leading the RPF. The French Judge, Jean-Louise Brugière, issued the arrest warrant in 2006 which also state Kagame's key role in participating in the genocide in Rwanda. However, since French law prohibits issuance of arrest warrants against serving presidents, Kagame was not specifically indicted, even though he was described as obstructing investigations on the shooting of a plane that carried Habyarimana.¹⁴⁷

Further, from the discussion with the former official of the ICTR, there is an indication that the first Prosecutor of the ICTR had initially indicted President Kagame, even though the indictment remains sealed to date.¹⁴⁸ When Carla Del Ponte attempted to indict the RPF military commanders between April 2002 and August 2003, Kagame criticised her and played part in getting her dismissed as Chief Prosecutor.¹⁴⁹ The Government of Rwanda opposed Del Ponte's allegation by indicating that the RPF was the one that stopped the genocide in Rwanda.¹⁵⁰ Prosecution of the RPF military commanders was

¹⁴⁷ Laughland (2008) 213 (citing *Délivrance de Mandats d'arret internationaux, Tribunal de Grande Instance de Paris, Cabinet de Jean-Louis Brugière*, Premier Vice-President, Paris, 17 November 2006).

¹⁴⁸ Information obtained from a former official of the ICTR on 8 July 2010, at The Hague. But even then, there is ample literature regarding Kagame's indictment and responsibility for genocide in Rwanda. See for example, V Peskin (2008) *International justice in Rwanda and the Balkans: Virtual trials and the struggle for state cooperation*, 207-231 ('Victor's justice revisited: *Prosecutor v Kagame*').

¹⁴⁹ Peskin (2008) 207.

¹⁵⁰ Peskin (2008) 208-209.

more complicated because the ICTR depended on the state cooperation of Rwanda, and so, it was not easy to succeed in prosecuting the current regime of Rwanda. If indictments were issued against Rwandan officials, Rwanda could possibly obstruct justice by blocking potential witnesses.

After Del Ponte left ICTR, the new Prosecutor, Hassan Jallow succeeded her. Hassan Jallow seems simply unwilling to indict the RPF military commanders, including President Kagame for genocide against Hutus. Victor Peskin describes Hassan Jallow as a prosecutor who ‘has not made RPF atrocities against Hutu civilians a priority.’¹⁵¹ Peskin notes further that, ‘Jallow’s approach to the RPF issue has been marked by ambiguity. On the one hand, he has defended his right to pursue the RPF. In a June 2005 speech to the Security Council, Jallow asserted his prerogative to issue RPF indictments beyond the deadline set by the Council. But on the other hand, he has claimed that he is restrained by the Council from doing so.’¹⁵² From these statements, it is apparent that Jallow needs more time to prosecute the RPF leaders. But, the ICTR is about to phase out. Hence, even if Jallow is given more time to prosecute the RPF leaders, there is no apparent indication he may complete the prosecution soon.

Perhaps if President Kagame is brought before the ICTR, he can assist the court in knowing the truth about the genocide in Rwanda, and assist the court in terms of justice and equality of arms and fairness to the accused persons before the ICTR. But, with the ICTR completion strategy due soon, probably the triggering of criminal prosecutions against President Kagame might begin during the next phase of the ICTR – which is anticipated to be the ‘residual trials’ to be commenced after the current time limit for the court expires.¹⁵³

Although the Trial Chamber of the ICTR has not issued a subpoena against President Paul Kagame of Rwanda, it must be recalled that as far back as 2006, it made an

¹⁵¹ Peskin (2008) 225.

¹⁵² Peskin (2008) 227.

¹⁵³ Information from a former official of the ICTR during an informal discussion with the author on 8 July 2010, at The Hague.

important contribution regarding the position on issuance of subpoenas against state officials, which is of course, contrary to what is observed in respect of President Paul Kagame. That position is now discussed below.

The Trial Chamber of ICTR has affirmed the authority of international criminal courts, by asserting that state agents may be compelled to testify before international criminal courts.¹⁵⁴ In this decision, the Chamber had considered it necessary that ‘[g]overnment officials enjoy no immunity from a subpoena, even where the subject-matter of their testimony was obtained in the course of the government service.’ Consequently, it observed, that, since the defence had made ‘reasonable efforts to secure the witness’s voluntary appearance, a subpoena *ad testificandum* [was] both necessary and appropriate for the fair conduct of trial.’¹⁵⁵

The Trial Chamber of ICTR has also emphasised that states as well as state officials can be compelled to appear and be interviewed by the accused. In particular, regarding subpoenas, it has decided that:

Article 28 of the Statute [of ICTR] imposes an obligation on States to “cooperate with the International Criminal Tribunal for Rwanda (...) The “investigation and prosecution of persons” encompasses not only Prosecution investigations, but the entire trial process, including the right of the Accused in Article 20(4) (e) to “obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her...”¹⁵⁶

¹⁵⁴ See, *Prosecutor v Bagosora*, Case No. ICTR-98-41-T, ICTR Trial Chamber, Decision on request for a subpoena for Major J. Biot, para 4. But see also, *Prosecutor v Bagosora et al*, Case No. ICTR-98-41-T, Decision on Defence Request to Correct Errors in Decision on Subpoena for Major Biot, Trial Chamber I, 29 August 2006, paras 1-3.

¹⁵⁵ *Prosecutor v Bagosora*, Case No. ICTR-98-41-T, ICTR Trial Chamber, Decision on request for a subpoena for Major J. Biot, paras 3-4, citing, *Prosecutor v Kršić* Appeal Decision of the ICTY Appeals Chamber, para. 27, quotations omitted.

¹⁵⁶ *Prosecutor v Bagosora et al*, Case No. ICTR-98-41-T, Decision on Kabiligi Motion for Cooperation of the Government of France and Subpoena of Former Officers, Trial Chamber I, 31 October 2006, para 2 (quoting: ‘*Prosecutor v Bagosora et al*, Decision on Bagosora Defence Request for Subpoena of Ambassador Mpungwe and Cooperation of the Government of the United Republic of Tanzania, Trial Chamber, 26 August 2006, para 2’); *Prosecutor v Bagosora et al*, Case No. ICTR-98-41-T, Decision on Request for Cooperation of the Government of France, Trial Chamber I, 6 October 2006, para 2; *Prosecutor v Bagosora et al*, Case No. ICTR-98-41-T, Decision on Request to the Kingdom of the Netherlands for Cooperation and Assistance, Trial Chamber, 7 February 1995, para 5; *Prosecutor v Bagosora et al*, Case No. ICTR-98-41-T, Decision on Request for Subpoena of Major General Yaache and Cooperation of the Government of Ghana, Trial Chamber, 23 June 2004, para 4.

The above quoted position was also stated in yet another application for request to the Kingdom of Belgium.¹⁵⁷ In another motion, the defence lawyers for Col. Bagosora had asked the ICTR Trial Chamber to issue subpoena to the Minister for Defence of the Government of Rwanda, General Marcel Gatsinzi, requiring his appearance before the Trial Chamber as a witness, claiming that he was a Chief of the Armed Forces of Rwanda between 7 and 17 April 1994, and that, he had ‘unique and specific knowledge concerning certain material facts relevant to the case’ against Col. Bagosora. In its finding, the Trial Chamber held that:

Government officials enjoy no immunity from the normal legal processes available to compel the testimony of private individuals. It makes no difference whether the official’s knowledge was obtained in the course of official duties or not...¹⁵⁸

Additionally, the Trial Chamber made a finding that Rule 54 of the Rules of Procedure and Evidence of ICTR authorises a Trial Chamber to issue ‘orders, summonses, subpoenas, warrants and transfer orders as may be necessary for the purposes of investigation or for the preparation or conduct of the trial.’¹⁵⁹ The Chamber considered that it ‘does not lightly issue a subpoena to a serving Minister of a State.’ Nevertheless, it found that the defence had shown by specific submissions that the testimony of General Gatsinzi was ‘likely to be material to specific matters of importance in the present case’ and that the defence had shown reasonably that the evidence could not be obtained elsewhere, and that it had made reasonable ‘efforts to secure witness’s voluntary cooperation without success’ and therefore it granted the application for subpoena requiring the personal appearance of General Marcel Gatsinzi before the Chamber in a trial, and directed the Registrar of ICTR to communicate that decision to General Marcel Gatsinzi.¹⁶⁰

¹⁵⁷ *Prosecutor v Bagosora et al*, Case No. ICTR-98-41-T, Decision on Request to the Kingdom of Belgium for Assistance pursuant to Article 28 of the Statute, Trial Chamber I, 21 September 2006, para 2.

¹⁵⁸ *Prosecutor v Bagosora et al*, Case No. ICTR-98-41-T, Decision on Request for a Subpoena, Trial Chamber I, 11 September 2006, para 4, (referring to: ‘*Prosecutor v Kršić*, Decision on Application for Subpoenas (AC), 1 July 2003, para 27; *Prosecutor v Milošević*, Decision on Assigned Counsel Application for Interview and Testimony of Tony Blair and Gerhard Schröder (TC), para 30’).

¹⁵⁹ *Prosecutor v Bagosora et al*, Case No. ICTR-98-41-T, Decision on Request for a Subpoena, Trial Chamber I, 11 September 2006, para 5.

¹⁶⁰ *Prosecutor v Bagosora et al*, Case No. ICTR-98-41-T, Decision on Request for a Subpoena, Trial Chamber I, 11 September 2006, paras 7 and 8.

Conclusively, it is observed from the experience of the Trial Chamber of the ICTR that a subpoena is the correct procedural mechanism for seeking to compel a state official to appear before the international criminal tribunals in order to testify. It would be noted that, the ICTR has also gone a step further in ordering state officials to appear before it. For example, in 2006 the Trial Chamber issued a subpoena for Mr Ami R Mpungwe, a Tanzanian ambassador to appear before it during the trial session.¹⁶¹ It should be understood that the ICTR has even issued subpoenas to international organisations such as UNHCR.¹⁶²

3.3.4 The SCSL and the question of subpoenas against state officials

The Trial Chamber of the SCSL has had also an opportunity to deal with the question of immunity of state officials in the case involving Charles Taylor. While it is undisputed fact that Charles Taylor is being prosecuted by the Special Court for Sierra Leone, it is also important to note that the Trial Chamber of the SCSL has inconsistently held that the then sitting president of the Republic of Sierra Leone, Dr. Ahmad Tejan-Kabbah was immune from being summoned as a witness, citing among others, an immunity of the serving president and that as a sitting head of state he could not be compelled to appear before the Special Court.¹⁶³ The contrary is proven and stated by the same Trial Chamber of the SCSL as we shall find out shortly in a different case decided in 2008.

The first subpoena decision of 2006 calls for a deeper analysis. The two accused persons, *Moinina Fofana* and *Samuel Hinga Norman* had applied for the issuance of a subpoena *ad testificandum* against the then sitting president of Sierra Leone, Ahmad Tejan Kabbah. They wanted him to appear and testify on their behalf before the Trial Chamber of the

¹⁶¹ *Prosecutor v Bagosora et al*, Case No. ICTR-98-41-T, Decision on Request for Subpoena of Ami R. Mpungwe, Trial Chamber I, 19 October 2006, para 6.

¹⁶² *See, Prosecutor v Bagosora et al*, Case No. ICTR-98-41-T, Decision on Ntabakuze Motion for Information from the UNHCR and a Meeting with one of its Officials, Trial Chamber I, 6 October 2006, para 6.

¹⁶³ *Prosecutor v Norman, Fofana and Kondewa*, Case No. SCSL-04-14-T, *Decision on Motions by Moinina Fofana and Sam Hinga Norman for the Issuance of a Subpoena Ad Testificandum to H.E Alhaji Dr. Ahmad Tejan Kabbah, President of the Republic of Sierra Leone*, Trial Chamber I, 13 June 2006, *see the Separate Concurring Opinion of Hon. Justice Benjamin Mutanga Itoe on the Chamber Majority Decision on Motions*, especially paras 57-58, 83-93, and 94-180.

SCSL. They believed that President Kabbah had refused to heed to their repeated requests for him to appear and testify on their behalf.

Norman and Fofana, who had filed joint submissions for the subpoenas on 15 December 2005, contended that as their Civil Defence Forces (CDF) leader, and that since they had been indicted for crimes committed in the course of fighting against the rebel groups of RUF/AFRC to restore the democratically elected government of Tejan Kabbah, which had been removed from power by the rebel forces, President Tejan Kabbah knew that they did not bear the greatest responsibility for such crimes. They further argued that President Kabbah was commanding and materially supporting and communicating with the leadership of the CDF which they had been heading. On the basis of his communication, command and support to them, President Tejan Kabbah also bore the greatest responsible for the crimes that Norman and Fofana were charged with, contending that the President was responsible both politically and militarily.

Further, Norman and Fofana contended that President Kabbah had issued commands, communications and materially supported them ‘both during his exile in Conakry [in Guinea] and from his presidential palace in Freetown.’ As such, they submitted that President Kabbah ‘may himself have been among a group or, at the very least, that he was in a position to give evidence regarding the relative culpability of the three accused persons.’¹⁶⁴ The Trial Chamber held that:

The President is as well the Head of State and finds himself at the top of the State machinery... President Tejan Kabbah is not an ordinary Sierra Leonean but also,...the current, sitting in, and incumbent President and Sovereign Head of State of the Republic of Sierra Leone...The President belongs to a different category and regime of immunities...In fact, his immunity under Section 48(4) of the Constitution [of Sierra Leone] should ordinarily include, not only immunity against criminal and civil actions, but also against Subpoenas, other Court processes, or even being compelled to appear in court as a factual witness unless he, President Kabbah on his own volition, voluntarily accepts and decides to so testify in these proceedings.¹⁶⁵

¹⁶⁴ See, *Prosecutor v Norman, Fofana and Kondewa*, SCSL-04-14-T, Fofana Motion for Issuance of a Subpoena *Ad Testificandum* to President Ahmad Tejan Kabbah, 15 December 2005, para 13.

¹⁶⁵ Paras 58, 98 and 100 of the SCSL Decision on Motions in *Norman, Fofana and Kondewa*.

The Trial Chamber of SCSL reached the above position and did not grant a request to issue *subpoena ad testificandum* against the incumbent President of Sierra Leone, because it found that the requirements set out in *Rule 54* of the *SCSL Rules of Procedure* (the necessity and legitimate forensic purpose) had not been met, and that it had discretion to refuse the application. However, in his *Dissenting Opinion on Decisions on Motions by Moinina Fofana and Sam Hinga Norman for Issuance of Subpoena Testificandum to H.E Alhaji Dr. Ahmad Tejan Kabbah*, then President of the Republic of Sierra Leone, Hon. Justice Thompson distinguished all arguments raised in the Majority Decision and stated, as is purposely quoted below:

There is nothing, I reckon, problematic about statutory powers to issue Subpoenas, nationally or internationally...I take for granted that, *if a priori there is no entitlement to immunity from international criminal prosecution reserved to a Head of State or government or any responsible government official under international law as regards the perpetration of international crimes, a fortiori international law does not confer any like immunity on such officials from testifying as witnesses in international criminal tribunals(...)* Specifically, therefore, in the context of the Special Court, no such immunity is expressly or impliedly provided for in the constitutive instruments or subordinate legislation of the tribunal...On this view, the President cannot claim immunity from subpoena as a logical derivative from his explicit immunity from prosecution since it is waived vis-à-vis the Special Court for Sierra Leone. Therefore, while the President enjoys immunity under the domestic law of Sierra Leone from prosecution by reason of Section 48(4) of the *Sierra Leone Constitution Act No.6 of 1991*, no immunity to appear as witness before the domestic court is granted. *No immunity to appear as a witness before the international criminal tribunals, likewise, exists.*¹⁶⁶

The dissenting opinion of Judge Thompson against the majority decision of the Trial Chamber has a very strong position that the law allowed the SCSL to issue subpoena *ad testificandum* to President Tejan Kabbah to testify before the court.¹⁶⁷ Due to the serious differences between the Judges on the interpretation of Rule 54, and hence leading to an

¹⁶⁶ See paras 8, 15 &16 of the *Dissenting Opinion of Hon. Justice Bankole Thompson on Decisions on Motions by Moinina Fofana and Sam Hinga Norman for the Issuance of a Subpoena Ad Testificandum to H.E Alhaji Dr Ahmed Tejan Kabbah, President of the Republic of Sierra Leone*, (Case No. SCSL-04-14-T). Emphasis as in the original, but some words are omitted in the quotation.

¹⁶⁷ See, *Dissenting Opinion of Judge Thomas Thompson, against the Decision of the Trial Chamber*, paras 14-30.

impugned decision as such, the Defence applied for leave to appeal against the Majority Decision. Leave was granted.¹⁶⁸

The Majority in the Appeals Chamber of the Special Court for Sierra Leone confirmed the decision of the Trial Chamber.¹⁶⁹ In view of this study, the majority decisions both by the Trial and Appeals Chambers of the SCSL were wrong. The correct position is that which is stated in the Dissenting Opinion of Judges Thompson (Trial Chamber) and Dissenting Opinion of Judge Geoffrey Robertson (Appeals Chamber). Judge Robertson's dissenting opinion against the majority decision of the Appeals Chamber is echoed along the same lines with the reasoning of the Dissenting Opinion of Judge Thompson of the Trial Chamber of SCSL.¹⁷⁰

By the reasoning of Justice Bankole Thompson in his Dissenting Opinion and Justice Geoffrey Robertson of the Trial Chamber and Appeals Chamber of the SCSL as shown above respectively, it is imperative that the question of immunity does not only involve prosecution but also does not extend to issuance of Subpoena *ad Testificandum* and, it can be added, *subpoena duces tecum* when the international or domestic criminal courts deal with core international crimes. In this regard, it is clear that state officials are not immune from the subpoenas issued by international criminal tribunals or courts. This study adopts this reasoning and position which is arguably, in line with contemporary obligations or requirements under international criminal law and human rights. Further, even if the Appeals Chamber and the Trial Chamber were correct in exercising their discretion under Rule 54 of the Rules of Procedure and Evidence of the SCSL, such discretion is not absolutely free. Accordingly, exercising discretion should have been in conformity with Articles 17(4) (e) of the Statute of SCSL and 14(e) of the International Covenant on Civil and Political Rights, 1966, and settled jurisprudence on the matter.¹⁷¹

¹⁶⁸ See *Prosecutor v Norman, Fofana, and Kondewa*, Case No. SCSL-04-14-T, Decision on Motions by the First and Second Accused for Leave to Appeal the Chamber's Decision on their Motions for the Issuance of a Subpoena to the President of the Republic of Sierra Leone, 29 June 2006.

