EXPERT WORKSHOP:

GIVING EFFECT TO THE LAW ON WAR CRIMES, CRIMES AGAINST HUMANITY AND GENOCIDE IN SOUTHERN AFRICA

Organised by:

The Centre for Human Rights,

International Criminal Law Services and

the Konrad Adenauer Stiftung

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Workshop Report

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Table of contents

A. WORKSHOP BACKGROUND AND FORMAT

On 13-14 June 2011, International Criminal Law Services (ICLS), the Centre for Human Rights, University of Pretoria (CHR) and the Konrad Adenauer Foundation organised a workshop for government experts from the Southern African Development Community (SADC) region at the University of Pretoria, South Africa. The workshop was sponsored by the Government of the Federal Republic of Germany, the Government of Finland, the Konrad Adenauer Foundation (KAS) and the Open Society Foundation for South Africa. The theme of the workshop was: 'Giving Effect to the Law on War Crimes, Crimes against Humanity and Genocide in Southern Africa.' The workshop was aimed at mapping and assessing the progress made by 15 Southern African states in becoming states parties to, and, giving domestic legal effect to treaties imposing duties upon them to prosecute and punish individuals responsible for war crimes, crimes against humanity and genocide. The workshop was further aimed at considering ways of providing assistance to those states that face challenges in doing so.

In order to ensure optimal involvement by the participants, the workshop commenced by way of brief introductory presentations, followed by detailed discussions in parallel working groups. In order to facilitate broad participation, the classical format of lengthy panel discussions was avoided. The small working groups provided a focused and informal setting; conducive to the sharing of information amongst participants. The facilitators participated as resource persons, providing background, developments and legal clarifications on relevant technical international criminal law and international humanitarian law issues.

In addition to references to the background materials provided beforehand and brief presentations, each session involved capacity building elements and clarifications aimed at equipping the experts with knowledge on political and legal steps involved in ratifying international treaties, domestication and conducting a successful trial involving international crimes.

B. PARTICIPANTS

The workshop was attended by government experts, mostly from the Attorney General's offices, Offices of the Directors of Public Prosecutions and the Ministries of Justice of the respective SADC states.[1] The participants brought a unique combination of experience with, and expertise in, national legislative, executive and judicial activities in relation to international crimes in the SADC region. The experts represented SADC states, except for Angola and Namibia whose experts were not in attendance.

The workshop also involved legal experts from the International Criminal Court (ICC), the International Committee of the Red Cross (ICRC), the University of Pretoria, a global law firm and Non-Governmental Organisations (NGOs) involved in legal reform and capacity building on issues of international crimes. The wealth of expertise and active participation of the experts resulted in a constructive and mutual transfer of knowledge, relating to the capacity to deal with war crimes, crimes against humanity and genocide at national level.

Government Experts		
Mr. Pako Dingalo	Senior State Counsel	Botswana
Ms. Constance Letsoalo	Senior Prosecutions Counsel, DPP's Office	Botswana
Ms. Priscilla Kedibone	Chief Prosecutions Counsel, DPP's Office	Botswana

[1] Experts came from Botswana, Democratic Republic of the Congo, Lesotho, Mauritius, Madagascar, Malawi, Mozambique, Seychelles, South Africa, Swaziland, Tanzania, Zambia, and Zimbabwe. Experts from Angola and Namibia did not attend.

Mr. Gerard Mabamba	Attorney General	Dem Republic of Congo
Ms. Evodia Chabane	Chief Legal Officer, Ministry of Justice and Human Rights	Lesotho
Mr. Mutengo Bihombo	Public Relations Officer, DPP's Office	Democratic Republic of Congo
Mr. Michael Tlali	Chief Attorney, Ministry of Justice and Constitutional Affairs	Lesotho
Mr. Ranary Rakotonavalona	Prosecutor General, Court of Appeal	Madagascar
Mr. Isaac Chiundira	Senior State Advocate, DPP's Office	Malawi
Lt. Col. Dr Dan Kuwali	Deputy Director, Legal Services, Malawi Defence Force	Malawi
Ms. Yashumatee Gopaul	State Counsel, DPP's Office	Mauritius
Ms. Sooraya Gareeboo	Acting Principal State Counsel, AG's Office	Mauritius
Ms. Amabelia Chuquela	Prosecutor, Attorney General's Office	Mozambique
Ms. Amelia Munguambe	Attorney General's Office	Mozambique
Mr. Koteswara Rao	Legal Advisor, Ministry of Foreign Affairs	Seychelles
Dr. JP Torie Pretorius	National Prosecuting Authority, Priority Crimes Litigation Unit	South Africa
Ms. Nthateng Matima	Department of Justice and Constitutional Development	South Africa
Mr. Reetsang Moroke	State Law Advisor, Department of Justice and International Relations	South Africa
Mr. Andre Stemmet	Senior State Law Adviser, Office of the Chief State Law Adviser	South Africa
Mr. Isake Nkukwana	State Law Advisor, Department of Justice	South Africa
Mr. Phumlani Dlamini	Senior Crown Counsel, Ministry of Justice	Swaziland
Mr. Ndzingeko Dlamini	Parliamentary Counsel, Ministry of Justice	Swaziland
Ms. Mohamed Msafiri	Senior State Attorney, AG's Chambers	Tanzania
Mr. Alex Ombuya	State Attorney, DPP's Office	Tanzania
Mr. Joe Hantebe Simachela	Deputy Chief State Advocate, Ministry of Justice	Zambia
Mr. Martin Lukwasa	Deputy Director, International Law and	Zambia

	Agreements Department, Ministry of Justice	
Mr. Richard Masempela	State Advocate, Ministry of Justice	Zambia
Mr. Prince Machaya	Deputy Attorney General	Zimbabwe
Mr. Joel Zowa	Deputy Chairman, Law Reform Commission, Ministry of Justice	Zimbabwe
Mr. Dereck Charamba	Public Prosecutor, Attorney General's Office Zimbabwe Law Officers Association	Zimbabwe
Facilitators and other experts		
Mr. Phakiso Mochochoko	Head of the Jurisdiction, Complementarity and Cooperation Division, Office of the Prosecutor, International Criminal Court	The Netherlands
Mr. Gabriel Oosthuizen	Chief of Party, Public International Law & Policy Group	Uganda
Ms. Yolanda Dwarika	Legal Counsel, SA Embassy to the Netherlands	South Africa
Mr. George Mongare Kegoro	Executive Director, ICJ Kenya	Kenya
Ms. Antoinette Louw	Senior Research Fellow with the International Crime in Africa Programme of the Institute for Security Studies	South Africa
Ms. Nicole Fritz	Executive Director, Southern Africa Litigation Centre	South Africa
Ms. Sarah Swart	Pretoria Regional Delegation of the ICRC	South Africa
Ms. Cecilia Nilsson Kleffner	Executive Director, International Criminal Law Service	The Netherlands
Ms. Amielle del Rosario	International Criminal Law Service	The Netherlands
Ms. Ottilia Anna Maunganidze	Institute for Security Studies	South Africa
Prof. Michelo Hansungule	Professor of Human Rights Law, Centre for Human Rights, University of Pretoria	Zambia
Dr. Chacha Bhoke Murungu	Coordinator, Centre for Human Rights, University of Pretoria	Tanzania
Prof. Frans Viljoen	Director, Centre for Human Rights, University of Pretoria	South Africa
Prof. Johan van der Vyver	Extraordinary Professor, Faculty of Law, University of Pretoria	South Africa

Prof. Anton Kok	Acting Dean, Faculty of Law, University of Pretoria	South Africa
Ms. Carole Viljoen	Office Manager, Centre for Human Rights, University of Pretoria	South Africa
Mr. Mathieu Ciaba	Research Assistant, Centre for Human Rights, University of Pretoria	Democratic Republic of Congo
Mr. Dieu-Donné Djamba Wedi	Team Assistant, Centre for Human Rights, University of Pretoria	Democratic Republic of Congo
Mr. Louis Chequela	LLM Student and Team Assistant, Centre for Human Rights, University of Pretoria	Mozambique
Ms. Sylvia Namwase	LLM Student and Team Assistant, Centre for Human Rights, University of Pretoria	Uganda
Mr. Amir Abdullah	Centre for Human Rights, University of Pretoria	Sudan

C. PROCEEDINGS

The proceedings followed the different steps of giving effect to international treaties at domestic level (i.e. ratification, domestication, implementation and enforcement). With regards to ratification, the report refers to the national process of subscribing to the obligations of a treaty and becoming a state party to it. Domestication refers to the process of adopting any necessary and appropriate legislation and ensuring national institutional readiness to act in accordance with the obligations arising from a treaty. Implementation refers to the activities taken in accordance with the obligations, including legislative and judicial measures to enforce such treaty obligations.

As demonstrated by the experts' contributions, these phases are not necessarily sequential or distinct, but serve as indicators of progress. Each stage was examined in terms of obligations, achievements and obstacles from legal, judicial and institutional perspectives. Since domestication of international crimes is an ongoing process in the SADC sub-region and that individual SADC states find themselves in different stages of progress, starting points and varying bases for involvement in the respective discussions varied amongst participants. This uneven progress enriched the discussion, allowing an exchange of lessons learned, challenges faced and best practices in the sub-region.

Introduction: After welcoming remarks given by Ms. Sindane (Director General of the Department of Justice and Constitutional Development, South Africa), Prof. Michelo Hansungule (Centre for Human Rights), and Prof. Anton Kok (Acting Dean, Faculty of Law, University of Pretoria), introductory presentations were given by Ms. Cecilia Nilsson Kleffner (Executive Director, ICLS), Mr. Gabriel Oosthuizen (Chief of Party, Uganda Project, Public International Law & Policy Group) and Prof. Hansungule.

The introduction pointed to the strong involvement of African states and experts in the efforts that led to the establishment of the International Criminal Court (ICC). It was pointed out that SADC states had played an important role in the processes that led to the adoption of the Rome Statute of the ICC (the Rome Statute). In particular, Prof. Hansungule in his presentation stated that the SADC states had started as far back as 1997 to adopt a common position on the establishment of the ICC, whereby states were urged to ratify the Rome Statute. This commitment has since been formalised through a broad regional membership to the Rome Statute, with 31 African states,

including 11 SADC states, with Seychelles having become a state party to the Rome Statute in August 2010.

The introductory section also reflected the unfortunate history and legacy of impunity for serious crimes that tormented many parts of the African continent during the era of colonialism and following independence. The obligation to respond to calls for justice by victims was mentioned as a matter of responsibility for the entire region, not only in legal terms, but also politically and morally.

By way of introduction, the workshop also highlighted current developments around international and hybrid courts and tribunals, raising questions about how best to use scarce resources, how to ensure efficient justice and avoid potential unnecessary competition and/or duplication of criminal jurisdictions at the national, regional and international level. Attention was given to effective jurisdictional divisions and a constructive relationship between international jurisdictions, in particular with regards to the proposed extension of criminal jurisdiction in the African Court of Justice and Human Rights. The relationship between international courts and states' capacity and willingness was highlighted with reference to the completion of the work of the International Criminal Tribunal for Rwanda (ICTR) and the United Nations Security Council's (UNSC) plans for the ICTR to transfer the remaining cases to states; plans that have now been formalised through a resolution of the UNSC establishing a residual mechanism for the ICTR.[2]

The introduction also highlighted the primary responsibility of states to investigate and prosecute international crimes. This obligation predates, and was reinforced in the Rome Statute. Thus, the obligation to investigate and prosecute (or extradite) applies to all Southern African states, as a result of their commitments made under international law, including within the framework of the Geneva Conventions and the Genocide Convention of 1948. The introduction also reflected that many SADC states have ratified other treaties also giving effect to obligations to legislate and punish international crimes. These include for instance, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[3] (Convention against Torture). This Convention imposes an express obligation on states to take effective legislative, administrative and judicial measures to make sure that they prevent acts of torture.[4]

The political realities of Africa today were referred to as a complicating factor for the enforcement of international criminal law, in particular in relation to allegations of serious crimes involving state officials. Speakers referred to the mixed messages sent by African states, individually and collectively, and the inconsistent and conditional level of support that the ICC has received in terms of its investigations and warrants of arrest for individuals in Africa. These messages threaten to undermine the ICC, but also serve to de-motivate authorities attempting to initiate proceedings at the national level.

Ratification: The status of ratification of treaties giving effect to war crimes, crimes against humanity and genocide was referred to by the facilitator, Gabriel Oosthuizen, as encouraging. States in the SADC region have a good record in terms of ratifying the Rome Statute (ratified by all SADC states except Angola, Swaziland, Mozambique and Zimbabwe), the Geneva Conventions and their Additional Protocols, the Genocide Convention (8 of 15 have ratified), the Protocol to the African Charter on the Rights of Women (10 of 15 have ratified), and the Protocol for the Prevention and Punishment of the Crime of Genocide, War Crimes, and Crimes against Humanity and All Forms of Discrimination, adopted by the International Conference of the Great Lakes Region. These treaties demonstrate the principled commitment of SADC states to adhere to international law ensuring accountability for the most serious international crimes. The participants reviewed the

[2] United Nations Security Council, Resolution 1966 (2010), Adopted by the Security Council at its 6463rd meeting, on 22 December 2010, S/RES/1966 (2010), para 1, and Annex 1 to the resolution: 'Statute of the International Residual Mechanism for Criminal Tribunals', articles 1-32.

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

[4] Arts 2(1) – (3), Convention against Torture.

charts provided by the organisers, assessed the current status of ratifications and the legal obligations under international law that derive from those treaties. The discussions served to clarify a number of issues, both of legal and political nature, some of which are set out below.

In the discussions, participants were asked to look at the treaties not ratified by the SADC states to try and establish where the challenges lie. The following pertinent issues, *inter alia*, were posed during the discussions: Is it because of the lack of political will or capacity that certain treaties are yet to be ratified? Is there a misconception that if a state ratifies certain treaties, there is no need to ratify other treaties? For example, is there a misperception that if a state ratifies the Rome Statute, there is no need to ratify the Genocide Convention? What are the challenges? What lessons can be learned from these processes used by those countries that have ratified or acceded to the treaties?

To ensure a constructive discussion, the facilitators of the working groups reminded the experts of the different stages of ratification at the international and national level, the difference between signature, ratification and accession, and the legal consequences of these sovereign acts.

