

Chapter 1

Introduction

1.1 An overview

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

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

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

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

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

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

⁶ See, Sec 27, *International Crimes Act*, 2009 (Kenya); Art 4, *Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002* (South Africa); Sec 18, *Law No.33 Bis/2003 Repressing the Crime of Genocide, Crimes against Humanity and War Crimes* (Rwanda); Art 28, *Constitution of Ethiopia*, 1995; Article 4 of the *Criminal Code of Ethiopia*, 2005; Art 7, *Law No. 052-2009/AN of 3 December 2009 relating to the Determination of the Competence and Procedure of Implementing the Rome Statute of the International Criminal Court by Courts of Burkina Faso*, Promulgated on 31 December 2009, at Ouagadougou, by Decree No. 2009-894/PRES; Art 208.7 of the *Law No. 2003-025 of 13 June 2003, amending the Penal Code, Law No. 61-27 of 15 July 1961* (Niger).

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

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

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

⁷ *The Arrest Warrant* case, para 58.

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

⁹ See background to this study and Ch.3.

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

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

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

1.2 Background to the study

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

²¹ Resolution 1970(2011), para 4.

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

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

²⁴ Paras 1 - 3.

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

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

²⁵ Para 2.

²⁶ Para 1.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

³⁸ Laughland (2008) 22-34, 22.

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

⁴⁰ Laughland (2008) 35-50.

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

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

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

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

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

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

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

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

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

1.2.1 Prosecution of African state officials: sketching the problem

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

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

⁴⁵ See Ch. 3 and 5 of this study.

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

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

The former President of Mauritania, Maaouya Ould Sid'Ahmed Taya, was also indicted in France in 2005.⁴⁹ Rwandan state officials have also been subjected to indictments in respect of international crimes committed in Rwanda in 1994. In 2007, a French judge, Jean-Louis Bruguiere indicted Rwandan state and military officials in connection with their alleged roles in the 1994 genocide in Rwanda. However, an arrest warrant was not issued against Paul Kagame due to his immunity from prosecution as president. In 2008, a Rwandan state official, Rose Kabuye, who had visited Germany on official mission, was arrested in Germany and extradited to France where she had been indicted in relation to her role in the genocide in Rwanda. The German authorities failed to prosecute her because of the provisions of sections 18, 19 and 20 of 'the *German Judiciary Act*' which grant immunity to diplomatic missions and state officials on official invitation in Germany.⁵⁰ Criminal proceedings in France were terminated by a court in Paris, and the Rwandan official was released. The prosecution of this Rwandan state official in France resulted in a diplomatic row between Rwanda and France whereby Rwanda denounced its relationship with France and joined the Commonwealth organisation. However, the French President, Nikolas Sarkozy visited Rwanda in 2010 in an attempt to restore diplomatic ties with Rwanda.

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

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

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

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

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

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

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

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

⁵¹ *Case Concerning Certain Criminal Proceedings in France (Republic of the Congo v France)*, Request for the Indication of a Provisional Measure, Order of 17 June 2003, ICJ Reports 2003, para 10.

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

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

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

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

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

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

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

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

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

⁵⁸ For a detailed survey of indictments against African state officials, see, *The African Union- European Union Expert Report on the Principle of Universal Jurisdiction*, Council of the European Union, Brussels, 16 April 2009, 8672/1/09, REV 1, p.24-29 (the AU-EU Expert Report (2009)).

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

⁶⁰ *Arrest Warrant* case, 3.

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

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

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

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

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

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

⁶⁴ *Case Concerning Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)*, Request for the Indication of Provisional Measures, Order of 28 May 2009, ICJ General List No.144, para 5.

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

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

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

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

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

⁶⁶ Para 34.

⁶⁷ Para 38.

⁶⁸ Paras 35-36

⁶⁹ Para 37.

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

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

1. 2. 2 The controversy on immunity

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

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

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

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

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

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

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

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

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

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

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

⁷⁶ Cassese (2008) 308-313.

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

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

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

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

⁷⁹ *Prosecutor v Karemera, Ngirumpatse and Nzirorera*, Case No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motions for Subpoena to Leon Mugesera and President Paul Kagame*, Trial Chamber III, 19 February 2008, paras 1-16; *Prosecutor v Karemera, et al., Decision on Joseph Nzirorera's Application for Certification to Appeal Decision on Joseph Nzirorera's Motion for Subpoena to President Paul Kagame*, 15 May 2008, paras 1-9; Testimony of Jean Kambanda in *Prosecutor v Bagosora et al*, Case No. ICTR-98-41-T, 11 July 2006, reprinted in Laughland (2008) 219-220.

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

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

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

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

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

1.3. Research questions

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

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

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

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

⁸⁵ See also discussions in parts 1.2.1 and 1.2.2 above.

