

Prosecution of African State Officials – National and International Perspectives

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ABSTRACT

This article presents national and international legal and judicial perspectives on the prosecution of international crimes committed by senior state officials. While taking a broad outlook on criminal prosecutions of heads of state, the article particularly focuses on African state officials because to a great extent in recent times, they have been beleaguered by criminal prosecutions at national and international courts or tribunals. It demonstrates this phenomenon by discussing cases before national and international courts. It observes that some African state officials are currently on trial before these courts on charges of international crimes. However, it is argued that African state officials are not the first and only ones to be prosecuted for international crimes. European state officials were in fact the first ones to be prosecuted for serious crimes of concern to the international community. Hence, the article demystifies misleading sentiments that Africans are perpetrators of international crimes. Despite this, it recommends that national and international courts should be able to enforce international criminal law at both fora equally, and that the practice and complaints by African state officials either individually or collectively at the African Union level against criminal processes before national courts in Europe and the International Criminal Court could be in breach of international law obligations imposed on all states under customary and conventional international law. The article recommends that African states should take measures to prosecute international crimes domestically, regionally or internationally so that impunity must not be tolerated at all levels.

I. HISTORICAL BACKGROUND

Although African state officials have recently become subjects of criminal prosecutions before national and international courts, one must not hasten to conclude that African leaders are perpetrators of international crimes. Contrary to this popular and legally untenable view, it must be known that African leaders are not the first ones to be prosecuted for serious international crimes. Further, prosecution of African leaders is not a new phenomenon in the history of criminal

trials. Actually, their colleagues in other continents, particularly in Europe were the first ones to be brought to courts to face trials on charges involving international crimes.

Prosecutions of African leaders are not new, but rather, a continuation of the practice that existed in the past whereby state leaders were put on criminal trials. History tells us that the first major criminal prosecution of a head of state took place in England in 1649, against King Charles I – the first King to be brought before the High Court of Justice at the Palace of Westminster to answer charges of ‘war crimes’ committed against civilians.¹ It was alleged that King Charles I was responsible because his soldiers had killed civilians during the first and second English Civil War between 1642 and 1651. The acts committed by soldiers under King Charles I would equally qualify as war crimes in modern international law.² Prosecuting a head of state at first seemed to be contrary to the myth which had existed at the time – that a King could not be sued before his own courts – and if he did, the verdict must always go in his favour since he is an infallible.

That the King could not be sued was highly entrenched in the traditional concept of sovereignty. Kings were sovereigns who seemed to be above the law which was supposed to apply to their subjects. This is reflected in the objection raised at the trial of King Charles I when the King asserted that the court did not have proper legal authority to prosecute him. The King put up this jurisdictional challenge in the following terms:

“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.”³

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¹ John Laughland, (2008) *A History of Political Trials: From Charles I to Saddam Hussein* Peter Lang Ltd: Oxford, 22.

² See e.g. art 8 (2) (a) (i) & art 8 (2) (b) (i), ICC Statute.

³ Statement by King Charles I of England during his initial appearance in the trial on 20 January 1646, quoted in Laughland, note 1 above, 26.

As observed in the above quoted statement, it has become a common practice that when state officials are arraigned before courts, they tend to object to the courts and their prosecutors contending that the courts lack legitimacy to try them.⁴ Following an overthrow of King Louis XVI on 10 August 1792, he was arraigned in December 1792 by the French National Convention,⁵ his defence lawyer challenged the legality of the court, but unsuccessfully, and eventually King Louis XVI was found guilty and executed on 21 January 1793.⁶

Elsewhere in Europe, trials were instituted after World War I. The Allies called for prosecutions of the leaders of Ottoman Turkey for the massacres of Armenians in 1915 during the World War I. The massacres were termed crimes against humanity and civilisation. Consequently, several Turkish ministers, including a Minister for Justice, the Minister for Foreign Affairs, the Interior Minister, and the grand vizier, Said Halim Pasha, were prosecuted for war crimes in 1919.⁷ It must be recalled that Article 227 of the Versailles Treaty, 1919 had called for the prosecution of the German Emperor, Kaiser Wilhelm II although he was never actually tried as he had fled to the Netherlands.

