



## **Saar Blueprints**

Irene Salgado Doval

The immunity of acting and former heads of  
State from national and international  
criminal Courts



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## **About the author**

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## **Preface**

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## A. Essay

### I. Introduction: origin and evolution of head of state immunity

The concept of immunity, i.e. that states and their highest representatives cannot be subjected to the jurisdiction of other states, is one of the oldest and most embedded principles in international public law.<sup>1</sup> Early notions of immunity relied on the idea that the sovereign was the embodiment of the state and as such personally entitled to protection through immunity, which in turn meant that there was no distinction between ‘head of state immunity’ and ‘sovereign immunity.’<sup>2</sup> Heads of state largely enjoyed immunity from the jurisdiction of another state’s Courts, sometimes even their own: a representation of this is Louis XVI conveying the famous phrase: ‘*L’état c’est moi*’. However, over the last two centuries monarchical structures began to rapidly decline and with them, the doctrine of absolute immunity. Parallely, principles of independence of states and sovereign equality were evolving, and the role of immunity changed from protecting the sovereign as an individual, to protecting the state as an entity. After World War II, absolute immunity was consolidated in favor of a more limited form of immunity for heads of state, in which mainly matters involving the exercise of sovereign authority (*acta iure imperii*) were protected from foreign domestic or international jurisdiction while commercial transactions (*acta iure gestionis*) were left out.<sup>3</sup>

Notwithstanding that the doctrine of immunity has significantly evolved from an absolute concept to a more restrictive one, the legal position of heads of state remains questioned to this date. Particularly the development of humanitarian international law and human rights, have sparked a debate in legal scholarship and judicial practice over the question whether international law recognizes exceptions to immunities granted to heads of state or other government officials in respect of the commission of international crimes.<sup>4</sup>

This paper is aimed at contributing to that debate by studying the concept of immunity for serving and former head of state immunity before international and foreign national criminal courts, paying special attention to a possible customary international law exception in the case of international crimes. The research will first delve into the scope and rationale of the

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<sup>1</sup> *Tangermann*, p. 86; *Cassese*, International Law, p. 98; *Doehring*, p. 284; in relation to German MPs: *Schulze-Fielitz*, Art. 46 GG, in: Dreier (ed.), GG, para. 21; *Ambos*, in: Joecks/Miebach (eds.), Münchener Kommentar zum Strafgesetzbuch, Vorbemerkung zu § 3, para. 104; *Horsthemke*, p. 35.

<sup>2</sup> *Fox, Webb*, p. 991; *Shaw*, p. 523-524; *Foakes*, p. 12, 13; *Ehlers*, in: Schoch/Schneider/Bier (eds.), Vorbemerkung § 40, in: Verwaltungsgerichtsordnung, para. 41; *Mallory*, Colum. L. Rev. 86/1986, p. 169 (170, 179); *George*, Fordham L. Rev. 64/1995, p. 1051 (1056); (466); *Tunks*, Duke LJ 52/2002, p. 651 (655).

<sup>3</sup> *Crawford*, p. 1115; *Foakes*, p. 15; *Streinz*, in: Sachs (ed.), Grundgesetz, Art. 25 GG, para. 55; *Herdegen*, in: Maunz/Dürig (eds.), Grundgesetz-Kommentar, Art. 25 GG, para. 52.

<sup>4</sup> Judicial practice: Cour de Cassation, [Chambre criminelle] (*General Prosecutor at the Court of Appeal of Paris v Gaddafi*) Judgment, Decision No. 64, 13 March 2001; *Regina v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte* (No. 3) 1 A.C. 147 [1999] [hereinafter *Pinochet No. 3*]; Academic discussion: *van Alebeek*, p. 1 ff.; *Tunks*, Duke LJ 52/2002, p. 651 (651, 652); *Cassese*, EJIL 13/2002; AJIL 98/2004, p. 407 (407, 408); *Stern*, ILSA 14/2008; *Akande, Shah*, EJIL 21/2011, p. 815 (816); *Mettraux*, et al., Int. Crim. Law Rev 18/2018, p. 577 (577); *Tladi*, LJIL 32/2019, p. 169 (169).

modern immunity concept, highlighting its origin from the doctrine of state immunity. Subsequently, this work will look at the conceptual distinction between two forms of immunity, *ratione materiae* and *ratione personae*, defining their nature and scope. The focal point of the research is the third part of the paper: first, the crimes for which a head of state may be held criminally responsible are defined by reference to different sources of international law. Second, an analysis of whether there is a customary law exception to head of state immunity in case of international crimes is made. Because this issue arises at a national and supranational level, the study is structured accordingly. The methodology adopted is academic and case law specific: an overview at the current state of the debate is provided, followed by an analysis and critical assessment of two landmark judgments, one before a foreign national court (*Pinochet No. 3*) and one before the International Criminal Court (ICC) (*Omar Al-Bashir*). Finally, a summary of the most important thesis will be presented accompanied by an outlook on future developments within this context.

## II. The concept of head of state immunity in international law

### 1. Starting point: The principle of state immunity

In international law, immunity grants certain officials due to their special status, e.g. as heads of state, protection from being subjected to any foreign domestic jurisdiction (or even any jurisdiction entirely) and thus enjoy freedom from prosecution.<sup>5</sup> Immunity protects the state and its highest representatives from foreign scrutiny. There are conceptually different categories of immunity, being the origin of modern head of state immunity the principle of state immunity. This international law doctrine, which is fundamental for the effective functioning of inter-state relations, is largely based on the core principle of sovereign equality enshrined in article 2 (1) UN Charter '*The organization is based on the principle of sovereign equality of all its Members*' and developed from the *maxime par in parem non habet imperium*,<sup>6</sup> by virtue of which equal states shall have no sovereignty over each other, including no exercise of jurisdiction (*par in parem non habet iudicium*).<sup>7</sup> The first judicial assessment on state immunity is universally agreed to be *The Schooner Exchange v. McFaddon* dating back to the year 1812, in which Chief Justice Marshall of the US Supreme Court remarked that '*one sovereign being is in no respect amenable to another*<sup>8</sup>'. However, with granting immunity to the state as an entity comes conferring it to the individuals who act

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<sup>5</sup> *Tangemann*, p. 86; *Doehring*, p. 284; *Ambos*, Vol. I, p. 406; *Kadelbach*, in: von der Groeben/Schwarze/Hatje, para. 5; *Ambos*, in: Joecks/Miebach (eds.), *Münchener Kommentar zum Strafgesetzbuch*, Vorbemerkung zu § 3, para. 104.

<sup>6</sup> 'An equal has no power over an equal'

<sup>7</sup> *Cassese*, *International Law* p. 98; *Senn*, p. 34; *Ambos*, Vol. I, p. 407; *Crawford*, p. 1039; *Fox, Webb*, p. 148; *Ambos*, in: Joecks/Miebach (eds.), *Münchener Kommentar zum Strafgesetzbuch*, Vorbemerkung zu § 3, para. 105; *Paulus*, NJW 1999, p. 2644 (2645).

<sup>8</sup> *The Schooner Exchange v. McFaddon*, 11 U.S. 116, p. 11 U.S. 127.

through it. The principle of state immunity would be completely undermined if heads of state or other high-ranking officials were not personally protected from foreign interference: hence, head of state immunity is included in the doctrine of state immunity.<sup>9</sup> Besides, because it is granted for the benefit of the state it is also in its power to waive it.<sup>10</sup> There is a threefold rationale for upholding head of state immunity before international and domestic criminal courts: firstly, it assures the free conduct of foreign affairs and other duties related to their official capacity; secondly, it manifests respect towards the principles of sovereign immunity and sovereign equality and finally it is justified by reciprocal courtesy towards sovereign state's heads of state.<sup>11</sup> Conversely, heads of state should respect human rights, *jus cogens* prohibitions and international humanitarian law. In this sense, it is worth noting that positive international law does not recognize criminal responsibility of states, therefore it is important that the conduct is attributable to an individual, which could be the head of state or someone in an equivalent position.<sup>12</sup> In respect to the nature and scope of immunity for serving and former heads of state, the next chapter will provide a more detailed evaluation of the two immunity categories there are in international law.

## 2. Types of immunity: *ratione materiae* and *ratione personae*

As mentioned beforehand, heads of state historically enjoyed certain privileges which were largely based on notions of superiority of the sovereign but also dignity of the state. Immunity is still enjoyed by heads of state and other government officials to this date but is now traced back to grounds of sovereign equality and state immunity; '*par in parem non habet imperium*'.<sup>13</sup> When addressing the contemporary concept and scope of immunity as well as its basis and purpose under international public law, a crucial distinction must be made between:

- (a) Sitting and former heads of state and
- (b) Immunity *ratione materiae* (functional immunity) and *ratione personae* (personal immunity)

The first distinction appears obvious, since it is only coherent that sitting heads of state, who carry out sovereign duties, have a differentiated status than former heads of state, who no longer hold an official post. The second distinction accomplishes this differentiation: while immunity *ratione personae* serves to shield heads of states from foreign criminal jurisdiction

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<sup>9</sup> Arrest Warrant of 11 April 2000 (*Democratic Republic of the Congo v. Belgium*) [2002] Judgment, ICJ Rep. 2002, p. 22, para. 53 [hereinafter *Arrest Warrant*]; Art. 2 (1) (a) (i) UNGA Res., UNCSI, Doc No. A/RES/59/38, 2 December 2004; Fox, Webb, p. 1255; Brohmer, LJIL 12/1999, p. 361 (364); Akande, Heads of State Immunity is a Part of State Immunity: A response to Jens Iverson, <https://www.ejiltalk.org/head-of-State-immunity-is-a-part-of-State-immunity-a-response-to-jens-iverson/> (last accessed on 6/09/2020).

<sup>10</sup> Crawford, p. 912; Piero Buzzini, LJIL, 22/2009, p. 455 (474).

<sup>11</sup> Senn, p. 35; Mallory, Colum. L. Rev. 86/1986, p. 169 (179); Zappalà, EJIL 12/2001, p. 595 (599); Tunks, Duke LJ 52/2002, p. 651 (655).

<sup>12</sup> ICJ, In Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v Serbia and Montenegro*) [2007] Judgment, ICJ Rep. 2007, para. 170; O'Keefe, p. 49.

<sup>13</sup> Foakes, p. 8; O'Keefe, Immunity *Ratione Materiae*, p. 2.

for the duration of their office for both official and private acts, immunity *ratione materiae* prohibits states from exercising their criminal jurisdiction over former foreign head of states for official acts done while in office.<sup>14</sup> These two immunity categories, namely functional (*ratione materiae*) and personal (*ratione personae*) immunity, are a generally accepted distinction supported by legal literature and largely based on state practice.<sup>15</sup>

Immunity *ratione materiae* encompasses all official acts carried out in an official capacity on behalf of the state.<sup>16</sup> Beneficiaries are therefore heads of state and other state officials who perform acts of set nature as part of their duty.<sup>17</sup> Its scope is broader than that of state immunity, since it not only covers acts of sovereign authority (*acta iure imperii*) but also private economic activities of the state (*acta iure gestionis*), provided that they are not carried out in a purely private capacity.<sup>18</sup> The primary duty of a head of state is the fulfilment of sovereign functions, which are in turn attributable to the state as an entity with independent sovereign power rather than to the individual who acts on its behalf. Therefore, the *raison d'être* behind this form of immunity is ensuring the fulfillment of official duties by the head of state or other officials without fearing prosecution or criminal liability.<sup>19</sup> Considering the nature of the acts protected, immunity *ratione materiae* does not end with the cease of functions, but the individual remains entitled to immunity for official acts performed during his/her term in office.<sup>20</sup> In principle, this form of immunity bars any criminal prosecution of former heads of state by foreign domestic courts, unless the state for which the head of state acted waives his/her right to immunity.<sup>21</sup> However, as I will address in part three of this paper, it might not be the case anymore under current customary international law: the question therefore remains, if functional immunity can pose a bar to prosecution before foreign domestic courts regarding international crimes. In regard to international tribunals such as the ICC or special tribunals like the International Criminal Tribunal for the former Yugoslavia (ICTY), the question is to be answered negatively, as judicial practice has shown that former heads of state can in fact be rendered susceptible to prosecution and no waiver of immunity by the respective state is necessary.

