

# Rome Statute of the International Criminal Court

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# Rome Statute of the International Criminal Court

Article-by-Article Commentary

edited by

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DIE FACHBUCHHANDLUNG

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## Article 98

### Cooperation with respect to waiver of immunity and consent to surrender

1. 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.

2. 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.

**Directly Relevant Rules of Procedure and Evidence:** Rule 195.

**Literature:** See Preliminary Remarks on Part 9 and: Ahlbrecht, H. and Ambos, K., *Der Fall Pinochet(s)* (Nomos 1999); Akande, D., 'Customary International Law and the Addition of New War Crimes to the Statute of the ICC', (January 2, 2018) *EJILTalk* <<https://www.ejiltalk.org/customary-international-law-and-the-addition-of-new-war-crimes-to-the-statute-of-the-icc/>> accessed 14 Jun. 2020; *id.*, 'The Effect of Security Council Resolutions and Domestic Proceedings on State Obligations to Cooperate with the ICC', (2012) 10 *JICJ* 299; *id.*, 'The Legal Nature of Security Council Referrals to the ICC and its Impact on Al Bashir's Immunities', (2009) 7 *JICJ* 333; *id.*, 'International Law Immunities and the International Criminal Court' (2004) 98 *AJIL* 407; *id.* and Shah, S., 'Immunities of State Officials, International Crimes, and Foreign Domestic Courts', (2010) 21 *EJIL* 815; Ambos, K., 'Punishment without a Sovereign? The *Ius Puniendi* Issue of International Criminal Law: A First Contribution to a Consistent Theory of International Criminal Law', (2013) 33 *OJLS* 293; Ascensio, H. and Bonafe, B.I., 'L'absence d'immunité des agents de l'Etat en cas de crime international: Pourquoi en débattre encore?', (2018) 122 *RGDIP* 821; Barkholdt, J. and Kulaga, J., *Analytical Presentation of the Comments and Observations by States on Draft Article 7, paragraph 1, of the ICC Draft Articles on Immunity of State Officials from foreign criminal jurisdiction*, United Nations General Assembly, Sixth Committee, 2017, KFG Working Paper Series, No. 14, Berlin Potsdam Research Group "The International Rule of Law: Rise or Decline?", Berlin 2018; Benzing, M., 'U.S. Bilateral Non-Surrender Agreements and Article 98 of the Statute of the International Criminal Court: An Exercise in the Law of Treaties', (2004) 8 *MPYbUNL* 181; Bianchi, A., 'Immunity versus Human Rights: The Pinochet Case', (1999) 10 *EJIL* 237; Blommestein, M. and Ryngaert, C., 'Exploring the Obligations for States to Act upon the ICC's Arrest Warrant for Omar Al-Bashir: A Legal Conflict between the Duty to Arrest and the Customary Status of Head of State Immunity', (2010) 5 *ZIS* 428; Bogdan, A., 'The United States and the International Criminal Court: Avoiding Jurisdiction through Bilateral Agreements in Reliance on Article 98', (2008) 8 *ICLRev* 1; Boschiero, N., 'The ICC Judicial Findings on Non-cooperation Against the DRC and No Immunity for Al-Bashir Based on UNSC Resolution 1593', (2015) 13 *JICJ* 625; Buzzini, G.P., 'Lights and Shadows of Immunities and Inviolability of State Officials in International Law: Some Comments on the *Djibouti v. France* Case', (2009) 22 *LeidenJIL* 455; Broomhall, B., *International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law* (OUP 2003); *id.* and Krefß, C., 'Implementing Cooperation Duties under the Rome Statute: A Comparative Synthesis', in: Krefß *et al.*, *Rome Statute II* (2005) 515; Byers, M., *Custom, Power and the Power of Rules* (CUP 1999); Cassese, A., 'When may senior State officials be tried for international crimes?', (2002) 13 *EJIL* 853; Chasapis-Tassinis, O., 'Customary International Law: Interpretation from the Beginning to the End', (2020) 31 *EJIL* (235); Cosnard, M., 'Quelques observations sur les décisions de la Chambre des Lords du 25 novembre 1998 et du 24 mars 1999 dans l'affaire Pinochet', (1999) 103 *RGDIP* 309; Crawford, J., *Brownlie's Principles of Public International Law* (OUP 9<sup>th</sup> edition 2019); *id.*, Sands, P. and Wilde, R., *In the Matter of the Statute of the ICC and in the Matter of Bilateral Agreements Sought by the United States under Article 98(2) of the Statute*, (2003) <<http://www.iccnw.org/documents/SandsCrawfordBIA14June03.pdf>> accessed 14 Jun. 2020; Damaška, M., 'What is

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### A. Introduction/General remarks

The subject-matter of Article 98 did not hold a prominent place in the negotiations on Part 9 for a long time. When the *Ad Hoc* Committee dealt with possible grounds for refusal in the context of surrender, the immunity issue was not specifically mentioned. Instead, all emphasis was placed on the competition between different surrender and extradition requests<sup>1</sup> which has received a detailed regulation in Article 90. The Preparatory Committee Draft 1998 then contained, in its Article 87, a bracketed ‘Option 2 (e)’ for a ground to refuse the execution of a request of surrender where ‘compliance with the request would put it [the State Party] in breach of an obligation that arises from [a peremptory norm of] general international law [treaty obligation] undertaken to another State’.<sup>2</sup> This draft, on the one hand, indicates that the issue of possible conflicting international obligations was now seen as going beyond the competition of surrender and extradition requests; on the other hand, the series of brackets testify to the fact that there was no unanimous view regarding this matter.

In fact, the issue of conflicting immunities was rather reluctantly addressed by some delegations, which were of the view that developments in general international law had substantively reduced, if not eliminated, immunities with respect to crimes under international law as listed in Article 5 of the Statute. However, on the insistence of some other delegations and without there being time for a sufficiently thorough discussion in the course of the Rome Conf., a provision on possibly conflicting immunities was included, and hereto was added another provision referring, in particular (without spelling this out explicitly), to Status of Forces Agreements.<sup>3</sup> In this latter respect, there was one additional reason for those States in favour of an efficient cooperation regime to approach the matter with very considerable reservation. It was thought that the right of every sending State – *i.e.* not only a sending State that is a party to the Statute – to make use of the complementarity regime pursuant to Articles 17 to 20 to invoke its primary right to exercise criminal jurisdiction both under the Statute and under the relevant agreement constituted sufficient protection for such a State’s legitimate interests.

The solution found in Article 98 is a rather complex one. It was recognized to be both impossible in the time available and undesirable to set up a list of those international obligations regarding immunities and primary treaty rights to criminal jurisdictions held by sending States that would indeed conflict with the obligation to surrender under

<sup>1</sup> See *Ad Hoc* Committee Report, para. 218.

<sup>2</sup> The text and its earlier versions is reprinted in: Bassiouni and Schabas (eds.), *History ICCII* (2016) 766.

<sup>3</sup> Kaul and Kreß (1999) 2 *YbIHL* 143, 164.



Article 89(1). It followed that the determination as to whether a real conflict existed had to be taken on a case-by-case basis. Article 98 thus places an obligation on the Court not to put a State in the position of having to violate its international obligations with respect to immunities. To the extent that a conflict of obligations would arise in case of a request, the Court must obtain the cooperation from the third or sending State, before issuing the request. Rule 195(1) further elaborates on the pivotal role accorded to the Court and states as follows:

*‘When a requested State notifies the Court that a request for surrender or assistance raises a problem of execution in respect of article 98, the requested State shall provide any information relevant to assist the Court in the application of article 98. Any concerned third State or sending State may provide additional information to assist the Court.’<sup>4</sup>*

It has been argued that the text of Article 98(1) is inconclusive as to whether the Court or the State Party concerned are competent to decide whether a request by the Court would give rise to a conflict of international legal obligations. In support of this argument, attention has been drawn to the fact that the French version begins by saying ‘(l)a Cour ne peut poursuivre l’exécution d’une demande’ and that Rule 195(1) enables the requested State to raise a problem of execution with the Court. On that basis, it has been suggested that the ‘better view seems to be that it is for the requested State to first determine whether the implementation of a request for surrender or assistance under Article 98 would result in a violation of its other international obligations subject, perhaps, to the ‘exceptional circumstances’ reviewing authority of the Court’.<sup>5</sup> This argument is unpersuasive. It is true that the French version of Article 98(1) differs from the English version in that it uses the word ‘exécution’.<sup>6</sup> While the French formulation is, by itself, unclear as it is by definition on the State concerned to ‘execute’ the request, nothing even in the French version suggests that the requested State should have the last say on the question of a conflict of international legal obligations. The wording of Article 98(1) rather places the emphasis on the Court. This strongly suggests that the competence lies with it. Rather than contradicting this impression, the formulation of Rule 195(1) confirms it. While the requested State may indeed ‘raise a problem of execution’, Rule 195(1) goes on to say that it is the Court that applies Article 98(1). It is also in full consonance with the most important vertical element of the cooperation scheme set up in Part 9<sup>7</sup> that the competence to decide the question of a conflict of obligations must ultimately lie with the Court. Leaving this fundamentally important matter to be decided by the requested State Party would not only constitute an exception within Part 9, but it would also strike at the core of the idea of efficient cooperation. This problem is recognized by the contrary view to the extent that it accepts the possibility of an “exceptional circumstances” reviewing authority of the Court’. But this is a half-hearted remedy and one prone to give rise to the most serious problems in practice. The correct interpretation of Article 98(1) therefore is that the **competence** authoritatively to decide the question of a conflict of obligation **lies with the Court**.<sup>8</sup> It may be added that the point was very much in the minds of the

<sup>4</sup> This sub-rule goes back to a French proposal; for the relatively uncontroversial drafting process on this sub-rule, see Harhoff and Mochochoko, in: Lee, ICC (2001) 637, 666.

<sup>5</sup> Mettraux *et al.* (2018) 18 *ICLRev* 577, 615.

<sup>6</sup> But see the Spanish version that, in line with the English version, uses the words ‘no dará curso’.

<sup>7</sup> Kreß and Prost above Preliminary Remarks mn. 5.

<sup>8</sup> This would appear to be the predominant view in international legal scholarship; see Benzing (2004) 8 *MPYbUNL* 199; Crawford *et al.*, *Matter of Statute* (2003) para. 23; Kreicker, *Exemptionen II* (2007) 1385;



negotiators and that the competence was given to the Court in full recognition of the fact that the Court's determination will not bind a State concerned that is not party to the Statute, and that for this reason, any determination by the Court, that no conflicting international obligation exists, will leave the requested State Party with the risk that the Court's determination of the international legal obligation is wrong.<sup>9</sup> In the course of the negotiations, it was felt that this risk is a tolerable one to bear in light of both the judicial expertise united on the bench and the persuasive authority that any relevant determination by the Court is bound to carry with it.<sup>10</sup> The Court's case law is in full conformity with the foregoing considerations. For example, PTC II found as follows:

*'(A)rticle 98 of the Statute addresses the Court, and is not a source of substantive rights (or additional duties) to State Parties. While it does indicate that a tension may exist between the duty of a State Party to cooperate with the Court and that State's obligation to respect immunities under international law, it leaves to the Court, and not to the State Party the responsibility to address the matter. The text of rule 125 of the Rules confirms this understanding.'*<sup>11</sup>

While it would appear that the implementing legislation of France, Germany,<sup>12</sup> New Zealand and Spain is fully in line with this basic scheme underlying the operation of Article 98, the picture is less clear in other States<sup>13</sup> (for further analysis, see below mn. 13).

Compared to provisions such as, in particular, Article 99(4), **Article 98 did not 4 absorb too much negotiation time in Rome.** It is also probably fair to say that the latter article was not considered to be of utmost political sensitivity by most participants in the negotiations. This also explains the rather short commentary devoted to Article 98 in the first edition of this volume. This assessment has proven wrong for two reasons. First, shortly after the Rome conference, the U.S. made an attempt to use Article 98(2) as one component of a more comprehensive strategy to, as it were, renegotiate the compromise on the Court's jurisdiction that had finally been struck in Rome. Second, the Court's case law regarding the application of Article 98(1) in the case of the (at the time: incumbent) head of state of Sudan, Al Bashir, has provoked criticisms particularly from African States.

Meißner, *Zusammenarbeit* (2005) 120; Sluiter, *Evidence* (2002) 171; Ubéda-Saillard, in: Fernandez *et al.*, *Commentaire II* (2019) 2309, 2312.

<sup>9</sup> This risk is rightly alluded to by Akande (2004) 98 *AJIL* 407, 431.

<sup>10</sup> Kreicker, *Exemtionen II* (2007) 1385 ff.

<sup>11</sup> ICC, *Prosecutor v. Omar Hassan Ahmad Al Bashir*, PTC II, Decision under article 87(7) of the Rome Statute on the non-compliance of Jordan with the request by the Court for the arrest and surrender of Omar A-Bashir, ICC-02/05-01/09-309, 11 Dec. 2017 (hereafter: Jordan Decision), para. 41; there is a line of entirely consistent case law on that point; see ICC, *Prosecutor v. Omar Hassan Ahmad Al Bashir*, PTC II, Decision under article 87(7) of the Rome Statute on the non-compliance of South Africa with the request by the Court for the arrest and surrender of Omar Al-Bashir, ICC-02/05-01/09-302, 6 Jul. 2017 (hereafter: South Africa Decision), para. 100; ICC, *Prosecutor v. Omar Hassan Ahmad Al Bashir*, PTC II, Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court, ICC-02/05-01/09-195, 9 Apr. 2014 (hereafter: DRC Decision), para. 16; ICC, *Prosecutor v. Omar Hassan Ahmad Al Bashir*, PTC I, 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, ICC-02/05-01/09-139, 12 Dec. 2011 (hereafter: Malawi Decision), para. 11.

<sup>12</sup> The German legislator has introduced a new Section 21 into the *Gerichtsverfassungsgesetz* (Law on the Organization of the Judiciary) which makes it clear that German authorities will not enter into an autonomous examination of the international legal issue once the Court has made a request; the purpose of this section to recognize the Court's decision-making power is correctly identified by Kreicker, *Exemtionen II* (2007) 1386.

<sup>13</sup> Broomhall and Kreß, in: Kreß *et al.*, *Rome Statute II* (2005) 525 ff.

- 5 In the course of the fourth and fifth session of the PrepCom in 2000, Article 98 received much unexpected attention because the U.S. delegation relied on it as part of its **comprehensive approach to renegotiate the Statute's jurisdiction scheme** so as to make it more amenable in Washington.<sup>14</sup> In fact, '[o]f all debates that took place in the Working Group on Cooperation, none engendered such interest and controversy as the discussions on rules under Article 98'.<sup>15</sup> At the end of the Rome Conf., the U.S. delegation had tabled a proposal for an amendment of what would become Article 12 (2). This proposal reads as follows:

*'With respect to States not party to the Statute the Court shall have jurisdiction over acts committed in the territory of a State not party, or committed by officials or agents of a State not party in the course of official duties and acknowledged by the State as such, only if that State has accepted jurisdiction in accordance with this article.'*<sup>16</sup>

The fact that this proposal was not taken up by the Conference and did therefore not make its way into the ICCS is central to understand much of the practice on Article 98 subsequent to the adoption of the ICCS. Shortly before the fourth session the U.S. conveyed to other States a package proposal consisting of the following two parts dealing with cooperation and jurisdiction:

*'Proposed Text of Rule to Art. 98 of the Rome Treaty*

*The Court shall proceed with a request to surrender or an acceptance of a person into the custody of the Court only in a manner consistent with its obligations under the relevant international agreement.'*

*Proposed Text to Supplement Document to the Rome Treaty:*

*'The United Nations and the International Criminal Court agree that the Court may seek the surrender or accept custody of a national who acts within the overall direction of a UN Member State, and such directing State has so acknowledged, only in the event (a) the directing State is a State Party to the Statute or the Court obtains the consent of the directing State, or (b) measures have been authorized pursuant to Chapter VII of the UN Charter against the directing State in relation to the situation or actions giving rise to the alleged crime or crimes, provided that in connection with such authorization the Security Council has determined that this subsection shall apply.'*

This initiative, that in essence revived the U.S.' proposal at the end of the Rome Conf. for an amendment on official acts,<sup>17</sup> proved unacceptable to the overwhelming majority of delegations that wished to preserve the integrity of the Statute as adopted in Rome rather than seeing it amended through the backdoor of the RPE.<sup>18</sup> At the fifth session the U.S. introduced the following amended version of the first part of its above-cited proposal:

<sup>14</sup> For more detailed information on this and on the following text, see Kaul, in: Fischer *et al.*, *Prosecution* (2001) 21–41; Keitner (2001) 6 *UCLAJIL&ForeignAffairs* 215–264; Scheffer (2005) 3 *JICJ* 333, 341–344.

<sup>15</sup> Harhoff and Mochochoko, in: Lee, *ICC* (2001) 637, 665.

<sup>16</sup> UN Doc. A/CONF.183/C.1/L.90, 16 Jul. 1998.

<sup>17</sup> At the end of the Rome Conf., the U.S. had proposed to amend Draft Art. 12(2) of the ICCS to the effect that the exercise of the ICC's jurisdiction over the conduct of State officials acknowledged by the State of the official to have been committed 'in the course of the official duties' would have been dependent on the acceptance by the State of the official; A/CONF.183/C.1/L.90; see Harhoff and Mochochoko, in: Lee, *ICC* (2001) 637, 667.

<sup>18</sup> Gartner, in: Fischer *et al.*, *Prosecution* (2001) 423, 431; Harhoff and Mochochoko, in: Lee, *ICC* (2001) 637, 668; Kaul, in: Fischer *et al.* *Prosecution* (2001) 21, 33.

*'The Court shall proceed with a request for surrender or an acceptance of a person into the custody of the Court only in a manner consistent with international agreements applicable to the surrender of the person'.*

Again, the proposal raised widespread and serious doubts regarding its compatibility with Article 98(2). Germany summarized its concerns and listed options for a compromise in conformity with the Statute in an analytical paper.<sup>19</sup> After some rounds of difficult negotiations the final version of what has become Rule 195(2), was agreed upon. The provision reads as follows:

*'The Court may not proceed with a request for the surrender of a person without the consent of a sending State if, under Article 98, paragraph 2, such a request would be inconsistent with obligations under an international agreement pursuant to which the consent of a sending State is required prior to the surrender of a person of that State to the Court'.*

On the insistence of the like-minded States and, in particular, the EU, the adoption of this sub-rule was complemented by the inclusion of the following provision in the report of the proceedings of the PrepCommis:

*'It is generally understood that Rule 9.19 (i.e. the later so adopted Rule 195(2)) should not be interpreted as requiring or in any way calling for the negotiation of provisions in any particular international agreement by the Court or any other international organization or State'.*

This was meant to operate as an additional bar against possible attempts to later use the relationship agreement under Article 2 of the Statute for indirect jurisdictional changes of the Statute.<sup>20</sup> Accordingly, the latter agreement was not so used.

The second U.S. initiative took shape after the failure of that State to have the most questionable SC Res. 1487<sup>21</sup> renewed. The initiative consisted in a world-wide campaign conducted by the U.S. and supported by a massive use of its economic power<sup>22</sup> to induce States Parties to enter into what may best be called **'bilateral non-surrender agreements'** with the U.S. The head of the U.S. delegation in Rome describes the content of the agreements in questions as follows:

*'The standard form language of the Bush Administration's bilateral non-surrender agreements (at least those that have been publicly disclosed) defines the 'persons' to be covered by the particular agreement to be 'current or former Government officials, employees (including contractors), or military personnel or nationals of one Party (italics in the original)'.*<sup>23</sup>

<sup>19</sup> The paper is reprinted as an annex to Kaul, in: Fischer *et al.*, *Prosecution* (2001) 21, 42.

<sup>20</sup> Kaul, in: Fischer *et al.*, *Prosecution* (2001) 21, 34.

<sup>21</sup> S/RES/1487 (2003) of 12 Jun. 2003 which in turn constitutes the renewal of S/RES/1422 (2002) of 12 Jul. 2002; for a legal and legal policy critique of this (mis)use of SC powers, see Kreß (2003) 40 *Art and Thought*, Fikrun Wa Fann 56 ff.

<sup>22</sup> Scheffer (2005) 3 *JICJ* 333, 350: 'The Bush Administration has been negotiating bilateral non-surrender agreements, not only as a reflection of its own reading of Article 98 (2) and the protection it can afford even non-party States (such as the United States), but also as a direct consequence of the conditionality for military, and, as recently amended, economic assistance to foreign governments set forth in extraordinarily punitive fashion in the American Service Members Protection Act (ASPA) (footnote omitted)'; see also Bogdan (2008) 8 *ICLRev* 1, 24–27.

<sup>23</sup> Scheffer (2005) 3 *JICJ* 333, 345; for more detailed information about the agreements, see Bogdan (2008) 8 *ICLRev* 1, 29–33.

- 7 Seven years after the Rome Conf., the head of the U.S. delegation in Rome stated that '[t]he US delegation contemplated in its discussions pertaining to Article 98(2) that particular agreements – either already in force or that would be negotiated and ratified in the future and which established jurisdictional responsibilities for investigating and prosecuting criminal charges against certain individuals before national courts – could be used to avoid surrender of particular types of suspects to the ICC'.<sup>24</sup> It is impossible, in the absence of a complete set of published *travaux préparatoires* to either contradict or confirm this assertion. What must be said, though, is that these contemplations were not disclosed to all participants in the negotiations and that, if this was indeed '**America's Original Intent**', it was most probably articulated very late in the day. For those and other reasons America's alleged '**original intent**' cannot be equated with '**the drafters' intent**' behind Article 98(2).<sup>25</sup>
- 8 A quite considerable number of States Parties have or are reported to have **concluded** one of the **bilateral agreements** in question. Many States Parties, however, have refused to enter into such an agreement despite all the pressure to which they had been exposed.
- 9 The second controversy about Article 98 in the practice of States, subsequent to its adoption concerns the application of Article 98(1) in the case against **Al Bashir**.<sup>26</sup> On 31 Mar. 2005, the SC, through Res. 1593, as adopted under Chapter VII of the UN Charter,<sup>27</sup> had referred the situation in Darfur (Sudan) to the Court. On 4 Mar. 2009, PTC I determined that the position of Al Bashir as the incumbent head of state of the non-State Party Sudan did not preclude the Court from exercising its jurisdiction in the case against that suspect.<sup>28</sup> On 6 Mar. 2009 and 21 Jul. 2010, the Registry adhered to the Chamber's instruction to request all States Parties to arrest and surrender Al Bashir.<sup>29</sup> In its decision of 12 Dec. 2011, the same (but differently composed) Chamber found that the Republic of Malawi had failed to cooperate with the Court by failing to arrest and surrender Al Bashir to the Court.<sup>30</sup> This finding was based on the convictions that: (1) there is an customary international law ('CIL') exception (even) to personal immunity for the purpose of proceedings before the Court<sup>31</sup> and (2) that the 'unavailability of immunities with respect to prosecution by international courts applies to any act of cooperation by States which forms an integral part of those prosecutions<sup>32</sup>'. In its decision of 13 Dec. 2011 pertaining to the Republic of Chad and presenting the same legal issues, the Chamber referred back to the decision it had rendered the day before.<sup>33</sup>

<sup>24</sup> Scheffer (2005) 3 *ICJ* 333, 336.

<sup>25</sup> The author of this commentary took an active part in the negotiations as a member of the German delegation. Kimberly Prost, the co-author of the same sentence in the previous edition, took an active part in the negotiations as a member of the Canadian delegation.

<sup>26</sup> For an essay that helpfully situates this practice of States in a broader context, see Tladi (2017) 60 *GYb L* 13 ff.

<sup>27</sup> S/RES/1593 (2005), 31 Mar. 2005.

<sup>28</sup> ICC, *Prosecutor v. Omar Hassan Ahmad Al Bashir* ('Omar Al Bashir'), PTC I, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09-3, 4 Mar. 2009, para. 41.

<sup>29</sup> ICC, *Prosecutor v. Omar Hassan Ahmad Al Bashir* ('Omar Al Bashir'), Registry, Request to All States Parties to the Rome Statute for the Arrest and Surrender of Omar Al Bashir, ICC-02/05-01/09-7, 6 Mar 2009; *id*, Supplementary Request to All States Parties to the Rome Statute for the Arrest and Surrender of Omar Al Bashir, ICC-02/05-01/09-96, 21 Jul. 2010.

<sup>30</sup> Malawi Decision, ICC-02/05-01/09-139, *in fine*.

<sup>31</sup> *Ibid.* para. 18 in conjunction with para. 43.

<sup>32</sup> *Ibid.* para. 44.

<sup>33</sup> ICC, *Prosecutor v. Omar Hassan Ahmad Al Bashir*, PTC I, Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by 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, ICC-02/05-01/09-140, 13 Dec. 2011, para. 13.



In its decision of 9 Apr. 2014, PTC II found that the DRC had failed to cooperate with the Court by deliberately refusing to arrest and surrender Omar Al Bashir.<sup>34</sup> This finding was based not on a CIL exception to personal immunity, but on the view that, through Res. 1593 (2005), the SC had ‘implicitly waived the immunities granted to Omar Al Bashir under international law and attached to his position as a Head of State’.<sup>35</sup> In its decision of 6 Jul. 2017 a differently composed PTC II found that South Africa had failed to comply with its obligations under the Statute by not executing the Court’s request for arrest and surrender of Al Bashir.<sup>36</sup> This finding was again not based on CIL, but based on the view that ‘the necessary effect of the Security Council resolution triggering the Court’s jurisdiction in the situation in Darfur and imposing on Sudan the obligation to cooperate fully with the Court, is that, for the limited purpose of the situation in Darfur, Sudan has rights and duties analogous to those of States Parties to the Statute’.<sup>37</sup> In its decision of 11 Dec. 2017 PTC II, composed as in the 2017 South Africa Decision, found that Jordan had failed to comply with its obligations under the Statute by not executing the Court’s request for arrest and surrender of Al Bashir<sup>38</sup> and confirmed its reasoning in the 2017 South Africa Decision.<sup>39</sup> The 2017 Jordan Decision went on appeal and the AC convened a hearing in which, apart from Jordan and the Prosecution as parties in the proceedings, the African Union, the Arab League and several professors of international law participated as *amici curiae*. On 6 May 2019, the AC rendered its judgment in which it confirmed the PTC II’s finding that Jordan had failed to comply with its obligations under the Statute by not executing the Court’s request for arrest and surrender of Al Bashir.<sup>40</sup> The AC based its judgment on both CIL and SC Res. 1593.<sup>41</sup>

The Malawi and Chad decisions of 12 and 13 Dec. 2011 provoked a **vigorous dissent by the AU Commission**.<sup>42</sup> The press release dated 9 Jan. 2012, by which this dissent was first communicated, contains the following passage:

*‘Following these Decisions of ICC Pre Trial Chamber I, the African Union Commission expresses its deep regret that the decision has the effect of: (1) Purporting to change customary international law in relation to immunity *ratione personae*; (2) Rendering Article 98 of the Rome Statute redundant, non-operational and meaningless; (3) Failing to address the critical issue of the removal or non removal of immunities by the UN Security Council resolution 1593 (2005), which referred the situation in Darfur to the ICC’.*<sup>43</sup>

In July 2014, the members of the AU decided to include the following Article 46Abis in the Protocol on Amendments to the Protocol on the Statute of the African Court on Human and Rights: ‘No charges shall be commenced or continued before the Court against any serving African Union Head of State or Government, or anybody acting or entitled to act in such capacity,

<sup>34</sup> DRC Decision, ICC-02/05-01/09-195, *in fine*.

<sup>35</sup> *Ibid.* para. 29.

<sup>36</sup> South Africa Decision, ICC-02/05-01/09-302, *in fine*.

<sup>37</sup> *Ibid.* para. 88.

<sup>38</sup> Jordan Decision, ICC-02/05-01/09-309, *in fine*.

<sup>39</sup> *Ibid.* paras. 37–40.

<sup>40</sup> ICC, *Prosecutor v. Omar Hassan Ahmad Al Bashir*, AC, Judgement in the Jordan Referral re Al-Bashir Appeal, ICC-02/05-01/09 OA 2, 6 May 2019 (hereafter: Jordan AJ), para. 215.

<sup>41</sup> *Ibid.* para. 114 in conjunction with para. 2.

<sup>42</sup> For a detailed account, see Gaeta and Labuda, in: Jalloh and Bantekas, *ICC and Africa* (2017) 138, 140 ff.

<sup>43</sup> AU, Press Release 002/2012, <[http://www.iccnw.org/documents/PR-\\_002-\\_ICC\\_English\\_2012.pdf](http://www.iccnw.org/documents/PR-_002-_ICC_English_2012.pdf)>, accessed 14 Jun. 2020.

or other senior state officials based on their functions, during their tenure of office<sup>44</sup>. In its Decision on the ICC made at the 36<sup>th</sup> Ordinary Session of the Executive Council in February 2020, the AU considered the 2019 AC Judgment to be at variance with the Rome Statute of the ICC, CIL and the AU common position and, based on this conviction, the AU called upon its Member States to oppose the AC Judgment.<sup>45</sup> Since a number of years, it has been a matter of discussion whether the ICJ should be requested to render an advisory opinion on the matter. In July 2018, the African States Members of the UN requested the issue of such a request to be included in the agenda of the UNGA.<sup>46</sup> In its Decision on the ICC made at the 36<sup>th</sup> Ordinary Session of the Executive Council in February 2020, the AU requested the African Group in New York to remove the request from the Agenda of the UNGA until further notice.<sup>47</sup>

## B. Analysis and interpretation of elements

### I. Paragraph 1

#### 1. Third State

- 11 The reference to ‘third State’ is not altogether clear: On the basis of a literal interpretation, ‘third State’ may mean ‘a State other than the requested State’ or – narrower – ‘a non-State Party’. The better case can be made for the first interpretation.<sup>48</sup> It is true, though, that Article 2(1)(h) VCLT defines the concept of ‘third State’ in the sense of ‘State not party to the treaty’. The drafters of the Statute were, however, free to use the same concept in a different way and this is what they did. A rather strong first indication pointing in this direction is the fact that other provisions of Part 5 (cf., in particular, Article 87(5) explicitly speak of ‘a State not party to the Statute’). Apart from that systematic argument, it should be borne in mind that it was the inviolability of diplomatic premises that was at the heart of the debate on Article 98(1). As it was widely felt during the negotiations, this inviolability could place an obstacle to the execution of a request for surrender, both *vis-à-vis* a State Party or a non-State Party.<sup>49</sup> The term ‘third State’ in this paragraph thus means ‘a State other than the requested State’. PTC I confirmed this interpretation by recognizing the possibility of a ‘third State which has ratified the Statute’<sup>50</sup>.

<sup>44</sup> 2014 Draft Protocol on the Amendments to the Protocol on the Statute of the African CtJHR, AU EX.CL/846 (XXV); Gaeta and Labuda, in: Jalloh and Bantekas, *ICC and Africa* (2017) 138, 160 ff.; Ssenyonjo and Nakitto (2016), 16 *ICLRev* 71 ff.; Tladi (2015) 13 *JICJ* 1 ff. For a Commentary on the 2014 Draft Protocol, see Wele and Vormbaum, *African Criminal Court* (2017).

<sup>45</sup> AU, *Decision on the International Criminal Court*, Executive Council, Doc. Ex.CL/2018(XXXVI), 36<sup>th</sup> Ordinary Session of the Executive Council, 6–7 Feb. 2020, Addis Ababa, para. 7, <[https://au.int/sites/default/files/decisions/38181-ex\\_cl\\_dec\\_1073\\_-\\_1096\\_xxxvi\\_e.pdf](https://au.int/sites/default/files/decisions/38181-ex_cl_dec_1073_-_1096_xxxvi_e.pdf)>, accessed 14 Jun. 2020.

<sup>46</sup> UN Doc. A/73/177, Letter dated 9 Jul. 2018 from the Permanent Representative of Kenya to the UN addressed to the SG, 18 Jul. 2018.

<sup>47</sup> AU, *Decision on the International Criminal Court*, Executive Council, Doc. Ex.CL/2018(XXXVI), 36<sup>th</sup> Ordinary Session of the Executive Council, 6–7 Feb. 2020, Addis Ababa, para. 12, [https://au.int/sites/default/files/decisions/38181-ex\\_cl\\_dec\\_1073\\_-\\_1096\\_xxxvi\\_e.pdf](https://au.int/sites/default/files/decisions/38181-ex_cl_dec_1073_-_1096_xxxvi_e.pdf), >, accessed 14 Jun. 2020.

<sup>48</sup> For the same view, see, for example, Ambos, *Treatise ICL III* (2016) 618; Pedretti, *Immunity* (2015) 277; Kreicker, *Exemption II* (2007) 1389–1390; for an alternative interpretation, see, for example, Gaeta, in: Cassese *et al.*, *Rome Statute I* (2002) 975, 994; perhaps the alternative interpretation also underlies the implementing legislation of the UK (see Lewis, in: Kreß *et al.*, *Rome Statute II* (2005) 459, 463). This, however, would not appear to represent a strong trend in the subsequent State practice, but rather an isolated minority view; Broomhall and Kreß, in: Kreß *et al.*, *Rome Statute II* (2005) 515, 525.

<sup>49</sup> Kaul and Kreß (1999) 2 *YbIHL* 143, 164.

<sup>50</sup> Malawi-Decision, ICC-02/05-01/09, para. 18; in the same vein, see Joint Conc.Op., Jordan AJ, ICC-02/05-01/09-397-Corr. OA 2, para. 451.

## 2. Obligations under international law

As PTC I confirmed,<sup>51</sup> paragraph 1 is not concerned with immunities or privileges 12  
accorded to a person on the basis of national law. The Court is thus not prevented, on  
the basis of this provision, to request the arrest and surrender of a person and the search  
of a place because of provisions in the law of the requested State. The paragraph is  
relevant only where the requested State can demonstrate that the action sought by the  
Court would place it in violation of an obligation at international law.

Paragraph 1 contains an open reference to possible conflicting obligations under 13  
international law, but does not in and of itself contain a determination in that respect.  
In particular, the paragraph can by no means be construed so as to revive immunities  
that international law no longer accepts. In its application of paragraph 1, the Court  
must therefore establish the existence of an immunity protection under international  
law on the basis of the relevant legal sources which are for many parts to be found  
outside the Statute while including Article 27. This basic scheme underlying the  
operation of Article 98(1) has often been misunderstood.<sup>52</sup> It has been argued, for  
example before the AC,<sup>53</sup> that Article 98(1) would become redundant if there was not at  
least one immunity obligation inconsistent with a request made by the Court. But such  
a reading of Article 98(1) misconstrues its wording, fails to properly appreciate its  
function and contradicts the drafting history as set out above in mn. 3. The **function** of  
Article 98(1) is purely procedural: Instead of recognizing and freezing certain immunity  
rights, it entrusts the Court with the procedural task to determine as the case may arise  
whether there is indeed an inconsistency at the relevant moment in time. In fact,  
Article 98(1) cannot become redundant whatever the result of its application will be in a  
given case and it makes it possible for the Court to take into consideration any  
evolution of the international law on immunities in whatever direction.<sup>54</sup> In accordance  
with this view, the AC has found as follows in the *Jordan AJ*:

*'It must be underlined (...) that article 98(1) of the Statute does not itself stipulate, recognise or preserve any immunities. It is a procedural rule that determines how the Court is to proceed where any immunity exists such that it could stand in the way of a request for cooperation. Accordingly, the existence of immunities must be established on the basis of the Court's sources of law, pursuant to article 21(1) of the Statute. (...) The above reading does not deprive article 98(1) of meaning. Article 98(1) of the Statute is indeed, as stated by Jordan, a 'conflict-avoidance rule', ensuring that State Parties are not placed in a situation where the cooperation obligations require them to breach an obligation owed to a third State. Article 98(1) remains an important procedural safeguard in that it requires the Court to consider whether a requested State owes an obligation to a 'third State' before proceeding with a request for arrest and surrender (or any other request for cooperation). Nevertheless, article 98(1) does not provide a basis for a presumption that an immunity exists; it merely imposes a procedural requirement for the Court to consider whether any international law obligation exists and applies to the requested State in a given situation'.<sup>55</sup>*

<sup>51</sup> Malawi-Decision, ICC-02/05-01/09, para. 20.

<sup>52</sup> For one example, see Burchard above, Article 27, mn. 11.

<sup>53</sup> Reference is made to this argument in *Al Bashir*, AC, Jordan AJ, para. 128.

<sup>54</sup> Kieß (*amicus curiae*), Transcripts, ICC-02/05-01/09-T-4 ENG, 10 Sept. 2018, p. 111–112.

<sup>55</sup> Jordan AJ, ICC-02/05-01/09 OA 2, paras. 130–131 (fn. omitted).

### 3. With respect to the State or diplomatic immunity of property

- 14 Perhaps somewhat surprisingly at first sight, it was this type of immunity protection that was the main driving force behind the inclusion of paragraph 1 into the Statute, the paradigm case being the customary inviolability of diplomatic premises as codified in Article 22 VCDR.<sup>56</sup> The reason for this prominence of the concern regarding premises and property is two-fold. First, there is little evidence in State practice that those immunities have suffered from an exception in the special case of investigative or other measures relating to criminal proceedings for crimes under international law. Second, Article 27 does not deal with these immunities so that there can be no argument of an anticipated waiver expressed through the acceptance of the latter article by State Parties. It follows that the application of paragraph 1 would require the Court to obtain the cooperation of a third State if it wished to proceed with a request involving the diplomatic premises of such State.<sup>57</sup>

### 4. With respect to the State or diplomatic immunity of a person

- 15 a) **State or diplomatic immunity of a person.** For the purposes of Article 98(1), the term ‘State immunity of a person’ covers both the **functional immunity** (immunity *ratione materiae*) and the **personal immunity** (immunity *ratione personae*). While these two concepts are quite distinct, it is possible to say at a very general level, as the first Special Rapporteur of the ILC on the subject of Immunity of State officials from foreign criminal jurisdiction, Roman Anatolevich Kolodkin, did, that ‘the State stands behind both the immunity *ratione personae* of its officials from foreign jurisdiction and their immunity *ratione materiae*’.<sup>58</sup> It is therefore warranted to construe the term ‘State immunity of a person’ for the purposes of Article 98(1) so as to include immunity *ratione personae*. To exclude this form of immunity would have the following odd consequence: The most powerful international law immunity enjoyed by a person which, accordingly, must be expected to be most likely to give rise to the conflict of duties that Article 98(1) seeks to avoid, would, except for the immunity of diplomats, remain uncovered. The resulting lacuna would then have to be filled by applying, by way of analogy, either the concept of ‘State immunity of a person’ or that of ‘diplomatic immunity of a person’.<sup>59</sup> The suggested broad interpretation of the term ‘State immunity’ in Article 98(1) avoids the need to resort to such an artificial solution.<sup>60</sup> The term ‘diplomatic immunity of a person’ refers to the customary law concept, as codified in the VCDR.<sup>61</sup> The terms ‘State or diplomatic immunity of a person’, as used in Article 98(1), cover the concept of ‘inviolability from arrest’.<sup>62</sup> While it is possible to

<sup>56</sup> For a comprehensive contemporary analysis of the applicable international law, see Kreicker, *Exemptionen I* (2007) 637–705.