More trials of heads of state were recorded in Europe after World War II. In Japan, the Military Tribunal for the Far East conducted trials of the Major War Criminals in Asia; as a result, many Japanese state and military officials were prosecuted for war crimes, crimes against humanity and crimes against peace. These leaders could not be entitled to immunity from prosecution.⁸ The most highly publicised trials were conducted at Nuremberg and there

was no immunity accorded to the accused persons.⁹ Consequently, German senior government officials and military commanders were put on trial on charges of war crimes, crimes against humanity and crimes against peace (aggression). In Romania, the leader, Marshal Ion Antonescu was tried and executed on 1 June 1946 by the Peoples' Tribunal established by a decree.¹⁰ Another trial was later conducted against the Romanian a state official, Nicolae Ceauşescu on 25 December 1989 charging him with genocide.¹¹ In Germany, the former Eastern German state official, Erich Honecker, was tried in 1991 in respect of the killings of civilians cross the Berlin Wall.¹²

Apart from Europe, heads of state have been put on trial before domestic courts in Latin American states, particularly in Guatemala, Peru, El Salvador, Chile, Colombia and Argentina on charges of crimes against humanity, particularly torture, forced disappearance and genocide. Some of the notable trials here include those of Albert Fujimori, former president of Peru who was put on trial in Peru, and the trial of Augusto Pinochet who was tried in Chile¹³ on charges of torture. However, there have been major challenges prosecuting the leaders. According to Naomi Roht – Arriaza, such challenges include amnesties and immunities.¹⁴ In Iraq, Saddam Hussein, former president of Iraq was prosecuted for crimes against humanity and found guilty. He was sentenced to death, and was executed by hanging. His defence of immunity as president of Iraq could not be accepted.¹⁵ In Cambodia, former state officials, including a former president, Khieu Samphan, have been tried by the Extra-Ordinary Chambers in the Courts of Cambodia.¹⁶

Apart from national criminal trials, some of the state officials have also been prosecuted before truly international criminal tribunals and courts. A telling example here is the trial of Slobodan Milošević,¹⁷ former president of Yugo-

⁴ For details on the chaos caused by heads of state during trials, see Patricia M Wald (2009) *Tyrants on Trial: Keeping order in the Courtroom*, Open Society Institute: New York; Suljagic, E 'Justice squandered? The trial of Slobodan Milosevic' in Lutz, EL and Reiger, C (2009) *Prosecuting heads of states*, Cambridge University Press: Cambridge/New York, 176-204; Newton, MA and Scharf, MP (2008) *Enemy of the state: The trial and execution of Saddam Hussein*, St Martins Press: New York; Yasmin Q Naqvi, (2010) *Impediments to exercising jurisdiction over international crimes*, TMC Asser Press: The Hague; Ku, C 'Legitimacy as an assessment of existing legal standards: The case of the 2003 Iraq war' in Thakur, R and Sidhu, WPS (eds.), (2006) *The Iraq crisis and world order*, United Nations University Press: Tokyo/New York/Paris, 397-412.

⁵ Laughland, note 1 above, 35-50.

⁶ Laughland, note 1 above, 36.

⁷ Laughland, note 1 above, 52.

⁸ Art 6 of the Charter of the International Military Tribunal for the Far East, Tokyo (The Tokyo Charter), 19 January 1946. See, Neil Boister and Robert 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.

⁹ Art 7, The London Charter of the International Military Tribunal (the "London Charter" or "Nuremberg Charter"), UNTS, Vol. 82.

¹⁰ Laughland, note 1 above, 122.

¹¹ Laughland, note 1 above, 185.

¹² Laughland, note 1 above, 195 - 196.

¹³ Ellen Lutz and Kathryn Sikkink 'The Justice Cascade: The Evolution and Impact of Foreign Human Rights Trials in Latin America' (2001) 2 *Chicago Journal of International Law* 1.

¹⁴ See, Naomi Roht-Arriaza, 'Prosecutions of Heads of State in Latin America', in Ellen L. Lutz and Caitlin Reiger, (2009) *Prosecuting Heads of States*, Cambridge University Press: Cambridge/New York, Ch.3, 47-76, particularly, p.56-57.

¹⁵ 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*'.