The second category is immunity *ratione personae*. Its conferral is attached to the office holder's status as a representative of the state and as such, temporarily limited to the term in

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<sup>14</sup> Shaw, p.554, 557; O'Keefe, Immunity *Ratione Materiae*, p. 1.

<sup>15</sup> Cassese, International Criminal Law, p. 318-319; Senn, p. 42; Foakes, p. 7; Pedretti, p. 13; Horsthemke, p. 34; Zappalà, EJIL 12/2001, p. 595 (598); Cassese, EJIL 13/2002, p. 853 (862); Akande, AJIL 98/2004, p. 407 (409); Kreicker, ZIS 7/2009, p. 350 (351-353).

<sup>16</sup> Shaw, p.557; Foakes, p. 7; Pedretti, p. 14.; Escobar Hernández, Immunity of State Officials from Foreign Criminal Jurisdiction, 04/04/2013, UN Doc. A/CN.4/661, p.44; O'Keefe, Immunity *Ratione Materiae*, p. 2.

<sup>17</sup> Shaw, p.557; Pedretti, p. 14.

<sup>18</sup> Foakes, p. 7; Pedretti, p. 19; Kolodkin, Immunity of State officials from foreign criminal jurisdiction, 10/06/2010, UN. Doc. A/CN.4/631, p. 16; D'Argent, CeDIE 04/2013, p. 8.

<sup>19</sup> Cassese, International Criminal Law, p. 319; Foakes, p. 8; Cassese, EJIL 13/2002, p. 853 (863).

<sup>20</sup> Doehring, p. 291; Regarding diplomatic agents: Foakes, p. 9; D'Argent, CeDIE 04/2013, p. 8.

<sup>21</sup> Shaw, p.559; Foakes, p. 7; Gaeta, JICJ 1/2003, p. 186 (189); O'Keefe, Immunity *Ratione Materiae*, p. 2.

office.<sup>22</sup> It can, however, end prematurely if it is waived by the home state.<sup>23</sup> Hence, former heads of state and other high-ranking officials once they leave office, only enjoy the more limited immunity *ratione materiae*.<sup>24</sup> In contrast to immunity *ratione materiae*, the protection offered by immunity *ratione personae* is absolute: it covers any act performed by the head of state or official in question, regardless of the official or private nature of the act and the place where or time when it was performed.<sup>25</sup> Its personal scope is restricted to heads of state and other high-ranking officials (heads of government and ministers of foreign affairs) because only they, as permanent representatives embody or personify the state to such an extent that to perform their duties, they necessarily need to be shielded from any intervention by foreign domestic courts or even international tribunals.<sup>26</sup> The justification for this immunity is the peaceful cooperation and co-existence among states, along with the free engagement in communications with other representatives and the conduct of international and diplomatic negotiations by those officials who represent the state at an international level.<sup>27</sup> As expressed by Judges Higgins, Kooijmans and Buergenthal in their joint separate opinion in the *Arrest Warrant* case '[...] immunities are granted to high State officials to guarantee the proper functioning of the network of mutual inter-State relations, which is paramount importance for a well-ordered and harmonious system'.<sup>28</sup> For a long time, it was settled customary international law that incumbent and former heads of state as well as other high-ranking officials enjoyed total immunity from foreign criminal prosecution, by both domestic and international tribunals.<sup>29</sup> However, currently it is debatable whether there is an exception, especially to immunity *ratione personae* under customary international law for international crimes, since such crimes affect the interest of the entire international community.<sup>30</sup>

<sup>22</sup> *Arrest Warrant*, para. 54; *Akande/Shah*, EJIL 21/2011, p. 815 (818).

<sup>23</sup> *Böse*, in: Kindhäuser/Neumann/Paeffgen (eds.), *Strafgesetzbuch*, para. 36; *Escobar Hernández*, Immunity of State Officials from Foreign Criminal Jurisdiction, 04/04/2013, UN Doc. A/CN.4/661, p. 49; *D'Argent*, CeDIE 04/2013, p. 8

<sup>24</sup> *Supra*, at 19.

<sup>25</sup> *Senn*, p.45; *Böse*, in: Kindhäuser/Neumann/Paeffgen (eds.), *Strafgesetzbuch*, para. 36; *Escobar Hernández*, Immunity of State Officials from Foreign Criminal Jurisdiction, UN Doc. A/CN.4/661, para. 44, 48; *Zappalà*, EJIL 12/2001, p. 595 (599); *Wirth*, EJIL 13/2002, p. 877 (883).

<sup>26</sup> *Akande, Shah*, EJIL 21/2011, p. 815 (818); *D'Argent*, CeDIE 04/2013, p. 6.

<sup>27</sup> *Pedretti*, p. 28; *Böse*, in: Kindhäuser/Neumann/Paeffgen (eds.), *Strafgesetzbuch*, para. 36; *Zappalà*, EJIL 12/2001, p. 595 (599); *Tunks*, Duke LJ 52/2002, p.651 (656); *Wirth*, EJIL 13/2002, p. 877 (888); *Akande*, AJIL 98/2004, p. 407 (410); *Akande, Shah*, EJIL 21/2011, p. 815 (818).

<sup>28</sup> Joint separate opinion of judges Higgins, Kooijmans and Buergenthal (*Democratic Republic of the Congo v. Belgium*) [2002] Judgment, ICJ Rep. 2002, para. 75.

<sup>29</sup> *Arrest Warrant*, para. 51; *Doehring*, p. 292; *Senn*, p. 44; *Pedretti*, p. 25; *Horsthemke*, p. 35; *Böse*, in: Kindhäuser/Neumann/Paeffgen (eds.), *Strafgesetzbuch*, para. 38; *Escobar Hernández*, Immunity of State Officials from Foreign Criminal Jurisdiction, 04/04/2013, UN Doc. A/CN.4/661, p. 45. *Zappalà*, EJIL 12/2001, p. 595 (599, 600); *Cassese*, EJIL 13/2002, p. 853 (864); *Akande*, AJIL 98/2004, p. 407 (413); *D'Argent*, CeDIE 04/2013, p. 5.

<sup>30</sup> *Bassiouni*, *Law & Contemp. Probs.* 50/1996, p. 63 (69).

### III. Criminal responsibility of heads of state for international crimes– an (customary international law) exception to immunity?

The question of whether heads of state can be made criminally liable for international crimes is one that has concerned the international community on a practical and academic level for some time now.<sup>31</sup> The atrocities committed during World War II, condemned globally, brought profound changes in the international criminal law regime: the international community finally saw the need to provide concrete methods to achieve individual criminal responsibility. In turn, the increasing awareness for safeguarding human rights caused the partial erosion of deep embedded principles of state sovereignty and immunity. However, excluding the Nuremberg and Tokyo Trials it was not until the close of the 20<sup>th</sup> century that this idea was materialized. There were multiple attempts from national and international tribunals to institute proceedings against heads of state and other state officials for the (alleged) commission of international crimes, some of which succeeded and ended with convictions for the perpetrators.<sup>32</sup> Anyhow, the progress made in protecting human rights has not been without challenge. The question at the center of the debate is if there is an exception to the immunities enjoyed by former and sitting heads of state (*ratione materiae* in case of the former and *ratione personae* in case of the latter) for serious crimes under international law. Since there is no universally held position, this matter is highly controversial. On one hand, an ever more human rights centered global community seeks accountability for violations of the most fundamental human rights. There are different arguments to support an exception to immunity of heads of state: according to one view, international crimes can never qualify as sovereign or official acts and therefore do not fall *per se* under the scope of immunity protection.<sup>33</sup> Another opinion appeals to an exception of head of state immunity under customary international law for serious crimes, noting that there is state practice and *opinio juris* that substantiate this position.<sup>34</sup> Furthermore, the *jus cogens* prohibition of international crimes also supports this argument: since *jus cogens* norms have the highest status in

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<sup>31</sup> *Id.* at 4.

<sup>32</sup> SCSL, *Prosecutor v. Charles Ghankay Taylor*, Judgment, Case No. SCSL-03-01-T, 18 May 2012; ICTY, *Prosecutor v. Rodovan Karadžić*, Judgment, Case No. IT-95-5/18-T, 24 March 2016; ICC, *The Prosecutor v. Omar Hassan Ahmad Al-Bashir*, Judgment, Case No. ICC-02/05-01/09 OA2, 6 May 2019; *Pinochet No. 3*; IHT, *The Public Prosecutor in the High Iraqi Court et al. v. Saddam Hussein Al Majeed et al.*, Case No. 29/c/2006, 26 December 2006.

<sup>33</sup> Joint separate opinion of judges Higgins, Kooijmans and Buergenthal (*Democratic Republic of the Congo v. Belgium*) [2002] Judgment, ICJ Rep. 2002, para. 85; *van Alebeek*, p. 99; *Ambos*, Vol. I, p. 411; *Bianchi*, EJIL 10/1999 p. 237 (265); *Tunks*, Duke LJ 52/2002, p. 651 (659, 676); *Stern*, ILSA J. Int'l & Comp. L. 14/2008, p. 441 (448, 449); *Akande, Shah*, EJIL 21/2011, p. 815 (828).

<sup>34</sup> *Sadat*, Why the ICC's Judgment in the Al-Bashir case wasn't so surprising, <https://www.justsecurity.org/64896/why-the-iccs-judgment-in-the-Al-Bashir-case-wasnt-so-surprising/> (last accessed 6/09/2020).

international law, they shall always prevail over hierarchically lower (immunity) rules.<sup>35</sup> The argument at the heart of this debate and which this paper focuses on is the customary law exception to immunity.

On the other hand, head of state immunity is a necessary mechanism to conduct international relations. There is a tendency that invokes the importance of the head of state immunity doctrine in international law as well insufficient state practice to support the existence of a customary law exception for serious crimes under international law.<sup>36</sup> This issue has likewise been addressed at the International Law Commission (ILC) which in its 2017 report on 'Immunity of state officials from foreign criminal jurisdiction' adopted Draft article 7, which provides an exception for immunity *ratione materiae* before foreign criminal jurisdictions for the crimes listed therein.<sup>37</sup> At an academic level, the work of the ILC has been criticized for lacking foundation in international law or state practice.<sup>38</sup> Another problem arises in relation to at which level these crimes should be prosecuted, since the administration of justice in relation to international crimes is formed of a patchwork system with the involvement of domestic courts, foreign domestic courts, international tribunals and ad-hoc tribunals. In this regard, the primary method of judicial prosecution is intended to be the domestic courts where the international crimes took place. However, very often the perpetrators as part of the state apparatus, pass legislation in their home state shielding themselves from prosecution for set crimes by granting themselves amnesty.<sup>39</sup>

After having briefly introduced the current state of the matter, the next section of this paper is dedicated to determining what international crimes could possibly amount to an immunity exception. Subsequently, a general consideration about prosecution before (foreign) domestic and international courts will be presented which will be complemented by considering two of the most notorious cases of prosecutions of former and serving heads of state before a domestic court and the ICC respectively.

## 1. Defining 'Crimes under international law'

The international criminal responsibility of heads of state is only debatable when it comes to certain crimes under international law, i.e. international crimes. The highest representative of

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<sup>35</sup> Joint dissenting opinion of Judges Rozakis and Caflisch joined by judges Wildhaber, Costa, Cabral Barreto and Vajić (*Al-Adsani v The United Kingdom*) Judgment, Application No. 35763/97, 21 November 2001, p. 30 para. 1; *van Alebeek*, p. 89; *Ambos*, Vol. I, p. 412, *Bianchi*, EJIL 10/1999, p. 237 (265); *Orakhelashvili*, EJIL 18/2007, p. 955 (964).

<sup>36</sup> *Arrest Warrant* para. 3, 8; Cour de Cassation, [Chambre criminelle] (*General Prosecutor at the Court of Appeal of Paris v Gaddafi*) Judgment, Decision No. 64, 13 March 2001; *Senn*, p. 155; *Akande, Shah*, EJIL 21/2011, p. 815 (817); *O'Keefe*, AJIL Unbound 109/2015, p. 167 (167).

<sup>37</sup> ILC, Draft article 7, Immunity of State officials from foreign criminal jurisdiction, UN Doc. A/CN.4/L.893.