<sup>57</sup> Joint Conc.Op. by Judges Eboe-Osuji, Morrison, Hofmánski and Bossa, Jordan AJ, ICC-02/05-01/09-397-Corr. OA 2, para. 407; see also Iverson (2012) 4 *GoJIL* 140–141.

<sup>58</sup> *Preliminary report on immunity of State officials from foreign criminal jurisdiction*, A/CN.4/601, 29 May 2008, 45–46 (para. 94).

<sup>59</sup> The ICJ has recognized the close proximity between the personal immunity of a diplomat and that of a Head of State in ICJ, *Case Concerning Certain Questions of Mutual Assistance in Criminal Matters* (Djibouti v. France), 4 Jun. 2008, ICJ Rep. 2008, 177, 238 (para. 174) (hereafter: *Mutual Assistance in Criminal Matters Judgment*). For a detailed historic elucidation of the importance of the concept of diplomatic immunity *ratione personae* for the concept of immunity *ratione personae*, see Riznik, *Immunität* (2015) 25 ff.; Summers (2007–2008) 16 *MichStateJIL* 459 ff.

<sup>60</sup> Kreß, in: Bergsmo and Yan, *State Sovereignty* (2012) 236–238.

<sup>61</sup> van Alebeek, *Immunity* (2008) 159 ff.

<sup>62</sup> Perhaps the concept of ‘inviolability’ is more ancient than that of ‘immunity’, see Riznik, *Immunität* (2015) 18 ff.



adopt a narrow understanding of ‘immunity from jurisdiction’ and to distinguish from that the concept of ‘inviolability of arrest’,<sup>63</sup> such distinction is not invariably made and it was not made during the drafting of Article 98. Rather, as is clear also from use of the term ‘diplomatic immunity of property’ in the same provision, the term ‘immunity’ was understood so as to include ‘inviolability’. There is thus also no lacuna in Article 98 with respect to the concept of ‘inviolability of arrest’, which would be in need of being filled by way of analogous reasoning.

**b) The third State is a State Party.** As will be explained in detail below (see 16 mn. 31 ff., 90 ff.), the inapplicability of functional and of personal immunities as articulated in the two paragraphs of Article 27 is declaratory of CIL. But even if this were not the case, there would be, because of Article 27’s legal effect as a matter of treaty law, no conflicting international obligations in a triangular relationship between the Court and two State Parties.<sup>64</sup>

**According to one view**, however, Article 27’s scope of application is limited to the 17 exercise of the Court’s jurisdiction in its direct relationship with the suspected State official and its State. According to this view, any waiver contained in Article 27 would be confined to that relationship so that the arrest by a State Party of a person enjoying an international immunity protection is not covered by Article 27 even where such an arrest is based on a request made by the Court.<sup>65</sup>

**This position is unconvincing** for the following reasons. First, the Court exercises its 18 jurisdiction within the meaning of Article 27 not only in its direct relationship with the suspected State official and its State, but also when it issues a request to a State party in order to be enabled to carry out its proceedings. Therefore, Article 27, already if taken in its literal sense, covers the issuance of a request to arrest and surrender. Second, Article 27’s practical value would risk to be significantly reduced if not more or less nullified if the general waiver of possible immunity rights contained therein would not be construed so as to include the cooperation relationship between the Court and State Parties. The suggestion to the contrary does therefore conflict with the principle of *effet utile*.<sup>66</sup> In accordance with this view, the AC has found as follows in the *Jordan AJ*:

<sup>63</sup> Weatherall (2019) 17 *JICJ* 451.

<sup>64</sup> For the same view, see, for example Robinson, in: Cryer *et al.* (eds.), *ICL* (2019) 523; Ambos, *Treatise ICL III* (2016) 619; Krc (2012) 18 *NewEnglandJL&CompL* 272–273; Akande (2004) 98 *AJIL* 407, 424; Broomhall, *International Justice* (2003) 144 ff.

<sup>65</sup> This view was espoused by some participants in the Jordan appeals proceedings; for a summary, see Jordan AJ, para. 54 (Jordan), 80 (African Union), 83 (Arab League). The same position has been put forward in part of the literature, see, for example, Mettraux, Dugard and du Plessis (2018) 18 *ICLRev* 577, 611; Krécker, *Exemptionen II* (2007) 1391 ff.; Gaeta, in: Cassese *et al.*, *Rome Statute I* (2002) 975, 991 ff. had pronounced herself in favour of such a limited scope of application of Article 27, but in order to avoid the ‘absurd consequences’ of applying Article 98(1) in the relationship between two State Parties, she had proposed to interpret the term ‘third State’ in this provision so as to cover only States not party to the Statute (see above note 44). Apart from the fact that the latter interpretation of the term ‘third State’ in Article 98 is unconvincing (see above mn. 11), Gaeta’s view also begs the question by virtue of which legal provision, if not Article 27, the State Party, to which the suspected State organ belongs, should have waived its immunity right so as to preclude the ‘absurd consequences’ of allowing that State to invoke this right *vis-à-vis* a requested State Party.

<sup>66</sup> For an early persuasive expression of the same view, see Akande (2004) 98 *AJIL* 407, 424: ‘[T]he removal of immunity from the exercise of the Court’s jurisdiction contained in Article 27 would be nullified in practice if Article 98(1) were interpreted as allowing parties to rely on the same immunities in order to prevent the surrender of their officials to the Court by other states [fn. omitted]. This argument is supported by the principle that ‘[a]n interpreter is not free to adopt a reading that would result in reducing whole clauses of paragraphs of a treaty to redundancy and inutility’ [fn. omitted].

*'The Appeals Chamber is unpersuaded by Jordan's argument that article 27(2), which is situated in Part 3 of the Statute, only addresses the Court's ability to exercise jurisdiction, and not the arrest and surrender of persons to the Court, which is regulated in Part 9. While articles 27 and 86 et seq. are located in different parts of the Statute, they must be read together and any possible tension between them must be reconciled. In the view of the Appeals Chamber, this is best achieved by reading article 27(2), both as a matter of conventional law and as reflecting customary international law, as also excluding reliance on immunity in relation to Head of State's arrest and surrender. (...) (T)he purpose of article 27 is to ensure that immunities do not stand in the way of the Court's exercise of jurisdiction; the Court's jurisdiction must be effective. This purpose would be all but defeated if a State Party, which is obliged to cooperate fully with the Court, were allowed to invoke immunity as a ground to refuse the arrest and surrender of its Head of State to the Court, given that the Court depends on State cooperation to execute warrants of arrest. The result would be that, in effect, the Court would be barred from exercising its jurisdiction because of the existence of immunities, which would be contrary to the letter and spirit of article 27(2). If such an interpretation would be adopted, an important provision of the Statute would become potentially meaningless.<sup>67</sup> (...) There is no reason why article 27(2) should be interpreted in a way that would allow a State Party to invoke Head of State immunity in the horizontal relationship if the Court were to ask for the arrest and surrender of the Head of State to another State Party. The law does not readily condone to be done through the back door something it forbids to be done through the front door. It must be noted that in such situations, the requested State is not proceeding to arrest the Head of State in order to prosecute him or her before the courts of the requested State Party: it is only lending assistance to the Court in its exercise of proper jurisdiction.'<sup>68</sup>*

- 19 **c) The third State is not a State Party.** In this context, Article 27 cannot be relied upon as a matter of treaty law because it has not been accepted by the third State concerned.<sup>69</sup> Therefore, the Court is required to decide the question of possible conflicting international obligations on the basis of the applicable international law outside the ICC Statute.
- 20 As the AC has correctly found in the *Jordan AJ*, as a matter of current general<sup>70</sup> CIL a State not party to the Statute does not enjoy functional or personal immunity rights in proceedings before the Court including the triangular relationship between the Court, a State Party requested to arrest and surrender a suspected organ of another State and the State to which this organ belongs.<sup>71</sup> Strictly speaking, it is therefore **not necessary to distinguish between functional and personal immunity** in proceedings before the Court.
- 21 In the following, such a distinction is drawn nevertheless in order to **recognize the difference** between the two categories of immunities and in order not to lose sight of the fact that, as a matter of CIL, **functional immunity** does not apply in criminal

<sup>67</sup> Jordan AJ, ICC-02/05-01/09-397-Corr OA 2, para. 122; for further explanation, see Joint Conc.Op. by Judges Eboe-Osuji, Morrison, Hofmánski and Bossa, *ibid*, paras. 402 ff.

<sup>68</sup> *Ibid.*, para. 127 (fn. omitted).

<sup>69</sup> Akande (2004) 98 *AJIL* 407, 421.

<sup>70</sup> Hereafter the term 'customary international law' is understood in the sense of general CIL, unless stated otherwise.

<sup>71</sup> Jordan AJ, ICC-02/05-01/09-397-Corr OA 2, para. 114.

<sup>72</sup> This is spelled out more explicitly in Joint Conc.Op. of Judges Eboe-Osuji, Morrison, Hofmánski and Bossa Jordan AJ, ICC-02/05-01/09-397-Anx1-Corr OA 2, paras. 239 ff.

proceedings for crimes under general international law even before national courts. States have, however, retained their CIL immunity right *ratione personae* with respect to proceedings before foreign national criminal courts. The inapplicability of that right in proceedings before the Court, including the arrest and surrender of a State organ concerned by another State at the request of the Court, results from the fact that the Court constitutes an international criminal court with a credible universal orientation (for detailed explanation, see below mn. 90 ff.).

**aa) Functional Immunity (Immunity *ratione materiae*). The concept of functional immunity** (immunity *ratione materiae*) is well captured in the second sentence of Article 39(2) VCDR.<sup>73</sup> Functional immunity forms part of CIL. It relates to the performance of official acts and it extends throughout the whole State apparatus. Functional immunity continues to exist for conduct during office when the person concerned no longer holds office.<sup>74</sup>

ICL *stricto sensu*<sup>75</sup> developed primarily to cover conduct by State officials.<sup>76</sup> While the conduct of non-State actors has come to acquire a more prominent place in present day ICL, the conduct of State officials remains at its core. **The question of whether functional immunity applies within the context of ICL (*stricto sensu*) is therefore of central importance.**

**The view that functional immunity under CIL does not apply to crimes under CIL was widespread in 2007** when the ILC decided to include the topic ‘Immunity of State officials from foreign criminal jurisdiction’ in its programme of work. In the same year, Helmut Kreicker published his monumental two volumes on ‘*Völkerrechtliche Exemtionen*’.<sup>77</sup> In this work, Kreicker refers to what he called a ‘virtually unanimous scholarly view’ that a State organ that commits a crime under CIL does not enjoy functional immunity.<sup>78</sup> In 2008, Rosanne van Alebeek’s book on *immunity* was published. It includes what continues to be the most thorough scholarly analysis of the question. Van Alebeek reached the conclusion that ‘functional immunity ends where individual responsibility [under CIL; C.K.] begins’.<sup>79</sup> In its 2009 Res., the IDI endorsed the view that functional immunity is inapplicable in criminal proceedings for crimes under international law.<sup>80</sup> The ICTY AC had already expressed the same view in its 1997 Blaškić Judgment<sup>81</sup> explicitly including national proceedings. The view continues to be

<sup>73</sup> van Alebeek, *Immunity* (2008) 110, who rightly points out (*ibid.* 165 ff.) that the second sentence of Art. 39(2) is not peculiar to the realm of diplomatic law.

<sup>74</sup> *Ibid.* 114–115; Akande and Shah (2010) 21 *EJIL* 815, 825–826.

<sup>75</sup> The concept of ICL *stricto sensu* exclusively covers those crimes that are rooted in CIL, whether they may be codified in an international treaty or not; Kreß, in: Wolfrum, *MPEIL V* (2012) 717, 719 ff. (paras. 10, 15). Hereafter the term ‘international criminal law’ is used in that strict sense, unless stated otherwise. This use of the term ‘international criminal law *stricto sensu*’ or ‘crime under customary international law’ is widely accepted. For a fundamentally different understanding of the concept ‘crime under customary international law’, see Heller (2017) 58 *HarvILJ* 353, 391. According to Heller, a ‘crime under customary international law’ is one that States are under a CIL *erga omnes* duty to criminalize.

<sup>76</sup> Akande and Shah (2010) 21 *EJIL* 815, 844–846.

<sup>77</sup> Kreicker, *Exemtionen I, II* (2007).

<sup>78</sup> Kreicker, *Exemtionen I* (2007), 180 (for a long list of references, see *ibid.* text in fn. 85).

<sup>79</sup> van Alebeek, *Immunity* (2008) 200 ff., 241.

<sup>80</sup> Institut de Droit International, Art. III(1) of the *Resolution on the Immunity from Jurisdiction of the State and of Persons Who Act on Behalf of the State in case of International Crimes*, Naples Sessions, <[https://www.idi-iil.org/app/uploads/2017/06/2009\\_naples\\_01\\_en.pdf](https://www.idi-iil.org/app/uploads/2017/06/2009_naples_01_en.pdf)> accessed 14 Jun. 2020; on that Resolution, see van Alebeek, in: Ruys *et al.*, *HB Immunities* (2019) 496, 509.

<sup>81</sup> ICTY, *Prosecutor v. Blaškić*, AC, Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 Jul. 1997, IT-95-14 (hereafter: 1997 Blaškić Judgment), 29 Oct. 1997, para. 41: ‘(T)hose responsible for such crimes (war crimes, crimes against humanity and genocide;



shared by a large majority of writers<sup>82</sup> to date. At the time of writing, the work of the ILC, at first sight, points in the same direction: Draft Article 7(1)(a) to (c), as provisionally adopted by the relevant Drafting Committee, states that immunity *ratione materiae* from the exercise of foreign criminal jurisdiction shall not apply in respect of genocide, CaH and war crimes.<sup>83</sup>

- 25 Yet, on closer inspection the picture that results from the ongoing work of the ILC is less than clear. This is for the following three reasons: First, Draft Article 7 was adopted by majority only.<sup>84</sup> Second, it has been left open whether the intention behind the draft is to codify or rather to progressively develop general CIL.<sup>85</sup> Third, the comments submitted to the ILC by States<sup>86</sup> make it plain that there is currently no consensus among them. In parallel to ‘wavering State Practice’,<sup>87</sup> a number of scholars have more recently questioned the inapplicability of the immunity *ratione materiae* protection in proceedings for crimes under CIL, Ingrid Wuerth’s essay ‘Pinochet’s Legacy Reassessed’ being the most thorough and perhaps also the most influential among them.<sup>88</sup> As a result of all this, and perhaps somewhat ironically,<sup>89</sup> what appeared to be a fairly robust international consensus in 2007,<sup>90</sup> has become a matter of quite considerable **controversy** in the course of the ILC’s work.<sup>91</sup>

C.K./K.P.) cannot invoke immunity from national or international jurisdiction even if they perpetrated such crimes while acting in their official capacity.’

<sup>82</sup> For a selection of more recent scholarly statements to that effect listed in the sequence of the date of their publication going backwards, see Horsthemke, *Immunitäten* (2019) 147; Mahmudov (2019) *Baku State University Law Review* 5, 93 ff.; Tladi (2019) 32 *LeidenJIL* 169, 187; van Alebeek, in: Ruys *et al.*, *HB Immunities* (2019) 496, 522; van der Wilt, in: Ruys *et al.*, *HB Immunities* (2019) 595, 596; Ascensio and Bonafe (2018) 122 *RGDIP* 821, 849; Frulli (2018) 16 *ICJ* 775, 782–783; Pedretti, *Immunity* (2015) 191; Talmon (2014) 46 *Berichte der Deutschen Gesellschaft für Internationales Recht* 329; Zhong, *Criminal Immunity* (2014) 3; Ambos, *Treatise ICL I* (2013) 414; Gosnell and Gaeta, in: Cassese and Gaeta, *ICL* (2013) 240–248; Akande and Shah (2010) 21 *EJIL* 815, 839–849; Senn, *Immunitäten* (2010) 77; Kreicker, *Exemtionen I* (2007) 219 (with an exception, however, for the functional immunity in the field of diplomatic and consular relations; *ibid.* 570 ff.); Nouwen (2005) 18 *LeidenJIL* 645, 663; Simbeye, *Immunity* (2004) 159; Cassese (2002) 13 *EJIL* 853, 863; Tangen, in: *Die völkerrechtliche Immunität* (2002) 218 (though with some remaining hesitation); Lüke, *Die Immunität staatlicher Funktionsträger* (2000) 273.

<sup>83</sup> A/CN.4/L.893, 10 Jul. 2017, 1; for a useful summary of the relevant conversation within the Commission, see Tladi (2019) 32 *LeidenJIL* 169 ff.

<sup>84</sup> *Report of the ILC, Sixty-Ninth Session* (1 May – 2 Jun. and 3 Jul. – 4 Aug. 2017), A/72/10, 164 (para. 74). The position of the minority within the Commission is summarized *ibid.* 181–183 (para. 3).

<sup>85</sup> The Commentary on Draft Article 7 speaks of a ‘discernible trend’ in the practice of States and of the need to preserve the ‘unity and systemic nature’ of the international legal order. The relevant passage of the Commentary concludes by saying: ‘(T)he Commission considers that it must pursue its mandate of promoting the progressive development and codification of international law by applying both the deductive and the inductive method’; *Report of the ILC, Sixty-Ninth Session* (1 May – 2 Jun. and 3 Jul. – 4 Aug. 2017), A/72/10, 178–181 (paras. 5–7); on the position of individual ILC members, see van Alebeek (2016) 112 *AJILUnbound* 27, 29 f.; on the ILC’s ‘dual mandate’ and its significance in the present context, see Tladi (2019) 32 *LeidenJIL* 169, 171–172; see further van Alebeek, in: Ruys *et al.*, *HB Immunities* (2019) 496, 509.

<sup>86</sup> For a succinct overview, see van Alebeek in: Ruys *et al.*, *HB Immunities* (2019), 496, 513, 516; for a detailed documentation, see Barkholdt and Kulaga, *Presentation* (2018).

<sup>87</sup> van Alebeek, in: Ruys *et al.*, *HB Immunities* (2019) 496, 522.

<sup>88</sup> Wuerth (2012) 106 *AJIL* 731 ff.; see also Crawford, *Brownlie’s Principles* (2019) 662; Elphick (2016) *The University of Western Australia Law Review* 41, 282 ff.; Huang (2014) *ChineseJIL* 1 ff.; Jia, in: Bergsmo and Ling, *State Sovereignty* (2012) 75, 82 ff.; O’Keefe (2015) 109 *AJILUnbound* 167; Fox and Webb, *Immunity* (2013) 571 ff.; Robinson, in: Cryer *et al.* (2019) 512–517, leaves the matter undecided.

<sup>89</sup> van Alebeek, in: Ruys *et al.*, *HB Immunities* (2019) 513, 518.

<sup>90</sup> It is worth recalling that Wuerth (2012) 106 *AJIL* 731, 732 noted that, at the time of her writing, ‘virtually all scholars’ took a view of the existing CIL different from hers.

<sup>91</sup> Ascensio and Bonafe (2018) 122 *RGDIP* 821, 821; van Alebeek (2018) 112 *AJILUnbound* 27 ff. (who also identifies a certain shift within the ILC membership).



In 2002, the ICJ touched upon the issue without authoritatively settling it. In its **Arrest Warrant Judgment** the ICJ said in an *obiter dictum* (completely unsupported by legal reasoning) that after a person ceases to hold an office to which immunity *ratione personae* is attached,

*'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 of 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'.<sup>92</sup>*

In respect of the commission of crimes under CIL during the period of office, this statement is ambiguous: If conduct of a State official which is criminal under international law is, by definition, considered to be committed 'in a private capacity' for the distinct purposes of the law on functional immunity, this conduct would fall outside the immunity protection *ratione materiae*.<sup>93</sup> If the ICJ was of this view, it should have said so because that idea, at least if the word 'private' is used, is far from being evident and it is subject to a significant amount of scholarly criticism.<sup>94</sup> If the *dictum* is, however, read with the understanding in mind that the international criminality of a certain conduct of a State official does not, in and of itself, affect the conduct's official character for the distinct purposes of functional immunity, the meaning may alter drastically: The *dictum* may then suggest that functional immunity applies before national courts even in criminal proceedings for crimes under international law. This would be so, unless the ICJ did not intend the above-cited passage to be an exhaustive circumscription of the scenarios in which functional immunity is inapplicable.<sup>95</sup> It is to be regretted that the ICJ has articulated itself in so uncertain terms with respect to such an important question.<sup>96</sup>

Since 2002, no opportunity arose for the ICJ to look more closely to the question of whether State officials who have allegedly committed crimes under international law enjoy functional immunity.<sup>97</sup> It bears mentioning, though, that the ICJ touched upon functional immunity under customary international law more generally on two occasions subsequent to the *Arrest Warrant Judgment*.

In its **2008 MACM Judgment**, the ICJ found that a claim of functional immunity belongs to the State of the State official concerned, the latter only being the beneficiary of the immunity protection provided.<sup>98</sup> The ICJ also observed that a State seeking immunity for one of its organs 'is expected to notify the authorities of the other State concerned'.<sup>99</sup>

In its **2012 Jurisdictional Immunities Judgment**, the ICJ explicitly distinguished between the immunity of the State and the functional immunity of State officials from criminal jurisdiction. The ICJ did so in the following terms:

<sup>92</sup> ICJ, *Case Concerning the Arrest Warrant of 11 Apr. 2000* (DRC v. Belgium), 14 Feb. 2002 (hereafter: *Arrest Warrant Judgment*), ICJ Rep. 2002, 3, 25 (para. 61).

<sup>93</sup> For a judicial pronouncement pointing in this direction, see Joint Individual Opinion of Judges Higgins, Kooijmans and Buergenthal, ICJ, *Arrest Warrant Judgment*, ICJ Rep. 2002, 63, 88 (para. 85); for a more nuanced judicial pronouncement in that respect, see Dissenting Opinion of Judge *van den Wyngaert*, *ibid.*, ICJ Rep. 2002, 137, 161 (para. 36).

<sup>94</sup> For a few examples, see Zahar and Sluiter, *ICL* (2008) 505; Kreicker, *Exemptionen I* (2007) 120–138; Cassese (2002) 13 *EJIL* 853, 868.

<sup>95</sup> Akande and Shah (2010) 21 *EJIL* 815, 839 are of the view that such a reading is possible. In the same direction Foakes, *The Position of Heads of State* (2014) 154.

<sup>96</sup> For a similar view, see, for example, Galand, *UNSC Referrals* (2019) 156.

<sup>97</sup> For the details, see van Alebeek, in: Ruys *et al.*, *HB Immunities* (2019) 496, 523.

<sup>98</sup> ICJ, *Mutual Assistance in Criminal Matters Judgment*, ICJ Rep. 2008, 177, 242 (para. 188).

<sup>99</sup> *Ibid.*, 244 (para. 196).

‘(T)he Court must emphasize that it is addressing only the question of the immunity of the State itself from the jurisdiction of the courts of other States, the question of whether, and if so, to what extent, immunity might apply in criminal proceedings against an official of the State is not in issue in the present case.’<sup>100</sup>

This distinction precludes relying on the conclusion reached in the *Jurisdictional Immunities* Judgment as a precedent for resolving the question of functional immunity of State officials in criminal proceedings for crimes under CIL.

- 30 In the course of its reasoning in the *Jurisdictional Immunities* Judgment, the ICJ addressed the question whether the fact that an international legal rule of conduct possesses the status of *ius cogens* implies that there can be no State immunity in proceedings where a violation of such a rule is alleged. The ICJ found as follows:

‘A *jus cogens* rule is one from which no derogation is permitted but the rules which determine the extent and scope of jurisdiction and when that jurisdiction may be exercised do not derogate from those substantive rules which possess *jus cogens* status, nor is there anything inherent in the concept of *jus cogens* which would require their modification or would displace their application.’<sup>101</sup>

This is a correct statement of law and it is of relevance also for the question of functional immunity of State officials in criminal proceedings for crimes under CIL. It follows from it that the argument, which has been made in part of the literature,<sup>102</sup> that the inapplicability of functional immunity in proceedings for crimes under CIL results from the *ius cogens* status of the underlying rules of conduct, does not hold.<sup>103</sup>

- 31 The correct view on the current state of CIL is that **functional immunity does not apply** in national and international criminal proceedings **for crimes under CIL**. The arguments in support of this view will be first summarized in this paragraph and set out in some detail thereafter. The first – and by itself sufficient – explanation for this state of CIL is as follows: The introduction in 1946, through ‘a general practice of States accepted as law’,<sup>104</sup> of individual criminal responsibility under international law into the international legal order, and this especially with the purpose of covering the conduct of State officials acting under the colour of authority, implies the inapplicability of functional immunity. As part of this argument (set out below in mn. 32–52), the rationale and the nature of the CIL rule of functional immunity will be explained. A second way to explain the current state of CIL (set out mn. 53–66), which at the same time further consolidates the first line of reasoning, is that a general practice of States accepted as law has come into existence before 1990, which specifically supports the inapplicability of functional immunity to criminal proceedings for crimes under CIL. The final component of the analysis of the current state of CIL (set out in mn. 67–83) consists of demonstrating that, though no longer being unchallenged especially in the verbal practice of States, no general practice of States accepted as law can be identified since 1990, which has given rise to a change of the state of CIL. This section of the commentary concludes (below in mn. 73–78) with some reflections on the recent

<sup>100</sup> ICJ, *Jurisdictional Immunities of the State* (Germany v. Italy), 3 Feb. 2012 (hereafter: *Jurisdictional Immunities Judgment*), ICJ Rep. 2012, 99, 139 (para. 91).

<sup>101</sup> *Ibid.* 141 (para. 95).

<sup>102</sup> See, for example, Bianchi (1999) 10 *EJIL* 237, 271–272.

<sup>103</sup> For the same view, see (and in all cases with references to opposing views) d’Argent and Lesaffre, in: Ruys *et al.*, *HB Immunities* (2019) 614 ff.; Jia, in: Bergsmo and Ling, *State Sovereignty* (2012), 75, 82 ff.; Akande and Shah (2010) 21 *EJIL* 815, 832 ff.

<sup>104</sup> Draft Conclusion 2 on the Identification of CIL, *Report of the ILC, Seventieth Session* (30 Apr. to 1 Jun. and 2 Jul. 10 Aug. 2018), A/73/10, 119 (para. 65).

challenge to the state of CIL contained in the verbal practice of a significant number of States, on possible ways to constructively respond to that challenge and on the need to distinguish between national and (certain) international criminal proceedings in that respect.

As was stated in the preceding paragraph, the first – and by itself sufficient – reason 32 for the inapplicability of functional immunity to proceedings for crimes under CIL is that the introduction, through a general practice of States accepted as law, of the concept of crime under CIL into the international legal order was for the main purpose of adjudicating the criminality of State officials for the relevant conduct. In order to explain the effect of this change of CIL on the application of the CIL rule of functional immunity for State officials in foreign criminal proceedings, the following paragraph will set out the **rationale** underlying this functional immunity rule.

According to **one view**, which can be traced back to the writings of Hans Kelsen,<sup>105</sup> 33 the **purpose of this rule is to prevent the circumvention of State immunity** by precluding a foreign court from calling into question the act of another State in proceedings against one of its officials. This view has recently been embraced by the UK House of Lords in *Jones v. Saudi Arabia*<sup>106</sup>, and it finds support within part of the literature.<sup>107</sup> Pursuant to that view, the term ‘official act’ as an element of the CIL rule on functional immunity and the term ‘act of State’ as an element of the CIL rules governing the attribution of conduct to a State are synonymous. Crimes under CIL committed by State officials under colour of authority then constitute official acts also for the distinct purposes of the CIL rule of functional immunity. This would mean this rule would not apply to proceedings for crimes under CIL only if an exception for the kind of official acts amounting to such crimes developed. Yet, as has been observed by a number of writers, the early State practice on functional immunity does not support that rationale.<sup>108</sup> It would also imply the odd suggestion that a State official does not enjoy functional immunity in case of *acta iure gestionis*.<sup>109</sup> It is also not evident why State immunity should extend beyond proceedings instituted against the State itself or against a State official in his or her official capacity with a view, for example, to seek State assets. To the contrary, it is difficult to see why it is a circumvention of the immunity of the State if criminal proceedings are instituted against one of its officials to adjudicate this official’s personal responsibility. In such a case it is not apparent, why the State of the official should thereby be impleaded indirectly.<sup>110</sup> It would therefore seem, as one commentator has aptly put it, that by attributing to the rule of functional

<sup>105</sup> For a detailed analysis of these writings with comprehensive references, see van Alebeek, *Immunity* (2008) 105 ff.

<sup>106</sup> *Jones v. Ministry of Interior for the Kingdom of Saudi Arabia and others*, 14 Jun. 2006, (2006) UKHL 26, 1, 18 (para. 31) (Lord Bingham of Cornhill); for the different legal position adopted by the Court of Appeal, see Keitner, in: Ruys and Angelet, *HB Immunities* (2019) 525, 535–536; for a more detailed study of the proceedings in this case, see Keitner (2011–2012) 80 *FordhamLRev* 605, 608 ff.; the same perspective was adopted by the first Special Rapporteur of the ILC on ‘Immunity of State officials from foreign criminal jurisdiction’ in his *Second Report on Immunity of State officials from foreign criminal jurisdiction*, A/CN.4/631, 10 Jun. 2010, 395, 403 (para. 24); the formulation chosen by the ICJ in its *Mutual Assistance in Criminal Matters Judgment*, ICJ Rep. 2008, 177, 242 (para. 188) need not be read as the endorsement of that view (but see Buzzini (2009) 22 *LeidenJIL* 455, 463.

<sup>107</sup> Akande and Shah (2010) 21 *EJIL* 815, 827.

<sup>108</sup> Keitner, in: Ruys and Angelet, *HB Immunities* (2019) 525, 527 ff.; Ascensio and Bonafe (2018) 122 *RGDIP* 821, 839; van Alebeek, *Immunity* (2008) 107 ff.

<sup>109</sup> van Alebeek, *Immunity* (2008) 106; concurring Buzzini (2009) 22 *LeidenJIL* 455, 463–464; Akande and Shah (2010) 21 *EJIL* 815, 827 avoid that oddity by arguing that the rationale of the functional immunity is twofold and includes the consideration set out in the following text.

<sup>110</sup> van Alebeek, in: Ruys *et al.*, *HB Immunities* (2019) 496, 499; Keitner, *ibid.*, 525, 525; for a different view, see Akande and Shah (2010) 21 *EJIL* 815, 827.

immunity the purpose of not circumventing the immunity of the State one ‘injects the domestic act of State doctrine in the international rule of functional immunity’.<sup>111</sup> Without unambiguous support in the practice of States to the contrary, it is unconvincing to assume a rationale that tends to give the CIL rule of functional immunity such a wide scope of application. This is all the more true as functional immunity constitutes an exception from the sovereign State right to exercise jurisdiction so that there can be no presumption for a far-reaching scope of application.<sup>112</sup>

- 34 **The rationale of this rule should therefore be understood differently.** In its 1997 Blaškić Judgment, the ICTY AC offered the following explanation:

*‘State officials are mere instruments of a State and their official action can only be attributed to the State. They cannot be the subject of sanctions or penalties for conduct that is not private but undertaken on behalf of the State. In other words, State officials cannot suffer the consequences of wrongful acts which are not attributable to them personally but to the State on whose behalf they act: they enjoy so-called “functional immunity”’.<sup>113</sup> (...) Customary international law protects the internal organization of each sovereign State: it leaves it to each sovereign State to determine its internal structure and in particular to designate the individuals acting as State agents or organs. Each sovereign State has the right to issue instructions to its organs, both those operating at the internal structure and those operating in the field of international relations, and also to provide for the sanctions or other remedies in case of non-compliance with those instructions. The corollary of this exclusive power is that each State is entitled to claim that acts or transactions performed by one of its organs in its official capacity be attributed to the State, so that the individual organ may not be held accountable for those acts or transactions’.<sup>114</sup>*

This explanation is based on a correct understanding of the concept of State sovereignty under CIL. It further shows that the concept of State sovereignty, as a matter of principle, does not require the interpreter to inject ‘an act of State doctrine’ into the CIL institution of functional immunity. Instead, the 1997 Blaškić Judgment convincingly clarifies that the CIL rule of functional immunity is underpinned by the combination of the following considerations:

*‘States are free to determine the mandate of their officials and they have exclusive jurisdiction to establish whether or not officials acted within the bounds of their mandate, and hence whether or not they incurred responsibility in their personal capacity’.<sup>115</sup>*

<sup>111</sup> van Alebeek, in: Ruys *et al.*, *HB Immunities* (2019) 496, 499. In its Memorandum of 31 Mar. 2008, entitled *Immunity of State officials from foreign criminal jurisdiction*, the Secretariat of the ILC correctly distinguishes between functional immunity and the ‘Act of State doctrine’ and observes that while the ‘act of State doctrine is an established doctrine in common law systems, it is rarely used by civil law tribunals’; A/CN.4/596, 35 (para. 54).

<sup>112</sup> Ascensio and Bonafe (2018) 122 *RGDIP* 821, 827–828 make the point that in view of the sovereign right of every State to exercise jurisdiction it is fallacious to treat functional immunity as if the existence of this legal institution constituted the methodological baseline.

<sup>113</sup> ICTY, Blaškić Judgment, IT-95–14, para. 38.

<sup>114</sup> *Ibid.* para. 41.

<sup>115</sup> van Alebeek, in: Ruys *et al.*, *HB Immunities* (2019) 496, 500. The same author demonstrates (*ibid.* 501) that neither the second Special Rapporteur Concepción Escobar Hernández nor the ILC as a whole have achieved clarity about this point of principle.



It follows that, rather than being exclusively procedural in nature,<sup>116</sup> the international legal obligation flowing from the CIL rule of functional immunity combines **considerations of substance and procedure** and can be translated into national law in either procedural or substantive terms.<sup>117</sup> The forum State may observe its international legal obligation to respect the functional immunity of foreign State officials acting under colour of authority from its criminal jurisdiction by including, in its substantive criminal law, a ground for excluding individual criminal responsibility or, synonymously, a defence based on the qualification of the relevant conduct as an ‘official act’. But the forum State may also choose to observe its international legal obligation at the level of its law on jurisdiction or procedure. If such an approach is chosen, the national authorities of the forum State concerned will be prevented to exercise that State’s jurisdiction over the conduct of a foreign State official who has acted under colour of authority. It is difficult, if not impossible, to say that one of those two possible national approaches would be better than the other to capture the rationale underlying the CIL rule of functional immunity. A substantive law qualification of the issue articulates well the idea that, where a State official enjoys functional immunity from foreign criminal jurisdiction, his or her personal responsibility under that foreign criminal law is not engaged.<sup>118</sup> It is therefore no accident that the issue of functional immunity was repeatedly addressed in the form of a substantive defence in early State practice.<sup>119</sup> At the same time, the jurisdictional/procedural qualification appropriately captures the idea that the forum State, in order to respect the sovereignty of the official’s State, is precluded from inquiring into the mandate of a State official where the latter acts under colour of authority. The inextricable connection between the CIL rule of functional immunity and the international legal concept of State sovereignty explains why, as the ICJ has recognized in the MACM Judgment (above nn. 28), the State is entitled to claim the functional immunity of its officials as a matter of its own right. This inter-State perspective should, however, not take away from the fact that the State official, though not possessing a right to functional immunity under current international law, also has a legitimate interest in the enjoyment of functional immunity to the extent that he or she acts on the basis of a mandate of his State.<sup>120</sup>

In the MACM Judgment, the ICJ has stated that ‘(t)he State which seeks to claim immunity for one of its State organs is expected to notify the authorities of the other

<sup>116</sup> This position was taken by the first Special Rapporteur of the ILC, *Preliminary report on immunity of State officials from foreign criminal jurisdiction*, by Roman Anatolevich Kolodkin, A/CN.4/601, 29 May 2008, 52 (para. 102 (e)). The second Special Rapporteur initially joined her predecessor on that point, *Second Report on immunity of State officials from foreign criminal jurisdiction*, by Ms. Concepción Escobar Hernández, A/CN.4/661, 4 Apr. 2013, 43 (para. 45), but in her *Fifth Report on immunity of State officials from foreign criminal jurisdiction* she correctly nuanced this position (see the following fn.).

<sup>117</sup> The second Special Rapporteur of the ILC on Immunity of State officials from foreign criminal jurisdiction has acknowledged the challenge in the following terms: ‘(T)his description of immunity as a mere procedural bar and the fundamental distinction between immunity and responsibility are difficult to support in absolute terms, especially in the field of criminal law. The analysis of practice and the teleological interpretation of immunity lead to more nuanced conclusions. One example that comes to mind is the fine line that separates the invocation of official position as a substantive defence to avoid responsibility from its invocation as a procedural defence to avoid the exercise of jurisdiction’; *Fifth Report on immunity of State officials from foreign criminal jurisdiction*, by Concepción Escobar Hernández, A/CN.4/701, 14 Jun. 2016, 64–65 (paras. 150).

<sup>118</sup> For a lucid recent exposition of this substantive element of the legal question under consideration, see Ascensio and Bonafe (2018) 122 *RGDIP* 821, 832 ff.

<sup>119</sup> Keitner, in: Ruys *et al.*, *HB Immunities* (2019) 525, 527 ff.

<sup>120</sup> As a reflection of this fact, the forum State may, as a matter of substantive law, come to the conclusion that no personal responsibility lies with the State official, even if the State of the official has declared a waiver of its right.

State concerned'.<sup>121</sup> This statement has been understood by many, including the two Special Rapporteurs of the ILC on Immunity of State officials, to mean that the forum State must observe the functional immunity enjoyed by a State official only if the State of the official has invoked its right to that immunity.<sup>122</sup> In accordance with this reading, it has been suggested in the literature that functional immunity must indeed be invoked by the State of the official before the forum State is bound to observe it.<sup>123</sup> The two Special Rapporteurs of the ILC have also taken that view<sup>124</sup> and the second Special Rapporteur has proposed a Draft Article 10 to that effect.<sup>125</sup> Whether this proposition constitutes the accurate reflection of existing CIL is, however, open to doubt even if one accepts the premise that the CIL rule of functional immunity entitles only the State and not the State official. It does not appear to be the case that there is presently a strong body of scholarly opinion in support of the rule proposed in Draft Article 10 as reflecting the *lex lata*.<sup>126</sup> The reasons to doubt its CIL status are as follows: First, as a matter of principle, the proposition that a right must be invoked before it must be observed is not inherently compelling. Second, functional immunity, while conferring a right under international law, only on the State of the official, also reflects a legitimate interest of the official personally (above mn. 35). This legitimate interest of the State official will be more safely protected if the forum State is bound to respect the CIL rule of functional immunity irrespective of its prior invocation. Third, it is true that the official nature of the conduct concerned will not always be obvious to the forum State. However, this practical concern<sup>127</sup> can be addressed by recognizing that the obligation of the forum State to observe the functional immunity of the foreign official presupposes that the forum State has sufficient reasons to be aware of the official nature of the conduct in question. It is also far from apparent that the proposition under consideration is supported by a general practice of States accepted as law. Quite to the contrary, the 2008 Memorandum by the Secretariat of the ILC suggests otherwise,<sup>128</sup> and neither of the two Special Rapporteurs has shown to the contrary. In the literature, it has been stated that the practice of States on the matter 'is mixed'.<sup>129</sup> Assuming the existence of such a 'mixed practice of States', it would require further explanation how this practice can nevertheless be interpreted as a general practice of States accepted as law. Finally, as regards the ICJ's formulation in the MACM Judgment, it should be seen in light of the specific factual context that the existence of an act under colour of State authority was not obvious.<sup>130</sup> It must further be observed that the ICJ's formulation is less clear than it has often been assumed. To say that a certain conduct is 'expected' is not the same as

<sup>121</sup> ICJ, MACM, ICJ Rep. 2008, 177, 244 (para. 196).

