

Joint Concurring Opinion of Judges Eboe-Osuji, Morrison, Hofmański and Bossa

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1. The reasons given in the Appeals Chamber's judgment¹ afford a simpler and adequate basis for resolving the question of immunity of a Head of State, being the dominant feature of this appeal. In our view, however, the importance and circumstance of that question recommend a certain view of the further analysis that underscores the correctness of the Appeals Chamber's judgment on that subject. The aim of this opinion is to reveal that further analysis in a connected way.

2. It is important to stress that the extent of this joint concurring opinion is limited to the normative question of immunity of Heads of State before this Court. This opinion does not deal with the question whether the Pre-Trial Chamber was correct in referring Jordan to the Assembly of States Parties and to the Security Council of the United Nations. Judge Eboe-Osuji, Judge Morrison and Judge Hofmański (as the Majority of the Appeals Chamber) have answered that question in the main judgment of the Appeals Chamber; while Judge Bossa joins Judge Ibañez in a partial dissent as to that question.

I. OVERVIEW

A. The Questions Presented

3. The ultimate question of substance to be answered in this appeal is whether, in the particular circumstances of this case, Mr Omar Al-Bashir, as the President of Sudan at the material times, enjoyed immunity before this Court, thus justifying Jordan's failure to comply with the Court's request for his arrest and surrender.

4. But that ultimate question of substance is accessible only through the narrower door of the procedural question: whether the Court was required first to obtain from Sudan a waiver of President Al-Bashir's immunity, as a prerequisite to the request to Jordan to arrest and surrender him.

5. For present purposes, the focus of the inquiry must remain on whether or not the immunity is recognised in the judicial processes of this Court. Many have found this to be a vexing question in the construction of the Rome Statute. Notably, article 98(1)

¹ 'Judgment in the Jordan Referral re Al-Bashir Appeal', 6 May 2019, ICC-02/05-01/09-397.

of the Rome Statute contemplates a certain prerequisite in the terms of ‘unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.’ Taking a practical view of the matter, it would be idle to dwell on the inquiry whether the efficacy of international law reasonably depends on any serious view that Mr Al-Bashir, as the President of Sudan, would waive any immunity that would be his to enjoy as such. For, that really is what is entailed by the idea of requiring the Court to obtain from ‘Sudan’ a waiver of President Al-Bashir’s immunity, as a precondition to the Court’s entitlement to present a request to Jordan for his arrest.² Yet, the idleness of that particular inquiry may be noted in passing, if only to illustrate immediately the relative fallacy of the idea of realistic dichotomy between matters of procedure and of substance, for purposes of justice.

6. For present purposes, then, the questions in the appeal are as follows:

- i. In the circumstances of the present case, did Mr Al-Bashir enjoy immunity at the material time, which prevented Jordan from arresting and surrendering him to the Court, as the Court requested?
- ii. As a necessary dimension of the foregoing question, was the Court required to obtain the waiver of Mr Al-Bashir’s immunity from Sudan as a precondition to presenting the request to Jordan for his arrest and surrender?
- iii. Naturally, an affirmative answer to the foregoing questions would absolve Jordan from any imputation of error. But, in the event of a negative answer, the eventual question becomes this: ought Jordan to be referred to the Assembly of States Parties or to the UN Security Council or to both?

7. We would answer the questions as follows:

- i. No
- ii. No

² In this connection, it may be considered, as a matter of judicial notice, that foreign relations is in most States the prerogative of the Head of State as a matter of international law. Unsurprisingly, that is also the case with Sudan. Notably, section 58(1) of the Interim National Constitution of the Republic of the Sudan (2005) provides as follows, among other things: ‘The President of the Republic is the Head of the State and Government and represents the will of the people and the authority of the State; he/she shall exercise the powers vested in him/her by this Constitution and the Comprehensive Peace Agreement and shall, without prejudice to the generality of the foregoing, perform the following functions: [...] (j) represent the State in its foreign relations, appoint ambassadors of the State and accept credentials of foreign ambassadors, (k) direct and supervise the foreign policy of the State and ratify treaties and international agreements with the approval of the National Legislature’.

- iii. Judge Eboe-Osuji, Judge Morrison and Judge Hofmański answer ‘No’; while Judge Bossa answers ‘Yes’.

8. As regards the first and second questions, the decision of the Pre-Trial Chamber is correct in the outcome: in finding that, by virtue of Security Council resolution 1593 (2005), Mr Al-Bashir did not enjoy immunity from arrest. Therefore, Jordan failed to comply with the Court’s request for his arrest and surrender. When the Security Council refers a situation to the Court pursuant to article 13(b) of the Statute, Head of State immunity cannot be invoked at the Court in any direction—horizontal or vertical. We do, however, reject any suggestion on the part of the Pre-Trial Chamber to the effect that there may be in customary international law a reserve of immunity that may be asserted before this Court, if not for article 27(2) of the Rome Statute. In our view, article 27(2) reflects customary international law in relation to immunity before an international criminal court in the exercise of its own proper jurisdiction.

9. On the third question, as noted earlier, Judge Eboe-Osuji, Judge Morrison and Judge Hofmański do not agree with the Pre-Trial Chamber’s decision; while Judge Bossa does. But that ground of appeal calls for no further analysis in this opinion; for present purposes, the Appeals Chamber’s judgment and the partly dissenting opinion are entirely adequate for all that needs to be said on the matter.

10. For the avoidance of doubt, this joint concurring opinion only concerns the specific circumstances of this case; involving the co-efficient incidence of the Rome Statute (which imposes upon its States Parties the obligation of full cooperation with the Court) and a Security Council resolution (which expressly imposes upon a specific UN Member State an obligation of full cooperation with the Court notwithstanding that the State in question is not a party to the Rome Statute).

II. CRUCIAL CONSIDERATIONS OF FACT AND LAW

11. This part will engage a review both of background information and some substrate legal principles and considerations that bear directly or indirectly on the questions presented.

A. Some Background Matter

1. UN Security Council Resolution 1593 (2005)

12. The Court is seised of this case, because the Security Council referred the situation in Darfur to the Prosecutor of this Court, by virtue of resolution 1593 (2005) adopted on 31 March 2005.

13. It is recalled that the Security Council is entitled to do this, pursuant to article 13(b) of the Rome Statute. Ordinarily, a treaty creates rights and obligations for only the States that are parties to it. But, article 13(b) of the Rome Statute provides for the possibility that the Security Council may refer a situation to the ICC Prosecutor, pursuant to Chapter VII of the UN Charter: thereby bringing within the Court's jurisdiction a situation concerning a country that is not a State Party to the Rome Statute, on condition that such a referral is made pursuant to Chapter VII of the UN Charter. It is recalled that Chapter VII of the UN Charter gives the Security Council the prerogative to maintain and manage international peace and security, as well as to contain threats to them.

14. The Security Council referred the Darfur situation to the ICC Prosecutor, following its determination 'that the situation in Sudan continues to constitute a threat to international peace and security'.

2. The Darfur Situation at the UN Security Council

(a) Prior UN Security Council Resolutions on Darfur

15. As part of the opening remarks at the hearing of this appeal, it was observed that resolution 1593 (2005) marks the 'zenith in the trajectory' of the Security Council's exercise of Chapter VII powers to contain threats to international peace and security in relation to Darfur. But the journey started earlier.³ Notably, on 25 May 2004, the President of the Security Council made a statement on behalf of the Council, which, in relevant parts, reads as follows:

³ Corrected Transcript of 10 September 2018, [ICC-02/05-01/09-T-4-ENG](#), at p 16, line 22. See *more generally*, at p 16, line 19 - p 17, line 16.

The Security Council expresses its grave concern over the deteriorating humanitarian and human rights situation in the Darfur region of Sudan. Noting that thousands have been killed and that hundreds of thousands of people are at risk of dying in the coming months, the Council emphasizes the need for immediate humanitarian access to the vulnerable population.

The Council also expresses its deep concern at the continuing reports of large-scale violations of human rights and of international humanitarian law in Darfur, including indiscriminate attacks on civilians, sexual violence, forced displacement and acts of violence, especially those with an ethnic dimension, and demands that those responsible be held accountable. [...] ⁴

16. On 30 July 2004, the Security Council adopted resolution 1556 (2004), ⁵ under Chapter VII powers, having determined that the situation in Sudan ‘constitutes a threat to international peace and security and to stability in the region’. ⁶ In that resolution, the Council ‘[r]eiterated its grave concern at the ongoing humanitarian crisis and widespread human rights violations, including continued attacks on civilians that are placing the lives of hundreds of thousands at risk’. ⁷ The Council ‘[c]ondemned all acts of violence and violations of human rights and international humanitarian law by all parties to the crisis, in particular by the Janjaweed, including indiscriminate attacks on civilians, rapes, forced displacements, and acts of violence especially those with an ethnic dimension, and expressed its utmost concern at the consequences of the conflict in Darfur on the civilian population, including women, children, internally displaced persons, and refugees’. ⁸ The Security Council further ‘[r]ecalled in this regard that the Government of Sudan bears the primary responsibility to respect human rights while maintaining law and order and protecting its population within its territory and that all parties are obliged to respect international humanitarian law’, and it ‘[u]rged all the parties to take the necessary steps to prevent and put an end to violations of human rights and international humanitarian law and underlining that there will be no impunity for violators’. ⁹

17. Acting under Chapter VII of the Charter, the Security Council demanded, *inter alia*, that the Government of Sudan disarm the Janjaweed militias, apprehend and bring to justice its leaders and associates who had incited and carried out violations of

⁴ See United Nations, Security Council, Statement by the President of the Security Council, 26 May 2004, S/PRST/2004/18, at p 1.

⁵ United Nations, Security Council, [Resolution 1556 \(2004\)](#), 30 July 2004, Doc No S/RES/1556.

⁶ *Ibid.*, at p 2.

⁷ *Ibid.*, at p 1.

⁸ *Ibid.*, at p 1.

⁹ *Ibid.*, at p 2.

human rights and international humanitarian law, as well as other atrocities in the Darfur region.¹⁰

18. On 18 September 2004, the Security Council adopted resolution 1564 (2004),¹¹ acting under Chapter VII powers, having reiterated that ‘the situation in Sudan constitutes a threat to international peace and security and to stability in the region’.¹² The Security Council ‘[r]ecall[ed] that the Sudanese Government bears the primary responsibility to protect its population within its territory, to respect human rights, and to maintain law and order, and that all parties are obliged to respect international humanitarian law’.¹³ The Council declared, among other things, ‘its grave concern that the Government of Sudan has not fully met its obligations noted in resolution 1556 (2004)’.¹⁴ The Council ‘[r]eiterate[d] its call for the Government of Sudan to end the climate of impunity in Darfur by identifying and bringing to justice all those responsible, including members of popular defence forces and Janjaweed militias, for the widespread human rights abuses and violations of international humanitarian law, and insist[ed] that the Government of Sudan take all appropriate steps to stop all violence and atrocities’;¹⁵ and, very significantly, it requested ‘that the Secretary-General rapidly establish an international commission of inquiry in order immediately to investigate reports of violations of international humanitarian law and human rights law in Darfur by all parties, to determine also whether or not acts of genocide have occurred, and to identify the perpetrators of such violations with a view to ensuring that those responsible are held accountable [...]’.¹⁶

19. It was in those circumstances that the International Commission of Inquiry on violations of international humanitarian law and human rights law in Darfur was established, chaired by the late Antonio Cassese.¹⁷

¹⁰ *Ibid*, at p 3, para 6.

¹¹ United Nations, Security Council, [Resolution 1564 \(2004\)](#), 18 September 2004, Doc No S/RES/1564.

¹² *Ibid*, at p 2.

¹³ *Ibid*, at p 2.

¹⁴ *Ibid*, at p 2, para 1.

¹⁵ *Ibid*, at p 3, para 7 (emphasis omitted).

¹⁶ *Ibid*, at pp 3-4, para 12.

¹⁷ The other four members of the Commission were Mohamed Fayek, Hina Jilani, Dumisa Ntsebeza and Therese Striggner-Scott. See United Nations, Security Council, ‘Report of the International Commission of Inquiry on Darfur to the Secretary-General, Pursuant to Security Council resolution

(b) The Cassese Commission Report

20. The terms of reference of the Cassese Commission indicated the following mandates: (1) to investigate reports of violations of international humanitarian law and human rights law in Darfur by all parties; (2) to determine whether or not acts of genocide had occurred; (3) to identify the perpetrators of such violations; and, (4) to suggest means of ensuring that those responsible for such violations are held accountable.¹⁸

21. The Cassese Commission began its work on 25 October 2004. And, on 25 January 2005, it rendered its report to the UN Secretary-General, who promptly submitted it to the Security Council.¹⁹ The report included the following key findings.

22. First, regarding the matter of its mandate, to ‘investigate reports of violations of international human rights law and international humanitarian law’, the Commission reported as follows:

Based on a thorough analysis of the information gathered in the course of its investigations, the Commission established that the Government of the Sudan and the Janjaweed are responsible for serious violations of international human rights and humanitarian law amounting to crimes under international law.²⁰

1564 (2004) of 18 September 2004’ [Annexed to Letter dated 31 January 2005 from the Secretary-General addressed to the President of the Security Council], 25 January 2005, Doc No S/2005/60, at p 2 [‘Cassese Commission Report’].

¹⁸ [Resolution 1564 \(2004\)](#), at pp 3-4, para 12.

¹⁹ Cassese Commission Report.

²⁰ Cassese Commission Report, at p 3. In particular, the Commission found that ‘Government forces and militias conducted indiscriminate attacks, including killing of civilians, torture, enforced disappearances, destruction of villages, rape and other forms of sexual violence, pillaging and forced displacement, throughout Darfur. These acts were conducted on a widespread and systematic basis, and therefore may amount to crimes against humanity. The extensive destruction and displacement have resulted in a loss of livelihood and means of survival for countless women, men and children. In addition to the large scale attacks, many people have been arrested and detained, and many have been held incommunicado for prolonged periods and tortured. The vast majority of the victims of all of these violations have been from the Fur, Zaghawa, Masalit, Jebel, Aranga and other so-called ‘African’ tribes’. The Commission also took care to reflect the Government side of the story. In that connection, the Commission reported as follows: ‘In their discussions with the Commission, Government of the Sudan officials stated that any attacks carried out by Government armed forces in Darfur were for counter-insurgency purposes and were conducted on the basis of military imperatives. However, it is clear from the Commission’s findings that most attacks were deliberately and indiscriminately directed against civilians. Moreover even if rebels, or persons supporting rebels, were present in some of the villages – which the Commission considers likely in only a very small number of instances – the attackers did not take precautions to enable civilians to leave the villages or otherwise be shielded from attack. Even where rebels may have been present in villages, the impact of the attacks on civilians shows that the use of military force was manifestly disproportionate to any threat posed by the rebels’.

23. Before turning to the second matter of its mandate, namely whether or not ‘acts of genocide ha[d] occurred’, it is more convenient now to touch (briefly) on the findings of the Cassese Commission as concerns its mandate to ‘identify the perpetrators of violations of international humanitarian law and human rights law in Darfur.’ The Commission reported as follows:

Those identified as possibly responsible for the [mentioned] violations consist of individual perpetrators, *including officials of the Government of Sudan*, members of militia forces, members of rebel groups, and certain foreign army officers acting in their personal capacity. *Some Government officials*, as well as members of militia forces, have also been named as possibly responsible for joint criminal enterprise to commit international crimes. Others are identified for their possible involvement in planning and/or ordering the commission of international crimes, or of aiding and abetting the perpetration of such crimes. The Commission also has identified *a number of senior Government officials and military commanders* who may be responsible, under the notion of superior (or command) responsibility, for knowingly failing to prevent or repress the perpetration of crimes. Members of rebel groups are named as suspected of participating in a joint criminal enterprise to commit international crimes, and as possibly responsible for knowingly failing to prevent or repress the perpetration of crimes committed by rebels.²¹

24. Turning now to its findings on the question of genocide, the Cassese Commission concluded that ‘the Government of the Sudan ha[d] not pursued a policy of genocide’.²² Concerning the question whether ‘acts’ of genocide had been committed, as distinct from the ‘intent’ to commit genocide, the Cassese Commission reported as follows:

Arguably, two elements of genocide might be deduced from the gross violations of human rights perpetrated by Government forces and the militias under their control. These two elements are, first, the *actus reus* consisting of killing, or causing serious bodily or mental harm, or deliberately inflicting conditions of life likely to bring about physical destruction; and, second, on the basis of a subjective standard, the existence of a protected group being targeted by the authors of criminal conduct. However, the crucial element of genocidal intent appears to be missing, at least as far as the central Government authorities are concerned. Generally speaking the policy of attacking, killing and forcibly displacing members of some tribes does not evince a specific intent to annihilate, in whole or in part, a group distinguished on racial, ethnic, national or religious grounds. Rather, it would seem that those who planned and organized attacks on villages pursued the intent to drive the victims from their homes, primarily for purposes of counter-insurgency warfare.²³

25. Having said all that, the Commission registered the following two important caveats to its findings on the question of genocide:

²¹ *Ibid*, at pp 4-5, emphasis added.

²² *Ibid*, at p 4.

²³ *Ibid*.

The Commission does recognise that in some instances individuals, including Government officials, may commit acts with genocidal intent. Whether this was the case in Darfur, however, is a determination that only a competent court can make on a case by case basis.

The conclusion that no genocidal policy has been pursued and implemented in Darfur by the Government authorities, directly or through the militias under their control, should not be taken in any way as detracting from the gravity of the crimes perpetrated in that region. International offences such as the crimes against humanity and war crimes that have been committed in Darfur may be no less serious and heinous than genocide.²⁴

26. It should be noted that notwithstanding the views of the Cassese Commission on the question of genocide, the Pre-Trial Chamber has since issued an arrest warrant against Mr Al-Bashir, on grounds that there are reasonable grounds to believe that he must stand trial for the crime of genocide. This observation is important because of the significance that the Convention on the Prevention and Punishment of the Crime of Genocide [the ‘Convention against Genocide’] bears upon the question of immunity presented in this appeal.

27. A summary of how the genocide charge came about may be helpful here. On 12 July 2010, the Pre-Trial Chamber issued a decision on a second warrant of arrest against Mr Al-Bashir.²⁵ The significance of that being a second warrant of arrest is this. The crimes attaching to the first warrant of arrest, issued on 4 March 2009,²⁶ were crimes against humanity and war crimes. The Pre-Trial Chamber had declined, on that occasion, to issue a warrant of arrest in relation to the crime of genocide. The Pre-Trial Chamber’s reasons for declining to do so were that the Prosecutor had sought to infer genocidal intent from the material submitted to the Pre-Trial Chamber for purposes of the arrest warrant. The Pre-Trial Chamber was not persuaded that genocidal intent was the only reasonable inference available to be drawn from the materials in question. The Prosecutor appealed that decision.²⁷ On appeal, the Appeals Chamber reversed the Pre-Trial Chamber on the point. The Appeals Chamber held that for purposes of issuance of arrest warrant, as opposed to conviction on the charge,

²⁴ *Ibid.*

²⁵ *Prosecutor v Al-Bashir* (Second Decision on the Prosecution’s Application for a Warrant of Arrest), 12 July 2010, [ICC-02/05-01/09-94](#) [Pre-Trial Chamber I].

²⁶ *Prosecutor v Al-Bashir* (Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir), 4 March 2009, [ICC-02/05-01/09-3](#) [Pre-Trial Chamber I].

²⁷ *Ibid.* See in particular paras 158-161.

it was enough that genocidal intent was one inference that could reasonably be drawn from the available evidence. It need not be the only reasonable inference.²⁸

28. Thus, in its decision of 12 July 2010, the Pre-Trial Chamber issued a warrant of arrest against Mr Al-Bashir for genocide (i) by killing; (ii) by causing serious bodily or mental harm; and, (iii) by deliberately inflicting on each target group conditions of life calculated to bring about the group's physical destruction.²⁹

29. Having found that violations of international humanitarian law and human rights law had occurred in Darfur, and having identified possible suspects of those violations, the Cassese Commission had to account for the final matter of its mandate, namely to suggest means of ensuring that those responsible for such violations are held accountable. In that regard, the Commission strongly recommended immediate referral of the Darfur situation to the ICC, stating as follows:

The Commission strongly recommends that the Security Council immediately refer the situation of Darfur to the International Criminal Court, pursuant to article 13(b) of the ICC Statute. As repeatedly stated by the Security Council, the situation constitutes a threat to international peace and security. Moreover, as the Commission has confirmed, serious violations of international human rights law and humanitarian law by all parties are continuing. The prosecution by the ICC of persons allegedly responsible for the most serious crimes in Darfur would contribute to the restoration of peace in the region.³⁰

30. As a crucial consideration in making that recommendation, the Commission observed, among other things:

The Sudanese justice system is unable and unwilling to address the situation in Darfur. This system has been significantly weakened during the last decade. Restrictive laws that grant broad powers to the executive have undermined the effectiveness of the judiciary, and many of the laws in force in Sudan today contravene basic human rights standards. Sudanese criminal laws do not adequately proscribe war crimes and crimes against humanity, such as those carried out in Darfur, and the Criminal Procedure Code contains provisions that prevent the effective prosecution of these acts. In addition, many victims informed the Commission that they had little confidence in the impartiality of the Sudanese justice system and its ability to bring to justice the perpetrators of the serious crimes committed in Darfur. In any event, many have feared reprisals in the event that they resort to the national justice system. The

²⁸ *Prosecutor v Al-Bashir* (Judgment on the appeal of the Prosecutor against the 'Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir'), 3 February 2010, [ICC-02/05-01/09-73](#), at paras 33-39 and 41 [Appeals Chamber].

²⁹ *Prosecutor v Al-Bashir* (Second Decision on the Prosecution's Application for a Warrant of Arrest), 12 July 2010, [ICC-02/05-01/09-94](#) [Pre-Trial Chamber I]. See in particular, p 28.

³⁰ Cassese Commission Report, at p 5.

measures taken so far by the Government to address the crisis have been both grossly inadequate and ineffective, which has contributed to the climate of almost total impunity for human rights violations in Darfur.³¹

31. Those are some of the crucial elements of the Cassese Commission Report that the Security Council noted in resolution 1593 (2005), when referring the situation in Darfur to the Prosecutor of the Court. Such a report is part of what must be considered in the task of interpreting a resolution of the Security Council, such as resolution 1593 (2005).

(c) Debate during Adoption of Resolution 1593 (2005)

32. Following the Cassese Commission Report on 25 January 2005, the Security Council adopted resolution 1593 (2005), on 31 March 2005.

33. During the debate on the adoption of the resolution, all members of the Security Council, even those abstaining from the vote, addressed the issue of impunity in Darfur, and the vast majority agreed that the climate of impunity prevalent in the region needed a joint response from the international community in order for it to end.³²

3. *Some Precursors to the Appeal*

34. We are cognisant of the various pronouncements in the jurisprudence of the Court—thus far limited to the pronouncements of the Pre-Trial Chambers—on State cooperation in the arrest and surrender of Mr Al-Bashir. The various analyses of the relevant Pre-Trial Chambers largely address three main topics, namely: (i) the existence of international law obligations of States regarding Head of State immunity; (ii) the impact, if any, of Security Council resolution 1593 (2005) on Sudan and the applicability of the Statute to a non-State Party such as Sudan; and, (iii) the applicability of article 98 of the Statute.

³¹ *Ibid*, at pp 5-6.

³² United Nations, Security Council, 5158th meeting, 31 March 2005, S/PV.5158. The result of the voting was as follows: 11 votes in favour, none against and four abstentions (Algeria, Brazil, China and United States of America).

35. In its decisions relating to Malawi and to Chad, Pre-Trial Chamber I determined that customary international law immunity did not apply to Mr Al-Bashir as President of Sudan, in any way that bars his prosecution before the Court.³³ Pre-Trial Chamber I found that: (i) immunity for Heads of State before international courts has been rejected since World War I;³⁴ (ii) prosecutions of Heads of State by international courts have gained widespread recognition as accepted practice in the last decade;³⁵ (iii) the States Parties to the Statute had ‘renounced any claim to immunity by ratifying the language of article 27(2)’, whilst non-States Parties had twice allowed for situations to be referred to the Court by the Security Council ‘undoubtedly in the knowledge that these referrals might involve prosecution of Heads of State who might ordinarily have immunity from domestic prosecution’;³⁶ and, (iv) to interpret article 98(1) in order to justify not surrendering Mr Al-Bashir on immunity grounds would disable the Court and international criminal justice, contrary to the purpose of the Statute.³⁷

36. Given its conclusion that customary international law does not recognise Head of State immunity when an international court seeks the arrest of a suspect for international crimes, Pre-Trial Chamber I found that there is no conflict between a State Party’s obligations towards the Court and its obligations *vis-à-vis* Sudan under customary international law, and that article 98(1) of the Statute is therefore not applicable.³⁸

37. Regarding immunity, Pre-Trial Chamber II held in its decision in relation to the Democratic Republic of the Congo—followed in the Djibouti³⁹ and Uganda⁴⁰

³³ *Prosecutor v Al-Bashir* (Decision Pursuant to Article 87 (7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir), 12 December 2011, [ICC-02/05-01/09-139-Corr](#) [Pre-Trial Chamber I] [*‘Malawi Referral Decision’*], at paras 37-43. *Prosecutor v Al-Bashir* (Decision pursuant to article 87 (7) of the Rome Statute on the refusal of the Republic of Chad to comply with the cooperation requests issued by the Court with respect to the arrest and surrender of Omar Hassan Ahmad Al Bashir), 13 December 2011, [ICC-02/05-01/09-140-tENG](#) [Pre-Trial Chamber I] [*‘Chad Referral Decision’*], at para 13.

³⁴ [Malawi Referral Decision](#), at para 38; [Chad Referral Decision](#), at para 13.

³⁵ [Malawi Referral Decision](#), at para 39; [Chad Referral Decision](#), at para 13.

³⁶ [Malawi Referral Decision](#), at para 40; [Chad Referral Decision](#), at para 13.

³⁷ [Malawi Referral Decision](#), at para 41; [Chad Referral Decision](#), at para 13.

³⁸ [Malawi Referral Decision](#), at para 43; [Chad Referral Decision](#), at para 13.

³⁹ *Prosecutor v Al-Bashir* (Decision on the non-compliance by the Republic of Djibouti with the request to arrest and surrender Omar Al-Bashir to the Court and referring the matter to the United

decisions—that under customary international law, a sitting Head of State did ‘enjo[y] personal immunities from criminal jurisdiction and inviolability before national courts of foreign States even when suspected of having committed one or more of the crimes that fall within the jurisdiction of the Court’.⁴¹ Pre-Trial Chamber II held that the explicit exception to the personal immunities of Heads of State in article 27(2) of the Statute was in principle confined to States Parties.⁴² However, undertaking a textual analysis of Security Council resolution 1593 (2005), Pre-Trial Chamber II found that, by virtue of the language in paragraph 2 indicating the Security Council’s decision that Sudan ‘shall cooperate fully’ with the Court, the Security Council had implicitly ‘waived’ any Head of State immunity that attached to Mr Al-Bashir under international law.⁴³

38. In a marked departure, in the *South Africa Referral Decision*,⁴⁴ Pre-Trial Chamber II (which was differently constituted, except for one Judge) held that customary international law recognises immunity for Heads of State, and that the Pre-Trial Chamber was unaware of any exception to that immunity when the arrest and surrender of a Head of State is sought for international crimes on behalf of an international court. In this decision, Pre-Trial Chamber II equally focused on Security Council resolution 1593 (2005) and its impact on the immunities of Mr Al-Bashir. However, unlike the decision in the DRC situation, Pre-Trial Chamber II found that, by referring a situation to the Prosecutor of the Court, Security Council resolution 1593 (2005) triggered the application of the Statute’s legal framework in its entirety, including the immunity exception under article 27 of the Statute. It found that by deciding that Sudan shall cooperate fully, the Security Council imposed on Sudan an obligation in relation to the Court, to cooperate fully with the Court for the limited

Nations Security Council and the Assembly of the State Parties to the Rome Statute), 11 July 2016, [ICC-02/05-01/09-266](#) [Pre-Trial Chamber II].

⁴⁰ *Prosecutor v Al-Bashir* (Decision on the non-compliance by the Republic of Uganda with the request to arrest and surrender Omar Al-Bashir to the Court and referring the matter to the United Nations Security Council and the Assembly of State Parties to the Rome Statute), 11 July 2016, [ICC-02/05-01/09-267](#) [Pre-Trial Chamber II]

⁴¹ *Prosecutor v Al-Bashir* (Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir’s Arrest and Surrender to the Court), 9 April 2014, [ICC-02/05-01/09-195](#) [Pre-Trial Chamber II] [*‘DRC Referral Decision’*], at paras 25-26.

⁴² [DRC Referral Decision](#), at para 25.

⁴³ *Ibid*, at paras 29, 31.

⁴⁴ *Prosecutor v Al-Bashir* (Decision under article 87(7) of the Rome Statute on the non-compliance by South Africa with the request by the Court for the arrest and surrender of Omar Al-Bashir), 6 July 2017, [ICC-02/05-01/09-302](#) [Pre-Trial Chamber II] [*‘South Africa Referral Decision’*], at para 68.

purpose of the situation in Darfur. Thus, Sudan had ‘rights and duties analogous to those of States Parties to the Statute’.⁴⁵

39. Therefore, while in the *DRC Referral Decision*, Pre-Trial Chamber II found that Mr Al-Bashir’s immunity was considered to be waived as a result of Security Council resolution 1593 (2005),⁴⁶ in the *South Africa Referral Decision*, it was considered that there was no immunity to be waived by virtue of the application of article 27 of the Statute.⁴⁷ With respect to article 98 of the Statute, in the *DRC Referral Decision*, Pre-Trial Chamber II noted that article 98(1) of the Statute aims at preventing a State from acting inconsistently with its international obligations towards a non-State Party as concerns the immunities that attach to its Head of State, but found that such inconsistencies did not arise in that case as a result of the implicit waiver of immunity found in Security Council resolution 1593 (2005).⁴⁸ In the *South Africa Referral Decision*, Pre-Trial Chamber II stated that for non-States Parties the applicable regime is that of article 98(1) of the Statute; but since, for the limited purpose of the situation in Darfur, Sudan has rights and duties analogous to those of States Parties to the Statute,⁴⁹ and since between States Parties article 98(1) is not applicable because there is no immunity to be waived by virtue of article 27 of the Statute, South Africa had a duty to arrest Mr Al-Bashir and surrender him to the Court while he was on its territory.⁵⁰

40. These various pronouncements of the Pre-Trial Chambers now coalesce in the judgment of the Appeals Chamber, as further explained in this opinion.

⁴⁵ *Ibid*, at paras 85, 88, 91.

⁴⁶ [DRC Referral Decision](#), at para 29.

⁴⁷ [South Africa Referral Decision](#), at para 81.

⁴⁸ [DRC Referral Decision](#), at paras 27, 29.

⁴⁹ [South Africa Referral Decision](#), at paras 82, 88.

⁵⁰ *Ibid*, at paras 81, 93-94, 97.

B. Bedrock Principles of Law

1. Juristic History of Sovereign Immunity from National Jurisdictions

(a) Definition of Jurisdiction

41. From first principles, a basic understanding of the term ‘jurisdiction’ connotes the prerogative of control over things, places and persons (and their conducts). For functional purposes, such prerogative of control may be expressed in the manner of legislative, judicial or executive power.

42. As will be seen in the ensuing review, in classical international law, before the age of multilateralism, the concept of jurisdiction was exclusively considered as a manifestation of sovereign power of a State within its realms.

(b) Bynkershoek on the Basis of Jurisdiction

43. Cornelius van Bynkershoek was one of the foremost luminaries of classical international law, very much of the stature of his compatriot forerunner Hugo Grotius of an earlier century. In his book *De Foro Legatorum Liber Singularis: a Monograph on the Jurisdiction over Ambassadors in both Civil and Commercial Cases*, Bynkershoek gave a lucid and authoritative explanation of the nature and origin of the jurisdiction of courts of law. He explained it, as we shall see presently, as a sovereign’s exercise of authority over his or her own subjects. That proposition has dominated the understanding of jurisdiction and its related concept of immunity since the earliest known judicial precedent. For this explanation, Bynkershoek deserves quoting at some length:

All jurisdiction, in both civil and criminal cases, belongs to the prince alone, and this he can either exercise himself, or delegate to another. Whichever of these alternatives he adopts, he can never extend his jurisdiction beyond the persons or things that are subject to his power. For just as there is a decree of the civil law [as opposed to the canon law] to the effect that ‘one extending his judicial decisions beyond his territory may be disobeyed with impunity’, so the wording of the law of nations is, ‘issue your commands but only to your subjects’. The matter depends solely on the condition of subjection to authority, and in the absence of this all assertion of jurisdiction is vain, and vain also is the preliminary summons to court. [...]

[T]he condition of being subject to authority is [...] of two kinds: one is that of a person, the other that of a thing that lies within the control of the authority which is under discussion; and either of these constitutes a basis of our being subject to a court for trial. A person may be tried in the courts of his domicile because, unless some privilege of his intervenes, he is

subject to his own magistrate. In regard to arrest [...] this also must rest solely upon subjection to jurisdiction. [...]

[W]hether we arrest resident aliens or, where it is permissible, citizens of another country who happen to be staying here, we arrest them for no other reason than that wherever one is found, there also he is understood to be subject to authority, and because he is subject he is compelled to submit to the jurisdiction of him who has summoned him into court.⁵¹

44. And this postulation of jurisdiction as exercise of authority over a domain, persons and things, unless protected by immunity, is evident (as a matter of logic) in the rationale that Bynkershoek offered in relation to foreign sovereigns. In that regard, he essentially asserted the general rule—and to him it was only a general rule—of immunity of foreign sovereigns, by way of analogy drawn from the settled practice of immunity of ambassadors, as set out in this footnote.⁵²

45. Beyond the analogy with ambassadorial immunity, Bynkershoek explained the principled basis for immunity of sovereigns on the footing that no foreign sovereign would be presumed to visit the realms of his or her equal ‘with the intention of subjecting himself to the authority’ of the host sovereign ‘and becoming a subject by change of domicile’.⁵³

⁵¹ Cornelius van Bynkershoek, *De Foro Legatorum Liber Singularis: a Monograph on the Jurisdiction over Ambassadors in both Civil and Commercial Cases* (1744) [Gordon J Laing translation, 1946], at pp 12-13.

⁵² We may consider first his analogue of ambassadorial immunity relative to sovereign immunity: ‘[I]f we proceed to inquire whether a prince who has committed a crime in a foreign country can be punished there, or if he has contracted a debt can be arrested for it, we must revert first to reason and then to practice. If we consult reason only, a great deal can be said on either side. For what if a prince in the dominions of another should discard the character of prince and assume that of robber and homicide; what if he should plot revolution, arouse factional strife, and act the part of rebel: is he to be immune from punishment? Again, if he cheats citizens out of money by contracting great debts, is he to be allowed to depart, bearing home such rich spoils? It is difficult to say. Nevertheless, when one considers it from the standpoint of reason, there is no lack of arguments against calling him to account. For if ambassadors, who represent the prince, are not subject either in the matter of contracts or of crimes to the jurisdiction of him in whose country they are serving as ambassadors, as I shall convincingly show presently, are we to come to the opposite conclusion in the case of the prince? Shall we decline to accept in the case of the prince, who is himself present and happens to be transacting his business in person, a situation which reason and the consent of all nations has accepted in the case of ambassadors solely because they represent the prince and are the interpreters of his message? Is not his inviolability greater than that of his ambassadors? Are we to arrest him and hurry him off to court to plead his case? Shall we allow in the case of the prince what is not allowed in that of the ambassador, because an ambassador has someone whom he represents and to whom he can appeal for trial at home, while the prince has no one of the kind?’ *Ibid.*, at pp 18-19.

⁵³ As Bynkershoek himself put it: ‘Now let us examine more closely the case of the prince who, though free and independent, has nevertheless entered the dominions of another, either to conduct negotiations which on other occasions are generally taken care of by ambassadors, such as those pertaining to treaties, trade-relations, and other matters of this sort, or to adjust a law suit in which he has become involved, or to learn from the policies of the other country something which he can adopt in his own, or

46. But on this matter of immunity of foreign sovereigns from the jurisdiction of the sovereign of the local forum, Bynkershoek's analysis had proceeded on the basis of logical reasoning, as opposed to settled customary international law—or general consensus of the legal precedents and academic commentaries—of the day. It was understandable, then, that he had to be more cautious in recognising certain exceptions to the general rule of immunity, which he awkwardly stated in the terms of the permissibility of arrest and possible infliction of deadly *violence* [remarkably, Bynkershoek preferred mob action in this respect rather than the due process of law!] when a foreign sovereign commits serious violations of the law in the territory of his or her host.⁵⁴ It may, of course, have escaped him that *violence* would be the most extreme antithesis of the *inviolability* of anyone protected by the privilege of immunity.

47. It is enough to accept that Bynkershoek (as is apparent above) and some other classical publicists⁵⁵ recognised much earlier the restrictive idea of sovereign immunity—as opposed to others of their era, Grotius among them—who, from the premise of reason and not settled practice, argued for sovereign immunity in more absolute terms.⁵⁶

merely for the purpose of diversion. *But whatever the reason for his visit, no one will say that he has gone with the intention of subjecting himself to the authority of another and of becoming a subject by change of domicile.* He is a stranger like any private individual, and as the latter is not subject to the obligations, personal or hereditary, of the place under consideration, or to its court, so it is very clear that the prince is not subject to them.' *Ibid*, at p 17, emphasis received.

⁵⁴ As Bynkershoek put it: 'But certain precautions are essential to the proper handling of affairs of this kind. For what if after the manner of a robber he should make an attack on the life, the property, or the chastity of someone, just as an enemy might run amuck in a captured city? He can certainly be arrested and perhaps put to death, although I should prefer that it be done by a mob rather than through duly constituted process of law. Even in an unlimited monarchy, under similar circumstances, the subjects of the prince have been accorded the right of rising against him, if he lays aside the character of prince and becomes a tyrant; and this right has been conceded by those who are not in general hostile to the cause of princes.' *Ibid*, at p 21.

⁵⁵ Coke, for instance, had insisted that there was no immunity in England for an ambassador who committed 'any crime which is *contra jus gentium*, as treason, felony, adultery or any other crime which is against the Law of Nations. He loseth the privilege and dignity of an Ambassador, as unworthy of so high a place; and may be punished here, as any other private alien ...'. See Robert Ward, *An Inquiry into the Foundation and History of the Law of Nations in Europe from the Time of the Greeks and Romans to the Age of Grotius*, (1795) vol 1 at p 320. Richard Zouche had similarly suggested that there is no immunity where a foreign sovereign impliedly submitted to the forum jurisdiction by making a contract, or by committing a wrong within the jurisdiction: Richard Zouche, *An Exposition of Feial Law and Procedure, or of Law between Nations, and Questions concerning the Same* (1650) vol 2 [J L Brierly translation, 1911] at p 65.

⁵⁶ See Hugo Grotius, *The Rights of War and Peace - including the Law of Nature and of Nations* (1625) [A C Campbell translation, 1901], Ch. XVIII, generally.

48. Ultimately, the essential point of the foregoing review is that Bynkershoek's conception of jurisdiction as a sovereign's exercise of authority over his or her own subjects—with sovereign immunity deriving from the presumption that no sovereign intends to subject himself or herself to the authority of his or her equal—has firmly controlled the rationale for sovereign immunity from time immemorial. It is plain to see this in cases ancient and modern, as we shall see next.

49. First, we may consider *The Schooner Exchange*. It is generally accepted by international lawyers as the leading judicial precedent on the subject. Chief Justice Marshall commenced his reasoning by observing that '[t]he jurisdiction of courts is a branch of that which is possessed by the nation as an independent sovereign power.'⁵⁷ According to him, '[t]he jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself.'⁵⁸ It is from those initial premises that Marshall CJ launched the juridical conception of sovereign immunity: on the basis of a presumption of implied waiver of jurisdiction of the sovereign of the forum. The presumption entails a general understanding (as Bynkershoek had explained) that no sovereign (as a matter of international relations) is to be presumed—by mere presence outside his or her own realm—to subject himself or herself to the authority of a sovereign equal while in the territory of such an equal. As Marshall CJ put it:

This full and absolute territorial jurisdiction being alike the attribute of every sovereign, and being incapable of conferring extra-territorial power, would not seem to contemplate foreign sovereigns nor their sovereign rights as its objects. One sovereign being in no respect amenable to another, and being bound by obligations of the highest character not to degrade the dignity of his nation, by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express license, or in the confidence that the immunities belonging to his independent sovereign station, though not expressly stipulated, are reserved by implication, and will be extended to him.

This perfect equality and absolute independence of sovereigns, and this common interest impelling them to mutual intercourse, and an interchange of good offices with each other, have given rise to a class of cases in which every sovereign is understood to waive the exercise of a part of that complete exclusive territorial jurisdiction, which has been stated to be the attribute of every nation.⁵⁹

⁵⁷ *The Schooner Exchange v McFaddon and Others*, 11 US (7 Cranch) 116 (1812) [US Supreme Court] at p 136.

⁵⁸ *Ibid*, at p 136.

⁵⁹ *Ibid*, at p 137.

50. And the obverse companion of that proposition—i.e. that no foreign sovereign is to be presumed (on entering a territory) to subject himself or herself to the authority of his or her sovereign equal—is that the territorial sovereign is not to be presumed to assert his or her authority over the sovereign equal, notwithstanding that the latter might have entered without consent.⁶⁰

51. Such original judicial pronouncements on the absence of authority between sovereign equals eventually became associated retrospectively (it seems) to the Latin maxim *par in parem non habet imperium*,⁶¹ which is now a popular explanation for the principle that anchors the idea of sovereign immunity. As Lord Goff put it in *Pinochet No 3*: ‘The principle of state immunity is expressed in the Latin maxim *par in parem non habet imperium*, the effect of which is that one sovereign state does not adjudicate on the conduct of another. This principle applies as between states ...’.⁶² The proposition was expressed in similar terms at the European Court of Human Rights.⁶³ In *Jones v Saudi Arabia*, Lord Bingham expressed the same principle notably as follows: ‘Based on the old principle *par in parem non habet imperium*, the rule of international law is not that a state should not exercise over another state a jurisdiction which it has but that (*save in cases recognised by international law*) a state has no jurisdiction over another state.’⁶⁴

⁶⁰ In that regard, Marshall CJ observed as follows: ‘Should one sovereign enter the territory of another, without the consent of that other, expressed or implied, it would present a question which does not appear to be perfectly settled, a decision of which, is not necessary to any conclusion to which the Court may come in the cause under consideration. If he did not thereby expose himself to the territorial jurisdiction of the sovereign, whose dominions he had entered, it would seem to be because all sovereigns impliedly engage not to avail themselves of a power over their equal, which a romantic confidence in their magnanimity has placed in their hands.’ *Ibid*, at p 138.

⁶¹ The maxim has been traced to Bartolus of Saxoferrato, the 14th century Italian jurist who had declared: ‘[N]on enim una civitas potest facere legem super alteram, quia par in parem non habet imperium.’ See Lee Caplan, ‘State Immunity, Human Rights, and *Jus Cogens*: A Critique of the Normative Hierarchy Theory’ (2003) 97 *Am J Int’l L* 741 at p 748, citing G Badr, *State Immunity: An Analytical and Prognostic View* (1984) at p 89.

⁶² See *R v Bartle and the Commissioner of Police for the Metropolis and Others, Ex Parte Pinochet; R v Evans and Another and the Commissioner of Police for the Metropolis and Others, Ex Parte Pinochet* (No 3) [2000] 1 AC 147 at p 210 [UK House of Lords].

⁶³ ‘[S]overeign immunity is a concept of international law, developed out of the principle *par in parem non habet imperium*, by virtue of which one State shall not be subject to the jurisdiction of another State’: See *Al-Adsani v UK* (Judgment), 21 November 2001, Application No 35763/97, at para 54 [ECtHR].

⁶⁴ *Jones v Saudi Arabia* [2006] UKHL 26, at para 14 [UK House of Lords], emphasis added.

2. *Jurisdiction of International Courts over International Crimes*

(a) **The Bearing of the Origin and Nature of Jurisdiction on the Essential Question of Whether Heads of State Enjoy Immunity before International Courts**

52. The above analysis, flowing from Bynkershoek's conception of the origin and nature of jurisdiction, thus gives much significance—from first principles—to the summary renunciation of immunity in article 27(2) of the Rome Statute, which the International Court of Justice [the 'ICJ'] quite rightly recognised in adequate terms in the *Arrest Warrant Case*,⁶⁵ in the result that there is no immunity of Heads of State before this Court.

53. We shall consider in due course the question whether customary international law ever evolved to recognise immunity for Heads of State before an international court. For now, it is enough to say that the principled significance referred to in the preceding paragraph begins with recalling that judges in *national* courts exercise jurisdiction in the national forum, in their capacity as delegates for purposes of exercise of sovereign authority within the national forum. In contrast, judges of *international* courts operate on an entirely different footing of delegated jurisdiction. They are not delegates of any *national* sovereign forbidden to exercise jurisdiction over his or her sovereign equals. They exercise jurisdiction on behalf of the *international* community, such as is represented by the aggregation of States who have authorised those international judges to exercise the jurisdiction in question. Thus, when the ICC 'exercise[s] jurisdiction' pursuant to article 13(a) and 13(c) or article 70 of the Rome Statute, it does so on behalf of the international community represented in the membership of the Rome Statute. But when the Security Council confers jurisdiction on the ICC pursuant to article 13(b) of the Rome Statute, the Court would be exercising those powers as the jurisdictional delegate of the Security Council, by virtue of the Council's power to maintain or manage international peace and security under Chapter VII of the UN Charter. In those circumstances, an accused person cannot successfully plead immunity from that exercise of jurisdiction, to the extent that such a plea of immunity is justified by concerns about the subjection of

⁶⁵ *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium)* (Judgment) [2002] ICJ Rep, at p 3 [['Arrest Warrant'](#) Case].

one sovereign to the *imperium* of another sovereign in violation of the ‘perfect equality and absolute independence’ between sovereigns.

54. The matter may also be considered from the perspective that the ICC’s exercise of jurisdiction over a Head of State involves no legitimate anxiety whatsoever that the ICC is exercising jurisdiction in order to apply laws made by one sovereign for the exclusive benefit of his or her own domestic interests: that being a legitimate concern that fully justified, as a practical matter, the principle in the maxim *par in parem non habet imperium*. The ICC exercises its jurisdiction in no other circumstance than on behalf of the international community—represented under the Rome Statute or the UN Charter as the case may be—for the purpose of the maintenance of international peace and security according to the rule of international law.

55. Thus, the distinction that the ICJ recognised in the *Arrest Warrant Case* between national courts and international courts with jurisdiction must have an effective significance. But, the distinction and its significance would be ultimately nullified if the *international* court is barred from exercising the jurisdiction that it has: when such a bar effectively proceeds from the same concerns that a *national* court is barred from exercising jurisdiction, notwithstanding that such concerns are irrelevant to the circumstances of an international court. Such an outcome would be particularly undesirable if it results from the paradox of a feature of the operation of international law in its dependence on national assistance. The paradox appears in the manner of inordinate focus upon any necessary process in the national forum as the *formal* object of the proceeding in question, when the *substantive* object of the proceeding is to enable the international court to exercise its own jurisdiction.

(b) What is an ‘International Court’

56. But, what is an ‘international court’? An ‘international court’ or an ‘international tribunal’ or an ‘international commission’ (in the context of administration of justice)—nothing turns on the choice of nomenclature—is an adjudicatory body that exercises jurisdiction at the behest of two or more states. Its jurisdiction may be conferred in one of a variety of ways: such as by treaty; by instrument of promulgation, referral or adhesion made by an international body or functionary empowered to do so; or, indeed, by adhesion or referral through an

arbitral clause in a treaty. A court that operates physically or in principle within a domestic realm exercises international jurisdiction where such jurisdiction results in any manner described above.

57. An international court may be regional or universal in orientation. In the latter case, the universal character remains undiminished by the mere fact that any of the States entitled to join it elected to stay out in the meantime, or declined to consent to the court's jurisdiction as the case may be. An international court may be *ad hoc* or permanent in duration. An *international* court is not characterised as such by the type or substance of law that it applies. The type of law may be civil or criminal or both; and the substance may be public international law, private international law, national law, or any combination of those. It may indeed be observed that a national court does not become an international court because it applies public international law in its work. Conversely, an international court does not lose its character as such, merely because its work requires it to apply the domestic law of one or more States.

58. The source of the jurisdiction that the court is meant to exercise is the ultimate element of its character as an international court. That source of jurisdiction is the collective sovereign will of the enabling States, expressed directly or through the legitimate exercise of mandate by an international body (such as the Security Council) or an international functionary (such as the UN Secretary-General, when properly empowered to set up a court of law).

59. The exercise of jurisdiction by an international tribunal is no contradiction—but an enhancement—to the idea of sovereign equality of States and their independence from one another. For, the court or tribunal derives its jurisdiction from the agreement of the States concerned to pool their sovereignty and independence for purposes of peaceful settlement of disputes of interest to the international community within that domain. Hence, an international court exercises the jurisdiction of no one sovereign. It exercises the jurisdiction of all the concerned sovereigns *inter se*, for their overall benefit.

60. Accordingly, in the outcome, the modern idea that no sovereign is above the law in his or her own realm now finds ready equivalence on the international plane: in the

sense that no sovereign is above international law on that plane, for the sake of international peace and security.

(c) Advantages of an International Criminal Court

61. Beyond the juristic advantages of an international criminal court as a court that exercises no national jurisdiction, there are other attendant advantages that favour the integrity of the judicial process concerned.

