

# International Law Rejects Immunity for International Crimes: Full Stop

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## Abstract

*As far back as 1994, Sir Arthur Watts QC, a pre-eminent international jurist of his time, put the question of head of state immunity for international crimes in these unequivocal terms: 'It can no longer be doubted that as a matter of general customary international law a Head of State will personally be liable to be called to account if there is sufficient evidence that he authorized or perpetrated such serious international crimes.' Most senior jurists of Watt's ilk who opined on the matter came to a similar conclusion. Yet, some concerning recent practice wrongly suggests that there remains doubt around the question. For example, the Advisory Committee on Public International Law (CAVV), an academic thinktank that advises the Dutch government, suggested in its report on the accountability of President Putin that 'in international legal practice, there is no clear-cut answer to the question of whether there is an exception to functional immunity for international crimes, including the crime of aggression.' This article uses the CAVV recommendation as a case study in the mistakes and confusions that have long plagued the discourse on the immunity of state officials, especially heads of state, accused or suspected of international crimes.*

## 1. Introduction

As far back as 1994, Sir Arthur Watts QC, a pre-eminent international jurist of his time, put the issue of head of state immunity for international crimes in these unequivocal terms: *'It can no longer be doubted that as a matter of general customary international law a Head of State will personally be liable to be called to account if there is sufficient evidence that he authorized or perpetrated such serious international crimes.'*<sup>1</sup> As we shall soon see, most senior jurists of Watt's ilk who opined on the matter—including Antonio Cassese, Otto Triffterer, Robert Jennings and John Dugard—came to a similar conclusion.

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<sup>1</sup> A. Watts, 'The Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers' 247 *Recueil des Cours* (1994) 13, at 84 (emphasis added).

Yet, certain concerning recent arguments wrongly suggest that there remains some doubt on the matter. For example, the Advisory Committee on Public International Law (CAVV), an academic thinktank that advises the Dutch government, suggested in its report on the accountability of President Putin that ‘in international legal practice, *there is no clear-cut answer to the question of whether there is an exception to functional immunity for international crimes, including the crime of aggression.*’<sup>2</sup> That suggestion is mistaken.

This article uses the CAVV recommendation as a case study in some of the mistakes and confusions that have long plagued the discourse on the immunity of state officials, especially heads of state, accused or suspected of international crimes. Part 2 shows that, contrary to the CAVV’s suggestion (and that of a handful of legal scholars), there *is* a clear-cut position in international law. It is this: customary international law recognizes no immunity for heads of state. That, in the words of Sir Arthur Watts, ‘can no longer be doubted’. Part 3 examines some of the inconsistencies and gaps in the argumentative literature that suggests the existence of doubt on this question. Part 4 concludes by stressing the contemporary importance of ending this debate on head of state immunity for international crimes.

## **2. The definitive position**

Judicial decisions of international courts have consistently rejected the idea of immunity of heads of state. That is unsurprising, because customary international law, as a matter of state practice since 1919, rejects immunity for heads of state. For these reasons, there is no basis on which it would be reasonable to ignore such consistent string of judicial decisions on this point, while preferring the subsidiary source of academic writings of a faction of legal scholars who value the regime of immunity. This is more so as the concordant views of the most eminent

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<sup>2</sup> Advisory Committee on Public International Law (CAVV), *Challenges in prosecuting the crime of aggression: jurisdiction and immunities*, Advisory Report No. 40, September 2022, available online at <https://www.advisorycommitteeinternationallaw.nl/publications/advisory-reports/2022/09/12/challenges-in-prosecuting-the-crime-of-aggression-jurisdiction-and-immunities> (visited 18 March 2023), at 4.

and senior jurists also concur with the consistent judicial decisions that reject such regime of immunity.

#### *A. Case law*

The immunity question has arisen in one form or another in at least eight different decisions and judgments of international courts – engaging the judicial opinions of no less than 40 judges. There has been no material inconsistency in their resulting pronouncements. Some of these decisions concerned matters that did not directly engage the issue of head of state immunity. Even so, the judicial pronouncements also helped to build upon an international jurisprudence that rejects head of state immunity for international crimes before international criminal tribunals.

An early pronouncement of the International Criminal Tribunal for the former Yugoslavia on immunity was delivered in 1995 in the *Karadžić* case. The Trial Chamber observed as a ‘general’ principle of ‘international humanitarian law’ that ‘official capacity of an individual even *de facto* in a position of authority whether as military commander, leader, or as one in government does not exempt him from criminal responsibility and would tend to aggravate it.’<sup>3</sup>

Later in the same year, the Appeals Chamber of the ICTY in *Tadić* cautioned against ‘stratagems [that] might be used to defeat the very purpose of the creation of an international criminal jurisdiction, to the benefit of the very people whom it has been designed to prosecute.’

In that regard, the Chamber observed that it ‘would be a travesty of law and a betrayal of the universal need for justice, should the concept of state sovereignty be allowed to be raised successfully against human rights.’<sup>4</sup>

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<sup>3</sup> Decision, *Karadžić et al.*, Trial Chamber, 16 May 1995, §§ 23–24.

<sup>4</sup> Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, *Tadić*, 2 October 1995, § 58.