<sup>122</sup> *Third Report on immunity of State officials from foreign criminal jurisdiction*, by Roman Anatolevich Kolodkin, A/CN.4/646, 24 May 2011, 8–9 (paras. 16–17); *Seventh Report on Immunity from foreign criminal jurisdiction*, by Special Rapporteur Concepción Escobar Hernández, A/CN.4/729, 18 Apr. 2019, 18 (para. 44), 20 (para. 51); for the same reading of the judgment, see, for example, Wuerth (2012) 106 AJIL 731, 745–746; Buzzini (2009) 22 LeidenJIL 455, 472.

<sup>123</sup> Wuerth (2012) 106 AJIL 731, 745.

<sup>124</sup> *Third Report on immunity of State officials from foreign criminal jurisdiction*, by Roman Anatolevich Kolodkin, A/CN.4/646, 24 May 2011, 9 (paras. 17–18); *Seventh Report on Immunity from foreign criminal jurisdiction*, by Special Rapporteur Concepción Escobar Hernández, A/CN.4/729, 18 Apr. 2019, 21 (para. 52).

<sup>125</sup> *Seventh Report on Immunity from foreign criminal jurisdiction*, by Special Rapporteur Concepción Escobar Hernández, A/CN.4/729, 18 Apr. 2019, 26 (para. 69).

<sup>126</sup> Buzzini (2009) 22 LeidenJIL 455, 470 ff. (with further references).

<sup>127</sup> Wuerth (2012) 106 AJIL 731, 747 explicitly calls it a policy reason.

<sup>128</sup> *Immunity of State officials from foreign criminal jurisdiction*, Memorandum by the Secretariat, A/CN.4/596, 31 Mar. 2008, 139–140 (para. 215).

<sup>129</sup> Foakes, *The Position of Heads of State* (2014) 174; Wuerth (2012) 106 AJIL 731, 746.

<sup>130</sup> Ascensio and Bonafe (2018) 122 RGDIP 821, 842.

saying that a certain conduct is 'legally required'. To conclude, **no persuasive case has been made so far that functional immunity under CIL must be invoked by the State of the official concerned, before the forum State is bound to observe it.** *De lege ferenda* it has rightly been pointed out that to make the obligation of the forum State to observe functional immunity dependent on its prior invocation by the official's State would place the State official concerned in quite a vulnerable position.<sup>131</sup> The further discussion should take this consideration into account.

In view of its rationale, as set out above mn. 34, the CIL rule on functional immunity **has never been applicable in criminal proceedings for crimes under CIL.**<sup>132</sup> The introduction of the concept of crime under international law into the international legal order implies the agreement among States about the existence of an international legal rule of conduct applying to the individual and about the existence of an international legal rule that threatens the individual concerned with punishment in case of violation of the rule. The concept of crime under CIL may certainly cover the conduct of non-State actors and today it does so to a considerable extent. At its inception, however, the concept of crime under CIL focused on the conduct of State officials.<sup>133</sup> Therefore, the acceptance by States of the concept of crime under CIL necessarily excludes the idea that the conduct of a State official in violation of the underlying international legal rule of conduct can only be attributed to his or her State.<sup>134</sup> To be sure, the attribution of such conduct to the State of the official according to the customary international rules on attribution remains perfectly possible. But the foundational logic of ILC presupposes that the relevant conduct must also be attributed to the State official *personally*. If seen from the perspective of the CIL rule of functional immunity, this means that States have, to that extent, renounced their freedom to determine the mandate within which State officials may act without incurring personal responsibility. Yet, it might be asked whether the CIL rule of functional immunity still serves the purpose to reserve to the State of the official the exclusive jurisdiction to establish whether a certain conduct allegedly in violation of an international legal rule of conduct and thus allegedly beyond the confines of exclusive attribution to the State, indeed constitutes such a violation. But to reserve to the State of the official this exclusive jurisdiction would defeat the very purpose of the internationalization of the rule of conduct coupled with the internationalization of the provision of a criminal sanction, which is inherent in the concept of crime under CIL. If the adjudication of a crime under CIL committed by a State official should have remained a matter for the exclusive jurisdiction of that State official's national criminal jurisdiction, no internationalization of the rule of conduct and no internationalization of the provision of a criminal sanction would have been required. It would then rather have sufficed to introduce an international legal obligation incumbent upon States to criminalize the relevant conduct and to exercise their national jurisdiction over their State officials in case of an alleged violation. Therefore, the introduction of the concept of crime under CIL, primarily designed to cover the conduct of State officials, carried with it the idea of allowing for the exercise of

<sup>131</sup> Ascensio and Bonafe (2018) 122 *RGDIP* 821, 842–843.

<sup>132</sup> Kreicker, *Exemptionen I* (2007) 550 ff. is of the view that the customary and conventional international functional immunities in diplomatic and consular relations follow a different logic and that, as a result hereof, this specific type of functional immunity also covers proceedings for crimes under international law (*ibid.* 564 ff.); for a subsequent summary of this position, see *id.* (2009) 4 *ZIS* 350, 357 ff. This is a doubtful proposition. For a more detailed exposition of the contrary view, see, for example Senn, *Immunitäten* (2010) 87 ff. (with detailed references to other scholarly writings in fn. 317); Wirth (2002) 12 *CLF* 429, 448–449.

<sup>133</sup> See, for example, Akande and Shah (2010) 21 *EJIL* 815, 843.

<sup>134</sup> Ascensio and Bonafe (2018) 122 *RGDIP* 821, 834.

extraterritorial criminal jurisdiction in order to ascertain whether the act of a State official falls under the international conduct rule in question. It could finally be asked whether such extraterritorial adjudication of the individual criminal responsibility under CIL was only intended to be confined to (certain) international criminal courts. This would then justify distinguishing between proceedings before (certain) international criminal courts and before foreign national criminal courts. Theoretically, the extraterritorial adjudication of crimes under CIL could indeed be confined to (certain) international criminal courts. However, the practical limitations of any such court were obvious already when States introduced the concept of crime under CIL into the international legal order. Confining the extraterritorial adjudication of the individual criminal responsibility under CIL to (certain) international criminal courts would therefore have meant that States had created a new concept of CIL, but, at the same time, wished to preclude that concept from acquiring a significant practical meaning precisely in those cases which were at the heart of the legal evolution, that is the conduct by State officials. This being an altogether unreasonable assumption, the introduction of the concept of crime under CIL carried with it the strong presumption of allowing also foreign criminal jurisdictions to exercise their jurisdiction in order to establish whether a crime under CIL was committed by a State official entailing the latter's personal responsibility.<sup>135</sup> Only in the case of the crime of aggression a different case can be made. The leadership requirement of this crime entails that the number of suspects will generally remain limited.<sup>136</sup> In view of that, the purpose underlying the introduction of the concept of crime of aggression under CIL might not be defeated by confining the extraterritorial jurisdiction over it to (certain) international criminal courts. From these considerations taken together, it can safely be concluded that the CIL rule of functional immunity is inapplicable in national and international criminal proceedings for crimes under CIL. In 2008, all this was astutely summarized by van Alebeek in the simple terms that 'functional immunity ends where individual responsibility (under customary international law; C.K.) begins'.<sup>137</sup> An exception remains conceivable, however, as far as the crime of aggression is concerned. Here, it is possible to argue that the inapplicability of the CIL rule of functional immunity remains confined to proceedings before (certain) international criminal courts.

- 38 **The preceding reasoning constitutes the interpretation of the relevant rule of CIL and it involves an element of systemic integration within the international legal order.**<sup>138</sup> It is certainly possible to say that such an approach includes an element of deduction. But this consists of no more than the ascertainment of the rationale of a rule of CIL and that rule's interpretation in consonance with its rationale so ascertained. Such an interpretive exercise is inevitable and does not contradict any accepted methodology of identifying the state of CIL.<sup>139</sup> In particular, such an identification of the applicable law is not to be confounded with the following statement made by the second ILC Special Rapporteur on Immunity of State officials from foreign criminal jurisdiction:

<sup>135</sup> Akande and Shah (2010) 21 *EJIL* 815, 843; see further Kreß (2006) 6 *JICJ* 561, 574 ff.

<sup>136</sup> See Zimmermann/Freiburg-Braun above Art. 8bis mn. 36 ff. and Ambos above Art. 25 mn. 54.

<sup>137</sup> van Alebeek, *Immunity* (2008) 241. In her most recent analysis of the question (in: Ruys *et al.*, *HB Immunities* (2019) 496, 500), the same author makes a stronger emphasis on the extraterritorial jurisdiction 'leg' of the argument than she did in her book. But as is shown in the above text, also the idea of extraterritorial jurisdiction is inherent in the concept of crime under international law. For a short, but very lucid analysis in the same vein, see Zhong, *Criminal Immunity* (2014) 3.

<sup>138</sup> For the same view, see Ascensio and Bonafe (2018) 122 *RGDIP* 821, 844.

<sup>139</sup> For a useful recent study on interpretation and CIL, see Chasapis-Tassinis (2020) 31 *EJIL* 235 ff.; see also the earlier perceptive study by Gärditz (2007) 45 *AVR* 1, 22.



‘Whether or not there is a customary norm defining international crimes as limitations or exceptions to immunity, a systematic analysis of the relationship between immunity and international crimes in contemporary international law shows that there are various arguments in favour of such a norm’.<sup>140</sup>

As has been correctly observed, by referring to arguments such as *ius cogens*, the fight against impunity, access to justice and the obligation to prosecute international crimes not in order to interpret the rule of functional immunity but as grounds why an exception to this rule is desirable, this statement ‘acquired the distinct taste of “*droit-de-l’hommisme*” and was unacceptable to the majority of the Commission members as far as the identification of *lex lata* was concerned’.<sup>141</sup>

As a matter of terminology, **a crime under CIL committed by a State official under ‘colour of authority’ does not constitute a ‘private act’**.<sup>142</sup> For the purposes of the CIL rules governing attribution within the context of the law of State responsibility for internationally wrongful acts the relevant conduct of the State official is an act of State. As far as the distinct purposes of the CIL rule of functional immunity are concerned it is more consonant with the preceding reasoning to say that such conduct does not qualify as an official act.<sup>143</sup>

It is worth mentioning that Akande and Shah have reached essentially the same conclusion on the basis of the assumption mentioned above (mn. 32) that one purpose of the CIL of functional immunity is to **preclude a foreign jurisdiction to indirectly call into question the act of another State**. Starting from that premise, these two authors said that the introduction of the concept of crime under CIL into the international legal order had the effect to create an exception to the CIL rule of functional immunity. Akande and Shah concluded as follows:

*Indeed, the very purpose of international criminal law is to attribute responsibility to individuals, including state officials, and to defeat the defence of official capacity or act of state. Since acts amounting to international law crimes are to be attributed to the individual, there is less need for a principle which shields those officials from responsibility for acts which are to be attributed solely to the state. The newer rule of attribution supersedes the earlier principle of immunity which seeks to protect non-responsibility.*<sup>144</sup>

Pursuant to this understanding of the rationale of the CIL rule of functional immunity, a crime under CIL law committed by a State official under colour of authority constitutes both an ‘act of State’ for the purposes of the CIL on State responsibility for internationally wrongful acts and an ‘official act’ for the purposes of

<sup>140</sup> Fifth Report on immunity of State officials from foreign criminal jurisdiction, by Concepción Escobar Hernández, A/CN.4/701, 14 Jun. 2016, 78 (para. 190).

<sup>141</sup> van Alebeek, in: Ruys *et al.*, *HB Immunities* (2019) 496, 518; on the possibility that this may be part of the explanation why the majority within the ILC regarding the *lex lata* has changed, see *id.* (2018) 112 *AILUnbound* 27, 31–2.

<sup>142</sup> See, for example, Ascensio and Bonafe (2018) 122 *RGDIP* 821, 848.

<sup>143</sup> van Alebeek, in: Ruys *et al.*, *HB Immunities* (2019) 496, 521; Nouwen (2005) 18 *LeidenJIL* 645, 663; as a corollary of the ILC’s inconclusiveness about the rationale of the CIL rule of functional immunity, it avoids a clear stand on this point of terminology in the Commentary on the Draft Articles on Immunity of State Officials from foreign criminal jurisdiction; see *Report of the International Law Commission, Sixty-Eighth Session* (2 May–10 Jun. and 4 Jul.–12 Aug. 2016), A/71/10, 354 (para. 5 of the Commentary on Draft Article 2), and *Report of the ILC, Sixty-Ninth Session* (1 May – 2 Jun. and 3 Jul. – 4 Aug. 2017), A/72/10, 183 (para. 11 of the Commentary of Draft Article 7).

<sup>144</sup> Akande and Shah (2010) 21 *EJIL* 815, 840. The two authors make a *caveat*, however, for the functional immunity enjoyed by a diplomat *vis-à-vis* this diplomat’s State of accreditation; *ibid.* 849 ff.

the CIL rule of functional immunity. The latter, however, suffers from a ‘crime under customary international law’ exception.<sup>145</sup>

- 41 **Article 6 of the 1945 London Charter** explicitly recognizes ‘individual responsibility’ for the crimes listed and Article 7 declares that ‘the official position of the defendants shall not be considered as freeing them from responsibility’. The drafters were aware of the fact that the concept of crime under CIL had not yet been firmly established and so, at the advice of Hans Kelsen, it was made explicit in order to crystallize international law at this point through an international judicial precedent at this historic juncture.<sup>146</sup> **In 1946, the Nuremberg Tribunal** stated that the Charter was ‘the expression of international law existing at the time of its creation; and to that extent (...) itself a contribution to international law’.<sup>147</sup> It further held that it had ‘long been recognized’ that ‘international law imposes duties and liabilities upon individuals’.<sup>148</sup> It also spoke of ‘crimes against international law’<sup>149</sup> and of ‘acts condemned as criminal by international law’.<sup>150</sup> With specific respect to the crime against peace, the Nuremberg Tribunal found that ‘it is not only an international crime’, but ‘that it is the supreme international crime’.<sup>151</sup> There can thus be no doubt that the Nuremberg Tribunal set the very precedent that the drafters of the London Charter intended to be set. From that premise, the Nuremberg Tribunal, apart from relying on Article 7 of the London Charter, proceeded to exactly the same systemic integration between the CIL rule of functional immunity and the foundational logic of international criminal law as was set out above (mn. 37). The Nuremberg Tribunal held as follows:

*‘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. (T)he very essence of the Charter is that individuals have international duties which transcend the national obligations of obedience imposed by the individual State. 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 action moves outside its competence under international law’.*<sup>152</sup>

- 42 The Nuremberg Judgment’s recognition of the existence of crimes under CIL did not come out of the blue. As will be shown below (mn. 53–55), it was foreshadowed by a rich, though not yet sufficiently general, body of State practice before and at the Paris Peace Conference after the First World War.<sup>153</sup> The Nuremberg Tribunal also made it explicit that it did **not** wish the legal significance of its pronouncement to remain **confined to its own exercise of criminal jurisdiction**. As was recalled, the Tribunal explicitly considered the London Charter’s assertion of individual criminal responsibility ‘a contribution to international law’.<sup>154</sup> In so doing, the Nuremberg Judgment

<sup>145</sup> Akande and Shah (2010) 21 *EJIL* 815, 831–832; van Alebeek, in: Ruys *et al.*, *HB Immunities* (2019) 496, 521 highlights the difference between the ‘interpretation’ and the ‘formation of an exception’ approach and the resulting difference in terminology with precision.

<sup>146</sup> Sellars, ‘Crimes against Peace’ (2013) 85 ff.

<sup>147</sup> IMT, Judgment of 1 Oct. 1946 (hereafter: Nuremberg Judgment), (1947) 41 *AJIL* 172, 216.

<sup>148</sup> *Ibid.*, 220.

<sup>149</sup> *Ibid.*, 221.

<sup>150</sup> *Ibid.*

<sup>151</sup> *Ibid.*, 186.

<sup>152</sup> *Ibid.*, 221.

<sup>153</sup> van Alebeek, *Immunity* (2008) 200 ff.

<sup>154</sup> Nuremberg Judgment, (1947) 41 *AJIL* 172, 216.

followed the observation of Robert Jackson. Right at the outset of the trial, the Chief Prosecutor had emphatically rejected the idea that the victorious powers could perhaps intend to proceed on the basis of an *ad hoc* and exceptional legal regime not subsequently available for general application. Jackson exclaimed:

*'The ultimate step in avoiding periodic wars, which are inevitable in a system of international lawlessness, is to make statesmen responsible to law. And let me make clear that while this is first applied against German aggressors, the law includes, and if it is to serve a useful purpose it must condemn, aggression by other nations, including those which sit here now in judgment.'*<sup>155</sup>

In 1946, the GA 'affirmed the principles of international law recognized by the Charter of the Nuremberg Tribunal and the judgment of the Tribunal' right after judgment was rendered.<sup>156</sup> It is true that Res. 95(1) does not say 'reaffirmed' as originally proposed and it is also true that it instructs the 'Committee on the codification of international law' to 'formulate' the principles recognized in the London Charter and in the Nuremberg Judgment.<sup>157</sup> This may be seen as having introduced a measure of ambiguity. Yet, it does not even come close to calling into question the idea of generally applicable law. To the contrary, the London Charter and the Nuremberg Judgment are 'affirmed' as 'principles of international law'. At this moment in time at last, the **concept of crime under CIL had crystallized** as such through 'general practice accepted by law'.<sup>158</sup> Of course, this concept, at the time, covered no more than had been recognized in the London Charter and the Nuremberg Judgment, crimes against peace, war crimes in international armed conflict, and CaH, the latter still being curtailed by the connection clause. Yet the concept had now arrived at the international legal scene together with its explicitly stated foundational logic.

**In 1948, the Tokyo Judgment** constituted the first subsequent application of this new body of law. Article 6 of the Statute of the Tokyo Tribunal, as did its predecessor, Article 7 of the London Charter, approaches the issue in terms of substantive criminal law and declares the official position of an accused as irrelevant. The Tokyo Judgment does not explain the inapplicability of the CIL rule of functional immunity on the ground that Japan consented to the proceedings. The judgment rather refers back to the pronouncement of the Nuremberg Judgment (above mn. 41), except for one sentence,<sup>159</sup> and declares itself to be 'in complete accord' with it.<sup>160</sup>

In the same year, the judgment delivered by a US Military Tribunal in the case **US v. List and others** confirmed, as was stated above (mn. 37), that the introduction of the concept of crime under international law into the international legal order entailed the strong presumption in support of a State power to exercise extraterritorial jurisdiction in order to adjudicate such a crime. The US Military Tribunal found as follows:

<sup>155</sup> 'Opening Speech of the Chief Prosecutor for the United States', repr. in: *Trial of German Major War Criminals by the International Military Tribunal Sitting at Nuremberg Germany* (William S. Hein & Co. 2001) 45.

<sup>156</sup> GA, Resolution 95(I), A/RES/1/95, 11 Dec. 1946.

<sup>157</sup> See, for example, Sellars, 'Crimes against Peace' (2013) 173.

<sup>158</sup> For a different view, see Heller (2017) 58 *HarvILJ* 352, 378 ff. (relying on the fact that the Resolution does not use the words 'reaffirm' or 'confirm').

<sup>159</sup> The phrase that 'individuals have international duties which transcend the national obligations of obedience imposed by the individual state' was not carried over on the insistence of the Soviet judge at Tokyo, see Sellars, 'Crimes against Peace' (2013) 249.

<sup>160</sup> Judgment of the IMTFE, 12 Nov. 1948, repr. in: B.V.A. Röling and C.F.Rüter (eds.), *The Tokyo Judgment* (University Press Amsterdam 1977) 28.

*‘An international crime is such an act universally recognized as criminal, which is a grave matter of international concern and for some valid reason cannot be left to the exclusive jurisdiction of the state that would have control over it under normal circumstances’.*<sup>161</sup>

- 46 Rather than suffering from an exception, functional immunity under CIL was found not to apply to criminal proceedings for such crimes allegedly committed by State officials acting under colour of authority.<sup>162</sup> **Neither does anything** in the above-cited passage of the Nuremberg Judgment **suggest that this finding was confined to (certain) international criminal proceedings.**<sup>163</sup>

- 47 It was therefore entirely consistent with the precedents of Nuremberg and Tokyo that the Supreme Court of the State of Israel, in 1962, applied the same foundational logic of international criminal law in the case against Eichmann. In the **Eichmann judgment**, the Jerusalem District Court accordingly found as follows:

*‘The theory of ‘Act of State’ means that the act performed by a person as an organ of the State (...) must be regarded as an act of the State alone. It follows that only the latter bears responsibility therefore, and it also follows that another State has no right to punish the person who committed the act, save with the consent of the State whose mission he performed. Were it not so, the first State would be interfering in the internal affairs of the second, which is contrary to the conception of the equality of States based on their sovereignty.’<sup>164</sup> (...). (T)here is no basis for the doctrine when the matter pertains to acts prohibited by the law of nations, especially when they are international crimes of the class of “crimes against humanity” (...). Of such odious acts it must be said that in point of international law they are completely outside the ‘sovereign’ jurisdiction of the State that ordered and ratified their commission, and therefore those who participated in those acts must personally account for them and cannot shelter behind the official character of their task or mission (...). (I)nternational law postulates that it is impossible for a State to sanction an act that violates its severe prohibitions, and from this follows the idea which forms the core of the concept of “international crime” that a person who was a party to such a crime must bear individual responsibility for it. If it were otherwise, the penal provisions of international law would be a mockery.’<sup>165</sup>*

- 48 As is apparent from the above-cited passages and the reasoning, the Nuremberg Judgment and the Eichmann Judgment proceeded to the same systematic integration between the CIL rule of functional immunity and the foundational logic underpinning the introduction of the concept of crime under international law into the international legal order as was set out above (mn. 37). As is also apparent, the Nuremberg Judgment has treated the **‘official capacity defence’** and the rule on **‘functional immunity’** as **indistinguishable**<sup>166</sup> and the *Eichmann* Judgment proceeded in the same way with respect to what it preferred to call the ‘Act of State theory’. This reflects the complex

<sup>161</sup> *US v. List and others*, 19 Feb. 1948, (1950) 11 LRTWC 1233, 1241.

<sup>162</sup> Ascensio and Bonafe (2018) 122 RGDIP 821, 844, 849; van Alebeek, in: Ruys *et al.*, *HB Immunities* (2019) 496, 518 ff, 522.

<sup>163</sup> It is therefore incorrect to disregard the ‘Nuremberg precedent’ and its immediate endorsement by the GA as irrelevant to the question whether the customary international rule of functional immunity applies in national criminal proceedings for crimes under CIL; but see Tladi (2019) 32 *LeidenJIL* 169, 182.

<sup>164</sup> *AG of Israel v. Adolf Eichmann* (1968) ILR 277, 308–309.

<sup>165</sup> *Id.* 309–310.

<sup>166</sup> This is correctly observed in the *Fifth report on Immunity of State Officials from foreign criminal jurisdiction*, by Concepción Escobar Hernández, Special Rapporteur, A/CN.4/701, 14 Jun. 2016, 56 (para. 127), 64–64 (para. 150).



combination of elements of substance and procedure in the CIL rule of functional immunity which was set out in some detail above (mn. 35). All this suggests that functional immunity forms the subject matter of the first rather than the second paragraph of Article 27 of the ICCS.<sup>167</sup>

It bears emphasizing that the **line of reasoning set out in the preceding paragraphs 49 is limited to crimes under CIL.**<sup>168</sup> Today, crimes under CIL are genocide, CaH, war crimes in international and non-international armed<sup>169</sup> conflict, and the crime of aggression, which are the crimes incorporated in the ICCS. It follows that the list of crimes contained in Draft Article 7 on Immunity of a State official from foreign criminal jurisdiction may be under-inclusive: It excludes the crime of aggression although this crime was at the heart of the introduction of the concept of crime under CIL into the international legal order. In fact, the Nuremberg Tribunal declared it the ‘supreme international crime’. The explanation given by the ILC for the non-inclusion of this crime in the Draft Article<sup>170</sup> is as cursory as it is weak.<sup>171</sup> It refers to the State conduct element (ignoring the fact that other crimes under CIL more often than not also involve State conduct when it comes to ascertaining the relevant contextual element. It asserts a special political sensitivity of the crime (ignoring the fact that proceedings for other crimes under CIL are also typically politically sensitive). And it states that the ICC’s jurisdiction over the crime of aggression has not yet been activated (a statement which is now outdated). The only possible way to plausibly argue that the CIL rule of functional immunity applies in national proceedings for the crime of aggression would be to say that, in view of the leadership clause, it is sufficient that (certain) international criminal courts exercise jurisdiction over that crime (see above mn. 37). Also, this line of reasoning would, however, result in the inapplicability of the CIL rule of functional immunity in proceedings before the ICC.

The concept of ‘crime under CIL’ is to be distinguished from that of ‘**violation of a 50 human right guaranteed under CIL**’, although the material scope of these two concepts is certainly co-extensive in parts. This distinction is not always made with sufficient rigor in the literature and, accordingly, the position that functional immunity is inapplicable in criminal proceedings for crimes under CIL is misunderstood as a general ‘human rights exception’. For example, Wuerth’s argues in her influential article (see above mn. 25) ‘that under customary international law as it stands today there is no human rights or international criminal law exception (human rights exception) to the

<sup>167</sup> For the same view, see Joint Conc.Op. of Judges Eboe-Osuji, Morrison, Hofmánski and Bossa Jordan AJ, ICC 02/03-01/09-397-Anx1-Corr OA 2, para. 250; Burchard above Article 27 mn. 16; van der Wilt, in: Rays *et al.*, *HB Immunities* (2019) 595, 595.

<sup>168</sup> In a similar direction, but preferring a different terminology, Olasolo, Martínez Vargas, and Quijano Ortiz (2010) *ICLR* 841, 861 emphasize the need to single out ‘*ius cogens* crimes’. Again in a similar direction, Einarsen (2012) *Universal Crimes* 295 ff. makes the interesting suggestion to introduce the new concept of ‘universal crime *lex lata*’.

<sup>169</sup> On the more recent crystallization of war crimes committed in non-international armed conflict, see, for example, Kress (2001) 30 *IsYbHumRts* 103, 104 ff.

<sup>170</sup> *Report of the ILC on the work of its sixty-ninth session*, 1 May – 2 Jun. and 3 Jul. – 4 Aug. 2017, A/72/10, 185–186 (para. 18 of the Commentary on Draft Article 7).

<sup>171</sup> The ILC’s decision not to include the crime of aggression was controversial. For the dissenting position and the explanations given for it by various members of the Commission, see ILC, *Provisional summary record of the 3387<sup>th</sup> meeting*, A.CN.4/SR.3378, 18 Aug. 2017, 6, 13–14, 16. It may be noted that the non-inclusion of the crime of aggression could be consistently explained on the basis of Hellers fundamentally differing understanding of the concept of crime under CIL as referred to above (fn. 74) because pursuant to this concept of crime under international law, the crime of aggression does not count as such; Heller (2017) 58 *HarvILJ* 353, 407.

customary international law of functional immunity'.<sup>172</sup> This formulation conflates what needs to be distinguished with care.<sup>173</sup>

- 51 Second, the concept of 'crime under CIL is to be distinguished from an **international treaty regime** which is **not rooted in customary law**: States may agree, by way of a treaty, to the creation of an international conduct rule applicable to individuals and to the introduction of an international criminal sanction in the case of the violation of such a rule. Without such an internationalization of the conduct rule and the provision of the criminal sanction, States may also agree explicitly or by necessary implication, by way of a treaty, that the CIL rule of functional immunity shall not extend to certain conduct by individuals, including State organs, so that States party to that treaty are entitled to impose individual criminal responsibility for such conduct under their national laws also when prosecuting foreign State officials. But such a regulation would remain strictly conventional in nature and its application would therefore be limited to the individuals falling under the criminal jurisdiction of the States bound by the treaty in question. It follows that the list of crimes contained in Draft Article 7 on Immunity of State officials from foreign criminal jurisdiction may be over-inclusive because it covers the crime of *apartheid*, torture, and enforced disappearance as autonomous 'crimes under international law' without explaining whether and how these crimes, apart from forming the object of international treaty regulation, have become rooted in CIL.<sup>174</sup>

- 52 The crimes which, in accordance with Article 5 of the ICCS, are under the jurisdiction of the ICC, are genocide, CaH, war crimes committed in international or non-international armed conflict and the crime of aggression. As was said above mn. 49, these crimes are crimes under CIL. Though this statement is no longer a matter of any significant controversy at the general level, there remains a question mark as to whether the definitions of the crimes as contained in the ICCS, as further elaborated upon in the Elements, invariably stay within the confines of CIL. It is again not seriously in dispute that the drafter's intent was not to create new law, but to codify existing CIL. This intent has been placed on record by the President of the Rome Conf.,<sup>175</sup> and it has left numerous traces in the text of the ICCS, including, for example, the use of quite a few traditional terms in the definitions of war crimes, the reference in the preamble to 'the most serious crimes of concern to the international community as whole', the Court's universal jurisdiction in case of SC referrals and certain instances of limited<sup>176</sup> retro-active jurisdiction.<sup>177</sup> Yet, it has been doubted by some whether the original drafters have lived up to their stated intent and it has further been asked whether the stated

<sup>172</sup> Wuerth, (2012) 106 *AJIL* 731, 732.

<sup>173</sup> For two scholarly analyses drawing this distinction with care, see van Alebeek, *Immunity* (2008) 201 ff., on the one hand, and 301 ff., on the other hand; Kreicker, *Exemptionen I* (2007), 175 ff., on the one hand, 219 ff., on the other hand.

<sup>174</sup> In the Commentary on Draft Art. 7, 'treaty based and customary norms' are referred to without clearly distinguishing between their legal effect, *Report of the ILC, Sixty-Ninth Session* (1 May – 2 Jun. and 3 Jul. – 4 Aug. 2017), A/72/10, 181 (para. 7). This point was helpfully highlighted with respect to the crimes of torture, forced disappearance and *apartheid* by Iran in this States' comments on Draft Art. 7, as repr. in Barkholdt and Kulaga, *Presentation* (2017), 30. For an internally consistent explanation of torture as an autonomous crime under CIL, see, however, Heller (2017) 58 *HarvILJ* 353, 409. Pursuant to Heller's distinct understanding of the concept of crime under international law, torture constitutes such a crime because States are not only under a treaty obligation, but also under a CIL obligation to criminalize torture nationally.

<sup>175</sup> Kirsch, in: Dörmann, *Elements* (2003) xiii.

<sup>176</sup> The ultimate limit resulting from Art. 11(1) of the ICCS.

<sup>177</sup> It is therefore somewhat surprising that de Souza Dias (2019) 17 *JICJ* 507, 518 claims that 'the project of a codification of international crimes was eventually abandoned' and she does not offer anything close to compelling evidence for that assertion.

intent was maintained with respect to the definition of the crime of aggression in Article 8bis of the ICCS<sup>178</sup> and when new war crimes were included in the ICCS.<sup>179</sup> Whether these doubts are well founded, is not a matter to be dealt with in a commentary on Article 98 of the ICCS. It must, however, be stated here that the reasoning set out so far and to be further developed in the following paragraph cannot explain the inapplicability of the CIL rule of functional immunity in proceedings for a crime listed in the ICCS to the extent that the definition exceeds existing CIL. Should a case before the Court ever arise where a charge is laid against the official of a State not party to the ICCS which concerns (part of a definition of) a crime not rooted in CIL, the Court would be duty bound to observe the functional immunity of this State official not only before it issues a request for arrest and surrender, but already before issuing an arrest warrant. For, in such a case, the Court would operate as a purely treaty-based Court and, as a treaty provision, Article 27(1) of the ICCS could not be invoked to the detriment of a State not party to the treaty<sup>180</sup> (for further analysis, see text below mn. 130).

As set out in the preceding paragraphs, as a result of its proper interpretation, the CIL 53 rule on functional immunity has not been applicable in proceedings for crimes under CIL when the concept of crime under international law was introduced into the international legal order. But even if one did not follow such interpretation, the same state of CIL could be identified because of the existence of a **general practice** accepted as law that specifically supports the **inapplicability of functional immunity** in such proceedings.

The starting point for the relevant legal evolution is the recognition, already in **classic 54 international law**, of the **extraterritorial jurisdiction of the belligerent State over war crimes** committed by enemy prisoners of war before capture.<sup>181</sup> This extraterritorial jurisdiction, to be exercised about foreign State soldiers, implied the inapplicability of functional immunity.<sup>182</sup>

This power constituted the background of the **debate** about the prosecution of war 55 crimes, CaH and the waging a war of aggression at the **Paris Peace Conference after the First World War**. As is well known, the relevant debates did not result in the birth of ICL, most importantly because the U.S. opposed to the internationalization of conduct rules applicable to the individual and the provision of a criminal sanction in case of a violation.<sup>183</sup> This fact does not justify, however, to dismiss the relevant practice of States from the study of the customary process.

Quite to the contrary, it is important to note that, in **1919**, the **Commission on 56 Responsibilities**, composed of State representatives, determined as follows:

*‘All persons belonging to enemy countries, however high their position may have been, without distinction of rank, including Chief 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.’*<sup>184</sup>

<sup>178</sup> The relevance of the question has been usefully highlighted by Milanovic (2012) 10 *JICJ* 165 ff.

<sup>179</sup> For such a doubt, see, for example, Galand (2019) 17 *JICJ* 933, 934 f.

<sup>180</sup> For the same view, see Akande (2018) *EJIL:Talk*; for two lucid analyses of other consequences resulting from the absence of a CIL basis of a crime listed in the ICCS or of part of the definition of such a crime, see Galand (2019) 17 *JICJ* 933 ff.; Milanovic (2011) 9 *JICJ* 25 ff.

<sup>181</sup> Kreß, in: Beauvallet, *Dictionnaire* (2017), 288, 288.

<sup>182</sup> In the same vein, see, for example, Ascensio and Bonafe (2018) 122 *RGDIP* 821, 829; see also van Alebeek, *Immunity* (2008) 201 ff.

<sup>183</sup> For a summary of the debate at Paris, see Kreß (2019) 62 *GYIL* (forthcoming).

<sup>184</sup> Commission on the Responsibilities of the Authors of the War and on Enforcement of Penalties, ‘Report Presented to the Preliminary Peace Conference’, 29 Mar. 1919, (1920) 14 *AJIL* 95, 117.

While it is true that the Allied and Associated Powers insisted on the vanquished Powers' consent to the envisaged prosecution through their ratification of the relevant peace treaties, the legal principle explained and stated in the Commission's report was not made dependent on such consent. It is noteworthy to add that not even the U.S. appeared to dissent from the above-cited conclusion submitted by the Commission to the extent that this conclusion applied to former State officials. In their 'Memorandum of Reservations', the representatives of the U.S. in the Commission stated as follows:

*'These observations (the immunity of a Head of State from foreign criminal proceedings; C.K.) the American representatives believe to be applicable to a head of State actually in office and engaged in the performance of his duties. They do not apply to a head of State who has abdicated or who has been repudiated by his people. Proceedings against him might be wise or unwise, but in any event, they would be against an individual out of office and not against an individual in office and thus in effect against the State.'*<sup>185</sup>

- 57 This meaningful practice of States at Paris after the First World War that formed the prologue of ICL, was followed by the practice of States leading to the **Nuremberg Judgment**, to that Judgment's pronouncement on the **inapplicability of functional immunity** in proceedings **for crimes under international law** and to the affirmation of this principle of international law by the GA (for the specific references, see above mn. 41–43).
- 58 In 1948, the GenC provided for the duty of its States parties 'to punish' public officials committing genocide, if the official acts on the territory of the State concerned (cf. Articles IV and VI of the Convention). This duty to punish is not conditioned on the public officials concerned being those of the territorial State. This State may also comply with its obligation by surrendering the public official to an international penal tribunal provided this tribunal has jurisdiction. To the extent that the Convention provides for a duty to exercise criminal jurisdiction over foreign public officials or to surrender them to an international criminal court with jurisdiction, the Convention cannot reasonably be read otherwise than to presuppose the inapplicability of the CIL rule of functional immunity.<sup>186</sup> In view of the Conventions' almost universal acceptance by States it thus provides another important element of State practice in specific support of the inapplicability of functional immunity to crimes under international law.
- 59 Since 1949, the GC explicitly provide for (an obligatory form of) universal jurisdiction for those war crimes which amount to grave breaches of the Conventions.<sup>187</sup> The **grave breaches regime** does not explicitly state that functional immunity is inapplicable. As a general rule, the ICJ has correctly stated in the *Arrest Warrant* Judgment that a provision for extraterritorial jurisdiction does not imply the absence of immunity.<sup>188</sup> Yet this statement must be qualified for those provisions of extraterritorial jurisdiction which would be deprived of practically all meaning if functional immunity was applicable.<sup>189</sup> Precisely this is true for the GC. In view of its limitation to IAC, the grave

<sup>185</sup> Memorandum of Reservations Presented by the Representatives of the United States to the Report of the Commission of Responsibilities, 4 Apr. 1919, (1920) 14 *AJIL* 127, 136.

<sup>186</sup> ICC, Minority Opinion of Judge Marc Perrin de Brichambaut, South Africa Decision, ICC-02/05-01/09/302-Anx, 6 Jul. 2017, 8 ff. (paras. 10 ff.); see also van der Wilt, in: Ruys *et al.*, *HB Immunities* (2019) 595, 608 ff.; Schiffbauer, in: Tams *et al.*, *Convention* (2014) 207–208 (mn. 55), 210–211 (mn. 61).

<sup>187</sup> For the specific references, see Kreß, in: Beauvallet, *Dictionnaire* (2017) 288, 289.

<sup>188</sup> ICJ, *Arrest Warrant* Judgment, I.C.J. Rep. 2002, 3, 24 (para. 59).

<sup>189</sup> Akande and Shah (2010) 21 *EJIL* 815, 841.



breaches regime enshrined in the Conventions essentially covers the conduct of soldiers ostensibly acting in official capacity. The core duty of States Parties under the Conventions to exercise criminal jurisdiction over alleged grave breaches of the Conventions by foreign soldiers present on their territory would be compromised at its core if those same soldiers continued to enjoy functional immunity. The *aut dedere aut iudicare* regime enshrined in the four GC and the latter Conventions' almost universal acceptance by States therefore provide another important element of State practice in specific support of the inapplicability of functional immunity to crimes under international law.<sup>190</sup>

**Subsequent to the judgments delivered at Nuremberg and Tokyo**, domestic courts in many States conducted criminal proceedings for war crimes, CaH and genocide against former German and Japanese State officials.<sup>191</sup>

It has been submitted that this State practice must be dismissed as irrelevant because, in those cases, **the official's home State did not invoke an immunity claim.**<sup>192</sup> But such an approach is mistaken.<sup>193</sup> First of all, it implies the unfounded (see above mn. 36) assumption that the forum State must observe the functional immunity of a foreign State official only if and once this State has invoked it. Perhaps even more importantly, it wrongly assumes that those States that exercised jurisdiction did so on the ground that no claim of functional immunity had been invoked. As will be shown in the following paragraphs, they did not.