62. Some of those advantages were discussed by the Commission of Experts appointed by the UN Secretary-General, at the request of the Security Council, to investigate and report on the events in Rwanda in 1994. In their report, the Commissioners contrasted the advantages of international criminal tribunals relative to those of municipal courts. In the relevant part, they observed as follows:

There are some obvious disadvantages to the municipal prosecution and trial of individuals in cases where the crimes alleged concern extremely severe violations, such as those determined to have taken place in Rwanda between 6 April and 15 July 1994. Municipal prosecution in these highly emotionally and politically charged cases can sometimes turn into simple retribution without respect for fair trial guarantees. Even where such trials are conducted with scrupulous regard for the rights of the accused, there is a great likelihood that a conviction will not be perceived to have been fairly reached.⁶⁶

Therefore, for the purposes of independence, objectivity and impartiality, there are advantages in having trials conducted by an international criminal tribunal in a place such as The Hague for the very reason that there would be a certain measure of distance from the venue of the trial and the places where severe atrocities have been perpetrated.⁶⁷

Moreover, the gravity of human rights violations committed in Rwanda from 6 April to 15 July 1994 extends far beyond Rwanda. As a matter of international peace and security, they concern the international community as a whole. It is not only a matter of ensuring justice in respect of atrocities that have already been perpetrated, but also a matter of deterrence for the future. The coherent development of international criminal law better to deter such crimes from being perpetrated in future not only in Rwanda but anywhere, would best be fostered by international prosecution rather than by domestic courts. An international tribunal can more effectively take account of the relevant international legal norms in their specificity because that forms its special field of competence. Domestic courts are not likely to be as familiar with the technique and substance of international law.⁶⁸

⁶⁶ United Nations, Security Council, '[Preliminary report of the Independent Commission of Experts established in accordance with Security Council resolution 935 \(1994\)](#)', Annex to Letter dated 1 October 1994 from the Secretary-General Addressed to the President of the Security Council, Doc No S/1994/1125, at para 136.

⁶⁷ *Ibid*, at para 137.

⁶⁸ *Ibid*, at para 138.

63. The advantages of an international court as suggested in the foregoing observations were not diminished by the Security Council's preference to locate the International Criminal Tribunal for Rwanda [the 'ICTR'] in Arusha, rather than The Hague as the Commission of Experts had recommended. Nor was the administration of international justice undermined by the fact that the Special Court for Sierra Leone [the 'SCSL'] conducted its proceedings in Freetown (except for the proceedings against Charles Taylor which were conducted in The Hague). The more important consideration remains the seising of the jurisdiction upon an international court, for purposes of greater perceptions of objectivity.

64. The observations of the Commission of Experts (on Rwanda) in that regard find support in the chronicles of international criminal law. It is noted in that connection that at the second meeting of the UN Committee on the Progressive Development of International Law and its Codification (as the International Law Commission was then called), held on 13 May 1947, the question of establishment of an international criminal court was raised by the representative of France, Mr Donnedieu de Vabres. He noted, among other things, that as a judge of the Nuremberg Tribunal, he was very much alive to the criticism of that tribunal as composed only of representatives of victor countries, and not representatives of the international community in the truest sense of the idea. In the result, he urged the Committee to consider the question of establishment of an international criminal court and on 15 May he submitted a memorandum on the subject.⁶⁹

(d) The Differentiated Quality of an International Court in International Law in relation to International Crimes

65. It is not necessary to belabour here the usual explanation of the meaning of customary international law, as consisting of 'evidence of general practice [of States] accepted as law.'⁷⁰ It may be accepted, however, that when the international community (in their multilateral or representative assemblies) repeatedly expresses a particular idea in the same general manner in a consistent series of declarations, let

⁶⁹ See United Nations, General Assembly, '[Historical Survey of the Question of International Criminal Jurisdiction](#)' (Memorandum submitted by the Secretary-General), (1949), Doc No A/CN.4/7/Rev.1, at p 25.

⁷⁰ See article 38(1)(b) of the Statute of the International Court of Justice.

alone legal provisions, that idea may be characterised confidently as generating a norm of customary international law.⁷¹

66. That being the case, it should be beyond reasonable dispute by now that customary international law has never evolved to recognise immunity—even for Heads of State—before an international court exercising jurisdiction over crimes under international law. That view of customary international law, as will become evident in the study conducted below, results from the consistent and repeated rejection of immunity (even for Heads of State) in sundry instruments of international law since World War II. And such repeated rejection has resulted in a general understanding of customary international law in that way.

67. In his Hague Lecture, Sir Arthur Watts QC had observed that ‘[i]t can no longer be doubted that as a matter of *general customary international law* a head of state will personally be liable to be called to account if there is sufficient evidence that he authorised or perpetrated such serious international crimes.’⁷² In *Pinochet No 3*, Lord Browne-Wilkinson expressed the understanding that Watts ‘was looking at those cases where the international community has established an international tribunal in relation to which the regulating document *expressly* makes the head of state subject to the tribunal’s jurisdiction’.⁷³

68. Watts’ observation that it ‘can no longer be doubted that as a matter of general customary international law a head of state will personally be liable’ to prosecution before an international court was also correctly echoed by the Secretariat of the United Nations, in the terms of a ‘generally accepted’ proposition. In a 2008 memorandum, it observed as follows:

[I]t is *generally accepted* that *even an incumbent high-ranking official* would not be covered by immunity when facing [international criminal] charges before certain *international* criminal tribunals where they have jurisdiction. This was confirmed in the *Arrest Warrant* case. It is the object of a specific provision in the Rome Statute of the International Criminal

⁷¹ See *Oppenheim’s International Law*, 9th edn (1996), at pp 30-31; *Brownlie’s Principles of Public International Law*, 8th edn (Crawford) (2012), at p 24; and, Malcolm Shaw, *International Law*, 8th edn (2017), at p 61.

⁷² Arthur Watts, ‘The Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers’ (1994) 247 *Recueil des cours* 13, at p 84, emphasis added.

⁷³ See *R v Bartle and the Commissioner of Police for the Metropolis & Ors, Ex p Pinochet (No 3)* [2000] 1 AC 147 at p 204 [UK House of Lords], emphasis received.

Court, and is illustrated by actual international criminal proceedings engaged against incumbent officials enjoying immunity *ratione personae* in the past.⁷⁴

69. In a significant footnote to the foregoing passage—footnote 391—the Secretariat correctly noted that ‘the first indictment by the International Criminal Tribunal for the Former Yugoslavia against Milosevic was filed while the latter was incumbent head of State of the Federal Republic of Yugoslavia (see the initial indictment on Kosovo against Slobodan Milosevic and others, dated 22 May 1999, Case No IT-99-37).’

70. Similarly, evidence of the international customary norm under discussion is further afforded in relation to President Charles Taylor—another Head of State who was indicted before an international court during his own incumbency of office. In his case, the Appeals Chamber of the SCSL correctly observed that ‘the principle seems now established that the sovereign equality of states does not prevent a Head of State from being prosecuted before an international criminal tribunal or court.’⁷⁵

71. Earlier at the House of Lords, Lord Slynn of Hadley observed in *Pinochet No 1* that the concept of immunity originally conceived from the perspective of lateral relations between States ‘has ... to be considered now in light of developments in international law relating to what are called international crimes.’⁷⁶ Following a review of international instruments that preclude immunity before international criminal tribunals, he concluded as follows: ‘There is ... no doubt that states have been moving towards the recognition of some crimes as those which should not be covered by claims of state or Head of State or other official or diplomatic immunity when charges are brought before international tribunals.’⁷⁷

72. There is little doubt that Lord Bingham was speaking to the same effect, when he observed as follows in *Jones v Saudi Arabia*: ‘Based on the old principle *par in parem non habet imperium*, the rule of international law is not that a state should not

⁷⁴ United Nations, General Assembly, International Law Commission, ‘Immunity of State officials from foreign criminal jurisdiction’ (Memorandum by the Secretariat), 31 March 2008, Doc No A/CN.4/596, at paras 141 and 142, underlined emphasis received. See also para. 150.

⁷⁵ *Prosecutor v Taylor* ([Decision on Immunity from Jurisdiction](#)), 31 May 2004, at para 52 [SCSL Appeals Chamber].

⁷⁶ See *R v Bartle and the Commissioner of Police for the Metropolis & Ors*, Ex p *Pinochet* (No 1) [2000] 1 AC 61 at p 77 [UK House of Lords].

⁷⁷ *Ibid*, at p 79.

exercise over another state a jurisdiction which it has but that (*save in cases recognised by international law*) a state has no jurisdiction over another state.⁷⁸

73. The norm which ‘can no longer be doubted ... as a matter of general customary international law’ (as Arthur Watts put it), or the ‘generally accepted’ norm (as the UN Secretariat rightly described it) ‘that even an incumbent high-ranking official would not be covered by immunity when facing [international criminal] charges before certain *international* criminal tribunals where they have jurisdiction’ was assumed in paragraph 115 of a recent report of the International Law Commission [the ‘ILC’], in the context of the question of immunities before foreign *national* jurisdictions.⁷⁹

74. A notable case law of the ICJ in which this norm was recognised is the *Arrest Warrant* case, as mentioned earlier. It involved an effort by Belgium to prosecute *in Belgium* and *under Belgian law* the Foreign Affairs Minister of the Democratic Republic of the Congo. The ICJ held that the Minister enjoyed immunity from Belgian jurisdiction. For, no State may exercise its own jurisdiction over senior officials of another State, even for purposes of prosecuting international crimes in the national forum.

75. However, the ICJ recognised as a general proposition that there is no immunity for a senior state official before an international court exercising jurisdiction that it

⁷⁸ *Jones v Saudi Arabia* [2006] UKHL 26, *supra*, at para 14 [UK House of Lords], emphasis added.

⁷⁹ The full text of the observations are as follows:

114. A number of members asserted that there was a strong link between immunity and impunity for international crimes. It was pointed out that, if no alternative forum or jurisdiction for prosecution of international crimes was available, the procedural barrier of immunity in domestic courts would entail substantive effects. Some members emphasized that substantive justice should not be the victim of procedural justice, particularly in the case of violations of peremptory norms of international law (*jus cogens*). Such members cautioned that an exclusively procedural approach to immunity would have a negative impact on the development of individual responsibility in international law.

115. It was noted that the International Criminal Court, the most obvious forum for the prosecution of State officials, did not have the capacity or the resources to prosecute all alleged perpetrators of international crimes. As the Court operated on the basis of complementarity, those members maintained that domestic courts should remain the principal forums for combating impunity. It was also noted that the responsibility of a State for an act did not negate the individual responsibility of an official and should not stand in the way of individual prosecutions.’ International Law Commission, ‘Report of the International Law Commission on the work of its sixty-ninth session (2017)’, Doc No A/72/10, paras 114 and 115.

has. That recognition is entirely consistent with the development of customary international law, in the manner of precluding immunity before international courts in their exercise of jurisdiction in respect of crimes under international law. That remains the case, though the ICJ may have had in mind positive norms in written instruments of international law, which preclude such immunity. But, those written international instruments serve, in their various turns that unite in notable constancy, as evidence of consistent practice of states accepted as law.

**(e) The Nascence of a ‘New International Law’ Norm
Rejecting Immunity before International Tribunals**

76. The origins of the ‘generally accepted’ norm that rejects immunity before international courts date back to the twilight days of World War I. In order to rule out ambiguity, the genesis of the norm deserves tracking in some detail. With reasonable certainty, that journey has been identified as beginning just before—but with an eye to—the Paris Peace Conference held at the Palace of Versailles in 1919, with the view to shaping the international order following the war.

77. In anticipation of what was to come at Versailles, the British Government established a ‘Committee of Enquiry into Breaches of the Laws of War’ on 1 November 1918, chaired by the jurist Sir John Macdonell.⁸⁰ Notably, in clause 2 of its terms of reference, the Macdonell Committee was tasked to inquire into and report on the ‘degree of responsibility for these offences attaching to particular members of the German Forces, including the German General Staff, or other highly placed individuals.’ And in clause 4, the Macdonell Committee was authorised to inquire into and report on ‘[a]ny other matters cognate or ancillary to the above which may arise in the course of the Enquiry, and which the Committee finds it useful or relevant to take into consideration.’ At the first meeting of the Macdonell Committee, on 6 November 1918, the Attorney-General of England and Wales, Sir Frederick E Smith KC, repudiated the related ideas that *might was right* and that *international law was too weak to stand in the way of might*. He expressed a perception of such attitudes as dominating the mind-set of Kaiser Willem II of Hohenzollern in waging the First

⁸⁰ First, Second and Third Interim Reports from the Committee of Enquiry into Breaches of the Laws of War (with Appendices).

World War.⁸¹ But, with the Kaiser having lost the war, the Attorney-General noted, ‘the question has now arisen, what steps ought to be taken ... for the purpose of re-establishing the authority of International Law.’⁸² In answering that question, the Attorney-General asserted the determination of the British Government ‘to take any steps that are necessary to reassert, and to reassert under circumstances of the utmost possible notoriety, the authority of those doctrines ... looking as far as we can with cool and passionless eyes into the future of the World, we are determined that our children and our grandchildren, and those who come after them, shall be spared what this generation has gone through.’⁸³ Continuing, he observed that ‘*the most effective deterrent of all is that for all ages men who are tempted to follow the wicked and the bloody path which the Governors of the Central Empires have trodden during the last four years, shall have present before their eyes, not a picture merely of the brilliant and meretricious glamour of military success, but also the recollection that in this great conflict punishment attended upon crime.*’⁸⁴ In that connection, the Attorney-General noted that ‘it is certain that in the events that have taken place in the last four and a-half years many great crimes against International Law have been committed.’⁸⁵

78. The Attorney-General informed the Macdonell Committee that a similar study was already underway in France.⁸⁶

79. The first question that engaged the Macdonell Committee was the nature of the tribunal to be created for purposes of trial and punishment of war crimes and crimes against humanity. Should it be of national or international character? The Committee resolved on 19 November 1918 that the tribunal should be of international character.⁸⁷ Only upon failure or impossibility to secure consent of Allied and Associated Governments to establish such an international tribunal should the British Government take steps to establish a national court.⁸⁸

⁸¹ *Ibid.*, at p 6.

⁸² *Ibid.*, at p 7, emphasis added.

⁸³ *Ibid.*

⁸⁴ *Ibid.*, emphasis added.

⁸⁵ *Ibid.*

⁸⁶ *Ibid.*, at p 8.

⁸⁷ *Ibid.*, at p 12.

⁸⁸ *Ibid.*

80. Pursuant to the Attorney-General's urge for speedy deliberation, the Macdonell Committee made a number of recommendations in an Interim Report dated 19 December 1918.⁸⁹ Amongst them was that 'an International Tribunal be established composed of Representatives of the Chief Allied States and the United States for the trial and punishment of offences against the laws and customs of war and the laws of humanity.'⁹⁰ With greater specificity, the law that the international tribunal was to apply was obviously indexed to the Martens Clause as follows: "the principles of the Law of Nations as they result from the usages established among civilised peoples, from the laws of humanity and the dictates of public conscience," and in particular the regulations contained in the Hague Conventions and Declarations and the Geneva Conventions so far as the same or any of them may be applicable.'⁹¹

81. It may be noted that in his memorandum to the Macdonell Committee, dated 30 December 1918, Sir Frederick Pollock (a Committee member and renowned jurist) observed that 'the questions' that the Committee was to deal with 'are unique in more than one way.'⁹² To begin with, '[p]recedent is wholly lacking for the facts. Before this war no one thought it possible that a Great Power should issue deliberate and systematic orders for the commission of acts hitherto condemned by the consent and abhorred in the usage of civilised nations.'⁹³ But, more to the point, for present purposes, Pollock continued: '*The jurisdiction is likewise without precedent. History furnishes no example of a tribunal established by several allied States to do justice on offenders against rules and customs equally recognized by all of them.*'⁹⁴ Given its international character, '[s]uch a tribunal is not bound by rules laid down in any one jurisdiction; so far as the several rules of different nations agree, it may adopt their contents as witness of general consent.'⁹⁵

82. No doubt, the Macdonell Committee's determination that an international tribunal be established to try the war criminals, according to international law and general principles of law recognised by civilised nations, proceeded from the

⁸⁹ *Ibid.*, at p 13.

⁹⁰ *Ibid.*, at p 14, emphasis added.

⁹¹ *Ibid.*, at p 15.

⁹² *Ibid.*, at p 53.

⁹³ *Ibid.*

⁹⁴ *Ibid.*, emphasis added.

⁹⁵ *Ibid.*

Committee's conclusion '*on the whole ... that no English Court, administering the ordinary criminal law, would have jurisdiction to try an enemy alien in respect of any, or at all events of the great majority, of the offences in question.*'⁹⁶

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83. In the meantime, on 21 November 1918, the Attorney-General had specially seised a sub-committee (the Special Sub-Committee on Law)—also chaired by Macdonell—to consider and report on the desirability of prosecuting the Kaiser and the modality of doing so if desirable.⁹⁷

84. On 28 November 1918, the Special Sub-Committee on Law reported in relation to the Kaiser's trial. They opined that it was desirable that the Kaiser be prosecuted. To do so was 'a question of policy'. But it was also necessary, 'in view of the grave charges' alleged against him. As the Sub-Committee put it, 'the vindication of the principles of International Law, which he has violated, would be incomplete were he not brought to trial.' Moreover, 'the trial of other offenders might be seriously prejudiced, if they could plead the superior order of a sovereign against whom no steps had been taken.'⁹⁸

85. Regarding the modalities, the Special Sub-Committee on Law principally recommended that 'an International Tribunal be established ... for the trial and punishment of the ex-Kaiser as well as other offenders against the laws and customs of war and the laws of humanity.'⁹⁹ Elaborating on the values of such an international tribunal for the intended purpose, the Special Sub-Committee on Law very tellingly observed as follows:

It seems to us that the trial of the Kaiser ought to be by an International Tribunal, free from national bias, the decisions of which would possess unquestionable authority, which would speak in the name of the conscience of the world, which would help to re-establish and strengthen International Law, and which in the future would be a deterrent and warning to rulers and highly placed officials who meditated or instigated offences against International Law.¹⁰⁰

⁹⁶ *Ibid*, at p 19, emphasis added.

⁹⁷ *Ibid*, at p 12.

⁹⁸ *Ibid*, at p 95.

⁹⁹ *Ibid*.

¹⁰⁰ *Ibid*, at p 96.

86. Obviously enabled by the advice and recommendations of the Special Sub-Committee on Law, the British Government met their French and Italian counterparts at a conference on 2 December 1918: during which they agreed to recommend that a demand should be made of the Netherlands ‘for the surrender of the person of the Kaiser for trial by an International Court.’¹⁰¹ Notably, the Kaiser had fled to the Netherlands on 10 November 1918, on asylum.¹⁰²

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87. Recalling the Attorney-General’s indication to the Macdonell Committee, at their inaugural meeting, that a similar study was already underway in France,¹⁰³ it appears from all indications that the French Government had indeed also been similarly assisted by Professor Ferdinand Larnaude, Dean of the Law Faculty of the University of Paris, and his colleague, Professor Albert Geouffre de Lapradelle, Professor of International Law at the same Law Faculty.¹⁰⁴ In their study titled *Examen de la responsabilité pénale de l’empereur Guillaume II*, Larnaude and de Lapradelle had considered it inconceivable that the Kaiser should enjoy impunity in respect of the crimes allegedly attributed to him.¹⁰⁵ Mindful, however, of a number of difficulties envisaged in proceeding under municipal law¹⁰⁶—including, in particular, immunity of sovereigns in foreign municipal courts¹⁰⁷—Larnaude and de Lapradelle found the solution, and a novel one, to lie in the use of international law. They were

¹⁰¹ *Ibid*, at p 13.

¹⁰² See William Schabas, *The Trial of the Kaiser* (2018), at p 31.

¹⁰³ See First, Second and Third Interim Reports from the Committee of Enquiry into Breaches of the Laws of War, *supra*, at p 8.

¹⁰⁴ See Schabas, *The Trial of the Kaiser*, *supra*, at p 17.

¹⁰⁵ Paris Peace Conference 1919, Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, Memorandum by F Larnaude & A de Lapradelle, ‘Inquiry into the Penal Liabilities of Emperor William II’, Annex to Minutes of the First Meeting held on 3 February 1919 at 3 p m, at p 4, at pp 8, 12 and 13. [Available at the US National Archives, File Unit 181.1201/16, Microcopy M 820 Roll 142].

¹⁰⁶ See *ibid*, at pp 6-9.

¹⁰⁷ As Larnaude and de Lapradelle put it: ‘The very immunity of a foreign sovereign raises one more difficulty, for it is a rule that this immunity does not permit of his being tried by a municipal court for an offence against ordinary law’: *ibid*, at p 8.

thus led, quite significantly, to enthuse: ‘*A new international law has arisen.*’¹⁰⁸ They adverted to this theme of novelty repeatedly in their study.¹⁰⁹

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88. It may be helpful to pause here and reflect briefly upon the significance of Larnaude and de Lapradelle’s felt need to punctuate their observations with the exclamatory declaration about the emergence of an order of international law. They had cited President Woodrow Wilson’s speeches as testifying to the emergence of this new international legal order.¹¹⁰ One immediate point to which Larnaude and de Lapradelle alluded was the principle of self-determination of peoples, which President Wilson had indicated as amongst the reasons for America’s entry into the war.¹¹¹ Also notable are Points V and XIV of Wilson’s famous ‘14 Points’ of 8 January 1918. According to Point V, there is to be ‘A free, open-minded, and absolutely impartial

¹⁰⁸ *Ibid.*, at p 10, emphasis added.

¹⁰⁹ For instance, at pp 12-13, they contended that the ‘liability of the Emperor to answer in his own person is the first thing to consider. It must be dealt with in order to insure the most necessary consequences of *the new law born of the war*’ (emphasis added); at p 13, they argued that the solution they propose has ‘the merit of being in harmony with this *new principle* of free and honourable peoples who are desirous that every right should be accompanied by a duty’ (emphasis added); at p 14, they were anxious to ‘let it be repeated’ that ‘the League of Nations is developing continuously and daily under our very eyes. *A new international law* is arising and forming under the pressure of circumstances’ (emphasis added); and, at p 15, they insist that ‘[t]he *new international law* to which circumstances give birth and which leaps fully armed from the universal conscience, awakened so energetically by President Wilson’s messages, demands that it should be the Allied and Associated nations who should create this high tribunal’ (emphasis added).

¹¹⁰ *Ibid.*, at p 10.

¹¹¹ That principle of self-determination is evident in the following passages in Wilson’s 2 April 1917 speech to a joint session of Congress urging them to authorise American entry into the war, following a period of neutrality:

‘Our object now [...] is to vindicate the principles of peace and justice in the life of the world as against selfish and autocratic power and to set up amongst the really free and self-governed peoples of the world such a concert of purpose and of action as will henceforth insure the observance of those principles. Neutrality is no longer feasible or desirable where the peace of the world is involved and the freedom of its peoples, and the menace to that peace and freedom lies in the existence of autocratic governments backed by organized force which is controlled wholly by their will, not by the will of their people. We have seen the last of neutrality in such circumstances. We are at the beginning of an age in which it will be insisted that the same standards of conduct and of responsibility for wrong done shall be observed among nations and their governments that are observed among the individual citizens of civilized states. [...]

We are glad, now that we see the facts with no veil of false pretense about them, to fight thus for the ultimate peace of the world and for the liberation of its peoples, the German peoples included: for the rights of nations great and small and the privilege of men everywhere to choose their way of life and of obedience. The world must be made safe for democracy. Its peace must be planted upon the tested foundations of political liberty.’ Woodrow Wilson, War Messages, 65th Congress, 1st Session, Senate Doc No 5, Serial No 7264, Washington, DC, 1917, pp 3-8.

adjustment of all colonial claims, based upon a strict observance of the principle that in determining all such questions of sovereignty the interests of the populations concerned must have equal weight with the equitable claims of the government whose title is to be determined.’ And, in Point XIV, Wilson contemplated the formation of the League of Nations, in the following words: ‘[a] general association of nations must be formed under specific covenants for the purpose of affording mutual guarantees of political independence and territorial integrity to great and small states alike.’¹¹²

89. In identifying these developments as evidence of the emergent international legal order, Larnaude and de Lapradelle observed as follows:

What becomes of the principle of non-interference in the Government of a State since President Wilson proclaimed the overriding principle of the participation of the people in the Government which has authority over it, and refused to negotiate with the German of Imperial Government? Further, has not the right of self-determination, which has brought about the recognition of the Czecho-Slovak, Polish and Yugo-Slav nations, become an integral part of the new international law?¹¹³

90. To be noted also, as part of this new international dispensation, is the idea of association of States formed to try and solve problems of mutual concern—in a ‘vital’ way and ‘in effective action’¹¹⁴—employing the sanctions of international law as needed for the purpose. That idea came to life at the end of World War I, with the League of Nations as an initial experiment.

91. But, Larnaude and de Lapradelle considered that the nascent international legal order in question also implied the ‘*principle of the responsibility, not only political but legal*, of the people who go to war’,¹¹⁵ for violations occasioned by the adoption ‘as war measures practices which have no relation to the military necessities of the struggle.’¹¹⁶ Such legal responsibility is to be distributed between the State and the individuals to whom the violations are attributed; with the State bearing civil responsibility, while the criminal responsibility belonged to the individual.¹¹⁷ In the

¹¹² See President Woodrow Wilson’s Fourteen Points. [Available at the Yale Law School, Lillian Goldman Law Library, the Avalon Project: http://avalon.law.yale.edu/20th_century/wilson14.asp].

¹¹³ Larnaude and de Lapradelle, *supra*, at p 10, emphasis received.

¹¹⁴ President Wilson’s address to the Paris Peace Conference, 25 January 1919.

¹¹⁵ Larnaude and de Lapradelle, *supra*, at p10, emphasis received.

¹¹⁶ *Ibid*, at pp 10-11.

¹¹⁷ *Ibid*, at p 11.

hypothesis of Larnaude and de Lapradelle, for such violations as were attributed to German military, it was ‘indispensable that the responsibility, the heaviest responsibility, should rest upon the shoulders of the German Emperor, the leader in the criminal conduct attributed to the German troops.’¹¹⁸

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92. As regards the proper forum for the application of this new concept of individual criminal responsibility in international law—the new regime of *jus puniendi*, if you like—Larnaude and de Lapradelle insisted that it had to be an international criminal tribunal. The Kaiser must be tried before it, unobstructed by the same concerns of sovereign immunity that posed the exigent obstacle to proceedings in national jurisdictions (thus making it necessary to look for solutions on the international stage).¹¹⁹ As they put it in the critical part:

The ‘question of William II’ would be considered from too narrow a point of view and dwarfed, if it were reduced to the proportions of a case before a criminal court or a military tribunal. To proclaim the solemn and purifying legal consequences which the public conscience requires should follow crimes such as those under consideration demands a higher Court, more resounding discussion and a greater stage.

The tribunal which should have jurisdiction in such a case should be one of no less importance than those which may try the heads of States guilty of crimes in the exercise of their municipal functions. The person charged is an Emperor, the head of a great Power, only yesterday himself all powerful; and he alone had position to conceive and order the crimes imputed to him. The high justice which an anxious world expects would not be satisfied if the German Emperor were tried, on the complaint of a private person, as an accomplice or even as a point party to a crime against the ordinary law. His are the acts of the head of a State, and they must be brought before a tribunal proportioned to them, in conformity with their true juridical character as the violation of neutrality, as violations of the laws of war, and as violations of the laws of war and of international law.

A tribunal must be found which by its composition, the position it occupies, and the authority with which it is clothed, is able to deliver the most solemn judgment the world has ever heard.

A way must be found to permit all acts of which he has been guilty, because he ordered them as an Emperor and King and War Lord, to be addressed. International law alone can supply this way; the facts charged against William II are international crimes; he must be tried before an international tribunal.¹²⁰

¹¹⁸ *Ibid.*

¹¹⁹ *Ibid.*, at p 10.

¹²⁰ *Ibid.*, emphasis added.

93. Greater specificity in rejecting the idea of sovereign immunity for the Kaiser (before the ‘international tribunal’ contemplated as the proper forum for his accountability) was assured when Larnaude and de Lapradelle returned to focus especial attention on the subject of immunity; in order to reject it with inescapable emphasis. Again, they may be quoted at length:

The solution which we adopt has moreover the merit of being in harmony with this new principle of free and honourable peoples who are desirous that every right should be accompanied by a duty. *Modern law does not know irresponsible authorities, even at the apex of hierarchies.* The State must be taken down from its high pedestal and subjected to the decisions of the judge. *Therefore, there can be no debate about exempting from judgment the man who is at the summit of the hierarchy, in application of either municipal or international law.* As Chief of a State, the German Emperor was entitled to all the privileges national law accorded—immunity from suit, honours and precedence. Before international law, he must also assume international responsibilities. *Ubi emolumentum, ibi onus esse debet.* *Let us therefore consider—and it will be our conclusion—the irremediable blow which would be struck against the new international law if the German Emperor were granted immunity. [...]*

Without going so far back, we take the liberty of quoting the justly celebrated passage of the Swiss writer upon international law of the 18th century, E de Vattel [...]. He expressed himself as follows in Chapter XI of Book III of his Law of Nations. After having demonstrated in paragraphs 183 and 184 that *an unjust war gives no right and how guilty is the sovereign who undertakes it*, he examines in paragraph 185 *the obligations of the sovereign*, saying: ‘He who does an injury is bound to repair the damage, or to make adequate satisfaction if the evil be irreparable, and *even to submit to punishment if the punishment be necessary either as an example or for the safety of the party offended and for that of human society.* *In this predicament stands a Prince who is the author of an unjust war.*’¹²¹

94. In London, the main Macdonell Committee ultimately answered along similar lines—as its Special Sub-Committee on Law and Larnaude and de Lapradelle—the question of what to do with the Kaiser. The Committee considered that there was evidence to the effect that the Kaiser had ‘in fact exercised his large constitutional powers, and was in truth “War Lord”’; and that there were ‘grounds for an opinion that a *prima facie* case can be established against him for responsibility for certain crimes.’¹²² In the Macdonell Committee’s view, the question of how to deal with him presented two options: he might be ‘treated summarily and administratively without any trial’ or he might ‘be tried before a Tribunal such as has been suggested above.’¹²³ The Macdonell Committee was ‘unable to see any reason in principle for excluding

¹²¹ *Ibid.*, at p 13, underlined emphasis received.

¹²² First, Second and Third Interim Reports from the Committee of Enquiry into Breaches of the Laws of War, *supra*, at p 30.

¹²³ *Ibid.*, at p 29.

[his] responsibility.¹²⁴ In the manner of emphasis to the point, the Committee added that it seemed to them ‘impossible to distinguish between his responsibility and that of other commanders; if any difference exists between them it is not one in his favour.’¹²⁵ As the Macdonell Committee had observed, ‘[t]o suffer him ... to go free and unpunished, while minor offenders acting under his orders, or with his sanction, were tried and punished, would be inequitable. He would be more favourably dealt with than others much less blameable.’¹²⁶ Hence, the majority of the Macdonell Committee shared the opinion that he should be tried before the international tribunal under contemplation.¹²⁷ The Committee arrived at this conclusion, having specifically discounted arguments and views as to sovereign immunity, militating against trying the Kaiser.¹²⁸ In the same vein, several members of the Committee separately expressed concurring views to the effect that the Kaiser should be tried before the international tribunal, and should not enjoy immunity.¹²⁹

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95. Thus, France and the UK (no doubt armed, respectively, with Larnaude and de Lapradelle’s study and both reports of the Macdonell Committee and its Sub-Committee on Law) embarked upon their journey to the Versailles Peace Conference, at the vanguard of the development of new international customary law, such as would eventually crystallise into rejection of immunity for Heads of State before international tribunals established to try and punish those who commit crimes under international law.

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96. Recall here Larnaude and de Lapradelle’s exclamation that a ‘new international law is born’—in relation to the idea that the Kaiser was to be tried before an international tribunal for crimes under international law. It may be helpful to consider now the significance of that declaration.

¹²⁴ *Ibid*, at p 30.

¹²⁵ *Ibid*.

¹²⁶ *Ibid*, at p 29.

¹²⁷ *Ibid*, at p 30.

¹²⁸ *Ibid*, at p 31.

¹²⁹ See Sir John Macdonell (Chairman), *ibid*, at pp 32-35; Professor J H Morgan, *ibid*, at pp 48-53.

97. Full appreciation of the significance also involves recalling that the Macdonell Committee and some of its members had observed that there was no precedent that stood against the idea of trying the Kaiser before an international tribunal, for violation of crimes under international law.¹³⁰

98. It may be noted that by this time, the 1812 judgment of the US Supreme Court in the *Schooner Exchange*¹³¹ was the classical judicial pronouncement on immunity of States from foreign jurisdictions. But, on no reasonable view did it afford accurate precedent against prosecuting a sovereign head before *an international tribunal for individual criminal responsibility* under international law. The *Schooner Exchange* judgment resulted from a civil suit brought in the US Federal Court—not an international court. And the issue for determination was whether two American citizens could regain possession of their vessel that had been commandeered on the orders of Emperor Napoleon and converted into a warship of France and renamed *Balou*. It thus offered inadequate basis of objection against prosecuting the Kaiser before an international tribunal for international crimes, in the manner contemplated by Larnaude and de Lapradelle and the Macdonell Committee.

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99. From the starting points of the preparatory work done in France (by Larnaude and de Lapradelle) and in England (by the Macdonell Committee), the Versailles Peace Conference of 1919 was the next stop along the route in the development of customary international law regarding the idea of prosecuting Heads of State before an international tribunal, for violation of crimes under international law.

¹³⁰ As the Committee put it: ‘In regard to the proceedings against the ex-Kaiser, the Committee are of opinion that little aid can be derived from precedents. ... While there is no exact precedent for punishment, there is also no exact precedent in modern times for a series of crimes brought about by a group of men of whom the ex-Kaiser was one’: *ibid*, at p 29. In the same vein, Professor Morgan (Vice-Chairman) observed as follows: ‘It would ... be the height of pedantry to treat the situation in accordance with precedents; the situation itself is unprecedented. I can see no reason, therefore, for according any immunity to the higher authorities in Germany any more than to the lower. When the Turkish Government ordered the exposure of British subjects on the Gallipoli Peninsula they were informed by the British Government that the authorities who gave the order, and not merely those who executed it, would be held personally responsible. This is a case in point’: *ibid*, at p 51. And, finally, Sir Frederick Pollock: ‘Precedent is wholly lacking for the facts. ... The jurisdiction is likewise without precedent. History furnishes no example of a tribunal established by several allied States to do justice on offenders against rules and customs equally recognized by all of them’: *ibid*, at p 53.

¹³¹ *The Schooner Exchange v McFaddon*, *supra*.

100. At the Versailles Peace Conference, five commissions were appointed to examine and report on the following questions:

- (a) League of Nations;
- (b) responsibility of the authors of the War and enforcement of penalties;
- (c) reparation for damage;
- (d) international legislation on labour; and,
- (e) international control of ports, waterways and railways.¹³²

101. For our purposes, the focus will remain on the second question. The terms of reference of the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties are indicated in this footnote.¹³³ Its work was, in turn, distributed amongst various sub-commissions. They included the third sub-commission, famously known as ‘Sub-Commission III’. Its Chairman was Robert Lansing (the US Secretary of State who was also the lead representative of the United States). The Vice-Chair alternated between Sir Gordon Hewart KC (who by now had become the Attorney-General of England and Wales, having served as Solicitor-General during the time of the Macdonell Committee) and Sir Ernest Pollock KC¹³⁴ (who by now had become the Solicitor-General of England and Wales and had served as a member of the Macdonell Committee together with his older cousin Sir Frederick Pollock KC). Hewart and Ernest Pollock went on later to become Lord Hewart and Viscount Hanworth, respectively the Lord Chief Justice of England and the Master of

¹³² US Department of State, *Papers relating to the Foreign Relations of the United States-Paris Peace Conference 1919*, vol III, Minutes of the Plenary Sessions of the Preliminary Peace Conference, 155, at pp 177, 199 and 200.

¹³³ The Commission was charged to inquire into and report upon the following: (1) The responsibility of the authors of the war; (2) The facts as to breaches of the laws and customs of war committed by the forces of the German Empire and their Allies, on land, on sea, and in the air during the present war; (3) The degree of responsibility for these offences attaching to particular members of those forces, including members of their ‘General Staffs, and other individuals, however highly placed’; (4) The constitution and procedure of a tribunal appropriate for the trial of these offences; and (5) Any other matters cognate or ancillary to the above which may arise in the course of the enquiry, and which the Commission might find it useful and relevant to take into consideration: see Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, Report Presented to the Preliminary Peace Conference, (1920) 14 *AJIL* 95.

¹³⁴ See US Department of State, *Papers relating to the Foreign Relations of the United States-Paris Peace Conference 1919*, vol III, Minutes of the Plenary Sessions of the Preliminary Peace Conference, 155, at p 204.

the Rolls.¹³⁵ The professional seniority that Hewart and Pollock brought to bear and the importance of their role in the British delegation in the work of Sub-Commission III—as did Dean Larnaude and Professor de Lapradelle of the French delegation—are not negligible for the purposes of the formation of customary international law in the relevant respect. For, it is generally accepted that the opinions of governments’ legal advisers are part of what inform state practice in relation to their particular States.¹³⁶

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102. A vista of legal developments in the relevant respect is afforded by the eventual text of article 227 of the Treaty of Versailles. In it, the States Parties ‘publicly arraign[ed] William II of Hohenzollern, formerly German Emperor, for a supreme offence against international morality and the sanctity of treaties.’ The agreement also foresaw the creation of a ‘special tribunal ... to try the accused’.¹³⁷ This was the by-product of a multilateral consideration of both the abjuration of Head of State immunity for international crimes and the establishment of an international criminal court for purposes of prosecution of such crimes.

103. In the nature of things, article 227, on its face, reveals nothing at all of the impassioned debates that occurred in the deliberations of Sub-Commission III. At the centre of that debate was the question of sovereign immunity. That is to say, it was squarely within the contemplation of Sub-Commission III. Lansing (the Chairman) registered a reservation on behalf of the US, against the idea of trial of the Kaiser. He specifically based himself on the immunity of Heads of State. The American concern on grounds of immunity eventually became an entrenched objection.¹³⁸

104. Against the American concern, Sir Ernest Pollock registered a diametrically opposite position on behalf of the British delegation, expressed in spirited terms. Notably, the British delegation had submitted to Sub-Commission III on 13 February

¹³⁵ See the *Oxford Dictionary of National Biographies* (online edition).

¹³⁶ See *Brownlie’s Principles of Public International Law*, 8th edn (Crawford) (2012), at p 24; Malcolm Shaw, *International Law*, 8th edn, *supra*, at p 61. See also *Oppenheim’s International Law*, 9th edn, *supra*, at p 28 (recognising the role that ‘statements by state representatives’ play in the formation of customary international law).

¹³⁷ See the Treaty of Versailles, 28 June 1919, article 227.

¹³⁸ Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, Report Presented to the Preliminary Peace Conference, (1920) 14 *AJIL* 95, *supra*, at pp 135-136.

1919 a memorandum (attached as Annex IV to the minutes of the second meeting). Unsurprisingly, it reflected the advisory opinion of the Macdonell Committee and its Sub-Committee on Law on the issue of a trial of the Kaiser. According to the Memorandum, the plea of sovereign immunity ‘may’ be raised as a difficult question of law standing in the way of the ex-Kaiser’s prosecution. However, they also stated that such immunity had ‘never’ been discussed in the context of an international criminal tribunal. As they put it:

So far as the share of the ex-Kaiser in the authorship of the war is concerned, difficult questions of law and of fact may be raised. It might, for example, be urged that the ex-Kaiser, being a Sovereign at the time when his responsibility as an author of the war was incurred and would be laid as a charge against him, was and must remain exempt from the jurisdiction of any Tribunal. The question of immunity of a Sovereign from the jurisdiction of a foreign Criminal Court has *rarely been discussed in modern times, and never in circumstances, similar to those in which it is suggested that it might be raised today.*¹³⁹

105. This Memorandum did not rule out that what was on the minds of its authors was also the Kaiser’s trial as serving sovereign—‘*being a Sovereign at the time when his responsibility as an author of the war was incurred* and would be laid as a charge against him.’ [Emphasis added.] Granted, the drafters of the British Memorandum, and of article 227, had clearly referred to the ‘ex-Kaiser’ and ‘former German Emperor’, and the Memorandum was deposited with Sub-Commission III¹⁴⁰ when William II had already abdicated the German and Prussian thrones and was living in the Netherlands on asylum.¹⁴¹ Nevertheless, the fervour and arguments with which the British delegation pressed for the prosecution of William II indicated indifference to the status of the Kaiser as a former or active Head of State. [Indeed, the recurrence of this fervour at the end of the Second World War, as will be seen later, retroactively bears out the proposition that the trial of the Kaiser, even as a reigning sovereign, was not ruled out in 1919.] As they insisted, without his prosecution, the ‘vindication of the principles of International Law, and the laws of humanity, which he ha[d] violated’ would ‘be incomplete,’ ‘if other offenders less culpable were punished.’¹⁴²

¹³⁹ Paris Peace Conference 1919, Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, Memorandum Submitted by the British Delegates, Annex IV to Minutes of the Second Meeting held on 7 February 1919 at 11:30 a m, at p 28. [Available at the US National Archives, File Unit 181.1201/16, Microcopy M 820 Roll 142], emphases added.

¹⁴⁰ *Ibid.*, at p 27.

¹⁴¹ See Schabas, *The Trial of the Kaiser*, *supra*, at p 31.

¹⁴² The British Memorandum of 13 February 1919, *supra*, at p 29: ‘First of all, we are of the opinion that is desirable to take proceedings against the German ex-Kaiser. We have already referred to the

This rationale for prosecuting the ex-Kaiser would seem to have precluded his immunity even as a serving Head of State. For, there would be no vindication of the principles of international law and the laws of humanity if he were to be spared prosecution, on account of any theory of immunity, as a serving Head of State. Furthermore, the authors of the British Memorandum argued that failure to try him might even prejudice the trial of his subordinates, if the defence of superior orders were to be raised.¹⁴³ Once more, this is a rationale for prosecution that would preclude the theory of immunity on account of incumbency in office.

106. At the very first meeting of Sub-Commission III on 25 February 1919, Chairman Lansing raised the British Memorandum that was deposited on 13 February 1919.¹⁴⁴ In the ensuing discussion about the mandate of Sub-Commission III, the differences of positions quickly became clear between the American delegation on the one side and the British and the French on the other. Pollock wasted no time in stressing the importance of ‘the question of setting up an international tribunal, and that, of course, is important from the British point of view, because the one demand is that, to take a leading case, the responsibility of the Kaiser, and the outrages committed in the course of the war, the whole of Great Britain demands that he should be tried. And it seems to me impossible to hand him over to anything except an international tribunal. On my return, when I was in London last week, this point of view was impressed upon me by those in authority, and the demand that we shall set up a tribunal to try the Kaiser is insistent, and urgent, and I can’t possibly neglect it.’¹⁴⁵

question of his being proceeded against as “the author of the war” and have indicated certain difficulties. In view, however, of the grave charges which may be preferred and established against the ex-Kaiser, the vindication of the principles of International Law and the laws of humanity, which he has violated, would be incomplete if he were not brought to trial, and if other offenders less culpable were punished. Moreover, the trial of other offenders might be seriously prejudiced if they attempted and were able to plead the superior orders of a Sovereign against whom no steps had been taken or were being taken.’

¹⁴³ *Ibid.*

¹⁴⁴ Paris Peace Conference 1919, Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, ‘Proceedings of a Meeting of “Sub-Commission No 3” of the “Commission on the Responsibilities for the War, etc”’, held on 25 February 1919 at 11:00 am, at p 1. [Available at the US National Archives, File Unit 181.123401/4, Microcopy M 820 Roll 144].

¹⁴⁵ *Ibid.*, at pp 2-3.

107. In his turn, Larnaude informed that ‘what Sir Ernest Pollock says for British opinion is also true of French public opinion’.¹⁴⁶ But he made sure to add that the ‘French public opinion does not concentrate itself on the ex-Kaiser only. Of course we keep him in the foreground, but we do not wish that this should be a means for other great culprits to escape punishment for criminal acts. Therefore, we do not at all disagree with the British point of view in wishing to see that all culprits—all those who have committed crimes, whoever they are—the great chiefs as well as the Supreme War Lord, should be brought before the jurisdiction.’¹⁴⁷ Elaborating further on the point, he stressed that the jurisdiction in question should concentrate ‘within a single international tribunal’.¹⁴⁸ For, ‘[w]e have reached a point at which the principles of international law should be vindicated, and receive a solemn consecration, through the intervention of international jurisdiction.’¹⁴⁹ Pollock’s and Larnaude’s insistence on an international tribunal was an apparent effort to counter Lansing’s lack of enthusiasm for such a tribunal—as he evidently preferred national tribunals.¹⁵⁰ It may, of course, be recalled that in the preparatory studies done by the Macdonell Committee (in England) and by Larnaude and de Lapradelle (in France), they had worried that the plea of sovereign immunity would prove an obstacle to proceedings before national courts, hence the need to establish an international tribunal.

108. In light of American ‘difficulties’ with the idea of an international tribunal, Pollock expressed willingness, at the next meeting of Sub-Commission III, to agree to a compromise that entailed the possibility for ‘national tribunals to sit together, and so to constitute a “*haute tribunal*” before which the most important cases might be brought.’¹⁵¹ He made sure to point out that such an arrangement was ‘not satisfactory’ to Great Britain and France, but that he would be prepared to accept it as a compromise ‘if that gives opportunity to general accord.’¹⁵² But, ‘if the United States found themselves unable to come into an agreement on that plan of uniting national

¹⁴⁶ *Ibid.*, at p 4.

¹⁴⁷ *Ibid.*

¹⁴⁸ *Ibid.*, at p 5.

¹⁴⁹ *Ibid.*

¹⁵⁰ See *ibid.*, at pp 5-6.

¹⁵¹ Paris Peace Conference 1919, Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, ‘Proceedings of a Meeting of “Sub-Commission No 3” of the “Commission on the Responsibilities for the War, etc”’, held on 4 March 1919 at 11:00 am, at p 1. [Available at the US National Archives, File Unit 181.123401/5, Microcopy M 820 Roll 144].

¹⁵² *Ibid.*

tribunals’, then Pollock would return to the original proposal made by Britain and France—‘namely, the formation of an international tribunal which should derive its authority from the Peace Conference, and from an article of the Treaty under which the Germans *would be required* to accept, and assent to the jurisdiction of that tribunal.’¹⁵³ On behalf of the French delegation, Larnaude expressed his ‘entire’ and ‘full’ agreement with Pollock.¹⁵⁴ When Lansing, in his turn, continued to express reservation, even to the compromise offered by Britain and France,¹⁵⁵ Pollock returned to reiterating that ‘nothing but an international tribunal of commanding power, force, and weight would have the moral position before the world to execute the justice which the entire world demands’. He insisted that Great Britain ‘could not be satisfied with merely trying cases where one or more of the allied nations are concerned.’¹⁵⁶ According to him, Great Britain ‘demand the proposition of justice to the world.’¹⁵⁷ And, to that end, they ‘demand’ that the concerned cases ‘shall be dealt with by a court of international authority and international weight.’¹⁵⁸ Larnaude spoke again to say that the French delegation was ‘taking exactly the same position’ as Pollock had expressed for Great Britain.¹⁵⁹

109. Beyond the question of an international tribunal, intractable differences of views persisted between the American delegation on the one hand and the British and French delegations on the other—on the related matter of immunity, as indicated earlier. During their third meeting, held on 8 March 1919, Sub-Commission III had to consider for approval a draft report that included text formulated in the terms of charges being brought ‘[a]gainst all authorities, civil or military, *however high their position* may have been, without distinction of rank, *including the heads of States*, who ordered, or abstained from preventing, putting an end to, or repressing, barbarities or acts of violence.’¹⁶⁰ Lansing promptly opposed the formulation.¹⁶¹ His

¹⁵³ *Ibid*, emphasis added.

¹⁵⁴ *Ibid*, at p 2.

¹⁵⁵ *Ibid*, at pp 2-3.

¹⁵⁶ *Ibid*, at p 4.

¹⁵⁷ *Ibid*.

¹⁵⁸ *Ibid*.

¹⁵⁹ *Ibid*, at p 5.

¹⁶⁰ See Paris Peace Conference 1919, Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, ‘Draft Report of Sub-Commission III (Final Draft prepared by the Drafting Committee and submitted to the Sub-Commission, 8 March 1919)’, at p 3, emphasis added. [Available at the US National Archives, File Unit 181.12302 Microcopy M 820 Roll 144].

‘first objection’ was against ‘the phrase “including the heads of States”’.¹⁶² His opening gambit was that the phrase was ‘superfluous.’¹⁶³ But his real objection was that the phrase ‘raises the issue at once, or rather it commits this commission to the right to try sovereigns of nations.’¹⁶⁴ In the event, Lansing proffered a different version of the draft norm, in the following language: ‘Against all authorities, civil or military, however high their position may have been without distinction of rank, who ordered, or openly gave assent to barbarities or acts of violence which they could have prevented.’¹⁶⁵ Notably, that version omitted the formulation ‘including heads of states’.