In 1997, the ICTY Appeals Chamber was confronted in *Blaškić* with the question whether the Republic of Croatia and its defence minister should be served a subpoena for the production of documentary evidence needed in the prosecution of a case before the tribunal. The Appeals Chamber began by stating what it described as a general rule of immunity for state officials. In that regard, the Chamber dismissed ‘the possibility of the International Tribunal *addressing subpoenas to State officials acting in their official capacity*. Such officials are mere instruments of a state, and their official action can only be attributed to the state. They cannot be the subject of sanctions or penalties for conduct that is not private but undertaken on behalf of a state. *In other words, state officials cannot suffer the consequences of wrongful acts which are not attributable to them personally but to the state on whose behalf they act: they enjoy so-called “functional immunity.”* This is a well-established rule of customary international law going back to the eighteenth and nineteenth centuries, restated many times since.’<sup>5</sup> That general rule, as the Appeals Chamber stated it, is based on ‘sovereign equality of States (*par in parem non habet imperium*).’<sup>6</sup>

But, having said that, the Appeals Chamber made sure to recognize the exception to the general rule, according to which immunity is unavailable in relation to international crimes—prosecuted before national and international courts. As the Chamber put it:

These exceptions arise from the norms of international criminal law prohibiting war crimes, crimes against humanity and genocide. Under these norms, 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. Similarly, other classes of persons (for example, spies, as defined in Article 29 of the Regulations Respecting the Laws and Customs of War on Land, annexed to the Hague Convention IV of 1907), although acting as State organs, may be held personally accountable for their wrongdoing.<sup>7</sup>

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<sup>5</sup> Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, *Prosecutor v Blaškić*, ICTY Appeals Chamber, 27 October 1997, § 38, emphasis added.

<sup>6</sup> *Ibid.*, § 41.

<sup>7</sup> *Ibid.* See further, Judgment, *Prosecutor v Furundžija* (Judgment), ICTY Trial Chamber, 10 December 1998, § 140 [ICTY Trial Chamber.]

From the International Court of Justice (ICJ) came the well-known *Arrest Warrant* case of 2000. The ICJ was confronted with the question of whether international law permitted Belgium to prosecute a former foreign minister of the Democratic Republic of the Congo before Belgian courts. The ICJ majority declared that they had ‘been *unable to deduce* ... that there exists under customary international law any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers for Foreign Affairs, where they are suspected of having committed war crimes or crimes against humanity.’<sup>8</sup> Nevertheless, the majority went on to observe that ‘an incumbent or former Minister for Foreign Affairs may be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction.’<sup>9</sup> In other words, there is no principle in the *Arrest Warrant* judgment that affords a refuge of immunity for state officials accused of international crimes before *international tribunals*. Indeed, the very words of the relevant pronouncement point in the opposite direction: ‘an incumbent or former Minister for Foreign Affairs may be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction.’<sup>10</sup>

Those pronouncements are directly controlled not only by the Court’s limitation of their pronouncement to the jurisdiction of foreign *national tribunals*; but by the very *ratio decidendi* in the case, which was the immunity of a former minister of foreign affairs of the Democratic Republic of the Congo from the jurisdiction of Belgian courts.

Writing extra-judicially in relation to the main pronouncement in the *Arrest Warrant* case, Antonio Cassese was quick to fault the judgment of the ICJ majority in their ‘[inability] to deduce’ that customary international law recognized no immunity in foreign *national courts* in relation to international crimes. He supplied some of the modern examples where immunity

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<sup>8</sup> *Arrest Warrant of 11 April 2000* (Democratic Republic of the Congo v Belgium), [2002] ICJ Reports p 3, § 58, emphasis added.

<sup>9</sup> *Ibid.*, p 3, § 61.

<sup>10</sup> *Ibid.*

was not recognized in foreign national courts in prosecutions of international crimes.<sup>11</sup> It goes without saying that the *inability* of the jurists on the majority of ICJ bench to deduce the point of customary international law on the matter does not gainsay the *ability* of other jurists of equal stature to deduce that point of customary international law. Cassese was a leading authority in international criminal law during his lifetime. He served as president at both the International Criminal Tribunal for the former Yugoslavia and the Special Tribunal for Lebanon. It may be noted that he was the presiding judge in the *Blaškić* judgment where the ICTY Appeals Chamber held that customary international law recognizes no immunity for any state official for international crimes—before national and international tribunals.

My own research additionally supports that of Cassese to the effect that there are further strong and numerous data that favour the proposition that customary international law recognizes no immunity for state officials when prosecuted in foreign national courts for international crimes.<sup>12</sup>

Be that as it may, there was no inconsistency between the ICJ majority judgment in the *Arrest Warrant* case and the series of pronouncements from the ICTY to the effect that customary

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<sup>11</sup> 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) 853, at p 870 *et seq.*

<sup>12</sup> Some of the data in that regard include but are not limited to: *Lieber Code* (1863) IV and V; for instance, article 71 provides: ‘Whoever intentionally inflicts additional wounds on an enemy already wholly disabled, or kills such an enemy, or who orders or encourages soldiers to do so, shall suffer death, if duly convicted, whether he belongs to the Army of the United States, or is an enemy captured after having committed his misdeed.’ See also the *Oxford Manual on the Laws of War on Land* (1880) article 84: ‘If any of the foregoing rules be violated, the offending parties should be punished, after a judicial hearing, by the belligerent in whose hands they are. Therefore ... Offenders against the laws of war are liable to the punishments specified in the penal law.’ See also Oppenheim, *International Law* (1912) Volume 2 (of 2) War and Neutrality, 2<sup>nd</sup> edn, §251. See also *United States v Bopp* 237 F 283 (1916) [ND Cal]. See also Versailles Treaty 1919, article 228. See also Paris Peace Conference, ‘Report of the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties’ 14 *American Journal of International Law* (1920) 95 at p 121. See also William Hall, *A Treatise on International Law*, 8<sup>th</sup> edn [Pearce Higgins] (1924) §135. See also *Ex Parte Quirin*, 317 US 1 (1942) [US Supreme Court] pp 30-31 and 35-36. See Opening Statement of Sir Hartley Shawcross, Attorney-General of UK, International Military Tribunal, Nuremberg, Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945 – 1 October 1946 (1947) vol III, p 92. See also Telford Taylor, ‘Final Report to the Secretary of the Army on the Nuernberg War Crimes Trials under Control Council Law No 10’ dated 15 August 1949, p 4. See also article 49 of Geneva Convention No I for the Amelioration of the Conditions of the Wounded and Sick in Armed Forces in the Field; article 50 of Convention No II for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; article 129 of Convention No III relative to the Treatment of Prisoners of War; and, article 146 of Convention No IV relative to the Protection of Civilian Persons in Time of War.

international law recognizes no immunity for state officials before *international tribunals*, in relation to international crimes.

