

ARTICLES

THE ICC AS A “TOOL” OF THE UNITED NATIONS SECURITY COUNCIL AND THE “ABSURDITY” OF HEAD OF STATE IMMUNITY WITH REGARD TO INTERNATIONAL CRIMES

A common sense rebuttal of prevalent accounts on International Criminal Law through an extensive analysis of *Jordan Referral re Al-Bashir*

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ABSTRACT

In *Jordan Referral re Al-Bashir*, the appeals chamber of the International Criminal Court (ICC) had to decide (1) whether Jordan had an obligation to arrest and surrender the sitting head of state of Sudan to the ICC for crimes against his own people and (2) whether to refer the matter of Jordan's alleged non-compliance to the United Nations Security Council (UNSC). The appeals chamber tackled both questions inappropriately. On the one hand, in view of the lack of guidance from the UNSC and the whole mess created during the “Al-Bashir saga,” the chamber should have found that Jordan justifiably failed to comply with the arrest warrant issued by the ICC. On the other hand, the ICC should have referred the whole matter to the UNSC. This Article addresses these issues while surveying the centuries' long evolution of the law on the international criminal responsibility of heads of state. While relying on prevalent accounts on International Criminal Law (ICL), the appeals chamber narrates a story according to which, for a long time, heads of state enjoyed absolute immunity—even with regard to international criminal conduct. However, at present, such immunity does not operate before international courts. The whole story does not correspond to the most compelling account of the evolution of the law on international crimes.

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INTRODUCTION

United Nations Security Council (UNSC) Resolution 1593 (2005) referred the situation in Darfur to the International Criminal Court (ICC) and mandated the Government of Sudan to cooperate fully with the ICC pursuant to the resolution.¹ UNSC Resolution 1593 also urged all States to cooperate fully.² In 2009 and 2010, the ICC issued two warrants for the arrest of the sitting head of state of Sudan, Omar Hassan Ahmad Al-Bashir. In 2017, Jordan hosted the 28th Summit of the League of Arab States in Amman. Al-Bashir attended the summit, but the State of Jordan did not arrest him. In 2019, in *Jordan Referral re Al-Bashir*, the appeals chamber of the ICC had to answer two questions: (1) whether Jordan had an obligation to arrest and surrender Al-Bashir to the ICC; and (2) whether the appeals chamber should refer the matter of Jordan’s alleged non-compliance to the UNSC. The first two paragraphs of the appeals chamber’s decision ruled on these two questions. First, the appeals chamber ruled that Jordan had such an obligation and that the nation failed to comply with this obligation.³ Nonetheless, the court decided not to refer the matter to the UNSC.⁴

1. Resolution 1593 (2005) Adopted by the Security Council at its 5158th meeting, on 31 March 2005 (S/RES/1593 (2005)), ¶ 1-2.

2. *Id.* ¶ 2.

3. Prosecutor v. Omar Hassan Ahmad Al-Bashir, ICC-02/05-01/09 OA2, Judgment in the

Both rulings are inappropriate, mainly because the appeals chamber carried out a deeply flawed analysis of the evolution of the law on the international criminal responsibility of sitting heads of state. The appeals chamber narrated a story according to which, for a long time, heads of state enjoyed absolute immunity. This immunity, however, slowly began to erode in the aftermath of the First World War. According to the appeals chamber, several episodes throughout the 20th century led to the emergence of International Criminal Law (ICL) and to the formation of an “international courts exception” to the absolute immunity of heads of state. This argument is not compelling. Contrary to this narrative crafted by the ICC appeals chamber, rules of international law concerning the criminal responsibility of individuals have actually been in existence since the origins of international law. Evidence of this is particularly concrete as it relates to sitting sovereigns, who were never entitled to any type of immunity with regard to international crimes. In the beginnings of international law, at a time where no universal peace institution existed, the rule was that any state was allowed to arrest and surrender a sitting sovereign who perpetrated outrageous acts against the law of nations. Moreover, despite overwhelming present-day academic opinion and jurisprudence to the contrary, there is strong evidence that this rule has endured and it is still in force today. However, in its current form, the rule must be viewed through the lense of the Chapter VII extraordinary powers of the UNSC. When these powers are properly acknowledged, it becomes clear that the removal of Al-Bashir’s head of state immunity was not one of the effects of UNSC Resolution 1593 simply because such immunity did not exist to begin with.

In order to elaborate and demonstrate these positions, this article will scrutinize the eleven “key findings of the Court.” Part I (*Key Findings 1-5: No Immunity before International Courts*) explains why the appeals chamber’s conclusion that sitting heads of state do not enjoy immunity before international courts is inappropriate. Section I.1 (*The Long History of ICL with No Immunity for Heads of State*), and its three subsections, explains why the most compelling account about the evolution of the law on international crimes is that, from its origins, international law provided for the international criminal responsibility of sitting sovereigns who committed extreme acts in violation of the law of nations. International law also allowed countries to arrest and surrender such sitting sovereigns who violated international law. In other words, at its origins, international law provided “no immunity at all” as far as international criminal conduct was concerned. Subsection I.1.1 (*The Appeals Chamber Reliance on the Westphalian “Myth”*) argues that the reliance of the appeals chamber on the idea that, for a long time, states could not intervene in other states to put an end to extreme violations of the law of nations is grounded on a discredited “myth.” Subsection I.1.2 (*Humanitarian Intervention and the Power to Punish a Sovereign*) elaborates on the right of humanitarian intervention and demonstrates

Jordan Referral re Al-Bashir Appeal ¶ 1 (May 6, 2019), ¶ 1 [hereinafter *Al-Bashir*].

4. *Id.* ¶ 2.

its inextricable linkage to the power of punishing a ruler who manifestly “moves outside” the realm of the law of nations. It also provides examples of centuries’ old practice and *opinio* suggesting that both ICL and its “no immunity at all” principle have been in existence for a long time. Subsection I.1.3. (*ICL Prevalent Accounts and the Notion of International Crime*) provides an interpretation on why prevalent accounts on ICL continue to hold on to the idea that this subset of international law has only come into existence in the middle of the 20th century. It concludes that, while attempting to uncouple *jus ad bellum* notions from ICL notions, prevalent accounts overlook the fact that such notions have been intertwined for a long time.

Section I.2 (*The Two World Wars: the Confirmation of No Immunity for Heads of State*) and its two subsections explain how, in the aftermath of the two world wars, the push for the creation of international tribunals and for the trial and punishment of “however highly placed” individuals is nothing but a confirmation of the old non-immunity rule that allowed states to arrest and surrender sitting heads of state. The two world wars also gave rise to two remarkable episodes whereby the ultimate victors of said wars attempted to create peremptory norms mandating the arrest and surrender of heads of state. The first subsection, Subsection I.2.1 (*The Case of William II of Hohenzollern*), surveys the first episode and explains how the appeals chamber misapprehended its significance. The author rebukes the appeals chamber for not analyzing important provisions relating to the problem of arrest and surrender and which were included not only in the Treaty of Versailles, but also in an important report that preceded its adoption. Subsection I.2.2 (*The case of Adolph Hitler*) surveys the second episode. This episode concerns the demand for the arrest and surrender of Hitler while he was the sitting head of state of Germany during the Second World War. An intriguing possibility is suggested, namely that such demand was the first universally peremptory arrest warrant. Section I.3 (*The Creation of International Criminal Tribunals in the End of the 20th Century*) asserts that it is unacceptable to use the end of the 20th century renaissance of ICL and the creation of international criminal courts—the hallmark of such renaissance—in order to pretend that old rules regulating the matter of arrest and surrender of sitting heads of state had never existed.

In particular, this Section explains how the appeals chamber did not realize that Articles 27 and 98 of its own statute are a reflection of those old rules. A straightforward and unbiased reading of these articles confirms that sitting head-of-state immunity with regard to international crimes simply does not exist, be it before national courts or international ones. Section I.4 (*A 21st Century Surprise: the ICJ's Hair-Raising Decision in the Arrest Warrant*) introduces the aberration of the whole story. Out of thin air, the International Court of Justice (ICJ) attempted to legislate from the bench in a frontal collision with the story described in the previous Sections. It absurdly determined, amongst other things, that if X, sitting head of state of country A, commits the crime of aggression or genocide in country B, country B is absolutely prohibited from initiating criminal proceedings against incumbent X. In this Section, it is suggested that the decision of the ICJ constitutes not only an unacceptable curtailment of the legitimate powers of States but that it also encroaches upon the authority of the UNSC. In

order to properly understand the latter suggestion, it is necessary to acknowledge the extraordinary powers of the UNSC and its rapport with international criminal tribunals and courts. The preceding is the main theme of the remaining sections of this article.

Part II (*Key Findings 6 and 7: the ICC as a “Tool” of the UNSC*) welcomes the finding of the appeals chamber that the ICC statute “puts the ICC at the disposal of the UN Security Council as a tool to maintain or restore international peace and security.”⁵ The concept of the ICC “as [a] tool at the disposal” is correct, but the appeals chamber did not appreciate what that concept truly entails. Section II.1 (*Outline of the Relationship between the UNSC and the ICC*) briefly sets out the legal framework regulating Chapter VII action and what that framework signifies for the relationship between the UNSC and the ICC. Section II.2 (*Practical Consequences and Interpretation Technique*) explains how a referral of a situation by the UNSC to the ICC might upend the ICC Statute in various and fundamental ways. It also argues that UNSC Resolutions should be interpreted according to common sense and with a sole purpose: to accord with the true intent of the UNSC. Section II.3 (*The Power of the UNSC in Relation to Arrest and Surrender Issues*) focuses on the authority of the UNSC in the context of the arrest and surrender of heads of state. Section II.3.1 (*Solving the Conundrum Created by the ICJ*) addresses a mind-boggling question: by adopting the UN Charter and for the sake of peace between nations, did states implicitly renounce their old power to arrest and surrender sitting foreign heads of state on account of their international crimes? Section II.3.2. (*Solving the Conundrum Created during the Al-Bashir Saga*) sets out yet another power of the UNSC, namely the power to authorize courts to issue universally peremptory arrest warrants. The UNSC authorized this power when it created its own international criminal tribunals (the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR)). However, the terms of UNSC Resolution 1593 apparently suggest that the UNSC did not authorize such power when it made a referral of the situation in Darfur to the ICC.

Part III (*Key findings 8-12: No Need to Refer the Matter to the UNSC*) addresses the question of whether the appeals chamber should have referred the matter to the UNSC. Had the appeals chamber recognized that it could not definitively conclude as to the effects of UNSC Resolution 1593, it should have found that Jordan justifiably failed to comply with the arrest warrant. Notwithstanding, the appeals chamber should have referred the matter to the UNSC. The objective of such “referral” would have been simple: to keep the UNSC formally updated of the doubts that the appeals chamber had encountered and to assure the UNSC that the appeals chamber would follow-up with any sort of guidance that the UNSC might deem appropriate. Had the appeals chamber followed this course, it would have chartered not only a creative way out of the whole mess, but it would have also demonstrated that it meant what it said: “the

5. *Id.* ¶ 6.

ICC [is] at the disposal of the UN Security Council as a tool to maintain or restore international peace and security.”⁶

I. KEY FINDINGS 1-5: NO IMMUNITY BEFORE INTERNATIONAL COURTS

The first key finding of the appeals chamber reads:

There is neither State practice nor *opinio juris* that would support the existence of Head of State immunity under customary international law vis-à-vis an international court. To the contrary, such immunity has never been recognised in international law as a bar to the jurisdiction of an international court.⁷

This finding is misleading. A suitable replacement would have read: There is neither sufficient State practice nor *opinio juris* that would support the existence of Head of State immunity under customary international law. To the contrary, centuries’ old State practice and *opinio juris* support the notion that such immunity must not be recognized as a bar to the jurisdiction of national or international authorities.

Part I will demonstrate that, while focusing solely on its own condition as an international court, the appeals chamber distorted not only the whole history of ICL but also the relevant provisions of the ICC statute. As a consequence, key findings 1-5 are defective.

I.1. The Long History of ICL with No Immunity for Heads of State

I.1.1. The Appeals Chamber Reliance on the Westphalian “Myth”

Prevalent accounts on ICL—according to which this subset of international law has only come “into its own” during, or in the aftermath of, the Second World War—are increasingly under strain.⁸ For long, scholars have acknowledged that death, imprisonment and other criminal sanctions have been used, for many centuries, to react against conduct proscribed as international criminal behavior.⁹ More recently, while some have cautiously unveiled that

6. *Id.*

7. *Al-Bashir*, *supra* note 3 ¶ 1.

8. These accounts can be found in all reference textbooks on ICL. A useful summary of the assumptions on which those accounts rest can be found in ROBERT CRYER, PROSECUTING INTERNATIONAL CRIMES: SELECTIVITY AND THE INTERNATIONAL CRIMINAL LAW REGIME 9-72 (2005). For the more extreme view that not even with the Second World War did ICL come into existence, see Georg Schwarzenberger, *The Problem of an International Criminal Law*, 3 CURRENT LEGAL PROBLEMS 263-96 (1950).

9. *See, e.g.*, SHELDON GLUECK, WAR CRIMINALS: THEIR PROSECUTION AND PUNISHMENT 1-18 (1944) (dismissing the “bitter conceptualism” to which some international lawyers and statesmen adhered in 1919 and rejecting the “climax of this legalistic version of Alice in Wonderland,” namely the idea that the “exalted sacred cow position of Head of state” exempts a

prevalent accounts are not compatible with what took place in the aftermath of the First World War,¹⁰ others have more decisively identified countless earlier episodes and realities which constitute a robust body of practice and *opinio* indicating that the existence of the law on international crimes stretches much farther back.¹¹ Both seem to confirm the notion that ICL has actually existed from the “beginnings of international law”¹² and that the model of international law on which prevalent accounts on ICL rest (a model according to which, for a long time, states were the only subjects of international law and sovereignty was deified) is a theoretical model that has never translated into a legal reality. They also demonstrate that a realistic and common-sense account of ICL is interwoven with the idea that the law on international crimes has never recognized any sort of immunity to sovereigns. In fact, sovereigns were the prime targets of ICL reactions. Extreme acts of barbarism or tyranny by a sovereign subjected him or her not merely to international criminal responsibility, but even to a war of humanitarian intervention; a war which could be legitimately set in motion in order to stop such criminal acts. To put it differently, in the beginnings of international law, ICL existed especially because of sitting sovereigns who

sovereign from criminal punishments under the law of nations); Jordan Paust, *Universality and the Responsibility to Enforce International Criminal Law: No U.S. Sanctuary for Alleged Nazi War Criminals*, 11 HOUS. J. INT’L L. 337-44 (1989) (demonstrating that, from the dawn of the constitutional history of the United States, “universal enforcement has been recognized over ‘crimes against mankind,’ crimes ‘against the whole world’ and the ‘enemies of the whole human family,’ or those persons who become ‘*hostes humani generis*’ by the commission of international crimes”). For other countless examples of United States’ old practice recognizing the existence of international crimes and that the “violations of international law were subject to criminal sanction,” see also Jordan Paust, *Federal Jurisdiction Over Extraterritorial Acts of Terrorism and Nonimmunity for Foreign Violators of International Law Under the FSIA and the Act of State Doctrine*, 23 VA. J. INT’L L. 211-15 (1983). Throughout this Article, the reader will be able to find innumerable examples of other centuries-old practice demonstrating that the existence of ICL is neither something that was only advocated in the United States nor a specific Second World War phenomenon.

10. WILLIAM SCHABAS, *THE TRIAL OF THE KAISER* (2018) (providing abundant information on how, in the aftermath of the First World War, the majority of actors took for granted that the law of nations provides for the individual criminal responsibility of “however highly placed individuals”). See also *infra* Section I.2.1.

11. Ziv Bohrer, *International Criminal Law’s Millennium of Forgotten History*, 34 LAW & HIST. REV. 393 (2016) (providing countless examples of pre-20th century practice demonstrating that a variety of actors have consistently viewed the law of nations as providing for the criminal punishment of individuals, particularly the punishment of the rulers who committed egregious violations of international law). See also *infra* Section I.1.3.

12. Miguel Lemos, *Commentary, Judgement, Prosecutor v. Nyiramasuhuko et al., Case No. ICTR-98-42-A, A. Ch., 14, AC Judgment, (December 14, 2015)*, in 59 ANNOTATED LEADING CASES SERIES 1340 (2019).

outrageously placed themselves beyond the realm of the law of nations.¹³ In a sense, ICL was directed primarily, but not exclusively, at them.

It is important to stress from the outset that the position that will be laid-bare throughout this Article is not exactly the same as the one put forward by a British Committee of Inquiry in the aftermath of the First World War. According to the committee, “no modern usage establishing such immunity appears to exist.”¹⁴ The position of this Article is blunter. Throughout the whole history of the law of nations, usages and practice unequivocally confirm that it would be absurd for international law to afford immunity to sitting princes, tyrants, kaisers or führers who outrageously placed themselves beyond the realm of the law of nations. Thus, there is a good chance that the current position of the ICJ and many others, a position according to which the sitting prime targets of ICL enjoy immunity, is similarly absurd.

Such usages and practice were not only disseminated,¹⁵ but have been reflected in countless writings of the most qualified publicists who have sagely and consistently invoked the law of nations, the laws of humanity, the general principles of civilized nations or the dictates of public conscience in order to provide an adequate theoretical framework for historical realities.¹⁶ This “longstanding practice” and the legal reality reflected in the writings of publicists is based on a simple premise.¹⁷ As Hugo Grotius has eloquently put it, no ruler is allowed to “inflict upon his subjects such treatment as no one is warranted in inflicting.”¹⁸ The premise is in perfect harmony with another important notion that is perfectly encapsulated in the first sentence of the chapter “Human Rights,” contained in Sean Murphy’s *Principles of International Law*: “Although it is common to note that traditional international law was concerned only with relations among states, in fact it has always been concerned with protecting persons.”¹⁹

13. The idea that the main targets of ICL were always the sitting high officials of a state, particularly the sovereigns, will become increasingly clear throughout this Article.

14. John Macdonnell, *Note on the Immunity of Sovereigns*, in FIRST INTERIM REPORT FROM THE COMMITTEE OF ENQUIRY INTO BREACHES OF THE LAWS OF WAR 31 (1919) (quoted in SCHABAS, *supra* note 5, at 162).

15. See HUMANITARIAN INTERVENTION: A HISTORY (Brendan Simms & D.J. Trim eds., 2011) (providing numerous examples of humanitarian interventions carried out by rulers of one country against rulers of other countries).

16. See JUST AND UNJUST MILITARY INTERVENTION: EUROPEAN THINKERS FROM VITORIA TO MILL (Stefano Recchia, & Jennifer M. Welsh eds., 2013) (providing revealing insights on how qualified publicists accepted the legitimacy of certain military interventions against rulers who inflicted extreme harm on populations).

17. *Id.* at 6-7.

18. HUGO GROTIUS, ON THE LAW OF WAR AND PEACE, bk II, ch. XXV, pt. VIII (1625).

19. SEAN MURPHY, PRINCIPLES OF INTERNATIONAL LAW 293 (2nd ed. 2012) (alluding to protections for “diplomats and envoys sent from one state to another . . . , combatants and non-combatants from the excesses of warfare . . . [and] persons against the acts of their own governments”).

International law protections for persons (or groups of persons) were especially recognized with regard to situations of manifest and widespread infliction of harm, i.e. situations in which the offense to the law of nations was so conspicuous and extreme that it would defy the “common sense of the world,” “elementary considerations of humanity” or “expectations generally shared” in the international community²⁰ to argue that international law was completely indifferent to it.²¹ Distancing itself from these longstanding considerations, the appeals chamber elaborated on “three central features” of a model of international law that supposedly came into force in the 17th century.²² The appeals chamber called this model the “Westphalian model of international law,” but some scholars have branded it as “the myth” or a “false principle.”²³ While quoting a 1905 book written by Lassa Oppenheim and alluding to a “general view,” the appeals chamber narrated a story supporting the assertion that a sovereign was entitled to absolute immunity.²⁴ Self-assuredly, it identified in the following terms the “second feature” of its Westphalian model that, “States were the only subjects of international law, to the exclusion of human beings. Hence, the manner in which one sovereign treated his or her subjects was a matter solely for that sovereign and that subject in their municipal order. International law could not intervene.”²⁵

The work of Oppenheim (an international legal scholar “best known for his

20. The Prize Cases, 67 U.S. 635, 670 (1863); Corfu Channel (U.K. v. Albania), Merits, I.C.J. Rep. 22, (1949); JORDAN PAUST, M.C. BASSIOUNI, ET AL., INTERNATIONAL CRIMINAL LAW: CASES AND MATERIALS, 6-9 (2007) (elaborating on how the “[a]wareness of the *degree* and *intensity* of general acceptance provides a more realistic approach to the identification and clarification of normative content”).

21. On protections against “massacres,” “atrocities” or acts of “uncommon cruelty” spanning from the 16th century to the second half of the 19th century, see Simms & Trim, *supra* note 15, at 26-38, 41-47. See also Simms & Trim, *supra* note 15, at 40 (asserting that the “original” *jus humanae societatis* was derived from “common humanity” and that it “trumped sovereignty” in “extreme cases”).

22. Joint Concurring Opinion of Judges Eboe-Osuji, Morrison, Hofmański and Bossa, ICC-02/05-01/09-397-Anx16 189 (May 2019) [hereinafter *Joint Concurring Opinion*]. This joint opinion is “incorporated by reference in the main judgment.” See also Q & A Regarding Appeals Chamber’s 6 May 2019 Judgment in The Jordan Referral Re Al-Bashir Appeal, Int’l Crim. Ct. (May 2019), <https://www.icc-cpi.int/itemsDocuments/190515-al-bashir-qa-eng.pdf>.

23. Andreas Osiander, *Sovereignty, International Relations, and the Westphalian Myth*, 55 (2) INT’L ORG. 260-69 (2001) (elaborating on the “Westphalian Myth” and on how the notions of sovereignty and non-intervention that became associated with prevalent accounts on the treaties of Westphalia are based on pure “imagination”); Brendan Simms, *A False Principle in the Law of Nations Burke, State Sovereignty, [German] Liberty, and Intervention in the Age of Westphalia*, *supra* note 9, at 92 (holding that the Westphalian treaties not only did not espouse the idea of non-intervention but, to the contrary, were “nothing less than a charter for intervention”).

24. Joint Concurring Opinion, *supra* note 22, at 189-90.

25. *Id.* at 190.

positivist approach to international law”²⁶ is important and, for the sake of this argument, it should be presumed that his view was actually attuned with the “general view,” albeit the fact seems to be that it was a minority one.²⁷ Hence, as far as Oppenheim is concerned, the appeals chamber should have better pondered the significance of the fact that although Oppenheim was famously known for having coined intervention as “dictatorial interference,”²⁸ he was also of the view that

should a State venture to treat its own subjects or a part thereof with such cruelty as would stagger humanity, public opinion of the rest of the world would call upon the Powers to exercise intervention for the purpose of *compelling* such State to establish a legal order of things within its boundaries sufficient to guarantee to its citizens an existence more adequate to the ideas of modern civilization.²⁹

Oppenheim does not suggest that compulsion would be illegal. His view is that humanitarian intervention (inclusive in its most extreme form, i.e. war) was a *de facto* matter, as was any other sort of war.³⁰ As such, according to the “general view” he represents, a humanitarian war as a reaction against a sovereign who inflicts “such cruelty” was ultimately not outlawed by the law of nations. Thus, the assertion that “the Powers” could exercise intervention in another state to put an end to atrocities is not only valid under a predominantly common-sense approach to international law, but is also compatible with the “positivist” approach. In other words, the assertion stands irrespective of whether a humanitarian intervention is conceived as a *right* or simply as a *de facto power*.

To begin with, it is important to not forget that the further we go back in the history of international law, the more limited is the number of people who had the ability of inflicting “such cruelty as would stagger humanity.” Typically, such ability was in the hands of the sovereign. Not only did the sovereign possess the power to deploy armies in order to inflict harm, but he or she was also not subject to the same type of outside institutionalized international scrutiny as heads of state are today. Considering that, for a long time, there was no “security council” that could come to the help of populations under the control of these sovereigns;

26. Lassa Francis Lawrence Oppenheim: German Jurist, Britannica (Oct. 3, 2021), <https://www.britannica.com/biography/Lassa-Francis-Lawrence-Oppenheim>. [<https://perma.cc/ZC3K-YKUY>].

27. On how the true “general view” was that in extreme cases an humanitarian intervention was not banned by the law of nations, see Jean-Pierre L. Fonteyne, *The Customary International Law Doctrine of Humanitarian Intervention: Its Current Validity under the U.N. Charter*, 4 CAL. W. INT'L L.J. 203, 215-24 (1974) (demonstrating that the idea of absolute prohibition of intervention was never as prevalent as sometimes one is led to believe and that, by the time Oppenheim was writing, the majority of scholars supported the legality of humanitarian intervention; i.e. “only a few scholars, albeit notorious ones” rejected the validity of the doctrine).

28. LASSA OPPENHEIM, INTERNATIONAL LAW. A TREATISE 181 (vol. 1, 1st ed. 1905).

29. *Id.* at 347 (emphasis added).

30. *Id.* at 181-91.

the most promising mechanism to stop atrocities was through foreign sovereign interventions aimed at removing the sovereign, stopping the cruelty and establishing an “existence more adequate to the ideas of modern civilization.”³¹ Such interventions would be legally impossible if there was some sort of sovereign immunity or inviolability that would have worked as a legal impediment to intervention and forceful removal from power.³² That is why, even from a “positivist” approach, international law did not provide for sovereign immunity against a war of humanitarian intervention.

In summary, under a common-sense approach espoused in so many of the classical texts written by the most qualified publicists of the time, immunity would simply be an absurdity. Under a positivist approach, the ultimate result was not all that different. Strict positivist observance of legal logic meant that the idea of immunity of a sitting head of state during a war did not make sense. The positivist approach could not even begin to meaningfully discuss the immunity issue because of the awfully permissive *jus ad bellum* view that was advocated by many “positivists” by the end of the 19th century. As Yoram Dinstein posits, such a view led to an “egregious anomaly”: how is it that an international system which is based on state sovereignty allows “each State . . . a sovereign right to destroy the sovereignty of others”?³³ In such a system, it was difficult (if not

31. See Ziv Bohrer, *The (Failed) Attempt to Try the Kaiser and the Long (Forgotten) History of International Criminal Law: Thoughts Following The Trial of The Kaiser by William A Schabas*, 53 ISR. LAW REV. 172 (2020) (stressing that foreign sovereigns “were among those considered authorised to punish a sovereign who committed an international crime” and pointing out that the offending ruler could not claim “that equal did not have power over equal” because by “sinning” such a ruler deprived himself of his/her protections based on equality with other rulers) [hereinafter *The (Failed) Attempt*]. On the connection between a foreign sovereign intervention and the punishment of the offending ruler by the foreign ruler, see *infra* Section I.1.2.

32. In general, while “immunity” relates to freedom from process, “inviolability” relates to freedom from arrest. See also Al-Bashir, *supra* note 3, ¶ 84. Throughout its decision, the appeals chamber loosely uses the word “immunity” as protection from both process and arrest. This Article will not take an issue with such an approach, mainly because some treaties, including an important one in *Jordan Referral re Al-Bashir*, speak of an “[i]mmunity from personal arrest or detention.” See also *infra* Part III. Sometimes, however, the word “inviolability” will be used, namely in situations where the question of protection from physical interference with a person’s body is manifestly independent from the question of the exercise of jurisdiction by a court.

33. YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENCE* 80 (6th ed. 2017). The question of whether unlimited discretion to initiate warfare was ever allowed “upon a proper legal principle of international law” cannot be fully addressed here. Joint Concurring Opinion, *supra* note 22, ¶ 176. Nonetheless, two remarks are important. First, it is very doubtful that the prevalent view was ever that an initiation of a war was a completely discretionary power, i.e. not subject to certain requirements. See also Randall Lesaffer, *Aggression before Versailles*, 29 EUR. J. INT’L L. 777 (2018) (“although it cannot be denied that 19th-century international law conceded to states the right to resort to force and war, this right was conditional and restricted”). Second, it is almost impossible that extreme aggressive conduct (or initiation/orchestration of wars of mass atrocities)

impossible or plainly absurd) to explain how a sovereign whose sovereignty could be destroyed for no good reason would, at the same time, be entitled to any sort of immunity and, even more difficult or absurd, to an absolute one.³⁴ Overall, the impression is that the Westphalian inspired “egregious” system of international law espoused by many positivists simply does not provide an accurate picture of the “post-Westphalian” legal reality. Stefano Recchia and Jennifer Wesh summarize that

From the sixteenth century onward, princes and states have sent their troops to fight in foreign lands against the will of local rulers, and in many instances the justification for doing so has been the appalling acts of those local rulers. Evidence of this longstanding practice reinforces the revisionist interpretation of the Peace of Westphalia (advanced by scholars such as Krasner, Osiander, and Teschke), according to which absolute state sovereignty and the attendant rule of nonintervention were not magically enshrined in 1648 [After Westphalia], Europe’s princes [continued to consider that, if] the behavior of fellow sovereigns . . . breached common standards of acceptability . . . , [international law allowed] limited interventions aimed at stopping oppression and massacre.³⁵

In other words, the legal reality in the centuries after Westphalia did not detract from the idea—embraced in countless “classical texts”—that intervention is allowed in some extreme cases.³⁶

Mind-bogglingly, and despite a cavalier attitude towards historical realities, it was the appeals chamber that destroyed its own absolute immunity story and, ironically, paid tribute to the sound solutions enshrined in the classical texts. In the words of the appeals chamber,

was ever considered permitted under international law. *Id.* at 777 (demonstrating that, in the centuries preceding the 20th century—including the century where positivism was allegedly dominant—international lawyers referred to a concept of “aggravated violation of *jus ad bellum*, which—at least in theory—triggered reaction and even sanction by the international society of states against the perpetrator”). Most probably, this type of extreme (atrocities-type) aggressive conduct was always considered proscribed simply because it constituted an extreme (criminal) violation of the law of nations. *See also* Frédéric Mégret, *International Criminal Justice as a Peace Project*, 29 EUR. J. INT’L L. 857 (2018) (suggesting that this type of aggression is “part of the larger genus of crimes against humanity”).