¹⁶ Decisions on the Khmer Rouge regime, available at <<http://www.eccc.gov.kh/english/default.aspx>> (accessed on 10 July 2012).

¹⁷ *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*

slavia, before the International Criminal Tribunal for the Former Yugoslavia on charges of genocide, crimes against humanity and war crimes. At the time of his indictment, Milosevic was still a serving president in office. The Milošević trial was later followed by that of his immediate successor as President, Milan Milutinović who 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 but was acquitted of all charges.¹⁸ Currently, Radovan Karadžić, former president of Serbia, is on trial before the ICTY on charges of genocide, crimes against humanity and war crimes.¹⁹

Like in other parts of the world, African heads of state have not been spared in the scourge of criminal prosecutions either domestically or at international level. In the following section, this Article presents a discussion on the cases involving African state officials at national and international courts.

2. PROSECUTION OF AFRICAN STATE OFFICIALS AT INTERNATIONAL COURTS

It is more than apparent now that African state officials have been charged with international crimes before domestic courts in African and European states. Further, African state officials have been subjects of international criminal proceedings before international courts. This section will now discuss these cases, with a particular focus on certain international crimes only. Once the discussion on this aspect is presented, the next section will be able to discuss concerns raised by Africans against prosecutions of the African personalities in European domestic courts. But first, the Article surveys cases involving African officials who are currently on trial or have been prosecuted by truly international tribunals and courts.

Perhaps the first state officials in Africa to be charged with international crimes, particularly genocide, crimes against humanity and war crimes are from Rwanda following the armed conflict that occurred in 1994. Key amongst the many Rwandan former ministers and governmental officials prosecuted by the International Criminal Tribunal for Rwanda include Jean Kambanda. Kambanda pleaded guilty to charges of genocide and crimes against humanity, and his official position as Prime Minister of Rwanda during the genocide acted as an aggravating factor when the ICTR sentenced him to life imprisonment.²⁰ After

Kambanda, many other former Rwandan state officials and military commanders have been prosecuted by the ICTR for charges of genocide, crimes against humanity and war crimes.

The armed conflict which occurred in Sierra Leone has led to the prosecution of the former president of Liberia, Charles Taylor, by the Special Court for Sierra Leone (SCSL). At the time of his indictment, Taylor was a serving president of Liberia. He challenged the indictment on the ground that he enjoyed immunity as head of state but his immunity was not recognised by the court.²¹ Taylor has been found guilty of aiding and abetting war crimes and crimes against humanity in Sierra Leone.²² His official position as head of state of Liberia at the time of the commission of war crimes and crimes against humanity was considered by the court as an aggravating factor in sentencing Taylor to 50 years in imprisonment term. Taylor has since appealed against both the conviction and sentence but the judgment of the Appeals Chamber of the SCSL is awaited.

Following international crimes committed in Darfur, Sudan, state officials from Sudan have been subjects of warrants of arrests issued by the Trial Chamber of the International Criminal Court (the ICC). Notable examples here include the warrants of arrest issued for the serving President of Sudan, Omar Al Bashir²³ and the two Ministers, Ahmad Mohammad Harun²⁴ (Minister of State for Humanitarian Affairs), and Abdel Raheem Muhammad Hussein²⁵ (Minister of National Defence) charging them with war crimes and crimes against humanity. But, the ICC has only issued a warrant of arrest for President Omar Al Bashir in respect of the crime of genocide, thus being the first ever genocide charge before the ICC. All these suspects are still at large, and some African states, including the African Union, have refused to cooperate with the ICC in arresting and transferring these individuals to the ICC to face trials.

nals and selected African jurisdictions – Mauritius, South Africa and Uganda, 134.

²¹ *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.

²² *Prosecutor v Charles Ghankay Taylor*, SCCL-03-1-T, Trial Chamber II, Judgment Summary, 26 April 2012, paras 1-181; *Prosecutor v Charles Ghankay Taylor*, SCCL-03-1-T, Trial Chamber II, Sentencing Judgment, 30 May 2012, paras 1-103.

²³ *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*, 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.

²⁴ *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.

²⁵ *Prosecutor v Abdel Raheem Muhammad Hussein*, ICC-02/05-01/12.

Milošević, Decision on Preliminary Motions, IT-99-37-PT, Trial Chamber, 8 November 2001.