The discussion, which was of an informal nature, pointed to and addressed the following challenges:

- *Challenges in aligning the treaties with the social situation and associating the social situation and traditions with the characteristics of the treaty.*
- *The general perceptions that there is no immediate need to become a signatory to additional treaties; hence, some treaties can be ratified if they are deemed to be of priority.*
- *Legal and constitutional issues of a politically sensitive nature. E.g. immunities (Rome Statute and Genocide Convention) and sentencing (Rome Statute).*
- *Legal and constitutional issues of a technical nature.*
- *These treaties are not a priority in comparison with other more pressing matters.*
    - *Other pressing matters exist, both for the executive and legislature.*
- *Insufficient internal and external pressure on politicians and policy makers to make it a priority. The following (mis-)perceptions allow for de-prioritisation of these issues:*
    - *These crimes do not occur on our territory.*
    - *Enforced Disappearances do not have much relevance in a local context.*
    - *There are no alleged criminals on our territory.*
    - *These crimes will never be prosecuted by our judiciary.*
    - *Other states (e.g. South Africa) with more resources are better placed to deal with these crimes.*
- *Limited public awareness and pressure.*
- *Insufficient capacity/understanding of international crimes by politicians and policy makers.*
    - *Insufficient understanding of the added value of these treaties, considering the existing liabilities and crimes provided for in the constitution and national law. E.g if a state has ratified the Rome Statute and is now taking part in its implementation, what is the added value in ratifying the Genocide Convention?*
- *Perception that providing for universal jurisdiction for serious crimes is sufficient.*
- *Perception that these crimes can be prosecuted as ordinary crimes.*
- *Limited awareness of the Rome Statute and the existence of the ICC.*
    - *Insufficient understanding that when authorities prosecute serious crimes at the national level, they apply national laws. Although the goal is to achieve the standards set in the Rome*

Statute (e.g. upon conviction, the ICC will impose sentences set out in the Rome Statute, while national courts are likely to apply national laws on sentencing that may differ from ICC's sentencing practice).

- *Insufficient exchange on how to address constitutional and other legal challenges when implementing the Rome Statute.*

- *Where treaties must be incorporated before ratification, or where there is a preference to do so, ratification is delayed due to the technical nature of the treaties.*
  - *The Rome Statue, for example, involves an extensive legal review process, touching on various legal instruments and institutions.*
  - *The Rome Statute's provisions on immunity and sentencing involve technical and constitutional issues that demand both political will and technical skills.*
- *Ratification must be followed by domestication, which has financial and resource consequences.*

Domestication: Prof. Michelo Hansungule provided an introduction to the discussion on domestication based on the *Protocol for the Prevention and Punishment of the Crime of Genocide, War Crimes, and Crimes against Humanity and All Forms of Discrimination* of the Great Lakes Region.[5] After having reminded the participants of the history, purpose and achievements of the International Conference of the Great Lakes Region in general, he turned to the *Protocol for the Prevention and Punishment of the Crime of Genocide, War Crimes, and Crimes against Humanity and All Forms of Discrimination* ("the Protocol") which obliges states to provide for the punishment of these crimes. Prof. Hansungule pointed to a particular paragraph in the preamble to the Protocol, which notes that the signatory states are "deeply concerned of the endemic conflicts and the persistent insecurity aggravated by the massive violation of human rights, the policies of exclusion and marginalisation, impunity with the respect the crime of genocide, war crimes, and crimes against humanity".

Article 9 dealing with domestication of the Protocol to fight impunity and obliging the states parties to define the crimes and to provide appropriate penalties was also highlighted: "The Member States undertake, according to their respective constitutions, to take the necessary measures to ensure that the provisions of this Protocol are domesticated and enforced and in particular to provide for effective penalties for persons guilty of the crime of genocide, war crimes, and crimes against humanity."

Further, he discussed with the experts Article 10 on jurisdiction, stating that every member state shall take the necessary measure to establish jurisdiction over the crime of genocide, war crimes and crimes against humanity. States are thereby obliged not to let cases of any of these crimes go unattended. Still, most SADC states face the challenge that these offences are not crimes provided for by national statutes. National courts operate by national statutes and not by international law.

Prof. Hansungule also underlined the importance of paragraph 1 of Article 14 of the Protocol honouring extradition: "A Member State which receives a request for extradition from another Member State which has not concluded an extradition treaty with the requested Member State may consider this Protocol as a legal basis for requesting extradition, as long as the crimes in respect of which such extradition is sought are within the field of application of this Protocol." Linking this with the ICC, Prof. Hansungule underlined that the Protocol explicitly prohibits impunity from prosecution and contradicts statements at the AU level that there will be no cooperation with

[5] The Great Lakes Region was formally established in 2006 as an international organisation comprising of the following 'core countries': Angola, Burundi, the Central African Republic, the Democratic Republic of Congo, the Republic of Congo, Kenya, Rwanda, Sudan, Tanzania, Uganda and Zambia. These are the so-called 'co-opted countries', invited to act as observers: Botswana, Egypt, Ethiopia, Malawi, Mozambique, Namibia and Zimbabwe.

the ICC. He reminded the participants that this workshop was aimed at those who advise the heads of state and who can initiate prosecutions, to ensure that international and regional commitments are lived up to and that politics do not stand in the way of justice.

Ms. Antoinette Louw, Senior Research Fellow with the International Crime in Africa Programme of the Institute for Security Studies guided the participants through a discussion on legislative drafting processes. Ms. Louw focused on Southern Africa and Eastern Africa, mainly highlighting domestication and legislative drafting as it applies to the Rome Statute and formulating three lessons.

The first lesson is not to underestimate the importance of first securing political support to do away with misperceptions and prejudices concerning international criminal justice, before embarking on legislative drafting processes. It was pointed out that out of 31 African states parties to the Rome Statute, 5 have implementing legislation, while 16 states parties[6] have draft legislation in various stages of completion. The fact that these drafts are not completed is due to competing national priorities, the political climate and/or the fact that to draft and finalise an Act requires resources and capacity. Thus, the importance of being realistic about the process of domestication was highlighted.

The second lesson was that legislative drafting is not simply a meeting of experts to draft a text. Instead, the process must involve a range of tailor-made activities including capacity-building concerning the subject matter to ensure that responsible stakeholders are fully on board, and understand the issues. Although the situation has improved significantly, awareness and technical knowledge about the Rome Statute and the ICC is still at times quite low in Africa.

The third lesson discussed with the experts was the choosing of technical assistance partners carefully and working with local partners, for a number of reasons: stereotypes of the ICC being partial to Africa will only be compounded if governments do not involve local partners; local partners will be there to provide ongoing assistance once laws are passed; and, local partners are much more sensitive to capacity constraints and other constraints. The session also pointed to the importance of technical expertise when drafting domestication legislation and the need to exchange ideas on what other African countries did and lessons learned, including consulting model laws (as guidelines only).

Ms. Sarah Swart, from the Pretoria Regional Delegation of the ICRC led a discussion on the implementation of the Geneva Conventions and their Additional Protocols as part of the work of the ICRC to provide countries with support when ratifying and implementing the treaties. She provided background to these treaties and explained the available tools (e.g. a model law with respect to the implementation of the Geneva Conventions, ratification kits and check lists) that the ICRC produces to explain the Geneva Conventions and the Additional Protocols. She pointed out that the level of ratification of the Additional Protocols among African states is very high.

Ms. Swart discussed with the experts the requirement to implement the Geneva Conventions through laws and military manuals, enforced by criminal and other effective sanctions. This session focused mainly on South Africa, which ratified the Geneva Conventions in 1952 but has since lacked implementing legislation. However, during the week of the workshop, the South African parliament introduced the Geneva Conventions Bill, after 12 years of preparations; the process is planned to be completed in 2011. This bill provides for full universal jurisdiction over war crimes and defines the difference between normal breaches and grave breaches. It also provides for command responsibility and superior responsibility; there are comprehensive provisions referring to “military superior officers” and the conduct to be punished.

One of the challenges with the drafting of the Geneva Conventions Bill, as discussed during the workshop, was the relationship with the Implementation of the Rome Statute of the International Criminal Court, Act 27 of 2002. There are three war crimes in the Geneva Conventions

[6] According to the Coalition for the ICC.

and the Additional Protocols, which are not covered by the Rome Statute. Moreover, there are jurisdictional limits on the ICC and in the Rome Statute implementing legislation whereas no such limits exist in the Geneva Conventions. However, the Geneva Conventions Bill (Chapter 6, Article 19) states: "The provisions of this Act must not be construed as limiting, amending, repealing or otherwise altering any provision of the Implementation of the Rome Statute of the International Criminal Court Act, 2002 (Act No. 27 of 2002), or as exempting any person from any duty or obligation imposed by that Act or prohibiting any person from complying with any provision of that Act."

The second case study was Lesotho. It was felt that Lesotho is representative of the process in many common law countries in the SADC. As Lesotho was a British colony, it automatically inherited the Geneva Conventions as per the Geneva Conventions Act (Colonial Territories) Order in Council, 1959 (before the Additional Protocols were adopted). However, just as in quite a few other countries within the region, there is insufficient legislation. The ICRC assists with implementation legislation and has helped in establishing a national International Humanitarian Law Committee, tasked with the duty to bring together all ministries and ensure that the Geneva Conventions are domesticated.

In relation to domestication, with a focus on institutions and practices, Lt. Col. Dr. Daniel Kuwali, Malawi Defence Force, led a discussion on laws, instructions and training of armed forces in Malawi. He underlined that in order to be effective, international instruments must be implemented by aligning national legislation with the provisions of international treaties, and enacting criminal legislation prohibiting and punishing violations of the law either by adopting a separate law or amending existing legislation. This implementation is interdisciplinary and involves multiple players, which necessitates a holistic approach to implementation, including dissemination of information to the military and civilians and careful planning by the highest political authorities. The session also looked at the concrete responsibilities that have been outlined in Article 1 of 1907 Hague Convention respecting the laws and customs of wars on land, whereby military superiors must issue instructions in conformity with the laws and customs of wars.

The experts also heard that the Geneva Conventions require that states disseminate the treaty texts and include relevant provisions within their military instructions. It was pointed out that Geneva Convention III[7] requires that members of the military be specifically instructed and that Additional Protocol II[8] requires that commanders have awareness commensurate with their level of responsibility. However, research shows that violations are not due to lack of awareness of the law, but difficulties in translating the law into appropriate knowledge and behaviour. The fact that soldiers are not lawyers was debated, pointing to the need for continuous integration of the law into military doctrine (i.e. all standard documents that guide the actions of the forces, encompassing all procedures, codes of conduct, rules of engagement including manuals, as well as measures, means and mechanisms).

Dr. Kuwali explained that an attempt was made in Malawi to integrate relevant laws at the strategic, operational, and tactical levels. This has been achieved by publishing user-friendly booklets. There is also a generic military manual that acts as the main text, and a simplified version of the pamphlet providing basic fundamentals about issues related to international humanitarian law, international human rights law, international criminal law, constitutional law and administrative law. These manuals have been incorporated into military courses and knowledge of these laws is part of promotional exercises. Further, Dr. Kuwali explained that the rules of engagement of the Malawian military have been carefully crafted to embody international humanitarian law and the breaches thereof have been explained clearly to troops at all levels, through practical exercises aimed at teaching the operational implications of the rules of international humanitarian law and to identify ways of ensuring compliance.

[7] Article 127.
[8] Article 83(2).

The session was concluded by pointing out the importance of criminal justice, while highlighting the priority of implementation of international humanitarian law through permanent, preventive and corrective actions, suggesting the establishment of a Committee of International Humanitarian Law or a Genocide Alert System within the African Peace and Security Architecture (APSA) to monitor compliance with international humanitarian law in peacetime and thereby complement the work of the ICRC.

The discussion, which was of an informal nature, identified and addressed the following challenges in terms of domestication:

- Insufficient capacity/understanding by authorities and policy makers.
  - Technical nature of treaties deters policy makers from engagement.
  - Fears of financial implications of domestication.
  - General lack of understanding of international law at the national level.
  - Difficulties to get all relevant ministries involved in the National International Humanitarian Law Committees.
  - Misperception that these treaties must not be domesticated.
- Insufficient political will to prioritise domestication.
  - In particular at the executive level, but also at the legislative level.
- Insufficient resources to sustain a long process of drafting legislation, educating stakeholders and keeping up the political will among all those involved in the process in the early stages so that by the time the bill is passed by the legislature, everyone is on board.
- Regime change – sometimes between ratification and domestication – leading to revision of priorities and policies.
- Insufficient political pressure from media, international community and civil society to domesticate.
- Difficulties in keeping the national International Humanitarian Law Committees active and engaged.
- Legal and constitutional issues of a politically sensitive nature.
  - E.g. immunities (Rome Statute and Genocide Convention) and sentencing (Rome Statute).
  - In some countries, the domestication process includes a cumbersome procedure of giving public notice in order to invite public opinion and awareness.
- Where legislation exists but is out-dated, difficult to raise political will to revise.
- Legal and constitutional issues of a technical nature.

National obligations to investigate, prosecute and extradite, including "complementarity" under the Rome Statute: The discussions concerning national obligations to investigate, prosecute and extradite and the "complementarity" principle under the Rome Statute was introduced by the facilitator, Ms. Yolande Dwarika, Legal Counsel to the South African Embassy in The Netherlands,. Ms. Dwarika coordinated the work of the ICC Assembly of States (ASP) on complementarity, before, during and since the 2010 Review Conference, and worked on the so called 'EU toolkit on complementarity'. Ms. Dwarika highlighted the pre-eminent role of the SADC states in the drafting of the Rome Statute and the fight against impunity, while emphasising that the ICC constitutes a court of last resort and the continued responsibility that states carry to prosecute crimes. The session focused on complementarity as one of the cornerstones of the Rome Statute; according to that principle, the ICC will only deal with cases that are not genuinely dealt with by national jurisdictions. The ICC will not interfere with such proceedings in national jurisdictions so long as they are genuine. However, as was discussed, the complementarity regime is reliant upon domestication; as long as states have not equipped themselves with the appropriate laws and

institutions to investigate and prosecute, the court will be forced to intervene to ensure accountability where it has jurisdiction.

Participants were reminded that the duty to investigate and prosecute international crimes applies to all states, not only states parties to the Rome Statute. It was also pointed out that the ICC Prosecutor will focus only on the most responsible. This results in an impunity gap in relation to lower-ranking accused, which can only be filled by states, and only if: domestic laws correspond to international obligations; capacity exists to handle serious crimes; and if appropriate institutions are in place. At the same time, the lack of political will is a significant challenge, preventing states from moving forward. The session discussed the work of the ASP, recognising that states parties to the Rome Statute can assist each other in strengthening domestic systems by way of technical assistance and legislative support; such proactive and supportive activities are sometimes defined as "positive complementarity". The participants were told that the Secretariat of the ASP, based in The Hague, can facilitate information exchange.

Mr. Phakiso Mochochoko, Head of the Jurisdiction, Complementarity and Cooperation Division of the ICC Prosecution, led a discussion on the ICC Prosecutor's perspective on complementarity. By way of introduction, Mr. Mochochoko sketched the background to the ICC's work in Africa and how it was triggered. He referred to where crimes are being committed, the needs and rights of victims and the mandate/jurisdiction of the ICC under the Rome Statute. The principle of complementarity was also referred to as a compromise between the principle of sovereignty and the prerogative and responsibility to investigate and prosecute war crimes, crimes against humanity and genocide. The primary duty to investigate and prosecute still rests with states; with the ICC acting as an international court if states fail to fulfil this duty. Complementarity regulates the admissibility of a case, which is for the judges to determine, including in situations referred to by another state or the UNSC. The session also addressed that the concept of "complementarity" also works at another level; due to limited capacity, the ICC can only investigate very few of the perpetrators in any given situation. It was reiterated that the ICC Prosecutor will focus on those bearing "greatest responsibility" but that the prosecution of the few by the ICC must not result in impunity for the many. The experts heard that beyond its own cases, the ICC can cooperate with national investigations and support efforts of "positive complementarity". Before the ICC Prosecutor starts an investigation, he/she starts a preliminary investigation, of which states parties and others are informed. The preliminary examination phase ends with the ICC Prosecutor encouraging states themselves to investigate and prosecute as well as encouraging other agencies to work with and assist that state.

