IMMUNITY OF STATE OFFICIALS AND PROSECUTION OF INTERNATIONAL CRIMES IN AFRICA

By

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A thesis submitted in fulfilment of the requirements for the degree Doctor Legum (LL.D) in the Faculty of Law of the University of Pretoria

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University of Pretoria

23 May 2011

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Acknowledgments


In the course of my doctoral studies, I was privileged to present a paper in a seminar on prosecution of international crimes in Africa: Chacha Bhoke Murungu, ‘African legal frameworks on the implementation of treaties proscribing international crimes’, presented at the African and European Civil Society Seminar on Justice and Accountability for International Crimes, organised by the European Commission, held at Protea Hotel Capital, Pretoria, South Africa, on 11 and 12 April 2011. Also, I participated in the Latin American, African and European Judicial Expert Workshop on the International Criminal Court, organised by Konrad Adenauer Stiftung, European Office in Brussels,
Belgium, held on 1-5 December 2010, in which I was nominated to serve as the Coordinator for the *African Expert Study Group on International Criminal Justice*.

Different persons examined my study at the oral defence of the proposal and final thesis. I am grateful to all examiners of my doctoral research proposal at Zanzibar on 19 March 2009: Prof Michelo Hansungule (my supervisor); Prof Pieter Bakker (University of South Africa); Prof Sokoine Cosmas (University of Dar es Salaam); Dr Harun (Zanzibar University); Mr Kyalo Mwaniki (Dean, Faculty of Law, Zanzibar University) and Katarina Frostell (Äbo Akademi, Finland). I am especially grateful for their critical questions and guidance on my study, particularly on scope, structure and research methodology. I thank my supervisor, Prof Michelo Hansungule, for the supervision of this thesis. I am also grateful to Prof Peter Martins (Cornell University Law School) and Prof Vincent Nmehielle (University of the Witwatersrand) who served as external examiners of this thesis. I benefited from their intensive comments and questions during the oral defence of my thesis on 10 May 2011. I also wish to put on record my sincere thanks to different international lawyers and legal experts who read draft chapters for this thesis: Prof John Dugard; Prof Erika de Wet; Prof Curtis Francis Doebbler; Prof Johan Van der Vyver; Prof Sufian Bukurura; Mr Bernard Dougherty; Dr Khoti Kamanga; and, Dr Jackson Maogoto.

In the course of my research, I was able to visit international courts based at The Hague. I was privileged to interact with some officials from these institutions. In this regard, I would like to thank Judge Daniel Ntanda Nsereko (Appeals Division of the ICC), Judge Prisca Nyambe (ICTY), Peter Robinson (Counsel at ICTY), Judge Julia Sebutinde (SCSL), George William Mugwanya, Senior Appeals Counsel, (ICTR), Rosette Muzigo Morrison (ICTR), Solomon Moriba (SCSL), Rachel Irura (SCSL) and Eleni Chaitidou (ICC). I also thank the security officers at these international courts for allowing me to attend and observe cases of Charles Taylor, Radovan Karadžić, Zdravko Tolimir, Vojislav Šešelj and Jean-Pierre Bemba. Further, I was able to observe the ICJ render its advisory opinion on Kosovo’s unilateral declaration of independence.
Research on laws from African states was not easy. I had to consult people to get the relevant laws and translation of such laws from French into English. In this regard, thanks are due to Christopher Mbazira (Uganda), Christian Garuka Nsabimana (Rwanda), Clément Kanuma (Burundi), Tem Fuh Mbuh (Cameroon) and Bruno Menzan (Ivory Coast). I am also grateful to the court officials at the High Court of South Africa, at Pretoria, for according me access to an important case (*State v Johannes Velde van der Merwe, Adriaan Johannes Vlok, Christoffel Lodewikus Smith, Gert Jacobus Louis Hosea Otto and Hermanus Johannes van Staden*, Criminal Case No. 392/2007, High Court of South Africa at Pretoria). Particularly, I thank the following people: Leonatra Rossouw; Diane Venter and Anusha Chetty.

I also thank members of the Post-Graduate Committee who approved my application to transfer into the structured doctoral degree programme at the Faculty of Law, University of Pretoria. I am truly grateful to Prof Duard Kleyn, Prof Christof Heyns, Prof Frans Viljoen and Prof Julia Sinclair. I was ably assisted administratively by the superb staff members of the Faculty of Law at University of Pretoria. I am grateful to Rina Deetlefs, Margaret Mkhatshwa and Marcel Deyseal.

Financial support from the Faculty of Law and Post-Graduate Office, University of Pretoria is highly acknowledged. The bursary awarded to me by the Post-Graduate Office enabled me travel to The Hague for research. I am also very grateful to the President of the Hague Academy Curatorium, His Excellency, Mr Boutros Boutros Ghali, and the Secretary General of The Hague Academy of International Law, Prof Yves Daudet, for awarding me a doctoral scholarship which made it possible for my research for two months (1 July - 31 August 2010) at The Hague Academy of International Law.

Librarians at the University of Pretoria, University of Dar es Salaam, University of South Africa and Peace Palace Library at The Hague Academy of International Law were professionally wonderful. At Pretoria, I was exceptionally assisted by David Maseko, Shirley Gilmore, Sonty Monakhisi and Liana Viljoen. At Dar es Salaam, I had the benefit of being assisted by Robert Tilumanya and Mr Komba. At The Hague Academy of
International Law, I had the privilege of being assisted by Francesca Markx, Neils van Tol, Monika Urbanowica, Sophie de Seze and Henriette van Hofwegen. At the library of the University of South Africa, the significant assistance of Prof Pieter Bakker is highly acknowledged.