That line of jurisprudence continued in *Prosecutor v Milošević* in 2001, where an ICTY Trial Chamber, again, directly dealt with the same issue in the following terms:

There is absolutely no basis for challenging the validity of Article 7, paragraph 2, which at this time *reflects a rule of customary international law*. The history of this rule can be traced to the development of the doctrine of individual criminal responsibility after the Second World War, when it was incorporated in Article 7 of the Nuremberg Charter and Article 6 of the Tokyo Tribunal Charter. *The customary character* of the rule is further supported by its incorporation in a wide number of other instruments, as well as case law.<sup>13</sup>

In 2003, the Appeals Chamber of the ICTY once more pronounced on the issue of immunity in *Prosecutor v Krstić*. On that occasion, the Appeals Chamber was dealing with a defence application for subpoena of witnesses. The Chamber took the opportunity to remove any doubt about what the Appeals Chamber had said earlier in *Blaškić*, underscoring the absence of immunity before *international courts* trying cases of international crimes. In that connection, the Appeals Chamber observed as follows:

The reasoning of the Appeals Chamber in the *Blaškić* Subpoena Decision is that, as the State official has acted on behalf of the State, only the State can be responsible for the acts of that official, and that, as a corollary, the State may demand for its State officials (where their acts are attributed only to the State) a ‘functional immunity from foreign jurisdiction’. Such a rule, the Appeals Chamber states, undoubtedly applies to relations between States *inter se*, but it must be taken into account and has always been respected by, *inter alia*, international courts. All of the authorities which the Appeals Chamber cited in support of the functional immunity upon which it relied relate to an immunity against prosecution. *It may be the case (it is unnecessary to decide here) that, between States, such a functional immunity exists against prosecution for those acts, but it would be incorrect to suggest that such an immunity exists in international criminal courts.* The Charter of the International Military Tribunal in Nuremberg denied such an immunity to ‘Heads of State or responsible officials in Government Departments’, as does this Tribunal’s Statute. [Emphasis added.]<sup>14</sup>

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<sup>13</sup> Decision on Preliminary Motions, *Prosecutor v Milosević*, ICTY Trial Chamber, 8 November 2001, §§ 28 and 29, emphasis added.

<sup>14</sup> Decision on Application for Subpoenas, *Prosecutor v Krstić*, ICTY Appeals Chamber, 1 July 2003, § 26.

In 2004, the Appeals Chamber of the Special Court for Sierra Leone (SCSL) had its turn in dealing with immunity directly. It stated, in *Taylor*, that the principle seems now established that the sovereign equality of states does not prevent a Head of State from being prosecuted before an international criminal tribunal or court.<sup>15</sup> The pronouncements of the Appeals Chamber of the SCSL were fully consistent with the jurisprudence reviewed above.

The last in the series of judgments of international courts that pronounced on immunity was in 2019 when, in *Al-Bashir*, the five judges of the Appeals Chamber of the International Criminal Court ('ICC') unanimously pronounced themselves on the question.<sup>16</sup> Following comprehensive research on the subject, they, too, found that '[t]here 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.'<sup>17</sup>

Again, it must be emphasized that the pronouncements of the ICC Appeals Chamber were fully consistent with the jurisprudence of international courts and tribunals reviewed above. On the basis of those earlier judicial pronouncements alone, let alone the state practice and writings of eminent scholars reviewed below, the pronouncement of the Appeals Chamber was entirely commonplace. It was surprising that anyone would see it as 'extremely controversial.'<sup>18</sup>

That is to say, the case law is crystal clear on the question whether there is immunity before an international criminal tribunal in the prosecution of an international crime. On each occasion

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<sup>15</sup> See Decision on Immunity from Jurisdiction, *Prosecutor v Charles Taylor*, SCSL Appeals Chamber, 31 May 2004, § 52.

<sup>16</sup> Appeal Judgment on Jordan Referral re Al-Bashir, *Prosecutor v Al-Bashir (Jordan Referral re Al-Bashir Appeal Judgment)*, ICC Appeals Chamber, 6 May 2019.

<sup>17</sup> *Ibid*, § 113. See also the Joint Concurring Opinion of Judges Eboe-Osuji, Morrison, Hofmanski and Bossa, para 70.

<sup>18</sup> See Dapo Akande, 'ICC Appeals Chamber Holds that Heads of State Have No Immunity Under Customary International Law Before International Tribunals', 6 May 2019, *EJIL:Talk!*, available at <<https://www.ejiltalk.org/icc-appeals-chamber-holds-that-heads-of-state-have-no-immunity-under-customary-international-law-before-international-tribunals/>> [Hereafter 'Akande's *EJIL:Talk!* blog of 6 May 2019'].



the question arose, the judges of those international tribunals (comprising more than 40 judges<sup>19</sup>) have—without exception—held or observed that there is no such immunity.