Ms. Nicole Fritz, Executive Director of the Southern Africa Litigation Centre, led the discussion on the ICTR Completion strategy and the consequences of its closure for Southern Africa. The discussion focused on the challenges in terms of the roles that the completion strategy envisages for national jurisdictions and national courts in the struggle against impunity. The session focused on a live case demonstrating legal challenges relating to South Africa's jurisdiction over crimes committed in Rwanda during the 1994 genocide. By way of background, the experts were reminded that the ICTR aims to complete its work in 2012. In accordance with UNSC Resolution No. 1966[9], the residual mechanism will take over some of the functions of the tribunal after July 2012. The narrow mandate of this mechanism, however, means that the support and cooperation of the international community is necessary to ensure accountability for those accused of crimes during the 1994 Genocide. It is therefore imperative, as stated by Ms. Fritz, that all states, particularly African states where many of the suspects are thought to reside, take meaningful action to avoid impunity.

The session covered the various international obligations triggered by the presence of suspects, and how in the absence of comprehensive legal frameworks which incorporate the relevant crimes, and in the absence of meaningful action with regards to universal jurisdiction and

[9] See above, footnote 2.

the principle of *aut dedere aut judicare*, Southern African states have become safe havens for alleged war criminals, thus preventing justice for victims of the genocide. South Africa was referred to as the state probably in the strongest position in Southern Africa to assist the ICTR in terms of, *inter alia*, technical capacity and expertise, procedural safeguards and constitutional protections, police and prosecution services and judicial transparency. However, South Africa has not legislated for jurisdiction to try crimes that were committed before July 2002. Thus, the workshop discussed how the importance of the obligation to extradite in accordance with the principle of *aut dedere aut judicare* comes into play ensuring that a lack of universal jurisdiction legislation will not be used to justify the continued presence of international suspects of international crimes in countries that are unable to prosecute.

The Rwandan suspect discussed in this session was granted refugee status in South Africa in 2010 and faces criminal charges in Rwanda for corruption, embezzlement, and terrorism and is the subject of a Rwandan extradition request to South Africa. He is also the subject of warrants of arrest from France and Spain relating to the murder of French and Spanish nationals as war crimes and crimes against humanity. Under international and South African law, individuals who are reasonably suspected of involvement in the commission of international crimes are ineligible for the grant of refugee status. Where a suspect is found in South Africa, there are only two options: (a) to extradite the individual to the place where the crime was committed, or a willing and able jurisdiction; or (b) prosecute the individual in the domestic courts. It was further discussed that in accordance with South African law on extradition, South Africa is bound to seriously consider the request of France and Spain.

The experts heard that South Africa has never resorted to universal jurisdiction as a basis of prosecution, but has domestic legislation that authorises universal jurisdiction in certain circumstances, provided for by the ICC Act. Prior to the ICC Act, South African legislation did not provide for war crimes, genocide and crimes against humanity and there had been no prosecutions of international crimes. The ICC Act created a structure for the national prosecution of the Rome Statute crimes and empowered national prosecuting authority and police services to undertake investigations and prosecutions of international crimes. The Police Services Act identifies crimes contemplated in the ICC Act as a priority and designates the Directorate of Priority Crime Investigations, giving it the power to investigate these crimes. The Act provides for a limited form of universal jurisdiction for the courts to exercise jurisdiction over a person, regardless of his or her nationality if that person is present in South Africa after the commission of a crime. This is much more comprehensive than, for example, the UK legislation which allows the court to assert jurisdiction only upon those resident in the UK. However, the ICC Act is not retroactive and no prosecution may take place if the crime was committed before the Rome Statute came into effect in 2002. Thus, it was concluded, the Rwandan genocide suspect present in South Africa cannot be prosecuted under the ICC Act. With this, the session demonstrated that the ICC Act has a loophole which allows for South Africa to be a safe haven for persons who are suspected to have committed international crimes before 2002. In order to remedy these deficiencies, the session discussed that South Africa will have to enact legislation providing for universal jurisdiction, or that it would have to follow the lead of the UK and amend the existing ICC Act, allowing for the retroactive jurisdiction by South African courts. New Zealand was mentioned as an example since its ICC Act gives its courts jurisdiction over war crimes and genocide from the 28 March 1979, the date when New Zealand ratified the Genocide Convention and over crimes against humanity from the 1 January 1991, the date on which the ICTY was given jurisdiction over crimes against humanity. These types of considerations should inform the drafting and implementing legislation processes undertaken by Southern African states as well as the rest of Africa.

The extensive discussion that followed addressed and clarified issues raised by the experts in relation to:

- the possibilities and difficulties of prosecuting crimes provided for by international customary law, but not by national legislation in dualist systems (in South Africa, for example, customary

international law forms part of the law in terms of the constitution, but so far no cases have been brought solely on the basis of customary international law);

- the relationship between refugee law and international criminal law;
- extradition challenges;
- the role of civil society in bringing about legislative changes (looking at the recent UK amendment developments);
- experts' speculations as to why South Africa has failed to prosecute or extradite in the case against the Rwandan genocide suspect;
- concerns about overwhelming the national criminal justice if legislation would be amended to broaden temporal jurisdiction;
- the capacity of other Southern African states to deal with alleged criminals residing or travelling on their territory; and
- the importance of providing for the international crimes, rather than merely ordinary crimes, such as murder.

Ms. Fritz pointed to African efforts to draft implementation legislation, including in Mozambique, where some alleged Rwandan genocide suspects are living. Others are allegedly in Swaziland, Zimbabwe, Kenya and Zambia. In this regard, the greatest prospect of securing justice in respect to these individuals given that they have not been indicted by the ICTR is the presence of implementing legislation, which asserts jurisdiction accommodating the Rwandan Genocide. Experts pointed to Zimbabwe and its Genocide Act of 2000, which is quite a short piece of legislation on the Genocide Convention and recognising the different interpretations covered by the international tribunals. The Genocide Act provides Zimbabwe with relevant law applicable to genocide, though not necessarily against war crimes and crimes against humanity punishable under the Geneva Conventions Act. However, whether there is political will and institutional resources to prosecute crimes committed during the Rwanda genocide in Zimbabwe was questioned. In relation to political will, experts also raised concerns that indictments from ICTR are often seen as an imposition by the west and that prosecutions are more likely to be supported if seen as an African incentive, for the benefit of African people's interest.

Dr. JP Torie Pretorius, from the South African National Prosecuting Authority, led the discussion on the South African experience from a prosecutor's perspective, seeking answers to the question why there have been no prosecutions of these crimes in South Africa, in spite of having the legal instruments at hand. He discussed the public's suspicion of prosecutors' *ulterior* motives and hidden agendas. He clarified that in most cases, the answer lies in the availability of evidence in relation to such international crimes, which he referred to as the "investigative impunity gap". The fact that these serious international crimes often have political elements result in elaborate cover-ups, complex schemes, a conspiracy to silence, and deep fear surrounding the extraction and divulging of information. For a successful investigation, it was held that, one must rely on legal assistance by other states, assistance with witness protection, help in contacting necessary individuals, etc. It was added that there is possibly a need to rely on NGOs, police, foreign observers, amongst other actors. One also needs political will, in addition to a functioning constitution, implementing legislation and functioning institutions. In South Africa, the legal community is ready and understands complementarity and the principles of the Rome Statute. The experts did however hear that police and investigators must also be trained as a case is only as strong as its evidence. Thus, investigators must be briefed and prepared as to what exactly is needed, including the basis for and obligations under universal jurisdiction. Dr. Pretorius also outlined several cases to demonstrate to the experts how political will and the adequate legal instruments are not sufficient where evidence is not available, procedurally admissible or sufficiently substantive, sometimes due to lack of cooperation with foreign authorities or procedures used by those presenting materials to the investigating authorities.

The discussion, which was of an informal nature, pointed to and addressed the following challenges:

- Insufficient capacity and resources of the judicial system.
- Investigations of serious international crimes are very different to national investigations and demand a different level of technical expertise and resources.
- Awareness-raising as well as technical training of the judiciary, prosecutors and investigators is needed.
- Trainings for practitioners must be tailor made to the national system, practical and include case studies.
- The ICC Assembly of States Parties will provide a web portal (through the ICC website) with access to various capacity building initiatives.
- Criminal justice systems are already overwhelmed with ordinary crimes.
- SADC countries should study the Canadian multi-disciplinary approach (its War Crimes Unit) to investigations of war crimes; crimes against humanity and genocide (it has provided legal assistance to South African prosecutors).
- The lack of implementation legislation.
- States must amend their laws so that it is easier to surrender to the ICC and prosecute foreign nationals.
- There is a joint commission (Joint Permanent Commission for Cooperation (JPCC) and the Permanent Commission for Cooperation on Defence and Security (JPCSD)) where security agents meet and discuss issues of extradition and human rights.
- The process by which a state fulfills its responsibility to investigate is challenged where the state is involved in the perpetration of the alleged crimes.
- Where judicial authorities are allowed to prosecute crimes under customary international law in the absence of legislation, there is still reluctance to do so, due to the legal uncertainties and lack of experience with such cases.
- The ICRC study on customary international humanitarian law was suggested as a good tool when prosecuting and trying international crimes. In includes national case law, official statements, UN practice, and ICTR practice.
- Insufficient basis for cooperation with foreign authorities and difficulties in accessing evidence and witnesses on foreign territory.
- Bilateral arrangements for cooperation and mutual legal assistance are key to successful investigations under the principle of universal jurisdiction. Further, national implementation legislation must provide for procedures as to how and when such cooperation and assistance can and should be requested.
- Insufficient capacity to provide witness protection.
- Insufficient understanding on how ICC can support national prosecutions.

A number of **suggestions and recommendations** were made repeatedly, with reference to all sessions. With some repetition from above, some of these recommendations were:

- The assistance is available: states should not hesitate to request assistance on implementing legislation, e.g. from ICRC, ISS, ICLS, individual experts, etc.
- Where appropriate, it is advisable to deal with several treaties on international criminal law in one legislation process.

- Educating the executive is always important in order for it not to fear these instruments, in particular explaining the concept of complementarity.
- Drafting of legislation must be preceded by awareness raising and training on international criminal law in order to establish sufficient understanding, sound legislation and local ownership of the process.
- The African Peer Review Mechanism can be a good platform to discuss these issues.
- It is important to make a realistic assessment of the financial implications of implementation, involving all relevant ministries.
- There is a need for closer cooperation between civilian authorities and military to ensure implementation of international humanitarian law. Most participants were uncertain as to the level of education and training of armed forces in international humanitarian law.
- A particular national authority to ensure compliance is important to bring national laws and practices in line with international obligations under international humanitarian law.
- There is a misconception that humanitarian law is only relevant for the military. The obligation to disseminate relates to both civilians and the military. International humanitarian law must be taught at all levels of society to be fully implemented.
- With regards to the training of armed forces, the obligation is on the government to disseminate information about international humanitarian law. However, where governments request help with this, the ICRC is able to assist upon request on an *ad hoc* basis. E.g. ICRC was in Zambia and Botswana training persons to be deployed in peacekeeping missions. In South Africa, the peacekeeping commissions training centre and the national army college has also received assistance from ICRC.
- Depending on developments in August 2011, the SADC parliament could be a forum for legislative progress in this area.
- It will be important to encourage other states than South Africa to take leadership on particular issues in the region.
- Distribute information about courses on how to draft legislation (e.g. at the University of Pretoria)
- In order to embark on a path towards a coordinated approach in the SADC region, it was suggested to encourage the SADC Committee of Ministers of Justice and Attorney Generals to deal with international criminal law treaties which requires ratification and domestication, based on a list that SADC secretariat could put together. This could be a path taken towards a coordinated approach.

D. SPECIAL SESSION ON THE CRIME OF AGGRESSION

In order to contribute to building the experts' capacity to relate to recent developments in international criminal law, Prof. Johan van der Vyver of the University of Pretoria, presented on the history and recent developments around the crime of aggression followed by reflections by Mr. Andre Stemmet, Senior State Law Adviser, Office of the Chief State Law Adviser, South Africa. Prof. van der Vyver provided an overview of the history of the crime of aggression. He explained the various efforts made prior to the 2010 Review Conference of the Rome Statute in Kampala to reach an agreement on the definition of the crime of aggression. These efforts had an impact on the eventual adoption of the crime and related mechanisms in the form of an amendment to the Rome Statute. He also examined the legal and political relationship between state acts of aggression and the crime of aggression which is committed by individuals.

Further, the presentation updated the experts on the entry into force and ratification procedures for the Rome Statute amendments, explaining that the ICC will not be able to investigate and prosecute this crime for at least another seven years. Mr. Stemmet, who was representing South Africa at the negotiations before and in Kampala, added his insights into the negotiations by addressing, in particular, the political restraints, last minute legal challenges and the compromises that followed. At Kampala, amendments were agreed in terms of article 8*bis* of the Resolution on Aggression.[10] Article 8*bis* relates to individual criminal responsibility of persons in leadership or command positions. The amendments on the crime of aggression adopted the definition of acts of aggression from the 1974 General Assembly Definition of Aggression (Resolution 3314(XXIX) of 14 December 1974). The elements of the crime of aggression were also adopted at Kampala. These elements are found in article 8*bis* of the Rome Statute.

[10] Res RC/Res 6 Adopted at the 13th Plenary meeting of the Review Conference of the Rome Statute of the International Criminal Court, on 11 June 2010, by consensus.

E. COUNTRY PAGES

This section consists of an overview of the 15 SADC countries' respective institutional and legal framework relevant to the ratification, domestication and implementation of genocide, crimes against humanity and war crimes. The information is compiled by the organisers, guided by information provided by the participants before, during and after the Expert Workshop. The countries are listed in alphabetical order according to the name of the country in English.

ANGOLA

Ratification and application of treaties

Angola is state party to the 1949 Geneva Conventions of 1949 and their 1977 Additional Protocols, as well as the 2006 Great Lakes Region's Protocol for the Prevention and the Punishment of the Crime of Genocide, War Crimes and Crimes Against Humanity and all forms of Discrimination.

Angola signed the 1998 Rome Statute of the International Criminal Court on 7 October 1998 but has not proceeded to ratification. No current efforts to ratify have been reported.

The President signs and ratifies international treaties,[11] subject to duly approval by the National Assembly.[12] The 2010 Constitution provides that general or common international law form an integral part of the Angolan legal system and that treaties and agreements binding on Angola can be applied after having been officially published and entered into force under international law.[13] The Constitution also sets out that law relating to fundamental rights must be interpreted in accordance with international treaties on rights, ratified by Angola, and that courts when considering issues of fundamental rights must apply international instruments, even if not invoked by the parties concerned.[14]

National law

Genocide, crimes against humanity and war crimes: The obligations of Angola under customary international law, the Geneva Conventions and their Additional Protocols and the Protocol for the Prevention and the Punishment of the Crime of Genocide, War Crimes and Crimes Against Humanity to punish the crime of genocide are not incorporated into national legislation. Many reports point to the Draft Criminal Code, including a section on genocide, crimes against humanity and war crimes but its progress has been stalled for many years.[15]

Crimes under customary international law

The Constitution seems to enable Courts of Angola to directly apply customary international law though no jurisprudence to the effect has been identified.

