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Victims' Right to Justice, Immunities and New Avenues for International Criminal Justice

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Abstract

On account of the immunities which foreign State officials enjoy under international law, universal jurisdiction trials fail to offer justice to victims of crimes orchestrated by State authorities. The ICC Appeals Chamber has affirmed that immunities are inapplicable before international courts as no customary rule providing immunities before international courts has taken shape. While plausible, a critical assessment should still be made of which features an international court should have to be genuinely distinguishable from domestic courts, and thereby not be concerned with immunities. In this paper, it is argued that, unlike domestic courts, certain international criminal courts may be expressly endorsed by the international community as organs which may restore peaceful relations between and among states – the very rationale underlying personal immunity – and, as such, provide victims with access to justice.

Keywords

victim's right to justice – immunities of State officials – international criminal courts – universal jurisdiction – general assembly

1 Introduction

Members of civil society and scholars are increasingly turning to States to establish new stand-alone, ad hoc tribunals – e.g., for Syria and for the crime of

aggression in Ukraine – as means to vindicate victims' right to justice.[1] These are important initiatives as the current global landscape suggests that the Rome Statute of the International Criminal Court (Rome Statute)[2] has little potential to attract further ratifications and that the creation by the UN Security Council (SC) of ad hoc tribunals or referral of any new situation to the International Criminal Court (ICC) is unlikely to occur in the near (or even distant) future.[3] Although an unpreceded increase can be witnessed in the number of universal jurisdiction proceedings,[4] which partly fill the gap left by the SC's inactivity, impunity remains for perpetrators of international crimes who run the State machinery, and, as such, are entitled to immunities.

Several structural reasons exist for States to establish ad hoc international criminal courts combining their jurisdiction on specific situations (or international crimes) not currently under the ICC's jurisdiction. Through the establishment of international adjudicatory bodies with their own cooperation and judicial assistance framework – the financial cost as well as the burden of providing access to material and witnesses for successful investigations and prosecutions would be shared by all States parties as well as other States interested to cooperate. Trials at such institutions would be adjudicated by judges with expertise in international criminal law instead of domestic criminal proceedings' judges. Moreover, and this is the focus of this article, such institutions, in contrast to their corresponding domestic institutions, would allegedly not be barred from exercising their jurisdiction over high-ranking officials entitled to personal immunity.

In this paper, the argument is put forward that, where a regime entirely denies the right to justice of victims of international crimes, other States, where

1 See Ingrid Elliott, "'A Meaningful Step towards Accountability'? A View from the Field on the United Nations International, Impartial and Independent Mechanism for Syria", 15 *Journal of International Criminal Justice* (2017) p. 255; Beth van Schaack, *Imagining Justice for Syria* (2021) pp. 238–242; Ewelina U. Ochab, "Experts Call For The Creation Of A Special Tribunal For The Punishment Of The Crime Of Aggression Against Ukraine", *Forbes* (4 March 2022), available https://www.forbes.com/sites/ewelinaochab/2022/03/04/experts-call-for-the-creation-of-a-special-tribunal-for-the-punishment-of-the-crime-of-aggression-against-ukraine/?sh=54a386041e22.

2 Rome Statute of the International Criminal Court, 1998, 2187 UNTS 3 (Rome Statute).

3 Andreas Zimmermann, "Finally … Or Would Rather Less Have Been More? The Recent Amendment on the Deletion of Article 124 of the Rome Statute and the Continued Quest for the Universality of the International Criminal Court", 14 *Journal of International Criminal Justice* (2016) p. 517.

4 Máximo Langer and Mackenzie Eason, "The Quiet Expansion of Universal Jurisdiction", 30 *European Journal of International Law* (2019) pp. 785, 809.

such victims have sought protection and are claiming vindication of their right, are under a duty to seek an alternative judicial avenue to bypass foreign State officials' immunities. In such instances, the international community may (or even ought to) endorse the collective establishment of an international criminal jurisdiction. In the *Jordan Appeals Judgment,* the ICC Appeals Chamber affirmed that the impunity gap left by the immunity of heads of States from foreign criminal jurisdiction could be filled by any criminal jurisdiction that is not of a State.[5] This finding is only partially validated here. On the one hand, the ICC Appeals Chamber's suggestion that an international criminal jurisdiction may not be constricted by the personal immunities which high-ranking officials normally enjoy is considered plausible. On the other hand, it will be claimed that for an international court not to be concerned with personal immunity, it must not only act on behalf of the international community, but also at its behest.

Two caveats of this paper should be mentioned from the outset: First, not all victims might seek prosecution and punishment of their perpetrators, as some may prefer other means of 'justice'.[6] Still, for many groups or societies afflicted by international crimes, fair trial followed by punishment of the perpetrator, if convicted, and international recognition of the wrongs inflicted, feature as prominent understandings of what obtaining justice means.[7] Second, the claims that will be made relate to personal immunity from the jurisdiction of an international criminal court, not immunity from arrest and surrender by States. Yet, all things considered, the ability to indict the otherwise untouchables remains a vital – albeit initial – first step, including for victims seeking 'vindicative satisfaction'.[8]

The inherent link between States' duty to investigate and prosecute international crimes and victims' right to justice, and its manifestation in States' exercises of universal jurisdiction, is explored in Section 2. The law governing immunities of State officials from foreign criminal jurisdiction is laid out in Section 3, with a focus on the International Court of Justice's (ICJ) *Arrest*

5 *Prosecutor v Al Bashir*, Judgment in the Jordan Referral re Al-Bashir Appeal, Appeals Chamber, ICC-02/05-01/09 OA2, 6 May 2019 (hereinafter *Jordan Appeal Judgment*).

6 See e.g., Payam Akhavan et al., "What Justice for the Yazidi Genocide?: Voices from Below', 42 *Human Rights Quarterly* (2020) pp. 1–47.

7 *Ibid*., pp. 15–16.

8 Conor McCarthy, "Victims Redress and International Criminal Justice: Competing Paradigms, or Compatible Forms of Justice?", 10 *Journal of International Criminal Justice* (2012) pp. 365–366. The trial could also take place in absentia. On whether trials in absentia answer to the demands of victims, see C Wheeler, 'Justice in the Absence of the Accused Can the Rights of Victims be Fully Vindicated without the Participation of the Accused?', 17 *Journal of International Criminal Justice* (2019) p. 413.

Warrant Case. The exception for international criminal courts as alluded to in the *Arrest Warrant Case* is addressed in Section 4. In Section 5, the discussion circles back to the ICC *Jordan Appeal Judgment*. A scrutiny of the arguments offered by the ICC Appeals Chamber to hold that immunities are not applicable before international courts (broadly defined), calls into question whether personal immunity rests on the sovereign equality principle alone, whether international courts are solely acting on behalf of the international community, and which elements should define an international court. The means available to the international community to make an international court act at its behest are presented in Section 6.

2 Universal Jurisdiction as an Avenue to Vindicate Victims' Right to Justice

Many victims of international crimes request the States where they are now residing to vindicate their right to justice under the principle of universal jurisdiction. However, States, courts and scholars mostly address universal jurisdiction as a right of States, not of victims.[9] Universal jurisdiction stands for the right of States to extend their criminal jurisdiction over certain conduct, 'irrespective of any link between themselves and the crime, the accused, or the victim.'[10] International lawyers generally justify the right to exercise jurisdiction despite the absence of a nexus with the said conduct with the premise that international crimes are 'offences against the international community'[11] or 'offensive to the international community as a whole'.[12] Hence, every State would be entitled to act on behalf of the international community to defend these interests with criminal sanctions.[13]

9 *Arrest Warrant of 11 April 2000* (*Democratic Republic of the Congo v. Belgium*), Judgment – Dissenting Opinion Van den Wyngaert, 14 February 2002, ICJ Reports (2002) 3, § 51 (hereinafter *Arrest Warrant Case*); *Ibid.* Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, § 50.

10 Ilias Bantekas, "Criminal Jurisdiction of States under International Law", in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (online edn, 2011) § 22. In Bantekas' view, this lack of nexus makes 'evident' that States should not be entitled to exercise universal jurisdiction over any type of conduct', except international crimes (*ibid.*). In the current work, international crimes stand for crimes established under customary international law.

11 Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (1994) pp. 56–57.