110. Pollock sharply disagreed with both Lansing’s argument and his alternative proposal that sought to delete the reference to ‘including heads of states’. To that end, Pollock argued as follows:

Mr President, I am sorry to say that I couldn’t accept the report if these words are deleted. To my mind they are not superfluous, and I think they are not superfluous for this reason: *I mean on behalf of the British Empire to include the possibility of a charge against the sovereigns of States*, and I think the view of the United States, which you have expressed quite fairly, and from information which you are now possessed of, is not to include a charge against the sovereigns of States, and therefore, there is a marked divergence between us, and as *I intend, on behalf of the British Empire, we intend—my colleague and myself—that the sovereign of a State should be put on trial, for that reason I think it can’t be said that the word are superfluous, because it is necessary to express what we mean*. To make it quite clear, and not to allow anyone to suppose that, by assenting to the deletion of these words, we have agreed to a course which it is not our intention to agree to, and therefore, on behalf of the British Empire I must ask that these words be retained. In that sense these words are not superfluous; they are intentional, and they were put there because I wanted to make our meaning clear. If I mean it, I want to say it.¹⁶⁶

111. Continuing, he insisted that ‘a criminal or a guilty person who is responsible for what happened in the course of the war’ should receive from the international community ‘the condemnation which he ought to receive’—be he the ‘President’ or the ‘King’ of any country.¹⁶⁷ Larnaude agreed ‘entirely’ with ‘the powerful argument’

¹⁶¹ Paris Peace Conference 1919, Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, ‘Proceedings of a Meeting of “Sub-Commission No 3” of the “Commission on the Responsibilities for the War, etc”’, held on 8 March 1919 at 11:00 am, at p 2. [Available at the US National Archives, File Unit 181.123401/6, Microcopy M 820 Roll 144].

¹⁶² *Ibid.*

¹⁶³ *Ibid.*

¹⁶⁴ *Ibid.*

¹⁶⁵ *Ibid.*, at p 3.

¹⁶⁶ *Ibid.*, at p 3, emphasis added.

¹⁶⁷ *Ibid.*, at p 4.

of Pollock.¹⁶⁸ He insisted that the word ‘authorities’ was too nebulous to be trusted to ensure that the Kaiser would be brought to trial. To him, ‘No equivocation or ambiguity should be possible.’¹⁶⁹ As proof of their ‘good faith’, he expressed the readiness of the Entente States ‘to say, and accept the idea that if our sovereigns, or heads of States have ordered such and such criminal acts, let them be brought to trial. If we are ready to admit all heads of States whatever may be brought to trial, we strengthen our position. The Entente countries are quite ready to deliver the heads of States into the hands of justice, because they hold that nobody is above justice. This is a great rule in the world of law and right. It is necessary that no man, whoever he may be, even the head of a State, should try and take shelter behind the responsibility which is offered to heads of States. Here we must bear in mind the fact that England has been making a great concession, because in the constitutional law of England it is understood that the heads of States—sovereigns—cannot be prosecuted.’¹⁷⁰ To sum up the purpose of the British proposition, Pollock insisted was ‘to put on trial, or to make a charge in respect of the abstention or preventing, or putting an end to, or repressing barbarities or acts of violence.’¹⁷¹ That being the purpose, ‘let it be quite plain.’¹⁷²

112. Ultimately, the American members of Sub-Commission III were not persuaded to withdraw their objection on grounds of sovereign immunity.¹⁷³ The Japanese delegation, although they agreed that crimes had been committed by ‘the enemy’, for which the responsibility rested ‘in high places’,¹⁷⁴ nevertheless entered a reservation against the prosecution by a victorious side, especially against defendants ‘including the heads of states.’¹⁷⁵ However, the reservations were not clearly framed as a matter of sovereign immunity, but were adequately expressed as such.

¹⁶⁸ *Ibid.*, at p 8.

¹⁶⁹ *Ibid.*

¹⁷⁰ *Ibid.*, at p 9.

¹⁷¹ *Ibid.*, at p 12.

¹⁷² *Ibid.*

¹⁷³ *Ibid.*, at p 11. See also Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, Report Presented to the Preliminary Peace Conference, (1920) 14 *AJIL* 95, *supra*, at pp 135-136.

¹⁷⁴ *Ibid.*, at p 151.

¹⁷⁵ *Ibid.*, at p 152.

113. The conclusion of the majority¹⁷⁶ of the Commission was decisive in rejecting the American and Japanese positions. Lansing was led to complain that ‘the American wishes in this matter seemed to be completely overlooked.’¹⁷⁷ The resulting text of the Commission report was specific, firm and unequivocal in rejecting the idea of sovereign immunity. It reads as follows in the relevant text:

[...] It is quite clear from the information now before the Commission that there are grave charges which must be brought and investigated by a court against a number of persons.

In these circumstances, the Commission desire to state expressly that in the hierarchy of persons in authority, there is no reason why rank, however exalted, should in any circumstances protect the holder of it from responsibility when that responsibility has been established before a properly constituted tribunal. This extends even to the case of heads of states. An argument has been raised to the contrary based upon the alleged immunity, and in particular the alleged inviolability, of a sovereign of a state. But this privilege, where it is recognized, is one of practical expedience in municipal law, and is not fundamental. However, even if, in some countries, a sovereign is exempt from being prosecuted in a national court of his own country the position from any international point of view is quite different.[*]

We have later on in our Report proposed the establishment of a high tribunal composed of judges drawn from many nations, and included the possibility of the trial before that tribunal of a former head of a state with the consent of that state itself secured by articles in the Treaty of Peace. If the immunity of a sovereign is claimed to extend beyond the limits above stated, it would involve laying down the principle that the greatest outrages against the laws and customs of war and the laws of humanity, if proved against him, could in no circumstances be punished. Such a conclusion would shock the conscience of civilized mankind.¹⁷⁸

114. It may be noted that the American objection on grounds of immunity had drawn no distinction that permitted the prosecution of a former Head of State (indeed at the time of the American objection, the Kaiser had been dethroned and was in The Netherlands on asylum), just as the majority of the Commission made no distinction that recognised immunity for a serving Head of State. Moreover, the insistence of the latter group that there was no immunity by reason of rank ‘however exalted’ ‘in any

¹⁷⁶ In addition to Japan and the United States, the other States represented in the Commission were Belgium, France, Greece, Italy, Poland, Romania, Serbia and the United Kingdom: See Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, Report Presented to the Preliminary Peace Conference, (1920) 14 *AJIL* 95, *supra*, at pp 96-97.

¹⁷⁷ See US Department of State, *Papers relating to the Foreign Relations of the United States—Paris Peace Conference 1919*, vol XI, Minutes of the Meetings of the American Commissioners Plenipotentiary, at pp 93-94.

* To the extent that it is correct to understand the Commission as saying that sovereign immunity does not avail in an international criminal tribunal properly constituted, that position is consistent with the understanding expressed by the ICJ in the *Arrest Warrant* case, *supra*, at para 61.

¹⁷⁸ Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, Report Presented to the Preliminary Peace Conference, (1920) 14 *AJIL* 95, *supra*, at p 116.

circumstances’ and ‘even to the case of heads of states’ is sufficient to preclude any such distinction. And that position was even clearer given their run of arguments in opposing the American objection in the course of the work of Sub-Commission III.

115. The Commission adopted the relevant part of the British Memorandum of 13 February 1919, consistent with the British position, as follows: ‘In view of the grave charges which may be preferred against—to take one case—the ex-Kaiser—the vindication of the principles of the laws and customs of war and the laws of humanity which have been violated would be incomplete if he were not brought to trial and if other offenders less highly placed were punished. Moreover, the trial of the offenders might be seriously prejudiced if they attempted and were able to plead the superior orders of a sovereign against whom no steps had been or were being taken.’¹⁷⁹

116. In conclusion, the Commission declared as follows: ‘All persons belonging to enemy countries, however high their position may have been, without distinction of rank, including Chiefs of States, who have been guilty of offences against the laws and customs of war or the laws of humanity, are liable to criminal prosecution.’¹⁸⁰

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117. It may be noted that the proposal about ‘the establishment of a high tribunal composed of judges drawn from many nations’, including the possibility of trial of a former head of a state before that tribunal ‘*with the consent of that state itself secured by articles in the Treaty of Peace*’ [emphasis added] was also mentioned by the Commission on Responsibility in their report. The German Government of the day had signed the Treaty of Versailles, including article 227. But that signing followed a vigorous protest against a document they called the ‘Diktat’,¹⁸¹ which protest culminated in mass resignation of the post-war German cabinet.¹⁸² Count Von Brockdorff-Rantzau’s¹⁸³ descriptions of the treaty reflect some of the German

¹⁷⁹ *Ibid.*, at p 117.

¹⁸⁰ *Ibid.*

¹⁸¹ See Louise Chipley Slavicek, *The Treaty of Versailles* (2010), at p 70. See also William Young, *German Diplomatic Relations 1871-1945* (2006), at p 137.

¹⁸² See Slavicek, *supra*, at pp 66-73. See also Young, *supra*, at pp 135-137.

¹⁸³ He was the German Foreign Minister and the leader of its delegation at the Paris Peace conference: see, for instance, <<http://www.britannica.com/biography/Ulrich-Graf-von-Brockdorff-Rantzau>>.

sentiments as entailing ‘a piece of violence and not of justice’¹⁸⁴ and that the ‘fat volume was quite unnecessary. They could have expressed the whole thing more simply in one clause—“Germany surrenders all claims to its existence.”’¹⁸⁵

118. Brockdorff-Rantzau’s speech, during the presentation of the conditions of peace to the German delegates on 7 May 1919, evidenced that the German delegation had anticipated the verbal pushback, as he stated, *inter alia*: ‘We are required to admit that we alone are war guilty; such an admission on my lips would be a lie. We are far from seeking to exonerate Germany from all responsibility for the fact that this world war broke out and was waged as it was [B]ut we emphatically combat the idea that Germany, whose people were convinced that they were waging a defensive war, should alone be laden with guilt.’¹⁸⁶ As to the methods employed in war, he protested that ‘Germany was not alone at fault. Every European nation knows of deeds and persons on whose memory their best citizens are reluctant to dwell. ... Crimes in war may not be excusable, but they are committed in the struggle for victory, in anxiety to preserve national existence, in a heat of passion which blunts the conscience of nations. The hundreds of thousands of non-combatants who have perished, since the 11th November through the blockade were killed with cold deliberation, after victory had been won and assured to our adversaries. Think of that, when you speak of guilt and atonement.’¹⁸⁷

119. Apparently unimpressed, the Entente Powers issued a lengthy reply to the Observations of the German Delegation on the Conditions of Peace, which, amongst other things, declared the following: ‘[t]he protest of the German Delegation shows that they utterly fail to understand the position in which Germany stands to-day’;¹⁸⁸ ‘the war which began on August 1, 1914, was the greatest crime against humanity and the freedom of peoples that any nation, calling itself civilized, has ever consciously

¹⁸⁴ See HMSO, Reply of the Allied and Associated Powers to the Observations of the German Delegation on the Conditions of Peace, 16 June 1919, at p 2.

¹⁸⁵ David Woodward, *World War I Almanac* (2009), at p 438.

¹⁸⁶ US Department of State, *Papers relating to the Foreign Relations of the United States—Paris Peace Conference 1919*, vol III, Minutes of the Plenary Sessions of the Peace Congress, 413, at p 417.

¹⁸⁷ *Ibid.*, at p 418.

¹⁸⁸ See HMSO, Reply of the Allied and Associated Powers to the Observations of the German Delegation on the Conditions of Peace, *supra*, at p 2.

committed’;¹⁸⁹ ‘Germany’s responsibility, however, is not confined to having planned and started the war. She is no less responsible for the savage and inhumane manner in which it was conducted’;¹⁹⁰ ‘[j]ustice, therefore, is the only possible basis for the settlement of the accounts of this terrible war’;¹⁹¹ ‘those individuals who are most clearly responsible for German aggression and for those acts of barbarism and inhumanity which have disgraced the German conduct of the war, must be handed over to a justice which has not been meted out to them at home’;¹⁹² ‘[i]f these things are hardships for Germany, they are hardships which Germany has brought upon herself’;¹⁹³ and that ‘if mankind is to be lifted out of the belief that war for selfish ends is legitimate to any State, if the old era is to be left behind and nations as well as individuals are to be brought beneath the reign of law, even if there is to be early reconciliation and appeasement, it will be because those responsible for concluding the war have had the courage to see that justice is not deflected for the sake of convenient peace.’¹⁹⁴

120. Furthermore, the Allied and Associated Powers referred to the trial of persons chargeable before the proposed international court, and stated:

The Allied and Associated Powers have given consideration to the observations of the German Delegation in regard to the trial of those chargeable with grave offences against international morality, the sanctity of treaties and the most essential rules of justice. They must repeat what they have said in the letter covering this Memorandum, that they regard this war as a crime deliberately plotted against the life and liberties of the peoples of Europe. It is a war which has brought death and mutilation to millions and has left all Europe in terrible suffering. Starvation, unemployment, disease stalk across that continent from end to end, and for decades its peoples will groan under the burdens and disorganisation the war has caused. They therefore regard the punishment of those responsible for bringing these calamities on the human race as essential on the score of justice.

They think it not less necessary as a deterrent to others who, at some later date, may be tempted to follow their example. The present Treaty is intended to mark a departure from the traditions and practices of earlier settlements which have been singularly inadequate in preventing the renewal of war. The Allied and Associated Powers indeed consider that the trial and punishment of those proved most responsible for the crimes and inhuman acts

¹⁸⁹ *Ibid.*

¹⁹⁰ *Ibid.*, at p 3.

¹⁹¹ *Ibid.*, at p 5, emphasis added.

¹⁹² *Ibid.*

¹⁹³ *Ibid.*

¹⁹⁴ *Ibid.*, emphasis added.

*committed in connection with a war or aggression, is inseparable from the establishment of that reign of law among nations which it was the agreed object of the peace to set up.*¹⁹⁵

121. Indeed, the attitude of the Entente Powers came as no surprise, for that attitude had been uniformly on display. That they were prepared to allow little room for negotiation was evident in many ways. It may be recalled that during the second meeting of Sub-Commission III (of the Commission on Responsibilities of the Authors of the War and on the Enforcement of Penalties), Sir Ernest Pollock had stated a conditional willingness to support a compromise arrangement in which national tribunals would ‘sit together, and so to constitute a “*haute tribuna*l” before which the most important cases might be brought.’¹⁹⁶ As a compromise arrangement, it was ‘not satisfactory’ to Great Britain and France, but Pollock would support it if Americans would also be supportive.¹⁹⁷ But failing American support of the idea, Pollock would return to the original proposal of Britain and France to form ‘*an international tribunal* which should derive its authority from the Peace Conference, and from an article of the Treaty under which the Germans *would be required to accept, and assent to the jurisdiction of that tribunal.*’¹⁹⁸

122. These exchanges constitute an essential part of tracing faithfully and fully the evolution of the current norm of individual criminal responsibility, with its attendant rejection of official position immunity (even for Heads of State) before international tribunals with jurisdiction to prosecute international crimes. These were robust statements of state-practice (with indications of *opinio juris*) by the States concerned, in the evolution of customary international law norms, specifically as concerns the prohibition of official position immunity. The exchanges also raise the question whether it could be said that Germany was left with any real choice, other than to accept article 227 of the Treaty of Versailles. Or, could it really be said that they had ‘waived’ the immunity of their former Head of State, even assuming that there was any such immunity to be waived?

¹⁹⁵ *Ibid.*, at p 30, emphasis added.

¹⁹⁶ Paris Peace Conference 1919, Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, ‘Proceedings of a Meeting of “Sub-Commission No 3” of the “Commission on the Responsibilities for the War, etc”’, held on 4 March 1919 at 11:00 am, at p 1. [Available at the US National Archives, File Unit 181.123401/5, Microcopy M 820 Roll 144].

¹⁹⁷ *Ibid.*

¹⁹⁸ *Ibid.*, emphases added.

123. Even if the consent of Germany to article 227 of the Treaty of Versailles derived from free choice, was this singular event—the consent to the prosecution of their former Head of State—a development in favour of, or against, the historical development of the current norm concerning the question of immunity of Heads of State before an international criminal court, from the point of view of state practice? Could the German consent be taken as deviating from the view of the majority of the Commission (considering that the United States of America had clearly objected to prosecuting the ex-Kaiser) who, recalling the exchanges reviewed above, appeared determined to reject the plea of immunity? As stated previously, the Allied and Associated Powers perceived the ex-Kaiser’s prosecution as ‘inseparable from the establishment of [the] reign of law among nations’; in the sense that ‘the vindication of the principles of the laws and customs of war and the laws of humanity which have been violated would be incomplete if he were not brought to trial and if other offenders less highly placed were punished.’¹⁹⁹

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124. Due to international politics at the time, the international tribunal contemplated by article 227 of the Treaty of Versailles was not created.²⁰⁰ Nevertheless, article 227 and its antecedents marked an early trend in international law’s march in the direction of individual criminal responsibility, and it marked the first steps towards the development of a customary international law norm that rejects official position of immunity—even for Heads of State—before international criminal courts. That said, the majority of the international community—to the extent represented in the most important international gathering of the period, to stitch up a global wound—could have affirmed uniformly (as a salutary part of the operation) the idea of Head of State immunity to the jurisdiction of an international criminal court. But, they refused to do so. Quite the contrary, they positively rejected the idea in an emphatic way.

¹⁹⁹ See Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, Report Presented to the Preliminary Peace Conference, *supra*, at p 117.

²⁰⁰ See William Schabas, *The International Criminal Court: a Commentary on the Rome Statute*, 2nd edn (2016), at p 2.

(f) The Development of the International Norm Rejecting Immunity before International Tribunals: Fostering at Nuremberg

125. From its novel origins in 1919, the rejection of official position immunity (even for Heads of State) took a firmer hold as a norm in 1945, after World War II. Ironically, it was the Americans who were now at the vanguard of the rejection of the plea of immunity.

126. The instrument that established the International Military Tribunal in Nuremberg set out clearly that the official positions of the defendants, whether as Heads of State or as responsible officials in government departments, would not free them from responsibility or mitigate punishment.²⁰¹ The Charter of the Tokyo Tribunal, in particular, left no hesitation that the official position of the defendant ‘at any time’ did not afford immunity.²⁰²

127. Similar, official position immunity was precluded in article II(4)(a) of Control Council Law No 10, in relation to post-World War II proceedings before national or occupation courts exercising jurisdiction in Germany, pursuant to article 6 of the London Agreement of 8 August 1945.

128. The US delegation championed this rejection of immunity robustly in more ways than one. The US played a leading role in the prosecution of the first Head of State and Head of Government in modern history. Remarkably, Grand Admiral Karl Dönitz, who had succeeded Adolf Hitler as Head of State and President of Germany upon Hitler’s suicide,²⁰³ was among the high officials of the Third Reich who were tried by the Nuremberg Tribunal. Dönitz was convicted at the end of his trial²⁰⁴ and sentenced to ten years imprisonment.²⁰⁵ He was, thus, the first Head of State to be tried by an international criminal court. In the same manner, during World War II,

²⁰¹ See Charter of the International Military Tribunal in Nuremberg, article 7.

²⁰² See Charter of the International Military Tribunal for the Far East, article 6.

²⁰³ *USA, France, UK & USSR v Göring & ors* [1947] 1 Trial of the Major War Criminals before the International Military Tribunal, at p 310.

²⁰⁴ *Ibid*, at p 315.

²⁰⁵ *Ibid*, at p 365.

Hideki Tojo was the Prime Minister²⁰⁶ and Head of Government of Japan.²⁰⁷ After the war, he was tried for war crimes before the Tokyo Tribunal, found guilty²⁰⁸ and sentenced to death by hanging.²⁰⁹ These trials were conducted on the basis of international legal texts that provided that official capacity did not afford immunity from prosecution before the international criminal courts that tried them.

129. The position of the Americans, in relation to the prohibition of the plea of official immunity, was a deliberate and clear reversal, in sharp contrast with their position in relation to article 227 of the Treaty of Versailles and the negotiations that led up to it. In 1919, as noted previously, the US Secretary of State, Lansing (leader of the US delegation to the Commission on Responsibility) had objected to the trial of the ex-Kaiser on grounds of Head of State immunity. Remarkably, he had invoked, in aid of his position, the decision of the US Supreme Court in *The Schooner Exchange*,²¹⁰ which has been credited in the development of the plea of sovereign immunity in international law.

130. However, Justice Robert H Jackson, in his turn as the US representative at the London Conference of 1945 (on secondment from the US Supreme Court), adopted a wholly opposite approach. In an eight-page report, submitted to President Truman on 6 June 1945, and presumably looking past *The Schooner Exchange*²¹¹ judgment, Jackson contended it to be inadmissible at the Nuremberg trials, referring to ‘the obsolete doctrine that a head of state is immune from legal liability.’ And, he continued: ‘There is more than a suspicion that this idea is a relic of the doctrine of the divine right of kings. It is, in any event, inconsistent with the position we take toward our own officials, who are frequently brought to court at the suit of citizens who allege their rights to have been invaded. We do not accept the paradox that legal responsibility should be the least where power is the greatest. We stand on the principle

²⁰⁶ *The Tokyo Major War Crimes Trial*, the Records of the International Military Tribunal for the Far East (R John Pritchard, ed) vol 103, transcript at p 49, 844.

²⁰⁷ *Ibid*, 845.

²⁰⁸ *Ibid*, 848.

²⁰⁹ *Ibid*, 857.

²¹⁰ *The Schooner Exchange v McFaddon*, *supra*.

²¹¹ Jackson must be presumed to be aware of *The Schooner Exchange* judgment. He was a former US Solicitor-General and a former US Attorney-General, and in addition, he was also (at the time of his functions as the US representative at the London Conference and US Chief of Counsel in Nuremberg) a justice of the same US Supreme Court that had decided the famous *Schooner Exchange* case.

of responsible government declared some three centuries ago to King James by Lord Chief Justice Coke, who proclaimed that even a King is still “under God and the law”.²¹²

131. It may be noted that it was to his own Head of State that Justice Jackson had directly made these observations, in terms of which he rejected Head of State immunity. It would, of course, be unhelpful to overwork the value of Jackson’s allusions to Sir Edward Coke’s own intrepid determination to genuflect his own Head of State (King James I) to the rule of law in the case of *Prohibitions del Roy*.²¹³

132. The report had consequences for emerging state practice and customary international law. In an annotation to Justice Jackson’s 6 June 1945 report to President Truman, it is indicated that the report ‘was released to the press by the White House with a statement of the President’s approval and was widely published through-out Europe as well as in the United States. This report was accepted by other governments as an official statement of the position of the United States and as such was placed before all of the delegations to the London Conference.’²¹⁴ In a press conference held the next day, 7 June 1945, President Truman expressed his ‘entire agreement’ with the Jackson report.²¹⁵ Thus, these events are important evidence of state practice from a powerful State, setting off customary international law along a course that rejects the plea of Head of State immunity before international criminal courts.

133. The preceding paragraphs indicate some of the relevant background to the repeated arguments insisted upon by the Americans, in the American draft text for the Nuremberg Charter, ‘that any defense based upon the fact that the accused is or was the head or purported head or other principal official of a state is legally inadmissible, and will not be entertained.’²¹⁶ There was also an equivalent provision proposed by the

²¹² See ‘Report to the President by Mr Justice Jackson, June 6, 1945’ in US Department of State, Report of Robert H Jackson, United States Representative to the International Conference on Military Trials (released February 1949) 42, at pp 46-47, emphasis added.

²¹³ *Prohibitions del Roy* [1607] EWHC KB J23.

²¹⁴ ‘Report to the President by Mr Justice Jackson, June 6, 1945,’ *supra*, at p 42.

²¹⁵ This was in response to the question: ‘Mr President, are you in complete agreement with Justice Jackson’s report?’. See Harry S Truman Library and Museum, ‘52. President’s New Conference—7 June 1945,’ available at <http://trumanlibrary.org/publicpapers/viewpapers.php?pid=59>.

²¹⁶ US Department of State, Report of Robert H Jackson, United States Representative to the International Conference on Military Trials, *supra*, at pp 24, 33, 58, 124, and 180, emphasis added.

Soviets.²¹⁷ The drafting subcommittee reported a text²¹⁸ that would eventually become the final form of article 7 of the Nuremberg Charter, and stated: ‘The official position of defendants, whether as Heads of State or responsible officials in Government departments, shall not be considered as freeing them from responsibility or mitigating punishment,’ editing the intermediate draft proposed by the British delegation²¹⁹ by deleting the word ‘various’ before ‘departments’.

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134. Returning, once more, to the judgment of the US Supreme Court in *The Schooner Exchange*, Lansing (in his capacity as the US representative on the Paris Peace Conference Commission on Responsibility) relied on that case as authority for his objection against the prosecution of the German Head of State during World War I. It might be helpful to recall that, in rejecting Lansing’s objection, the other members of the Commission expressed their view that ‘this privilege, where it is recognized, is one of practical expedience in municipal law, and is not fundamental. However, even if, in some countries, a sovereign is exempt from being prosecuted in a national court of his own country the position from an international point of view is quite different.’²²⁰

135. On the contrary, as mentioned previously, Jackson (in his capacity as US representative at the London Conference) insisted that the German Head of State, during World War II, face prosecution. He also claimed that the plea of Head of State immunity must remain unavailable, as it was a ‘relic’ of a bygone era when the King would be above the law and could do no wrong.

²¹⁷ The text was as follows: ‘The official position of persons guilty of war crimes, their position as heads of states or as heads of various departments shall not be considered as freeing them from or in mitigation of their responsibility’: *ibid*, at p 180.

²¹⁸ ‘7. The official position of defendants, whether as heads of State or responsible officials in various Departments, shall not be considered as freeing them from responsibility or mitigating punishment’: *ibid*, at p 197.

²¹⁹ The British text read as follows: ‘7. The official position of Defendants, whether as heads of State or responsible officials in various Departments, shall not be considered as freeing them from responsibility or mitigating punishment’: *ibid*, at p 205.

²²⁰ See Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, Report Presented to the Preliminary Peace Conference, (1920) 14 *AJIL* 95, *supra*, at p 116.

136. This change of position by the US may be contemplated from three angles. None of these angles, however, support the proposition that customary international law recognises official position immunity (even for Heads of State) for the purposes of trials before international criminal courts. First, the plea of Head of State immunity was not given effect in 1919. Although the Netherlands refused to surrender the ex-Kaiser for trial, the plea did not take hold as the majority disagreed with the objection by the American delegation to the trial on grounds of Head of State immunity. Secondly, the rejection of the plea was confirmed in 1945, by the majority of the parties to the Treaty of Versailles, having then enlisted the United States (former opponent) as a new believer, and with Japan (the second 1919 opponent) having members of its Government and its Head of Government subjected to prosecutions in the Far East. And, thirdly, even if the US objection had been sustained in 1919, the rejection of the same plea in 1945 marked a new point of departure for the development of customary international law, and the course of a new norm that renders the plea inadmissible before an international criminal court.

137. Now, despite the end result, both Jackson (in 1945) and the Commission on Responsibility (in 1919) were not convinced that *The Schooner Exchange* represented an authoritative obstruction to the prosecution of a Head of State before an international criminal court.

138. It bears recalling once more that the facts of *The Schooner Exchange*, from the perspective of ‘international custom, as evidence of a general practice accepted as law,’ did not involve immunity from a trial before an international criminal court. The case concerned the question of immunity before the District Court of the United States for the District of Pennsylvania. Therefore, as a matter of *ratio decidendi*, the rule of immunity according to *The Schooner Exchange* does not apply to a trial in respect of an international crime before an international criminal court. The view of the majority of the Commission on Responsibility, which considered *The Schooner Exchange* to be irrelevant was, therefore, correct.

139. The distinction of *The Schooner Exchange* was confirmed by the pronouncements of the Permanent Court of International Justice [the ‘PCIJ’] in *The*

Lotus case²²¹ in 1927, which discussed the development of customary international law from the practice of states. It teaches important lessons, including that a norm developed in respect of a particular problem may not apply to a different situation, even though the situations may look similar on a casual view.

140. In *The Lotus* case, France protested Turkey's exercise of criminal jurisdiction over a French citizen, Lieutenant Demons, for a maritime collision that involved ships of both nations and occurred outside the territory of Turkey. The PCIJ considered that the case cast in relief the 'very nature and existing conditions of international law.'²²² The PCIJ held, among other things, that there is 'the necessity of ascertaining whether or not under international law there is a principle which would have prohibited Turkey, in the circumstances of the case before the Court, from prosecuting Lieutenant Demons. And moreover ... this must be ascertained by examining precedents offering a close analogy to the case under consideration; for it is only from precedents of this nature that the existence of a general principle applicable to the particular case may appear. ... The Court therefore must, in any event, ascertain whether or not there exists a rule of international law limiting the freedom of States to extend the criminal jurisdiction of their courts to a situation uniting the circumstances of the present case'.²²³

141. The PCIJ's requirement of 'a close analogy' and 'a situation uniting the circumstances of the present case', for the application of a rule of customary international law, seems to address the question of propriety and custom in a very radical way.

142. Applying the criteria of *The Lotus* case, which requires 'a close analogy' between the facts and circumstances of the case at hand, and those of a historical case that inspired the legal customary norm urged as applicable to the case at hand, it is reasonable to believe that the plea of immunity of Heads of State or of other State officials before an international criminal court may not, as a matter of customary international law, derive from *The Schooner Exchange*. As a matter of immunity from

²²¹ [*The Case of the SS 'Lotus'*](#) [1927] PCIJ Judgment, Series A, No 10.

²²² *Ibid*, at p 18.

²²³ *Ibid*, at p 21, emphasis added.

the jurisdiction of the US Federal Court for the District of Pennsylvania, *The Schooner Exchange* did not offer ‘a close analogy to the case under consideration’ before an international criminal court. Therefore, there was no ‘situation uniting the circumstances’.

143. In addition, *The Schooner Exchange* rule presented no obstacle to the prosecution of the ex-Kaiser due to the fact that the pronouncements made by Chief Justice Marshall did not accommodate the view that pleas of sovereign immunity derived from something other than ‘practical expedience in municipal law,’ as pointed out by the Commission on Responsibility. When *The Schooner Exchange* was decided, in 1812, the general rule was that sovereign heads of many realms could not be sued in the courts of their own countries. However, in 1945, Jackson observed that the situation had changed, or was starting to change, in many countries and the sovereign could be sued in his or her jurisdiction. It then became ‘obsolete’, as Jackson saw it, to maintain the derivative rule that the courts of one country should not exercise jurisdiction over foreign sovereigns (as otherwise it would give one sovereign of the forum imperium over the foreign sovereign). Jackson considered that the privilege of immunity for foreign sovereigns in forum courts at the national level derived from a historical ‘relic’. As the Commission on Responsibility noted in 1919, the ‘practical expedience in municipal law’ effect was to prevent the sovereign of the forum from supposing dominium over foreign sovereigns. Consequently, as Jackson saw it, if the situation had changed, and the plea of sovereign immunity would be obsolete at the national level,²²⁴ it would also be obsolete before an international criminal tribunal.

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144. The Americans were not the only ones who repudiated the plea of official position immunity at the London Conference of 1945. France, the Soviet Union, the United Kingdom and the United States were the main parties to the London Agreement (which adopted the Nuremberg Charter). Australia, Belgium,

²²⁴ It may not be insignificant that article II(4)(a) of Control Council Law No 10 also prohibited official position immunity in proceedings before national or occupation courts exercising jurisdiction in Germany, pursuant to article 6 of the London Agreement of 8 August 1945.

Czechoslovakia, Denmark, Ethiopia, Greece, Haiti, Honduras, India, Luxembourg, the Netherlands, New Zealand, Norway, Panama, Paraguay, Poland, Uruguay, Venezuela and Yugoslavia, governments of the ‘United Nations’ also expressed their adherence to the agreement.²²⁵

145. The role of the post-war British government, regarding the development of a customary international law norm that repudiated the plea of official position immunity in Nuremberg and related prosecutions, also deserves a closer look. The basic premise of the British Government’s position was the assumption ‘that it [was] beyond question that Hitler and a number of arch-criminals associated with him (including Mussolini) must, so far as they fall into Allied hands, suffer the penalty of death for their conduct leading up to the war and for the wickedness which they have either themselves perpetrated or have authorized in the conduct of the war. It would be manifestly impossible to punish war criminals of a lower grade by a capital sentence pronounced by a Military Court unless the ringleaders are dealt with equal severity.’²²⁶

146. It is important to note the attitude towards accountability of the position of the British Government at the Paris Peace Conference in 1919, and to look beyond the reference in 1945 to ‘the penalty of death’ as the ‘preferred course’,²²⁷ which would not fit with today’s sensibilities.

147. It should be noted that on 23 April 1945, when Sir Alexander Cadogan²²⁸ delivered the aide-mémoire to the White House Counsel, Judge Samuel Rosenman,²²⁹ Hitler was still alive, as far as anyone was aware, and remained Germany’s Head of State. [It is also to be noted that in a speech he delivered to the American Society of International Law on 13 April 1945, Robert H Jackson had contemplated a ‘United

²²⁵ See *USA, France, UK & USSR v Göring & ors* [1947] 1 Trial of the Major War Criminals before the International Military Tribunal, *supra*, at p 9.

²²⁶ Aide-Mémoire from the United Kingdom, 23 April 1945, in US Department of State, Report of Robert H Jackson, United States Representative to the International Conference on Military Trials, *supra*, at p 18, emphasis added.

²²⁷ Regarding the manner of arriving at this penalty of death, the British Government had vigorously argued that summary ‘execution without trial is the preferable course’—rather than trial before ‘some form of tribunal claiming to exercise judicial functions’: see *ibid.*

²²⁸ Cadogan was the incumbent Permanent Secretary at the UK Foreign Office.

²²⁹ US Department of State, Report of Robert H Jackson, United States Representative to the International Conference on Military Trials, *supra*, at p 18.

Nations court that would try ... Hitler or Goebbels'²³⁰ at a time when Hitler was still the Head of State of Germany. Hitler is generally believed to have died on 30 April 1945.²³¹ Although Cadogan's demarches suggested that 'a capital sentence pronounced by a Military Court' was being considered for him, 'execution without trial [was] the preferable course' at the time. There was no question of Head of State immunity at all. Therefore, when the British abandoned their idea of the 'preferable course,' they supported the American proposal as a good basis to proceed with the London Conference of 1945.²³² Thus, the Nuremberg Charter was concluded, with article 7 excluding the plea of official position immunity in the following terms (as previously stated): 'The official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment.'

148. It is important to appreciate that article 7 of the Nuremberg Charter contains no words of limitation, to the effect that any immunity was reserved for serving Heads of State or senior State officials. Immunity by reason of official position was precluded simpliciter.

149. The International Military Tribunal, in their judgment, reiterated the absence of immunity for Heads of State by stating: 'The principle of international law, which, under certain circumstances, protects the representatives of a state, cannot be applied to acts which are condemned as criminal by international law. The authors of these acts cannot shelter themselves behind their official position in order to be freed from punishment in appropriate proceedings. ... He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the state if the state in authorizing actions moves outside its competence under international law.'²³³ The previous pronouncement was broad enough to exclude both the plea of official position immunity, as well as the defence of act of state.

²³⁰ Robert H Jackson, 'The Rule of Law Among Nations' (1945) 31 *American Bar Association Journal* 290.

²³¹ See John Lucas, 'Adolf Hitler: Dictator of Germany' in Encyclopaedia Britannica, available at <http://www.britannica.com/biography/Adolf-Hitler>.

²³² US Department of State, Report of Robert H Jackson, United States Representative to the International Conference on Military Trials, *supra*, at p 41.

²³³ *Ibid*, at p 223.

150. It is thus clear from the foregoing review that the development of international law after World War II, in the order of individual criminal responsibility for crimes under international law, was firmer in the rejection of immunity, even for Heads of State. And that was a trend that had emerged in the consciousness of international law 26 years earlier at the close of World War I.

(g) Consolidation of the International Norm Rejecting Immunity before International Tribunals: Adoption by the United Nations

151. Another stage in the evolution of customary international law not only regarding individual criminal responsibility, but also the rejection of immunity for State officials including Heads of State, is the UN's approval of the principles of law that emanated from both the Nuremberg Charter and the judgment of the Nuremberg Trial, and the ensuing progressive development and consolidation of those norms under the auspices of the UN.

152. In resolution 95(I) adopted on 11 December 1946, the UN General Assembly affirmed the principles of international law recognised by the Charter of the Nuremberg Tribunal and the judgment of the same tribunal. The UN had 55 Member States at the time.²³⁴ The UN General Assembly requested the ILC to elaborate the Nuremberg Principles 'as a matter of primary importance.'²³⁵

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153. In December 1948, the UN General Assembly adopted the Convention against Genocide. In article IV it is provided as follows: 'Persons committing genocide or any of the other acts [of genocide] enumerated in article III shall be punished, *whether*

²³⁴ The member states at the time were: Afghanistan, Argentina, Australia, Belgium, Bolivia, Brazil, Byelorussian Soviet Socialist Republic, Canada, Chile, China, Colombia, Costa Rica, Cuba, Czechoslovakia, Denmark, Dominican Republic, Ecuador, Egypt, El Salvador, Ethiopia, France, Greece, Guatemala, Haiti, Honduras, Iceland, India, Iran, Iraq, Lebanon, Liberia, Luxembourg, Mexico, Netherlands, New Zealand, Nicaragua, Norway, Panama, Paraguay, Peru, Philippine Republic, Poland, Saudi Arabia, Siam, Sweden, Syria, Turkey, Ukrainian Soviet Socialist Republic, Union of South Africa, Union of Soviet Socialist Republics, United Kingdom, United States, Uruguay, Venezuela, and Yugoslavia: see UN, Growth in the United Nations membership, 1945—present, available at <www.un.org/en/sections/member-states/growth-united-nations-membership-1945-present/index.html>

²³⁵ See United Nations, General Assembly, [Resolution 95\(I\)](#), 11 December 1946, Doc No A/RES/95(I).

they are constitutionally responsible rulers, public officials or private individuals.' [Emphasis added.] And in article V, it is provided as follows: 'Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.' Those are clear statements repudiating immunity of heads of State for the international crime proscribed in that treaty. To the extent that these formulations are among many of their kind in international instruments, they do constitute State practice expressed on the multilateral level.

154. During the second session of the ILC in 1950, the Commission submitted to the UN General Assembly their report covering the work of that session, including the Principles of International Law recognised in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal, with commentaries.

155. Nuremberg principle III appears as follows: 'The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible Government official does not relieve him from responsibility under international law.'²³⁶ The development had Nuremberg solely in mind.

156. That norm was further consolidated in international law through subsequent work done under the aegis of the UN. Notably, coinciding with Nuremberg Principle III, article 3 of the ILC's draft Code of Offences against the Peace and Security of Mankind (1954) provides as follows: 'The fact that a person acted as Head of State or as responsible government official does not relieve him of responsibility for committing any of the offences defined in this Code.'

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157. In 1993 the Security Council adopted resolution 827 (1993) of 25 May 1993 establishing the International Criminal Tribunal for the former Yugoslavia [the 'ICTY']. To that resolution was annexed the report of the UN Secretary-General

²³⁶ See ILC, *Yearbook* (1950), vol II, at p 375

recommending the establishment of the tribunal. In paragraph 55 of the report, the Secretary-General observed as follows:

Virtually all the written comments received by the Secretary-General have suggested that the statute of the International Tribunal should contain provisions with regard to the individual criminal responsibility of heads of State, government officials and persons acting in an official capacity. These suggestions draw upon the precedents following the Second World War. The Statute should, therefore, contain provisions which specify that a plea of head of State immunity or that an act was committed in the official capacity of the accused will not constitute a defence, nor will it mitigate punishment. [Emphasis added.]

158. Accordingly, article 7(2) of the ICTY Statute, as annexed to the UN Secretary-General's report contained the following provision: 'The official position of any accused person, *whether as Head of State or Government* or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.' [Emphasis added.] The Security Council duly adopted the Statute. It was thus that the ICTY indicted President Milosevic on 22 May 1999, while he was incumbent President of Serbia.²³⁷ There is no known evidence of global protest against his indictment on grounds of Head of State immunity.²³⁸

159. Following the Rwandan Genocide of 1994, the UN Secretary-General established a Commission of Experts to inquire into the events and report to the Security Council, pursuant to its resolution 935 (1994) of 1 July 1994. In their preliminary report, transmitted to the Security Council on 1 October 1994, the Commission of Experts observed, among others things, that 'the Nuremberg Trials established clearly the principle that any individual, regardless of office or rank, shall be held responsible in international law for war crimes, crimes against peace or crimes against humanity. It symbolized the possibility that trials could actually be carried out and punishment enforced in modern times.'²³⁹ And, in particular: 'The Nuremberg

²³⁷ See United Nations, General Assembly, International Law Commission, 'Immunity of State officials from foreign criminal jurisdiction' (Memorandum by the Secretariat), *supra*, at para 142, footnote 391.

²³⁸ To the contrary, it is noted that as far back as 17 December 1992, the *Los Angeles Times* had reported that Laurence Eagleburger, the US Secretary of State had named '[l]eaders such as Slobodan Milosevic, the President of Serbia, Radovan Karadzic, the self-declared president of the Serbian Bosnian Republic, and Gen Ratho [sic] Mladic, commander of Bosnian Serb military forces' as some of the suspects who must face trial before an international court of law. See Norman Kempster, 'Eagleburger Seeks Balkan Atrocity Trials', *Los Angeles Times*, 17 December 1992. See also Michelle Nicholasen, 'What About Milosevic', *PBS Frontline*, available at <www.pbs.org/wgbh/pages/frontline/shows/karadzic/trial/milosevic.html>

²³⁹ United Nations, Security Council, '[Preliminary report of the Independent Commission of Experts established in accordance with Security Council resolution 935 \(1994\)](#),' Annex to Letter, dated 1

Principles, adopted by the United Nations General Assembly on 11 December 1946, affirmed that *even a Head of State* is not free from responsibility under international law for the commission of a crime under international law.²⁴⁰ In the circumstances, the Commission of Experts recommended that trials of individuals suspected of international crimes during the events in Rwanda ‘be carried out by an international criminal tribunal,’²⁴¹ preferably the ICTY.²⁴²

160. Subsequently, on 8 November 1994, the Security Council established the ICTR under resolution 955 (1994). Article 6(2) of its Statute provided as follows: ‘The official position of any accused person, *whether as Head of state or government* or as a responsible government official, shall not relieve such person of criminal responsibility nor mitigate punishment.’ [Emphasis added.]

161. On 9 December 1994, the UN Secretary-General submitted the Commission of Experts’ final report to the Security Council. In it, they repeated verbatim their earlier observations about absence of immunity for Heads of State, as a norm established in Nuremberg.²⁴³

162. On 16 October 1997, the ICTR confirmed the indictment (for genocide and crimes against humanity) against Mr Jean Kambanda, the Prime Minister of Rwanda during the events of 1994.²⁴⁴ On 1 May 1998, he pleaded guilty.

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163. In 1998, the Rome Statute was adopted, creating the International Criminal Court. As seen earlier, article 27 provides as follows:

This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a

October 1994, from the Secretary-General addressed to the President of the Security Council, Doc No S/1994/1125, at para 127, emphasis added.

²⁴⁰ *Ibid*, at para 129, emphasis added.

²⁴¹ *Ibid*, at para 141.

²⁴² *Ibid*, at paras 139-142.

²⁴³ United Nations, Security Council, ‘[Final report of the Independent Commission of Experts established in accordance with Security Council resolution 935 \(1994\)](#),’ Annex to Letter dated 9 December 1994 from the Secretary-General Addressed to the President of the Security Council, Doc No S/1994/1405, at paras 171 and 173.

²⁴⁴ *Prosecutor v Kambanda* ([Judgment and Sentence](#)), 4 September 1998, at paras 2 and 3 [ICTR Trial Chamber].

Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.²⁴⁵

Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.²⁴⁶

164. In June 2000, the UN Secretary-General's Special Representative in East Timor promulgated Regulation No 2000/15 on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences. Modelled on the equivalent provision in the Rome Statute, section 15 provided as follows:

The present regulation shall apply equally to all persons without any distinction based on official capacity. In particular, *official capacity as a Head of State or Government*, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under the present regulation, nor shall it, in and of itself, constitute a ground for reduction of sentence.²⁴⁷

Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the panels from exercising its jurisdiction over such a person.²⁴⁸

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165. Pursuant to Security Council resolution 1315 (2000) of 14 August 2000, the UN Secretary-General concluded an Agreement with the Government of Sierra Leone, establishing the SCSL. Article 6(2) provides: 'The official position of any accused persons, *whether as Head of State or Government* or as a responsible government official, shall not relieve such person of criminal responsibility nor mitigate punishment.' [Emphasis added.]

166. In the light of the foregoing, it is noted that the Special Court for Sierra Leone confirmed the indictment against Charles Taylor on 7 March 2003 and an arrest warrant was issued on that date, while he was the President of Liberia. The indictment

²⁴⁵ Rome Statute, art 27(1).

²⁴⁶ *Ibid*, article 27(2).

²⁴⁷ UNTAET Regulation No 2000/15, article 15.1, emphasis added.

²⁴⁸ *Ibid*, article 15.2.

and arrest warrant were formally unsealed on 12 June 2003. Mr Taylor stepped down as President of Liberia on 11 August 2003.²⁴⁹

167. As noted earlier, a challenge to his indictment was made on grounds of Head of State immunity. The challenge was motivated by arguments, including this: ‘The Indictment against Charles Taylor was invalid due to his personal immunity from criminal prosecution. Further, the timing of the disclosure of the arrest warrant and indictment on 12 June 2003 was designed to frustrate Charles Taylor’s peace-making initiative in Ghana and cause prejudice to his functions as Head of State.’²⁵⁰ It was additionally contended that the ‘Special Court’s attempt to serve the indictment and arrest warrant on Charles Taylor in Ghana was a violation of the principle of sovereign equality.’²⁵¹ In the result, the relief sought were: (a) orders quashing the indictment, arrest warrant and all consequential orders; and, (b) interim relief restraining the service of the indictment and arrest warrant on Mr Taylor.

168. It is particularly instructive that the challenge was purportedly based on the judgment of the ICJ in the *Arrest Warrant Case*.

169. But the Appeals Chamber of the SCSL dismissed the challenge, reasoning that ‘the principle seems now established that the sovereign equality of states does not prevent a Head of State from being prosecuted before an international criminal tribunal or court.’²⁵²

170. It is significant that the SCSL Appeals Chamber had exercised its powers to appoint two professors of international law—Philippe Sands and Dianne Orentlicher—as *amici curiae* in the appeal.²⁵³ The Chamber also received submissions from the African Bar Association.²⁵⁴

171. As the Appeals Chamber understood him, Professor Sands had submitted as follows, among other things: ‘In respect of international courts, international practice

²⁴⁹ See *Prosecutor v Taylor* ([Judgment](#)) 26 September 2013, at para 4 [SCSL Appeals Chamber]. See also *Prosecutor v Taylor* ([Decision on Immunity from Jurisdiction](#)) 31 May 2004, at para 1 [SCSL Appeals Chamber].

²⁵⁰ *Prosecutor v Taylor* ([Decision on Immunity from Jurisdiction](#)), *supra*, at para 6.

²⁵¹ *Ibid*, at para 7.

²⁵² *Ibid*, at para 52.

²⁵³ *Ibid*, at para 2.

²⁵⁴ *Ibid*, recitals at page 3.

and academic commentary supports the view that jurisdiction may be exercised over a serving Head of State in respect of international crimes. Particular reference may be had to the *Pinochet* cases and the *Yerodia* [a.k.a. *Arrest Warrant*] case.²⁵⁵ But, '[i]n respect of national courts a serving Head of State is entitled to immunity even in respect of international crimes.'²⁵⁶

172. On the part of Professor Orentlicher, the Appeals Chamber summarised her submissions as follows. Mr Taylor's incumbency of office as Head of State when he was indicted did not invalidate that indictment on grounds of personal immunity or 'procedural immunities accorded heads of state under international law'.²⁵⁷ Nor did he enjoy immunity *ratione materiae* from prosecution for the specific crimes charged against him, such that he could not be prosecuted even as a former Head of State. Orentlicher submitted that in the *Arrest Warrant* case, the ICJ had made a distinction between 'the law applicable in the case of an attempt by a national court to prosecute the foreign minister of another State, from the rule embodied in statutes of international criminal tribunals.' And for purposes of that distinction, 'the Special Court is an international court and may exercise jurisdiction over incumbent and former heads of state in accordance with its statute.'²⁵⁸

173. In their own submissions addressing the challenge against the validity of the indictment, the African Bar Association submitted that Mr Taylor enjoyed no immunity from prosecution in respect of the international crimes charged against him. In support of their submission, they made 'reference to the case of *United States of America v Noriega*, the *Pinochet* case, the *Milosevic* case, the 1993 World Conference on Human Rights and the Rome Statute of the ICC.'²⁵⁹

174. Another joint judicial mechanism between the UN and a national government is the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the period of Democratic Kampuchea. It may also be noted that the Law on the Establishment of that mechanism provides as follows in article 29: 'The

²⁵⁵ *Ibid.*, at para 17.

²⁵⁶ *Ibid.*

²⁵⁷ *Ibid.*, at para 18.

²⁵⁸ *Ibid.*

²⁵⁹ *Ibid.*, at para 19.

position or rank of any Suspect shall not relieve such person of criminal responsibility or mitigate punishment.’ That provision does not recognise the position of Head of State or Head of Government as affording an exception to the rule rejecting immunity.

(h) The Anti-Immunity Norm relative to Incumbency

175. In discussions such as that currently engaged in the case at bar, there may be a lingering temptation to wonder whether the legal developments reviewed in relation to the march of customary international law involve rejection of immunity only in relation to former Heads of State, who do not enjoy immunity *ratione materiae*. It would thus leave undisturbed the idea that serving Heads of State would enjoy immunity *ratione personae* while in office. These distinctions are discussed elsewhere in this analysis. It may be said, for now, that the distinction is ultimately false in relation to customary international law as reviewed above. First, the evolution of customary international law, to the effect that not even Heads of State may enjoy immunity before international criminal courts, did not limit the anti-immunity norm to former Heads of State. That is to say, Nuremberg Principle III²⁶⁰ and its progeny specify nothing to the effect that the norm would operate only when the official is no longer in power.