34. L. J. BRIERLY, *THE OUTLOOK FOR INTERNATIONAL LAW* 21 (1944) (speaking of the existence of a “logical impossibility” in such type of system). Of course, it would also constitute an absurdity to argue that, if a ruler of country A invaded country B, he or she could claim inviolability or immunity in country B. That might explain why, in the research for this Article, the author was unable to find not only one single international law scholar who argued that such immunity actually existed if a sovereign invaded another country but also, and perhaps even more revealingly, if a sovereign inflicted outrageous suffering on its own population.

35. Recchia & Welsh, *supra* note 16, at 6-7.

36. Simms & Trim, *supra* note 15, at 40.

[The] commission of international crimes is not part of the job description of the [sovereign]. The primary justification for leadership of State is protection of the population, which by necessity precludes the [infliction of outrageous suffering] against [it]. A deeper reflection should then readily reveal an internal inconsistency with the idea of cloaking the [sovereign] with immunity *ratione personae*, if he or she commits such crimes. This is in the sense that the purity of the logic of such immunity ultimately turns on itself, as the justification for the immunity *ratione personae* is that the beneficiary is a serving [sovereign]. It is easy enough to see that the operation of *ratione personae* immunity (even in cases of international crimes) must mean that a [sovereign] who elects to exterminate the entire population of his own State may still lay claim to immunity *ratione personae* against the charge of extermination. But the flaw is plain enough to see in that example; because by virtue of the crime in question, he may have eliminated the population as an essential normative element of statehood—and may have been enabled in that project by valid cloak of immunity *ratione personae* recognised as such by international law. The absurdity cannot be presumed upon a proper legal principle of international law.”³⁷

Since non-absurdity precludes immunity, the only way to argue that the appeals chamber is not contradicting itself is if one accepts that the appeals chamber is effectively declaring that it can see what, for a long time, others could not.³⁸ To be sure, it might not be incorrect that some extreme positivist approaches to international law led to absurd results. However, it is precisely because “absurdity cannot be presumed” that there is no trace, in the classical texts, of any sort of sovereign immunity with regard to extreme acts of barbarism or tyranny. On the contrary, those texts consistently suggest that a foreign sovereign has a *right* to put in motion a war against a sovereign who manifestly “moves outside” the realm of the law of nations.³⁹

1.1.2. Humanitarian Intervention and the Power to Punish a Sovereign

Patient dissection of how the right of humanitarian intervention was perceived at the beginning of the 17th century by the “first most qualified publicist” would have helped the appeals chamber to set its analysis in the right

37. Joint Concurring Opinion, *supra* note 22, ¶ 176.

38. In fact, it is the appeals chamber that fails to grasp what others for a long time did not, namely that the history of absolute immunity was never an international law story. *See* The (Failed) Attempt, *supra* note 31, at 172-73 (elaborating on how “[t]he prevailing belief that rulers have long enjoyed absolute sovereign immunity confuses the history of domestic and of international criminal justice”).

39. *See infra* Section I.2.2.

course.⁴⁰ The right of humanitarian intervention was based on the peremptory norm mentioned above: no one—state, individual or group—can “inflict upon his subjects such treatment as no one is warranted in inflicting.”⁴¹ As Grotius also put it, in the case of violation of this norm, “the exercise of the right vested in human society [would not be] precluded.”⁴² But such a violation did not merely give rise to the right of human society to prevent the continuation of atrocities through a war of humanitarian intervention. In tandem, it gave rise to the right to punish atrocities. As Theodor Meron has acutely noted, the statement by Grotius of the “right to punish the perpetrators of gross violations of human rights committed in another state” is also “implicit” in the possibility of humanitarian intervention.⁴³

Indeed, it would be absurd to argue that, in the process of exercising universal enforcement jurisdiction and putting an end to such gross violations, the intervening state could not capture the sovereign or that it would have to immediately release him or her, as soon as (absolute) immunity was invoked. It would be equally absurd to argue that the capturing state could only, at best, place the sovereign in a pleasant or unpleasant place where he or she would find a shield from any other type of justice or retribution. As the appeals chamber could have put it, the flaw in such arguments would be “plain enough” because “deeper reflection should readily reveal an internal inconsistency” in any type of dichotomy that completely uncouples prevention of international crimes from the punishment thereof.⁴⁴

The truth of the matter is that Grotius’s peremptory norm is nothing more but nothing less than 17th century parlor conveying the idea that “genocidal violence . . . and crimes against humanity—that is, gross human rights violations [that] shock the moral conscience of mankind” are criminal violations of the law of nations.⁴⁵ Thus, apparently, it is impossible to escape the logical consequence that the possibility of infliction of criminal sanctions, such as death, imprisonment,

40. Simms & Trim, *supra* note 15, at 24 (holding that a “complete analysis of intervention must incorporate the long-term history and must begin . . . in the late sixteenth century”).

41. GROTIUS, *supra* note 18, at bk II, ch. XXV, pt. VIII.

42. *Id.*

43. Theodor Meron, *Common Rights of Mankind in Gentili, Grotius and Suarez*, 85 AM. J. INT’L L. 112 (1991) (elaborating on this right to punish, which is “[r]elated to, but broader than, the right of humanitarian intervention” and noting that such right “is an important precursor to the recognition in modern international law of universal jurisdiction over such matters as genocide, war crimes and crimes against humanity”). *See also* Simms & Trim, *supra* note 15, at 40. On the closely connected right of “kings, and those who possess rights equal to those kings, [. . .] of demanding punishments not only on account of injuries committed against themselves or their subjects, but also on account of injuries [that] excessively violate the law [. . .] of nations in regard to any persons whatsoever”, see GROTIUS, *supra* note 18, at bk. II, ch. XX, pt. XL.

44. Joint Concurring Opinion, *supra* note 22, ¶ 176.

45. Recchia & Wesh, *supra* note 16, at 2; MICHAEL WALZER, JUST AND UNJUST WARS 107 (1977).

and many others,⁴⁶ through the exercise of universal adjudicative jurisdiction,⁴⁷ is inherent to the right to start a war of humanitarian intervention as a reaction against international crime.⁴⁸

Moreover, and most importantly for present purposes, enforcement of the law of nations, through a war of humanitarian intervention on behalf of the community of nations, was the last resort measure. *A fortiori*, if a war could be avoided through the use of other universal enforcement mechanisms, such as an arrest and surrender—thereby preventing a frontal clash with “fundamental principles of international society, notably . . . noninterference, and political independence” and also avoiding the additional suffering, “death and destruction” that always come along with military intervention⁴⁹—that arrest and surrender was of course possible.⁵⁰

Humanitarian interventions were not an esoteric phenomenon in the pre-20th century history of the law of nations. The five centuries preceding the 20th are not devoid of examples of demands for capture, arrests, declarations of outlawry, prosecutions, punishments, killings and other mechanisms used to deal with rulers who violated the law of nations. Suffice to mention a few. In the second half of the 15th century, the trial of von-Hagenbach I—the “first international war crimes trial in history”⁵¹—was the trial of a tyrant. According to 16th century writers, a tyrant was a prince “who was guilty of shedding his subjects’ blood carelessly and with uncommon cruelty.”⁵² A tyrant could not only be removed by force through a war of humanitarian intervention but could also be subject to *criminal* punishment on account of his tyrannical acts.⁵³ To put it differently, “[The

46. Jordan Paust, *Nullum Crimen and Related Claims*, 25 DENV. J. INT’L L. & POL’Y 323, 324 (1997) (the “customary array of possible sentences for international crime [. . .] had ranged from letters of reprimand to death”).

47. On adjudicative jurisdiction “in the interest of the entire community of civilized States”, see also United Nations War Crimes Commission, TRIAL OF WAR CRIMINALS BY MIXED INTER-ALLIED TRIBUNAL, MEMORANDUM BY THE OFFICE OF THE UNITED STATES REPRESENTATIVE [hereinafter *Memorandum*] 4-8 (31 August 1944) (“[w]hile the state whose nationals are directly affected has a *primary interest*, all civilized states have a *real interest* in the punishment of [international] crimes”) (emphasis added).

48. On the conceptualization of a war of humanitarian intervention as a tool designed to *punish* a ruler who violates the law of nations, see Recchia and Wesh, *supra* note 16, at 9.

49. *Id.* at 2.

50. As we will see below, UNSC’s authorizations for the issuance of peremptory international arrest warrants and for the initiation of a war of humanitarian intervention as a reaction against international crime are two closely related universal enforcement mechanisms.

51. MICHAEL P. SCHARF & WILLIAM A. SCHABAS, SLOBODAN MILOSEVIC ON TRIAL: A COMPANION 39 (2002) (holding that “[t]he history of international war crimes trials begins with the 1474 prosecution of Peter von Hagenbach”).

52. Simms & Trim, *supra* note 15, at 26.

53. Shannon Brincat, *Death to Tyrants: Self-Defence, Human Rights and Tyrannicide—Part II*, 5 J. INT. POLITICAL THEORY 78 (2009) (elaborating on how Grotius and Vattel placed tyrants in

doctrine of tyranny] not only regulated interactions between collective entities [*jus ad bellum* dimension], but was also a penal norm that treated the relevant individual ruler and his close associates as international outlaws [ICL dimension].”⁵⁴

By the end of the 16th century, against the background of an English “humanitarian” intervention in the Netherlands to counter Spanish tyranny, reciprocal charges were exchanged between King Philip II of Spain, on the one hand, and William of Orange of the Netherlands and the English, on the other.⁵⁵ In 1580, Phillip issued a proclamation outlawing William where

He called Willem “a pest on the whole of Christianity and the enemy of the human race” and offered 25,000 crowns to anyone who killed Willem. Willem was severely injured by an unsuccessful assassination attempt in 1582. On July 10, 1584, Balthasar Gérard, a subject and supporter of Philip II who regarded Willem as a traitor to both Philip and the Catholic religion, succeeded in assassinating Willem.⁵⁶

In turn, the English and Willem clearly viewed the actions of Phillip as tyrannical in that

[The English chief ministers] eventually agreed that Philip personally, and the Spanish generally, were guilty of tyrannical rule – and that this underpinned their policy vis-à-vis Spain over the Netherlands The perception of the Spanish government’s tyranny was widely held in England . . . [and] underlying it all was a clear concept that Philip and his lieutenants, by their extreme misrule and abuse, had forfeited the Habsburgs’ sovereign rights [R]egardless of the consequences of intervention, [the English] seemed to have had no doubt that intervention was a legitimate response to tyranny.⁵⁷

In the middle of the 17th century, in 1642, King Charles I started a war “in support of his claim to absolute rule” and commanded troops who, under his direction, “committed war crimes by plundering towns, killing civilians and

the category of “atrocious criminals” or “*hostes humani generis*” who fall within the scope of universal jurisdiction and how those labels are associated with the termination of sovereign protections: “classifying the tyrant’s rule as *criminal* removes any vestige of legitimacy and with it, all the protections of sovereignty that may have been previously conferred”).

54. Bohrer, *supra* note 11, at 442 (elaborating on how the tyranny doctrine, which was originally an *ad bellum* law, is strongly related to ICL history).

55. Simms & Trim, *supra* note 15, at 31-36 (informing that the English intervention in the Netherlands was grounded in Spanish tyranny, atrocity and oppression).

56. Susan Flantzner, *Unofficial Royalty*, DUTCH ROYALS (Mar. 4, 2018), <https://www.unofficialroyalty.com/category/currentmonarchies/dutch/page/2/#:~:text=On%20July%2010%2C%201584%2C%20Balthasar,religion%2C%20succeeded%20in%20assassinating%20Willem> [<https://perma.cc/C32J-DF26>].

57. Simms & Trim, *supra* note 15, at 32.

torturing prisoners of war.”⁵⁸ He was eventually captured and found his way to trial where

The prosecutor, John Cooke, drew upon Magna Carta, the law of nations, and of the Bible to charge him with a crime that only kings or other heads of state could commit: a *crime* called *tyranny*, committed by a ruler who mass murders his own people and denies them civil and religious liberties.⁵⁹

In the end, and while still “nominally sovereign,” he was also tried for offences against the unwritten “general law of reason or nations and . . . convicted of international crimes.”⁶⁰ As a consequence, King Charles I was executed.⁶¹

In the middle of the 18th century, against the backdrop of Prussian King Frederick II’s invasion of Saxony in 1756 and in a letter of protest

Vattel remarked that Frederick had not only abused the right to make war; he had also breached the laws of war, the sanctity of which had to be preserved if war was not to degenerate into barbaric fury. It was in the common interest of all nations to join and repress the sovereigns responsible for such misconduct. Vattel noted that this had also been the view taken by the Imperial Diet in the recent outlawing of Frederick II as an enemy of the Empire—a view shared by the “most respectable powers of Europe.” [For Vattel], [i]t is certainly recommended for the interest and the safety of nations to repress he who tramples on rules [i.e. the rules of the law of nations] which constitute the unique foundation of their tranquility, and without which everything would become prey to the strongest and the most daring. This is what the most respectable powers of Europe have felt; it is what motivated the decree that has recently been issued by the Diet of the Empire.⁶²

By the end of the 18th century, the French revolutionaries put King Louis XVI on trial. He was convicted by the National Assembly and sent for execution.⁶³ He was tried and convicted for treason based on the principles of the law of nations and not domestic law.⁶⁴ He was advised to invoke lack of

58. Geoffrey Robertson, *Ending Impunity: How International Criminal Law Can Put Tyrants on Trial*, 38 CORNELL INT’L L.J. 651 (2005).

59. *Id.* at 651.

60. Bohrer, *supra* note 11, at 454-55.

61. Maurice Ashley, Charles I, Britannica (Nov. 15, 2021), <https://www.britannica.com/biography/Charles-I-king-of-Great-Britain-and-Ireland> [<https://perma.cc/U5WD-V624>].

62. WALTER RECH, ENEMIES OF MANKIND: VATTEL’S THEORY OF COLLECTIVE SECURITY 147-48 (2013).

63. Robertson, *supra* note 58, at 652.

64. DAN EDELSTEIN, THE TERROR OF NATURAL RIGHT: REPUBLICANISM, THE CULT OF NATURE, AND THE FRENCH REVOLUTION 147-52 (2009) (describing how the law of nations and the notion of “universally shared set of principles” underlaid the proceedings).

jurisdiction on account that the French constitution guaranteed his inviolability. Nonetheless, the prevalent view was that the law of nations trumped French constitutional law and “all civil forms.”⁶⁵

A year later, the French National Convention also adopted a decree declaring that the British Prime Minister was an enemy of mankind.⁶⁶ Then, in the 19th century, the textbook example of Napoleon is most illustrative. In the Declaration of the Powers against Napoleon, the people wrote that

The Powers who have signed the Treaty of Paris reassembled in Congress at Vienna, having been informed of the escape of Napoleon Bonaparte In thus violating the convention which established him in the Island of Elba, Bonaparte destroyed the only legal title for his existence. By reappearing in France with projects of disorder and destruction, he has cut himself off from the protection of the law and has shown in the face of the world that there can be neither peace nor truce with him. Accordingly, the Powers declare that Napoleon Bonaparte is excluded from civil and social relations, and, as an Enemy and Disturber of the tranquility of the World, that he has incurred public vengeance.⁶⁷

The British prime minister described Napoleon as a “captain of freebooters or banditti and consequently out of the pale of protection of nations [For the British prime minister, Napoleon] headed his expedition as an outlaw and an outcast; *hostis humani generis*.”⁶⁸ Prussian Field-Marshal Blucher stated that “The Prussian field marshal had vowed that he would seize the emperor, dead or alive, and have him shot like an ordinary outlaw. To the emissaries of the French provisional government, he refused the armistice they requested unless they surrendered Napoleon to him.”⁶⁹ Napoleon was captured and perpetually detained without trial.

What is remarkable in all these episodes—involving captures, demands for surrender, trials, imperial decrees, proclamations, letters of protest, etc.—is that no one was apparently convinced that interventions, punishments, arrests, etc. against these rulers were illegal or that they could invoke any sort of *international law* that would work as a protection against the grave charges at stake in each of the episodes. In pure international law terms—and despite that, as it would be expected, trials of heads of state were a rare phenomenon—these episodes appear

65. *Id.* at 147-52 (explaining how different actors viewed the laws of nations or nature superseding national law); Robertson, *supra* note 58, at 652.

66. Décret de la Convention Nationale, L’an second de la République Française, qui déclare Williams Pitt ennemi du genre humain, De L’Imprimerie nationale exécutive du Louvre (August 7, 1793).

67. Congress of Vienna, *Declaration of the Powers against Napoleon (March 13, 1815)*, in BRITISH AND FOREIGN STATE PAPERS 663 (1839).

68. James Crawford, *Napoleon 1814–1815: A Small Issue of Status*, in INTERNATIONAL LAW IN THE LONG NINETEENTH CENTURY (1776-1914): FROM THE PUBLIC LAW OF EUROPE TO GLOBAL INTERNATIONAL LAW? 10 (Inge Van Hulle and Randall C.H. Lesaffer eds., 2019).

69. J. CHRISTOPHER HEROLD, THE AGE OF NAPOLEON 415 (2002).

to be nothing short of (1) relevant practice and relevant *opinio iuris* indicating that a head of state who put himself beyond the law of nations was not entitled to any sort of immunity and (2) relevant practice and relevant *opinio iuris* suggesting that the idea that ICL only emerged in the middle of the 20th century is not correct.⁷⁰ As further developed below, these pre-20th century examples are also an invaluable tool to understand why few were persuaded when, in the 20th century, a famous Secretary of State suggested that a head of state was not subject to criminal punishments under the law of nations.⁷¹

1.1.3. ICL Prevalent Accounts and the Notion of International Crime

Considering the above, one may ask, why do so many ICL scholars persist in holding on to the idea that ICL only came “into its own” during, or in the aftermath of, the Second World War? There are two issues here: (1) a “label” issue and (2) “more substantive” issues.

Concerning the “label” issue, a lingering concern of ICL scholars is apparently that the fact that a violation of the laws of nations might be punished with death or imprisonment is not the same as saying that international crimes are part of international law or that ICL has been in existence for a long time. The idea seems to be that the label “international crime” is somewhat anachronistically used if applied to all of the above. Still, if the law of nations made room for the punishment of the ones who violate it (by death, deprivation of freedom, or other criminal law-type sanctions), then there seems to be no way around the fact that ICL actually existed. The label (“*delicti jus gentium*”, “international crimes”, “extreme conduct in violation of the law of nations”, “crimes against the world”, “crimes against mankind”, “crimes against humanity”, etc.) is not what really matters.

In relation to the more substantive issues, Professor Cryer, in his work, does not deny that there are countless examples of punishment for violations of the law of nations spanning from the 16th to the beginning of the 20th century. On the other hand, he is also aware that many of the most prominent international law publicists have suggested or “implied” the actual existence of ICL. Finally, he admits that, even as far back as the trial of von Hagenbach, there were already a “number of aspects [. . .] that indicate [that] many of the arguments and claims made today in relation to international criminal law are of long -standing”.⁷²

However, Cryer does not accept that ICL came “into its own” before the

70. Naturally, it is as true of the past and it is of the present that, normally, sitting heads of state do not sit on the bench on account of their international crimes. Surely, political reasons contribute to this reality. However, more often, when the moment for the trial comes, the heads of state have already been deposed, executed or used other methods, like suicide, to spare them from being tried in a court of law. More on why sitting heads of state are not often prosecuted and/or tried in a court of law, *infra* Section II.3.1.

71. *See infra* Section I.2.1.

72. CRYER, *supra* note 8, at 18.

Second World War.⁷³ The following two considerations emerge as decisive for his ultimate stance.⁷⁴ First, “[c]riminal law traditionally requires some sense of hierarchical authority” and for a long time it was difficult to ground “an international criminal law in a decentralized legal order,”⁷⁵ a difficulty which became even clearer in the period from 1700 to 1914. Secondly, publicists seemed to speak of punishment not in the sense of criminal punishment; rather, in the sense of “punishment of hostilities”, i.e. “a just war may be entered into against malefactors.”⁷⁶

As to the first argument, it must be stressed that there is no law of nature (or, for that matter, any international law positive rule) prescribing that for ICL to exist—and for its precepts to be enforced—it is necessary a centralized legal order or a hierarchical authority. As to the second, Cryer puts the argument forward based on a paragraph written by Grotius. Nevertheless, it is Cryer himself that immediately brings to the fore another paragraph written by Grotius in which the “father” of international law “clearly implies that the law of nations provides for the death penalty in case of its violation by individuals.”⁷⁷ Concerning the latter paragraph, Cryer comments that

This is a more convincing quote; Grotius is referring to ‘punishment’ in the criminal sense. In the paragraph cited, Grotius refers back, for further details to book II, chapter XX, which deals expressly with criminal punishment, as opposed to the waging of war against wrongdoers. However, it is difficult to draw clear conclusions on what Grotius meant as his work is at times contradictory.⁷⁸

However, these two apparently contradictory ideas conveyed by Grotius and many other qualified publicists who accepted or implied the existence of criminal law in the law of nations,⁷⁹ are not contradictory at all. The notion of international

73. *Id.* at 36.

74. *Id.* at 9-31.

75. *Id.* at 25.

76. *Id.* at 23.

77. Sheldon Glueck, *The Nuremberg Trial and Aggressive War*, 59 HARV. L. REV 396, 434 (1946).

78. CRYER, *supra* note 8, at 23-24.

79. Apart from Grotius, the other most qualified publicists whose views are discussed by Cryer are Vitoria, Gentili and Vattel. CRYER, *supra* note 8, at 22-25. Although Cryer slightly downplays their views, while casting doubt on whether they refer to “punishment in the criminal sense”, all of them also allude to punishments for violations of the law of nations in a criminal sense. EMERICH DE VATTEL, *OF THE RIGHT OF WAR, WITH REGARD TO THINGS BELONGING TO THE ENEMY, IN THE LAW OF NATIONS: OR, PRINCIPLES OF THE LAW OF NATURE APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS* bk. III ¶ 166, bk. IV ¶ 81 (1758), and *Of the Rights, Privileges, and Immunities of Ambassadors and Other Public Ministers*, in *THE LAW OF NATIONS: OR, PRINCIPLES OF THE LAW OF NATURE APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS* ¶ 81 (1758); William Bain, *Vitoria: the Law of War, Saving the Innocent, and the Image of God in JUST AND UNJUST MILITARY INTERVENTION: EUROPEAN*

crime perpetrated by the rulers that is at stake in these ideas—and that is “embedded” in the history of international law, as reflected in the works of those publicists—is a notion that is closely linked with *jus ad bellum* considerations. For those publicists, some types of extreme “sovereign” conduct in violation of the law of nations trigger not only the possibility of infliction of typical ICL sanctions (particularly, the infliction of death) but also the possibility of a *jus ad bellum* reaction (namely, a war of humanitarian intervention). Naturally, more often than not, the emphasis lied on the fact that a war of humanitarian intervention could be initiated in order to stop atrocities. Nevertheless, such a war could be concomitantly used as a kind of arrest and surrender mechanism in order to punish the perpetrator of the atrocities.⁸⁰

All told, perhaps the problem is simply that the widely accepted Westphalian model and associated ideas (namely, absolute prohibition of intervention and absolute immunity of a sovereign) are not compatible with a common sense account of the history of international law. In that sense, many ICL scholars (and the appeals chamber of the ICC) incur in a foundational misapprehension of the whole issue surveyed in this Article. The emerging notions from the story that one has been narrating thus far—namely, international crimes have been in existence for a long time and there was never any sort of head of state immunity with regard to such crimes—are supported by one simple idea. This idea is that some conduct is so atrocious that the rationale according to which international law is completely indifferent to it is a rationale that never took a firm hold on the practice of states and in the writings of the most qualified publicists.

If one duly takes into account the full breadth of sanctions and reactions to international crime that emerges from all of the above, three important consequences follow. First, if sovereign X of country A ventured to enter the territory of country B, by violence or just by accident, country B had the power to proceed with the arrest and punishment on account of X’s crimes against the law of nations.⁸¹ Secondly, country B was also free to surrender X to any country

THINKERS FROM VITORIA TO MILL 72-79; URSULA VOLLERTHUN, THE IDEA OF INTERNATIONAL SOCIETY, ERASMUS, VITORIA, GENTILI AND GROTIUS 106-44 (James L. Richardson ed. 2017). For other views of some of the most qualified publicists of the 17th, 18th, 19th and beginning of the 20th centuries endorsing the view that criminal punishment on account of violations of the law of nations was a legal reality, see Hersch Lauterpacht, *The Law of Nations and the Punishment of War Crimes*, 21 BR. YEARB. INT. LAW 58, 61-62 (1944).

80. As explored further ahead, international arrest warrants against the perpetrators of international crimes are sometimes a substitute and other times a complement to a war of humanitarian intervention. See *infra* Section II.3.

81. On the specific case of arrest and punishment (or absence of immunity or inviolability) in the case of invasion of a foreign country, see also Macdonnell, *supra* note 14, at 49-50 (conducting an analysis of pre- First World War legal realities and concluding that “[t]he result of an examination of the authorities, if such can be said to exist, would seem to be that there is no rule or usage exempting from criminal jurisdiction sovereigns who have invaded the territory of another sovereign”); Glueck, *supra* note 77, at 424 (noting that, “by invading neighboring countries [. . .]

which expressed willingness in the prosecution and/or punishment of X.⁸² Likewise, and thirdly, at this stage in the evolution of international law (1) the authorities of country A were not prohibited from issuing universal warrants for the capture (“dead or alive”) of kings, emperors or princes of other states, on account of such crimes; (2) no international law ban was in place that prevented any type of national inquiries (criminal investigations or otherwise) on whether an outside sovereign was perpetrating such crimes.

In a sense, these universal enforcement mechanisms associated with the possibility of inflicting international criminal punishments were “short of war” tools that could be legitimately deployed in order to prevent a war of humanitarian intervention.⁸³ There are specific remarks with regard to this old *jus ad bellum*/ICL legal framework that are particularly important in order to properly understand transformations such a framework might have undergone throughout the evolution of international law. First, the set of rights vested in the human society described above could be exercised by any single state on its own volition. As no central universal authority in matters of war and peace existed and insistence on multilateralism was still an incipient idea, willingness by one state to be the standard-bearer of the values of humanity was simply considered to be the best available option at the time. In other words, these international law rights were powers which any single state had the legal authority to use. There is little support in theory, and even less in practice, for the assertion that states were actually mandated by international law to use such powers.⁸⁴ The exercise of “universal jurisdiction” (through war or otherwise) was, as the expression itself might suggest, a universal power; not a universal duty.⁸⁵

Secondly, it is vital to note that the power to arrest and surrender a sovereign is not an appendix of the right of humanitarian intervention. The ultimate foundation for such power is the peremptory norm (“no ruler is allowed”) which also constitutes the premise of the intervention. Thus, even if the possibility to initiate a humanitarian war has endured transformations at later stages in the

for purposes of aggression, conquest and the mass-extermination of the subjects of neighboring States, an offending sovereign destroys any implied consent that he be exempt from the jurisdiction of others, and strips himself and his agents of any mantle of immunity”).

82. Let us also not forget that, for a long time, many have accepted that it is a “fundamental principle of international law that states can do those things which are not prohibited by the established principles and rules of that law.” Memorandum, *supra* note 47, at 1. *See also* S.S. “Lotus” (Fra. v. Turk.), Judgment, 1927 P.C.I.J. (Ser. A) No. 10, at 19 (Sept. 7).

83. *See infra* Section II.3.1.

84. Nonetheless, on a treaty basis, some interventions were legally mandated. Simms & Trim, *supra* note 15, at 39.

85. *See also* M. Adatci, *Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties*, 14 AM. J. INT'L L. 121 (1920) [hereinafter *Commission on the Responsibility*] (speaking of an international law *power* or *authority* to try the individuals alleged to be guilty of crimes in violation of the customs of war or the laws of humanity and of “power to set up, pursuant to its own legislation, an appropriate tribunal, military or civil, for the trial of such cases”) (emphasis added).

evolution of international law—in order to accommodate the emergence of a central authority in matters of war and peace—such does not automatically signify that the power to arrest and surrender has also endured the same type of transformations.⁸⁶

Thirdly, the exercise of such powers was not predicated on a strict demarcation between the exercise of jurisdiction by the executive authorities and the exercise of jurisdiction by the courts. Each state was free to determine which authority—a King, an Emperor, a military authority, a court, a Governor, etc.—could exercise such powers. The legal authority to initiate prosecutions, to order arrests and to inflict punishments, summarily or otherwise, was not the monopoly of the courts.

Lastly, and as a precautionary measure against the aversion of some scholars to common sense (non-written law) considerations to flesh out the applicable rules, it is important to note that many of the aspects of the old legal *jus ad bellum*/ICL legal framework described above, was endorsed in several records during the 19th century and the beginning of the 20th century. To begin with, not only the state practice but also the relatively common written use of terms like “intervention,” “humanitarian,” “humanitarian intervention,” “principles of humanity,” and other “cognate terms” during the 19th century⁸⁷ allow the conclusion that the 19th century can be rightfully characterized as the “high noon of intervention.”⁸⁸ Moreover, the 19th century is also the period of 100 years in which the (international) criminal law of war is applied more effectively. This is a consequence not only of the adoption of the first widely participated declarations about the laws and customs of war, but also of the many attempts to codify at the national level the laws and customs of war.⁸⁹ Not coincidentally, in the end of the century (1899), the first wide-reaching conventions on the laws and customs of war were signed and the principles of humanity were enshrined in the preamble of one such convention. This is *relevant practice and opinio* of a non-insignificant number of countries that, even during a state of war, there are non-written protections,

populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity, and the

86. As will be explained *infra* Section II.3.1., while *ad bellum* reactions against international crime (chiefly, a humanitarian intervention to put an end to international crimes) are today under the centralized and monopolized control of the UNSC, ICL reactions (chiefly, the prosecution and the arrest and surrender of a ruler accused of international crimes) are not.

87. Davide Rodogno, *The “Principles of Humanity” and the European Powers’ Intervention in Ottoman Lebanon and Syria in 1860–1861*, in HUMANITARIAN INTERVENTION: A HISTORY 159–60 (Brendan Simms & D.J. Trim eds., 2011).