12 Malcom Shaw, *International Law* (2008) p. 668.

13 See infra note 76–79.

With the recent upsurge of domestic prosecutions under the universality principle, this type of proceedings is increasingly conceived as a proper legal avenue to provide victims of international crimes with a right to justice. At the root of this conceptual shift lies States' duty to investigate and prosecute international crimes, which itself has long been associated with victims' right to justice. Human rights bodies, such as the Committee Against Torture (CAT), the Human Rights Committee, and the European Court of Human Rights (ECtHR), have interpreted the right to redress or effective remedy for serious violations of human rights as including criminal investigations leading to the prosecution of the perpetrators.[14] The Inter-American Court of Human Rights (IACtHR), with its emphasis on punishment in the interest of victims,[15] showcases the strongest form of a victims' right to justice doctrine. The case law of the Committee on Enforced Disappearance and of the Committee on the Elimination of Discrimination Against Women confirm that victims of grave crimes have a right to see the responsible persons prosecuted, convicted and punished.[16] In international criminal law, victims' right to justice is now embodied in the infamous 'fight against impunity', a global fight which calls upon all States to ensure prosecutions of perpetrators of international crimes by taking measures at the national level and by enhancing international cooperation.

The rather complicated question is whether States owe victims of crimes which happened outside their territory and jurisdiction the duty to investigate and prosecute. Many treaties, such as the Geneva Conventions and the Convention against Torture, require that their States parties investigate and prosecute certain conduct when the alleged perpetrator happens to be in their territory and is not extradited.[17] According to the International Law Commission (ILC), the obligation to exercise criminal jurisdiction when an alleged offender is present in the State territory, regardless of any other jurisdictional links, implies an obligation to establish universal jurisdiction in the

14 UN CAT, 'General Comment No 3 on the Implementation of Article 14 by States Parties' (2012) UN Doc CAT/C/GC/3, §§ 16–17; UN HRC, *Arellana v. Colombia*, Comm. no. 563/1993, 27 October 1995, §§ 8.2, 10.; ECtHR, *Erikson v. Italy*, Appl. no. 37900/97, Decision as to Admissibility, 26 October 1999 (adds 'capable of leading to the identification and punishment'); see also UN CERD, *Habassi v. Denmark*, Comm. no. 10/1997, 17 March 1999, § 6.1.

15 IACtHR, *Velásquez Rodríguez v. Honduras*, Judgment (Merits), 29 July 1988, §§ 178–181.

16 UN CED, *Yrusta v Argentina*, Comm. no. 1/2013, 11 March 2016; UN CEDAW, *S.H. v Bosnia and Herzegovina*, Comm. no 116/2017, 9 July 2020, §§ 8.3, 10.

17 E.g. Arts. 49, 50, 129, and 146, respectively, of the First, Second, Third, and Fourth Geneva Conventions; Art. 85 (1), (3) and Art. 88 (2) of Additional Protocol I of 1977; Art. 7 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

domestic law in the first place.[18] In the *Habré* case, the ICJ confirmed that the compliance with their obligation to establish universal jurisdiction of their courts by States parties to the UN Convention Against Torture, is a necessary condition for enabling preliminary inquiries and for submitting cases to their competent authorities for the purpose of prosecution.[19] The *Habré case* revolved around the obligation of Senegal towards other parties to the Convention Against Torture to prosecute or extradite Hissène Habré, former President of Chad, who resided in Senegal, for the crimes he was alleged to have committed against Chadians in Chad.[20]

Before the case appeared on the ICJ docket, the CAT had already found that Senegal was in violation of its obligation arising under the Convention. Interestingly, the CAT considered that the communication's authors – seven Chadian national living in Chad – had the required victim status to trigger its competence: not because they were victims of Habré, but in particular for being victims of Senegal's failure to bring criminal proceedings against him.[21] A congruent inference is that, when a State party to the Convention against Torture fails to exercise universal jurisdiction over an alleged perpetrator present in its territory, not only does it breach conventional obligations, but it also violates victims' right to justice.

The debate over universal jurisdiction becomes particularly fraught regarding accused not present in the forum State's territory, also known as absolute universal jurisdiction (as opposed to conditional universal jurisdiction). The main reason why absolute universal jurisdiction is often disputed is because of the alleged complete inexistence of any connection between the State and the crime, with not even the accused being present in the forum State.[22] Two observations may be offered to temper this disapproval. Firstly, while absolute universal jurisdiction is often conflated with in absentia trials, which may

18 ILC, The Obligation to Extradite or Prosecute (aut dedere aut judicare): Final Report, 2 *Yearbook of the International Law Commission* (2014) pp. 8–9.

19 *Questions relating to the Obligation to Prosecute or Extradite* (*Belgium v. Senegal*), Judgment, 20 July 2012, ICJ Reports (2012) 422, at 451, § 74.

20 However, see *Ibid*., Separate Opinion of Judge Cançado Trindade, §§ 148, 176 (presenting Senegal's failure to prosecute Habré as a denial of justice).

21 UN CAT, *Suleymane Guengueng et al. v. Senegal*, Comm. no. 181/2001, 19 May 2006 2006 (the complainants had instituted the proceedings before the Senegalese courts, which had been halted, see also UN CAT, *H.B.A. et al. v Canada*, Comm no 536/2013, 2 December 2015, para. 9.7).

22 *Arrest Warrant Case,* Separate Opinion of Judge Rezek, § 6, 10; *Ibid*. Declaration of Judge Ranjeva, § 3.

indeed warrant fair trial concerns,[23] some States – such as Germany, South Africa and Switzerland – restrict the 'absolute' scope to the pre-trial stage.[24] Secondly, should the accused's presence (rather than nationality) create a sufficient link to justify conditional universal jurisdiction, a similar connection between the victims and the forum State may be found in most absolute universal jurisdiction cases.[25] International law does not recognize victim's residency as grounds for jurisdiction. Yet, a human rights duty to pursue investigations, and ask for the extradition of the suspect in view of prosecution, may arise for the victims' host State when no alternative forum may exist to vindicate the harm inflicted upon these individuals who are now under its jurisdiction.[26] Some soft law instruments, such as the Basic Principles on the Right to a Remedy and the UN Principles to Combat Impunity,[27] also point in this direction. Notably, in the latter instrument, no condition for the exercise of universal jurisdiction is expressly mentioned.

Some recent scholarship views the authority of universal jurisdiction as grounded in the right to justice. Hovell argues that 'universal jurisdiction is best understood as being based in an individual's right of access to justice for victims of serious international crimes'.[28] For Hovell, the significant role played by victim communities in motivating and supporting, if not instituting, universal jurisdiction trials reveals 'that universal jurisdiction is most often exercised at the behest, and in the interests of, victims.'[29] Hovell also refers to Mégret's and Mills' recent research on the need for theories of universal jurisdiction to integrate victims' right of access to justice to support her claim that the

23 Claus Kreß, "Universal Jurisdiction over International Crimes and the Institut de Droit International", 4 *Journal of International Criminal Justice* (2006) pp. 576–579, 581–584.

24 See Gerhard Werle and Paul Christoph Bornkamm, "Torture in Zimbabwe under Scrutiny in South Africa: The Judgment of the North Gauteng High Court in SALC v. National Director of Public Prosecutions", 11 *Journal of International Criminal Justice* (2013) pp. 666–668.

25 Frédéric Mégret, "The 'elephant in the room' in Debates about Universal Jurisdiction: diasporas, duties of hospitality, and the constitution of the political', 6 *Transnational Legal Theory* (2015) p. 89.

26 *Ibid*., pp. 112–114.

27 GA Res. 60/147, 16 December 2005, preamb. § 8, Principles 12, 3(c); UN Commission on Human Rights, Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, UN Doc. E/CN.4/2005/102/Add.1 8 February 2005, Principle 21(1).

28 Devika Hovell, "The Authority of Universal Jurisdiction", 29 *European Journal of International Law* (2018) p. 455.

29 *Ibid.,* pp. 453, 449–455.

authority of universal jurisdiction does not reside in the interest of the 'international community'.[30]

While this literature rightly indicates that victims have been the leading force behind the rise of universal jurisdiction trials, both approaches (victims and international community) on the grounds for a State to exercise universal jurisdiction are not mutually exclusive. From a public international law perspective, States exercising universal jurisdiction legally act on behalf of the international community. At the same time, from a human rights law standpoint, such States are acting at the behest of victims claiming their right to justice. This should be contrasted with certain international criminal courts, which act on behalf of, and at the behest of, the international community. Although international criminal courts are complementary to domestic jurisdiction seeking to vindicate victim's right to justice, they do not act at the behest of victims, but of the international community.