Investigations and prosecutions

No cases of genocide, crimes against humanity or war crimes have been documented.

Extradition

Article 14 of the International Conference on the Great Lakes Region Protocol for the Prevention and the Punishment of the Crime of Genocide, War Crimes and Crimes Against Humanity and all forms of Discrimination states that genocide, war crimes and crimes against humanity shall be extraditable and that states may consider the protocol as a legal basis for requesting extradition. The protocol also states that for purposes of extradition, the crime of genocide, war crimes, and crimes against humanity shall not be considered as political crimes and that extradition shall be granted if the commission of the offence concerned is such that the laws of the country in which the

[11] Article 121 of the 2010 Constitution.
[12] *Ibid,* Article 161.
[13] *Ibid,* Article 13.
[14] *Ibid*, Article 26.
[15] See: Website of CICC, http://www.coalitionfortheicc.org/?mod=country&iduct=5.

person is found would justify his or her arrest and imprisonment as if the offence had been committed in that country.

Noted efforts to ensure compliance with obligations

According to information provided by ICRC from September 2010, Angola has yet to establish a National Committee on international humanitarian law.

BOTSWANA

Ratification and application of treaties

Botswana is state party to the 1949 Geneva Conventions and their 1977 Additional Protocols, the 1998 Rome Statute of the International Criminal Court and the SADC Protocol on Mutual Legal Assistance in Criminal Matters, 2002.

The President has the competence to negotiate and sign treaties on the advice from the cabinet.

Botswana follows a dualist approach insofar as treaties are concerned. Draft bills can be prepared within the Attorney-General's Chambers, through the Legislative Drafting Division. The Attorney- General falls under the Office of the President.

The Constitution does not provide a clear delineation between international law and national law.[16] However, section 24 of the Interpretation Act, 1984, recognises that international treaties, agreements or conventions and obligations binding upon Botswana are to be considered. Thus, while the constitution does not expressly state that international law forms part of the law of Botswana, courts are bound to consider international law.

National law

Genocide and crimes against humanity: Genocide and crimes against humanity are not criminalised under national legislation. Botswana is in the process of enacting the law to implement the Rome Statute of the ICC. The delay in implementation has been attributed to capacity, expertise and resources challenges as well as other competing priorities at the national level.[17]

War crimes: Grave breaches are punishable under the Geneva Conventions Act 1970, giving effect to the four Geneva Conventions. The 1970 Act (enacted prior to the Additional Protocols) applies to acts committed by a person irrespective of nationality and wherever committed.[18] Thus, in Botswana universal jurisdiction applies to grave breaches committed in international armed conflicts. Where a crime involves willful killing of a protected person, it is punishable with death or imprisonment. In other situations it is punishable with imprisonment not exceeding 14 years.

Crimes under customary international law

Customary international law forms part of the law of Botswana. This emanates from the Roman-Dutch legal system, combined with common law. However, section 3 of the Penal Code states that "no person shall be liable to punishment by the common law", which is reinforced by section 10(8) of the Constitution providing that "no person shall be convicted of a criminal offence unless that offence is defined and the penalty therefore is prescribed in a written law".[19]

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[16] Emannuel K Quansah 'An examination of the use of International Law as an Interpretative tool in Human Rights Litigation in Ghana and Botswana' in Magnus Killander (ed.,), (2010) *International Law and Domestic Human Rights Litigation in Africa*, Pretoria University Law Press: Pretoria, Ch. 3, 37 – 56, 45.

[17] Lee Stone 'Country Study I: Botswana' in Max du Plessis and Jolyon Ford (2008) *Unable or Unwilling? Case Studies on Domestic Implementation of the ICC Statute in Selected African Countries*, Monograph No. 141, Institute for Security Studies: Pretoria, 19 -36.

[18] Section 3, Geneva Conventions Act.

[19] Lee Stone (n 17), pp 22-23.

Extradition

In Botswana, extradition is possible (subject to a number of restrictions[20]) where a crime, if it were committed within the jurisdiction of Botswana, would be an offence punishable with imprisonment for a term of not less than two years or other greater penalty.[21] The Extradition Act also provides that an offence is not considered an offence of a political character (and thus extraditable) if it is an offence under an international convention to which Botswana and the requesting country are parties and there is an obligation to surrender.[22]

Jurisdictional powers and executive discretion

The 1970 Act provides that criminal proceedings for grave breaches shall not be conducted by court-martial and only take place by or on behalf of the Director of Public Prosecutions. If issues arise relating to the applicability of the Convention, such issues shall be referred to the President for approval.[23]

Investigations and prosecutions

No cases of genocide, crimes against humanity and war crimes before Botswana courts have been documented.

Noted efforts to ensure compliance with obligations

There are no formal institutionalised structures which deal specifically with the implementation of treaties on IHL. Nevertheless, ad hoc consultative committees review international treaties in order for such treaties to be ratified. These arrangements fall under the Office of the President, Ministry of Foreign Affairs and the Attorney-General's Chambers.

Humanitarian law is taught at the University of Botswana at the postgraduate and undergraduate levels. Military and police trainings cover aspects of international humanitarian law. Reports also refer to ICRC support in training Botswana members of peace keeping operations.

DEMOCRATIC REPUBLIC OF CONGO

Ratification and application of treaties

The Democratic Republic of the Congo (DRC) is party to the 1948 Genocide Convention (since 1962), the 1949 Geneva Conventions (since 1961) and their 1977 Additional Protocols (since 1982 and 2002 respectively) as well as the 1998 Rome Statute of the International Criminal Court (since 2002).

The President of the Republic negotiates and ratifies international treaties and agreements.[24] Parliament ratifies treaties pertaining to peace, international organisations, the resolution of international conflicts, the status of persons, public finances, amendments to existing laws, modifications to the exercise of jurisdiction and trade agreements.[25]

DRC follows a civil law system of monism. Article 153 of the Constitution requires that "the civil and military courts and tribunals apply duly ratified international treaties" as far as they do not conflict with national laws.

[20] See Section 8, Extradition Act, 2005, Chapter 09:03.
[21] *Ibid*, Section 2(2).
[22] *Id.*
[23] Lee Stone (n 17).
[24] Article 213 of the 2006 Constitution.
[25] Avocats Sans Frontières, Case Study "The application of the Rome statute of the international criminal court by the courts of the Democratic Republic of Congo", Page 22.

National law

Genocide: DRC is a state party to the 1948 Genocide Convention and in Congolese law crimes of genocide are governed by Article 164 of the Military Penal Code (MPC).[26] According to this Article, genocide is punishable by death. The definition of genocide includes the following acts committed with intention to destroy, in whole or in part, a national, political, racial, ethnic or religious group, including:

1. killing members of the group
2. causing serious bodily or mental harm to members of the group
3. deliberately inflicting on the group conditions of life calculated to bring about physical destruction, in whole or in part
4. measures to prevent births within the group
5. forcibly transferring children from one group to another

Crimes against humanity: In Congolese law, crimes against humanity are criminalized by Articles 165 to 172 of the MPC, but defined differently to the Rome Statute. Article 165 defines crimes against humanity as "serious violations of international humanitarian law committed against any civilian population before or during war", while pointing out that "crimes against humanity are not necessarily related to the state of war".[27]

Article 166[28] lists serious offences that amount to crimes against humanity and which are punished in accordance with the provisions of the MPC, including torture, physical violence, forced military recruitment, denying the right to a fair trial, illegal deportation, hostage taking, attacks against civilians, racial discrimination, targeting cultural and historical monuments, etc. According to Articles 167 and 168,[29] the punishment for the above crimes against humanity ranges from life imprisonment to death penalty.

War crimes: War crimes are governed by Articles 173 to 175 of the MPC. Article 173 defines war crimes as "all offences committed against the laws of the Republic during war time which are not justified by the laws or customs of war." Article 175 states that superior officers whose subordinates are prosecuted for a war crime, may also be held liable for these actions.

Crimes under customary international law

The obligations of the DRC under customary international law are not reflected in the Constitution. Though customary international law has been referenced in jurisprudence of DRC courts, no investigations or prosecutions have taken place solely on the basis of customary international law.

Investigations and prosecutions

A number of investigations and prosecutions have taken place in the DRC, relying on the above mentioned provision of the MPC and since 2006, the Congolese military courts have applied directly the Rome Statute in a number of cases, including in the February 2011 convicting four military officers of rape and terrorism as crimes against humanity.[30] Recently, in August 2011, the Military Garrison Court of Bukavu in the Province of South Kivu convicted two members of the F.D.L.R to life imprisonment and imprisonment for a term of 30 years, respectively, for crimes

[26] Loi N° 024/2002 Du 18 novembre 2002, Portant Code Penal Militaire, Chapitre II : Des Crimes de Genocide et des Crimes Contre l'Humanite, Section 1 : Du crime de génocide, Article 164.

[27] *Ibid.*, Section 2 : Des crimes contre l'humanité, Article 165 «Les crimes contre l'humanité sont des violations graves du droit international humanitaire commises contre toutes populations civiles avant ou pendant la guerre. Les crimes contre l'humanité ne sont pas nécessairement liés à l'état de guerre et peuvent se commettre, non seulement entre personnes de nationalité différente, mais même entre sujets d'un même Etat ».

[28] *Ibid.* Section 2 : Des crimes contre l'humanité Article, 166.

[29] *Ibid.* Section 2 : Des crimes contre l'humanité Articles 167 & 168.

[30] See: http://www.rnw.nl/international-justice/article/fizi-mobile-court-rape-verdicts.

against humanity by rape (including sexual slavery), murder, torture and arbitrary imprisonment of civilians.[31]

Jurisdictional powers and executive discretion

Although there are efforts to change the situation, as of June 2011, the military courts in the DRC have exclusive jurisdiction over cases involving genocide, crimes against humanity and war crimes. The constitution of 2006 "recognized the power of the president of the republic to replace civilian courts with military courts in times of war and under certain conditions, the constitution clearly restricted the personal jurisdiction of military courts to the members of the armed forces and police forces only".[32] In wartime or under exceptional circumstances, the President of the Republic may replace civilian courts by military courts for specific offences and for defined periods.[33] The military judiciary code recognizes the jurisdiction of military courts, even in peacetime, over a large range of civilian actors where they have a military connection.[34]

The right of appeal is guaranteed by article 21, paragraph 2[35] and article 156, paragraph 2[36] of the Constitution, both of which do not permit any exception. Under the terms of article 276 of the judiciary military code, the right of appeal is also recognized before the military courts. During wartime, however, decisions of the Cour Militaire Opérationnelle are not subject to appeal.

The draft implementation legislation on the Rome Statute (see below) would, if enacted, shift jurisdiction over genocide, crimes against humanity and war crimes from the military to the civilian courts.

Noted efforts to ensure compliance with obligations

Draft implementing legislation on the Rome Statute was first introduced in 2008, which came close to adoption in the first half of 2010, but remains a draft at the time of writing. This draft would add war crimes, crimes against humanity, and genocide, as defined in the Rome Statute, to the Criminal Code and apply to acts committed since July 2002.

A large number of actors have been active in the DRC, to assist with legal reforms and capacity building, including NGOs, governments and international organisations. In October 2010, the United Nations published its Mapping Report on serious human rights violations committed in Congo between 1993 and 2003.[37] This report documented 617 alleged violent incidents and described the role of responsible national and foreign parties. The report also noted that the Congolese judicial system does not currently have the capacity or sufficient guarantees of independence to ensure justice for these crimes. Therefore other possible options were suggested, including the creation of a mixed judicial mechanism.

The Congolese government responded by drafting a new legislation that will realize the U.N. report's propositions by establishing a mixed court. The draft was adopted by the Council of Ministers on July 30 2011[38] but was rejected by the Senate on 22 August 2011. This proposed mixed court would involve both national and international staff, and would be responsible for trying the most serious crimes not currently prosecuted by the International Criminal Court. The mixed court would have the jurisdiction to try crimes allegedly committed both before and after the entry into

[31] See: http://www.asf.be/en/two-members-fdlr-convicted-crimes-against-humanity-south-kivu-dr-congo.
[32] Article 156, para 2 of the Constitution.
[33] *Id*.
[34] *Supra n. 26,* Articles 108, 110-112, translated by Marcel Wetsh'okonda Koso, *Democratic Republic of Congo Military Justice and Human Rights: An urgent need to complete reforms*, A study by AfriMAP and The Open Society Initiative for Southern Africa, 2010.
[35] Article 21 para 2 Constitution 2006 "Le droit de former un recours contre un jugement est garanti à tous. Il est exercé dans les conditions fixées par la loi.»
[36] Article 156 para 2 Constitution 2006 " En temps de guerre ou lorsque l'état de siège ou d'urgence est proclamé, le Président de la République, par une décision délibérée en Conseil des ministres, peut suspendre sur tout ou partie de la République et pour la durée et les infractions qu'il fixe, l'action répressive des Cours et Tribunaux de droit commun au profit de celle des juridictions militaires. Cependant, le droit d'appel ne peut être suspendu.»
[37] See: http://www.ohchr.org/Documents/Countries/ZR/DRC_MAPPING_REPORT_FINAL_FR.pdf.
[38] See: Human Rights Watch, *Democratic Republic of the Congo: Pass Mixed Court Law*, 17 August 2011, available at: http://www.unhcr.org/refworld/docid/4e4dfbb82.html [accessed 20 September 2011].

force of the Rome Statute in 2002. One highly controversial point of the proposed legislation, however, is that it defines the death penalty as the only applicable punishment for those convicted of crimes by the mixed court.

LESOTHO

Ratification and application of treaties

The Kingdom of Lesotho is a state party to, among others, the 1948 Genocide Convention, 1949 Geneva Conventions and their 1977 Additional Protocols, the 1973 Convention on the Suppression and Punishment of Apartheid, and the Rome Statute of the International Criminal Court (since 2000).

The Kingdom of Lesotho takes a dualist approach to international law.

National law

A limited number of treaties have been domesticated in Lesotho. One example here is the Geneva Conventions (Colonial Territories) Order in Council 1959 which gives effect to the Geneva Conventions (but not the Additional Protocols) at domestic level. As has been done to the UK legislation since, this legislation requires updates.

Genocide and crimes against humanity: The obligations of Lesotho under customary international law, the Genocide Convention, the Geneva Conventions and the 1998 Rome Statute to punish the crime of genocide and crimes against humanity are not incorporated into national legislation. Lesotho is still in the process of implementing the 1998 Rome Statute. Since 2001, Lesotho has taken measures towards the incorporation of this treaty, including carried out comparative studies of the laws of South Africa and UK on the implementation of the Rome Statute. An informal draft has been reported to have circulated previously, but has not been made publicly available.

War crimes: The grave breaches provisions of the Geneva Conventions were incorporated, with universal jurisdiction, into the law of Lesotho through the UK Geneva Conventions (Colonial Territories) Order in Council 1959 which extended the Geneva Conventions Act, 1957 to apply to colonial territories. The 1957 Acts states that any breach should be treated as a felony, to be punished with life imprisonment when involving wilful killing and imprisonment up to a maximum of fourteen years for other grave breaches.[39]

Crimes under customary international law

The obligation of Lesotho to comply with customary international law is not explicitly recognised in the Constitution and there is no documented jurisprudence analysing this relationship.