¹⁸ *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; *Prosecutor v Milutinović et al*, Case No. IT-05-87-T, Trial Chamber, Judgment, 26 February 2009, paras 273, 283-284.

¹⁹ *Prosecutor v Karadžić*, Case No. (IT-95-5/18).

²⁰ *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 tribu-*

Three former state officials from Kenya currently stand charged with crimes against humanity before the ICC in respect of the crimes committed during the post-election violence since December 2007. These individuals are William Samoei Ruto²⁶, former Minister of Higher Education, Science and Technology; Uhuru Kenyatta, former Deputy Minister of Kenya and; Francis Kirimi Muthaura,²⁷ former Secretary to the Cabinet of Kenya. The ICC has also proceeded against Libyan former state officials, such as Muammar Gaddafi (former leader of Libyan Revolution and Commander of the Armed Forces, died in October 2011 and the case against him was terminated on 22 November 2011), Saif Al-Islam Gaddafi (former *de facto* Prime Minister of Libya) and Abdullah Al Senussi²⁸ (former Head of the Military Intelligence). These leaders are charged as indirect co-perpetrators of crimes against humanity that occurred in Libya since February 2011. Jean-Pierre Bemba Gombo (former Vice-President and Senator of the DRC) is charged before the ICC for war crimes and crimes against humanity committed in the Central African Republic between 2002 and 2004.²⁹ Similarly, the former President of Ivory Coast, Laurent Gbagbo, is currently on trial before the ICC for crimes against humanity and war crimes that occurred in Ivory Coast.³⁰

The preceding examples demonstrate criminal trials of African state officials at international courts or tribunals. This part will now present a discussion on cases involving African state officials who have been, or are being prosecuted for international crimes at national courts both in Africa and Europe.³¹

3. PROSECUTION OF STATE OFFICIALS AT NATIONAL COURTS

Other African heads of state who were prosecuted domestically include Mengistu Haile Mariam of Ethiopia. Mengistu was prosecuted for genocide and torture.³² He was tried in absentia and sentenced to death. He lives in Zimbabwe now. During the trial, one of the defences which Mengistu put forward was immunity of a head of state, arguing that since he had served as a head of the government he could not be tried by a domestic court in Ethiopia. The rule on immunity was rejected by the court³³ which reasoned that by prosecuting

Mengistu for genocide, Ethiopian courts were fulfilling their obligation to prosecute and punish perpetrators of genocide as found in the Genocide Convention of 1948 which Ethiopia ratified in 1957 and for the first time had included it in the Penal Code of the Empire of Ethiopia, 1957. The court also reasoned that section 4 of the Penal Code provided that all accused persons are treated equally and therefore that there was no way Mengistu could have been accorded protection different from other normal accused persons.

In Senegal, criminal proceedings are about to be commenced against the former president of Chad, Hissene Habre, following the decisions of the African Union and the International Court of Justice requiring Senegal to prosecute Habre for crimes against humanity committed in Chad.³⁴ In Libya, the trial of Saif Al Islam Gaddafi is underway for crimes against humanity and war crimes. This is despite the fact that the same person is subject of the proceedings at the ICC.

Criminal proceedings were initiated against Muammar Gaddafi, former leader of Libya, before the senior examining magistrate of the *Tribunal de grande instance* in Paris. Gaddafi was charged with complicity in murder and acts of terrorism. The case ended in his favour, particularly on immunity of a serving head of state recognised under customary international law.³⁵ In 2005, French authorities had indicted the former President of Mauritania, Maaouya Ould Sid'Ahmed Taya 2005.³⁶ Similarly, a Rwandan state official, Rose Kabuye, was arrested in Germany and extradited to France where she was subjected to criminal prosecution. However, the charges were terminated for lack of proof of her responsibility in the genocide in Rwanda. On 5 December 2001, the Paris *Tribunal de grande instance* indicted Congolese senior officials alleging crimes against humanity committed in the Congo. The indictments were issued against Denis Sassou Nguesso, President of the Republic of the Congo, together with his military commanders.³⁷ When Congo instituted a case against France, the International Court of Justice ruled in favour of Congo. In England and USA, several attempts to prosecute Robert Mugabe, the President of Zimbabwe, have failed on the ground that he enjoys immunity as a serving head of state.³⁸

²⁶ *Prosecutor v Ruto and Arap Sang*, ICC-01/09-01/11.