True, the creation of international criminal jurisdiction has been applauded as a vindication of victim's right to justice.[31] Even where such international criminal institutions confined the victims' role to that of witnesses, such as at the International Criminal Tribunals for the Former Yugoslavia (ICTY) and Rwanda (ICTR) and the Special Court for Sierra Leone (SCSL), they were responding to victims' wish to have their perpetrators investigated, prosecuted and punished.[32] The Rome Statute was a further major step in the affirmation of a victims right to justice, in that it 'not only granted victims a right to reparations, but [...] also introduced a totally novel participatory regime' for victims.[33] However, the ICC does neither have universal jurisdiction nor can its jurisdiction be triggered by victims.

The right of access to justice is not absolute, including at the domestic level, even if some interpret it as having attained a *jus cogens* status.[34] States'

30 Mégret, *supra* note 25, p. 89; Alex Mills, "Rethinking Jurisdiction in International Law", 84 *British Yearbook of International Law* (2014) pp. 235–237; for a variation see Yuna Han, "Should German Courts Prosecute Syrian International Crimes? Revisiting the 'Dual Foundation' Thesis", *Ethics & International Affairs* (2022, forthcoming).

31 Valentina Spiga, "No Redress without Justice: Victims and International Criminal Law", 10 *Journal of International Criminal Justice* (2012) p. 1383.

32 Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991, UN Doc. A/49/342S/1994/1007, 29 August 1994, §§ 50–51.

33 Christine Van den Wyngaert, "Victims before International Criminal Courts: Some Views and Concerns of an ICC Trial Judge", 44 *Case Western Reserve Journal of International Law* (2011) p. 477; Art. 68(3) of the Rome Statute.

34 IACtHR, *Goiburú, et al. v. Paraguay*, Judgment on Merits, Reparations and Costs, Series C, No. 153, 22 September 2006, §§ 84, 131; *Prosecutor v El Sayed*, Order of 15 April 2010

regulations limiting or impeding individuals' access to justice may be considered as justified in so far as they do not result in an entire denial of justice.[35] The questions addressed in the next sections, is whether a general rule under public international law requires domestic criminal courts to uphold the immunity of foreign State officials even in cases of international crimes; if so, whether any special rule or exception could ensure that no denial of justice takes place.

3 Immunities from Foreign Criminal Jurisdiction

Under customary international law, States have a duty to grant immunity from their jurisdiction to officials of other States. Besides diplomatic immunities, international law provides all State officials with functional immunities and certain high-ranking officials with a personal immunity from the jurisdiction of other States.

Functional immunity (immunity *ratione materiae*) is not attached to the position of the official, but to the acts performed in an official capacity, therefore applying to any person who conducted such acts. In contrast, personal immunity (immunity *ratione personae*) is restricted to certain high-ranking officials, in particular heads of State, heads of government and ministers of foreign affairs. Personal immunity covers all acts performed, whether in a private or official capacity, or prior to or during the term of office.

There is an emerging consensus that personal immunity is absolute. In the *Arrest Warrant Case*, the ICJ found that customary international law did not provide any form of exception to personal immunity for international crimes,[36] yet spelled out four circumstances which would ensure that personal immunity not equal impunity. The first three circumstances relate to prosecutions before domestic courts, while the fourth is about international courts. A brief assessment whether the ICJ offered potentially effective avenues to those seeking justice at the domestic level is in order.

Assigning Matter to Pre-Trial Judge, President of the Special Tribunal of Lebanon, CH/PRES/2010/01, 15 April 2010, § 29.

35 ECtHR, *Jones and others v. the United Kingdom*, Appl. nos. 34356/06 & 40528/06, Judgment, 14 January 2014, §§ 186, 201; ILC, Fifth report on immunity of State officials from foreign criminal jurisdiction, by Concepción Escobar Hernández, Special Rapporteur, UN Doc. A/CN.4/701 (2016), § 88.

36 *Arrest Warrant Case*, § 58.

The ICJ held that personal immunity is irrelevant in the home State of the high-ranking officials;[37] that, personal immunity does not apply if waived, and;[38] that once high-ranking officials entitled to immunity *ratione personae* cease to hold office, they lose their personal immunity but remain protected by their functional immunity.[39] On the last point, the Court ruled that a former high-ranking official can be tried before foreign domestic courts in respect of acts committed in a private capacity.[40] Notwithstanding the ICJ ruling, the ILC provisionally decided in the course of its work on the immunity of State officials, that functional immunity does not apply to genocide, crimes against humanity, war crimes, apartheid crimes, torture and enforced disappearance.[41]

Overall, the ICJ *Arrest Warrant Case* offered little hope to those seeking accountability for international crimes perpetrated by State officials. Any prospect of trials of sitting high-ranking officials taking place at home or before a foreign jurisdiction mostly rely on a future regime change. In other words, unless alternative avenues are open to those seeking justice for the atrocities perpetrated by the authorities of a never-ending regime, international law immunities generally result in the victims' loss of access to justice. The fourth circumstance alluded to by the ICJ, which is discussed in the next section, concerns the possibility of trials before certain international criminal courts.

4 Personal Immunity before Certain International Criminal Courts

Given the dire chance that domestic prosecutions take place, the *Arrest Warrant Case* also mentioned in passing that an official entitled to personal immunity 'may be subject to criminal proceedings before certain international criminal courts where they have jurisdiction',[42] specifying the ICTY and ICTR as well as the ICC. In particular, the ICJ quoted Article 27 of the Rome Statute, which explicitly discards any plea of immunity as a bar or defence.[43] Yet, it is unclear whether Article 27 is actually reflective of customary international law or only affects States consenting to the ICC's jurisdiction.

37 *Ibid.*
38 *Ibid,* § 61.
39 *Ibid.*
40 *Ibid*; for a critique on international crimes qualifying as private acts, Antonio Cassese, "When May Senior State Officials Be Tried for International Crimes? Some Comments on the Congo v. Belgium Case", 13 *European Journal of International Law* (2002) p. 865.
41 ILC, Report of the International Law Commission, UN Doc. A/72/10, draft Art. 7.
42 *Arrest Warrant Case*, § 61.
43 *Ibid.*

The customary-based perspective would be that, since Nuremberg, an exception to immunity *ratione personae* has been established under customary international law for trials before international courts.[44] Earlier in its judgment, the ICJ found that the rules discarding immunities contained in the Nuremberg Charter (Article 7), Tokyo Charter (Article 6), ICTY Statute (Article 7(2)), ICTR Statute (Article 6 (2) and Rome Statute (Art. 27) do not bear on the customary international law applicable to national courts.[45] This assertion may lead to the assumption that the ICJ inferred that customary international law exception to personal immunity exists but strictly pertains to international criminal courts and tribunals.

Conversely, the consent-based position denies that such exception has crystallized in customary international law as of yet. The ICJ indeed specified that immunities do not apply before 'certain international criminal courts, where they have jurisdiction'. Hence, for immunities not to apply before a specific international criminal court, its jurisdiction would need to be predicated on some form of consent by the concerned State.[46] To do otherwise would arguably infringe the *pacta tertiis* rule,[47] that is, international treaties do not establish any obligations and rights for third countries.[48]

The rigour of the consent-based position is however affected by two frailties. First, it acknowledges that indirect forms of consent may substantiate jurisdiction. The notion of 'consent' – especially with regard to Nuremberg and the ICTY –[49] is comprehended as a highly (if not excessively) flexible concept, which puts in question the consent-based position's alleged adherence to strict positivism. Second, its view on the legal status of Article 27 Rome Statute conflicts with two jurisdictional channels of the ICC, thus suggesting that States opted for the customary-based position. Article 27 does not recognize that

44 See e.g., Antonio Cassese, *International Criminal* Law (2008) pp. 311–312; Paola Gaeta, "Does President Al Bashir Enjoy Immunity from Arrest", 7 *Journal of International Criminal Justice* (2009) p. 320; Claus Kreß, "The International Criminal Court and Immunities under International Law for States Not Party to the Court's Statute", in M. Bergsmo, L. Yang (eds), *State Sovereignty and International Criminal Law* (2012) pp. 245–248.

45 *Arrest Warrant Case*, § 58.

46 See e.g. Dapo Akande, "International Law Immunities and the International Criminal Court", 98 *American Journal of International Law* (2004) pp. 416–418, 420.

47 *Ibid*. p. 420.