<sup>38</sup> *Klabbers*, p. 114; *Murphy*, AJIL Unbound 112/2018; *Shen*, AJIL Unbound 112/2018, p. 9 (11); *Forteau*, AJIL Unbound 112/2018, p. 22 (25); *van Alebeek*, AJIL Unbound 112/2018, p. 27 (30)

<sup>39</sup> *Cryer et al.*, p. 54; *Tiba*, WJILDR 21/2013, p. 134 (135). In the context of the transition to democracy in Spain the 'Amnesty Law' (Ley 46/1977) was passed, which in its Art. 2 (e) (f) granted amnesty to 'crimes committed by law enforcement officials and agents against the exercise of individual rights' BOE No. 248, 17/19/1977.

a sovereign state may only be prosecuted for certain crimes, those considered to qualify either by customary or treaty law as internationally condemnable and therefore, punishable.<sup>40</sup> This chapter offers a framework in respect of such international crimes guided by one firmly consolidated treaty which holds an identifier status of customary international law: The Statute of the ICC, i.e. Rome Statute. Furthermore, as secondary sources and to complement the definitions comprised in the Rome Statute, other important international treaties will be consulted like the Geneva Conventions or the CAT. The Rome Statute sets forth the crimes that can be prosecuted by the ICC and enumerates in articles 6, 7, 8, 8bis Rome Statute the following: genocide, crimes against humanity, war crimes and crime of aggression.

- a) *Genocide*: article II of the genocide convention defines this crime as: '[...] *Genocide means any of the following acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group*'.<sup>41</sup> This definition has been widely adopted at both national<sup>42</sup> and international level, including in the 1998 Rome Statute, in the statutes of the International Criminal Tribunal for Rwanda (ICTR) and of the ICTY. This crime is directed towards a group, i.e. a permanent unity of people who share the same or some of the abovementioned characteristics. It protects mainly collective rather than individual interests.<sup>43</sup> The prohibition of genocide has consistently concerned the global community since the Nuremberg Trials and although the term 'genocide' was not coined until after, the prosecutors then used the term 'crimes against humanity' instead. Genocide falls under the protective scope of *jus cogens* norms and is recognizably a customary international law rule, imposing an *erga omnes* obligation on states.<sup>44</sup> It is deemed to be as an exceptionally serious type of a crime against humanity.<sup>45</sup>
- b) *Crimes against humanity*: article 7 of the Rome Statute includes a list of ten offences which amount to crimes against humanity (murder, extermination, enslavement...) in addition to a residual category for comparable inhumane acts '*when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack*'. Like the prohibition of genocide, crimes against humanity has consistently been codified in the statutes of international criminal tribunals. The elements of this crime are following: first there must be an attack, defined as a multiplicity of

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<sup>40</sup> *Ambos*, Vol. II, p. 1-220; *O'Keefe*, p. 120; *Stern*, ILSA 14/2008, p. 441 (444).

<sup>41</sup> UNGA Res. 260 A (III) *Convention on the Prevention and Punishment of the Crime of Genocide*, 09/12/1948.

<sup>42</sup> In Germany § 6 Völkerstrafgesetzbuch (VStGB).

<sup>43</sup> *Nsereko*, in: McDonald/Swaak-Goldman (eds.), p. 117 (124); *Ambos*, Vol. II, p. 5; UNGA Res. 96, *The Crime of Genocide*, 11 December 1949, UN Doc. A/RES/98 (I) pp. 188-189.

<sup>44</sup> Rule of customary international law: *Nsereko*, in: McDonald/Swaak-Goldman (eds.), p. 117 (120); '*Jus cogens*' status of the prohibition of genocide: ICJ, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, [1951] ICJ Rep. 1951, p. 13; '*Erga omnes*' obligation of States: ICJ, *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)* Judgment, [1996] ICJ Rep. 1996, p. 595, para. 31; *Shah*, *Emory Int'l L. Rev.* 16/2002, p. 351 (379) *Wouters/Verhoven*, *Int'l Crim. L. Rev.* 05/2005, p. 401 (404).

<sup>45</sup> *West*, in: MacDonal/Swaak-Goldman (eds.), p. 175 (184).

unlawful or violent acts such as, but not limited to murder, torture, etc. Violent acts of a non-armed nature directed towards the mistreatment of the civilian population, (e.g. the system of apartheid) are encompassed by this definition.<sup>46</sup> Second, the attack needs to be widespread or systematic. The ILC and in subsequent judgments of ad-hoc tribunals, the term 'widespread' has been defined as referring to a large-scale attack with numerous victims, whereas under 'systematic' a 'preconceived plan or policy' is understood.<sup>47</sup> Finally, 'civilian population' makes reference to the fact that the attack must be directed to a certain number of persons that share common attributes and are not part of the armed forces, making it of a collective nature and excluding random acts of violence.<sup>48</sup>

- c) *War crimes*: war crimes are grave breaches of international humanitarian law (also known as laws of armed conflict or *ius in bello*) committed in the context of an armed conflict.<sup>49</sup> There traditional distinction between international and domestic conflict (two box approach) is, since the Tadić decision, obsolete.<sup>50</sup> There are three primary sources of war crime codifications: the Hague Conventions of 1899 and 1907 which restrained the use of certain methods and means of warfare; the Geneva Conventions of 1949 with primary focus on the protection of persons and property and finally, combining both systematics, Rome Statute. Article 8 (2) of the Rome Statute, which resembles greatly the definition of the Geneva Conventions, defines which specific offenses are meant under 'war crimes' (willful killing, torture or inhuman treatment, etc.) while underlining in article 8 (1) that the Court has jurisdiction '*in respect of such war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.*'
- d) *Crime of aggression*: the Nuremberg and Tokyo trials prosecuted the crime of aggression (then 'crime against peace') for the first time. Since then, the definition has been constantly evolving, however scholars and academics tried to narrow the scope codify this crime in the Rome Statute. Finally, at the Kampala Conference in 2009, a binding definition for the 'crime of aggression' was adopted adding a new article 8*bis* to the Rome Statute. Article 8*bis* makes a distinction between the crime of aggression (article 8*bis* (1))

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<sup>46</sup> ICTR, *The Prosecutor v. Jean-Paul Akayesu*, Judgment, Case No. ICTR-94-4-T, 2 September 1998, para. 581; ICTR, *Ferdinand Nahimana et al. v. The Prosecutor*, Judgment, Case No. ICTR-99-52-A, 28 November 2007, para. 918; ICTY, *Prosecutor v. Lukić and Lukić*, Judgment, Case No. IT-98-32/1-T, 20 July 2009 para. 873.

<sup>47</sup> Regarding 'widespread': Draft Code of Crimes against the Peace and Security of Mankind with commentaries, Article 18(4) [1996]; Regarding 'systematic': Draft Code of Crimes against the Peace and Security of Mankind with commentaries, Article 18(3) [1996]; ICTY, *Prosecutor v Kordić and Čerkez*, Judgment, Case No. IT-95-14/2-A, 17 December 2004, para. 94; ICTR, *Prosecutor v Bagosora and Nsengiyumva*, Judgment, Case No. ICTR-98-41-A, 14 December 2011, para. 389.

<sup>48</sup> *Swaak-Goldman*, in: MacDonald/Swaak-Goldman (eds.), p. 145 (156); *Ambos*, Vol. II, p. 63.

<sup>49</sup> *Ambos*, Vol. II, p. 117; O'Keefe, p. 123; UN Human Rights Office of the High Commissioner, Info Note 2, DRC 1993-2003 UN Mapping Report, [https://www.ohchr.org/Documents/Countries/CD/FS-2\\_Crimes\\_Final.pdf](https://www.ohchr.org/Documents/Countries/CD/FS-2_Crimes_Final.pdf) (last accessed on 6/09/2020).

<sup>50</sup> ICTY, *Prosecutor v. Dusko Tadić*, Decision on the defence motion for interlocutory appeal on jurisdiction, Case No. IT-94-1-AR 72, 2 October 1995, para. 71 ff.; *Ambos*, Vol. II, p. 122; *Ambos*, in: Joecks/Miebach (eds.), Münchener Kommentar zum Strafgesetzbuch, Vorbemerkung zu § 8, Rn. 2.

and an act of state aggression contrary to international law (article 8bis (2)). While the former determines individual responsibility under international criminal law, the latter concerns state responsibility under general international law as a necessary precondition for individual criminal responsibility.<sup>51</sup> Even though highly controversial regarding the exact definition the customary law character of this crime is undisputed.<sup>52</sup>

- e) *Torture*: according to the CAT, torture is any serious infliction of mental or physical pain by a state official or a private individual on behalf of or with the acquiescence of state authorities for a specific purpose, e.g. to force a confession.<sup>53</sup> The CAT is legally binding and imposes various obligations on the states parties: they are required to take preventive measures to eradicate torture and to prosecute or extradite a foreign state officials, including heads of state, accused of torture or other acts falling within the scope of set Convention.<sup>54</sup> The Convention has currently 170 state parties, therefore earning universal recognition. The prohibition and punishment of torture is clearly a *jus cogens* norm of international humanitarian law.<sup>55</sup>

The primary purpose of prohibiting certain actions under international law, like those mentioned, is safeguarding global peace and international security. Therefore, it is equally as important to prosecute the individuals committing them. The abovementioned list of crimes are peremptory prohibitions of international law, *jus cogens* norms.<sup>56</sup> Having had an overview of what offences are considered crimes under international law, the next chapter addresses the practical stance of the problem: can serving or former heads of state be held responsible for the commission of such atrocities?

## 2. Horizontal Immunity: national criminal courts

The principle ‘there is no right without a remedy’ is directly linked to idea that the recognition of individual human rights or the prohibition of conducts such as crimes under international law, is ineffective without the availability of (inter)national enforcement mechanisms in case of violations or breach of prohibitions.<sup>57</sup> Primarily, human rights violations should be prosecuted where the crimes took place, as was the case with Saddam Hussein’s conviction by the Iraqi Special Tribunal or the constitution Extraordinary Chambers of Cambodia

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<sup>51</sup> Schmalenbach, JZ 65/2010, p. 745 (747); Zimmermann/Henn, ZRP 240/2013, p. 240 (241).

<sup>52</sup> ICJ, Case Concerning military and paramilitary in and against Nicaragua (*Nicaragua v. United States of America*) Judgment, [1986] ICJ Rep. 1986; Extract from the Yearbook of the International Law Commission, Vol. II [1996], UN Doc. A/51/10; Ambos, Vol. II, p. 196; Kreß, EJIL, 20/2009, p. 1129 (1132);

<sup>53</sup> UNGA Res. 39/45, Art. 1 (1) Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984; Callies, in: Callies/Ruffert (eds.), EUV/AEUUV, Art. 4, para. 15; Kempen/Bock, in: Görres (eds.), Staatslexikon, Folter.

<sup>54</sup> Art. 2 and 5 (2) CAT; CAT/C/SR.354, p. 11, para. 39, 40; Adams, in: Scott (ed.), p. 247 (250).

<sup>55</sup> ICTY, *Prosecutor v. Anto Furundžija*, Case No. IT-95-17/1-T, 10 December 1998, para. 153; ECtHR, *Al-Adsani v The United Kingdom*, Judgment, Application No. 35763/97, 21 November 2001, para. 60, 61.

<sup>56</sup> Bassiouni, Law & Contemp. Probs. 50/1996, p. 63 (68).

<sup>57</sup> van Alebeek, p. 240; Adams, in: Scott (ed.), p. 247 (250); Flauss, SZIER, 3/2000, p. 299 (307).