176. Furthermore, the immateriality of the distinction between immunity *ratione materiae* and immunity *ratione personae*, for purposes of the exercise of jurisdiction by an international criminal court, is underscored by the very reason for the absence of immunity *ratione materiae*. That reason is that commission of international crimes is not part of the job description of the Head of State. The primary justification for leadership of State is protection of the population, which by necessity precludes the commission of international crimes against them. A deeper reflection should then readily reveal an internal inconsistency with the idea of cloaking the leader with immunity *ratione personae*, if he or she commits such crimes. This is in the sense that the purity of the logic of such immunity ultimately turns on itself, as the justification for the immunity *ratione personae* is that the beneficiary is a serving Head of his

²⁶⁰ The text of Nuremberg Principle III is recalled as follows: ‘The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible Government official does not relieve him from responsibility under international law.’

State. It is easy enough to see that the operation of *ratione personae* immunity (even in cases of international crimes) must mean that a Head of State who elects to exterminate the entire population of his own State may still lay claim to immunity *ratione personae* against the charge of extermination. But the flaw is plain enough to see in that example; because by virtue of the crime in question, he may have eliminated the population as an essential normative element of statehood²⁶¹—and may have been enabled in that project by valid cloak of immunity *ratione personae* recognised as such by international law. The absurdity cannot be presumed upon a proper legal principle of international law. The ILC has appropriately captured the legal dilemma in an analysis they conducted precisely on the question of immunity of high State officials who abuse the privileges and facilities of office in order to commit crimes against peace and security of humankind (which are the same crimes proscribed in the Rome Statute):

[C]rimes against the peace and security of mankind often require the involvement of persons in positions of governmental authority who are capable of formulating plans or policies involving acts of exceptional gravity and magnitude. These crimes require the power to use or to authorize the use of the essential means of destruction and to mobilize the personnel required for carrying out these crimes. *A government official who plans, instigates, authorizes or orders such crimes not only provides the means and the personnel required to commit the crime, but also abuses the authority and power entrusted to him. He may, therefore, be considered to be even more culpable than the subordinate who actually commits the criminal act.* It would be paradoxical to allow the individuals who are, in some respects, the most responsible for the crimes covered by the Code to invoke the sovereignty of the State and to hide behind the immunity that is conferred on them by virtue of their positions particularly since these heinous crimes shock the conscience of mankind, violate some of the most fundamental rules of international law and threaten international peace and security.²⁶²

177. A sensible approach to resolving the dilemma may lie in the compelling argument of legal nullity once deployed by Alexander Hamilton, when authority is employed contrary to its purpose. As he put it: ‘There is no position which depends on clearer principles, than that every act of delegated authority, contrary to the tenor of the commission under which it is exercised, is void. ... To deny this, would be to

²⁶¹ See for instance article 1 of the Montevideo Convention on the Rights and Duties of States, which explains that ‘[t]he state as a person of international law should possess the following qualifications: (a) a permanent *population*; (b) a defined territory; (c) government; and, (d) capacity to enter into relations with other states.’ Emphasis added.

²⁶² International Law Commission, ‘Draft Code of Crimes against the Peace and Security of Mankind with commentaries (1996)’ in the *Yearbook of the International Law Commission, 1996*, vol II, Part 2, at p 27, commentary (1) to draft article 7, emphasis added.

affirm ... that men acting by virtue of powers, may do not only what their powers do not authorize, but what they forbid.’²⁶³

178. Accordingly, immunity *ratione personae* is a void idea if it purports to provide legal cover against prosecution before an international court in respect of an international crime committed by a Head of State whose very job description is entirely inconsistent with the idea of committing such a crime.

179. Indeed, the work of the ILC does manage to make the nature of Hamilton’s logic very relevant to international criminal law—specifically on the question of the relative practical value of the distinction between immunity *ratione materiae* and *ratione personae*. As they put it in the commentary to article 7 to the Draft Code of Crimes and Peace and Security of Mankind (1996):

The absence of any procedural immunity with respect to prosecution or punishment in appropriate judicial proceedings is an essential corollary of the absence of any substantive immunity or defence. *It would be paradoxical to prevent an individual from invoking his official position to avoid responsibility for a crime only to permit him to invoke this same consideration to avoid the consequences of this responsibility.*²⁶⁴

180. These reasons lend much persuasion to the observations of the late Professor Ian Brownlie that ‘the same logic’—which denies a former Head of State the claim of immunity *ratione materiae*—‘should surely apply to the position of a serving Head of State and immunity *ratione personae*.’²⁶⁵ We accept that view.

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181. In the circumstances outlined above, the idea of immunity *ratione personae* is not readily salvaged by the functional rationale that some commentators now tend to offer in an effort to revise the justification for Head of State immunity. According to this rationale, immunity *ratione personae* is held out as necessary to allow Heads of State to discharge their duties of State without disruption occasioned by prosecution. We note that this was not the classical justification that Bynkershoek or Marshall CJ (in *The Schooner Exchange*) invoked. The classical justification was the more

²⁶³ Alexander Hamilton, *Federalist Paper No 78*.

²⁶⁴ International Law Commission, ‘Draft Code of Crimes against the Peace and Security of Mankind with commentaries (1996)’ in the *Yearbook of the International Law Commission, 1996*, vol II, Part 2, at p 27, commentary (6) to draft article 7, emphasis added.

²⁶⁵ Ian Brownlie, *Principles of Public International Law*, 7th edn (2008), at p 603.

straightforward and unapologetic idea that no sovereign has dominion over an equal: *par in parem non habet imperium*.

182. The need to avoid disruption to the discharge of duties of State is undoubtedly an important consideration. But, whether it should command an absolute value, in the order of immunity of persons from prosecution, remains to be seen.

183. To begin with, any view in favour of such a value is necessarily troubled by life's defining reality, to the effect that no human being is indispensable in the life of a nation, by the mere virtue of occupying office as the Head of State or Government. A successor will always emerge to take over the reins of power in the event of death or disability—or any of the other many events—that terminates political tenure. That is surely the case even in hereditary monarchies, let alone in democratically elected positions where the Head of State or Government must, at any rate, leave office sooner or later at the end of a term limit or when voted out of office.

184. Corporal incidents like death or other serious incapacity of the mind or body are the kinds of disabilities that are readily thought of as events that abruptly bring tenures to their end. But disabilities that terminate office may also take a legal form: such as when the Head of State is compelled to leave office following impeachment proceedings; or when he must serve a sentence of imprisonment following conviction for his own involvement in a criminal conduct—even as a process of domestic law. There is, therefore, nothing at all in juristic logic that would necessarily validate the insistence that a Head of State, who abuses his position by committing an international crime, must be spared prosecution before an international criminal court while in office, out of a need to avoid disruption of tenure. Indeed, the logic of imbuing him with immunity while in office has not recognised any distinction in what may or may not properly interfere with the supposed privilege of non-disruption of tenure. Quite apart from the fact that many leaders have died in the middle of their tenure, many have had unexpectedly short reigns.²⁶⁶ It thus stands to reason that the

²⁶⁶ Ms Kim Campbell served as Prime Minister of Canada from June to November 1993, before losing office in a general election (see www.britannica.com/biography/Kim-Campbell) following a predecessor (Mr Brian Mulroney) who was in office for nine years (see www.britannica.com/biography/Brian-Mulroney). Lady Jane Grey served as Queen of England for nine days only in 1553, before she was prevailed upon to abdicate and was subsequently imprisoned in the

argument of non-disruption of political office entails only an indifferent norm that would perpetuate a Head of State's ability to commit international crimes, to the extent that he is inclined and able to do so.

185. On the facts of the *Arrest Warrant* case, involving the attempt by Belgium to prosecute the foreign affairs minister of the DRC, the ICJ held that immunity *ratione personae* precluded Belgium's attempt. The decision may be sensible in its own context, since international law does not readily permit one State's exercise of its own national criminal jurisdiction to disrupt the political leadership of another State. Such is the essence of the norm of sovereign equality of States. In its function of adjustment of disputes between nations, the ICJ was wholly entitled to decide the *Arrest Warrant* case as it did. And it is to be respected. But, the operation of the idea of immunity *ratione personae* in that way must be confined to the exercise of criminal jurisdiction by *national courts* without more.

186. In the sphere, however, of judicial inquiry into individual criminal responsibility for international crimes—before an *international court* properly imbued with jurisdiction—it is difficult to accept that the operation of the idea of immunity *ratione personae* for a Head of State may also be extended effectively to bar an international court, such as the ICC, from the exercise of its proper criminal jurisdiction. To accept such an extension is to accept the consequent shrinking of the field of accountability in the very stark way of presuming international law's readiness and willingness to condone one human being's calculated irrigation of his own political power with the blood of a fellow human being. There is no known theory of international law that confers such a privilege upon a Head of State. That being the case, the privilege may not be enjoyed through the backdoor of the idea of immunity *ratione personae*, when the underlying conduct is not legally warranted as a matter of authority *ratione materiae*.

Tower of London and eventually beheaded: see www.britannica.com/biography/Lady-Jane-Grey. And in Vietnam, Emperor Dục Đức reigned for only three days in July 1883 before being overthrown and dying later: see, K W Taylor, *A History of the Vietnamese* (2013) at p 474; see also Bradley Camp Davis, *Imperial Bandits* (2017) at p 106.

187. Notably, at the ICC, it is now recognised in the legal framework²⁶⁷ that the trial of a senior State functionary, such as a Head of State, may proceed under an arrangement that may excuse him from continuous presence at trial, in order to allow him relative room to perform important functions of State without undue interruption on account of the judicial proceedings. This is rightly left as a matter of discretion for a trial chamber, which will assess the propriety of such an excusal on a case-by-case basis taking all the particular circumstances of the case into account. What may be taken into account might, of course, include whether or not the official is enabled in office by a truly democratic mandate from the population, as opposed to a leader who came into office or is sustained in it by sheer repression (including in the manner of the very conducts that may have formed the subject matter of the judicial inquiry from which he claims immunity).

188. Ultimately, then, the rationale of non-disruption of political mandate does not have an overriding value, in the order of immunity of Heads of State from prosecution before an international court with proper jurisdiction over international crimes.

3. *Reconciling Relevant Interests of International Law*

189. There were three central features of the Westphalian model of international law that gave logical prominence to the idea of foreign sovereign immunity in the forum court. The first was the idea of sovereign equality of States and their absolute independence from one another. By virtue of this feature, no State was permitted to exercise dominion over another.²⁶⁸ The logic then became inescapable that the sovereign of one State was immune from the jurisdiction of another State. Indeed that logic was given especial force by the view of the Head of State as blended to the State itself, with the Head of State seen as the sovereign head that protruded from the sovereign body politic. According to that view, Louis XIV was merely giving voice to an image that he and his imperial peers had of themselves and of one another in his unblushing declaration of '*L'État c'est moi*.'²⁶⁹

²⁶⁷ See rule 134*quater* of the ICC Rules of Procedure and Evidence.

²⁶⁸ See L Oppenheim, *International Law*, vol 1 (Peace), 2nd edn (1912), at p 62.

²⁶⁹ Arthur Watts, 'The Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers' (1994) 247 III *Recueil des cours*, at p 35.

190. The second feature was the general view that States were the only subjects of international law,²⁷⁰ to the exclusion of human beings.²⁷¹ Hence, the manner in which one sovereign treated his or her subjects was a matter solely for that sovereign and that subject in their municipal order. International law could not intervene. That was also a logical incidence of the first feature: as it removed a justification for one sovereign to intervene into the affairs of another by the process of a political or legal judgement that can only entail exercise of jurisdiction by the intervening sovereign, in accordance with social, political or legal standards that might well have been seen as peculiar to only his or her own realm.

191. The next Westphalian feature was the absence of multilateral institutions that had mandate to exercise jurisdiction from outside the forum, in matters concerning States, according to generally agreed upon international legal standards, such as relate to protection of human rights and humanitarian norms. Given that absence, the first two features held all sway.

192. But, since the end of World War II, international law has, to all intents and purposes, evolved away from its Westphalian roots in relation to individuals. Regardless of the imperfections of that evolution, human beings now have recognised rights and duties that the human agents of States may no longer violate, without provoking questions of accountability on the international stage.²⁷² Quite naturally, it is the tendency to ask those questions that do in turn generate questions of immunity for the human agents of States whose conducts attract the questions.

²⁷⁰ As Oppenheim put it in the 1912 edition of his work: ‘Since the Law of Nations is a law between States only and exclusively, States only and exclusively are subjects of the Law of Nations’: L Oppenheim, *supra*, at p 362.

²⁷¹ Oppenheim had stressed that point as follows: ‘It must be specially mentioned that the character of a subject of the Law of Nations and of an International Person can be attributed neither to monarchs, diplomatic envoys, private individuals, or churches, not to chartered companies, nations, or races after the loss of their State (as, for instance, the Jews or the Poles), and organised wandering tribes’: *ibid*, at p 108. It is no stretch of hypothesis to say that it was the privations suffered by some of those excluded groups of individuals up until World War II, largely in consequence of such exclusion, that immediately triggered the sudden and rapid evolution in international law, thus promoting human beings into the ranks of the direct subjects of international law, following that war.

²⁷² See, generally Andrew Clapham, *Brierley’s Law of Nations*, 7th edn (2012), at pp 80-85. In this connection, it is deserving to recognise Professor Clapham’s pithy observation that the pre-occupation of commentators with ‘the rare and often sensational occasions on which [international law] is flagrantly broken’ has a mistaken tendency to lure attention away from the reality that ‘international law is normally observed ... and states generally find it convenient to observe the law’: see, *ibid*, at p 80.

193. Counsel of good sense will always recommend the need for sensible correlation of international law's answers to the difficult questions presented; such that accommodates all interests at stake. The correct answer must be one that strives to retain the original aim of international law, as seeking to ensure reasonably smooth relations between States, while at the same time according the necessary significance to the idea of human beings as also subjects of international law. In their joint separate opinion in the *Arrest Warrant* case, Judge Higgins, Judge Kooijmans and Judge Buergenthal had correctly set out the scope of the needed adjustment in the following words:

One of the challenges of present-day international law is to provide for stability of international relations and effective international intercourse while at the same time guaranteeing respect for human rights. The difficult task that international law today faces is to provide that stability in international relations by a means other than the impunity of those responsible for major human rights violations. This challenge is reflected in the present dispute and the Court should surely be engaged in this task, even as it fulfils its function of resolving a dispute that has arisen before it. But through choosing to look at half the story – immunity—it is not in a position to do so.²⁷³

194. In the nature of things, different judges may resolve the particular dispute differently even on the same facts. But what matters most is the wisdom of the counsel that 'through choosing to look at half the story' the judges would not be in a position to strike the right balance. Judges Higgins, Kooijmans and Buergenthal chided their fellow members of the bench for looking at 'immunity' alone as 'half the story', without adequately looking at 'jurisdiction' as the other half.²⁷⁴

195. Perhaps, more fundamentally, in a case that engages the question of immunity, the full view of the two halves may involve, on the one hand, the need for 'stability in international relations' in the light of the interests of the State the conduct of whose agents are in issue, and on the other hand, the need to ensure 'stability ... by a means

²⁷³ *Arrest Warrant Case, supra*, [Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal](#), at para 5.

²⁷⁴ In the view of Judges Higgins, Kooijmans and Buergenthal, the fuller picture required the Court to consider that 'it was not only desirable, but indeed necessary, that the Court should have stated its position on this issue of jurisdiction. The reasons are various. "Immunity" is the common shorthand phrase for "immunity from jurisdiction". If there is no jurisdiction *en principe*, then the question of an immunity from a jurisdiction which would otherwise exist simply does not arise. The Court, in passing over the question of jurisdiction, has given the impression that "immunity" is a free-standing topic of international law. It is not. "Immunity" and "jurisdiction" are inextricably linked. Whether there is "immunity" in any given instance will depend not only upon the status of Mr Yerodia but also upon what type of jurisdiction, and on what basis, the Belgian authorities were seeking to assert it': *ibid*, at para 3.

other than the impunity of those responsible for major human rights violations.’ It is, of course, that particular binary view of the full picture that is the inquiry that engages the Appeals Chamber in this case.

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196. That inquiry may require us to begin with considering that the matter of impunity—or immunity—at issue concerns violations of the most serious crimes known to international law. They are genocide, crimes against humanity, war crimes and the crime of aggression. The matter at issue does not concern whether a Head of State may enjoy immunity from any of the multitude of crimes in the average national criminal code: such as forgery, fraud, corruption,²⁷⁵ assault, or even murder. In the *Arrest Warrant* case, Judge Al-Khasawneh aptly set up the very nature of that fundamental matter in the following way:

A more fundamental question is whether high State officials are entitled to benefit from immunity even when they are accused of having committed *exceptionally grave crimes recognized as such by the international community*. In other words, should immunity become *de facto* impunity for criminal conduct as long as it was in pursuance of State policy?²⁷⁶

197. From the springboard of the exceptional gravity of the international crimes in question, it must be considered that there are existing strategies of international law that play a critical role in resolving the conflict presented in cases such as that now at bar. They include considerations of obligations *erga omnes* and norms that enjoy *jus cogens* status. We review them next.

4. *Considerations of Obligations Erga Omnes*

198. As the very nature of the dispute in this case makes so clear, the harder questions of international law come in the shape of claims of rights on the part of a subject of international law and the correlative obligations of another subject of

²⁷⁵ Notably, some important statesmen have urged conferring jurisdiction upon the ICC to try corruption cases, given the existence of an international Convention against Corruption. Their urge for an ICC jurisdiction proceeds from the premises that the incidence of corruption in terms of its human toll can in many cases be no less devastating to humanity than the incidence of crimes against humanity. But, even here, the jurisdiction if and when conferred on the ICC would not be for minor instances of corruption.

²⁷⁶ *Arrest Warrant* case, [Dissenting Opinion of Judge Al-Khasawneh](#), *supra*, at para 5, emphases added.

international law. As the original subjects of international law, States also are, in relation to one another, the principal subjects of international law in terms of rights and obligations. And such rights and obligations can be either bilateral or multilateral or both in orientation.

199. The concept of obligation *erga omnes* entails a formula for the attribution of an obligation as multilateral. It is indeed the plenary form of multilateral obligations possible. In the case of the *Prosecutor v Furundžija*, the ICTY Trial Chamber [before Judge Mumba (presiding), Judge Cassese and Judge May] explained the matter as follows, in the context of torture:

[T]he prohibition of torture imposes upon States obligations *erga omnes*, that is, obligations owed towards all the other members of the international community, each of which then has a correlative right. In addition, the violation of such an obligation simultaneously constitutes a breach of the correlative right of all members of the international community and gives rise to a claim for compliance accruing to each and every member, which then has the right to insist on fulfilment of the obligation or in any case to call for the breach to be discontinued.²⁷⁷

200. In the ILC's Fragmentation report, the concept is similarly defined as follows: 'A norm which is creative of obligations *erga omnes* is owed to the "international community as a whole" and all States—irrespective of their particular interest in the matter—are entitled to invoke State responsibility in case of breach.'²⁷⁸

201. It goes without saying that, according to the explanation offered in the second part of this definition, international institutions representing the 'international community as a whole' by virtue of mandate conferred by a given treaty, are entitled to invoke that responsibility that the obligor State owes to the whole world. Hence, if it is found that a duty to arrest a suspect is something that qualifies as an obligation *erga omnes*, by virtue of the kind of crime that engages that duty to arrest, the ICC would then be entitled to assert that right against the State that owes the duty to the whole world. Once more, the pronouncements of the ICTY Trial Chamber in *Furundžija* speak precisely to that point. As they put it:

Where there exist international bodies charged with impartially monitoring compliance with treaty provisions on torture, these bodies enjoy priority over individual States in establishing

²⁷⁷ *Prosecutor v Anto Furundžija* ([Judgment](#)), 10 December 1998, at para 151 [ICTY Trial Chamber].

²⁷⁸ International Law Commission, 'Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International law' (Report of the Study Group of the International Law Commission), 3 April 2006, Doc No A/CN.4/L.682, at para 380.

whether a certain State has taken all the necessary measures to prevent and punish torture and, if they have not, in calling upon that State to fulfil its international obligations. The existence of such international mechanisms makes it possible for compliance with international law to be ensured in a neutral and impartial manner.²⁷⁹

202. Although the ICTY Trial Chamber has sensibly invoked the rationale of neutrality and impartiality—no doubt uniformity of approach and expertise are further factors—for granting priority to an international body charged with impartial monitoring of compliance to a given international norm, it remains the case that the concept of obligation *erga omnes* is merely a strategy that gives the ‘international community as a whole’ the standing to assert a valid claim. The concept is not typically concerned with ranking claims in any order of priority or hierarchy. That particular task is more appropriately engaged by different strategies: such as by virtue of *jus cogens*, or as a function of article 103 of the UN Charter, among other methods. In that regard, there is much merit in the following observations of the ILC:

Obligations *erga omnes* are different from Article 103 of the United Nations Charter and *jus cogens*. Whereas the latter are distinguished by their normative power—their ability to override a conflicting norm—obligations *erga omnes* designate the scope of application of the relevant law, and the procedural consequences that follow from this. A norm which is creative of obligations *erga omnes* is owed to the “international community as a whole” and all States—irrespective of their particular interest in the matter—are entitled to invoke State responsibility in case of breach. The *erga omnes* nature of an obligation, however, indicates no clear superiority of that obligation over other obligations. Although in practice norms recognized as having an *erga omnes* validity set up undoubtedly important obligations, this importance does not translate into a hierarchical superiority similar to that of Article 103 and *jus cogens*.²⁸⁰

203. Indeed, the strongest value of obligation *erga omnes*, in terms of ‘the scope of application of the relevant law’ is to emphasise that even a legitimate obligation which one State owes to another in a bilateral relationship may not readily obscure or marginalise—let alone eclipse—an obligation which that State owes to the whole world. In the *Barcelona Traction* case, that proposition was stated with compelling clarity, in the following way:

When a State admits into its territory foreign investments or foreign nationals, whether natural or juristic persons, it is bound to extend to them the protection of the law and assumes obligations concerning the treatment to be afforded them. These obligations, however, are

²⁷⁹ *Prosecutor v Furundžija*, *supra*, at para 152.

²⁸⁰ International Law Commission, ‘Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International law’ (Report of the Study Group of the International Law Commission), *supra*, at para 380, emphasis added.

neither absolute nor unqualified. In particular, an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.²⁸¹

Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law (*Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, I.C.J. Reports 1951, p. 23); others are conferred by international instruments of a universal or quasi-universal character.²⁸²

Obligations the performance of which is the subject of diplomatic protection are not of the same category. [...]²⁸³

204. The direct value of the foregoing pronouncements in the context of the present case is to the effect that any arguable bilateral obligation that Jordan may owe Sudan—to respect any applicable immunity that international law may allow to Heads of State—may not readily displace any obligation that Jordan owes to the whole world as a matter of obligation *erga omnes*. Other methods of international law abound to resolve any conflict that arises. One such method is to consider whether any of the conflicting obligations directly or indirectly has the value of *jus cogens*.

5. Norms of *Jus Cogens*

205. It is recalled that a *jus cogens* norm is, as a peremptory norm, an international legal norm that enjoys the right of way in the event of a conflict with any other norm—regardless of its source—that is not also a *jus cogens* norm. In *Furundžija*, the ICTY Trial Chamber correctly described *jus cogens* as ‘a norm that enjoys a higher rank in the international hierarchy than treaty law and even “ordinary” customary rules.’²⁸⁴ But, it is necessary to stress that the hierarchy in question is not merely ceremonial. It has substantial consequences. In *Furundžija*, the ICTY Trial Chamber correctly indicated the foremost of such consequences as follows: ‘The most conspicuous consequence of this higher rank is that the principle at issue cannot be

²⁸¹ *Barcelona Traction, Light and Power Company, Limited* (Judgment) [1970] ICJ Reports, at p 32, para 33.

²⁸² *Ibid*, at para 34.

²⁸³ *Ibid*, at para 35.

²⁸⁴ *Prosecutor v Furundžija*, *supra*, at para 153.

derogated from by States through international treaties or local or special customs or even general customary rules not endowed with the same normative force.’²⁸⁵ Hence, in *Prosecutor v Kupreškić et al*, the ICTY Trial Chamber [before Judge Cassese (presiding), Judge May and Judge Mumba] described *jus cogens* as being ‘of a non-derogable and overriding character’.²⁸⁶

206. As a matter of legal doctrines, there is no generally agreed upon formula that qualifies a norm as *jus cogens*.²⁸⁷ Rather, *jus cogens* norms are established inductively, by virtue of ‘State practice and in the jurisprudence of international tribunals.’²⁸⁸

207. It has now been authoritatively settled that the proscriptions of genocide, crimes against humanity and war crimes enjoy the status of *jus cogens* norms. To that effect, Judge Cassese and his fellow members of the bench had observed as follows in the *Kupreškić* case: ‘most norms of international humanitarian law, in particular those prohibiting war crimes, crimes against humanity and genocide, are also peremptory norms of international law or *jus cogens*.’²⁸⁹

208. The ILC, for their part, have made consistently similar observations:

[V]arious tribunals, national and international, have affirmed the idea of peremptory norms in contexts not limited to the validity of treaties. Those peremptory norms that are clearly accepted and recognized include the prohibitions of aggression, genocide, slavery, racial discrimination, crimes against humanity and torture, and the right to self-determination.²⁹⁰

209. And speaking to known instances of the evidence of the agreement as to the *jus cogens* character of these prohibitions, the ILC observed as follows:

Among these prohibitions, it is generally agreed that the prohibition of aggression is to be regarded as peremptory. This is supported, for example, by the Commission’s commentary to what was to become article 53 [of the Convention on the Law of Treaties], uncontradicted statements by Governments in the course of the Vienna Conference on the Law of Treaties,

²⁸⁵ *Ibid.*

²⁸⁶ *Prosecutor v Kupreškić et al*, ([Judgment](#)), 14 January 2000, at para 520 [ICTY Trial Chamber].

²⁸⁷ International Law Commission, ‘Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International law’ (Report of the Study Group of the International Law Commission), *supra*, at para 375.

²⁸⁸ International Law Commission, ‘Report of the International Law Commission on the work of its eighteenth session’, *Yearbook* (1966) vol II, Part 2, at p 248.

²⁸⁹ *Prosecutor v Kupreškić et al*, *supra*, at para 520.

²⁹⁰ See International Law Commission, ‘Report of the International Law Commission on the work of its fifty-third session’, *Yearbook* (2001) vol II, Part 2, at p 85.

the submissions of both parties in the *Military and Paramilitary Activities in and against Nicaragua* case and the Court's own position in that case. There also seems to be widespread agreement with other examples listed in the Commission's commentary to article 53: *viz.* the prohibitions against slavery and the slave trade, genocide, and racial discrimination and apartheid. These practices have been prohibited in widely ratified international treaties and conventions admitting of no exception. There was general agreement among Governments as to the peremptory character of these prohibitions at the Vienna Conference. As to the peremptory character of the prohibition against genocide, this is supported by a number of decisions by national and international courts.²⁹¹

210. The ILC had explained their character as *jus cogens*, in the terms of 'substantive rules of conduct that prohibit what has come to be seen as intolerable because of the threat it presents to the survival of States and their peoples and the most basic human values.'²⁹²

6. *The Reasoning of the International Court of Justice on Jus Cogens and Violations of International Criminal Norms*

211. The need in this case to resolve the difficult onus upon a State in relation to the bilateral obligation (concerning Head of State immunity in mutual relations) contrasted with an obligation *erga omnes* upon the same State (to assist in the prevention and punishment of international crimes such as genocide, crimes against humanity and war crimes) makes it inevitable to contend with a certain pronouncement of the ICJ in relation to *jus cogens*.

212. Of particular interest is the reasoning of the Majority regarding *jus cogens* in the case concerning the *Jurisdictional Immunities of States*.²⁹³ The Majority rejected the argument that 'since the rule which accords one State immunity before the courts of another does not have the status of *jus cogens*, the rule of immunity must give way [to the *jus cogens* rules forming part of the law of armed conflict, that being the subject

²⁹¹ *Ibid*, at pp 112-113.

²⁹² *Ibid*, at p 112.

²⁹³ See [*Jurisdictional Immunities of States*](#) (*Germany v Italy: Greece Intervening*), at paras 92 *et seq.* It is not controversial that the ICJ would observe in the case concerning the *Jurisdictional Immunities of States* that the allegations in the *Arrest Warrant* case were of 'criminal violations of rules which undoubtedly possess the character of *jus cogens* ...': *ibid*, at para 95. The controversy lays rather with the retroactive attempt that the Majority made in *Jurisdictional Immunities of States* to induct the *Arrest Warrant* case into the *jus cogens* reasoning of the Majority in the *Jurisdictional Immunities of States*: *ibid* at para 95. The fact is that the Court was differently composed—in a very radical way, with Judge Koroma being the only judge common—in the two cases, and the judgment of the Court in the *Arrest Warrant* case does not suggest that the Court had *jus cogens* in mind in that particular case.

matter of the forum court's exercise of jurisdiction]'.²⁹⁴ As their primary reasoning in rejecting that argument, the Majority pronounced itself as follows:

This argument therefore depends upon the existence of a conflict between a rule, or rules, of *jus cogens*, and the rule of customary law which requires one State to accord immunity to another. In the opinion of the Court, however, no such conflict exists. Assuming for this purpose that the rules of the law of armed conflict which prohibit the murder of civilians in occupied territory, the deportation of civilian inhabitants to slave labour and the deportation of prisoners of war to slave labour are rules of *jus cogens*, there is no conflict between those rules and the rules on State immunity. The two sets of rules address different matters. The rules of State immunity are procedural in character and are confined to determining whether or not the courts of one State may exercise jurisdiction in respect of another State. They do not bear upon the question whether or not the conduct in respect of which the proceedings are brought was lawful or unlawful. That is why the application of the contemporary law of State immunity to proceedings concerning events which occurred in 1943-1945 does not infringe the principle that law should not be applied retrospectively to determine matters of legality and responsibility (as the Court has explained in paragraph 58 ...). For the same reason, recognizing the immunity of a foreign State in accordance with customary international law does not amount to recognizing as lawful a situation created by the breach of a *jus cogens* rule, or rendering aid and assistance in maintaining that situation, and so cannot contravene the principle in Article 41 of the International Law Commission's Articles on State Responsibility.²⁹⁵

213. With respect, there is a need to handle that reasoning with care. For, it carries an appreciable risk of confusion in relation to the exercise of jurisdiction by the ICC, due to the failure to limit the scope of application of that reasoning strictly to the type of case then before the ICJ. That is to say, the case before the ICJ involved a dispute between two States as a matter of their horizontal relationship. This is in the context that the courts of Italy had attempted to exercise jurisdiction over Germany as a State. It might then have been sufficient for the ICJ Majority to limit itself to the reasoning employed in the *Armed Activities in the Congo* case, to the effect that a *jus cogens* rule does not confer upon the Court jurisdiction which it would not otherwise possess.²⁹⁶ That, indeed, is an accurate statement of international law. In those circumstances, the controlling principle was (as seen earlier) always conveyed in the maxim *par in parem non habet imperium*. That is the principle that deprives one State of jurisdiction over another. That might have been a serviceable and defensible basis on which the Majority might have left the matter for purposes of the *Jurisdictional*

²⁹⁴ See [Jurisdictional Immunities of States](#), *supra*, at paras 92.

²⁹⁵ *Ibid.*, at paras 93.

²⁹⁶ See *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v Rwanda)*, (Jurisdiction and Admissibility) (Judgment) [2006] ICJ Reports at paras 64 and 125.

Immunities of States case. So, too, might the Majority have defensibly rested its reasoning on considerations of inter-temporal law, in the sense that there was no clarity that violations in the case had engaged a rule of *jus cogens* during World War II when those violations occurred [although that particular reasoning did not impress Judge Cançado Trindade.²⁹⁷] But, unfortunately, the Majority employed broader reasoning that did not persuade everyone—as the dissenting opinions (of Judge Cançado Trindade and Judge Yusuf) adequately show.

214. For purposes of the case now before the Appeals Chamber, it is necessary to engage the Majority's apparent effort at distinction, by seeking to focus on the nature and purpose of the different norms said to be in conflict. It is difficult to accept that attempt at distinction, to the extent that it carries a risk of general application beyond the context of horizontal relationship between States. There are many reasons for that difficulty. Notably, related aspects of normative distinctions on immunity are discussed in the next section of this opinion. For present purposes, however, it is possible to see the difficulty, through the analogy of a rule that gives cyclists the right of way over motorists—perhaps out of the need to protect human life (and the added benefit to the environment and improvements in general lifestyle through a policy that discourages the use of private motor cars). In the event of a legal dispute arising from a collision between a bicycle and a motor car, the judge may not readily avoid a finding of a conflict in the right of way, merely by focusing on the respective nature and purpose of a bicycle compared to a motor car, as different modes of transport. With respect, that analogy is akin to reasoning that the Majority employed in paragraph 93 of the *Jurisdictional Immunities of States* case, when they insisted that immunity from the legal process was not in conflict with the *jus cogens* norm that requires prevention and punishment of war crimes, because the different norms engaged address different concerns.

215. For purposes of the exercise of *penal* jurisdiction by an international tribunal such as the ICC, being an international mechanism of last resort the objective of which is to enable *punishment* of conducts of *individuals* who violate *jus cogens* norms, the issue is quite starkly and simply this. Would the rule of immunity, when

²⁹⁷ See *Jurisdictional Immunities of States*, [Dissenting Opinion of Judge Cançado Trindade](#), at para 16.

given effect, prevent or obstruct the contemplated *punishment* in a given case before the ICC—especially when there is no national court able or willing otherwise to ensure such punishment? If the answer is yes, then there is a conflict of norms between the *jus cogens* norm and the immunity norm. That being the case, the lesser norm must give way. In this specific regard of individual criminal responsibility, the more persuasive reasoning in the *Jurisdictional Immunities of States* case was that registered by Judge Cançado Trindade with much sympathy in the following words:

[W]hat jeopardizes or destabilizes the international legal order are the international crimes and not individual suits for reparation in the search for justice. In my perception, what troubles the international legal order, are the cover-up of such international crimes accompanied by the impunity of the perpetrators, and not the victims' search for justice. When a State pursues a criminal policy of murdering segments of its own population, and of the population of other States, it cannot, later on, place itself behind the shield of sovereign immunities, as these latter were never conceived for that purpose. Grave breaches of human rights and of international humanitarian law, amounting to international crimes, are not at all acts *jure imperii*. They are anti-juridical acts, they are breaches of *jus cogens*, that cannot simply be removed or thrown into oblivion by reliance on State immunity. This would block the access to justice, and impose impunity. It is, in fact, the opposite that should take place: breaches of *jus cogens* bring about the removal of claims of State immunity, so that justice can be done.²⁹⁸

216. Judge Cançado Trindade's reasoning finds close intellectual affinity with the impeccable logic which Lord Millet had deployed earlier in *Pinochet (No 3)* in the following words: 'International law cannot be supposed to have established a crime having the character of a *jus cogens* and at the same time to have provided an immunity which is co-extensive with the obligation it seeks to impose.'²⁹⁹

217. Notably, in another case, the ICJ itself expressed a much similar concern against stylised interpretations that could result in impunity for genocide—the prevention of which is generally recognised as a *jus cogens* norm. In the case concerning the *Application of the Convention on the Prevention and the Punishment of Genocide (Judgment)*, the Court cautioned against any interpretation that 'could entail that there would be no legal recourse available under the Convention in some readily conceivable circumstances: genocide has allegedly been committed within a State by its leaders but they have not been brought to trial because, for instance, they are still

²⁹⁸ See *Jurisdictional Immunities of States*, [Dissenting Opinion of Judge Cançado Trindade](#), at para 129. See also [Dissenting Opinion of Judge Yusuf](#), at paras 28–30.

²⁹⁹ See *Pinochet (No 3)*, *supra*, at p 278.

very much in control of the powers of the State including the police, prosecution services and the courts and there is no international penal tribunal able to exercise jurisdiction over the alleged crimes ...’.³⁰⁰

218. In conclusion, it is necessary to emphasise this. The value to be accorded to the reasoning of the ICJ Majority in *Jurisdictional Immunities of States* on the matter of *jus cogens* (as discussed above) must be limited to the type of case there under adjudication—i.e. cases where the courts of one State attempt to exercise jurisdiction over another State. But for purposes of jurisdiction of the ICC—which has a different orientation—in relation to the crimes proscribed in the Rome Statute, we do not accept that immunity (from the jurisdiction of the ICC) is not in conflict with *jus cogens* norms that largely underwrite the international obligations to prevent and punish the violations proscribed in the Rome Statute.

7. *A Look at certain other Distinctions*

(a) **Substantive Jurisdiction and Procedural Immunity**

219. A further difficulty arising from aspects of immunity literature and jurisprudence concerns the view that immunity is ‘essentially procedural in nature.’³⁰¹ An oft-cited pronouncement in that regard is the following reasoning stated in paragraph 60 of the *Arrest Warrant* case:

The Court emphasizes, however, that the immunity from jurisdiction enjoyed by incumbent Ministers for Foreign Affairs does not mean that they enjoy impunity in respect of any crimes they might have committed, irrespective of their gravity. Immunity from criminal jurisdiction and individual criminal responsibility are quite separate concepts. While jurisdictional immunity is procedural in nature, criminal responsibility is a question of substantive law. Jurisdictional immunity may well bar prosecution for a certain period or for certain offences; it cannot exonerate the person to whom it applies from all criminal responsibility.³⁰²

220. In an apparent effort to relieve the despondency of that distinction, the following is said immediately in paragraph 61:

Accordingly, the immunities enjoyed under international law by an incumbent or former Minister for Foreign Affairs do not represent a bar to criminal prosecution in certain

³⁰⁰ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Judgment) [2007] ICJ Reports 43, at para 182.

³⁰¹ See *Jurisdictional Immunities of States*, at p 99, para 58.

³⁰² See *Arrest Warrant* case, *supra*, at para 60.

circumstances. First, such persons enjoy no criminal immunity under international law in their own countries, and may thus be tried by those countries' courts in accordance with the relevant rules of domestic law. Secondly, they will cease to enjoy immunity from foreign jurisdiction if the State which they represent or have represented decides to waive that immunity. Thirdly, after a person ceases to hold the office of Minister for Foreign Affairs, he or she will no longer enjoy all of the immunities accorded by international law in other States. Provided that it has jurisdiction under international law, a court of one State may try a former Minister for Foreign Affairs of another State in respect of acts committed prior or subsequent to his or her period of office, as well as in respect of acts committed during that period of office in a private capacity. Fourthly, an incumbent or former Minister for Foreign Affairs may be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction. Examples include the International Criminal Tribunal for the former Yugoslavia, and the International Criminal Tribunal for Rwanda, established pursuant to Security Council resolutions under Chapter VII of the United Nations Charter, and the future International Criminal Court created by the 1998 Rome Convention. The latter's Statute expressly provides, in Article 27, paragraph 2, that '[i]mmunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.'³⁰³

221. Unfortunately, the fundamental import of the proposition was not fully explained either in the *Arrest Warrant* case or in the *Jurisdictional Immunities* case. Notably, the 'substantive' versus the 'procedural' aspects of immunity have been explained as follows in the context of the American practice: 'The substantive aspect concerns whether immunity should be applied absolutely in favor of all foreign sovereigns or whether the privilege should be accorded only in certain limited circumstances. The procedural aspect involves ... the manner in which the claim is presented to the court.'³⁰⁴

222. According to the US practice, there are two ways in which a claim of foreign sovereign immunity may be presented to the court, as a matter of procedure. It may come to the court by way of a 'suggestion' from the Executive Branch on behalf of the foreign sovereign, or the foreign sovereign may appear without prejudice and assert the claim directly. As explained by the American commentator quoted earlier on the subject:

It should be understood that a court which grants an immunity claim has initial jurisdiction over the controversy; when the defense is recognized the court is said to have relinquished that jurisdiction. The litigant may present a claim of immunity in either of two ways: the foreign sovereign may appear as a claimant and present the issue directly to the court, or the sovereign may request that the United States Department of State file a

³⁰³ *Ibid.*, at para 61.

³⁰⁴ James W Reid, 'Is the Current Disposition of the Doctrine of Sovereign Immunity in the United States Appropriate in Light of Prevailing Governmental Policy?' (1970) 1 *Ga J Int'l & Comp L* 133, at p 134.

suggestion of immunity with the court, or it may do both. The courts accord the latter suggestion a conclusive effect, under the rationale that the judiciary should not render a decision which could prevent this executive branch from carrying out its foreign affairs duties. When a sovereign presents a claim directly in court, a determination is rendered taking into account past decisions with similar factual situations.³⁰⁵

223. If the foregoing explanation of the ‘procedural’ aspect of jurisdiction is exhaustive of the meaning of the idea as it was contemplated in the *Arrest Warrant* case, then the proposition would have been uncontroversial. For, that only gives the proposition a readily appreciable value—of not hindering jurisdiction—in the circumstance in which a court of law deems it appropriate to proceed in earnest with the trial of the person on behalf of whom immunity is claimed. Such was the sense of the proposition in the following reasoning of the Versailles Peace Conference Commission on Responsibility on the Authors of the War: ‘But this privilege, where it is recognized, is one of *practical expedience* in municipal law, and it is not fundamental.’³⁰⁶

224. Beyond such limited value, however, the proposition that immunity is only ‘procedural’ becomes more difficult to accept, if the aim is to afford a normative justification (rather than a ‘practical expedience’) to sustain the plea of immunity in particular cases. First, the proposition in that normative sense has not found favour with some eminent jurists, who persuasively view it as a technical contrivance that hinders—rather than serves—the ultimate ends of justice. That criticism was made in *Maxwell v Murphy*, when Chief Justice Dixon of the High Court of Australia derided the proposition in the terms of a distinction ‘which in reality must operate to impair or destroy rights of substance.’³⁰⁷ Similarly, in *Tolofson v Jensen*, Justice Gerard LaForest of the Supreme Court of Canada disapproved of a similar tendency to cling to the view of statute of limitations as ‘procedural.’ As a corrective, he approved of the tendency of Canadian judiciary to erode the technical distinction between ‘substance’ and ‘procedure’, alternatively referred to respectively as right and remedy, with the view to doing justice. As Justice LaForest put it:

³⁰⁵ Reid, *supra*, at p 176.

³⁰⁶ See Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, Report Presented to the Preliminary Peace Conference, (1920) 14 AJIL 95, at p 116, emphasis added.

³⁰⁷ *Maxwell v Murphy* [1957] 96 CLR 261 at p 267 [High Court of Australia].

So far as the technical distinction between right and remedy, Canadian courts have been chipping away at it for some time on the basis of relevant policy considerations. I think this Court should continue the trend. It seems to be particularly appropriate to do so in the conflict of laws field where, as I stated earlier, the purpose of substantive/procedural classification is to determine which rules will make the machinery of the forum court run smoothly as distinguished from those determinative of the rights of both parties.³⁰⁸

225. Indeed, Dixon and LaForest are not alone in their distrust of this distinction. Notably, on the panel of the *Arrest Warrant* case, Judge Al-Khasawneh directly reproached the distinction as ‘artificially drawn’ to circumvent the ‘morally embarrassing issue’ of whether immunity would ‘become *de facto* impunity for criminal conduct’ in the form of ‘exceptionally grave crimes recognized as such by the international community’. According to him:

A more fundamental question is whether high State officials are entitled to benefit from immunity even when they are accused of having committed exceptionally grave crimes recognized as such by the international community. In other words, should immunity become *de facto* impunity for criminal conduct as long as it was in pursuance of State policy? The Judgment sought to circumvent this morally embarrassing issue by recourse to an existing but artificially drawn distinction between immunity as a substantive defence on the one hand and immunity as a procedural defence on the other. The artificiality of this distinction can be gleaned from the ILC commentary to Article 7 of the Draft Code of Crimes against the Peace and Security of Mankind, which States: “The absence of any procedural immunity with respect to prosecution or punishment in appropriate judicial proceedings”—and it should not be forgotten that the draft was intended to apply to national or international courts—“is an essential corollary of the absence of any substantive immunity or defence. It would be paradoxical to prevent an individual from invoking his official position to avoid responsibility for a crime only to permit him to invoke this same consideration to avoid the consequences of this responsibility.”³⁰⁹

226. Judge Al-Khasawneh was equally unimpressed by the relief reasoning that the Majority had deployed in paragraph 61 of the Court’s judgment. He described it as ‘an attempt at proving that immunity and impunity are not synonymous.’³¹⁰ Notably, Judges Higgins, Kooijmans and Buergenthal had equally registered a ‘less than sanguine’ feeling about the reasoning in paragraph 61.³¹¹

³⁰⁸ *Tolofson v Jensen* [1994] 3 SCR 1022, 1994 Can LII 44 at pp 57-58 [Supreme Court of Canada].

³⁰⁹ See the *Arrest Warrant* case, [Dissenting Opinion of Judge Al-Khasawneh](#), at para 5. See various reports of International Law Commission reflecting similar concerns, including the ILC commentaries 6-8 to article 1 of Draft Articles on Immunity of State Officials from foreign criminal jurisdiction, Report of sixty-fifth session (2013), Doc No A/68/10, at pp 54-55. See also International Law Commission, ‘Report of the International Law Commission on the work of its sixty-ninth session (2017)’, Doc No A/72/10, at paras 114 and 115.

³¹⁰ See *Arrest Warrant* case, [Dissenting Opinion of Judge Al-Khasawneh](#), at para 6.

³¹¹ See *Arrest Warrant* case, [Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal](#), at para 78.

227. One apparent danger with the proposition that immunity is merely ‘procedural’ and not ‘substantive’ is that the simplicity of its statement can obscure the possibility that immunity does have a real potential to defeat liability—quite substantively, really. Some members of the ILC rightly recognised the dilemma, in the following observations:

A number of members asserted that there was a strong link between immunity and impunity for international crimes. It was pointed out that, if no alternative forum or jurisdiction for prosecution of international crimes was available, the procedural barrier of immunity in domestic courts would entail substantive effects. Some members emphasized that substantive justice should not be the victim of procedural justice, particularly in the case of violations of peremptory norms of international law (*jus cogens*). Such members cautioned that an exclusively procedural approach to immunity would have a negative impact on the development of individual responsibility in international law.³¹²

It was noted that the International Criminal Court, the most obvious forum for the prosecution of State officials, did not have the capacity or the resources to prosecute all alleged perpetrators of international crimes. As the Court operated on the basis of complementarity, those members maintained that domestic courts should remain the principal forums for combating impunity. It was also noted that the responsibility of a State for an act did not negate the individual responsibility of an official and should not stand in the way of individual prosecutions.³¹³

228. Perhaps, Judge Koroma’s succinct distillation of the ‘substantive’ versus ‘procedural’ distinction down to its bare essentials in the *Arrest Warrant* case may also show its difficulties clearly, even as he reasoned to support the Majority. As he put it: ‘It is not ... that immunity represents freedom from *legal liability* as such, but rather that it represents exemption from *legal process*.’³¹⁴

229. The difficulty, however, is that criminal law, possibly more than any other area of the law, reveals the particular vulnerabilities of this view. In criminal law, ‘legal liability’ means culpability. But, the presumption of innocence forbids the finding of culpability—hence no ‘legal liability’—without the ‘legal process’ of a trial. Hence, ‘exemption from legal process’ effectively ‘represents freedom from legal liability’ for the time being. And, the longer the suspect enjoys such an ‘exemption from legal process’ the longer he enjoys ‘freedom from legal liability.’ And the awkwardness of a rule of immunity that is sustained merely on the basis of the distinction that

³¹² International Law Commission, ‘Report of the International Law Commission on the work of its sixty-ninth session (2017)’, Doc No A/72/10, at para 114.

³¹³ *Ibid*, at para 115.

³¹⁴ See *Arrest Warrant* case, [Separate Opinion of Judge Koroma](#), at para 5, emphasis added.

immunity is merely ‘procedural’ is particularly exposed in relation to a regal Head of State or President ‘for life’; who by definition enjoys such exemption from legal process (and the resulting freedom from legal liability)—‘for life’.

230. Indeed, in every other respect, one must also consider here the well-known maxim that ‘justice delayed is justice denied.’ The maxim is no mere mindless mantra in any scenario where administration of justice is deferred long enough on grounds of immunity; with the consequence that evidence in support of prosecution is degraded, compromised or lost—or witnesses, complainants or suspects die—all due to passage of time. Worse still is the scenario where the world is made to standby and look on helplessly, while a regime in power commits genocide or other crimes against humanity (as has happened many times in human history) behind a technical legal shield of immunity; when the active assertion and exercise of jurisdiction without immunity might have served a tangible value in repressing or inhibiting the violations. These concerns remain unresolved by the simple proposition that immunity is merely procedural and not substantive. Second, looking past the apparent circularity of the proposition—when stated in the terms that ‘the immunity from jurisdiction enjoyed by incumbent [high-ranking officials] does not mean that they enjoy impunity in respect of any crimes they might have committed, irrespective of their gravity’³¹⁵—there may well remain a definitional difficulty with immunity (that makes the proposition that immunity is merely ‘procedural’ and not ‘substantive’ quite difficult to follow) as a practical matter. This is to the extent that immunity means ‘exemption from ... jurisdiction, obligation or duty’.³¹⁶ And, as the UN Secretariat quite rightly observed:

If jurisdiction is concerned with the exercise by a State of its competence to prescribe, adjudicate or enforce laws, the concept of immunity seems to seek to achieve a reverse outcome, namely the avoidance of the exercise of jurisdiction and a refusal to satisfy an otherwise legally sound and enforceable claim in a proper jurisdiction. [...]

Immunity acts as a barrier or an impediment to the exercise by a State of its jurisdiction, particularly in respect of adjudicatory and enforcement jurisdiction. [...]³¹⁷

³¹⁵ See [Arrest Warrant](#) case, at para 60.