48 See Art. 34, Vienna Convention on the Law of Treaties, 1969, 1155 UNTS 331.

49 The Allies are deemed to have consented on behalf of Germany to the Nuremberg Tribunal. FRY's consent to the ICTY is inferred from Yugoslavia ratification of the UN Charter, while FRY was not recognized as a UN Member State at the time of the tribunal establishment, see General Assembly, 7th Plenary Meeting, UN Doc A/RES/47/1, 22 September 1992.

high-ranking officials from non-party States may be immune from the Court's jurisdiction, while the Statute in Articles 12(2)(a) and 13(b), respectively, lays down that nationals of non-consenting States may fall under its jurisdiction when they commit crimes within the territory of States parties, or as part of a situation referred by the SC under Chapter VII of the UN Charter.[50] On the face of it, the Statute therefore seems to indicate that immunities are inapplicable before the ICC, even if the proceedings concern high-ranking officials of States neither party nor consenting to the Court's jurisdiction.

Article 27 lay at the heart of the *Al Bashir Case,* which sprung from the SC referral of the situation in Darfur, Sudan, to the ICC.[51] After over a decade of confusion about whether Article 27 should be understood as a customary or a treaty norm, the 'Al Bashir saga' reached its climax in the ICC's *Jordan Appeal Judgment*.

5 The ICC Jordan Appeal Judgment

The *Al Bashir case* concerned the immunity from arrest and surrender of the (then) incumbent head of State of Sudan, Omar Al Bashir, to the ICC. In addressing whether States parties had an obligation to arrest and surrender Al-Bashir when found in their territory, the Court also had to rule on whether it itself had jurisdiction over him. With Sudan not being a State party to the Rome Statute, some ICC Pre-Trial Chambers held that no immunity existed before international criminal courts under customary international law,[52] whereas others relied on the obligation of Sudan to cooperate with the Court flowing from the SC resolution which had referred the situation in Darfur, Sudan, to the ICC.[53] After repeated changes in the Pre-Trial Chambers case

50 On whether these are relying on some form of consent, see Alexandre Skander Galand, "The Nature of the Rome Statute of the International Criminal Court (and its Amended Jurisdictional Scheme)", 17 *Journal of International Criminal Justice* (2019) p. 944.

51 UNSC Res. 1593 (31 March 2005) UN Doc S/RES/1593.

52 *Prosecutor v Al Bashir,* Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir, Pre-Trial Chamber I, ICC-02/05–01/09, 12 December 2011, §§ 36, 38–39; *Prosecutor v Al Bashir,* Decision pursuant to article 87(7) of the Rome Statute on the refusal of the Republic of Chad to comply with the cooperation requests issued by the Court with respect to the arrest and surrender of Omar Hassan Ahmad Al Bashir, Pre-Trial Chamber I, ICC-02/05-01/09-140, 13 December 2011, § 13.

53 *Prosecutor v Al Bashir,* Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al-Bashir's Arrest and Surrender to the Court, Pre-Trial

law, the Appeals Chamber in the *Jordan Appeal Judgment* ruled in favour of the 'customary international law' line.[54]

To the great surprise of many, including this author,[55] the ICC Appeals Chamber found that no 'Head of State immunity' before international criminal courts exists under customary international law. For the Appeals Chamber, whether sufficient State practice and *opinio juris* exist to establish a customary exception to personal immunity for proceedings before international criminal courts is not the question at stake, but rather whether sufficient State practice and *opinio juris* show that high-ranking State officials have ever been entitled to immunity from international criminal jurisdiction.[56] The Chamber takes the position that international courts are an entirely different species than national courts. As a different species, the assessment of customary international law applicable to international courts would restart from zero.

The Chamber's point of departure on how to assess customary international law when it comes to international courts is tricky, but plausible. Yet, what is the distinguishing factor between international and national courts? The Appeals Chamber held that the lack of customary law recognizing personal immunity before an international court is explained by the fact that, while the latter acts on behalf of the international community as a whole, national courts are essentially the expression of a State's sovereign power.[57] As such, domestic courts 'are necessarily limited by the sovereign power of other States', writes the Court.[58] For international courts, which are in a vertical relationship with States instead, 'the principle of *par in parem non habet imperium*, which is based on the sovereign equality of States, finds no application.'[59]

Chamber II, ICC-02/05-01/09-195, 9 April 2014, § 29; *Prosecutor v Al Bashir,* Decision under Article 87(7) of the Rome Statute on the Non-Compliance by South Africa with the Request by the Court for the Arrest and Surrender of Omar Al-Bashir, Pre-Trial Chamber II, ICC-02/ 05-01/09-302, 6 July 2017, §§ 88–89; *Prosecutor v Al Bashir,* Decision under article 87(7) of the Rome Statute on the non-compliance by Jordan with the request by the Court for the arrest and surrender or Omar Al-Bashir, Pre-Trial Chamber II, ICC-02/ 05-01/09-309, 11 December 2017, § 44.

54 *Jordan Appeal Judgment,* §§ 113–114.

55 Alexandre Skander Galand, *UN Security Council Referrals to the International Criminal Court: Legal Nature, Effects and Limits* (2018) pp. 172–174.

56 *Ibid.,* § 116.

57 *Ibid.,* § 115.

58 *Ibid.*

59 *Ibid.*

5.1 *Is It All about Par in Parem?*

Contrary to the Appeals Chamber's finding,[60] the *par in parem* principle more fully explains the rationale for upholding functional immunity than personal immunity.[61] Functional immunity holds that State officials cannot be held responsible before a foreign jurisdiction for acts attributable to the State.[62] It thus ensure that no other State than their own has the authority to judge acts undertaken in an official capacity, or from a sovereign equality perspective, of judging the conduct of another State – the very essence of the *par in parem* principle. This elucidates why many domestic courts consider that functional immunity does not apply to international crimes: because the commission of such acts cannot be official in nature,[63] or that sovereignty does not allow for the commission of international crimes, and therefore sovereign immunity does not cover these acts.[64]

In contrast, the values underlying immunity *ratione personae* are not exclusively related to safeguarding the *par in parem* principle. As the ILC Secretariat affirmed, 'the immunity of head of State is today construed as an autonomous institution under international law, inspired by its own *rationale* and subject to a separate regime.'[65] From the outset, the *par in parem* principle fails to explain why immunity *ratione personae* covers official as well as private acts, which are by definition not attributable to the State. Arguably, serving heads of State are often perceived as personifying the State; foreign proceedings against them would symbolically inculpate the State itself. However, the personification theory does not explicate why Ministers of Foreign Affairs are also entitled to personal immunity.[66] The main aim of affording personal immunity to those who do not personify the State is more convincingly to ensure their effective

60 *Jordan Appeal Judgment,* Joint Concurring Opinion of Judges Eboe-Osuji, Morrison, Hofmański and Bossa, §§ 181–182 (hereinafter *Jordan Joint Concurring Opinion*).

61 Robert Cryer et al., *An Introduction to International Criminal Law and Procedure* (2019) 528; *Prosecutor v Blaškić*, Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, Appeals Chamber, IT-95-14-AR108bis 29 October 1997, § 41.

62 *Prosecutor v Blaškić*, *supra* note 61, § 38.

63 See e.g. *Pinochet*, Belgium, Court of First Instance of Brussels, Judgment, 119 *International Law Reports* 349, 6 November 1998.

64 See *Eichmann,* Israel, Supreme Court, Judgment, 36 *International Law Reports* 309–310, 29 May 1962.

65 ILC, Immunity of State Officials from Foreign Criminal Jurisdiction: Memorandum by the Secretariat, UN Doc. A/CN.4/596 (2008), § 103.

66 Arthur Watts, "The Legal Position in International Law of Heads of State, Heads of Government and Foreign Ministers", 247 *Recueil de Cours* (1994) pp. 102–103; *Arrest Warrant Case*, Dissenting Opinion of Judge Al-Khasawneh, § 2.

performance of their functions throughout the world, without fear of arrest and prosecution.[67] A need which indeed makes personal immunity of 'functional necessity' to the stability of international relations.[68]

True, the argument that international courts are unique, appropriate forums to deal with international crimes committed by high-ranking State officials in office has some purchase. The crux of the issue created by personal immunity is a balance between, on the one hand, the need for stability and peace in international relations and, on the other hand, the interest of the international community in punishing international crimes.[69] Yet, balancing these values gives rise to similar State's anxieties towards the international, vertical level as at the inter-State, horizontal level. For instance, South Africa's withdrawal letter from the Rome Statute, issued in response to the *Decision on South Africa's Non-Compliance with the Request to Arrest and Surrender Al-Bashir*,[70] voiced alarming concerns over the ICC's aim of justice and accountability getting precedence over 'the immediate objectives [of] peace, security and stability.'[71] Likewise, the Malabo Protocol, which aims to expand the mandate of the African Court on Human and Peoples Rights to try international crimes, but at the same time awards immunities to all sitting Heads of States, further reflects the uneasy relationship between the 'fight against impunity' and the 'commitment to promote peace, security and stability.'[72] In light of these, it is quite apparent that from States' perspective, the judicial actions of international criminal courts must be acknowledged as potentially detrimental to other fundamental objectives of the international community, such as peace, security and stability. That international criminal courts are better placed to ensure accountability of high-ranking officials because they are not on equal footing with States does not on its own merit solve these tensions.