### ***B. State practice***

The matter must also be considered from the perspective of the political or legislative acts of states. The case law of international courts reflects that state practice. As a matter of consistent practice of states as a source of customary international law, there is hardly a better gauge of both the existence of such evidence and of its consistency—in the sense of the standard of ‘constant and uniform usage practised by the States in question’ laid down in the *Asylum Case* as the test of customary international law<sup>20</sup>—than in the chronicle of decisions that states make when assembled together to answer specific questions on a particular matter. Pronouncements and conducts of states acting separately in their own internal affairs do not readily provide as sharp a view of congruent state practice—given that not all states may have the opportunity, the inclination or the expertise to express themselves at all on every topic of international law, let alone do so in a manner susceptible of easy alignment in a way that shows uniformity.<sup>21</sup> It is such disparate circumstances of states in their reactions to the same issue that make their joint resolutions in their assemblies the best gauge of state practice on a particular point of international law. And it is their consistent statement of the same norm—the ‘constant and

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<sup>19</sup> The head count of the judges is as follows: Decision, *Prosecutor v Karadžić*, ICTY Trial Chamber, 16 May 1995: Judges Karibi-Whyte, Odio Benito, and Jorda; Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, *Prosecutor v Tadić*, ICTY Appeals Chamber, 2 October 1995: Judges Cassese, Li, Deschênes, Abi-Saab, and Sidhwa; Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, *Prosecutor v Blaškić*, ICTY Appeals Chamber, 27 October 1997: Judges Cassese, Karibi-Whyte, Li, Stephen, and Vorah; Judgment, *Prosecutor v Furundžija*, ICTY Trial Chamber, 10 December 1998: Judges Mumba, Cassese, and May; Judgment, *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)*, ICJ, 2002: Judges Guillaume, Shi, Oda, Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal, Judges *ad hoc* Bula-Bula, and, Van den Wyngaert; Decision on Preliminary Motions, *Prosecutor v Milošević*, ICTY Trial Chamber, 8 November 2001: Judges May, Robinson, and Fihri; Decision on Application for Subpoenas, *Prosecutor v Krstić*, ICTY Appeals Chamber, 1 July 2003: Judges Meron, Pocar, Shahabuddeen, Hunt, and Güney; Decision on Immunity from Jurisdiction, *Prosecutor v Charles Taylor*, SCSL Appeals Chamber, 31 May 2004: Judges Ayoola, King, and Winter; Judgment Jordan Referral re Al-Bashir Appeal, *Prosecutor v Al-Bashir*, ICC Appeals Chamber, 6 May 2019: Judges Eboe-Osuji, Morrison, Hofmański, Ibáñez Carranza, and Bossa.

<sup>20</sup> See the *Asylum Case* (Colombia/Peru) (1950) ICJ Reports 266 at p 276.

<sup>21</sup> See Malcolm Shaw, *International Law*, 6<sup>th</sup> edn (2008) p 73.

uniform usage practised by the States in question’—across a series of resolutions or treaties that generates the best view of customary international law on the point in question.<sup>22</sup>

From that point of view, the international community has delivered a ‘clear-cut’ rejection of immunity for heads of state before international tribunals tasked with trying international crimes, ever since 1919 when the international community gave that signal in Article 227 of the Versailles Treaty.

The rejection of head of state immunity thus first indicated in 1919 was unequivocally realized in 1945, immediately after World War II. As their predecessors-in-office had done in 1919, the heads of government of the Allied nations (this time including the Soviet Union) declared their resolve to prosecute Adolf Hitler, the German Fuhrer, before an international criminal tribunal.<sup>23</sup> When Hitler frustrated that resolve in his own regard by committing suicide as the war was ending, the Allies then prosecuted the surviving cream of the crop of the Third Reich war-time government. Amongst those actually prosecuted was Grand Admiral Karl Dönitz who succeeded Hitler as Germany’s Head of State.<sup>24</sup> They were prosecuted pursuant to the Charter of the International Military Tribunal in Nuremberg. It significantly provided in Article 7 that the ‘official position of defendants, whether as Heads of State or responsible officials in

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<sup>22</sup> See also Shaw, *International Law, supra*, p 82. In this connection, Professors Akande and Tzanakopoulos are quite correct when they observed as follows: ‘Given that the ASP resolution is a statement of the parties to the Rome Statute which explicitly purports to give meaning to a provision of the Rome Statute . . . , and to set out how that provision applies in a particular circumstance, the resolution is practice of the parties to the Statute regarding the interpretation of that treaty’: Dapo Akande and Antonios Tzanakopoulos, ‘Treaty Law and ICC Jurisdiction Over the Crime of Aggression’ 29 *European Journal of International Law* (2018) 939 at p 944.

<sup>23</sup> See United States, Department of State, *Bulletin*, vol XII, No 293, 4 February 1945, p 154. See also See also The American Presidency Project, Statement by President Roosevelt warning neutral nations against asylum for war criminals, available at <https://www.presidency.ucsb.edu/documents/statement-warning-neutral-nations-against-asylum-for-war-criminals>. See also Franklin D Roosevelt, Fireside Chat No 23, Report on the Home Front, Radio Broadcast of 12 October 1942. See United States, *The War Messages of Franklin D Roosevelt—December 8, 1941 to October 12, 1942*, p 71. See also note of 14 October 1942, communicating the Soviet Union government’s endorsement of President Roosevelt’s message of accountability delivered on behalf of the Allies: United States, Department of State, Report of Robert H Jackson, United States Representative to the International Conference on Military Trials, London 1945 [1947] pp 16—17

<sup>24</sup> See generally, *Trial of the Major War Criminals before the International Military Tribunal*, Nuremberg (14 November 1945 to 1 October 1946), especially at p 78.

Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment.’

The period after World War II saw the crystallisation of the norm that rejects head of state immunity from accountability for international crimes. This was achieved on behalf of the United Nations through the leading work of the International Law Commission, notably beginning with their formulation of the Nuremberg Principles, the third of which provides as follows: ‘The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible Government official does not relieve him from responsibility under international law.’<sup>25</sup> That principle was amply reflected in successive draft codes that the ILC produced, pursuant to mandates from the UN General Assembly, regarding crimes against the peace and human security, all of which rejected head of state immunity.<sup>26</sup> Later, in the 1990s, the UN Security Council, on behalf of the UN, created international criminal tribunals for the former Yugoslavia and for Rwanda, and authorized the creation of a special war crimes court for Sierra Leone. Without exception, all the founding instruments of these tribunals contained provisions that rejected immunity for heads of state.<sup>27</sup> The same rejection of immunity was eventually repeated in the Rome Statute of the International Criminal Court.<sup>28</sup>

It is important to stress that the occurrence of that norm in the Rome Statute is thus not novel. It was, at the adoption of the Statute in 1998, an idea that had been repeated in *every* relevant multilateral instrument of international law since 1919. It is precisely the repetition of that norm in successive relevant international instruments that gives the norm its status as a norm of

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<sup>25</sup> See *Yearbook of the International Law Commission (1950)* vol II, para 97.

<sup>26</sup> See the ILC Draft Code of Offences against the Peace and Security of Mankind (1954), article 3; and the Draft Code of Crimes against the Peace and Security of Mankind (1996), article 7.

<sup>27</sup> See the Statute of the International Criminal Tribunal for the former Yugoslavia (1993), article 7(2); the Statute of the International Criminal Tribunal for Rwanda (1994), article 6(2); and the Statute of the Special Court for Sierra Leone (200), article 6(2).

<sup>28</sup> Article 27, ICC Statute.

customary international law, as correctly observed in all the decisions and judgments of international courts and tribunals reviewed earlier. It has become *customary* to see that norm expressed in the familiar way in relevant international legal documents.

There is much significance, in this connection, to the observations of the International Law Commission in 1996 saying this:

The official position of an individual has been consistently excluded as a possible defence to crimes under international law in the relevant instruments adopted since the Charter of the Nürnberg Tribunal, including the Charter of the Tokyo Tribunal (article 6), Control Council Law No 10 (article 4) and, more recently, the statute of the International Tribunal for the Former Yugoslavia (article 7) and the statute of the International Tribunal for Rwanda (article 6). The absence of such a defence was also recognized by the Commission in the Nürnberg Principles (Principle III) and the 1954 draft Code (article 3).<sup>29</sup>

On any reasonable view, what the ILC correctly observed in 1996 as *consistent* exclusion of immunity is the very definition of *customary* international law.

It is unfortunate that some scholars have not accounted for the legal significance of the developments summarized above, when they insist that customary international law recognizes immunity for heads of state even in the proceedings of an international criminal court.

### ***C. Scholarly writings***

Following the Nuremberg proceedings, the UN General Assembly adopted Resolution 95(I), ‘*affirming the principles of international law* recognized by the Charter of the Nürnberg Tribunal and the judgment of the Tribunal,’<sup>30</sup> and invited the International Law Commission to both formulate those principles and to reflect them in the codification of crimes against the peace and security of humankind.<sup>31</sup> The UNGA did not ‘affirm’ a mere policy in Resolution 95(I). Here, it is important to stress that what the UNGA affirmed were ‘principles of

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<sup>29</sup> International Law Commission, ‘Draft Code of Crimes against the Peace and Security of Mankind with commentaries (1996)’ in the *Yearbook of the International Law Commission* (1996) vol II, Part 2, at p 27, commentary (4) to draft article 7, emphasis added.

<sup>30</sup> See UN General Assembly resolution 95(I) of 11 December 1946, emphasis added.

<sup>31</sup> See UN General Assembly resolution 177(II) of 21 November 1946. See also res 95(I).

international law.’ The phrase has applied meaning. In the *Lotus* case, the Permanent Court of International Justice said that ‘the words “principles of international law,” as ordinarily used, can only mean international law *as it is applied* between all nations belonging to the community of States.’<sup>32</sup>

Directly responding to their mandate to formulate ‘principles of international law’ recognized in the Charter of the Nuremberg Tribunal and in the judgment of the Tribunal, the ILC formulated seven such ‘principles of international law.’ As noted earlier, the third of those principles rejects immunity for state officials including heads of state accused of international crimes.<sup>33</sup> Notably, the principle was primarily derived from article 7 of the Charter of the Nuremberg Tribunal and the pronouncements of the Tribunal giving value to that provision and the norm it conveyed. As the Tribunal put it:

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.<sup>34</sup>

In keeping with their mandate to reflect the Nuremberg principles in the codification of the draft code of crimes, the ILC duly complied. They consistently reflected the principle in the draft criminal codes they produced over the years: in Article 3 of the 1951 Draft Code of Offences against the Peace and Security of Mankind,<sup>35</sup> in Article 3 of the 1954 Draft Code,<sup>36</sup> in Article 13 of the 1991 draft,<sup>37</sup> and in Article 7 of the 1996 draft.<sup>38</sup>

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<sup>32</sup> See the *Case of the SS Lotus* Series A, No 10, of 7 September 1927, at p 16, emphasis added.