¹⁶⁹ *Prosecutor v Norman, Fofana and Kondewa*, SCSL Appeals Chamber, para 8-39 (majority decision).

¹⁷⁰ See Dissenting Opinion of Judge Geoffrey Robertson against the decision of the Appeals Chamber of SCSL, para 10-50.

¹⁷¹ See, *Prosecutor v Kordić and Mario Cerkeć*, Case No. IT-95-14/2, Decision on Appeal Regarding Statement of a Deceased Witness, Appeals Chamber, ICTY, 21 July 2000, para 20.

However, on 30 June 2008, the Trial Chamber of the SCSL having perhaps recognised the errors it had made in the first subpoena decision in the case of *Norman, Fofana and Kondewa* above, changed its position, albeit too late, and in respect of a former president (not the sitting president), Ahmad Tejan Kabbah of Sierra Leone. This time the Trial Chamber of the SCSL held boldly that ‘the [d]efence has met the prescribed standard for the issuance of a subpoena under Rule 54 thereby justifying the exercise by the Chamber of its discretion to grant the orders sought.’¹⁷² After this finding, the Chamber granted the application by Counsel for Issa Hassan Sesay for the issuance of subpoena to Ahmad Tejan Kabbah, former president of Sierra Leone, for a pre-testimony interview and for testimony at the trial. The Chamber thus ordered Ahmad Tejan Kabbah to testify, if called as a defence witness, which order was complied with.

The Chamber did so in the purported pretext that the present application was different from that of *Norman, Fofana and Kondewa*. Judge Benjamin Mutanga Itoe revealed the differences (which may not necessarily be genuine differences at all). The Judge observed that while in the first subpoena application the accused sought evidence of President Tejan Kabbah contending that he also bore the greatest responsibility for the crimes they were charged with, which also reveals that they wanted the president to be charged for the same crimes, in the second subpoena application, the accused persons ‘did not conceal their intention.’ Instead, ‘the objective of their application was for Ex-President Kabbah to appear in Court to testify on their behalf to the effect that they did not, as stipulated in the Agreement and in the Statute of [the] Court, bear the greatest responsibility for the crimes committed during the conflict to have warranted their prosecution.’¹⁷³ The Judge observed further that in the initial subpoena application, the accused had wanted to ridicule and embarrass President Tejan Kabbah by exposing his

¹⁷² *Prosecutor v Sesay, Kallon and Gbao*, Case No. SCSL-04-15-T, Written Reasoned Decision on Motion for Issuance of a Subpoena to H.E. Dr Ahmad Tejan Kabbah, Former President of the Republic of Sierra Leone, Trial Chamber I, 30 June 2008, para 21.

¹⁷³ *Prosecutor v Sesay, Kallon and Gbao*, Case No. SCSL-04-15-T, Trial Chamber I, 30 June 2008, A Separate Concurring Opinion of Hon Justice Benjamin Mutanga Itoe on the Chamber’s Unanimous Written Reasoned Decision on the Motion for Issuance of a Subpoena to H.E Dr Ahmad Tejan Kabbah, Former President of the Republic of Sierra Leone, para 22.

involvement and conduct in the conflict as the CDF boss, who would ultimately bear criminal responsibility.¹⁷⁴

An observation in the second subpoena decision by the Trial Chamber of the SCSL is that the court clearly lacks consistency in the way it treats state officials in relation to prosecution of international crimes. While it is a position stated in the first subpoena decision in *Norman, Fofana and Kondewa* on 13 June 2006 that President Tejan Kabbah (then serving president) enjoyed immunity from testifying before the Trial Chamber of the SCSL, in the second case decided on 30 June 2008, the Trial Chamber drastically deviated from its own weak position it had stated in 2006. A further observation is on the way Judge Benjamin Mutanga Itoe himself has come to agree that there is no immunity for President Tejan Kabbah from testifying before the SCSL. His inconsistency is also observed when he stated that:

Even though the earlier motion was denied on the basis of the same criteria on which this one is granted, it is my finding that these two applications, even though identical in their subject matter and in the objective they seek to achieve, are distinguishable and that the verdict or stand adopted by This Chamber, in the earlier one, does not necessarily bind it to come to a similar conclusion based on similar reasons, in the later case given the configuration and divergence of the facts on which the two applications were made and canvassed.¹⁷⁵

The above paragraph proves a self-contradicting position adopted by Judge Benjamin Mutanga Itoe and the Trial Chamber of the SCSL generally. It calls for the question – whether the position of the SCSL – regarding immunity is that there is no immunity for state officials from testifying before it. This is true, and more so, when the reality is revealed that at the time the second subpoena application was made, President Tejan Kabbah had ceased to be a president, but that the SCSL refused to grant an application for a subpoena against President Tejan Kabbah when he was still in office as president. Would the testimony of President Tejan Kabbah really not assist the accused persons, *Norman, Fofana and Kondewa* in 2006? Why has the SCSL now changed and stated that the evidence of former president Tejan Kabbah would materially assist the accused in

¹⁷⁴ Para 31.

¹⁷⁵ Para 34.

Sesay, Kallon and Gbao? Is there any significant difference between the two subpoena applications?

There is no difference between the two subpoena applications. Rather, there are more similarities than differences. All involve the same conflict, time; circumstances, crimes committed, same potential witness, and were before the same court. In this respect, one would have expected the court to treat same circumstances and cases alike. Arguably, President Kabbah was probably ‘uniquely placed to testify about those issues.’ By refusing to allow President Kabbah to testify in the first subpoena application, the SCSL denied the accused their right to call witness to support their case, as per Article 17(4) (e) of the Statute of the SCSL, as well as to ensure fair trial and equality of arms. There could have been truth in him ordering and communicating with the CDF leadership in Sierra Leone during the armed conflict. Commenting on the inconsistency in the jurisprudence of the SCSL on the issue of subpoenas, Patrick Hassan-Morlai has rightly observed that the jurisprudence of the court is highly inconsistent on this point, and that ‘it is doubtful whether the subpoena decision has created a precedent or made a positive contribution to existing jurisprudence in this area of law.’¹⁷⁶ Hassan-Morlai was seriously challenging the court’s first subpoena decision in that it substantially failed to follow and appreciate the jurisprudence of the ICTY and ICTR on subpoenas.

It appears from the jurisprudence of the SCSL that so far, it has been a position of that court *not* to recognise immunity of former state officials from testifying before it. This is observed above in the second subpoena decision where former President Tejan Kabbah was ordered to testify for the accused, Issa Hassan Sesay. Another example is when the SCSL allowed the prosecution’s motion for the issuance of a subpoena against former Vice-President of Liberia, Moses Blah to testify against Charles Taylor. On 14 May 2008, former Vice-President Moses Blah was called in to testify for the prosecution, but he turned to be a hostile witness and chose to testify for Taylor. This could have been influenced by the fact that he was a subordinate of Taylor, and Taylor had handed power

¹⁷⁶ PM Hassan-Morlai, ‘Evidence in International Criminal Trials: Lessons and contributions from the Special Court for Sierra Leone’ (2009) 3 *African Journal of Legal Studies* 96-118, 108.

to him when he left for asylum in Nigeria in 2003. The SCSL has only been faced with one really challenge involving the then serving president, Tejan Kabbah. The practice on granting subpoenas has apparently developed with easiness before the SCSL. On 29 June 2010, the Trial Chamber of the SCSL (Judge Julia Sebutinde, Presiding) granted an application for the issuance of a subpoena to three witnesses: Naomi Campbell, Carole White and Mia Farrow. The Chamber noted that it was in the interest of a fair and expeditious trial to grant such application.¹⁷⁷

It can be contended that state officials have a duty to assist international criminal tribunals or courts especially when dealing with international crimes. Arguably, such state officials should not be accorded immunity from prosecution and that such immunity does not extend to issues of subpoena *ad testificandum* or *duces tecum* as long as there are circumstances linking such senior state officials to the commission of international crimes. The idea is that state officials must not go unsummoned or unpunished before international and domestic courts for their involvement in the commission of international crimes. To crystallise this position, regard must be had, although in a different context, to the case of *South African Rugby Football Union and Others v President of the Republic of South Africa and Others*¹⁷⁸ wherein De Villiers, J of the Transvaal High Court, required Nelson Mandela, then President of the Republic of South Africa to give evidence. On two occasions, counsel for the President had objected to the order that the President be required to give evidence, but the Judge affirmed his order and President Mandela complied with it by giving evidence in court.

It is contended that courts must be proactive enough to summon state officials to give evidence insofar as international crimes are concerned. Courts must not shy away from

¹⁷⁷ *Prosecutor v Taylor*, Case No. SCSL-03-1-T, Decision on Public with Confidential Annexes A and B Prosecution Motion to call Three Additional Witnesses, Trial Chamber, 29 June 2010, paras 1-22, especially, 21.

¹⁷⁸ *South African Rugby Football Union and Others v President of the Republic of South Africa and Others* 1998 (10) BCLR 1256 (T); *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, per Chaskalson, P.

issuing subpoenas *ad-testificandum* and *duces tecum* where justice so requires. They must not be hand-and tongue-tied with the shield of immunity of state officials to the detriment of the other party to the proceedings. It can also be argued that in the same way, civil claims for reparations may rightly be advanced by the victims of human rights abuses against state officials who commit international crimes.

3.4 Conclusion

In this chapter, the discussion has been on the following aspects: whether the practice on immunity of state officials before international courts is settled; whether there is uniform standard of application regarding the question of immunity of state officials, and whether immunity of state officials covers criminal prosecution and subpoenas. It is observed that state officials do not receive the same treatment before international courts. The jurisprudence of international courts is inconsistent on the aspect of subpoenas to state officials.

Whereas the Nuremberg and Tokyo Tribunals did not recognise immunity from prosecution, the ICJ has decided in the *Arrest Warrant* case that a serving state official, particularly a Minister for Foreign Affairs enjoys immunity from prosecution before domestic courts of a foreign state. But, it is necessary to also understand that from the ICJ's decision, a former state official is amenable to prosecution before the ICC and international criminal tribunals for international crimes, and even domestic courts of a foreign state if such courts have jurisdiction and if immunity is not recognised by such courts.

The ICTY, ICTR and SCSL have held that a former state official does not enjoy immunity from prosecution. This position is reflected in the cases of *Milošević*, *Karadžić*, *Kambanda* and *Taylor* respectively. It is also observed that the ICC has stated a clear position that a serving president of a state that has not ratified the Rome Statute does not enjoy immunity from prosecution before it. This, the ICC did in respect of President Omar Al Bashir of Sudan who has been indicted by the Prosecutor of the ICC but

remains at large. It is also the position as evidenced in the trial of Saddam Hussein that former state officials enjoy no immunity from prosecution for international crimes.

However, the Appeals Chambers of the ICTY and SCSL, and the Trial Chamber of ICTR have also surprisingly held that a sitting state official cannot be subpoenaed in order to testify or appear for interview or submit important documents to be used as evidence before the international criminal tribunals. These decisions are reflected in the *Blaškić* case, *Norman* and *Moinina Fofana* case, and *Karemera* and *Nzirorera*¹⁷⁹ case respectively. This position has created a state of ‘confusion’ and ‘controversy’ in the field of immunity of state officials in international law.

It appears that both the SCSL and the ICTY have emphasised that while the immunity enjoyed by the state officials does not cover prosecution, such courts have stated that it covers *subpoenas ad testificandum* and *duces tecum*. This is the main point of confusion. But, for purposes of avoiding and rectifying such confusion, it is important to understand the dissenting opinions expressed by Judges Bankole Thompson and Geoffrey Robertson in opposition to that position as stated by the SCSL in *Norman* and *Fofana* case. The Dissenting opinions are to the effect that no state official enjoys immunity from being subpoenaed to testify or produce important documents that may be used as evidence in international criminal tribunals. This position is also supported by the decision of the Appeals Chamber of ICTY in the *Kršić* and *Milošević* cases as discussed in this chapter. Also, the decision of the Trial Chamber of the ICTY in *Blaškić* case (Judge McDonald, presiding) must be followed, and is in line with the decisions in *Kršić*, and the dissenting opinions at both the Trial Chamber and Appeals Chamber of the SCSL in *Norman* and *Moinina Fofana* case.

However, the jurisprudence of the SCSL on the question of subpoena is inconsistent and confusing. The inconsistency is observed in the way the Trial Chamber of the SCSL later came to accept the fact that former presidents can testify before it and thus granted

¹⁷⁹ *Prosecutor v Karemera, Ngirumpatse and 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, paras 1-16.

subpoena applications for President Tejan Kabbah to testify as a defence witness in *Sesay, Kallon and Gbao* on 30 June 2008. The same goes for the court's position in allowing former vice-president of Liberia, Moses Blah to testify against Charles Taylor in May 2008. Hence, there is a notable inconsistency and contradiction especially in the decisions of the Trial Chamber of the SCSL.

Furthermore, the Trial Chamber of the ICTR has emphatically held time and again that a state official does not enjoy immunity from being subpoenaed to testify or being interviewed for the purpose of fair conduct of a trial. The decisions of the ICTR in this regard are observed in various applications for subpoenas in the *Bagosora* cases as presented in this chapter.

There is need to treat state officials equally in respect of prosecution or testifying before international courts. This need is quite important for all trials before the ICC and other international tribunals. Since the ICC is a permanent court dealing with international crimes, it should adopt the good decisions on subpoenas by the Trial Chamber of the ICTR in *Bagosora* cases, and should consider the decision of the Trial Chamber of the ICTY in *Blaškić* case, and that of the Appeals Chamber of the ICTY in *Krštić* case, as well as the Dissenting Opinions of Judges Bankole Thompson and Geoffrey Robertson in the subpoena decisions before Trial Chamber and Appeals Chamber of the SCSL in *Norman and Fofana*, and the 2008 decision of the Trial Chamber of SCSL in *Sesay, Kallon and Gbao* case respectively. These decisions are important on the treatment of state officials, particularly on issues of subpoenas.

These decisions will help the ICC to interpret and apply the provisions of article 64(6) (b) of the Rome Statute in a more progressive way. The ICC should not shy away from compelling state officials to appear before it, or to testify and produce important documents before it for the purpose of fair preparation or conduct of trials. It is the view of this study that state officials enjoy no immunity from the normal legal processes to compel them to testify or give evidence before ICC and international criminal tribunals.

This is particularly so because such leaders have a duty to assist the ICC and the international criminal tribunals especially when dealing with international crimes.

Compelling such state officials to appear for interview or to testify inevitably renders fair trial for the accused in the courts especially when conditions for the issuance of subpoenas have been met and that, the efforts to secure their voluntary attendance have failed, and that such state officials may possess important information or evidence for the purpose of conducting or preparation of trials. From the practice at international and specialised criminal courts, state officials should not be accorded immunity from prosecution. Further immunity does not extend to issues of subpoenas *ad testificandum* or *duces tecum* as long as there are circumstances linking such senior state officials to the commission of international crimes.

Chapter 4

The African Union, prosecution of international crimes and the question of immunity of state officials

4.1 Introduction

The previous chapter has discussed the jurisprudence of international courts on immunity in relation to subpoenas against state officials. This chapter now contextualises the issues of immunity and prosecution of international crimes at the African Union (AU) level. It discusses how the AU has treated the questions of the immunity and prosecution of state officials for international crimes. It examines the legality or basis of the political concerns raised by the AU in respect of the indictment of some African state officials by the ICC. The practice of the AU is examined in line with the cases against President Omar Al Bashir of Sudan.

Further, the discussion is also on the intended measures to establish a Criminal Chamber within the African Court of Justice and Human Rights (the Criminal Chamber) with criminal jurisdiction for purposes of prosecuting persons who commit international crimes in Africa. This arises from the refusal by the AU to cooperate with the ICC over the arrest warrant issued against Omar Al Bashir.¹ The chapter argues that, by refusing to cooperate with the ICC, African states parties to the Rome Statute have breached their obligations under the Rome Statute.

In the course of discussion, the study examines whether the AU has any legal framework relevant to the prosecution of individuals who commit international crimes, including state officials. It highlights on the efforts made by the African Commission on Human and Peoples' Rights to urge African states to ratify and implement the Rome Statute.

¹ Not all African states have supported the call not to cooperate with the ICC over the arrest warrant for President Omar Bashir of Sudan. South Africa, Botswana and Uganda have shown their intent to arrest Bashir should he visit such states. However, it has recently been observed in Kenya and Chad that President Bashir can still officially visit even those states parties to the Rome Statute and those that have enacted laws implementing the Rome Statute.

Further, it discusses the existing sub-regional efforts to prosecute and punish perpetrators of international crimes, based on the example from the Great Lakes Region. Then, it examines the political concerns raised by the AU regarding the indictment of some of the African personalities of state before the ICC and some domestic courts in European states. The aim is to examine how the AU intends to address the question of immunity of state officials by refusing to cooperate with the ICC and by preferring trials of African state officials in Africa.

However, before discussing any of the concerns by the AU against the ICC, it is important to examine the current cases before the ICC which have apparently given rise to the concerns or opposition expressed by the AU against the ICC.

4.2 Cases before the International Criminal Court as at 2011

As of early 2011, all the six situations and several accused persons before the ICC² have come from Africa.³ The cases before the ICC are based on the state referrals,⁴ referrals by the United Nations Security Council⁵ and *proprio motu* powers of the Prosecutor to initiate investigations.⁶ Based on reasonable belief that individuals have committed international crimes in Uganda, DRC, Central African Republic, Kenya and Darfur, Sudan, the Prosecutor of the ICC requested the Pre-Trial Chamber of the ICC to issue arrest warrants for various individuals.⁷

Regarding the Situation in Uganda⁸ which was referred by the Government of Uganda to the Prosecutor of the ICC in December 2003, five warrants of arrest have been issued against five top leaders of the Lord's Resistance Army (LRA), a rebel force which

² On the jurisdiction of the ICC, see Ch 2, part 2.3.6 of this study.

³ For situations in the ICC, see information on the website of the ICC, at <<http://www.icc-cpi.int>> (accessed on 27 September 2010).

⁴ The situations in Uganda, DRC and Central African Republic.

⁵ The situations in Libya and Darfur, Sudan, through UNSC Res 1970(2011) and 1593(2005).

⁶ The situation in Kenya, pursuant to art 15, Rome Statute.

⁷ See cases at the ICC website <<http://www.icc-cpi.int>> (accessed on 27 September 2010).