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67 See Federal Criminal Court (Swtizerland), *A. c. Ministère Public de la Confédération*, Case no. BB.2011.140, Decision of 25 July 2012, § 5.4.2; *Mofaz, Re*, First Instance, ILDC 97 (UK 2004), 12 February 2004, § 11–14.

68 Zsuzsanna Deen-Racsmany, "Prosecutor v. Taylor: The Status of the Special Court for Sierra Leone and Its Implications for Immunity", 18 *Leiden Journal of International Law* (2005) p. 314.

69 *Arrest Warrant Case*, Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, § 5.

70 *Prosecutor v Al Bashir,* Decision under Article 87(7) of the Rome Statute on the Non-Compliance by South Africa with the Request by the Court for the Arrest and Surrender of Omar Al-Bashir, Pre-Trial Chamber II, ICC-02/ 05-01/09-302, 6 July 2017.

71 Republic of South Africa, Withdrawal Notification, UN Doc. C.N.786.2016.TREATIES-XVIII.10, 19 October 2016 (revoked before taking effect).

72 Malabo Protocol, Art. 46A *bis*, preamp. § 5, 11.

That is not to say that the pursuit of accountability for international crimes may never take precedence over personal immunity and the values it seeks to protect. When victims of international crimes are unable to pursue justice because the perpetrators enjoy *de facto* absolute immunity at home and *de jure* absolute immunity from foreign jurisdiction, immunity could be said to equal impunity. In these cases, the States where victims of international crimes have fled to and are asking for redress, may find themselves under the duty to seek alternative ways to fulfil these victims' right to justice. In such instances, the international community may (or even ought to) take the political decision, regardless of the most responsible State's consent, to restore peace through justice. This is revealed in practice from Nuremberg to the SC referrals of the situation in Darfur, Sudan and Libya to the ICC, passing by the ICTY, ICTR and SCSL.

Having established that personal immunity does not solely rely on the *par in parem* principle, the next section unveils this principle's role in how the ICC Appeals Chamber distinguishes between international and national courts.

5.2 *Acting on Behalf of the International Community?*

The gist of the ICC Appeals Chamber's reasoning for distinguishing international courts from domestic courts is that only the former act on behalf of the international community when adjudicating international crimes,[73] while domestic jurisdictions would only exercise their sovereign powers. Disagreeing with this distinction, Kreß has commented that 'national criminal courts, when adjudicating crimes under international law, also act on behalf of the international community. This is most clearly visible in a case where a national criminal court exercises universal jurisdiction over such a crime.'[74] Indeed, emphasizing that international courts are not concerned with immunity *ratione personae* because, unlike national courts, they act on behalf of the international community, undermines the crucial work of domestic jurisdictions in the fight against impunity. The main justification of these States, which assert jurisdiction while lacking any territorial or nationality link with the crime, is that crimes under international law are breaches of obligations *erga omnes*, and that every State thereby has a right (if not an obligation) to adjudicate them on behalf of all States.[75] This is how the Supreme Court of Israel justified its assertion of jurisdiction over Eichmann:

73 *Jordan Appeal Judgment,* § 115.

74 Claus Kreß, *Preliminary Observations on the ICC Appeals Chamber's Judgment of 6 May 2019 in the Jordan Referral re Al-Bashir Appeal* (2019) p. 15.

75 Cedric Ryngaert, *Jurisdiction in International Law* (2015) p. 127.

> The State of Israel, therefore, was entitled, pursuant to the principle of universal jurisdiction, and acting in the capacity of guardian of international law and agents for its enforcement, to try the Appellant.[76]

The same reasoning was stated by a US Court of Appeal in *Demjanjuk,*[77] and some twenty five years later by the High Court of Kenya when upholding the obligation to prosecute or surrender Al Bashir to the ICC,[78] should he ever return to Kenya. The Constitutional Court of South Africa also substantiated South Africa's duty to investigate alleged crimes against humanity perpetrated by Zimbabwean officials against Zimbabwean nationals in Zimbabwe on this basis.[79] Interestingly, however, South Africa's Constitutional Court conceded that '[i]f Zimbabwe were able and willing to investigate and prosecute the alleged crimes of torture, there would be no place for South Africa also to do so.'[80] The latter subsidiarity and complementarity considerations show how victims' right to justice can serve as a domestic trigger for a State to act on behalf of the international community,[81] but that the principle of non-intervention may instead demand that a State limits its exercise of universal jurisdiction to cases where the most involved State fails to provide access to justice.

Obviously, States do not exercise universal jurisdiction exclusively in the interest of the international community. It may also be for the State's own interest in, as seen above, providing justice to victims or, in certain cases, for some other political purposes. Among others, Langer argues that current practice reveals that States do not exercise universal jurisdiction as global enforcers of the anti-impunity norm but rather as an immigration policy to ensure that international crimes' perpetrators do not find a safe haven in their territory.[82] Most importantly, universal jurisdiction has sometimes been resisted on account of the lingering risk that national authorities might also use

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76 *Eichmann, supra* note 64, § 12.

77 *Demjanjuk*, US Court of Appeals (Sixth Circuit), 3776 F.2d 571, 31 October 1985, § 21.

78 *The Kenya Section of the International Commission of Jurists v. the Attorney-General and Others*, Miscellaneous Criminal Application 685 of 2010, Judgment of 28 November 2011, High Court of Kenya, (2011) eKLR, p. 14.

79 *National Commissioner of The South African Police Service v Southern African Human Rights Litigation Centre and Another*, Constitutional Court, South Africa, CCT 02/14, 30 October 2014, §§ 4, 80.

80 *Ibid.* § 62.

81 The case was brought by two NGOs: one representing exiled victims, the other providing support to human rights and public interest ligation.

82 Máximo Langer, "Universal Jurisdiction is Not Disappearing: The Shift from 'Global Enforcer' to 'No Safe Haven' Universal Jurisdiction", 13 *Journal of International Criminal Justice* (2015) p. 245.

prosecutions in the name of the international community to unduly impede or limit a foreign State's ability to engage in international affairs.[83] Many States from the Global South who indeed support the universality principle for certain crimes, still express the fear that it be selectively, arbitrarily or politically abused.[84]

In the seminal *Decision on Interlocutory Appeal on Jurisdiction*, the ICTY Appeals Chamber juxtaposes the hazards of domestic trials conducted under the universality principle with the safeguards offered by trial before an international criminal court as follows:

> [O]ne cannot but rejoice at the thought that, universal jurisdiction being nowadays acknowledged in the case of international crimes, a person suspected of [international crimes] offences may finally be brought before an international judicial body for a dispassionate consideration of his indictment by impartial, independent and disinterested judges coming, as it happens here, from all continents of the world.[85]

The uneasiness which the ICTY Chamber expressed towards domestic jurisdiction acting under the universality principle was perhaps more related to the accused's fair trial rights, in particular, the right to an independent and impartial tribunal. The State from which the accused hails often shares this disquiet, especially should the accused be one of its high-ranking officials. The argument of international courts not being in a horizontal relationship with States hardly mitigates this apprehension. Indeed, a State, of which officials are accused of international crimes, may be more concerned with whether a certain international court with jurisdiction over the conduct is sufficiently independent, impartial and objective to conduct highly political trials.

5.3 *Which Courts Are International?*

Pursuant to the ICC's Appeals Chamber's reasoning, the customary rule of personal immunity to which high-ranking officials are normally entitled would not be applicable before any criminal court that qualifies as 'international'. Two States could thus create an international adjudicatory body with jurisdiction over crimes perpetrated in a third State, and indict the head of that State.

83 See *Arrest Warrant Case*, Separate Opinion of President Guillaume, § 14.

84 See Report of the Secretary-General, The Scope and Application of the Principle of Universal Jurisdiction, UN Doc. A/66/93, 20 June 2011, § 109 (African Union's Comments).

85 *Prosecutor v Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Appeals Chamber, Case No IT-94-1, 2 October 1995, § 62.