<sup>33</sup> ‘The fact that a person who committed an act which constitutes a Crime under international law acted as Head of State or responsible Government official does not relieve him from responsibility under international law’: see International Law Commission, ‘Principles of International Law recognised in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal’ *Yearbook of the International Law Commission* (1950) vol II 374 at p 375.

<sup>34</sup> See *United States & Ors v Göring & Ors (Judgment)* (1946) 1 Trial of the Major War Criminals before the International Military Tribunal (1947) p 223.

<sup>35</sup> See *Yearbook of the International Law Commission* (1951) vol II, beginning at p 134 (para 59) and specifically at p 137.

<sup>36</sup> See *Yearbook of the International Law Commission* (1954) vol II, beginning at p 151, specifically at p 152.

<sup>37</sup> See *Yearbook of the International Law Commission* (1991) vol II, Part Two, beginning at p 94, specifically at p 95.

<sup>38</sup> See *Yearbook of the International Law Commission* (1996) vol II, Part Two, beginning at p 17, specifically at p 26.

In the meantime, that principle has also been *consistently* reflected, as noted earlier, in one formulation or another in all the founding instruments of international criminal courts and tribunals. All in all, as of date, there is a minimum of eighteen (18) such instruments that have so reflected the principle.<sup>39</sup> That consistency firmly makes the proposition a norm of customary international law, within any acceptable meaning of ‘international custom, as evidence of general practice of states accepted as law,’ in the words of article 38(1)(b) of the ICJ Statute.

The Third Nuremberg Principle is further crystallized as a principle of customary international law in ‘the teachings of the most highly qualified publicists of the various nations’—also within the meaning of article 38(1)(d) of the ICJ Statute. This is evident not only in the relevant opinion of the ILC, as published in 1996 (as seen earlier),<sup>40</sup> but also as products of inquiries commissioned by the United Nations to consider questions of accountability following episodes of international crimes committed in the former Yugoslavia<sup>41</sup> and in Rwanda.<sup>42</sup>

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<sup>39</sup> They are the Versailles Peace Treaty (1919), article 227; Charter of the International Military Tribunal at Nuremberg (1945), article 7; Control Council Law No 10 (1945), article 4; the Charter of the International Military Tribunal for the Far East (1946), article 6; Convention for the Prevention and Punishment of the Crime of Genocide (1948), article IV; Principles of International Law Recognized by the Nuremberg Charter and Judgment (1950), Principle III; Draft Code of Offences against Peace and Security of Mankind (1951), article 3, Draft Code of Offences against Peace and Security of Mankind (1954), article 3; Draft Code of Offences against Peace and Security of Mankind (1991), article 13, Draft Code of Crimes against Peace and Security of Mankind (1996), article 7; Statute of the International Criminal Tribunal for the former Yugoslavia (1993), article 7(2); Statute of the International Criminal Tribunal for Rwanda (1994), article 6(2); Rome Statute of the International Criminal Court (1998), article 27; Statute of the Special Court for Sierra Leone (2000), article 6(2); Reg No 2000/15 East-Timor re Special Panels for Serious Criminal Offences (2000), section 15; Law on Extraordinary Chambers in the Courts of Cambodia (2001), article 29; Law No.05/L-053 on the establishment of Kosovo Specialist Chambers (2015), article 16(1)(b); Organic Law No 15-003 on the Special Criminal Court of the Central African Republic (2015), article 56.

<sup>40</sup> United Nations International Law Commission, ‘Draft Code of Crimes against the Peace and Security of Mankind with commentaries (1996)’ in the *Yearbook of the International Law Commission* (1996) vol II, Part 2, at p 27, commentary (4) to draft article 7: ‘The official position of an individual has been *consistently* excluded as a possible defence to crimes under international law in the relevant instruments adopted since the Charter of the Nürnberg Tribunal . . . .’ Emphasis added.

<sup>41</sup> See Report of the Secretary-General pursuant to Paragraph 2 of Security Council Resolution 808 (1993) (S/25704), para. 55

<sup>42</sup> See United Nations, Security Council, Final Report of the Commission of Experts established pursuant to Security Council resolution 935 (1994) Doc No S/1994/1405: ‘[T]he Nuremberg trials *established clearly the principle* that any individual, *regardless of office or rank*, shall be held responsible in international law for war crimes, crimes against peace or crimes against humanity. It symbolized the possibility that trials could actually be carried out and punishment enforced in modern times.’ [Para 171, emphasis added.] ‘It is a *well-established principle of international law* that a person who orders a subordinate to commit a violation for which there is individual responsibility is as responsible as the individual that actually carries it out. The Nuremberg Principles, adopted by the General Assembly on 11 December 1946, affirmed that even a Head of State is not free from

Notable amongst ‘the most highly qualified publicists of the various nations’ whose views *concur* (and the significance of that agreement is discussed in Section 3, *infra*) in recognising the Third Nuremberg Principle as reflecting customary international law were the late Sir Robert Jennings (a former Whewell Professor of International Law at Cambridge and former President of the International Court of Justice),<sup>43</sup> the late Antonio Cassese (a former professor of international law at the University of Florence and former President of the International Criminal Tribunal for the former Yugoslavia and former President of the Special Tribunal for Lebanon),<sup>44</sup> the late Sir Arthur Watts QC (an eminent jurist who with Jennings co-edited *Oppenheim’s International Law*, a classic treatise),<sup>45</sup> the late Professor Otto Triffterer,<sup>46</sup> Professor (emeritus) Alain Pellet,<sup>47</sup> Professor (emeritus) Roger S Clark,<sup>48</sup> and Professor (emeritus) John Dugard.<sup>49</sup> The next generation of senior scholars who shared that view include, but are not limited to, Professor Guénaél Mettraux,<sup>50</sup> and Professor Max du Plessis,<sup>51</sup> Professor

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responsibility under international law for the commission of a crime under international law.’ [Para 173, emphasis added.]