(ECCC) to bring Khmer Rouge officials to justice.<sup>58</sup> However, sometimes foreign domestic courts are the only available administrators of justice to effectively prosecute and convict alleged criminal heads of state.<sup>59</sup> A preliminary question that needs to be addressed is on what base foreign national courts obtain jurisdiction in the first place. To achieve an effective protection of human rights and the enforcement of international crimes prohibitions, an involvement of the global community is necessary through the principle of universal jurisdiction. Universal jurisdiction allows national courts to claim jurisdiction over specific offences (*jus cogens* norms) like genocide, torture, war crimes, crimes against humanity irrespective of the territory where they took place or nationality of the offender.<sup>60</sup>

The treaty basis for universal jurisdiction in relation to war crimes and crimes against humanity, are the four Geneva Conventions of 1949.<sup>61</sup> Foreign domestic courts can invoke this principle when their state has adopted legislation punishing the relevant offence, e.g. by ratifying the CAT, which is the first treaty to provide universal jurisdiction in matters relating to torture.<sup>62</sup> Universal jurisdiction is based on the idea certain crimes harm the international community and its order as a whole, therefore individual states must act to protect it.<sup>63</sup> However, as noted by the International Court of Justice (ICJ) '*jurisdiction does not imply the absence of immunity, while the absence of immunity does not imply jurisdiction*' which means that functional and personal immunities are an additional burden for courts to surpass in their aim at holding heads of state responsible for serious criminal actions.<sup>64</sup> For the traditional, state-oriented approach, head of state immunity is absolute and does not accept any exceptions on an inter-state level. The horizontal relationship between states expressed in the notion of sovereign equality and highlighted by the principle '*par in parem non habet iudicium*' impede domestic courts from judging the conduct of a foreign head of state, as formulated by the Special Court for Sierra Leone (SCSL) '*A reason for the distinction [...] between national Courts and international Courts [...] would appear due to the fact that the*

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<sup>58</sup> It should be noted that the Iraqi Special Tribunal was heavily influenced and controlled by American powers, see: *Cryer et al.*, p. 149; *Mandhane*, UTLJ 61/2011, p. 163 (169). The ECCC was established as part of an agreement between the Cambodian government and the UN, however they form part of the domestic system of Cambodia and the domestic legal system apply, see: *Cryer et al.*, p. 154.

<sup>59</sup> *Id.*, at 38.

<sup>60</sup> *Randall*, Tex. 66/1988, 785 p. 788; In relation to the crime of 'torture': *Adams*, in: Scott (ed.), p. 247 (251); *Brown*, New Eng. L. Rev. 35/2001, p. 383 (384, 385); *O'Keefe*, JICJ 2/2004, p. 735 (745); *O'Keefe*, JICJ 7/2009, p. 811 (813 ff.); *O'Donnell*, B. U. Int'l. J. 26/2008, p. 376 (378); International Justice Resource Center, Universal Jurisdiction, <https://ijrcenter.org/cases-before-national-Courts/domestic-exercise-of-universal-jurisdiction/> (last accessed 6/09/2020).

<sup>61</sup> Art. 49 GC for the amelioration of the conditions of the wounded and sick in armed forces in the field; Art. 50 GC for the amelioration of the conditions of wounded, sick and shipwrecked members of armed forces at sea; Art. 129 GC relative to the treatment of prisoners of war; Art. 146 GC relative to the protection of civilian persons in time of war.

<sup>62</sup> *Fox, Webb*, p. 250, 251; *O'Keefe*, p. 51; *Paulus*, NJW 1999, p. 2644 (2646).

<sup>63</sup> *O'Keefe*, p. 51; *Robinson*, The Princeton Principles on Universal Jurisdiction, p. 16; *Randall*, Tex. 66/1988, 785 p. (788); *Bianchi*, EJIL 10/1999 p. 237 (250); *Sadat*, New Eng. L. Rev. 35/2001, p. 241 (244); International Justice Resource Center, Universal Jurisdiction, <https://ijrcenter.org/cases-before-national-Courts/domestic-exercise-of-universal-jurisdiction/> (last accessed 6/09/2020).

<sup>64</sup> *Arrest Warrant*, para. 59.

*principle that one sovereign State does not adjudicate on the conduct of another State*'.<sup>65</sup>

Similarly, the European Court of Human Rights (ECtHR) ruled in the *Al-Adsani* case that the right to access a domestic court is not absolute but limited by the concept of sovereign immunity '*by which one State shall not be subject to the jurisdiction of another State*'.<sup>66</sup>

Indeed, the horizontal relationship between equal states makes it hard for domestic courts to justify an exception to immunity *ratione materiae* or (even less) *personae* to judge the behavior of a foreign former or sitting head of state, even for international crimes. The importance of a head of state in the constitutional and/or political structure of a sovereign country is not to be overlooked. Moreover, some argue that there is a risk of manipulation and politization of judicial decisions taken by domestic courts, which could be used to arbitrarily sabotage other states.<sup>67</sup> Thus, the question remains there is an exception to head of state immunity before national courts in cases involving individual criminal responsibility for serious violations of international law either evolving or already established under customary international law. To provide a comprehensive approach, the elements of a customary international law rule should be mentioned. Customary international law emerges when there is sufficiently consolidated and widespread (although not universal) state practice and a sense of obligation or legal conviction, i.e. *opinio juris* to adhere to this practice.<sup>68</sup>

In light of the underlying convictions regarding this topic, I will analyze one landmark judgment (*Pinochet No. 3*) and thereafter make a critical assessment of the most relevant arguments brought forward by each Law Lord.

a) *R. v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte.*

The starting point for arguments refusing to uphold immunity *ratione materiae* for former heads of state is undoubtedly the judgment of the House of Lords in the *Pinochet* case. Chile's ex-dictator, Augusto Pinochet, was arrested by British authorities in London in the year 1998 following an international arrest warrant issued by Spanish authorities under allegations of human rights abuses, torture, hostage-taking and genocide committed against Spanish and Chilean citizens during the military regime established in 1973. The core issue in the case concerned was whether Pinochet was entitled, as a former head of state, to immunity for the offences for which he was charged. Pinochet's defense argued that his

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<sup>65</sup> SCSL, *Prosecutor v. Charles Taylor*, Decision on Immunity from Jurisdiction, Case No. SCSL-2003-01-I, 31 May 2004, para. 51 [hereinafter *Charles Taylor* (immunity)].

<sup>66</sup> ECtHR, *Al-Adsani v The United Kingdom*, Judgment, Application No. 35763/97, 21 November 2001, para. 53, 54; *Shaw*, p. 538.

<sup>67</sup> Cassese, *International Criminal Law*, p. 312; *Gaeta*, JIJC 7/2009, p. 315 (320, 321); *Kiyani*, *Chinese JIL* 12/2013, p. 467 (491).

<sup>68</sup> *Continental Shelf (Libyan Arab Jamahiriya v Malta)* [1985] Judgment, ICJ Rep. 1985, p. 13, para. 29; *Goldsmith/Posner*, p. 23; *Herdegen*, in: Maunz/Dürig (eds.), *Grundgesetz-Kommentar*, Art. 25 GG, para. 36; *Anaya*, *Customary International Law*, ASIL 92/1998, p. 41 (42).

status as a former head of state granted him immunity *ratione materiae* for all acts undertaken during his mandate. However, the second majority decision of the House of Lords held that Pinochet did not enjoy immunity for the torture charges after 1988 brought against him. The CAT, which entered into force in September of 1988 for the UK, conferred state parties universal jurisdiction over extraterritorial torture offences.<sup>69</sup> Therefore, state parties to this Convention<sup>70</sup> could not have, in light of this provision, reasonably intended for immunity *ratione materiae* to be upheld in proceedings concerning torture against former heads of state.<sup>71</sup>

The arguments offered by the six out of seven judges who ruled out his immunity varied in their line of reasoning, so that different approaches can be discerned. On the one hand, Lord Brownie-Wilkinson, Hope and Saville largely based their arguments on the CAT and other positive sources of law and only excluded Pinochet's immunity in respect of the torture charges after 1988.<sup>72</sup> On the other hand, Lord Philipps, Millet and Hutton relied extensively on principles of international criminal law and on international law as such; with the two former Lords dissenting from the other four, maintaining that UK Courts had jurisdiction over acts of torture and other offences committed prior to that date.<sup>73</sup> The starting point of the discussion was the distinction between immunity of a serving and former head of state: all Law Lords found it indisputable that if Pinochet were a serving head of state, he would as a matter of customary international and national law enjoy immunity *ratione personae* from all actions and prosecutions, whether relating to official or private activities.<sup>74</sup> However, due to his status as a former head of state, he retained immunity *ratione materiae* which only covers official acts committed during his term. On the immunity question, Lord Brownie-Wilkinson argued that after the entry into force of the CAT for the UK when a head of state engages in the commission of torture, he/she cannot be considered as acting in a capacity which attracts immunity. The reason is that torture itself is contrary to international law and falls under a *jus cogens* prohibition, therefore these acts do not fall under the scope of protection of immunity *ratione materiae*.<sup>75</sup> Similarly, Lord Hope emphasized that Chile's obligations recognized by customary international law through the CAT effectively overrode the immunity *ratione materiae* he would otherwise have enjoyed.<sup>76</sup> Lord Saville embraced the arguments brought forward by his colleagues, Lord Brownie-Wilkinson and Hope, while highlighting that '*States who have become parties [to the CAT] have clearly and unambiguously agreed that official torture should now be dealt with in a way which would otherwise amount to an interference in*

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<sup>69</sup> Article 5 (2) CAT.

<sup>70</sup> All three countries involved: Chile, Spain and the UK were parties to the Convention by the time the charges were brought against him.

<sup>71</sup> *Pinochet No.3*, p. 2, 8.

<sup>72</sup> *Bhuta*, Melb. U. L. Rev. 23/1999, p. 499 (522).

<sup>73</sup> *Pinochet No.3*, p. 3; *Bhuta*, Melb. U. L. Rev. 23/1999, p. 499 (522).

<sup>74</sup> *Pinochet No. 3*, p. 11, 30, 70, 81.

<sup>75</sup> *Ibid.*, p. 11.

<sup>76</sup> *Ibid.*, p. 72.

*their sovereignty*.<sup>77</sup>

Lord Hutton's approach was, in comparison to the other Lordships, more hybrid. To argue his position, he relied on the CAT concluding that upholding his immunity *ratione materiae* would be in breach of set Convention.<sup>78</sup> Furthermore, he reviewed sources of international law, stating that '*since the end of the second world war, there has been a clear recognition by the international community that certain crimes are so grave and so inhuman that they constitute crimes against international law and that the international community is under duty to bring to justice a person who commits such crimes.*'<sup>79</sup> Therefore, Pinochet did not enjoy immunity *ratione materiae* for the crimes of torture brought against him after 29 September 1988.<sup>80</sup> Lord Millet's and Lord Phillip's reasoning was more international law centered than their fellow Lordships. Lord Millet undertook a careful analysis of the post-World War II evolution in relation to state immunity, clarifying that this development meant that large-scale or systematic torture '*has come to be regarded as an attack upon the international order*'.<sup>81</sup> Adding that '*the systematic use of torture [...] as an instrument of state policy and joined piracy [...] as an international crime of universal jurisdiction well before 1984*'.<sup>82</sup> He then concluded that Pinochet should be extradited for all charges brought against him, regardless of when the (alleged) commission took place.<sup>83</sup> In a similar vein, Lord Phillip argued that the conduct attributed to Pinochet is governed by international law, which does not grant former heads of state immunity before international criminal courts because the allegations brought against them were committed in an official capacity.<sup>84</sup> He continued by denying the existence of any international law rule on immunity for former heads of state in respect of international crimes, including but not limited to torture.<sup>85</sup>

The only dissenting opinion forwarded by Lord Goff brought up some counterarguments that will be briefly addressed. He held that the governmental functions of a head of state although they do not include purely private acts, they can certainly include criminal acts.<sup>86</sup> He held that removing immunity could lead to ex-heads of state '*being the subject of unfounded allegations emanating from states of a different political persuasion*'.<sup>87</sup> According to his understanding, only the CAT, to which all states involved where parties could have waived the right of Pinochet to head of state immunity *ratione materiae*: however, the CAT had not done so neither explicitly nor implicitly.<sup>88</sup> He also emphasized the lack of settled practice

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<sup>77</sup> *Pinochet No. 3*, p. 86.

<sup>78</sup> *Ibid.*, p. 82.

<sup>79</sup> *Ibid.*, 3, p. 80.

<sup>80</sup> *Ibid.*, p. 81.

<sup>81</sup> *Pinochet No. 3*, p. 89 ff, 91.

<sup>82</sup> *Ibid.*, p. 92.

<sup>83</sup> *Ibid.*, p. 94.

<sup>84</sup> *Ibid.*, p. 101.

<sup>85</sup> *Ibid.*, p. 101

<sup>86</sup> *Ibid.*, p. 52.