Akande, Jacobs and Heller, among others, have been particularly critical about this scenario.[86] Their reason is that by creating such body, the two States are simply doing together what they could not have done alone, hence *nemo dat quod non habet*. However, if the ICC Appeals Chamber's claims of no immunities under customary international law vis-à-vis international courts are given credence, the *nemo dat quod non habet* principle is effectively circumvented.

Assuming that this is indeed the current state of customary international law, the remaining issue is whether the scope of the customary inapplicability of immunities is limited to 'certain' international criminal courts. Unlike the ICJ in the *Arrest Warrant Case*, the ICC Appeals Chamber omits to emphasize that the irrelevance of personal immunity is only for 'certain' international criminal courts. Quite the contrary, the Chamber posits that immunities are inapplicable before any courts which are not of a State. The Joint Concurring Opinion of Judges Eboe-Osuji, Morrison, Hofmański and Bossa (Joint Concurring Opinion), incorporated into the main judgment by references, defines an 'international court' as 'an adjudicatory body that exercises jurisdiction at the behest of two or more states'.[87] This broad definition encompasses two requirements: the source of jurisdiction and an independent legal personality.

An international court exercises 'international' jurisdiction when such jurisdiction was conferred, among other ways, 'by treaty', 'by instrument of promulgation, referral or adhesion made by an international body or functionary empowered to do so'.[88] For the Joint Concurring Opinion, 'the source of the jurisdiction that the court is meant to exercise, is the ultimate element of its character as an international court'.[89] Simply because an international court's legal basis is an international instrument – be it of regional or universal orientation, created by two or over one hundred States, or by the SC or the UN Secretary General – it 'exercises the jurisdiction of no one sovereign. It exercises the jurisdiction of all the concerned sovereign'.[90]

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86 Akande, *supra* note 46, p. 418; Kevin Jon Heller, "Some (Tongue in Cheek) Advice for Iran Regarding Trump"d, OpinioJuris, 2 July 2020, available https://opiniojuris.org/2020/07/02/some-tongue-in-cheek-advice-for-iran-regarding-trump/; Dov Jacobs, "You Have Just Entered Narnia: ICC Appeals Chamber adopts the worst possible solution on immunities in the Bashir case", Spreading the Jam, 6 May 2019, available https://dovjacobs.com/2019/05/06/you-have-just-entered-narnia-icc-appeals-chamber-adopts-the-worst-possible-solution-on-immunities-in-the-bashir-case/.

87 *Jordan Joint Concurring Opinion,* § 56.

88 *Ibid.*

89 *Ibid.* § 57.

90 *Ibid.* §§ 57, 59.

The main judgment's emphasis on international courts 'not acting on behalf of a particular State or States',[91] suggests that a treaty-based court might still be acting on behalf of its founding States. The Chamber seems to posit that a court must be of a distinct legal personality from its Member States to be really international.[92] This would indeed be a necessary test to establish its independence from its member States. An organization with its own legal personality (theoretically) has an autonomous will differing from that of its member States[93] – and if it's a criminal court, it would exercise a distinct (international) criminal jurisdiction.

According to the Joint Concurring Opinion, international courts are seized of jurisdiction 'for purposes of greater perceptions of "objectivity"'.[94] However, this feature is not made a determinant element of its definition of international courts before which personal immunity does not apply. Rather, it is assumed that, because they are pooling jurisdiction – even of a limited number – of States of which they are theoretically independent, international courts are perceived as objective. Three observations militate for an additional safeguard – establishing the court's 'objectivity' – to be adduced to the elements of source and distinct legal personality. First, even if the statute of a bilateral court (or a regional court) were to have strict rules of impartiality, it is questionable whether when judging the head of State of a third State it would be perceived as more objective than the domestic court of one of its founding members. If one takes the ICTY Appeals Chamber's passage quoted above on why international courts may be favoured over domestic jurisdiction – besides fair trial rights, including right to an independent and impartial tribunal, the Chamber also attributed a pivotal role to the universal composition of the bench in ensuring their objectivity, or, at best, lack of prejudice towards the accused. In a similar vein, Kreß suggests that the absence of a customary rule of immunity before international courts only applies to those international courts 'that credibly display [an] universal orientation and that are therefore entitled to the perception of being reliabl[y] shielded against the risk of hegemonic abuse.'[95]

Second, international courts are never entirely free from States' political influence, or even interference. Indeed, several scholars have demonstrated how powerful States seek to control the ICC and weaker States have succeeded

91 *Jordan Appeal Judgment,* § 115.

92 See *Request under Regulation 46(3) of the Regulations of the Court,* Decision on the 'Prosecution's Request for a Ruling on Jurisdiction on Article 19.3 of the Statute', Pre-Trial Chamber I, ICC-RoC46(3)-01/18-37, 6 September 2018, § 48.

93 Gaeta, *supra* note 44, p. 321.

94 *Jordan Joint Concurring Opinion,* § 63.

95 Kreß, *supra* note 74, p. 18.

in instrumentalizing the ICC to deal with their political conflicts through self-referrals.[96] In Ba's words, '[i]nternational criminal law and justice are inherently political. International courts operate in a world made primarily of states. Those states try to leverage the legal institutions and processes, in pursuit of their political and security interests.'[97] Through the promise of cooperation (or non-cooperation) States show where they would like the Court to pursue its investigations. Interestingly, the Expert Review on the ICC commissioned by the Assembly of States Parties (ASP) concedes that 'the ICC is both a judicial entity (ICC/Court) and an international organisation (ICC/IO). As a judicial entity, the Court must benefit from judicial independence. As an international organisation, States Parties reasonably expect to be able to guide and shape the institution.'[98] Of course, the ICC is a unique international organization in that the ASP cannot directly interfere with its judicial course of actions.[99] Yet, the ASP may take certain measures (e.g., allocation of budget, amendments of the Rules of Procedure and Evidence or the creation of an oversight mechanism) communicating the State parties' preferences to the prosecutorial or judicial branches.[100] Similar contentions exist in respect of the relationship between the ICC and the SC. Despite the former's institutional autonomy, the latter decides, pursuant to the geopolitical interests of its five permanent members (P-5), for which situations the Court should be conferred extraordinary jurisdiction, and which nationals, situations and cases should be spared.[101]

Third, international criminal proceedings have political consequences at the domestic and international level. Nouwen and Werner convincingly demonstrate that an ICC decision on whether to indict a certain individual, signals who is and who is not considered a potential enemy of mankind,[102]

96 See generally David Bosco, *Rough Justice: The International Criminal Court in a World of Power Politics* (2014); Oumar Ba, *States of Justice: The Politics of the International Criminal Court* (2020).

97 Oumar Ba, "States of Justice Symposium: A response", OpinioJuris, 21 August 2020, available http://opiniojuris.org/2020/08/21/states-of-justice-symposium-a-response/.

98 Independent Expert Review of the International Criminal Court and the Rome Statute System: Final Report 30 September 2020, § 26 (footnote omitted).

99 Arts. 112, 119 of the Rome Statute.

100 Jonathan O'Donohue, 'The ICC and the ASP', in C. Stahn (ed), *The Law and Practice of the International Criminal Court* (2015) p. 138.

101 Arts. 13(b) and 16 of the Rome Statute; see Deborah Ruiz Verduzco, 'The Relationship between the ICC and the United Nations Security Council', in C. Stahn (ed), *Ibid.*, pp. 36–38, 53–60.

102 Sarah Nouwen and Wouter Werner, "Doing Justice to the Political: The International Criminal Court in Uganda and Sudan", 21 *European Journal of International Law* (2011) p. 962.

and as such, with which States international relations may be entertained. In this sense, an international criminal court may play an even greater role than national courts in the stability of international relations.

That is not to say that the ICC must expressly recognize itself as a political institution.[103] However, the Court should acknowledge the conflict between the political dynamics in which international criminal bodies operate and the political considerations underlying the institution of immunity *ratione personae*. The latter suggest that an international criminal jurisdiction must have features indicating its sufficient objective, independent and impartial nature to conduct highly political trials. To ensure such safeguards, the subjective test of internationality should be followed by an objective test.[104] That is, for an international court to have competence over high-ranking officials of States who have not consented to its exercise of jurisdiction, it must be ascertained whether the international community has actually made a concerted decision to entrust this organ to take actions which otherwise would be internationally disruptive. In other words, that such adjudicatory body does not act at the behest of two or more States, as the Joint Concurring Opinion suggests, but at the behest of the international community.