⁸ For a discussion on the three situations in Uganda, DRC and Sudan, see generally, E Greppi, 'Inability to investigate and prosecute under Article 17' in Politi and Gioia (2008) 63-70.

operates in northern Uganda. The case is being heard by Pre-Trial Chamber II of the ICC. The rebel leaders that have been indicted are Joseph Kony, Vicent Otti (believed to have died), Okot Odhiambo, Dominic Ongwen and Raska Lukwiya. All these rebel leaders are accused of crimes against humanity and war crimes.⁹ In the Situation in the Democratic Republic of Congo, which was referred by the Government of the DRC in 2002, four cases are being heard by different chambers of the ICC. Three of those cases are still in the Pre-Trial stage while the case against Thomas Lubanga Dyilo is at the trial stage. In all these cases, the accused persons are charged with committing crimes against humanity and war crimes in the DRC.¹⁰ In the Situation in the Central African Republic, which was referred by the Government of the Central African Republic in 2003, there is one person charged with war crimes and crimes against humanity. That person is Jean-Pierre Bemba Gombo, former Vice-President and Senator of the DRC, and president of the Movement for the Liberation of Congo (*Mouvement pour la Libération du Congo* 'MLC') rebel forces which fought not only in the DRC, but also in the Central African Republic between 2002 and 2003. The case against Mr Bemba is currently being heard by Pre-Trial Chamber II of the ICC, and is at the pre-trial stage.¹¹

The situation in Libya is likely to lead to warrants of arrest being issued by the ICC. In his address to the Security Council in May 2011, the Prosecutor of the ICC indicated that he would apply for the issuance of warrants of arrest against Libyan leaders, including Muammar Gaddafi. Indeed, on 16 May 2011, the Prosecutor of the ICC filed an

⁹ See, Situation in Uganda, *Prosecutor v Kony*, Case No. ICC-02/04-01/05, Warrant of Arrest for Joseph Kony Issued on 8 July 2005 as Amended on 27 September 2005, Pre-Trial Chamber II, 27 September 2005, paras 1-53; *Prosecutor v Otti*, Case No. ICC-02/04-01/05, Warrant of Arrest for Vicent Otti, 8 July 2005, Pre-Trial Chamber II, paras 1-53; *Prosecutor v Odhiambo*, Case No. ICC-02/04-01/05, Warrant of Arrest for Okot Odhiambo, Pre-Trial Chamber II, 8 July 2005, paras 1-43; *Prosecutor v Ongwen*, Case No. ICC-02/04-01/05, Warrant of Arrest for Dominic Ongwen, Pre-Trial Chamber II, 8 July 2005, paras 1-41; *Prosecutor v Lukwiya*, Case No. ICC-02/04-01/05, Warrant of Arrest for Raska Lukwiya, Pre-Trial Chamber II, 8 July 2005, paras 1-41.

¹⁰ See, Situation in the Democratic Republic of Congo, *Prosecutor v 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 Ntaganda*, Case No. ICC-01/04-01/06, Warrant of Arrest, Pre-Trial Chamber I, 22 August 2006, p.1-5; *Prosecutor v Katanga*, Case No. ICC-02/04-01/07, Urgent Warrant of Arrest for Germain Katanga, Pre-Trial Chamber I, 2 July 2007, p.1-7; *Prosecutor v Chui*, Case No. ICC-01/04-02/07, Warrant of Arrest for Mathieu Ngudjolo Chui, 6 July 2007, p.1-8.

¹¹ See, Situation in the Central African Republic, *Prosecutor v Bemba Gombo*, Case No. ICC-01/05-01/08, Warrant of Arrest for Jean-Pierre Bemba Gombo Replacing the Warrant of Arrest issued on 23 May 2008, Pre-Trial Chamber III, 10 June 2008, p.1-10.

application for the issuance of warrants of arrest for Muammar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi¹² alleging their criminal responsibility for crimes against humanity committed in Libya since 15 February 2011. The application was filed pursuant to article 58 of the Rome Statute. As of 23 May 2011, the ICC had not yet decided on the application. Because investigations are still ongoing in Libya, it is anticipated that more applications and cases could arise from Libya. However, it would be important if the Prosecutor of the ICC investigated other international crimes, particularly grave breaches of the Geneva Conventions and war crimes, from both sides of the conflict in Libya: rebel forces; government forces; and crimes committed by NATO and other forces operating in Libya.

In the situation in Darfur, there are five cases being heard by Pre-Trial Chamber I of the ICC. One suspect, Bahr Idriss Abu Garda appeared voluntarily before Pre-Trial Chamber I of the ICC on 18 May 2009. His appearance followed a summons to appear issued by the Pre-Trial Chamber I of the ICC.¹³ The Prosecutor had filed an application for the issuance of a warrant of arrest or summons to appear alleging that Abu Garda committed war crimes, particularly attacking the AU Mission in Sudan on 29 September 2007. The rebel force under control and command of Abu Garda attacked the AU peacekeepers resulting to the death of twelve peacekeepers. The Pre-Trial Chamber of the ICC conducted a confirmation hearing in respect of Abu Garda between 19 and 29 October 2009. On 8 February 2010, Pre-Trial Chamber I refused to confirm charges against Abu Garda on the ground that the prosecution had failed to prove evidence incriminating him with the crimes. An appeal by the Prosecutor was refused on 23 April 2010. Although no charges have been confirmed as yet, Abu Garda is currently being held by the ICC as the Prosecutor intends to submit new evidence.¹⁴

¹² Situation in the Libyan Arab Jamahiriyah, *Prosecutor's Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, No. ICC-01/11, Public Redacted Version, Pre-Trial Chamber I (Judge Cuno Tarfusser, Presiding Judge, Judge Sylvia Steiner and Judge Sanji Mmasenono Monageng), 16 May 2011, 1-23, paras 1- 68.

¹³ *Prosecutor v Garda*, Case No. ICC-02/05-02/09, Summons to Appear for Bahr Idriss Abu Garda (Public), 7 May 2009, Pre-Trial Chamber, 1-10.

¹⁴ *Prosecutor v Garda*, Case No. ICC-02/05-02/09, Public Decision on the "Prosecution's Application for Leave to Appeal the Decision on the Confirmation of Charges", 23 April 2010, Pre-Trial Chamber, 1-15.

The appearance of Abu Garda was later followed by the voluntary appearance on 17 June 2010, by Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus, charged with war crimes.¹⁵ This was in compliance with a summons to appear issued by the Pre-Trial Chamber on 27 August 2009.¹⁶

The Darfur situation has at present led to indictments against two senior state officials of Sudan, a sitting president (Omar Al Bashir), and Ahmad Harun, a Minister of State for the Interior of the Government of Sudan, and former Minister of State for Humanitarian Affairs.¹⁷ Ahmad Harun is charged with war crimes and crimes against humanity while Bashir is charged with genocide, crimes against humanity and war crimes. In respect of President Bashir, a charge of genocide was included in the application for a warrant of arrest by the Prosecutor but the Pre-Trial Chamber did not confirm it. The Prosecutor appealed the decision of the Pre-Trial Chamber on the question of genocide. The Appeals Chamber of the ICC rendered its decision reversing the decision of the Pre-Trial Chamber, and ordering it to reconsider the genocide charge *de novo*.¹⁸ Consequently, the Pre-Trial Chamber, now composed of different judges, issued its decision allowing the genocide charge against President Omar Al Bashir,¹⁹ and issued a new arrest warrant containing the genocide charge.²⁰ The Chamber decided that way because it had reasonable ground to believe that Omar Al Bashir is criminally responsible under articles 25(3) and 6(a)-(c) of the Rome Statute for the crime of genocide, at least indirectly as a

¹⁵ *Prosecutor v Nourain and Jamus*, Case No. ICC-02/05-03/09, Pre-Trial Chamber I, 17 June 2010, Transcript (ICC-02/05-03/09-T-4-ENG ET WT 17-06-2010 1/27 SZ PT), 1-27.

¹⁶ *Prosecutor v Nourain and Jamus*, Case No. ICC-02/05-03/09, Pre-Trial Chamber I, Second Decision on the Prosecutor's Application under Article 58, 27 August 2009, paras 1-35; *Prosecutor v Nourain*, Case No. ICC-02/05-03/09, Confidential Summons to Appear for Abdallah Banda Abakaer Nourain, 27 August 2009, paras 1-20; *Prosecutor v Jamus*, Case No. ICC-02/05-03/09, Confidential Summons to Appear for Saleh Mohammed Jerbo Jamus, 27 August 2009, paras 1-20.

¹⁷ See generally, Situation in Darfur, Sudan, *Prosecutor v Al-Bashir*, Case No. ICC-02/05-01/09, Warrant of Arrest for Omar Hassan Al-Bashir, Pre-Trial Chamber I, 4 March 2009, p.1-8; *Prosecutor v Harun*, Case No. ICC-02/05-01/07, Warrant of Arrest for Ahmad Harun, Pre-Trial Chamber I, 27 April 2007, p.1-16; *Prosecutor v Al Abd –Al-Rahman (Ali Kushayb)*, Case No. ICC-02/05-01/07, Warrant of Arrest for Ali Muhammad Al Abd –Al-Rahman, Pre-Trial Chamber I, 27 April 2007, p.1-17.

¹⁸ *Prosecutor v Al Bashir*, Case No. ICC-02/05-01/09 OA, Judgment on the Appeal of the Prosecutor against the "Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir", Appeals Chamber, 3 February 2010, 1-18, paras 1-42.

¹⁹ *Prosecutor v Al Bashir*, Case No. ICC-02/05-01/09, Second Decision on the Prosecution's Application for a Warrant of Arrest, Public Document, 12 July 2010, 1-30, paras 1-44.

²⁰ *Prosecutor v Al Bashir*, Case No. ICC-02/05-01/09, Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir, Public Document, 12 July 2010, 1-9.

co-perpetrator or perpetrator of genocide in Darfur. President Omar Al Bashir of Sudan is now the first person ever to be charged with genocide before the ICC.

On 31 March 2010, Pre-Trial Chamber II of the ICC issued a decision authorising the Prosecutor to begin investigation into the Situation in Kenya pursuant to article 15 of the Rome Statute.²¹ Such authorisation was based on the fact that the Chamber had reasonable ground to believe that crimes against humanity were committed in Kenya during the post-election conflict.²² On 15 December 2010, the Prosecutor of the ICC filed an application for the issuance of summonses to appear for six individuals, including Kenyan senior state officials. These are Henry Kiprono Kosgey, William Samoei Ruto, Joshua Arap Sang, all members of the political party called the Orange Democratic Movement (ODM).²³ The other persons are Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, all state officials and members of a political party called the Party of National Unity (PNU).²⁴ The Prosecutor submitted that there were reasonable grounds to believe that all these suspects committed crimes against humanity within the jurisdiction of the ICC and therefore that the court should issue summonses to appear. On 8 March 2011, the Pre-Trial Chamber issued its decision on the Prosecutor's application for the issuance of summonses to appear for the suspects.²⁵ The suspects entered their initial appearances on 7 and 8 April 2011. The ICC will conduct a

²¹ See, Situation in Kenya, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Kenya, Public Document, No. ICC-01/09, 31 March 2010.

²² Situation in Kenya, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Kenya, Public Document, No. ICC-01/09, 31 March 2010, 1-80, paras 1-153.

²³ 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.

²⁴ 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.

²⁵ *Prosecutor v Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, Case No. ICC-01/09-02/11, Decision on the Prosecutor's Application for Summons to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, Pre-Trial Chamber, 8 March 2011; *Prosecutor v William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, Case No. ICC-01/09-01/11-01, Decision on the Prosecutor's Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, 8 March 2011. The suspects entered their initial appearances on 7 and 8 April 2011.

confirmation of charges hearing later in September 2011 either to discharge them or to confirm the charges against them.

Following the ICC Prosecutor's application for the issuance of summonses to appear for the Kenyan state officials, Kenya approached the AU asking it to request the United Nations Security Council to defer the investigations and prosecution in Kenya. In its decision on the implementation of the decisions on the ICC, the AU supported and endorsed Kenya's request for a deferral of investigations and prosecutions regarding crimes against humanity committed in Kenya during the post-election violence in 2008.²⁶ It should be understood clearly that a request for the deferral of investigation and prosecution under article 16 of the Rome Statute does not do away with subsequent prosecution. Consequently, no matter how long it takes, Kenyan individuals can still be prosecuted. The Security Council cannot tolerate impunity in the name of deferrals of investigations or prosecutions. Hence, it is wrong for the AU to endorse the request by Kenya for a deferral of investigation and prosecution. It must be recalled that Kenya did not utilise its opportunity under article 17 of the Rome Statute when it was given such opportunity. Kenya failed to prosecute persons responsible for crimes against humanity at its national courts. To request for a deferral of prosecution is not in any event going to be in line with complementarity principle for Kenya.

The fact that the accused persons currently before the ICC have all come from Africa, has given rise to a negative attitude by the AU against the ICC. Except Botswana, South Africa and Uganda, the rest of the AU member states have categorically taken a position that the ICC has targeted Africans, and state officials in particular, leaving other persons from other states scot-free. As will be observed below, the AU has decided not to cooperate with the ICC in respect of the warrant of arrest for President Omar Al Bashir of Sudan. While this declaration may hold substance at least politically, it does not hold any

²⁶ See, Decision on the Implementation of the Decisions on the International Criminal Court, Doc.EX.CL/639(XVIII), Assembly/AU/Dec.334(XVI), para 6, Sixteenth Ordinary Session, 30-31 January 2011, Addis Ababa. However, one must note that some Kenyan authorities do not want to accept that Kenya requested the deferral of the investigations. For example, Vice President of Kenya, Kalonzo Musyoka is reported to have said in the Kenyan *Daily Nation* that Kenya had not requested any such deferral. See, 'Leaders trade barbs over Ocampo six trials at burial', *Daily Nation*, 20 March 2011.

legal validity under international law. It will be argued below that there is no legal basis to allege that the ICC has targeted Africans.

At this point, it is necessary to discuss the validity or otherwise of allegations levelled against the ICC by the AU whilst relating it to the question of immunity of African state officials. But, before doing so, it is necessary to examine whether the AU has any legal or institutional framework to prosecute crimes that are also within the jurisdiction of the ICC.

4.3. The African Union and legal framework on prosecution of international crimes in Africa

The African Union (AU), which replaced the former Organization of the African Unity (OAU), was formed in 2000 through the Constitutive Act of the African Union (the Constitutive Act of the AU). The Constitutive Act of the AU was adopted by the then OAU Assembly of Heads of State and Governments in Lomé, Togo, at the 36th ordinary session of the Assembly from 10-11 July 2000. The Constitutive Act of the AU contains key principles that reject impunity in Africa. Such principles are reflected in article 4 of the Constitutive Act of the AU.²⁷ Amongst them, is the principle that allows the AU to have the right to intervene in a member state pursuant to a decision of the Assembly of Heads of State and Government of the Union in respect of grave circumstances, namely: ‘war crimes, genocide and crimes against humanity.’²⁸ The AU has the duty to respect for the sanctity of human life, condemnation and rejection of impunity²⁹ and to respect democratic principles, human rights, rule of law and good governance.³⁰

²⁷ Relevant parts of art 4 of the Constitutive Act of the AU provide that:

‘The Union shall function in accordance with the following principles:

(h) the right of the Union to intervene in a member state pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes; genocide and crimes against humanity;

(o) respect for the sanctity of human life, condemnation and rejection of impunity and political assassination, acts of terrorism and subversive activities.’

²⁸ Art 4(h).

²⁹ Art 4(o).

³⁰ Art 4(m).

It should be recalled that the AU was meant to curb *inter alia*, the endemic problems of armed conflicts in Africa, and hence the essence of such principles. Events of the genocide in Rwanda in 1994 practically played role in providing the background to relevant provisions in the Constitutive Act of the AU on ‘rejection of impunity’ and allowing the AU to ‘intervene’ in a member state of the Union in case of ‘grave circumstances’ of genocide, war crimes and crimes against humanity.

Apart from the provisions of article 4(h) of the Constitutive Act of the AU, the AU does not seem to have an express mandate to prosecute individuals who commit international crimes in Africa, particularly at regional level. Perhaps a possible way is for the AU to rely on moral or political grounds to ask one of its member states to prosecute perpetrators of international crimes (particularly state officials) as Senegal did for Habré on behalf of the AU. It is difficult to infer that ‘intervention’ as envisaged under article 4(h) of the Constitutive Act of the AU would include ‘prosecution’ of perpetrators of international crimes in Africa. It is contended that the word ‘intervene’ as put in article 4(h) was meant to apply to military intervention (use of force) and not judicial intervention as such. Except for article 4(o) of the Constitutive Act of the AU, no other provisions reject impunity, and by analogy, immunity for international crimes. Despite the rejection of impunity, it is not entirely and specifically provided in the Constitutive Act of the AU whether really an African state official can be prosecuted for international crimes and therefore that, in grave circumstances of genocide, war crimes and crimes against humanity, a state official may not claim immunity from prosecution for such crimes in Africa. However, based on customary and conventional international law, it may be argued that such state officials cannot benefit from immunity for international crimes.

Although the Constitutive Act of the African Union contains provisions that reject impunity for international crimes³¹ committed in African states, it nevertheless does not have an express provision outlawing immunity of state officials from prosecution for such crimes. Thus, at African regional level, there is currently no instrument which calls

³¹ Arts 4(h), 4(m) and 4(o).

for prosecution of individuals who commit international crimes in Africa and rejects immunity of state officials in general.³² However, one may argue that since the Constitutive Act of the AU rejects impunity and by necessary inference refers to human rights, it follows that in general sense, it can be said to have rejected immunity for international crimes.

It is important to understand that in 2005 the African Commission on Human and Peoples' Rights (the African Commission) adopted a resolution in which it urged African states to end impunity in Africa, and to domesticate and implement the Rome Statute.³³ In this resolution, the African Commission recalled its Resolution on the Ratification of the Treaty on the International Criminal Court (the Rome Statute) by the African Commission on Human and People's Rights, which was adopted at Banjul, on 31 October 1998. It also made reference to the Resolution on the Ratification of the Statute of the International Criminal Court by OAU member states, adopted at Pretoria, on 16 May 2002.³⁴ Further, the African Commission noted that international crimes continued to be committed in Africa, while perpetrators were rarely brought to justice. In addition, it was concerned that some African states that had ratified the Rome Statute had not incorporated it at national level. In this regard, the African Commission urged member states of the AU 'to ensure that the perpetrators of crimes under international human rights law and international humanitarian law should not benefit from impunity.'³⁵ It also called for African states 'to ratify the Rome Statute and to adopt a national plan of action for the effective implementation of the Rome Statute at the national level.'³⁶ Recognising the fact that some African states had entered into bilateral immunity agreements with USA, the African Commission urged African states 'to withdraw from article 98 Bilateral

³² However, regarding corruption (which is not an international crime as per this study), there is the African Union Convention on Preventing and Combating Corruption, adopted in Maputo on 11 July 2003, entered into force on 5 August 2006. Art 3(5) of this Convention provides for total rejection of impunity in respect of corruption.