Numerous of those proceedings, which were conducted subsequent to the Nuremberg Judgment under **CCL No. 10**,<sup>194</sup> were governed by **Article II (4)(a) of that Law**. This provision declared the official capacity of the person concerned to be irrelevant, and, as was shown (above mn. 33), *The Nuremberg Judgment* had understood the principle of irrelevance of official capacity to be indistinguishable from the inapplicability of functional immunity. This principle – and not the absence of a German claim to functional immunity – was the legal ground on which functional immunity was considered to be inapplicable in the national proceedings under CCL No. 10 and this 'paved the way for the condemnation of thousands of German officials'.<sup>195</sup> To illustrate

<sup>190</sup> Akande and Shah (2010) 21 *EJIL* 815, 843–844. These two authors correctly point out that the 'Pinochet Precedent' set by the British Courts can be explained on the basis of the same logic: In view of the fact that the crime of torture involves State conduct, the extraterritorial jurisdiction provided for by the Anti-Torture Convention would be deprived of its core function if it co-existed with functional immunity. Nevertheless, the Anti-Torture Convention is not relied upon as a further instance of State practice in the above text because it must be doubted whether torture as an autonomous crime amounts to a crime under CIL (for the distinction between crimes under international law and crimes exclusively subject to an international treaty regime, see above mn. 37).

<sup>191</sup> For a more detailed perusal of this body of State practice, see, for example, Kreicker, *Exemptionen I* (2007) 203 ff.; Pedretti, *Immunity* (2015) 167 ff.

<sup>192</sup> Wuerth (2012) 106 *AJIL* 731, 755. With respect to the 'criminal prosecution and immunity of military personnel for crimes perpetrated during military conflict in the territory of a State exercising jurisdiction', the first Special Rapporteur of the ILC on Immunity for State officials from foreign criminal jurisdiction observed that this is 'a special case' not to be 'considered within the framework of this topic'; *Second report on immunity of State officials from foreign criminal jurisdiction*, by Roman Anatolevich Kolodkin, Special Rapporteur, A/CN.4/631, 10 Jun. 2010, 54 (para. 86). For a correct criticism on this obscure observation, see Ascensio and Bonafe (2018) 122 *RGDIP* 821, 831.

<sup>193</sup> See, for example, Ascensio and Bonafe (2018) 122 *RGDIP* 821, 830; Akande and Shah (2010) 21 *EJIL* 815, 839–840.

<sup>194</sup> For the text of Control Council Law No 10, see <<https://www.legal-tools.org/doc/ffda62/pdf/>>. See also Tladi (2019) 32 *LeidenJIL* 169, 183 referring to the proceedings conducted under the 1945 Royal Warrant of the UK.

<sup>195</sup> Pedretti, *Immunity* (2015) 185 ff.

this *opinio iuris* by just one explicit example, the U.S. Military Tribunal in the Ministries case stated Judgment:

*‘To permit such immunity [when crimes against peace are at stake; C.K.] is to shroud international law in a mist of unreality. We reject it and hold that those who plan, prepare, initiate and wage aggressive wars and invasions, and those who knowingly, consciously and responsibly participate therein violate international law and may be tried, convicted and punished for their acts.’*<sup>196</sup>

- 63 This passage foreshadowed the passage from the previously cited **Eichmann Judgment** which did not explain the inapplicability of functional immunity with the absence of a German claim to that effect, but rather, as was shown (above mn. 31), with the foundational logic of ILC. In the same vein, in the **Barbie case**, the **French Cour de Cassation**, while being less emphatic than the U.S. Military Tribunal in the Ministries case and the Supreme Court of Israel in the *Eichmann* case, stated that the capacity in which Barbie had acted had ‘no effect in law upon his responsibility’.<sup>197</sup> This again is clearly different from relying on Germany not having claimed its right to functional immunity.<sup>198</sup> The Barbie Judgment does not use the term ‘(functional) immunity’.<sup>199</sup> But it clearly follows the foundational logic of ILC, which had been articulated by the Nuremberg Judgment (above mn. 31) in order to explain why functional immunity does not apply in criminal proceedings for crimes under CIL.
- 64 Numerous national proceedings for war crimes were also conducted against former State officials of Japan subsequent to the Tokyo Trial.<sup>200</sup> While it is not apparent that Japan had invoked a claim to functional immunity in those proceedings, there is also no evidence that the States exercising jurisdiction did so on the ground that functional immunity had not been invoked (see above mn. 60). The relevant fact thus remains that jurisdiction was exercised about foreign State officials for crimes under CIL without applying the CIL rule of functional immunity.
- 65 In light of the preceding considerations, it is very difficult to understand why the ILC, in addition to not properly engaging with the interplay between the recognition by States of crimes under CIL and the rationale underlying the CIL rule of functional immunity, has downgraded the significance of the practice of States summarized in the preceding paragraphs almost to insignificance.<sup>201</sup> As a result of this, the discussion

<sup>196</sup> *In re Weizsäcker and others* (Ministries Trial), United States Military Tribunal at Nuremberg, 14 Apr. 1949, (1949) 16 ILR 344, 349.

<sup>197</sup> *Cour de cassation* (France), *Barbie*, (1995) 100 ILR 330, 336.

<sup>198</sup> Pedretti, *Immunity* (2015) 174–175.

<sup>199</sup> *Fifth report on Immunity of State Officials from foreign criminal jurisdiction*, by Concepción Escobar Hernández, Special Rapporteur, A/CN.4/701, 14 Jun. 2016, 49–50 (para. 114 with footnote 233).

<sup>200</sup> See for example, Supreme Court of the United States, Trial of General Tomoyuki Yamashita, 4 Feb. 1946, (1948) IV LRTWC, 38 ff.; United States Military Commission, Shanghai, Trial of Lieutenant-General Shigeru Sawada and three others, 27 Feb. and 15 Apr. 1946, (1948) V LRTWC, 1 ff.; Netherlands Temporary Court-Martial, Macassar, Trial of Tanabe Koshiro, 5 Feb. 1947, (1949) XI LRTWC, 1 f.; Netherlands Temporary Court-Martial at Amboina, Trial of Susuki Motosuke, 28 Jan. 1948, (1949) XIII LRTWC, 126 f.; Chinese War Crimes Military Tribunal of the Ministry of National Defence, Nanking, Trial of Takashi Sakai, 29 Aug. 1946, (1949) XIV LRTWC, 1 ff.

<sup>201</sup> This point applies with respect to the 2008 Memorandum *Immunity of State officials from foreign criminal jurisdiction* provided by the Secretariat (A/CN.4/596, 31 Mar. 2008) which essentially disregards the practice of States before 1990 except for the Eichmann Judgment (see *ibid.* paras. 180–207). The same point applies with respect to the *Second report on immunity of State officials from foreign criminal jurisdiction*, by Roman Anatolevich Kolodkin, Special Rapporteur, A/CN.4/631, 10 Jun. 2010. In this report, the practice of States before the Second World War is disregarded and the relevance of the Nuremberg precedent and the national judicial practice subsequent to it is dismissed on the mistaken (see above mn. 36) ground that there is no evidence that the ‘States which these States served asserted their

within the ILC has centred around the question of whether the practice of States since 1990 has given rise to the formation of an ICL exception from functional immunity. **But in 1990 it was long established that functional immunity under CIL is inapplicable to crimes under CIL.**<sup>202</sup>

This was recognized by the UN SG in his report on the establishment of the ICTY,<sup>203</sup> 66 and even more explicitly, by the ILC itself when the Commission, in the Commentary on Draft Article 7 of the ILC Draft Code 1996, acknowledged:

*‘The absence of any procedural immunity with respect to prosecution or punishment in appropriate proceedings is an essential corollary of the absence of any substantive immunity 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 the same consideration to avoid the consequences of his responsibility.’*<sup>204</sup>

Therefore, the **correct question to be asked is whether a general practice accepted 67 as law, which has given rise to the application of a CIL rule of functional immunity in proceedings for crimes under CIL, has come into existence subsequent to 1990.** As will be shown in the following paragraphs, the practice of States since 1990 has indeed not given rise to a change of CIL to the effect that State officials enjoy functional immunity in proceedings for crimes under international law.<sup>205</sup>

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immunity’ (*ibid.* 43 (para. 69)). The same point also applies, albeit in a somewhat lesser form, to the *Fifth report on Immunity of State Officials from foreign criminal jurisdiction* by Concepción Escobar Hernández, Special Rapporteur, A/CN.4/701, 14 Jun. 2016: There is no mention in this report of the early practice of exercising criminal jurisdiction over war crimes committed by enemy soldiers, no mention of the State practice at the Paris Peace Conference, no prominent reference to the significance of the Nuremberg Judgment and its affirmation by States (but see *ibid.* 42 paras. 96, 127), and there is just a passing mention of a small part of the national case law subsequent to the judgments of Nuremberg and Tokyo (the *Eichmann* Judgment is referred to *ibid.* 50 at para. 115 (with fn. 234 without a full reference to its reasoning and the reference to the *Barkir* Judgment *ibid.* 49–50 at para. 114 (with footnote 233) is accompanied by the comment that it contained no ‘express ruling’ on immunity).

<sup>202</sup> For the same view and a persuasive criticism of the shortcomings of the ILC’s identification of the relevant practice of States, see Ascensio and Bonafe (2018) 122 RGDIP 821, 828.

<sup>203</sup> *Report of the Secretary-General Pursuant to paragraph 2 of Security Council Resolution 808 (1993)*, 3 May 1993, S/25704, para. 55 (with reference to the ‘precedents following the Second World War’).

<sup>204</sup> (1996-II-2) YbILC 27 (para. 6). According to one view within the ILC in its present composition, the current state of CIL is precisely what the Commission deemed to be ‘paradoxical’ in 1996, that is the absence of any substantive immunity in the form of a defence of official act and the existence of a procedural immunity *ratione materiae*. This view is alluded to in the Commentary on Draft Art. 6(5) of the ILC Draft Articles on CaH. While Art. 6(5) precludes the reliance on the substantive defence of official act, the Commentary adds that this without prejudice ‘to any procedural immunity that a foreign State official may enjoy before a national criminal jurisdiction’; *Report of the ILC, Sixty-Ninth Session (1 May – 2 Jun. and 3 Jul. – 4 Aug. 2017)*, A/72/10, 69 (para. 30).

<sup>205</sup> It was shown above (see mn. 35) that the CIL rule of functional immunity combines considerations of substance and procedure. The matter would be different regarding the change of CIL in question. None of those States, that have recently declared their conviction that the CIL rule of functional immunity applies in (national) proceedings for crimes under international law, has at the same time questioned the fact that genocide, CaH, war crimes and the crime of aggression are crimes under CIL the commission of which engages the individual criminal responsibility also of State officials acting under colour of authority. This means that the change of CIL under consideration would entail the introduction of a new rule of functional immunity of a purely procedural character. It would in fact be an international legal rule that incorporates the core idea of the act of State doctrine as presently being applied only in certain national legal orders. While most of the statements made by States in connection with ILC Draft Art. 7 on Immunity of State officials from foreign criminal jurisdiction do not go into such detail, some capture the point: Australia and Israel, for example, have emphasized that they understand functional immunity to be of a purely procedural character; the relevant passages of those two statements are reprinted in Barkholdt and Kulaga, *Presentation* (2017), 1 (Australia), 32 (Israel), and 49 (Russia).

- 68 In the course of the **debate within the ILC about the fifth report submitted by the second Special Rapporteur**, which laid the ground for what was to become **Draft Article 7 of the ILC Draft Articles on Immunity of State officials from foreign jurisdiction**,<sup>206</sup> it was perhaps ILC member Sean Murphy who presented the most detailed argument in support of the applicability before foreign jurisdictions of functional immunity under CIL for crimes under CIL. Murphy considered the practice of States since 1990 to be ‘neither widespread nor representative in terms of identifying existing customary international law’.<sup>207</sup> To the contrary, he opined that ‘case law did not unequivocally weigh in favour of draft article 7’, especially if ‘civil case law’ was included in the analysis.<sup>208</sup> He opined that there might perhaps rather be a countertrend.<sup>209</sup>
- 69 It must first be noted that the argument put forward by Murphy, in accordance with the ILC’s limited mandate, is confined to national proceedings. Murphy does not question the fact that the **international and internationalised criminal tribunals** established since the 1990s have invariably confirmed the Nuremberg legacy on the **inapplicability of functional immunity** in their proceedings for crimes under CIL.<sup>210</sup> It is, however, worthy of note that the relevant judicial decisions do not distinguish between national and international proceedings. The 1997 Blaškić Judgment of the ICTY AC was already (see above mn. 24) mentioned as one prominent example. In its 2001 Decision in the case against Slobodan Milošević, to name another one, a TC followed the Blaškić Judgment and quite emphatically rejected the idea that the defendant could enjoy functional immunity in view of the fact that his conduct was committed in his capacity as former Head of State. The decision is explicitly grounded in CIL and nothing in the reasoning suggests that the TC wished to depart from the statement in the 1997 Blaškić Judgment that the CIL rule of functional immunity is inapplicable both in international and in national proceedings for crimes under CIL.<sup>211</sup> As far as the ICC is concerned, TC v(a) expressed the view ‘that the main aim of Article 27(1) is to align the ICC Statute with the contemporary norm of international law according to which public officials are no longer entitled to immunity for violation of international criminal law’.<sup>212</sup> The Chamber further found that ‘the struggle against impunity for crimes that shock the conscience of humanity (...) is a hopelessly lost cause without that cardinal principle of modern international criminal law’.<sup>213</sup>
- 70 Murphy’s reference to the ICJ’s **Jurisdictional Immunity Judgment**<sup>214</sup> is misplaced as the ICJ emphasised that its finding regarding the issue State immunity was without prejudice to the question of functional immunity of State officials in foreign criminal proceedings for crimes under international law (see above mn. 29).
- 71 There is, however, reason to believe that Murphy’s reference **to national case law in civil proceedings against State officials** is well founded. The question of a CIL basis for an individual civil responsibility of an individual who commits a crime under interna-

<sup>206</sup> *Fifth report on Immunity of State Officials from foreign criminal jurisdiction*, by Concepción Escobar Hernández, Special Rapporteur, A/CN.4/701, 14 Jun. 2016.

<sup>207</sup> *Ibid.*

<sup>208</sup> *Ibid.* 4–5.

<sup>209</sup> ILC, *Provisional summary record of the 3362<sup>nd</sup> meeting*, A/CN.4/SR.3362, 19 Jun. 2017, 4.

<sup>210</sup> For an overview, see van der Wilt, in: Ruys *et al.*, *HB Immunities* (2019) 595, 595; Foakes, *The Position of Heads of State* (2014) 188 ff.

<sup>211</sup> ICTY, *Prosecutor v. Slobodan Milošević*, TC, Decision on Preliminary Motions, IT-02-54, 8 Nov. 2001, paras. 26–34.

<sup>212</sup> ICC, *Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, ICC-01/09-01/11, 18 Jun. 2013, 31 (para. 66).

<sup>213</sup> *Ibid.*, 33 (para. 69).

<sup>214</sup> ILC, *Provisional summary record of the 3362<sup>nd</sup> meeting*, A/CN.4/SR.3362, 19 Jun. 2017, 4.



tional has received much less attention in the practice of States and in international legal scholarship than its criminal law counterpart. Yet, it is difficult to see how an international conduct rule applying directly to the individual that underlies a crime under CIL could impact on the applicability of the CIL rule of functional immunity only in criminal and not also in civil proceedings against the State official concerned. The fact that a national court grants functional immunity to a State official in civil proceedings, although the relevant conduct amounted to a crime under CIL, can therefore not convincingly be disregarded when it comes to the assessment of the State practice under consideration.<sup>215</sup> As of yet, there is, however, no significant line of national decisions which recognize the functional immunity of a State official in civil proceedings although the relevant conduct amounted to a crime under CIL. Whether the 2007 UK House of Lords' Jones Judgment (above mn. 33) counts, depends on whether torture constitutes an autonomous crime under CIL (see above mn. 51).

With respect to the **national case law in criminal proceedings since 1990**, a number 72 of proceedings instituted and a number of judgments delivered after 1990 confirm the inapplicability of functional immunity for crimes under CIL.

This is not true for the much-discussed British proceedings in the **case against 73 Pinochet**.<sup>216</sup> From a close reading, it follows that the 'Pinochet legacy' is confined to the treaty regulation of the crime of torture,<sup>217</sup> which, as was shown (above mn. 51), must be distinguished from the question of the inapplicability of functional immunity in proceedings for crimes under CIL. Contrary to what has sometimes been assumed,<sup>218</sup> the UK proceedings in Pinochet have not been a 'watershed moment' for the legal question under consideration.

But it is true, for example,<sup>219</sup> for the **2000 Bouterse Judgment of the Dutch Court of 74 Appeal**,<sup>220</sup> for the **2008 Lozano Judgement of the Italian Supreme Court**,<sup>221</sup> and for the **2012 Nezzar Judgment of the Swiss Federal Criminal Court**.<sup>222</sup>

National judicial practice to the contrary is rare. One judgment in point is the **2005 75 Habré Extradition Judgment** delivered by a Court of Appeal of Senegal in which the

<sup>215</sup> But see, without explanation, Tladi (2019) 32 *LeidenJIL* 169, 183.

<sup>216</sup> For a documentation of the case against Pinochet, see Ahlbrecht and Ambos, *Der Fall Pinochet(s)* (1999); on those proceedings, among the early contributions on the British proceedings are Bianchi (1999) 10 *EJIL* 237 ff.; Cosnard (1999) *RGDIP* 309 ff.; Dominici (1999) *RGDIP* 297 ff.; Gornig, in: Ipsen and Schmidt-Jortzig, *FS Rauschnig* (2001) 457, 476 ff.; Villalpando (2004) 104 *RGDIP* 393 ff.

<sup>217</sup> For a meticulous analysis, see van Alebeek, *Immunity* (2008) 224 ff.; for another careful analysis, see Wuerth (2012) 106 *AJIL* 731, 734 ff.; for a less rigorous approach in this respect, see Tladi (2019) 32 *LeidenJIL* 169, 184.

<sup>218</sup> For reference, see Wuerth (2012) 106 *AJIL* 731, 731.

<sup>219</sup> For further analysis, see Pedretti, *Immunity* (2015) 167 ff. Pedretti persuasively argues that a number of judgments delivered by Spanish Courts, while not explicitly declaring functional immunity inapplicable, must be understood as implicitly taking this view (*ibid.* 180 ff.). The same author shows (*ibid.* 172–173) that the Federal High Court of Ethiopia, though in a case against an Ethiopian defendant (Mengisto Hailemariam), took the view that functional immunity is inapplicable in proceedings for crimes under CIL. For further relevant national criminal proceedings in New Zealand, the UK, France and Turkey, see van Alebeek, in: Ruys *et al.*, *HB Immunities* (2019) 496, 514. On the current German trial against former members of the Syrian Secret Service, see Galand (May 27, 2020) *Just Security*.

<sup>220</sup> Court of Appeal (Amsterdam), *Re: Bouterse (Desire)*, Case Nos. R 97/163/12 Sv and R 97/176/12 Sv, 20 Nov. 2000, (2001) 32 *NethYbIL* 276; for a summary, see van Alebeek, in: Ruys *et al.*, *HB Immunities* (2019) 496, 511–512; the fact that this judgment was overturned by the Supreme Court on another ground is no reason to disregard its relevance, see Tladi (2019) 32 *LeidenJIL* 169, 184.

<sup>221</sup> Supreme Court of Italy, *Lozano (Mario Luiz) v. Italy*, Case No. 31171/2008, 24 Jul. 2008; for a summary, see van Alebeek, in: Ruys *et al.*, *HB Immunities* (2019) 496, 512.

<sup>222</sup> Federal Criminal Court of Switzerland, *A. v. Ministère Public de la Confédération*, Case No. BB.2011.140, 25 Jul. 2012; for a summary, see van Alebeek, in: Ruys *et al.*, *HB Immunities* (2019) 496, 512.

Court, dubiously relying on the *Arrest Warrant* Judgment, found that Mr *Habré* enjoyed functional immunity.<sup>223</sup>

76 In view of all that, the national judicial practice after 1990, though not being entirely consistent, is broadly in line with the pre-1990 *acquis*.<sup>224</sup> It is certainly possible to doubt whether this practice by itself constitutes a general practice of States accepted as law. Yet, and this is the point that matters, it is **impossible to suggest that this practice**, even if taken together with that in civil proceedings, has given rise to **a change of CIL** to the effect that State officials enjoy functional immunity in national proceedings for crimes under CIL.

77 This being said, there is now a body of **recent verbal State practice** set by the governments of the States concerned in support **for a new rule of functional immunity** in cases of crimes under CIL. Whether Article 46*Abis* in the Protocol on Amendments to the Protocol on the Statute of the AfricanCtJHR (for the text, see above mn 10) forms part of that practice is unclear, however, for the two reasons that it is doubtful whether this provision at all applies to functional immunity and if so whether it is intended to articulate an *opinio iuris* reaching beyond the realm of the envisaged new regional jurisdiction.<sup>225</sup> Yet, as was already indicated (above mn 25), in the context of the GA's Sixth Committee's deliberations on the work of the ILC, a significant number of States have made it clear that they did not consider Draft Article 7 on Immunity of State officials from foreign jurisdiction to express existing CIL.<sup>226</sup> While these statements are wrong as a matter of existing law, they are nevertheless relevant verbal State practice in support of a legal change.<sup>227</sup> Care is necessary, however, in the evaluation of the reach of the respective statements. In view of the ILC's definition of its topic, those statements certainly refer to national proceedings. But in view of the fact that the ILC has decided not to include international criminal proceedings in its topic, it cannot be presumed without further that the relevant statements extend to international criminal proceedings. In fact, certain States have formulated an explicit *caveat* to this effect.<sup>228</sup> In that context, the verbal practice of the U.S. is of particular note. As was already mentioned (above mn. 5), this State, at the end of the Rome Conf., proposed to amend Draft Article 12(2) of the ICCS to the effect that the exercise of the ICC's jurisdiction over the conduct of State officials acknowledged by the State of the official to have been committed 'in the course of the official duties' would have been dependent on the acceptance by the State of the official. The need felt by the U.S. to secure a jurisdictional carve out for officials of a State not party to the ICCS is noteworthy because it implies the view that these State officials would not already be protected by the enjoyment of functional immunity under CIL.<sup>229</sup> The same consideration applies to the jurisdictional carve outs for officials of a State not party to the ICCS, as, regrettably, contained in the two SC referrals<sup>230</sup> pursuant to Article 13(b) of the ICCS.<sup>231</sup>

<sup>223</sup> Tladi (2019) 32 *LeidenJIL* 269, 185–186.

<sup>224</sup> For a more detailed explanation of the same view, see Tladi (2019) 32 *LeidenJIL* 169, 187.

<sup>225</sup> For a concise analysis, see Tladi (2015) 13 *JICJ* 1 ff.

<sup>226</sup> van Alebeek, in: Ruys *et al.*, *HB Immunities* (2019), 496, 516–517.

<sup>227</sup> For the same view, see van Alebeek, in: Ruys *et al.*, *HB Immunities* (2019), 496, 522.

<sup>228</sup> See, for example, the statements made by Australia and by Russia, as repr. in Barkholdt and Kulaga, *Presentation* (2017), 1 (Australia) and 50 (Russia).

<sup>229</sup> The same consideration applies to the 2002 'Findings' by the United States' Congress on the ICCS (Pub. L. 107–206, title II, § 2002, Aug. 2, 2002, 116 Stat. 899), which approaches the matter in terms of the ICC's jurisdiction and not in terms of functional immunity.

<sup>230</sup> S/RES/1593 (2005), 31 Mar. 2005 (Situation in Sudan), op. para. 6; S/RES/1970 (2011), 26 Feb. 2011 (Situation in the Libyan Arab Jamahiriya), op. para. 6.

<sup>231</sup> Galand, *UNSC Referrals* (2019) 179.

In any event, touching upon a core aspect of the international criminal justice system, the emergence of the verbal State practice in question gives one reason to pause. While it strikes at the heart of the international criminal justice system, it should not be perceived simply as the attempt to retreat from its foundational idea. Instead it would seem fair not to rule out the possibility that the body of verbal State practice in question, in an important part, may reflect a **heightened sensitivity of the risk of politically motivated criminal proceedings to blame a State**, through criminal proceedings against one of its officials, for the existence of a ‘criminal’ State policy in a politically sensitive and legally controversial context as well as in the absence of a prior careful factual and legal scrutiny by an independent and thus authoritative international organ.<sup>232</sup> It is not apparent that there is much empirical evidence that this risk has materialized in the past. Nevertheless, the practice of States in question might call for consideration whether the just-mentioned risk can be addressed *de lege ferenda* without fundamentally weakening the national pillar of the international criminal justice system. In view of the paramount importance of the matter, the following paragraphs offer a few reflections on possible ways forward.

To extend the application of the CIL rule of functional immunity to national proceedings for crimes under CIL, but to make this application dependent on a **prior invocation of the rule by the State of the official** (on the *lex lata* see above mn. 36) would go too far in the direction of weakening the national pillar of the international criminal justice system. For it may be precisely in a case of the invocation of functional immunity that the extraterritorial exercise of jurisdiction over an alleged crime under international law is called for.<sup>233</sup>

But it should be considered what can be done *de lege ferenda* to attenuate the risk of an abusive exercise of extraterritorial criminal jurisdiction based on the unfounded allegation of the commission of a crime under CIL. One might contemplate, for example, **special procedural safeguards** with respect to the independence and impartiality of the competent authorities in the forum State and/or heightened procedural standards for intrusive action such as the issuance of an arrest warrant.<sup>234</sup> A proposal, which would attach even greater weight to the concerns of the official’s State, would be to make the exercise of extraterritorial jurisdiction over crimes under CIL dependent on the prior finding by an authoritative international body that the contextual element of the alleged crime under CIL exists or that there are at least sufficient reasons to believe that it does.<sup>235</sup>

Looking in a different direction for a compromise solution, ILC member Georg Nolte has taken the CIL duty of States to prosecute crimes under international law of their officials as a starting point. On that basis, Nolte has suggested that the State of the official may fulfil this duty either by waiving the functional immunity of the official or by undertaking to prosecute him or her.<sup>236</sup> This proposal implies vesting the **State of the official with primary jurisdiction** coupled with a duty which is equivalent to the

<sup>232</sup> It is worth observing that de Sena, *Diritto Internazionale* (1996), has put forward a view that incorporates this concern into the *lex lata* in a way that would make the CIL rule of functional immunity applicable in most proceedings for crimes under international law. De Sena *ibid.* 139 argues that a State official should enjoy functional immunity in criminal proceedings for a crime under CIL the establishment of which requires a finding of an entire State policy. Van Alebeek, *Immunity* (2008) 142, 257 ff. persuasively points out that de Sena’s position does not correctly represent the *lex lata* on functional immunity, but that it raises an important point of legal policy.

<sup>233</sup> Ascensio and Bonafe (2018) 122 *RGDIP* 821, 843.

<sup>234</sup> Ascensio and Bonafe (2018) 122 *RGDIP* 821, 848; Kreß and Garibian (2018) 16 *JICJ* 909, 948.

<sup>235</sup> Van Alebeek, *Immunity* (2008) 263–264.

<sup>236</sup> Nolte, A/CN.4/SR.3365, 13 Jul. 2017, 6.

obligation *aut dedere aut iudicare*. While Nolte has made this proposal starting from the position that the customary international rule of functional immunity applies in proceedings for crimes under CIL, his proposal may very well be considered also on the basis of the contrary view of existing CIL. In fact, it constitutes the most promising attempt at striking a fair balance between the different concerns at stake which is currently under discussion. What is more, Nolte's proposed scheme reflects the *lex lata* in two crucial respects. First, there are persuasive reasons to believe that the State of an official under suspicion of having committed a crime under CIL is under an obligation *aut iudicare aut dedere* under CIL.<sup>237</sup> Second, there are persuasive reasons to believe that the exercise of universal jurisdiction under CIL is already today governed by the principle of subsidiarity.<sup>238</sup> Nolte's suggestion therefore involves only one element *de lege ferenda* and that is to vest the State of the official with primary jurisdiction over a crime under CIL also *vis-à-vis* another State or other States which are directly affected by the alleged crime. One might see a certain rigidity in the attribution of such a primacy right,<sup>239</sup> but it is worthy of further reflection whether such a rigidity might be a price worthy of paying to accommodate the concerns that have recently been articulated in a part of the relevant verbal practice of States.

82 Those concerns, it must finally be observed, do not, however, apply to proceedings before **international criminal courts of a credible universal orientation**. The ICC may serve as the paradigm example to make the point plain. Apart from its jurisdiction being complementary to that of national criminal jurisdictions, this Court constitutes an international judicial body designed for universal adherence and vested with all the internationally applicable guarantees of judicial independence and impartiality. While such institutional design does not preclude judicial error, the concern of a politically abusive exercise of jurisdiction over an alleged crime under CIL must carry, at the very least, much lesser weight (for a more detailed analysis, see below mn. 122 ff.).<sup>240</sup>

83 In conclusion, in order to strike a fair balance between the conflicting concerns at issue, there is no need to extend, *de lege ferenda*, the applicability of the CIL rule of functional immunity to crimes under CIL. Instead, the conversation *de lege ferenda* should rather focus on reflecting further on the possibility of introducing **a new rule of primacy of jurisdiction** which would vest the State of an official under suspicion of having committed a crime under CIL with primary jurisdiction not only *vis-à-vis* a State of universal jurisdiction, but also with respect to States which possess a direct connection with the alleged crime. The perhaps central question to be addressed in that context is how to deal with a situation where the willingness of the State of the official genuinely to conduct proceedings must be doubted.

84 **bb) Personal Immunity (immunity *ratione personae*).** Personal immunity (immunity *ratione personae*) is today<sup>241</sup> generally (but see below mn. 88) grounded in **a rule of CIL**. The beneficiaries of this rule are, first of all, incumbent **Heads of States, Head of**

<sup>237</sup> For a powerful argument in support of that, see Heller (2017) 58 *HarvILJ* 352, 391 ff.

<sup>238</sup> Kreß (2006) 4 *JICJ* 561, 579 ff.

<sup>239</sup> Ascensio and Bonafe (2018) 122 *RGDIP* 821, 843–844.

<sup>240</sup> For a different view, see Morris (2001) 64 *L&ContempProbs* 13, 30 ff. for whom precisely the specific authority of an international criminal court creates a risk that States may legitimately wish to avoid incurring. Morris accepts that the risk of abuse is significantly reduced in case of an international criminal court such as the ICC, she does not consider it eliminated (*ibid.* 46). This assessment is based on the assumption that international criminal law, to a significant extent, remains uncertain and therefore particularly vulnerable to judicial activism.

<sup>241</sup> For a fascinating argument in support of the suggestion that, for a very long time, the obligation to respect the personal immunity of Heads of State has been flowing rather from a general principle of international law than a rule of CIL, see Riznik, *Immunität* (2015) 147 ff.



**Governments and diplomats.**<sup>242</sup> The personal immunity of Heads of States and Governments applies *erga omnes* while the personal immunity of diplomats is confined to the jurisdiction of the State where they are accredited or through which they transit.<sup>243</sup> The personal immunity of the officials in question extends to private activities.<sup>244</sup> While it is possible to draw a conceptual distinction between personal immunity from criminal jurisdiction and inviolability from arrest for certain purposes, for present purposes personal immunity is understood so as to encompass inviolability from arrest.<sup>245</sup> Personal immunity is **purely procedural** in nature and thus, as a matter of treaty law, covered by Article 27(2) of the ICCS. Personal immunity precludes, *inter alia*, the issuance of an arrest warrant.<sup>246</sup> According to the ICJ's MACM Judgment, it does not, however, preclude procedural acts not associated with measures of constraint such as a 'mere invitation to testify'.<sup>247</sup> The enjoyment of personal immunity terminates with the end of the State office.<sup>248</sup>

In its **Arrest Warrant Judgment**, the ICJ found in 2002 that

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*'in international law it is firmly established that, as also diplomatic and consular agents, certain holders of high-ranking office in a State, such as the Head of State, Head of Government and Minister for Foreign Affairs, enjoy immunities from jurisdiction in other States, both civil and criminal.'*<sup>249</sup>

That the enjoyment of personal immunity by **Ministers for Foreign Affairs** was indeed 'firmly established' in CIL in 2002, is open to doubt.<sup>250</sup> Yet, the ILC has endorsed the ICJ's finding in Draft Article 3 on Immunity of State officials from foreign criminal jurisdiction<sup>251</sup> and it would not seem that the matter has remained one of any significant controversy among States. Draft Article 3 can therefore safely be taken so as to reflect the state of CIL.<sup>252</sup>

As of yet, the ICJ has not identified any other 'high-ranking office in a State' the holding of which would involve the enjoyment of personal immunity<sup>253</sup> and the ILC has been unable to determine the existence of such other office. The ILC concluded that,

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<sup>242</sup> The ICJ has acknowledged the personal immunity of diplomats in passing in its MACM Judgment, ICJ Rep. 2008, 177, 243–244 (para. 194). For a detailed analysis of both types of personal immunities, see van Alebeek, *Immunity* (2008), 150 ff.

<sup>243</sup> van Alebeek, *Immunity* (2008), 275.

<sup>244</sup> See, for example, Ubéda-Saillard, in: Ruys *et al.*, *HB Immunities* (2019) 481, 489; Akande and Shah (2010) 21 *EJIL* 815, 819.

<sup>245</sup> On the limited exception from inviolability of arrest with respect to the prevention of the imminent commission of a crime, see van Alebeek, *Immunity* (2008) 163; for the intimate connection between 'inviolability' and 'immunity' in the context of personal immunities, see Ubéda-Saillard, in: Ruys *et al.*, *HB Immunities* (2019) 481, 487; Sanger and Wood, *HB Immunities* (2019) 452, 465 call personal inviolability and immunity from at least criminal jurisdiction the 'core immunities'.

<sup>246</sup> ICJ, Arrest Warrant Judgment, ICJ Rep. 2002, 3, 29 (para. 70).

<sup>247</sup> ICJ, MACM Judgment, ICJ Rep. 2008, 177, 237 (para. 171), 240 (para. 179).

<sup>248</sup> See, for example, Ubéda-Saillard, in: Ruys *et al.*, *HB Immunities* (2019) 481, 490.

<sup>249</sup> ICJ, Arrest Warrant Judgment, ICJ Rep. 2002, 3, 20–21 (para. 51).

<sup>250</sup> For a critical analysis, with an emphasis on the position of Minister of Foreign Affairs, see ICJ, Arrest Warrant Case, Dissenting Opinion of Judge *ad hoc* van den Wyngaert, ICJ Rep. 2002, 137, 143 (paras. 11 ff.); see further below mn. 89.

<sup>251</sup> For the text of Draft Art. 7, see *Report of the ILC on the work of its sixty-fifth session* (6 May to 7 Jun. and 8 Jul. to 9 Aug. 2013), A/68/10, 43, and for the Commentary, see *ibid.* 43 ff. and, in particular, 45 (para. 7).

<sup>252</sup> For the same view, see, for example, Ubéda-Saillard, in: Ruys *et al.*, *HB Immunities* (2019), 481, 484–487.

<sup>253</sup> In its MACM Judgment, ICJ Rep. 2008, 177, 236–237 (para. 170), the Court has confirmed its finding in the Arrest Warrant Judgment without any further specification; for critical analysis, see Buzzini (2009) 22 *LeidenJIL* 455, 460–461.

under current CIL law, any personal immunity protection, which holders of such other ‘high-ranking office in a State’ enjoy, must be identified within the context of the law governing the protection of special missions.<sup>254</sup>

- 87 Any immunity provided by international law for **members of special missions** is also to be considered as a case of a State immunity of a person within the meaning of Article 98(1) of the ICCS. Drawing closely on Art. 1(a) of the Convention on Special Missions,<sup>255</sup> such a mission has been defined as a temporary mission, representing the sending State, which is sent by one State to another in order to carry out official engagements or State business, and to the reception of which the receiving State has given its consent.<sup>256</sup> Such a mission includes the delegation of a State to a diplomatic conference hosted by the receiving State<sup>257</sup> as well as a meeting between two foreign State delegations on the territory of the receiving State.<sup>258</sup> The relevant treaty provisions are contained in the 1969 Convention on Special Missions, which, as of yet, enjoys a rather limited number of ratifications and accessions. The customary status of this convention has not yet been ascertained by the ICJ.<sup>259</sup> A strong case can be made, however, that a CIL rule has developed through a general practice of States accepted as law pursuant to which members of a special mission enjoy personal inviolability.<sup>260</sup> Whether or not such immunity protection is confined to members of a high-level political mission, as distinct from members of a special mission of an essentially administrative or technical nature appears to be a matter of continuing uncertainty.<sup>261</sup>
- 88 **State delegations to conferences or meetings hosted by an International Organization** are not special missions within the meaning of the preceding paragraph<sup>262</sup> and there is presently no CIL providing for personal immunities of members of the relevant State delegations. Yet, there is a body of conventional law<sup>263</sup> with a triangular dimension (International Organization, Sending State, Receiving State/Host State) the common core of which is to vest the members of such delegations with personal inviolability during their participation in the conference.<sup>264</sup>
- 89 The common **rationale** underlying all personal immunities presented in the preceding paragraphs is their importance for the **effective performance of the relevant functions** and, intimately connected, for ensuring a smooth intercourse between States. This rationale can be traced back to the long-standing practice of States with respect to

<sup>254</sup> *Ibid.*, 47 (para. 12); for the same view, see, for example, Ubéda-Saillard, in: Ruys *et al.*, *HB Immunities* (2019) 481–487; for a more immunity friendly view, see Kreicker, *Exemtionen II* (2007) 727–729; Huang (2014) 13 *ChineseJIL*, 13, 1, 11.

<sup>255</sup> 1400 UNTS 231; the Convention is in force as of 21 Jun. 1985; for a detailed analysis of this Convention, see Sanger and Wood, in: Ruys *et al.*, *HB Immunities* 452, 458 ff.; Kreicker, *Exemtionen II* (2007) 773 ff.

<sup>256</sup> Sanger and Wood, in: Ruys *et al.*, *HB Immunities* 452, 464.

<sup>257</sup> Kreicker, *Exemtionen II* (2007) 833.

<sup>258</sup> Sanger and Wood, in: Ruys *et al.*, *HB Immunities*, 452, 479.

<sup>259</sup> The Court has referred to the Convention in passing and only as a matter of treaty law in its MACM Judgment, ICJ Rep. 2008, 177, 243–244 (para. 194).

<sup>260</sup> Kreicker, *Exemtionen II* (2007) 836–837; Sanger and Wood, in: Ruys *et al.*, *HB Immunities* 452, 465 opine that, in addition to personal inviolability, immunity from criminal jurisdiction also forms part of CIL.