The SCSL entertained a similar view in the *Decision on Taylor Immunity*. Like the ICC Appeals Chamber, the SCSL Appeals Chamber opined that the distinction between national courts and international courts lies in the non-applicability of the *par in parem* principle to the latter type of adjudicatory body. Unlike the ICC Appeals Chamber, however, it also qualified the relevance of this structural distinction by specifying that another reason for the irrelevance of immunities before international courts is that 'states have considered the collective judgment of the international community to provide a vital safeguard against the potential destabilizing effect of unilateral judgment in this area'.[105] For this reason, the Chamber endeavoured to establish the legal basis for the SCSL's creation under Chapter VII of the UN Charter.[106] In doing so, it

103 Yet, it could explain its politics and choices, see Marieke de Hoon, "The Future of the International Criminal Court. On Critique, Legalism and Strengthening the ICC's Legitimacy", 17 *International Criminal Law Review* (2017) p. 611.

104 Perhaps drawing from the objective international personality test upheld in *Reparation for Injuries Suffered in the Service of the United Nations* (1949) Advisory Opinion, ICJ Rep 174, p. 185, see also Dan Sarooshi, "Conferrals by States of Powers on International Organizations: The Case of Agency", 74 *British Yearbook of International Law* (2003) 297 fn 13.

105 *Prosecutor v Taylor*, Decision on Immunity from Jurisdiction, Appeals Chamber, Appeals Chamber, SCSL-2003-01-I, 31 May 2004, § 51 (referring the amicus of Prof. Diane Orenlitcher) (hereinafter *Decision on Taylor Immunity*).

106 *Ibid.*

hinted that its source of jurisdiction – i.e. a bilateral agreement between Sierra Leone and the UN – would not suffice to make it fall under the 'certain international criminal courts' category. Although the provisions of the Agreement did not affect rights and obligation of other States than Sierra Leone,[107] the fact that it was 'an expression of the will of the international community' rendered the functional necessity of upholding immunity *ratione personae* before this court 'truly international in character' moot.[108]

In the next sections, the argument is developed that, for the distinction between national and international courts to impact on the immunity of high-ranking State officials, the latter need not only act on behalf, but also at the behest, of the international community as a whole.

6 Acting at the Behest of the International Community

The *Jordan Appeal Judgment* refers to 'international courts' as international actors which, in contrast to domestic courts, do not act on behalf of States.[109] For the ICC Appeals Chamber, being an international court with jurisdiction over international crimes means that the adjudicating body acts on behalf of the international community. Yet, this has been exposed as a wrong binary reading of which courts are acting on behalf of international community. Rather, to legitimately operate on a different plane than domestic courts, an international court must not only act on behalf of the international community, it must further be validated by the international community.

Woetzel stated in 1960 that a tribunal is international for being 'instituted by one or a group of nations with the consent and approval of the international community.'[110] He specified that the international community must offer its 'clear endorsement' of the tribunal and that approval 'cannot be simply assumed'.[111] In other words, a claim to act on behalf of the international community is insufficient: the international community must have explicitly commanded the said adjudicatory body for the latter to act at its behest. This distinction is crucial.

107 Deen-Racsmany, *supra* note 68, p. 313.

108 *Decision on Taylor Immunity*, § 37.

109 *Ibid.* § 115.

110 Robert Woetzel, "The Nuremberg Trials in International Law (1960) p. 49; for a critique, see Astrid Kjeldgaard-Pedersen, "What Defines an International Criminal Court: A Critical Assessment of the Involvement of the International Community as a Deciding Factor", 28 *Leiden Journal of International Law* (2015) p. 113.

111 *Ibid.*, Woetzel, supra note 110, p. 49.

The fundamental issue of who speaks for the international community nonetheless remains. On account of its universal membership, the UN may be seen as the primary agency of the international community. However, the international community of States may also decide to endorse an institution outside of the UN. Woetzel was of the opinion that, if the UN was 'paralysed in its activity due to unforeseen circumstances or non-existent,' the requisite endorsement could be given by a 'combination of states that represent the "quasi-totality of civilised nations".'[112] For instance, the International Military Tribunal at Nuremberg (IMT) also qualified, according to Woetzel, as an international court.[113] The IMT was established through an agreement between France, the United Kingdom, the United States and the Soviet Union. Whereas the General Assembly (GA) had not gathered yet, the agreement was left open for other States of the UN to adhere to it.[114] Only nineteen States decided to offer their 'benediction of the proceedings'.[115] Quite controversially – given that the UN counted 51 members in 1945, and that some countries had not joined the organization yet –[116] Woetzel still considered that the signatories and adhering States represented 'the quasi-totality of civilised nations' and that therefore 'the IMT clearly had the sanction of the international community and can be considered an international court.'[117] The doubtful, but little discussed, endorsement of the IMT by the 'international community' showcases why this label is to be approached with great care.

The ICC, in contrast, 'can make a convincing claim to directly embody the "collective" will' of the international community.[118] While the ICC is not a UN organ, the Rome Conference was organized and hosted by the UN, and 160 States participated in the drafting of the Statute. The Statute contains an open invitation for any State's adherence. At the time of writing this article, 123 States have ratified the Rome Statute, which almost equals two-thirds of the UN Member States. Most importantly, the Relationship Agreement between the ICC and the UN – negotiated in accordance with Article 2 of the Rome Statute and General Assembly Resolution 58/79 of 9 December 2003 –, as well

112 *Ibid.,* p. 53.
113 *Ibid.,* p. 56–57.
114 Art. 5 London Agreement of 8 August 1945.
115 William Schabas, "The United Nations War Crimes Commission's Proposal For An International Criminal Court", 25 *Criminal Law Forum* (2014) p. 188.
116 Ilias Bantekas and Susan Nash, *International Criminal Law* (2007) p. 333. The principles of international law established in the Nuremberg judgment, on the other hand, have received such recognition, UNGA Res. 95, 11 December 1946.
117 Woetzel, *supra* note 110, pp. 56–57.
118 Kreß, *supra* note 44, p. 247.

as the SC's use of referrals in the situations of Darfur, Sudan and Libya, demonstrate the UN's endorsement of the ICC. Notably, the Statute also insists on selecting bench members from different geographic regions of the world.[119] As such, the ICC presents itself as the paradigmatic example of a 'truly' international criminal court.[120]

As mentioned above, the most convincing evidence that the international community endorses a tribunal is present if it is part of the UN system. Two UN bodies might be seen as embodying the collective will of the UN Member States. The SC, when it acts under Chapter VII of the UN charter is taking decisions deemed as actions of all the UN Member States.[121] At the SCSL, the Appeals Chamber considered in the *Decision on Taylor Immunity* that the alleged Chapter VII status of the Agreement establishing the SCSL made it 'an expression of the will of the international community'.[122] The same applies to the ICTY, ICTR, and the Special Tribunal for Lebanon, or even more so, as they are subsidiary organs of the SC.

The second UN body concerned, the UN General Assembly (GA), is the most representative forum of the UN, as all Member States may vote on its recommendations. On important matters related to international peace and security, a GA recommendation requires a two-thirds majority. Although GA's recommendations are not binding, an explicit validation of the jurisdictional framework of an ad hoc 'international criminal court' would have significant weight in determining whether such an adjudicatory body acts at the behest of the international community. The GA has not recommended or endorsed the establishment of an international adjudicatory body yet. However, as long as the SC is not at that very moment actively dealing with the situation over which an eventual ad hoc international criminal court would exercise its jurisdiction, the GA would not be prevented from exercising its power to make recommendations endorsing said body.[123] The inability of the SC, due to a lack of unanimity among its permanent members, to adequately respond to situations where international peace and security is threatened, has been increasingly interpreted, since the Uniting for Peace Resolution,[124] as opening

119 Art. 36(8) Rome Statute.
120 Galand, *supra* note 50, pp. 171–172.
121 Art. 24 UN Charter.
122 *Decision on Taylor Immunity*, § 38.
123 Arts. 10, 12(1) UN Charter; see Rosalyn Higgins et al., *Oppenheim's International Law: United Nations* (2017) 58.
124 UNGA Res. 377(V), 3 November 1950.

the door for the GA to act.[125] While a renewed emphasis on the GA's secondary responsibility for peace and security is taking place, the ICJ in the *Certain Expenses* case, issued in the midst of the Cold War, had already confirmed this liberal interpretation of the GA's power in matters of peace and security.[126]