³³ *Resolution on Ending Impunity and on the Domestication and Implementation of the Rome Statute of the International Court* (2005). The resolution is reprinted in C Heyns and M Killander (eds.), (2007) *Compendium of key human rights documents of the African Union*, 323-324.

³⁴ Preamble to *Resolution on Ending Impunity and on the Domestication and Implementation of the Rome Statute of the International Court* (2005).

³⁵ Para 1 of the Resolution.

³⁶ Para 2.

Immunity Agreements and refrain from engaging in acts that would weaken the effectiveness of the Court in line with their international obligations.’³⁷ Finally, it encouraged ‘the Assembly of Heads of State and Government of the African Union to urge its member states to condemn and reject impunity.’³⁸

From the preceding, one observes that the African Commission had made efforts to ensure that African states ratified the Rome Statute in order to end impunity for international crimes. However, it is common that resolutions of the African Commission are non-binding as such. In particular, the resolution at issue was merely to encourage states but not to create obligation on African states to reject impunity or repress international crimes. Given this observation, one needs to look at the binding treaties on this matter.

It has been observed earlier that there is no African regional treaty to punish international crimes. Short of any regional legal framework on the prosecution of international crimes in Africa, one must rely on the sub-regional legal instruments. In Africa, the only express sub-regional mechanism that calls for prosecution of individuals who commit international crimes, and rejects immunity of state officials is the *Protocol for the Prevention and the Punishment of the Crime of Genocide, War Crimes and Crimes against Humanity and all forms of Discrimination*, which was signed by the International Conference on the Great Lakes Region, on 29 November 2006. The Protocol is now examined in turn.

4.3.1 Protocol for the Prevention and Punishment of the Crime of Genocide, War Crimes and Crimes against Humanity and All Forms of Discrimination

On 29 November 2006, Heads of State and Governments of the International Conference on the Great Lakes Region adopted a *Protocol for the Prevention and the Punishment of the Crime of Genocide, War Crimes and Crimes against Humanity and all forms of*

³⁷ Para 3.

³⁸ Para 5.

Discrimination. This is a Protocol to the Pact on Security, Stability and Development in the Great Lakes Region.³⁹ The Protocol is an integral part of the Pact and does not need separate signatures.⁴⁰ Eventually, all members to the Pact are members to this Protocol. The Protocol was adopted against the background of obligations arising from the Genocide Convention and the United Nations General Assembly Resolution 96(I) of 11 December 1946 which declared that ‘genocide’ is a crime under international law. It was adopted on the premises of the endemic armed conflicts aggravating massive human rights violations and impunity for international crimes of genocide, war crimes and crimes against humanity especially in the Great Lakes Region. Further, the precept of this Protocol was the Geneva Conventions governing the conduct of hostilities during armed conflicts, as well as the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol. Amongst other international instruments setting the background for this Protocol is the Rome Statute.

The Preamble to the Protocol states that all member states of the Great Lakes Region were mindful of their duty to exercise criminal jurisdiction over the perpetrators of genocide, war crimes and crimes against humanity. It also refers to Common Article 3 to the Geneva Conventions as enshrined in article 3 of the Statute of the ICTR. This results from the history of the genocide in Rwanda in 1994. The Great Lakes Region is determined to put an end to such international crimes in its region.⁴¹

The Protocol defines the crimes of genocide, war crimes and crimes against humanity as defined under articles 6, 7 and 8 of the Rome Statute.⁴² The purpose of the Protocol is also to give effect to the Genocide Convention, 1948, and the Rome Statute in the member states of the Great Lakes Region.⁴³ Importantly, the Protocol imposes

³⁹ Pact on Security, Stability and Development in the Great Lakes Region, International Conference on the Great Lakes, 2006, signed at Nairobi, Kenya.

⁴⁰ Art 43, Protocol for the Prevention and the Punishment of the Crime of Genocide, War Crimes and Crimes against Humanity and all forms of Discrimination, International Conference on the Great Lakes Region, signed on 29 November 2006, Preamble, paras 1-12 (hereinafter ‘ Protocol on International Crimes’).

⁴¹ See, Protocol on International Crimes, Preamble, paras 1-12.

⁴² Art 1(a), (h) and (i).

⁴³ See Ch. III, art 8(1) – (3), Protocol on International Crimes.

obligations on member states of the Great Lakes Region to combat impunity and to take appropriate measures to bring before competent courts the perpetrators of genocide, war crimes and crimes against humanity in accordance with the Genocide Convention, the Rome Statute as well as relevant UN Security Council Resolutions. The option is provided to either punish perpetrators of such crimes before competent national courts or before international judicial bodies.⁴⁴ Further, member states to the International Conference on the Great Lakes Region are obliged to take measures to ensure that courts have jurisdiction to punish genocide, war crimes and crimes against humanity. Article 11 of the Protocol provides that statutes of limitation shall not apply with regards to genocide, war crimes and crimes against humanity. More relevant is article 12 of the Protocol, which expressly outlaws immunity and provides that:

The provisions of this chapter shall apply to all persons suspected of committing the offences to which this Protocol applies, irrespective of the official status of such persons. In particular, the official status of a Head of State or Government, or an official member of a Government or Parliament, or an elected representative or agent of a State shall in no way shield or bar their criminal liability.

It should be noted that despite this good authority outlawing immunity, state parties to the Protocol have nevertheless never respected this obligation because they have actually participated in the AU decisions refusing cooperation with the ICC over the arrest warrant for President Bashir. It is submitted that states parties to the Protocol should have respected their clear obligation under article 12 of the Protocol regarding the Sudanese president.

As the Protocol was adopted whilst having the provisions of the Rome Statute in mind, it is not surprising that article 12 of the Protocol replicates the contents of article 27 of the Rome Statute. Member states in the Great Lakes Region have also undertaken to cooperate in the detection, prevention and punishing of individuals who commit genocide, war crimes and crimes against humanity in the region.⁴⁵ Extradition may be sought by any member state to the Protocol and the Great Lakes Region in respect of

⁴⁴ Art 9, Protocol on International Crimes.

⁴⁵ Art 13.

international crimes of genocide, war crimes and crimes against humanity.⁴⁶ Article 21 of the Protocol creates an express obligation on member states to ratify the Rome Statute in accordance with their constitutional requirements. Perhaps this provision has led to the ratification of the Rome Statute in many of the member states of the Great Lakes Region. Of the eleven core member states of the International Conference on the Great Lakes Region,⁴⁷ only Angola, Rwanda and Sudan have not ratified the Rome Statute as at 2010.⁴⁸

Article 22 of the Protocol obliges member states to enact laws to enable cooperation with the ICC. Despite this express obligation, it must be understood that states parties to the Protocol such as Tanzania, Rwanda, Zambia, Angola and Sudan have not yet enacted such laws to enable cooperation with the ICC. Failure to enact such laws seems to be a clear breach of their legal obligation under the Protocol. Article 23 of the Protocol is more emphatic on the cooperation with the ICC. It requires the member states to provide cooperation in respect of arrest and hand over to the ICC, of all persons suspected of having committed crimes within the jurisdiction of the ICC. It also deals with requests for cooperation related to renunciation of immunity and consent to hand over indicted persons and execution or enforcement of the ICC sentences to individuals. Article 24 of the Protocol provides that in case of competing requests, the ICC shall take precedence over the national requests of member states. This provision empowers the ICC to have supremacy over national courts in cases of requests. However, all cooperation with the

⁴⁶ Arts 14-16.

⁴⁷ The eleven core member states of the Great Lakes Region are: Republic of Angola; Republic of Burundi; Central African Republic; Republic of Congo; Democratic Republic of Congo; Republic of Kenya; Republic of Rwanda; Republic of Sudan; United Republic of Tanzania; Republic of Uganda and the Republic of Zambia.

⁴⁸ Angola signed the Rome Statute on 7 October 1998 but has not ratified it; Sudan signed the Rome Statute on 8 September 2000 but has not ratified it, hence the two states of Angola and Sudan are not states parties to the Rome Statute. Rwanda has neither signed nor ratified the Rome Statute. Tanzania ratified the Rome Statute on 20 August 2002, but has not yet enacted an implementing law. Kenya ratified it on 15 March 2005 (and has enacted a law to implement the Rome Statute of the ICC—the law is called the *International Crimes Act, 2008*). Zambia ratified the Rome Statute on 13 November 2002. Uganda ratified it on 20 August 2002 and has enacted a law to allow cooperation with the ICC, the law is called the *International Criminal Court Act, 2010*; Congo ratified the Rome Statute on 3 May 2005; DRC ratified it on 11 August 2002 (and is in the process of enacting an implementing legislation); Central African Republic ratified it on 3 October 2001; Burundi ratified the Rome Statute on 21 September 2004, and has amended its Penal Code to include crimes within the jurisdiction of the ICC.

ICC is subject to the ratification of the Rome Statute by member states of the Great Lakes Region who are parties to the Protocol.

In the end, the Protocol is the only strong legal instrument in Africa at present which specifically does not recognise immunity from prosecution for international crimes, and calls for punishment of persons who commit international crimes in the sub-region. It is a major sub-regional effort to curb the rising trend of commission of international crimes by state officials as well as private individuals in Africa.

In the preceding part, the discussion has been on the existing legal framework on the prosecution of international crimes in African regional and sub-regional levels. The following part will now address the growing concerns by the AU over prosecution of international crimes before the ICC. The purpose here is to examine how the AU intends to address the question of prosecution of international crimes and immunity of state officials by refusing to cooperate with the ICC and by preferring trials of African state officials in Africa.

4.4 The African Union concerns over prosecution of serving African state officials by the ICC

Following the issuance of a warrant of arrest for President Omar Al-Bashir of Sudan by the ICC, there has emerged in Africa, sentiments on the prosecution of African state officials. Apart from Africa, the Council of the League of Arab States had also issued a decision condemning the decision of the Pre-Trial Chamber of the ICC on President Omar Al Bashir of Sudan.⁴⁹ On its part, the AU which initially appeared to be amongst the greatest supporters of the ICC,⁵⁰ has now changed its position and relationship with the ICC and has embarked on the move not to cooperate with the ICC on the Omar Al

⁴⁹ See, Decision adopted by the Council of the League of Arab States meeting at Ministerial Level in Cairo, Egypt, on 4 March 2009.

⁵⁰ For a comprehensive understanding on the work of the African states in the creation of the ICC, see generally, P Mochochoko, 'Africa and the International Criminal Court' in EA Ankumah and EK. Kwakwa (eds.), (2005) *African perspectives on international criminal justice*, 241-258. As at 2010, only 30 African states are states parties to the Rome Statute.

Bashir's warrant of arrest despite the arrest warrants circulated by the ICC to states parties to the Rome Statute, including African states.

The AU has raised concerns reflecting that the ICC is an imperialist tool of Western powers and that it has only targeted and is discriminating against Africans. The Chairperson of the AU Commission, Jean Ping once echoed the views of the AU regarding the warrant of arrest issued against President Omar Al Bashir of Sudan in which he complained that the ICC is discriminating against Africa. He said:

We have to find a way for these entities [the protagonists in Sudan] to work together and not go back to war...This is what we are doing but Ocampo doesn't care. He just wants to catch Bashir. Let him go and catch him...We are not against the ICC...But we need to examine their manner of operating. There are double standards. There seems to be some bullying against Africa.⁵¹

Similarly, the Rwandan President, Paul Kagame raised concerns that the ICC is a new form of imperialism intending to undermine African and other powerless states. The argument that the ICC is an imperialist Western tool is also advanced by some African scholars. Mahmood Mamdani argues that the ICC is a manifestation of the modern Western colonialism. To Mamdani, the ICC is 'rapidly turning into a Western court to try African crimes against humanity. It has targeted governments that are US adversaries and ignored actions the United States doesn't oppose, like those of Uganda and Rwanda in eastern Congo, effectively conferring impunity on them.'⁵²

Further, it has been argued by the AU that the focus by the ICC on Africa undermines peace processes in African states. It is also the view of the AU that by refusing to authorise deferrals of the investigations and prosecutions in Kenya and Sudan, the Security Council has ignored calls by the AU for peace in Sudan and Kenya. The other concern is that the Security Council has played double standards against African states by referring the situation in Darfur, Sudan to the ICC. The argument goes further that the

⁵¹ The AU Chief challenges ICC to arrest Sudanese president, Sudan Tribune, 24 July 2010, available at <<http://www.sudantribune.com/spip.php?article3574>> (accessed on 12 February 2011).

⁵² M Mamdani 'The new humanitarian order' The Nation, 29 September 2008, available at <<http://www.thenation.com/doc/20080929/mamdani>> (accessed on 11 February 2011).

Security Council has failed to refer the situation in Gaza, Palestine, as recommended by the Goldstone Report following an inquiry on the crimes committed by Israel soldiers in Gaza in 2009.⁵³ Similarly, the Security Council has also failed to take measures to refer the conflict in Iraq to the ICC for further investigation and possible prosecution. However, the Prosecutor of the ICC seems to be considering the situations in Gaza, Iraq and Georgia.

The other concern raised by the AU and some individuals in Africa is that the ICC has decided to proceed against a serving President of Sudan while Sudan is not a state party to the Rome Statute. This argument seems to lean on articles 98 and 27 of the Rome Statute. Apparently, this argument would seem to also base on state sovereignty. During his time as Chairman of the AU, Bingu wa Mutharika (President of Malawi) pointed out clearly the issues of immunity of a state official and state sovereignty regarding President Bashir of Sudan. He said,

To subject a sovereign head of state to a warrant of arrest is undermining African solidarity and African peace and security that we fought for for so many years...There is a general concern in Africa that the issuance of a warrant of arrest for...al-Bashir, a duly elected president, is a violation of the principles of sovereignty guaranteed under the United Nations and under the African Union charter (sic). May be there are other ways of addressing this problem.⁵⁴

The merits and demerits of these grounds of objection or concerns by the AU will be considered later. However, before dealing with the objections, it is important that one sets the background on the AU decisions not to cooperate with the ICC as we turn to discuss below.

⁵³ See, 'Human Rights in Palestine and other Occupied Arab Territories' Report of the United Nations Fact-Finding Mission on the Gaza Conflict, A/HRC/12/48, Human Rights Council, Twelfth Session, Agenda Item 7, 25 September 2009, 1-452, paras 1-1979 and annextures. However, one must note that after the report was submitted to the UN, Richard Goldstone retracted from his findings, which makes it difficult to confirm whether military commanders and state officials from Israel should be held responsible for the crimes committed in Gaza.

⁵⁴ Quoted in M du Plessis (2010) *The International Criminal Court that Africa wants*, Monograph No.172, 18.

On 5 March 2009, the Peace and Security Council of the African Union at its 175th meeting at Addis Ababa, Ethiopia, adopted a position on the decision of the Pre-Trial Chamber I of the ICC to issue an arrest warrant against the President of the Republic of Sudan, Omar Al Bashir.⁵⁵ While recalling its Communiqué⁵⁶ as well as the AU Assembly decision,⁵⁷ the Peace and Security Council of the African Union expressed ‘deep concern over the decision that was taken by the Pre-Trial Chamber of the ICC on 4 March 2009, to issue an arrest warrant against the President of the Republic of Sudan, Mr. Omar Hassan Al-Bashir, for war crimes and crimes against humanity, and the far reaching consequences of this decision.’⁵⁸

The Peace and Security Council of the AU noted with regrets that the ICC decision came at a critical juncture in the process of promoting lasting peace and reconciliation in Sudan, and underlined that the search for justice should be pursued in a way that does not impede or jeopardise the promotion of peace in Sudan.⁵⁹ It reaffirmed the ‘AU’s conviction that the process initiated by the ICC and the decision of its Pre-Trial Chamber have the potential to seriously undermine the on-going efforts to address the many pressing peace and security challenges facing Sudan and may lead to further suffering for the people of the Sudan and greater destabilisation of the country and the region.’⁶⁰

Again, in its decision, the Peace and Security Council of the AU deeply regretted that despite the request made by the AU to the United Nations Security Council to defer prosecution of President Omar Al Bashir of Sudan under article 16 of the Rome Statute, the UN Security Council had failed to consider such a request.⁶¹ It thus appealed once again to the UN Security Council to assume its responsibilities by deferring the process

⁵⁵ 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.

⁵⁶ PSC/PR/Comm (CXLII) Rev 1., Adopted at its 142nd meeting held on 21 July 2008, at Addis Ababa, Ethiopia.

⁵⁷ See, 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.

⁵⁸ See, Communiqué of the 175th meeting of the Peace and Security Council of the African Union, 5 March 2009, paras 1 and 2.

⁵⁹ Para 2.

⁶⁰ Para 4.

⁶¹ Para 5.

initiated by the ICC against President Omar Al Bashir of Sudan.⁶² The UN Security Council did not agree to the AU's request, and only noted such a request. Although the AU may have a collective voice on the arrest warrant against Omar Al Bashir, it must be noted that the AU is not a party to the Rome Statute as a collective body. Instead, only some individual African states are parties to the Rome Statute. This could be the reason for the UN Security Council's rejection to the request by the AU.

It is argued further that the request by the AU did not demonstrate a clear case of a threat to international peace and security to merit a deferral by the Security Council. The issue of President Omar Al Bashir's prosecution cannot be solved by simply requesting a deferral. Even if the matter were to be deferred, it would still mean that President Omar Al Bashir can be tried at some other future time.

Relying on the decision by the Peace and Security Council of the AU,⁶³ the African Union's position is expressly stated in its decision of the AU Assembly on the ICC adopted on 3 July 2009 at Sirte, Libya.⁶⁴ But, before this decision, the AU Assembly had adopted another decision on the application by the ICC Prosecutor for the indictment of the President of the Republic of Sudan.⁶⁵ In its decision, the AU expressed its deep concern at the indictment made by the Prosecutor of the ICC against President Omar Al Bashir of Sudan.⁶⁶ The AU warned that, in view of the 'delicate nature of the peace processes' underway at the time in Sudan, the approval by the Pre-Trial Chamber of the ICC on the application for the issuance of arrest warrant against President Omar Al Bashir would 'seriously undermine the ongoing efforts' aimed at facilitating peace in

⁶² Para 6.