Jurisdictional powers and executive discretion

The 1957 Act grants jurisdiction to civilian courts (not courts-martial) and subjects any proceeding to the approval of the Director of Public Prosecutions (in the case of England) and leaves it up to the State Secretary to decide on questions arising regarding the applicability of the Geneva Conventions. In the 1959 Act, the responsibility of the State Secretary was delegated to Her Majesty's High Commissioner. However, since then, the constitutional system of Lesotho established a Director of Public Prosecutions with the responsibility to initiate proceedings and the High Court has the unlimited original jurisdiction to hear criminal proceedings.[40]

Investigations and prosecutions

No actual cases of genocide, crimes against humanity and war crimes have been reported.

[39] Section 1 of the 1957 Act.
[40] Section 19 of the Constitution.

Noted efforts to ensure compliance with obligations

In 2001, a national committee on the implementation of international humanitarian law was set up in Lesotho. Composition of the committee is from different ministries and government departments. The committee is called the Lesotho National Committee on IHL, and has the task of advising the government on matters of IHL. The Committee can also provide training programmes to disseminate information about IHL and adopt measures for the implementation of IHL.[41]

MADAGASCAR

Ratification and application of treaties

Madagascar is state party to the 1949 Geneva Conventions (since 1963) and their 1977 Additional Protocols (since 1992), the 1973 Convention on the Suppression and Punishment of Apartheid, and the 1998 Rome Statute of the International Criminal Court (since 2008). No current developments to ratify additional treaties have been reported.

The President negotiates and signs international treaties. The Prime Minister has the authority to negotiate and sign the international agreements not subject to ratification.[42] Most treaties are subject to ratification and before that takes place, the treaties are submitted to constitutional review by the Constitutional Court.[43]

Madagascar follows a civil law system of monism. Article 132 of the Constitution[44] establishes that "treaties or agreements that are duly ratified or adopted shall have, as from their publication, an authority higher than that of laws, subject, for each agreement or treaty, to its implementation by the other party". Those provisions establish the hierarchy of rules in the legal system in Madagascar and enshrine the supremacy of ratified treaties and in concrete terms, the provisions of the treaties take precedence in the case of a conflict of laws.

National law

Genocide, crimes against humanity and war crimes: The obligations of Madagascar under the Geneva Conventions, customary international law and the Rome Statute to punish these crimes are not reflected in national legislation.

Crimes under customary international law

The obligation of Madagascar to comply with customary international law is not explicitly recognised in the Constitution and no jurisprudence to the effect has been identified.

Investigations and prosecutions

No cases of genocide, crimes against humanity or war crimes have been documented.

Noted efforts to ensure compliance with obligations

Decree No. 2006-435, relating to the creation, organization and operation of a national committee on international humanitarian law, was adopted on 27 June 2006. This decree establishes a national committee in Madagascar, with a mandate to support the national implementation of international humanitarian law treaties to which Madagascar is a state party, to promote the dissemination of IHL in Madagascar, to advise the government on new developments in IHL, and to propose measures to harmonize national legislation with relevant international treaties. The decree

[41] See: ICRC, Table of National Committees and Other National Bodies on International Humanitarian Law, 30 September 2010, Available at: http://www.icrc.org/eng/assets/files/other/national-committes-icrc-30-09-2010.pdf.
[42] Article 133 of the Constitution.
[43] Article 132 of the Constitution.
[44] Loi constitutionnelle n° 2007-001 du 27 avril 2007.

contains stipulations on the composition of the committee, its organization and its operating procedures.[45]

The military manual of Madagascar was extensively referenced by ICRC in its large study on Customary International Humanitarian Law.[46]

MALAWI

Ratification and application of treaties

Malawi is a state party to the 1998 Rome Statute of the International Criminal Court, the 1949 Geneva Conventions and their 1977 Additional Protocols.

The President of the Republic of Malawi has the power to enter into and accede to international agreements.[47] No current developments to ratify further ICL treaties have been reported.

Malawi applies the dualist system, whereby international law is a recognised source of law in Malawi and international treaties form part of the law if provided for in the Act of Parliament ratifying the agreement.[48] On the other hand, treaties entered into before the 1994 Constitution form part of the Law of Malawi, unless Parliament provides otherwise.[49]

The process of domesticating international treaties is initiated by the responsible Ministry. The Ministry of Justice then prepares a draft bill to be approved by the Cabinet before being tabled to the Parliament for adoption or approval. The Bill then becomes an Act of Parliament after being assented to by the President.

National law

Genocide: The Constitution of Malawi (1994) prohibits genocide ('Acts of genocide are prohibited and shall be prevented and punished'[50]) and the Penal Code has recently been amended to include the offence of genocide.[51] An offence involving the killing of a person is punishable by death or life imprisonment; and in any other case, with imprisonment for twenty one years.[52] A person may be tried and punished for the offence of genocide whether committed within or outside Malawi.[53] However, the Penal Code does not specifically provide for crimes against and humanity and war crimes and there is no further implementation legislation intended to fill this gap. No ongoing efforts to implement further international criminal law treaties have been reported.

Crimes against humanity: Malawi has not incorporated this crime in its national legislation.

War crimes: Malawi has enacted the Geneva Conventions, through the 1968 Geneva Conventions Act.[54] Section 4(1) of the Geneva Conventions Act, chapter 12:03 of the Laws of Malawi, confers universal jurisdiction to the courts in Malawi in respect of grave breaches of the Geneva Conventions. In accordance with this provision, Malawian courts may exercise universal jurisdiction over the alleged perpetrators, irrespective of their nationality, if the grave breaches were committed in Malawi or abroad, and the perpetrator is found in the territory of Malawi.[55] This act stems from 1967 and thus, in terms of temporal jurisdiction, it covers relevant acts committed during the last

[45] See: International review of the red cross, "National implementation of international humanitarian law, Biannual update on national legislation and case law, July–December 2006" Volume 89, Number 865, March 2007.
[46] See: http://www.icrc.org/eng/war-and-law/treaties-customary-law/customary-law/.
[47] Section 89, Constitution of Malawi.
[48] *Ibid.* Section 11(2)(c).
[49] *Ibid.* Section 211.
[50] *Ibid.* Section 17.
[51] *Ibid.* Section 217A of Penal Code (Amendment) Act No. 1 of 2011, assented on 20th January, 2011 and Published on 28th January, 2011.
[52] *Ibid.* Sec 217A(2).
[53] *Ibid.* Sec 217(A)(3).
[54] Chapter 12:3 of the Laws of Malawi.
[55] *Supra* (n51), Section 5; Section 66, Criminal Procedure and Evidence Code, Chapter 8:01 Laws of Malawi.

decades. The Geneva Conventions Act provides that in case of a grave breach causing or contributing to the death of a protected person, life imprisonment should be imposed. In the case of other breach, imprisonment for fourteen years applies.[56]

Crimes under customary international law

Acts that amount to crimes under customary international law constitutes crimes under the law of Malawi "unless inconsistent with this Constitution or an Act of Parliament".[57] However, no such cases have been reported.

Extradition

The 1972 Extradition Act, chapter 8:03 of the Laws of Malawi, regulates extradition of suspects.[58] As in many jurisdictions, the Extradition Act provides that an offence for which the person is to be extradited must also be an offence under the law of Malawi and listed in the Second Schedule of the Act.[59] Although the Schedule does not contain genocide, war crimes and crimes against humanity, it provides for "any other offence specially agreed to be a relevant offence under the extradition arrangement entered into by the Minister of Justice with the government of any country providing for surrender on a basis of reciprocity, of fugitive offenders".[60] The Extradition Act refers merely to surrender to another country, and does not contain reference to surrenders to international courts and tribunals.

Jurisdictional powers and executive discretion

Proceedings for crimes under the Geneva Conventions Act are to be tried by, or on behalf of, the Director of Public Prosecutions.[61] Where the alleged crime has taken place outside Malawi, jurisdictional questions shall be determined by the Minister of Justice.[62]

Investigations and prosecutions

No reports have been found of any proceedings initiated to try grave breaches under the Geneva Conventions.

Noted efforts to ensure compliance with obligations

Malawi has formed a National Committee on International humanitarian Law under the Ministry of National Defence in collaboration with the Ministry of Foreign Affairs and International Corporation. Amongst its functions, the Committee was tasked to adopt the necessary legislative measures to repress grave breaches of international humanitarian law treaties on the basis of universal jurisdiction. It was further mandated to ensure that protected persons and places under the Geneva Conventions are identified and protected. The Committee was also established to ensure guarantees of humane treatment and due legal process in the time of armed conflict, and to conduct trainings of persons in, and to advise the armed forces on international humanitarian law.

Malawi reportedly attempts to integrate relevant humanitarian law obligations at the strategic, operational, and tactical levels. [63] This has been achieved by publishing booklets that are user-friendly to readers at all levels. There is a generic military manual that acts as the main text, and there are also simplified versions of the pamphlet that provides basic fundamentals about issues related to international humanitarian law, international human rights law, and international criminal law, constitutional and administrative law. These pamphlets are incorporated into military courses.

[56] Article 4, para 1, subparas i and ii.
[57] Section 211(3), Constitution of Malawi.
[58] Chapter 8:03, Amended 2000.
[59] Sec 5, p. 14 of the Act.
[60] Sec 3 of the Act as read with Sec 5, p. 14.
[61] Article 4, para 3.
[62] Article 4, para 4.
[63] Dan Kuwali, "Guns and Laws: Integrating Law in Military Doctrine in Malawi", conference paper *presented* at the Expert Workshop: Giving Effect to the Law on War Crimes, Crimes Humanity and Genocide in Southern Africa, University of Pretoria, Centre for Human Rights, 13-14 June, 2011, p. 5.

More importantly, knowledge of these laws forms part of promotional exams for officers in the Malawi Defence Forces.[64]

It has also been reported that the rules of engagement have been carefully crafted to embody IHL and that the breaches thereof have been explained clearly to troops at all levels.[65]

In February 2010, the International Bar Association organised a workshop on the ICC and implementation legislation for Malawi.[66] International humanitarian law is taught as a component of a course of Public International Law at the Faculty of Law, Chancellor College, University of Malawi which is one of the two public universities in Malawi. The Malawi Defence Force has also established a centre for security studies in conjunction with the other public university in Malawi, i.e., Mzuzu University, where IHL has been incorporated into all four years of study.[67]

MAURITIUS

Ratification and application of treaties

Mauritius is a state party to the 1949 Geneva Conventions and their 1977 Additional Protocols, as well as the 1998 Rome Statute of the International Criminal Court.

Mauritius falls into the category of states following the dualist approach in terms of international treaties, whereby prior to application treaties must first be incorporated into domestic law.[68]

In Mauritius, there is a preference, but not a requirement, to incorporate treaties into domestic law before ratification.[69]

National law

Mauritius has enacted a number of laws incorporating international treaties and international crimes into its domestic legislation. For example, the Geneva Conventions Act of 1970, as amended, incorporates the provisions of the Geneva Conventions into domestic law. In July 2011, the International Criminal Court Act ("2011 ICC Act") was passed by the Parliament of Mauritius and gazetted.

Genocide and crimes against humanity: Until the entry into force of the 2011 ICC Act, there is no incorporation of genocide or crimes against humanity in the legislation of Mauritius. Genocide and crimes against humanity are provided for under the 2011 ICC Act and defined as in the Rome Statute. With the entry into force of the 2011 ICC Act, the Criminal Code will be amended to include genocide and crimes against humanity. The Act grants the courts of Mauritius universal jurisdiction based on active personality (citizen, residency or presence after commission) and passive personality. Further, the Act provides for superior and command responsibility,[70] and reflects the

[64] *Ibid.*
[65] *Ibid.*
[66] See: http://www.ibanet.org/ENews_Archive/IBA_29March_2010_Enews_IBAHRI_Malawi_workshop_on_ICC.aspx .
[67] Kuwali, *supra* (n 63), p. 5.
[68] *Pierce v. Pierce* 1998 SCJ 397, *Roussety v. The Honourable The Attorney General*, 1967 MR 45: "As regards treaties the Privy Council has authoritatively laid down the following principle in the case of *A. G. for Canada v. A. G. for Ontario* [*A-G Canada v. A-G Ontario, (1937) A.C. 326 (Privy Council), 352*]: *Within the British Empire there is a well established rule that the making of a treaty is an executive act, while the performance of its obligations, if they entail alteration of the existing domestic law, requires legislative action.[...]The stipulations of international obligations* unless enacted into laws by Parliament, *cannot, in principle, be enforced in municipal courts, and the right to enforce remains only with the high contracting parties* (See *Vajesingji Joravarsingji v. Secretary of State for India* (1924) L.R.51. I.A. 357, 360."and *M M Jordan v M R Jordan* 1999 SCJ 58a.
[69] See, for example, the Report of the working Group on the Universal Periodic Review for Mauritius (A/HRC/11/28, 3 March 2009), in relation to the Convention on the Rights of Persons with Disabilities (CPD): "82. Mauritius takes note of the recommendations listed below, and offers the following comments:1. With regards to the recommendation to ratify in 2009, as it had committed itself, the CPD (France), included in paragraph 33 (a), Mauritius indicates that it has undertaken to ratify the CPD as soon as the necessary legislation is passed, and the necessary measures are taken to allow implementation of the CPD".
[70] Section 5, 2011 ICC Act.

Rome Statute's absence of immunities. The Act does not refer to a temporal limitation to the jurisdiction over these crimes.

War crimes: The 2003 Geneva Conventions (Amendment) Act incorporates a number of provisions of the 1949 Geneva Conventions, including those regarding grave breaches. The Act was amended in 2003 to incorporate relevant provisions of Additional Protocols I and II, i.e. also including acts committed during internal armed conflicts. The Act establishes universal jurisdiction for grave breaches committed in international armed conflicts. Other breaches are limited to territorial jurisdiction only. The information above regarding the 2011 ICC Act and genocide applies equally to war crimes.

Crimes under customary international law

The obligation of Mauritius to comply with customary international law is not explicitly recognised in the Constitution. As regards its international relations, Mauritius does however recognise customary international law.[71] Further, it has been said, in relation to the International Covenant on Civil and Political Rights, to be "a well-recognised canon of construction that domestic legislation, including the Constitution, should if possible be construed so as to conform to such international instruments."[72] However, customary international law seems not to be applied as part of domestic law, unless it is specifically enacted.

Extradition

Extradition of an accused to and from foreign states is possible under the Extradition Act where: (i) the act which the offender is alleged or found to have committed what amounts to an extradition crime within the meaning of the Extradition Act; and (ii) either the foreign State is a Commonwealth country; or (iii) an extradition treaty between Mauritius and the foreign State exists. As regards crimes under the 2011 ICC Act, requests for surrender by the ICC will be dealt with in accordance with the procedures prescribed in that Act.

Jurisdictional powers and executive discretion

The Geneva Conventions Act notably grants jurisdiction to civilian courts (not court-martials or other military courts).[73]

A prosecution for an offence under the 2011 ICC Act shall take place before a Judge without a jury.[74]

Investigations and prosecutions

No cases of genocide, crimes against humanity or war crimes have been documented.