³¹⁶ See the *Shorter Oxford English Dictionary*, emphasis added.

³¹⁷ United Nations, General Assembly, International Law Commission, ‘Immunity of State officials from foreign criminal jurisdiction’ (Memorandum by the Secretariat), *supra*, at paras 14 and 15.

231. If exemption from—or impediment to—jurisdiction is the effect of immunity, it becomes largely academic to dwell on the question whether immunity is merely ‘procedural’ or truly ‘substantive,’ in respect of a decision the practical effect of which is to validate that exemption or impediment in a given case. Similarly troubled is the expenditure of effort asserting any theory the aim of which is to suggest that immunity may be upheld in a manner that does not really amount to a bar to the exercise of jurisdiction; when the practical effect of that ‘procedural’ exercise is in fact to bar the *substantive* exercise of jurisdiction for as long as that *procedural* exercise endures. Third, for all the catalogue of circumstances that the Majority outlined in paragraph 61 of the *Arrest Warrant* case, as when immunities ‘do not represent a bar to criminal prosecution in certain circumstances,’ the ultimate question must remain whether or not there is meaningful accountability when contemporary customary international law—as it has developed since World War II—insists in the manner of Nuremberg Principle III that there must be accountability for international crimes that shock the conscience of humanity, regardless of the high office (and specifically including the office of Head of State) occupied by the suspect.

232. But, even accepting the validity of the proposition that immunity is merely ‘procedural’, as stated by the Majority in the *Arrest Warrant* case and reiterated by the Majority in the *Jurisdictional Immunities of States* case, the proposition remains only a judicial opinion. That is to say, it is only a ‘subsidiary means for the determination of rules of law’—within the meaning of article 38(1)(d) of the ICJ Statute. Confronted, then, with the actual text of a treaty that is applicable in a given case, the proposition must then yield to the dictates of the particular text of the treaty in question. Hence, the proposition cannot obstruct the effect of a provision such as article 27(2) of the Rome Statute couched in the terms that ‘[i]mmunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, *shall not bar* the Court from exercising its jurisdiction over such a person.’ [Emphasis added.] It is thus clear that the purpose of the plea of immunity is precisely to ‘bar’ the Court from exercising jurisdiction in a particular case, regardless of the characterisation of immunity as ‘procedural’ or ‘substantive.’ But the effect of recalling that the judicial characterisation of the nature of immunity as only a ‘subsidiary’ means, for the determination of rules of international law, that where the actual text of a treaty is to the effect that a plea of immunity ‘shall not bar

the Court from exercising its jurisdiction over ... a person', as article 27(2) of the Rome Statute provides, then the provision must be interpreted and applied to have that effect as a matter of *substance*.

233. It is instructive to note that it was explicitly accepted in the *Arrest Warrant* case that article 27(2) of the Rome Statute is a clear example of those instances when the assertion of immunity 'shall not bar' the exercise of jurisdiction. Nevertheless, that particular concession in the *Arrest Warrant* case does not insulate from general scrutiny in other respects the proposition that immunity is merely 'procedural'.

234. Nor, indeed, is such scrutiny avoided by virtue of the other circumstances catalogued in paragraph 61 of the *Arrest Warrant* case as when 'immunities ... do not represent a bar to criminal prosecution ...'. For instance, the first two such circumstances (discussed in validation of the theory that immunity is merely 'procedural') are these:

First, such persons enjoy no criminal immunity under international law in their own countries, and may thus be tried by those countries' courts in accordance with the relevant rules of domestic law. Secondly, they will cease to enjoy immunity from foreign jurisdiction if the State which they represent or have represented decides to waive that immunity. Thirdly, after a person ceases to hold the office of Minister for Foreign Affairs, he or she will no longer enjoy all of the immunities accorded by international law in other States.³¹⁸

235. But these reasons could not validate a view of immunity the effect of which would prevent the present exercise of jurisdiction by an international criminal court that is willing and ready to do so according to its statute. The first hypothesis (that the culprit may be tried by his own country) is unconvincing, because members of oppressive regimes are, for various reasons, seldom prosecuted by their own national criminal justice systems even after their reigns, let alone while in office (considering that most Heads of State enjoy immunity *de facto* or *de jure* in their own national forums).

236. The second hypothesis (that international law may rely upon the official's State of nationality to waive his immunity) is just as unconvincing, especially as regards Heads of State. For, States rarely waive immunity of their officials, especially when they or their associates are in control of the government. Notably, in most cases, the

³¹⁸ See [Arrest Warrant](#) Case at p 25, para 61.

ultimate prerogative on matters of foreign affairs rests with the Head of State. Effectiveness of international law cannot then depend, in any respect, on the prospect of the Head of State waiving his own immunity.

237. The third hypothesis (that the beneficiary would no longer enjoy immunity in international law once out of office) fares no better as a convincing reason to accord initial immunity to an official for alleged violation of international norms. For one thing, the hypothesis does not account for the situation in which the official remains in office for a very long time; with an assurance of non-prosecution at home, rather than leave office and face prosecution outside his country. But, even in most cases when a former official has vacated office, foreign jurisdictions have not shown great enthusiasm to prosecute retired Heads of State for violations they are alleged to have committed while in office. Even the prosecution of Hissène Habré in Senegal, after a long and protracted exertion of efforts by the African Union and the international community,³¹⁹ is a rather rare exception that demonstrates the weakness of the hypothesis under consideration: it does not prove its strength.

238. All this is to say that there is much sympathy with the caution registered by the UN Secretariat, to the effect that ‘the formalism in this dichotomy [‘procedural’ versus ‘substantive’ immunity] tends to obscure the nature of the dynamic relationship that seems to exist’ between that construct of aspects of immunity.³²⁰

(b) Immunities *Ratione Materiae* and *Ratione Personae*

239. In addition to the distinction between ‘substantive’ and ‘procedural’ aspects of immunity, discussions of immunity also often engage a tendency to make yet another kind of distinction in the literature and jurisprudence: that being the distinction between immunity *ratione materiae* and immunity *ratione personae*.

240. Immunity *ratione materiae* is said to attach to the conduct of State officials in the discharge of the essential matter of public functions (*acta jure imperii*); as

³¹⁹ See Human Rights Watch, ‘The Case of Hissène Habré before the Extraordinary African Chambers in Senegal: Questions and Answers’, 3 May 2016: available at <www.hrw.org/news/2016/05/03/qa-case-hissene-habre-extraordinary-african-chambers-senegal>

³²⁰ See United Nations, General Assembly, International Law Commission, ‘Immunity of State officials from foreign criminal jurisdiction’ (Memorandum by the Secretariat), *supra*, at para 68.

opposed to conducts not so oriented (*acta jure gestionis*), such as those involving trade and commerce or those of a purely private nature. Immunity *ratione materiae* is derived from the act of State doctrine. As such, the immunity effectively means non-justiciability of the conduct as a matter of individual responsibility of the official—even when the incumbent is no longer in office. That manner of immunity covers a broad range of state functionaries. Immunity *ratione personae*, on the other hand, covers a more limited pool of officials at the tip of the pyramid of political power. It is immunity that is based on status of the individual, usually Heads of State and some senior State officials, and subsists only while the beneficiary is in office.

241. But, whatever bearing this dichotomy may have in the debate of immunity between States, it must be handled with extreme caution in the realms of the jurisdiction of an international criminal court: lest it should become one of those tedious distinctions that produce much injustice. In other words, it is important to ensure, at all times, that this dichotomy does not defeat both the juridical and functional purposes of accountability for crimes under international law. For one thing, the rejection of immunity *ratione materiae* for crimes under international law, on grounds that they are not cognisable acts of State, loses its juridical value if the same official is allowed to plead immunity *ratione personae* for precisely the same conduct. The point was made earlier in other words. Here, it is to be considered that even immunity *ratione personae* springs from the fountain of State sovereignty.³²¹ But, if the sovereignty of the State entitles no one to commit international law crimes in the name of the State, it becomes difficult legally to justify how the sovereignty of the State could supply immunity to anyone who commits the same crimes, on grounds that such immunity results from status as State official. The rational dissonance is made even worse, if, as is often the case, the international law crimes in question were against the State concerned, in the sense that they may be acts of genocide or crimes against humanity that a leader selfishly committed against the population of the same State, in order that he may attain or sustain political power. The sensible logic of

³²¹ As the U.S. Supreme Court quite rightly observed, immunity from suit ‘is a fundamental aspect of the sovereignty ...’: *Alden v Maine*, 527 US 706 at p 713 (1999) [US Supreme Court].

Alexander Hamilton (though speaking to nullity of unconstitutional legislation) also speaks to this dissonance, as seen earlier.³²²

242. Vattel had earlier expressed similar views, in his observation that ‘the essential end of civil society’ is ‘to labour in concert for the common happiness of all.’³²³ Elaborating the point from the perspective of the Head of State as merely the fiduciary holder of sovereignty of his nation, Vattel wrote as follows:

It is evident that men form a political society, and submit to laws, solely for their own advantage and safety. The sovereign authority is then established only for the common good of all the citizens; and it would be absurd to think that it could change its nature on passing into the hands of a senate or a monarch. Flattery therefore cannot, without rendering itself equally ridiculous and odious, deny that the sovereign is only established for the safety and advantage of society.

A good prince, a wise conductor of society, ought to have his mind impressed with this great truth, that the sovereign power is solely intrusted to him for the safety of the state, and the happiness of all the people—that his is not permitted to consider himself as the principal object in the administration of affairs, to seek his own satisfaction, or his private advantage—but that he ought to direct all his view, all his steps, to the greatest advantage of the state and people who have submitted to him.* ... But in most kingdoms, a criminal flattery has long since caused these maxims to be forgotten. A crowd of servile courtiers easily persuade a proud monarch that the nation was made for him, and not he for the nation. He soon considers the kingdom as a patrimony that is his own property, and his people a herd of cattle from which he is to derive his wealth, and he may dispose of to answer his own views, and gratify his passions. Hence those fatal wars undertaken by ambition, restlessness, hatred and pride ...

³²⁴

243. It is wholly undesirable for international law to serve, in effect, as an instrument of the ‘criminal flattery’ that Vattel reproves with so much passion—as causing to be forgotten the maxims which hold that the ultimate end of sovereign authority is to serve the common good of all the citizens, and not to indulge the whims and selfish

³²² To recall, he put it this way: ‘There is no position which depends on clearer principles, than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. No legislative act, therefore, contrary to the Constitution, can be valid. To deny this, would be to affirm, that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves; that men acting by virtue of powers, may do not only what their powers do not authorize, but what they forbid’: Alexander Hamilton, *Federalist Paper No 78*.

³²³ Emer de Vattel, *The Law of Nations* (1758) [edited by Kapossy and Whatmore, 2008], at p 105, emphasis added.

* The last words of Louis VI ... to his son Louis VII ... were—‘Remember, my son, that royalty is but a public employment of which you must render a rigorous account to him who is the sole disposer of crowns and sceptres.’

³²⁴ *Ibid*, at pp 97-98, emphasis added.

desires of the Head of State for the time being. Yet, that refracted view of sovereignty is seriously implicated in any conception of sovereign immunity—notably expressed in the terminology of *ratione personae*—the effect of which is to protect a serving Head of State from accountability, even when he undertakes to commit shocking international crimes (such as genocide or crimes against humanity) against his own people.³²⁵

244. Another difficulty that the dichotomy of *ratione materiae* and *ratione personae* presents is its embarrassment to the juridical purpose of accountability. This is in the sense that even those who wield political power are to yield to the supremacy of international law—as administered through an international tribunal authorised to exercise jurisdiction on the matter. Both Sir Ernest Pollock QC (a UK representative at Versailles and the future Viscount Hanworth MR)³²⁶ and Justice Robert Jackson (US representative at the London Conference) articulated that purpose very clearly for both the Treaty of Versailles (article 227) and the Charter of the Nuremberg Tribunal (article 7). The robust views of Jackson, seen earlier, adequately captured the common position.³²⁷

245. A dichotomy, then, in the conception of immunity—the effect of which is that immunity *ratione personae* may bar an international criminal tribunal from immediate exercise of jurisdiction over a Head of State while he is in power—has no other practical interpretation than to degrade the principle of accountability in international

³²⁵ For Vattel, it is grave enough that he ‘lavishes the blood of his most faithful subjects, and exposes his people to the calamities of war, when he has it in his power to maintain them in the enjoyment of an honourable and salutary peace’: *ibid*, at p 482.

³²⁶ In a meeting of ‘Sub-Commission No 3 of the Commission on Responsibility for the authors of the War’, Pollock remain unwavering in the proposition that international law must hold to account even Presidents and Kings who commit war crimes. See ‘Proceedings of a Meeting of “Sub-Commission No 3” of the Commission on the Responsibilities for the War, etc’’, held on 8 March 1919 at 11:00 am. See also Schabas, *The Trial of the Kaiser* (2018), at pp 51, 162, 165-170, especially at p 170.

³²⁷ As he put it in his June 1945 report to President Truman: ‘Nor should such a defense be recognized as the obsolete doctrine that a head of state is immune from legal liability. There is more than a suspicion that this idea is a relic of the doctrine of the divine right of kings. It is, in any event, inconsistent with the position we take toward our own officials, who are frequently brought to court at the suit of citizens who allege their rights to have been invaded. We do not accept the paradox that legal responsibility should be the least where power is the greatest. We stand on the principle of responsible government declared some three centuries ago to King James by Lord Chief Justice Coke, who proclaimed that even a King is still “under God and the law”’: see ‘Report to the President by Mr Justice Jackson, June 6, 1945’ in US Department of State, Report of Robert H Jackson, United States Representative to the International Conference on Military Trials (released February 1949) 42, at pp 46-47.

law (according to Nuremberg Principle III) down to the value of a yoke upon only people who have no power. It is indeed so, for, when Heads of State leave office, they generally join the rank of powerless people (possibly to be treated with even greater indignity); except in those instances where they may have managed to insure their own continued protection against accountability by a careful succession plan. It would be an unfortunate acceptance of international law, if its conscious construct is intended to encumber only persons in the rank of the powerless.

246. But more than that, to protect an incumbent Head of State from the exactions of accountability for crimes under international law—through an applied notion of immunity *ratione personae*—is functionally detrimental to the purpose of the accountability norm. This is in view of the potential that such Heads of State may indeed feel legally protected—rather than hindered—in their perpetration of the violations; where such violations hold the advantage of perpetuation in office for as long as is possible and necessary to diminish or avoid the prospect of future accountability.

247. Perhaps, an unobstructed view of the incompatibility between the idea of immunity *ratione personae* (or personal immunity) and that of individual criminal responsibility emerges starkly when the latter notion is also rendered in its own Latinised nomenclature of competence *ratione personae*. To be noted here are the observations of the UN Secretary-General to the latter effect. As he put it: ‘An important element in relation to the competence *ratione personae* (personal jurisdiction) of the International Tribunal is the principle of individual criminal responsibility. As noted ..., the Security Council has reaffirmed in a number of resolutions that persons committing serious violations of international humanitarian law in the former Yugoslavia are individually responsible for such violations.’³²⁸ Against that background, it is difficult to see how immunity *ratione personae* (or personal immunity) of a Head of State can co-exist with competence *ratione personae* (or personal jurisdiction) of an international criminal tribunal when properly established over the same person by way of a provision which gives that tribunal precisely that personal jurisdiction over a Head of State, with no words of limitation

³²⁸ See United Nations, Security Council, ‘[Report of the Secretary-General pursuant to paragraph 2 of Security Council resolution 808 \(1993\)](#),’ 3 May 1993, Doc No S/25704, at para 53.

in the provision suggesting that it is really only over a former—and not an incumbent—Head of State that the international tribunal was meant to exercise its competence *ratione personae*.

248. We therefore endorse no dichotomy in the conception of immunity in any manner that holds the prospect that it was only in relation to a *former* Head of State that the drafters of the Rome Statute intended to confer personal jurisdiction upon the ICC. Accountability for crimes under international law, in the context of the Rome Statute, means nothing less than accountability. It means that persons suspected or accused of crimes under international law shall be investigated or prosecuted *as soon as possible*, to the extent that this Court is empowered to exercise personal jurisdiction under the Rome Statute, regardless of the political office of the suspect or accused. From the perspective of international law, there is nothing that requires accountability to mean that powerful suspects and accused shall be investigated or prosecuted only in the future, when they no longer hold political power.

249. The foregoing position is clear enough from the apparent purpose of article 27 of the Rome Statute, which is to negate the idea of immunity in whatever form—specifically notwithstanding the characterisation of the idea of immunity as either *ratione materiae* or *ratione personae*.

250. Article 27(1) negates the idea of immunity *ratione materiae*, in the following words:

This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.

251. For its part, article 27(2) of the Rome Statute specifically negates immunity *ratione personae*, by providing as follows: ‘Immunities or special procedural rules *which may attach to the official capacity of a person*, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a *person*.’ [Emphasis added.]

252. Article 27 in its entirety must be seen in a composite way as both a codification of Nuremberg Principle III, which has since become a norm of customary

international law. In any event, customary international law harbours no rule that contradicts Nuremberg Principle III relative to the jurisdiction of an international court. It is particularly necessary to stress in this connection that there are no words of limitation in either Nuremberg Principle III or article 27 of the Rome Statute to the effect that the negation of exemptions, immunities or special procedural rules in relation to ‘official capacity’ may operate only when the suspect or accused no longer enjoys such official capacity. Thus, the analysis conducted above reveals a sufficient rational obstacle to reading in such words of limitation.

(c) Regarding the Crime of Genocide against the background of Obligations *Erga Omnes* and *Jus Cogens*

253. The tabulation of immunity into *ratione materiae* and *ratione personae* also has an appreciable significance in relation to the duty to prevent and punish the crime of genocide—a generally accepted *jus cogens* norm. That question may be considered in the broader context of a debate amongst the Pre-Trial Chamber whose decision is now under appeal.

254. In both the decisions on the *Jordan Referral* Decision and the earlier *South Africa Referral* Decision, there was a division of opinion between the Majority of the Pre-Trial Chamber and Judge Perrin de Brichambaut as to what bearing the Convention against Genocide has on the issues at hand. The debate indicated what the judges on both sides appeared to have approached in the manner of mutually exclusive grounds of judicial reasoning. But, it need not be so. The road to Rome never was one. For reasons developed below, we consider the reasoning of Judge Perrin de Brichambaut to be more apposite; to the effect that the Convention against Genocide has a proper bearing on the question presented, especially to the extent of the analysis employed by the Majority to preclude immunity. Nevertheless, the reasoning on both sides is complementary to their common ultimate conclusion that precludes immunity before this Court. That is to say, both the Majority and Judge Perrin de Brichambaut arrived at the same ultimate answer, but from different perspectives.

255. For purposes of harmony in the development of international law in the relevant aspect, the pronouncement of the Majority must be rejected, when it says as follows in paragraph 109 of the *South Africa Referral Decision*:

As a final point, the Chamber notes that both South Africa and Sudan are parties to the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, and that one of the warrants for the arrest of Omar Al-Bashir has been issued for the crime of genocide. While not necessary in light of the conclusions reached above and despite the absence in the present proceedings of submissions by any participant on this point, the Chamber has in any case considered the question whether that Convention renders inapplicable, between South Africa and Sudan and with respect to implementation of the warrant for arrest for the alleged crime of genocide, the Head of State immunity of Omar Al-Bashir. The majority of the Chamber is however unable to answer this question in the affirmative. Above all, this is because the Genocide Convention, unlike the Statute in article 27(2), does not mention immunities based on official capacity, and the majority does not see a convincing basis for a constructive interpretation of the provisions in the Convention such that would give rise to an implicit exclusion of immunities. Article IV of the Convention speaks of individual criminal responsibility of “persons committing genocide”—which, as convincingly explained by the International Court of Justice, must not be confused with immunity from criminal jurisdiction—and can be effective even without reading into it an implicit exclusion of immunities based on official capacity. As for Article VI of the Convention, the majority observes that this provision is concerned with the allocation of competence among national and international jurisdictions in trying “persons charged with genocide”, and, again, does not bear upon immunities. Therefore, and irrespective of any other consideration, no consequences relevant to the issue under consideration can be derived from the Genocide Convention.³²⁹

256. There are many reasons that militate against that pronouncement. No issue is taken here with the concern that counsel may not have had the opportunity to submit on the point, nor that the Majority considered the matter non-essential for their own purposes. The matter, rather, is with the substance of the reasoning once the Pre-Trial Chamber Majority engaged it. First, we do not accept any suggestion to the effect that the exclusion of immunity requires any particular language to be employed in its formulation, nor that the word ‘immunity’ must be mentioned in such formulation. All that is required is express language or *necessary implication* that a court of law is not barred from exercising jurisdiction.

257. Second, there is more to article IV of the Convention against Genocide than merely to say that ‘persons committing genocide ... shall be punished’ More fully, it provides that ‘[p]ersons committing genocide or *any of the other acts enumerated in article III* shall be punished, *whether they are constitutionally responsible rulers,*

³²⁹ [South Africa Referral Decision](#), at para 109.

public officials or private individuals.’ [Emphasis added.] Notably, all the acts enumerated in article III are: (a) genocide; (b) conspiracy to commit genocide; (c) direct and public incitement to commit genocide; (e) attempt to commit genocide; and, (f) complicity in genocide. The legislative intention is thus clear from article IV in the following ways: (i) accountability must be brought to bear for all the kindred ways that genocide may be committed or occasioned; and, (ii) such accountability must be brought to bear upon all *principals* and *accessories*, without exception. Not even ‘constitutional rulers’ are exempted from punishment. Thus, there is no room for immunity.

258. Third, caution is necessary regarding the view that article VI is merely ‘concerned with the allocation of competence among national and international jurisdictions.’ In light of the evident intent to ensure the accountability of all principals and accessories to genocide, it is reasonable to consider that the real purpose of article VI is to enlarge the complementary scheme for the prevention and punishment of genocide, as the united purpose of the international community in their legal repudiation of the ‘odious scourge’ of genocide. That united purpose is apparent not only in the Convention against Genocide itself, but also in the antecedent UN General Assembly resolution 96(I) of 11 December 1946 on the Crime of Genocide.

259. In resolution 96(I), the General Assembly declared and affirmed the following propositions, among other things:

- that genocide is ‘contrary to moral law and to the spirit and aims of the United Nations’;
- that ‘genocide is a crime under international law which the civilised world condemns, and for the commission of which principals and accomplices—whether private individuals, public officials or statesmen ... are punishable ...’; and
- that the ‘[p]unishment of the crime of genocide is a matter of international concern.’

260. From that antecedent, the international community proceeded as follows in the Convention against Genocide:

- they recalled resolution 96(I) of 1946;
- they recognised ‘that at all periods of history genocide has inflicted great losses on humanity’;
- they expressed their conviction that ‘in order to liberate mankind from such an odious scourge, international co-operation is required’; and
- they committed themselves to a pact that included the following:
 - i. a binding undertaking ‘to prevent and to punish’ genocide as ‘a crime under international law’, ‘whether committed in time of peace or in time of war’ (article I) ; and
 - ii. a binding requirement to punish persons committing genocide or any of the other enumerated associated offences³³⁰—whether such persons ‘are constitutionally responsible rulers, public officials or private individuals’ (article IV).

261. It is against that background that article VI must be construed in the following provision: ‘Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.’

262. The drafting history of the provision reassures the view that the real purpose of the provision—in contemplating genocide trials to take place before national or international tribunals—is to enlarge the complementary strategies for the prevention and punishment of genocide. This is particularly so given that in the period of negotiation, drafting and adoption of the Convention against Genocide, there was no international tribunal to exercise jurisdiction, though such a tribunal had been

³³⁰ Besides genocide itself, the other acts punishable under the Convention against Genocide are conspiracy to commit genocide; direct and public incitement to commit genocide; attempt to commit genocide; and, complicity in genocide.

optimistically anticipated.³³¹ It was thus necessary to engage the complementary jurisdiction of national courts to try the crime, in the meantime.

Notably, during the debate on what was then ‘draft article VII’ of the Convention against Genocide, some delegations had unsuccessfully objected to the idea of jurisdiction of an international court.³³² Some of those objections rested on arguments of national sovereignty.³³³ But this was not exclusively so. It has also been observed that some of those objecting had offered, ironically, that they did so ‘not because they were opposed in principle to an international criminal jurisdiction, but because the phrase objected to expressed a hope and not a reality, since it referred to a jurisdiction which did not exist.’³³⁴ The retention of the provision in the end is testament to the greater force of the delegates who preferred the complementarity of jurisdictions that specifically includes the international criminal jurisdiction. The delegates in favour of an international criminal jurisdiction insisted that ‘such jurisdiction was necessary to achieve effective repression of the crime of genocide, because national courts might be unable to punish such a crime, especially when committed or tolerated by State authorities.’³³⁵ Notable among the delegates who shared that view were Mr Chaumont and Mr Spanien of France, Mr Sardar Bahadur Khan of Pakistan, and Mr Ingles of the Philippines.³³⁶ Unimpressed by the objection to international jurisdiction on grounds of national sovereignty, Mr Demesmin of Haiti and Mr Arancibia L’azote of Chile

³³¹ As noted earlier, the question of establishment of an international criminal court had been raised by the representative of France, Mr Donnedieu de Vabres. He had noted, in that connection, that he had felt the criticism of that the Nuremberg Tribunal (on which he had served as a judge) as composed only of representatives of victor countries, and not representatives of the international community in the truest sense of the idea. Consequently, as a member of the predecessor of the ILC, he urged the consideration of the question of establishment of an international criminal court, submitting a memorandum to that end. See United Nations, General Assembly, ‘[Historical Survey of the Question of International Criminal Jurisdiction](#)’ (Memorandum submitted by the Secretary-General), (1949), Doc No A/CN.4/7/Rev.1, at p 25.

³³² See ILC, *Yearbook* (1950), *supra*, at pp 8-9.

³³³ See United Nations, General Assembly, ‘[Historical Survey of the Question of International Criminal Jurisdiction](#)’ (Memorandum submitted by the Secretary-General), (1949), Doc No A/CN.4/7/Rev.1, *supra*, at pp 36-38.

³³⁴ See ILC, *Yearbook* (1950), *supra*, at p 8, para 49.

³³⁵ United Nations, General Assembly, ‘[Historical Survey of the Question of International Criminal Jurisdiction](#)’ (Memorandum submitted by the Secretary-General), (1949), Doc No A/CN.4/7/Rev.1, *supra*, at p 38.

³³⁶ *Ibid.*

argued that national sovereignty ‘was now out of date, and that the idea of interdependence of States had taken its place.’³³⁷

263. The Convention against Genocide was adopted on 9 December 1948 under the auspices of General Assembly resolution 260 A (III), which approved the text of the Convention and proposed it for signature and ratification. As mentioned earlier, there was no international tribunal in place to try persons charged with the crime. But, article VI was anticipatory of the day when such a tribunal would come to be. And that conclusion is all too clear from the text of companion resolution 260 B (III) also adopted on 9 December 1948. With the intention of establishing an international court, the General Assembly said as follows, among other things, in resolution 260 B (III):

The General Assembly

Considering that the discussion of the Convention on the Prevention and Punishment of the Crime of Genocide has raised the question of the desirability of having persons charged with genocide tried by a competent international tribunal,

Considering that, in the course of development of the international community, there will be an increasing need of an international judicial organ for the trial of certain crimes under international law,

Invites the International Law Commission to study the desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide or other crimes over which jurisdiction will be conferred upon that organ by international conventions; [...]

264. Indeed, not only was that theme reiterated two years later in General Assembly resolution 489 (V) of 12 December 1950, but in the latter instance, the General Assembly specifically declared article VI of the Convention against Genocide as operating on its mind,³³⁸ in their decision to compose a committee (made of representatives of 17 Member States) ‘to meet in Geneva on 1 August 1951 for the purpose of preparing one or more preliminary draft conventions and proposals relating to the establishment and the statute of an international criminal court.’³³⁹ The convention establishing the ICC as a permanent version of that tribunal was eventually adopted on 17 July 1998—in the form of what is now known as the Rome

³³⁷ *Ibid*, at pp 38-39.

³³⁸ United Nations, General Assembly, [Resolution 489 \(V\)](#) on International Criminal Jurisdiction, 12 December 1950, A/RES/489(V), at third preambular paragraph [‘*Bearing in mind* article VI of the Convention on the Prevention and Punishment of the Crime of Genocide’.]

³³⁹ *Ibid*, at para 1.

Statute. Along the way, *ad hoc* versions of the tribunal contemplated in article VI of the Convention against Genocide had been established: in 1993 for the former Yugoslavia and in 1994 for Rwanda.

265. Fourth, clear consequences are apparent in relation to the issue of whether or not Mr Al-Bashir enjoyed immunity, as President of Sudan at the material times, in any Member State to the Convention against Genocide, specifically in Sudan let alone Jordan. Those consequences include the combined operation of articles IV and VI of the Convention against Genocide, which would clearly preclude immunity for him either in Jordan or in Sudan. This is to the extent that the ICC is the kind of international court contemplated in article VI of the Convention against Genocide, and to the extent that article IV contemplates that Mr Al-Bashir was the kind of ‘constitutional ruler’ who ‘shall be punished’ before such an international court. Indeed, the amplitude of the intended consequences would be that he would have enjoyed no immunity in Sudan for the crime of genocide, thus warranting no immunity for him in Jordan for the crime of genocide in relation to the request for his surrender to stand trial at the ICC for that crime.

266. Finally, as alluded to at the beginning of this subsection, the pronouncement of the Pre-Trial Chamber majority engages the distinction *à la mode* between immunity *ratione materiae* and immunity *ratione personae*, which we reject to any extent that it would effectively bar the jurisdiction of this Court. This is sufficiently clear from the allusion of the Pre-Trial Chamber majority to the oft-cited dictum to the effect that ‘individual criminal responsibility of “persons committing genocide” ... must not be confused with immunity from criminal jurisdiction ...’, as the majority put it. The difficulties arising from that distinction in relation to the exercise of jurisdiction by the ICC has been discussed elsewhere in this opinion. Specifically, it is unwise to subscribe to any dichotomy in the conception of immunity that holds a very real prospect of undermining the norm of accountability for crimes under international law, which is the very *raison d’être* of this Court’s jurisdiction. That norm of accountability for genocide is amply underscored in the jurisprudence of the ICJ

itself.³⁴⁰ When the Convention against Genocide contemplates in article IV and article VI that accomplices to genocide ‘shall be punished’—before an international tribunal—‘whether they are constitutionally responsible rulers, public officials or private individuals,’ there are no words of limitation that suggest that they ‘shall be punished’—but only at a deferred time. It means they shall be punished whenever possible. Such suspects or accused persons are not to enjoy immunity until an indeterminate time in the future. For, such indefinite deferral may largely or entirely defeat the imperative that they ‘shall’ be punished. But, beyond the Convention against Genocide, similar concerns exist in relation to the other crimes under international law, accountability for which is required by the operation of Nuremberg Principle III and its progeny in international law, as expressed in various ways in treaties and customary international law.

III. DISPOSITIVE CONSIDERATIONS

267. In the case at bar, Jordan and some *amici curiae* share the position that customary international law yields the clue to the correct answer to the primary question of immunity presented in this appeal, notwithstanding resolution 1593 (2005). The Prosecutor, more than most, insists that it is not necessary to consider customary international law: for, as she argues, the right answer is adequately supplied by a proper construction of resolution 1593 (2005) together with the Rome Statute.

268. It is appropriate to follow the order of the sources of international law commonly outlined in article 21 of the Rome Statute and, earlier, in article 38(1) of the ICJ Statute. That order takes treaties (for whom they bind) as the starting point of the search for applicable law in a specific case; after which comes customary law as the default source of law. That being the case, it is only appropriate to begin the

³⁴⁰ As the ICJ noted in an early advisory opinion on the Convention against Genocide: ‘The Court will begin by reaffirming that “the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation” and that a consequence of that conception is “the universal character both of the condemnation of genocide and of the co-operation required ‘in order to liberate mankind from such an odious scourge’ (Preamble to the Convention)”’: *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion [1951] ICJ Reports, at p 23).

inquiry by considering both resolution 1593 (2005)—underwritten by the UN Charter—and the Rome Statute.

269. Since this case immediately concerns the application of Security Council resolution 1593 (2005) and the Rome Statute incorporated into the resolution by reference, the primary focus of the decision must then be on the construction of those two instruments operating jointly and severally. But that primary focus must also take customary international law into account, in the sense of considering whether there is any extent to which it obstructs the operation of resolution 1593 (2005) and the Rome Statute.

270. Hence the more convenient structure of this decision will be as follows.

A. Whether UN Security Council Resolution 1593 (2005) and the Rome Statute preserve Immunity of Mr Al-Bashir

1. UN Security Council Resolution 1593 (2005)

(a) Interpreting UN Security Council Resolutions

271. The ICJ has handed down a most useful line of case law on the interpretation of Security Council resolutions.³⁴¹ There is much good sense in the suggested approach, for purposes of interpreting resolution 1593 (2005). Two of those judgments may now be examined more closely for the lessons they hold.

272. The first judgment of interest is the *Namibia* advisory opinion. As is fairly apparent from the formal citation of the opinion—*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*—the subject matter of the issue concerned the continued presence of apartheid South Africa following the

³⁴¹ See *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* (Advisory Opinion) [1971] ICJ Reports 16; *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v United Kingdom)* (Provisional Measures, Order of 14 April 1992) [1992] ICJ Reports 3; *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v United States of America)* (Provisional Measures, Order of 14 April 1992) [1992] ICJ Reports 114; *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (Advisory Opinion) [2010] ICJ Reports 40.

termination of its protectorate mandate over South West Africa (as Namibia was formerly called). A feature of much significance in the advisory opinion was a declaration made in paragraph 2 of Security Council resolution 276 (1970), as follows: ‘the continued presence of the South African authorities in Namibia is illegal and that consequently all acts taken by the Government of South Africa on behalf of or concerning Namibia after the termination of the Mandate are illegal and invalid.’ Notably, the resolution was not taken under Chapter VII powers of the Security Council.

273. The ICJ considered that when the Security Council adopted the series of resolutions that culminated in and included resolution 276 (1970), the Security Council was ‘acting in the exercise of what it deemed to be its primary responsibility, the maintenance of peace and security, which, under the Charter, embraces situations which might lead to a breach of the peace.’³⁴² Alluding to the principle of effectiveness in relation to the declaration made in paragraph 2 of the resolution, ‘the Court consider[ed] that the qualification of a situation as illegal does not by itself put an end to it. It can only be the first, necessary step in an endeavour to bring the illegal situation to an end.’³⁴³ Consequently, the ICJ considered that UN Member States are not free to conduct business as usual as regards any situation in which such declaration of illegality has been made by the Security Council. As the ICJ put it:

It would be an untenable interpretation to maintain that, once such a declaration had been made by the Security Council under Article 24 of the Charter, on behalf of all member States, those Members would be free to act in disregard of such illegality or even to recognize violations of law resulting from it. When confronted with such an internationally unlawful situation, Members of the United Nations would be expected to act in consequence of the declaration made on their behalf. The question therefore arises as to the effect of this decision of the Security Council for States Members of the United Nations in accordance with Article 25 of the Charter.³⁴⁴

274. In considering the effect to be given to Security Council resolutions, the ICJ had to reckon with the argument that the resolutions in question were ‘couched in exhortatory rather than mandatory language and that, therefore, they do not purport to

³⁴² *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* (Advisory Opinion) [1971] ICJ Reports, p 16, at para 109.

³⁴³ *Ibid*, at para 111.

³⁴⁴ *Ibid*, at para 112.

impose any legal duty on any State nor to affect legally any right of any State.’³⁴⁵ To be considered in this regard are two paragraphs in two related Security Council resolutions—namely resolution 264 (1969) and resolution 269 (1969)—together with a further paragraph in resolution 276 (1970). The three paragraphs were couched in the terms of ‘calls upon’. Notably, paragraph 3 of resolution 264 (1969) ‘*Calls upon* South Africa to withdraw its administration from Namibia immediately’; paragraph 5 of resolution 269 (1969) ‘*Calls upon* the Government of South Africa to withdraw its administration from the territory immediately and in any case before 4 October 1969’; and, paragraph 5 of resolution 276 (1970) ‘*Calls upon* all States, particularly those which have economic and other interests in Namibia, to refrain from any dealings with the Government of South Africa which are inconsistent with operative paragraph 2 of this resolution’. Quite significantly, the ICJ considered that resolution 276 (1970), together with resolution 264 (1969) and resolution 269 (1969), had a ‘combined and cumulative effect.’³⁴⁶

275. The argument that the resolutions in question were couched in *hortatory* rather than *mandatory* language occasioned the following reaction from the ICJ: ‘*The language of a resolution of the Security Council should be carefully analysed before a conclusion can be made as to its binding effect. In view of the nature of the powers under Article 25, the question whether they have been in fact exercised is to be determined in each case, having regard to the terms of the resolution to be interpreted, the discussions leading to it, the Charter provisions invoked and, in general, all circumstances that might assist in determining the legal consequences of the resolution of the Security Council.*’³⁴⁷

276. Applying those tests, the ICJ found ‘that the decisions made by the Security Council in paragraphs 2 and 5 of resolution 276 (1970), as related to paragraph 3 of resolution 264 (1969) and paragraph 5 of resolution 269 (1969), *were adopted in conformity with the purposes and principles of the Charter and in accordance with its articles 24 and 25. The decisions are consequently binding on all States Members of*

³⁴⁵ *Ibid*, at para 114.

³⁴⁶ *Ibid*, at para 108.

³⁴⁷ *Ibid*, at para 114, emphasis added.

*the United Nations, which are thus under obligation to accept and carry them out.*³⁴⁸

In coming to that conclusion, the ICJ recalled its pronouncement in the *Reparation* advisory opinion, as follows:

The Charter has not been content to make the Organization created by it merely a centre ‘for harmonizing the actions of nations in the attainment of these common ends’ (Article 1, para 4). It has equipped that centre with organs, and has given it special tasks. *It has defined the position of the Members in relation to the Organization by requiring them to give it every assistance in any action undertaken by it (Article 2, para 5), and to accept and carry out the decisions of the Security Council.*³⁴⁹

277. In the end, the ICJ concluded that *Security Council resolutions are binding on all Member States of the UN, even when those are made under article 25*—which is under Chapter V and not under Chapter VII—of the Charter. As the ICJ put it:

Thus *when the Security Council adopts a decision under Article 25* in accordance with the Charter, *it is for member States to comply with that decision*, including those members of the Security Council which voted against it and those Members of the United Nations who are not members of the Council. *To hold otherwise would be to deprive this principal organ of its essential functions and powers under the Charter.*³⁵⁰

278. Consequently, held the ICJ, UN Member States are ‘under obligation to recognize the illegality and invalidity of South Africa’s continued presence in Namibia. They are also under obligation to refrain from lending any support or any form of assistance to South Africa with reference to its occupation of Namibia’.³⁵¹

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279. It is possible to use a similar template of judicial reasoning and analysis for purposes of the interpretation of resolution 1593 (2005) made under the even stronger Chapter VII powers of the Security Council. That analysis may proceed as follows. The resolution creates a baseline of obligation on all UN Member States: to cooperate fully with the ICC. That obligation results from the Security Council’s determination ‘that the situation in Sudan continues to constitute a threat to international peace and security’, for which the decision to refer the Darfur situation to the ICC constitutes a countermeasure. As with the Namibia situation, the Security Council’s decision to

³⁴⁸ *Ibid.*, at para 115, emphases added.

³⁴⁹ *Ibid.*, at para 116, emphasis added.

³⁵⁰ *Ibid.*, emphasis added.

³⁵¹ *Ibid.*, at para 119.

refer the Darfur situation to the ICC must be assessed against the background of a related series of other resolutions that repeatedly condemned perpetrations of violence against the civilian populations of Darfur, in violation of international human rights and humanitarian law. Those condemnations were invariably accompanied with an insistence on investigation and prosecution of the violations.³⁵²

280. The baseline of obligations to comply with resolution 1593 (2005) begins with urging all States to cooperate with the ICC—as a fundamental proposition. From that baseline, the obligations become more exacting with specific regard to Sudan and the States Parties to the Rome Statute—explicitly mentioned in the resolution or alluded to (by necessary implication) as bearing the more onerous obligations. The more onerous obligation for Rome Statute States Parties, as indicated in the resolution, is in the manner of the deductive allusion to their obligation under the Statute; while at the same time urging all States to cooperate fully with the Court, notwithstanding that they may not all be party to the Rome Statute. That deductive allusion to the treaty obligation of the Rome Statute States Parties is inescapable in the following formulation: ‘while recognizing that States not party to the Rome Statute have no obligation under the Statute, urges all States and concerned regional and other international organizations to cooperate fully.’ The necessary implication of that formulation is, first, that States Parties to the Rome Statute have *obligations* under it; and, second, that all States are still *urged* to cooperate fully with the Court notwithstanding that they may not be parties to the Rome Statute itself and thus bear no obligation under it.

281. For its part, the obligation for Sudan was imposed in the unequivocal language of the decision ‘that the Government of Sudan and all other parties to the conflict in Darfur, *shall* cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution.’³⁵³

³⁵² See, for instance, [Resolution 1556 \(2004\)](#): ‘underlining that there will be no impunity for violators.’ See also United Nations, Security Council, [Resolution 1574 \(2004\)](#), 19 November 2004, Doc No S/RES/1574 (2004): ‘emphasizing the need for perpetrators of all such crimes to be brought to justice *without delay*’, emphasis added.

³⁵³ [Resolution 1593 \(2005\)](#), *supra*, at para 2, emphasis added.

282. The consequence of the more exacting obligation of full cooperation on Sudan presses directly against any claim it might stake for Head of State immunity to protect Mr Al-Bashir from arrest and surrender; which claim would subtract from Sudan's full cooperation with the Court as required by resolution 1593 (2005). That consequence is especially aggravated in the absence of evidence that Sudan has more modestly cooperated with the Court in other ways that do not engage the surrender of their Head of State.

283. For all the other UN Member States, their own relatively less onerous obligation would have the *minimum effect* of affording legal justification for them; were they to cooperate fully with the Court as the resolution urges, including by arresting and surrendering Mr Al-Bashir to the Court regardless of his status as the incumbent Head of State of Sudan. This *legal justification* can only be a *minimum effect* of the Security Council's 'urge' of full cooperation on all UN Member States, regardless of their membership to the Rome Statute. It is so because the *Namibia* advisory opinion suggests that resolution 1593 (2005) may have a stronger jural correlative upon all UN Member States.³⁵⁴

284. Such legal justification would necessarily operate against any claim of immunity that Sudan may advance against the operation of the resolution, in light of the urge of full cooperation directed at all States. Ultimately, the combined operation of that legal justification and the more onerous obligation on Sudan must surely deprive all value to Sudan's claim of Head of State immunity in the circumstances. In other words, the obligation created for States who are both members of the UN and of the Rome Statute, arising from the joint and several operation of resolution 1593 (2005) and the Rome Statute, affords them defence against any claim of responsibility

³⁵⁴ It is recalled that according to the *Namibia* advisory opinion, UN Member States were found to be 'under *obligation* to recognize the illegality and invalidity of South Africa's continued presence in Namibia. They are also under *obligation* to refrain from lending any support or any form of assistance to South Africa with reference to its occupation of Namibia': *Namibia* advisory opinion, *supra*, para 119, emphasis added. This is notwithstanding that paragraph 5 of resolution 276 (1970) was taken under article 25, and merely '*Calls upon* all States [...] to refrain from any dealings with the Government of South Africa which are inconsistent with operative paragraph 2 of this resolution'. The finding that an obligation had resulted upon UN Member States resulted from that view that '*when the Security Council adopts a decision under Article 25 in accordance with the Charter, it is for member States to comply with that decision*, including those members of the Security Council which voted against it and those Members of the United Nations who are not members of the Council. *To hold otherwise would be to deprive this principal organ of its essential functions and powers under the Charter*' *Namibia* advisory opinion, *supra*, at para 116, emphasis added.

for wrongful act of State, should they fail to accord any Head of State immunity to Mr Al-Bashir, in any inclination on their part to honour the ICC request for his arrest and surrender. For its part, Sudan would be hard pressed to maintain a claim of such responsibility for wrongful act against any such State. Any such claim from Sudan would necessarily face the obstacle of *ex turpi causa non oritur actio*, in light of the explicit obligation imposed upon it to cooperate fully with the ICC, especially in the absence of any evidence that it has done so in any other manner. It is not insignificant to keep in mind that all these obligations arise from the exercise of Chapter VII powers of the Security Council.

285. It may be apposite, at this juncture, to recall the opinion of the ICJ that UN Member States were under obligation to recognise the illegality and invalidity of apartheid South Africa's continued presence in Namibia. And that they were 'also under obligation to refrain from lending any support or any form of assistance' to South Africa in relation to its continued presence in Namibia.³⁵⁵ By parity of reasoning, it is eminently arguable that the object of resolution 1593 (2005) was to ensure accountability—according to the Rome Statute—for alleged violations of international criminal norms in Darfur, thereby bringing an end to the illegal condition of impunity in that regard. Therefore, UN Member States are under obligation to refrain from lending any support or any form of assistance to Sudan which may prolong that condition of illegality.

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286. The second ICJ case to be considered closely, for inspiration in the interpretation of Security Council resolutions, is the *Kosovo* advisory opinion. The ICJ had been called upon to answer the following question: 'Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?' The ICJ's eventual answer to that question need not detain us. Of greater interest for us, rather, is how the ICJ treated certain crucial documents. The first document of interest was Security Council resolution 1244 (1999), adopted on 10 June 1999. That resolution authorised the

³⁵⁵ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, *supra*, at para 119.

creation of an international military presence [known as Kosovo Force or ‘KFOR’], as well as an international civil presence [the United Nations Interim Administration Mission in Kosovo or ‘UNMIK’], laying down a framework for the administration of Kosovo. Another important set of documents of interest were UNMIK regulations promulgated by the Representative to the UN Secretary-General, pursuant to the powers and responsibilities stipulated in Security Council resolution 1244 (1999). They included regulation 2001/9 of 15 May 2001 on a Constitutional Framework for Provisional Self-Government [the ‘Constitutional Framework’].

287. For purposes of its opinion, the ICJ considered several factors that are relevant in the interpretation of Security Council resolutions.³⁵⁶ The first amongst them was that ‘the rules on treaty interpretation embodied in Articles 31 and 32 of the Vienna Convention on the Law of Treaties [the ‘VCLT’] may provide guidance.’³⁵⁷ But, while that is so, it remains the case that ‘differences between Security Council resolutions and treaties mean that the interpretation of Security Council resolutions also requires that other factors be taken into account.’³⁵⁸ In that connection, the ICJ recalled that Security Council resolutions are drafted through a very different process from that of a treaty; the final text of the resolutions represents the view of the Security Council as a body; the resolutions are issued as such by a single collective body; and, they are a product of the voting process provided for in article 27 of the Charter. The ICJ recalled its previous opinion in the *Namibia* advisory opinion, to the effect that Security Council resolutions can bind all UN Member States whether or not they played any part in formulating the given resolution.³⁵⁹ The ICJ further considered that the interpretation of Security Council resolutions may require an analysis of statements by representatives of members of the Security Council made at the time of their adoption, other resolutions of the Security Council on the same issue, as well as

³⁵⁶ *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, *supra*, at para 94.

³⁵⁷ *Ibid.*

³⁵⁸ *Ibid.* See also United Nations, Compensation Commission Governing Council, ‘Report and Recommendation made by the Panel of Commissioners concerning the First Instalment of ‘E2’ Claims’, 3 July 1998, Doc No S/AC.26/1998/7, at para 54.

³⁵⁹ *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, *supra*, para 94.

the subsequent practice of relevant United Nations organs and of States affected by those given resolutions.³⁶⁰

288. It was undoubtedly with these guidelines in mind that the ICJ undertook the construction of Security Council resolution 1244 (1999)—and the Constitutional Framework made under it—in terms of their implications in international law. Consistently with past pronouncements, the ICJ found that resolution 1244 (1999) itself ‘was expressly adopted by the Security Council on the basis of Chapter VII of the United Nations Charter, and *therefore clearly imposes international legal obligations*.’³⁶¹ It was noted in that connection that none of the participants had questioned that proposition.³⁶² It may be noted, at this juncture, that there is more in international jurisprudence to the effect that Security Council resolutions made under Chapter VII of the Charter create binding obligations for UN Member States.³⁶³

289. The value of the indicated line of case law is rather clear in the context of the question now before the Appeals Chamber, concerning resolution 1593 (2005). To invite the imperative language of the *Kosovo* advisory opinion, Security Council resolution 1593 (2005) ‘clearly imposes international legal obligations.’ But, perhaps the conclusion of greater interest was that the ICJ found, in the *Kosovo* advisory opinion, that UNMIK regulations (which promulgated the Constitutional Framework) also formed part of international law. In that regard, the ICJ reasoned as follows:

The Court observes that UNMIK regulations, including regulation 2001/9, which promulgated the Constitutional Framework, are adopted by the Special Representative of the Secretary-General on the basis of the authority derived from Security Council resolution 1244 (1999) [...] and thus ultimately from the United Nations Charter. The Constitutional Framework derives its binding force from the binding character of resolution 1244 (1999) and thus from international law. In that sense it therefore possesses an international legal character.³⁶⁴

³⁶⁰ *Ibid.*

³⁶¹ *Ibid.*, at para 85, emphasis added.

³⁶² *Ibid.*

³⁶³ See, for instance, *Prosecutor v Tadić* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction), 2 October 1995, at para 44 [ICTY Appeals Chamber]; *Prosecutor v Blaškić* ([Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997](#)), at para 26 [ICTY Appeals Chamber]. To a related extent, see also *Bosphorus v Ireland*, 30 June 2005, Case No 45036/98 [ECtHR, Grand Chamber].

³⁶⁴ *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, supra*, at para 88.