During my two-month research period at The Hague Academy of International Law, I was privileged to meet other doctoral research scholars. Mr Moustafa Said Alam Eldin (University of Alexandria, Egypt) and Ms Zhang Meirong (Zhongnan University of Economics and Law, China) gave me inspirational moments. Thanks to Mrs Merula Oomen of The Hague Academy who made our accommodation arrangements. Thanks are also due to the Accountants at the Peace Palace for the timely payment of the bursary. In the same token, I must thank my host family in The Hague: Mrs Teijken and Mr Neils.

My friends and well-wishers helped me at all times. Dr Jamil Ddamulira Mujuzi, Prof Luitfried Xavier Mbunda, Pius Peter Hilla, Dismas Bhini, Ngwaru Maghembe, Benjamin Kujinga, John Mhangate, Japhet Biegon, Edward Onkendi, Misheck Nyoka, Dustan John Shimbo, thank you for encouraging me.

I owe gratitude to all members of staff at the Centre for Human Rights, Faculty of Law, University of Pretoria. To Dr Magnus Killander, and doctoral candidates at the Faculty of Law, University of Pretoria, thank you for our monthly discussions.

Finally, I thank my family members and all relatives for their continued prayers and support.

Chacha Bhoke Murungu
Pretoria, 23 May 2011.
Dedication

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

Chacha Bhole Murungu

Signature……………………

23 May 2011.
## List of abbreviations

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
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<tbody>
<tr>
<td>AU</td>
<td>African Union</td>
</tr>
<tr>
<td>BBC</td>
<td>British Broadcasting Corporation</td>
</tr>
<tr>
<td>CICC</td>
<td>Coalition for an International Criminal Court</td>
</tr>
<tr>
<td>DRC</td>
<td>Democratic Republic of the Congo</td>
</tr>
<tr>
<td>ECCC</td>
<td>Extra-ordinary Chambers in the Courts of Cambodia</td>
</tr>
<tr>
<td>EU</td>
<td>European Union</td>
</tr>
<tr>
<td>FRY</td>
<td>Former Federal Republic of Yugoslavia</td>
</tr>
<tr>
<td>ICC</td>
<td>International Criminal Court</td>
</tr>
<tr>
<td>ICJ</td>
<td>International Court of Justice</td>
</tr>
<tr>
<td>ICTR</td>
<td>International Criminal Tribunal for Rwanda</td>
</tr>
<tr>
<td>ICTY</td>
<td>International Criminal Tribunal for the former Yugoslavia</td>
</tr>
<tr>
<td>ILC</td>
<td>International Law Commission</td>
</tr>
<tr>
<td>ILM</td>
<td>International Legal Materials</td>
</tr>
<tr>
<td>ILR</td>
<td>International Law Reports</td>
</tr>
<tr>
<td>JCE</td>
<td>Joint Criminal Enterprise</td>
</tr>
<tr>
<td>LRA</td>
<td>Lord’s Resistance Army</td>
</tr>
<tr>
<td>MLC</td>
<td>Mouvement pour la Libération du Congo</td>
</tr>
<tr>
<td>NATO</td>
<td>North Atlantic Treaty Organisation</td>
</tr>
<tr>
<td>NGOs</td>
<td>Non-Governmental Organisations</td>
</tr>
<tr>
<td>IMT</td>
<td>International Military Tribunal, at Nuremberg</td>
</tr>
<tr>
<td>IMTFE</td>
<td>International Military Tribunal for the Far East, at Tokyo</td>
</tr>
<tr>
<td>Rome Statute</td>
<td>The Rome Statute of the International Criminal Court</td>
</tr>
<tr>
<td>Abbreviation</td>
<td>Full Form</td>
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<tr>
<td>RPF</td>
<td>Rwandan Patriotic Front</td>
</tr>
<tr>
<td>SADC</td>
<td>Southern African Development Community</td>
</tr>
<tr>
<td>SCSL</td>
<td>Special Court for Sierra Leone</td>
</tr>
<tr>
<td>SICT</td>
<td>Supreme Iraqi Criminal Tribunal</td>
</tr>
<tr>
<td>TRC</td>
<td>Truth and Reconciliation Commission</td>
</tr>
<tr>
<td>UK</td>
<td>United Kingdom of Great Britain and Northern Ireland</td>
</tr>
<tr>
<td>UN</td>
<td>United Nations</td>
</tr>
<tr>
<td>UNGA Res</td>
<td>United Nations General Assembly Resolution</td>
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<tr>
<td>USA</td>
<td>United States of America</td>
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Summary

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

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

Further, the study criticises the African Union’s opposition to the prosecutions before the International Criminal Court (ICC). It argues that however strong it may be, such opposition is unfounded in international law and is motivated by African solidarity to weaken the role of the ICC in Africa. It concludes that the decisions taken by the African Union not to cooperate with the ICC are geared towards breaching international obligations on cooperation with the ICC. The study calls upon African states to respect their obligations under the Rome Statute and customary international law. It recommends that African states should cooperate with the ICC in the investigations and prosecution of persons responsible for international crimes in Africa.
At international level, the study reveals the conflicting jurisprudence of international courts on subpoenas against state officials. It argues that, state officials are not immune from being subpoenaed to testify or adduce evidence before international courts. It contends that issuing subpoenas to state officials ensures fairness and equality of arms in the prosecution of international crimes. It recommends that international courts should treat state officials equally regarding prosecution and subpoenas. It further recommends that African states should respect their obligations arising from the Rome Statute and that, immunity should not be used to develop a culture of impunity for international crimes committed in Africa.
List of terms

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