Noted efforts to ensure compliance with obligations

The National Humanitarian Law Committee, established in 2001, is responsible for implementing and disseminating information concerning IHL at the national level.[75] The Committee is chaired by the Permanent Secretary of the Prime Minister's Office and is comprised of representatives of other concerned government ministries and the Mauritius Red Cross. In 2007, Mauritius reported a number of activities it had undertaken relating to teaching and disseminating IHL.[76] The NHLC and the Red Cross Society have embarked on a sensitisation programme on IHL issues for public servants. A half day workshop was conducted in October 2010 and a similar workshop was due to be organised in May 2011.

[71] See: *Danche v The Commissioner of Police & Ors* [2002 SCJ 171].
[72] See: *Matadeen D and Anor v Pointu M. G. C. and Ors* (Privy Council) 1997 PRV 14.
[73] Section 2, 2003 Geneva Conventions Act.
[74] Section 8, 2011 ICC Act.
[75] Republic of Mauritius, Sixth Annual Report of the National Humanitarian Law Committee of Mauritius, 2007, available online: http://www.gov.mu/portal/goc/pmo/file/hlaw07.doc.
[76] *Id.*

MOZAMBIQUE

Ratification and application of treaties

Mozambique is a state party to, among others, the 1948 Genocide Convention (since 1983), the 1949 Geneva Conventions and their 1977 Additional Protocols (since 1983), the SADC Protocol on Mutual Legal Assistance in Criminal Matters 2002.

Mozambique signed the Rome Statute of the International Criminal Court in 2000 but has not yet ratified it. In proceeding with ratification, Mozambique will first conclude on some of the issues it has identified as compatibility issues between the Rome Statute on the one hand, and the Constitution and national legislation on the other hand. One issue raised here has been the compatibility of the respective sentencing regimes. Lack of resources and capacity are some of the challenges leading to delays in implementing treaties.

Ratification of treaties falls under the purview of the Council of Ministers which has been empowered under article 204 of the Constitution to prepare the signing and ratifying treaties. The power to negotiate treaties is vested in the President while the Parliament ratifies the treaties.

As per article 18 of the Constitution, international treaties ratified by the executive have the force of law in the country. The provisions of the international treaty enjoy the same legal status under the 2004 Constitution as those laws that emerge from the Parliament.[77] For treaties to be domesticated, a draft is initiated and submitted to the speaker of the parliament who later takes it to the relevant parliamentary committees for deliberations, before the President can promulgate the law within thirty days. Once the law is promulgated, it must be published in the Gazette for it to enter into force.

National law

Genocide and crimes against humanity: Currently, genocide and crimes against humanity are not defined crimes under Mozambique legislation. While proceeding towards implementation of the 1998 Rome Statute, Mozambique is, according to informal reports, in the process of developing implementation legislation.

War crimes: The Law on Military Crimes[78] from 1987 criminalises war crimes committed in the field by troops against civilian population, prisoners of war, civilian buildings, and objects using the sign of the Red Cross. Punishment for war crimes ranges between 12 years and 24 years in prison.

Crimes under customary international law

The obligation of Mozambique to comply with customary international law is not explicitly recognised in the Constitution and no jurisprudence to the effect has been identified.

Jurisdictional powers and executive discretion

Military Courts were given the competence over war crimes under the Law on Military Crimes.[79] However, in 2008, the Assembly of the Republic passed a bill transferring all military judges to civilian courts since court martial can only exist in time of war.

Investigations and prosecutions

There are no reported proceedings dealing with genocide, crimes against humanity and war crimes.

Noted efforts to ensure compliance with obligations

International humanitarian law is taught at universities and at the International Relations Institute.

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[77] Article 18 of the Constitution.
[78] No. 17/87 of 21 December 1987.
[79] *Id.*

The institutional and operational capacity of the Mozambican justice sector needs to be strengthened. For instance, courts and offices of the Attorney General have been reported to face high rates of procedural delays.[80]

NAMIBIA

Ratification and application of treaties

Namibia is a state party to the 1948 Genocide Convention, the 1949 Geneva Conventions and their Additional Protocols I and II, the 1984 Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment, the 2003 Protocol to the African Charter on the Rights of Women, as well as the 1998 Rome Statute of the International Criminal Court.

The President negotiates and signs international agreements, either personally or through delegation, after which the National Assembly agrees to the ratification of or accession to the agreements.[81] The process of ratifying treaties starts from the Ministry of Foreign Affairs and the Attorney-General, and then continues to the Cabinet. Following an approval by the Cabinet, an agreement is tabled in parliament for ratification or accession by the signatory or the minister in whose mandate the subject matter of the instrument falls.

International treaties to which Namibia is bound are automatically incorporated into Namibian law. In the words found in article 144 of the Constitution, "Unless otherwise provided by this Constitution or Act of Parliament, the general rules of public international law and international agreements binding upon Namibia under this Constitution shall form part of the law of Namibia". This provision seemingly places Namibia in the category of monist states, though the direct application of international law depends to a great extent on the content and wording of the rule/obligation in question. The readiness or otherwise of practitioners to invoke and courts to apply international law directly reflects a litigation culture and tradition which have yet to embrace the changes brought about by the constitutional provisions in article 144. Articles 63 and 144 of the Constitution constitutes a break from the pre-independence situation in two respects: a) ratification of international instruments fell to the executive, now ratification is done by parliament (national assembly) and b) before a treaty could become part of the law of the land, it had to be specifically incorporated into the law by way of domestic legislation. On the strength of article 144 it would appear that upon ratification international instruments form part of the law and there is no need in principle for an act of parliament expressly incorporating the international instrument. This change has however not entirely taken root within the litigation culture.

It seems that national incorporation legislation, unless expressly and unequivocally called for by the international instrument, remains necessary when the international instrument introduces new concepts into the law, such as: extended jurisdiction; the creation of crimes not known within the domestic system; the creation of international cooperation arrangements (e.g. with ICC); or an extension of the available forms of, for example, mutual legal assistance, which require resort to the courts.

National law

Genocide and crimes against humanity: Namibia is yet to enact laws to implement the 1948 Genocide Convention and the 1998 Rome Statute. The drafting process has progressed with regards to implementation of the 1998 Rome Statute, though at the time of writing no draft can be accessed.[82] However, according to Article 144 of the Constitution, the Genocide Convention and the Rome Statute for the International Criminal Court form part of the law of Namibia. As mentioned

[80] Pg. 5, Un General Assembly, Summary prepared by the Office of the High Commissioner for Human Rights in accordance with paragraph 15 (c) (HRC-2011).
[81] Article 32(3(e) and Article 63(2)(e) of the Namibian Constitution.
[82] See: Website of the NGO Coalition for the ICC, See http://www.iccnow.org/?mod=country&iduct=121 and a document issued by Human Rights Watch http://www.essex.ac.uk/armedcon/story_id/icc-implementation.pdf.

above, the direct application of these treaties is nevertheless subject to all the complications and substantive and procedural challenges that national courts are faced with when interpreting and applying international treaties in the absence of national incorporation legislation.

Further, Article 23 of the Constitution furthermore prohibits 'racial discrimination and the practice and ideology of apartheid', and the Racial Discrimination Prohibition Act of 1991 imposes criminal liability for such actions, given that the Prosecutor-General has authorized a trial. The punishment can vary from a fine up to 15 years imprisonment.

War crimes: Namibia has enacted the 1949 Geneva Conventions and their Additional Protocols through the Geneva Conventions Act of 2003. The Act prohibits and punishes grave breaches of the Geneva Conventions and Protocol I, subject to the authorization of the Prosecution-General. The Act provides the Namibian courts (other than court martial or other military courts[83]) with universal jurisdiction over grave breaches:

> 2(1) Any person who, in Namibia or elsewhere, commits, or aids, abets or procures the commission by another person of, a grave breach of any of the Conventions or of Protocol I is guilty of an offence.
>
> […]
>
> 2(3) This section applies to all persons, irrespective of their nationality or citizenship.

Grave breaches involving willful killing are punishable with life imprisonment, and in any other case with imprisonment not exceeding 14 years.

Crimes under customary international law

Without an actual case, it is difficult to assess whether or not article 144 can be used as a basis for criminal liability for a customary international law crime. It is however clear that the status of customary international law in Namibia is strengthened by the provisions of article 144 as it provides a basis for the courts to apply customary international law directly.

Extradition

According to the Extradition Act of 1996, extraditable offences under the Act are those that are punishable with at least 12 months imprisonment in the receiving country and punishable with 12 months imprisonment or more in Namibia.[84] Extradition is only effected to the limited number of countries that Namibia has extradition agreements with or has been specified in the Proclamation attached to the Act. A request is sent to the Minister of Justice, who authorizes a magistrate to proceed with an inquiry. The magistrate then issues an order and the Minister of Justice makes the final decision of extradition. The magistrate's order is subject to appeal to the High Court in terms of section 14, and per the Supreme Court judgment in *S v Koch* 2006 (NR) 513 (SC) a further appeal lies to the Supreme Court.

Jurisdictional powers and executive discretion

A prosecution under the Geneva Conventions Act takes place before a civilian court (other than court martial or other military courts[85]) and is subject to the written authority of the Prosecutor-General.[86] The Prosecutor-General is the prosecutorial authority in the country, created in terms of Article 88 of the Constitution and whose independence is entrenched in the Constitution. This provision seeks to prevent abuse and ensure that all prosecutions carried out in terms of the Geneva Conventions Act are the result of the proper exercise of authority.

Investigations and prosecutions

No cases of genocide, crimes against humanity or war crimes have been documented.

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[83] Section 1, No. 15 of 2003: Geneva Conventions Act, 2003.
[84] The Extradition Act of No. 11 of 1996, section 3(1).
[85] *Supra* (n83) Section 1.
[86] *Ibid.* Section 2(6).

Noted efforts to ensure compliance with obligations

In 1995, the Inter-ministerial Technical Committee on Human Rights and Humanitarian Law was established to advise the government on issues relating to human rights and international humanitarian law. The Committee is chaired by the Ministry of Justice and also consists of representatives from the Ministry of Foreign Affairs, Ministry of Gender, Ministry of Health, Ministry of Defence, Ministry of Safety and Security and Ministry of Lands and Resettlement. This Committee is responsible for submitting state reports under the various international human rights instruments. The Ombudsperson is no longer part of the Committee but submits his own reports, however there remains a cooperative relationship between the two bodies.

The Ministry of Defence is the line Ministry in the implementation of international humanitarian law. The Ministry has established the Law of War Desk to disseminate international humanitarian law in the Defence Force. The Desk acts in collaboration with instructors at the Defence Force Military School in training and disseminating information on the subject. In addition, the ICRC assists in conducting trainings. International humanitarian law is furthermore is taught to members of the Police and Defence forces at the Military School and Police College.

SEYCHELLES

Ratification and application of treaties

The Republic of Seychelles is party to, among others, the 1948 Genocide Convention, the 1949 Geneva Conventions and their 1977 Additional Protocols, the 1973 Apartheid Convention, the Optional Protocol to the Convention on Rights of Child prohibiting recruitment of child soldiers, the 1998 Rome Statute of the International Criminal Court, as well as the African regional Conventions on Terrorism and Rights of Women.

While a colony of the UK, Seychelles was subject to UK ratification/accessions or extended application of the Genocide and Geneva Conventions. After independence, Seychelles sent a diplomatic note dated 22 October 1979 to the UN Secretary-General declaring that it would not consider itself bound by all the (multilateral) treaties, which the UK had ratified or extended to Seychelles, unless it specifically declared itself to be bound by such treaties or conventions, which it considered appropriate. This declaration was considered effective only in respect of those treaties or conventions to which the UN Secretary-General was the depository.

The UK acceded to the 1948 Genocide Convention on 30 January 1970 and declared its extension to its overseas territories, including Seychelles on 2 June 1970. Similarly, the UK became party the four 1949 Geneva Conventions on 23 September 1957. Seychelles declared its adherence to the Geneva Conventions on 8 November 1984, and on the same day, it formally became party to the Additional Protocols I and II.

National law

The 1991 Constitution of Seychelles adopted in 1991 took into account and incorporated provisions to implement the Conventions against apartheid, torture and on child soldiers.[87]

Genocide: The British Government enacted the Genocide Act in 1969, which was extended to British Overseas Territories, including Seychelles, through the Genocide Act 1969 (Overseas Territories) Order 1970. This Order, as revised by the Seychelles Law Commission in 1991, is still in operation. For the offence of genocide, the Genocide Act 1969 (Overseas Territories) Order 1970 incorporates, with adaptations, Article II of the Genocide Convention in its Schedule and provides for universal jurisdiction. The punishment for the offence of genocide, involving the killing

[87] Articles 16, 27 and 31, respectively.

of a person, is life imprisonment. In all other cases, the punishment would be 14 years imprisonment.

Crimes against humanity: This crime is not incorporated into the legislation of the Seychelles, which has yet to adopt implementing legislation for the 1998 Rome Statute.

War crimes: After independence, Seychelles became party to the four 1949 Geneva Conventions and their 1977 Additional Protocols. Pursuant to these treaties, it enacted the Geneva Conventions Act in 1985 which came into force in August 1986. Although this Act was made with reference to these Conventions and Protocols, none of their provisions were incorporated into the Act or as Schedule to the Act. However, terms such as "prisoners of war", "protecting power", "protected internee", etc., were defined with reference to the definitions of the Conventions. Similarly, the offences were identified with reference to the grave breaches in Articles 50, 51, 130 and 147, of Conventions I to IV, respectively. In case of any offence involving killing of a person, a conviction would result in a sentence of life imprisonment.[88] In all other cases, the punishment would be up to 14 years imprisonment.

Section 3 of the Act envisages universal jurisdiction in respect of grave breaches. However, as with cases of genocide, the prosecution could be launched only with the consent of the AG.[89] Further, it may be noted that the Act does not insist upon the presence of alleged offender in the territory of Seychelles for prosecuting him for the offences. Thus, while both the Acts insist upon prior consent of the Attorney-General for launching prosecution for the offences under the Acts, the universal jurisdiction is implicit under the Genocide Order, it is explicit and in clear terms under the Geneva Conventions Act.

Jurisdictional powers and executive discretion

While the proceedings for the offence of Genocide could be initiated by, or with the consent of the Attorney General, the Genocide Act 1969 (Overseas Territories) Order 1970 provides that genocide cases based on universal jurisdiction be initiated with the consent of the Attorney General.

Investigations and prosecutions

No reports have been found of any proceedings initiated to try grave breaches under the Geneva Conventions.

SOUTH AFRICA

Ratification and application of treaties

South Africa is a state party to, among others, the 1948 Genocide Convention, the 1949 Geneva Conventions and their 1977 Additional Protocols, the 1998 Rome Statute of the International Criminal Court, the 1999 OAU Convention on the Prevention and Combating of Terrorism and the 2003 Protocol on the African Charter of the Rights of Women.

Section 231(1) of the Constitution of the Republic of South Africa (the Constitution) provides that the negotiating and signing of all international agreements is the responsibility of the national executive. The term "international agreements" is used generically to denote all international agreements governed by public international law, irrespective of designation. The national executive is the Cabinet (Ministers) together with the President and Deputy President.