88. Simms & Trim, *supra* note 15, at 21.

89. CRYER, *supra* note 8, at 25–31.

requirements of the public conscience.⁹⁰

This formulation is widely known as the Martens clause and a common sense reading of the protections alluded therein supports the notion that the Martens clause simply recognizes that *both* in situations of war and in situations of peace humans *remain* protected.⁹¹ In the beginning of the 20th century, virtually all countries in the world signed the treaty containing the preamble in which the Martens clause was inserted.⁹² This means that certain elementary considerations of humanity became *indisputably* part of the universal law of humanity in 1907. As Robert Jackson put it half-a-century later, these basic principles were “assimilated as a part of International Law *at least* since 1907.”⁹³

I.2. The Two World Wars: Confirmation of No Immunity for Heads of State

The notions corresponding to the pre-wars basic international legal framework described in the previous Section and, in particular, the notions that an international law on international crimes (or ICL) does in fact exist and that there is no type of head of state immunity with regard to such crimes, were all unequivocally endorsed in the aftermath of the two world wars.

I.2.1. The Case of William II of Hohenzollern

Powerfully grounded on the universal subjugation of all to the elementary principles of humanity described above and enshrined in the Martens clause, an enlightening report—elaborated by a “Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties” in the aftermath of the First World War (hereinafter Report)—unmistakably linked the violation of those principles with the criminal punishment of individuals.⁹⁴ The result of such Report, elaborated by “[s]everal of the world’s leading international lawyers,”⁹⁵

90. International Convention with Respect to the Laws and Customs of War on Land and its Regulations, 1899 (The Hague Conventions II of 1899), 187 C.T.S. 429.

91. On the Martens Clause as “a specific and recognized provision giving protection to groups and individuals during both war and peace time,” see Jeremy Sarkin, *The Historical Origins, Convergence and Interrelationship of International Human Rights Law, International Humanitarian Law, International Criminal Law and Public International Law and Their Application from at Least the Nineteenth Century*, 1 HUM. RTS. & INT’L LEGAL DISCOURSE 125, 125-72 (2007).

92. Regulations Concerning the Laws and Customs of War on Land the preamble, Annexed to Convention (IV) Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631.

93. Robert H. Jackson, *International Conference on Military Trials: London, 1945, Report to the President by Mr. Justice Jackson, Yale L. Sch.: The Avalon Project* (June 6, 1945), <http://avalon.law.yale.edu/int/jack08.asp> [<https://perma.cc/3Q66-XZXH>] (emphasis added).

94. Commission on the Responsibility, *supra* note 85, at 95.

95. SCHABAS, *supra* note 10, at 5.

were six clear-cut articles to be inserted in the future “treaties with enemy governments,” most prominently the future Treaty of Versailles.⁹⁶ The first of such articles stated:

The Enemy Government admits that . . . every . . . *State* may exercise . . . the right which it would have . . . to try and punish *any enemy* . . . who had been guilty of a violation of the principles of the law of nations as these result from the usages established among civilized peoples, from the laws of humanity and from the dictates of public conscience.⁹⁷

Two remarks are important to immediately put forward with regard to Article 1 of the Report. First, there can be no doubt that, for the drafters of Article 1, the existence of ICL pre-dated the drafting of the Report.⁹⁸ Indeed, the reference to an *admission of a right to try and punish* can only mean that the drafters thought that such an international law grounded right pre-existed the Report. Secondly, the italicized words in Article I, which are in tune with all the other articles of the Report alluding not only to an international tribunal but also to national courts, simply meant that trial and punishment of *any person* for crimes against international law could be carried out by international or national courts. Nothing in these articles suggest that a head of state (or any other high official responsible for international crimes) could claim immunity before a national court. As the conclusion of the Report on the whole matter simply put it:

All persons belonging to enemy countries, however high their position may have been, without distinction of rank, including Chiefs of States, who have been guilty of offences against the laws and customs of war or the laws of humanity, *are liable to criminal prosecution*.⁹⁹

Articles 228 and 229 of the Treaty of Versailles follow in the footsteps of the Report. According to Article 228, “[t]he German Government recognises the right of the Allied and Associated Powers to bring before [national or international] military tribunals persons accused of having committed acts in violation of the laws and customs of war.”¹⁰⁰ Apart from the Kaiser, whose special “arraignment,” “surrender,” “trial,” and “punishment” issue was to be dealt with in a separate provision,¹⁰¹ Articles 228 and 229 were meant to be applied to any person, however highly placed, including any head of government or foreign minister responsible for war crimes.¹⁰²

96. Commission on the Responsibility, *supra* note 85, at 153.

97. *Id.* at 153, 154 (emphasis added).

98. See CRYER, *supra* note 8, at 33 (admitting that “[t]he [drafters] clearly considered there to be a separate phase of international criminal law”).

99. Commission on the Responsibility, *supra* note 85, at 135 (emphasis added).

100. The Treaty of Versailles, 225 C.T.S. art. 228 (1919) [hereinafter *Treaty of Versailles*].

101. *Id.* at art. 227.

102. International Military Tribunal (Nuremberg), Judgment, 55, 56 (Oct. 1, 1946), https://crimeofaggression.info/documents/6/1946_Nuremberg_Judgement.pdf [<https://perma.cc/PQ63->

The appeals chamber failed to mention all these articles and the clear-cut idea that flows from them, i.e. no immunity at all. As the Report put forward

An argument has been raised [. . .] based upon the alleged immunity and in particular the alleged inviolability, of a sovereign of a state. But this privilege, where it is recognized, is one of practical expedience in municipal law, and is not fundamental. However, even if, in some countries, a sovereign is exempt from being prosecuted in a national court of his own country *the position from an international point of view is quite different*.¹⁰³

Instead, in a Section titled “The Nascence of a ‘New International Law’ Norm Rejecting Immunity before International Tribunals,” the appeals chamber obsessively focused its analysis on the debate that preceded the adoption of the Report and on the (pro-state-sovereignty and pro-immunity of heads of state) exacerbated, positivist and inflexible position of Secretary Lansing of the United States, a position which was set out in the American delegation reservations to the Report.¹⁰⁴ Some reservations were also voiced, albeit in milder terms, by the delegation from Japan.¹⁰⁵ According to the American delegation’s view

the head of the state is responsible [to] the law of his country, not the law of a foreign country or group of countries; the tribunal to which he is responsible is the tribunal of his country, not of a foreign country or group of countries. [We] know of no international statute or convention making violation of the laws and customs of war – not to speak of the laws or principles of humanity – an international crime, affixing a punishment to it, and declaring the court which has jurisdiction over the

8FLM] [hereinafter *International Military Tribunal*]. On arts. 227, 228 and 229 and their relevance for the Nuremberg enterprise, see Memorandum, *supra* note 47, at 3-4 (“[these provisions] asserted or recognized the right of joint allied military tribunals to try war criminals [. . .]. The fact that these provisions are inserted into peace treaties is of no significance for war-time or an armistice period. They were inserted in the treaties for post-war purposes – to make it clear that military courts might operate not only during the time of war and through the armistice period but after the conclusion of peace as well”).

103. Commission on the Responsibility, *supra* note 85, at 116 (emphasis added).

104. Joint Concurring Opinion, *supra* note 22, ¶ 76-124. On Lansing’s reliance on *The Schooner Exchange*, a case decided by the United States Supreme Court, compare the (not compelling) observations of the appeals chamber in *id.* ¶ 98, 129, 130, 138 (focusing on the idea that the precedent does not apply in what international courts are concerned) with the remarks of Glueck, *supra* note 77, at 422-24 (noting that *The Schooner Exchange* “dealt with the normal, peacetime relations of friendly sovereigns” and that the “immunity which a sovereign and his agents enjoy by virtue of the privilege granted him and them by other sovereigns is based upon international comity and courtesy; and its recognition is dependent upon an important condition precedent: that the sovereign in question, or his agent, be conducting himself in conformity with international law. The host sovereign can otherwise refuse to grant immunity”).

105. Commission on the Responsibility, *supra* note 85, at 151-52.

offence.”¹⁰⁶

The motives underlying the appeals chamber’s obsession are easy to uncover.¹⁰⁷ On the one hand, the appeals chamber intended to highlight the contradiction between Lansing’s position and the position of the Americans in the aftermath of the Second World War. On the other hand, it sought to use the “no immunity” statements of the representatives of other countries, who were clearly opposed to Lansing’s view, to back its stance that there is no immunity before international courts. That is a flagrant distortion of the import of such statements, as the final Articles of the Report—alluding to national courts—unequivocally demonstrate. While proceeding in such fashion, the appeals chamber showed that it inadvertently misunderstood or, worse, consciously disregarded the true nature of the whole debate. Be that as it may, in relation to Lansing’s extreme view, the appeals chamber should have simply highlighted two facts: (1) such view was not reflected in the actual Articles of the Report; and (2) the Treaty of Versailles (a treaty signed and also devised by the American President himself and to which Japan was also a party along with more than thirty other countries) has no trace of any sort of immunity for heads of state or other highly placed officials.

Sometimes, it is theorized that the *opinio* of the Allied and Associated Powers (or AAPs) was that they could only try and punish the Kaiser because Germany would assent to it, or would waive his immunity. This theory does not pass muster. As clearly enshrined in the quotes of the Report mentioned above, and in the Treaty of Versailles itself, the prevalent view was that Germany would “admit” or “recognize” international criminal law rules, powers, and rights that pre-existed the adoption of the treaty. The pre-existence of such rules—and concomitant pre-inexistence of any sort of alleged immunity—was not a “riddle” and it did not, in any way, depend upon Germany’s “consent [to be] secured by articles in the Treaty of Peace.”¹⁰⁸ Of course, such a pre-

106. *Id.* at 136, 146. The delegation from Japan “asked whether international law recognizes a penal law as applicable to those who are guilty.” *Id.* at 152.

107. The following paragraphs of this Section will rely heavily upon information available in SCHABAS, *supra* note 10, mainly due to the fact that, as the appeals chamber quotes Schabas’ book, one can confidently assume that it was aware of the information contained therein. Nonetheless, in addition to the remarks that will be put forward throughout this Article, it is important to note that Schabas’ book is tributary of prevalent accounts of ICL and, hence, Schabas interprets the episode of the Kaiser in a way that does not pay tribute to the long history of ICL narrated in Section I.1. Useful critical guidance for a proper interpretation of the Kaiser’s episode narrated in Schabas book can be found in The (Failed) Attempt, *supra* note 31.

108. *See* SCHABAS, *supra* note 10, at 5, 118-20 (upholding the idea that consent of Germany was required). The awkward idea that consent of the defeated state – or of the state whose ruler is under prosecution – has somehow to be secured (and has indeed been secured, explicitly or implicitly, in the most important episodes of ICL) is of remarkable endurance. *See, e.g.*, Steffen Wirth, *Immunity Core Crimes?, The ICJ’s Judgment in the Congo v. Belgium Case*, 13 EUR. J. INT’L L. 884, n. 47 (2002) (“probably [. . .] to date, in all cases of international criminal tribunals,

existent state of affairs could not be retroactively modified by the manner in which the jurisdiction of a particular high tribunal was to be defined in that treaty.¹⁰⁹ Therefore, the fact that the AAPs demanded that Germany accept the Treaty of Versailles changes neither the prevalent *opinio* on the immunity issue nor prevalent *opinio* on the existence of international law customary rules for the (criminal) punishment of individuals. Again, it is important to emphasize that, at least according to the view of the drafters of the Report and of the Treaty of Versailles, all these rules were in existence well before the report was issued and the treaty was signed.

Certainly, no one would dare argue that the American and Japanese delegations' view is more valuable than the view of all others for the purpose of evaluating the state of customary international law in 1919. Such daring is also categorically prevented by the fact that the international law grounded view of all others is perfectly consistent, not only with the "formal charge" written in Article 227 of the Treaty of Versailles,¹¹⁰ but also with the old non-written law of humanity: if a mighty sovereign perpetrates outrageous acts against the law of nations or a "supreme offence against international morality and the sanctity of treaties," other sovereign authorities are not prevented to "fix [him or her] the punishment [that it] should be imposed."¹¹¹ Such consistency is also interestingly underscored by the circumstance that this expression, which apparently only deals with moral claims, was ultimately viewed as a "formula . . . about criminal responsibility" encompassing all possible criminal violations of international law.¹¹² In other words, the power to punish the Kaiser enshrined in Article 227 is a mirror of an ICL principle of international law that had been in existence for a

the respective states must be considered to have waived their right to immunity"); see also HAZEL FOX AND PHILIPPA WEBB, *THE LAW OF STATE IMMUNITY* 556 (3rd ed. 2013) (holding that "[t]he question of immunity did not arise with regard to the Nuremberg Tribunal or the ICTY or ICTR. With respect to the former, the consent of Germany by unconditional surrender dispensed with the need for such a plea; with respect to the international criminal tribunals, their establishment by decision of the Security Council under Chapter VII of the UN Charter, which binds all members, dispensed with the need for consent of any participating State").

109. On the unwarranted (and scholarly encouraged) mesh between jurisdictional (treaty) law issues and substantive (customary) law matters, see Lemos, *supra* note 12, at 1338-47 (elaborating on how this mesh has greatly contributed for non-common sense solutions to ICL issues).

110. SCHABAS, *supra* note 10, at 2.

111. Treaty of Versailles, *supra* note 100, at art. 227. Curiously, it was Lansing himself that "crafted rather casually, [unconscious] that he was drafting a legal instrument or a treaty provision," the expression "supreme offence against international morality and the sanctity of treaties." SCHABAS, *supra* note 10, at 4.

112. SCHABAS, *supra* note 10, at 192-95, 200 (narrating the American President's drafting of the expression and interesting interactions with the leaders of France, the United Kingdom and Italy). On how the expression was subsequently understood as encompassing war crimes, see *id.* at 235-37 ("[c]learly, not only the Procurator General but also de Foreign Office knew that he was examining classic violations of the laws and customs of war. There was never any suggestion that these did not fit the charge of offences 'against the morality and sanctity of treaties'").

long time.

The conclusion of the appeals chamber would have been simple: Lansing’s extreme view was not only completely ignored by the Americans in the aftermath of the Second World War but was also “ignored” by the American President in 1919 and, hence, was not the final authoritative position of the Americans in the aftermath of the First World War.¹¹³ That would have settled the issue and would have prompted the appeals chamber to focus on what really mattered. Had the appeals chamber focused on what was important in *Jordan Referral re Al-Bashir*, it would not have failed to carefully scrutinize the content of Article IV of the Report, which actually deals with the arrest and surrender issue. Astonishingly, the appeals chamber did not even mention it. Article IV states that

The Enemy Government agrees, on the demand of any of the Allied or Associated States, to take all possible measures for the purpose of the delivery to the designated authority, for trial by the High Tribunal or, at its instance, by a national court of one of such Allied or Associated States, of any person alleged to be guilty of an offence against the laws and customs of war or the laws of humanity who may be in its territory or otherwise under its direction or control.¹¹⁴

The delivery of “any person” to a designated authority “for trial by a national court” precludes the notion that persons highly placed could claim immunity in order to prevent surrender for trial in a national court. This was also subsequently confirmed by Article 228 of the Treaty of Versailles which states, “The German Government shall hand over to the Allied and Associated Powers, or to such one of them as shall so request, all persons accused of having committed an act in violation of the laws and customs of war.”¹¹⁵ It is also astonishing the little time the appeals chamber spent analyzing Article 227 of the Treaty of Versailles, an article that not only arraigned the Kaiser for the purpose of trial in a high tribunal but also provided that “The Allied and Associated Powers will address a request to the Government of the Netherlands for the surrender to them of the ex-Emperor in order that he may be put on trial.”¹¹⁶ Several remarks in relation to this provision and the information the appeals chamber had at its disposal about its adoption, and subsequent attempts at its implementation, are inexplicably missing from its decision.¹¹⁷

The fact that the AAPs considered that they could legitimately address a request to the Netherlands to surrender him, meant that, at least to their mind, the Netherlands was not bound by any international obligation to recognize the Kaiser any sort of protection and, as such, was allowed under international law

113. SCHABAS, *supra* note 10, at 193.

114. Commission on the Responsibility, *supra* note 85, at 154.

115. Treaty of Versailles, *supra* note 100, at art. 228.

116. *Id.* at art. 227.

117. Information on the following paragraphs in SCHABAS, *supra* note 10, chapters 4, 5, 6, 12, 14, 16, 17.

to surrender him to the AAPs.¹¹⁸ Possibly, it meant more than only that. Particularly, an idea alluded to countless times was that the Netherlands had an international law obligation to surrender the Kaiser. There is no evidence of a clear-cut legal rationale supporting that idea. However, the legal intuition often expressed was that the AAPs were claiming the power to be acting in the name of the international community.¹¹⁹ Thus, they could legitimately demand compliance from the Netherlands with an obligation that the Netherlands would otherwise not have. In other words, they intuited they could legitimately create new arrest and surrender law for the specific situation, and that such new law could depart from the otherwise in existence general extradition law. That would also allow the Netherlands to disregard its national rules on asylum or extradition. To be sure, nowhere was the idea exactly expressed in this specific way. However, the AAPs' many allusions to the will of the international community speak volumes.¹²⁰

Another rationale, which was undoubtedly intuited with an ironic appeal to Grotius, a Dutch, was simply grounded on the *aut dedere aut judicare* stance of some of the fathers of international law.¹²¹ According to this rationale, the Netherlands had an option. As the Kaiser was undoubtedly a person accused of having perpetrated very serious crimes, the Netherlands could either surrender or punish him. However, given the peculiarity of the specific case at hand, the Netherlands would be stripped of the latter option; it had to surrender him to the AAPs. Hence, this rationale also involved a *sui generis* creation of new arrest and surrender law for the specific case. Both rationales therefore involved an appeal to the will of the international community. This required the Kaiser be tried in a High Tribunal, which still had to be created and mandated the Netherlands to comply with the arrest and surrender warrant. A warrant which would be formally issued upon the entry into force of the arraignment and trial clauses of the Treaty

118. Dutch experts considered that “there was no obstacle to extradition of the Kaiser for acts of his troops, committed under his orders, that were contrary to the law of nations” and, initially, the Government of the Netherlands considered that, “[should] extradition be demanded, the reply [. . .] ‘would depend on the circumstances,’” although later they “polished their arguments against rendition.” SCHABAS, *supra* note 10, at 76-79.

119. See also Glueck, *supra* note 77, at 446 (stating that the agreement by the AAPs “to pool their rights and duties in enforcement of international law as agents for the entire Family of Nations was in itself an exercise of world sovereignty in behalf of world law”). On the same idea as applied to prosecution of war criminals in the Second World War, see *infra* Section I.2.2.

120. Consider the significance of allusions such as “surrender in deference to the request of what was practically the [will of the] entire civilized world” and “demand for extradition [. . .] as the first act *de facto*, if not *de jure*, of the League of Nations, seeking to exercise international jurisdiction in a matter involving crimes that aroused the consciences of the civilized world.” SCHABAS, *supra* note 10, at 257, 270.

121. GROTIUS, *supra* note 18, at bk II, ch. XXI, § IV; EMER DE Vattel, THE LAW OF NATIONS, bk. II, ch. 6, ¶ 76, 77 (1758). On the *aut dedere aut judicare* principle, see MIGUEL JOÃO COSTA, EXTRADITION LAW: REVIEWING GROUNDS FOR REFUSAL FROM THE CLASSIC PARADIGM TO MUTUAL RECOGNITION AND BEYOND 20-26, 311-12, 335-39, 568-69 (2019).

of Versailles.

The arrest and surrender similarities between the problem surrounding the Kaiser’s case and the situation that the appeals chamber had to deal with are so striking that it is difficult to imagine the appeals chamber inadvertently missed its significance.¹²² However, taking into account the demeanor with which the appeals chamber disposed of the case, it is perhaps not difficult to reluctantly guess the inner workings of its ultimate decision not to spend energy analyzing Article 227. That is, a careful analysis of Article 227 and of the discussions it generated would collide head-on with the appeals chamber theory; that there is “no immunity before international tribunals.” Indeed, it is abundantly clear that the practice enshrined in Article 227, and the decision to submit the Kaiser to a trial before an international tribunal, were not accompanied by the concomitant *opinio* that an international court was the only legitimate option to punish him according to pre-existent customary international law. “As long as he is punished,” trial before national courts or simple punishment (*à la Napoleon* or otherwise) through joint political decision of the AAPs were in general not viewed as illegitimate options under international law, albeit for some to “impose [political] punishment, on whatever grounds” was more legitimate than punishment through the use of any type of court.¹²³ The view of the AAPs, as subtly enshrined in Article 227, was that *they*, acting singly or in concert, were not barred from deciding how the Kaiser was to be punished. The magnitude of the international criminality of the acts at stake was sufficient to bar any allegation of immunity vis-à-vis the AAPs together or just one of them. There was simply no question of immunity before an international court. In fact, such a court did not even come into existence.

An alternative explanation for the attitude of the appeals chamber is that the arraignment and the subsequent arrest and surrender demand for a trial in a high tribunal did not target a sitting head of state but a former one. Hence, the whole case was not directly on point. However, if such was the real worry of the appeals chamber, then it should have explored the significance of the fact that, during the war and while the Kaiser was a sitting head of state, a coroner’s jury in Ireland delivered a “verdict”—in connection with the torpedoing of the *RMS Lusitania* by a German submarine—stating that “this appalling crime was contrary to international law and the conventions of all civilized nations, and we therefore charge to . . . the Emperor . . . the crime of willful and wholesale murder before the tribunal of the civilized world.”¹²⁴ One can perhaps infer that the appeals chamber considered that national vague charges for crimes against international law before an undefined “tribunal of the civilized world” were an exoteric thing and, hence, also not directly on point.¹²⁵

122. The similarities will become even more obvious *infra* Section II.3.2.

123. SCHABAS, *supra* note 10, at 186-89.

124. *Id.* at 13.

125. On the possibility of trying the Kaiser in a national court with regard to the sinking of the *RMS Lusitania*, see also *id.* at 112.

Whatever the inferences of the appeals chamber might have been, Article 227's international tribunal that never came into being was, in the reality of things, conspicuously conceived as an early 20th century "tool" for the pursuance of values pertaining both to international criminal justice and international peace and security, i.e. a precursor of the 21st century ICC.¹²⁶ Or, as the AAPs decided to put it at the time, not really a simple tool but a high tribunal which would be guided "by the highest motives of international policy, with a view to vindicating the solemn obligations of international undertakings and the validity of international morality."¹²⁷ It is also not difficult to look at the combination between the "public arraignment" and the "request for surrender" enshrined in Article 227 as the embryo of future universally preemptory warrants for the arrest and surrender of heads of state. Particularly, points of contact exist between this episode and the episode concerning the most important indictment and warrant of the whole history of international law, an indictment and a warrant which the appeals chamber completely ignored: the public arraignment and demand for the arrest and surrender of the sitting head of state of Germany during the Second World War, Adolph Hitler.

1.2.2. The Case of Adolph Hitler

In a Section titled "The Development of the International Norm Rejecting Immunity before International Tribunals: Fostering at Nuremberg," the appeals chamber continued with its "international courts" obsession. The appeals chamber started its analysis "in 1945, after World War II," by alluding to the "instrument that established the International Military Tribunal in Nuremberg."¹²⁸ Had the appeals chamber really focused on the arrest and surrender issue, it ought to have started its analysis some years earlier.

At a time when the law of war was being tested as to its limits and undergoing a turbulent "continual adaptation [which] follows the needs of a changing world,"¹²⁹ important developments took place. Drawing upon Roosevelt and Churchill's "Atlantic Charter," twenty-six Allied states from five continents, engulfed in "the struggle for victory over Hitlerism," issued the "Declaration by the United Nations of 1942" and, while using language reminiscent of (other) past humanitarian interventions, they arrogated themselves the quality of protectors of "human rights and justice."¹³⁰ Drawing upon such a declaration, the Moscow

126. See parallels with the early 21st century ICC, *infra* II.3.2.

127. Treaty of Versailles, *supra* note 100, at art. 227.

128. Joint Concurring Opinion, *supra* note 22, ¶125-26.

129. International Military Tribunal, *supra* note 102, at 54.

130. *Declaration by the United Nations*, Yale L. Sch.: The Avalon Project (January 1942), https://avalon.law.yale.edu/20th_century/decade03.asp [<https://perma.cc/TZB3-9LZK>] ("Being convinced that complete victory over their enemies is essential to defend life, liberty, independence and religious freedom, and to *preserve human rights and justice in their own lands as well as in other lands*, and that they are now engaged in a common struggle against savage and brutal forces seeking to subjugate the world") (emphasis added). On old justifications for humanitarian

Conference of October of 1943 addressed issues relating to the “transition from war to peace” and to the establishment of “international peace and security.”¹³¹ Using powerful language that would become the hallmark of future UNSC Chapter VII action, the “Joint Four-Nation Declaration of the governments of the United States of America, United Kingdom, the Soviet Union, and China” spoke of “[the adoption of] all measures deemed by them to be necessary; [the need of establishing an] international organization for the maintenance of international peace and security [and of a] joint action on behalf of the community of nations.”¹³²

The conference led to the signing of a “Statement on Atrocities,” a statement that possibly constituted the first successful attempt by the “United Nations” to create peremptory norms binding upon the whole world. It is important to be abundantly clear about what one is suggesting here. One is proposing that certain actions adopted by the representatives of the United Nations, in order to create the organization of the United Nations, and to take provisional measures in its name and “on behalf of the community of nations,” are not merely actions that were legitimately grounded in international law. These are also actions that came to be increasingly viewed during the war as “an expression of” the stance of the international community of states considered as a whole.¹³³ In this sense, from a certain moment that is difficult to precisely pinpoint and going forward, some of these actions adopted in the name of the “whole” became peremptorily binding on all states.

The Statement on Atrocities, issued by The United Kingdom, the United States and the Soviet Union, “speaking in the interest of thirty-two United Nations,” related to “evidence of atrocities, massacres and cold-blooded mass executions which [were] being perpetrated by Hitlerite forces . . . , [t]he brutalities of Nazi domination [and other] monstrous crimes.”¹³⁴ After alluding to the intention that the persons responsible for such atrocities be punished in the countries where the atrocities were perpetrated, the last two paragraphs alluded to ideas of arrest, surrender and punishment. Significantly, the paragraphs provide

interventions on the basis of religious rights and/or human rights, which continued to be used throughout the whole history of international law and are still used today, see Simms & Trim, *supra* note 15 at 21–47 (concluding that, “[a]lthough presuppositions about the nature of government have changed and concepts of both ‘conscience’ and ‘mankind’ have likewise evolved since the sixteenth century, nevertheless, there are numerous continuities. This is true not only in the sorts of actions that have been regarded as unacceptable, but also in how governments have responded (and, indeed, in the problems they face in responding) to egregious religious persecution, widespread massacres, ethnic cleansing, or outright genocide”).

131. *The Moscow Conference, Yale L. Sch.: The Avalon Project* (October 1943), <https://avalon.law.yale.edu/wwii/moscow.asp> [<https://perma.cc/94Q9-WQ4V>] [hereinafter *The Moscow Conference*].

132. *Id.*

133. See *infra* in this Section discussing the closely related statements of the IMT.

134. The Moscow Conference, *supra* note 131.

that

Let those who have hitherto not imbrued their hands with innocent blood beware lest they join the ranks of the guilty, for most assuredly the three Allied powers will pursue them to the uttermost ends of the earth and will deliver them to their accusers in order that justice may be done.

The above declaration is without prejudice to the case of German criminals whose offenses have no particular geographical localization and who will be punished by joint decision of the government of the Allies.¹³⁵

The outstanding target of this Statement on Atrocities and of the joint decision of the government of the Allies was the only person whose name can be readily identified in the statement, i.e. the sitting head of state of Germany, Hitler. It would have been beneficial for the appeals chamber to consider the import of this fact in light of an old ordinance of 1667, which is an “an interesting contribution to the theory of sources of international law.”¹³⁶ The ordinance provides that “Matters, that are clear by the light and law of nature, are presupposed; things unnecessary are passed over in silence; and other things may be judged by the common customs and constitutions of war; or may upon new emergents, be expressed afterward.¹³⁷ Surely, it was “passed over in silence” that the “pursuance” of the greatest criminal of all major war criminals to “the uttermost ends of the earth” meant that Hitler did not enjoy any sort of sitting head of state immunity; to state that expressly would have been “unnecessary.” Moreover, Hitler would be “punished” by a “joint decision of the United Nations,” whatever form such punishing decision would eventually take.¹³⁸ It was also “unnecessary” to specify the form of the punishing decision because that is “another thing,” which will be “expressed afterward,” either according to the “common customs and constitutions of war” or according to “new emergents.”

The indisputable fact is that there is no hint the Allies’ state practice and *opinio* embodied in the Statement on Atrocities was knitted together with a potential future creation of an international tribunal. Hence, it would be incorrect to read into the statement any practice or *opinio* that Hitler would not be able to claim immunity before an international court. At this moment, to the mind of the Allies, Hitler is actually completely unimmunized vis-à-vis the Allies themselves. What the declaration really suggests is that, while the Allies, acting together or on their own, were not prohibited, in the abstract, to arrest Hitler and try him through the use of their own courts or simply according to what they deemed expedient, Hitler was to be punished, *in concreto*, by a joint decision of the

135. *Id.*

136. Theodor Meron, *On Custom and the Antecedents of the Martens Clause in Medieval and Renaissance Ordinances of War*, in *RECHT ZWISCHEN UMBRUCH UND BEWAHRUNG: VÖLKERRECHT, EUROPARECHT, STAATSRECHT: FESTSCHRIFT FÜR RUDOLF BERNHARDT 173-77* (Ulrich Beyerlin et al. eds., 1995).