⁶³ See, Decision on the Application by the International Criminal Court (ICC) Prosecutor for the Indictment of the President of the Republic of Sudan, Decision Assembly/AU/Dec.221 (XII), adopted on 3 July 2009, Sirte, Libya, para 3 ('The Assembly...Endorses the Communiqué issued by the Peace and Security Council(PSC) of the African Union(AU) at its 142nd meeting, held on 21 July 2008, and Urges the United Nations Security Council, in accordance with the provisions of Article 16 of the Rome Statute of the ICC, and as requested by the PSC at its above mentioned meeting, to defer the process initiated by the ICC').

⁶⁴ 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.

⁶⁵ Decision on the Application by the International Criminal Court (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.

⁶⁶ Para 1.

Darfur.⁶⁷ The AU Assembly went ahead and requested the Commission of the African Union to discuss the issue of indictments against African leaders. Specifically, the Commission was required to do the following:

[T]o convene as early as possible, a meeting of the African countries that are parties to the Rome Statute on the establishment of the International Criminal Court (ICC) to exchange views on the work of the ICC in relation to Africa, in particular in the light of the processes initiated against African personalities, and to submit recommendations thereon taking into account all relevant elements.⁶⁸

In addition, reacting to the UN Security Council's position, the AU took a new perspective regarding the prosecution of President Omar Al Bashir:

[The AU Assembly] decides that in view of the fact that the request by the African Union has never been acted upon, the AU member states *shall not cooperate* pursuant to the provisions of Article 98 of the Rome Statute of the ICC relating to immunities, for the arrest and surrender of President Bashir.⁶⁹

The AU decisions on non-cooperation with the ICC indicate how African states are unwilling to cooperate with the ICC. In my field research at The Hague based international courts; I was convinced that the AU opposition to the ICC prosecutions poses a problem to prosecuting African individuals, including state officials responsible for international crimes. With particular reference to the arrest warrant issued against President Omar Al Bashir of Sudan, my discussions with officials of the ICC revealed that there are practical challenges in prosecuting state officials. One Judge of the Appeals Division of the ICC pointed out that the real problem is the lack of political will and state cooperation with the ICC in respect of enforcement of arrest warrants.⁷⁰ At the time of the discussion, Kenya had invited President Omar Al Bashir of Sudan. So, it was echoed that Kenya was in clear violation of its obligations arising from the Rome Statute by failing to arrest President Omar Al Bashir. A legal Officer at the ICC gave an opinion

⁶⁷ Para 2.

⁶⁸ Para 5.

⁶⁹ Para 10.

⁷⁰ Discussion with Judge Daniel Ntanda Nsereko, Appeals Division of the ICC, 31 August 2010, in his Chamber.

that states should cooperate with the court to enforce the warrants of arrest issued against President Omar Al Bashir of Sudan.⁷¹

The fact that the ICC officials called for state cooperation indicates that there is already lack of state cooperation with the ICC in respect of the arrest warrant against President Bashir. My discussions with the ICC officials revealed that the AU has also played a role in hampering the legal processes against President Omar Al Bashir. During the discussion, it was pointed out that by failing to arrest Omar Al Bashir; states like Chad and Kenya have clearly breached their international obligations arising from the Rome Statute. This suggests that states are not politically willing to cooperate with the ICC in the prosecution of President Bashir for international crimes.

Whether Omar Al Bashir will ever escape justice is an issue which remains to be seen.⁷² Like Radovan Karadžić, President Omar Al Bashir of Sudan could face justice after his time in office as president. So, Omar Al Bashir will probably be prosecuted no matter how long it takes to arrest him. A Senior Appeals Counsel at the ICTR⁷³ echoed the view that as long as a state official is charged with international crimes, such official is no less different from other accused persons. To this view, it is apparent that there is no much problem in prosecuting a state official as such.

Despite the AU decision not to cooperate with the ICC in respect of the warrant of arrest for Omar Al Bashir, it should be noted that some African states were not in support of the AU position. Botswana and South Africa had not agreed to the terms of the AU decision on the arrest and surrender of President Omar Al Bashir of Sudan, contending that they are bound by the terms of the Rome Statute, to which they are states parties. Botswana made it clear that it will support the ICC in enforcing the warrant of arrest issued against President Omar Al Bashir of Sudan. On 8 July 2009, Botswana stated that '[a]s a State

⁷¹ Response by Eleni Chaitidou, Legal Officer, Chambers, ICC, on 27 July 2010. The response was in respect of the question I posed during the Question and Answer session after a presentation on the work of the ICC was made by the two officials from the ICC. The presentation took place in the Auditorium, The Hague Academy of International Law.

⁷² Response by a Legal Officer, Office of the Prosecutor, ICC, on 27 July 2010.

⁷³ Dr George William Mugwanya, Senior Appeals Counsel, ICTR. Discussions were held on 9 July 2009 at The Hague.

Party to the Rome Statute of the ICC, Botswana will fully abide with its treaty obligations and will support the International Criminal Court in its endeavours to implement the provisions of the Rome Statute.’⁷⁴ On 4 July 2009, after the adoption of the Sirte AU decision on the warrant of arrest for Omar Al Bashir, Botswana issued a press statement in which it indicated that it did not agree with the AU decision not to cooperate with the ICC. Botswana contended that it has treaty obligations to cooperate with the ICC in the arrest and surrender of Omar Al Bashir to the ICC to face trial.

Following Botswana’s expression not to support the AU decisions, South Africa also made it categorically that it will support the ICC on the question of Omar Al Bashir. On 31 July 2009, Dr Ntsaluba (South African Minister for Foreign Affairs) explained that South Africa is a state party to the Rome Statute and therefore it is obliged to cooperate with the ICC. The Minister further stated that article 27 of the Rome Statute rejects immunity of state officials, comparing article 27 of the Rome State with section 4(1) of the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002.⁷⁵ The effect of this position is that if Omar Al Bashir visits South Africa, he can be arrested and surrendered to the ICC or prosecuted in South Africa for crimes within the jurisdiction of the ICC and South African courts.

Equally, contending on the cooperation with the ICC and obligations arising from the Rome Statute to which is a state party, Uganda indicated its position that it would arrest Omar Al Bashir, should he step on the Ugandan territory. This means that despite the AU collective decisions, individual states can proceed to arrest Omar Al Bashir in their own territories, doing so under the Rome Statute and national laws imposing obligations to arrest and surrender suspects of international crimes. In July 2010, during the 15th AU Summit held at Kampala, the AU took a decision once again not to cooperate with the

⁷⁴ A letter dated 8 July 2009 from the Minister of Foreign Affairs and International Cooperation of the Republic of Botswana to Justice Sany-Hyun Song, President of the ICC.

⁷⁵ M du Plessis (2010)16.

ICC in respect of arrest and surrender of Omar Al Bashir of Sudan, and rejected the request by the ICC to open a Liaison Officer to the AU in Addis Ababa, Ethiopia.⁷⁶

However, as the preceding examples indicate, the AU decisions not to cooperate with the ICC on the arrest warrant issued against Omar Al Bashir are not free from criticism. African Non-Governmental Organisations raised concerns over the decision of the AU on Omar Al Bashir, reminding African states of their obligations under the Rome Statute, to which some are states parties.⁷⁷ The statement issued by representatives of African Civil Society Organisations called upon African states parties to the Rome Statute 'to reaffirm their commitment to end impunity for serious international crimes and uphold the values of accountability, protection of human rights and the rule of law, as espoused in the AU's Constitutive Act.'⁷⁸ African states parties to the Rome Statute were also called upon to 'reaffirm [their] commitment to uphold (...) international and domestic obligations stemming from [their] decision to ratify the Rome Statute of the ICC.'⁷⁹

In South Africa, a group of NGOs as well as individuals petitioned the President of South Africa, Jacob Zuma, to remind the government that South Africa is a state party to the Rome Statute⁸⁰ and has enacted a law implementing the Rome Statute,⁸¹ and therefore that, that being the case, the South African government was obliged to adhere to international law obligations as recognised under the Constitution of South Africa, 1996.⁸²

⁷⁶ See, Press Release No.104, '15th AU Summit, Decisions of the 15th AU Summit', Addis Ababa, 29 July 2010, 6.

⁷⁷ See, 'Statement by Representatives of African Civil Society and the Legal Profession on the Implications of the African Union's recent Decisions on Universal Jurisdiction and the work of the International Criminal Court in Africa', Cape Town, 11 May 2009. The meeting of the 39 representatives was convened by the Institute for Security Studies (ISS). The statement was issued ahead of the meeting of the African States Parties to the Rome Statute of the ICC convened by the AU Commission which took place from 8-9 June 2009, at Addis Ababa, Ethiopia.

⁷⁸ 'Statement by Representatives of African Civil Society and the Legal Profession on the Implications of the African Union's recent Decisions on Universal Jurisdiction and the work of the International Criminal Court in Africa', Cape Town, 11 May 2009, 3.

⁷⁹ As above.

⁸⁰ See, 'Statement by Civil Society Organizations and Concerned Individuals on South Africa's Support for the Decision by the AU to refuse Cooperation with the ICC', 15 July 2009.

⁸¹ *Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002.*

⁸² Sec 231, Constitution of the Republic of South Africa, 1996.

According to sections 231 and 232 of the Constitution of South Africa, international treaties are part of the law of South Africa. Since the Rome Statute is an international treaty, and South Africa has enacted a law implementing the Rome Statute, it is therefore trite to say that South Africa is under obligation to respect its obligations under the Rome Statute, the constitution and *Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002*. In essence, the South African government was under duty to cooperate with the ICC on the issue of Omar Al Bashir. According to the law in South Africa,⁸³ if Omar Al Bashir stepped on the territory of South Africa, South Africa is obliged to arrest him and hand him to the ICC for prosecution. Hence, as a state party, South Africa is under obligation to cooperate with the ICC on the arrest warrant of Omar Al Bashir. The Civil Society Organisations and individuals had called for unequivocal statement by the Government of South Africa to honour its obligations under the constitution and the *Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002*.

After the issuance of warrant of arrest for Omar Al Bashir, the AU echoed its voice that, whilst it did not tolerate impunity,⁸⁴ it nevertheless was concerned with the indictment and warrant of arrest issued by the ICC against Omar Al Bashir. The AU contended that arresting and possibly prosecuting Omar Al Bashir ‘would disrupt the peace process in Darfur.’⁸⁵

The AU signaled its concerns that Omar Al Bashir was needed for the peace process in Darfur, and some authorities in Africa made allegations that the ICC is a creation of the Western powers or allies. It would appear that Africa had expressed its concerns that the ICC is largely portrayed as ‘imperialist’ imposition by powerful Western nations. But, it must be noted that the African Civil Society Organisations and members of the legal profession have diametrically argued that ‘this is a misleading and unproductive approach

⁸³ *Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002*.

⁸⁴ ‘Decision on the Application by the International Criminal Court (ICC) Prosecutor for the Indictment of the President of the Republic of Sudan’, Decision Assembly/AU/Dec.221 (XII), para 6 (stating that “The Assembly...Reiterates AU’s unflinching commitment to combat impunity and promoting democracy, the rule of law and good governance throughout the entire continent, in conformity with its Constitutive Act”).

⁸⁵ Paras 2 and 3.

to the Court, and one which illustrates the urgent need to raise awareness about international criminal justice and how the ICC works throughout Africa.’⁸⁶

It is a fact that the concerns by the AU have been that – the ICC has only targeted African leaders and other African individuals, and that – it represents the neo-colonial influences. The AU also seems to argue that arresting or prosecuting some African state officials for international crimes interferes with sovereignty of African states. However, it is important to know from the authorities at the ICC on this issue of selecting or targeting only Africans. The President of the ICC, Judge Sang-Hyun Song, has dismissed this claim as being political. Judge Song strongly argued,

And those who do not know that the ICC has sought none of the four situations currently before it could be forgiven for thinking that the Court has intended to have particular focus on Africa. Where facts are well understood, the Court enjoys broad support. But where they are not, there can arise efforts to exercise political influence on the Court.⁸⁷

Despite the above defensive statement by Judge Song of the ICC, the real issue is why the Prosecutor of the ICC has not indicted any of the leaders from Western powers such as USA, UK, France or Israel for their alleged crimes in Iraq and Palestine, or in Libya (during the war in Libya in 2011). This is for example, despite the authoritative reports, such as the one by Judge Richard Goldstone submitted to the UN with recommendations that the Prosecutor of the ICC should initiate legal investigation in respect of the international crimes committed by Israel state officials and military commanders in Palestine.⁸⁸

Arguably, the Prosecutor of the ICC can invoke his investigatory powers as he did for the Kenyan situation under article 15 of the Rome Statute in investigating crimes committed

⁸⁶ ‘Statement by Representatives of African Civil Society and the Legal Profession on the Implications of the African Union’s recent Decisions on Universal Jurisdiction and the work of the International Criminal Court in Africa’, Cape Town, 11 May 2009, 2.

⁸⁷ See, Remarks of Judge Sang-Hyun Song, President, International Criminal Court, made at a Seminar, ‘The International Criminal Court: Working for Africa’, Organised by the Institute for Security Studies, on 3 June 2009, at Pretoria, South Africa, 3.

⁸⁸ See, ‘Human Rights in Palestine and other Occupied Arab Territories’ Report of the United Nations Fact-Finding Mission on the Gaza Conflict, A/HRC/12/48, Human Rights Council, Twelfth Session, Agenda Item 7, 25 September 2009, 1-452, paras 1-1979 and annexures. As noted before, Goldstone later retracted from the findings contained in that report.

in Palestine and Iraq. However, the only obstacle is that states such as Israel and USA (unlike UK) are not parties to the Rome Statute. Nevertheless, should the UN Security Council act under its Chapter VII powers as per the Charter of the United Nations and refer the Iraq and Palestine situations to the ICC, the Prosecutor will be mandated. But this assertion can easily be defeated by the Veto powers from both the UK and USA, states that authorised their armed forces to invade Iraq and thereby committing international crimes. As to Israel, it could be difficult for the UN Security Council to pass a resolution authorising the ICC Prosecutor to investigate crimes committed in Palestine. This is so because Israel is an ally to both the USA and UK, and therefore that, any such proposal in the Security Council is likely be vetoed by UK and USA.

The above part has demonstrated the real concerns raised by the AU regarding the indictment of President Omar Al Bashir of Sudan by the Prosecutor of the ICC. The following part presents criticism and challenges against the AU concerns based on international law principles.

4.5 The African Union trend: A critique

This study maintains that African states must not deviate from what they had voluntarily subscribed to in the establishment of the ICC.⁸⁹ It would be fair to argue that African states, including Sudan had participated in the initial processes leading to the creation of the ICC.⁹⁰ Sudan had signed the Rome Statute of the ICC⁹¹ even though it has not ratified it, hence not a state party to the Rome Statute.

⁸⁹ For a critical understanding on Africa's contribution to the creation of the ICC, see, SBO Gutto, 'Africa's contradictory roles and participation in the international criminal justice system' in Ankumah and Kwakwa (2005) 17-27.

⁹⁰ Remarks of Judge Sang-Hyun Song, President, International Criminal Court, made at a Seminar, 'The International Criminal Court: Working for Africa', Organised by the Institute for Security Studies, on 3 June 2009, at Pretoria, South Africa, 2.

⁹¹ Sudan signed the Rome Statute of the ICC on 8 September 2000. But, on 27 August 2008, a few days after the indictment of President Bashir of Sudan, the Government of Sudan, through its Minister for Foreign Affairs, Deng Alor Koul, notified the Secretary-General of the United Nations that it does not intend 'to become a party to the Rome Statute', and therefore that it 'has no legal obligation arising from its signature on 8 September 2000.' Available at the UN treaties depository, <<http://treaties.un.org>> (accessed on 15 January 2010).

Several arguments are presented below against the AU's opposition to the issuance of an arrest warrant against Omar Al Bashir. It will be recalled that African states collectively in regional and sub-regional organisations had supported the establishment of the ICC. Besides, it is argued (as will be demonstrated below) that the Darfur situation was referred to the ICC by the UN Security Council. Further, thirty one African states are parties to the Rome Statute – which means that – such states are duty bound to cooperate with the ICC. It is also argued that the AU position not to cooperate with the ICC violates international law obligations arising from the Rome Statute. Additionally, it is argued below that the African states parties to the Rome Statute are obliged to prosecute and punish persons responsible for international crimes. This translates into cooperating in the arrest and prosecution of perpetrators of international crimes, including assisting the ICC in this regard. Further, it is argued that the AU's sentiment that only Africans are targeted by the ICC is countered by the fact that some African personalities occupy positions at the ICC and that African states may have failed to use complementarity principle. One must be mindful that although African states had ideally supported the establishment of the ICC, it is true that this does not mean they had accepted to be singled out by the ICC in its operation. While sympathising with African states in the way the operation of international justice has apparently taken shape in the ICC, it is appropriate to consider arguments countering the opposition raised by the AU as discussed below.

4.5.1 African regional and sub-regional organisations supported the ICC

Although African states have now turned against the ICC, it must be noted that African states had played a great role in the establishment of the ICC. Below is a clear indication of the previous initiative by African states. The African states through regional and sub-regional groupings had expressed desire for the establishment of the ICC. Both SADC and OAU (now AU) had taken steps towards achieving this goal. It should be recalled that on 14 September 1997, legal experts from the SADC member states met in Pretoria, South Africa and formulated ten principles⁹² for the establishment of the ICC.⁹³ The

⁹² SADC Principles of Consensus and Negotiations, formulated on 14 September 1997, available at <<http://www.iss.co.za/pubs/asr/9No1/InCriminalCourt.html> > (accessed on 27 September 2010).

experts from SADC had met to discuss their negotiation strategies and agree on a common position. This meeting served as an impetus for an Africa wide consultation process on the establishment of the ICC. The principles adopted were then transmitted for review to SADC Ministers of Justice and Attorney-Generals.⁹⁴ The SADC Ministers of Justice and Attorney-Generals adopted a common statement which later became an instruction manual for SADC's negotiations.⁹⁵ The statement affirmed the commitment of SADC to an early establishment of an independent and impartial court which is an effective complement to national criminal justice systems, with an equitable geographical composition.⁹⁶ SADC also believed that the ICC was necessary for peace and security.⁹⁷ It also believed that the ICC should have inherent jurisdiction in respect of core international crimes of genocide, war crimes and crimes against humanity.⁹⁸

Further, it was the SADC's position that the court should have competence to determine admissibility of cases regarding the inability, unwillingness and unavailability of national criminal justice with regard to international crimes.⁹⁹ Moreover, SADC believed that court must respect human rights of victims and accused persons before it.¹⁰⁰ SADC had warned that the court must not be subjected to the United Nations Security Council for it could cause a political influence on the court.¹⁰¹ Most importantly, SADC, including Zimbabwe had urged states to cooperate with the court, and encouraged member states to

⁹³ SADC was the first sub-regional organisation in Africa to formulate and agree on a set of principles of consensus for an effective ICC.