290. There is profound implication in the finding that the UNMIK regulations—although subsidiary instruments—also possessed *binding* force, because of their ‘international legal character’, derived from resolution 1244 (1999) and, ultimately, the UN Charter. That profound implication is in the manner of an ability to supersede questions of existing Serbian sovereignty in Kosovo, by the operation of the parent resolution. As the ICJ was to observe: ‘Viewed together, resolution 1244 (1999) and UNMIK regulation 1999/1 therefore had the effect of superseding the legal order in force at that time in the territory of Kosovo and setting up an international territorial administration.’³⁶⁵ This effect is particularly significant, given that the resolution itself had specifically ‘recalled the sovereignty and the territorial integrity of the Federal Republic of Yugoslavia.’³⁶⁶ It is thus clear that the Security Council can, in the exercise of Chapter VII powers, take decisions that may have right of way over claims of sovereignty intended to be encumbered by the effects of the resolution, without violating the principles expressed in article 2(1) of the Charter: that ‘[t]he Organization is based on the principle of the sovereign equality of all its Members.’ This goes without saying, of course, because actions of the Security Council, for purposes of its Chapter VII powers, are not in principle inconsistent with the principle of ‘sovereign equality’ of UN Member States. Similarly, article 2(7) of the Charter requires that the principle that the UN may not intervene ‘in matters which are essentially within the domestic jurisdiction of any state ... shall not prejudice the application of enforcement measures under Chapter VII.’ For, the Security Council acts on behalf of all UN Member States, as the ICJ explained in the *Namibia* advisory opinion.³⁶⁷

291. But it is important to stress that the ICJ had been keen to emphasise that the object and purpose of resolution 1244 (1999) were to set up, on an exceptional basis, an interim regime of administration in Kosovo, ‘which, save to the extent that it

³⁶⁵ *Ibid.*, at para 97.

³⁶⁶ *Ibid.*, at para 95.

³⁶⁷ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, *supra*, at para 112.

expressly preserved it, superseded the Serbian legal order and which aimed at the stabilization of Kosovo, and that it was designed to do so on an interim basis.’³⁶⁸

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292. The methodology of the *Kosovo* advisory opinion holds important lessons for the matter now before the Appeals Chamber. Such lessons include the following. First, as a general proposition, article 31 and 32 of the VCLT may guide the interpretation of resolution 1593 (2005). The operation of article 31(1) of the VCLT, in particular, requires that the resolution shall be interpreted in good faith in accordance with the ordinary meaning to be given to its terms, in their context and in the light of the object and purpose of the resolution.

293. Second, the Security Council’s adhesion of the Rome Statute onto resolution 1593 (2005) produces the legal effect of superseding the legal order in the resolution’s sphere of operation. This is in the same way that resolution 1244 (1999) and the UNMIK regulations made under it had the effect of superseding the existing legal order in Kosovo. In other words, in relation to resolution 1593 (2005), the Rome Statute must have a minimum of the value that the UNMIK regulations had in relation to resolution 1244 (1999)—if not more.

294. A significant sphere of operation of resolution 1593 (2005) is in the international legal relations of all the UN Member States to whom the resolution was addressed. It results in the alteration of the order of the international legal obligations of the UN Member States, in light of the priority that must be given to the measures taken under Chapter VII powers of the Security Council.

295. And, finally, the combined operation of resolution 1593 (2005) and the Rome Statute has the legal effect of superseding any claim of sovereign immunity that Sudan may have had in barring or impeding the prosecution of Mr Al-Bashir as the President of Sudan. This is in the same way that the displacement of Serbia’s existing sovereignty over Kosovo was amongst the legal effects that resolution 1244 (1999) and UNMIK regulations had in superseding Serbia’s claims of sovereignty in Kosovo.

³⁶⁸ *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, supra*, at para 100.

(b) The Terms of UN Security Council Resolution 1593 (2005)

296. As regards the application of resolution 1593 (2005), the controlling focus must remain on its object. That object is to refer the situation in Darfur to the ICC, specifically engaging the international legal norm of accountability the aim of which is to bring to an end the illegal situation of impunity. The aim of interpretation should ultimately be to effectuate that object. For present purposes, the vexing question for the Appeals Chamber is whether that object is consistent with immunity for Mr Al-Bashir in his travels as the President of Sudan to States, such as Jordan, who are parties to the Rome Statute. That question requires a close look at the terms of the resolution.

297. The operative part of the resolution begins with the fundamental premise that the Security Council had first determined ‘that the situation in Sudan continues to constitute a threat to international peace and security.’³⁶⁹ And, consequently, ‘[a]cting under Chapter VII of the Charter of the United Nations,’³⁷⁰ the Council decided ‘to refer the situation in Darfur since 1 July 2002 to the Prosecutor of the International Criminal Court.’³⁷¹

298. In making the referral, the Council was fully conscious of the reality that in the absence of international cooperation the Court cannot succeed in the mandate that the Security Council was entrusting to it. The Council then addressed that concern by a complement of direct impositions and exhortations to cooperate fully with the Court. The direct impositions were for the Government of Sudan and all other parties to the conflict in Darfur. As the Council expressed these impositions: ‘the Government of Sudan and all other parties to the conflict in Darfur shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution’.³⁷² The exhortations, in their turn, were directed at all States as well as regional and international organisations concerned with the armed conflict in Darfur. In terms, the Council had expressed the exhortation in the following words (immediately following the direct imposition of the duty of full cooperation upon

³⁶⁹ [Resolution 1593 \(2005\)](#), at fifth paragraph of preamble.

³⁷⁰ *Ibid*, at sixth paragraph of preamble.

³⁷¹ *Ibid*, at operative paragraph 1.

³⁷² *Ibid*, at operative paragraph 2.

Sudan and the other parties to the conflict in Darfur): ‘and, while recognizing that States not party to the Rome Statute have no obligation under the Statute, urges all States and concerned regional and other international organizations to cooperate fully.’³⁷³

299. Regrettably, the terms of the resolution do not directly answer the question whether the resolution’s object of referral of the Darfur situation to the ICC for purposes of accountability for violations of international criminal law norms would be consistent with immunity for Sudan’s senior State officials including the President. But, it is no surprise to an astute observer of international affairs that diplomatic outcomes may not always supply clear and direct answers to difficult legal questions that courts of law must answer later. The surprise lies rather with any supposition that courts of law may similarly avoid direct answers to such difficult legal questions, because diplomacy did not answer them. But it must be said here that if intentional ambiguity be a cherished virtue in diplomacy, it is a vice in jurisprudence. In the final analysis it is an obligation of the judicial function to say clearly whether or not a litigant is entitled to the legal claim seised of the Court. That is the whole essence of construction of a legal instrument upon which a legal claim is founded. It involves constructing answers to difficult questions, by distilling actionable meaning from the combined strains of what is stated, what is elided and what is excluded. Such distilled meaning is then tested, for correctness, against the object or purpose of the instrument being construed. Any meaning that hinders the object or purpose will be discarded as incorrect. But the meaning that best supports or furthers the object or purpose of the instrument will be accepted as correct: such meaning may not be perfect, but it may be the best that justice could do in the circumstances.

300. Against the foregoing explanation, it must be considered that there are a number of declarations that the Security Council did not make in resolution 1593 (2005), and has not made since, given the pressure of the circumstances apparent to them, in order to make clear that the President of Sudan enjoys immunity. First, it is immediately apparent that in imposing a duty of ‘full cooperation’ upon the Government of Sudan and all parties to the armed conflict, there is no language in the text of resolution 1593

³⁷³ *Ibid.*

(2005) by which it could be said that immunity for the President of Sudan would constitute an exception to the duty of ‘full cooperation’ that the resolution imposed on Sudan.

301. Second, and significantly against that background, it is apparent also that immunity was very much on the minds of the Security Council membership. That is obvious from the consideration, *inter alia*, that the very text of the resolution had specifically stipulated immunity for others including ‘current or former officials ... from a contributing State outside Sudan which is not a party to the Rome Statute’³⁷⁴—but did not similarly stipulate such immunity directly or indirectly for officials of the Government of Sudan. The failure of resolution 1593 (2005) to stipulate immunity for officials of the Government of Sudan as was done for ‘officials ... from a contributing State outside Sudan which is not a party to the Rome Statute’ is obvious as to its reasons and implications. It shows that notwithstanding that immunity was very much on the mind of the Council at all material times, they did not wish to extend it to officials of the Government of Sudan, beyond the limited extent that they had extended such immunity to officials from a contributing State ‘outside Sudan’ which is not a party to the Rome Statute. In that regard, the record of the debate amply shows that most of the members of the Council had registered objections—ranging from mild to very strong—against immunity to the limited extent that it was recognised so expressly for ‘officials ... from a contributing State outside Sudan which is not a party to the Rome Statute’.

302. Some may find revealing (on the question of immunity) the statement-after-the-vote made by the Permanent Representative of the Philippines (Ambassador Lauro Baja Jr)—even though his country was not then a State Party to the Rome Statute. As he observed:

We voted for resolution 1593 (2005) in response to the urgency and the gravity of the crimes which the Security Council and the international community are expected and obliged to address. [...]

³⁷⁴ As operative paragraph 6 plainly expressed that immunity: the Council ‘*Decides* that nationals, current or former officials or personnel from a contributing State outside Sudan which is not a party to the Rome Statute of the International Criminal Court shall be subject to the exclusive jurisdiction of that contributing State for all alleged acts or omissions arising out of or related to operations in Sudan established or authorized by the Council or the African Union, unless such exclusive jurisdiction has been expressly waived by that contributing State.’

We do, however, share the concerns of some delegations about the manner in which resolution 1593 (2005) was arrived at. Once again, fault lines in the Council and potential veto threats prevented the emergence of a strong, robust and clear signal from this body—which the Council badly needs these days. Perhaps that is the reason why the call for Security Council reform grows louder as the days go by.

We also believe that the International Criminal Court (ICC) may be a casualty of resolution 1593 (2005). Operative paragraph 6 of the resolution is killing its credibility—softly, perhaps, but killing it nevertheless. We may ask whether the Security Council has the prerogative to mandate the limitation of the jurisdiction of the ICC under the Rome Statute once the exercise of its jurisdiction has advanced. Operative paragraph 6 subtly subsumed the independence of the ICC into the political and diplomatic vagaries of the Security Council. Nevertheless, that eventuality may well be worth the sacrifice if impunity is, indeed, ended in Darfur; if human rights are, indeed, finally protected and promoted; and if, indeed, the rule of law there is upheld. Thus, we voted in favour of resolution 1593 (2005).³⁷⁵

303. In his turn, the Permanent Representative of Argentina, Ambassador César Mayoral, also directly addressed immunity in the following words:

[...] Argentina also understands that the International Criminal Court is the proper forum for the international community as a whole to combat impunity wherever it might occur and to bring to justice those responsible for the most serious crimes. [...]

We believe that the letter and spirit of the Rome Statute must be respected and that the balance of its provisions must be preserved, taking into account the legitimate concerns of States without weakening in any way the powers of the Court. For that reason, we regret that we had to adopt a text that establishes an exception to the jurisdiction of the Court. It is our hope that this will not become standard practice.

We would like to make it clear that the exception provided for in paragraph 6 should be limited exclusively to those nationals or members of the armed forces of a State that is not party to the Rome Statute that are participating in peacekeeping operations established or authorized by the Security Council.

Finally, we wish to establish clearly that we are against any position or agreement which generically would exclude the nationals of a State from the jurisdiction of the Court, because that would affect the basis for such jurisdiction and thwart the letter and the spirit of the Rome Statute.³⁷⁶

304. Similarly seeking to constrain the significance of the limited immunity recognised in operative paragraph 6 of resolution 1593 (2005), the Permanent Representative of France, Ambassador Jean-Marc de la Sablière, spoke as follows:

France welcomes the historic resolution that has just been adopted. For the first time, the Security Council has referred a situation to the International Criminal Court. Thus, it has sent a twofold and very forceful message not only to all those who have committed or might be

³⁷⁵ United Nations, Security Council, Meeting Record, 5158th Meeting [Thursday, 31 March 2005, 10.30 pm, New York] Doc No S/PV.5158, at p 6.

³⁷⁶ *Ibid*, at pp 7-8.

tempted to commit atrocities in Darfur, but also to the victims: the international community will not allow those crimes to go unpunished.

The resolution also marks a turning point, for it sends the same message beyond Darfur to the perpetrators of crimes against humanity and war crimes, who until now have all too often escaped justice. The Security Council will remain vigilant to ensure that there is no impunity.

To achieve that result, my country was prepared to recognize—regarding the situation in Darfur and under certain conditions—a jurisdictional immunity vis-à-vis the International Criminal Court for certain nationals or personnel of States not parties to the Rome Statute. Here, I must emphasize that the jurisdictional immunity provided for in the text we have just adopted obviously cannot run counter to other international obligations of States and will be subject, where appropriate, to the interpretation of the courts of my country.³⁷⁷

305. For his part, the Permanent Representative of Greece, Ambassador Adamantios Th Vassilakis, spoke as follows:

The last issue that the Security Council had to address was the violation of humanitarian law. It is the issue of impunity, which we must never allow to go unpunished. The issue of violations of humanitarian law is one to which my country attaches very great importance; that is why we are a party to the International Criminal Court. We would have preferred a resolution text without exceptions, but we were guided by our concern that it would be far more important to have a resolution that took into account certain differing views than to have no resolution at all and to allow violations of humanitarian law to go unpunished.³⁷⁸

306. The Permanent Representative of the United Republic of Tanzania, Ambassador Augustine P Mahiga, registered his country's position in the following words:

The United Republic of Tanzania voted in favour of the resolution we have just adopted with considerable reservations. The human tragedy in Darfur is a matter of serious concern to us and to Africa, as it is to the international community. In that regard, in the interest of justice and accountability, we believe that further delay in reaching an agreement in the hope of a more desirable outcome would not serve the ends of justice or the aspirations of the people of Darfur to peace, justice and reconciliation. Regrettably, the delay in addressing those expectations has been the result of an undue focus on the mechanism at the expense of addressing urgently the plight of the people of Darfur.

We are relieved that the Council has ultimately taken action on the matter. Tanzania is a State party to the International Criminal Court—a Court established to bring to justice those accused of genocide and other serious crimes against humanity. We strongly believe that the Court is the most appropriate international organ for dealing with the situation in Darfur, as recommended by the Commission of Inquiry. However, we are concerned that the resolution also addresses other issues that are, in our view, extraneous to the imperative at hand. We are therefore unable to accept that the resolution should in any way be interpreted as seeking to circumvent the jurisdiction of the Court. In spite of those shortcomings, it is our hope that the resolution will assist in addressing the issue of impunity in Darfur.³⁷⁹

³⁷⁷ *Ibid*, at p 8.

³⁷⁸ *Ibid*, at p 9.

³⁷⁹ *Ibid*, at p 9.

307. The Permanent Representative of Romania, Ambassador Mihnea Motoc considered as follows: ‘At the end of the day, what the Council said today is that there is no way, in our times, that anyone, anywhere in the world, can get away without just retribution for the commission of serious crimes.’³⁸⁰

308. Having voted for resolution 1593 (2005), the Permanent Representative of the Russian Federation, Ambassador Andrey Denisov explained his vote in the following words among others:

The members of the Security Council have frequently reaffirmed that the struggle against impunity is one of the most important elements of a long-term political settlement in Darfur and the Sudan as a whole. All who are guilty of gross violations of human rights in Darfur must be duly punished, as is rightly pointed out in the report of the International Commission of Inquiry.³⁸¹

309. Ambassador Joël Adechi, the Permanent Representative of Benin, registered the following position on behalf of his country:

The vote just taken by the Security Council is a major event in the context of the tireless efforts of the international community to promote the rule of law and to protect humanity against the terrible events witnessed in recent decades. The vote was also in keeping with action by the Council to find a solution to the lethal conflict under way in Darfur.

We regret the fact that the text we have adopted contains a provision of immunity from jurisdiction, which runs counter to the spirit of the Rome Statute.³⁸²

310. Also not to be lost in significance is the post-ballot statement of the President of the Council, Ambassador Ronaldo Sardenberg of Brazil, who took the unusual step of abstaining from voting in favour of the resolution, precisely because of that limited immunity. His explanation deserves setting out in its entirety, as follows:

I shall now make a statement in my capacity as representative of Brazil.

Brazil is in favour of the referral of the situation in Darfur to the International Criminal Court (ICC). Nevertheless, Brazil was not able to join those members that voted in favour of the resolution. We remain committed to bringing to justice those accused of the crimes mentioned in the report of the Commission of Inquiry, and in that sense we are ready to fully cooperate whenever necessary with the International Criminal Court. The maintenance of international peace and the fight against impunity cannot be viewed as conflicting objectives. Brazil reiterates that the ICC provides all the necessary checks and balances to prevent possible abuses and politically motivated misuse of its jurisdiction. Thus, efforts to secure broader

³⁸⁰ *Ibid.*, at p 10.

³⁸¹ *Ibid.*

³⁸² *Ibid.*

immunities from the jurisdiction of the Court are both unwarranted and unhelpful, in our view.

This is the first time the Council has approved a referral of criminal matters to the International Criminal Court, and that approval offers a rare opportunity for the Council to act promptly in one of the most important issues on the international agenda. However, from our point of view, the referral should not be approved at any cost. Brazil understands that there are limits to negotiating the approval of the referral within the Council, and they refer, first, to the responsibilities of the Council vis-à-vis an international instrument; secondly, to the integrity of the Rome Statute, which now has 98 ratifications; and thirdly, to the consistency of the position we have sustained since the negotiations on the Rome Statute. For those reasons, Brazil abstained in the voting on the resolution on the referral.

As recommended by the report of the International Commission of Inquiry, the ICC remains the only acceptable instance of criminal law for dealing with the issue of accountability in the Sudan. We have exhaustively negotiated a text that could better reflect both the concerns of countries non-parties to the Rome Statute, as well as the commitments of those countries that have ratified that instrument.

For the sake of the referral, Brazil painstakingly agreed during the negotiations upon provisions that presented a serious level of difficulty for my Government, such as the exemption from jurisdiction for nationals of those countries not parties to the Statute, even though—considering the need to approve the referral—Brazil acceded to such a limited immunity. To go further would constitute an inadequate and risky interference of the Council in the constitutional basis of an independent judicial body and a position inconsistent with the principles we have defended in the past on this issue. The text just approved contains a preambular paragraph through which the Council takes note of the existence of agreements referred to in article 98-2 of the Rome Statute. My delegation has difficulty in supporting a reference that not only does not favour the fight against impunity but also stresses a provision whose application has been a highly controversial issue. We understand that it would be a contradiction to mention, in the very text of a referral by the Council to the ICC, measures that limit the jurisdictional activity of the Court.

In addition, Brazil also was not in a position to support operative paragraph 6, through which the Council recognizes the existence of exclusive jurisdiction, a legal exception that is inconsistent in international law.

These are substantial issues that, in our view, will not contribute to strengthening the role of the ICC—which is our aspiration. Brazil has consistently rejected initiatives aimed at extending exemptions of certain categories of individuals from ICC jurisdiction, and we maintain our position to prevent efforts that may have the effect of dismantling the achievements reached in the field of international criminal justice. Both the acceleration and the format of negotiations during the last few days have prevented some delegations from balancing the clear objective of referral to the ICC against the hindrances imposed thereon. Insurmountable constraints thus prevented Brazil from voting in favour of a proposal that we have always understood would be the appropriate instrument to help curb violence and end impunity in Darfur.³⁸³

311. The foregoing observations of the Permanent Representatives of the Members of the Security Council taken together could not reasonably encourage the view that

³⁸³ *Ibid.*, at p 11.

in adopting resolution 1593 (2005)—expressly as an exercise of their powers under Chapter VII of the UN Charter—the Security Council had contemplated immunity for President Al-Bashir, as an exception to that Chapter VII measure.

312. And, finally, there is the matter of the Security Council’s reaction—or lack thereof—following the Pre-Trial Chambers’ various decisions that interpreted resolution 1593 (2005) as not intending immunity for Mr Al-Bashir as the President of Sudan. Notably, in a very useful commentary he wrote twenty years ahead of his appearance for Jordan in this appeal, Sir Michael Wood explained that the Security Council has been noted to avail itself of its prerogative of providing ‘authentic interpretation [of its resolutions] in the true sense.’³⁸⁴ Indeed, ‘[s]uch authentic interpretations are likely to be more common in the case of [Security Council resolutions] than in the case of treaties.’³⁸⁵ The reason for that should be obvious. And, quite significantly, ‘[t]hey may be given in a subsequent resolution or in some other way (e.g. a Presidential statement or a letter from the President).’³⁸⁶ A sample list of instances in which the Council has done so is given; including the instance in which resolution 970 (1995) of 12 January 1995 was adopted to reaffirm the requirements in paragraph 12 of resolution 820 (1993) of 17 April 1993. As Wood observed, ‘[t]his authentic interpretation was apparently considered necessary because of a contrary interpretation provided by the Legal Adviser to the Co-Chairmen of the Steering Committee of the International Conference on the Former Yugoslavia (S/1995/6, para 6).’³⁸⁷

313. Against such a possibility of authentic interpretation subsequently given to correct an important misinterpretation of a Security Council resolution in the meantime, it is noted that the Pre-Trial Chamber has rendered a number of decisions, interpreting resolution 1593 (2005) as saying it did not accommodate immunity for Mr Al-Bashir in his office as Sudan’s President.³⁸⁸ Not only have these decisions generated spirited academic and diplomatic controversy, they have also been brought

³⁸⁴ Michael C Wood, ‘The Interpretation of Security Council Resolutions’ (1998) 2 *Max Planck Yearbook of United Nations Law* 73, at p 82.

³⁸⁵ *Ibid.*, at p 83.

³⁸⁶ *Ibid.*

³⁸⁷ *Ibid.*

³⁸⁸ See *supra*, at II.A.3.

to the specific attention of the Security Council in two significant ways: (a) through periodic reports of the Prosecutor of the Court to the Council³⁸⁹; and, (b) as purposive direct referrals to the Council of instances of the non-compliance with a Security Council resolution taken under Chapter VII.³⁹⁰ It is noteworthy that on no occasion since then has the Security Council adopted a subsequent resolution seeking to render an authentic interpretation to clarify that resolution 1593 (2005) had indeed been intended to be—or is in effect—consistent with immunity for Mr Al-Bashir as the President of Sudan.

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314. As discussed above, two important factors that militate against the suggestion that resolution 1593 (2005) was intended to be—or is in effect—consistent with immunity for any official of the Government of Sudan are these: (i) the failure of the resolution itself to provide for or allude to immunity for Sudanese Government officials, and, (ii) the disinclination that most Security Council members declared—on record—against immunity, even to the limited extent that it was recognised in operative paragraph 6 of the resolution upon adoption.

315. There is yet a further factor. It lies in the very fact that the report of the Commission of Inquiry had been all too clear in pointing the finger of culpability directly at officials of the Government of Sudan with no exceptions made in respect of any of those officials—not even for Mr Al-Bashir as President. Notable in that regard, are findings of the Commission as follows:

Based on a thorough analysis of the information gathered in the course of its investigations, the Commission established that *the Government of the Sudan* and the Janjaweed are responsible for serious violations of international human rights and humanitarian law amounting to crimes under international law. In particular, the Commission found that *Government forces* and militias conducted indiscriminate attacks, including killing of civilians, torture, enforced disappearances, destruction of villages, rape and other forms of

³⁸⁹ See *for example*, Seventeenth report of the Prosecutor of the International Criminal Court to the UN Security Council pursuant to UNSCR 1593 (2005), 5 June 2013; Twenty-first report of the Prosecutor of the International Criminal Court to the UN Security Council pursuant to UNSCR 1593 (2005), 29 June 2015; Twenty-sixth report of the Prosecutor of the International Criminal Court to the UN Security Council pursuant to UNSCR 1593 (2005), 12 December 2017; Twenty-seventh report of the Prosecutor of the International Criminal Court to the UN Security Council pursuant to UNSCR 1593 (2005), 20 June 2018; Twenty-eighth report of the Prosecutor of the International Criminal Court to the UN Security Council pursuant to UNSCR 1593 (2005), 14 December 2018.

³⁹⁰ See *supra*, at II.A.3.

sexual violence, pillaging and forced displacement, throughout Darfur. These acts were conducted on a widespread and systematic basis, and therefore may amount to crimes against humanity. The extensive destruction and displacement have resulted in a loss of livelihood and means of survival for countless women, men and children. In addition to the large scale attacks, many people have been arrested and detained, and many have been held incommunicado for prolonged periods and tortured. The vast majority of the victims of all of these violations have been from the Fur, Zaghawa, Masalit, Jebel, Aranga and other so-called “African” tribes.³⁹¹

316. The Commission was careful to take the point of view of Government officials into account, but remained unpersuaded about their innocence. This is reflected as follows in the Commission’s report:

In their discussions with the Commission, *Government of the Sudan officials* stated that *any attacks carried out by Government armed forces* in Darfur were for counter-insurgency purposes and were conducted on the basis of military imperatives. However, it is clear from the Commission’s findings that most attacks were deliberately and indiscriminately directed against civilians. Moreover even if rebels, or persons supporting rebels, were present in some of the villages—which the Commission considers likely in only a very small number of instances—the attackers did not take precautions to enable civilians to leave the villages or otherwise be shielded from attack. Even where rebels may have been present in villages, the impact of the attacks on civilians shows that the use of military force was manifestly disproportionate to any threat posed by the rebels.³⁹²

317. It is particularly to be noted that ‘senior Government officials’ were implicated as among other persons alleged to have committed crimes. As the Commission put it:

Those identified as possibly responsible for the above-mentioned violations consist of individual perpetrators, including *officials of the Government of Sudan*, members of militia forces, members of rebel groups, and certain foreign army officers acting in their personal capacity. *Some Government officials*, as well as members of militia forces, have also been named as possibly responsible for joint criminal enterprise to commit international crimes. Others are identified for their possible involvement in planning and/or ordering the commission of international crimes, or of aiding and abetting the perpetration of such crimes. The Commission also has identified a number of *senior Government officials and military commanders* who may be responsible, under the notion of superior (or command) responsibility, for knowingly failing to prevent or repress the perpetration of crimes. Members of rebel groups are named as suspected of participating in a joint criminal enterprise to commit international crimes, and as possibly responsible for knowingly failing to prevent or repress the perpetration of crimes committed by rebels.³⁹³

318. Having so directly implicated officials of the Government of Sudan (even senior ones) in the violations, and having ‘strongly recommend[ed] that the Security Council immediately refer the situation of Darfur to the International Criminal Court, pursuant

³⁹¹ Cassese Commission Report, at p 3, emphasis added.

³⁹² *Ibid*, emphasis added.

³⁹³ *Ibid*, at p 5, emphases added.

to article 13(b) of the Statute,³⁹⁴ the Commission of Inquiry would have clearly cast in sharp relief the question of immunity of any of those Sudanese officials in the mind of the Security Council as the Council was considering the referral, pursuant to the Rome Statute—an international legal instrument that the Council must be presumed to know as containing a provision (article 27 of the Rome Statute) abjuring immunity even for Heads of State. Indeed, the operation of article 27 in the minds of Council members is especially accentuated by the fundamental and enduring objection of the United States against ‘the view that the ICC should be able to exercise jurisdiction over the nationals, *including government officials*, of States not party to the Rome Statute.’³⁹⁵ Yet, the focus of the United States’ objection was as justification for the limited immunity recognised in operative paragraph 6. In *speaking* supportively in relation to the referral to the Court, the United States said nothing at all that amounts to extension of immunity similarly to ‘government officials’ of Sudan.

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319. In light of all the considerations reviewed above, the Security Council must be presumed with full confidence to have intended to leave it to the regular judicial construction of the Rome Statute, to yield the appropriate answer to the question whether the Head of State of Sudan would enjoy immunity following the referral of the case to the ICC.

320. For purposes of the present litigation, the answer to the question of immunity of the President of Sudan, as a matter of regular judicial construction of the Rome Statute ultimately turns on how article 27 of the Rome Statute is reconciled with article 98. But, that particular exercise may derive helpful relief from an integrated view of resolution 1593 (2005) as a part of the Rome Statute, rather than a desolate accessory remarkable only as a source of discomfiture in the jurisprudence of international law. That integrated view of resolution 1593 (2005) requires taking into account the essence of the resolutions that established the *ad hoc* international criminal tribunals for the comparisons they may hold to the system indicated in article

³⁹⁴ *Ibid.*

³⁹⁵ United Nations, Security Council, Meeting Record, 5158th Meeting, *supra*, at p 3, emphasis added.

13(b) of the Rome Statute, pursuant to which resolution 1593 (2005) was adopted—all of which are a function of Chapter VII powers of the Security Council.

(c) Comparisons with resolutions establishing *ad hoc* tribunals

321. Important lessons derived from the resolutions that the Security Council used to create the *ad hoc* international criminal tribunals must also bear on the interpretation of resolution 1593 (2005)—of the same Security Council—as regards the question whether Head of State immunity is consistent with the latter resolution.

322. The constating features of the various resolutions are essentially the same. They were all adopted following the findings of commissions of experts saying that the situations in question involved serious violations of international human rights and humanitarian norms; which compelled the exercise of jurisdiction by an international criminal tribunal, in order to avoid impunity.³⁹⁶

323. The situation in the former Yugoslavia afforded the initial precedent in which the Security Council used its Chapter VII powers to confer jurisdiction upon an international criminal tribunal, because the Council considered that serious violations of international human rights and humanitarian norms constituted a threat to international peace and security. That initial precedent entailed the following steps. In resolution 808 (1993), the Council first '[d]ecide[d] that an international tribunal shall be established for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991'.³⁹⁷ And, then, the Council '[r]equest[ed] the Secretary-General to submit for consideration by the Council at the earliest possible date, and if possible no later than 60 days after the adoption of the present resolution, a report on all aspects of this matter, including specific proposals and where appropriate options for the effective

³⁹⁶ For the situation in Darfur: see [Resolution 1593 \(2005\)](#), at first preambular paragraph read together with the Report of the International Commission of Inquiry on Darfur to the Secretary-General, *supra*, at p 5. For the situation in the former Yugoslavia, see [Resolution 808 \(1993\)](#), at fifth preambular paragraph. And, for the situation in Rwanda, see [Resolution 955 \(1994\)](#), at sixth and eighth preambular paragraphs, read together with United Nations, Security Council, '[Preliminary report of the Independent Commission of Experts established in accordance with Security Council resolution 935 \(1994\)](#)', at para 133 [annexed to Letter dated 1 October 1994 from the Secretary-General addressed to the President of the Security Council], 4 October 1994, Doc No S/1994/1125.

³⁹⁷ See [Resolution 808 \(1993\)](#), at para 1.

and expeditious implementation of the decision contained in paragraph 1 above, taking into account suggestions put forward in this regard by Member States'.³⁹⁸ The UN Secretary-General duly submitted his report. In it, he recommended both the text of the draft statute for the international tribunal—annexed to the report—and that an enabling resolution (rather than a treaty) should be adopted to put into effect the decision that the Council had already taken to establish the tribunal.³⁹⁹ In accordance with that report, the Council finally adopted on 25 May 1993 resolution 827 (1993) as recommended in the report of the Secretary-General to which was annexed the Statute of the ICTY.

324. With the experience gained from the Yugoslavia situation, the Security Council streamlined its process—from a three-step process⁴⁰⁰ following the recommendation of the commission of experts down to a one-step process⁴⁰¹—in the Rwanda situation. The Council followed that streamlined template in the Darfur situation.

325. But the common denominators in the Security Council's actions in the three situations—in which the Council conferred jurisdiction upon an international tribunal—boil down to the fact that the Council was acting under its Chapter VII powers,⁴⁰² having determined that each instance of the violations in respect of which jurisdiction was being conferred upon an international tribunal was something that constituted a threat to international peace and security.⁴⁰³ Another consideration that was palpable in all three situations was the determination of the Security Council to

³⁹⁸ *Ibid.*, at para 2.

³⁹⁹ See United Nations, Security Council, '[Report of the Secretary-General pursuant to paragraph 2 of Security Council resolution 808 \(1993\)](#)', 3 May 1993, Doc No S/2570, generally, especially at para 30 *et seq.* The draft statute was annexed at page 9 of the report.

⁴⁰⁰ Step 1 was an initial resolution—i.e. [Resolution 808 \(1993\)](#)—deciding to establish a tribunal and requesting the Secretary-General to submit a report on the modalities of doing so; step 2 was the report of the Secretary-General on the modalities of a tribunal annexing the draft statute of the tribunal; and, step 3 was a further resolution—i.e. [Resolution 827 \(1993\)](#)—adopting the report of the Secretary-General and 'hereby' establishing the tribunal which the Council had already decided to establish by the initial resolution.

⁴⁰¹ The Council followed the more straight-forward approach of adopting one resolution to creating an international criminal tribunal for Rwanda, following the recommendation of the commission of experts.

⁴⁰² For the ICTY, see the eleventh preambular paragraph in [Resolution 827 \(1993\)](#); for the ICTR, see the eleventh preambular in [Resolution 955 \(1994\)](#); and, for the ICC, see the sixth preambular paragraph in [Resolution 1593 \(2005\)](#).

⁴⁰³ See the seventh preambular paragraph in [Resolution 808 \(1993\)](#), see also the fourth preambular paragraph in [Resolution 827 \(1993\)](#); fifth the preambular paragraph in [Resolution 955 \(1994\)](#); and, the fifth preambular paragraph in [Resolution 1593 \(2005\)](#).

put an end to such crimes as were concerned in the situation, and to take effective measures to bring to justice persons who were responsible for them. While that consideration was expressly declared in the resolutions concerning the former Yugoslavia⁴⁰⁴ and Rwanda,⁴⁰⁵ the same consideration was individually expressed by representatives in their speeches following the adoption of resolution 1593 (2005). It is very significant, indeed, that such determination was expressed with much force by Ms Patterson on behalf of the United States—even as she also registered her country’s fundamental objection ‘to the view that the ICC should be able to exercise jurisdiction over the nationals, including government officials, of States not party to the Rome Statute.’⁴⁰⁶ Beyond that objection, she said as follows:

We strongly support bringing to justice those responsible for the crimes and atrocities that have occurred in Darfur and ending the climate of impunity there. Violators of international humanitarian law and human rights law must be held accountable. In September, we concluded that genocide had occurred in Darfur and we called for and supported the creation of the International Commission of Inquiry. United Nations estimates are that 180,000 people have died from violence, atrocities and the hunger and disease caused by the conflict. Justice must be served in Darfur.

By adopting this resolution, the international community has established an accountability mechanism for the perpetrators of crimes and atrocities in Darfur. The resolution will refer the situation in Darfur to the International Criminal Court (ICC) for investigation and prosecution. While the United States believes that the better mechanism would have been a hybrid tribunal in Africa, it is important that the international community speak with one voice in order to help promote effective accountability.

The United States continues to fundamentally object to the view that the ICC should be able to exercise jurisdiction over the nationals, including government officials, of States not party to the Rome Statute. That strikes at the essence of the nature of sovereignty. Because of our concerns, we do not agree to a Security Council referral of the situation in Darfur to the ICC and abstained in the voting on today’s resolution. We decided not to oppose the resolution because of the need for the international community to work together in order to end the climate of impunity in the Sudan and because the resolution provides protection from investigation or prosecution for United States nationals and members of the armed forces of non-State parties.⁴⁰⁷

326. Every member of the Security Council—without exception—abjured impunity and spoke in favour of the need to bring to justice those guilty of the violations

⁴⁰⁴ See the eighth preambular paragraph in [Resolution 808 \(1993\)](#), see also the fifth preambular paragraph in [Resolution 827 \(1993\)](#).

⁴⁰⁵ See sixth preambular paragraph in [Resolution 955 \(1994\)](#).

⁴⁰⁶ United Nations, Security Council, Meeting Record, 5158th Meeting, *supra*, at p 3.

⁴⁰⁷ *Ibid.* Notably addressing the matter of impunity in view of the controversial paragraph 6 which was included at the request of the United States, Ms Patterson insisted that it ‘does not mean that there will be immunity for American citizens who act in violation of the law. We will continue to discipline our own people when appropriate’: *ibid.*, at p 4.

committed in Darfur. That sentiment was uniformly expressed: not only by the 12 States who voted in favour of the resolution,⁴⁰⁸ but also by the other three States who (like the United States) had abstained from the voting.⁴⁰⁹ It is significant that no State voted against the resolution.

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327. The point then is that the establishment of the ICTY in 1993 proved largely to be a model and precedent used by the Security Council to establish the ICTR in 1994. In that regard, the immediate value of the UN Secretary-General's report for the establishment of the ICTY effectively translated into a derivative value in the establishment of the ICTR, as regards immunity as a legal question, as well as on conferment of jurisdiction upon the ICC in respect of Darfur. An appreciation of that value begins with the fact that in their request to the Secretary-General to prepare and submit a report on the modalities of the international tribunal contemplated in resolution 808 (1993) of 22 February 1993, the Security Council had also urged the Secretary-General to take into account the suggestions of Member States.⁴¹⁰ In the resulting report dated 3 May 1993, the Secretary-General observed that he had duly

⁴⁰⁸ Argentina, Benin, Denmark, France, Greece, Japan, Philippines, Romania, Russian Federation, United Kingdom of Great Britain and Northern Ireland, and United Republic of Tanzania.

⁴⁰⁹ Algeria, Brazil and China.

⁴¹⁰ United Nations, Security Council, '[Report of the Secretary-General pursuant to paragraph 2 of Security Council resolution 808 \(1993\)](#)', *supra*, at para 2.

taken into account the views of States,⁴¹¹ of non-governmental organisations, and of individual experts.⁴¹²

328. It is against that background that one must consider the UN Secretary-General's observations in favour of accountability of officials including Heads of State, and the correlative repudiation of official position immunity including of Heads of State in particular. As he put it:

*Virtually all of the written comments received by the Secretary-General have suggested that the statute of the International Tribunal should contain provisions with regard to the individual criminal responsibility of heads of State, government officials and persons acting in an official capacity. These suggestions draw upon the precedents following the Second World War. The Statute should, therefore, contain provisions which specify that a plea of head of State immunity or that an act was committed in the official capacity of the accused will not constitute a defence, nor will it mitigate punishment.*⁴¹³

329. In the result, the UN Secretary-General proposed that in the statute of the tribunal—a draft of which was annexed to his report—article 7(2) should contain the

⁴¹¹ As it was stated in the report: 'In accordance with the request of the Security Council, the Secretary-General has taken into account in the preparation of the present report the suggestions put forward by Member States, in particular those reflected in the following Security Council documents submitted by Member States and noted by the Council in its Resolution 808 (1993): the report of the committee of jurists submitted by France (S/25266), the report of the commission of jurists submitted by Italy (S/25300), and the report submitted by the Permanent Representative of Sweden on behalf of the Chairman-in-Office of the Conference on Security and Cooperation in Europe (CSCE) (S/25307). The Secretary-General has also sought the views of the Commission of Experts established pursuant to Security Council Resolution 780 (1992) and has made use of the information gathered by that Commission. In addition, the Secretary-General has taken into account suggestions or comments put forward formally or informally by the following Member States since the adoption of Resolution 808 (1993): Australia, Austria, Belgium, Brazil, Canada, Chile, China, Denmark, Egypt,* Germany, Iran (Islamic Republic of),* Ireland, Italy, Malaysia,* Mexico, Netherlands, New Zealand, Pakistan,* Portugal, Russian Federation, Saudi Arabia,* Senegal,* Slovenia, Spain, Sweden, Turkey,* United Kingdom of Great Britain and Northern Ireland, United States of America and Yugoslavia. He has also received suggestions or comments from a non-member State (Switzerland)': *ibid*, at para 13.

⁴¹² In that respect, the Secretary-General noted as follows: 'The Secretary-General has also received comments from the International Committee of the Red Cross (ICRC) and from the following non-governmental organizations: Amnesty International, Association Internationale des Jeunes Avocats, Ethnic Minorities Barristers' Association, Fédération internationale des femmes des carrières juridiques, International Criminal Police Organization, Jacob Blaustein Institution for the Advancement of Human Rights, Lawyers Committee for Human Rights, National Alliance of Women's Organisations (NAWO), and Parliamentarians for Global Action. Observations have also been received from international meetings and individual experts in relevant fields': *ibid*, at para 14.

⁴¹³ *Ibid*, at para 55, emphases added. In the nature of things, the most serviceable value for that manner of individual criminal responsibility will be in manner of superior responsibility, which the Secretary-General accounted for as follows: 'A person in a position of superior authority should, therefore, be held individually responsible for giving the unlawful order to commit a crime under the present statute. But he should also be held responsible for failure to prevent a crime or to deter the unlawful behaviour of his subordinates. This imputed responsibility or criminal negligence is engaged if the person in superior authority knew or had reason to know that his subordinates were about to commit or had committed crimes and yet failed to take the necessary and reasonable steps to prevent or repress the commission of such crimes or to punish those who had committed them', *ibid*, at para 56.

following provision: ‘The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.’⁴¹⁴

330. In their ensuing resolution 827 (1993) of 25 May 1993, the Security Council ‘approve[d] the report of the Secretary-General’⁴¹⁵ and decided thereby to establish an international tribunal for the former Yugoslavia.⁴¹⁶ And to that end, the Security Council adopted the Statute of the International Tribunal annexed to the UN Secretary-General’s report.⁴¹⁷ That decision was expressed in the following text:

Decides hereby to establish an international tribunal for the sole purpose of prosecuting persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia between 1 January 1991 and a date to be determined by the Security Council upon the restoration of peace and to this end to adopt the Statute of the International Tribunal annexed to the above-mentioned report [...].⁴¹⁸

331. It is necessary to pause here and note that it should not be surprising that ‘[v]irtually all of the written comments received by the Secretary-General’ would have suggested that the statute of the ICTY should contain the norm expressed in article 7(2). For, that is precisely a norm that the ILC had formulated in 1950 as Nuremberg Principle III:⁴¹⁹ having been directed to do so by the United Nations General Assembly,⁴²⁰ following the Assembly’s affirmation in an earlier resolution of the principles of international law recognised by the Charter of the Nuremberg Tribunal and the judgment of the Tribunal.⁴²¹ In effect, article 7(2) of the ICTY Statute marked the first occasion that the international community, acting through the agency of the Security Council, gave actionable value to Nuremberg Principle III, since its initial occurrence as article 7 of the Nuremberg Charter.

⁴¹⁴ *Ibid.*, at para 59.

⁴¹⁵ See [Resolution 827 \(1993\)](#), *supra*, at para 1.

⁴¹⁶ *Ibid.*, at para 2.

⁴¹⁷ *Ibid.*

⁴¹⁸ *Ibid.*

⁴¹⁹ See ILC, *Yearbook* (1950), vol II, p 192.

⁴²⁰ See United Nations, General Assembly [Resolution 177 \(II\)](#) on Formulation of the Principles recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal, A/RES/177(II), 21 November 1947, at para (a).

⁴²¹ See United Nations General Assembly [Resolution 95\(I\)](#) on Affirmation of Principles of International Law recognized by the Charter of the Nürnberg Tribunal, 11 December 1946, at first operative paragraph.

332. In the next year following the establishment of the ICTY, genocide erupted in Rwanda. In response the Security Council adopted a resolution in which, amongst other things, the UN Secretary-General was tasked to establish a commission of experts to inquire into the events.⁴²² No doubt inspired by the precedent of the Security Council's measures in relation to the former Yugoslavia,⁴²³ the Commission of Experts on Rwanda submitted an interim report to the Security Council through the Secretary-General on 1 October 1994. In their report, the Commission recommended that jurisdiction be conferred upon the already existing tribunal for the former Yugoslavia,⁴²⁴ or a new similar tribunal, to inquire into the violations committed in Rwanda.⁴²⁵

333. Notably, in their consideration of the question of individual criminal responsibility, the Commission of Experts expressed their understanding of Nuremberg Principle III as rejecting immunity on grounds of official capacity. As the Commission put it: '[T]he *Nuremberg Trials established clearly* the principle that any individual, regardless of office or rank, shall be held responsible in international law for war crimes, crimes against peace or crimes against humanity. It symbolized the possibility that trials could actually be carried out and punishment enforced in modern times.'⁴²⁶

334. The Commission of Experts also specifically reiterated the norm of accountability of Heads of State in the context of superior responsibility, in the following words:

It is a *well-established principle of international law* that a person who orders a subordinate to commit a violation for which there is individual responsibility is as responsible as the individual that actually carries it out. The Nuremberg Principles, adopted by the United Nations General Assembly on 11 December 1946, affirmed that *even a Head of State is not free from responsibility under international law for the commission of a crime under international law*.⁴²⁷

⁴²² See [Resolution 935 \(1994\)](#), at para 1.

⁴²³ United Nations, Security Council, '[Preliminary report of the Independent Commission of Experts established in accordance with Security Council resolution 935 \(1994\)](#),' Annex to Letter dated 1 October 1994 from the Secretary-General Addressed to the President of the Security Council, Doc No S/1994/1125, See para 128 for instance.

⁴²⁴ *Ibid*, at para 139.

⁴²⁵ *Ibid*, at para 133.

⁴²⁶ *Ibid*, at para 127, emphasis added.

⁴²⁷ *Ibid*, at para 129, emphasis added.

335. On 8 November 1994, the Security Council adopted resolution 955 (1994), establishing the ICTR—having received the request of the post-conflict Government of Rwanda to do so. The Security Council expressed the decision as follows:

Decides hereby, having received the request of the Government of Rwanda (S/1994/1115), to establish an international tribunal for the sole purpose of prosecuting persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994 and to this end to adopt the Statute of the International Criminal Tribunal for Rwanda annexed hereto [...].⁴²⁸

336. Annexed to resolution 955 (1994) is a statute largely modelled on the precedent of the ICTY Statute.⁴²⁹ In article 6(2) of the ICTR Statute, the Council rendered in identical terms the same norm that they had expressed in article 7(2) of the ICTY Statute.

337. The next major milestone in the development of international law in this connection was the adoption of the Rome Statute in 1998, into which is incorporated in article 27 essentially the same norm that the Security Council had successively expressed in article 7(2) and article 6(2) of the ICTY and the ICTR statutes, respectively.

338. It then stands to reason that when the Security Council referred the Darfur situation to the ICC in 2005, they were referring the situation to a very familiar regime of accountability—in which there would be no immunity for even Heads of State. That being the case, it would be wholly unreasonable to suppose either that the Security Council had intended the opposite result as compared with their previous experiences or that they did not know that they were referring the situation to an international criminal jurisdiction that did not recognise immunity for Heads of State.

⁴²⁸ [Resolution 955 \(1994\)](#), at para 1.

⁴²⁹ As a minor point, it may be noted that while the Security Council had adopted the draft ICTY Statute annexed to the report of the Secretary-General; in respect of the ICTR, the Council had directly annexed the Statute of the ICTR to Resolution 955 (1994). Nothing turns on the procedure, except, perhaps, to say that lessons learnt from the previous experience in relation to the ICTY had enabled greater efficiency in the processes of the Council in the subsequent instance concerning the ICTR.

2. *The Purpose of Article 13(b) of the Rome Statute*

339. One angle to the present litigation which many have found vexed—from the time of the Security Council’s referral of the Darfur situation to the ICC—has been the question whether the Rome Statute can portend adverse effect for States not party to it. That issue results from an established principle of international law captured in the maxim *res inter alios acta alteri nocere non debet*; or its synonymous variant *pacta tertiis nec nocent prosunt*. According to that principle, a treaty raises no duty or right to non-parties. The immediate value of that issue to the questions now presented is this. It is the prerogative of States Parties to yield their sovereignty to the extent delineated in the Rome Statute: which includes displacing the immunity of their officials including Heads of State, according to article 27. But, such a state of international affairs would surely carry no adverse implication in the indicated manner for States not parties to the Rome Statute.

340. The import of the principle of *res inter alios acta*, as outlined above, remains a general rule of international law, for purpose of the Rome Statute. But, it is also the case that United Nations law circumscribes well-known exceptions to that general rule—with particular regard to the maintenance of international peace and security. The point in the end is to say this. Standing alone, the Rome Statute entails no duty or right for States not party to it. But, the Rome Statute can entail rights and duties for a State not party to it—by the operation of another treaty to which that State is a party. And here, it must be stressed that no particular arrangement of words is required to convey that meaning; noting the controversy provoked by the formulations of words employed by the Pre-Trial Chamber in the past to say effectively the same thing in different ways.

341. This takes us to a studied consideration of the significance of article 13(b) of the Rome Statute. But, there is much perspective to be derived against the background of the earlier review of the measures taken by the Security Council in creating and conferring jurisdiction upon the ICTY and the ICTR under Chapter VII of the UN Charter.

342. It is recalled that in resolution 827 (1993) and resolution 955 (1994), the Security Council had established the ICTY and the ICTR ‘for the sole purpose of

prosecuting persons responsible for' genocide and other serious violations of international humanitarian law committed in the territories of the former Yugoslavia and Rwanda, respectively.⁴³⁰ The significance of the limited purpose of those *ad hoc* tribunals lies in the following explanation offered in the UN Secretary-General's report to the Security Council, following the Council's adoption of resolution 808 (1993):

The Security Council's decision in resolution 808 (1993) to establish an international tribunal is circumscribed in scope and purpose: the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991. *The decision does not relate to the establishment of an international criminal jurisdiction in general nor to the creation of an international criminal court of a permanent nature, issues which are and remain under active consideration by the International Law Commission and the General Assembly.*⁴³¹

343. Indeed, for present purposes—especially as concerns the question of the legal propriety of the Rome Statute to create duties and rights for States not parties—there is much significance in the fact that during the Security Council's creation of the ICTY and the ICTR, the establishment of an international criminal jurisdiction in general and the creation of an international criminal court of a permanent nature, were and remained 'under active consideration by the International Law Commission and the General Assembly', as indicated in the report of the UN Secretary-General quoted above.