²⁷ *Prosecutor v Muthaura and Kenyatta*, ICC-01/09-02/11.

²⁸ *Prosecutor v Saif-Al Islam Gaddafi and Abdullah Al Senussi*, ICC-01/11-01/11

²⁹ *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.

³⁰ *Prosecutor v Laurent Gbagbo*, ICC-02/11-01/11.

³¹ For more details, see, Chacha Bhoke Murungu 'Towards a Criminal Chamber in the African Court of Justice and Human Rights' (2011) 9 (5) *Journal of International Criminal Justice* 1067- 1088; Cha Bhoke Murungu (2011) *Immunity of State Officials and Prosecution of International Crimes in Africa*, LL.D Thesis, University of Pretoria.

³² *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.

³³ FK Tiba, 'Prosecuting International crimes in Domestic Courts:

The Trial of Mengistu and other Derg members for Genocide, Torture and Summary Executions' in Chacha B Murungu and Japhet Biegon (2011) *Prosecuting international crimes in Africa*, Pretoria University Law Press: Pretoria, 163-183, 165.

³⁴ Questions Relating to the Obligation to Prosecute or Extradite (*Belgium v Senegal*), ICJ Judgment, 20 July 2012; AU Decision 127(VII), July 2006.

³⁵ 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.

³⁶ See, *International Federation of Human Rights Defenders (FIDH) and others v Ould Dah*, 8 July 2002, Court of Appeal of Nîmes, 1 July 2005 (Nîmes Assize Court, France).

³⁷ *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.

³⁸ *Re Mugabe*, ILDC 96 (UK 2004), 14 January 2004, Bow Street Magistrate's Court; *Tachiona v Mugabe*, 169 F.Supp.2d 259, 309

The judiciary in Spain has also issued indictments against some African state officials, particularly from Morocco, Equatorial Guinea and Rwanda on charges of crimes against humanity and genocide respectively.³⁹ Likewise, courts in Belgium are on record as having indicted African state officials from Congo, Rwanda, Ivory Coast, Central African Republic, Democratic Republic of Congo and Chad charging them with crimes against humanity, war crimes and crimes against humanity.⁴⁰ Domestic courts in European states have mainly indicted African state officials based on strictly universal jurisdiction *in absentia* over international crimes. This has led the African Union, perhaps triggered by Rwanda following the arrest of Rose Kabuye in Germany in 2008 to complain against the way the domestic courts in Europe have been indicting or issuing warrants of arrest against serving African personalities. In 2009, the African Union made concerted efforts to consult the European Union with a view to studying the principle of universal jurisdiction and state the parameters within which this principle should be applied.⁴¹ The AU has raised the following particular concern:

“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.”⁴²

Much as one would wish to accept the genuine concerns raised by the AU as indicated above, one must be conscious of the fact that the AU should accept the way universal jurisdiction can be used to ensure justice for victims of international crimes. However, this does not mean that universal jurisdiction *in absentia* is something that is effective in addressing impunity for serious international crimes. Nevertheless, the same traditional universal jurisdiction has never been applied to indict leaders or state officials from powerful states who have equally committed crimes in other parts of the world, particularly in Iraq and Palestine.

(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.

³⁹ *Hassan II*, 23 December 1998, *Audiencia Nacional* (Central Examining Magistrate No.5); *Obiang Nguema and others*, 23 December 1998, *Audiencia Nacional* (Central Examining Magistrate No.5); *Rwanda*, 6 February 2008, *Audiencia Nacional* (Central Examining Magistrate No.4).

⁴⁰ *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)); *Public Prosecutor v Ndobasi*, Court of Appeal of Brussels, Belgium, 16 April 2002; *Case Concerning the Arrest Warrant of 11 April 2000* (The Democratic Republic of Congo v Belgium), 2002 ICJ Reports, 14 February 2002, paras 59, 61 & 76.

⁴¹ *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.

⁴² As above, para 38.