⁹⁴ For an exhaustive discussion on the SADC Principles, including the relevant attachment of the text of the Common Statement issued by SADC Ministers of Justice and Attorney-Generals, see, S Maungo, 'The establishment of the International Criminal Court: SADC's participation in the negotiations' (2000) 9(1) *African Security Review* 42, available at <<http://www.iss.co.za/pubs/asr/9No1/InCriminalCourt.html>> (accessed on 27 September 2010).

⁹⁵ S Maungo, 'The African contribution towards the establishment of an International Criminal Court' in AA Yusuf (2000) 8 *African Yearbook of International Law*, 333-350. The ten principles of SADC are listed at 335-336, fn.6 thereof.

⁹⁶ Common Statement issued by SADC Ministers of Justice and Attorney-Generals, 1997, para 1, available at <<http://www.iss.co.za/pubs/asr/9No1/InCriminalCourt.html>> (accessed on 27 September 2010).

⁹⁷ Para 2.

⁹⁸ Para 3.

⁹⁹ Para 4.

¹⁰⁰ Paras 5-6.

¹⁰¹ Para 8.

participate fully in the Rome Conference in order to finalise and adopt a Statute for the establishment of the court.¹⁰²

The SADC principles called for automatic jurisdiction over international crimes of genocide, crimes against humanity and war crimes. They also called for an independent Prosecutor with power to initiate proceedings *ex officio*; full cooperation of all states with the ICC at all times; and adequate funding for the court. The African states had also ‘banded together to ensure the court’s independence.’¹⁰³ In principle, African states had rejected proposals that the ICC be placed under control of the United Nations Security Council.¹⁰⁴

The SADC meeting was later followed by the meeting of the representatives of African governments in Dakar, Senegal from 5 to 6 February 1998 to discuss the establishment of the ICC. The Dakar Declaration on the ICC was adopted drawing largely from the SADC principles, and called for an early establishment of an effective and independent ICC.¹⁰⁵ The Dakar Declaration on ICC called for an independent ICC free from the UN Security Council; fair trial and rights of suspects and accused persons; and prosecution of individuals for international crimes when national courts proved unable and unwilling to prosecute. The Dakar Declaration on ICC was later to be acknowledged by the OAU Council of Ministers at its meeting on 27 February 1998, which appealed to all OAU member states to support the creation of the ICC.

The resolution of the OAU Council of Ministers was later approved by the OAU Summit of Heads of State and Governments at a meeting in Burkina Faso in June 1998.¹⁰⁶ It

¹⁰² Paras 9-13.

¹⁰³ Remarks by the President of the ICC, Judge Sang-Hyun Song, made at a Seminar, ‘The International Criminal Court: Working for Africa’, Organised by the Institute for Security Studies, on 3 June 2009, at Pretoria, South Africa, 4.

¹⁰⁴ As above.

¹⁰⁵ On the historical overview on the events and calls by African states leading to the establishment of the ICC, see, P Mochochoko, ‘Africa and the International Criminal Court’ in Ankumah and Kwakwa (2005) 241-258, 245.

¹⁰⁶ Mochochoko in Ankumah and Kwakwa (2005) 248-249.

would seem that, for Africa, the ‘establishment of the ICC was a matter of priority’¹⁰⁷ because it could strengthen measures adopted by African states in combating human rights violations, and thus peace and security. Former Prime Minister of Senegal had also said that ‘Africa needs a court that can deter and punish genocide and crimes against humanity since these are major human tragedies and obstacles to Africa’s economic and social development.’¹⁰⁸ Probably, African efforts towards establishing the ICC were a result of past history on the continent, particularly the events in Rwanda in 1994.

Even after the Rome Statute was adopted, some African states had recognised the necessity and importance of the ICC such that they mobilised themselves to take measures to ensure effective ratification and implementation of the Rome Statute. For instance, member states of the International Conference on the Great Lakes Region had in 2006 adopted a Protocol,¹⁰⁹ which called for ratification and implementation of the Rome Statute in national jurisdictions¹¹⁰ and cooperation with the ICC.¹¹¹

It can be said that the Protocol contributed to the ratification of the Rome Statute of the ICC by member states to the International Conference on the Great Lakes Region, except for Angola, Rwanda and Sudan. These states are non-parties to the Rome Statute of the ICC. So, given that member states to the Protocol have clear obligations to cooperate with the ICC, it is trite that by participating in the decisions of the AU not to cooperate with the ICC such states have breached their international obligations arising from the Protocol. An alarming fact is when Kenya defied its obligation to cooperate with the ICC in respect of the arrest warrant issued for Omar Al Bashir (who visited Kenya in August

¹⁰⁷ Tiyanjana Maluwa, the then OAU legal Counsel, had said on behalf of the OAU at the opening of the Rome Conference: “From the OAU’s point of view, the adoption of the statute establishing the international criminal court should not be delayed a day longer than necessary.” See, *Speeches and Statements at the Opening of the Rome Conference on 17 June 1998*. But see also, Mochochoko in *Ankumah and Kwakwa* (2005) 242, fn 3 where this statement is quoted.

¹⁰⁸ Statement of Senegalese Prime Minister, Habib Thiam at the Close of the Dakar Conference, 5-6 February 1998. The Dakar Conference was attended by 24 African states.

¹⁰⁹ Protocol for the Prevention and the Punishment of the Crime of Genocide, War Crimes and Crimes against Humanity and all forms of Discrimination, 1996 (Protocol on International Crimes). See Part 4.3.1 of this chapter above for further discussion on the Protocol.

¹¹⁰ See arts 9-11, Protocol on International Crimes.

¹¹¹ Arts 21-25, Protocol on International Crimes.

2010). By this, Kenya actually breached its clear international law obligations under the Rome Statute, the Protocol and its domestic law implementing the Rome Statute.¹¹²

4.5.2 African states had hailed the establishment of the ICC

By supporting the establishment of the ICC, African states favoured the world-wide move against a culture of impunity for international crimes. More importantly, African states were among the first to become states parties to the Rome Statute. Senegal became the first state party to the Rome Statute after it ratified the statute on 2 February 1999. Even more interesting is the fact that when the Rome Statute was adopted and opened for signature, some African states, particularly Zambia and Zimbabwe signed the treaty on the same day, that is, 17 July 1998. Some African states had held key positions in the Drafting and Preparatory Committees of the Rome Statute. South Africa, Lesotho and Zambia had participated in leading such groups. Siyuvule Maqungo has documented how the African states were generally represented in all the structures of the Rome Conference. Notable in this case, is ‘Egypt which chaired the Drafting Committee and Lesotho was a member of the Bureau of Committee of the Whole.’¹¹³ South Africa’s Peter Kruger was responsible for coordinating the Working Group on International Cooperation and Judicial Assistance at the Preparatory Committee. During the Rome Conference, this duty was given to Mr Phakiso Mochochoko of Lesotho. Medard Rwelamira of South Africa coordinated the Working Group on Organisational Questions (Composition and Administration of the Court).¹¹⁴

Studying the issues and negotiations for the ICC, it is apparent that African states had hailed the establishment of the ICC. Roy Lee has documented views and comments by all governments,¹¹⁵ including African governments on the establishment of the ICC. This study considers it useful to examine the African views, which are pertinent to the

¹¹² *International Crimes Act*, 2008, discussed in Ch 5, on Kenya.

¹¹³ Maqungo in Yusuf (2000) 339, fn 14 thereof.

¹¹⁴ For different roles held by African states, see, Maqungo in Yusuf (2000) 338.

¹¹⁵ See, RS Lee (Ed.), *The International Criminal Court: The making of the Rome Statute, issues, negotiations, results* (1999) 573-639. This paper adopts the views of African states as presented in extract form by Roy Lee who was the Executive Secretary of the Diplomatic Conference and Secretary of the Preparatory Committee on the Establishment of an International Criminal Court.

discussion at hand, as presented by Roy Lee. Much reliance is placed on the extracts of statements of views and comments of African states as presented.

Algeria had expressed its position that it ‘always longed for such Court, and ‘had always been committed to its achievement.’¹¹⁶ Benin contended that, ‘[t]he adoption of the Statute was historic. Benin would have preferred action by consensus. Africa would welcome the adoption of the Statute as it had for centuries suffered the most heinous crimes, such as slavery.’¹¹⁷ Botswana viewed the Rome Statute as a landmark in the history of the United Nations and mankind. It ‘supported the adoption of the Statute because it reflected consensus, and believed future generations should be able to perfect it.’¹¹⁸ Burkina Faso indicated that on the basis of its jurisdiction, its permanence and its universal in character, the court would provide an appropriate legal framework for the punishment of all grave breaches of fundamental rights. It also expressed that the court would eliminate the need for recourse to *ad hoc* tribunals.¹¹⁹ Cameroon welcomed the consensus on the complex principle of complementarity, but had suggested that the relation between the ICC and the Security Council should be one of cooperation and complementarity insofar as the court’s purpose was to reinforce the Security Council’s action in fulfilling its mandate under Chapter VII of the Charter of the United Nations.¹²⁰

Ghana indicated that the Rome Conference marked an important stage in efforts to establish a legal institution for prosecuting perpetrators of genocide, crimes against humanity, war crimes and serious violations of international humanitarian law. It also stated that ‘with the adoption of the Rome Statute, the international community had scored a historic victory.’¹²¹

Kenya welcomed the idea of having the ICC, and recognised the ‘contributions made by the Non-Governmental Organisations to the work of the Preparatory Committee and the

¹¹⁶ Lee (1999) 573 (citing Press Release, L/Rom/22, 17 July 1998).

¹¹⁷ Lee (1999) 577 (citing, Press Release, L/Rom/22, 17 July 1998).

¹¹⁸ Lee (1999) 577.

¹¹⁹ Lee (1999) 579, referring to Doc. A/C.6/53/SR.12, 22 October 1998.

¹²⁰ Lee (1999) 583, citing A/C.6/53/SR.12, 22 October 1998.

¹²¹ Lee (1999) 594.

Diplomatic Conference.’¹²² Kenya went further to suggest that the experience at the ICTY and ICTR be used by the ICC. The Nigerian delegation at the Rome Conference was ‘convinced that the establishment of the ICC would contribute towards the maintenance of international peace and security.’ As such, it called upon the international community to take all possible measures to ensure that the court came into operation without unnecessary delay.¹²³ Senegal welcomed the adoption of the Rome Statute in July 1998 in that such event marked an important stage in the international community’s efforts to build a world of justice and peace. Particularly, Senegal was concerned that ‘in the twentieth-century, too many acts of violations had gone unpunished’, which was why it supported the process of establishing the ICC. Indeed, Senegal was the first African state to sign the Rome Statute.¹²⁴

Speaking on behalf of the SADC, South Africa welcomed the adoption of the Rome Statute, which would ‘serve notice to those responsible for acts of genocide and other serious crimes that the culture of impunity was at an end.’¹²⁵ South Africa sent a message that the international community would no longer stand by and watch the perpetration of ‘horrendous crimes.’ It was South Africa’s belief that the Rome Statute ‘would serve as a reminder that even during armed conflicts the rule of law must be upheld.’ South Africa urged states to ratify the Rome Statute, and encouraged states that had voted against the adoption of the Rome Statute to put aside their misgivings and contribute to the establishment of the court. South Africa stated that it was necessary that there is impartiality, effectiveness and universality in the court. Lesotho aligned with the position stated by South Africa. It stressed the significance of adopting the Rome Statute. It urged for a compromise to be reached on the court’s jurisdiction, principle of complementarity, independence of the prosecutor and prohibited any reservations to be entered against provisions of the Rome Statute.¹²⁶ Equally, Zimbabwe associated itself with a statement

¹²² Lee (1999) 604-605.

¹²³ Lee (1999) 612.

¹²⁴ Lee (1999) 619-620.

¹²⁵ Lee (1999) 622-623, extracting the statement from A/C.6/53/SR.9, 20 October 1998.

¹²⁶ Lee (1999) 606-607, extracting the statement from A/C.6/53/SR.11, October 1998.

made by South Africa on behalf of SADC. It preferred ‘an independent, impartial court with automatic jurisdiction over the core crimes, including the crime of aggression.’¹²⁷

Sudan spoke on behalf of the Arab Group of States. It expressed the point that the ICC ‘must try every criminal that commits a crime against humanity.’¹²⁸ But indications were that the Arab states were not happy with the Rome Statute. They wanted the crime and act of aggression and nuclear weapons to be prohibited by the Statute. Also, concerns were that the Rome Statute could give power to the Security Council instead of the General Assembly. The Arab states wanted reservations to the Statute to be allowed. However, regarding Sudan’s own position, it was principally ‘to support judicial and other forms of peaceful settlement of disputes.’ Sudan expressed the concerns ‘whether it would be possible for the ICC to indict and try aggressors, or whether the principle of no impunity would be applied selectively to try only weak and absolve the strong. Sudan insisted that the ICC be independent from the Security Council and that the crime of aggression be included in the crimes falling within the competence of the ICC.’¹²⁹

Egypt called for the establishment of the ICC contending that the Arab world would need such a court, as acts of the perpetrator went unpunished. It accepted the text of the Rome Statute with some reservations for the need to include the use of weapons of mass destruction such as nuclear weapons, and the definition of aggression. Egypt indicated that determination of aggression should be under the purview of the General Assembly. Despite these, Egypt remained optimistic that the ICC would punish war crimes, genocide, crimes against humanity and protect children in situations of armed conflict.¹³⁰

In addition, other African states such as Uganda, Sierra Leone, Democratic Republic of Congo, Djibouti, Ivory Coast, Guinea, Malawi and Tanzania, supported the establishment of the ICC. Tanzania associated with the statement made by South Africa on behalf of SADC. But, Tanzania wanted criminal responsibility to be imputed to legal entities.

¹²⁷ Lee (1999) 637.

¹²⁸ Lee (1999) 624-625.

¹²⁹ Lee (1999) 624, referring to A/C.6/SR.12, 22 October 1998.

¹³⁰ Lee (1999) 591-592.

Tanzania's position was informed by the genocide in Rwanda.¹³¹ It can be said that if all these African states had supported the establishment of the ICC, any opposition against the ICC is not justified in law.

4.5.3 The Darfur Situation was referred to the ICC by the UN Security Council

Although the referral of the situation in Darfur sparks debates as to the impartiality of the Security Council and the issue of double standards against Africa, it is important to understand that the Darfur Situation was referred to the ICC by the United Nations Security Council by its resolution 1593 of 2005, well within the jurisdiction of the ICC in accordance with the Rome Statute.¹³² The referral was an implementation of the recommendations contained in the report of the International Commission of Inquiry on Darfur of 2005. The Security Council did so because it considered the judicial bodies in Sudan unable to do justice to the victims because the state authorities were unwilling and had therefore, failed to utilise the opportunity accorded to them through article 17 of the Rome Statute on complementarity principle. Under this principle, states enjoy the supremacy over prosecution of international crimes within the jurisdiction of the ICC. It is only when states have genuinely failed or are unwilling that the ICC can exercise its jurisdiction.

It must be recalled, the Sudanese authorities failed to conduct meaningful trials for perpetrators of international crimes in Darfur, and where there were prosecutions, such prosecutions were not genuine as such. This is why the Prosecutor of the ICC had to proceed against individuals responsible for the crimes committed in Darfur. Therefore, the AU should desist from levelling allegations against the ICC because the ICC is not meant to target Africans only.

As observed above, except for the situation in Kenya, all current situations before the ICC have actually been referred to the court by the African states and the United Nations Security Council. Again, it can be rightly argued that the Prosecutor of the ICC had

¹³¹ A/C.6.53/SR.9, 21 October 1998.

¹³² Art 13(b), Rome Statute.

followed all the necessary legal requirements and procedures stipulated under the Rome Statute in seeking the court's order to issue a warrant of arrest against Omar Al Bashir of Sudan.¹³³ The Prosecutor of the ICC had established that there were reasonable grounds to believe that Omar Al Bashir bears criminal responsibility for international crimes committed in Darfur.¹³⁴ As we have noted above, the Pre-Trial Chamber of the ICC was satisfied with the legal requirements set by the Rome Statute before it issued its decision allowing the Prosecutor's motion to issue a warrant of arrest for Omar Al Bashir for crimes against humanity, genocide and war crimes committed in Darfur.

4.5.4 Darfur and the question of immunity of serving state officials

It is true that the indictment of Omar Al Bashir raises an important concern regarding immunity attaching to state officials. It should be recalled that the AU condemned the issuance of warrants of arrest for Omar Al Bashir on *inter alia*, the issue of sovereignty and immunity of state officials, as we have noted the statement by the then Chairman of the AU, President Bingu wa Mutharika. The contention by the AU is that the issuance of the warrants of arrest seems to ignore the rule on immunity as provided for under article 98 of the Rome Statute. One must recall that article 27 of the Rome Statute outlaws immunity. Further, although a plain interpretation of the Rome Statute seems to suggest that the court can only exercise its jurisdiction over individuals from states parties to the Rome Statute, it must be understood that the ICC was empowered by the UN Security Council through resolution 1593 of 2005 to proceed against individuals from Sudan. This is only possible under article 25 of the Charter of the United Nations.

Sudan, and by extension, individuals from Sudan, are bound by article 25 of the Charter of the United Nations and resolution 1593 of 2005. Arguably, an obligation in respect of Sudan arises not from the express provisions of the Rome Statute, but rather, from the decision and referral by the UN Security Council and article 25 of the Charter of the

¹³³ Arts 53 and 58, Rome Statute.

¹³⁴ See, 'The Situation in Darfur, The Sudan', *Summary of the Case, Prosecutor's Application for Warrant of Arrest under Article 58 against Omar Hassan Ahmad Al Bashir*, Office of the Prosecutor, 1-32, available at <<http://www.icc-cpi.int>> (accessed on 15 January 2010).