As regards approval of international agreements that have been negotiated and/or signed, section 231(2) provides that agreements must be approved by both houses of Parliament. In practice, this means that the Department responsible for the processing of a particular agreement

[88] Since the Act was enacted prior to the 1991 Constitution of Seychelles, death penalty is envisaged in sections 4(1)(b) and 6 of the Act. The 1991 Constitution, however, prohibits the death penalty. This is an anomaly, which needs to be rectified.
[89] Section 3(3).

must first submit a Cabinet Memorandum to the Cabinet. Upon approval by Cabinet, the responsible Department submits the agreement to Parliament, together with a draft resolution and an explanatory memorandum. The two houses of Parliament deliberate separately and once both have approved the agreement, the agreement can enter into force and bind South Africa in terms of the provisions on entry into force in the agreement. Usually entry into force will take place after ratification or accession. The responsible Department must then draft instrument of accession/ratification, for signature and deposit by the Minister of International Relations and Cooperation.

Section 231(3) of the Constitution provides for an exception to the above procedure. International agreements of a technical, administrative or executive nature or agreements not requiring ratification or accession may be approved only by the national executive, without reference to Parliament, but must be tabled in both houses of Parliament within a reasonable time.

If an international agreement has domestic effect, it must be published in the Government Gazette. Enabling legislation may provide that in case of such publication, the agreement will have domestic legislative effect.

An international agreement becomes law in South Africa when it is enacted into law by national legislation and a self-executing provision is law as long as the particular agreement has been approved by parliament and is consistent with the Constitution.[90]

Furthermore, one of the factors which South African courts should take into account when interpreting the Bill of Rights, is to consider international law as per section 39 of the constitution. Furthermore, courts are supposed to prefer any reasonable interpretation of the legislation that is consistent with international law.[91] Hence, international law provides useful guidance to courts in South Africa.

National law

Genocide and crimes against humanity: Genocide and crimes against humanity are criminalised in South African law under the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 (The 2002 ICC Act), which prohibits and punishes international crimes, and confers universal jurisdiction on the High Court of South Africa over any person responsible for genocide or crimes against humanity committed since 2002, regardless of where the crime was committed and irrespective of nationality.[92] The Act incorporates the Rome Statute as a schedule to the Act and copies the definitions of the crimes as found in the Rome Statute. For the purpose of jurisdiction, section 4(1) of the Act provides that "despite anything to the contrary in any other law of the Republic, any person who commits a crime as described in the Rome Statute, is guilty of an offence and liable on conviction to a fine or imprisonment."

Extra-territorial jurisdiction is provided for under section 4(3) of the Act in that, the jurisdiction of a South African court will be triggered when a person commits a crime outside the territory of the Republic on conditions that the person falls within the following possibilities:

(a) that person is a South African citizen;

(b) that person is not a South African citizen but is ordinarily resident in the Republic*;*

(c) that person, after the commission of the crime, is present in the territory of the Republic*;* or

(d) that person has committed the said crime against a South African citizen or against a person who is ordinarily resident in the Republic*.*

[90] Section 231(4), Constitution of South Africa, 1996.
[91] *Ibid.* Section 233.
[92] Sec 4(3), Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002.

The 2002 ICC Act also confirms that, in compliance with Article 27 of the Rome Statute no person responsible for these crimes can benefit from immunity, and immunity cannot be used as a ground to mitigate punishment.[93]

War crimes: The 2002 ICC Act incorporates the Rome Statute and recognizes breaches of the Geneva Conventions as war crimes by copying the definitions of the war crimes as found in the Rome Statute. The 2002 ICC Act thereby also incorporates war crimes applying to conflicts of a non-international nature.[94] The jurisdictional aspects outlined in relation to genocide apply to war crimes as well.

Further, the Geneva Conventions Bill 2010, adopted by the South African parliament in June 2011 and approved by the Cabinet in September 2011 incorporates grave breaches of international law as offences under South African law and attaches, to these offences, full universal jurisdiction (to grave breaches, not to other breaches). The Bill defines the difference between normal breaches and grave breaches of international humanitarian law and provides for command and superior responsibility. In terms of the relationship between the 2002 ICC Act and the Geneva Conventions Bill; there are three war crimes in the Geneva Conventions and the Additional Protocols which are not covered by the Rome Statute and therefore not covered by the 2002 ICC Act. As mentioned, there are no jurisdictional limits attached to the Geneva Conventions Bill. Further, the Geneva Conventions Bill (Chapter 6, Article 19) states: "The provisions of this Act must not be construed as limiting, amending, repealing or otherwise altering any provision of the Implementation of the Rome Statute of the International Criminal Court Act, 2002 (Act No. 27 of 2002), or as exempting any person from any duty or obligation imposed by that Act or prohibiting any person from complying with any provision of that Act." The Geneva Conventions Bill is silent with regards to the issue of immunities in relation to prosecutions of breaches.

Crimes under customary international law

Customary international law forms part of the law of South Africa under section 230 of the Constitution of South Africa, 1996. However, so far no cases of genocide, crimes against humanity or war crimes have been reported based on customary international law.

In relation to the status of the Geneva Conventions as customary international law, it is noteworthy that the Constitutional Court confirmed the customary nature of international humanitarian law as reflected therein, noting also that the rules relating to international and internal armed conflict have become increasingly blurred.[95]

Extradition

Extradition matters are dealt with in terms of the Extradition Act 67 of 1962, whereby a person can be extradited from South Africa to a foreign state, in accordance with an extradition agreement,[96] designation or comity for offences recognised under South African law. Extraditable offences include all offences under South African law punishable with imprisonment for a period of six months or more, i.e. including genocide, crimes against humanity and war crimes.

If an extradition request is received, the Minister of Justice and Constitutional Development gives a notification in terms of section 5(1)(a) of the Extradition Act that he has received the request. The subject of an extradition request appears before a magistrate for a hearing to determine the extraditability of the subject. Thereafter, a magistrate communicates his/her outcome to the Minister for him to make a decision in terms of section 11 of the Extradition Act.

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[93] Sec 4(2)(a) of the Act.

[94] See: Article 8(2)(c) of the Rome Statute.

[95] *S v Basson* 2007 (3) SA 582 (CC), para 175. See SALC: Submission to the Portfolio Committee on Defence and Military Veterans, Implementation of the Geneva Conventions Bill [B10-2011]. Available at: http://www.southernafricalitigationcentre.org/library/item/salc_submissions_on_the_south_african_implmentation_of_the_geneva_conventions_bill.

[96] Under South African law, an extradition agreement means a bilateral agreement or a provision in a multilateral convention by which South Africa is bound, which provides for the same effect. (Extradition Amendment Act 1996).

Jurisdictional powers and executive discretion

Criminal prosecutions under the 2002 ICC Act must receive the consent of the National Director of Public Prosecutions. Once the consent of the National Director of Public Prosecutions has been given, an appropriate High Court will be designated for purposes of prosecution. The Minister of Justice responsible for the administration of justice must, in consultation with the Chief Justice of South Africa and after consultation with the National Director of Public Prosecutions designate an appropriate High Court for prosecution.[97]

The 2002 ICC Act empowers the South African High Court with competence to try genocide, crimes against humanity and war crimes. South Africa has designated the Priority Crimes Litigation Unit, under the National Prosecuting Authority, to ensure the effectiveness of South Africa's implementing law.

In terms of prosecutions of grave breaches under the Geneva Conventions Bill, any provincial division of the High Court 'or a court of similar status' has jurisdiction. In the case of a member of the defence force acting, a military court also has jurisdiction. As with case of genocide, the Minister of Justice is involved in designating an appropriate Court.[98] The Bill is silent as to whether prosecutions would be designated to the Priority Crimes Litigation Unit.

Investigations and prosecutions

In spite of the legislative framework, no cases of genocide, crimes against humanity and war crimes have been heard in South Africa. Nevertheless, the South African authorities have been seized by a few situations worth mentioning in which the triggering of jurisdiction has been sought.

In 1941, the 1929 Geneva Convention relative to the treatment of prisoners of war was applied as part of the law of South Africa in a case regarding the right of the accused to obtain legal representation. The Convention was applied as part of the law of South Africa.[99]

On 3 August 2009, two NGOs (Solidarity Alliance and Media Review Network) presented a docket to the National Prosecuting Authority (NPA) and the Priority Crimes Litigation Unit alleging that certain individuals, including members of the Israeli army who fought in Operation Cast Lead in Gaza, were responsible for war crimes committed during the Gaza offensive. The attempt did not lead to prosecutions, reportedly due to the lack of available evidence.

In 2008, a dossier was presented to the NPA alleging violations amounting to crimes against humanity in Zimbabwe by some individuals from Zimbabwe during the run-up to the 2008 elections. The NPA declined to prosecute the Zimbabwean officials, again reportedly due to the lack of available evidence. An appeal was lodged by the Zimbabwean Exiles Forum and the Southern African Litigation Centre. At time of writing, the matter has not been brought to prosecution by the investigative authorities.

A live case before South African authorities involves an extradition request by the Republic of Rwanda against a Rwandan suspect who was granted refugee status in South Africa in 2010 while facing criminal charges in Rwanda for corruption, embezzlement and terrorism and the subject of a Rwandan extradition request to South Africa. The same person is also a subject of warrants of arrest from France and Spain relating to the murder of French and Spanish nationals as war crimes and crimes against humanity. However, as mentioned above, the 2002 ICC Act establishes jurisdiction for these crimes to be tried in South Africa only when committed since 2002, and so far no attempts have been made to bring charges based on customary international law. NGOs have argued that in the absence of exercising universal jurisdiction or other appropriate sanction under South Africa law, South Africa has an obligation under international law to extradite the subject to the country that fulfils the criteria for extradition.

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[97] See: Section 5 of the 2002 ICC Act.

[98] See: Section 6 and ¨Definitions¨ in the 2011 Bill.

[99] *R. v. Giuseppe and others*, 21 January 1942, 43 TPD 139, See: ICRC's Database available at: http://www.icrc.org/ihl-nat.nsf/46707c419d6bdfa24125673e00508145/1c92eb96df8d1828c1256af60036ddf5!OpenDocument.

Noted efforts to ensure compliance with obligations

A state law adviser is tasked with overseeing compliance with the 2002 ICC Act.

In 2006, South Africa established a National Committee on International Humanitarian Law, under the Department of Foreign Affairs, "to act as a focal point and to provide leadership on all matters related to the domestic implementation and dissemination of IHL".[100]

International humanitarian law is taught at universities and the South African National Defence Force. The subject has been incorporated into the Code of Conduct for members of the armed forces. The course is also taught during the Basic Military Training and then at the Services Staff College. Most universities offer a Master degree in International Criminal Law.

SWAZILAND

Ratification and application of treaties

Swaziland is a state party to the 1949 Geneva Conventions and their 1977 Additional Protocols. Swaziland is not a state party to the 1948 Genocide Convention and the 1998 Rome Statute of the International Criminal Court and has raised issues such as immunity of the head of state and more pressing political priorities as main reasons for the lack of progress in terms of ratification. There are currently no reported efforts to proceed with ratification of other treaties creating obligations to investigate and prosecute genocide, crimes against humanity and war crimes.

Section 238 of the 2005 Constitution provides that the government executes international agreements in the name of the Crown and that the treaty that must be ratified shall be subject to ratification and become binding through an Act of parliament, or a resolution adopted by two-thirds of the parliament. Unless a treaty is self-executing, an agreement becomes law upon an Act of Parliament.

National law

Genocide, crimes against humanity and war crimes are not criminalised under national legislation.

Crimes under customary international law

The fact that Swaziland is bound to respect its obligations under international customary law is not reflected in the constitution and no jurisprudence to this effect has been identified.

Investigations and prosecutions

No cases of genocide, crimes against humanity and war crimes have been documented before Swaziland courts.

Noted efforts to ensure compliance with obligations

Armed forces now have their own legal advisors (recently established).

Not specifically focusing on international crimes, but still relevant for future potential developments was the request in Swaziland for advise from the Commonwealth Secretariat in improving its treatment of vulnerable witnesses in Court.[101]

In 2004, a National Committee on International Humanitarian Law was formed to take measures and to set up mechanisms to implement IHL in Swaziland. International humanitarian law is taught as part of international law at the University of Swaziland.

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[100] See: ICRC, Table of National Committees and Other National Bodies on International Humanitarian Law, 30 September 2010. Available at: http://www.icrc.org/eng/assets/files/other/national-committes-icrc-30-09-2010.pdf.

[101] See website of the Commonwealth Secretariat, http://www.thecommonwealth.org/news/222988/270410swazivulnerablewitnesses.htm.

Swaziland has an agreement with the ICTR for the transfer of prisoners and enforcement of sentences handed down by the ICTR. Hence, prisoners sentenced by the ICTR can serve their sentences in Swaziland.

TANZANIA

Ratification and application of treaties

Tanzania is a state party to the 1948 Genocide Convention (since 1984), the 1949 Geneva Conventions and the 1977 Additional Protocols to the Geneva Conventions, the 1973 Apartheid Convention, the 1998 Rome Statute of the International Criminal Court (since 20 August 2002) and the 2006 Pact on Security, Stability and Development in the Great Lakes Region.

In Tanzania, the power to enter into treaties is entrusted to the executive branch of the government. Article 63 of the Constitution of Tanzania, 1977, provides that the National Assembly has power to deliberate upon and ratify all treaties and agreements to which Tanzania is a party and the provisions of which require ratification.

Tanzania is a dualist state. International treaties ratified by Tanzania do not have the force of law unless they are incorporated into domestic law through an Act of Parliament.[102] The National Assembly has power to enact legislation where implementation of an international treaty requires legislation.[103]

Three methods are used to transform treaties into municipal law. First, the provisions of a treaty may be embodied in the text of an Act of Parliament. Second, the treaty may be included as a schedule to a statute. Third, an enabling Act of Parliament may give the executive the power to bring a treaty into effect in municipal law by means of proclamation or notice in the Government Gazette.

Self-executing treaties do not require ratification by the Parliament through an Act *and* are enforceable in Tanzania without an Act of Parliament.[104] The *Presidential Circular No.1 of 1985*[105]related to agreements between Tanzania and other states, international organisations and conferences are under the purview of the Cabinet, and the duty to initiate legislative implementation vests in the responsible Ministry or government department.[106] Essentially, international agreements of technical, administrative or executive nature, or any agreement that does not require ratification, are examples of self-executing treaties. In practice, it is the Ministry of Foreign Affairs and International Cooperation which deals with the ratification of international treaties and leaves it to the relevant ministry for implementation.

Courts in Tanzania can refer to international law as a guide to interpretation only if it is consistent with the constitution.

National law

Genocide and crimes against humanity: The obligations of Tanzania under customary international law, the Rome Statute and the Protocol for the Prevention and the Punishment of the Crime of Genocide, War Crimes and Crimes against Humanity to punish the crimes of genocide, and crimes against humanity are not incorporated into national legislation.