<sup>43</sup> See Robert Jennings, ‘The Pinochet Extradition Case in the English Courts’ in L Boisson de Chazournes and V Gowlland-Debbas (eds), *The International Legal System in Quest of Equity and Universality: Liber Amicorum Georges Abi-Saab* (2001) 677 at p 692: ‘[I]t must be remembered that the immunity applies only in circumstances which involve the principle that one sovereign state will not exercise its jurisdiction over another sovereign state; *par in parem non habet imperium*. That aphorism is the foundation and the sum of the rule of immunity. For that reason even heads of state *do not by international law* have any immunity from the jurisdiction of an international tribunal; nor indeed from the domestic courts of their home state.’ [Emphasis added.]

<sup>44</sup> See Antonio Cassese, *International Criminal Law* (2003) at p 267.

<sup>45</sup> See Arthur Watts, ‘The Legal Position in International Law of Heads of States, Heads of Governments and Foreign ministers’ (1994) *Recueil des cours de l’Académie de droit international de La Haye* (1994) Vol 247, p 84.

<sup>46</sup> Otto Triffterer, ‘Article 27: Irrelevance of Official Capacity’ in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court* (2008) 779 at p 786: ‘It is self-evident that article 27 is applicable only within the jurisdiction of the Court, as established by the Rome Statute after it came into force on 1st July 2002. However, it nevertheless recognizes a *generally accepted principle of international criminal law*. The basis, however, is not the Statute itself, but *the underlying law merely expressed and defined in the Statute*. Article 27 can, therefore, claim validity and applicability before the Court, but for instance also before internationalized Courts like the Special Court for Sierra Leone.’ [Emphasis added.]

<sup>47</sup> See Alain Pellet, ‘Response to Koh and Buchwald’s Article: Don Quixote and Sancho Panza Tilt at Windmills’ 109 *The American Journal of International Law* (2015) 557 at pp 563-564.

<sup>48</sup> Ellen S Podgor & Roger S Clark, *Understanding International Criminal Law*, 3rd edn (2013) pp 138-139: ‘*Customary law is now well established that ‘head of state immunity’ is impermissible when the crime is an international crime prosecuted in an international court or tribunal...*’ [Emphasis added.]

<sup>49</sup> See Guénaél Mettraux, John Dugard & Max du Plessis, ‘Heads of State Immunities, International Crimes and President Bashir’s Visit to South Africa’ 18 *International Criminal Law Review* (2018) 577 at pp 620-621.

<sup>50</sup> *Ibid.*

<sup>51</sup> *Ibid.*

Gerhard Werle,<sup>52</sup> Professor Florian Jeßberger,<sup>53</sup> Professor Leila Sadat,<sup>54</sup> Professor Paola Gaeta,<sup>55</sup> Professor Herman van der Wilt,<sup>56</sup> Professor Claus Kreß,<sup>57</sup> Professor Charles Jalloh,<sup>58</sup> Professor JIA Bingbing,<sup>59</sup> and Professor David Scheffer.<sup>60</sup>

To complete the accounting, it is only fair to acknowledge, as already noted, that there have also been some scholars who argued that customary international law recognizes immunity for heads of state even when they are charged with international crimes before international

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<sup>52</sup> Gerhard Werle and Florian Jessberger, *Principles of International Criminal Law*, 3<sup>rd</sup> edn (2014): ‘Today there is no doubt that the Nuremberg Principles are *firmly established as customary international law*. Nuremberg accomplished what had failed after World War I. The criminality of the worst violations of international law was from now on firm component of the international legal system.’ [Page 10] And ‘The fact that a perpetrator acts in his or her official capacity does not affect his or her responsibilities under international criminal law. Immunity *ratione materiae* thus does not affect the commission of crimes under international law. This view of immunity under international law is *recognized in customary international law*. Indeed, the fact that the crime is committed in the exercise of sovereign functions is often an aggravating circumstance.’ [Page 273.] ‘In the case of crimes under international law, immunity *ratione materiae* is inapplicable not only to trials before international courts, but also vis-à-vis state judiciaries. Today, this is *also anchored in customary international law*. This development gained significant momentum as a result of the decisions of the British House of Lords in the *Pinochet* case.’ [Page 275.]

<sup>53</sup> *Ibid.*

<sup>54</sup> See Leila Nadya Sadat, ‘Heads of state and other government officials before the International Criminal Court: the uneasy revolution continues’ in Margaret de Guzman and Valerie Oosterveld (eds), *The Elgar Companion to the International Criminal Court* (2020) at p 96 [first published on 31 January 2019, see [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3321998](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3321998)]; Leila Nadya Sadat, ‘Why the ICC’s Judgment in the al-Bashir Case Wasn’t So Surprising’ *Just Security* 12 July 2019.

<sup>55</sup> See Paola Gaeta & Patryk Labuda, ‘Trying Sitting Heads of State: the African Union versus the ICC in the Al Bashir and Kenyatta Cases,’ in A Abass, I Bantekas & C Jalloh (eds), *International Criminal Court and Africa* (Oxford: Oxford University Press, 2017) 138-162; Paola Gaeta, ‘Immunity of States and State Officials: A Major Stumbling Block to Judicial Scrutiny?’ in A Cassese (ed), *Realizing Utopia. The Future of International Law* (Oxford: Oxford University Press, 2012), pp 28-238; Paola Gaeta, ‘Does President Al Bashir Enjoy Immunity from Arrest?’ in *7 Journal of International Criminal Justice* (2009) pp 315-332; and, Paola Gaeta, ‘*Ratione Materiae* Immunities of Former Heads of State and International Crimes: the *Hissène Habré* Case,’ in *1 Journal of International Criminal Justice* (2003) pp 186-196.