United Nations. Hence, any immunity attaching to Sudanese state officials cannot apply under article 27 of the Rome Statute.

4.5.5 The peace processes in African states and calls for deferrals

One of the concerns raised by the AU is that the prosecutions at the ICC may affect peace process in Sudan and Kenya. This has been one of the reasons for calls for deferrals¹³⁵ of investigations and prosecutions in Sudan and Kenya respectively. This issue leads to the conclusion that the AU wants the UN Security Council to defer investigations in Sudan and Kenya and that such call should be seriously considered. It also seems that peace could prevail over the search for justice in African states. One must not undermine the role of international justice. Arguably, the search for peace has to go hand in hand with the search for justice. International crimes cannot be met with impunity as stressed in article 4(h), 4(m) and 4(o) of the Constitutive Act of the African Union.

It should be recalled that the ratification of the Rome Statute by African states defeats the purposes of calls for deferrals of investigations or prosecutions. Demands for deferrals must be supported by convincing evidence that prosecutions or investigations could threaten international peace and security. Even if deferrals could be the course, this does not mean that perpetrators of international crimes may escape justice. One has to weigh the evidence in favour of prosecution and that of a deferral. Regarding the situation in Darfur, it is true that serious international crimes were committed and that, the Commission of Inquiry on Darfur had found that Sudan had not commenced high profile prosecutions. Further, it is apparent that Sudan has refused to cooperate with the ICC in arresting and surrendering suspects of international crimes in Darfur. It should be understood that calls for deferrals by the Security Council do not indicate any possibility for Sudan to prosecute responsible persons for international crimes, despite arguments based on ensuring peace processes in Darfur.

¹³⁵ For a detailed study on deferrals under article 16 of the Rome Statute, see D Akande, M du Plessis and CC Jalloh 'An African expert study on the African Union concerns about article 16 of the Rome Statute of the ICC', Position Paper, Institute for Security Studies, Pretoria, 2010, 1-30.

Given that Sudan and Kenya have failed to prosecute persons responsible for international crimes, why should the two states be given the opportunities through deferrals? There is no clear indication at present to suggest that the deferrals might give rise to the domestic criminal prosecutions. In this regard, it is argued that requests by the AU for the deferrals should not be honoured because they do not show how the ongoing prosecutions are likely to jeopardise international peace and security. The only avenue left for Kenya and Sudan is the exercise of powers given to the Prosecutor under article 53 of the Rome Statute. This is a discretionary power conferred to the Prosecutor of the ICC and must require the proof of interests of justice before the Prosecutor can halt investigations or prosecutions. However, the Rome Statute seems to favour prosecution than deferrals, and that is why the ICC was established as such. It is thus recommended that calls for deferrals should not be taken to defeat the demand for justice. The AU should demonstrate genuinely that Kenya or Sudan can genuinely institute domestic criminal prosecutions which might perhaps frustrate the work of the ICC.

4.5.6 Some African states are states parties to the Rome Statute

The AU position against the ICC is flawed in law because the African states were instrumental to the establishment of the ICC.¹³⁶ At the time of writing, a total of thirty one African states are parties to the Rome Statute.¹³⁷ The last state to ratify the Rome Statute is Seychelles. These states ratified the Rome Statute and some of them, particularly South Africa, Kenya, Burundi, Uganda, Burkina Faso, Niger and Senegal, have enacted national laws recognising the competence of the ICC over international

¹³⁶ However, it can also be argued that supporting the establishment of the ICC does not necessarily lead to acceptance of the outcome of the court prosecutions.

¹³⁷ As of May 2011, African states parties to the Rome Statute of the ICC are thirty one: Benin (ratified the Rome Statute on 22 January 2002); Burkina Faso (30 November 1998); Ghana (20 December 1999); Mali (16 August 2000); Lesotho (6 September 2000); Botswana (8 September 2000); Sierra Leone (15 September 2000); Gabon (20 September 2000); South Africa (27 November 2000); Nigeria (27 September 2001); Central African Republic (3 October 2001); Mauritius (5 March 2002); Senegal (2 February 1999); Niger (11 April 2002); Democratic Republic of Congo (11 April 2002); Uganda (14 June 2002); Namibia (20 June 2002); The Gambia (28 June 2002); United Republic of Tanzania (20 August 2002); Malawi (19 September 2002); Djibouti (5 November 2002); Zambia (13 November 2002); Guinea (14 July 2003); Congo (3 May 2004); Burundi (21 September 2004); Liberia (22 September 2004); Kenya (15 March 2005); Comoros (18 August 2006); Chad (1 January 2007); Seychelles (October 2010) and Madagascar (14 March 2008) and Seychelles. This information is available at <<http://www.icc-cpi/int/Menu/ASP/statutes+parties>> (accessed on 29 August 2010).

crimes.¹³⁸ As such, these states are under obligation to provide full cooperation with the ICC in all aspects as enshrined under the Rome Statute of the ICC. Besides, by incorporating the Rome Statute into national laws, such states are under obligation to prosecute international crimes or arrest and surrender suspects of international crimes, such as President Bashir of Sudan, to the ICC to face justice. Some African states, although not yet parties to the Rome Statute of the ICC, had nevertheless signed the Rome Statute of the ICC.¹³⁹ Such states had signified their commitment to the ICC in the prosecution of international crimes. So, there is no genuine objection by the AU to the arrest warrant issued for Omar Al Bashir issued by the ICC.

4.5.7 African states have the duty to prosecute and punish international crimes

It should be understood that African states have an international obligation to prosecute and punish perpetrators of international crimes. Such obligation stems from the Rome Statute,¹⁴⁰ customary international law and other international law treaties.¹⁴¹ However, critics may argue that the Rome Statute does not contain an express universal jurisdiction provisions. Nonetheless, it is an international law obligation for states to either prosecute or punish international crimes¹⁴² (*aut dedere aut judicare*).¹⁴³ This is what is known as the duty to prosecute or punish individuals who commit international crimes. It must be

¹³⁸ South Africa, Senegal, Burundi, Niger, Burkina Faso, Uganda and Kenya have enacted laws to prosecute and punish crimes under the Rome Statute.

¹³⁹ Such states are the following: Algeria (signed the Rome Statute of the ICC on 28 December 2000); Angola (7 October 1998); Cameroon (17 July 1998); Cape Verde (28 December 2000); Cote d'Ivoire (9 November 1998); Egypt (26 December 2000); Eritrea (7 October 1998); Guinea-Bissau (12 September 2000); Morocco (8 September 2000); Mozambique (28 December 2000); Sudan (8 September 2000) and Zimbabwe (17 July 1998).

¹⁴⁰ The Preamble to the Rome Statute states that:

'[...] Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international co-operation,

Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes,

Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes [...]

¹⁴¹ See, The Genocide Convention, arts I and IV; The Convention against Torture, 1984, arts 5 and 7; The Geneva Conventions, 1949; ICCPR, art 2(3); International Convention on the Suppression and Punishment of the Crime of Apartheid, 1973, art 3.

¹⁴² G Robertson, (2002) *Crimes against humanity: The struggle for global justice*, 265-268.

¹⁴³ For an understanding of '*aut dedere aut judicare*', see, MC Bassiouni and EM Wise (1995) *Aut dedere aut judicare*; A Cassese, (Ed), (2009) *The Oxford Companion to International Criminal Justice*, 253-254.

recalled that such obligation has attained the status of *jus cogens* under customary international law. This is an obligation *erga omnes*. The ICJ has held that this obligation is contained in the Genocide Convention and had found Serbia in violation of article 1 of the Genocide Convention by failing to arrest and surrender to the ICTY, persons wanted by that tribunal for genocide committed in Srebreniča.¹⁴⁴ Hence, African states have an international law obligation to cooperate with the ICC in arresting Omar Al Bashir of Sudan to be prosecuted by the court.

After the above discussion, it is important to note yet another key factor why the African states should not perceive that their leaders are being targeted by the ICC as such. It is a fact that some of the Africans serve in the ICC as discussed below.

4.5.8 African personalities occupy positions at the ICC

It is valid to argue that as at 2011, there are five Judges from African states, and that the Deputy Prosecutor and the First Vice-President of the ICC are from African states. Some Judges from African states sit in the Appeals, Trial and Pre-Trial Chambers. These Judges include Joyce Aluoch (Kenya), Sanji Mmasenono Monageng (Botswana), Daniel Ntanda Nsereko (Uganda), and Fatoumata Dembele Diarra (Mali).¹⁴⁵ So, the African Union must not complain that only Africans are being targeted by the ICC. Conversely, it would seem that if indicted by the Prosecutor of the ICC, some African individuals, including state officials, would be tried before their fellow Africans. Perhaps it would be right to ask: *what do African states want?* The only possible speculation is that these states want to try perpetrators of international crimes within Africa in the name of justice for Africa. This can only be achieved once there are legal and institutional frameworks in Africa, which at present are still debated in Africa.

¹⁴⁴ See, *Case Concerning the Application of the Convention on the Prevention and Punishment of Genocide (Bosnia Herzegovina v Serbia and Montenegro)*, ICJ Reports (2007), paras 439-450.

¹⁴⁵ International Criminal Court, <<http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/>> (accessed on 13 August 2010); International Criminal Court, 'Fifth Annual Report, August 2008-July 2009' (2009) *Hague Yearbook of International Law* 141-158, 157.

In conclusion, it is wrong for the African Union to refuse to cooperate with the ICC in respect of the arrest warrant issued by the ICC. There is no legal authority to support the AU's decisions, except on political grounds and African partisanship or solidarity. Perhaps it could be right to assert that African states perceive the ICC as targeting their leaders due to the fact that the Prosecutor of the ICC has not been able to indict leaders of powerful nations, who may as well bear the same responsibility for international crimes as some leaders of African states.

4.6 Conclusion

In this chapter, it has been shown that there is generally no legal mechanism in the African continent that addresses the question of prosecution of international crimes and immunity of state officials at regional level. This is despite the 2005 resolution by the African Commission on Human and Peoples' Rights to end impunity in Africa and implement the Rome Statute. However, the Protocol for the Prevention and the Punishment of the Crime of Genocide, War Crimes and Crimes against Humanity and all forms of Discrimination (of the Great Lakes Region) is the only sub-regional mechanism that exists, and renders a very useful example for Africa which the AU should imitate.

In summary, arguments presented by the AU against the ICC are based on imperialism, selective justice of targeting only Africa, peace processes, that the Security Council has ignored the calls for deferrals, that the Security Council has acted with double standards, and finally that, the issue of immunity attaching to Sudanese or Kenyan state officials arise in the cases before the ICC. All these arguments are credible in some way. It is true that at least geographically, the only cases and accused persons before the ICC as of 2011 come from Africa. It is also true that the case against President Omar Al Bashir of Sudan raises immunity concerns. True is also the fact that the Security Council has not yet referred situations such as those in Gaza, Iraq and Georgia to the ICC. There is serious concern that even if proposals were to be tabled before the Security Council for such referrals, there is imminent danger of the exercise of veto powers by states like US and UK, which are responsible for the crimes committed in Iraq.

While the preceding arguments are valid, this study opposes them. Legally, arguments against cooperation with the ICC are flawed in law because some African states are parties to the Rome Statute. Besides, by refusing to cooperate with the ICC over prosecution of President Omar Al Bashir, African states have violated their obligations in respect of cooperation in the arrest and surrender of suspects to the ICC,¹⁴⁶ the Constitutive Act of the AU as well as customary international law. The AU has not proved that Kenya and Sudan can effectively commence domestic criminal prosecutions in order that the Security Council may defer such situations. Moreover, deferrals do not necessarily do away with prosecutions before the ICC; they are only temporal suspension of prosecutions or investigations. This means that if national authorities do not act genuinely, the ICC can allow investigations and prosecutions.

It is not clear whether by refusing to cooperate with the ICC over President Omar Al Bashir, the AU protects immunity of African state officials for international crimes, or it rejects impunity as per article 4(h), 4(m) and 4(o) of the Constitutive Act of the African Union. There is need for the AU member states, especially those which are parties to the Rome Statute, to support the ICC as per the Rome Statute, particularly under article 87(6) thereof.

¹⁴⁶ See, arts 86-93, Rome Statute.

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 judicare: 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(CC VII), 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 Reprising 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 Reprising 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 Reprising 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.

Chapter 6

Conclusion and recommendations

6.1 Introduction

In line with the objectives of this study as indicated in the introduction,¹ the study sought to address three key issues.² Firstly, whether international law *jus cogens* imposing an obligation to prosecute and punish persons responsible for international crimes prevail over immunity of state officials, and secondly, whether state officials are immune from being subpoenaed by international courts exercising jurisdiction over international crimes. Thirdly, the study also sought to understand the practice of African states on immunity and prosecution of international crimes. This chapter presents findings on the above three issues so as to indicate whether the assumptions by the study are proven or not.³ Findings are followed by appropriate recommendations on each issue.

6.2 Findings

Since every chapter has its own conclusion on the identified issues, it is not necessary to repeat the said conclusions here. Rather, this chapter gives general conclusions running throughout the whole of this study. The conclusions presented below confirm the assumptions underlying this study.

¹ See Ch. 1, part 1.7.

² See Ch 1, part 1.3.

³ See the assumptions in Ch. 1, part 1.4.

6.2.1 International law *jus cogens* imposing obligation to prosecute and punish perpetrators of international crimes prevail over immunity

It is acknowledged that immunity arose out of the necessity for state relations as well as the smooth functioning of state officials within their own states and abroad.⁴ International law as found in treaties and custom is certain that state officials do not enjoy immunity before international courts when such courts have jurisdiction over international crimes. The ICJ confirmed this position in the *Arrest Warrant* case decided in 2002, and this still remains the position to date. Other international courts have also confirmed this position in the cases of *Kambanda*, *Milosevic*, *Taylor*, *Karadzic*, *Omar Al Bashir* and *Saddam Hussein*.

At national level, there is no settled position in international law whether serving state officials can be prosecuted for international crimes before foreign domestic courts. The case of Habré in Senegal suggests that it is only possible to prosecute former state officials of a foreign state. Further, the trial of Mengistu in Ethiopia only suggests that former state officials can be prosecuted before their own national courts. Immunity of state officials before national courts is an area which needs to be studied further. The real issue is whether, if indicted, the serving state officials can benefit from immunity from prosecution before foreign domestic courts or national courts from their own states. This leads to the consideration of two competing norms in international law. On one hand, there are international law *jus cogens* imposing obligation *erga omnes* to prosecute perpetrators of international crimes. On the other, the issue of immunity of state officials as recognised under customary international law arises.

Chapter 2 of this study has shown that international law *jus cogens* imposing obligations *erga omnes* in relation to international crimes prevail over immunity of state officials. Immunity is regarded as being lower to *jus cogens* rules because such rules are

⁴ See, A Orakhelashvili (2006) *Peremptory norms in International law*, 320; DP Stewart 'Immunity and accountability: More continuity than change' (2005) 99 *American Society International Law Proceedings* 227, 229; D Aversano 'Can the Pope be a defendant in American courts? The grant of head of state immunity and the judiciary's role to answer this question' (2006) 18 *Pace International Law Review* 495, 506.

fundamental such that they cannot be superseded by immunity. Consequently, if immunity is granted to any state official responsible for international crimes, such action is a breach of customary international law and treaty law requiring states to prosecute and punish persons responsible for international crimes.

There are six grounds in which immunity of state officials cannot prevail over international law *jus cogens*. First, treaty obligations to prosecute state officials accused of international crimes are incompatible with immunity. Second, states have impliedly waived the immunity of their officials by signing treaties criminalising certain international offences. Third, customary international law lifts functional immunity in case of international crimes. Fourth, the *jus cogens* nature of international crimes supersedes immunity attaching to state officials. Fifth, international crimes fall outside the notion of acts performed in a sovereign capacity. Sixth, the fundamental rights of victims are incompatible with immunities⁵ in that they require perpetrators of international crimes to be prosecuted.

From the listed grounds, it is appropriate to conclude that international law does not allow immunity of state officials to prevail over international law *jus cogens* on the prohibition and punishment of international crimes. This position applies in national and international courts. It is applicable particularly to international crimes, including genocide, the crime of aggression, crimes against humanity, war crimes, terrorism, slavery, human-trafficking, apartheid and torture. Hence, if international law *jus cogens* are in conflict with immunity in respect of these crimes, it is obvious that *jus cogens*, hierarchically superior norms than immunity rules, must override the immunity even though immunity arises from customary international law.

After concluding on the competing norms of *jus cogens* and immunity, we turn to present findings on the question of subpoenas against state officials before international courts. This is another important aspect of immunity considered by this study.

⁵ YQ Naqvi (2010) *Impediments to exercising jurisdiction over international crimes*, 254.

6.2.2 State officials do not enjoy immunity from being subpoenaed by international courts

In chapter 3, the study offered views on the question of immunity of state officials in relation to prosecution of international crimes before international courts. This emanated from the fact that the practice in international courts is not consistent regarding immunity of state officials from prosecution and issuance of *subpoenas ad testificandum* and *duces tecum*. The discussion on subpoenas against state officials is based on the jurisprudence of international courts. Particularly, we have discussed case law of the ICTR, ICTY and SCSL.

It is concluded that there is no uniformity regarding the treatment of immunity of state officials in respect of prosecution and subpoenas. International courts have contributed to the confusion on whether immunity protects state officials from issuance of subpoenas *ad testificandum* and *duces tecum*. This is where there is inconsistency in terms of the judicial practice and interpretation. This confusion is observed in the decisions of the Trial Chambers in *Norman* case decided by the SCSL in 2006 and the *Bagosora* cases decided by the ICTR. The ICTR Trial Chamber rejected motions to subpoena President Paul Kagame who should have testified for the defence in respect of his role and that of RPF in the genocide in Rwanda in 1994. The Trial Chambers in those cases have decided that serving state officials are immune from being subpoenaed to testify or produce documents that can be used as evidence before international courts, doing so by aligning with immunity of such officials. It should be noted that the minority dissenting decisions on subpoena in the Trial and Appeals Chambers in *Norman* case are the correct and proper interpretation to be adopted, which this study accepts, as they represent a contemporary international criminal law on the question of immunity, holding that serving state officials are not immune from *subpoenas* before international courts with jurisdiction to prosecute and punish individuals responsible for international crimes. However, it must be noted that in *Norman* case, the majority decisions upheld immunity of President Tejan Kabbah as protected under section 48(4) of the Constitution of Sierra Leone, and not applying the immunity provisions as contained in the Statute of the SCSL.