War crimes: Grave breaches of international humanitarian law can be punished under the Geneva Conventions Act (Colonial Territories) Order in Council, 1959, which extended the Geneva Conventions Act, 1957 to apply to colonial territories. The 1957 Act provides for universal

[102] See generally: Chacha Bhoke Murungu 'The Place of International Law in Human Rights Litigation in Tanzania' in Magnus Killander (ed.), (2010) *International Law and Domestic Human Rights Litigation in Africa*, Pretoria University Law Press: Pretoria, Ch. 4, 57- 69.
[103] Art 63(3),(d) & (e) of the Constitution of the United Republic of Tanzania, 1977.
[104] *Id.*
[105] See: Presidential Circular No. 1 of 1985 (In Kiswahili, called *Waraka wa Rais Na.1 wa 1985*), Ref. No. SHC/C 180/1/C/70.
[106] For a deeper understanding of the ratification procedure or process into municipal law in Tanzania, see Khoti Kamanga, pp. 55-58.

jurisdiction and states that any breach should be treated as a felony, to be punished with life imprisonment when involving wilful killing and imprisonment up to a maximum of fourteen years for other grave breaches.[107]

Crimes under customary international law

Crimes recognised under customary international law are punishable in Tanzania as customary international law is applicable as a source of law in Tanzania, as long as it is consistent with the constitution. However, prosecutions based solely on customary international law have not been reported.

Extradition

Extradition matters are dealt with under the Extradition Act of 1965.[108] The Schedule to the Extradition Act lists the offences for which extradition may be sought. None of the listed offences relate to genocide, war crimes or crimes against humanity. Further, since genocide, war crimes and crimes against humanity are offences under customary international law, it would be argued that they can be subject of extradition proceedings in Tanzania since customary international law applies in Tanzania. However, Tanzania has never tested these crimes in that regard. While the Extradition Act does not mention genocide, crimes against humanity and war crimes as extraditable offences, Article 14 of the International Conference on the Great Lakes Region's Protocol for the Prevention and the Punishment of the Crime of Genocide, War Crimes and Crimes Against Humanity and all forms of Discrimination states that these crimes shall be extraditable and that states may consider the protocol as a legal basis for requesting extradition. The protocol also states that for purposes of extradition, the crime of genocide, war crimes, and crimes against humanity shall not be considered as political crimes and that extradition shall be granted if the commission of the offence concerned is such that the laws of the country in which the person is found would justify his or her arrest and imprisonment as if the offence had been committed in that country.

Jurisdictional powers and executive discretion

The jurisdiction over grave breaches of the Geneva Conventions is vested with the High Court. The High Court has universal jurisdiction and unlimited original jurisdiction over these crimes.

Sections 384 and 385 of the Penal Code provide universal jurisdiction over crimes punishable in the laws of Tanzania if such crimes are committed in any part of the world and are offences under the laws in force in the place where they are committed or proposed to be done. Such crimes may be prosecuted with the consent of the Director of Public Prosecutions.

Investigations and prosecutions

There are no reported proceedings initiated to try grave breaches under the Geneva Conventions.

Noted efforts to ensure compliance with obligations

International humanitarian law and international criminal justice are taught as subjects in universities. Recently, the Open University of Tanzania started a master's degree programme in international criminal justice, whereas public international law has since enjoyed a long period of teaching at the University of Dar es Salaam. Further, the ICRC plays a big role in disseminating information on international humanitarian law in the Armed Forces. Military Academy and Police Training College offer international humanitarian law as a component of the courses. However, there is no Inter-ministerial Committee to deal with issues of international humanitarian law in Tanzania.

[107] Section 1, of the 1957 Act.
[108] CAP.368 REV 2002.

ZAMBIA

Ratification and application of treaties

Zambia is a state party to the 1949 Geneva Conventions and their 1977 Additional Protocols. Zambia signed the Rome Statute of the ICC on 17 July 1998, and ratified it on 13 November 2002. Zambia is also state party to the 2006 Great Lakes Region Protocol for the Prevention and the Punishment of the Crime of Genocide, War Crimes and Crimes Against Humanity and all forms of Discrimination, the 2006 Convention for the Protection from Enforced Disappearance and the 1973 Convention on the Suppression and Punishment of Apartheid.

Zambia, like many common law jurisdictions, follows a dualist system in matters of international treaties. International law in Zambia, being regarded as a separate regime from that of domestic law therefore requires transformation into national law before forming part of Zambian law. Without necessary domestic law, Zambian courts cannot enforce an international treaty.[109]

The President negotiates and signs international treaties,[110] and the Ministry of Legal Affairs is notably responsible for ratification and domestication of treaties, including those concerning IHL. Once a treaty has been signed by the President, the implementing ministry prepares a memorandum advising the Cabinet of the signing. The implementing Minister then prepares a cabinet memorandum which is sent to the Policy Analysis and Co-ordination Division who then comments on the memorandum prior to submitting it back to the implementing ministry. After revising the memo, the implementing ministry addresses the Cabinet memorandum to all ministries.

The implementing ministry finalises the memorandum, encloses comments from all ministries and submits the memorandum to the Policy Analysis and Co-operation Division which puts the issue of ratification of the treaty on the Cabinet agenda. The Cabinet then makes a decision as to whether Zambia should ratify the treaty. The implementing ministry then prepares the instrument of ratification or accession. The Foreign Affairs Minister sends instructions to the relevant Ambassador to deposit the instrument.

National law

Genocide and crimes against humanity: The obligations of Zambia under customary international law, the Rome Statute and the Protocol for the Prevention and the Punishment of the Crime of Genocide, War Crimes and Crimes Against Humanity to punish the crime of genocide and crimes against humanity are not incorporated into national legislation.

War crimes: The above mentioned obligations of Zambia under international law, as well as under the Geneva Conventions, to punish war crimes are not incorporated into national legislation.

Crimes under customary international law

The obligation of Zambia to comply with customary international law is not explicitly recognised in the Constitution. However, the Constitution defines "existing law" to mean "all law, whether a rule of law or a provision of an Act of Parliament or of any other enactment or instrument whatsoever […] having effect as part of the law of Zambia or party thereof immediately before the commencement of this Act, and includes any Act of Parliament or statutory instrument made before such commencement and coming into force on such commencement or thereafter". Although customary international law forms part of the law in Zambia, it is however rarely invoked by Zambian lawyers.[111]

[109] An exception is observed in the judgment of Musumali, J in *Sara Longwe v Intercontinental Hotels*, 1992/HP/765; [1993] 4 LRC 221 where the judge took judicial notice of an international treaty even though it had not been domesticated in Zambia.
[110] Article 44 of the Constitution of Zambia.
[111] Michelo Hansungule 'Domestication of International Human Rights Law in Zambia' in Magnus Killander (ed.), (2010) *International Law and Domestic Human Rights Litigation in Africa*, Pretoria University Law Press: Pretoria, Ch. 5, 71-82, 72.

Extradition

In principle, extradition is possible where the concerned offence is punishable by imprisonment for a maximum period of not less than one year under the laws of the requesting country and of Zambia.[112] While the Extradition Act does not mention genocide, crimes against humanity and war crimes as an extraditable offence, Article 14 of the International Conference on the Great Lakes Region Protocol for the Prevention and the Punishment of the Crime of Genocide, War Crimes and Crimes Against Humanity and all forms of Discrimination states that these crimes shall be extraditable and that states may consider the protocol as a legal basis for requesting extradition. The protocol also states that for purposes of extradition, the crime of genocide, war crimes, and crimes against humanity shall not be considered as political crimes and that extradition shall be granted if the commission of the offence concerned is such that the laws of the country in which the person is found would justify his or her arrest and imprisonment as if the offence had been committed in that country.

Investigations and prosecutions

No cases of genocide, crimes against humanity or war crimes have been documented.

Noted efforts to ensure compliance with obligations

In 2007, Zambia established the National Committee for the Implementation of the International Humanitarian Law, chaired by the Ministry of Justice, to, *inter alia*: review national legislation in support of full implementation of IHL obligations; encourage the dissemination of IHL and corresponding obligations; advise on international treaties and conferences, further ratifications and all matters concerning IHL.[113]

ZIMBABWE

Ratification and application of treaties

Zimbabwe is a state party to the 1948 Genocide Convention, the 1949 Geneva Conventions and their 1977 Additional Protocols, the 1973 Convention on the Suppression and Punishment of Apartheid, and the 2003 Protocol to the African Charter on the Rights of Women.

In addition, Zimbabwe signed the Rome Statute of the International Criminal Court of 1998 (signed on the day the Rome Statute was opened for signature on 17 July 1998) but no current efforts to proceed with ratification have been reported.

The President of Zimbabwe enters into international agreements.[114] An agreement that requires laws to be changed is subject to approval by Parliament.[115] No current developments to ratify further ICL treaties have been reported.

Zimbabwe applies the dualist system and international agreements only form part of the law of Zimbabwe once it has been incorporated into the law by an Act of Parliament.[116]

National law

Genocide: The Genocide Act of 2000 enables effect to be given within Zimbabwe to the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. The Act became enforceable on 16 June 2000. It has only five provisions, and a schedule to the Act which appends

[112] Section 4(1), 1968 Extradition Act.
[113] See ICRC, Table of National Committees and Other National Bodies on International Humanitarian Law, 30 September 2010, Available at: http://www.icrc.org/eng/assets/files/other/national-committes-icrc-30-09-2010.pdf.
[114] Sec 31(H)(3) of the Constitution (as amended 2005).
[115] *Ibid.,* Section 111B.
[116] *Id.*

the Genocide Convention.[117] The Act provides that the Genocide Convention shall have the force of law in Zimbabwe[118] and defines genocide as the Genocide Convention.[119] Further, in dealing with genocide, the Genocide Act provides that any word or expression to which a meaning has been assigned in the Genocide Convention or by an international criminal tribunal interpreting the Genocide Convention, such word or interpretation shall bear the same meaning when used in the context of the Act.[120]

The Act imposes death penalty for acts involving killing[121] and life imprisonment for other offences. The Act reflects the text of the Genocide Convention doing away with immunities from prosecution of this crime. The Act applies to conduct since the Act was enforced in 2000.

Crimes against humanity: Zimbabwe has not implemented this crime in its national legislation.

War crimes: Zimbabwe enacted the Geneva Conventions Act, 1981 (which was amended in 1996). The Act prohibits and punishes grave breaches of the Geneva Conventions and its Protocol I (i.e. committed during an international armed conflict). Universal jurisdiction is provided for these offences. Grave breaches involving willful killing are punishable with imprisonment not exceeding thirty years or death penalty, while other grave breaches involve imprisonment for a period not exceeding fourteen years.[122]

Crimes under customary international law

The Constitution is silent on the application on customary international law. Reports point to jurisprudence stating that customary international law forms part of the law of Zimbabwe.[123]

Extradition

The 2000 Genocide Act amends the 1982 Extradition Act making genocide an extraditable offence, in a situation where there is an extradition agreement. This also applies to grave breaches, amounting to an offence under Zimbabwean law.[124]

Jurisdictional powers and executive discretion

In Zimbabwe, any prosecution of persons for the crime of genocide must be commenced with the consent of the Attorney–General. No special investigative body has been established to deal with the genocide or grave breaches.

In terms of grave breaches, the Geneva Conventions Act provides that any relevant court (not military court or court martial) in Zimbabwe may proceed with trial as if the offence had been committed in that place.[125] However, the court may not proceed without the authority of the Attorney-General.[126]

Investigations and prosecutions

No reports have been found of any proceedings initiated to try grave breaches under the Geneva Conventions or the Genocide Convention.

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[117] Section 2 of the Genocide Act.
[118] *Ibid*, Section 3.
[119] *Ibid*, Section 4.
[120] *Ibid*, Section 2.
[121] Unless the perpetrator is under 18 or the court considers other ¨extenuating circumstances¨. In those situations, life imprisonment or other sentence apply: Article 337, Chapter 9:07, Criminal Procedure and Evidence Act.
[122] Article 2, Geneva Conventions Act, 1981 (as amended by the Geneva Conventions Amendment Act, 1996).
[123] Waddington J stated that "*there is no doubt that customary international law is part of the law of this country"* in the case of *Barker McComarc (Pvt) Ltd v. Government of Kenya*, 1983 (4) SA 817 (ZS), see: http://www.nyulawglobal.org/globalex/zimbabwe.htm#_International_Law_and_Its Applicati.
[124] Article 14, Extradition Act, Chapter 9:08, (as amended 1997).
[125] Article 3, Geneva Conventions Act, 1981 (as amended by the Geneva Conventions Amendment Act, 1996).
[126] *Ibid.* Article 6.

Noted efforts to ensure compliance with obligations

According to ICRC,[127] in 1993 Zimbabwe established an Interministerial Committee for Human Rights and Humanitarian Law, chaired under the Ministry of Justice and Legal Affairs, and involving representatives from Foreign Affairs, Defence, Interior, Justice, Culture, Education, Health and Children, Youth, Equality and Employment, President's Office, Ombudsman, Public Prosecutor's Office, and judiciary. This Committee holds a sub-committee on IHL, chaired by the Ministry of Defence, with the mandate to coordinate ministries' Human Rights and International Humanitarian Law activities and to advise the Government on all issues related to human rights and humanitarian law, as well as to identify those instruments that have not yet been ratified and to promote the awareness of humanitarian law.

Developments that were referred to in the Workshop as having a potential positive impact on the domestication and implementation of ICL treaties, included the recent establishment of the Human Rights Commission[128] and a potential forthcoming adoption of an International Treaties Act.[129]

With regards to dissemination of international humanitarian law, the course is taught as part of the Army and Police training in Zimbabwe, and at universities, in addition to the role played by the ICRC on disseminating information on IHL.

[127] ICRC Advisory Service on IHL /Updated 30 September 2010/GCHA, available at: http://www.icrc.org/eng/assets/files/other/national-committes-icrc-30-09-2010.pdf.
[128] The Human Rights Commission was established in 2010 and the Human Rights Commission Bill was gazetted in June 2011.
[129] Informal information shared at the Workshop.

List of abbreviations

ASP	Assembly of States Parties
AU	African Union
CHR	Centre for Human Rights
ICC	International Criminal Court
ICLS	International Criminal Law Services
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
IHL	International Humanitarian Law
ISS	Institute for Security Studies
NGOs	Non-Governmental Organisations
SADC	Southern African Development Community
UK	United Kingdom
UN	United Nations

Annex: BACKGROUND DOCUMENTATION

a. TREATIES AND SECURITY COUNCIL RESOLUTIONS (where available in English, French and Portuguese)	
Rome Statute of the International Criminal Court (1998) Statut de Rome de la Cour pénale international (1998)	http://www.icc-cpi.int/NR/rdonlyres/0D8024D3-87EA-4E6A-8A27-05B987C38689/0/RomeStatuteEng.pdf (English) http://www.icc-cpi.int/NR/rdonlyres/ECB09E5F-26B0-48CD-862B-A9D6A191FC32/0/RomeStatuteFra.pdf (Français) http://pfdc.pgr.mpf.gov.br/atuacao-e-conteudos-de-apoio/legislacao/segurancapublica/estatuto_roma_tribunal_penal_internacional.pdf (Português)
Agreement on the Privileges and Immunities of the International Criminal Court Accord sur les privilèges et immunités de la Cour	http://untreaty.un.org/cod/icc/apic/apic(e).pdf (English) http://untreaty.un.org/unts/144078_158780/6/8/13851.pdf (Français)
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