4. CONCLUSION

Certain perceptions and misgivings have arisen in Africa particularly by critically assessing the way the African state officials have been charged before domestic courts in Europe or before the ICC and international criminal tribunals. Some quarters in Africa have expressed sentiments that the domestic courts in Europe and the ICC—which also is located in European soil, have targeted Africans.

Further, the AU has particularly adopted a series of resolutions indicating that it shall not cooperate with the ICC in the arrest and transfer of suspects from Sudan, Kenya and Libya.⁴³ This has substantially led to African initiatives to establish a criminal division of the African Court of Justice and Human and Peoples’ Right to prosecute international crimes committed in Africa. The AU has made some notable progress towards conferring the African Court with criminal jurisdiction over individuals responsible for international crimes. This idea has also been adopted by the East African Community which has decided to amend the Treaty for the Establishment of the East African Community to confer the East African Court of Justice with criminal jurisdiction over international crimes.⁴⁴

Currently, the East African Community is working on this initiative, which, if successful, will lead to the requests for the transfer of cases against the four Kenyan individuals from the ICC to the East African Court of Justice. One should note that the ICC might not allow transfer of cases since the Statute of the ICC does not provide for any transfer of cases to sub-regional courts; it may only transfer cases to national courts.⁴⁵ However, the idea to establish various criminal jurisdictions in African regional and sub-regional courts could serve to develop jurisprudence on international law principles while protecting human rights in general. The initiatives should be supported based on the fact that they can help end impunity in Africa and serve to protect humanity from the most abhorrent international crimes.

It is argued that the fact that the courts in European states and the ICC have indicted African personalities does not necessarily mean that these courts have specifically targeted Africans. Rather, such courts have actually invoked their rightful legal mandate and ensured that victims of international crimes get redress. By refusing to cooperate with the ICC, the African Union has breached its obligations under article 87(6) of the Rome Statute of the ICC which imposes an obligation on intergovernmental organisations to cooperate with the ICC in the investigation and prosecution of perpetrators of international crimes.

⁴³ See e.g. Decision on the Implementation of the Assembly Decisions on the International Criminal Court, Assembly/AU/Dec.366 (XVII), Doc. EX.CL/670(XIX).

⁴⁴ Pursuant to Art 27(2), Treaty for the Establishment of the East African Community, 1999.

⁴⁵ Under the principle of complementarity, article 1 and 17, ICC Statute.

In the African context, such non-cooperation with the ICC could be a violation of the obligations imposed to the African Union and its member states in article 4(o) of the Constitutive Act of the African Union which reject impunity for human rights violations. Even more so, the act of refusing to cooperate with the ICC in the arrest of individuals from Kenya, Sudan and Libya could amount to a violation of international law rooted in customary international law imposing obligation on states to prosecute international crimes or cooperate with international and national courts in the punishment of these crimes. It could also be a violation of articles I and VI of the Convention on the Prevention and Punishment of the Crime of Genocide, 1948, ratified by most African states.

Because African states have consistently refused to cooperate with the ICC, this can provide a justification for anyone individual, organisation to file a case against all those African states parties to the Protocol on the Establishment of the African Court on Human and Peoples' Rights to seek a decision of the court declaring that such states have breached their obligations under international law. This can be done so pursuant to articles 34(6) and 5(3), read together with Article 3 (on jurisdiction of the court) of the

Protocol establishing the court, read together with Rule 26 of the Rules of Procedure of the African Court on Human and Peoples' Rights. In this treaty, the African Court is empowered to interpret and apply provisions of the African Charter on Human and Peoples' Rights, the Protocol establishing the African Court and any other relevant human rights treaty ratified by the state party.

Considering that a majority of African states have ratified the Rome Statute of the ICC (which imports *pacta sunt servanda* obligations), it could be possible for individuals or organisations to file a case before the African Court with a view to compel African states to respect their obligations under the Rome Statute of the ICC, a treaty which has a bearing on human rights protection, and therefore, falling within the implied and expanded interpretation of the phrase 'any other relevant human rights treaty.' One hopes to see if creative litigants in Africa can invoke this enabling provisions and interpretation of the Protocol establishing the African Human Rights Court and enforce the obligations imposed on African states and the AU by the Rome Statute of the ICC. That said, African states and the AU should be reminded of the duty to cooperate with the ICC in prosecuting perpetrators of international crimes.