<sup>261</sup> For a more restrictive view, see Kreicker, *Exemtionen II* (2007) 820 ff.; for a perhaps more open view, see also Sanger and Wood, in: Ruys *et al.*, *HB Immunities* 452, 484 ff. For an interesting report about the more recent British practice on special missions, see Talmon (2014) 46 *Berichte der Deutschen Gesellschaft für Internationales Recht* 313, 344 ff.

<sup>262</sup> Kreicker, *Exemtionen II* (2007) 833.

<sup>263</sup> For the most prominent example, see the Convention on the Privileges and Immunities of the United Nations, 13 Feb. 1946, 1 UNTS 15, with a *corrigendum* in 90 UNTS 327.

<sup>264</sup> For a more detailed exposition, see Kreicker, *Exemtionen II* (2007) 992 ff.

diplomats or messengers and heralds.<sup>265</sup> In the same vein, the ICJ stated in its Arrest Warrant Judgment, with a view to the Minister for Foreign Affairs:

*'Under customary international law, the immunities accorded to Ministers of Foreign Affairs are not granted for their personal benefit, but for the effective performance of their functions on behalf of their respective States.'*<sup>266</sup>

When it comes to the particularly wide scope of the personal immunity enjoyed by the Head of State and, arguably, the Head of Government, there would appear to be an additional consideration underpinning the relevant CIL rule which may be couched in different terms. It would appear that 'remnants of majestic dignity'<sup>267</sup> resonate and certainly the old idea of *par in parem non habet imperium* continues to play a role in view of the fact that the Head of State continues to be seen as the embodiment of its State. This last consideration probably best explains the broad scope of the personal immunity that Heads of States and Head of governments enjoy.<sup>268</sup> While it does not carry the same force in the case of the Minister of Foreign Affairs, the ICJ has extended the broad scope of the personal immunity enjoyed by the Head of State and by the Head of Government to the Minister of Foreign Affairs (above mn. 85).<sup>269</sup>

**(1) The inapplicability of personal immunities in proceedings before the Court as a matter of customary international law.** At the inter-State level, personal immunities are not subject to an exception for proceedings for crimes under CIL.<sup>270</sup> Other than in the case of functional immunity (above mn. 37), the main rationale underlying personal immunity (above mn. 89) extends to national proceedings for crimes under CIL. Therefore, in order not to apply the CIL rule of personal immunity in national proceedings for crimes under CIL, it would be necessary to identify a general practice of States accepted as law in support of an exception to that effect. To identify such a

<sup>265</sup> See, for example, van Alebeek, *Immunity* (2008) 160 ff.; Riznik, *Immunität* (2015) 143 ff.; Akande and Shah (2011) 21 *EJIL* 815, 824. In the same vein, and most in point as regards the Head of Government, the principle of non-intervention may also reflect on the matter if one considers that criminal proceedings against an incumbent Head of Government strike at the heart of an existing State government structure.

<sup>266</sup> ICJ, Arrest Warrant Judgment, ICJ Rep. 2002, 3, 21–22 (para. 53).

<sup>267</sup> van Alebeek, *Immunity* (2008) 180.

<sup>268</sup> van Alebeek, *Immunity* (2008) 180 ff.; on the special position of the Head of State, see also Watts (1994/III) 247 *RCADI* 9, 36.

<sup>269</sup> This problem with the internal coherency of the ICJ's reasoning in the Arrest Warrant Judgment was pointed out, for example, by Akande and Shah (2011) 21 *EJIL* 815, 818 ff.; van Alebeek, *Immunity* (2008) 187 ff. extends that criticism to the scope of personal immunity accorded to Heads of Government.

<sup>270</sup> This position conforms with the predominant view in international legal scholarship. See, for example, Norsthenke, *Immunität* (2019) 161 ff.; Ubéda-Saillard, in: Ruys *et al.*, *HB Immunities* (2019), 481, 489 ff.; Pearetti, *Immunity* (2015) 304 ff., 422 ff.; Foakes, *The Position of Heads of State* (2014) 124; Gaeta (2009) 7 *JICJ* 315, 317–318; Huang (2014) 13 *ChineseJIL*, 1, 11; van Alebeek, *Immunity* (2008) 205 ff.; Kreicker, *Exemptionen II* (2007) 729 ff. (regarding the troika), 840 ff. (regarding special missions), 1000 (regarding State delegations to conferences and meetings hosted by an International Organisation); Simbeye, *Immunity* (2004) 158. A partly different view has been put forward by Mettraux *et al.* (2018) 18 *JCLRev* 577, 593 ff. Those three authors are of the view that there is a crime under CIL exception to the personal immunity under CIL which applies to both national and international criminal proceedings. This exception is believed to be limited in scope, however. It is thought to deprive the individual official charged to invoke the immunity he or she would otherwise enjoy. But it does not cover the inter-State relationship regarding the cooperation in criminal matters. Mettraux *et al.* are therefore not in disagreement with the ICJ's Arrest Warrant Judgment's conclusion that the issuance and circulation of the arrest warrant was in violation of the DRC's right to have the personal immunity of its Minister of Foreign Affairs observed. Yet, had this Minister been on Belgium territory 'customary international law', in the view of those three authors 'would not have provided a bar to his arrest or to his subsequent trial before a Belgian court'; *ibid.* 595–596.

practice is, however, presently impossible.<sup>271</sup> In the Arrest Warrant Judgment, the ICJ has thus correctly found as follows:

*‘The Court has carefully examined State practice, including national legislation and those few decisions of higher Courts, such as the House of Lords and the French Court of Cassation. It has been unable to deduce from this practice that there exists under customary international law a form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers of Foreign Affairs, where they are suspected of having committed war crimes or crimes against humanity’.*<sup>272</sup>

This finding was questioned by Judge Al Khasawneh<sup>273</sup> and Judge *ad hoc* van den Wyngaert,<sup>274</sup> but in neither case was this explained on the basis of the identification of a general practice of States accepted as law. The ILC has correctly followed the finding in the Arrest Warrant Judgment and has accordingly rejected the idea that the CIL rule of personal immunity that applies in cases of Heads of States, Heads of Government and Ministers of Foreign Affairs could suffer from a crime under CIL exception.<sup>275</sup>

91 At the same time, the ICJ has carefully confined its reasoning in the Arrest Warrant Judgment as well as its conclusion to national criminal proceedings.<sup>276</sup> It has, in particular, stated the following:

*‘(...) (T)he immunities enjoyed under international law by an incumbent or former Minister for Foreign Affairs do not represent a bar to criminal prosecution in certain circumstances.*

*(...)*

*Secondly, they will cease to enjoy immunity from foreign jurisdiction if the State which they represent or have represented decides to waive that immunity.*

*(...)*

*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 (emphasis added; C.K.)”.*<sup>277</sup>

<sup>271</sup> For a careful perusal of the relevant practice of States, see, in particular, van Alebeek, *Immunity* (2006) 267 ff.; and, in addition, the other scholarly writings listed in the preceding fn.

<sup>272</sup> ICJ Arrest Warrant Judgment, ICJ Rep. 2002, 3, 24 (para. 58).

<sup>273</sup> ICJ, Arrest Warrant Case, Dissenting Opinion of Judge Al Khasawneh, ICJ Rep. 2002, 95, 97 (paras. 5 ff.).

<sup>274</sup> ICJ, Arrest Warrant Case, Dissenting Opinion of Judge *ad hoc* van den Wyngaert, ICJ Rep. 2002, 137, 152 ff. (paras. 24 ff.).

<sup>275</sup> The second Special Rapporteur had suggested to make that explicit and had, to that effect, added a second paragraph to Draft Art. 7 stating explicitly that no crime under CIL exception to the personal immunities of the troika applies; see *Fifth report on Immunity of State Officials from foreign criminal jurisdiction*, by Concepción Escobar Hernández, Special Rapporteur, A/CN.4/701, 14 Jun. 2016, 94–95 (para. 248); for the Special Rapporteur’s explanation, see *ibid.* 92–93 (paras. 237–240). Such a specific statement was, however, not deemed necessary by the Commission and Draft Article 7, as provisionally adopted does therefore not contain such a specific provision; see A/CN.4/L.893, 10 Jul. 2017.

<sup>276</sup> For the careful wording of the reasoning, see ICJ, Arrest Warrant Judgment, ICJ Rep. 2002, 3, 24 (para. 58).

<sup>277</sup> *Ibid.* 25–26 (para. 61).



The ICJ has thereby **left open** the possibility of the **inapplicability** of the CIL rule on **personal immunity** regarding the troika with respect to proceedings before the ICC. More specifically, on the basis of both a literal and contextual reading, the above-cited *dictum* of the ICJ supports the view that Article 27(2) of the ICCS is declaratory of CIL with respect to the immunity protection *ratione personae* enjoyed by the troika to the extent that such beneficiaries of the latter immunity category fall within the jurisdiction of the Court.<sup>278</sup> This follows from a conjunctive reading of the second and the fourth circumstance listed in the ICJ's *dictum*. For only if the reference to proceedings before the ICC, as an example for the fourth category of circumstances listed, includes those cases where the ICC, in accordance with Art. 12(2)(a) of the ICCS exercises its jurisdiction over officials of States not party to the Statute, the fourth circumstance substantially adds to the second category of circumstances, that is cases where the State of the official has waived its claim to immunity. It must be noted, though, that the ICJ has not provided a legal analysis in support of the *dictum* under consideration. It has therefore become a matter of some speculation whether the ICJ perhaps 'forgot' to qualify its legal proposition concerning the ICC so that it does not extend to the exercise of the ICC's jurisdiction over nationals of States not parties.<sup>279</sup>

**International legal scholarship is divided** about the question whether and if so to what extent the CIL rule on the personal immunity applies in proceedings before the ICC. 93

According to **one scholarly position**,<sup>280</sup> this CIL rule applies in the vertical relationship between the Court and the suspected State official and its State as well as in the triangular relationship between the Court, the suspected State official and its State, and a State Party requested by the Court to arrest and surrender the suspected State official. Pursuant to this view, the Court is precluded from issuing an arrest warrant against the relevant State official of a State not party of the ICCS, unless the SC decides otherwise or the relevant State not party waives its immunity right in question. According to this view, Art. 27(2) of the ICCS is not reflective of CIL as far as it pertains to personal immunities. This provision can therefore only be relied upon *vis-à-vis* (officials of) State Parties. 94

<sup>278</sup> For a similar reading of the formulation of the ICJ's 'international court *dictum*', see Zahar and Sluiter, *ICL* (2007) 504.

<sup>279</sup> See, for a first example, Akande (2004) 98 *AJIL* 407, 418, who sums up his view that 'the statement by the ICJ that international immunities may not be pleaded before certain international tribunals must be read subject to the condition (1) that the instruments creating those tribunals expressly or implicitly remove the relevant immunity, and (2) that the state of the official concerned is bound by the instrument removing the immunity [footnote omitted]'; in the same vein, Jacobs, in: Stahn, *Practice* (2015) 281, 288; Talmon (2014) 46 *Berichte der Deutschen Gesellschaft für Internationales Recht* 313, 360, prefers such a narrow reading of the ICJ's *dictum*, but he concedes that the formulation may be read differently; Klingberg (2003) 46 *GYIL* 537, 549 opines that 'the judgment must be regarded as leaving open the question of whether article 27 para. 2 Rome Statute allows the ICC to derogate from immunities enjoyed by third state nationals'.

<sup>280</sup> This position was set out in the greatest clarity first by Akande (2004) 98 *AJIL* 407, 415 ff.; for the same view, see, for example, Galand, *UNSC Referrals* (2019) 174 ff.; Robinson, in: Cryer *et al.*, *ICL* (2019) 528 ff.; Kiyani (2013) 12 *ChineseJIL* 467, 486 ff.; Senn, *Immunitäten* (2010) 185 ff.; Pedretti, *Immunity* (2015) 266–267, 304 ff.; Talmon (2014) *Berichte der Deutschen Gesellschaft für Völkerrecht* 313, 359 ff.; Liu, in: Bergsmo and Ling, *State Sovereignty* (2012) 55, 63 ff.; van Alebeek, *Immunity* (2008) 275 ff.; Uerpman (2006) 44 *AVR* 33, 48; Nouwen (2005) 18 *LeidenJIL* 645, 656 ff.; Simbeye, *Immunity* (2004) 158–159. Ambos, *Treatise ILC II* (2013) 414–415 in conjunction with *Treatise ILC III* (2016) 620 shows an inclination in the same direction, but adds the *caveat* that 'it may be argued that there is an emerging customary rule setting aside immunity vis-à-vis international criminal tribunals' (*Treatise ILC II* (2013) 414).

- 95 According to a **second scholarly position**,<sup>281</sup> the CIL rule on personal immunity does not apply in the vertical relationship between the Court and the suspected State official and its State, but it does apply in the triangular relationship between the Court, the suspected State official and its State, and a State Party requested by the Court to arrest and surrender the suspected State official. Pursuant to this view, the Court may issue an arrest warrant against a State official of a State not party enjoying personal immunity from foreign criminal jurisdiction. But the Court is precluded from requesting a State Party to arrest and surrender such a State official unless the SC has decided otherwise or the relevant State not party to the ICCS has waived its immunity right in question. According to this view, the CIL rule on personal immunities does not apply in criminal proceedings for crimes under CIL before certain international criminal courts, including the ICC and, to that extent, Art. 27(2) is reflective of CIL. Yet, the CIL rule on personal immunities is believed to remain applicable in the triangular relationship between the Court, the suspected State official and its State, and a State Party requested by the Court to arrest and surrender the suspected State official. For the requested State party, so the argument runs, is exercising its national criminal jurisdiction when arresting and surrendering the State official sought by the Court and that exercise of national criminal jurisdiction remains covered by the CIL rule on personal immunity, as set out above (mn. 84–85 in conjunction with 90). This CIL rule on personal immunity imposes an obligation under international law on the State Party which the Court, under Article 98 (1) is bound to observe before proceeding with a request for arrest and surrender.
- 96 According to a **third scholarly opinion**,<sup>282</sup> the CIL rule on personal immunity does not apply in the vertical relationship between the Court and the requested State official and its State.<sup>283</sup> Personal immunities under CIL might, however, be relevant in respect of the arrest or surrender of an official of a State not party at the request by the Court.<sup>284</sup> Yet, this relevance is not precisely the same as with respect to a purely inter-State legal relationship. In case of a request for arrest and surrender issued by the Court, the requested State Party must take into account the fact that the rationale underlying the enjoyment of personal immunity from foreign criminal jurisdiction does not apply to the same extent in case of a request issued by an international criminal court because there is a lesser risk that proceedings are being conducted in order to unduly impede or

<sup>281</sup> This position was set out in the greatest clarity first by Gaeta, in: Cassese *et al.*, *Rome Statute I* (2002), 975, 991 ff.; the same author confirmed her position in (2009) 7 *JICJ*, 315, 319 ff.; for the same view, Mahmudov, I. (2019) *Baku State University Law Review* 5, 83, 86 ff.; Whiting, in: Cassese and Gaeta, *ICL* (2013), 319 ff.; Kreicker (2009) 7 *ZIS* 350, 353 ff., 365 ff.; *id.*, (2008) 21 *HuV-I* 157, 162 ff.; *id.* *Exemptionen I* (2007) 761 ff. in conjunction with *Exemptionen II* (2007) 1374 ff., 1380 (but see Kreicker, in: Kreß and Barriga, *Aggression I* (2017) 675, 696 ff., where this author has moved in the direction of the fourth opinion as set out in the following para. of the text). This view was also embraced by Blommesteijn and Ivargaaert (2010) 6 *ZIS* 428, 438 ff., as well as in the *Submissions of the Amicus Curiae on Head of State Immunity* by Sands, P. and Macdonald, A. in SCSL, *The Prosecutor v. Charles Ghankay Taylor*, Case SCSL-2003-01-I, 23 Oct. 2003, 22–23 (paras. 55–56), 41 (para. 97), 48 (para. 118); Tladi (2015) 13 *JICJ* 1, 12 ff. adds the following nuance to the argument: In his view, there is currently no CIL on the exercise of the ICC's jurisdiction over a State official enjoying personal immunity so that Article 27(2) can provide for the inapplicability of personal immunity in relation to the Court's own exercise of jurisdiction without violating the right of a State not party under CIL. In Tladi's view, this, however, does not affect the triangular international legal relationship between the Court, a State Party and a State not party governing the cooperation between a State party and the Court. The State party would therefore remain under an obligation under CIL to observe the personal immunity of the official of a State not party also when requested by the Court to arrest and surrender such an official. According to the position taken by Tladi, this precludes the Court, in accordance with Article 98(1), from proceeding with such a request.

<sup>282</sup> Mettraux *et al.* (2018) 18 *ICLRev* 577 ff.

<sup>283</sup> *Ibid.* 583 ff.

<sup>284</sup> *Ibid.* 598 ff.

limit the State of the official's ability to engage in international action and because the interest that such a court seeks to uphold reaches well beyond the national interest of one foreign State.<sup>285</sup> According to this position, it is also of importance that in complying with a request from the Court the arrest and surrender State is effectively not acting on its own behalf but on behalf a community of States.<sup>286</sup> From all these distinctive features of the triangular legal relationship between the Court, a requested State Party and a State not party, it is believed to follow that, within this relationship the requested State party needs not necessarily give precedence to the observance of the personal immunities generally being enjoyed by the official of the non-State party. Instead, it is concluded that, at the present stage of the development of international law, the requested State Party is entitled to make a considered choice how best to deal with the conflict between the *prima facie* duty to cooperate with the Court, on the one hand, and the *prima facie* obligation to observe foreign personal immunity rights<sup>287</sup>

According to a **fourth scholarly opinion**, the CIL rule of personal immunity applies 97 neither in the vertical relationship between the Court and the suspected State official and its State nor in the triangular relationship between the Court, the suspected State official and its State, and a State Party requested by the Court to arrest and surrender the suspected State official. Pursuant to this view, the Court may, when exercising its jurisdiction – be it under Art. 12(1) in conjunction with Article 13(b) of the ICCS, or under Article 12(2)(a) of the ICC Statute – issue an arrest warrant against the official of a State not party enjoying personal immunity from foreign criminal jurisdiction and the Court may also, in such a case, request a State party to arrest and surrender such a State official. The more widespread reasoning among the scholars holding that opinion is that, first, through a general practice of States accepted as law, a crime under CIL exception to the CIL rule on the personal immunity has come into existence with respect to criminal proceedings for crimes under CIL before certain international criminal courts, including the ICC. Second, it is believed that the arrest and surrender of a suspect at the request of the ICC, in a material sense, forms part of the proceedings before the international criminal court concerned rather than to constitute an exercise of national criminal jurisdiction<sup>288</sup>. One scholar has put forward the distinct argument that the CIL rule on personal immunity has never been applicable to criminal proceedings for crimes under CIL before certain international criminal courts, including the ICC, and that no general practice of States accepted as law has ever developed to the effect of such applicability.<sup>289</sup> Hereby, this scholar has foreshadowed the line of reasoning which was subsequently adopted in the Jordan Appeal Judgment (see below mn. 99, 105, 108).

Apart from the general question whether and if so to what extent the CIL rule on the 98 personal immunity applies in proceedings before the ICC, there is a **distinct and more narrow controversy** within international legal scholarship as to whether it is of legal

<sup>285</sup> *Ibid.* 601–602.

<sup>286</sup> *Ibid.* 616.

<sup>287</sup> *Ibid.* 616–617.

<sup>288</sup> For the most detailed exposition of this view so far, see Horsthemke, *Immunitäten* (2019) 167 ff., 246 ff., 334 ff.; the same view was taken in the previous edition of this commentary (Kreß and Prost, in: Triffterer and Ambos, *ICC Commentary* (2016), 2128 ff. (mn. 23 ff.); and by Kreß, in: Bergsmo and Ling, *State Sovereignty* (2012) 223, 243 ff.; cautiously in the same vein, see van der Wilt, in: Ruys *et al.*, *HB Immunities* (2019) 595, 611; *id.* in: Ackermann *et al.*, *Visions of Justice: liber amicorum Mirjan Damaška* (2016), 457, 468–469; Kreicker, in: Kreß and Barriga, *Aggression I* (2017) 675, 696 ff.; while he does not endorse that position, it is noteworthy that Zhong, *Criminal Immunity* (2014) 2 calls for further research and argument on the question whether the ICC could be seen as an organ of the international community.

<sup>289</sup> Riznik, *Immunität* (2015) 202 ff.

relevance if the State not party to the ICCS is, however, a party to the **GenC**. According to one view, a State Party to the GenC cannot invoke its CIL right to personal immunity protection in proceedings for the crime of genocide before the ICC. This view is based on the understanding that the ICC constitutes an international penal tribunal within the meaning of Article VI GenC. The argument goes on as follows: If a State Party to the GenC is bound under Art. IV of this Convention to ensure that immunities do not stand in the way of proceedings against any of its officials in case there are grounds to believe that genocide has been committed on its territory, this State cannot invoke such immunities *vis-à-vis* another State that, having accepted the ICC's jurisdiction, is requested to arrest and surrender such an official for the purposes of proceedings before the ICC. This is because Article VI GenC states that there shall be criminal proceedings either in the territorial State or before 'such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction'.<sup>290</sup> This line of reasoning has been doubted, however. Reference has been made to the fact that there is no specific mention of the ICC in Article VI GenC and to the practical difficulties that might result from the fact that the ICC's jurisdiction extends beyond the crime of genocide.<sup>291</sup>

99 In its **Jordan AJ**,<sup>292</sup> the AC has embraced the fourth scholarly opinion referred to above (mn. 97), albeit with a residual measure of **ambiguity** (see further below mn. 105–112). In the lead-up to the Jordan AJ, several PTC of the ICC had produced **divergent case law** on the matter (for a summary account of the Court's case law, see above mn. 9, for a more detailed presentation, see below mn. 100–103).

100 In its **Malawi Decision**, PTC I had found that: (1) there is an ICL exception (even) from incumbent head of state immunity for the purpose of proceedings before the Court<sup>293</sup> and that (2) the 'unavailability of immunities with respect to prosecution by international courts applies to any act of cooperation by States which forms an integral part of those prosecutions'<sup>294</sup>. The first finding is based on an analysis of the practice of States starting from the Paris Peace Conference in 1919 and it includes a reference to 'certain international criminal courts dictum' in the Arrest Warrant Judgment.<sup>295</sup> The conclusion reads as follows:

*'The Chamber considers that the international community's commitment to rejecting immunity in circumstances where international courts seek arrest for international crimes has reached a critical mass. If it ever was appropriate to say so, it is certainly no longer appropriate to say that international law immunity applies in the present context.'*

*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 Head of State's arrest for the commission of international crimes.'*<sup>296</sup>

<sup>290</sup> For this view, see, for example, Gillet (2012) 23 *CLF* 63, 94–95; see also Schiffbauer, in: Tams *et al.*, Convention (2014) 191, 210 (para. 61).

<sup>291</sup> Jakobs, in: Stahn, *Practice* (2015) 281, 297–298.

<sup>292</sup> For the full reference, see above mn. 9 (fn. 41); for a succinct early presentation and contextualisation of the Jordan AJ, see Nouwen (2019) *CambridgeLJ* 1 ff.

<sup>293</sup> Malawi Decision, ICC-02/05-01/09-139, para. 18 in conjunction with para. 43.

<sup>294</sup> *Ibid.* para. 44.

<sup>295</sup> *Ibid.* paras. 23–36, 42–43.

<sup>296</sup> *Ibid.* paras. 23–36, 42–43 (numbers of paragraphs and footnote in the original omitted, emphasis as in the original).



The Chamber went on to explain why the Court is not precluded by virtue of Article 98(1) to request a State Party, on whose territory an incumbent Head of a State not Party sought by the Court is present, to arrest and surrender that Head of State:

*‘Furthermore, the Chamber is of the view that the unavailability of immunities with respect to prosecutions by international courts applies to any act of cooperation by States which forms an integral part of those prosecutions.*

*Indeed, the cooperation regime between the Court and States Parties, as established in Part IX of the Statute, cannot in any way be equated with the inter-state cooperation regime which exists between sovereign States. This is evidenced by the Statute itself which refers in article 91 of the Statute to the ‘distinct nature of the Court’, and in article 102 of the Statute which makes a clear distinction between ‘surrender’, meaning the delivering up of a person by one State to another as provided by treaty, convention or national legislation.*

*Indeed, it is the view of the Chamber that when cooperating with this Court and therefore acting on its behalf, States Parties are instruments for the enforcement of the jus puniendi of the international community whose exercise has been entrusted to this Court when States have failed to prosecute those responsible for the crimes within its jurisdiction.’<sup>297</sup>*

Hereby, PTC I adopted the fourth scholarly position referred to above (mn. 97) embracing the reasoning set out first there. The Chamber held the same way in the Chad Decision.<sup>298</sup>

The ‘customary law avenue’, as identified by PTC I in the Malawi Decision, was subsequently not followed in the **DRC Decision**, in the **South Africa Decision** and in the **Jordan Decision** by PTC II. None of these decisions, however, engaged in any detail with the reasoning set out in the Malawi Decision (but see below mn. 103 for the Minority Opinion of Judge Perrin de Brichambaut appended to the South Africa Decision). In the South Africa Decision, PTC II touched upon the question of CIL in passing and observed, without further, that it was ‘unable to identify a rule in CIL that would exclude immunity for Heads of States 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’.<sup>299</sup> In the Jordan Decision, the PTC simply referred back to this finding.<sup>300</sup>

In the **South Africa Decision**, the question (as presented above in mn. 98) as to whether the GenC was of legal import, was, by majority, decided in the negative. No ‘convincing basis’ was held to exist ‘for a constructive interpretation of the provisions in the Convention such that would give rise to an implicit exclusion of immunities’.<sup>301</sup>

The ‘customary law avenue’ was addressed in the **Minority Opinion of Judge Perrin de Brichambaut** appended to the South Africa Decision. Judge Perrin de Brichambaut started his analysis by asking the following question:

*‘There is a well-established rule of customary international law according to which incumbent Heads of State enjoy immunity from arrest and prosecution by domestic courts of third States, even in respect of international crimes. This rule has a clear rationale, namely to ensure the unimpeded conduct of international relations and to prevent interference in the internal affairs of a State by a third State. However, the*

<sup>297</sup> *Ibid.* paras. 44–46.

<sup>298</sup> Chad Decision, ICC-02/05-01/09-140, para. 13.

<sup>299</sup> South Africa Decision, ICC-02/05-01/09-302, para. 68.

<sup>300</sup> Jordan Decision, ICC-02/05-01/09-309, para. 27.

<sup>301</sup> South Africa Decision, ICC-02/05-01/09-302, para. 109.

rule is limited to the horizontal relationship between States *inter se*. The question, accordingly, arises whether the involvement of an international court affects the application of the rule of customary international law regarding the personal immunity of Heads of State in the relationship between States. In more specific terms, is a State Party to the Statute obliged to respect the immunity of the Head of State of a non-State Party to the Statute, on the basis of the existing rule of customary international law regulating the horizontal relationship between States?<sup>302</sup>

Upon analysis of the practice of States, Judge Perrin de Brichambaut concluded:

*‘The approaches of States differ in relation to the question of whether the existing rule of customary international law regarding immunities, which regulates the horizontal relationship between States, functions in the same manner in the relationship between a State Party to the Statute and a non-State Party to the Statute. This may be the result of the varying approaches adopted by the international courts in respect of this issue and the possibly diverging application of the rationales of the rule of customary international law on immunities in the two contexts. Accordingly, it is not possible to determine, at this point in time, whether the scope of senior officials’ immunity from arrest is restricted when the arresting State is acting in compliance with its obligations towards the Court or whether the rule of customary international law applies in the same manner in these circumstances as it would in the horizontal relationship between States.’<sup>303</sup>*

- 104 In the same minority opinion, **Judge Perrin de Brichambaut** gave an affirmative answer to the question (as referred to above in mn. 98, 102) as to whether the **GenC** was of legal import. He found as follows:

*‘In essence, the combined effect of a literal and contextual interpretation of article IV of the Genocide Convention, in conjunction with an assessment of the object and purpose of the treaty, will lead to the conclusion that personal immunities cannot attach to “constitutionally responsible rulers”, within the meaning of article IV of the Convention, when charged with the crime of genocide. Pursuant to article VI of the Convention, such immunities are removed for the purposes of prosecution, *inter alia*, before an “international penal tribunal”. This Court constitutes exactly such an international penal tribunal. It follows that South Africa would not have acted inconsistently with its obligations under international law with respect to the immunity of Omar Al-Bashir if it had arrested and surrendered him to the Court because his immunity had been removed by virtue of Sudan acceding to the Genocide Convention. No impediment existed at the horizontal level between South Africa and Sudan with regard to the execution of the request for arrest and surrender of Omar Al-Bashir issued by the Court.’<sup>304</sup>*

- 105 In its **Jordan AJ**, the **AC** **unanimously determined** that there is **no rule of CIL recognising Head of State immunity** *vis-à-vis* international courts and that the absence of such a rule is relevant also for the triangular legal relationship between the Court, a requested State Party, and a State not party.<sup>305</sup> Hereby, the AC essentially embraced the second line of reasoning, as set forth in support of the fourth scholarly opinion referred to above mn. 97. The AC further found that Sudan ‘was under an obligation to

<sup>302</sup> South Africa Decision, ICC-02/05-01/09-302, Minority Opinion of Judge Perrin de Brichambaut, para. 84.

<sup>303</sup> Ibid. para. 96.

<sup>304</sup> Ibid. para. 9.

<sup>305</sup> Jordan AJ, ICC-02/05-01/09-397-Corr. OA 2, para. 114 in conjunction with para. 2.

cooperate in the arrest and surrender of Mr Al-Bashir by virtue of its being party to the Convention against Genocide'.<sup>306</sup>

**First**, the AC found that '(A)rticle 27(2) (...) reflects the status of customary international law'.<sup>307</sup> In support of that finding, the AC referred to the Nuremberg Judgment, to Resolution 95(1) of the GA, to Principle III of the Nuremberg Principles, as adopted by the ILC, to Article IV GenC, to the Statutes of ICTY and ICTR as well as to the preparatory reports submitted by the UN SG.<sup>308</sup> The AC further noted that the ICTY issued an indictment against President Slobodan Milošević while he was still President of Serbia and that the SCSL issued an indictment against President Charles Taylor when he was still President of Liberia.<sup>309</sup> In its analysis up to this point, the AC stated that it 'fully agrees' with the conclusions reached by PTC in the Malawi Decision (as set out above mn. 97, text of citation accompanying fn. 224).<sup>310</sup>

**Second**, the AC determined as follows:

*'The absence of a rule of customary international law recognising Head of State immunity vis-à-vis international courts is relevant not only to the question of whether an international court may issue a warrant for the arrest of a Head of State and conduct proceedings against him or her, but also for the horizontal relationship between States when a State is requested by an international court to arrest and surrender the Head of State of another State. As further explained in the Joined Concurring Opinion of Judges Oboe-Osuji, Morrison, Hofmánski and Bossa and correctly found by the Pre-Trial Chamber in the Malawi Decision, no immunities under international customary law operate in such a situation to bar an international court in its exercise of its own jurisdiction.'*<sup>311</sup>

The AC held that this legal situation is also explained by the fact that **an international court**, rather than being essentially the expression of a State's sovereign power acts **on behalf of the international community as a whole**.<sup>312</sup> In view of that 'fundamentally different nature of an international court as opposed to a domestic court' the AC emphasised that

*'it would be wrong to assume that an exception to the customary international law rule on Head of State immunity applicable in the relationship between States has to be established; rather the onus is on those who claim that there is such immunity in relation to international court to establish sufficient State practice and opinio iuris.'*<sup>313</sup>

Judges Oboe-Osuji, Morrison, Hofmánski and Bossa provided a more elaborated explanation of the findings reached in the Jordan AJ, as summarized in the preceding paragraphs, in their **Joint Conc.Op.** appended to the Judgment.

The Joint Conc.Op., first, explains the Judgment's finding regarding **the onus for the identification of the applicable CIL** (see above mn. 107). In that respect, it advances the consideration that the factual setting of national proceedings before a U.S. court, which characterizes the early leading U.S. case on immunities, *The Schooner Exchange*, does not allow for drawing a sufficiently close case analogy to the case of criminal

<sup>306</sup> *Ibid.* para. 161.

<sup>307</sup> *Ibid.* para. 103.

<sup>308</sup> *Ibid.* paras. 103–107.

<sup>309</sup> *Ibid.* paras. 107, 109.

<sup>310</sup> *Ibid.* para. 113.

<sup>311</sup> *Ibid.* para. 114.

<sup>312</sup> *Ibid.* para. 115.

<sup>313</sup> *Ibid.* para. 116.

proceedings for crimes under CIL before an international court.<sup>314</sup> Therefore, this precedent does not provide a sufficient basis for setting the premise that the CIL rule on personal immunities has ever been applicable to proceedings for crimes under CIL before an international court. While the *onus* has thus been placed on those who claim that personal immunities apply to proceedings for crimes under CIL before an international court, the Joint Conc.Op. nevertheless makes the point that already the practice of States at the Paris Peace Conference after the **First World War** strongly pointed in the direction of the **inapplicability of personal immunities** before international courts.<sup>315</sup> The Joint Conc.Op. does not fail to note the dissenting opinion expressed by the U.S. during the Paris peace negotiations, but emphasizes this State's change of opinion in the lead up of the Nuremberg trial.<sup>316</sup>

- 111 The Joint Conc.Op. also provides a more elaborate explanation for the Judgment's finding that **the inapplicability of the CIL rule on personal immunities** in proceedings for crimes under CIL before an international court **extends to the horizontal relationship** between States when a State is requested by an international court to arrest and surrender the Head of State of another State. The central consideration with respect to the ICCS reads as follows:

*'The combined effect of article 4(2) and article 59 (...) 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 as exercising the kind of jurisdiction that is forbidden of forum States under customary international law in relation to foreign sovereigns.'*<sup>317</sup>

- 112 From the foregoing analysis, the Joint Conc.Op. draws a conclusion the formulation of which creates a **residual measure of ambiguity**. The relevant passage reads as follows:

*'In the circumstances 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 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 VI of the UN Charter for purposes of conferring jurisdiction upon the Court through an article 13(b) referral; and (c) concerning 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 under article 13(b) of the Statute, where the resolution has only urged, rather than required the concerned State to cooperate fully with the ICC.'*<sup>318</sup>

This list does not include the relationship between a State that is not party and a requested State Party in a case in which the Court's jurisdiction is exercised not on the

<sup>314</sup> Joint Conc.Op., Jordan AJ, ICC-02/05-01/09-397-Corr. OA 2, para. 142.

<sup>315</sup> *Ibid.* paras. 76–124.

<sup>316</sup> *Ibid.* paras. 125–132.

<sup>317</sup> *Ibid.* para. 444 (emphasis added).

<sup>318</sup> *Ibid.* para. 451.



basis of a SC Res., but under **Art. 12(2)(a) ICCS**.<sup>319</sup> This is somewhat perplexing as both the relevant passage in the Judgment itself (above mn. 107) and the central explanatory consideration in the Joint Conc.Op. (above mn. 111) are worded in a manner so as to cover also this fourth scenario.

Finally, in the Joint Conc.Op. the Jordan AJ's agreement with Judge Perrin de Brichambaut's affirmative answer (as referred to above mn. 104) to the question of whether the **Genocide Convention** is of legal import (as referred to above mn. 98) is persuasively explained. In support of that position, the Joint Conc.Op. contains the statement that there is 'no room for immunity' in Article IV GenC in view of the fact that the imperative of punishment explicitly extends to 'constitutional rulers'.<sup>320</sup> The Joint Conc.Op. further declares that the ICC constitutes an 'international penal tribunal' as anticipated in Article VI GenC<sup>321</sup> and that the 'real purpose' of that provision 'is to enlarge the complementarity strategies for the (...) punishment of genocide'.<sup>322</sup> The combined effect of Articles IV and VI is then held to be that a State Party to the GenC cannot claim personal immunity *vis-à-vis* a State Party to the ICCS that is requested to arrest and surrender to the ICC a State official of the State Party to the GenC for proceedings for the crime of genocide.<sup>323</sup>

As regards the fundamental legal issue before the AC on Jordan's appeal against the Jordan Decision, the **preferable view** is that there is no rule of CIL rule of personal immunity *vis-à-vis* an international criminal court with a credible universal orientation and that the absence of such a rule is relevant also for the triangular legal relationship between such a Court, a requested State Party, and a State not party.<sup>324</sup> The ICC being such an international criminal court, it follows that **no CIL personal immunities apply in proceedings before it including the horizontal limb of the triangular legal relationship between the ICC, a requested State Party, and a State not party**. This is true in all cases where the ICC exercises its jurisdiction – and not only in proceedings triggered by a SC referral under Article 13(b). A strong argument can be made in support of the view put forward in the Jordan AJ that the CIL rule of personal immunity has never been applicable in proceedings before an international criminal court with a credible universal orientation (below mn. 115). Even assuming, however, that the CIL rule of personal immunity *a priori* extended to proceedings before all kinds of international criminal courts, an exception to that rule has developed through a general practice of States accepted as law, and this exception applies to proceedings before international criminal courts with a credible universal orientation (below mn. 116–127). In the absence of a consistent body of State practice based on *opinio iuris* in that respect, it remains a matter of judicial interpretation whether the arrest and surrender by a State Party to the ICC at the request of the Court must be seen as the exercise of the criminal jurisdiction of that State Party or whether such acts form part of the proceedings before the ICC. In accordance with the Jordan AJ, the latter view is more persuasive (below mn. 128–131).

A strong argument can be made in support of the view put forward in the Jordan AJ that the **CIL rule of personal immunity has never been applicable** in proceedings before an international criminal court with a credible universal orientation. The matter

<sup>319</sup> Probably for this reason, Ubéda-Saillard, in: Fernandez *et al.*, Commentaire (2019), 2309, 2321 holds that the AC 'se retranche derrière la résolution 1593 (2005)'.

<sup>320</sup> *Ibid.* paras. 257, 266.

<sup>321</sup> *Ibid.* para. 264.

<sup>322</sup> *Ibid.* para. 262 (emphasis added).

<sup>323</sup> *Ibid.* para. 265.