137. *Id.*

138. The Moscow Conference, *supra* note 131.

Allies. The future form of that decision could be the summary execution by whomever first captured Hitler, a judgment by an international or national court (for example, a court of the country where the most “abominable deeds” were perpetrated)¹³⁹ or any other mechanism that the Allies’ imagination could devise.¹⁴⁰

In fact, the British had favored for a long time the summary execution of Hitler, in tune with what they seemed to have favored a quarter century earlier in what the Kaiser was concerned.¹⁴¹ The appeals chamber simply noted that the British stance “deserve[d] a closer look” and that it meant that, for the British, “[t]here was no question of Head of State immunity at all.”¹⁴² However, the appeals chamber did not seriously engage with the significance of the British stance. Rather, it enigmatically suggested that the stance “would not fit with today’s sensibilities.”¹⁴³ Such lack of engagement is even more unfortunate because the British stance was not an isolated one. It was favored by the Americans for a long time and, likely, the Soviets would have concurred.¹⁴⁴ Another “passed over in silence” important detail is that the Statement on Atrocities purported to create a peremptory obligation for states to arrest Hitler and to surrender him to whatever executive or judicial authority the future joint decision of the Allies would determine. In fact, the universal purport of the declaration (“will pursue them to the uttermost ends of the earth”) basically meant that neutral states were not off limits and that no Netherlands-style First World War hospitable traditions would be allowed to prevail in dealing with Hitler.¹⁴⁵

Even before the Statement on Atrocities was issued, a five continents’ United Nations War Crimes Commission (UNWCC) was established.¹⁴⁶ Its first official meeting was held in early January of 1944. In November 1944, while already fully operating as an international criminal justice’s “global operation,” the UNWCC unsurprisingly established that Hitler could be held accountable for the

139. While national courts were not to be automatically used in relation to the “German criminals whose offenses have no particular geographical localization and who [would] be punished by joint decision of the government of the Allies,” it would be incorrect to read into the statement that the use of such courts was excluded *a priori* or that they could not be legitimately used if the Allies opted for such a course of action. *See also infra* in this Section.

140. On the “freedom of action of [Allied] states” in this regard, see Memorandum, *supra* note 47, at 1-4, and authorities cited therein.

141. SCHABAS, *supra* note 10, at 16.

142. Joint Concurring Opinion, *supra* note 22, ¶ 147.

143. *Id.*

144. On Roosevelt’s stance, see KENNETH GALLANT, *THE PRINCIPLE OF LEGALITY IN INTERNATIONAL AND COMPARATIVE CRIMINAL LAW* 73 (2010).

145. On neutral states’ harboring of war criminals as an action that would be inconsistent with the principles of the United Nations, see declarations mentioned in Glueck, *supra* note 77, at 419-21, n.75.

146. Information and quotes in this paragraph retrieved from DAN PLESCH, *HUMAN RIGHTS AFTER HITLER: THE LOST HISTORY OF PROSECUTING AXIS WAR CRIMES* 2, 87, 158-77 (2017).

atrocities. By March 1945, even before the war ended and while Hitler was still the sitting head of state, the non-written arrest warrant against him gained its internationalized written form, as the sixteen-nation commission recommended seven separate indictments against him. These indictments were based upon national “formal charges” that were brought by Belgium and Czechoslovakia some three or four months before.

While reading the appeals chamber decision, all of the above seems to be unimportant. Indeed, its opinion seems to be that Hitler was entitled to an old sort of absolute immunity during the whole Second World War. For the appeals chamber, naked aggression, brutal war crimes and monstrous crimes against humanity apparently did not have any effect on Hitler’s immunity and a French court could not, validly and legitimately, issue an arrest warrant against Hitler. No authority could arrest him and offend his inviolability when, for example, in 1940, he decided to take a tour of Paris. Apparently, Hitler’s immunity was to only disappear at a later stage, if, and only if, an international court was created and formally issued an arrest warrant against him.

However, facts are stubborn. An international court only decisively entered the equation almost two years after the Statement on Atrocities, more due to a “fortunate” American change of heart than to a (inexistent) rule of international law mandating the creation of an international body of judges. In April 1945, the joint decision of the Allies was already assuming its final form, i.e. an international military tribunal to try all the major war criminals, including Hitler.¹⁴⁷ The new American president fully embraced the idea, allied troops began arresting German war criminals in occupied territory and, in August 1945, the agreement for the prosecution of the major war criminals was adopted. Two months before, in June 1945, the UN Charter was signed by fifty-one original members of the then nearly seventy existing sovereign states. The “all states” universal and outwards reach of the Charter was conspicuous.¹⁴⁸ According to Article 2(7), “[although] [n]othing in the . . . Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of *any state* . . . , this principle shall not prejudice the application of enforcement measures under Chapter VII.”¹⁴⁹ According to its Article 2(6), “The Organization shall ensure that states which are *not Members* of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security.”¹⁵⁰

The outward reach envisioned in these two provisions is the natural “consequence of the fact that the purpose of the United Nations, [as unveiled three years before], was not only to maintain peace within the Organisation but

147. Justice Robert H. Jackson, *Rule of Law Among Nations* 16 (April 13 1945), https://www.roberthjackson.org/wp-content/uploads/2015/01/Rule_of_Law_Among_Nations.pdf [<https://perma.cc/A9XK-TZMQ>].

148. *See infra* Section II.3.

149. U.N. Charter art. 2, ¶7, 1 U.N.T.S. 16 (Oct. 24, 1945) (emphasis added).

150. *Id.* at art. 2, ¶6 (emphasis added).

within the whole international community.”¹⁵¹ It is perhaps decisive that, at the time, no State in the world protested against the reach envisioned by these provisions and that, as such, by the time the Second World War was definitively over and the International Military Tribunal (IMT) started operating, the actions of the United Nations were already recognized as measures adopted in the name of the international community as a whole.

In 1946, the “new emergents” concerning the “constitutions of war [and peace]” might lend some support to the assertion that the commands issued years earlier, for the arrest and surrender of the major war criminals, might have actually constituted the first universal peremptory commands issued by a not yet fully formed security council. Although it is a perilous exercise to interpret what the law was in 1943 and 1944 solely in light of the 1943 Allies’ Statement on Atrocities, their ultimate victory in 1945 and the prevailing “dominant moral ideas,” which contributed to determine “the contents, contours and characteristics of the law of war at any moment in time,”¹⁵² the list of countries that had actually come to lend support to such a statement is surely not insignificant. It is also notable that “all charter signatories were required to have adhered” to the 1942 declaration.¹⁵³ Even before the war ended, the law embodied in the Statement on Atrocities was already the legitimate expression of the view of the international community.

However, even if that was not the case, the post war situation is unequivocal. In 1946, on the force of all these extraordinary developments, and in particular on the basis of the “Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis” adopted by four countries “acting in the interests of all the United Nations and by their representatives duly authorized thereto”,¹⁵⁴ unnamed and named arrest warrants against all major criminals of the Axis, however highly placed, were in legitimate legal existence. In other words, in 1946, these arrest warrants were universally binding and every state in the world was bound to execute—through “arrests and surrenders” of all the major war criminals—the will of the new international community.¹⁵⁵

151. HANS KELSEN, *THE LAW OF THE UNITED NATIONS* 106, 107 (1950).

152. Abi-Saab, *The Specificities of Humanitarian Law*, in *STUDIES AND ESSAYS ON INTERNATIONAL HUMANITARIAN LAW AND RED CROSS PRINCIPLES IN HONOUR OF JEAN PICTET* 265 (Christophe Swinarski ed., 1984).

153. PLESCH, *supra* note 146, at 2.

154. Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Preamble, art. 1 (Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279, 281, 282).

155. More in general, see Glueck, *supra* note 77, at 446 (noting that “[i]n acting jointly and as agents of all civilized States in the vindication of international law through the prosecution of individuals who brought about its wholesale violation, the United Nations needed no pre-existent World State or World Legislature to justify their jurisdiction. Their agreement [. . .] to pool their rights and duties in enforcement of international law as agents for the entire Family of Nations was in itself an exercise of world sovereignty in behalf of world law. Any formal charter of united action could only have been declaratory of an existent situation”).

The IMT did not have to squarely deal with the issue of arrest and surrender of sitting heads of state because the war was over, Hitler was dead, Germany was occupied and, in one way or another, the former head of state, foreign ministers and other high ranked defendants were also dead or were orderly surrendered to the tribunal. The IMT eloquently held that

The making of the Charter was the exercise of the sovereign legislative power by the countries to which the German Reich unconditionally surrendered; and the undoubted right of these countries to legislate for the occupied territories has been recognized by the civilized world. The Charter is not an arbitrary exercise of power on the part of the victorious nations, but in the view of the Tribunal, as will be shown, it is the *expression* of International Law existing at the time of its creation; and to that extent is itself a contribution to International Law. The signatory Powers created this Tribunal, defined the law it was to administer, and made regulations for the proper conduct of the Trial. In doing so, they have done together what any one of them might have done *singly*; for it is not to be doubted that any nation has the right thus to set up special courts to administer law.¹⁵⁶

In this quote, the IMT was chiefly making the point that the criminal prohibition of aggression was not *ex post facto* law and that such was proven by international history pre-dating the adoption of the Charter.¹⁵⁷ The IMT's stance that the legitimacy of punishment did not rest solely on the fact of Germany's surrender but was also grounded on international law is a stance applicable to the IMT Charter as a whole, including its clear-cut rejection of any immunity in Article 7. The IMT stated

The principle of International Law, which under certain circumstances protects the representatives of a State, cannot be applied to acts which are condemned as criminal by International Law. The authors of these acts cannot shelter themselves behind their official position in order to be freed from punishment in appropriate proceedings [T]he very essence of the Charter is that individuals have international duties which transcend the national obligations of obedience imposed by the individual State. He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the State if the State in authorizing action moves outside its competence under International

156. International Military Tribunal, *supra* note 102, at 52 (emphasis added).

157. Miguel Lemos, *Jus Cogens Versus the Chapter VII Powers of the Security Council: With Particular References to Humanitarian Intervention and Terrorism*, 19 (1) CHINESE J. INT'L L. 13-15 (2020) (elaborating on why there should be no doubt that aggression was already an international crime in the 1920s). On the "nonsense" claim that Nuremberg law was *ex post facto*, see Paust, *Universality*, *supra* note 9, at 341. See also THEODOR MERON, *THE MAKING OF INTERNATIONAL CRIMINAL JUSTICE. A VIEW FROM THE BENCH* 88 (2011).

Law.¹⁵⁸

The IMT was not suggesting that the Allies “legislated away” immunity on the basis that Germany had surrendered or that the proceedings before the IMT were the only appropriate ones.¹⁵⁹ It was merely making the point that the “very essence” of the international law on war crimes precludes immunity. The point of the IMT was broader but simply meant that it is absurd to argue that acts of naked aggression, brutal war crimes and monstrous crimes against humanity had no effect on the immunity or inviolability that Hitler would have otherwise enjoyed during the war, after the war, as a sitting head of state or as a former one, either in official visits or in private ones. Furthermore, the IMT meant that it would be ridiculous to argue that the Belgian and Czech charges against him, and their endorsement by the UNWCC, were illegitimate, invalid or otherwise somewhat against the law of nations. It certainly did not cross the IMT’s mind that an indictment or arrest warrant against Hitler, in the middle of the Second World War, constituted an unacceptable and abusive destabilizing factor in international relations.

In more cinematic terms, the IMT perhaps wondered: imagine that Hitler assumed the role of an envoy on a peace mission and flew solo to Britain during the Second World War, like his deputy Rudolf Hess actually did in 1941. After wondering, the IMT ruled: of course, Britain did not have to respect the immunity that he would otherwise have enjoyed and it could, through the exercise of criminal jurisdiction, military jurisdiction, King’s jurisdiction, administrative jurisdiction, etc., arrest him, put him on trial or deploy more expedited ways of dealing with him. One can imagine the IMT holding the view that no one can seriously suggest that, in light of the atrocities at stake, Britain simply had no option under international law rather than to declare Hitler *persona non grata* and to allow him to go back to Germany or even to wander the streets of the United

158. International Military Tribunal, *supra* note 102, at 56.

159. See ROBERT CRYER ET AL., AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE 520 (2019) (suggesting that, as “the Allies stood in the position of national legislator [. . .], they legislate[d] away immunity before the Tokyo and Nuremberg Tribunals”). Perhaps some would also venture to suggest that Hitler could not be tried before national courts of the allies or that any other type of “appropriate” less pleasant military proceedings were somewhat illegitimate. Such a suggestion would not correspond to the words of the IMT. For the IMT, the allies “have done together what any one of them might have done *singly*.” That surely includes the idea that the main objective of the whole thing, i.e., punishment of war criminals for their war crimes, etc. could be pursued by *one single state* through the “appropriate” use of its national courts. On the “unrestricted” jurisdiction of national courts to try war criminals irrespective of their status and the “appropriate” use of such jurisdiction, see Memorandum, *supra* note 47, at 1-4 (“[s]uch courts in the trial of such cases are, of course, subject to the established substantive and procedural principles of justice which are common to civilized countries, and the military convening commander may not properly preclude their application). On the “organized” or “appropriate” use of the courts where the crimes were perpetrated, see also Glueck, *supra* note 77, at 419-21, n.75, 434.

Kingdom. As the British Committee of Inquiry established in the aftermath of the First World War would have put it, no one invited him.¹⁶⁰

Impressionistic techniques of presenting the issue apart, the IMT simply acknowledged a long-standing legal reality and made the *exact same point* that, as mentioned above, the appeals chambers also put forward 70 years later: there is “an internal inconsistency with the idea of cloaking the [sovereign] with immunity . . . if he or she commits such crimes.”¹⁶¹ The difference is that the IMT, in contrast with the appeals chamber, did not think it was unveiling something extraordinarily new to the world enshrined in the “vertical aspects” of the treaty providing for its own creation and it did not presumptuously focus on its own “international tribunal” condition.¹⁶² The IMT’s most eloquent words are a resounding echo of the whole story that this Article has been narrating thus far that

The law of war [including its penal sanctions and mechanisms designed to enforce them] is to be found not only in treaties, but in the customs and practices of States, which gradually obtained universal recognition, and from the general principles of justice applied by jurists and practiced by military courts. This law is not static, but by continual adaptation follows the needs of a changing world. Indeed, in many cases treaties do no more than express and define for more accurate reference the principles of law already existing.¹⁶³

At this juncture, it is important to emphasize four points. First, and most importantly, the IMT was not suggesting that what is today known as ICL, i.e., international law providing for the criminal punishment of individuals, was a creation of the drafters of the IMT Charter. Indeed, it was upholding exactly the opposite, i.e. that the international law on crimes of aggression, crimes against humanity and war crimes pre-existed the Charter and that the Charter only “expressed” and “defined” for “more accurate reference the principles of law already existing.”¹⁶⁴

Secondly, the IMT did not suggest that the fact that immunity does not operate when international crimes are at stake means that countries cannot, through treaties or national legislation, enact rules prohibiting their courts from ordering the arrest of foreign heads of state who are in their territory.¹⁶⁵ Similarly, the IMT did not assume that there is any sort of international law peremptory mandate imposing on states the duty to prosecute foreign heads of state who

160. SCHABAS, *supra* note 10, at 50.

161. Joint Concurring Opinion, *supra* note 22, ¶ 176.

162. See *infra* Section I.3.

163. International Military Tribunal, *supra* note 102, at 54.

164. *Id.*

165. See Memorandum, *supra* note 47, at 2 (“any jurisdictional limitation on the power of a particular state in this regard, which may be found in its law, is a limitation which has been self-imposed by that state and which that state, under international law, is free to remove if it chooses to do so”).

allegedly have perpetrated international crimes. The IMT was merely making the argument that, from the point of view of “International Law,” the position is manifest, i.e. the customary principle of general international law providing immunities, whatever its scope might be,¹⁶⁶ does not extend to situations of aggression, war crimes and crimes against humanity.

Thirdly, for the IMT, the idea that immunities do not apply with regard to international crimes was quite simple and it did not involve any sophisticated *ratione personae* versus *ratione materiae* or horizontal versus vertical distinctions which became the hallmark of a surreal controversy arising seventy years later.¹⁶⁷ Speaking about that controversy, Harmen van der Wilt is a rare example of a scholar who does not neglect the words of the IMT. In that sense, van der Wilt’s non-forgetfulness is worthy of praise. However, he also puts forward that

While [the] position of the IMT is laudable and stands to logic in view of the aim to end impunity for international crimes, its scope is by no means clear. After all, in the horizontal (inter-State) context it would imply that one State could assess when another State acts *ultra vires* under international law, and such judgments are precisely precluded by the *par in parem* maxim. Nevertheless, [immunities *ratione materiae*] for former State officials, including heads of State, are no longer sacrosanct, as is evidenced by the landmark decision of the UK House of Lords in the case of the former dictator of Chile, Augusto Pinochet. International crimes, while at first sight official acts, do not deserve that label, and ever since ‘Nuremberg’ foreign courts should be entitled to ignore immunities in such cases, at least in respect of State officials who have stepped down from office.¹⁶⁸

Van der Wilt’s stance is disconcerting because the position of the IMT is “by [all] means” as clear as one can get and it “stands to logic” not because of that present day in vogue idea of “end of impunity.”¹⁶⁹ Rather, it stands to logic because of sheer common sense and basic understanding of the rules of war. The IMT clearly saw what others still cannot. For example, enforcement of the law on war crimes by states, acting singly or in concert, is subject neither to a “horizontal” limit or *par in parem* maxim nor to any national or personal decision on when an official “steps down from office.” What is unclear is why—after more than 70 years since the *International Military Tribunal* authoritatively pronounced on the issue—scholars feel comfortable in seeing some kind of

166. See Salvatore Zappalà, *Do Heads of State in Office Enjoy Immunity from Jurisdiction for International Crimes? The Ghaddafi Case before the French Cour de Cassation*, 12 EUR. J. INT’L L. 595, 599-600 (2001) for a useful summary on what this scope might be.

167. See *infra* Section II.3.1.

168. Harmen van der Wilt, *The Immunities and the International Criminal Court*, in CAMBRIDGE HANDBOOK OF IMMUNITIES AND INTERNATIONAL LAW 596 (Ruys, Angelet and Ferro eds., 2019).

169. *Id.*

naiveté in the words of the IMT or in considering that the House of Lords has some type of expertise on the matter. Moreover, it is no less disconcerting that, after the IMT and other Nuremberg military tribunals convicted an entire leadership of a country to death by hanging and other international criminal punishments for their crimes of aggression, war crimes and crimes against humanity, van der Wilt and many others are hypnotized with the idea that it was the “landmark” *Pinochet* decision of the House of Lords that “evidenced” that immunities “are no longer sacrosanct.”¹⁷⁰ Furthermore, whatever “personal absolute immunity” dictum the House of Lords hastily put forward, its decision was focused not only on a former head of state and the crime of torture but was also looking at the whole issue through the “self-imposed” national lens of the UK State Immunity Act 1978 and the treaty lens of the 1984 Torture Convention.¹⁷¹ It was not focused on the more fundamental war and peace questions confronted and tackled by the IMT.

Fourthly, in view of the grand stature of the judgment of the IMT in international law,¹⁷² any argument, by the House of Lords or others, that there is any sort of immunities in customary international law with regard to “such [core] crimes”¹⁷³ must clarify how the existence of any such immunities is compatible with the recognized principle of international law engraved in the IMT judgment. At the very least, one has to convincingly explain what changed or occurred after 1946 which would justify a departure from what the IMT declared. In other words, it is difficult to imagine that any judicial decision, which contradicts the IMT, turns into binding international law if it is not grounded on unequivocal and persuasive analysis; be such a decision issued by a national court or by an internationally prestigious one.¹⁷⁴

The appeals chamber embraced the idea that the IMT simply denied the existence of immunities with regard to international crimes and that such denial was in accordance with the IMT Charter. It not only considered that the decision of the IMT “was firmer in the rejection of the immunity” but also correctly

170. *Id.*

171. See CRYER, ET AL., *supra* note 159, at 512-14, 517 (for the dictum and a useful summary of this “gem of the common law”); see also Andrea Bianchi, *Immunity Versus Human Rights: The Pinochet Case*, 10 Eur. J. Int'l L. 237, 237-77 (1999); Qinmin Shen, *Methodological Flaws in the ILC's Study on Exceptions to Immunity Ratione Materiae of State Officials from Foreign Criminal Jurisdiction*, 112 AM. J. INT'L L. UNBOUND 11 (2018) (affirming that the case merely concerns the interpretation of the Torture Convention); Mr. Rajput (India), ICL, Provisional Summary Record of the 3363rd Meeting (19 June 2017), A/CN.4/SR.3363, at 7 (affirming that the case was concerned “not with the position under international law, but exclusively with domestic law”). Domestic law provided that the principles on diplomatic immunities apply to “a sovereign or other head of State.” UK State Immunity Act 1978, §20.

172. See *infra* Section I.4.

173. E.g., aggression, war crimes and crimes against humanity. Today, included in these “core crimes” is the crime of genocide, insofar as it is to be considered a special case of crimes against humanity (see also *infra* Section II.3.1).

174. See *infra* Section I.4 and Section II.3.1.

observed that “[i]t is important to appreciate that article 7 of the Nuremberg Charter contains no words of limitation, to the effect that any immunity was reserved for serving Heads of State or senior State officials. Immunity by reason of official position was precluded simpliciter.”¹⁷⁵ However, the appeals chamber did not seem to realize that its own “no words of limitation” must mean that, from the point of view of general international law, immunity could not be invoked *tout court*, including vis-à-vis national authorities. Or, perhaps, it did in fact realize this because, in a short footnote, the appeals chamber acknowledged as much, while commenting on Article II(4)(a) of Control Council Law No 10. The content of this article is exactly the same as the one of Article 7 of the Charter. The appeals chamber said, “It may not be insignificant that [article II] also prohibited official position immunity in proceedings before national or occupation courts exercising jurisdiction in Germany, pursuant to article 6 of the London Agreement of 8 August 1945.”¹⁷⁶

Again, the appeals chamber did not follow-up on what that non-insignificance reference means, but it correctly did not venture to suggest that proceedings before national courts would not be appropriate ones or that the IMT implicitly backed its “no-immunity before international courts” story.

In conclusion, the appeals chamber not only looked past the significance of the non-written arrest warrant and written indictment/arrest warrant against Hitler and its own “immunity was precluded simpliciter” words, but also did not pay due respect to the force and significance that the words of the IMT bear in any true narrative about the history of ICL. Had it paid such respect, it would not have failed to realize that, as explained in the next Section, its own ICC Statute “does no more than express and define for more accurate reference [non-immunity] principles of law already existing [for a long time]”.¹⁷⁷

1.3. The International Criminal Tribunals and Courts of the End of the 20th Century

The previous Sections have shown that international law has never prohibited the arrest and surrender of sitting heads of states for their crimes under international law and that the court misinterpreted decisive episodes, in order to justify the nascence and development of a customary rule specifically addressed to international courts. Thus, it is not strictly necessary to analyze all subsequent 20th century developments mentioned by the appeals chamber in the Section titled “Consolidation of the International Norm Rejecting Immunity before International Tribunals: Adoption by the United Nations.” There can be no “consolidation” of a rule that had never existed in non-consolidated form. In particular, it is disingenuous to use the end of the 20th century renaissance of ICL, and the creation of international criminal courts and tribunals which is the

175. Joint Concurring Opinion, *supra* note 22, ¶ 148.

176. *Id.* ¶ 143, n. 224.

177. International Military Tribunal, *supra* note 102, at 54.

hallmark of such renaissance, to twist the old rule on the matter. The argument would be disconcerting: whereas in the past international law provided no immunity at all, the adoption of the statutes of the new international criminal courts and tribunals signified the subtle creation of a new rule providing immunity *ratione personae* before national courts. At the time of writing this Article, no one has ever argued that any of the legal documents on ICL mentioned by the appeals chamber intended to depart from the law as it was recognized by the IMT.¹⁷⁸ Similarly, there is no one arguing that any convention on immunities of diplomats or envoys on special missions intended to depart from such law or to regulate the appropriate boundaries for the exercise of the criminal jurisdiction of mankind. Treaties on immunities of diplomats that say that “[a] diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State”¹⁷⁹ or that “[t]he person of a diplomatic agent shall be inviolable [and he or she] shall not be liable to any form of arrest or detention”¹⁸⁰ were not designed with the issue of immunity of a head of state for international crimes in mind. Similarly, treaties were not conceived on the assumption that a diplomat or envoy immunity and inviolability are not affected if he or she commits aggression, war crimes, or crimes against humanity in the receiving state. In such cases, he or she is no longer a legitimate diplomat or envoy for peace and can, of course, be arrested and punished.¹⁸¹

The appeals chamber itself did not suggest any such extraordinary alteration on the law of international crimes had in fact occurred because, for a long time, there was “absolutely” no document on the laws of war and international crimes suggesting such an extraordinary thing; or, as Jordan Paust would put it, “Latinized nonsense about a so-called immunity *ratione materiae* or immunity *ratione personae* for international criminal conduct [is of recent vintage].”¹⁸²

An overview of the appeals chamber’s “consolidation section” would also be fatiguing. The analysis of the court is more of the same, i.e. the appeals chamber persists in its obsessive focus on its own position as an international court and foregoes the larger picture. However, a fitting example of the more of the same

178. See *id.* ¶ 151-74.

179. Vienna Convention on Diplomatic Relations, art. 31, Apr. 18, 1961 23 U.S.T. 3227, 500 U.N.T.S. 95.

180. *Id.* at art. 29.

181. On war crimes and the question of diplomatic immunity, see William W. Bishop, *Abetz. Sirey, 1950.1.185 (French Cour de Cassation, 1950)*, 46 AM. J. INT’L L. 161-63 (1952); see also Leonard Sutton, *Jurisdiction over Diplomatic Personnel and International Organizations’ Personnel for Common Crimes and Internationally Defined Crimes*, in A TREATISE ON INTERNATIONAL CRIMINAL LAW, VOL. II 97, 110, 111 (Bassiouni and Nanda eds., 1973). For other situations in which the diplomat may be arrested, see Thomas Weatherall, *Inviolability Not Immunity, Re-evaluating the Execution of International Arrest Warrants by Domestic Authorities of Receiving States*, 17 J. INT. CRIM. JUSTICE 49, 50 (2019). But compare with, CRYER, ET AL., *supra* note 159, at 517. For more on diplomats’ and envoys’ immunities, see *infra* Part III.

182. Jordan Paust, *Genocide in Rwanda, State Responsibility to Prosecute or Extradite, and Nonimmunity for Heads of State and Other Public Officials*, 34 HOUS. J. INT’L L 71, n. 50 (2011).

demeanor of the appeals chamber must be analyzed in this Article because it relates to the two provisions of the ICC Statute that have generated a bizarre debate during the last decade, namely Articles 27 and 98.¹⁸³

The relevant part of Article 27 (Irrelevance of official capacity) provides

official capacity as a Head of State . . . shall in no case exempt a person from criminal responsibility under this Statute . . . Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.¹⁸⁴

The relevant part of Article 98 (Cooperation with respect to waiver of immunity and consent to surrender) provides

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 . . . of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity . . .¹⁸⁵

With regard to heads of state, there is no reason to believe that the content of these provisions was deemed problematic by the drafters of the ICC Statute.¹⁸⁶

On the one hand, under Article 27, heads of state do not enjoy any type of immunity vis-à-vis the ICC.¹⁸⁷ This was deemed unproblematic because, according to all pre and post Nuremberg precedents the drafters considered, there was no reason to believe that general international law mandated national or international courts to recognize any type of head of state immunity with regard to international crimes. In fact, the appeals chamber of the ICTY had expressly restated such a state of affairs not long before the Rome Diplomatic Conference.¹⁸⁸ Furthermore, as the complementary principle underpins the system agreed in Rome, it is difficult to imagine how the drafters could have ever dreamed that sitting foreign heads of state were immune before national

183. Rome Statute of the International Criminal Court, arts 27, 98, July 17, 1998, 2187 U.N.T.S. 3 [hereinafter *ICC Statute*].

184. *Id.* at art. 27.

185. *Id.* at art. 98.

186. During the drafting process, not only was there not much discussion on the topic but it is also clear that no intricate *ratione materiae* vs. *ratione personae* immunity of heads of state discussion took place. See WILLIAM SCHABAS, *THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY ON THE ROME STATUTE* 594-96, 1343-44 (2nd ed. 2016); see also Claus Kress and Kimberly Prost, *International Cooperation and Judicial Assistance*, in *ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY* 2219, 2120 (Otto Triffterer and Kai Ambos eds., 2016); see also David Scheffer, *Article 98(2) of the Rome Statute: America's Original Intent*, 3 J. INT. CRIM. JUSTICE 333-53 (2005).

187. ICC Statute, *supra* note 183, at art. 27.

188. See *infra* Section II.3.2.

jurisdictions and, hence, states could not arrest them, but that such immunity and impossibility to arrest disappears because an innovative provision, which would waive immunities in what cooperation with the ICC is concerned, would be inserted in the future ICC Statute.¹⁸⁹ While some have attempted to devise a rationale that supports the notion that the ICC Statute actually enshrines such an innovative provision,¹⁹⁰ had the drafters thought that they were derogating from a longstanding international rule providing head of state immunity for international crimes, they would have discussed the matter seriously.

On the other hand, both Articles 27 and 98 acknowledge that there are rules of treaties, international comity customs and national legislation that accord certain types of immunities to heads of state and other representatives of “third states” on official, state or diplomatic functions and that the Court has to take this into account when deciding whether to proceed with an arrest and surrender request. This was also unproblematic. Considering that the no-immunity rule with regard to international crimes is not as a *jus cogens* mandate imposing on states the obligation to arrest and surrender foreign officials just because a court of another country makes a prima facie case that they committed international crimes,¹⁹¹ states were never prohibited from concluding treaties, establishing customs or adopting national legislation preventing their criminal courts from exercising jurisdiction over foreign officials conducting diplomacy business. For example, if Afghanistan is a party to a treaty with the United States where an “immunity from personal arrest or detention” for official gatherings is granted,¹⁹² the ICC “may not proceed with a request” to Afghanistan for the arrest and surrender of the President of the United States on official visit to Afghanistan, unless the Court obtains “the cooperation of the [US] for the waiver of the immunity.”¹⁹³ Note that, for the drafters, as the jurisdiction of the ICC was primarily going to be based upon the principle of territoriality, it was clear that its jurisdiction could be triggered in relation to alleged international crimes committed by the head of state of a state not party to the ICC in the territory of a state party.¹⁹⁴ Thus, in such a scenario, the drafters might have simply assumed that, if the courts of a state party would not themselves be able to order the arrest or detention of the head of state of a state not party, the ICC has to respect such

189. Mr. Murase (Japan), ICL, Provisional Summary Record of the 3328th Meeting (19 June 2017), A/CN.4/SR.3328, 10-11 (“[i]n accordance with the principle of complementarity, national courts were required to exercise their criminal jurisdiction even if the crimes had been committed by State officials ‘during their term of office’ [. . .] in the case of genocide, crimes against humanity, crimes of aggression and war crimes”).

190. See, e.g., Steffen Wirth, *Immunities, Related Problems, and Article 98 of the Rome Statute*, 12 CRIMINAL LAW FORUM 445, 452, 453 (2001).