<sup>87</sup> *Ibid.*, p. 53.

<sup>88</sup> *Ibid.*, 3, p. 50.

regarding an exception to immunity *ratione materiae*, therefore excluding a customary international law exception in regards to this matter.<sup>89</sup>

### *b) Preliminary critical assessment*

The *Pinochet No. 3* decision set out a major precedent, since for the first time a foreign domestic court challenged the immunity *ratione materiae* enjoyed by a former head of state in regard to international crimes. In the following paragraphs, a critical review of the arguments in relation to immunity put forward by the Appellate Committee of the House of Lords in the *Pinochet No. 3* judgment will take place.

From an international law perspective, the interpretation of British national law in light of customary international law offered by the Law Lords is certainly to be welcomed. The conclusion reached by the Law Lords was satisfactory, however the reasoning behind some aspects were somewhat contradictory or lacked legal or factual basis. Lord Brownie Wilkinson as did some other Lords argued that torture as a *jus cogens* prohibition did not attract immunity but only after the entry into force of the CAT for the UK. He argues that the principle of universal jurisdiction enshrined in the Convention is contrary to upholding Pinochet's immunity *ratione materiae*. However, although this argument holds truth, there are other compelling reasons for excluding his immunity: namely a customary law exception. As Lord Millet rightly pointed out, customary international law has reached a stage of development in which universal jurisdiction is exercised by states in cases of international crimes when: (a) the crimes are prohibited by *jus cogens* and (b) they must be '*so serious and on such a scale that they can justly be regarded as an attack on the international legal order*'.<sup>90</sup>

Since the case at hand fulfills both criteria, there is no question, in my opinion, that the Appellate Committee should have removed his immunity for all allegations and not only for those after the ratification of the CAT. Another question arises in regard to Lord Hutton's conclusion that Pinochet had only lost immunity for torture charges after 1988. A closer reading of following statement given by his Lordship is necessary: '*[...] they constitute crimes against international law and that the international community is under a duty to bring to justice such a person who commits such crimes. Torture has been recognized as such a crime*'.<sup>91</sup> He seemingly equates international crimes to torture, being the only logical implication of this that the immunity exception is not limited to torture but applies in relation to all international crimes.<sup>92</sup>

Moreover, Lord Goff's commentary on the effects of removing functional immunity of heads

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<sup>89</sup> *Pinochet No. 3*, p. 48.

<sup>90</sup> *Ibid.*, p. 91.

<sup>91</sup> *Ibid.*, p. 80.

<sup>92</sup> *Wirth*, CLF 12/2001, p. 430 (436).

of state should be addressed. Accurately, immunity is granted to heads of state in part to avoid being targets of malicious allegations. However, I cannot agree that an exception to immunity in cases of international crimes can actually have the effects he mentions, or at least to that extent. In a democratic state, if allegations brought against a former head of state are unfounded, the national court in question is under the obligation to dismiss the claims. Furthermore, governments influence on the judiciary is limited in a democratic state, so their political persuasions should not play a significant role when or if instituting proceedings. Also, prosecuting a former head of state can have serious political and economic implications for set state, therefore making it unlikely that governments will actually resort or influence prosecutions. It should also be mentioned that extradition process' in many countries contains legal and procedural safeguards to avoid possible abuses.<sup>93</sup> Finally, it seems like Lord Goff's dismisses the importance of individual criminal responsibility and human rights developments in international criminal law. The reason for removing immunity in this case, like many others, was to hold an ex-dictator accountable for appalling human rights violations committed during his mandate and under his orders. The CAT (along with other human rights instruments) was ratified by many states precisely for this reason: not appreciating an immunity exception in this case would vacate of content the rights and offences enshrined in the Convention, its *raison d'être*. In short, the concept of head of state immunity must necessarily undergo a modification or limitation for a 'greater good': the realization of human rights and its legal basis must be customary and treaty law.

### 3. Vertical Immunity: International Criminal Courts

In light of the abovementioned case, it is plausible for foreign domestic courts to admit an international crime exception for immunity *ratione materiae* of former heads of state, but any interference with the immunity *ratione personae* of serving heads of state is rejected. However, an incumbent head of state who commits international crimes is no less of a danger to global peace and security than a former head of state, hence why in proceedings before international criminal courts even personal immunities do generally not pose a hurdle to prosecution. This is due to the fact that all international(zed) tribunals have adopted provisions in their statutes which either limit or right out bar allegations of immunity to avoid prosecution.<sup>94</sup> Furthermore, jurisprudence and state practice have confirmed the enforcement of these immunity provisions, possibly establishing it as a customary rule of international law.<sup>95</sup>

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<sup>93</sup> Rumney, in: Law Tchr., 33/1999, p. 340 (349).

<sup>94</sup> UNSC Res. 808, Art. 7 *Statute of the International Criminal Tribunal for the Former Yugoslavia*, 25 May 1993 [hereinafter ICTY Statute]; Article 6 UNSC Res. 955, *Statute of the International Criminal Tribunal for Rwanda*, 8 November 1994 [hereinafter ICTR Statute]; Art. 27 Rome Statute; UNSEC Res. 1315, Art. 6 *Statute of the Special Court for Sierra Leone*, 14 August 2000.

<sup>95</sup> Exhaustive discussion: *Infra*, p.19 ff.

The system of international justice is complex and there are different categories of criminal tribunals, although presently the main criminal tribunal is the International Criminal Court. In the early 1990s, the Security Council, through the powers conferred by articles 41 and 42 UN-Charter set up two ad-hoc tribunals: the ICTY (1993-2017) and ICTR, (1994-2015) which were limited to prosecute international crimes committed during the Balkan conflict and the Rwandan genocide respectively.<sup>96</sup> Both statutes, of mandatory compliance for all member states of the UN,<sup>97</sup> expressly excluded any status or immunity-related exception from prosecution so that all high ranking officials and heads of state or government could be tried.<sup>98</sup> The Rome Statute follows a similar, more compelling pattern and contains a provision to overcome the problem of personal immunities. Based on article 27 of the Rome Statute whether immunities nor special procedural rules can bar the court from exercising its jurisdiction. The Rome Statute is not directly applicable and must be ratified by UN member states, who relinquish any immunity claims by freely accepting the application of the Statute.<sup>99</sup> However, states which are parties to the UN but not to the ICC could also see their sovereignty weakened by the court's jurisdiction. This would be the result of applying Article 13 (b) Rome Statute which confers on the Security Council the power, acting under Chapter VII of the UN Charter, of referring a situation to the ICC.

The last category of international criminal tribunals are 'hybrid' or 'internationalized' tribunals, which are institutions that incorporate elements of national and international law resulting in a mixed form of justice.<sup>100</sup> Their statutes follow a slightly different approach, by including arguably unclear immunity exception norms which underline that the status of a person or a prior pardon shall have no influence or effect on the prosecution.<sup>101</sup> However, state practice before hybrid tribunals has shown that these provisions have the same effect as an immunity exception clause.<sup>102</sup>

Unsurprisingly, international tribunals have less difficulties at declaring immunity claims null and void than foreign domestic courts. The inherent international character of these courts indicates that they operate with support of the international community which in turn, prevents them from acting manifestly unfair, which is often problematic with foreign domestic courts.<sup>103</sup> To this same conclusion came the SCSL, arguing that *'[...] State immunity derives from the equality of sovereign States and therefore has no relevance to international criminal*

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<sup>96</sup> UN, <https://www.icty.org> (last accessed 6/09/2020); UN, <http://www.unictl.org> (last accessed 05/04/2020); Weinberg de Roca/Rassi, Stan. J. Int'L L 44/2008, p. 1-62.

<sup>97</sup> Yugoslavia's mandate, as a non-UN member state, resulted from the Dayton Accords.

<sup>98</sup> Article 7 ICTY Statute; Article 6 ICTR Statute.

<sup>99</sup> Cryer et al., p. 438; Ambos, Vol. I, p. 414; Schabas, p. 402; Wirth, EJIL 13/2002, p. 877 (889).

<sup>100</sup> Cohen, Stan. J. Int'L L. 43/2007 p. 1 (2); Raub, N.Y.U. J. Int'L L. & POL. 41/2009, p. 1013 (1015).

<sup>101</sup> Article 6 (2) UNSC Res. 1315, *Statute of the Special Court for Sierra Leone*, 16 January 2002 [hereinafter SCSL Statute]; Article 6 UNSC Res. 1757, *Statute of the Special Tribunal for Lebanon*, 30 May 2007; Hybrid tribunals see: Cohen, Stan. J. Int'L L. 43/2007 p. 1 (2); Raub, N.Y.U. J. Int'L L. & POL. 41/2009, p. 1013 (1015).

<sup>102</sup> Charles Taylor (immunity), para. 48 ff.

<sup>103</sup> Cryer et al., p. 438; Wirth, EJIL 13/2002, p. 877 (889); Mettraux, et al., Int. Crim. Law Rev. 18/2018, p. 577 (601).

*tribunals [...] [who] derive their mandate from the international community*.<sup>104</sup>

International tribunals have made bold attempts at prosecuting some of the most infamous international criminals, without considering their position in the state's apparatus. In many cases, the prosecutions succeeded and ended with convictions, even in regards of sitting heads of state. Therefore, it appears likely to once again question whether this judicial practice by international tribunals in respect to immunities has evolved to a customary rule of international law. In the following, probably the most relevant judgment to date in relation to sitting heads of state before an international tribunal will be considered: it is the case of since 2019 ex-Sudanese head of state, Omar Al-Bashir. This case is interesting because it raises several issues,-first in regard to the court's jurisdiction, since Sudan is not a state party to the ICC, and also to Al-Bashir's entitlement to immunity as a (then) sitting head of state.

#### *a) The Prosecutor v. Omar Hassan Ahmad Al Bashir*

Since Sudan gained independence from the United Kingdom in 1956, it has suffered several violent conflicts. The most recent one has been ongoing since the year 2003 in Darfur, where investigations showed that the Sudanese government resorted to serious human rights violations like systematic killing, war crimes, crimes against humanity and genocide as a response to military activities of rebel groups.<sup>105</sup> This caused for massive concern within the international community, who saw the need to rapidly act within the existing legal framework. However, Sudan's position as a non-party state to the Rome Statute meant that the prosecutor of the ICC could not, *ex officio*, prosecute those responsible for the alleged crimes. In view of this, two years after the outbreak of violence in Darfur, the United Nations Security Council (UNSC) determined that the situation constituted 'a threat to international peace and security' and acting under its Chapter VII UN Charter powers adopted Resolution 1593 (2005) thereby referring the situation to the prosecutor of the ICC. This conferred jurisdiction to the court pursuant to article 13 (b) Rome Statute.<sup>106</sup>

On the 4<sup>th</sup> of March of 2009, the Pre-trial Chamber I (PTC I) of the ICC issued an arrest warrant for war crimes and crimes against humanity, which was amended a year later by a second warrant to include the crime of genocide, against (then) acting Sudanese president Omar Al-Bashir.<sup>107</sup> Subject of a brief analysis and a subsequent critical assessment will be two differently reasoned decisions of the ICC regarding Al-Bashir's immunities: the decision

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<sup>104</sup> *Charles Taylor* (immunity), para. 51.

<sup>105</sup> *Schabas*, p. 50; *Trahan*, *Fordham Int'l L.J.*, 04/2008, p. 990 (990 ff.); **Jones, 6/2009, p. 13 (14)**; *Kelly*, *UC Davis J. Int'l L. & Pol'y*, 18/2011, p. 205 (206 ff.).

<sup>106</sup> UNSC, Resolution 1593, UN Doc. S/RES/1593 [2005].

<sup>107</sup> ICC (PTC I) Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir (*The Prosecutor v. Omar Hassan Ahmad Al Bashir*), Case No. ICC-02/05-01/09-3, 4 March 2009 [hereinafter *Arrest Warrant*]; ICC (PTC I) Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir (*The Prosecutor v. Omar Hassan Ahmad Al Bashir*), Case No. ICC-02/05-01/09-95, 12 July 2010.

on the *Arrest Warrant* of 2009<sup>108</sup> and the latest decision on the failure by Jordan to comply with its obligations arising under the Rome Statute<sup>109</sup>. The analysis of these decisions is of crucial importance for the aim of this paper, namely, to determine if there is an immunity exception for heads of state because they reflect customary international law rules or rules that are widely recognized by the world community.