<sup>324</sup> Jordan AJ, ICC-02/05-01/09-397-Corr. OA 2, para. 114 in conjunction with para. 2.

depends on the rationale underlying this CIL rule. In its Charles Taylor Decision, the SCSL AC held that ‘the principle that one sovereign state does not adjudicate on the conduct of another state (...) has no relevance to international criminal tribunals which are not organs of a state but derive their mandate from the international community’.<sup>325</sup> Similarly, the Joint Conc.Op. appended to the Jordan AJ found that the ‘classical justification’ of the CIL rule on personal immunity was the principle of *par in parem non habet imperium*.<sup>326</sup> Yet, this Opinion also recognized the functionality rationale, as set out by the ICJ in the Arrest Warrant Judgment (see above mn. 89), and found that ‘the need to avoid disruption to the discharge of the duties of State is undoubtedly an important consideration.’<sup>327</sup> As was seen (above mn. 89), it is indeed this rationale that lies at the core of the personal immunity protection under CIL. Therefore, this rationale must be borne in mind when answering the question of whether the CIL on personal immunity *a priori* equally applies in proceedings before all kinds of international criminal courts. In that respect, it has been argued that such applicability follows from the functionality rationale.<sup>328</sup> This conclusion, however, is not compelling. At closer inspection, the effective performance of the State functions in question need not be seen as an absolute value within the international legal order.<sup>329</sup> The functionality rationale underlying the CIL rule on personal immunity may rather be seen as articulating the preponderance, which classic international law accorded to the effective performance of the relevant State functions over the conflicting interest of a foreign State to exercise its jurisdiction over the State official concerned. A first question that arises is whether the same preponderance is to be accorded to the functionality interest where the interest in exercising jurisdiction over the person concerned is no longer simply that of another State, but one of the international community as a whole, as is the case in proceedings for crimes under CIL. Yet, the preponderance may still lie with the functionality interest because of the perceived risk that national judicial proceedings may not be sufficiently shielded against political instrumentalization by the relevant State government. But the balance may shift when proceedings take place before a tribunal that, through its institutional design, possesses an appreciable element of verticality distancing it from the politics of one national State or one regional group of States. In such a case, the preponderance of the functionality value is no longer obvious and, by the same token, the reference to the principle of *par in parem non habet imperium* loses its compelling force. This gives a reason to doubt whether the classic CIL rule on personal immunity must be seen as being *a priori* equally applicable in proceedings before such international criminal courts which, through their institutional design, possess an appreciable element of verticality. And this consideration may well be the key to properly appreciate why, at the Paris Peace Conference after the First World War, when the idea of international criminal justice powerfully emerged, notably Britain and France expressed the view that proceedings before an international criminal tribunal must be distinguished from national proceedings with respect to the question of immunity in the case

<sup>325</sup> SCSL, *Prosecutor v. Charles Ghankay Taylor*, Decision on Immunity from Jurisdiction, SCSL-2003-01-I, 31 May 2004, para. 51.

<sup>326</sup> Joint Conc.Op., Jordan AJ, ICC-02/05-01/09-397-Corr. OA 2, para. 181.

<sup>327</sup> *Ibid.* para. 182.

<sup>328</sup> Frulli (2004) 2 *JICJ* 1118, 1128; it was then taken up, for example, by Deen-Racsmany (2005) 18 *LeidenJIL* 299, 314; Nouwen (2005) 18 *LeidenJIL* 645, 667 (with the slight shift to the necessity ‘of maintaining peaceful international relations’; van Alebeek, *Immunity* (2008) 276–277 (text in fn. 337); in the same direction, see Klingberg (2003) 46 *GYbIL* 537, 544.

<sup>329</sup> This point is also made in the Joint Conc.Op., Jordan AJ, ICC-02/05-01/09-397-Corr. OA 2, para. 182.

of the former German Emperor.<sup>330</sup> In that respect, the Joint Conc.Op. appended to the Jordan AJ refers to a statement made by Sir Ernest Pollock for the British delegation in the Commission on Responsibilities and which questions the applicability of the classic CIL rule on personal immunity in the following terms:

*'So far as the share of the ex-Kaiser in the authorship of 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 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 may be raised today.'*<sup>331</sup>

That the 'circumstances' in which the immunity question had never been discussed before were, in Britain's view, proceedings before an international criminal court is evident from the further statement made by Pollock that 'it seems impossible to me to hand him [the former German Emperor; C.K.] over to anything except an international tribunal'.<sup>332</sup> The relevance of the distinction between national and (certain) international proceedings was also clearly perceived by France. In that vein, Larnaude, one of the French members in the Commission on Responsibilities put forward that 'we have reached the point at which the principles of international law should be vindicated, and receive a solemn consecration, through the intervention of international jurisdiction'.<sup>333</sup> Already in the lead-up to the Paris Peace Conference, Larnaude, together with his colleague de Lapradelle, had elaborated upon the need of instituting proceedings against the former German Emperor before an international criminal tribunal in a joint memorandum. Among the many noteworthy passages of this memorandum is the following one:

*'Il faut trouver un tribunal, qui par sa composition, par la place qu'il occupera, par l'autorité dont il sera investi, puisse rendre le verdict le plus solennel que le monde ait encore entendu. (...) Or, cette solution, c'est le droit international seul qui peut nous la fournir. Les faits reprochés à Guillaume II sont des crimes internationaux: c'est par un Tribunal international qu'il doit être jugé.'*<sup>334</sup>

This memorandum was then endorsed by the French Prime Minister and circulated at the Paris Peace Conference. From these statements a direct line leads to a central part of an exchange between the President of the U.S. Wilson and the British Prime Minister Lloyd George in the Peace Conference's Council of Four on the question of a trial of the former German Emperor. Wilson hesitatingly observed: 'I question whether we have the right to set up a tribunal made up only by the belligerents. The parties to the dispute would also be the judges.' To this, Lloyd George replied: 'In my view, England and the United States should not be seen as injured parties [...]. We both made war for justice.' Wilson remained unconvinced and asked: 'Suppose that, sometime in the future, one country was victorious over another that had attacked it in a violation of international

<sup>330</sup> This sentiment prevailing before and at Paris of a need to distinguish between national and international proceedings does not receive sufficient attention in the analysis of the practice of States, as set forth by Mettraux *et al.* (2018) 18 *ICLRev* 577, 583 ff.

<sup>331</sup> Joint Conc.Op., Jordan AJ, ICC-02/05-01/09-397-Corr. OA 2, para. 104.

<sup>332</sup> *Ibid.* para. 106.

<sup>333</sup> *Ibid.* para. 107.

<sup>334</sup> (1919) 45 *JDI* 131, 143–144.

law. Would it alone be able to judge those guilty of crimes against international law of which it had been the victim?’ Lloyd George responded as follows: ‘Not at all. Then the League of Nations would intervene in accordance with fundamental rules that we will have laid down. In the present case, it is not Belgium and France that will have to judge the offenders. If we want to have the League of Nations to have a chance to succeed, it must offer more than mere lip service. The violation of treaties is precisely the sort of crime in which the League of Nations has a direct interest.’<sup>335</sup> With hindsight, one may say that these historic sources do not approach the matter in precisely the same technical legal terms as we do today. But the sentiment that the international character of the tribunal matters for a number of issues including the question of immunity and that there is a need to properly express this international character through an appropriate institutional design is too clearly apparent for it being ignored. The dispute between the majority of States and the U.S. at the Paris Peace Conference on the question of immunity – including that of personal immunity in contemporary legal terminology – can therefore very well be seen as having been one about the interpretation of the CIL rule existing at the time. It is difficult to say that, at this historic moment in time, one or the other interpretation imperatively imposed itself as the correct one.<sup>336</sup> But it is equally difficult to discard the preference voiced by the majority of States after the First World War at Paris that the classic CIL rule on personal immunity was not applicable in the ‘circumstances’ of proceedings before a ‘properly composed’ tribunal. In conclusion, a strong argument can therefore be made in support of the narrower interpretation of the CIL rule on personal immunity, as espoused by a minority within international legal scholarship<sup>337</sup> and, most importantly, by the AC of the ICC in the Jordan AJ (above mn. 108).

- 116 Even assuming, however, that the CIL rule of personal immunity *a priori* does extend to proceedings before all kinds of international criminal courts, an **exception** to that rule has developed through a general practice of States accepted as law, and this exception applies to proceedings for crimes under CIL before international criminal courts with a credible universal orientation.
- 117 In that respect, the Joint Conc.Op. has made a most noteworthy contribution to the state of the debate. Before the Jordan AJ, the debate on CIL and personal immunity had been suffering from **insufficiently close attention** and, hence, insufficient weight having been attributed to the **practice of States**, first, at the Paris Peace conference **after the First World War** and, second, in the course of the preparations for the Nuremberg trial **after the Second World War**.<sup>338</sup> This is true for the previous edition of this commentary, but it is notably true for that body of international legal scholarship which supports the applicability of the CIL rule on personal immunity in proceedings before the ICC. To name just one of the perhaps strongest worded arguments submitted in support of this position, Asad G. Kiyani has dealt with the practice of States at the Paris Peace Conference in the following cursory manner: ‘While the Commission [on Responsibilities; C.K.] may itself have envisaged a change in the nature of immunities, States failed to implement the Commission’s proposals.’<sup>339</sup> As far as the practice of States with respect to the trials at Nuremberg and Tokyo is concerned, the same author

<sup>335</sup> The conversation is reproduced in Schabas, *Kaiser* (2018) 178.

<sup>336</sup> But see van Alebeek, *Immunity* (2008) 277 who writes that the U.S. delegates ‘were right’.

<sup>337</sup> For the most detailed expositions of this view, see Riznik, *Immunität* (2015) 202 ff.; Tladi (2015) 13 *JICJ* 1, 12–13; for the same conclusion, albeit on the basis of a less detailed reasoning, see Gaeta, in: Cassese *et al.*, *Rome Statute I* (2002) 975, 991 ff.; the same author confirmed her position in (2009) 7 *JICJ* 315, 319 ff.

<sup>338</sup> Kreß and Prost, in: Triffterer and Ambos, *Commentary* (2016) 2134–2136 (mn. 31–32).

<sup>339</sup> Kiyani (2013) 12 *ChineseJIL* 467, 489.



is content of making a reference to the statutory provisions on the irrelevance of official capacity and of discarding those provisions as irrelevant to the question of personal immunity.<sup>340</sup> The Joint Conc.Op., however, has demonstrated, through a meticulous judicial analysis<sup>341</sup> that the practice of States before and at Paris and before Nuremberg and Tokyo is far more meaningful. The first convincing conclusion reached in the Joint Conc.Op. is that the Paris Peace process includes a significant body of robust State practice in support of the inapplicability of the CIL rule on personal immunity in proceedings for crimes under CIL before international criminal courts with a credible universal orientation (on that term, see below mn. 123–124).<sup>342</sup> In addition to a full reference to the relevant part of the Joint Conc.Op. and the references made in the preceding paragraph to the practice of States in point, the following passage of the report submitted by Commission on Responsibilities to the Paris Peace Conference is worthy of citation in full:

*In these circumstances, the Commission desires to state expressly that in the hierarchy of persons of authority, there is no reason why rank, however exalted, should in any circumstances protect the holder of it from responsibility when this responsibility has been established by 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.*<sup>343</sup>

That this verbal practice of States pertained not only to functional immunity, but also to the personal immunity of a Head of States, is confirmed not only by its own terms, but also by the reservation expressed against it by the U.S. delegates. For, this reservation, as is apparent from the relevant passage (cited above mn. 56), was specifically directed to what is nowadays called personal immunity. And precisely this dissent voiced by the U.S. in Paris should no longer inform the practice of this same State when the latter, at the end of the Second World War, decided to take the lead toward the trials of Nuremberg and Tokyo. To have emphasized this fact and its significance for the identification of the evolution of CIL, constitutes the second and equally persuasive conclusion reached in the Joint Conc.Op.<sup>344</sup> This Opinion in particular refers to the following passage contained in a report submitted by Robert Jackson to the President of the U.S.: ‘We do not accept the paradox that legal responsibility should be the least where power is the greatest.’<sup>345</sup> The Joint Conc.Op. has persuasively demonstrated that Robert Jackson’s rejection of what he called the ‘obsolete doctrine that a head of state is immune from legal liability’ was not only directed to functional immunity, but extended to the personal immunity of a Head of State. What is more, the U.S. President publicly stated his ‘entire agreement’ with Jackson’s report.<sup>346</sup> The British position closely mirrored Jackson’s insistence on including those with the greatest power within the ambit of the envisaged international

<sup>340</sup> *Ibid.* 490.

<sup>341</sup> Joint Conc.Op., Jordan AJ, ICC-02/05-01/09-397-Corr. OA 2, paras. 76–132.

<sup>342</sup> *Ibid.* paras. 122–123.

<sup>343</sup> Commission on the Responsibility of the Authors of War and on Enforcement of Penalties, Report Presented to the Preliminary Peace Conference (1920) 14 *AJIL* 95, 116.

<sup>344</sup> Joint Conc.Op., Jordan AJ, ICC-02/05-01/09-397-Corr. OA 2, para. 128–136.

<sup>345</sup> *Ibid.* para. 130.

<sup>346</sup> *Ibid.* para. 132.

proceedings. For Britain, it was ‘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’ and this view was communicated to the U.S. when Hitler was still alive and the incumbent Head of State of Germany.<sup>347</sup> At this crucial juncture of the manifestation of the idea of international criminal justice, the U.S. and Britain thus clearly confirmed the conviction, that had emerged after the First World War, that the interest in conducting proceedings for crimes under CIL before an international criminal tribunal weighs most heavily in cases of those highest-ranking State officials, which allegedly bear the greatest possibility for the relevant complex of macro-criminality, and that a Head of State, a Head of Government and a Minister for Foreign Affairs is likely to be among those officials. The fact that eventually no trial against such a State official materialized after the Paris Peace Conference and at Nuremberg and Tokyo may caution against the conclusion that a general practice of States accepted as law had already fully developed at this moment in time. By no means, however, does this fact justify to ignore this early practice and to say that ‘until the ICC Statute there was no state practice’ on personal immunities in proceedings for crimes under CIL before international criminal courts.<sup>348</sup> Quite to the contrary, the preparatory verbal practice of States must be of paramount importance with respect to the identification of the state of CIL relating to possible subsequent proceedings before an international criminal court with an appreciably vertical design which, by themselves, do not constitute State practice.<sup>349</sup> In the absence of outright rejection by States, the judicial pronouncement by such a court at the end of such proceedings may then be accorded a CIL crystallizing effect if it builds on a sufficiently consistent body of verbal State practice which was in place beforehand.<sup>350</sup> It is thus warranted to conclude that the body of robust State practice supported by *opinio iuris* which had developed on the global scene at two crucial junctures of world history had prepared the stage for the **crystallization**, through the judicial pronouncement of an international criminal court with a credible universal orientation, of an **exception to the CIL rule on personal immunity** – if such an exception was at all needed despite the considerations set forth above in mn. 115.

- 118 It remains a matter of controversy whether the statements on the irrelevance of official capacity contained in the Nuremberg and Tokyo Judgments and in the Statutes of international and internationalised criminal tribunals form part of the **practice of States on the inapplicability of the CIL rule of personal immunities** in proceedings for crimes under CIL before international criminal courts of a credible universal orientation. According to one view, those statements only deal with functional immunity.<sup>351</sup> The wording of those statements tends to support this view. Yet, against the background of the fact that, since the Paris Peace Conference, States had repeatedly recognized the need to include, where applicable, incumbent Heads of States in proceedings for crimes under CIL it was far from implausible for the ILC in 1996<sup>352</sup> as well as for the SCSL AC in the Charles Taylor Decision<sup>353</sup> as well as for the ICC AC in the Jordan AJ (see above

<sup>347</sup> *Ibid.* paras. 145–147.

<sup>348</sup> van Alebeek, *Immunity* (2008) 276.

<sup>349</sup> For an illuminating study on the identification of CIL in the specific context of branches of the international legal order where the structure of the relevant rules is not of an inter-State nature, see Gaerditz (2007) 45 AVR 1, 4 ff.

<sup>350</sup> In the same vein, see the observation in Jordan Appeal Judgment, ICC-02/05-01/09-397-Corr. OA 2, para. 113.

<sup>351</sup> For the most powerful argument in that respect, see van Alebeek *ibid.* 292.

<sup>352</sup> (1996-II-2) YbILC 27 (para. 6); see above mn. 66.

<sup>353</sup> SCSL, *Prosecutor v. Charles Ghankay Taylor*, Decision on Immunity from Jurisdiction, SCSL-2003-01-I, 31 May 2004, paras. 45 ff.

mn. 106) to understand the statements in question as covering the immunity question comprehensively. It also bears noting, as has been done in the Joint Conc.Op., that the U.S. delegation had incumbent Heads of State in mind when the text on the irrelevance of official immunity was negotiated and that there is no evidence of a controversy among the drafters on that matter.<sup>354</sup> It is therefore far from evident that Article 27(2) ICCS articulates anything new on substance. It is at least equally plausible to assume that the distinctive treatment of functional and personal immunity in the two paragraphs enshrined in Article 27 simply reflects the advance in analytical clarity that had been achieved in the meantime in the international legal discourse on immunities. Be that as it may, the case for the inapplicability of the CIL rule of personal immunities in proceedings for crimes under CIL before international criminal courts of a credible universal orientation made in this commentary does not rest decisively on the series of statements on the irrelevance of official capacity beginning with Article 7 of the London Charter.

In May 1999, the **Prosecutor of the ICTY indicted Slobodan Milošević**. He was 119 then the incumbent Head of the Federal Republic of Yugoslavia.<sup>355</sup> On 24 May 1999, Judge Hunt confirmed this indictment and ordered that certified orders of a warrant of arrest were transmitted by the Registrar to all UN Member States.<sup>356</sup> In its Decision of 8 Nov. 2001, a TC confirmed the jurisdiction of the Tribunal.<sup>357</sup> The precedential value of this decision is weakened by the fact that it has not explicitly confronted the legal issue of the personal immunity as a distinct legal problem and has rather placed the pertinent passages of the decision under the title ‘Lack of competence by reason of his status as *former* President (emphasis added; C.K.)’. Yet, it is a fact that the ICTY, by indicting Slobodan Milošević and by confirming the indictment, set the first judicial precedent for the exercise of jurisdiction by an international criminal tribunal over an incumbent Head of State. The case was one of high international visibility, the arrest warrant was transmitted to all UN Member States and it is not apparent that the procedural action taken by the ICTY met with any significant legal protest within the international community.

In May 2004, the **SCSL AC found that the Taylor indictment** and its judicial 120 confirmation were lawful despite the fact that the accused was then the incumbent President of Liberia. Other than in the case against Milošević, the question of personal immunities was now squarely identified as such and fully argued before the AC. The Chamber found that the principle is 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.<sup>358</sup> While the Taylor Decision was criticized by a number of international legal scholars in this regard,<sup>359</sup> it is not apparent that it provoked any significant legal protest within the international community.

If, contrary to the strong (see above mn. 115) case made by the Jordan AJ, such a case 121 is at all necessary, the case can persuasively be made, that, against the backdrop of the meaningful practice of States at Paris, Nuremberg and Tokyo, the two just-mentioned

<sup>354</sup> Joint Conc.Op., Jordan AJ, ICC-02/05-01/09-397-Corr. OA 2, para. 133 (with a specific reference to the relevant U.S. draft text).

<sup>355</sup> For a meticulous analysis, see Horsthemke, *Immunitäten* (2019) 173 ff. (with detailed references).

<sup>356</sup> ICTY, *Prosecutor v. Slobodan Milošević et al.*, OTP, Decision on Review of Indictment and Application for Consequential Orders, Judge David Hunt, IT-02-54, 24 May 1999, para. 38.

<sup>357</sup> ICTY, *Prosecutor v. Milošević*, TC, Decision on Preliminary Motion, IT-02-54, 8 Nov. 2001, paras. 26 ff.

<sup>358</sup> SCSL, *Prosecutor v. Charles Ghankay Taylor*, Decision on Immunity from Jurisdiction, 31 May 2004, SCSL-2003-01-I, 31 May 2004, para. 52.

<sup>359</sup> For such criticisms, see the contributions referred to above in fn. 327.

high-profile international judicial precedents and their acceptance within the international community, have **crystallized an exception to the CIL rule on personal immunities** through a general practice of States accepted as law.<sup>360</sup>

- 122 This happened before the AU, in 2012, voiced its **dissent** to the Malawi and Chad Decisions (see above mn. 10). What is more, upon closer inspection it turns out that this dissent is **limited in scope**. This was confirmed by the AU in the course of the proceedings before the AC on Jordan's appeal against the Jordan Decision. Here, the AU, while maintaining that the then incumbent President of Sudan Al Bashir enjoyed personal immunity at the horizontal level of the triangular legal relationship between the Court, Jordan as the requested State Party and Sudan as the third State, accepted that 'the Court may have jurisdiction over a head of a State not party to the Rome Statute in terms of Article 27'.<sup>361</sup> The AU does therefore not challenge the idea that the CIL rule on personal immunities is inapplicable in proceedings before the ICC. It only disputes that such inapplicability extends to the horizontal level of the triangular legal relationship between the Court, a requested State Party and a third State not party. The AU made it clear before the AC that its previous statements regarding the matter are to be read in that sense.<sup>362</sup>
- 123 Whether the inapplicability of the CIL rule on personal immunities is explained by way of a narrow interpretation of this rule (see above mn. 115) or on the basis of the development of an exception (see above mn. 116–121), such inapplicability, contrary to the formulation in the Jordan AJ (see above mn. 107), does not extend to proceedings before **any** international criminal court. Rather, and in conformity with the qualification

<sup>360</sup> It is worth mentioning that the same position was adopted in *Immunity of State officials from foreign criminal jurisdiction*, Memorandum by the Secretariat, A/CN.4/596, 31 Mar. 2008, para. 142. In the previous edition (Kreß and Prost, in: Triffterer and Ambos, *Commentary* (2016) 2134 (mn. 31)), the term 'modern custom' was used in the present context to highlight the importance of the relevant verbal practice of States and to recognize a legitimate place for deductive reasoning with respect to broader principles articulated by States in their verbal practice (for a more detailed discussion of the relevant methodological questions, see, for example, Simma and Paulus (1999) 93 *AJIL* 302 ff.; Byers, *Custom, Power* (1999); Roberts (2001) 95 *AJIL* 757 ff.; Seibert-Fohr, in Zimmermann and Hofmann, *Unity and Diversity* (2006) 264 ff.; Gärditz (2007) 45 *AVR* 1 ff.). But in view of the fact, that the use of said term may give rise to the suspicion that those authors, who refer to it, have a different kind of CIL in mind (in this context, see Second report on identification of CIL, by Michael Wood, Special Rapporteur, A/CN.4/672, 22 May 2014, 11 (para. 28)) the term is no longer used in this commentary. In fact, the term is not needed to explain or sustain the commentary's identification of the applicable CIL which is in line with the ILC's Draft Conclusions on identification of CIL, as adopted in 2018, and the commentaries hereof. The following elements bear highlighting in the present context: Conclusion 2 confirms that the same basic 'two-element approach' with respect to the identification of a rule of CIL applies throughout the international legal order (paragraph 6 of the commentary of Draft Conclusion 2; (2018-II-2) *YbILC* 126 (para. 66)) and in paragraph 5 of the commentary of Draft Conclusion, it is recognized that the identification of a CIL rule may entail 'a measure of deduction' (*ibid.*). Draft Conclusion 3 confirms that 'in assessing evidence for the purpose of ascertaining whether there is a general practice and whether it is accepted as law (*opinio iuris*), regard must be had to the overall context, the nature of the rule, and the particular circumstances in which the evidence in question is to be found' (*ibid.*). In paragraph 6 of the commentary of Draft Conclusion 3, it is recognized that, while each of the two constituent elements remains conceptually distinct, both elements may be intertwined in fact ((2018-II-2) *YbILC* 128–129 (para. 66)). Finally, Draft Conclusion 6(1) confirms that the concept of 'State practice' includes 'verbal acts' and 'may, under certain circumstances, include inaction' ((2018-II-2) *YbILC* 133 (para. 66)).

<sup>361</sup> ICC, *Prosecutor v. Al Bashir*, AU's Submissions in the "Hashemite Kingdom of Jordan's Appeal Against the 'Decision under Article 87(7) of the Rome Statute on the Non-Compliance by Jordan with the Request by the Court for the Arrest and Surrender (of) Omar Al-Bashir'", 13 Jul. 2018, ICC-02/05-01/09 OA2, para. 16; in the same vein, see The Supreme Court of Appeal of South Africa, *The Minister of Justice and Constitutional Development et al. v. The Southern Africa Litigation Centre et al.*, Case No. 867/15, 15 Mar. 2016, (2016) ZASCA 17, 52 (para. 77).

<sup>362</sup> *Al Bashir*, ICC-02/05-01/09 OA2, para. 18.



made by the ICJ in the Arrest Warrant Judgment (see above mn. 91), the CIL rule on **personal immunities** is **inapplicable** only in proceedings **before certain international criminal courts**. Such courts are those with a credible universal orientation.

The term ‘international criminal court with a credible universal orientation’ builds on a passage in the Jordan AJ,<sup>363</sup> but nothing hinges on this choice of term.<sup>364</sup> What matters is the substantive idea that, at the present stage of the legal evolution, the inapplicability of the CIL rule of personal immunities can be persuasively explained only in case of such an international criminal court that qualifies as a direct embodiment of the international community as a whole and thus as an organ qualified to directly enforce the *ius puniendi* of this legal community.<sup>365</sup> Whether an international criminal court qualifies as such, depends, first of all, on its jurisdiction *ratione materiae* which must relate to crimes under CIL (see further below in mn. 130). Second, the law governing the operation of and the proceedings before such a court must include all the applicable international law human rights and due process standards. Third, the Court must, through the process of its creation, its institutional design and its acceptance within the international community, be sufficiently distanced from one or a few national States and even an entire regional group of States.<sup>366</sup> The latter criterion is fulfilled where an international criminal tribunal has been set up by the SC and the same holds true for an international criminal tribunal which, as is the case with the SCSL, has been created with that Council’s explicit blessing.<sup>367</sup> The case of the ICC is more difficult in those instances where this Court’s exercise of jurisdiction has not been triggered by a SC referral. The argument against treating the ICC as a direct embodiment of the international community is the continuing lack of (quasi-)universal adherence to the ICC Statute.<sup>368</sup> But this fact is outweighed by the following considerations: The ICCS has been negotiated on the universal level and it contains a standing invitation for universal adherence. The UN GA has endorsed the negotiation process and its outcome.<sup>369</sup> Through the conclusion of the Relationship Agreement with the ICC, the UN has also embraced the vision of a complementary relationship between the UN and the ICC, as enshrined in Article 2 ICCS. Finally, ICC Statute has attracted a very significant number of ratifications which include States from all world regions. This, together with the institutional provisions in Article 36 ICCS, ensures a clear distance from one or a few national States and even an entire regional group of States. Therefore, the **ICC constitutes an international criminal court with a credible**

<sup>363</sup> Jordan AJ, ICC-01/05-01/09-397-Corr. OA 2, para. 57.

<sup>364</sup> In its Charles Taylor Decision, the AC of the SCSL uses the term ‘truly international’ to articulate the same idea, SCSL, *Prosecutor v. Charles Ghankay Taylor*, Decision on Immunity from Jurisdiction, 31 May 2004, SCSL-2003-01-I, 31 May 2004, para. 38.

<sup>365</sup> In the Jordan AJ, ICC-02/05-01/09-397-Corr. OA 2, para. 115, essentially the same idea is contained in the formulation that ‘international courts act on behalf of the international community as a whole’. The formulation chosen in the Jordan AJ, however, requires the refinement suggested in the above text with respect to the international criminal courts concerned and also in respect to the indirect enforcement of ICL through national criminal courts (see below text in mn. 128).

<sup>366</sup> For a very similar approach, see Horsthemke, *Immunitäten* (2019) 236 f., building on the earlier analysis by Meisenberg (2004) 17 *HuV-I* 30, 38; in the same vein, see Riznik, *Immunität* (2015) 224–225; Blommesteijn and Ryngaert (2010) 6 *ZIS* 428, 438.

<sup>367</sup> For a comprehensive analysis, see SCSL, *Prosecutor v. Charles Ghankay Taylor*, Decision on Immunity from Jurisdiction, 31 May 2004, SCSL-2003-01-I, 31 May 2004, paras. 37 ff.

<sup>368</sup> See, for example, Senn, *Immunitäten* (2010) 168 ff.; Uerpmann-Witzack (2006) 44 *AVR* 33, 45 ff.

<sup>369</sup> A/RES/52/160, 15 Dec. 1997, para. 3 (without vote); A/RES/53/105, 8 Dec. 1998, para. 1: “(...) acknowledges the historic significance of the adoption of the Rome Statute of the International Criminal Court” (without vote).

**universal orientation** whenever it exercises its jurisdiction and not only where its jurisdiction is based on a SC Res..<sup>370</sup>

- 125 The considerations set out in the preceding paragraph are borne out by a study of the practice of States since the Paris Peace Conference. In their Joint Sep.Op., Judges Higgins, Kooijmans and Buergenthal stated as follows:

*‘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.’*<sup>371</sup>

States have been experiencing this challenge and have been trying to respond to it since the inception of the legal evolution of international criminal justice. This is clearly apparent already from the conversation at the Paris Peace Conference after the First World War when States, for the first time, debated the institution of international criminal proceedings for crimes under international law. At this juncture States did not envisage a bilateral or a regional court, but one with a credible universal orientation, aspiring as closely as possible to the ideal of a future international criminal court connected with the nascent League of Nations.<sup>372</sup> The same ambition, however imperfectly implemented through its institutional design,<sup>373</sup> was present when the Nuremberg Tribunal was established, as is apparent from the fact ‘that nineteen nations subscribed to the London Agreement, besides the four Allied Powers’.<sup>374</sup> The Joint Conc.Op. has accurately captured, what clearly appeared to be the main underlying motivation of the relevant State practice in the course of the past hundred years, when it stated that ‘the more important consideration remains the seising of the jurisdiction upon an international court, for purposes of greater perceptions of objectivity’.<sup>375</sup> This consideration has remained central ever since in the attempt made by States at striking a fair balance between the interest in conducting proceedings for crimes under CIL and the legitimate interest in ensuring that highest State officials are not unduly impeded in the effective performance of their duties. This is especially true in light of the fact that, at the moment of the institution of criminal proceedings, the individual criminal responsibility in question remains yet to be ascertained. The legal evolution summarized so far provides sufficient evidence for the idea that **States**<sup>376</sup> **attribute decisive weight to**

<sup>370</sup> For the same view see Burchard above Art. 27, mn. 13; for a judicial finding going at least a long way in the direction of embracing that idea, see ICC, *Decision on the “Prosecution’s Request for a Ruling on Jurisdiction under Article 19(3) of the Statute”*, PTC I, ICC-RoC46(3)-01/18-37, 6 Sep. 2018, para. 48: ‘In the light of the foregoing, it is the view of the Chamber that more than 120 States, representing the vast majority of the international community, had the power, in conformity with international law, to bring into being an entity called ‘International Criminal Court’, possessing objective international personality and not just personality recognized by them alone, together with the capacity to act against impunity for the most serious crimes of concern to the international community as whole and which is complementary to national jurisdictions. Thus, the existence of the ICC is an objective fact. In other words, it is a legal-judicial-institutional entity which has engaged and cooperated not only with States Parties, but with a large number of States not Party to the Statute as well, whether signatories or not.’

<sup>371</sup> ICJ, *Arrest Warrant Case*, Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, ICJ Rep. 2002, 63, 64 (para. 5).

<sup>372</sup> For a closer analysis with detailed references, see Kreß (2019) 62 *GYIL* (forthcoming).

<sup>373</sup> Due reference is made to this imperfection in paragraph 64 of the Joint Conc.Op., *Jordan Appeal Judgment*, ICC-02/05-01/09-397-Corr. OA 2.

<sup>374</sup> Woetzel, *Nuremberg Trials* (1960) 55.

<sup>375</sup> Joint Conc.Op., *Jordan AJ*, ICC-02/05-01/09-397-Corr. OA 2, para. 63.

<sup>376</sup> Interestingly, the idea of a distinction between national and international criminal proceedings also appears in China’s statement within the Sixth Committee of the UN that ‘(i)mmunity from criminal

those criteria that underlie the term of ‘international criminal court of credible universal orientation’ in striking what they perceive to be the right balance.<sup>377</sup> This interpretation of how States have over a long period of times been addressing the challenge of striking a fair balance between the conflicting interests at stake is not contradicted by the obvious facts that also national criminal courts will act impartially in a great many cases, that also international criminal courts with a credible universal orientation may err and fail in certain cases, and that they have, more often than not, been criticized for allegedly having been politically biased when they exercised their jurisdiction in politically sensitive contexts.<sup>378</sup>

Dapo Akando has formulated the most important **argument against** the legal view developed so far by maintaining that this position fails to explain why the States Parties to the ICC should, together, be in a position to do what they cannot achieve on their own.<sup>379</sup> Rosanne van Alebeek has followed up on this line of reasoning and has asked the following rhetorical question:

*‘The statement that two states cannot circumvent the right to immunity of a third State by establishing an international criminal court is uncontroversial. But if two states cannot do so, why would sixty?’<sup>380</sup>*

The argument is based on a **delegation model of the ICC’s jurisdiction** and built around the *inter partes* effect of an international treaty (or: *res inter alios acta*) and the Roman Law principle of *nemo plus iuris transferre potest quam ipse habet*. In a variation of this argument, it is maintained that the idea referred to in both the Taylor Decision<sup>381</sup> and the Jordan AJ that the exercise of jurisdiction by an international criminal court does not contradict the principle of *par in parem non habet imperium*, runs in a circle. For, a group of States may unite in order to bundle their powers of jurisdiction, but the States concerned nevertheless remain a group of peers *vis-à-vis* third States.

But this line of reasoning already fails to account for the international judicial precedents in the Milošević and Taylor cases and their acceptance within the international community. For, neither was the Federal Republic of Yugoslavia a UN Member State, when its incumbent President was indicted,<sup>382</sup> nor was the Republic of Liberia bound by the international treaty establishing the SCSL. And yet, the ICTY and the SCSL were deemed to be of a sufficiently credible universal orientation to justify the inapplicability of the CIL rule of personal immunity. This did not contradict the principle of *nemo plus iuris transferre potest quam ipse habet* because these international criminal courts did not exercise a bundle of delegated national jurisdiction titles, but

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jurisdiction of a foreign State was not the same as immunity from international criminal jurisdiction such as that of the International Criminal Court and the two should not be linked’.

<sup>377</sup> For the opposite view, see Kiyani (2013) 12 *ChineseJIL* 467, 491 ff. In the course of his sweeping criticism, the recognition of the fact, that ‘greater perceptions of objectivity’ have been playing an important role in the practice of States with regard to international criminal justice, gets somewhat distorted when it is reduced (*ibid.* 492) to the simplistic believe that ‘international courts are somehow uniquely impartial’.

<sup>378</sup> On the last point, see the perceptive analysis by Robinson (2015) 28 *LeidenJIL* 323, 333 ff.

<sup>379</sup> Akande (2004) 98 *AJIL* 407, 416–417; see also *Submissions of the Amicus Curiae on Head of State Immunity* by Sands and Macdonald in SCSL, *Prosecutor v. Charles Ghankay Taylor*, SCSL-2003-01-I, 23 Oct. 2003, 34 (para. 78).

<sup>380</sup> van Alebeek, *Immunity* (2008) 277.

<sup>381</sup> SCSL, *Prosecutor v. Charles Ghankay Taylor*, Decision on Immunity from Jurisdiction, 31 May 2004, SCSL-2003-01-I, 31 May 2004, para. 51; Jordan AJ, ICC-02/05-01/09-397-Corr. OA 2, para. 115.

<sup>382</sup> For a detailed demonstration of that point, see Horsthemke, *Immunitäten* (2019) 174 ff.; the point is recognized, though only in passing, by Akande (2004) 98 *AJIL* 407, 417 (fn. 470).

enforced the *ius puniendi* of the international community. In the same vein, the ICC has not been established to exercise delegated national jurisdiction but to exercise the *ius puniendi of the international community with respect to crimes under CIL*.<sup>383</sup> In the Malawi Decision, this was duly recognized in the form of the determination that ‘the *ius puniendi* of the international community (...) has been entrusted on this Court’.<sup>384</sup> Importantly, neither SC Res. 827 establishing the ICTY,<sup>385</sup> nor the international agreement establishing the SCSL,<sup>386</sup> nor the ICCS have created the relevant *ius puniendi*.<sup>387</sup> This *ius puniendi* rather predates the ICCS and is rooted in CIL.<sup>388</sup> In fact, the *ius puniendi* of the international community is inherent in the very concept of crime under CIL.<sup>389</sup> This concept was introduced into the international legal order as the result of practice of States, which started after the end of the First World War and in which States not party to the ICCS, such as the U.S. the Russian Federation or India, have played an important part (see above mn. 41 ff.). The explanation of the ICC’s jurisdiction as ultimately residing in the international community’s *ius puniendi* is rather obvious in case of the Court’s universal SC-based jurisdiction.<sup>390</sup> But the Court was not designed as an institution with two fundamentally different faces depending on whether or not the SC triggered the proceedings before it.<sup>391</sup> Instead, the Court was established to directly enforce one and the same *ius puniendi* of the international community whenever it exercises its jurisdiction. In the case of Article 12(2) of the ICCS, due to a political compromise struck at the Rome Conf., States have refrained from a comprehensive activation *ratione personae* of the *ius puniendi* of the international community. But to the extent that they have entrusted the Court with jurisdiction, the ultimate source of this jurisdiction remains ill-understood as a bundle of

<sup>383</sup> Triffterer, in: Triffterer, *Commentary* (2008) 6; *Observations by Professor Paola Gaeta as amicus curiae on the merits of the legal questions presented in the Hashemite Jordan’s appeal against the ‘Decision under Article 87(7) of the Rome Statute on the non-compliance by Jordan with the request by the Court for the arrest and surrender (of) Omar Al-Bashir’ of 12 Mar. 2018*, ICC-02/05-01/09-365 OA2, 18 Jun. 2018, 4 ff.; Gaeta and Labuda, in Jalloh and Baetckes, *ICC and Africa* (2017) 138, 152 ff.; the propriety of the ‘delegation model’ in the context of the exercise of international criminal jurisdiction over crimes under CIL has also been questioned by Zhong, *Criminal Immunity* (2014) 2.

<sup>384</sup> Malawi Decision, ICC-02/05-01/09-139, para. 46. In the same vein, Judge Ibáñez Carranza has stated in her *Separate and Conc. Op. on the Judgment on the Appeal of Mr Saif Al-Islam Gaddafi against the Decision of Pre-Trial Chamber I entitled ‘Decision on the “Admissibility Challenge by Dr. Saif Al-Islam Gaddafi pursuant to Articles 17(1)(c), 19, and 20(3) of the Rome Statute”*’, ICC-01/11-01/11-695-AnxI OA8, 21 Apr. 2020 48 (para. 129): ‘In the field of international criminal law, the Rome Statute is the first treaty that consolidates permanently the international *ius puniendi* for core crimes’ (emphasis in the original).

<sup>385</sup> S/RFS/827 (1993), 25 May 1993.

<sup>386</sup> SCSL, *Prosecutor v. Charles Ghankay Taylor*, Decision on Immunity from Jurisdiction, 31 May 2004, SCSL-2003-01-I, 31 May 2004, para. 51; Jordan AJ, ICC-02/05-01/09-397-Corr. OA 2, para. 35.

<sup>387</sup> This commentary does therefore not endorse the idea ‘that the Rome Conference was a quasi-legislative process during which the international community “legislated” by a non-unanimous vote’ (but see Sadat, *Transformation* (2002) 11). This is not to deny the possibility that the inclusive negotiation process that led to the definitions of crimes in the ICCS and the Elements of Crime may, at various points, have crystallized CIL.

<sup>388</sup> For an important recent study of this *ius puniendi*, see Ambos (2013) 33 *OJLS* 293 ff.; for an important contrary view, see Mégret (2019) 23 *Max Planck Yearbook of United Nations Law* 161ff.

<sup>389</sup> Triffterer, *Untersuchungen* (1966) 30–31, 210 ff.