191. See *infra* in this Section.

192. See *infra* Part III.

193. It is irrelevant for present purposes to debate whether the drafters thought of the “third state” as only encompassing states not party to the Rome Statute or also states parties. See, CRYER ET AL., *supra* note 159, at 523, n.119, 121.

194. See Wirth, *supra* note 190, at 453.

a state of affairs. The drafters were certainly aware that the ICC Statute could not supersede any international obligations due to states not party.

Had the appeals chamber unbiasedly read these provisions and avoided convoluted “horizontal” versus “vertical” considerations and “juristic algebra” exercises, it could have easily seen past the fogginess created by the scholarly controversy about the content of these provisions.¹⁹⁵ Unfortunately, the appeals chamber’s attempt at reconciliation of Article 27 with Article 98—through the use of such convoluted considerations—and respective key findings 2 to 5 are so poorly designed to fit its “no immunity before international courts” story that it suffices to note in this Article only one of the puzzlingly outcomes of such an attempt. After having conducted an “Analysis in Four Steps,” in which the fourth step is a “juristic algebra” exercise, the appeals chamber submitted that the relevant part of Article 98 is not concerned with the core crimes of the ICC Statute but with offences against the administration of justice.¹⁹⁶

An open mind, and a new non-tortuous disposition, would have also enabled the appeals chamber to distance itself from past contradictory decisions of the ICC’s pre-trial and trial chambers on the matter.¹⁹⁷ In order to support the unproblematic content of Articles 27 and 98 described above, the appeals chamber only had to engage with its own references in relation to how the immunity issue was viewed in the last decade of the 20th century, not long before the ICC Statute was adopted. A very important antecedent of Articles 27 and 98 is enshrined in Article 7 of the “Draft Code of Offenses Offences against the Peace and Security of Mankind of 1996.” This code played “a seminal role in the preparation of the Rome Statute”¹⁹⁸ and is considered by many as an authoritative document to determine what the general view was at the time.¹⁹⁹ As to Article 7,

195. Insistence on these “vertical” vs “horizontal” considerations is widespread. See 1 KAI AMBOS, *TREATISE ON INTERNATIONAL CRIMINAL LAW* xii (2013) (partitioning the section on “Immunity for international crimes?” of his *Treatise on International Criminal Law* into two subsections, namely “Vertical immunity (vis-à-vis international criminal tribunals)” and “Horizontal immunity (interstate level)”); see generally Dapo Akande, *The Immunity of Heads of States of Nonparties in the Early Years of the ICC*, 112 AM. J. INT’L L. UNBOUND 172-76 (2018).

196. See Joint Concurring Opinion, *supra* note 22, ¶¶ 396-412.

197. Consider an overview of these previous decisions in Gerhard Kemp, *Immunity of High-Ranking Officials Before the International Criminal Court – Between International Law and Political Reality*, in *THE INTERNATIONAL CRIMINAL COURT IN TURBULENT TIMES* 61-82 (Gerhard Werle and Andreas Zimmermann eds., 2019).

198. WILLIAM SCHABAS, *AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT* 11 (5th ed. 2017).

199. *Prosecutor v. Furundzija*, Case No. IT-95-17/1-T, Judgment, ¶ 227 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998) (“the Draft Code is an authoritative international instrument which, depending upon the specific question at issue, may (i) constitute evidence of customary law, or (ii) shed light on customary rules which are of uncertain contents or are in the process of formation, or, at the very least, (iii) be indicative of the legal views of eminently qualified publicists representing the major legal systems of the world”).

the Draft Code accurately reflects the law as it came out of Nuremberg and as affirmed repeatedly in countless legal instruments.²⁰⁰

The appeals chamber's own quotes reveal that it was aware of the significance of the antecedent and of its content. The wording of Article 7 essentially adapts the non-immunity formulation, which can be found in those countless legal instruments, to the circumstance of adoption of a universal code of international crimes against the peace and security of mankind. "The official position of an individual who commits a crime against the peace and security of mankind, even if he acted as head of State or Government, does not relieve him of criminal responsibility"²⁰¹

In order to determine content, the appeals chamber appropriately relied on the commentary to Article 7 which provides that

The absence of any procedural immunity with respect to prosecution or punishment in appropriate judicial proceedings is an essential corollary of the absence of any substantive immunity or defence. It would be paradoxical to prevent an individual from invoking his official position to avoid responsibility for a crime only to permit him to invoke this same consideration to avoid the consequences of this responsibility.²⁰²

Article 7 and its commentary are manifestly drafted in the sense that immunities with regard to international crimes simply do not exist, as a matter of general international law. The awareness of the appeals chamber of this fact is not to be doubted because it is the appeals chamber itself that approvingly quoted the opinion of Judge Al-Khasawneh in the *Arrest Warrant* case. In fact, Judge Al-Khasawneh's words are a 16 years in advance reprimand to the appeals chamber, ". . . and it should not be forgotten that the draft was intended to apply to *national or international courts*."²⁰³

It is extraordinary how the appeals chamber approved Judge Al-Khasawneh's words but completely failed to note their significance. The appeals chamber also

200. Article 7 basically reproduces the Principle III of the Nuremberg Principles adopted in 1951, Article 3 of the Draft Code of Offences against the Peace and Security of Mankind adopted by the ILC in 1954 and Draft Article 13 adopted provisionally by the ILC in 1991. Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal, ¶ 103 [1950], 2 Y.B. INT'L L. COMM'N, U.N. Doc. A/CN.4/SER.A/1950/Add.1; Draft Code of Offences against the Peace and Security of Mankind, Article 3 [1954], 2 Y.B. INT'L L. COMM'N, UN Doc A/2673; Draft Code of Crimes Against the Peace and Security of Mankind, Titles and Texts of Articles Adopted by the Drafting Committee: Parts One and Two; art. 1-26, art. 13, 1 Y.B. Int'l L. Comm'n, U.N. Doc. A/CN.4/L.459 [and corr.1] and Add.1 (1991).

201. Draft Code of Offences Offences against the Peace and Security of Mankind of 1996, art. 7.

202. Draft Code of Crimes Against the Peace and Security of Mankind with Commentaries, art. 7, [1996] 2 Y.B. Int'l L. Comm'n, UN Doc. A/51/10 at 27.

203. Dem. Rep. Congo v. Belg., Judgment, dissenting opinion of Judge Al-khasawneh, ¶ 5 (Feb. 14, 2002), <https://www.icj-cij.org/public/files/case-related/121/121-20020214-JUD-01-07-EN.pdf> [https://perma.cc/2VAC-PY7G] [hereinafter *Arrest Warrant*] (emphasis added).

omitted Judge Van den Wyngaert’s clear-cut position in the same *Arrest Warrant* decision that Article 7 is “intended to apply, not only to *international* criminal courts, but also to *national* authorities exercising jurisdiction . . . or co-operating mutually by extraditing or prosecuting alleged perpetrators of international crimes”²⁰⁴

Finally, with reference to its own statute and its own condition as the international criminal court, the appeals chamber should have asked itself what the preamble of the ICC Statute signifies when it recalls “that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes.”²⁰⁵ Several questions ought to follow. Is it that the duty of every state only arises in relation to its own territory and nationals? Does it extend to foreign territory and nationals only when high officials who are entitled to an alleged immunity are not involved? Is jurisdiction barred if the high officials who are entitled to an alleged immunity perpetrate crimes in the territory, or against nationals, of other states? Considering that during many decades after Nuremberg there was no international criminal court, does it make sense to consider that, on the one hand, during those “cold war” decades, national authorities were not prevented from “exercising jurisdiction or co-operating mutually by extraditing or prosecuting alleged perpetrators of international crimes”²⁰⁶ but, on the other hand, the same authorities were barred from exercising such jurisdiction in relation to the sitting high officials who normally bear the greatest responsibility for international crimes? Is it that during those decades the only available option was to hope that, in the future, their arrest and surrender could take place in an international criminal court that could possibly be created?

Although the famous “duty” should be reasonably interpreted as a right or a power—and not as a fully formed and comprehensive *jus cogens* mandate imposing impossible to enforce illusory universal obligations and prohibiting amnesties or other type of reasonable mechanisms of resolving conflicts—²⁰⁷ the

204. Dem. Rep. Congo v. Belg., Judgment, dissenting opinion of Judge Van den Wyngaert, ¶ 17 (Feb. 14, 2002), <https://www.icj-cij.org/public/files/case-related/121/121-20020214-JUD-01-09-EN.pdf> [<https://perma.cc/2VAC-PY7G>] (emphasis not ours).

205. ICC Statute, *supra* note 183, at pmb1.

206. Dem. Rep. Congo v. Belg., Judgment, dissenting opinion of Judge Van den Wyngaert, ¶ 17.

207. As of today, to hold that there is a peremptory (or even non-peremptory) customary norm imposing *aut dedere aut judicare* in relation to international crimes must be considered wishful thinking. CRYER ET AL., *supra* note 159, at 77-78. *But see* Kress and Prost, *supra* note 167; Paust, *Universality*, *supra* note 9, at 337 (“[t]oday it is generally recognized that customary international law of a peremptory nature places an obligation on each nation-state to search for and bring into custody and to initiate prosecution of or to extradite all persons within its territory or control who are reasonably accused of having committed, for example, war crimes, genocide, breaches of neutrality, and other crimes against peace”). Although this is a complex issue that cannot be extensively discussed here, a single remark is of import in this context. Even if (for the sake of the

answer to all questions above is negative.

The appeals chamber would have unequivocally come to this conclusion, had it seriously engaged with Judge Van den Wyngaert and Judge Al-Khasawneh's opinions. However, that meant that the appeals chamber also had to boldly engage with the troubling consequences of the majority's decision in the *Arrest Warrant case*, a decision that was delivered three years after the ICC Statute was adopted, but before it entered into force. Apparently out of "respect"²⁰⁸ the appeals chamber chose not to do so.

I.4. A 21st Century Surprise: the ICJ's Hair-Raising Decision in the Arrest Warrant

Judge Van den Wyngaert and Judge Al-Khasawneh were, together with Judge Oda, the dissenting voices on the *Arrest Warrant*, a decision delivered in the beginning of the 21st century. The arrest and surrender story narrated in this article began to be viewed through a different lens on February 14, 2002. The *Arrest Warrant* is the inspiration for the appeals chamber's "no immunity before international courts" stance. Out of thin air and based upon "such phrases and little else" (i.e. "Latinized nonsense", *Pinochet*, *Qaddafi*, and an ill-defined notion of protecting effectively the functions of foreign Ministers),²⁰⁹ the most prestigious court on earth came up with the idea that, under customary international law, it is illegal to issue an arrest warrant against a sitting foreign minister, except in the case of certain international courts.²¹⁰ As such, it implicitly

argument) one assumes that such a "peremptory duty" exists, then it has to be weighed against the "peremptory duty" to maintain international peace and security. In this context, and considering that the values relating to the protection of peace might have to prevail over values relating to international criminal justice, any "duty" to prosecute international crimes might have to cede *in concreto* in view of the need to maintain international peace and security. On clashes between peremptory norms, see Lemos, *Jus Cogens*, *supra* note 157, at 27-52.

208. Joint Concurring Opinion, *supra* note 22, ¶ 185.

209. Paust, *Genocide*, *supra* note 182, at 77, n. 83. See also *Dem. Rep. Congo v. Belg.*, Judgment, ¶ 53 (Feb. 14, 2002), <https://www.icj-cij.org/public/files/case-related/121/121-20020214-JUD-01-00-EN.pdf> ("[i]n customary international law, the immunities accorded to Ministers for Foreign Affairs are not granted for their personal benefit, but to ensure the effective performance of their functions on behalf of their respective States"). *Arrest Warrant*, *supra* note 203, at (Joint Separate Opinion of Judges Higgins, Kooijmans, and Buergenthal) ¶ 75, at <https://www.icj-cij.org/public/files/case-related/121/121-20020214-JUD-01-05-EN.pdf> (elaborating on how "immunities are granted to high State officials to guarantee the proper functioning of the network of mutual inter-State relations, which is of paramount importance for a well-ordered and harmonious international system").

210. *Dem. Rep. Congo v. Belg.*, Judgment, ¶¶ 54, 61 (Feb. 14, 2002), <https://www.icj-cij.org/public/files/case-related/121/121-20020214-JUD-01-00-EN.pdf> [<https://perma.cc/2VAC-PY7G>]. On the question of which international courts are supposedly encompassed by this exception, see Sarah Nouwen, *Return to sender: Let the International Court of Justice Justify or Qualify International-Criminal-Court Exceptionalism Regarding Personal Immunities*, 78

upheld that sitting heads of state are also protected.²¹¹ Antonio Cassese described the alleged effects as

The International Court of Justice (ICJ) delivered . . . [a] blow to universality in 2002 in its judgment in the *Arrest Warrant* case . . . [by] stating that foreign ministers enjoy personal immunity from jurisdiction while in office The range of criminal prosecutions against foreign ministers (as well as, one can assume, any other senior state official) *was thus significantly reduced*. As a consequence, the reach of national jurisdiction, including universal jurisdiction (the exercise of which by Belgian authorities had triggered the proceedings before the Court), *was correspondingly reduced*.²¹²

On its face, the highlighted expressions in Cassese’s quote simply stress that judges at the ICJ legislated from the bench in head-on collision with (and looking past) the story narrated in the previous Sections of this Article.²¹³ The ICJ did not even quote the abovementioned no-immunity statement of the IMT. That was a fatal flaw. Indeed, there are very good reasons to consider that what the IMT said *was the customary international law* in force in 2001. As the appeals chamber rightly highlighted,²¹⁴ the IMT’s principles were “Adopt[ed] by the United Nations” through unanimous “affirm[ation] of the principles of international law recognized by the Charter of the Nürnberg Tribunal and the judgment of the Tribunal.”²¹⁵ Cassese also noted that

By ‘affirming’ those principles, the General Assembly (consisting at the time of fifty-five Member States) clearly intended to express its approval of and support for the general concepts and legal constructs of criminal law that could be derived from the IMT Charter and had been set out,

CAMBRIDGE L.J. 596, 597-99 (2019).

211. For an overview of national case-law, before and after the *Arrest Warrant*, recognizing the immunity of sitting heads of state, see JOANNE FOAKES, *THE POSITION OF HEADS OF STATE AND SENIOR OFFICIALS IN INTERNATIONAL LAW* 81-83 (2014); *see also* CRYER ET AL., *supra* note 159, at 517-18.

212. Antonio Cassese, *Is the Bell Tolling for Universality? A Plea for a Sensible Notion of Universal Jurisdiction*, 1 J. INT’L. CRIM. JUSTICE 589 (2003) (emphasis added). While the ICJ’s main judgment did not even delve into the question of universal jurisdiction and whether it is admissible under international law, several judges expressed their opinions on the matter. For a useful summary of the opinions of these judges and discussion on universal jurisdiction, see Antonio Cassese, *When May Senior State Officials be Tried for International Crimes? Some Comments on the Congo v. Belgium Case*, 13 EUR. J. INT’L L. 853, 855-62 (2002); *see also* PEDRO CAEIRO, *FUNDAMENTO, CONTEÚDO E LIMITES DA JURISDIÇÃO PENAL DO ESTADO, O CASO PORTUGUÊS* 239-46 (2010).

213. In fact, Cassese must have been well aware that the ICJ decision contradicted what he, as president of the ICTY, had said five years before. *See infra* Section II.3.1.

214. Joint Concurring Opinion, *supra* note 22, ¶ 151.

215. Affirmation of the Principles of International Law Recognised by the Charter of the Nuremberg Tribunal, GA Res. 95(I), U.N. Doc. A/236 (Dec. 11, 1946).

either explicitly or implicitly, by the IMT.²¹⁶

Because there is no reason to suspect that the universal international law, as set out by the IMT, was superseded by some obscure practice and *opinio* of the international community as a whole, the ICJ's lack of engagement with such law is, on the sole authority, strength and legal force of the IMT Judgment, sufficient reason to consider that the law set out in the *Arrest Warrant* is irredeemably flawed. As such, the appeals chamber could have simply set it aside as bad law.

Yet, in addition to the fact that it is the decision of the most important judicial organ of the UN, it is impossible to escape the fact that many states apparently acquiesced and adjusted their conduct to it and that, *today*, the “general view” of states, courts and scholars is that sitting heads of state enjoy an absolute immunity from foreign jurisdiction.²¹⁷ Indeed, at least apparently, the present-day disconcerting “general view” is that the existence of such immunity has for “long been clear” and “uncontroversial.”²¹⁸

The alleged “state of affairs” created by the *Arrest Warrant* was adroitly described by Sean Murphy, speaking for Jordan, during the oral proceedings before the appeals chamber. While addressing the suggestion of the president of the appeals chamber that, if the ICC could not issue an arrest warrant against “heads of state for life,” they would be virtually beyond the reach of international criminal justice, Murphy commented that

Whereas you say Head of State for life, you know, how do we get at them? But I do think that the court nevertheless says in the *Arrest Warrant* case, immunity *ratione personae* from foreign criminal jurisdiction is absolute . . . because of a belief that we do have a need for interstate conversation, the ability to interact among each other. And without that, denying that possibility for foreign ministers and Head of States and government is a very serious intrusion into their ability to function. And that is an important value that I think the court in the *Arrest Warrant* case was recognising . . . So I think that's where we stand. And as unsatisfactory as it may be, that is the law.²¹⁹

The *Arrest Warrant* was in fact a decision based on a “belief” and it is as

216. See Antonio Cassese, *Affirmation of the Principles of International Law Recognized by the Charter of the Nürnberg Tribunal (Dec. 11, 1946)*, https://legal.un.org/avl/ha/ga_95-I/ga_95-I.html [https://perma.cc/4VCD-LTL8].

217. Roger O'Keefe, *An “International Crime” Exception to the Immunity of State Officials from Foreign Criminal Jurisdiction: Not Currently, Not Likely*, 109 AM. J. INT'L L. UNBOUND 167, 167-68 (2015) (elaborating on how, “[a]s regards immunity *ratione personae*, the absence of any international crime’ exception is *plain*”) (emphasis added).

218. Dapo Akande and Sangeeta Shah, *Immunities of State Officials, International Crimes, and Foreign Domestic Courts*, 21 EUR. J. INT'L L. 815, 818-20 (2011).

219. Int'l Crim. Ct. App. Chamber, Appeals Hearing Transcript, at 68, U.N. Doc. ICC-02/05-01/09-T-5-ENG (Sept. 11, 2018), <https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-02/05-01/09-T-5-ENG> [https://perma.cc/3JU6-B3UL].

“unsatisfactory” as it can be. Proper fixing is compulsory because if the *Arrest Warrant*—and its cursory statements devoid of any meaningful analysis of the issues at stake—are allowed to stand, one of the essential pillars of the law on international crimes practically vanishes.

The gist of the issue lies in appropriately distinguishing the values related to the protection of “interstate conversation” from the values related to the protection of “international peace and security.” While ordering the cancellation of the arrest warrant issued by Belgium against the foreign minister of Congo, the ICJ conflated the two values and subtly determined, albeit using different terminology, that such a warrant was a threat to peace. In doing so, the ICJ has not only unacceptably curtailed legitimate powers of states but has also encroached on the powers of the UNSC to maintain international peace and security. That is so, because only the UNSC has the power to make such a determination. Part II introduces the extraordinary powers of the UNSC on the matter and demonstrates that, had the appeals chamber properly grasped the extent of such powers, it could have easily distanced itself from the conundrum sprouting from the *Arrest Warrant*.

II – KEY FINDINGS 6 AND 7: THE ICC AS A “TOOL” OF THE UNSC

The sixth key finding of the appeals chamber provides, “Article 13(b) of the Statute puts the ICC at the disposal of the UN Security Council as a tool to maintain or restore international peace and security, thus obviating the need for the UN Security Council to create new ad hoc tribunals for this purpose.”²²⁰ This finding is apparently a sound one. However, the following Sections will demonstrate that the appeals chamber did not fully appreciate the consequences of the conception enshrined in it. Particularly, it did not realize that Article 13(b) of the ICC Statute merely highlights that the ICC, as any other institution, state or individual, is at the disposal of the UNSC as a tool to maintain or restore international peace and security.

II.1. Outline of the Relationship between the UNSC and the ICC

The sixth key finding is a surprising one. In academia, and in the ICC’s own jurisprudence, there is a deep-seated suspicion towards the UNSC and a strong reluctance to acknowledge its overriding authority.²²¹ As Michael Wood puts it, “[m]uch of the writing about the Security Council by international lawyers has an air of unreality [and, often, it portrays its actions, in general, and towards the ICC in particular as] *ultra vires*, beyond its powers under the Charter, or

220. Al-Bashir, *supra* note 3, ¶ 6.

221. For an acknowledgment of this (*jus cogens* or peremptory) overriding authority of the UNSC, see Lemos, *Jus Cogens*, *supra* note 157, at 1-52. For an example of the deep-seated suspicion with a specific focus on the Al-Bashir saga, see Asad G. Kiyani, *Al-Bashir & the ICC: The Problem of Head of State Immunity*, CHINESE J. INT’L L. 467 (2013).

otherwise unlawful.”²²²

The widespread reluctance is related to the circumstance that the crucial role of the UNSC in the current international order has not yet been properly acknowledged. Its overt political nature is cause for mistrust and the prominent role that major powers play in it leads to discomfort. As a consequence, although its overriding authority is evident from the point of view of the law, it is intuitively rejected by many on the basis of their own convictions about what the law should be.²²³

Thus, throughout the last two decades scholars devised a series of parameters or limits to UNSC action towards the ICC, an action that supposedly has to take place within the parameters of the ICC Statute.²²⁴ Paradigmatically, William Schabas affirmed that an “unacceptable immunity provision,” imposed in a UNSC referral at the insistence of the United States, renders “the entire referral . . . defective and cannot legally trigger the jurisdiction of the Court.”²²⁵ However, Schabas also accepts that, while creating its own courts, the UNSC can “withdraw immunity from anyone” and that, pursuant to Chapter VII, it can impose obligations on states not party to cooperate with the ICC.²²⁶ Thus, for Schabas, a UNSC referral imposing such obligations on states not party or “order[ing] forms of cooperation that are not contemplated by the Rome Statute” are apparently not defective and do not affect the jurisdiction of the Court.²²⁷ The question then becomes: why does Schabas not easily accept that the UNSC can remove immunities also when referring a situation to the ICC?²²⁸

Schabas’s zigzagging is problematic. In order to avoid the problem, one can simply accept something that is apparently hard to acknowledge: because it is not limited by general international law, there are virtually no limits to Chapter VII action.²²⁹ Hence, the fact that the UNSC can deviate from pre-existing international law simply means that it is not bound by any rules of international law, including those concerning international organizations. As legitimately as it can authorize an international organization to exercise jurisdiction that such organization does not have, the UNSC can also neutralize the jurisdiction that an

222. Michael Wood, *The Law of Treaties and the UN Security Council: Some Reflections*, in *THE LAW OF TREATIES BEYOND THE VIENNA CONVENTION* 244, 247 (E. Cannizzaro ed., 2011).

223. Lemos, *Jus Cogens*, *supra* note 157, at 36-43.

224. See a recent and extensive overview of the alleged limits or parameters in GABRIEL M. LENTNER, *THE UN SECURITY COUNCIL AND THE INTERNATIONAL CRIMINAL COURT, THE REFERRAL MECHANISM IN THEORY AND PRACTICE* 33-35, 45, 61-63, 67-69, 88, 89, 96, 101-03, 106, 147, 186-92 (2018). See a brief overview of the assumptions of many scholars about the limits or parameters that allegedly govern UNSC action in Kiyani, *supra* note 221, at 474-80.

225. SCHABAS, *supra* note 177, at 66.

226. *Id.* at 250.

227. *Id.*

228. SCHABAS, *supra* note 167, at 604.

229. Lemos, *Jus Cogens*, *supra* note 157, ¶ 106 (“[T]he [UN]SC is endowed with virtually unlimited powers to adopt whatever measure imaginable to fulfil its rather complex mission.”).

organization would otherwise have.²³⁰

In short, taking into consideration the vast authority of the UNSC—in order to maintain *universal* peace and security—it is incoherent to accept that the UNSC can interfere with the rules of customary or treaty law, impose treaty obligations on states that are not party to a treaty, displace customary or treaty rules on immunities of officials of states not party, etc., but not interfere with the rules of the ICC Statute. After all, the ICC is part of the universe to which Chapter VII measures are addressed. This simply means that the possibility of referring a situation to the ICC, or targeting the ICC in any other way, does not flow from Article 13(b) of the ICC Statute but from the unbounded authority of the UNSC under the UN Charter.²³¹

Conversely, accepting the consequences that flow from that unbounded authority, it becomes clear that the UNSC might potentially use all world actors as a tool for peace. As the unbounded powers of UNSC existed well before the ICC came into being, the ICC is merely one newly added actor which the UNSC might use in any imaginable way to maintain or restore international peace and security.²³²

In order to be abundantly clear about the relationship between the UNSC and the ICC endorsed in this Article, one extreme example, inspired by the current pandemic crisis, will suffice.²³³ Imagine that the Covid-19 pandemic gets out of control of individual governments, and wars start to break out in different parts of the planet. In such a scenario, it is conceivable that the UNSC would adopt a resolution decreeing a universal cease-fire and lockdown, creating a new international crime of spreading the pandemic, and assigning jurisdiction to the ICC to try and punish perpetrators of the new crime. Less conceivably, but not impossibly, the UNSC might consider that the extraordinary urgency of the

230. *But see* Luigi Condorelli & Santiago Villalpando, *Can the Security Council Extend the ICC's Jurisdiction?*, in *THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY* 572 (Antonio Cassese et al. eds., 2002) (affirming that the UNSC has no powers to effect an extension of the jurisdiction of the ICC); Kiyani, *supra* note 221, 480 (“[B]asic rules [of the law of treaties] prevent the Security Council . . . from extending the jurisdiction of the Court”); Gabriel M. Lentner, *The Role of the UN Security Council vis-à-vis the International Criminal Court – Resolution 1970 (2011) and its Challenges to International Criminal Justice*, 14 *INT’L AND COMPAR. L. REV.* 7, 13 (2014) (“[T]he Charter nowhere does purport to authorize other international organizations to perform acts beyond their constituent documents.”).

231. *But see* Dapo Akande, *The Legal Nature of Security Council Referrals to the ICC and its Impact on Al Bashir’s Immunities*, 7 *J. INT’L CRIM. JUST.* 333, 340-41 (2009) (suggesting that the UNSC must confine itself to the boundaries set in Article 13).

232. *But see* Dapo Akande, *The Effect of Security Council Resolutions and Domestic Proceedings on State Obligations to Cooperate with the ICC*, 10 *J. INT’L CRIM. JUST.* 299, 308 (2012) (“Since the ICC has separate legal personality from its states parties and the ICC itself is not member of the UN, the Court is not itself bound by UN Security Council decisions”).

233. *See* Lemos, *Jus Cogens*, *supra* note 157, ¶¶ 110-13, for extreme examples of UNSC action potentially colliding with *jus cogens* or other rules of international law.

situation (and the need to deter conduct that would put the very survival of humanity at risk) warrants an expedited form of trial and punishment, according to which fair trial guarantees only play a minimal role. Cinematically, one might consider that the situation is so urgent that the UNSC would feel compelled to determine that each trial is to be conducted through summary proceedings within twenty-four hours before a single judge of the appeals chamber. *Ad absurdum*, one can also ponder the possibility of the members of the UNSC putting themselves into the hands of ICC judges. In view of the finding in the UN Secretary General report that heads of state are deliberately failing to take the necessary measures, the UNSC could determine that trial and punishment of heads of state will be prioritized and include the possibility of application of the death penalty in the most serious cases.

Of course, the point is not to argue that it is probable that the UNSC will ever adopt this type of approach to its relationship with the ICC. Rather, the point is that such is not inconceivable or illegal and that, if extraordinary circumstances emerge, it is adequate for the UNSC to ponder whether extraordinary action is warranted. In other words, the UNSC is the only earthly body whose authority can be rapidly and legitimately deployed in order to adopt peremptory and universal *ultima ratio* measures. Peremptory and universal measures can also be adopted by the immaterial entity known as the “international community of states as a whole.”²³⁴ But the will of such an entity often takes too long to materialize, and its actions might not be sufficiently effective to deal with pressing international peace and security issues. The founders of the UN were aware of this, and that is why they decided to create a body with authority to act as the representative of the international community as a whole in matters of war and peace.

The founders were also aware that there is an inextricable link between these matters and international criminal justice. As Part I shows, such link is as old as international law itself. However, while the link is old, it took two world wars for it to become a prominent part of the institutionalized legal framework of the international community. In the aftermath of the First World War, the attempt to make that link more salient failed. In contrast, in the aftermath of the Second World War, four out of the five countries which would later sit as permanent members of the UNSC created—while acting in the name of the international community—effective international criminal justice mechanisms. As it turned out, the trials conducted by the IMT and other military tribunals in Europe and the Pacific were the first successful universal materialization of the link, a connection embodied thereafter in the affirmation by the General-Assembly of the Nuremberg principles. The Cold War ensued, and it took more than 40 years for that link to become salient again. In 1993 and 1994, acting on the reinvigorated strength of the UN Charter, its peace security body decided to create the ICTY and the ICTR. In order to enable their effective functioning, the UNSC—acting in universal fashion—imposed on *all states* an obligation to cooperate with these tribunals.

234. Vienna Convention on the Law of Treaties, art. 53.

The ad hoc creation of these tribunals brought again to the fore the idea that international peace and security might be well served by a permanent international criminal justice institution. It was by now clear that the UN Charter endowed the UNSC with universal legislative powers.²³⁵ As such, the UNSC could have decided to provide the world with a type of institution permanently entrusted with powers to apply international criminal justice *for the purpose* of enhancing international peace and security. However, at the same time, and somewhat ironically, the international community decided to press on with the old idea that a treaty was the best mechanism to create such an institution.

Thus, the ICC was born, not under the peremptory authority of the UNSC but under the limited authority of the ICC Statute, a treaty that cannot be considered at present as the *peremptory expression* of the will of the international community as a whole in matters of war and peace.²³⁶ At times, it even seems that the ICC was designed to operate independently of the inextricable link between international criminal justice and matters of war and peace.²³⁷ To make things worse, that limited authority is exercised through a complicated set of mechanisms and a myriad of convoluted written rules that do not favor its smooth operation as an instrument to apply international criminal justice for the purpose of maintaining international peace and security.