#### aa) Judgment of 4 March 2009

In its first decision the ICC was faced with determining whether the case against Al-Bashir fell within its jurisdiction. Hence, the court considered its jurisdiction *ratione loci*, *ratione temporis*, *ratione materiae* and *ratione personae*. The court determined that it had obtained jurisdiction *ratione loci* and *temporis*, pursuant to article 13 (b) Rome Statute through the UNSC referral: this encompassed the crimes occurred in the territory of Darfur (Sudan) since 1 July 2002.<sup>110</sup> Further, the court found it had jurisdiction *ratione materiae* since the conducts Al-Bashir was accused of constituted genocide, crimes against humanity and war crimes.<sup>111</sup> Finally, the most relevant question raised related to its jurisdiction *ratione personae*. Especially whether the immunity exclusion of article 27 Rome Statute applied to the present case or if instead Al-Bashir enjoyed full personal immunity, considering his status as the then sitting head of state of Sudan, a country not party to the Rome Statute. This was the first time the court had to decide on its jurisdiction *ratione personae* in regard to a sitting head of state of a non-party state, making the outcome of the judgment extremely relevant and influential. The ICC found that '*the current position of Omar Al-Bashir as a Head of a State which is not party to the Statute, has no effect on the Court's jurisdiction over the present case*'.<sup>112</sup> To reason this conclusion, the court offered the following arguments: first, the court referred to the preamble of the Rome Statute which contains the primary objective of the court, namely that of ending impunity for international crimes.<sup>113</sup> Further, it claimed that in aim of achieving this objective the Rome Statute adopted 'core principles' which are embodied in article 27 of the Rome Statute and expressly exclude any personal or functional immunities before the court.<sup>114</sup> On the question of the applicable law the court considered, under scrutiny of the requirements set out in article 21 Rome Statute, if recourse to international law beyond the Rome Statute was necessary. It held that this was not the case, because the Rome Statute leaves no legal loophole in relation to immunities.<sup>115</sup> The closing argument was arguably also

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<sup>108</sup> *Arrest Warrant*.

<sup>109</sup> ICC (AC) Judgment in the Jordan Referral re Al-Bashir Appeal (*The Prosecutor v. Omar Hassan Ahmad Al-Bashir*), Case No. ICC-02/05-01/09 OA2, 6 May 2019 [hereinafter *Jordan*].

<sup>110</sup> *Arrest Warrant*, para. 37.

<sup>111</sup> *Ibid.*, para. 39.

<sup>112</sup> *Ibid.*, para. 41.

<sup>113</sup> *Ibid.*, para. 42.

<sup>114</sup> *Ibid.*, para. 43.

<sup>115</sup> *Ibid.*, para. 44.

the most compelling: the court held that the referral of the situation in Darfur by the UNSC to the ICC entailed the application of all its regulatory instruments to the proceedings against Al-Bashir, which includes the Rome Statute.<sup>116</sup>

## bb) Judgment of 6 May 2019

On May 6<sup>th</sup> 2019 the Appeals Chamber of the ICC issued a judgment on whether Jordan had violated its international obligations arising out of the Rome Statute to arrest and surrender Al-Bashir in a visit to the country in March of 2017. According to article 86 Rome Statute, contracting parties are under a binding obligation to '*cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court*'. In the present case, it meant that all state parties to the Rome Statute were under a treaty obligation to arrest and surrender Al-Bashir, when in their territory, observing the arrest warrants issued against him in 2009 and 2010 by the ICC. However, many countries failed to comply with their obligations under the Rome Statute, highly influenced by the position adopted by the African Union, which formally rejected these warrants and urged its member states not to cooperate with the ICC.<sup>117</sup> This defiance is reflected in a series of judgments delivered by the ICC which under article 87 (7) Rome Statute condemned the lack of action taken by the states in question.<sup>118</sup> These non-complying countries often argued that arresting a sitting head of state of a non-party state to the Rome Statute, who enjoys under international law immunity *ratione personae*, would have been in breach of their international obligations, recalling article 98 (1) Rome Statute which reads: '*The Court may not proceed with a request for surrender 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 [...]*'

The central question in the present case against Jordan was whether a sitting head of state from a non-party state to the Rome Statute but under its jurisdiction through a UNSC referral is immune from arrest and surrender by an ICC member state, and thus whether Jordan could rely on Art. 98 (1) Rome Statute. In its defense, Jordan's counsel argued that arresting

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<sup>116</sup> *Arrest Warrant*, para. 45; *Gaeta*, JIJC 7/2009, p. 315 (324); *Blommesteijn/Ryngaert*, ZIS 6/2010, p. 428 (434).

<sup>117</sup> AU Assembly 'Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Tribunal (ICC)', 3 July 2009, AU Doc. Assembly/AU/Dec. 245 (XIII) Rev. 1 para. 10; *Sadat*, in: DeGuzman/Oosterveld (eds.), p. 18, 19; *Tladi*, JICJ 11/2013, p. 199 (204); *Omorogbe*, NILR 33/2019, p. 287 (288).

<sup>118</sup> ICC (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 (*The Prosecutor v. Omar Hassan Ahmad Al Bashir*), Case No. ICC-02/05-01/09, 12 December 11 [hereinafter *Malawi*]; ICC (PTC I) Decision in the non-compliance by the Republic of Uganda with the request to arrest and surrender Omar Al-Bashir to the Court and referring the matter to the UNSC and the Assembly of state parties to the Rome Statute (*The Prosecutor v. Omar Hassan Ahmad Al Bashir*), Case No. ICC-02/05-01/09-267, 11 July 2016; ICC (PTC I) Decision under article 87(7) of the Rome Statute on the non-compliance by South Africa with the request by the Court for the arrest and surrender of Omar Al-Bashir (*The Prosecutor v Omar Hassan Ahmad Al-Bashir*) Case No. ICC-02/05-01/09-302, 6 July 2017.

Al-Bashir would have been in breach of its obligations under international law because customary international law grants sitting heads of state immunity *ratione personae*.<sup>119</sup> Furthermore, the exclusion of immunity for heads of state contained in article 27 (2) Rome Statute did not apply to Al-Bashir, because Sudan was not a state party to the Rome Statute.<sup>120</sup> The UNSC referral only affected the relationship between Sudan and the ICC but did not remove Al-Bashir's immunity vis-à-vis other states.<sup>121</sup> However, the court concluded that immunity could not be upheld in such a case therefore finding that Jordan had indeed not complied with its obligations arising under the Rome Statute.<sup>122</sup> This judgment is of special interest because the ICC combined its two lines of reasoning to explain the exclusion of sitting head of state immunity before the court. One is based on customary international law and the other on the UNSC referral and the obligation of Sudan to 'cooperate fully' with the court.<sup>123</sup>

As previously mentioned<sup>124</sup> article 27 (2) Rome Statute provides that '*immunities [...] shall not bar the Court from exercising its jurisdiction [...]*' and according to the ICC, this provision has the status of customary international law. To support this argument, the court noted that provisions barring immunity before international criminal tribunals were formulated *inter alia* in the Nuremberg Charter, the Convention against Genocide and in the statutes of the ICTY, ICTR and SCSL.<sup>125</sup> It also mentioned the indictment and prosecution of sitting heads of state before international criminal courts like Charles Taylor<sup>126</sup> or Slobodan Milošević<sup>127</sup> to provide further evidence of a customary international law exception to head of state immunity.<sup>128</sup> On the contrary, the court observed that immunity of former or sitting heads of state has never been upheld before international criminal tribunals.<sup>129</sup> This is partly due to the singular character of international tribunals in comparison to domestic courts: international tribunals act on behalf of the '*international community as a whole*' and the principle of *par in parem non habet imperium* does not apply in this case.<sup>130</sup> Further, the court endorsed its previous (somewhat controversial) *Malawi* decision stating that it was '*fully satisfied that the pronouncements made by the Pre-Trial Chamber I [...] have adequately and correctly confirmed the absence of a rule of customary international law recognizing Head of State*

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<sup>119</sup> *Jordan*, para. 15.

<sup>120</sup> *Ibid.*, para. 15.

<sup>121</sup> 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' (*The Prosecutor v. Omar Hassan Ahmad Al Bashir*) 12 March 2018, paras. 63, 64.

<sup>122</sup> *Jordan*, p. 4.

<sup>123</sup> *Ibid.*, p. 6, para. 1, 7.

<sup>124</sup> *Supra*, p. 18.

<sup>125</sup> *Jordan*, paras. 103-108.

<sup>126</sup> SCSL, *Prosecutor v. Charles Ghankay Taylor*, Judgment, Case No. SCSL-03-01-T, 18 May 2012.

<sup>127</sup> ICTY, *The Prosecutor v. Slobodan Milošević et al.*, Indictment, Case No. IT-99-37, 22 May 1999.

<sup>128</sup> *Jordan*, para. 107, 109.

<sup>129</sup> *Ibid.*, para. 114.

<sup>130</sup> *Ibid.*, para. 115.

*immunity before international courts in the exercise of proper jurisdiction.*<sup>131</sup> It hence acknowledged that by acceding the Rome Statute, state parties had given up head of state immunity in proceedings before the court, both in the vertical relationship with the court and in the '*horizontal relationship between state parties [...] if the Court is asking for the arrest and surrender of a person.*'<sup>132</sup>

The second avenue taken by the court focused on the UNSC referral. The court pointed out that despite Sudan's status as a non-party to the Rome Statute, it is still bound by the authority of the UNSC as a member to the United Nations.<sup>133</sup> The referral of the situation in Darfur to the ICC via Resolution 1593 (2005)<sup>134</sup> triggered the court's jurisdiction, as established in article 13 (b) Rome Statute, which it must exercise in accordance with the Rome Statute's provisions.<sup>135</sup> According to set resolution, Jordan had the obligation to cooperate with the ICC, giving effect to the arrest warrant.<sup>136</sup> Furthermore, the resolution created a distinct obligation for Sudan, then bound to '*cooperate fully with and provide necessary assistance to the Court and the Prosecutor*' so that the cooperation regime applicable to states parties, namely article 86 Rome Statute, was from this moment onward also applicable to Sudan's cooperation with the court.<sup>137</sup> This includes the application of article 27 (2) Rome Statute, which precludes the defense of immunity, in words of the court '*full cooperation in accordance with the Statute encompasses all those obligations that States Parties owe to the Court and that are necessary for effective exercise of jurisdiction by the Court.*'<sup>138</sup> It goes without say that if Sudan could invoke immunity of its (then) sitting head of state it would be impossible to prosecute him, making 'full cooperation' as required by Resolution 1593 (2005) impossible.<sup>139</sup>

At this point it might be necessary to recall that Jordan claimed that Al-Bashir not having immunity before the ICC does not mean that he does not enjoy immunity from arrest by other states (e.g. Jordan) acting at the request of an international criminal court. The court however rejected this argument insisting that the effect of article 27 (2) Rome Statute also arises in the horizontal relationship between Sudan and other states or else this provision would be rendered ineffective.<sup>140</sup> In any case, if Jordan considered arresting Al-Bashir incompatible with its obligations it should have initiated the consultation procedure pursuant to article 97 Rome Statute and not unilaterally decide not to cooperate with the court.<sup>141</sup>

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<sup>131</sup> *Jordan*, para. 113.

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

<sup>133</sup> Article 25 UN Charter; *Jordan*, para. 140.

<sup>134</sup> UNSC, Resolution 1593, UN Doc. S/RES/1593 [2005].

<sup>135</sup> *Jordan*, para. 135, 149.

<sup>136</sup> *Ibid.*, para. 117.

<sup>137</sup> *Ibid.*, paras. 140, 141.

<sup>138</sup> *Ibid.*, para. 143.

<sup>139</sup> *Ibid.*, para. 143.

<sup>140</sup> *Ibid.*, para. 149.

<sup>141</sup> *Ibid.*, para. 152, 153.

### *b) Preliminary critical assessment*

These judgments delivered by the ICC are subject of great controversy. The criticism focuses especially on the immunity exception and the question whether it was applicable to Al-Bashir or not. Therefore, a tentative appraisal of both judgments may be useful to further understand the issues and points of criticism.