<sup>390</sup> For an ultimately similar, though somewhat convoluted, explanation, see de Souza Dias (2019) 17 *JICJ* 507, 529 ‘a form of quasi-universal jurisdiction grounded in the Council’s Chapter VII powers’; for a different view, termed ‘Chapter VII-conception’, see Galand, *UNSC Referrals* (2019) 129 ff., 222–23.

<sup>391</sup> *Observations by Professor Paola Gaeta as amicus curiae*, ICC-02/05-01/09-365 OA2, 5. For such a view, however, König, *Legitimation* (2003) 407–408, who, however (and hereby, arguably, revealing an internal inconsistency), acknowledges that the conditions for the exercise of jurisdiction contained in Art. 12(2) ICCS have resulted from a political compromise rather than reflecting a legal necessity.



national titles to territorial and active personality jurisdiction.<sup>392</sup> While the exercise of these jurisdiction titles serves the pursuit of national interests, State Parties have made it possible through Article 12(2) of the ICCS, albeit with the limitations *ratione personae* contained therein, that the international community directly enforces its *ius puniendi*. For the sake of clarity, it may be added that the same reasoning would apply, if States had formulated Art. 12 ICCS, what they could lawfully have done, without limitations *ratione personae*. In such case, States would not have delegated to the Court a bundle of primarily national powers of universal jurisdiction over crimes under CIL. They would rather have enabled the international community to directly enforce, though the ICC, its *ius puniendi* with its full universal reach.<sup>393</sup>

The idea, that the *ius puniendi* over crimes under CIL is ultimately rooted in the normative concept of an overarching international community,<sup>394</sup> has been underlying the practice of States as early as after the First World War.<sup>395</sup> From there, an unbroken line runs to the reference to the 'international community as a whole' in the fourth preambular paragraph of the ICCS. In the meantime, the international legal concept of international community consolidated,<sup>396</sup> most importantly, through its inclusion in Article 53 VCLT. In its Barcelona Traction Judgment, the ICJ found that 'an essential distinction should be drawn between the obligations of a State toward the international community as a whole, and those arising to another State'.<sup>397</sup> The same legal logic applies to those obligations of individuals under CIL the violation of which gives rise to international criminality. These obligations are owed toward the international community and therefore the *ius puniendi* over crimes under CIL ultimately resides in this community. The latter not being organized,<sup>398</sup> it must be vested with organs in order to enforce its *ius puniendi*. National courts indirectly operate as organs of the international community when they exercise jurisdiction over crimes under CIL and an international criminal court with a credible universal orientation, such as the ICC, acts as a direct embodiment of this community. By definition, both the decentralized and the direct enforcement of the *ius puniendi* of the international community are grounded in the same ultimate source of jurisdiction. In that sense, the adjudication of ICL by national criminal courts and international criminal courts with a credible universal jurisdiction is

<sup>392</sup> This, however, is the position maintained, for example, by de Souza Dias (2019) 17 *JICJ* 507, 516 ff.; and Galand, *UNSC Referrals* (2019) 129; for a detailed criticism of the delegation model, see Morris (2001) 64 *L&ContempProbs* 13, 26 ff.

<sup>393</sup> Unfortunately, the Jordan AJ has not articulated the true nature of the Court with the same clarity as PTC I in the Muavia Decision (see above fn. 417). In paragraphs 52, 58, and 59 of the Joint Conc.Op., Jordan AJ, ICC-02/05-01/09-397-Corr. OA 2, the point has not been fully elucidated, either. PTC I came again very close to embrace the idea set out in the text when it made the statement referred to above in fn. 403. To the contrary, and regrettably, TC IV misconceived of the true nature of the ICC by stating that the ICC Statute 'is first and foremost a multilateral treaty which acts as an international criminal code to the parties to it'; ICC, *Prosecutor v. Ntaganda*, Second decision on the Defence's challenge to the jurisdiction of the Court in respect of Counts 6 and 9, TC IV, ICC-01/04-02/06-1707, 4 Jan. 2017, para. 35. This part of the decision was, fortunately, not endorsed on appeal in ICC, *Prosecutor v. Ntaganda*, Judgment on the appeal of Mr Ntaganda against the "Second decision on the Defence's challenge to the jurisdiction of the Court in respect of Counts 6 and 9", AC, ICC-01/04-02/06 OA5, 15 Jun. 2017.

<sup>394</sup> For a comprehensive analysis of the international legal concept of 'international community', see Paulus, *Internationale Gemeinschaft* (2001); see also Simma (1994) 250 *RCADI* 217, 243 ff.

<sup>395</sup> For a closer analysis with detailed references, see Krefß (2019) 62 *GYIL* (forthcoming).

<sup>396</sup> For a more detailed account, see Simma (1994) 250 *RCADI* 217, 285 ff.

<sup>397</sup> ICJ, *Barcelona Traction, Light and Power Company, Limited* (Belgium v. Spain) (New Application: 1962), 5 Feb. 1970, ICJ Rep. 1970, 3, 32 (para. 33).

<sup>398</sup> On this fundamental point and its implications, see Paulus, *Internationale Gemeinschaft* (2001) 423 ff.

not fundamentally different in character<sup>399</sup>. **But there is an important difference in institutional design** which brings the latter courts in a more intimate relationship with the international community and thereby structurally enhances the possibility that the community interest is loyally realized. This explains that the **balance** between the interest in the prosecution of persons allegedly most responsible for a crime under CIL and the conflicting interest in the undisturbed performance of the State functions entrusted upon its highest officials may be **struck differently depending on how the *ius puniendi* is enforced**.<sup>400</sup> Or, the words of Pierre d'Argent and Pauline Lesaffre, 'the international law obligations relating to the immunities of foreign States and of their representatives simply reflect the fact that, in the world of today, even a truly independent judge who applies international law remains the embodiment of a specific State, so its authority will always be perceived as such from outside: somehow, the theory of "*dédoublement fonctionnel*" proves its limits'.<sup>401</sup>

- 129 The concept of direct enforcement of the *ius puniendi* of the international community is not abused if it is applied to the exercise of the ICC's jurisdiction also in those instances where the Court's proceedings have not been triggered by the SC. Those great many States from all world regions, that have decided to establish the ICC in a transparent and inclusive process of global negotiations and by codifying or crystallizing the pre-existing substantive ICL, have not hereby hijacked the idea of an international community for the disguised pursuit of their national interests. Rather, they have decided, with a standing invitation to all other States to join them, to live up to a central aspiration underlying the entire customary process, which is to provide the international community with a court of credible universal orientation for the direct enforcement of this community's *ius puniendi*. This central aspiration consists of having the international criminal justice system move in the direction of the ideal of the equal enforcement of the law. This central aspiration resonates from one of the central passages of Robert Jackson's opening speech in Nuremberg (for the citation, see above in mn. 42) which amounted to a promise, in the form of robust verbal State practice, for the institutional design of a future international criminal justice system. The SC practice subsequent to the ICC establishment and with respect to the Court provides abundant evidence for the fact that **an institutional design, that does not make the enforcement of the *ius puniendi* dependent on the political will within the SC at a given moment in time, is far more conducive to the approximation to the ideal of the equal enforcement of the law**.<sup>402</sup> For this reason, it is unpersuasive to deny the credibility of

<sup>399</sup> Here is the point (already alluded to in the text above in mn. 125 and fn. 398) where the important observation in the Jordan AJ, ICC-02/05-01/09-397-Corr. OA 2, para. 115, needs a refinement. It is true that 'international courts act on behalf of the international community as a whole' when they enforce the *ius puniendi* of the international community. But the same must be said of a national criminal court that adjudicates a crime under CIL, especially when such court exercises universal jurisdiction. The essential point is that an international criminal court with a credible universal orientation constitutes a direct embodiment of the international community.

<sup>400</sup> On that specific basis, the Jordan AJ, ICC-02/05-01/09-397-Corr. OA 2, para. 116, could indeed speak of a 'fundamentally different nature of an international court as opposed to a domestic court exercising jurisdiction over a Head of State'. This formulation, as may be observed in passing, closely mirrors the statement contained in the Preliminary report on immunity of State officials from foreign criminal jurisdiction, by Special Rapporteur Roman Anatolevich Kolodkin, A/CN.4/601, 29 May 2008, 52 (para. 103) that '(i)mmunity from international criminal jurisdiction appears to be fundamentally different from immunity from national criminal jurisdiction'.

<sup>401</sup> d'Argent and Lesaffre, in: Ruys *et al.*, *HB Immunities* (2019) 614, 633.

<sup>402</sup> At the end of his study *UNSC Referrals* (2019) Galand correctly observes that 'the SC is certainly what causes the greatest legitimacy issues to the ICC (*ibid.* 228). In a similarly convincing vein, Kiyani (2013) 12 *ChineseJIL* 467, 503–504 points out that any unequal exposure to the Court's jurisdiction based on enhanced SC powers entails a serious legitimacy problem.

the universal orientation of an international criminal court to the extent that its proceedings have not received a SC blessing of some kind. For the same reason, it is equally **unpersuasive to allow a minority of States to prevent**, through their non-accession to the relevant treaty, a sufficiently representative group of States from **enabling the international community to directly enforce its pre-existing *ius puniendi***. Such a minority of States remains unaffected by the ICCS as a matter of treaty law. But those States cannot distance themselves from one legal effect that is ultimately rooted in CIL that is the inapplicability of the CIL rule on personal immunities before an international criminal court with a credible universal orientation.<sup>403</sup> In other words, the ICCS is not a 'world order treaty' or 'global treaty' in the sense that its State Parties have assumed the authority to define a global community interest by way of a majority decision.<sup>404</sup> But the ICCS may appropriately be called a world order treaty in the more limited sense that its State Parties have, in the course of a truly global negotiation process, endowed the international community with an organ in order to improve the prospects for the loyal realization of a global community interest, as it had already been defined through the ordinary process of the formation of CIL.

It bears emphasizing that the reasoning set out in the preceding paragraphs supports the inapplicability of the CIL rule of personal immunity in proceeding for a crime listed in the ICCS only to the extent that the **crime is rooted in CIL** and thus falls within the *ius puniendi* of the international community (see, *mutatis mutandis*, the text above in mn. 52 with respect to functional immunities). Should a case before the Court ever arise where a charge is laid against the official of a State not party to the ICCS which concerns (part of a definition of) a crime not rooted in CIL, the Court would, as a matter of CIL, be duty bound to observe the personal immunity of this State official not only before it issues a request for arrest and surrender, but already before issuing an arrest warrant. For, in such a case, the ICC would operate as a purely treaty-based Court and, as a treaty provision, Article 27(2) of the ICCS could not be invoked to the detriment of a State not party to the ICCS.<sup>405</sup> But the 'original intent' to establish one single ICC with a jurisdiction *ratione materiae* confined to 'most serious crimes of concern to the international community as a whole',<sup>406</sup> hence crimes under CIL, must be re-emphasized (see again text above in mn. 52). This often recorded and documented original intent should guide the interpretation of the definitions of crimes enshrined in the ICCS, unless it is clearly apparent that the drafters of an amendment of the ICCS have decided to change direction and to abandon the idea of one single ultimate source of the ICC's jurisdiction, that is the *ius puniendi* of the international community.<sup>407</sup> In identifying the ambit of this *ius puniendi* and, as a corollary hereof, the inapplicability of the CIL rule of personal immunity, the ICC **must guard with rigor against stretching the boundary**. It is at this very point of the analysis that Roth's two important insights should be borne in mind that the concept of State sovereignty provides for scope for moral disagreement within a pluralist international legal order and affords States with protection against direct external intrusion even in cases of violations of international

<sup>403</sup> The point is alluded to, but not fully spelled out, in paragraph 57 of the Joint Conc.Op., Jordan AJ, ICC-02/05-01/09-397-Corr. OA 2, where the four judges find that 'the universal character remains undiminished by the mere fact any of the States entitled to join it elected to stay out in the meantime'.

<sup>404</sup> On the debate about such a genre of treaties, see, for example, Morris (2001) 64 *L&ContempProbs* 13, 52 ff.; Simma (1994) 250 *RCADI* 217, 331 ff.; Tomuschat (1993) 241 *RCADI* 195, 269 ff.

<sup>405</sup> To that extent, there is thus no disagreement with the 'delegation model' espoused, for example, by de Souza Dias (2019) 17 *JICJ* 507, 516 ff.; and Galand, *UNSC Referrals* (2019) 129.

<sup>406</sup> ICCS, fourth preambular consideration.

<sup>407</sup> De Souza Dias and Galand (*ibid.*), however, take it for granted, and both without detailed analysis, that the definitions of crimes included in the ICCS, at various places, depart from CIL.

law.<sup>408</sup> The *ius puniendi* of the international community, as rooted in CIL, draws the red line along which this shield ends.<sup>409</sup> A pushing of that boundary through judicial activism would indeed warrant the criticism that the Court hijacks the international legal concept of the international community.

- 131 In accordance with the view set forth in this commentary since its second edition position,<sup>410</sup> a position then adopted in the Malawi Decision (see above mn. 100) and subsequently confirmed in the Jordan AJ (see above mn. 107) and further explained in the Joint Conc.Op. (see above mn. 111), **the arrest and surrender by a State Party to the ICC at the request of the Court** does not constitute the exercise of national criminal jurisdiction for the purposes of the CIL rule on personal immunity. For those purposes, it rather **forms part of the proceedings before the ICC** in which the **CIL rule of personal immunity** (including inviolability<sup>411</sup>) is **inapplicable** rather than constituting an exercise of national criminal jurisdiction which is subject to the latter rule of CIL.
- 132 It is not correct simply to set as the baseline for the identification of the applicable CIL that the arrest and surrender by a State Party to the ICC at the request of the Court constitutes an exercise of national criminal jurisdiction for the purposes of the CIL rule on personal immunity and, departing from that premise, to place the onus on those who want to demonstrate that ‘an exception to this rule’ has developed for proceedings before certain international criminal courts through a general practice of States accepted as law. Instead, the primary task is to interpret the CIL rule on personal immunity from foreign criminal jurisdiction in order to ascertain whether it **covers the arrest and surrender** of a suspect by a State Party at the request of the ICC **or** whether the procedural action rather **forms part of the proceedings before the ICC**. States may authoritatively answer this question of interpretation through a consistent practice. But in the absence of such a consistent practice, the question of interpretation is ultimately one for judicial ascertainment giving due regard to the rationales of the CIL rules under consideration.
- 133 On the question of interpretation under consideration, there is **no consistent practice of States**, as was correctly stated in the Min.Op. of Judge Perrin de Brichambaut appended to the South Africa Decision (see above mn. 103). Although this has only rarely been taken into consideration,<sup>412</sup> it bears mentioning at the outset that, in the Milošević case, the ICTY had found the CIL rule of personal immunity not to apply to the arrest and surrender of a suspect by a UN Member State so requested. The ICTY had accordingly transmitted its warrant of arrest for Milošević to all UN Member

<sup>408</sup> The argument is set out in monographic length in Roth, *Sovereign Equality and Moral Disagreement* (2014) 230 ff.

<sup>409</sup> Paulus, *Internationale Gemeinschaft* (2001) rightly speaks of a global minimal consensus.

<sup>410</sup> Kreß and Prost, in: Triffterer and Ambos, *ICC Commentary* (2016) 2136–2137 (mn. 33); *id.*, in: Triffterer, *ICC Commentary* (2008) 1612–1613 (mn. 23).

<sup>411</sup> Weatherall (2019) 17 *JICJ* 45, 47 ff. suggests distinguishing between personal immunity and inviolability. Yet, neither the verbal practice of States (including the negotiations leading to the formulation of Art. 98 ICCS), nor the judicial practice (including the case law of the ICC), nor the scholarly debate supports the idea that such a distinction has any bearing on the matter. Rather, as Weatherall himself correctly observes that ‘there is an overwhelming tendency to fold the two concepts (personal immunity and inviolability from arrest; C.K.) together’ (*ibid.* 51) and ‘a belief that immunity *ratione personae* subsumes inviolability in this context (such that the applicability of immunity *ratione personae* from foreign jurisdiction includes inviolability from physical interference)’ (*ibid.* 74). In light of these correct observations, the distinction between personal immunity and inviolability, rather than advancing the legal analysis, constitutes an artificiality.

<sup>412</sup> This is true also for the previous edition of this commentary. But see Weatherall (2019) 17 *JICJ* 45, 55.



States.<sup>413</sup> It should be recalled that this international judicial action pertained to the incumbent President of a State that, at the material time, was not a member of the UN.<sup>414</sup> On the other hand, and as far as the ICC is concerned, the AU has consistently articulated its legal conviction that the arrest and surrender decision by a requested State Party constitutes an exercise of national criminal jurisdiction subject to the CIL rule of personal immunity (see above mn. 122). In the course of the proceedings before the AC on Jordan's appeal against the Jordan Decision, this view was endorsed by Jordan<sup>415</sup> and by the Arab League.<sup>416</sup> Yet, already the practice of African States lacks unanimity.<sup>417</sup> Perhaps, most notably, in 2018, the Court of Appeal at Nairobi determined that 'under customary international law (...) it was legitimate for Kenya to disregard President Al-Bashir's immunity and to execute the ICC's request for cooperating by arresting him'.<sup>418</sup> In 2016, the Supreme Court of South Africa had not gone that far, but had found that 'customary international law is in a state of flux' and that this is insufficient to determine that there exists 'an international criminal law exception to the immunity and inviolability that heads of state enjoy when visiting foreign countries and before foreign national Courts'.<sup>419</sup> But this did not preclude the Supreme Court to determine that 'South Africa decided to implement its obligations under the Rome Statute (...) on the basis that all forms of immunity, including head of state immunity, would not constitute a bar to (...) South Africa cooperating with the ICC, where an arrest warrant had been issued and a request for cooperation made'. This, the South African Supreme Court of Appeal found 'does not undermine customary international law'.<sup>420</sup> This cannot be read other than to suggest – as has been articulated in greater detail in the third scholarly opinion referred to above mn. 95 – that while the South African Supreme Court did not consider the ICC exception to the CIL rule of personal immunity to encompass the arrest and surrender by a State Party at the request by the ICC, the South African Supreme Court did not believe that, in such a scenario, the latter CIL rule applied with the same force as in case of national criminal proceedings. There is thus more than a nuance between the 2016 Al-Bashir Decision of the South African Supreme Court and the position voiced on the international plane by the AU.

<sup>413</sup> ICTY, *Prosecutor v. Slobodan Milošević et al.*, OTP, Decision on Review of Indictment and Application for Consequential Orders, Judge David Hunt, IT-02-54, 24 May 1999, para. 38.

<sup>414</sup> This point is not mentioned by Weatherall (2019) 17 JICJ 45, 64–65.

<sup>415</sup> ICC, *The Hashemite Kingdom of Jordan's appeal against the "Decision under article 87(7) of the Rome Statute on the non-compliance by Jordan with the request by the Court for arrest and surrender (of) Omar Al-Bashir"*, ICC-02/05-01/09-326 RH PT OA2, 12 Mar. 2018, para. 23; *The Hashemite Kingdom of Jordan's to the Observations submitted by Professors of International Law pursuant to rule 103 of the Rules of Procedure and Evidence*, ICC-02/05-01/09-368, NM PT OA2, 16 Jul. 2018, para. 3 (fn. 9).

<sup>416</sup> ICC, *The League of Arab States' Observations on the Hashemite Kingdom of Jordan's Appeal Against the "Decision under Article 87(7) of the Rome Statute on the non-compliance by Jordan with the request by the Court for the arrest and surrender (of) Omar Al-Bashir"*, 16 Jul. 2018, ICC-02/05-01/09-367 OA2, para. 26.

<sup>417</sup> For an early appraisal of the practice of African States, see Keppler (2012) 56 JAFricanL 4 ff. On the more recent divide between instances of practice by executive and judicial branches of African States, see Weatherall (2019) 17 JICJ 45, 72.

<sup>418</sup> *The AG & 2 others v. The Kenya Section of the International Commission of Jurists*, Civil Appeal No. 105 CF 2012 consolidated with Criminal Appeal No. 274 OF 2011, (2018) eKLR, 16 Feb. 2018.

<sup>419</sup> *The Supreme Court of Appeal of South Africa, The Minister of Justice and Constitutional Development et al. v. The Southern Africa Litigation Centre et al.*, Case No. 867/15, 15 Mar. 2016, (2016) ZASCA 17, 56–57 (para. 84).

<sup>420</sup> *Ibid.* 68–69 (para. 103).

- 134 Contrary to what was asserted on behalf of Jordan before the ICC AC,<sup>421</sup> the ILC has not taken a position on the question whether the CIL rule of personal immunity applies to the arrest and surrender of a beneficiary of this rule by a State Party to the ICCS at the request of the Court.<sup>422</sup> The question was, however, discussed in great detail before the AC in the lead-up to the Jordan AJ. In particular, Roger O’Keefe, in his capacity as *amicus curiae*, provided the Chamber with a detailed summary of the argument in support of the view that the CIL rule of personal immunity applies to the arrest and surrender of a beneficiary of this rule by a State Party to the ICCS at the request of the Court. The core of O’Keefe’s submission to the AC was as follows:

*‘To say that in surrendering the official to the ICC, the requested State is acting as the ICC’s agent or jurisdictional proxy, is legally meaningless. It is also, I would point out, an inaccurate metaphor, since it is the States Parties which have conferred jurisdiction on the Court, not the other way around. What engages immunity and inviolability is the subjection of the official to the power of a foreign State’s own criminal courts and own police. The source or purpose of any such request for subjection is immaterial.’<sup>423</sup>*

The argument submitted by O’Keefe can be approached from a formal and from a functional perspective. The *formal perspective* is that of attribution under CIL. As of yet, the question of whether the conduct of a State may be attributed to an international organization to the extent that such State implements a binding decision made by an international organization without retaining an element of discretion, has not received a closer scrutiny in respect of the execution of request for arrest and surrender made by the ICC<sup>424</sup> and this commentary does not take a position in that respect. The following counter-argument against O’Keefe’s line of reasoning does therefore not entail the assertion that the execution of the Court’s request for arrest and surrender by the requested State is attributable to the Court under the CIL rules of attribution. Instead, this counter-argument adopts a *functional perspective* which takes as a starting point the essential reason for the applicability of the CIL rule on personal immunity in national proceedings even in cases of crimes under CIL. As was shown above mn. 124, the essential consideration is that, in view of ‘the perception of comparatively lesser objectivity’ of national criminal courts, the balance between the interest in conducting proceedings for crimes under CIL and the State interest in ensuring that its highest State officials are not unduly impeded in the effective performance of their duties is currently struck in favour of the latter interest as far as national criminal proceedings are concerned. Yet, where the national authorities do not institute proceedings on their own initiative, but execute the request of an international criminal court with a credible universal orientation, such as the ICC; there can be no legitimate concern of their conduct being perhaps insufficiently insulated against possible policy motivations of the

<sup>421</sup> Murphy (counsel for Jordan), Transcript, ICC-02/05-01/09-T-5-ENG, 11 Sep. 2018, 87.

<sup>422</sup> See the *Eighth report on immunity of State Officials from foreign criminal jurisdiction*, by Concepción Escobar Hernández, Special Rapporteur, A/CN.4/739, 28 Feb. 2020, 7–8 (para. 17), and, in particular, 10–12 (paras. 27–32), where it is suggested not to take a position on the matter.

<sup>423</sup> O’Keefe (*amicus curiae*), Transcript, ICC-02/05-01/09-T-5-ENG, 11 Sep. 2018, 4. *Ibid.* 4–5 O’Keefe draws an analogy to inter-State extradition within the European Union under the Arrest Warrant regime; for a response to this consideration see Kreß (*amicus curiae*), Transcript, ICC-02/05-01/09-T-5-ENG, 11 Sep. 2018, 39.

<sup>424</sup> I am grateful to Keiichiro Kawai (Kyoto University) for pointing that out to me. The question of attribution of the conduct of an organ of a State to an international organization under CIL has received closer attention in connection with the ILC’s Draft Article 7 on responsibility of international organizations, ILC, *Report of the ILC, Sixty-third session* (26 Apr. – 6 Jun. and 4 Jul. to 12 Aug. 2011), A/66/10, 40 (para. 87).

national State concerned. Rather, a State that loyally executes a request for arrest and surrender by the ICC acts within the overall framework of international criminal proceedings. The ‘greater perceptions of objectivity’ therefore extend to the arrest and surrender of a person by a State Party at the request of the Court. If seen from a functional perspective, the **requested State is therefore assisting in the ICC’s direct enforcement of the *ius puniendi* of the international community** rather than exercising its own criminal jurisdiction. Or, to take up a term used in the Joint Conc.Op., the requested State Party functionally **acts as a surrogate for the non-existing purely international execution mechanism.**<sup>425</sup> This point is only further emphasized by the strong verticality enshrined in the second sentence of Article 59(4) ICCS pursuant to which ‘(i)t 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)’. This counter-argument carries the greater force and it has therefore rightly been adopted by the Jordan AJ and spelled out in greater detail in the Joint Conc.Op.

The State practice in support of the reasoning set out in the preceding paragraphs on the inapplicability of the CIL rule on personal immunity in proceedings for crimes under CIL before the ICC directly concerned Heads of States, Heads of Government and Minister of Foreign Affairs. But in view of the fact that the various personal immunities referred to above in mn. 84–88 can be explained on the basis of a common rationale (as pointed out above in mn. 89), **this reasoning must apply to all customary international personal immunities.**

Therefore, the reasoning also covers the **CIL personal immunity of diplomats.** As was mentioned (above in mn. 84–85), diplomatic immunity lies at the origin of the entire development of CIL personal immunity and has provided the model for Head of State Immunity has evolved, it bears recalling at the outset that the personal immunity only applies *inter partes* (see above mn. 84). Already for that reason, the relevant CIL rule does not bind the ICC. Yet, the inapplicability of the CIL rule on personal immunity in proceedings for crimes under CIL before the ICC is relevant in order to explain why diplomatic personal immunity under CIL does not apply at the horizontal level of the triangular legal relationship between the Court, a requested receiving State of a diplomat sought by the Court and a State not party to the ICCS that had sent the diplomat. In that respect, the inapplicability of the CIL rule on personal immunity in proceedings for crimes under CIL before the ICC with respect to Heads of State must reflect back on diplomats. The legal situation cannot be different with respect to the conventional international law personal immunity of diplomats, as enshrined in the VCDR. This Convention has codified the personal diplomatic immunity which existed under CIL. The fact that the Convention does not specify the inapplicability of the CIL rule on personal immunity in proceedings for crimes under CIL before an international criminal court with universal orientation is readily explained by the fact that it was negotiated and adopted at a moment in time when the possibility of the establishment of such a Court was not in the mind of the drafters. This fact does not, however, exclude, and, in view of the principle of systemic integration codified in Article 31(3)(c) VCLT, it should not exclude, a construction of the conventional provisions on diplomatic personal immunity in line with the evolution of the relevant CIL. It must

<sup>425</sup> Joint Conc.Op., Jordan AJ, ICC-02/05-01/09-397-Corr. OA 2, sub-title before para. 441. This should be read in conjunction with the important passage in para. 55 where the four judges rightly speak of an ‘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 (emphasis in the original)’.

be emphasized, though, that the above considerations do not apply to the inviolability of the diplomatic premises (see above mn. 14).

- 137 The reasoning must further cover the CIL personal immunity protecting **State officials sent on a special mission**. As was mentioned above in mn. 86–87, it is this CIL rule pursuant to which high-ranking State officials other than Heads of State, Heads of Government, and Ministers of Foreign Affairs may enjoy personal immunity. This protection, first of all, is not directly relevant for the ICC as, similar to diplomatic personal immunity, it applies only *vis-à-vis* the receiving State. Yet, here, and in analogy to the case of diplomatic personal immunity, the inapplicability of the CIL rule on personal immunity in proceedings for crimes under CIL before the ICC is relevant in order to explain why special mission personal immunity under CIL does not apply at the horizontal level of the triangular legal relationship between the Court, a requested receiving State of a member of a special mission sought by the Court and a State not party to the ICCS that had sent the special mission. In that respect, the CIL personal immunity protection of a member of a special mission cannot go further than that enjoyed by a Head of State, a Head of Government, and a Minister for Foreign Affairs. The considerations set forth in the preceding paragraph concerning the interpretation of the conventional immunity provision enshrined in the VCDR apply *mutatis mutandis* with respect to those contained in the 1969 Convention on Special Missions. A separate legal issue would arise in case a State Party and a State not party concluded a bilateral agreement providing for special mission immunity with the clear intent to make this conventional immunity protection applicable also in proceedings before the ICC in order to avoid the consequences of the inapplicability of the CIL rule on personal immunity in proceedings for crimes under CIL before an international criminal court with universal orientation. In such case, the first question would be whether such an agreement was contrary to what the Joint Conc.Op. termed ‘*jus cogens* norms that largely underwrite the international obligations to prevent and punish the violations proscribed in the Rome Statute’.<sup>426</sup> But at this stage of the legal development, it may be doubted whether a special mission agreement, as under consideration, would be contrary to *jus cogens* and thus invalid. Nevertheless, State Parties are not in a legal position to hinder the Court’s full exercise of jurisdiction through the conclusion of new bilateral immunity agreements. As will be set out below in mn. 170 ff., agreements concluded between a State Party and a State not party after the State Party’s signature of the ICCS do not fall under Article 98(2) ICCS. The same logic leads to the conclusion that a conventional special mission immunity newly established by a bilateral agreement between a State Party and a State not party is incapable of creating that kind of conflict of international obligation that the Court, in the application of Article 98(1) ICCS, must prevent from occurring. At the same time, the ICC should not take by surprise a State Party that has received a special mission in good faith. If the Court subsequently issues an arrest warrant concerning a person, who forms part of this mission, it should not request the receiving State Party to arrest and surrender that person in the course of the relevant mission without having first obtained the cooperation by the third State.

- 138 Ultimately, the legal situation can only be the same with respect to the conventional immunities of **members of State delegations to conferences or meetings hosted by an International Organization**. In view of the principle of systemic integration codified in Article 31(3)(c) VCLT, the relevant treaty provisions must be construed in harmony with the inapplicability of the CIL rule on personal immunity in proceedings for crimes under CIL before the ICC in order to avoid that lower-ranking State officials enjoy a

<sup>426</sup> Joint Conc.Op., Jordan AJ, ICC-02/05-01/09-397-Corr. OA 2, para. 218.



personal immunity where their Heads of State, Heads of Government and Ministers for Foreign Affairs do not.<sup>427</sup> This question had been lurking in the background of the discussion about the legal status of Mr Al Bashir in Jordan as the purpose of his stay in Jordan was his attendance of the 28<sup>th</sup> Arab League Summit. In view of that, Jordan and the Arab League had argued that Al Bashir, in addition to his asserted Head of State CIL personal immunity, had also been enjoying a conventional immunity protection under the 1953 Convention on the Privileges and Immunities of the League of Arab States.<sup>428</sup> The Jordan AJ did not deal at great length with that Convention as it found that the relevant provisions had in any event been displaced by virtue of SC Res. 1593 (see below mn. 141 ff.).<sup>429</sup> It did therefore not specify its views on whether Al Bashir fell within the personal immunity provision enshrined in this Convention while in attendance of the 28<sup>th</sup> Arab League Summit and how to align this provision with the inapplicability of the CIL rule on personal immunity in proceedings for crimes under CIL before the ICC.

As was shown (above mn. 117), in the course of the history of international criminal justice, States have recognized that it is essential for the legitimacy of international criminal justice as well as for the realization of the expressive function of ICJ<sup>430</sup> that an international criminal court with credible universal orientation is not barred by any personal immunity protection from enforcing the *ius puniendi* of the international community over an incumbent Head of State, Head of Government or Minister for Foreign Affairs. Yet, the **balance** struck with the conflicting interest in the effective performance of duties by these high State officials remains a **delicate one** in particular in view of the possibility inherent in any criminal proceedings that they may result in an acquittal. The first and foremost consequence of that fact must be never to proceed with undue haste before a decision about an arrest warrant against a beneficiary of personal immunity under the CIL rule applicable in national criminal proceedings is made. To the contrary, the Prosecutor must apply his or her utmost care to such a decision in due reflection of the delicacy of the balance struck between the conflicting interests at stake. Second, the Joint Conc.Op. has rightly found that Rule 134<sup>quater</sup> RPE, according to which an accused fulfilling extraordinary public duties at the highest national level may be excused from presence at trial, was adopted with a view to accommodate, to a certain extent, the interests of the State of the official sought.<sup>431</sup> Whether in certain circumstances the Court should, third, leave open a small window for certain minimal contacts between State Parties and a high-ranking State official sought by the Court, is a matter for practical consideration not to be pursued further in this commentary.<sup>432</sup>

As Sarah Nouwen has astutely observed, ‘the question of the limits on immunity is (...) about a prioritization of values *within* international law’.<sup>433</sup> This has been duly recognized in the Joint Conc.Op. and this commentary takes the view that the **Jordan AJ** has **struck the balance in accurate reflection of the practice of States** since the end of the First World War. The fact that there is currently no agreement among States

<sup>427</sup> Krels (*amicus curiae*), Transcript, ICC-02/05-01/09-T-7 NB PT OA2, 13 Sep. 2018, 70–71.

<sup>428</sup> For the most detailed exposition of this argument, see ICC, *The League of Arab States’ Observations on the Hashemite Kingdom of Jordan’s Appeal Against the “Decision under Article 87(7) of the Rome Statute on the non-compliance by Jordan with the request by the Court for the arrest and surrender (of) Omar Al-Bashir”*, 16 Jul. 2018, ICC-02/05-01/09-367 OA2, paras. 7 ff. (with references to the relevant legal instruments).

<sup>429</sup> Jordan AJ, ICC-02/05-01/09-397-Corr. OA 2, para. 158.

<sup>430</sup> On international criminal law’s expressive function, see, in particular, the illuminating study by Damaška (2007) 83 *ChicagoKLRev* 329, 345.

<sup>431</sup> *Ibid.* para. 187.

<sup>432</sup> ICC, *Amicus Curiae Observations of Professors Robinson, Cryer, deGuzman, Lafontaine, Oosterveld, and Stahn*, ICC-02/05-01/09-362 EC PT OA2, 17 Jun. 2018, paras. 21–22.

<sup>433</sup> Nouwen (2019) *CambridgeLJ* 1, 15 (emphasis in the original).

about the conclusion reached by the ICC AC does not contradict this view. This fact does, however, suggest that it might be worthwhile to request the ICJ return to its ‘certain international criminal courts’ *dictum* in the Arrest Warrant Judgment in view of the Jordan AJ.<sup>434</sup> Should the ICJ find differently than the Jordan AJ, the ICC should leave the ICJ the last word for the time being. Should the ICJ concur with the ICC, this would add significantly to the authority of this legal view. For, though it may be deplored, for some observers the ICC’s specific mandate gives rise to the suspicion that this Court operates with an almost in-built international criminal justice bias.<sup>435</sup>

- 141 (2) **The inapplicability of personal immunities in proceedings before the Court as a result of Security Council decisions.** In view of the fact that the CIL rule of personal immunity does not apply in proceedings for crimes under CIL before the ICC including the horizontal limb of the triangular legal relationship between the ICC, a requested State Party and a third State, the question of whether the SC could, through a legally binding resolution, **displace any applicable CIL personal immunity** is essentially a theoretical one. But as it has received much attention both in the case law of the ICC and in international legal scholarship in connection with SC Res. 1593 on Sudan (Darfur),<sup>436</sup> the question will be addressed in the following paragraphs.
- 142 In the **DRC, South Africa and Jordan Decisions**, it was held that the SC, through its Res. 1593, displaced any applicable CIL personal immunity of Al Bashir for the purpose of proceedings before the ICC, including the horizontal limb of the triangular legal relationship between the ICC, a requested State Party and a third State. The PTCs, however, used two different lines of reasoning.
- 143 In the DRC Decision, it was determined that the SC had **implicitly lifted** any immunities of Al Bashir through requiring Sudan under the second operative paragraph of Res. 1593 to ‘cooperate fully’ with the Court.<sup>437</sup>
- 144 While this interpretation met with the agreement of some **international legal scholars**,<sup>438</sup> others questioned whether the words ‘cooperate fully’ could have the effect of implicitly displacing of an existing immunity or whether they could have merely entailed the duty to waive an existing immunity right.<sup>439</sup>
- 145 The South Africa and Jordan Decisions responded to that criticism and found that, through the combined effect of the referral and the imposition on Sudan of the requirement to ‘cooperate fully’, the SC had placed that State in a **situation, that was for all cooperation purposes analogous to that of a State Party**, including the applicability of Article 27(2) of the ICCS.<sup>440</sup> This latter line of reasoning had been developed by Dapo Akande<sup>441</sup> and other scholars had subsequently taken it up.<sup>442</sup>

<sup>434</sup> In support of such a request Nouwen *ibid.* 15–16; in the same direction already Kreß in: Bergsmo and Ling *State Sovereignty* (2012) 223, 263–264.

<sup>435</sup> For one example of such a suspicion *vis-à-vis* the ICC and the harbouring of greater trust in the ICJ, see Nouwen *ibid.* 15–16; in the same direction, see Kiyani (2013) 12 *ChineseJIL* 467, 505; for a lucid analysis of the ICC’s rough place amidst severe tensions and conflicting expectations, see Robinson (2015) 28 *LeidenJIL* 323 ff. with nuanced conclusions at 344 ff.

<sup>436</sup> S/RES/1593 (2005), 31 Mar. 2005.

<sup>437</sup> DRC Decision, ICC-02/05-01/09-195, 9 Apr. 2014, paras. 29–31.

<sup>438</sup> Ambos, *Treatise ICL III* (2016) 620; Boschiero (2015) 13 *JICJ* 625, 647 ff.

<sup>439</sup> See, for example, Pedretti, *Immunity* (2015) 291–292; Horsthemke, *Immunitäten* (2019) 275; for an earlier position in the same direction, see Blommesteijn and Ryngaert (2010) 6 *ZIS* 428, 441, 444.

<sup>440</sup> South Africa Decision, ICC-02/05-01/09-302, 6 Jul. 2017, paras. 91–95; Jordan Decision, ICC-02/05-01/09-309, 11 Dec. 2017, paras. 37–40.

<sup>441</sup> Akande (2009) 7 *JICJ* 333, 345–348; see also Kreß, in: Bergsmo and Ling, *State Sovereignty* (2012) 223, 240–243.

<sup>442</sup> See, for example, Pedretti, *Immunity* (2015) 288–292.