Yet, the UN Charter’s written and unwritten powers of the UNSC, on the one hand, and the written door in Article 13(b) of the ICC Statute, on the other, might be effectively deployed to turn the ICC into an effective mechanism for that purpose, i.e. “to fulfil the highest goal of the Charter and international law.”²³⁸

235. Lemos, *Jus Cogens*, *supra* note 157, ¶ 75 (“As the Charter does not bar the [UN]SC from assuming [a] legislative role, the implication is that, when the [UN]SC assumes such role, it has ‘the ability to alter the international legal landscape instantaneously’ and in various and fundamental ways.”). *See also* different contributions in *THE SECURITY COUNCIL AS GLOBAL LEGISLATOR* (Vesselin Popovski and Trudy Fraser eds., 2014).

236. *But see* Claus Kreß, *Preliminary Observations on the ICC Appeals Chamber’s Judgment of 6 May 2019 in the Jordan Referral re Al-Bashir Appeal*, Torkel Opsahl Academic EPublisher1, 17-19 (2019), <https://www.toaep.org/ops-pdf/8-kress> [<https://perma.cc/WU2B-SWQG>] (“[A]s a matter of customary international law, [states not party to the ICC Statute] cannot *completely* distance themselves from the fact that the international community, in full conformity of a *central guiding principle of the customary process*, has been provided, by virtue of the ICC Statute, with a court of *universal orientation* for the enforcement of this community’s *ius puniendi*”) (emphasis added). The expressions highlighted are intended to stress that Kreß’s stance stands on very shaky ground. The pooling of powers decided by the states parties when they adhered to the ICC is nothing more than just that. Absent UNSC intervention, it is impossible – at least for the time being – to come to the conclusion that the ICC is a legitimate judicial representative of the “international community [of states] as a whole” in matters of war and peace or matters of international criminal justice.

237. Mégret, *supra* note 33, at 842-48. On true ICL as primarily, if not exclusively, concerned with war or war-like atrocities, see also *infra* Conclusion.

238. George P. Fletcher & Jens David Ohlin, *The ICC—Two Courts in One?*, 4 J. INT’L CRIM.

That is why the sixth finding of the appeals chamber is a welcomed one and, if properly understood, it unveils a relationship between the UNSC and the ICC that allows room for the ICC's effective functioning as a tool for peace.

There are some rather uninteresting written rules concerning such a relationship which can be found in an agreement between the ICC and the UN.²³⁹ One of the main purposes of the rest of this Article is to flesh out the most important non-written norms governing the interaction.

II.2. Practical consequences and interpretation technique

From an international criminal justice standpoint, it is often said that the main purpose of allowing UNSC referrals under Article 13(b) of the ICC Statute “is to extend the jurisdiction of the ICC to situations occurring outside the territory of a state party and with respect to acts committed by non-nationals of a state party.”²⁴⁰ From a maintenance of international peace and security standpoint, it is not. From the latter standpoint, the purpose is to open a new permanent door that, irrespective of location or personal status, the UNSC might use to address threats to peace.²⁴¹ As the appeals chamber correctly assumed, this “obviate[s] the need for the UN Security Council to create new ad hoc tribunals for this purpose.”²⁴²

Scholars have also made much of a literal reading of Article 13 (“[e]xercise of jurisdiction”) and its applicability also to the case of UNSC referrals. According to Article 13, the jurisdiction of the ICC is exercised in “accordance with the provisions of this Statute.”²⁴³ That is in fact the case if, but only if, the UNSC did not—expressly or implicitly—determine otherwise.²⁴⁴ For example, the fact that the ICC Statute enshrines rules that do not operate in relation to states not party or operate differently depending on whether the state is a party or not might simply be overcome by a decision of the UNSC determining that all states are bound to cooperate with the ICC in the same terms as states parties do. Alternatively, as the appeals chamber explored, the UNSC might devise a “comprehensive regime of cooperation . . . with the clear intention of replacing the two cooperation regimes provided for in the Rome Statute.”²⁴⁵

JUST. 428, 432 (2006).

239. Negotiated Relationship Agreement between the International Criminal Court and the United Nations (approved by the General Assembly in its resolution 58/318 of 13 September 2004, and entered into force on 4 October 2004) [hereinafter *Relationship Agreement*].

240. Akande, *supra* note 209, at 305.

241. There is nothing in the Charter or the ICC statute that would prohibit the UNSC from making a referral of a situation occurring in a state party or anywhere else in the world.

242. Al-Bashir, *supra* note 3, ¶ 6.

243. ICC Statute, *supra* note 183, at art. 13.

244. Moreover, there are some provisions of the ICC Statute that are simply inapplicable. Fletcher & Ohlin, *supra* note 238, at 429, 431-32 (providing examples of how situations referred by the UNSC to the ICC “are placed on a separate judicial track”).

245. Al-Bashir, *supra* note 3, ¶ 137.

It is particularly important to keep this in mind when assessing the obligations that states not party might have vis-à-vis the ICC because such obligations do not arise from the ICC Statute but from the UNSC resolution which imposes them. This indicates that, unless the UNSC merely decides to make a state not party into a state party, the provisions of the ICC Statute do not apply to the state not party *qua tale*. Rather, the contents of the provisions of the ICC Statute enshrining certain obligations apply by virtue of the UNSC Resolution. Furthermore, if the UNSC can impose cooperation obligations with the ICC on states not parties, it can also impose on states parties cooperation obligations that are different from those of the ICC Statute. To argue otherwise is impossible.

Another point that needs adequate clarification concerns the legal force of Chapter VII impositions. Normally, the UNSC endows its Chapter VII impositions with peremptory force. That is, there is no way by which the state or states targeted by such impositions can escape them. Such does not occur even if a state decides to withdraw from the UN because the targeting of a state through Chapter VII powers is not premised on UN membership.²⁴⁶ A similar imposition occurs if the UNSC mandates states parties to a certain treaty to comply with their pre-existing treaty obligations. If the UNSC issues such a mandate and such obligations gain peremptory force, states parties to the treaty cannot avoid complying with the content of the obligations by withdrawing from the treaty. Thus, it is always necessary to evaluate whether the UNSC intended to modify the legal force of the obligations that states parties to a certain treaty have.²⁴⁷ If the UNSC has so intended, states parties cannot entertain the idea of avoiding compliance by withdrawing from the treaty.²⁴⁸ A peremptory imposition persists beyond the moment of withdrawal irrespective of whether the provisions of the treaty itself attempt to regulate withdrawal issues or extend obligations of cooperation beyond the date of withdrawal.²⁴⁹

Moreover, while interpreting the provisions of the ICC Statute in the case of UNSC referrals, one has also to take into account that such provisions might have gained a completely different meaning as a consequence of the referral and the duty to interpret the provisions of the ICC Statute in conformity with UNSC

246. U.N. Charter, *supra* note 137, art. 2, ¶¶ 6-7; *see also* Lemos, *Jus Cogens*, *supra* note 157, ¶ 44.

247. For example, there is nothing in UNSC Resolution 1593 (2005) which leads to the conclusion that when the UNSC referred the situation in Darfur to the ICC, it intended to peremptorily mandate states parties to comply with the ICC Statute. Thus, states parties continue to be under the obligation to comply with the ICC Statute solely on a treaty basis.

248. For example, if the UNSC actually issues a mandate for the states parties of the ICC to comply with the obligations of the ICC Statute, they cannot avoid those obligations by withdrawing from the ICC Statute.

249. One such type of provision is Article 127 of the ICC Statute. ICC Statute, *supra* note 183, at art. 127 (1998).

Resolutions.²⁵⁰ Whereas their normal treaty interpretation, in the cases where the ICC Statute functions on its own, might lead to result Y, their interpretation in conformity with the relevant UN Charter rules and the UNSC Resolution might lead to result X. For example, if the UNSC determines that arrest warrants issued by the ICC have to be complied with immediately—or “without undue delay”²⁵¹—by states not parties, all provisions on cooperation of Part IX of the ICC Statute are automatically adjusted to the new mandate. Hence, there is no room for such states to invoke “a fundamental legal principle of general application” (Article 93 ICC Statute) or “consultations” with the court (Article 97) as a justification for not immediately complying or delaying compliance.²⁵² It is to be noted that, as many of the (state-friendly) legal intricacies enshrined in the ICC Statute are not fine-tuned to Chapter VII’s more demanding realities, sometimes the UNSC might feel impelled to simply scrap them in the context of a specific resolution.

Thus, UNSC Resolutions should be interpreted primarily to give effect to the will of the UNSC and should not be interpreted to make them compatible with the ICC Statute or any other rules of international law.²⁵³ Note that, as a predominantly political body, the UNSC does not always express its will in perfect legalese; not even the best international law scholars do. That is just one more reason why tribunals should not use the Vienna Convention treaty interpretative guidelines to interpret resolutions of the UNSC. Tribunals should simply try to assert what the will of the UNSC was in light of all the available material that might be relevant to determine such will; no general interpretative technique is needed, and convoluted techniques are particularly to be avoided.

In this sense, there is apparently nothing wrong with the dictum of the ICTY appeals chamber on the matter. “[I]t must be presumed that the Security Council, where it did not explicitly or implicitly depart from general rules of international [or treaty] law, intended to remain within the confines of such rules.”²⁵⁴ The word

250. On interpretation of UNSC resolutions, see Michael Wood, *The Interpretation of UN Security Council Resolutions*, 2 MAX PLANK UNYB 73 (1998); Michael Wood, *The Interpretation of Security Council Resolutions, Revisited*, 20 MAX PLANK UNYB 1-35 (2017).

251. Updated Statute of the International Criminal Tribunal for the Former Yugoslavia, art. 29, ¶ 2 (Sept. 2009). Adopted by S.C. Res. 827 (May 25, 1993).

252. That a robust UNSC referral can greatly enhance the authority and effectiveness of the ICC should not be doubted. ICC-OTP, *Informal Expert Paper: Fact-Finding and Investigative Functions of the Office of the Prosecutor, Including International Co-operation*, ¶ 92 (2003).

253. *But see* INT’L LAW COMM’N, Third Rep. on Peremptory Norms of General International Law (*jus cogens*), ¶ 157, U.N. Doc. A/CN.4/714 (Feb. 12, 2018) (“[G]iven the important functions of Security Council resolutions, it would be expected that, if at all possible, the consequences of invalidity be avoided through the rules of interpretation . . . Since the rules of interpretation . . . require an interpretation consistent with general international law, including *jus cogens*, Security Council [resolutions] should, to the extent possible, be interpreted in a manner consistent with *jus cogens*”).

254. *Prosecutor v. Tadić*, Case No. IT-94-1-A, Judgment, ¶ 287 (Int’l Crim. Trib. for the Former Yugoslavia 15 July, 1999).

“implicitly” plays a crucial role because it is important to keep in mind that, given its overriding authority, sometimes *it is just a fact* that the UNSC does not spend much energy pre-determining the actual content of the international rules that it might have decided to implicitly override. Most of the time, it is even impossible to accurately pre-determine the myriad of rules that might be overridden by a specific Chapter VII Resolution; it is only with its application in practice that one discerns the extraordinary overriding legal effects of a specific Chapter VII Resolution.

With all these considerations in mind, it is possible to attempt to properly determine whether UNSC Resolution 1593 (2005) intended to allow the ICC to issue a peremptory arrest warrant for a sitting head of state. That is the purpose of Section II.3.2. But prior to that (Section II.3.1), it is necessary that *we* spend some energy attempting to determine the actual content of the rule that the UNSC might have implicitly decided to override (i.e. the alleged customary rule on the immunity of a head of state).

II.3 The power of the UNSC in relation to arrest and surrender issues

II.3.1. Solving the conundrum created by the ICJ

In relation to that actual content, there is a possibility that, considering the whole story it misinterpreted, the appeals chamber was not in conditions to explore, namely the possibility that states implicitly relinquished their old power to arrest and surrender foreign sitting heads of state when they adopted the UN Charter. The question to be answered in this Section is whether such old power has become irreconcilable with the structure underpinning the new global order created in the aftermath of the Second World War.

With the advent of the UN, and its sweeping prohibition on the use of force and threat of use of force, a humanitarian war can no longer be carried out by a single state on its own volition. A humanitarian war to suppress international crimes can only proceed if the UNSC authorizes it.²⁵⁵ Thus, all the considerations relating to the right of humanitarian intervention and the power of states to arrest and surrender heads of state analyzed in Part I, are now to be viewed in light of the powers of the UNSC on the matter. As, in the new UN system legal reality, a humanitarian intervention to prevent or stop international crimes can only proceed if the UNSC authorizes it, one can analogically argue that an arrest and surrender of foreign sitting heads of state to prevent and punish such crimes can only take place if the UNSC authorizes it.

This state of affairs could be explained by the notion that, in this new system, the “values served by maintaining a strong normative system” of protection of peace “prevail over values advanced in attempting to thwart” international crimes.²⁵⁶ In fact, in such a system protection might encompass not only sitting

255. MURPHY, *supra* note 13, at 493-95.

256. *Id.* at 341.

heads of state but even former ones in relation to acts practiced while in office. As Sean Murphy highlighted while asking “immunity *ratione materiae* of state officials from foreign criminal jurisdiction: where is the state practice in support of exceptions?”—the more systemic problem here is how to explain that an international system with no immunity for heads of state and other high officials “takes account of rules that seek to avoid interstate conflict.”²⁵⁷

Intuiting that such protection *ratione materiae* might be unduly strong, Steffen Wirth attempts to strike the optimal equilibrium between the values at stake and puts forward that, while international protections disappear as soon as one is no longer the head of state, the “hierarchy” of values favors international protections for sitting heads of state. He explains that

The rationale of the international law of state immunity in this context is that immunity *ratione personae* protects the state’s ability to discharge its functions, including the maintenance of peace. This ability would be endangered if a sitting head of state could be prosecuted and arrested. As the maintenance of peace is even more important than the prosecution of core crimes, immunity *ratione personae* may be opposed to such prosecutions.²⁵⁸

This rationale offers, in the abstract, an attractive reconciliation of the values at stake. As *jus cogens* norms exist in an international system the primordial objective of which is the maintenance of international peace and security, the superiority of *jus cogens*—and the need to protect such superiority through different types of mechanisms—only goes so far as to the point when such mechanisms start to decisively collide with the primordial objective.

Attractive as it may be, and besides the fact that it does not provide a convincing explanation on why the maintenance of peace, or the avoidance of interstate conflict, do not also vouch for protections to former heads of state, the rationale is unwarranted from a values and practice perspective and it is not in tune with the will of the founders of the current international system. Insofar as the founders are concerned, it would have been extraordinary if, in view of the whole non-immunity story narrated in Part I and while preparing the trial of the major war criminals, the founders proceeded to set up a system according to which immunity of sitting heads of state with regard to international crimes would be the general applicable rule.

Indeed, it is one thing for the founders to have intended to forbid one single state from deploying the most dramatic measure to prevent and punish atrocities perpetrated by a head of state, i.e., a humanitarian war. Such prohibition is inherent to the general proscription of the use of force and to the founders’

257. Sean Murphy, *Immunity Ratione Materiae of State Officials from Foreign Criminal Jurisdiction: Where is the State Practice in Support of Exceptions?*, 112 AM. J. INT’L L. UNBOUND 4, 8 (2018).

258. Wirth, *supra* note 190, at 432, 457 (submitting “that immunity *ratione personae* should prevail even over the very important value which is addressed by the criminal prosecution of core crimes, namely, human rights”).

intention to elevate peace to the primordial value of the new system. It is another thing for the founders to have intended to bar states from deploying other mechanisms at their disposal to prevent and punish international crimes. Tellingly, the drafting history of the UN Charter does not provide one single shred of evidence that the founders even contemplated such a prohibition. And, while the IMT was obviously aware of the prohibition of the use of force enshrined in the UN Charter, and even described aggression as the “supreme international crime,”²⁵⁹ it also did not contemplate that any such change might have occurred in the “very essence” of the law of international crimes. There is a simple explanation for this: the zeitgeist would not have entertained any sort of immunity suggestion.

Some questions about what the founders might have actually said in case they had to ponder the immunity question are worth bringing to the fore. It is not necessary to repeat in this Section the Hitler non-immunity during war considerations already mentioned in Section I.2.2; there is no doubt about what the founders would have said on that. Consider instead how the founders, or indeed any country, would respond to the following vivid examples/questions relating to scenarios where, technically, there is no war (hereinafter “uncontroversial examples”): Bin Laden, head of state of country X, ordered the systematic and widespread mass murder of thousands of foreigners who lived in country X. Can courts of the countries whose citizens were massacred in X issue and circulate a warrant for the arrest and surrender of Bin Laden, and if Bin Laden ordered the systematic and widespread mass murder of thousands of people who lived in country U through attacks against high-rises in country U? Does anyone really believe that the founders, or indeed any executive or judicial authority of country U, would ever consider that any sort of immunity applies in this situation, or that State U cannot initiate criminal proceedings against Bin Laden? Or that State U cannot indict Bin Laden if it gathers sufficient evidence of the aggression, war crime or crime against humanity (how you name the *crime* does not really matter) and cannot issue and circulate a warrant for the arrest and surrender of Bin Laden? And, if Bin Laden is in the territory of State U at the time of the attacks or afterwards, can State U not arrest Bin Laden? Does State U have to wait for the UNSC to remove Bin Laden’s immunity in order to deploy all these measures?

These extreme-case questions do not obscure the law that is applicable in less extreme situations. On the contrary, they are an invaluable tool to understand what the law actually is. Because, again, it is one thing to say that countries willingly prohibit themselves through customs from exercising their criminal jurisdiction in relation to heads of state conducting diplomacy business. It is another thing to say that they willingly put themselves under customs that they will not be able to uphold in particularly extreme cases. Surely, the states that founded the UN did not want to put states in such an awkward situation. That is also why the IMT said that, in relation to those particularly extreme cases, i.e.,

259. International Military Tribunal, *supra* note 102, at 25.

aggression, war crimes, and crimes against humanity, immunity does not exist. In summary, it is impossible to entertain the idea that the founders wanted to enshrine in the Charter any type of immunity with regard to international crimes.

One can even confidently guess that the founders would have come up with rather uncomplicated remarks, all of which flow naturally from Article 2 of the Charter, particularly from the passages providing that

All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state . . . [Although] [n]othing contained in the . . . Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state . . . this principle shall not prejudice the application of enforcement measures under Chapter VII.²⁶⁰

First, the founders would have stressed that no notion of sovereignty or immunity can work as a limit to Chapter VII enforcement measures.

Secondly, they would have pointed out that, whereas initiation of a war by a state is prohibited by the Charter—even as a means to prevent international crimes—notions of sovereignty or immunity cannot preclude any other type of “short of war” enforcement mechanisms by states to put an end to international crimes. That will not be the case if, but only if, such mechanisms involve the threat or use of force “against the territorial integrity or political independence” of another state.²⁶¹

Thirdly, they would have held that one is reading too much into the Charter if one considers that an initiation of criminal proceedings, an indictment, the issuance of an arrest warrant, or the arrest of a certain sitting head of state for international crimes is to be automatically considered, under the Charter, as a threat or use of force “against the territorial integrity or political independence” of the state at stake. Fourthly, they would have highlighted that this is particularly true because the general prohibitive principle is one of no intervention “in matters which are essentially within the domestic jurisdiction of any state” and the commission of international crimes is obviously not a matter essentially within that jurisdiction.²⁶²

Beyond UN Charter’s Article 2, the founders would also have not missed the more systematic and pragmatic issues raised by such an immunity. They would have pointed out that such an immunity is hardly reconcilable with the system regulating the UNSC’s decision making process. In view of the fact that, at the time, there was no international criminal court, such immunity would mean, in practice, that an indictment or arrest warrant against a head of state for international crimes could only be produced with the authorization of the UNSC.

260. U.N. Charter, *supra* note 137, art. 2 ¶¶ 4-7.

261. *Id.*

262. Paust, *Universality*, *supra* note 9, at 221 (“[I]t has been recognized that article 2 (7) implicitly confirms competence to intervene matters that are *not* ‘essentially within’ the jurisdiction of a particular State and, moreover, that a State’s violation of international law is precisely one of those circumstances that are not ‘essentially within’ the domestic jurisdiction of a particular State”).

Thus, there would be a permanent member's veto power over states' ability to produce an indictment or arrest warrant, even for international crimes perpetrated on their own territory, i.e., a veto power over matters which are not only of international jurisdictional concern but are matters which also pertain to the essential domestic jurisdiction of that state. The founders would have also realized that, in such a scenario, the existence of immunity itself might constitute a threat to peace.²⁶³ In other words, they would have considered the whole immunity thing to be a terrible idea and an unacceptable upset to the carefully devised equilibria set out in the Charter.

Finally, if pressed on the matter, they would have pointed out that if a well-meaning state (for example, Belgium) decided to pursue the arrest of a foreign head of state on account of aggression, war crimes, or crimes against humanity and such a move turned out to cause *in concreto* a threat to peace, then it was the job of the UNSC to step in and adopt necessary measures. Possibly, they would even have gone as far as to specifically suggest that the UNSC could order Belgium to cancel the arrest warrant or would cancel the arrest warrant itself. It is not implausible that one or two of the founders would have suggested that the ICJ could have a role in the matter. But the majority would have immediately pushed back: the task of maintaining international peace and security is to be entrusted to the UNSC; not to the ICJ.

One could be tempted to dismiss the previous paragraphs as pure guesswork and observe that, irrespective of what the thoughts of the founders actually were, if the UNSC were to be entrusted with such “cancelling of arrest warrants” power, no one, including the UNSC itself, has noted. That would be an incorrect observation. Let us press on a bit longer with Belgium and the *Arrest Warrant* example. At the initial stages, when it became public that Belgium claimed the right to exercise universal jurisdiction over the foreign minister of Congo, the UNSC might have looked at such an abstract assertion of power as insufficient to merit its Chapter VII attention. It might have pondered that it would be better to let the verbal and judicial disputes follow their normal course. However, the situation would have changed if the foreign minister had actually been arrested, and Congo threatened to take retaliatory measures involving the use of force. Then, the UNSC would have certainly weighed in. To put it differently, as the whole situation did not actually turn into an imminent and serious threat to peace, there is no notice that the UNSC has actually noted it. But it certainly did, not only because supervision of these types of issues is inherent to the UNSC's job, as the Al-Bashir case abundantly proves today, but also because, at the time, the UNSC was no newcomer to issues relating to arrest and surrender in highly sensitive cases.²⁶⁴

In the real world, the peaceful settlement of the dispute proceeded through

263. *See infra* Section II.3.2.

264. On UNSC Resolutions related to the Lockerbie incident, see Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. U.K.), Provisional Measures, 1992 I.C.J. 3 (April 14).

judicial means, and the ICJ settled the issue in a sense that is, on its face, in tune with maintaining peaceful relations between states. Belgium reduced its universal jurisdiction intentions and, as a result, the law today—at least as interpreted by the ICJ and *apparently* acquiesced by Belgium and many other states—is that sitting heads of state are entitled under customary international law to an absolute immunity from foreign jurisdiction. This is not only the law as it ought to be but it is also not the best view on what the extant law is. First, it is difficult to imagine that states have really accepted that they cannot produce an indictment, issue a request for the arrest and surrender or actually arrest a head of state in the Hitler and Bin Laden war and non-war scenarios mentioned above. This means that, if acknowledged that states did not willingly relinquish such powers, then the whole ICJ absolute immunity for incumbents theory crumbles. At the very least, as the ICJ did not open an exception for uncontroversial cases, the theory is crippled. To put it differently, the problem is not so much that some would consider that to hold that state U is *barred under international law* from issuing an arrest warrant against head of state Hitler or Bin Laden is morally outrageous. The problem is more that it is absurd “upon a proper legal principle of international law.”²⁶⁵

One could counter-argue: states are not prohibited through their practice and *opinio* to adopt absurd legal positions. That is right, but then probably one is not asking the right question. The question posed to states should not be: “do you think immunity from foreign jurisdiction is absolute?” The question should be: “do you think you are prohibited from indicting, arresting, or issuing an arrest warrant for sitting head of state Hitler or sitting head of state Bin Laden?” Then, if the answer to the latter question is “yes,” one would have to concede that personal immunity from foreign jurisdiction is really absolute. Most probably, the answers would only reveal that *opinio* on “absolute” is in fact *relative* and that states, just like scholars and judges, continue with the familiar difficulty of fitting extreme situations within the realm of law. In what concerns the founders and common sense, these considerations alone would settle the question.

Nonetheless, as mentioned above, the attractive solution proposed by Wirth is also unwarranted from the perspective of values and practice. As far as the latter is concerned, the fact is that states do not normally practice universal jurisdiction and, surely, there are a lot of good explanations for the fact that they do not normally exercise universal jurisdiction over sitting heads of state. Not only are there only 198 of them at any given point in time (and not all of them spend their time in public office perpetrating aggression, war crimes, or crimes against humanity), but states also do not normally spend their resources attempting to bring to the dock foreign heads of state. Not least, because of all the associated nuisances such a course of action might entail, as Belgium has embarrassingly learned in the case of a “mere” foreign minister.

It is also important to realize that the notion of universal jurisdiction is one that makes sense precisely with regard to sitting heads of state who are the

265. Joint Concurring Opinion, *supra* note 22, ¶ 176.

criminals in control of the whole apparatus of the state.²⁶⁶ That is simply because if the sitting heads of state are not the criminals themselves, then such an apparatus will normally not be impeded from deploying territorial jurisdiction, i.e., the need for universal enforcement does not really arise, at least in most cases.

Moreover, reasons of international comity and ensuring the smooth conduct of international relations explain that, at the international level, states conclude treaties where immunities are provided and that, at the domestic level, idiosyncratically legislate themselves the scope of immunities that national authorities have to uphold. However, that does not automatically translate into an *opinio* that states cannot, or that they will not (if the right occasion arises), decide to use their machinery to prevent international crimes by a foreign head of state and/or punish him or her, particularly in cases that directly affect them. In other words, the fact that they conclude treaties on immunities, adopt legislation where immunity is provided, and do not normally “practice” the issuance of arrest warrants against sitting heads of state does not mean that they really consider that there is an international law prohibition from concluding treaties or adopting legislation where immunity is not provided or that they will not, if the right occasion arises, issue an arrest warrant against a sitting head of state. Indeed, whereas the wording of many conventions on diplomats seem to enshrine absolute immunities that also make sense for the case of heads of state conducting diplomacy business, many ICL treaties seem to enshrine the exact opposite idea, namely that there is even a duty to prosecute or extradite them.²⁶⁷

In sum, it might just be that customary law is neither “here or there” and, hence, states are free. As legitimately as they can move towards bolder assertions of jurisdiction over foreign heads of state, they can also more cautiously restrain themselves from engaging in actions that might destabilize international relations. In practice, that has resulted in national laws with very different purports and in the signing up to treaties which apparently enshrine conflicting obligations.²⁶⁸

As far as the values at stake are concerned, it is important to note that the

266. The most egregious international crimes are often perpetrated by the ones who hold control over the apparatus of the state. Mr. Gómez-Robledo (Mexico), ICL, Int’l Law Comm’n, Provisional Summary Record of the 3363rd Meeting (19 June 2017), U.N. Doc. A/CN.4/SR.3363, at 4 (19 June 2017) (“[H]istory had shown that,” in many of these cases, “it had often been States themselves that had attempted to prevent those agents from being held accountable by domestic courts”); *id.* Mr. Peter (Tanzania), ICL, Provisional summary record of the 3363rd meeting (19 June 2017), A/CN.4/SR.3363, at 10-11 (noting, first, that “[P]ersons holding high office were in a position to influence the level of immunity they themselves enjoyed and could thus create a safety net for themselves once they took office and consolidated their power,” and, secondly, “in certain developing countries, the phrase ‘during their term of office’ was devoid of meaning since some rulers remained in office for life and some monarchs, who reigned for life, had full executive powers”).

267. *See supra* Section I.3.

268. *See also infra* Part III.

situation is not one of strict “hierarchy” of values, but of values that are part of the constitutional international order. Both the maintenance of international peace and security, and the prohibition to commit international crimes are part of the international constitutional order. Although *in concreto* priority to the maintenance of international peace and security must be given, there is no need to look at the prohibition on the threat or use of force as hierarchically superior to other *jus cogens* norms. In fact, the perpetration of core crimes is almost by definition a disturbance of peace or an escalation of war. In the abstract, there are many conducts that might be deemed as a threat to peace and the UNSC has to keep a vigilant eye in order to determine which ones merit Chapter VII attention. But, there should be no automatic assumption that the issuance of an arrest warrant against high officials is always a threat to peace prohibited by the Charter. Indeed, in many cases, an arrest warrant might just be a mechanism used to prevent the continuation of international crimes and threats to peace arising from the commission thereof.²⁶⁹

Moreover, and still from a values and practice perspective, it is of note that many qualified publicists attempt, with visible apprehension, to mitigate the consequences of the *Arrest Warrant*. This might suggest that the strength of persuasiveness that might lead the ICJ’s decisions to turn into actual law is low as far as the *Arrest Warrant* is concerned. It is perhaps instructive to cite the view of Theodor Meron, who no one would deny is one of the most qualified publicists in this area. Commenting on Article 3 of an “important resolution on universal criminal jurisdiction” adopted in 2005, Meron opines that

Apart from investigations and requests for extradition, the exercise of universal jurisdiction [in Article 3] requires the presence of the alleged offender in the territory of the prosecuting state In my view, this requirement has the advantage of discouraging abusive resort to universality of jurisdiction and in absentia trials.²⁷⁰

And, recently, while commenting on the Al-Bashir saga, Meron put forward that

While recognizing a number of promising ideas reflected in the Malabo Protocol, I am . . . concerned about the Protocol’s Article 46A(bis), which provides that no charges may be brought before the African Court of Justice and Human Rights against any serving AU head of state . . . during their tenure of office. This provision would take international criminal law all the way back to before Nuremberg. I recognize, of course, that the Protocol has not entered into force, that it is still far from obtaining the required number of ratifications, and that it limits the immunities to the period in which the [head of state] concerned [is] still serving Nonetheless, it sets a troubling precedent, as does the saga of Omar Al-Bashir. The rule of law demands equality of all individuals

269. For a different rationale, cf. Wirth, *supra* note 190, at 444, 445.

270. THEODOR MERON, *THE HUMANIZATION OF INTERNATIONAL LAW* 123 (2006).

before the law. The more that this principle is made subject to exceptions—and the more that such exceptions benefit those in positions of privilege or power—the weaker the rule of law and the overall imperative to end impunity become.²⁷¹

While one might understand, and even fully agree, with the overall purport of Meron’s stance, the rule of law and the principle of equality are not only relevant when an international court comes into the equation. With all due respect, the focus should be on the *Arrest Warrant*, not on Article 46A(bis). It was the *Arrest Warrant* that took ICL “all the way back” to an ICL that never was.