Some authors have called for the GA's creation of ad hoc tribunals under the Uniting for Peace doctrine in situations where the SC fails to assume its responsibility to protect.[127] The purpose of the GA recommendation as here explored, is not to create a subsidiary body with judicial powers. Rather, the recommendation would simply promote a treaty-based court, which it deems sufficiently impartial, independent and fair, as an organ acting at the behest of the international community. Given the GA's (nearly) universal membership, its recommendation would provide the necessary degree of legitimacy to the said court to be characterized as 'truly international'. The GA's recommendation non-binding status would be irrelevant, unless it would aim to oblige States to cooperate with the said court, a power the GA would lack.[128]

Furthermore, an argument could be made that the GA would be urged to endorse this adjudicative body when the SC fails to act and no other international jurisdictional avenues are in place to provide victims with access to justice. The 'need to ensure accountability' and 'ensure justice for all victims' is indeed emphasized in the GA resolution creating the International, Impartial and Independent Mechanisms for Syria,[129] a quasi-prosecutorial body born out of exasperation with the abuse of veto powers at the SC.[130] Moreover, the establishment of an ad hoc international criminal court with jurisdiction over

125 See Ved Nanda, "The Security Council Veto in the Context of Atrocity Crimes, Uniting for Peace and the Responsibility to Protect", 52 *Case Western Reserve Journal of International Law* (2020) pp. 135–140; Christian Wenaweser and James Cockayne, "Justice for Syria? The International, Impartial and Independent Mechanism and the Emergence of the UN General Assembly in the Realm of International Criminal Justice", 15 Journal of International Criminal Justice (2017) pp. 220–223 ; Higgins et al., *supra* note 123, pp. 58–61.

126 *Certain Expenses of the United Nations* (*Article 17, paragraph 2, of the Charter*), Advisory Opinion, ICJ Rep 1962, 151, p. 163.

127 Michael Ramsden, "'Uniting for Peace' in the Age of International Justice", 42 *The Yale Journal of International Law Online* (2016) pp. 16–22; Rebecca Barber, "Accountability for Crimes against the Rohingya: Possibilities for the General Assembly where the Security Council Fails", 17 *Journal of International Criminal Justice* (2019) pp. 578–580.

128 Ramsden, *supra* note 127, p. 21; Barber, *supra* note 127, p. 581. The GA could call upon States to cooperate with the ad hoc tribunal, as it has done on other occasions, see e.g. GA Res. 3(I), 13 February 1946.

129 UNGA Res. 71/248, 21 December 2016, § 1.

130 The Mechanism was established to provide assistance to 'national, regional and international jurisdiction that have or may in the future have jurisdiction' over international crimes perpetrated in Syria, UNGA Res. 71/248, 21 December 2016, § 4.

international crimes perpetrated in situations (or international crimes) which fall outside the jurisdiction of the ICC, might be seen as a collective measure of States to bring an end to serious breaches of *jus cogens* norms, as commanded by Article 41 of the ILC Draft Articles on the Responsibility of States.[131] Most (if not all) crimes established under customary international have a *jus cogens* status.[132] The duty to investigate international crimes, and more generally the right to access to justice, have also been considered to have acquired this status.[133] By issuing a recommendation endorsing the court's statutory framework, should it be deemed suitable for the purpose, the GA would assume its own duty to bring to an end serious breaches of *jus cogens* norms.

7 Conclusion

The unwillingness or inability of certain States to engage with international crimes committed in their territory or by their nationals, combined with the gaps in, or weakness of existing international accountability forums, suggests that prosecution of all perpetrators of mass atrocities may be structurally unfeasible. With the assistance of non-governmental organizations, a sort of 'entrepreneurial justice' is occurring, where domestic courts are asked to fill the impunity gaps left by existing international criminal courts.[134] Domestic prosecutions of international crimes under the principle of universal jurisdiction are certainly on the rise, but are limited to non-State actors and low-ranking State officials. Impunity therefore lingers.

States, where victims of international crimes have fled to and are asking for the most responsible perpetrator to be held accountable, find themselves under a duty, subject to the constraints of personal immunity, to make efforts to fulfil these victims' right to access justice. In the ground-breaking *Jordan Appeal Judgment*, the ICC Appeals Chamber's has affirmed that immunities of high-ranking State officials are inapplicable vis-à-vis international courts. If, as

131 See ILC, Responsibility of States for Internationally Wrongful Acts, *Yearbook of the International Law Commission* (2001) p. 31, UN Doc. A/56/10, Art. 41; ILC, Peremptory norms of general international law (jus cogens), *Yearbook of the International Law Commission* (2019) p. 141, UN Doc. A/74/10, Conclusion 19.

132 See ILC, Peremptory norms of general international law (jus cogens), *Yearbook of the International Law Commission* (2019) p. 141, UN Doc. A/74/10, Conclusion 23, Annex.

133 *Goiburú, et al. v. Paraguay, supra* note 34, § 84, 131; *Prosecutor v El Sayed*, *supra* note 34, § 29.

134 Michelle Burgis-Kasthala, "Entrepreneurial Justice: Syria, the Commission for International Justice and Accountability and the Renewal of International Criminal Justice", 30 *European Journal of International Law* (2019) p. 1165.

the ICC Appeals Chamber suggests, personal immunities are indeed customarily inapplicable vis-à-vis international courts, the fulfilment of victims' right to justice reveals itself as a duty of cooperation to establish a jurisdiction before which immunities are irrelevant. Under the very broad definition of international courts spelled out by the ICC's appeals judges, a new international criminal court with jurisdiction over foreign high-ranking officials (from, for instance, Syria) can be set up by (at least two) States, say France and Germany. In this paper however, we have shown that for such adjudicatory body to really qualify as international it must answer to the political considerations justifying the institution of immunity *ratione personae*.

Contrary to what the ICC Appeals Chamber affirms, the personal immunity of high-ranking State officials does not lie solely on the *par in parem* principle. Personal immunity rests mostly on the need to ensure stability within and between countries of the international community. Most international lawyers appreciate that the exercise of criminal jurisdiction in defiance of immunity may impact on the diplomatic relations between the forum State and the State of nationality of the accused. The argument has been made here, that the exercise of jurisdiction by an international adjudicatory body incurs a rather similar risk, despite the non-bilateral inter-State dimension of the process. International criminal courts take decisions, which, especially when charging political leaders, have the capacity to spring domestic unrest, as well as impact other States' decision on whether, and with whom, a peaceful and cooperative relationship may be maintained.

In light of the values for which personal immunity is normally upheld, the decision to enable a judicial body to put this otherwise absolute immunity aside must either be derived from consent of the concerned State or from a concerted choice of the international community. The international community may decide that in certain circumstances the establishment of a new mechanism of international criminal justice before which immunities would not be applicable contributes to international peace and security. Such concerted choice from the very 'body', which the legal institution of personal immunity is designed to protect the interests, renders the immunity's *raison d'être* mute.

What distinguishes domestic and international criminal courts is not that the latter act on behalf of the international community, as the ICC Appeals Chamber affirms. States asserting universal jurisdiction do so as well. Rather, structural features should guarantee that proceedings of international criminal courts do not conceal particular political interests or bias, as States exercising universal jurisdiction are often suspected of. A defining feature of an international court would be that it acts, not only on behalf, but also at the

behest of the international community; that is, that it had been specifically entrusted by the international community as a whole to pursue its mandate. This would further attest of the adjudicatory body's objectivity, independence and internationality.

The international community may express its voice through several organs. Cooperation in establishing this jurisdiction may take place between two or more State, or within a regional organization, or the UN. Yet, it is indeed when the latter endorses the design and mandate of the institution that will exercise such jurisdiction, that it may be termed an international criminal jurisdiction. While the SC has been highly active in creating and using various accountability mechanisms during the twenty years or so following the end of the Cold War, recent failures by the P-5 to address situations where international crimes are perpetrated in impunity reveal that the Council is frozen again. The GA with its universal membership, was indeed intended to be the 'town meeting place of the world' representing 'the open conscience of humanity'.[135] Its revived willingness to step in when the SC fails to assume its primary responsibility make it the most appropriate channel for the international community to formally endorse the establishment of a new international judicial mechanism in situations where it is clear that no other avenues are available to fulfil victims, right to justice.

The vindication of victims' right to justice asks not only that States pursue accountability for international crimes, but also that international organizations with a relevant mandate exercise their discretion to act. When the right avenue to fulfil victims' right to justice is paved, the international community, preferably through the collective system of the UN, should make use of this mechanism. Not doing so, implies leaving space for States to act unilaterally or in small coalitions, at the risk of acting inconsistently with the law on immunities, but justifying any potential breach as a sort of reprisal against the wrongdoer.

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135 Yearbook of the United Nations (1946–7) p. 51.