**The reasoning put forward in the South Africa and Jordan Decisions did not convince everybody, either.** In particular, it met with the opposition of Jordan, the AU and the Arab League. Their common position was that a SC referral pursuant to Article 13(b) of the ICCS did not, without further language, render Article 27(2) of the ICCS applicable to a State not party to the ICCS.<sup>443</sup> As regards the words ‘cooperate fully’ in the second operative paragraph of SC Res. 1593, Jordan, the AU and the Arab League maintained that, neither by themselves nor in conjunction with Article 13(b) ICCS, could they be interpreted as implicitly removing a CIL personal immunity applying at the horizontal level of the triangular legal relationship between the ICC, a requested State Party and Sudan.<sup>444</sup> In the same context, it was also put forward that a displacement of a CIL personal immunity by the SC would require the inclusion of an explicit provision to that effect in the relevant resolution. One consideration advanced in support of such a requirement was the need for a waiver of immunity to take an explicit form.<sup>445</sup> In order to make the same point, Jordan, in particular, drew on the pronouncement by the ECtHR that an intention of the SC to impose any obligations on member States to breach fundamental principles of human rights cannot be presumed.<sup>446</sup> Finally, Asad G. Kiyani went beyond all those arguments and argued that a SC Res., while taking precedence over conflicting treaty obligations in accordance to Article 103 of the UN Charter, does not trump CIL and could, for this reason, not have the effect of displacing an applicable CIL personal immunity.<sup>447</sup>

In the **Jordan AJ**, the **AC** found that **Sudan**, by virtue of SC Res. 1593, **could not have invoked any CIL personal immunity** both *vis-à-vis* the Court and *vis-à-vis* a State Party that was requested by the Court to arrest and surrender Al Bashir.<sup>448</sup> The AC found that, in case of a SC referral pursuant to Article 13(b), the SC may decide whether States not party to the ICCS will have to cooperate with the ICC in a manner analogous to State Parties or whether the cooperation will retain its ordinary voluntary nature as alluded to in Article 87(5).<sup>449</sup> The AC held that the words ‘cooperate fully’ in the second operative paragraph of SC Res. 1593 indicated that the SC had decided to place Sudan under an obligation to cooperate. In the absence of a distinct set of cooperation duties triggered by a SC referral, Sudan’s obligations to cooperate could only be those applying

<sup>443</sup> ICC, *The Hashemite Kingdom of Jordan’s appeal against the “Decision under article 87(7) of the Rome Statute on the non-compliance by Jordan with the request by the Court for arrest and surrender (of) Omar Al-Bashir”*, ICC-02/05-01/09-326 RH PT OA2, 12 Mar. 2018, para. 63; ICC, *Prosecutor v. Al Bashir*, African Union’s Submissions in the “Hashemite Kingdom of Jordan’s Appeal Against the ‘Decision under Article 87(7) of the Rome Statute on the Non-Compliance by Jordan with the Request by the Court for the Arrest and Surrender (of) Omar Al-Bashir’”, 13 Jul. 2018, ICC-02/05-01/09 OA2, paras. 33–39; ICC, *The League of Arab States’ Observations on the Hashemite Kingdom of Jordan’s Appeal Against the “Decision under Article 87(7) of the Rome Statute on the non-compliance by Jordan with the request by the Court for the arrest and surrender (of) Omar Al-Bashir”*, 16 Jul. 2018, ICC-02/05-01/09-367 OA2, paras. 6, 36; in the same critical vein, see *Observations by Professor Paola Gaeta as amicus curiae on the merits of the legal questions presented in the Hashemite Jordan’s appeal against the ‘Decision under Article 87(7) of the Rome Statute on the non-compliance by Jordan with the request by the Court for the arrest and surrender (of) Omar Al-Bashir’* of 12 Mar. 2018, ICC-02/05-01/09 OA2, 18 Jun. 2018, 4 ff.

<sup>444</sup> ICC, *Jordan’s appeal*, ICC-02/05-01/09-326 RH PT OA2, 12 Mar. 2018, para. 65; ICC, *African Union’s Submissions*, paras. 52–62; ICC, *The League of Arab States’ Observations*, ICC-02/05-01/09-367 OA2, para. 6; in the same vein, see, for example, ICC, *Observations by Professor Paola Gaeta*, ICC-02/05-01/09 OA2, 7; Tladi (2015) 13 *JICL* 1027, 1043; Mettraux *et al.* (2018) 18 *ICLRev* 577, 609.

<sup>445</sup> Tladi (2015) 13 *JICL* 1027, 1043; ICC, *Jordan’s Appeal*, ICC-02/05-01/09-326 RH PT OA2, 12 Mar. 2018, para. 69.

<sup>446</sup> *Ibid.* para. 70.

<sup>447</sup> Kiyani (2013) 12 *ChineseJIL* 467, 486.

<sup>448</sup> *Jordan AJ*, ICC-02/05-01/09-397-Corr. OA 2, para. 149.

<sup>449</sup> *Ibid.* para. 137.

to States Parties under Part 9 of the ICCS.<sup>450</sup> And as the obligation to cooperate by a State Party is to be interpreted in light of Article 27(2), the AC determined that the same logic had to apply with respect to Sudan.<sup>451</sup> In the view of the AC, the legal situation was therefore as follows:

*‘There is no reason to assume that article 27(2) would not be applicable to cooperation by Sudan. (...) “full cooperation” in accordance with the Statute encompasses all those obligations that State Parties owe to the Court and that are necessary for the effective exercise of jurisdiction by the Court. Article 27(2) applies in the sense that immunities that Sudan may otherwise enjoy under international law, as a matter of its relations with another State, cannot bar the Court’s exercise of jurisdiction. There would simply be no “full cooperation” if Sudan could invoke immunities vis-à-vis the Court that may otherwise exist under national or international law, as a matter of its relations with another State. If that were the case, the Court’s ability to punish crimes that may have been committed in the Darfur situation would be limited from the start, and the Court’s exercise of jurisdiction would not be effective. Given that Sudan was therefore not in a position to rely on Head of State immunity for Mr Al-Bashir, the Appeals Chamber considers that there was no need for the Court to obtain a waiver from Sudan before it could proceed with a request to Jordan for Mr Al-Bashir’s arrest and surrender, in accordance with article 98(1) of the ICC Statute. (...) Article 98(1) does not itself generate or preserve any immunity. As Sudan could not invoke Head of State immunity vis-à-vis a request by the Court for the arrest and surrender of Mr Al-Bashir, there was nothing that could have been waived. The legal obligation under Resolution 1593, which imposed on Sudan the same obligation of cooperation that the Rome Statute impose on States Parties, including with regard to the applicability of article 27(2) of the Statute, prevailed as *lex specialis*, over any immunity that would otherwise exist between Sudan and Jordan.’<sup>452</sup>*

The AC found this interpretation of SC Res. 1593 all the more apposite as the Cassese Commission Report, which formed the resolution’s immediate background, had strongly pointed in the direction of suspects being situated at the highest level of Sudan’s State apparatus.<sup>453</sup> Finally, the AC remained unpersuaded by the argument that the displacement of any applicable CIL immunity would have required an explicit provision to that effect. In that respect, the AC emphasized that the legal effect of the SC Res. was not to be identified with that of a waiver of immunity so that the question whether such a waiver has to be explicit was deemed irrelevant.<sup>454</sup> And Jordan’s argument based on the case law of the ECtHR was rejected as unconvincing because no analogy could be drawn between the protection of fundamental human rights and CIL personal immunities.<sup>455</sup>

**148 The analysis provided by the Jordan AJ, though not being beyond question, is persuasive.**<sup>456</sup> Understandably, the Jordan AJ does not take up Kiyani’s argument (see above mn. 141) that a SC Res. cannot displace CIL. It is true that Article 103 of the UN

<sup>450</sup> *Ibid.* paras. 140–141.

<sup>451</sup> *Ibid.* para. 143.

<sup>452</sup> *Ibid.* paras. 143–144.

<sup>453</sup> *Ibid.* para. 148.

<sup>454</sup> *Ibid.* para. 146.

<sup>455</sup> *Ibid.* para. 147.

<sup>456</sup> The following considerations are essentially in line with ICC, *Amicus Curiae Observations of Professors Robinson, Cryer, deGuzman, Lafontaine, Oosterveld, and Stahn*, ICC-02/05-01/09-362 EC PT OA2, 17 Jun. 2018, paras. 3 ff., and they amplify the reasoning provided by Kreß and Prost, in: Triffterer and Ambos, *Commentary* (2016) 2140–2141 (para. 39).



Charter only refers to conflicting international agreements. Yet, it would be odd to assume that the SC, while being competent to authorize a use of military force in the exercise of its primary responsibility for the maintenance or restoration of international peace and security would be categorically precluded from deviating from CIL if it considers such a deviation necessary to fulfil its mandate.<sup>457</sup> It is therefore unsurprising that neither Jordan nor the AU and the Arab League had embraced that far-reaching position. The AC then convincingly rejected the idea that a displacement of an otherwise applicable immunity right requires an explicit provision to that effect. In its remaining analysis, the Jordan AJ started from the two correct premises that Article 27 (2) is relevant for the application of Article 98(1) (see above mn. 18) and that the function of the latter provision is purely procedural (see above mn. 13). The Judgment then correctly clarified that a displacement of any applicable CIL immunity is not inherent in a SC referral pursuant to Article 13(b), but depends on the wording of the relevant SC Res. It may, however, be doubted whether the AC was correct to assume that a SC Res. that obligates one or more States not party to cooperate with the Court can only result in a set of cooperation obligations for such States that is identical with those applicable to States Parties. Instead, it is not inconceivable that the SC, instead of displacing any otherwise applicable immunity right owned by a State not party to the ICCS, only requires such a State to waive such right should the conduct of the international criminal proceedings necessitate such action. Assuming that such an immunity right exists, it would go too far to say that the Court would not exercise its jurisdiction 'in accordance with the provisions of this Statute' if it respected that right until it was to receive a waiver.<sup>458</sup> To interpret the words 'cooperate fully' in operative paragraph 2 of Res. 1593 without including Article 27(2) would therefore not necessarily have amounted to a departure from the ICCS. Yet, in view of the findings of the Cassese Commission Report and the near certainty of a recalcitrant Sudan, such a narrow interpretation would have meant neglecting the context and missing the purpose of Res. 1593 and, as a result hereof, depriving Res. 1593 of an essential part of its *effet utile*.

## 5. Immunities of International Organizations with respect to a person

Para. 1 of Art. 98 does not address possible **immunities of officials of international organizations**.<sup>459</sup> This does not imply the conscious decision made by the drafters that no immunity issue may arise. Rather it constitutes a *lacuna* that must be filled in the spirit of para. 1.<sup>460</sup> If the question of instituting proceedings against an official of an international organization were to arise, the Court, in analogous application of Article 98(1), would have to ascertain the absence of a conflicting immunity right owned by the relevant international organization *vis-à-vis* the requested State before proceeding with a request for surrender or assistance. In the following paragraphs, the relevant legal questions will not be comprehensively examined, but they will at least be highlighted.

The immunities under consideration are often referred to in the **founding treaty of the relevant international organization** and may receive a more detailed regulation in special treaties. The most important among those treaties is the 1946 Convention on

<sup>457</sup> Amicus Curiae Observations of Professor Robinson *et al.*, ICC-02/05-01/09-362 EC PT OA2, para. 4 (with further references).

<sup>458</sup> The consideration to the contrary, as set out in Kreß and Prost, in: Triffterer and Ambos, *Commentary* (2016) 2140–2141 (para. 39), is no longer maintained.

<sup>459</sup> In the following, international organisations are understood to be inter-governmental organisations.

<sup>460</sup> See, for example, Akande (2004) 98 *AJIL* 404, 430.

Privileges and Immunities of the UN.<sup>461</sup> Whether the relevant body of conventional law has, as a result of certain common patterns, given rise to the formation of certain core rules of CIL remains a matter of doubt.<sup>462</sup>

151 The immunities of officials of an international organization are, in most instances (but see below mn. 153), **functional** in nature. Apart from the officials, other persons, such as experts on mission, may enjoy such immunity.<sup>463</sup>

152 According to **one scholarly view**, the functional immunity of an individual, who has acted in the exercise of a mandate entrusted upon him or her by an international organization, is more robust than that of the functional immunity of a State (on that immunity, see above mn. 22 ff.) so that it also covers proceedings for crimes under international law.<sup>464</sup> This is believed to be true even in case of proceedings before an international criminal court with universal orientation such as the ICC.<sup>465</sup> Article 19 of the Relationship Agreement between the ICC and the UN<sup>466</sup> is taken to confirm the correctness of that view. This provision states as follows:

*If the Court seeks to exercise its jurisdiction over a person who is alleged to be criminally responsible for a crime within the jurisdiction of the Court and if, in the circumstances, such person enjoys, according to the Convention on the Privileges and Immunities of the United Nations and the relevant rules of international law, any privileges and immunities as are necessary for the independent exercise of his or her work for the United Nations, the United Nations undertakes to cooperate fully with the Court and to take all necessary measures to allow the Court to exercise its jurisdiction, in particular by waiving any such privileges and immunities in accordance with the Convention on the Privileges and Immunities of the United Nations and the relevant rules of international law.*

According to this scholarly view, the ICC will be precluded from requesting a State Party to arrest and surrender a beneficiary of the relevant conventional functional immunity if that State Party is bound by the relevant international convention and if the membership of the international organization concerned is not exclusively one composed of States Parties to the ICCS.

153 According to **another scholarly view**,<sup>467</sup> there is no persuasive reason to give the concept of functional immunity a more robust meaning in the context of international organizations than in the context of State officials. Under this view, and on the premise explained above in mn. 31 ff. that the CIL rule of functional immunity is inapplicable in proceedings for crimes under CIL, an individual, who has acted in the context of a mandate entrusted upon him or her by an international organization, will not enjoy conventional international law functional immunity in proceedings for crimes under international law. The fact that the relevant treaties do not specifically deal with proceedings for crimes under CIL, is not believed to contradict that legal proposition because those treaties should be interpreted bearing in view the rationale underlying the

<sup>461</sup> 1946 Convention on Privileges and Immunities of the United Nations, 13 Feb. 1946, 1 UNTS 15, with a *corrigendum* in 90 UNTS 327.

<sup>462</sup> Walter and Preger, in *Ruys et al.*, *HB Immunities* (2019) 544–545 (with detailed further references in fn. 21 f.).

<sup>463</sup> *Ibid.* 546–550.

<sup>464</sup> Kreicker, *Exemptionen II* (2007) 911 f.; *id.* (2009) 4 ZIS 350, 361.

<sup>465</sup> *Ibid.*

<sup>466</sup> Negotiated Relationship Agreement between the ICC and the UN, 22 Jul. 2004, <[https://www.icc-cpi.int/NR/rdonlyres/916FC6A2-7846-4177-A5EA-5AA9B6D1E96C/0/ICCASP3Res1\\_English.pdf](https://www.icc-cpi.int/NR/rdonlyres/916FC6A2-7846-4177-A5EA-5AA9B6D1E96C/0/ICCASP3Res1_English.pdf)> accessed 14 Jun. 2020.

<sup>467</sup> See, for example, Senn, *Immunitäten* (2010) 97 f.; Wirth (2002) 12 CLF 429, 448–449.

functional immunity protection they accord. Article 19 of the Relationship Agreement is also not seen as a compelling piece of evidence to the contrary as this provision retains its practical significance in proceedings for crimes under Article 70 ICCS.<sup>468</sup>

The legal issue highlighted in the preceding paragraphs may be of practical relevance, 154 in particular, if there were reasons to believe that **UN Peacekeepers** have committed crimes under CIL warranting the institution of proceedings before the ICC. While the troop-contributing States, by virtue of bilateral agreement concluded with the UN, usually retain exclusive criminal jurisdiction over the conduct of their soldiers,<sup>469</sup> a UN peacekeeper nevertheless functionally acts for the UN. This means that the UN might claim any applicable functional immunity of its peacekeeper for conduct committed in the course of the peacekeeping operation.<sup>470</sup> Yet, it bears recalling (see above mn. 77) that the SC, regrettably, has repeatedly provided peacekeepers with a specific jurisdictional shield against possible proceedings before the ICC. In a series of resolutions, the Council has vested troop-contributing States with the exclusive jurisdiction over their peacekeepers. If lawful, those provisions render moot the question of whether UN peacekeepers enjoy conventional international law functional immunity in proceedings before the ICC.

Finally, most international organizations provide for **personal immunity of their 155 highest-ranking officials** in a manner similar to the personal immunity of diplomats.<sup>471</sup> This gives rise to the question whether the considerations set out above (mn. 115 ff.) in support of the inapplicability of the CIL rule of personal immunity in proceedings before the ICC also justify to interpret the relevant conventional international law provisions on personal immunities so as not to apply in such proceedings.

## 6. Waiver of immunity

If the Court recognises that a request would conflict with an international immunity 156 right of a third State or an international organization, the Court may either decide not to pursue the request or to engage in negotiations with that third State or international organization in order to obtain a **waiver of immunity**. Article 98(1) is framed in mandatory terms such that if the Court wishes to proceed with the request, it is the responsibility of the Court to obtain the requisite waiver from the relevant third State, before approaching the State where the person or place is located. The same should apply *mutatis mutandis* in case of an international organization. Paragraph 1 does not address specifically the situation, where the Court, for some reason, fails to know of the existence of the immunity and submits the request. Here, as Rule 195, sub-rule 1 clarifies, the requested State will bring the matter to the attention of the Court and advise of the necessity for the Court to seek the relevant waiver. The same possibility exists under Article 97 whenever a requested State believes the Court made the request erroneously.<sup>472</sup>

As far as **third States that are not party to the Statute** are concerned, there can be 157 **no obligation under the Statute to express a waiver**. Nor is there an explicit obligation for States Parties to waive their immunities. In the latter case, however, a strong argument based on Article 86 and the overall purpose of the Statute can be made in favour of an implicit obligation to waive their immunity rights where the State concerned will not use its primary right to exercise criminal jurisdiction. On the basis

<sup>468</sup> *Ibid.*

<sup>469</sup> See, for example, Freedman and Lemay-Hébert, in: Ruys *et al.*, *HB Immunities* (2019), 579, 583.

<sup>470</sup> Kreicker (2009) 4 ZIS 350, 364–365; Rawski (2002) 18 *ConnecticutJIL* 103, 110.

<sup>471</sup> Walter and Preger, in: Ruys *et al.*, *HB Immunities* (2019) 542, 546.

<sup>472</sup> Jordan AJ, ICC-02/05-01/09-397-Corr. OA 2, para. 152; Kreß and Prost above Article 97 mn. 8 ff.

of the foregoing analysis, this implicit obligation currently has a limited scope of application; it may, in particular, become of some practical relevance regarding the inviolability of diplomatic premises.<sup>473</sup>

## II. Paragraph 2

### 1. 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

158 a) **Types of agreements *ratione personae*.** Paragraph 2 only covers **inter-State agreements**. The requested State must be a party to the relevant agreement. This follows from the explicit reference to ‘its obligations’, *i.e.* the obligations of the requested State under the agreement in question. Rule 195, sub-rule 2, does not contradict this result for the following reasons: First, while this provision does not repeat the specific reference to ‘its’ obligations and does not specify the inter-State nature of the agreement, it refers back to Article 98(2) which precludes an interpretation at variance with this latter provision.<sup>474</sup> Second, the intention of the U.S. to formulate a rule that would widen the scope of agreements under paragraph 2 so as to include agreements concluded by the Court, such as the agreement under Article 2 of the Statute that was rejected by an overwhelming majority of delegations at the PrepCom-mis (see above mn. 5).<sup>475</sup> Third, had Rule 195(2) to be interpreted in line with the U.S. intention, that would create a conflict with Article 98(2), and pursuant to Article 51(5), the former provision would prevail.

159 It not being an inter-State agreement, para. 2 does **not** cover international conventions on privileges and immunities concluded between an **International Organization and its member States**. To the extent that such agreements include immunity provisions to the benefit of members of State delegations to conferences and meetings hosted by the organization, it is possible to say that they include, as part of a broader triangular legal architecture, a legal relationship between a sending State and a receiving State, the latter typically being the Host State of the International Organization. Yet, as such agreements are better to be dealt with within paragraph 1 (see above mn. 138), there is no need to extend the applicability of paragraph 2 to them.<sup>476</sup>

160 Paragraph 2 covers **bilateral as well as multilateral** agreements.

161 Para. 2 only covers agreements between a **State Party and non-party States**.<sup>477</sup> While this does not follow from the wording of para. 2, its purpose strongly suggests that restriction. As in the case of para. 1, the purpose of para. 2 is to prevent a State Party to

<sup>473</sup> See, for example, Kreicker, *Exemptionen II* (2007) 1394 ff.

<sup>474</sup> Horsthemke, *Immunitäten* (2019) 300–301; Benzing (2004) 8 *MPYbUNL* 181, 208 ff.; Gartner, in: Fischer *et al.*, *Prosecution* (2001) 423, 433; Harhoff and Mochochoko, in: Lee, *ICC* (2001) 637, 669; Keitner (2001) 6 *UCLAJIL&ForeignAffairs* 215, 261 ff.

<sup>475</sup> In that respect, Scheffer (2005) 3 *JICJ* 333, 343 formulates in a slightly misleading manner.

<sup>476</sup> The Jordan AJ, ICC-02/05-01/09-397-Corr. OA 2, para. 159, arrives at the same conclusion.

<sup>477</sup> The contrary view put forward in Kreß and Prost, in *Commentary* (2016) 2143 (mn. 46) is no longer maintained; for the same view as embraced in the above text, see Horsthemke, *Immunitäten* (2019) 309 ff.; Ambos, *Treatise ICL III* (2016) 623; Sendel (2007) 3 *ZIS* 118, 121; Akande (2004) 98 *AJIL* 407, 428 ff. (Akanke’s reasoning, however, differs from that set forth in this commentary in that one of the considerations advanced by him – *ibid.* 428 – is to harmonize the interpretation of Art. 98(2) with the narrow interpretation of the term ‘third State’ in Art. 98(1), as rejected above in mn. 11); for the view that Art. 98(2) also covers agreements among States Parties, see Senn, *Immunitäten* (2010) 347 (albeit without argument).



be placed in a situation of conflicting obligations as a result of a request by the Court for arrest and surrender. Yet, by virtue of Article 89(1) States Parties have assumed the core obligation to arrest and surrender. This obligation implies the duty for any State Party not to make the arrest and surrender of another State Party dependent on the first State's prior consent. Should any prior agreement among States Parties exist (on subsequent agreements, see below mn. 167 ff.), that would have to be interpreted otherwise,<sup>478</sup> it would have become inapplicable as a result of the entry into force of the ICCS by virtue of Article 30(3) VCLT. There is thus no need for a conflict-avoidance rule in the form of Article 98(2), as between States Parties.

**b) Types of agreements *ratione materiae*.** While the negotiations on paragraph 2 were conducted with a view to concerns raised by some delegations that the surrender obligation under Part 9 could conflict with obligations arising out of SOFAs, the language chosen does not confine the paragraph to this category of agreements. Rather, the agreed upon formulation that refers to a 'sending' and, by implication, a 'receiving' State also includes treaty provisions on re-extradition and may include other agreements of a similar nature, provided that they make use of the technical concept of a 'sending' and a 'receiving' State and give rise to the same conflict of international obligations.<sup>479</sup>

With a view to certain SOFAs including, in particular, the ones concluded within the umbrella of NATO, it has been questioned whether they may create a conflict of obligations, as referred to in para. 2.<sup>480</sup> The reasoning starts from the fact that the SOFAs concerned confine the primary or exclusive competence of the sending State to acts perpetrated in the performance of official duty. It is then argued that crimes under CIL are not perpetrated in that quality. This reasoning is questionable, though. The widespread reference by States to SOFAs in the course of the negotiations leading to Article 98(2) suggests that the relevant provisions in those agreements are meant to cover any conduct under colour of authority including crimes under CIL.<sup>481</sup> Whether or not the SOFAs in question contain an explicit consent requirement is also immaterial because it is reasonable to assume that there is an implicit requirement for a receiving State, that has agreed to the exclusive or primary jurisdiction of a sending State over a certain person, to ask for the consent of the receiving State before arresting and surrendering such a person at the request of the Court.<sup>482</sup> It has finally been argued that the fact that SOFAs in question do not provide for immunities, but only allocate the exercise of criminal jurisdiction among the sending and the receiving State, speaks against applying Article 98(2) to them. But the fact that SOFAs do not recognize immunities, but allocate or rank jurisdiction titles rather supports than hinders the application of Article 98(2) to such agreements. For, not only does nothing in the wording of this provision require that the agreement concerned provides for a conventional immunity right,<sup>483</sup> but, what is more, a provision on possible conflicting immunities already exists in the form of Article 98(1).

<sup>478</sup> Senn, *Immunitäten* (2010) 366 ff. makes the point that it will usually be possible, in particular in view of Art. 31(3)(a) VCLT, to interpret prior agreements between States Parties so that they do not impose an implicit requirement of prior consent with respect to a request issued by the Court.

<sup>479</sup> Horsthemke, *Immunitäten* (2019) 301; Senn, *Immunitäten* (2010) 387–388; Crawford *et al.*, *Matter of Statute* (2003), para. 42; the position taken by Bogdan (2008) 8 *ICLRev* 1, 23, is not entirely clear.

<sup>480</sup> Paust (2000) 33 *VandJTransnatL* 1, 10 ff.; Fleck (2003) 1 *JICJ* 651, 662; the latter author then argues that the functional immunity of those persons is covered by Art. 98(1), a position which is internally incoherent and at odds with existing ICL (see above mn. 31 ff.).

<sup>481</sup> For the same view, see van der Wilt (2005) 18 *LeidenJIL* 93, 102; Senn, *Immunitäten* (2010) 356–357.

<sup>482</sup> Senn, *Immunitäten* (2010) 359–360.

<sup>483</sup> Horsthemke, *Immunitäten* (2019) 298.

- 164 Carrying this consideration to its end, the AC has determined in the Jordan AJ, that ‘article 98(2) does not concern immunities – be they customary or conventional in nature – but **agreements** according to which a receiving State undertakes not to surrender a person of the sending State to the Court without **prior consent**’.<sup>484</sup> While the wording of Article 98(2) does not call for such a restriction, the AC’s finding is persuasive as a matter of sensible delineation between the two paragraphs of Article 98.<sup>485</sup>
- 165 **c) Categories of persons.** The combined effect of the reference to a ‘sending State’ and to ‘a person of that State’ in para. 2 is that the scope of this provision is confined to **persons** that are **present** on the territory of a receiving State because they have been sent there by a sending State.<sup>486</sup> The conclusion of a number of bilateral non-surrender agreements, that cover a far broader range of persons (see above mn. 6), therefore, already for that reason, go beyond the scope of para. 2. The conclusion of such agreement has also not resulted in a body of subsequent practice evidencing an agreement to widen the scope of application of para. 2. Suffice it to say that the member States of the EU have rejected this aspect of the U.S. treaty practice (see above mn. 6 ff.). Instead, the EU guiding principles on the matter specify that ‘any solution should cover only persons present on the territory of the requested State because they have been sent by a sending State, cf. Article 98, paragraph 2 of the Rome Statute’.<sup>487</sup>
- 166 While the term ‘person of that State’ may suggest otherwise, it is clear from the context and the purpose of the provision that the persons covered need **not** be **nationals** of the sending State.<sup>488</sup>
- 167 **d) The time of the conclusion of the agreement.** The perhaps central controversy surrounding para. 2 is whether or not it covers, apart from pre-existing agreements, also subsequent agreements.
- 168 Whereas a strong body of international legal scholarship<sup>489</sup> and the Legal Service of the EU Commission<sup>490</sup> maintain that para. 2 does **not** extend to agreements entered into by the receiving State **after** the latter’s **signature** of the Statute or the Statute’s entry into force for the latter, an almost equal number of writers opine<sup>491</sup> that **no such time limit** exists. In the joint statement of the latter position by James Crawford, Philippe

<sup>484</sup> Jordan AJ, ICC-02/05-01/09-397-Corr. OA 2, para. 159 (emphasis added); for the same position, see ICC, Prosecution Response to the Hashemite Kingdom of Jordan’s Appeal against the “Decision under article 87(7) of the Rome Statute on the non-compliance by Jordan with the request by the Court for the arrest and surrender (of) Omar Al-Bashir”, ICC-02/05-01/09 331 EC PT OA2, 3 Apr. 2018, para. 59.

<sup>485</sup> Therefore, the view put forward in Kreß and Prost, in *Commentary* (2016) 2143 (mn. 47), that bilateral immunity agreements on special missions can fall under Article 98(2), is no longer maintained. See above mn. 135 on how to deal with any possible ‘new’ special mission agreements between a State Party and a State not party to the ICCS.

<sup>486</sup> Horsthemke, *Immunitäten* (2019) 315–316; Crawford *et al.*, *Matter of Statute* (2003), paras. 43–45; Ambos, *Treatise ICL III* (2016) 624–625; Senn, *Immunitäten* (2010) 373 ff.; Benzing (2004) 8 *MPYbUNL* 181, 210 ff.; van der Wilt (2005) 18 *LeidenJIL* 93, 104; Bogdan (2008) 8 *ICLRev* 1, 22–24.

<sup>487</sup> EU, General Affairs and External Relations, 2450<sup>th</sup> Council session, Brussels, 30 Sep. 2002, 12134/02 (Presse 279), Annex.

<sup>488</sup> Horsthemke, *Immunitäten* (2019) 313 ff.; Benzing (2004) 8 *MPYbUNL* 181, 213; Scheffer (2005) 3 *JICJ* 333, 346–349.

<sup>489</sup> Horsthemke, *Immunitäten* (2019) 305 ff.; Ambos, *Treatise ICL III* (2016) 623–624; Benzing (2004) 8 *MPYbUNL* 181, 214–220; Gartner, in: Fischer *et al.*, *Prosecution* (2001) 423, 430; Kreicker, *Exemptionen II* (2007) 1383 ff.; Kaul and Kreß (1999) 2 *YbHumL* 143, 165; Meißner, *Zusammenarbeit* (2003) 132–134.

<sup>490</sup> The Internal Opinion is reprinted in: 23 *HumRtsLJ* 158 (2002).

<sup>491</sup> Crawford *et al.*, *Matter of Statute* (2003), para. 38; Scheffer (2005) 3 *JICJ* 333, 340; Sendel (2007) 3 *ZIS* 118, 123; van der Wilt (2005) 18 *LeidenJIL* 93, 100 ff.; Zappalà (2003) 1 *JICJ* 114, 122 ff. (though with some reservations).

Sands and Ralph Wilde, that has received much attention, an important qualification is made, though. Those commentators submit that any new agreement ‘should make clear provision to ensure that the “sending” State subjects the person to effective investigation and, where warranted, prosecution. Additionally, any new agreement ought to also make provision for the re-transfer to the repatriating State of any person who is not subject to effective investigation or prosecution in a third State’.<sup>492</sup>

The wide interpretation of para. 2 including agreements irrespective of the time of their conclusion is based on a literal and contextual reading. The point is made that the wording of para. 2 does not contain a limitation regarding the time of the conclusion of the agreements. Furthermore, an *argumentum e contrario* is drawn from the use of the word ‘existing’ in Article 90(6) and in Article 93(3) which is missing in Article 98 (2). The Head of the U.S. delegation in Rome has also referred to ‘America’s Original Intent’ to further support the broad interpretation (*cf.* mn. 7). While the latter argument is of limited significance at best (*cf.* mn. 7), the literal and contextual reasoning do carry considerable weight.

Yet, it is submitted that, on balance, the arguments to the contrary, as set out in the following paragraphs, are stronger and must therefore prevail. The concern that guided the negotiations on Article 98 was to **eliminate any obstacle to ratification** that could result from already existing treaty obligations. This ‘original intent’ is evidenced not only by the personal recollection of those who participated in the Rome debates within the working group on Part 9,<sup>493</sup> but also, and, of course, more importantly, by the fact that Article 87 of the Preparatory Committee Draft 1998 (see above mn. 1) that comprehensively deals with the issue of possible conflicting obligations does not envisage the insertion of a provision that would follow the entirely different logic to provide State Parties with a tool to subsequently limit the Court’s power to effectively exercise its jurisdiction. The brackets contained in Article 87 of the Draft 1998 make it plain that a number of States approached even this narrow issue of possible conflicts due to existing international obligations with reservation (see above mn. 2) and did certainly not intend to agree to a provision that would allow States Parties to create a situation of conflicting international obligations after the signature of the Statute and to hereby, in fact, shield broad categories of persons from the exercise of the Court’s jurisdiction.

This link between the controversy in question and the Court’s jurisdiction leads to the most important – both purposive and contextual – **argument against the broad construction**: The Court’s jurisdiction was the ‘question of questions’ in Rome and, as it is generally known, the discussions pertaining to the jurisdiction issues lasted until the very end of the diplomatic conference.<sup>494</sup> One cornerstone of the so hard-fought final

<sup>492</sup> Crawford *et al.*, *Matter of Statute* (2003), para. 50; in the same direction, see Ubéda-Saillard, in: Fernandez *et al.*, *Commentaire II* (2019) 2309, 2323.

<sup>493</sup> *Cf.*, apart from this commentators, the Austrian delegate, Gartner, in: Fischer *et al.*, *Prosecution* (2001) 423, 430: ‘The idea behind it [article 98 para. 2 of the Statute] was to solve legal conflicts, which might arise because of Status of Forces Agreements which are already in place. But it has to be emphasized that Art. 98, para. 2 was not designed to create an incentive for (future) State parties to conclude Status of Forces Agreements, which would amount to an obstacle to the execution of requests for co-operation issued by the Court’. Scheffer (2005) 3 *JICJ* 333, 340 seeks to downgrade statements of that kind by attributing them to ‘some commentators, reflecting what they describe as the intent of certain delegates to the ICC negotiations’. This characterization of statements made by those who continuously participated in the actual negotiations and actively contributed to them is perhaps not entirely appropriate when, at the same time, so much is made of ‘America’s Original Intent’ that is said to have been ‘contemplated in its [America’s] discussions pertaining to Article 98 (2)’, but that was never clearly expressed in the WG on Part 9.

<sup>494</sup> For a detailed account, see Kaul and Kreß (1999) 2 *YbIHL* 143, 145–157.

compromise solution contained in Article 12(2) provides the Court with a limited jurisdiction over nationals of non-party States. The broad interpretation of Article 98 (2) would allow States Parties to renegotiate, on a bilateral basis, this cornerstone of the compromise on jurisdiction, and this with respect, in particular, to armed personnel, *i.e.* a category of persons the conduct of which is very much in the purview of ICL.<sup>495</sup> Obviously, such a possibility was not contemplated in the course of the negotiations leading to the adoption of Article 98. To accept such a reading of the second para. of this provision, is irreconcilable with the overarching guiding principle to interpret the Statute as a coherent whole. This systematic consideration is of a much more substantial character than the undisputable fact that the word ‘existing’, the insertion of which would have clarified the matter, is absent from para. 2 while contained in Article 90(c) and Article 93(3). When measuring the comparable weight of the systematic reasoning set out in the preceding lines against the *argumentum e contrario* drawn from Article 90 (6) and Article 93(3), the well-known fact should also be borne in mind, that the huge time pressure under which the Statute, including Part 9, had to be adopted in Rome, did not leave sufficient time, neither for the WG nor for the Drafting Committee, for a thorough consistency check. Eventually, the narrower interpretation of para. 2 supported in this commentary duly reflects the fact that para. 2 constitutes an exception to the overarching obligation to cooperate in Article 86 and, more specifically, to surrender in Article 89(1), and keeps that exception to reasonable confines.

172 It bears emphasising that the **narrow interpretation does not adversely affect any legitimate interest** of a sending State that is not party to the Statute. Every such State retains the unfettered right to assert, *vis-à-vis* the Court, its primary criminal jurisdiction through the complementarity scheme. Interestingly, the important qualification made by Crawford *et al.* referred to above in para. 166 also recognises the need to accord a different treatment to a ‘non-surrender agreement’ by a State Party concluded after the latter’s signature of the Statute. The qualification suggested by those three writers certainly constitutes a most welcome limitation of the effects that would otherwise result from the inclusion of subsequent agreements into para. 2. From the perspective of the contrary view espoused in this commentary, one cannot fail to note that Crawford *et al.*, by qualifying their position with respect to ‘new agreements’, concede that context and purpose of the Statute justify a distinction between old and new agreements even in the absence of an explicit basis in the wording of para. 2. If this is true, and this is precisely the position taken here, it is far more plausible, however, not to adopt the broad interpretation in the first place and instead to limit the application of para. 2, in view of its purpose and the overall coherency of the ICCS, to pre-existing agreements while leaving untouched the right of any sending State to avail itself of its primary right to exercise jurisdiction under the ICCS’s complementarity regime.

173 The **subsequent practice** to para. 2 does not reveal an agreement of State Parties that the broad interpretation should prevail. Under the prevailing circumstances of high pressure and often secret negotiations, it is not even clear whether those States Parties, that have concluded a non-surrender agreement with the U.S., were of the view to hereby remain within the confines of para. 2 or whether they simply hoped that any treaty conflict would remain of a theoretical nature. In any event, the fact remains that

<sup>495</sup> If, contrary to the persuasive view adopted by the AC in the Jordan AJ (see above para. 161), the applicability of Article 98(2) was to be extended to agreements providing for immunity, for example in connection with a special mission, the broad interpretation would also open a broad avenue for States Parties to circumvent the inapplicability of CIL immunities in proceedings before the ICC through the conclusion of such ‘new’ immunity agreements.



many States Parties rejected the conclusion of such an agreement (see above mn. 8). While the EU Guiding Principles mentioned above<sup>496</sup> do not confirm the narrow interpretation, they should not be interpreted as the expression of a unanimous *opinio juris* to the contrary, either. Rather, they formulate the lowest common denominator among EU member States while implicitly confirming a lack of agreement regarding the controversy about the issue of ‘new’ agreements. Finally, the reference in the fourth preambular paragraph of SC Res. 1593<sup>497</sup> to the ‘existence of agreements referred to in article 98–2 of the Rome Statute’ does not constitute evidence for an agreement on the broad interpretation by way of subsequent practice. For, it has been made clear at the time of the adoption of the resolution that the reference in question was not unanimously understood as the expression of an *opinio juris*, but was rather seen by some to be no more than a factual background statement.<sup>498</sup>

In conclusion, para. 2 only refers to **pre-existing agreements**. With a view to the principle enshrined in Article 18 VCLT, this means more specifically agreements concluded by a State Party before the latter’s signature of the Statute. 174

**e) Legal effect of concluding a non-surrender agreement outside the scope of paragraph 2.** At this stage of the legal evolution, it may remain difficult to argue that the conclusion by a State Party of a non-surrender agreement after the latter State’s signature of the Statute contradicts *ius cogens* (see the observations above mn. 135). Assuming therefore the validity of such an agreement, the State Party concerned, by entering into the agreement, creates a potential conflict between the resulting treaty obligation and a request for arrest and surrender made by the Court. If the Court was to make such a request, the State Party concerned would have to violate one of the two conflicting international obligations binding on it.<sup>499</sup> 175

## 2. Consent of the sending State

Where a request would conflict with the requirement resulting from a pre-existing agreement falling under para. 2 to first obtain the consent of a sending State, the Court, in parallel to the case of para. 1, has only two choices – abandon pursuit of the particular request, or seek to obtain the consent of the sending State. 176

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<sup>496</sup> See fn. 70.

<sup>497</sup> S/RES/1593 (2005), 31 Mar. 2005.

<sup>498</sup> Zimmermann, in: Dupuy *et al.*, *Essays in Honour of Tomuschat* (2006) 691 ff.

<sup>499</sup> In the same vein, Benzing (2004) 8 *MPYbUNL* 181, 221–235; Tallmann (2004) 92 *GeorgetownLJ* 1033, 1053; Boyden (2008) 8 *ICLRev* 1, 41, argues that States Parties that have signed a potentially conflicting bilateral agreement should insist on the latter implying the ‘definitive obligation of the part of the U.S. to investigate and/or prosecute’ with respect to an individual concerned.