The ICC decision of 4 March 2009 has been widely discussed in legal literature, with many scholars arguing that article 27 Rome Statute cannot be applicable to non-party states and others who agree with the findings of the court but consider the analysis unconvincing.<sup>142</sup> Furthermore, regional international organizations like the Islamic Conference, the Arab League and in particular the African Union strongly opposed the court's decision to issue an arrest warrant against Al-Bashir.<sup>143</sup> I must agree with those scholars who find the conclusion reached by the court correct but criticize the reasoning. The first consideration raised by the court refers to the aim of the ICC to fight impunity for international crimes, which is embodied in the preamble of its statute. This objective, while being legitimate seems however an unsuitable basis to support the exclusion of Al-Bashir's immunity, since the case concerns a non-party state. Considering that Sudan has not ratified the treaty, the goals and objectives set out therein do not create any international obligations for the country.

The second argument is inappropriate for a similar reason as the first one. Indeed, the exclusion of immunity reflects a core principle of the Rome Statute. However, only in respect to the nationals of states which have ratified the statute, therefore excluding Sudan. In its third argument, the judges held the view that in the absence of a legal loophole, only the Rome Statute applied to the proceedings, disregarding other rules of international law set out in article 21 (1) Rome Statute. For any statute provision to apply (in this case article 27 Rome Statute) over a customary law norm to a non-party state, it must go beyond being a treaty provision: it must reflect a principle of customary international law.<sup>144</sup> Thus, the legal validity of the rule does not emanate from the consent of the parties but from its character as customary law. This problem was not addressed by the court, which could have rightfully applied to Sudan the immunity exclusion rule arguing its customary law status. Finally, the court pointed out that Sudan, as a member State to the UN has accepted to comply with binding UNSC resolutions, such as Resolution 1593 (2005) which refers the situation in

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<sup>142</sup> Non-application of Art. 27: *Akande*, AJIL Unbound 112/2018, p. 172 (172 ff.); Application of Art. 27, but critical of the arguments: *Gaeta*, JJC 7/2009, p. 315 (323); *Burghardt/Geneuss*, ZIS 4/2009, p. 126 (129); *Kreicker*, ZIS 7/2009, p. 350 (356); *Schabas*, Windsor Y.B. Access Just. 28/2010, p. 1 (7, 8); *Blommestijn/Ryngaert*, ZIS 6/2010, p. 428 (434); *Cartes Rodríguez*, AEDI 35/2019, p. 487 (510).

<sup>143</sup> AU, General Assembly decision on the application by the ICC prosecutor for the indictment of the President of the Republic of Sudan, Doc. Assembly/AU/Dec.221 (XII), 3 February 2009, paras. 2, 3; AU, Peace and Security Council Decision (PSC/PR/Comm (CLXXV)), 5 March 2009, paras. 4-6; AU, Decision on the meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC), Doc. Assembly/AU/13 (XIII), 3 July 2009, para. 9; *Sadat*, in: DeGuzman/Oosterveld (eds.), p. 18; *Shahine*, Arab League criticizes ICC charges against Sudan, <https://www.reuters.com/article/us-warcrimes-sudan-icc/arab-league-criticizes-icc-charges-against-sudan-idUSL1633478620080716> (last accessed 6/09/2020).

<sup>144</sup> *Gaeta*, JJC 7/2009, p. 315 (324); *Cartes Rodríguez*, AEDI 35/2019, p. 487 (510).

Darfur to the ICC. The only logical interpretation therefore is that through a referral from the UNSC to the ICC, Sudan is put in the same position as an ICC party, having to comply with the Rome Statute.<sup>145</sup> This reasoning, which is in my opinion the most convincing one in this judgment, has been used by the court the case concerning the non-compliance with the arrest warrant by South Africa.<sup>146</sup>

The second decision mentioned in this paper is the latest Judgment in the Al-Bashir case of 2019 against Jordan. It follows the ten-year trend of ICC judgments in the Al-Bashir case, in which the court has never recognized his immunity.<sup>147</sup> Other than in its earliest judgement in discussed above, the court clarified that the irrelevance of immunities vis-à-vis international courts is not a mere treaty provision enshrined in article 27 Rome Statute, but a rule of customary international law that therefore also applies to non-state parties.<sup>148</sup> It also argued that the UNSC referral conferred an obligation to both Sudan and Jordan to cooperate with the ICC. The reasoning followed by the court in this case should be welcomed, particularly the diligent assessment undertaken in regard to the immunity exception of heads of state before international criminal courts and its customary law character. As previously mentioned, for a treaty provision to be considered customary international law it must enjoy sufficient state practice and *opinio juris*. Hence, to reason the customary law character of article 27 Rome Statute the court noted that cases such as Taylor or Milošević serve as state practice while the existence of an immunity exclusion provision in virtually all statutes of international criminal tribunals since World War II as *opinio juris*. I agree with this conclusion since like the court, I find there to be sufficient state practice and *opinio juris* to make such an affirmation.

The first real indicator of state practice can be said to be the Nuremberg and Tokyo trials, in which major war figures and serving high-ranking officials of Nazi Germany (Dönitz) and Japan were prosecuted. Other notorious cases include the indictment of Milošević by the ICTY while he was serving, Kambanda's conviction by the ICTR, the indictment of Kenyatta by the ICC in 2011 or the warrants issued against Muammar and Saif Al-Islam Gaddafi by the ICC, which were not enforced due to the death of father and son months later. One might argue that in all the above-mentioned cases of prosecution and even conviction of sitting or former heads of state or high-ranking officials (except in the case of Gaddafi) they were nationals of states parties to the respective applicable statute, which is different in the case

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<sup>145</sup> Akande, JICJ 7/2009, p. 333 (335, 340 ff.); Burghardt/Geneuss, ZIS 4/2009, p. 126 (129).

<sup>146</sup> ICC (PCT II) Decision under article 87 (7) of the Rome Statute on the non-compliance by South Africa with the request by the Court for the arrest and surrender of Omar Al-Bashir (*The Prosecutor v. Omar Hassan Ahmad Al Bashir*) Case No. 02/05.01/09-203, 6 July 2017.

<sup>147</sup> Sadat, Why the ICC's Judgment in the Al-Bashir case wasn't so surprising, <https://www.justsecurity.org/64896/why-the-iccs-judgment-in-the-Al-Bashir-case-wasnt-so-surprising/> (last accessed 6/09/2020).

<sup>148</sup> Cassese, International Criminal Law, p. 311 ff.; Zappalà, EJIL 12/2001, p. 595 (602 ff.); Frulli, JICJ 2/2004, p. 1118 (1127); Cryer, GoJIL 1/2009, p. 45 (64); Gaeta, JICJ 7/2009, p. 315 (324); Kreß, in: Bergsmo/Yan (eds.), p. 223 (252).

of Sudan and the Rome Statute. While this certainly holds truth, this cannot be used to undermine the existence of sufficient state practice, which exists regardless of a statute membership. Furthermore, there is a clear universal consensus that people who commit international crimes should be held responsible and that immunities should not stand in the way of it. This is reflected by the ratification of the Rome Statute by 123 countries that have voluntarily accepted to be under the jurisdiction of the ICC. Therefore, as the court correctly pointed out, an immunity exception of sitting or former heads of state before international criminal tribunals is customary international law. General<sup>149</sup> customary law is, in principle, binding on all states.<sup>150</sup> Hence, it means that all nationals regardless of their state's ICC membership or the existence of a UNSC referral, cannot claim immunity as a legitimate procedural bar before international criminal tribunals in proceedings against them. I mentioned that they are 'in principle' applicable to all states because according to the persistent objector doctrine, states which persistently object to the application of a customary international law rule during its emergence, are exempt from its application when it finally crystallizes into such.<sup>151</sup> It seems like Jordan and Sudan could have relied on the persistent objector doctrine to avoid the application of the immunity exception on them. However, neither party decided to bring up this argument. In the case of Jordan, this might have to do with the fact that it is a party to the Rome Statute. From expressly accepting the Rome Statute's legal provisions, the *opinio juris* element of customary international law, i.e. Jordan's belief it is complying with a legal obligation could be satisfied.<sup>152</sup> It is also questionable whether the doctrine could have succeeded, since the customary law rule of not granting sitting heads of state immunity before international criminal tribunals concerns the protection of *jus cogens* crimes enshrined in the Rome Statute.<sup>153</sup> Furthermore, the persistent objector doctrine is gradually diminishing and the affected state tends to base its claim on either the meaning and the scope of the accepted rule or argue that a rule has not yet become customary law.<sup>154</sup> The fulfillment of the timely objection criteria also raises doubts, since the customary law rule was not emerging at the time the judgment was delivered but, according to the court, already existing.<sup>155</sup> This might be some of the reasons why Sudan chose not to pursue this controversial line of defense. Anyhow, there is also a

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<sup>149</sup> General and regional customary international law must be distinguished.

<sup>150</sup> ICJ, North Sea Continental Shelf Cases, (*Federal Republic of Germany v. Denmark/ Netherlands*), Judgment, ICJ Rep. 1969, p.3, para. 63 '*general or customary law rules and obligations, by their very nature, must have equal force for all member states of the international community, and cannot therefore be the subject of any right of unilateral exclusion exercisable at will by any of them in its own favor*'.

<sup>151</sup> Crawford, p. 233; Dumberry, Int'l & Comp. L. Q. 59/2010, p. 779 (781); Holning, Chi. J. Int'l L. 6/2005, p. 495 (498).

<sup>152</sup> The objection must be maintained 'consistently': *McClane*, ILSA J. Int'l L. 13/1989, p. 1 (2). Conclusion of agreements evidences '*opinio juris sive necessitatis*': *McClane*, ILSA J. Int'l L. 13/1989, p. 1 (4).

<sup>153</sup> *Sadat*, Why the ICC's Judgment in the Al-Bashir case wasn't so surprising, <https://www.justsecurity.org/64896/why-the-iccs-judgment-in-the-Al-Bashir-case-wasnt-so-surprising/> (last accessed 6/09/2020).

<sup>154</sup> Crawford, p. 233; Dumberry, Int'l & Comp. L. Q. 59/2010, p. 779 (781).

<sup>155</sup> A State must object to the rule during its development: *Goldsmith/ Posner*, p. 25; Crawford, p. 233; *Loschin*, J. Int'l L. & Pol'y 2/1996, p. 148 (150).

compelling argument for limiting the application of the persistent objector doctrine regarding international human rights rules.<sup>156</sup> The idea of human rights is linked to the idea of their universality, meaning that they have to exist everywhere and be available to everyone – safeguarding certain cultural exceptionalisms.<sup>157</sup> The universality of human rights is therefore in inherent tension with the persistent objector doctrine, which limits the enforceability of certain customary international rules that exist to protect human rights.<sup>158</sup>

At this point, the backlash this judgment has received should be addressed. Several legal experts have fiercely criticized the reasoning of the Appeals Chamber as confusing, incoherent or even deeply misguided.<sup>159</sup> Some have argued that through this decision article 98 (1) Rome Statute, which reads: '*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, [...]*.' has been rendered irrelevant.<sup>160</sup> Indeed, that might be a coherent interpretation of the judgment. However, this accusation mistakes the non-applicability of article 98 (1) as a diminishment of the provision. At a closer look, the non-applicability of article 98 (1) is the mere consequence of recognizing the irrelevance of immunities vis-à-vis international courts as a rule of customary law. Furthermore, the purpose of article 98 (1) was not to be used as a means to avoid cooperation with the court in the prosecution of international crimes.<sup>161</sup> Another point of criticism relates to the distinction of the court drawn between domestic jurisdictions and international courts regarding head of state immunity. According to the court international tribunals are impartial by nature. As they do not act on behalf of a state and are thus not an expression of a state's sovereign power, which is necessarily limited by the sovereign power of other states, the principle of sovereign equality that applies between states does not apply before an

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<sup>156</sup> *Holning*, Chi. J. Int'l L. 6/2005, p. 495 (498).

<sup>157</sup> *Holning*, Chi. J. Int'l L. 6/2005, p. 495 (501).

<sup>158</sup> Tension between universal human rights and persistent objector doctrine: *Holning*, Chi. J. Int'l L. 6/2005, p. 495 (510).