While it is true that universal assertions of jurisdiction might in theory lead to abuse and, arguably, there is evidence of some abusive practice, there is no sign of clearly abusive widespread practice.²⁷² It is also worth noting that, for many decades before the *Arrest Warrant*, states had good reasons to consider that immunity for international crimes simply did not exist and rarely exercised universal jurisdiction against foreign officials and, even more rarely, against sitting *de jure* or *de facto* heads of state.²⁷³

271. Theodor Meron, *Closing the Accountability Gap: Concrete Steps Toward Ending Impunity for Atrocity Crimes*, 112 AM. J. INT’L L. 445-46 (2018).

272. *But see* Mr. Huang (People’s Republic of China), ICL, *Summary Record of the 3330th Meeting* (Apr. 24, 2017), U.N. Doc. A/CN.4/SR.3330, at 7-9 (suggesting that instances of “abusive exercise of universal jurisdiction” do often occur); Kolodkin (Russian Federation), ICL, *Summary Record of the 3361st Meeting* (June 14, 2017), U.N. Doc. A/CN.4/SR.3361, at 7 (similar); Mr. Rajput (India), ICL, *Summary Record of the 3363rd meeting* (June 19, 2017), U.N. Doc. A/CN.4/SR.3363, at 9 (similar). Mr. Nolte (Germany), ICL, *Summary Record of the 3365th meeting* (July 2017), U.N. Doc. A/CN.4/SR.3365 at 5 (similar).

273. On the curious case of General Noriega who, on February 4, 1988, was indicted by a “grand jury for the Southern District of Florida [. . .] on drug-related charges,” see *United States v. Noriega*, 117 F.3d 1206 (11th Cir. 1997). On the more recent indictment of the President of Venezuela for drug offences, see *U.S. Department of Justice Indicts Venezuelan Leader Nicolás Maduro on Narcotrafficking Charges*, 114 AM. J. INT’L L. 511-18 (2020). For other interesting United States’ practice, see Bianchi, *supra* note 155, at 257-59, 263, 266, n. 130 (For example, the FSIA “expressly provides for the denial of immunity to foreign states and their officials that facilitate terrorist activities. The statutory provision [. . .] overrides the common law doctrine of head of state immunity”). On the whole (still unresolved) confusion surrounding the issue of head of state immunity in the United States, see also Jerrold Mallory, *Resolving the Confusion over Head of State Immunity: The Defined Rights of Kings*, 86 COLUM. L. REV 169, 197 (1986) (concluding that “[t]he law of head of state immunity is undeveloped and confused”). This 1986 state of confusion has not changed dramatically over the years. For a more recent overview, see Christopher Totten, *Head-of-State and Foreign Official Immunity in the United States After Samantar: A Suggested Approach*, 34 FORDHAM INT’L L.J. 368-83, 368 (2011) (holding that the “doctrines of foreign head-of-state immunity and foreign official immunity in the United States are in a state of disarray”). Notably, in the United States, deference of the judicial branch to the executive branch on this matter is, at least on the surface, robustly engrained in the system. Nonetheless, it is difficult

Furthermore, one can certainly appeal to notions as the abuse of right, *mala fide* prosecutions or others, to argue that one state cannot abusively exercise its right to issue arrest warrants and circulate them in order to interfere in matters essentially within the sovereignty of other countries or in the ability of other states to conduct diplomacy business. On a case-by-case basis, one can even allow room for a judicial body, like the ICJ, to determine that a specific assertion of a universal jurisdiction by a specific tribunal in Belgium is abusive and has the potential to destabilize international peace and security.

One also does not have to be surprised if tribunals, in certain countries, look at their national laws on immunities, or at the treaties to which their country is a party, and come to the conclusion that the prohibition to arrest and surrender certain representatives of foreign states extends to cases involving allegations of international crimes. There is also nothing wrong in urging or pressuring countries to formulate their laws on immunities in a way that prevents their courts from issuing arrest warrants that might impair interstate conversation. Similarly, states can attempt to develop procedural rules regulating the issuance of arrest warrants against foreign officials or their arrests in foreign territory²⁷⁴ or they can try to establish rules placing the exercise of such powers under the supervision of an international court, or an UNWCC style type of entity. Such rules might, in the due course of time, become the customary, or even, peremptory expression of the will of the international community as a whole.

However, for the time being, one cannot overcome the problem through the judicial formulation of an international law general rule determining that countries are absolutely prohibited from prosecuting and issuing such arrest warrants and pretend that serious allegations of aggression, war crimes, or crimes against humanity by a certain head of state or other high officials are always matters essentially within the sovereignty of countries or constitute, each and every time, inadmissible interference with diplomacy business. That is why the whole reasoning developed, and the corresponding generally applicable non-immunity principle, makes sense not only in relation to the uncontroversial cases mentioned above, but also in relation to all cases of serious allegations of aggression, war crimes, and crimes against humanity. There is also no reason why, if a certain state, within its peculiar realm, deems absentia trials to be

to imagine a US Court restraining itself from prosecuting a sitting head of State against whom there is mounting evidence of responsibility for an egregious international crime committed against the United States. Be that as it may, such prosecution *will almost certainly take place* as soon as the executive branch neutralizes immunity by the simple declaration that, in light of such crimes, the sitting head of State is not to be considered as a legitimate head of state.

274. Interesting possible safeguards to prevent abuses are presented in Zappalà, *supra* note 152, at 605-07, 611-12. See also Mathias Forteau, *Immunities and International Crimes Before the ILC: Looking for Innovative Solutions*, 112 AM. J. INT'L L. UNBOUND 25-26 (2018) (suggesting that “domestic organs should be permitted not to grant immunity when international crimes are at stake provided that [there is an] absence of alternative means of redress before domestic courts of the territorial state or the state of nationality, and [. . .] [there are] a number of credible allegations by relevant international organizations that international crimes have been or are committed”).

acceptable, one should, from an international law standpoint, discourage its use in relation to anyone, including foreign heads of state.²⁷⁵

In the end, the problem is not that more exceptions are made to the principle of equality, but rather to endorse the *Arrest Warrant* decision disrupts, even if not arbitrarily, the very core of the principle of equality. It not only prevents the rules on international crimes from reaching those who were always the most obvious targets of such rules, i.e., the high officials who normally bear the greatest responsibility for international crimes, but also allows such rules to embrace all the other less responsible ones. For those who consider that there are not only customary law sitting immunities for foreign high officials, but also customary law duties to prosecute or extradite, the state of affairs comes close to a laughing matter: states through their practice and *opinio* formed rules that mandate them to prosecute the high, mid, and low level perpetrators that act under orders (i.e., the subordinates of Hitler or Bin Laden), but prohibit them to prosecute the superiors who have actually issued the criminal political commands (i.e., Hitler and Bin Laden themselves, and their heads of government and foreign ministers), unless they step down from office, voluntarily or otherwise.

Finally, the lack of ratification highlighted by Meron might be a subtle sign that state *opinio* runs against the *Arrest Warrant*, an *opinio* which is particularly relevant because it comes from countries more directly affected by the whole Al-Bashir saga and, arguably, are less inclined to bring charges against sitting foreign heads of state. In fact, it is one thing to argue that many African states do not want to be mandated by the ICC to arrest an African head of state; it is another thing to say that in the *opinio* of (for example) South Africa, South Africa itself cannot prosecute a massacre of South African citizens living in Namibia ordered by X, the head of state of Namibia. Again, while the Charter prohibits South Africa from invading Namibia without UNSC authorization, it is hair-raising to say that it cannot initiate proceedings and/or issue and circulate an arrest warrant, or that it cannot arrest X, if X sets foot in South Africa, irrespective of whether the head of state is on a private or official visit, *incognito* or just by accident.

The Supreme Court of Appeal of South Africa, at least, did not think that any such prohibitions should exist and has held that South African law mandates such criminal proceedings.²⁷⁶ Indeed, the position of the Supreme Court is based upon

275. On France’s fondness for such types of trials, dating back to the Kaiser, see SCHABAS, *supra* note 10, at 18.

276. On the judgment of the Supreme Court, see Dapo Akande, *The Bashir Case: Has the South African Supreme Court Abolished Immunity for all Heads of States? EJIL:Talk! (Mar. 29, 2016)*, <https://www.ejiltalk.org/the-bashir-case-has-the-south-african-supreme-court-abolished-immunity-for-all-heads-of-states/> [<https://perma.cc/7BHD-BKWK>]. Interestingly, the Supreme Court noted that, while a customary law prohibition existed, South Africa’s law is a “matter for national pride rather than concern.” As correctly noted by Akande, “[w]hen that broad principle of universal jurisdiction is combined with a lack of immunity, the Bashir judgment puts South Africa in the same place that Belgium was in prior to the *Arrest Warrant* decision.” Besides South Africa,

the fact that South African law clearly allows South African courts to order the arrest of, and issue arrest warrants for, sitting foreign heads of state for trial and punishment before South African courts themselves. South African law, and the stance of its Supreme Court, might also constitute subtle practice and *opinio* running against the *Arrest Warrant*.

While it is clear that, if South Africa issues an arrest warrant, it cannot impose on other states an obligation to arrest and surrender X, it is also worth considering that to prohibit South Africa from issuing an arrest warrant, it might even work in practice as an incentive to go to war. In fact, if no consensus is reached at the UNSC about what measures to take against Namibia, South Africa might well be tempted to bypass the mere issuance of an arrest warrant and go directly to war against Namibia. Considering that, according to the *Arrest Warrant*, both mechanisms are illegal, incentives for South Africa to attempt through criminal proceedings and cooperation of other states to get at X and avoid war with Namibia are eliminated. In such a scenario, the threat to peace becomes the *Arrest Warrant* itself. Let us also not forget that the issuance and circulation of an arrest warrant might not only be specifically devised for the arrest of X abroad, but also as a means of isolating X and pressuring Namibia's state apparatus and/or population to quickly get rid of its tyrant in order to avoid a foreign invasion of Namibia and the additional suffering for its population that would result from such a war.²⁷⁷ In certain non-implausible scenarios, the simple arrest of X abroad might also be the measure which allows Namibia to get rid of its dictator and avoid war.²⁷⁸

It is also of note that on the ILC surreal debate mentioned above—a debate in “rounds” in which almost everyone seems to agree that sitting high officials enjoy immunity *ratione personae* from foreign jurisdiction, but disagree over

other countries that apparently do not recognize personal immunity include Burkina Faso, the Comoros, Ireland, and Mauritius. *Fifth Report on Immunity of State Officials from Foreign Criminal Jurisdiction*, A/CN.4/701 (2016), ¶ 58. Consider also information about law in the Republic of Korea, in Mr. Park (Korea), ICL, *Summary Record of the 3360th Meeting* (June 17, 2017), U.N. Doc. A/CN.4/SR.3360, at 7 (informing that the national law of the Republic of Korea “provided for criminal jurisdiction over all foreigners who committed serious international crimes outside the territory of the State but who were present in it, regardless of their official status. However, it was uncertain whether high-ranking State officials could enjoy immunity from such jurisdiction, since the courts had never dealt with such cases”). A similar stance to the one of the South African Supreme Court was subsequently adopted by the Court of Appeal of Kenya. *See* Kenya Court of Appeal at Nairobi, Civil Appeal 105 of 2012 & Criminal Appeal 274 of 2011 (Consolidated), Attorney General & 2 others v Kenya Section of International Commission of Jurists, Judgment, Feb. 16, 2018 [2018] eKLR. In general, on these two decisions, see Kemp, *supra* note 177, at 70-77.

277. On the plausible connection between the arrest warrants for Milošević, his fall from power, and subsequent surrender to the Hague, see Arrest and Transfer, United Nations <http://www.icty.org/en/content/arrest-and-transfer> [<https://perma.cc/2C8D-GCGZ>]. *See also infra* II.3.2.

278. *See also infra* Part III.

other less important things—the agreement is not as unanimous as one is, sometimes, led to believe.²⁷⁹ Commenting on that debate, Dire Tladi (the member of the ILC from South Africa) wrote that

The conclusion that international law does not recognize any exceptions to immunity *ratione personae* is not controversial and it is unnecessary to explore the Report’s basis for this conclusion. It is the conclusion that there are exceptions to immunity *ratione materiae* that resulted in controversy and division with the Commission.²⁸⁰

However, one can imagine other members writing exactly the opposite, namely that there is in fact controversy and that it is certainly necessary to better explore the Report’s basis for such conclusion. The member of Colombia alluded to the fact that some states spoke against “a broad and unrestrictive view of immunity *ratione personae*.”²⁸¹ The member from Japan expressed “serious concerns regarding draft article 7(2), pursuant to which immunity applied to State officials ‘during their term of office’” and, with no qualms, suggested that such paragraph should be simply deleted.²⁸² Similarly, the member from Tanzania held that, “[w]hile he understood that the Special Rapporteur would not be able to please everyone, [Draft Article 7 (2)] made very little, if any, sense to him.”²⁸³

Perhaps the most revealing position is the one of Special Rapporteur Escobar Hernández herself. Ultimately, she seems to agree with these three members and subtly conveys the notion that Draft Article 7(2) does not make much sense, at least from the point of view of “an international legal order whose unity and systemic nature cannot be ignored.”²⁸⁴ Hernández wrote that

Although she fully understood their arguments . . . , she did not believe that the Commission had much leeway, since the *trend* in both international practice and doctrine was clearly towards the enjoyment of the full scope of immunity *ratione personae* She was also aware that the situation would never apply to persons who held permanent office, such as monarchs, unless they abdicated or were dethroned, and that it could have the effect of allowing certain persons to hold on to office.

279. On the whole debate, see Dire Tladi, *The International Law Commission’s Recent Work on Exceptions to Immunity: Charting the Course for a Brave New World in International Law?*, 32 LEIDEN J. INT. LAW 169-87 (2019).

280. *Id.* at 173.

281. Mr. Valencia-Ospina (Colombia), ILC, *Summary Record of the 3361st Meeting* (June 14, 2017), U.N. Doc. A/CN.4/SR.3361, at 14-15.

282. Mr. Murase (Japan), ILC, *Summary Record of the 3328th Meeting* (June 19, 2017), U.N. Doc. A/CN.4/SR.3328, at 9-11.

283. Mr. Peter (Tanzania), ILC, *Summary Record of the 3363rd Meeting* (June 19, 2017), U.N. Doc. A/CN.4/SR.3363, at 10-11.

284. *Report of the International Law Commission, Sixty-Ninth Session, A/72/10* (2017), at 181.

Frankly, she did not believe that the Commission had the power to draw up an instrument to prevent such a situation.²⁸⁵

Perhaps because of the “trend” and the lack of “leeway” or “power”,²⁸⁶ Draft Article 7 as a whole is so poorly designed that, in its *rationae materiae* exceptions to immunity, it even omits the “supreme international crime” of aggression. That is, the aggressor head of state is immune from the foreign jurisdiction of the aggressed state, not only while he enjoys an immunity *rationae personae*, but even when he or she steps down from office. The Special Rapporteur seems to have failed to grasp that prosecution of the aggressor head of state is also—while aggression is ongoing and the UNSC has not taken over the situation according to UN Charter Article 51—one of the legitimate self-defense measures that the aggressed state, or any other state, might deploy. In other words, such prosecution is not only a power that can be exercised because aggression is an international crime, but it is also a power protected under the umbrella of the *jus cogens* norm relating to self-defense. Whatever the confusing Kampala understandings say on the matter,²⁸⁷ to argue that states can deploy all forceful and non-forceful measures necessary to repeal aggression, except the measure of prosecuting the sitting head of state who is perpetrating the very act of aggression, is pure nonsense, at least according to common sense and the UN Charter.²⁸⁸

285. Ms. Escobar Hernández (Spain), ICL, *Summary Record of the 3365th Meeting* (May 30, 2017), U.N. Doc. A/CN.4/SR.3365, at 15, 16 (emphasis added).

286. On the lack of “political will”, see also O’Keefe, *supra* note 194, at 170. (“[i]t would be a mistake to think that there exists among member states of the General Assembly the political will for the acceptance, even by explicit way of progressive development, of an international crime exception to the immunity of state officials, *ratione personae* or *materiae*, from foreign criminal jurisdiction”).

287. See Mr. Murase (Japan), ICL, *Summary Record of the 3328th Meeting* (June 19, 2017), U.N. Doc. A/CN.4/SR.3328, 10-11; Mr. Murphy (United States), ICL, *Summary Record of the 3329th Meeting* (July 27, 2016), U.N. Doc. A/CN.4/SR.3329, at 11.

288. *But see* Draft Code of Crimes Against the Peace and Security of Mankind with Commentaries (1996), *supra* note 181, at 27-30 (“[t]he second and third provisions of [Draft Article 8] comprise a separate jurisdictional regime for the crime of aggression [. . .]. This jurisdictional regime provides for the exclusive jurisdiction of an international criminal court for the crime of aggression with the singular exception of the national jurisdiction of the State which has committed aggression over its own nationals”). As mentioned *supra* I.1, the very idea that an aggressed state cannot, on the basis of the principle of territoriality, prosecute aggression, is not sound. On national prosecutions for aggression, see also Mr. Jalloh (Sierra Leone), ILC, *Summary Record of the 3362nd Meeting* (June 19, 2017), U.N. Doc. A/CN.4/SR.3362, at 12 (holding that the definition of aggression adopted by the General Assembly and the inclusion of the crime of aggression in the Rome Statute show that aggression can be prosecuted in domestic courts); Ms. Lehto (Finland), ILC, *Summary Record of the 3362nd Meeting* (June 19, 2017), U.N. Doc. A/CN.4/SR.3362, at 11 (informing that the finish Parliament held that Finland is able exercise its primary jurisdiction over the crime of aggression); Mr. Kittichaisaree (Thailand), ICL, *Summary Record of the 3329th*

All told, there are no compelling arguments to hold that the long held rule that no immunity at all for heads of state with regard to aggression, war crimes, and crimes against humanity has been eliminated as a result of the “trend.” That is simply because the “very essence” of ICL, and the unity and integrity of the system that was laid down in the aftermath of the Second World War, do not comport an immunity for “such crimes.” Obviously, the conclusion that immunity does not exist for such crimes does not apply to other *materiae*—like torture, corruption, enforced disappearances, etc.—which, in Draft Article 7, were inexplicably bundled together with the crimes of genocide, war crimes, and crimes against humanity. The “very essence” of ICL, and the unity and integrity of the system laid down after the Second World War, have very little to say about other alleged international crimes, which are not firmly embedded in the system as peremptory ICL.

From a strict customary law stance on the identification of rules of international law, according to which “relevant practice must be general, meaning that it must be sufficiently widespread and representative, as well as consistent,”²⁸⁹ one could say that the two decade “trend,” which started with the *Pinochet* and was given a veritable boost in the *Arrest Warrant*, does not yet constitute sufficient widespread and consistent practice and *opinio* enabling the conclusion that the centuries old and well established no-immunity rule has been displaced by a new “prohibitive rule”²⁹⁰ barring states from exercising jurisdiction over high officials with regard to international crimes. As a cautious ICJ has put it on an advisory opinion on whether the use of nuclear weapons is always prohibited, “in view of the present state of international law viewed as a whole . . . , the Court is led to observe that it cannot [attain such] a definitive conclusion.”²⁹¹

But, if strict notions of practice and *opinio* do not allow for such a result,²⁹² then common sense and the “combined significance”²⁹³ of the laws of humanity, the general principles of nations and the dictates of public conscience mandate the

Meeting (July 27, 2016), U.N. Doc. A/CN.4/SR.3329, at 10 (speaking, more in general, of prosecutions “undertaken in a domestic court of a State which had been a victim of aggression”).

289. ILC, *Report on the Work of Its Sixty-Eighth Session*, U.N. Doc. A/71/10 (Sept. 19, 2016) (Draft Conclusion 8(1)) at 94-97.

290. S.S. “*Lotus*” (Fra. v. Turk.), Judgment, 1927 P.C.I.J. (Ser. A) No. 10, at 19 (Sept. 7).

291. Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, I.C.J. Rep. (1996), ¶ 97.

292. In fact, if one strictly interprets such notions on the basis of national legislation, case-law, treaties, etc., there might even exist very good reasons to hold that not only is head of state immunity the general applicable rule but also that exceptions *ratione materiae* to immunity from foreign jurisdiction simply do not exist. For a strong analysis, see Murphy, *supra* note 231, at 4-8.

293. Helmut Strebler, *Martens Clause*, ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 327 (R. Bernhardt ed., vol. 3, 1997).

outcome.²⁹⁴ No more and no less than the fathers of international law in the 17th century and the founders of the UN in the middle of the 20th century did, it is difficult—if not impossible—to see how a general principle of international law of the 21st century can be so absolute as to prohibit a state from deploying, in each and every case, the territorial and universal criminal jurisdiction of its courts with regard to crimes of aggression, war crimes, and crimes against humanity perpetrated by sitting heads of state. Taking into account that, according to this view, there are not enough grounds to depart from the general principle of international law enshrined in the IMT decision, and denying heads of state immunity for such crimes, it is legally impossible for the UNSC to have removed an immunity that did not exist to begin with.²⁹⁵

This conclusion does not render the whole scholarly and jurisprudential extensive discussion about the “removal of immunity” issue useless. Instead, it allows the discussion to be framed in terms that make it more transparent: the question is not whether one of the effects of the UNSC Resolution 1593 (2005) was to remove the immunity of Al-Bashir, but whether one of the effects was to authorize the ICC to issue a peremptory arrest warrant, i.e., a warrant that states are bound to comply with on the sole force of the resolution. In practice, the terms of the discussion do not change dramatically. In the case of an affirmative answer, the ICC would be allowed to issue such an arrest warrant: Jordan and any other state had to comply with it, and they could not avoid the duty to comply by leaving the ICC or the UN.

Before discussing the issue in the next Section, it is important to step into the discussion with one fact very present in mind: because of the *Arrest Warrant*, the assumption of many at the time of adoption of UNSC Resolution 1593 (2005) was that heads of state (and consequently, Al-Bashir) actually enjoyed immunity under customary international law from foreign criminal jurisdiction. In other words, many of the members of the UNSC, or the UNSC itself, might have incurred an “error in law.” For some, this adds another element of confusion to the situation. On the contrary, this element clarifies the situation and it could have prompted the appeals chamber to find a more appropriate way out of the whole mess.

II.3.2. Solving the conundrum created during the Al-Bashir saga

Somewhat the reverse of the UNSC’s power to order states to cancel their arrest warrants is its power to order arrests or to authorize courts, including the ICC, to issue arrest warrants which are peremptorily binding on a state, some states, or the whole world. The moral intuitive assumption underlying the teleological reasoning of the appeals chamber, all other chambers that pronounced

294. On these principles as an interpretative aide and strong argument in these types of discussions, see Theodor Meron, *The Martens Clause, Principles of Humanity and Dictates of Public Conscience*, 94 AM. J. INT’L L. 78-89 (2000).

295. In light of this conclusion, the 7th key finding of the appeals chamber is incorrect because it is premised on the existence of head of state immunity. See Al-Bashir, *supra* note 3, at 6.

on the matter, and the virtually unanimous part of scholarly opinion that approaches the problem from an international criminal justice perspective, is well encapsulated in the following “logical necessity,” which is typical of rationales that do not sufficiently take into account the primordial objective guiding UNSC Chapter VII action that²⁹⁶

[I]t would certainly go against logic to presume that while referring a situation to the ICC, the UNSC had intended that those who bear the greatest responsibility could evade the Court’s proceedings, even if their State were obliged to cooperate with the Court. If this was the intention of the UNSC, it should have been stated explicitly.²⁹⁷

This sensible logic has to be confronted with another, more pragmatic, one. From a peace and security more focused perspective, one could counter-argue that it would certainly go against logic to presume that, while referring a situation to the ICC, the UNSC intended to allow the ICC to impose on states the obligation to arrest heads of state of other countries. In view of the endangerment of peaceful relations between states that such a situation might entail, “if this was the intention of the UNSC, it should have been stated explicitly.”²⁹⁸

The crux of the matter is that the complexity of the whole situation is not captured by a logic that excessively focuses on international criminal justice. As a matter of principle, from a peace and security perspective, Chapter VII authority must be used to reduce conflict, not to create it. Thus, one cannot presume that—when it uses criminal justice in order to promote peace and security—the UNSC intends to create mechanisms the very use of which might lead to disruptions of peace. At stake here are extremely difficult balancing acts, in relation to ongoing conflictual situations, i.e., situations that can only be properly addressed through the use of Chapter VII unbounded discretion. As the appeals chamber of the ICTY wisely highlighted, the Charter “leaves the choice of means and their evaluation to the Security Council, which enjoys wide discretionary powers in this regard; and it could not have been otherwise, as such a choice involves political evaluation of highly complex and dynamic situations.”²⁹⁹

In order to appropriately tackle the problem, the appeals chamber can only have been right when it decided to look into the practice of the ICTY and into the

296. The most famous example of this logical necessity was used by Judge Lauterpacht in an attempt to unsuccessfully explain why *jus cogens* is a limit to UNSC action. Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Order of Sept. 13, 1993, I.C.J. Rep. 100 (1993) (separate opinion Lauterpacht). On this, see Lemos, *Jus Cogens, supra* note 157 at 27-28.

297. ALEXANDRE GALAND, UN SECURITY COUNCIL REFERRALS TO THE INTERNATIONAL CRIMINAL COURT: LEGAL NATURE, EFFECTS AND LIMITS 189 (2018).

298. *Id.*

299. Prosecutor v. Tadić, Case No. IT-94-1 A, Appeal on Jurisdiction, ¶ 39 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

resolution providing for its creation.³⁰⁰ After all, the first and most prominent judicial tool of the UNSC to maintain international peace and security was the ICTY. In the course of its inquiry, the appeals chamber found strong evidence that UNSC Resolution 827 (1993) authorized the ICTY to issue peremptory arrest warrants against any sitting head of state implicated in the atrocities committed in the former Yugoslavia. As it turned out, the ICTY issued an arrest warrant against the sitting head of state of the Former Republic of Yugoslavia (FRY), a state that was not a member of the UN at the time. There were no significant protests on record against the warrant.³⁰¹ This is powerful evidence that the warrant was considered legitimate by the international community of states as a whole. Moreover, there are important parallels that might be drawn between the situation in the former Yugoslavia and the one in Darfur, namely in what concerns the reports that served as the breaking ground for the creation of the ICTY and the referral of the situation in Darfur to the ICC. Both highlighted the involvement of high-level officials and helped build momentum for some sort of action by the international community of states as a whole. The momentum led to the creation of the first tribunal by the UNSC and to the first referral by the UNSC to the ICC.

However, the parallels are far from perfect. There are two important differences. One is obvious and the appeals chamber was aware of it, the other is less obvious and, given the whole incorrect immunity story it had embraced, it was perhaps difficult for the appeals chamber to have detected it. This less obvious difference relates to the *opinio* of states with regard to the existence of sitting head of state immunity. UNSC Resolution 827 (1993) was adopted at a moment where immunity of sitting heads of state was not really a question. As demonstrated above, the prevalent view at the time was that head of state immunity was not applicable with regard to international crimes. There was simply no question of removing an immunity that did not exist to begin with, i.e., the extant international legal background that jurists at the UNSC had to take into account when drafting Resolution 827 did not include any controversial immunity issue. It was also obvious that the UNSC would be authorizing the ICTY to issue arrest and surrender warrants and that, while imposing an obligation on all states to cooperate with the ICTY, the UNSC would be mandating states to comply with such warrants.³⁰² As there was no question of immunity, the arrest warrants could be issued against any person, including heads of state.

Thus, the ICTY started to issue warrants for the arrest and surrender of many persons, including numerous senior officials. On May 27, 1999, David Hunt, a

300. Information in this paragraph is found in Joint Concurring Opinion, *supra* note 22, at 69, 157-58, 321-38.

301. Cassese, *supra* note 189, at 866.

302. UNSC Resolution 827 (1993), ¶ 4; ICTY Statute, art. 29. On the “exceptional legal basis of Article 29 . . .] [and] the novel and indeed unique power granted to the International Tribunal to issue orders to sovereign States,” *see* Prosecutor v. Tihomir Blaškić, Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of July 18, 1997, Case No. IT-95-14-AR108 bis, ¶ 26 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 29, 1997).

judge of a trial chamber of the ICTY, issued warrants for the arrest of several senior officials, including Slobodan Milošević, on account of war crimes and crimes against humanity.³⁰³ These arrest warrants were re-issued one and a half years later, on January 22, 2001.³⁰⁴ The fact that Milošević sat as head of state until October 7, 2000 was apparently not much of an issue and his special status did not deserve special treatment. That was perfectly in tune with the fact that, almost two years before the first warrants against Milošević were issued and more than one year before the ICC Statute was adopted, the appeals chamber of the ICTY unmistakably shared the prevalent view at the time. While opening the way for future arrest warrants against “however highly placed” sitting officials—and choosing its words in a way that speaks volumes—the appeals chamber presided by Antonio Cassese basically repeated what the IMT had said half-century before, that under the “norms of international criminal law prohibiting war crimes, crimes against humanity and genocide . . . , those responsible for such crimes cannot invoke immunity from *national* or international jurisdiction even if they perpetrated such crimes while acting in their official capacity.”³⁰⁵

This 1997 statement by the ICTY appeals chamber³⁰⁶ is a resounding echo not only of the whole story narrated in Part I but also of another statement issued from within the UNSC half a decade before by Madeleine Albright, the permanent representative of the United States to the UN. While rejoicing with the creation of the ICTY, Albright said

There is an echo in this Chamber today. The Nuremberg Principles have been reaffirmed. *We have preserved* the long-neglected compact made by the community of civilized nations 48 years ago in San Francisco to [1] create the United Nations *and* [2] enforce the Nuremberg Principles. The lesson that *we are all* accountable to international law may have finally taken hold in our collective memory.³⁰⁷

However, on April 11, 2000, Belgium issued an arrest warrant for the foreign

303. In her application to Judge Hunt, Prosecutor Louise Arbour pointed out that “this indictment is the first in the history of this Tribunal to charge a Head of State during an on-going armed conflict with the commission of serious violations of international humanitarian law,” President Milosevic and Four other Senior Fry Officials Indicted for Murder, Persecution and Deportation in Kosovo (May 27, 1999), <https://www.icty.org/en/sid/7765> [<https://perma.cc/7DD9-EGR4>].