344. It is recalled that the active consideration of the creation of the ICC at the UN goes back to General Assembly resolution 177 (II) of 21 November 1947. By virtue of that resolution, the General Assembly had directed the ILC to '[p]repare a draft code of offences against the peace and security of mankind, indicating clearly the place to be accorded to the principles [of international law recognised in the Charter of the Nuremberg Tribunal and in the judgment of that Tribunal]'.⁴³²

345. On 9 December 1948, together with resolution 260 A (III) approving the Convention against Genocide and proposing it for signature and ratification, the General Assembly also adopted resolution 260 B (III). Instructively, the text of the

⁴³⁰ See [Resolution 827 \(1993\)](#), at para 2, and [Resolution 955 \(1994\)](#), at para 1, emphasis added.

⁴³¹ United Nations, Security Council, '[Report of the Secretary-General pursuant to paragraph 2 of Security Council resolution 808 \(1993\)](#)', *supra*, at para 12, emphasis added.

⁴³² See United Nations, General Assembly, [Resolution 177 \(II\)](#), 21 November 1947, A/RES/177(II), at para (b).

latter resolution directly tasked the ILC to study the desirability and possibility of creating an international criminal court. The resolution set out that task in the following text:

Considering that the discussion of the Convention on the Prevention and Punishment of the Crime of Genocide has raised the question of the desirability of having persons charged with genocide tried by a competent international tribunal,

Considering that, in the course of development of the international community, there will be an increasing need of an international judicial organ for the trial of certain crimes under international law,

Invites the International Law Commission to study the desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide or other crimes over which jurisdiction will be conferred upon that organ by international conventions;

Requests the International Law Commission, in carrying out this task, to pay attention to the possibility of establishing a Criminal Chamber of the International Court of Justice.

346. The two special rapporteurs to whom the ILC had assigned the question—Professor Ricardo Alfaro (a former President of Panama) and Judge Emil Sandström (of Sweden)—had divergent viewpoints. And each submitted his own report; leading to discussion within the ILC and their eventual vote on the question.

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347. Professor Alfaro's report remains a most important chronicle of the quest for a permanent international criminal court,⁴³³ as part of the ILC's and the General Assembly's active consideration of that question. In that report, he recounts earlier efforts: including work done under the auspices of the International Association of Penal Law between 1926 and 1928, presided over by Professor V V Pella of the University of Bucharest. Notably, '[a]t the Congress of the Association in Brussels, in 1926, papers were submitted by no less than thirteen jurists, among them Donnedieu de Vabres and Pella, whose "conclusions" were adopted by the Congress, as the basis for its discussions. A resolution was passed comprising twelve points, the most substantial of which were' as follows:

(a) the Permanent Court of International Justice should have criminal jurisdiction;

⁴³³ ILC, *Yearbook* (1950), *supra*, at p 1 *et seq.*

(b) the Court should have competence to try States for an unjust aggression and for all violations of international law;

(c) the Court should also be competent to try individuals for international criminal responsibilities; and

(d) offences and penalties should be defined and pre-established by precise texts.⁴³⁴

348. Quite notably, Professor Pella's 'draft statute of an International Criminal Court' undertaken on behalf of the International Association of Penal Law, was suggested as a document that 'might be used by the International Law Commission as a basis for discussion of the concrete problem of the organization of the court.'⁴³⁵

349. Ultimately, from the mandate conferred upon the ILC by General Assembly resolution 260 B (III), Alfaro boiled down the concrete matter into the following three broad queries:

Was it *desirable* to establish an international judicial organ for the trial of persons charged with genocide and other crimes?

Was it *possible* to establish such a judicial organ?

Was it *possible* to establish a Criminal Chamber of the International Court of Justice?⁴³⁶

350. It is important to pause at this juncture and mark those questions as affording—from the perspective of *res inter alios acta*—an early insight into the significance of article 13(b) of the Rome Statute adopted years later.

351. On the question of the *desirability* of establishing an international judicial organ for the trial of persons charged with genocide and other crimes, Alfaro answered the question unequivocally in the following words, based on his study:

That it is *desirable* to establish a judicial organ for the trial of international crimes, seems to be evidenced by all the facts, declarations, studies, proposals, recommendations, plans and decisions which have marked for a period of over thirty years the birth and growth of the idea of an international criminal jurisdiction. In fact, more than something desirable, it is a thing

⁴³⁴ *Ibid*, at p 5, para 24.

⁴³⁵ *Ibid*, at p 5, para 25.

⁴³⁶ *Ibid*, at p 16, para 127.

desired, an aspiration of Governments, institutions, conferences, jurists, statesmen and writers.⁴³⁷

352. Alfaro also answered the question of the *possibility* in the affirmative, citing the examples of a ‘judicial organ of that type [that] was created by the Geneva Convention of 1937 for the trial of persons responsible for acts of international terrorism’ and the ‘[t]wo International Military Tribunals [that] were set up by multilateral agreements, one in Nürnberg in 1945, the other in Tokyo in 1946.’⁴³⁸ He did, however, note the ‘question of sovereignty’ as ‘[o]ne objection worthy of some consideration’.⁴³⁹ It had been argued in that respect ‘that for States to relinquish their domestic penal jurisdiction and to be obliged to deliver their own nationals to an external jurisdiction would be contrary to the classical principle of sovereignty, doubtless meaning absolute sovereignty.’⁴⁴⁰

353. But, Alfaro did not consider the sovereignty-based objection as insurmountable. He deployed two powerful strokes of reasoning against the objection. The first was founded on considerations of effectiveness. As he put it:

This objection, which of course covers an immense field of discussion, might be countered with the remark that certain crimes perpetrated by Governments or by individuals as representatives of Governments, could hardly be tried by territorial courts. Only an international court can properly try certain international crimes. Consequently, for the repression of crimes against the peace, war crimes, crimes against humanity and genocide, an international court is essential.⁴⁴¹

354. But just as compelling—and perhaps more so for the present purposes of the significance of article 13(b) of the Rome Statute—is Alfaro’s reasoning deriving from the effect of the UN on the matter of sovereignty of its Member States. As he put it:

A more general but equally direct answer is that the principle of absolute sovereignty is incompatible with the present organization of the world. The very existence and functioning of the United Nations implies a relinquishment of part of the sovereign rights of nations. Against the theory of absolute sovereignty stands the incontrovertible, palpable fact of the interdependence of States. Interdependence regulates life in the community of States, very much in the same manner as limitations to individual freedom regulate life in the national

⁴³⁷ *Ibid.*, at p 16, para 128.

⁴³⁸ *Ibid.*, at p 16, para 128 [*sic*].

⁴³⁹ *Ibid.*, at p 16, para 129.

⁴⁴⁰ *Ibid.*

⁴⁴¹ *Ibid.*, at p 17, para 129 cont’d.

society. For States as well as for individuals, the right of every one is limited by the rights of others. The sovereignty of the State is subordinated to the supremacy of international law.⁴⁴²

355. Ultimately, the matter may be distilled down to the following essential consideration: ‘If the rule of law is to govern the community of States and protect it against violations of the international public order, it can only be satisfactorily established by the promulgation of an international penal code and by the permanent functioning of an international criminal jurisdiction.’⁴⁴³

356. In his final analysis, Alfaro submitted that the United Nations may *establish* an international criminal jurisdiction on the following bases:

That an International Penal Court or a Criminal Chamber of the International Court of Justice be created by the United Nations;

That such a judicial organ be vested with power to deal with crimes against the peace and security of mankind, genocide and such other crimes in respect of which jurisdiction may be conferred on it by international convention;

That the jurisdiction of the international organ of penal justice be exercised over States as well as over individuals accused of any of the crimes above mentioned;

That the judicial organ be competent also to decide certain controversies relative to the administration of criminal justice;

That all crimes for which States or individuals be tried by the international judicial organ be defined in an International Penal Code;

That the judges of the Criminal Court or Chamber be jurists of high qualifications elected in the same manner as the judges of the International Court of Justice and chosen without distinction as to nationality;

That the Criminal Court or Chamber shall be a permanent body, but shall sit in plenary session only when it is seized of proceedings for an offence within its jurisdiction;

That a Permanent Division of the Court or Chamber be constituted, in such manner as may be determined by the Statute, to attend to current business and to convene full meetings when necessary;

That international criminal proceedings shall be started only by the Security Council or by a State duly authorized therefor by the Security Council; and,

That defendants appearing before the international judicial organ shall have all the guarantees necessary for their defence and that hearings shall be public.⁴⁴⁴

⁴⁴² *Ibid*, at pp 16-17, para 129.

⁴⁴³ *Ibid*, at p 17, para 136.

⁴⁴⁴ *Ibid*, at p 17, para 130.

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357. In his turn, Judge Sandström poured cold water on the evident warmth that radiated through Professor Alfaro's analysis. To begin with, Sandström considered it important that the inquiry must first settle the proper interpretation of the terms of reference⁴⁴⁵ of General Assembly resolution 260 B (III). From that perspective, 'two alternatives offer themselves: the establishment of an international criminal jurisdiction outside the framework of the United Nations by a special group of States, or the establishment of a judicial organ of the United Nations within the framework of the United Nations Organization.'⁴⁴⁶

358. He considered that the first alternative was relatively unproblematic as compared with the second. For, as concerns the first alternative, it is up to States to decide, presumably in the absence of such an international criminal jurisdiction, to establish it outside the framework of the UN and bind themselves accordingly.⁴⁴⁷ But, '[c]onsidering that the request to study this problem came from the General Assembly, and in view of the circumstances in which this request was made, the latter alternative must be considered as the correct interpretation of the terms of reference.'⁴⁴⁸ Therefore, for purposes of his inquiry, he considered that General Assembly resolution 260 B (III) 'must be assumed to aim at a study of the question (1) whether and on what conditions, with regard to the United Nations Charter, the judicial organ as envisaged in the request could be established, and, (2) whether, in the light of the result of that study, and, in general, in the actual state of organization of the international community, the establishment thereof would be desirable.'⁴⁴⁹

359. Regarding the question whether and on what conditions the judicial organ as envisaged in General Assembly resolution 260 B (III) could be established from the perspective of the UN Charter, Sandström approached the discussion by considering the relevant provisions of both the UN Charter and the ICJ Statute, and, in particular,

⁴⁴⁵ *Ibid*, at p 18.

⁴⁴⁶ *Ibid*, at p 19, para 2.

⁴⁴⁷ *Ibid*, at p 19, paras 2a, 3.

⁴⁴⁸ *Ibid*, at p 19, para 2b.

⁴⁴⁹ *Ibid*, at p 19, para 2c.

whether they may require an amendment. In that regard, he expressed the following views, among others:

(i) To create an international criminal court as a separate organ within the UN would require the Court to be a principal organ of the UN, comparable in stature to the International Court of Justice which is a principal organ of the UN.⁴⁵⁰ That would require an amendment of the Charter by two-thirds majority, and subject to the veto.⁴⁵¹

(ii) Since the ICJ Statute did not envisage either a 'repressive jurisdiction' in respect of international criminal law, or jurisdiction to inquire into individual criminal responsibility,⁴⁵² to confer such a criminal jurisdiction on a Chamber of the ICJ would similarly require an amendment to the ICJ Statute. That, too, would require a two-thirds majority and subject to the veto.⁴⁵³

(iii) In any event, the General Assembly does not have the power to make the competence binding compulsorily upon UN Member States, presumably considering that the jurisdiction of the ICJ is not compulsory on all UN Member States.⁴⁵⁴

360. Regarding the question whether the establishment of an international criminal jurisdiction would be *desirable*, in the prevailing context of the actual state of organisation of the international community, Sandström first considered that 'after the experiences of mankind during the two world wars of this century there undoubtedly is an urgent desire for such a jurisdiction. Few things could better satisfy the common craving for justice.'⁴⁵⁵ Nevertheless, he rested his (ultimately negative) analysis upon the following conclusion:

In my opinion the cons outweigh by far the pros. A permanent judicial criminal organ established in the actual organization of the international community would be impaired by very serious defects and would do more harm than good. The time cannot as yet be considered ripe for the establishment of such an organ.⁴⁵⁶

361. Following a discussion based on the two reports of Professor Alfaro and Judge Sandström, the Commission put the matter to a vote. By eight votes to one, with two abstentions, it was decided that the establishment of an international judicial organ was *desirable* for the trial of persons charged with genocide or other crimes over which jurisdiction will be conferred upon that organ by international conventions. It was also decided by seven votes to three, with one abstention, that the establishment

⁴⁵⁰ See *ibid*, at p 19, paras 4-4a and 6-8.

⁴⁵¹ See *ibid*, at p 20, para 9.

⁴⁵² See *ibid*, at p 19, para 5.

⁴⁵³ See *ibid*, at p 20, para 10.

⁴⁵⁴ See *ibid*, at p 20, paras 12 and 13.

⁴⁵⁵ See *ibid*, at p 20, para 14.

⁴⁵⁶ See *ibid*, at p 23, para 39.

of the judicial organ was *possible*. It was decided not to recommend the possibility of establishing a criminal chamber of the ICJ, although it was possible to do so by amendment of the Court's Statute. That outcome was reported in Part IV of the report of the ILC on the work of its second session.⁴⁵⁷

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362. Following a preliminary consideration of the ILC's report on the question of international criminal jurisdiction, the General Assembly adopted resolution 489 (V) on 12 December 1950, establishing a committee composed of the representatives of seventeen Member States 'for the purpose of preparing one or more preliminary draft conventions and proposals relating to the establishment and the statute of an international criminal court.'⁴⁵⁸ The Committee on International Criminal Jurisdiction met at Geneva in August 1951 and completed a draft statute for an international criminal court.⁴⁵⁹

363. General Assembly resolution 36/106 of 10 December 1981 may be noted as another milestone along the way to the establishment of the ICC. Having considered the draft Code of Offences against the Peace and Security of Mankind, which the ILC had submitted to the General Assembly in 1954,⁴⁶⁰ the Assembly recalled 'its belief that the elaboration of a code of offences against the peace and security of mankind could contribute to strengthening international peace and security and thus to promoting and implementing the purposes and principles set forth in the Charter of the United Nations.'⁴⁶¹ Against that background, the Assembly invited the ILC 'to resume its work with a view to elaborating the draft Code of Offences against the Peace and Security of Mankind and to examine it with the required priority in order to

⁴⁵⁷ See *ibid*, at p 378 paras 128 to 145.

⁴⁵⁸ See United Nations, General Assembly, [Resolution 489 \(V\)](#) on International Criminal Jurisdiction, 12 December 1950, A/RES/489(V), at para 1.

⁴⁵⁹ See ILC website <http://legal.un.org/ilc/guide/7_2.shtml#ilcrep> [accessed 26 November 2018]. See also Schabas, *The International Criminal Court: a Commentary on the Rome Statute*, 2nd edn (2016), at p 8.

⁴⁶⁰ United Nations, General Assembly, Resolution 36/106 on Draft Code of Offences against the Peace and Security of Mankind, 10 December 1981, [A/RES/36/106](#), at third preambular paragraph.

⁴⁶¹ *Ibid*, at fourth preambular paragraph.

review it, taking duly into account of the results achieved by the process of the progressive development of international law'.⁴⁶²

364. The significance of resolution 36/106 lies, for present purposes, mostly in the General Assembly's proclamation that the project of producing a code of offences against the peace and security of humankind was something that could contribute not only to the strengthening of international peace and security, but would in the result promote and implement the purposes and principles set forth in the Charter of the United Nations.

365. In further resolutions of the General Assembly, they considered also that the establishment of an international criminal court was something that inured to the advantage of the United Nations not only in relation to its Charter, both also as an organisation. That message was clear in both General Assembly resolution 45/41 of 28 November 1990 and resolution 46/54 of 9 December 1991. In both resolutions, the General Assembly emphasised 'the need for the progressive development of international law and its codification in order to make it a more effective means of implementing the purposes and principles set forth in the Charter of the United Nations and in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations and to give increased importance to its role in relations among States.'⁴⁶³ Hence, the Assembly invited the ILC 'within the framework of the draft Code of Crimes against the Peace and Security of Mankind, to consider further and analyse the issues raised in its report on the work of its forty-second session concerning the question of an international criminal jurisdiction, including proposals for the establishment of an international criminal court or other international criminal trial mechanism in order to enable the General Assembly to provide guidance on the matter'.⁴⁶⁴

⁴⁶² *Ibid.*, at para 1.

⁴⁶³ See United Nations, General Assembly, [Resolution 46/54](#) on the Report of the International Law Commission on the work of its forty-third session, 9 December 1991, A/RES/46/54, at second preambular paragraph. See also United Nations, General Assembly, [Resolution 45/41](#) on the Report of the International Law Commission on the work of its forty-second session, 28 November 1990, A/RES/45/41, in the same place.

⁴⁶⁴ At para 3 common to [Resolution 45/41](#) and [Resolution 46/54](#).

366. The ILC recommenced its consideration of the question of an international criminal jurisdiction in 1992, under the topic ‘Draft code of crimes against the peace and security of mankind’.⁴⁶⁵

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367. To keep the narrative within manageable length for the reader, the history up to this point so far has been greatly abbreviated; and will remain so abbreviated beyond this point. It is enough to say that much was said and done between and within the General Assembly and the ILC—by way of resolutions from the former and responsive reports from the latter—involving continued and renewed mandates from the General Assembly to the ILC to study the question of establishing an international criminal court in the context of the preparation of a draft code of offences against the peace and security of humankind.

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368. Pursuant to their mandate, the ILC eventually submitted a report to the General Assembly in 1994. It contained a Draft Statute of an International Criminal Court [the ‘ILC’s Draft ICC Statute’], with commentaries. In the report, the ILC also ‘recommend[ed] to the General Assembly to convene an international conference of plenipotentiaries to study the draft statute and to conclude a convention on the establishment of an international criminal court.’⁴⁶⁶

369. For purposes of the question now before the Appeals Chamber, it is certainly significant that this recommendation served as the immediate spur for the General Assembly to set up preparatory committees to consider and make arrangements for the convening of the international conference of plenipotentiaries that was held in Rome in 1998, which resulted in the adoption of the Rome Statute.⁴⁶⁷

⁴⁶⁵ *Ibid.*

⁴⁶⁶ ILC, *Yearbook* (1994), vol 2, Part 2, at p 26, para 90. See also United Nations, General Assembly, [Resolution 49/53](#) on the Establishment of an international criminal court, 9 December 1994, A/RES/49/53, at third preambular paragraph.

⁴⁶⁷ See, *generally*, United Nations, General Assembly, [Resolution 49/53](#), *supra*. See also United Nations, General Assembly, Resolution 50/46 on the Establishment of an international criminal court, 11 December 1995 [A/RES/50/46](#); United Nations, General Assembly, Resolution 51/207 on the Establishment of an international criminal court, 17 December 1996, [A/RES/51/207](#).

370. Of especial significance are two important draft provisions of the ILC's Draft ICC Statute—and the related ILC commentaries. They reveal much about the intendment of what became article 13(b) of the Rome Statute, in light of the issue that hinges on the principle of *res inter alios acta*.

371. We may begin with article 2 in the ILC's Draft ICC Statute. It provided as follows: 'The President, with the approval of the States Parties to this Statute ..., *may* conclude an agreement establishing an appropriate relationship between the Court and the United Nations.'⁴⁶⁸ The sameness of object between this draft provision and the eventual article 2 of the Rome Statute is accentuated by the fact that while the ILC draft left the relationship between the ICC and the UN as an optional idea, in the Rome Statute itself the idea was rendered in the more obligatory language: 'The Court *shall* be brought into relationship with the United Nations through an agreement to be approved by the Assembly of States Parties to this Statute and thereafter concluded by the President of the Court on its behalf.' [Emphasis added.]

372. In his book of commentary on the Rome Statute, Professor William Schabas observed as follows in the context of article 2 of the Rome Statute:

At the time of entry into force of the Genocide Convention, in 1951, some States argued that it had in effect taken on a life of its own and that it 'belonged' henceforth to the States Parties. The Convention had been drafted under the auspices of the United Nations system, and its text was adopted in 1948 by a General Assembly resolution. The International Court of Justice replied that the Genocide Convention was a 'permanent interest of direct concern to the United Nations which has not disappeared with entry into force.' The same might be said of the Rome Statute of the International Criminal Court.⁴⁶⁹

373. It is a correct observation. The debate within the ILC, which culminated in their adoption of their draft article 2, is much revealing in this regard. It is directly informative as to what was operating on the minds of the expert body that the General Assembly had delegated the task of considering the matter of establishment of the ICC. In particular, they had effectively confronted a redux of the agonising that marked the Alfaro-Sandström era: concerning whether the UN should establish an international criminal court within or outside the existing framework of the UN. If so, how? A particular feature of that debate concerned the questions whether the ICC

⁴⁶⁸ ILC, *Yearbook* (1994), *supra*, at p 27, emphasis added.

⁴⁶⁹ Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd edn, (2016), *supra*, at p 67.

should be set up as a subsidiary or principal organ of the UN and whether it should be set up by an amendment to the UN Charter or by a separate treaty or by a resolution of either the General Assembly or the Security Council. For the answers to those questions, the ILC's commentaries are very instructive. And, they should be set out at some length in the relevant respect:

(1) Divergent views were expressed in the Commission on the relationship of the court to the United Nations. Several members of the Commission favoured the court becoming a subsidiary organ of the United Nations by way of resolutions of the Security Council and General Assembly, without the need for any treaty. Others strongly preferred that it be created as an organ of the United Nations by amendment to the Charter of the United Nations. Still others thought such an amendment unrealistic and even undesirable at this stage, and advocated another kind of link with the United Nations such as the Agreement governing the relationship between the United Nations and the International Atomic Energy Agency (see article XVI of the IAEA statute).

(2) One view that was strongly advanced favoured a jurisdictional structure based on resolutions of the General Assembly and Security Council, on the ground that this would reflect the will of the international community as a whole, would be more flexible, and would bring the court within the framework of the United Nations without the need for an amendment of the Charter. Adoption of the statute by a treaty to which only some States would be parties would be an unsatisfactory alternative, since the States on whose territory terrible crimes were committed would not necessarily be parties to the statute; in some cases, such States were the least likely to become parties. To adopt the statute by treaty could give the impression of a circle of "virtuous" States as between whom, in practice, cases requiring the involvement of the court would not arise.

(3) However the Commission concluded that it would be extremely difficult to establish the court by a resolution of an organ of the United Nations, without the support of a treaty. General Assembly resolutions do not impose binding, legal obligations on States in relation to conduct external to the functioning of the United Nations itself. In the present case important obligations—for example the obligation of a State to transfer an accused person from its own custody to the custody of the court—which are essential to the court's functioning could not be imposed by a resolution. A treaty commitment is essential for this purpose. Moreover, a treaty accepted by a State pursuant to its constitutional procedures will normally have the force of law within that State—unlike a resolution—and that may be necessary if that State needs to take action vis-a-vis individuals within its jurisdiction pursuant to the statute. And, finally, resolutions can be readily amended or even revoked: that would scarcely be consistent with the concept of a permanent judicial body.

(4) Between the solution of a treaty and an amendment of the Charter, the majority preferred the former, and it is reflected in the text of article 2. This envisages a relationship agreement accepted by the competent organs of the United Nations and on behalf of the court, but with the States parties to the statute creating the court assuming the responsibility for its operation. This relationship agreement would be concluded between the Presidency, acting on behalf of and with the prior approval of States parties, and the United Nations, and it would provide, inter alia, for the exercise by the United Nations of the powers and functions referred to in the statute.

(5) On the other hand, some members felt strongly that the court could only fulfil its proper role if it was made an organ of the United Nations by amendment of the Charter. In their view, the court is intended as an expression of the concern about and desire of the organized

international community to suppress certain most serious crimes. It is logical that the court be organically linked with the United Nations as the manifestation of that community. They would therefore prefer article 2 to provide simply that “The court shall be a judicial organ of the United Nations”.

(7) Despite this disagreement at the level of technique, it was agreed that the court could only operate effectively if it were brought into a close relationship with the United Nations, both for administrative purposes, in order to enhance its universality, authority and permanence, and because in part the exercise of the court’s jurisdiction could be consequential upon decisions by the Security Council (see art. 23). [...]

(8) Some of the links with the United Nations are provided for in the draft statute. [...] ⁴⁷⁰

374. In the context of the debate, it is necessary to draw special attention to the ILC’s observation ‘that it would be extremely difficult to establish the court by a resolution of an organ of the United Nations, without the support of a treaty. General Assembly resolutions do not impose binding, legal obligations on States in relation to conduct external to the functioning of the United Nations itself.’⁴⁷¹ Keeping in mind that the object of that observation is General Assembly resolutions, it requires stressing, perhaps, that this observation does not contradict the idea recognised in both the *Namibia* and the *Kosovo* advisory opinions that the Security Council may impose binding, legal obligations on UN Member States; and may do so in relation to conduct connected to the functioning of the United Nations, in light of its own mandate.

375. The preceding observation brings us to the second provision of the ILC’s Draft ICC Statute that holds interest for us. It is draft article 23, which was reserved for ‘Action by the Security Council’. Draft article 23(1) provided as follows: ‘Notwithstanding article 21, the Court has jurisdiction in accordance with this Statute with respect to crimes referred to in article 20 as a consequence of the referral of a matter to the Court by the Security Council acting under Chapter VII of the Charter of the United Nations.’⁴⁷² In those terms, draft article 23(1) of the ILC’s Draft ICC Statute was the initial working draft of article 13(b) of the Rome Statute now rendered in the following terms: ‘The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if: [...] A situation in which one or more of such crimes appears to have been committed is

⁴⁷⁰ ILC, *Yearbook* (1994), *supra*, at pp 27-28.

⁴⁷¹ *Ibid.*, at p 28.

⁴⁷² *Ibid.*, at p 43.

referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations [...].’

376. The two provisions have precisely the same effect, with the following tracking adjustments made: (a) draft article 20 [to which reference is made in draft article 23(1)] was the substantive approximation of article 5 of the Rome Statute—as is accurately suggested by their common sub-heading of ‘Crimes within the jurisdiction of the Court’,⁴⁷³ and, (b) the draft article 21 that is referred to as ‘notwithstanding’ in draft article 23(1) was the substantive approximation of article 13(a) of the Rome Statute.⁴⁷⁴

377. Once more, a review of the debate that culminated in the ILC’s adoption of its draft article 23(1) makes clear that the intendment was precisely to put the ICC at the disposal of the Security Council, for purposes of the Council’s mandate to contain or manage threats to international peace and security. This is in the same way that the ICTY and the ICTR had served the same purpose. The difference is that the ICC is a permanent court, whose existence dispenses with the need for the Security Council to create new *ad hoc* tribunals in future. The very objective (and necessary consequence) of having the Council ‘make use of’ the ICC in that way is to impose the ICC upon UN Member States—notwithstanding that they may not be States Parties to the Rome Statute—precisely in the same way that the ICTY and the ICTR had been imposed upon UN Member States. This view is evident from the following ILC commentaries:

⁴⁷³ Under the subheading of ‘*Crimes within the Jurisdiction of the Court*’, article 5 of the Rome Statute provides as follows: ‘The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes: (a) The crime of genocide; (b) Crimes against humanity; (c) War crimes; (d) The crime of aggression.’ Under the same subheading, article 20 of ILC Draft ICC Statute similarly provided as follows: ‘The Court has jurisdiction in accordance with this Statute with respect to the following crimes: (a) The crime of genocide; (b) The crime of aggression; (c) Serious violations of the laws and customs applicable in armed conflict; (d) Crimes against humanity; (e) Crimes, established under or pursuant to the treaty provisions listed in the Annex, which, having regard to the conduct alleged, constitute exceptionally serious crimes of international concern’: ILC, *Yearbook* (1994), *supra*, at p 38.

⁴⁷⁴ Article 13(a) of the Rome Statute provides as follows: ‘The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if: (a) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14 [...].’ For its part, article 21 of the ILC Draft ICC Statute contemplated that ‘[t]he Court may exercise its jurisdiction over a person with respect to a crime referred to in article 20’ when a State (either a party or one accepting the jurisdiction of the Court) refers a complaint to the Court, under the stipulated conditions based on national connection, but no such connection in relation to the crime of genocide. See ILC, *Yearbook* (1994), *supra*, at p 41.

(1) Paragraph 1 of article 23 does not constitute a separate strand of jurisdiction from the point of view of the kind of crimes which the court may deal with (jurisdiction *ratione materiae*). Rather, *it allows the Security Council to initiate recourse to the court by dispensing with the requirement of the acceptance by a State of the court's jurisdiction under article 21, and of the lodging of a complaint under article 25. This power may be exercised, for example, in circumstances where the Council might have authority to establish an ad hoc tribunal under Chapter VII of the Charter of the United Nations. The Commission felt that such a provision was necessary in order to enable the Council to make use of the court, as an alternative to establishing ad hoc tribunals and as a response to crimes which affront the conscience of mankind.* On the other hand it did not intend in any way to add to or increase the powers of the Council as defined in the Charter, *as distinct from making available to it the jurisdiction mechanism created by the statute.*

(2) The Commission understood that the Security Council would not normally refer to the court a 'case' in the sense of an allegation against named individuals. Article 23, paragraph 1, envisages that the Council would refer to the court a 'matter', that is to say, a situation to which Chapter VII of the Charter applies. It would then be the responsibility of the Prosecutor to determine which individuals should be charged with crimes referred to in article 20 in relation to that matter: see article 25, paragraph 4.⁴⁷⁵

378. Notably, the ILC intended their draft article 23(1) to have the effect that the Security Council, acting under Chapter VII powers, would impose the jurisdiction of the ICC upon UN Member States—even '*against their will*'. That intendment is evident in the fifth commentary to draft article 23(1):

(5) *Some members were of the view that the power to refer cases to the court under article 23, paragraph 1, should also be conferred on the General Assembly, particularly in cases in which the Security Council might be hampered in its actions by the veto. On further consideration, however, it was felt that such a provision should not be included as the General Assembly lacked authority under the Charter of the United Nations to affect directly the rights of States against their will, especially in respect of issues of criminal jurisdiction.* The General Assembly would of course retain its power under the Charter to make recommendations with respect to matters falling within the jurisdiction of the court, and, depending on the terms of any relationship agreement under article 2, will have a significant role in the operation of the statute.⁴⁷⁶

379. In the eventual proceedings of the Preparatory Committee on the ICC, it was also clearly understood by both those in favour and against article 23(1) of the ILC Draft ICC Statute, that its aim was to couple the Rome Statute directly onto the UN Charter, for the sole purpose of making the ICC an instrument of the Security Council in its exercise of power under Chapter VII. It may assist to set out in some detail the summary of the debate as reported by the Preparatory Committee rapporteur, Mr Jun Yoshida (Japan):

⁴⁷⁵ ILC, *Yearbook* (1994), *supra*, at p 44, emphasis added.

⁴⁷⁶ *Ibid.*, emphases added.

(a) The Security Council: article 23

Delegates in their comments appeared to agree that the statute would not affect the role of the Security Council as prescribed in the Charter of the United Nations. The Council would, therefore, continue to exercise primary authority to determine and respond to threats to and breaches of the peace and to acts of aggression; the obligation of Member States to accept and carry out the decisions of the Council under Article 25 of the Charter would remain unchanged. In the light of the above, three general concerns were voiced: first, that it was important, in the design of the statute, to ensure that the international system of dispute resolution—and in particular the role of the Security Council—would not be undermined; secondly, that the statute should not confer any more authority on the Security Council than that already assigned to it by the Charter; and thirdly, that the relationship between the court and Council should not undermine the judicial independence and integrity of the court or the sovereign equality of States.⁴⁷⁷

In the light of the above concerns, some delegations found article 23 either completely unacceptable or in need of substantial revision precisely because it conferred more authority on the Security Council than did the Charter or than was necessary in contemporary international relations; it also diminished the requisite judicial independence of the court. In their view, the Security Council was a political organ whose primary concern was the maintenance of peace and security, resolving disputes between States and having sufficient effective power to implement its decisions. The Council made its decisions, according to these delegations, taking into account political considerations. The court, in contrast, was a judicial body, concerned only with the criminal responsibility of individuals who committed serious crimes deeply offensive to any moral sense.⁴⁷⁸

Some other delegations, however, favoured the proposed article 23 of the statute. In their view, the article was compatible with the role for the Security Council carved out in the Charter and properly took account of the current situation of international relations. They did not agree with the view that decisions of the Security Council were exclusively political in nature. They were convinced that, while it was a political organ, the Security Council made decisions in accordance with the Charter of the United Nations and international law.⁴⁷⁹

(i) Article 23 (1)

Some delegations asked for the deletion of article 23(1), empowering the Security Council to refer a ‘matter’ to the court. Others favoured its retention. For the former delegations, a referral by the Security Council would affect the independence of the court in the administration of justice. Delegations holding this view believed that a political body should not determine whether a judicial body should act. In addition, referral by the Security Council would dispense with the requirements of article 21 as well as complementarity and the sovereign equality of States. It was further noted that article 23(1) assigned the right of referral of a matter to the court only to the Security Council. Taking into account current efforts to define the new world order, in which the relationship between the Security Council

⁴⁷⁷ United Nations, Preparatory Committee on the Establishment of an International Criminal Court, Proceedings of the Preparatory Committee during the Period 25 March—12 April 1996, Draft summary (Rapporteur: Mr Jun Yoshida), 8 April 1996, Doc No. A/AC.249/CRP.5, at pp 4–6, at para 13.

⁴⁷⁸ *Ibid.*, at para 14.

⁴⁷⁹ *Ibid.*, at para 15.

and the General Assembly had come under scrutiny, these delegations wondered if such right should also be conferred upon the General Assembly.⁴⁸⁰

Those delegations favouring the retention of article 23(1) based their views on the following: the Security Council had already demonstrated a capacity to address the core humanitarian law crimes through the creation of two ad hoc tribunals for the former Yugoslavia and for Rwanda and had created the International Commission of Inquiry for Burundi to report on violations of international humanitarian law; one of the purposes of the court was to obviate the creation of ad hoc tribunals. In this context, the Council's referral should activate a mandatory jurisdiction, similar to the powers of the ad hoc tribunals. The Council's referral would not, according to these delegations, impair the independence of the court, because the Prosecutor would be free to decide whether there was sufficient evidence to indict a particular individual for a crime.⁴⁸¹

It was also noted that article 23(1) limited the Security Council's referral authority to Chapter VII situations. Some delegations proposed that the Council's referral authority should be extended to matters under Chapter VI as well. They mentioned Articles 33 and 36 of the Charter, which encourage Council action of a peaceful character with respect to any dispute, the continuance of which was likely to endanger the maintenance of international peace and security. One of the 'appropriate procedures' described, it was noted, was 'judicial settlement'. Those pressing this point suggested deleting Chapter VII of from article 23(1) so that Chapter VI actions would also be covered. Some other delegations did not favour the extension of the Council's right of referral to Chapter VI, while some other delegations reserved their position on this issue.⁴⁸²

As regards the use of the word 'matter' in article 23(1), a suggestion was made to replace it with 'case' and to provide that any referral should be accompanied by such supporting documentation as was available to the Security Council. This modification of article 23, according to this suggestion, would impose on the Council the same burdens and responsibilities imposed on a complainant State. Many delegations, while not disagreeing with the latter, did not agree with the proposal to change the word 'matter' to 'case'. The word 'situation' was also considered too broad by some delegations.⁴⁸³

380. Two representative voices among those who supported the retention of the role of the Security Council as contemplated in article 23(1) of the ILC Draft ICC Statute were the delegations of the Russian Federation and of the United States. The representative of the Russian Federation was notably reported as saying 'that the court statute should not, in any way, limit the powers of the Security Council. *Decisions of the Security Council, taken on behalf of the international community under Chapter VII, were legally binding.*'⁴⁸⁴ For his part, the representative of the United States observed as follows, among other things:

⁴⁸⁰ *Ibid*, at para 16.

⁴⁸¹ *Ibid*, at para 17.

⁴⁸² *Ibid*, at para 18.

⁴⁸³ *Ibid*, at para 19.

⁴⁸⁴ See United Nations, Preparatory Committee on the Establishment of an International Criminal Court, Press Release: '[Role of Security Council in triggering Prosecution discussed in Preparatory](#)

Article 23(1): *The Security Council has demonstrated a powerful capability to address the core humanitarian law crimes through the creation of international criminal tribunals for the former Yugoslavia and for Rwanda. The Council also created last year the International Commission of Inquiry for Burundi and now awaits that Commission's report on violations of international humanitarian law. When dealing with conflicts and atrocities, the Security Council consistently condemns and seeks the enforcement of international humanitarian law in resolution after resolution. It has become the norm of the Council's work, not the exception. Article 23(1) authorizes the Council, acting under Chapter VII of the UN Charter, to refer entire matters to the ICC. Article 25(4) stipulates that a complaint is not required for the initiation of an investigation into a matter referred by the Security Council. Once a 'matter' is referred by the Council, then the Prosecutor will be able to independently initiate individual cases relating to that matter. Thus, as to individuals and individual cases, the Prosecutor has complete independence and freedom of action. We agree with the distinguished representatives of France and Germany and other delegations that it would be unwise and impractical to require the Security Council, when it refers a matter to the Court under Article 23(1), to file a complaint with the Court of the same character as described in Article 25(3). *Given the recent practice of the Security Council, not only would the Council view the ICC as a useful and indeed necessary judicial forum for the enforcement of international humanitarian law, but the number of individual cases that arise from such referrals could quickly mushroom into hundreds within a short period of time. If delegations are concerned about a sufficient caseload for the ICC and the prosecutor's independence to initiate cases, the Security Council can prime a powerful engine of justice.* Therefore, we would find it difficult to understand objections to Article 23(1). *In fact, we would propose that the Council not be confined to referrals under Chapter VII but also have the opportunity to refer a matter under Chapter VI, which under Articles 33 and 36 of the UN Charter encourages Council action of a peaceful character with respect to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security.* One of the 'appropriate procedures' described is 'judicial settlement'. In furtherance of this point, we recommend that the text of Article 23(1) be revised by deleting Chapter VII of from that provision so that Chapter VI actions will be covered as well.⁴⁸⁵*

381. A strong voice of opposition was that of Mexico, whose delegate saw the draft article 23 as entailing Security Council's 'manipulation' of the ICC. In that regard, he was reported as follows:

Speaking in opposition to the role of the Council the representative of Mexico saw no reason to involve the Security Council in the work of the international criminal court. The court should be permanent, universal, impartial and independent. *The manipulation of that court by the Security Council* would politicize its work and reduce its authority. The court should be based on the principle of universality. That could only be achieved by leaving the Security Council out of its structure. Article 23 should be deleted from the Statute.⁴⁸⁶

[Committee for International Criminal Court](#),' 4 April 1996, Doc No L/2776, at first page, emphasis added.

⁴⁸⁵ United States Delegation to the Preparatory Committee on ICC, '[Trigger Mechanism](#)', [Second Question: The Role of the Security Council and of Complaints by States, Articles 23 and 25, April 1996](#),' at pp 2-3, part of the records of the Preparatory Committee on the Establishment of the International Criminal Court, emphases added.

⁴⁸⁶ See United Nations, Preparatory Committee on the Establishment of an International Criminal Court, Press Release: '[Role of Security Council in triggering Prosecution discussed in Preparatory Committee for International Criminal Court](#),' *supra*, at second page, emphasis added.

382. But there is, for present purposes, evident paradox in Mexico's objection. For, it supports the main point that the purpose of draft article 23(1)—which is now article 13(b) of the Rome Statute—was always to turn the Court into an *instrument* of the Security Council for purposes of maintenance of international peace and security, largely in the same way that the ICTY and ICTR had been. The fear of 'manipulation' is nothing more than the fear that an instrument intended for proper use can also be vulnerable to misuse or abuse.

383. In the circumstances, it may also be interesting to note that article 23(2) of the ILC Draft ICC Statute had sought to give the Security Council the sole trigger for purposes of the ICC's exercise of jurisdiction over the crime of aggression, according to the following draft text: 'A complaint of or directly related to an act of aggression may not be brought under this Statute unless the Security Council has first determined that a State has committed the act of aggression which is the subject of the complaint.' With the noticeable exception of the UN Members States who enjoy the veto power in the Security Council, the provision was generally rejected by a palpable majority of delegates at the Preparatory Committee, even by those who supported the text of draft article 23(1). That sense is quite clear from the contemporary press release of the Preparatory Committee dated 4 April 1996. For instance, the representative of the Netherlands was reported as saying that 'the Council *should be able* to refer cases to the international criminal court, based upon the example of the *ad hoc* tribunals. But paragraphs 2 and 3 of Article 23 would seriously impede the independence and impartiality of the court.'⁴⁸⁷ To the same effect, the representative of Thailand said that his country '*could accept the idea of authorizing the Security Council to refer a matter to the court, as that approach would obviate the need for the creation of additional ad hoc tribunals*'. However, since the Council was a political body, its decisions should not be a determining factor on whether the court should prosecute a particular matter or not. Paragraphs 2 and 3 of Article 23 of the draft statute should be deleted or amended to provide that the proceedings of the Council should not affect

⁴⁸⁷ *Ibid*, emphasis added.

the court.⁴⁸⁸ Denmark, Egypt and Greece also recommended the deletion of article 23(2) of the ILC Draft ICC Statute.⁴⁸⁹

384. In the end, the substance of article 23(1) of the ILC Draft ICC Statute was retained and transformed into what became article 13(b) of the Rome Statute. And the ILC draft article 23(2) was rejected by the Preparatory Committee.

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385. In the light of the foregoing review, it is beyond dispute that the ICC is both a progeny of the United Nations and a member of its constellation. That recognition does not, in any way, diminish the Court's institutional or occupational independence as a court of law, which does not take instruction or direction from the United Nations or any of its Member States; nor does the Court, for that matter, take instruction or direction from even the Court's own Assembly of States Parties or from any of its States Parties, in the discharge of its judicial or prosecutorial mandate. It is only by preserving that judicial and prosecutorial independence in the strictest sense of the idea will the fear of politicising the Court be eased—even in the circumstances of the Court's relationship with its Assembly of States Parties. As the United States delegation correctly observed during the proceedings of the Preparatory Committee on the ICC, it is a 'reality ... that States parties to the ICC statute will always remain political entities.'⁴⁹⁰ The fear of politicisation that Mexico, the Netherlands and others insisted must be eschewed from the work of the Court, must thus be prevented from whatever source it may come, be it the Security Council, the Assembly of States Parties or particular States regardless of affiliation.

386. Against the foregoing observation, the following must be said. The function of article 13(b) of the Rome Statute is to put the processes of the ICC to the disposal of the United Nations, acting through the Security Council acting under Chapter VII of the UN Charter, for the specific purpose of managing or containing threats to international peace and security: to the extent that it is possible to aid that end through

⁴⁸⁸ *Ibid.*, at p 3, emphases added.

⁴⁸⁹ *Ibid.*

⁴⁹⁰ United States Delegation to the Preparatory Committee on ICC, '[Trigger Mechanism](#)', [Second Question: The Role of the Security Council and of Complaints by States, Articles 23 and 25, April 1996](#), *supra*, at p 2.

fair and impartial administration of international criminal justice, having the strictest regard to the dictates of judicial and prosecutorial independence. This is precisely in the same sense that the processes of the *ad hoc* tribunals had assisted the United Nations, through the Security Council acting under Chapter VII. When operating in that mode, any resolution of the Security Council (by virtue of which it refers a situation to the ICC) becomes binding on every UN Member State even ‘against their will’—as rightly indicated in the observations of the representative of the Russian Federation during the Preparatory Committee proceedings, in the fifth commentary to article 23(1) of the ILC Draft ICC Statute and in the case law of the ICJ as witnessed in both the *Namibia* and the *Kosovo* advisory opinions—notwithstanding that any concerned UN Member State may not also be a State Party to the Rome Statute. Such binding effect is an incidence of the operation of the UN Charter—which allows the Security Council relative freedom to elect reasonable means to manage or contain threats to international peace and security—and not by the operation of the Rome Statute standing alone in the given circumstances. But, it requires underscoring that to hitch the Rome Statute onto the UN Charter in that way, need not—and should not—be seen as a development that necessarily ‘politicises’ or ‘manipulates’ the ICC. The better view of the matter is in the light of using judicial methods to achieve pacific settlement of disputes—as correctly observed by the delegation of the United States during the proceedings of the Preparatory Committee.⁴⁹¹ That is a very old idea in international law. As is always the case with using judicial methods to settle international disputes—though with strong overlays or undertones of politics to them—the independence of both the Judges and the Prosecutor remains a non-negotiable pillar of the process. In sum, the delegation of the United States was quite correct in observing that all that what became article 13(b) of the Rome Statute does is to ‘prime a powerful engine of justice’⁴⁹² without prejudice to the traditional precepts of independence that guide the administration of justice.

⁴⁹¹ *Ibid.*, at pp 2-3.

⁴⁹² *Ibid.*

3. *Reconciling Articles 27 and 98 of the Rome Statute*

(a) **A Review of certain Arguments on Reconciling Articles 27 and 98 of the Rome Statute**

387. Counsel for Jordan and some interveners argued at length—as we understood them—that article 98 of the Rome Statute (which recognised immunity under certain conditions) must be construed without regard to article 27. It may be recalled, once more, that article 27(2), in particular, provides that such immunities or special procedural rules as may attach to the official capacity of a person may not bar the Court from exercising jurisdiction. It may also be recalled that article 98 requires the Court to secure the ‘waiver of immunity’ of a ‘third State’ before proceeding with a request for surrender or assistance from another State, where such a request would otherwise require the requested State to violate the immunity of the ‘third State’.

388. The position argued by Jordan’s counsel and some interveners, was premised upon the factual circumstance that the ‘third State’ in the case at bar is Sudan, which is a State not party to the Rome Statute. That being the case, there may, at least in theory, be a difference in legal positions between the ‘third State’ (within the meaning of article 98) that *is not* party to the Rome Statute, and a ‘third State’ that *is* a State Party.

389. It is a matter of interest that one of the interveners on the side of Jordan, Professor O’Keefe, insists that there was absolute clarity to the point, from the perspective utility. In his own contention, membership *vel non* to the Rome Statute makes no difference whatsoever in the legal position of the ‘third State.’ As he contended, a ‘third State’ within the meaning of article 98 is a State other than the audience of the Court’s request for surrender or assistance. There is merit in that definition, as far as it goes. But, to Professor O’Keefe there is more to it than definitions. In his view, such a ‘third State’ is entitled to immunity under article 98 of the Rome Statute, regardless of article 27. That, of course, is a different matter.

390. The main argument of Counsel for Jordan and some interveners on their behalf is unpersuasive, regarding the relationship between article 27 and article 98. And it is even less so by the bolstering argument of Professor O’Keefe. A major obstacle for them lies in the very old canon of interpretation of legal instruments—including

treaties—which holds that a legal instrument is not to be given a blinkered reading. It must be read in its entirety. That canon is adequately codified in article 31 of the VCLT.

391. To begin with, article 31(1) requires ‘[a] treaty’—not merely discrete provisions in it—to be ‘interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.’ No doubt, if the object and purpose of a treaty, like the Rome Statute, is to ensure against impunity, any provision that denies immunity is more consonant with the object and purpose of the treaty than any provision that tends to recognise immunity. That is not to say that the latter provision would be necessarily ignored in every case. It is rather to underscore the implausibility of construing such a provision without considering what impact the former provision would have on that construction.

392. What is more, article 31(2) of the VCLT makes the foregoing interpretation even clearer. It requires regard to be had not only to the ‘preamble and annexes’ but also to any external ‘agreement’ made by the parties ‘in connection’ with the conclusion of the treaty, as well as any external ‘instrument’ made by ‘one or more’ of the parties ‘in connection’ with the conclusion of the treaty and accepted by the other parties as ‘an instrument related to the treaty.’ The difficulties that article 31(2) present for the argument made on behalf of Jordan—robustly boosted by Professor O’Keefe—include these. First, the journey from article 98 of the Rome Statute to the preamble—in order to discern object and purpose—will invariably engage the angst against *impunity* as a central object and purpose. Second, it is difficult to make that journey without encountering the norm against *immunity* as laid down in article 27, or passing through that provision. Third, in addition to the requirement to consult the preamble, it is difficult to explain the good sense of needing to take into account ‘annexes’ and external ‘agreements’ and ‘instruments’ made in ‘connection’ with the conclusion of the treaty or ‘related’ to it, while insisting that actual provisions within the treaty itself that are connected or related to each other are to be disregarded—as Jordan and Professor O’Keefe urge. We are not persuaded.

393. Mr O’Keefe’s bolstering argument runs into the further difficulty not only with the tenet of interpretation of a treaty in good faith, as required by article 31(1) of the VCLT, but also article 26 which provides that ‘[e]very treaty in force is binding upon

the parties to it and must be performed by them in good faith.’ As the ICJ has correctly observed, that provision may rightly imply that ‘it is the purpose of the Treaty, and the intentions of the parties in concluding it, which should prevail over its literal application. The principle of good faith obliges the Parties to apply it in a reasonable way and in such a manner that its purpose can be realized.’⁴⁹³

394. In his important treatise titled the *General Principles of Law as Applied by International Courts and Tribunals*, Professor Bin Cheng observed that ‘[t]he law of treaties is closely bound with the principle of good faith, if indeed not based on it’⁴⁹⁴ and ‘would be a mere mockery’⁴⁹⁵ without it. From that perspective, the imperatives of good faith make it difficult to sustain the proposition that parties to a treaty are happily to embrace discrete provisions that serve their interest for the time being, while deleting from consideration those that prove inconvenient to interests and concerns not shared by all. That is not to say, of course, that interests and concerns must always be ignored if they are not shared by all parties to a treaty. It is only to say that the court seised of the matter may have a difficult task of construction to tackle. That is the case here.