⁸⁶ See Ch 2 of this study.

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

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

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

1.4. Assumptions

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

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

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

1.5. Research methods

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

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

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

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

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

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

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

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

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

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

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

1.6. Existing studies

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

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

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

⁹³ See, ILC, Report on the work of its 60th session (2008), paras 265-311; P Gaeta, ‘Official capacity and immunities’ in A Cassese, P Gaeta and JRWD Jones (eds.), (2002) *The Rome Statute of the International Criminal Court: A commentary*, Vol.1, 975-1002; O Triffterer, ‘Article 27’ in O Triffterer (ed.), (2008) *Commentary on the Rome Statute of the International Criminal Court: Observers’ notes, article by article*, 2nd edn, 779-793; WA Schabas (2010) *The International Criminal Court: A commentary on the Rome Statute*, 446-453; G Werle (2009) *Principles of international criminal law*, 2nd edn, 234-241; A Cassese (2008) 302-314; RV Alebeek (2008) *The immunity of states and their officials in international criminal law and international human rights law*; Y Simbeye (2004) *Immunity and international criminal law*, 1-173; Williams and Sherif (2009) 71-92; N Boister and R Burchill ‘The implications of the Pinochet decision for the extradition or prosecution of former South African heads of state for crimes committed under Apartheid’ (1999) 11 *African Journal of International and Comparative Law* 619-637; L Buzzard, ‘Holding an arsonist’s feet to the fire -The legality and enforceability of the ICC’s arrest warrant for Sudanese President Omar Al-Bashir’ (2009) 24 *American University International Law Review* 897-941; D

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

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

⁹⁴ Cassese (2008) 313-314.

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

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

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

⁹⁶ See, A Okuta, 'National legislation for prosecution of international crimes in Kenya' (2009) 7 *Journal of International Criminal Justice* 1063-1076; M Niang 'The Senegalese legal framework for the prosecution of international crimes' (2009) 7 *Journal of International Criminal Justice* 1047-1062; M du Plessis 'International criminal courts, the International Criminal Court, and South Africa's Implementation of the Rome Statute' in J Dugard (2005) *International Law: A south African perspective*, Ch. 10, 174-209; M du Plessis 'South Africa's Implementation of the ICC Statute: An African example' (2007) 5 *Journal of International Criminal Justice* 460; A Katz 'An Act of transformation: The incorporation of the Rome Statute of the ICC into national law in South Africa' (2003) 12(4) *African Security Review* 27; M du Plessis 'Bringing the International Criminal Court home –the implementation of the Rome Statute of the International Criminal Court Act 2002' (2003) 16 *South African Journal of Criminal Justice* 2; P Gaeta 'Does President Al Bashir enjoy immunity from arrest?' (2009) 7 *Journal of International Criminal Justice* 315-332.

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

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

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

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

1.7. Objectives of the study

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

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

¹⁰⁰ Dugard (2005) 238-265.

¹⁰¹ Simbeye (2004) 109-110.

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

¹⁰³ Naqvi (2010) 230-236.

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

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

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

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

1.8 Significance of the study

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

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

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

1.9 Limitations and delimitations of the study

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

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

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

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

1.9.1 Definition of state officials as per the Rome Statute

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

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

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

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

1.9.2 Crimes covered in this study

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

¹⁰⁵ *Arrest Warrant* case, para 51.

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

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

¹⁰⁶ Arts 2, 3 and 4, Statute of ICTR.

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

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

¹⁰⁹ Art II, Genocide Convention.

¹¹⁰ Art 5(1) (d), Rome Statute.

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

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

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

1.9.3 Temporal limit on crimes committed by state officials

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

1.10 Conceptual clarifications

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

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

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

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

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

1.10.1 Immunity

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

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

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

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

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

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

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

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

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

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

¹²² Aiyar (2005) 549-550.

¹²³ Schabas (2007) 231.

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

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

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

1.10.1.1 Scope of immunity of state officials

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

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

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

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

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

¹²⁸ Shaw (2003) 655-656.

¹²⁹ Shaw (2003) 655-656.

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

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

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

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

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

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

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

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

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

¹³⁵ Broomhall (2003) 128.

¹³⁶ *Arrest Warrant* case, para 61.

1.10.2 International crimes

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

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

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

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

¹³⁸ Naqvi (2010) 21-32.

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

¹⁴⁰ Naqvi (2010) 21.

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

¹⁴² Cassese (2008) 11-13.

¹⁴³ Naqvi (2010) 31.

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

1.10.3 Indictment

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

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

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

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

1.10.4 Prosecution

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

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

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

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

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

¹⁴⁷ See, art 58(7), Rome Statute.

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

1.11 Chapter outline

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

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

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

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

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

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

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

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



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