304. Milosevic and others case: warrants re-issued to the Federal Republic of Yugoslavia (Jan. 23, 2001), <https://www.icty.org/en/press/milosevic-and-others-case-warrants-re-issued-federal-republic-yugoslavia> [<https://perma.cc/TX8P-GR77>].

305. See *Blaškić*, Case No. IT-95-14-AR108, ¶ 41 (emphasis added).

306. For other statements by the ICTY implying that immunity for international crimes simply does not exist, be it before international courts or national authorities, see Wirth, *Immunity*, *supra* note 108, at 886, 187, n.63.

307. U.N. SCOR, 48th Sess., 3175 mtg. at 11, U.N. Doc. S/PV.4893 (Feb. 22, 1993) (emphasis added).

minister of Congo and the *Arrest Warrant* saga started. Congo complained and on February 14, 2002, the ICJ forgot the driving force behind the creation of the UN and the adoption of Nuremberg principles and came up with the idea that there is a rule of international law according to which sitting foreign ministers, heads of state, and other senior officials are entitled to immunity, even with regard to international crimes. Hence, on March 31, 2005, when Resolution 1593 was adopted, the extant international legal background that UNSC jurists took into account included a decision of the ICJ upholding an immunity idea at odds with the one prevalent in 1993. In 2005, for many jurists who view ICJ decisions as authoritative statements of law, head of state immunity *was the law*. There is no information on record about whether jurists at the UNSC noticed the dramatic change in landscape or whether they even thought about the immunity issue and the *Arrest Warrant*, its effects, or the “certain international courts” exception set out therein. Even if they did, and if they really believed that in 2005 the general rule was that a sitting head of state was entitled to immunity even with regard to international crimes, it is difficult to believe they would not have discussed whether it was necessary to remove the immunity of all high officials of a state not party to the ICC Statute who, according to the Cassese Report,³⁰⁸ might have been implicated in the atrocities committed in Darfur.

The same chain of thought might be set forth using the “error in law” path. As mentioned above, in 2005 many jurists might have incurred an error about what the law was. That is exactly why the argument that if the UNSC really wanted to remove immunity, it should have said it explicitly is a stronger argument than one would have expected. In fact, and perhaps ironically, the comparison with the ICTY weakens the argument that immunity was implicitly removed in the Darfur situation. That is because the argument that while adopting the ICTY Statute, the UNSC also did not explicitly remove immunity, is falsely grounded on the legal existence of an immunity that, at the time, no one thought it existed.

In sum, within the context of UNSC Resolution 827 (1993)—and its implementation through the arrest warrant against Milošević—any sort of head of state immunity allegation would have been summarily dismissed (in fact, the issue of sitting head of state immunity did not even arise); in contrast, within the context of UNSC Resolution 1593 (2005), and its implementation through the arrest warrant against Al-Bashir the allegation of sitting head of state immunity turned out to be a deeply complex legal question. Ultimately, and in addition to the fact that Al-Bashir’s extensive travelling confronted many countries with a thorny issue, it was such complexity that constituted the decisive factor providing all the room for doubts, not only about the opportunity of the arrest warrant against Al-Bashir, but about its very legality.

The legality problem was even more acute, and the protests became even more intense, because of the most obvious difference between the two resolutions, namely the fact that, while Resolution 827 (1993) imposed an

308. Report of the International Commission of Inquiry on violations of international humanitarian law and human rights law in Darfur (S/2005/60).

obligation of cooperation on *all states*, UNSC Resolution 1593 (2005) did not. This reveals another difficulty with the “logical necessity” mentioned above, i.e., the reasonable notion that “the UNSC cannot had [sic] intended that those who bear the greatest responsibility could evade the Court’s proceedings”³⁰⁹ does not square with the fact that the UNSC did not impose an obligation to cooperate with the ICC on all states. This fact leads to mind-boggling questions. If the UNSC, acting in the name of the international community of states as a whole, really intended to impose obligations on states to arrest and surrender those who bear the greatest responsibility, what can justify that it did not impose such an obligation on all states? How come it decided to impose such an obligation only on Sudan, the state that is least likely to comply? Was the UNSC only counting on states parties and their duty to fulfill their obligations under the ICC Statute? If so, what did the UNSC actually intend when, instead of imposing obligations on states not parties, it merely “urged” them to cooperate with the ICC?

The appeals chamber noted the mind-boggling problem and *chose* to overcome it through the lens of international criminal justice and its logical need to ensure that, within the acceptable boundaries of what the words of the UNSC might mean, the interpretation most suitable to ensure accountability, and an “end to impunity” prevailed. It used an ingenious combination between what it labeled as “less onerous obligations” or “minimum effects” and on the other hand what it labeled “legal justification[s].”³¹⁰ This combination allowed it to arrive at the conclusion that even states not parties did not have to respect the alleged immunity of Al-Bashir in what proceedings before the ICC are concerned. Consider the words of the appeals chamber that

For all other UN Member States [which are not parties to the Statute], their own relatively less onerous obligation would have the *minimum effect* of affording legal justification for them; were they to cooperate fully with the Court as the resolution urges, including by arresting and surrendering Mr Al-Bashir to the Court regardless of his status as the incumbent Head of State of Sudan. This *legal justification* can only be a *minimum effect* of the Security Council’s ‘urge’ of full cooperation on all UN Member States, regardless of their membership to the Rome Statute.³¹¹

Apart from the fact that the UNSC Resolution urged *all states* (not only UN Member States and not only states not parties; states parties were also urged), the appeals chamber’s reasoning is clever, at least from an exclusive international criminal justice viewpoint. It also attains an extraordinary result that is in tune

309. ALEXANDRE GALAND, UN SECURITY COUNCIL REFERRALS TO THE INTERNATIONAL CRIMINAL COURT: LEGAL NATURE, EFFECTS AND LIMITS 189 (2018).

310. Joint Concurring opinion, *supra* note 22, ¶ 283.

311. Prosecutor v. Al Bashir, ICC-02/05-01/09-397, Concurring opinion of Judges Eboe-Osuji, Morrison, Hofmański, and Bossa, ¶ 283 (May 6, 2019), https://www.icc-cpi.int/RelatedRecords/CR2019_02595.PDF [<https://perma.cc/24MZ-YAVJ>].

with interpreting UNSC Resolutions to give the maximum effect to the will of the UNSC without pressing hard on the notion that if the UNSC really wanted to override international law rules, it should have made an explicit determination to that effect. The appeals chamber is really saying that, although it merely “urged,” the UNSC implicitly created universal exceptions to a whole set of international law rules that might obstruct cooperation with the ICC. In theory, the amount of customary or treaty rules covered is large. In practice, the appeals chamber ruled that, by virtue of the UNSC Resolution, the provisions of the ICC Statute on cooperation gained universal effect and neutralized the applicable treaty and customary rules regarding immunities. Namely, states that would otherwise have to respect the customary or treaty immunities of Al-Bashir do not have to if cooperation with the ICC is at stake. For the appeals chamber, because one must try to give *maximum effect* to the will of the UNSC to bring culprits to the dock, a deviation from the normally applicable international law rules might be the effect not only of a clear obligation imposed by the UNSC but also of a mere “urge” to cooperate with the ICC.³¹²

The appeals chamber is reading too much into the “urging” will of the UNSC.³¹³ Considering the above, it is difficult to believe that the UNSC, acting as it must, from the standpoint of peace and security, really wanted to attain that extraordinary overriding “minimum effect” through a mere “urge.” That is particularly true because one cannot assume that jurists at the UNSC were unaware of Article 98 of the ICC Statute, which clearly states that “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 . . . of a third State.”

No one can realistically put forward the notion that jurists at the UNSC took into account the appeals chamber’s above mentioned puzzlingly “juristic algebra” idea that Article 98 does not apply to the core crimes but to offenses against the administration of justice. As jurists at the UNSC reasonably thought that Article 98 concerns core crimes, that extraordinary minimum effect can only be attained if one endorses the idea that the UNSC also implicitly intended to override Article 98.

In conclusion, in view of the content of the ICC Statute itself, the appeals chamber would have had to realize that it is far-fetched to argue that the implicit will of the UNSC encompassed, *in this particular case*, so many minimum effects

312. See Nouwen, *supra* note 210, at 605-07 (on the ruling as relying on a “Security-Council-analogous-to-a-state-party route”). See Weatherall, *supra* note 181, at 65-66 (on this type of purposive interpretation); see also Erika de Wet, *Referrals to the International Criminal Court Under Chapter VII of the United Nations Charter and the Immunity of Foreign State Officials*, 112 AM. J. INT’L L. UNBOUND 36-37 (2018) (for a skillful defense of a purposive interpretation of UNSC Resolution 1593).

313. See also Akande, *The Legal Nature*, *supra* note 231, at 344-45 (holding that the text or history of the resolution do not suggest that the UNSC “intended to provide permission to any state to perform any particular act it could otherwise not perform”). Compare with *id.* at 347-48. See also Weatherall, *supra* note 181, at 65, 66.

and overrides of international law rules. This conclusion would be particularly warranted in view of the politically charged controversy surrounding the adoption of the resolution³¹⁴ and subsequent inaction of the UNSC, which might be simply interpreted as a “passed over in silence” way of considering that non-compliance by states with the arrest warrant issued by the ICC is not a breach of UNSC Resolution 1593 (2005).³¹⁵ Indeed, in view of the fact that two permanent members of the UNSC had even stated that removal of immunities was not one of the effects of the resolution,³¹⁶ it is unwise—absent other statements, or compelling evidence, to the contrary—to rule the exact opposite.

From the standpoint of international peace and security, and while acting as a wiser “tool” of the UNSC that does not lightly contradict the statements of some of its most important members, the appeals chamber *should have chosen* a different course of action. After noting the mind-boggling problem, it should have appealed to its sixth key finding. It should have gone beyond the theory and put itself in practice “at the disposal” of UNSC to maintain or restore international peace and security.³¹⁷ The following paragraphs are just a rough sketch of how such a course of action might have looked.

The appeals chamber should have started with an assumption, an expectation, and a fact: while referring the situation in Darfur to the ICC—and bearing in mind the content of the Cassese Report—one must assume that the UNSC wanted to *authorize* the ICC the power to issue arrest warrants against the alleged culprits, including heads of state, irrespective of whether he or she is the head of a state party or non-party. While such an authorization is not to be doubted, one would have expected that the UNSC would have *mandated all states to comply* with potential warrants. However, this expectation did not translate into a fact. Even using the best interpretative techniques, it is impossible to read such a mandate into the “urging” terms of the resolution.

Following this conclusion, the appeals chamber should have started to roll out the problematic theoretical issues that the whole saga brought to the fore and the

314. See discussion *infra* (on the politically charged nature of the resolution at the moment of adoption).

315. See also *Transcript of Record at 101–02, Prosecutor v. Al-Bashir, ICC-02/05-01/09-T-5-ENG (2018)* (“I do want to note that for years now the Prosecution has been making reports to the Security Council claiming that States are failing to comply with their interpretation of the Council’s resolution. Despite that, and despite some referrals to the Council, the Council has taken no action at all to address these purported violations of its resolution”). The idea underlying this observation of Sean Murphy is that the interpretation corresponding to the ordinary meaning of UNSC Resolution 1593 (2005), namely, that the UNSC did not impose any obligation of cooperation with the ICC to state parties or non-parties to the ICC (apart from Sudan), is the only credible interpretation.

316. U.N. SCOR, 73d Sess., 8290 mtg. at 9, 17, U.N. Doc S/PV.8290 (June 20, 2018) (statements by Russia and China).

317. See *generally* Mégret, *supra* note 33, at 835-58 (on international criminal justice as a peace project and on how judicial authorities understand the demands of peace).

practical consequences of the fact that they were inadequately forecast in the resolution. Highlighting theoretical difficulties, the court should have first acknowledged that the imposition on any state of a peremptory obligation to arrest and surrender the head of state of another state is an extraordinary imposition, one that can even be viewed as subversion of a specific country's electoral system. As such, the appeals chamber was not going to lightly assume that the UNSC intended to authorize the ICC to use such a peremptory power. Secondly, the appeals chamber should have acknowledged the three-tiered situation created by the resolution: (1) Sudan is forced to cooperate on the sole force of the UNSC Resolution; (2) states not parties are not bound to cooperate but are urged to do so; and (3) states parties are also merely urged to cooperate and, hence, are mandated to comply with arrest warrants on the sole force of the ICC Statute. Thirdly, it should have highlighted that this three-tiered situation resulting from present (and possibly future) practice of the UNSC might actually lead states parties to conclude that, in order to not be forced to comply with present and future ICC problematic arrest warrants against heads of state and other high officials, the wiser option is to withdraw from the ICC.

Subsequently, the appeals chamber should have highlighted how the theoretical problem turned into reality:³¹⁸ many states parties did not comply with the arrest warrants for Al-Bashir; others appear unable or unwilling to do so; some states parties threatened to withdraw and powerful bodies (including the League of Arab States, the Conference of Islamic States and the Non-Aligned Movement) adopted an anti-ICC conflictual posture; most prominently, the African Union not only repeatedly affirmed that the process initiated by the ICC and decisions of its chambers have the potential to “seriously undermine peace in Sudan and in the Region” but even went as far as issuing a string of decisions determining that AU Member States shall not cooperate with the arrest warrant for Al-Bashir;³¹⁹ one state party, South Africa, considered that it could actually flout present and future ICC warrants to arrest and surrender high officials by withdrawing from the ICC Statute and took concrete steps to withdraw;³²⁰ in the midst of the whole mess, two states, the Philippines and Burundi, have actually withdrawn; and many states not parties, including permanent members of the

318. See THE INTERNATIONAL CRIMINAL COURT IN TURBULENT TIMES (Gerhard Werle & Andreas Zimmermann eds., 2019) (for an overview of the reality described in this paragraph).

319. See, e.g., A.U. Peace & Security Council, Statement dated Mar. 5, 2019, PSC/PR/Comm.(CLXXV) (statement on the ICC arrest warrant against the President of the Republic of Sudan, Omar Al-Bashir); A.U. Assembly, Decision dated July 3, 2009, ¶ 10 Doc. Assembly/AU/13(XIII) (on the meeting of African States Parties to the Rome Statute of the International Criminal Tribunal (ICC)). See Kiyani, *supra* note 221, at 494-96 (for an overview of the stance of the AU).

320. U.N. Secretary-General, Letter dated Oct. 25, 2016, C.N. 786.2016.TREATIES.XVIII.10, <https://treaties.un.org/doc/Publication/CN/2016/CN.786.2016-Eng.pdf> [<https://perma.cc/WC4L-7GUF>]. Subsequently, South Africa revoked its notification of withdrawal. See U.N. Secretary-General, Letter dated Mar. 7, 2017, C.N. 121.2017.TREATIES.XVIII.10, <https://treaties.un.org/doc/Publication/CN/2017/CN.121.2017-Eng.pdf> [<https://perma.cc/8LRA-J2SM>].

UNSC, allowed Al-Bashir to visit their territory, to conduct diplomacy business as usual and, in general, showed no disposition to execute the request for arrest and surrender. In conclusion, the appeals chamber would have to recognize that the world—or a big part thereof—does not consider itself under a legal obligation, or even a moral one, to implement an arrest warrant issued in connection with UNSC Resolution 1593 (2005).

While adopting this course of action, the appeals chamber would be pointing out that the real culprits of the whole mess are not only the previous contradictory decisions of the ICC chambers and the *Arrest Warrant* but also, and perhaps primarily, UNSC Resolution 1593 (2005) itself. Indeed, the appeals chamber could have alluded to the fact that support for an ICC role on the Darfur situation lacked sufficient political backing from the beginning:

The United States was strongly opposed to the referral . . . [and] would have preferred a hybrid tribunal in Africa China abstained from the vote . . . because of ‘major reservations’ regarding some of the provisions of the Rome Statute and because it believed that the perpetrators should be tried in Sudanese courts. The Algerian representative would have preferred an African Union–devised solution to the problem of Sudanese impunity as well as to resolve the conflict itself. The Brazilian representative indicated strong support for the ICC and the referral but objected to the resolution’s paragraph 6, which proclaimed the U.S. view on the selective jurisdiction of the Court and thus ‘would not strengthen the role of the International Criminal Court.’³²¹

After noting that perhaps such insufficient political backing is a symptom of a larger problem that has not yet abated and continued to play a role on the whole controversy, the appeals chamber could have held that—in light of the politically charged nature of the issue and taking into account the perplexities generated by the *Arrest Warrant* and the three-tiered system apparently created by the resolution—it could not “reach a definitive conclusion” as to whether the real intention of the UNSC was to allow it to issue peremptory arrest warrants which are binding on anyone else other than the Government of Sudan.

In essence, therefore, the appeals chamber should have clarified that the requests for the arrest and surrender of Al-Bashir are, on the main, non-peremptory arrest warrants. As a result, for the time being, the only unequivocal conclusion would be that only the Government of Sudan has a peremptory obligation to arrest and surrender Al-Bashir. Lastly, it should have noted that such a conclusion could change, if the UNSC provided some sort of guidance to the contrary. While adopting this course of action, the appeals chamber would have opened a door for a constructive interaction with the UNSC,³²² would have contributed to a reduction of “interstate conflict,” and, it would have transformed itself into a tool of the UNSC, not only in theory, but also in practice. Or, not

321. BENJAMIN SCHIFF, BUILDING THE INTERNATIONAL CRIMINAL COURT 229-32 (2008).

322. See discussion *infra* Part III.

really a simple tool but an early 21st century *sui generis* Chapter VII tribunal that is guided by two important purposes or motives: not only by the purpose that “the most serious crimes of concern to the international community as a whole must not go unpunished,” but also by the “highest motive of international policy” of maintaining international peace and security.³²³

III – KEY FINDINGS 8-11: NO NEED TO REFER THE MATTER TO THE UNSC

The eighth key finding of the appeals chamber provides that

The first clause of article 87(7) of the Statute consists of two cumulative conditions, namely, (i) that the State concerned failed to comply with a request to cooperate; and (ii) that this non-compliance is grave enough to prevent the Court from exercising its functions and powers under the Statute. It is only when the Chamber has established that both conditions are met that it *may* proceed to consider whether to *refer the State* to the . . . UN Security Council³²⁴

Under the ICC Statute, this finding is seemingly correct. However, in the very particular circumstances of this case, it paved the way for the appeals chamber’s two inappropriate rulings mentioned in the Introduction to this Article. According to the first ruling, “Jordan had failed to comply with its obligations under the Statute by not executing the Court’s request for the arrest of . . . Al-Bashir and his surrender to the Court”³²⁵ According to the second, “in the particular circumstances of this case, Pre-Trial Chamber II erroneously exercised its discretion to *refer Jordan* to . . . the Security Council of the United Nations.”³²⁶

In light of the discussion in the previous Section, the appeals chamber should have merely noted that, in relation to the head of state immunity issue, Jordan, like any state party, might have been put into a confounding situation. Moreover, in the specific “League of Arab States” case of Jordan, Jordan simply had a good “legal justification” for not arresting Al-Bashir. Although Jordan did not have to respect an in-existent head of state immunity, it had an apparent conflicting obligation to respect a diplomatic immunity established in a treaty. On its face, Article 11(a) of the 1953 Convention on the Privileges and Immunities of the League of Arab States prohibited Jordan from arresting any Sudanese official in connection with journeys for conferences convened by the League of Arab States, even with regard to international crimes.³²⁷ Article 11(a) states, “Representatives of Member States to the principal and subsidiary organs of the League of Arab

323. See discussion *supra* Section I.2.1 (for parallels with the early 20th century high tribunal to try the Kaiser).

324. Prosecutor v. Al-Bashir, ICC-02/05-01/09 OA2, Judgment in the Jordan Referral re Al-Bashir Appeal, ¶ 8 (May 6, 2019) (emphasis added).

325. *Id.* at 4.

326. *Id.* (emphasis added).

327. Convention on the Privileges and Immunities of the League of Arab States (May 10, 1953).

States and to conferences convened by the League shall, while exercising their functions and during the journey to and from the place of meeting, enjoy. . . [i]mmunity from personal arrest or detention”³²⁸

Naturally, it could be argued that states of the League of Arab States merely wanted to replicate in the treaty the old protection of diplomats and envoys customary rule, a rule that does not extend to international crimes.³²⁹ Hence, they did not want to depart *inter se* from the no-immunity principle with regard to international crimes. Jordan would have argued this was in fact the case if Al-Bashir took advantage of the Arab summit to coordinate a 9/11 style international crime in Amman. In such a scenario, Jordan would have argued that it would be absurd to say that the old envoy customary immunity, and the 1953 treaty immunity from personal arrests, applies to “such crimes.” Hence, Jordan would argue that it did not have to wait for Sudan to waive Al-Bashir’s diplomatic immunity in order to arrest him before he left Amman.³³⁰ Jordan also would have reminded whomever raised an “absolute” argument that the old diplomat or envoy customary immunity was never absolute because, whatever formal credentials the diplomat or envoy possessed, it did not apply if the envoy or diplomat was dispatched with the sole purpose to use a disguised peace mission to exterminate the population of the other country or to assassinate such country’s King or Queen.³³¹

Old considerations aside, because Al-Bashir was a diplomat or an envoy protected by Article 11(a) and went to Jordan on a peaceful mission, Jordan relied on the wording of Article 11 and *justifiably* failed to comply with an arrest warrant issued by the ICC, in order to comply with an equally important obligation arising from a treaty rule which protects the important value of peaceful conduct of diplomatic relations within an important international organization. The common sense conclusion would have been simple: because the “urging” will of the UNSC can neither be interpreted in the sense that it implicitly removed the diplomatic immunity enshrined in the convention nor in the sense that it peremptorily mandated Jordan to comply with an arrest warrant issued by the ICC, Jordan had a good excuse to have failed to comply.³³² Under

328. *Id.* art. 11(a).

329. *See also supra* Section I.3.

330. In the same vein as diplomats (*see supra* Section I.3), in these types of cases, the head of state is no longer a peaceful envoy and can, as a matter of course, be arrested and punished. *But see* Zappalà, *supra* note 152, at 600 (“[i]t is submitted that personal immunity of Heads of State for official visits must always be *preserved*, and even international crimes make no exception”).

331. No one can have any doubt that, if the envoy or diplomat survived an attempted extermination or assassination, his capture and punishment, summarily or otherwise, did not violate the law of nations. *But see* CRYER ET AL., *supra* note 159, at 517 n.78.

332. In light of this conclusion, it is unnecessary to analyze in this Article the key findings 9-11 of the appeals chamber, which contain rather uninteresting considerations about the importance of not refusing to comply with arrest warrants, and the consultations procedure between the court and states prescribed by the ICC Statute.

the ICC Statute's language, the appeals chamber could have merely stated that the effects of the arrest warrant were neutralized for the specific Arab League context because compliance with the warrant apparently required Jordan "to act inconsistently with its obligations under international [treaty] law with respect to the diplomatic immunity of a person."³³³ In sum, the appeals chamber should not have ruled that Jordan failed to comply.³³⁴

Yet, the appeals chamber should have ignored the wording of Article 87(7) and confidently proceeded to formally and immediately communicate the whole matter to the UNSC. Paragraph 9 of UNSC Resolution 1593 (2005) states that the UNSC "[d]ecides to remain seized of the matter."³³⁵ As the UNSC has decided to remain seized of the matter, all important developments must be officially and without delay communicated to the UNSC, irrespective of whether they amount to a failure to comply or not. In the case Jordan had actually failed to comply (as the appeals chamber found it did), the word "may" in Article 87(7) also runs against Article 17 of the Relationship Agreement, "Where a matter has been referred to the Court by the Security Council and the Court makes a finding . . . of a failure by a State to cooperate with the Court, the Court *shall* . . . refer the matter to it"³³⁶

In other words, whatever the case may be (either Jordan failed to comply or it had a justification for not having complied), it is inadequate not to "refer" the matter to the UNSC. Apparently, the appeals chamber boils down the whole issue to the question of whether or not to refer a "country," the state of Jordan, to the UNSC. Ultimately, the appeals chamber (on the grounds of alleged errors of the trial chamber relating to what the word "consultations" means and differential treatment between South Africa and Jordan) decided not to refer "Jordan" to the UNSC.³³⁷ That is, although in the view of the appeals chamber Jordan failed to comply and prevented the Court "from exercising its functions and powers,"³³⁸ this most important and intricate matter and the conclusions of the appeals chamber were not formally referred, communicated, or informed to the UNSC (how one labels the type of interaction here at stake is not important) and its guidance with regard to the whole mess was not decisively sought. That was a missed opportunity to demonstrate the ICC's availability for some sort of more immediate, direct and productive interaction with the UNSC that goes beyond the regular reports about its work.³³⁹ At the end of the day, it also demonstrates that

333. ICC Statute, *supra* note 183, at art. 98.

334. On Jordan and other states' legally justified reluctance to comply with ICC decisions, see also Weatherall, *supra* note 181, at 76 (holding that no "sound legal rationale" has been provided to receiving states of the arrest warrant and, hence, "receiving states may to some degree be forgiven for their reluctance to take action that is, by any measure, extraordinary").

335. UNSC Resolution 1593 (2005).

336. Relationship Agreement, *supra* note 239, at art. 17 (emphasis added).

337. Prosecutor v. Al-Bashir, ICC-02/05-01/09 OA2, Judgment in the Jordan Referral re Al-Bashir Appeal, ¶ 182-213 (May 6, 2019).

338. ICC Statute, *supra* note 183, at art. 87(7).

339. The ICC regularly keeps the General Assembly and the UNSC informed about its work;

the appeals chamber did not really mean what it said, namely that “the ICC [is] at the disposal of the UN Security Council as a tool to maintain or restore international peace and security.”³⁴⁰

CONCLUSION

Ultimately, what is there to say about the judgment of the appeals chamber on what was “perhaps the most legally contentious and politically sensitive issue that the ICC has faced in its history?”³⁴¹ True, the whole approach of the appeals chamber can be excusably viewed as an attempt to “respect” the flawed “full immunity” position of the ICJ (and the acceptance by all sides in the dispute of the *Arrest Warrant* position)³⁴² and, on the other hand, an effort to ensure that immunity of incumbents (or Kings or Queens for life) does not de facto turn into an absolute one and we end up in a world where the most responsible are beyond reach. In that sense, the criticism put forward in this article might be viewed as imbalanced.

Be that as it may, the way the appeals chamber went about the whole problem is deeply flawed from the point of view of the history of international law and it also presents much less than “half of the story” which was forgotten in the *Arrest Warrant*.³⁴³ In fact, it distorted the whole ICL history, which is a disservice for the whole international criminal justice project. The real problem is that, at stake in the whole story is not “charting the course for a brave new world,”³⁴⁴ but the proper unveiling of a wise old one. As the appeals chamber confirmed, if the true past of ICL is not set straight, there is a good chance that one gets its present wrong.

Nonetheless, in chartering such a course, the appeals chamber again brought up the troubling consequences of the *Arrest Warrant* and, ironically, it might have contributed to a revitalization of the whole debate (or so one hopes). ICJ’s extremely flawed rulings should be discarded by the ICC and the ICJ itself, which would do well to take the next opportunity to tackle the matter from the

the ICC President annually delivers a report to the General Assembly, and the Prosecutor often briefs the UNSC.

340. Prosecutor v. Omar Hassan Ahmad Al-Bashir, ICC-02/05-01/09 OA2, Judgment in the Jordan Referral re Al-Bashir Appeal, ¶ 6.

341. Manuel Ventura, *Prosecutor v. Al-Bashir, ICC-02/05-01/09-302, 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*, 111 AM. J. INT’L L. 1007 (2018).

342. Transcript of Record at 7, Prosecutor v. Al-Bashir, ICC-02/05-02/09 (2018).

343. *Arrest Warrant*, *supra* note 203, (Dem. Rep. Congo v. Belg.), Judgment, 2002 I.C.J. 3, 63, ¶ 75 (Feb. 14, 2002) (joint Separate opinion of Judges Higgins, Kooijmans, & Buergenthal).

344. *But see* Tladi, *supra* note 279, at 169-87 (speaking of the issue as an “emotive” one, as it relates with the “soul of international law” and its ability to promote “accountability and justice for the victims of atrocity crimes”).

perspective of “international law viewed as a whole.”³⁴⁵ This view would produce results more in tune with the fathers of international law and the founders of the UN. A simple recognition of the long protection of populations history of international law in extreme cases and the extraordinary powers of the UNSC on the new architecture set up to avert another World War, will easily enable the ICJ to take a step back.

In the beginning of the whole saga, George Fletcher and Jens Ohlin presciently warned that the ICC might have to be “two courts in one” and noted that “[t]he very idea, in fact, that a criminal court should have anything to do with issues of peace and security is rather strange.”³⁴⁶ This is not that strange though. Perhaps what Fletcher and Ohlin were trying to say is that the ICL itself is strange. An international criminal law for barbarisms in war and other extreme inhumanities—primarily directed at the “rulers,” i.e., the very ones who are supposed to be the first enforcers of such law—is, as someone important in this whole story has noted, a strange tribute to reason.

As a permanent institution at the disposal of the UNSC for the maintenance of international peace and security, the ICC will face hard questions about the relationship between war and peace and the difficult task of striking the right balance between international peace and security, and international criminal justice in ongoing conflictual situations involving high state officials. This difficulty explains the “Al-Bashir saga.” Dealing with this is a complex task, but not impossible. Analogous questions were answered, and similar tasks were performed, with wisdom, by the IMT and, on its footpaths, by the Chapter VII tribunals. It is not yet the time to pass final judgment on the ICC but, going forward, common sense is paramount.

345. See U.N. GAOR, 73d Sess., 3d plen. mtg. at 7, UN Doc. A/73/251, (Sept. 21, 2018) (the African Union sought an Advisory Opinion on the whole issue from the ICJ and the matter currently sits with the General Assembly).

346. Fletcher & Ohlin, *supra* note 238, at 428-33.