The conclusion is that in this case, the court applied domestic law of Sierra Leone and not international law on immunity thereby creating confusion on whether immunity applies in relation to international crimes.

However, in 2008 the SCSL Trial Chamber in *Sesay, Kallon and Gbao* case accepted the new position that former state officials, particularly former President Tejan Kabbah of Sierra Leone can be subpoenaed before it to testify for purposes of expeditious trial and equality of arms. The conclusion is that the SCSL has come to accept that issuing subpoenas to state officials is the right course provided that the court is satisfied with the conditions for subpoenas. This marks the court's change of its own previous position, perhaps a sign of having realised its own errors of 2006 in the subpoena application in *Norman* case

The decision of the Trial Chamber of the ICTY on the subpoenas in *Blaškić* case echoes that serving state officials are not immune from being subpoenaed to testify before international courts. The Appeals decision in *Blaškić* case should not be followed as it detracts from the progressive development of international criminal law on immunity of state officials and their duty to assist international courts by appearing before such courts. International courts must follow the position stated in *Krštić* case by the Appeals Chamber which echoes the position that state officials are not immune from prosecution as well as from the issuance of subpoena provided that the conditions for the issuance of subpoenas are met.

Apart from the discussion on immunity and prosecution at international level, the study has examined these two aspects at the African regional level as presented below.

6.2.3 There is no comprehensive regional framework to prosecute international crimes and outlaw immunity of state officials in Africa

We have examined in chapter 4 whether there is any comprehensive African regional framework to prosecute international crimes as well as outlaw immunity attaching to state

officials in respect of such crimes. It is observed that Africa does not have a clear regional treaty or judicial institution to repress international crimes. It has been argued that the Constitutive Act of the African Union contains provisions on the rejection of impunity⁶ and those allowing intervention in grave circumstances of international crimes.⁷ Although rejection of impunity may be interpreted to mean demands for prosecution of perpetrators in Africa, it is nevertheless argued that the provision is not sufficient and comprehensive to address immunity in relation to international crimes. Intervention as reflected in article 4(h) of the Constitutive Act of the AU refers to military intervention but not judicial intervention such as prosecution of perpetrators of crimes.

However, it has been established that there is only one express and comprehensive instrument on the prosecution of international crimes at sub-regional level. The Great Lakes Region has adopted a progressive Protocol⁸ to deal with international crimes in the sub-region. This Protocol outlaws immunity of state officials⁹ and imposes obligation on member states in the sub-region to prosecute and punish international crimes.¹⁰ The AU cannot rely on this single comprehensive instrument to prosecute international crimes in the region. Hence, there is need for the AU to take measures to establish such mechanisms. Further, the fact that there is no adequate mechanism to suppress international crimes at regional level indicates the need for the AU to support the existing international institutions with jurisdiction over crimes committed in Africa. In this regard, it is important for the AU to support the ICC in prosecuting individuals responsible for crimes committed in African states.

In addition to exploring the legal and judicial frameworks on the prosecution of international crimes in Africa, chapter 4 of this study has also discussed the perception by

⁶ Art 4(m) & (o), Constitutive Act of the AU.

⁷ Art 4(h), Constitutive Act of the AU.

⁸ Protocol for the Prevention and the Punishment of the Crime of Genocide, War Crimes and Crimes against Humanity and all forms of Discrimination, signed at Nairobi, by the International Conference on the Great Lakes Region on 29 November 2006.

⁹ Art 12 of the Protocol.

¹⁰ Art 9 of the Protocol.

the AU against the prosecution of African individuals, especially state officials. Below is the finding on the AU's perception against the ICC.

6.2.4 The African Union's opposition to the International Criminal Court violates international law

It has been indicated in chapter 4¹¹ that the AU has adopted several decisions not to cooperate with the ICC in the prosecution of President Omar Al Bashir of Sudan. The AU opposes the ICC prosecutions on the grounds that the ICC reflects imperialism, selective justice of targeting only Africans, and that the ICC has acted with double standards. While it is accepted that the ICC has only prosecuted individuals from Africa, leaving individuals from other parts of the world, the above arguments should not be taken as an exoneration of the African states' obligations towards the ICC. An observation is made that African states have simply acted on nothing but solidarity. This has a potential of violating international law obligations arising from the Rome Statute.¹²

It should be understood that the ICC is not meant to target only Africans. Most of the allegations levelled by the AU against the ICC indicate that there is little understanding of the role that the ICC can play in Africa. It is better that African states take an objective approach in the fight against impunity for international crimes.

International law has long created obligations on parties to treaties to respect their obligations arising from such treaties.¹³ Because a majority of African states are parties to the Rome Statute creating the ICC, by refusing to cooperate with the ICC on the arrest warrant for President Omar Al Bashir of Sudan, such states have violated their obligations in respect of cooperation with the ICC.¹⁴ Further, the decisions by the AU calling for non-cooperation with the ICC actually violates article 87(6) of the Rome Statute which imposes an obligation on intergovernmental organisations (like the AU) to

¹¹ See conclusion reached in ch.4, part 4.6.

¹² See generally, arts 86-93, Rome Statute.

¹³ Vienna Convention on the Law of Treaties, 1969.

¹⁴ See, arts 86-93, Rome Statute.

cooperate with the ICC in the investigations and prosecutions of persons responsible for international crimes within the jurisdiction of the ICC.

Further, customary international law imposes obligation on states to prosecute and punish international crimes. This also extends to issues of cooperation with judicial institutions established to punish international crimes such as genocide, war crimes, crimes against humanity, torture and the crime of aggression. In this regard, calls for non-cooperation with the ICC in the prosecution of international crimes violate customary international law. One must understand that by adopting decisions on non-cooperation with the ICC, the AU has acted in violation of the provisions of the Constitutive Act of the AU which reject impunity and outlaw genocide, war crimes and crimes against humanity.¹⁵

Following the above finding on the mechanisms at regional level, it was necessary to examine the practice on prosecution of international crimes in some African states as discussed in chapter 5 of this study. In the following part, we present findings on the issues of immunity of state officials and prosecution of international crimes in selected African jurisdictions.

6.2.5 Immunity of state officials has been outlawed in some African jurisdictions

Chapter 5 of this study has examined the existing laws, judicial precedents and state practice on immunity and prosecution of international crimes in Ethiopia, South Africa, Senegal, Kenya, Rwanda, Burundi, Uganda, Burkina Faso, Niger, Congo and the DRC. With the exception of the DRC, these states have enacted laws to implement the Rome Statute at domestic level. The DRC is still in the process of enacting a law to incorporate the Rome Statute. In all these states, it is observed that international crimes are punishable by law. Except in Senegal, all the laws studied in these states expressly reject immunity of state officials from prosecution for international crimes.

¹⁵ Art 4(h), (m) & (o), Constitutive Act of the AU.

6.2.6 The laws implementing the Rome Statute in some African states allow universal jurisdiction and retroactive application of punishment

The laws studied in these states go beyond what the Rome Statute provides. Such laws confer national courts with universal jurisdiction to prosecute persons responsible for international crimes. This is a very good indication that any person who commits international crimes can be held responsible. The fact that universal jurisdiction is recognised in these states means that national jurisdictions have a wide margin to close impunity gaps in respect of crimes within the jurisdiction of the ICC. Universal jurisdiction in such laws will allow national jurisdictions to exercise positive complementarity as recognised under articles 1 and 17 of the Rome Statute. Because these states have empowered domestic courts to exercise universal jurisdiction, it follows that such courts can apply universal jurisdiction to reject immunity of state officials provided that such officials are responsible for international crimes. In this regard, courts in these states can prosecute persons who commit international crimes outside the territory of such states. These states are good examples for other African states that have not yet enacted laws to punish international crimes at domestic level.

However, national jurisdictions such as Senegal, Niger and Burkina Faso have gone to the extent of providing for an absolute universal jurisdiction without the necessary requirement of the territoriality and nationality links. This might lead to universal jurisdiction *in absentia*. It must be understood that the absolute universal jurisdiction cannot attain effective enforcement. Unless the perpetrators are found in the territory of the prosecuting state, there is no hope for its active role in the punishment of international crimes.

Additionally, the laws implementing the Rome Statute in Senegal and Uganda¹⁶ are inconsistent with the Rome Statute because such laws create punishment for crimes committed in the past thereby allowing retroactive application of the laws and punishment. These laws seem to be inconsistent with article 22 of the Rome Statute

¹⁶ *International Criminal Court Act*, No 11 of 2010 (Uganda).

which outlaws application of laws and punishment for crimes committed in the past (*nullum crimen sine lege*). The Rome Statute requires that a person cannot be criminally responsible unless the conduct in question constituted, at the time it took place, a crime within the jurisdiction of the court.¹⁷ The Rome Statute requires that, in case of ambiguity as to the definition of a crime for purpose of criminal responsibility, an interpretation most favourable to the accused be adopted. Despite the express provision outlawing retroactive application of the laws and punishment as seen in article 22 of the Rome Statute, international law has not yet done away with the possibility of prosecuting persons responsible for crimes committed in the past, provided that such crimes are recognised under customary international law. This means that, any conduct, which may not be a crime under the Rome Statute, can still be recognised as such under customary international law. In fact, article 22(3) of the Rome Statute recognises the possibility that the Rome Statute does not affect the characterisation of any conduct as criminal under international law independently of the Rome Statute. In this regard, laws allowing retroactive application are more practical in the field as international crimes will not go unpunished.

6.3 Recommendations

From the preceding findings, this study presents a number of recommendations as indicated below. Recommendations are directed at international and national courts, the African Union, and specific African states.

6.3.1 Courts should hold that international law *jus cogens* prevail over immunity

It has been concluded that international law *jus cogens* imposing obligation *erga omnes* to prosecute and punish persons responsible for international crimes prevail over immunity of state officials. This is relevant to both national and international courts. Truly, there is no uniform position before national and international courts. It is easily accepted before international courts with jurisdiction over international crimes that

¹⁷ Art 22(1), Rome Statute.

immunity cannot prevail over *jus cogens*. Contrary to the above, national courts' judgments in *Mugabe* and *Gaddafi* cases as discussed in chapter 2, reflect the position that immunity may prevail unless there is a clear treaty provision outlawing such immunity of state officials. The possible solution should be the harmonisation of national and international laws in order to avoid the confusion between national and international jurisprudence on immunity of state officials. Harmonisation can be by way of enacting specific legislation outlawing immunity at national jurisdictions. This could be possible for example, through domestication of international treaties outlawing immunity of state officials in respect of international crimes. Harmonisation of international and national laws may lead the courts to hold that international law *jus cogens* must prevail over immunity founded on customary international law.

6.3.2 Courts should issue subpoenas against state officials

Subpoenas should be issued against state officials who may be in a position to assist the defence or prosecution and the courts in unfolding the truth and for fairness reasons to the accused persons. One cannot simply imagine seeing some state officials being indicted and arrested whereas others of equal responsibility are simply protected by the same law that prosecutes others. For example, it is just unimaginable that Charles Taylor was indicted on the basis of international law rejecting immunity, whilst Tejan Kabbah was not subpoenaed to testify for the defence in *Norman* case. Equally, it is rather a mockery of international law to find that Tony Blair and Gerhard Schröder were not subpoenaed based on immunity of such leaders whereas Milošević was indicted, arrested and prosecuted by the ICTY and the court rejected any immunity accorded to Milošević by virtue of his official status. The same goes for President Paul Kagame who should have been subpoenaed by the ICTR to testify in the *Nzirorera's* application for subpoena.

This study suggests that if conditions for the issuance of subpoenas are fulfilled, international courts, such as ICC, should not shy away from issuing subpoenas against serving state officials even though this seems to be envisaged under article 64(6) (b) of the Rome Statute. Issuing subpoenas may ensure fairness, expedition of trials and

equality of arms in international prosecutions. These are essential to both the defence and prosecution sides before international courts. Therefore, such courts should not unreasonably withhold this kind of remedy where there are grounds for its issuance.

The preceding recommendations relate to the situation obtaining in international courts. It is important that one understands the position at the African regional level with particular reference to the issue of immunity and prosecution of international crimes, as we now turn to recommend.

6.3.3 The African Union should adopt a regional treaty to prosecute international crimes and outlaw immunity, and such treaty should call for cooperation with the International Criminal Court

Following the finding that there is no comprehensive regional mechanism to prosecute international crimes and outlaw immunity in Africa,¹⁸ it is recommended that the AU should consider adopting a treaty which will allow prosecution of international crimes in Africa. Such treaty should also outlaw immunity of state officials in respect of international crimes. The suggested treaty should call upon African states to prosecute and punish persons responsible for international crimes. The AU needs to learn from the Great Lakes Region which has adopted a Protocol on the prosecution and punishment of international crimes. It would be better if the AU followed the steps initiated by the Great Lakes Region. The AU can adopt such a treaty by amending article 4(h) of the Constitutive Act of the AU to allow judicial intervention in terms of prosecution of perpetrators of international crimes. Such amendment should also call for the establishment of a regional judicial organ to prosecute international crimes in Africa. Since the AU has shown its desire to establish a criminal chamber within the African Court of Justice and Human Rights,¹⁹ it is recommended that the AU should amend the

¹⁸ See part 6.2.3 above & Ch.4 above.

¹⁹ See, Decision on the Implementation of the Assembly Decision on the Abuse of the Principle of Universal Jurisdiction, Doc. Assembly/AU/Dec.213(XII), 4 February 2009, para 9 (stating that ‘The Assembly...Requests the Commission, in consultation with the African Commission on Human and Peoples’ Rights, and the African Court on Human and Peoples’ Rights, to examine the implications of the

Statute of the African Court of Justice and Human Rights and its Protocol²⁰ in order to pave the way for the establishment of the proposed criminal chamber.

Despite the proposed establishment of an institution with competence over international crimes in Africa, it is recommended that the treaty establishing such institution should also impose an express obligation on African states to ratify the Rome Statute. Such obligation should also extend to issues of cooperation with the ICC. This would enable a majority of African states to become states parties to the Rome Statute thereby allow such states to exercise positive complementarity as recognised under the Rome Statute.²¹ It must be recalled that the ICC is a modern and permanent international court which may exercise jurisdiction over international crimes committed anywhere in the world, including Africa. It is suggested that, in case of competing requests, the ICC should take precedence over the African judicial institution or national requests. This would be in line with what has already been suggested by the member states of the Great Lakes Region in the Protocol which calls for prosecution of international crimes.²²

Since the ICC is an international judicial institution capable of prosecuting individuals, including those from African states, it is recommended that African states should cooperate with the ICC in the investigation and prosecution of international crimes committed in African states. Hence, African states should desist from levelling legally unfounded claims against the ICC.

6.3.4 African states should ratify and implement the Rome Statute

It is recommended that African states that have not yet ratified the Rome Statute should do so and proceed to domesticate it into national laws so as to give effect to the treaty at

Court being empowered to try international crimes such as genocide, crimes against humanity and war crimes, and report thereon to the Assembly in 2010’).

²⁰ For a detailed discussion on the African Court of Justice and Human Rights, see, M Hansungule ‘African courts and the African Commission on Human and Peoples’ Rights’ in A Bösil and J Diescho (2009) *Human rights in Africa: Legal perspectives on their protection and promotion* 233-271.

²¹ See arts 1 and 17, Rome Statute.

²² Arts 21 - 24 of the Protocol for the Prevention and the Punishment of the Crime of Genocide, War Crimes and Crimes against Humanity and all forms of Discrimination.

domestic level. It is important for national jurisdictions to be consistent with international law contained in the Rome Statute. Such laws should also expressly reject immunity for state officials charged with international crimes. If African states ratify and domesticate the Rome Statute, there will be no unnecessary complaints that the ICC is targeting Africans only. Once such laws are enacted, African states would have the competence to exercise jurisdiction over persons responsible for international crimes in Africa. This would be in line with the principle of positive complementarity recognised under the Rome Statute. Hence, there could be no animosity between African states and the ICC regarding prosecution of international crimes in Africa. Further, the fact that African jurisdictions can prosecute international crimes at domestic level they would assist the ICC in reducing its bulk of cases arising from African states.

6.3.5 States should allow universal jurisdiction based on territoriality and nationality principles, and should harmonise their laws with international law standards

It is recommended that states like Senegal, Niger, and Burkina Faso which have enacted laws implementing the Rome Statute thereby allowing absolute universal jurisdiction, should amend the laws in order to adopt the principle of universal jurisdiction based on nationality links and territoriality of the victims or perpetrators. These requirements will enhance the possibility of holding responsible those who commit international crimes. It will also avoid universal jurisdiction *in absentia* which results from absolute universal jurisdiction.

Absolute universal jurisdiction is weak in that it cannot be applied if the perpetrator of crimes cannot be found in the territory of the state with competence to exercise such jurisdiction. It is meaningless to have absolute universal jurisdiction if courts cannot be able to exercise power over the perpetrators of crimes. Absolute jurisdiction is ambitious but very weak. Hence, if emphasis is put on the presence of perpetrator in the territory of a state, it will be easy to enforce warrants of arrest issued in respect of international crimes committed outside the territory of a state concerned.

Furthermore, it is recommended that national laws in Senegal and Uganda should be harmonised with the Rome Statute in order to meet international standards, particularly in respect of retroactive application of punishment. Uganda and Senegal should amend their laws implementing the Rome Statute in order to respect the principle of *nullum crimen sine lege* and *nulla poena sine lege* as contained in article 22(1) and (2) of the Rome Statute. It is obvious that retroactivity of laws violates the rights of accused persons under articles 7(2) of the African Charter on Human and Peoples' Rights, article 3(4) of the International Covenant on Civil and Political Rights (to which Uganda and Senegal are states parties), and article 8 of the Universal Declaration of Human Rights. It is already accepted in human rights jurisprudence that retroactive application of the laws in Senegal violates human rights of accused persons as was held by the ECOWAS Court in the case against Habré.²³

It would be better if the national laws were aligned with international human rights standards contained in treaties. However, should Uganda and Senegal choose not to amend their laws to outlaw retroactivity application of their laws, it will nevertheless, not be a breach of customary international law as was held in the *Eichmann* case.²⁴ This case echoes that customary international law has imposed on states the duty to prosecute international crimes, and that there is no state practice and custom that states cannot allow retroactive application of their laws to persons responsible for crimes committed in the past.

²³ 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.

²⁴ *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.

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