<sup>159</sup> *Jacobs*, You have just entered Narnia, <https://dovjacobs.com/2019/05/06/you-have-just-entered-narnia-icc-appeals-chamber-adopts-the-worst-possible-solution-on-immunities-in-the-bashir-case/> (last accessed 6/09/2020); *Akande*, ICC Appeals Chamber, <https://www.ejiltalk.org/icc-appeals-chamber-holds-that-heads-of-state-have-no-immunity-under-customary-international-law-before-international-tribunals/> (last accessed 6/09/2020); *Batros*, A Confusing ICC Appeals Judgment on Head-of-State Immunity, <https://www.justsecurity.org/63962/a-confusing-icc-appeals-judgment-on-head-of-state-immunity/> (last accessed 6/09/2020).

<sup>160</sup> *Jacobs*, You have just entered Narnia, <https://dovjacobs.com/2019/05/06/you-have-just-entered-narnia-icc-appeals-chamber-adopts-the-worst-possible-solution-on-immunities-in-the-bashir-case/> (last accessed 6/09/2020); *Batros*, A Confusing ICC Appeals Judgment on Head-of-State Immunity, <https://www.justsecurity.org/63962/a-confusing-icc-appeals-judgment-on-head-of-state-immunity/> (last accessed 6/09/2020); *Oltean/Zebrowski*, ICC Appeals Chamber Judgment on Jordan, <https://www.ijmonitor.org/2019/05/icc-appeals-chamber-judgment-on-jordan-analysis-and-implications-on-the-question-of-immunity/> (last accessed 6/09/2020).

<sup>161</sup> *Sadat*, Why the ICC's Judgment in the Al-Bashir case wasn't so surprising, <https://www.justsecurity.org/64896/why-the-iccs-judgment-in-the-Al-Bashir-case-wasnt-so-surprising/> (last accessed 6/09/2020).

international court.<sup>162</sup> Some authors argue that this could lead to absurd situations, like two countries creating an international tribunal to prosecute the head of state of a third country, which would be possible according to the court's reasoning.<sup>163</sup> This not only undermines the principle *pacta non tertius* but it is manifestly contrary to international law, since states cannot grant an international tribunal powers they do not possess (e.g. the power to adjudicate over a third-country head of state).<sup>164</sup> I agree, an 'international' tribunal created by country A and B to adjudicate over country C goes against many principles of international law. However, I do not find that the court's decision stands up to this argument: that conclusion does not take into account the succeeding passage of the judgment, in which the court clearly characterizes international courts as acting '*on behalf of the international community as a whole*'.<sup>165</sup> All international courts mentioned in this paper like ICTY, ICTR, SCSL or ICC did in fact act on behalf of the international community: the first three were set up by the UN which has as members 193 sovereign states while the ICC counts 123 state parties, making its universality undeniable. Moreover, international criminal tribunals have mechanisms in place to avoid their own abuse of power. The ICC, for example, needs to obtain jurisdiction over non-party states before it can act. This is only possible through a UNSC referral, i.e. when the UNSC classifies the situation in the country in question as a 'threat to the peace, breach of the peace or acts of aggression'. An 'international tribunal' which does not contain in its statute any minimal procedural safeguards will, possibly, not be recognized by many countries for lacking seriousness and legal basis. Hence, in light of the aforementioned arguments, the assumption that two countries can in fact strip a third country of its sovereignty right by creating an 'international tribunal' and prosecuting a third country's head of state is not only unrealistic but not foreseen or included in the court's Jordan judgment. Lastly, it is worth mentioning the court's examination of the interaction between a UNSC referral and the immunities and obligations of a non-party state under the Rome Statute. In sum, the referral imposed the obligation on Sudan to cooperate with the court as if it were a state party, which led to the application of the Rome Statute. Since the Rome Statute includes an immunity exclusion provision, Al-Bashir could not enjoy immunity as the Sudanese head of state before the ICC. This second approach taken by the court made the judgment more convincing. Had the court exhausted its analysis on the customary law character of the rule, the outcome could have raised (more) doubts, since the application of customary law rules determined by the ICC to a non-party state, like Sudan, is questionable.

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<sup>162</sup> *Jordan*, para. 115.

<sup>163</sup> *Jacobs*, You have just entered Narnia, <https://dovjacobs.com/2019/05/06/you-have-just-entered-narnia-icc-appeals-chamber-adopts-the-worst-possible-solution-on-immunities-in-the-bashir-case/> (last accessed 6/09/2020).

<sup>164</sup> *Batros*, A Confusing ICC Appeals Judgment on Head-of-State Immunity, <https://www.justsecurity.org/63962/a-confusing-icc-appeals-judgment-on-head-of-state-immunity/> (last accessed 6/09/2020); *Kiyani*, Elisions and Omissions, <https://www.justsecurity.org/63973/elisions-and-omissions-questioning-the-iccs-latest-bashir-immunity-ruling/> (last accessed 6/09/2020).

<sup>165</sup> *Jordan*, para. 115.

Anyhow, Al-Bashir's fate nowadays seems clearer than it was years before: since he was ousted in April of 2019, Sudan's transitional government has agreed to hand him over to the ICC. This makes the delicate matter of removing Al-Bashir's immunity *ratione personae* an internal decision by Sudan's authorities and not anymore, the ICC's responsibility. This avoids an uncomfortable situation for both Sudan, AU countries and the ICC: on the one hand, neither Sudan nor parties to the AU have to breach their allegiance to the organization by complying with the ICC. On the other hand, the ICC can finally steer clear of accusations that it racially profiles countries by only targeting African heads of state or that it breaches a state's sovereignty and international law. However, the lessons learned from the ten-year battle in the Al-Bashir saga between countries who resisted to give up the immunities of heads of state accused of international crimes and the ICC, will without doubt be of great importance in similar cases that might arise in the future.

#### IV. Conclusion

The present paper considered the problem of immunity of serving and former heads of state from the jurisdiction of national and international courts by analyzing two landmark judgments concerning this topic. These decisions were complemented with other relevant judgments to reflect the current state practice and to provide a clear indication of what the existing *opinio juris* is. In the following, I will outline the main observations made throughout this paper.

There is a universal consensus that sitting heads of state enjoy absolute immunity *ratione personae* before foreign domestic courts.<sup>166</sup> This has been reaffirmed *inter alia* by the *Pinochet No. 3* judgment and the subsequent *Arrest Warrant*<sup>167</sup> case before the ICJ. However, the same cannot be said for former heads of state.<sup>168</sup> The groundbreaking *Pinochet No. 3* paved the way for convicting former heads of state of international crimes at the national level. In this sense, Belgium in 2003 brought a case against former Chadian dictator Hissene Habré and Spain in 2006 issued two arrest warrants against former Guatemalan president Efraín Ríos Montt for international crimes.<sup>169</sup> However, these prosecutions were unsuccessful, and the two ex-presidents were years later tried before other criminal tribunals: an ad-hoc tribunal created by the African Union in the case of Habré and before Guatemalan national courts in the case of Ríos Montt.

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<sup>166</sup> Audiencia Nacional [Sala de lo Penal], *Fidel Castro*, Case No. 1999/2723, 4 March 1999; *Tunks*, Duke LJ 52/2002, p. 651 (663); *Akande*, AJIL 98/2004, p. 407 (411); *O'Keefe*, AJIL Unbound 109/2015, p. 167 (167); *Foakes*, Immunity for International Crimes?; <https://www.chathamhouse.org/publications/papers/view/179865> (last accessed 6/09/2020).

<sup>167</sup> ICJ, Arrest Warrant of 11 April 2000 (*Democratic Republic of the Congo v. Belgium*), Judgment, ICJ Rep. 2002, p. 3. [hereinafter ICJ *Arrest Warrant*].

<sup>168</sup> *Mbokani*, ICC's Appeals Chamber Judgment on Jordan, <https://www.ijmonitor.org/2019/05/iccs-appeals-chamber-judgment-on-jordan-a-legally-correct-reasoning-for-a-politically-incorrect-prosecution/> (last accessed 6/09/2020).

<sup>169</sup> Audiencia Nacional, Diligencias Previas: 331/1999-10 genocidio, terrorismo y torturas, Auto de Extradición, 22 November 2006.

It is thus difficult to deduce any clear rules regarding immunities of former heads of state in proceedings before foreign domestic courts. One reason is because it is exceptionally difficult for a foreign national court to gather the necessary evidence to achieve a conviction, therefore they rarely get involved in prosecuting foreign heads of state. Another reason is that there is a great disparity in the outcomes, which makes it difficult to define a trend.<sup>170</sup> Furthermore, the risk of politization and destabilization when domestic court act unilaterally (put forward e.g. by Lord Goff in the *Pinochet No. 3* judgment) is another argument for upholding immunity before national domestic courts. In any case, if a former head of state fears prosecution by a foreign domestic court he/she will likely avoid that risk by simply not travelling to that country, rendering such prosecutions more symbolic than effective. Thus, although international law opens the possibility for former heads of state to be tried at a national level for international crimes due to the significant drawbacks that such a proceeding can entail it does not seem like the most appropriate forum.

However, the situation appears differently in relation to international tribunals. The decisions of international criminal tribunals show that neither functional nor personal immunities of heads of state prevent them from prosecution. As the ICJ restated in the *Arrest Warrant* case, *even sitting heads of State do not retain their personal immunity before 'certain international tribunals'*.<sup>171</sup> The legal basis can be found first in an immunity removal clause in every statute of international(zed) tribunals, including in the Rome Statute. ICC state parties have voluntarily waived their right to immunity claims before the court. The creation of international tribunals is linked to the idea of prosecuting heads of state, high-ranking officials and other individuals who would normally enjoy immunity for international crimes. Hence, removing any prerogatives that bar prosecution seems like a logical conclusion of the creation of international criminal tribunals.

The most interesting observation found in this paper is, however, the customary law character of the immunity *ratione personae* exclusion for heads of state before international criminal tribunals.<sup>172</sup> First of all, this goes to show the evolving nature of customary international law, which went from preserving core principles such as head of state immunity to *de jure* and *de facto* eliminating it for *jus cogens* prohibitions, concretely international crimes. Second, it is beyond doubt that this finding included in the Jordan judgment, will have far-reaching consequences regarding party and non-party states to the Rome Statute. It is now clear that when the ICC issues an arrest warrant against a non-party sitting head of state, all state parties are under a legal obligation to execute it.<sup>173</sup> Countries unwilling to

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<sup>170</sup> Foakes, <https://www.chathamhouse.org/publications/papers/view/179865> (last accessed 6/09/2020).

<sup>171</sup> ICJ *Arrest Warrant*, para 61.

<sup>172</sup> *Malawi*, para. 42; ICC (PTC I I) Decision pursuant to article 87 (7) of the Rome Statute on the refusal of the Republic of Chad to comply with the cooperation request issued by the court (*The Prosecutor v. Omar Hassan Ahmad Al Bashir*) Case No. 02/05-01/09, 13 December 2011, para. 13; *Jordan*, para. 113.

<sup>173</sup> Provided it has jurisdiction, which in respect of a non-party state would only be possible through a UNSC referral: Article 13 (b) Rome Statute.

cooperate with the ICC's warrants cannot justify their inactivity by resorting to article 98 (1) Rome Statute. This is justified on the ground that heads of state do not enjoy, as a matter of customary international law, any immunities vis-à-vis international criminal tribunals.<sup>174</sup> Because this principle also applies in the horizontal relationship between states, executing arrest warrants would not lead to any state acting '*inconsistently with its obligations under international law*'. As I mentioned, the Jordan judgment also impacts the immunity of heads of state of non-party states in their relationship to the ICC or, possibly, other international criminal tribunals. If the ICC through a UNSC referral obtains jurisdiction over a non-party state, that state will likewise have to observe (1) the Rome Statute, since through a UNSC referral the same cooperation regime applied to state parties is applied to non-party states<sup>175</sup> and (2) customary international law rules crystallized by the ICC, i.e. the exclusion of head of state immunity for *jus cogens* crimes enshrined in the Rome Statute.

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<sup>174</sup> *Jordan*, para. 116.

<sup>175</sup> *Ibid.*, paras. 140, 141.

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