395. And that brings us to a workable approach for resolving the seeming conflict between article 27 and article 98 of the Rome Statute.

(b) An Analysis in Four Steps

396. The task of reconciling article 27 and article 98 of the Rome Statute requires no particular analytical formula that has been pre-ordained and accepted by all. But, it is possible to approach the task in four steps, involving the following considerations: the Court’s international criminal jurisdiction; the Court’s authority to exercise its jurisdiction; the Court’s authority to exercise jurisdiction without exemptions of immunity; and, finally a certain exercise in juristic algebra as it were.

(i) Step 1: The Court’s International Criminal Jurisdiction

⁴⁹³ *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* (Judgment) [1997] ICJ Reports 7, at p 79.

⁴⁹⁴ Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (1987), at p 106.

⁴⁹⁵ *Ibid*, at p 113.

397. As a primary consideration, the Court's international criminal jurisdiction requires keeping in mind the provisions of article 5 of the Rome Statute. It provides that the Court 'has jurisdiction in accordance with this Statute' with respect to: (a) the crime of genocide; (b) crimes against humanity; (c) war crimes; and, (d) the crime of aggression.

(ii) Step 2: The Court's Authority to Exercise its Jurisdiction

398. Next to be considered is article 13 of the Rome Statute, which stipulates the prime movers of the Court's authority to exercise its international criminal jurisdiction. It provides as follows:

The Court *may exercise its jurisdiction* with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if:

- (a) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14;
- (b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; or
- (c) The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15. [Emphasis added.]

(iii) Step 3: The Court's Authority to Exercise Jurisdiction without Exemptions of Immunity

399. Once the Court has been propelled into its authority, pursuant to article 13, to exercise its jurisdiction under article 5 of the Rome Statute, article 27 comes into play to ensure that such jurisdiction as launched into operation is not impeded by official status of the suspect or accused. Here, it helps to recall the provision of article 27:

This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.⁴⁹⁶

⁴⁹⁶ Rome Statute, article 27(1).

Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, *shall not bar the Court from exercising its jurisdiction* over such a person.⁴⁹⁷

400. Noting that there are no words of limitation or other modifying cross-referencing indicated in article 27 of the Rome Statute, including any reference to article 98 as an exception,⁴⁹⁸ the composite effect of the three frames of analysis indicated above then boils down to this: article 5 establishes the subject matter jurisdiction of the Court over the international crimes listed there; article 13 gives the Court the authorisation to ‘exercise its jurisdiction’ over those crimes, ‘if’ any of the indicated conditions has been fulfilled; and, article 27(2), in particular, states in peremptory language that no consideration of immunity or special procedural rule, which may conceivably attach to anyone, can ‘bar the Court from exercising its jurisdiction’ over that person.

401. No doubt, when article 27(2) speaks of the Court exercising ‘its jurisdiction’—which shall not be barred—what is contemplated is the jurisdiction which the Court was entitled to ‘exercise’ by virtue of any of the means indicated in article 13. That surely includes the jurisdiction which it is entitled to ‘exercise’ when the Security Council, in the exercise of its Chapter VII powers, refers a situation to the Court, pursuant to article 13(b) of the Rome Statute.

402. It is difficult to see the good sense of any proposition to the effect that the drafters of the Rome Statute would have intended the Statute itself to recognise as valid the potential for immunity or a special procedural rule to obstruct the Court from exercising its jurisdiction in another provision, when it has already precluded that possibility in article 27(2). Yet, that precisely is the sum of the submissions of Jordan’s counsel and the *amici curiae* on their side, urged as a sensible construction of article 98. Again, for the sake of completeness, it helps to set out the provision as follows:

⁴⁹⁷ *Ibid*, article 27(2).

⁴⁹⁸ It must be presumed that the drafters of the Rome Statute would have had no difficulty doing so, had they intended it, as is the case in many provisions of the Rome Statute, including the following examples: articles 17(1) and (1)(c); 20(1); 30(1); 31(1) and (3); 35(3); 36(1) and (10); 39(2)(c) and (4); 43(1); 57(1) and (3); 61(1) and (11); 62; 64(3)(c); 67(1)(d); 72(3); 76(2); 77(1); 80.

The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.⁴⁹⁹

The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.⁵⁰⁰

403. In light of the foregoing considerations, the construction urged by Jordan's counsel, as supported by the interveners on their side, is unpersuasive.

404. How then is article 27 to be reconciled with article 98? The answer ultimately lies with the fourth step of the analysis. We consider it next.

(iv) Step 4: A Juristic Algebra

405. The focus of the fourth step of the analysis rests on the construction of article 98(1) of the Rome Statute. Article 98(2) requires no separate construction for present purposes. It is enough to note that it generally follows the same course as the construction of article 98(1), with necessary variation.

406. Reconciliation of article 27 and article 98(1) involves an exercise in juristic algebra along the following lines. First, the immunity that is protected by article 98(1) is what remains after the subtraction of the immunity that is precluded under article 27(2). Hence, when the request for cooperation is for purposes of enabling the Court to 'exercise' the jurisdiction vested upon it from any of the sources indicated in article 13, the effect of article 27(2) is that no immunities or special procedures may bar the Court from 'exercising' such jurisdiction as has been conferred under article 13. Hence, the immunities that remain for purposes of article 98 are those that were not removed by article 27.

407. Second, the subtraction of immunities under article 27 requires keeping in mind that the immunities therein indicated are immunities in relation to a 'person'. They do not account for the gamut of immunities that may legitimately belong to a *State*

⁴⁹⁹ Rome Statute, article 98(1).

⁵⁰⁰ *Ibid*, article 98(2).

beyond the *person* of the suspect or accused. Hence, the subtraction of immunities precluded by article 27 may still leave unaffected a remainder of immunities that may be reckoned with for purposes of article 98(1).

408. It is important to stress here, as has been amply demonstrated elsewhere in this opinion, that for purposes of the ICC as an international court, article 27 is a reflection of customary international law, which does not recognise personal immunity before an international court in the exercise of jurisdiction that it has over crimes under international law. That being the case, it would be incorrect to suppose, for purposes of article 98(1), that there is any remainder of personal immunity under customary international law which was not removed by article 27.

409. Third, the construction of article 98(1) also requires keeping in mind that at the centre-stage of relevant considerations remains the concern of ‘inconsistency’ with the requested State’s ‘obligations under international law’ with respect to the State whose immunity is under contemplation. And in this connection, the opinion of the ICJ in the *Barcelona Traction* case endures as a paramount consideration, for the specific purposes of this appeal. As may be recalled, it was correctly observed in that case that obligations in international law ‘are neither absolute nor unqualified. In particular, an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State’ such as in the field of diplomatic protection.⁵⁰¹ ‘By their very nature the former are the concern of all States.’⁵⁰² Elaborating on the nature of the obligations owed to the whole world, the Court observed that ‘[s]uch obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law ...; others are conferred by international instruments of a universal or quasi-universal character.’⁵⁰³ Admittedly, this consideration has the greatest effect in strengthening the juristic wind that clears any lingering shroud of immunity around

⁵⁰¹ *Barcelona Traction, Light and Power Company, Limited* (Judgment) [1970] ICJ Reports 3, at para 33.

⁵⁰² *Ibid.*

⁵⁰³ *Ibid.*, at para 34.

the ‘person’ of the suspect or accused, as a neutral inquiry. Nevertheless, the value of the consideration remains this. The construction of article 98(1), as a matter of ‘international obligation’ owed to the third State, does not permit a tunnel-vision that sees only the immunity that is claimed by the ‘third State’ but not the obligation that both the requested State and the third State owe the whole world.

410. Fourth, it is also to be considered that the remainder of immunities (for purposes of article 98) following the subtraction of the immunities precluded under article 27 may take into account the nature of the offence—in terms of either a substantive ‘international crime’ known traditionally as such or an adjectival offence of obstruction of justice—such as is contemplated in the matter of the jurisdiction under consideration. Here, the matter of jurisdiction may take two forms. The first concerns article 13, which specifically refers to article 5 as nominating the nature of the offences over which the Court has thereby been given jurisdiction. It is fairly easy to see that article 27 would operate to reduce the scope of immunity that may be asserted in a case if not for that provision. Notably, they involve crimes captured by Nuremberg Principle III. These are the category of violations typically known as ‘crimes under international law’ or ‘international crimes.’ The second matter of jurisdiction concerns article 70, conferring on the Court jurisdiction over the offences of obstruction of justice. That presents the more involved problem of analysis. To begin with, it may be noted that article 70 offences are of a different order than those immediately implicated by article 13. Article 70 offences do not engage Nuremberg Principle III as directly as the crimes listed under article 5. Beyond that, it is also possible to see that article 70 contemplates different kinds of offences. Some of them may have appreciable connection to full and effective exercise of jurisdiction over the classic international crimes listed in article 5, such as when efforts are made to derail or obstruct the ‘administration of justice’ in relation to a trial of an article 5 crime. It remains possible, however, that some article 70 offences may concern ‘administration of justice’ in general, without a direct connection to an article 5 jurisdiction in a specific case—such as when a functionary or staff member of the Court is subjected to serious acts of violence merely for working at the Court, as part of an effort to intimidate those who work at the Court.

411. Still, it is not easy to see that every conferment of jurisdiction over article 5 *international crimes*, through article 13, would reasonably contemplate an article 70 jurisdiction directly or indirectly. This is because prosecution of *international crimes* does not routinely result in offences against the administration of justice.

412. Yet, the Court's ability to exercise effective jurisdiction, whether under article 70 or article 13, depends on the cooperation of States. It is easier to see that the Security Council's conferment of jurisdiction on the Court, under article 13(b), is something that contemplates the international crimes listed in article 5, because article 13 refers only to that provision and not to article 70. Hence, it is equally easy to see that prosecution of article 5 crimes, as a matter of Security Council referral under article 13, is something that can readily encumber States not party to the Rome Statute, because of the Council's exercise of Chapter VII powers for purposes of the referral. But, since article 13 does not refer to article 70, then the jurisdiction under article 70 offences may thus be seen as engaging only the obligations of those States who are parties to the Rome Statute; and may thus generate no obligation of cooperation upon States not Parties to the Rome Statute because their own obligation arises only in the exceptional exercise of power by the Security Council under article 13(b). This is especially the case where a particular exercise of article 70 jurisdiction arises from circumstances that are wholly unconnected with the exercise of jurisdiction conferred under article 13(b). A request for cooperation for purposes of exercise of article 70 jurisdiction may then engage questions of immunity that may remain claimable by the operation of article 98(1). That is to say, a cooperation request made for purposes of the prosecution of article 70 offences may engage a residual question of immunity not concerned with article 27.

B. Whether Customary International Law Preserves Immunity for President Al-Bashir notwithstanding UN Security Council Resolution 1593 (2005) and the Rome Statute

Whether Customary International Law Obstructs National Jurisdictions from Cooperating with International Courts

413. It must be accepted in the end that the real difficulty in this appeal is not whether the question of immunity before the ICC, or immunity before national forums (to any extent that the latter question of immunity is plausible under the Rome

Statute) afforded Jordan a proper legal excuse to decline the cooperation request made on it to arrest President Al-Bashir and transfer him to the ICC. That question may well be a red herring in the end. For, there is no convincing theory that would support the conclusion that President Al-Bashir enjoyed immunity at the ICC, in the particular circumstances of this case, as discussed fully elsewhere in this opinion.

414. The real conundrum, rather, is whether the immunity which Mr Al-Bashir (as Sudan's Head of State) would have ordinarily enjoyed on the horizontal plane, in the legal system of another State, afforded Jordan a legal excuse to decline the cooperation request to arrest him and transfer him to the ICC. It is a vexed question indeed. The Pre-Trial Chamber engaged the matter in a certain pronouncement it made in the *South Africa Referral Decision*. On an apparent view, that pronouncement may seem contradictory to the earlier pronouncements of the Pre-Trial Chamber in the *Malawi*⁵⁰⁴ and the *Chad*⁵⁰⁵ referral decisions, saying that customary international law has rejected the idea of immunity before international criminal courts with jurisdiction over international crimes. The Pre-Trial Chamber's position on the matter was stated as follows in the *Malawi Referral Decision*: 'If it ever was appropriate to say so, it is certainly no longer appropriate to say that customary international law immunity applies in the present context.'⁵⁰⁶ And, to put its point beyond ambiguity in the light of the historical legal developments that it considered in that decision, the Pre-Trial Chamber continued as follows:

For the above reasons and the jurisprudence cited earlier in this decision, the Chamber finds that customary international law creates an exception to Head of State immunity when international courts seek a Head of State's arrest for the commission of international crimes. There is no conflict between Malawi's obligations towards the Court and its obligations under customary international law.⁵⁰⁷

415. But, in the *South Africa Referral Decision*, the Pre-Trial Chamber's contradictory observations are as follows:

[T]he Chamber notes that customary international law prevents the exercise of criminal jurisdiction by States against Heads of State of other States. This immunity extends to any act of authority which would hinder the Head of State in the performance of his or her duties. The Chamber is unable to identify a rule in customary international law

⁵⁰⁴ See [Malawi Referral Decision](#), at paras 22-39, especially at paras 42 and 43.

⁵⁰⁵ See [Chad Referral Decision](#), at para 13.

⁵⁰⁶ [Malawi Referral Decision](#), at para 42.

⁵⁰⁷ *Ibid*, at para 43.

that would exclude immunity for Heads of State when their arrest is sought for international crimes by another State, even when the arrest is sought on behalf of an international court, including, specifically, this Court.⁵⁰⁸

416. In order to examine the legal correctness of that pronouncement, it is necessary to reiterate what the Pre-Trial Chamber's point was and what it was not. The Pre-Trial Chamber was not saying that there is a rule of customary international law that recognises the plea of immunity before international courts. Rather, the Pre-Trial Chamber was saying this. There is a well-known rule of customary international law that prevents States from exercising criminal jurisdiction over each other's Heads of State; and, that rule of customary international law has not developed to recognise any exception that would permit States to exercise their criminal jurisdiction over each other's Heads of State, in a bid to assist an international criminal court—even this Court. There is, however, no escaping the conclusion that the pronouncement in the *South Africa Referral* Decision is at odds with that in the *Malawi Referral* Decision. To that extent, as amply discussed elsewhere in this opinion, the conclusion in the *Malawi Referral* Decision stands on much sounder footing.

417. At face value, the pronouncement in the *South Africa Referral* Decision may appear logically attractive to some observers. But, the matter goes deeper than face value and a view of logic. As the Pre-Trial Chamber's remaining analysis shows, much depends on the construction of Security Council resolution 1593 (2005), necessarily read together with the Rome Statute. On that particular analysis, the Pre-Trial Chamber concluded, quite correctly, that no immunity was available to Mr Al-Bashir in Jordan. There is no error with the Pre-Trial Chamber's analysis in that regard. At a certain level of abstraction, that analysis should be adequate to resolve the difficulty. Yet, fuller analysis may engage consideration of the matter from the following further perspectives: whether the principle of effectiveness requires UN Member States to cooperate in the implementation of a decision of the Security Council taken under Chapter VII of the Charter; the reason for the horizontal immunity among equal sovereigns; and, whether it is reasonable to see the ICC's request for arrest and surrender as something in the manner of surrogation of the

⁵⁰⁸ [South Africa Referral Decision](#), at para 68.

ICC's jurisdiction, rather than Jordan's exercise of national criminal jurisdiction. Those angles of the analysis will be examined next.

(a) The Principle of Effectiveness in International Law

418. The principle of effectiveness offers a salient perspective from which to consider whether Head of State immunity operating at the State level entitled States to decline the Court's cooperation request to arrest Mr Al-Bashir (as Sudan's President) and transfer him to the Court: thus resulting in the Court being effectively barred from the jurisdiction that it is otherwise entitled to exercise.

419. The principle of effective interpretation has correctly been defined as 'a principle which gives preference to that interpretation of a treaty which best promotes its major purposes'.⁵⁰⁹ There may well be a proper query whether this principle is really different from that of purposive interpretation codified in article 31(1) of the VCLT. But, that is a question for another day. For now, we may approach the principle in its own terms.

420. It was observed by the 1960s that '[t]he judgments and opinions of the International Court of Justice support the assertion that the principle of effectiveness has on the whole prevailed in the court's interpretation of the Charter.'⁵¹⁰ And Professor Malcolm Shaw has observed more recently that the approach 'is now well established and especially relevant to the United Nations ...'.⁵¹¹ Some of the leading cases that reflect that approach were fully discussed by the Majority of Trial Chamber V(A) in a decision in the *Ruto and Sang* case.⁵¹² There is no need to repeat the exercise for present purposes.

421. In the end, the essence of the concerned line of jurisprudence is that the requirements of a coordinated international order, the central objective of which is to

⁵⁰⁹ See Myers McDougal and Richard Gardner, 'The Veto and the Charter: An Interpretation for Survival' (1951) 60 *Yale L J* 258, at p 261.

⁵¹⁰ Editors, 'World Court and the United Nations Charter: The Principle of Effectiveness in Interpretation' (1962) *Duke L J* 85.

⁵¹¹ Malcom Shaw, *International Law*, 6th edn (2008), at p 937.

⁵¹² See *Prosecutor v Ruto and Sang* (Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation), 17 April 2014, [ICC-01/09-01/11-1274-Corr2](#), at paras 67-87, paras 104-109, and paras 130-132 [Trial Chamber V(A)].

undertake collective actions to tackle global problems of common concern, may mean that those activities are to be carried out by ‘certain entities which are not States’—i.e. international organisations or institutions—established for the necessary purpose.⁵¹³ And the effective carrying out of those activities may, as necessary, give rise to obligations upon the States concerned, even though those obligations may not have been specifically stipulated as such in the particular treaty establishing the international organisation or institution in question.

422. Claims of sovereignty present a special tension between the normative requirements of effectiveness of a treaty for its purposes versus the dissonant interests and conveniences of particular States. In the *SS Wimbledon* case, the PCIJ was urged to adopt a restrictive approach to treaty interpretation which places limitation upon sovereignty. The PCIJ accepted that the restrictive approach to treaty interpretation would be warranted in case of doubt that the given treaty had intended limitation on sovereignty. However, held the PCIJ, the restrictive approach to treaty interpretation would not be followed where it is reasonably clear that the treaty intended to create an international obligation the necessary effect of which is to place a restriction upon sovereignty, by requiring sovereignty to be exercised in a certain way.⁵¹⁴ Surely, one way in which such restriction upon sovereignty can occur is where the limitation is necessary for purposes of effective discharge of the mandate of an international organisation or institution established to undertake, on behalf of the international community, crucial collective action to tackle global problems of common interest. Indeed, that precisely was Professor Alfaro’s point, when, as seen earlier, he had observed (in his report on the establishment of an international criminal jurisdiction) ‘that the principle of absolute sovereignty is incompatible with the present organization of the world. The very existence and functioning of the United Nations implies a relinquishment of part of the sovereign rights of nations. Against the theory of absolute sovereignty stands the incontrovertible, palpable fact of the

⁵¹³ *Reparation for Injuries Suffered in the Service of the United Nation* (Advisory Opinion) [1949] ICJ Reports 174, at p 178.

⁵¹⁴ As the Court put it: ‘The Court declines to see in the conclusion of any Treaty by which a State undertakes to perform or refrain from performing a particular act an abandonment of its sovereignty. No doubt any convention creating an obligation of this kind places a restriction upon the exercise of the sovereign rights of the State, in the sense that it requires them to be exercised in a certain way. But the right of entering into international engagements is an attribute of State sovereignty’: *The SS Wimbledon (UK, France, Italy and Japan v Germany)* [1923] PCIJ (ser A) No 1, at para 35.

interdependence of States. Interdependence regulates life in the community of States, very much in the same manner as limitations to individual freedom regulate life in the national society. For States as well as for individuals, the right of every one is limited by the rights of others. The sovereignty of the State is subordinated to the supremacy of international law.⁵¹⁵

423. And that would similarly be the case in the construction of treaties (like the Rome Statute)—or Security Council resolutions (such as resolution 1593) — conferring jurisdiction on the ICC to investigate and prosecute the special class of international concerns generally accepted as entailing obligations *erga omnes*.

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424. The principle of effectiveness is engaged in the present appeal by the fact that, the cooperation of States is, in the nature of things, critical to the effectiveness of international law and, in particular, the effective implementation of legitimate measures that arise from its processes. This is the case not only for the ICC, but also for the UN especially in respect of measures that the Security Council decides upon, in order to maintain international peace and security, using Chapter VII powers. In the specific circumstance of the exercise of jurisdiction by the ICTY, also under Chapter VII powers of the Security Council, the Appeals Chamber of the ICTY observed as follows in a decision in the *Blaškić* case:

Turning then to the power of the International Tribunal to issue binding orders to States, the Appeals Chamber notes that Croatia has challenged the existence of such a power, claiming that, under the Statute, the International Tribunal only possesses jurisdiction over individuals and that it lacks any jurisdiction over States. This view is based on a manifest misconception. Clearly, under Article 1 of the Statute, the International Tribunal has criminal jurisdiction solely over natural ‘persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since [1 January] 1991’. The International Tribunal can prosecute and try those persons. This is its primary jurisdiction. *However, it is self-evident that the International Tribunal, in order to bring to trial persons living under the jurisdiction of sovereign States, not being endowed with enforcement agents of its own, must rely upon the cooperation of States. The International Tribunal must turn to States if it is effectively to investigate crimes, collect evidence, summon witnesses and have indictees arrested and surrendered to the International Tribunal.* The drafters of the Statute realistically took account of this in imposing upon all States the obligation to lend cooperation and judicial assistance to the International Tribunal. This obligation is laid down in Article 29 and restated in paragraph 4 of Security Council resolution 827 (1993). Its binding force

⁵¹⁵ ILC, *Yearbook* (1950), *supra*, at pp 16-17, para 129.

derives from the provisions of Chapter VII and Article 25 of the United Nations Charter and from the Security Council resolution adopted pursuant to those provisions. The exceptional legal basis of Article 29 accounts for the novel and indeed unique power granted to the International Tribunal to issue orders to sovereign States (under customary international law, States, as a matter of principle, cannot be ‘ordered’ either by other States or by international bodies). Furthermore, the obligation set out—in the clearest of terms—in Article 29 is an obligation which is incumbent on every Member State of the United Nations vis-à-vis all other Member States. The Security Council, the body entrusted with primary responsibility for the maintenance of international peace and security, has solemnly enjoined all Member States to comply with orders and requests of the International Tribunal. The nature and content of this obligation, as well as the source from which it originates, make it clear that Article 29 does not create bilateral relations. Article 29 imposes an obligation on Member States towards all other Members or, in other words, an ‘obligation *erga omnes partes*’. By the same token, Article 29 posits a community interest in its observance. In other words, every Member State of the United Nations has a legal interest in the fulfilment of the obligation laid down in Article 29 [...] ⁵¹⁶

425. With the necessary variations made for a reasonable construction of article 98 of the Rome Statute, the foregoing observations generally apply to the need for effective exercise of jurisdiction by the ICC—especially by virtue of a combination of the Rome Statute and Security Council resolution 1593 (2005). It is specifically to be noted that article 29(1) and (2) of the ICTY Statute to which reference was repeatedly made in the *Blaškić* decision, as quoted above, are respectively equivalent to articles 86 and 93 of the Rome Statute. They impose upon the concerned States the obligation to cooperate fully with the court in the manner prescribed in the Statute.⁵¹⁷ That obligation is restated in Security Council resolution 827 (1993) concerning the ICTY and resolution 1593 (2005) concerning the ICC, each according to its own terms.

426. If, then, the UN Charter by its various provisions imposes an obligation of cooperation upon its Member States, an avoidance of that obligation can only result properly, as a matter of law, from a compelling view of a competing obligation that is at least of equal importance. Such a compelling view of a competing obligation must

⁵¹⁶ *Prosecutor v Blaškić* ([Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997](#)) [1997], at para 26, emphases added.

⁵¹⁷ Notably, article 29 of the ICTY Statute provides as follows:

- (1) States shall cooperate with the International Tribunal in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law.
- (2) States shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including, but not limited to:
 - (a) the identification and location of persons;
 - (b) the taking of testimony and the production of evidence;
 - (c) the service of documents;
 - (d) the arrest or detention of persons;
 - (e) the surrender or the transfer of the accused to the International Tribunal.

begin with an actual proof of the existence of the obligation, beyond the mere claim.⁵¹⁸ Following the proof of its existence, the competing obligation should next be shown to be at least of equal importance as the international obligation to implement in good faith a measure that the Security Council adopted under Chapter VII. The need to establish relative importance is obvious, for the reason that a Security Council decision involving measures aimed, for instance, at the maintenance of international peace and security, or the protection of some other *jus cogens* norm, must be implemented effectively in preference (to that extent) over an obligation in the nature of—or bordering on—mere comity.

427. The principle of effectiveness thus requires to be considered what effect the plea and acceptance of horizontal immunity for Mr Al-Bashir (as Sudan’s President) would have on the implementation of resolution 1593 (2005) as a measure against an identified threat to international peace and security, and, in turn, on the ICC proceedings chosen by the Security Council as the appropriate means for that measure. Beyond the intrinsic difficulty of logic presented in that dilemma, it is also to be considered that there is nothing to show that the Government of Sudan has done anything in any other respect to cooperate at all with the Court—let alone cooperate ‘fully’—as required by resolution 1593 (2005). Indeed, available evidence suggests the opposite reality.⁵¹⁹ That is to say, it has not cooperated with the arrest and surrender of any other indictee that was not their President, nor assisted in the serving of the Court’s processes against other accused persons who were in Sudan at all material times. A reflection of this refusal to cooperate with the Court is the failure of

⁵¹⁸ The ICJ once had occasion to consider the interpretation of article 51 of the UN Charter, which refers to the ‘inherent right’ - or in the French version a ‘natural’ right - of individual or collective self-defence of UN Member States, in relation to which ‘nothing in the [UN Charter] shall impair’ in the event of an armed attack. The Court found ‘that Article 51 of the Charter *is only meaningful* on the basis that there is a “natural” or “inherent” right of self-defence, and it is hard to see how this can be other than of a customary nature [...]’. See *Case concerning Military and Para-Military Activities in and against Nicaragua (Nicaragua v USA)* (Merits) [1986] ICJ Reports 14, at para 176, emphasis added.

⁵¹⁹ See *generally*, Seventeenth report of the Prosecutor of the International Criminal Court to the UN Security Council pursuant to UNSCR 1593 (2005), 5 June 2013; Twenty-first report of the Prosecutor of the International Criminal Court to the UN Security Council pursuant to UNSCR 1593 (2005), 29 June 2015, Twenty-sixth report of the Prosecutor of the International Criminal Court to the UN Security Council pursuant to UNSCR 1593 (2005), 12 December 2017; Twenty-seventh report of the Prosecutor of the International Criminal Court to the UN Security Council pursuant to UNSCR 1593 (2005), 20 June 2018; Twenty-eighth report of the Prosecutor of the International Criminal Court to the UN Security Council pursuant to UNSCR 1593 (2005), 14 December 2018.

Sudan's Government to participate in this appeal, though invited to do so, in order to assist the Chamber to better understand its perspectives in the case. In those circumstances, the effect of horizontal immunity for Mr Al-Bashir (as Sudan's President) would amount, as a practical matter, to nothing short of contributing to a blanket cover against resolution 1593 (2005) that would render it wholly ineffective, if not a virtual mockery.

428. Notably, the ICJ has described such a situation of frustration of an international obligation in the very relevant context of the obligation to prevent and punish the crime of genocide, in terms of 'readily conceivable circumstances' in which 'there would be no legal recourse available under the Convention'—i.e. frustration of those recourses. Those circumstances entail this very realistic scenario: 'genocide has allegedly been committed within a State by its leaders but they have not been brought to trial because, for instance, they are still very much in control of the powers of the State including the police, prosecution services and the courts and there is no international penal tribunal able to exercise jurisdiction over the alleged crimes'.⁵²⁰

429. Nuremberg Principle III reinforces the operation of the rule of effectiveness discussed above. The Nuremberg Principle does so by countering any incidence of immunity in respect of crimes under international law. There is the question whether Nuremberg Principle III has acquired the status of a *jus cogens* norm. But, whatever the precise answer to that question may be, the principle is closely connected as to come undoubtedly under the umbrella of the *jus cogens* norm that forbids the commission of genocide and other crimes against humanity, in the sense that the Nuremberg Principle insists that those who violate those *jus cogens* norms must be punished regardless of their political station—even as Heads of State. The plea of immunity thus becomes unsustainable for the benefit of anyone accused of violating such *jus cogens* norms. Hence, if the effectiveness of resolution 1593 (2005) contemplates the prosecution of Mr Al-Bashir (notwithstanding his position as Sudan's President), Nuremberg Principle III affords another consideration against his immunity even at the horizontal axis. The result is this: whether as a consequence of the obligation *erga omnes* that Sudan owes to other States or of the obligation *erga*

⁵²⁰ *Bosnia and Herzegovina v Yugoslavia (Serbia and Montenegro)* ([Application of the Convention on the Prevention and the Punishment of Genocide \(Judgment\)](#)), 26 February 2007, at para 182.

omnes that each State owes to the whole world themselves, States are absolved from any bilateral (or horizontal) obligation of inviolability of the immunity of Mr Al-Bashir (as Sudan's Head of State): if he is under an arrest warrant issued by an international court before which he enjoys no immunity in any event by the combined operation of the Rome Statute and Security Council resolution 1593 (2005).

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430. Without limiting the generality of the foregoing analysis, it is also possible to consider the matter from the analogous *perspective* of waiver of immunity, though not necessarily *in terms* of that concept. Arguably, 'waiver' of immunity carries no significance beyond the operative idea of negation of a privilege or right at the instance of its supposed beneficiary. That is to say, where there is immunity at the instance of a State, the beneficiary State may waive it: thus enabling another State to proceed as it would not have done, had the immunity not been waived. If the operative idea is negation of privilege or right at the instance of its intended beneficiary, it should then not matter how such negation is achieved at its base or locus. Such negation may be achieved by any other means that renders the privilege or right unavailable to the intended beneficiary. One other way to achieve that negation of privilege or right is by operation of Nuremberg Principle III. This is in the sense that there is no immunity, as a matter of international law, for a Head of State or senior State official in respect of international crimes when an international tribunal is properly exercising jurisdiction. That being the case, the contemplated immunity has been negated at base. Thus, there is no immunity that needs waiving or one that could reasonably anchor an international obligation with which another State must comply. The analysis has the minimal effect that non-existent immunity for a State at home (in relation to an international crime over which an international court is enabled with jurisdiction) could then not generate abroad an instance of immunity that such a State may successfully assert against another State.

(b) The Reason for the Horizontal Immunity

431. As has been shown earlier, from the commentaries of Bynkershoek to the dictum of Marshall CJ in *The Schooner Exchange* and beyond, the uniformly accepted juristic reason for the rule of horizontal immunity, expressed in the maxim *par in*

parem non habet imperium, is to preserve the perfect equality of sovereigns between and among themselves, and their perfect independence from one another. This is in furtherance of the original Westphalian understanding that international law does not permit the subjection of any sovereign to the jurisdiction of an equal. That concept retains its value, including in the light of the rejection of colonial domination as a cardinal principle of international law enshrined in the UN Charter and reiterated in various UN resolutions.

432. It is significant that when that rule of immunity commenced its march in earnest in 1812, by virtue of *The Schooner Exchange*, there were no multi-lateral international institutions comparable to the UN or the ICC, which served as an agreed clearing house of joint action: where the strictures of absolute sovereignty may be mutually adjusted as necessary, for purposes of maintaining international peace and security and promoting respect for human rights, and for the general good of the international community.

433. And, here, we must also always keep in mind the significance of the worry that motivated Robert Jackson to register, in 1945, what he described as ‘more than a suspicion’ that the idea of immunity of Heads of State ‘is a relic of the doctrine of the divine right of kings.’⁵²¹ It is indeed more than a suspicion. It must be remembered that in 1812, most States were ruled by monarchs. There was a general rule of sovereign immunity within States, expressed in the maxim *rex non potest peccare*. It precluded legal proceedings against sovereigns within their own respective forums. Case law and legal literature are replete with various renditions of that idea in its own time. But, for present purposes, Arthur Watts’s observations are enough to recap the point:

The law relating to the various aspects of the treatment due to foreign Heads of States has its roots in earlier conceptions of States and their rulers, and the relationship between the two. Until the French revolution ushered in the modern era of republics, the States which were the active participants in the international community which gave rise to modern international law were monarchies whose rulers were regarded as possessing personal qualities of sovereignty. In many respects the State could almost be seen as the property of its ruler, and it was to a considerable degree the ruler’s personal attributes of sovereignty which gave his

⁵²¹ See ‘Report to the President by Mr Justice Jackson, June 6, 1945’ in US Department of State, Report of Robert H Jackson, United States Representative to the International Conference on Military Trials (released February 1949) 42, at p 46.

State the quality of being a sovereign State, rather than the other way round. The interrelationship between the State and its Head was thus very close: in Louis XIV's words, '*L'Etat, c'est moi.*' In addition, Heads of States in some cases possessed special religious attributes.

Perhaps not surprisingly, the older law not only treated Heads of States as entitled to very special legal considerations, but also frequently made no clear distinction between the Head of State on the one hand, and the State itself on the other. With international relations having that more personal quality than is usual today, issues of sovereign immunity were mainly concerned with protecting the position of the Head of State, just as diplomatic immunities were a matter of protecting his envoy.⁵²²

434. In a 1907 case, Justice Oliver Wendell Holmes tried, on behalf of the US Supreme Court, to update the rationale for forum sovereign immunity, as founded 'on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends.'⁵²³ Holmes's logic of immunity in the domestic realm quite starkly affords, in turn, the logical explanation for foreign sovereign immunity. There is an obvious havoc to the notion of dignity of a foreign monarch or of her equality with a peer from whom there is absolute independence as well, were she to be subjected at the same time to the jurisdiction of that 'equal' for purposes of legal accountability in the realms of such an 'equal' who could not himself be held accountable in his own realms.⁵²⁴

435. But, these rationales that explained the rule of foreign immunity at the horizontal level are not compromised by proceedings before an international court—certainly not at the ICC. In other words, the rationale of perfect equality between States and their absolute independence from each other remains undisturbed, if a State is subjected to the jurisdiction of an international court. The Secretariat of the UN has adequately recapitulated the matter, as follows:

In between the two World Wars and thereafter, the prevailing view began to give way to arrangements that bear on the character and architecture of the international criminal legal system today. If relinquishing its domestic penal jurisdiction and being obliged to deliver up its nationals to a foreign jurisdiction was seen by a State as contrary to the classical principle of sovereignty, an international court properly established was arguably an appropriate response by the international community to counter any misapprehensions that there were certain crimes perpetrated by Governments or by individuals as representatives of

⁵²² Arthur Watts, 'The Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers' (1994) 247 III *Recueil des cours*, *supra*, at p 35.

⁵²³ *Kawananakoa v Polybank*, 205 US 359 at 353 (1907) [US Supreme Court].

⁵²⁴ See United Nations, General Assembly, International Law Commission, 'Immunity of State officials from foreign criminal jurisdiction' (Memorandum by the Secretariat), *supra*, at para 28.

Governments that could hardly be tried by territorial courts. By creating such a court, States will have consensually acted upon their own sovereign will in concert with other States to serve the supremacy of international law. The Appeals Chamber for the Special Court for Sierra Leone, in its decision on the immunity from jurisdiction in respect of Charles Taylor, noted that the principle of State immunity derives from the equality of sovereign States—whereby one State may not adjudicate on the conduct of another State—and therefore has no relevance to international criminal tribunals, which are not organs of the State but derive their mandate from the international community.⁵²⁵

The conclusion of the Rome Statute of the International Criminal Court was a result of this challenge to orthodoxy that started at the beginning of the twentieth century. The internationalization of the criminal jurisdiction allowed the international community to overcome the constrictions of sovereignty. At the same time, it allowed States to continue to take measures domestically to implement international obligations. All these developments should be seen as supplementing and not supplanting the national criminal jurisdiction; indeed, the Rome Statute is complementary to national jurisdictions.⁵²⁶

436. It is not necessary to investigate whether the idea of immunity was ever an issue in the legal proceedings between States at the ICJ and the PCIJ before it, even when one State declined to consent to jurisdiction of those international courts. It is enough to say that States retain their independence from and equality with one another, notwithstanding that their Heads of State may be subject to the jurisdiction of the ICC. Indeed, in France, for instance, the Constitution was amended⁵²⁷ to recognise the jurisdiction of the ICC over the President of France under the conditions ‘provided for by the Treaty signed on 18 July 1998.’⁵²⁸ Similarly, the Constitution of Kenya recognises that the constitutional immunity of the President from legal proceedings ‘shall not extend to a crime for which the President may be prosecuted under any treaty to which Kenya is party and which prohibits such immunity.’⁵²⁹ Those constitutional norms in France and Kenya sufficiently and amply bear testimony to the notion that the subjection of the Head of State of a country to the jurisdiction of an international court entails no loss of sovereign equality or independence, on the theory of *par in parem non habet imperium*.

437. Hence, the traditional rule of sovereign immunity among States affords wholly inapposite considerations of immunity that may have any bearing to the question of

⁵²⁵ *Ibid*, at para 72.

⁵²⁶ *Ibid*, at para 73.

⁵²⁷ By virtue of Decision 98-408 DC of 22 January 1999 (Treaty laying down the Statute of the International Criminal Court).

⁵²⁸ See article 67 read together with article 53-2 of the Constitution of France, as amended.

⁵²⁹ See article 143(4) of the Constitution of Kenya (2010).

immunity before this Court in the manner suggested by the Pre-Trial Chamber in the *South Africa Referral Decision*, as a matter of customary international law.

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438. There may, of course, be the temptation—as some commentators have suggested lately—to have regard to the subsidiary arguments about the need to preserve the ‘dignity’ of Heads of State or prevent them from being obstructed in the performance of their duties, when they are tried by any Court, including the ICC. It is not necessary to dwell on these arguments, in any extended way. They may summarily be addressed by asking this: What ‘dignity’ is preserved for a Head of State who is the object of a lingering accusation of crimes in an indictment pending before an international criminal court, with an arrest warrant issued against him? And, here, it must be observed that the minimum effect of article 27 of the Rome Statute, unconnected to article 98, is that the Court may indict a Head of State and issue an arrest warrant against him, regardless of their actual execution. Does dignity lie with such a Head of State, compelled to hide away at home or sneak around on the international scene, generating a dark cloud of diplomatic awkwardness among peers when anyone deigns to invite or welcome him occasionally into the society of eminent peers? It would seem that what is inconsistent with the dignity of a Head of State is to carry around the reputational yoke of a fugitive from justice, rather than confront the accusation with dignified mettle in the courtroom, assisted by able legal counsel that are in abundant supply around the world and which most Heads of State can afford—in full confidence that the verdict of acquittal will follow at the end of trial, or appeal where guilt is not proved beyond reasonable doubt at trial.

439. The concern about the trial process obstructing a Head of State from discharging the important functions of public office fares no better as an argument inuring to immunity. For one thing, there have been many heads of State who have faced legal proceedings in their national jurisdictions while in office. Such proceedings range from trials in civil or criminal cases, to impeachment proceedings in the legislature. The course of such proceedings includes investigations and pre-trial procedures. But, the matter has now been addressed by the Rome Statute’s Assembly of States Parties, by way of rule 134~~ter~~(1) of the Rules, which now provides as follows:

An accused subject to a summons to appear who is mandated to fulfill extraordinary public duties at the highest national level may submit a written request to the Trial Chamber to be excused and to be represented by counsel only; the request must specify that the accused explicitly waives the right to be present at the trial.

440. Neither dignity nor inconvenience is enough to override the imperatives that bear in favour of the exercise of criminal jurisdiction by the ICC, considered even from the perspective of customary international law.

(c) Surrogation of Jurisdiction

441. A further consideration in the circumstances of the present case, viewed from the perspective of the Pre-Trial Chamber's customary international law pronouncements in the *South Africa Referral* Decision, engages the question as to whose jurisdiction is being exercised when the ICC requests a State Party to arrest and surrender a person to the Court. Is it the criminal jurisdiction of the requested State that is being exercised, in an apparent violation of the customary international law rule of immunity embodied in the maxim *par in parem non habet imperium*? Or is it the jurisdiction of the ICC which the requested State is exercising as a surrogate of the ICC?

442. One way to look at the matter is that the combined operation of articles 4(2) and 59 of the Rome Statute results in the conclusion that it is the jurisdiction of the Court that is being exercised when there is a request to a State Party to arrest and surrender a person to the Court. According to article 4(2): 'The Court may exercise its functions and powers, as provided in this Statute, on the territory of any State Party and, by special agreement, on the territory of any other State.'⁵³⁰ For its part, article 59 deals with arrest proceedings in the custodial State. It provides as follows:

1. A State Party which has received a request for provisional arrest or for arrest and surrender shall immediately take steps to arrest the person in question in accordance with its laws and the provisions of Part 9.

2. A person arrested shall be brought promptly before the competent judicial authority in the custodial State which shall determine, in accordance with the law of that State, that:

(a) The warrant applies to that person;

⁵³⁰ It is noted that article 4(2) is not necessarily saying the same thing as article 3(3), which provides: 'The Court may sit elsewhere, whenever it considers it desirable, as provided in this Statute.'

(b) The person has been arrested in accordance with the proper process; and

(c) The person's rights have been respected.

3. The person arrested shall have the right to apply to the competent authority in the custodial State for interim release pending surrender.

4. In reaching a decision on any such application, the competent authority in the custodial State shall consider whether, given the gravity of the alleged crimes, there are urgent and exceptional circumstances to justify interim release and whether necessary safeguards exist to ensure that the custodial State can fulfil its duty to surrender the person to the Court. It shall not be open to the competent authority of the custodial State to consider whether the warrant of arrest was properly issued in accordance with article 58, paragraph 1 (a) and (b).

5. The Pre-Trial Chamber shall be notified of any request for interim release and shall make recommendations to the competent authority in the custodial State. The competent authority in the custodial State shall give full consideration to such recommendations, including any recommendations on measures to prevent the escape of the person, before rendering its decision.

6. If the person is granted interim release, the Pre-Trial Chamber may request periodic reports on the status of the interim release.

7. Once ordered to be surrendered by the custodial State, the person shall be delivered to the Court as soon as possible.

443. Article 59 is a carefully calibrated regime. It seeks to ensure that notwithstanding that the proceedings are undertaken on behalf of the ICC, they must nevertheless be done in a manner that is respectful of the domestic legal order, in order to avoid needless conflict between the two regimes. But that need to be respectful of the domestic legal order does not make the arrest and surrender process an exercise of domestic criminal jurisdiction as such. This is because the domestic legal process being followed for purposes of article 59 could not result in a trial within the domestic realm of the charges concerned in the underlying ICC indictment. Furthermore, it is significant that article 59(4) forbids the domestic regime from second-guessing the correctness or regularity of the ICC arrest warrant that is the subject matter of the proceeding contemplated in article 59. In that regard, article 59(4) provides as follows: 'It shall not be open to the competent authority of the custodial State to consider whether the warrant of arrest was properly issued in accordance with article 58, paragraph 1 (a) and (b).'

444. The combined effect of article 4(2) and article 59 thus serves to insulate the criminal jurisdiction of the requested State from attaching, as such, to the foreign sovereign of a third State indicted at the ICC. Therefore, the requested State should

not be seen to be exercising the kind of jurisdiction that is forbidden of forum States under customary international law in relation to foreign sovereigns.

445. The foregoing analysis has an enhanced value, in the specific circumstances of the need to implement Security Council resolution 1593 (2005). It is important to stress, in this connection, that this conclusion, as it specifically concerns Security Council resolution 1593 (2005), depends on the unique circumstances of that resolution as a Chapter VII measure, which all UN Member States are obligated (or expected) to implement according to its terms, pursuant to the various provisions of the UN Charter which create that obligation or expectation. If in implementing that resolution, States Parties to the Rome Statute execute the ICC request under the direction of article 59, they should not be seen as exercising their own criminal jurisdiction. They are merely acting as jurisdictional surrogates of the ICC, for the purposes of enabling it to exercise its jurisdiction effectively as authorised by the Security Council resolution in question.

C. Two Vital Lessons

446. Before concluding, it is important to underscore two vital lessons from the foregoing review. The primary lesson is that there is no rule of customary international law that recognises *immunity* for high officials of states, including Heads of State, before an international criminal tribunal that has jurisdiction to try suspects of crimes under international law. Article 27 of the Rome Statute appropriately reflects this reality of customary international law.

447. However, the proposition does not go the extra step of presenting a positive proposition that a particular international criminal tribunal may properly exercise *jurisdiction* over a particular high official of a state. Whether an international court may properly exercise jurisdiction is a primary question that depends on the source of the jurisdiction of the particular international criminal tribunal. If the source of *jurisdiction* is customary international law, then the absence of a rule of customary international law that recognises *immunity* for a high state official before an international criminal tribunal would have the logical consequence of leaving that tribunal duly free to exercise that customary law *jurisdiction* over any state official.

The current reality of international law, however, is that unlike the jurisdiction of the superior court in the common law system, the sources of jurisdictions of international criminal tribunals—from the Nuremberg era tribunals to the ICTY and ICTR and the ICC—have uniformly come in written legal instruments. In the result, the question whether or not a particular tribunal may exercise jurisdiction over a particular state official must depend on the construction of the particular international legal instrument that confers such jurisdiction. It is the *presence* of such *jurisdiction* that gives functional significance to the *absence* of *immunity* under customary international law; with the consequence that even a Head of State may be prosecuted where jurisdiction has been conferred on the Court. That is to say, a claim of *immunity* will not bar the Court from the exercise of the *jurisdiction* that it has.

448. For the ICC, the international instrument concerned is primarily the Rome Statute (where the suspect or accused is the high official of a State Party), together with the relevant Security Council resolution and the UN Charter (where the suspect or accused is the high official of a UN Member State that is not party to the Rome Statute, in a situation referred under article 13(b) of the Rome Statute). It is the latter scenario that now concerns the Appeals Chamber.

449. Ultimately, the absence of a customary rule of immunity would entail *no jurisdiction* for the ICC, if a given situation falls neither within the Rome Statute (where the suspect or accused is the high official of a State Party) nor within any relevant Security Council resolution and the UN Charter (where the suspect or accused is the high official of a UN Member State that is not party to the Rome Statute). The difficulty in that respect is an absence of jurisdiction as a primary matter. It does not engage the presence of immunity, because there was no jurisdiction to begin with, against which to claim immunity.

450. But, there is a secondary lesson to be derived from the absence of a customary rule of immunity of high state officials—including Heads of State—before an international criminal tribunal. That lesson involves the principle of effectiveness. This is in the sense that once the source of jurisdiction of an international criminal tribunal is properly identified, a rule of customary international law that operates at the horizontal level cannot then operate reasonably to frustrate the jurisdiction of an international criminal tribunal. For the latter concern, the matter is to be resolved as a

matter of construction of the relevant international instruments, particularly in the context of resolving international legal obligations including obligations *erga omnes*.

451. In the circumstance of article 98(1) of the Rome Statute, the difficulty presented to the assertion of immunity at the horizontal plane involves three scenarios: (a) in a relationship between States Parties to the Rome Statute, it is not plausible that the third State (party to the Rome Statute) may assert in relation to the requested State (also party to the Rome Statute) the immunity of the high state official of the third State who is a suspect or an accused at the ICC; (b) it is also not readily accepted that as between Member States of the UN, the third State (not party to the Rome Statute) may successfully assert the immunity of its official in relation to the requested State (that is a party to the Rome Statute), where the Security Council specifically requires the third State to cooperate fully with the ICC, pursuant to a resolution taken under Chapter VII of the UN Charter for purposes of conferring jurisdiction upon the Court through an article 13(b) referral; and, (c) as concerns two UN Member States not party to the Rome Statute, it should not be assumed that immunity may successfully be asserted in the context of a Security Council referral made under article 13(b) of the Rome Statute, where the resolution has only urged, rather than required, the concerned State to cooperate fully with the ICC. For, such an assumption may, depending on the circumstances, give a legal lie to the declaration that there had been a ‘threat to international peace and security’, thus warranting the Security Council to exercise its Chapter VII powers to refer a situation to the ICC, as a measure to deal with such threat. In other words, it is either that there was a threat to international peace and security declared in good faith or there was not. Where the Security Council has declared in good faith that there was a threat to international peace and security, then measures prescribed to confront those threats must create for all UN Member States the minimum of an expectation, if not an obligation, to comply with that declaration of emergency, while it endures.

IV. CONCLUSION

452. It is for all the foregoing reasons that we conclude that the decision of the Pre-Trial Chamber is ultimately correct in finding that Mr Al-Bashir did not enjoy

immunity from arrest and surrender to the Court. In the circumstances, Jordan failed to comply with the Court's request to arrest and surrender him to the Court.

453. The obligation upon Jordan in that regard resulted from the combined operation of article 27 of the Rome Statute and Security Council resolution 1593 (2005) through which the situation in Darfur was referred to the Court pursuant to article 13(b) of the Rome Statute.

454. While agreeing with the Pre-Trial Chamber as to the foregoing overall finding, we do not agree with any suggestion on their part that lends to the view that there may be in customary international law a reserve of immunity that may be asserted before this Court if not for article 27(2) of the Rome Statute. We find that provision to be consistent with customary international law; and it controls the question of immunity according to the text and circumstances of resolution 1593 (2005). That being the case, Head of State immunity could not be invoked by Sudan in any direction—horizontal or vertical—in relation to the Court's exercise of jurisdiction.

Done in both English and French, the English version being authoritative.



Judge Chile Eboe-Osuji, Presiding



Judge Howard Morrison



Judge Piotr Hofmański



Judge Solomy Balungi Bossa

Dated this 6th day of May 2019

At The Hague, The Netherlands