<sup>56</sup> Herman van der Wilt, ‘The continuing story of the International Criminal Court and personal immunities’ (2015) Amsterdam Law School Research Paper; No. 2015-48), Amsterdam Center for International Law, University of Amsterdam, <http://ssrn.com/abstract=2701205>.

<sup>57</sup> See Claus Kreß, ‘Article 98’ in Kai Ambos (ed), *Rome Statute of the International Criminal Court: Article-by-Article Commentary*, 4<sup>th</sup> edn (2022), pp 2595 *et seq*; Claus Kreß, ‘Preliminary Observations on the ICC Appeals Chamber’s Judgment of 6 May 2019 in the Jordan Referral re Al-Bashir Appeal’ *Occasional Paper Series* [Torkel Opsahl Academic EPublisher 2019].

<sup>58</sup> See Charles Jalloh, ‘Reflections on the Indictment of Sitting Heads of State and Government and Its Consequences for Peace and Stability and Reconciliation in Africa’ *7 African Journal of Legal Studies* (2014) 43 at pp 56-59. See also Charles Jalloh, *The Legal Legacy of the Special Court for Sierra Leone* (Cambridge University Press, 2020) at pp 25, 29, 214, 217, 260, 262, 273 and 275.

<sup>59</sup> JIA Bingbing, ‘Immunity for State Officials from Foreign Jurisdiction for International Crimes’ in Morten Bergsmo and LING Yan (editors), *State Sovereignty and International Criminal Law* [Torkel Opsahl Academic EPublisher 2012], 75 at pp 77-78.

<sup>60</sup> David Scheffer (remarks), American Society of International Law, Annual General Meeting, 25-26 June 2020, Panel discussion on ‘Head of State Immunity’. Available at <<https://youtube.com/znHERfBwhmY>> Timestamp 0:07:26 - 0:15:19.



tribunals. It bears saying, however, that by reference to the qualifications of ‘the most highly qualified publicists’ indicated in article 38(1)(d) of the ICJ Statute, the scholars in the dissenting school pale in stature in comparison to the older generation of legal scholars whose views have been noted above. But, more important than mere comparative stature, the dissents are substantively weak, as discussed in the next section.

### **3. Arguments against immunity**

The CAVV opined that ‘[i]n *international legal practice*, there is *no clear-cut* answer to the question of whether there is an exception to functional immunity for international crimes, including the crime of aggression.’<sup>61</sup> Here, care must be taken to separate ‘international legal practice’ from academic opinions, seldom unanimous on any subject. And, perhaps, most importantly from the perspective of legal scholarship, sympathy for immunity enjoys no *concurrence* in the teaching of legal scholars whose opinions have the highest authority. Quite the contrary, as shown above, the *concurrence* of the most eminent legal scholars leans emphatically against the existence of immunity for heads of state from accountability before international courts that are exercising jurisdiction over international crimes.

#### ***A. The ‘policy argument’***

In her monograph on the subject, Roseanne van Alebeek correctly highlights how international law has changed in significant ways: in the light of the promotion that human rights have received in international law since the end of World War II. As she observed:

International human rights law and international criminal law have changed the outlook of the international legal order. Over the past fifty years or so, states have developed a body of fundamental rights and obligations of individuals that deserve protection and surveillance on the international level. Many of the norms protected by international human rights law and international criminal law form part of what is sometimes called the ‘international public order’. They are considered fundamental to the existence of the international legal order and are therefore non-derogable – or *jus cogens*.<sup>62</sup>

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<sup>61</sup> CAVV, *supra* note 2, at 16 (emphasis added).

<sup>62</sup> See Roseanne van Alebeek, *The Immunity of States and Their Officials in International Criminal Law and International Human Rights Law* (2008), 418.

Van Alebeek does not stand alone amongst legal scholars who recognize how significantly international law has changed since the end of World War II in light of the promotion that human rights have received in international law since then. Yet, she ultimately aligns her scholarship with that of commentators known to have rejected the proposition that senior state officials, including heads of state, have lost the immunity which international law had recognized for them at an earlier era, even when they are accused of serious violation of human rights in ways that amount to international crimes needing to be tried before international criminal tribunals.<sup>63</sup> In that regard, she alludes to impurities of syllogism, such as those implicated in ‘circular reasoning’<sup>64</sup> and a failure to respect the ‘parameters of coherent legal argument.’<sup>65</sup>

But besides the mere allure of syllogistic formalism that got in the way, there are substantive mistakes in analyses such as van Alebeek’s. I can only discuss a few. To begin with, she inexplicably casts the operative stimulus for the anti-immunity proposition as a matter of mere *policy*. As she put it: ‘Policy arguments do not assert that the developments in international human rights law and international criminal law *have changed* the immunities of foreign state officials; they assert that states *should change* these immunities in view of these developments.’<sup>66</sup> With respect, this is mistaken. Notably, she is not alone in that mistake. We see a similar mistake in the scholarship that inspire her own. For long, Dapo Akande arguably enjoyed standing as the leading scholar who argued that customary international law recognizes immunity for heads of state charged with international crimes in proceedings before

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<sup>63</sup> *Ibid*, ch 5 generally, especially at p 276, citing with approval Dapo Akande, ‘International Law Immunities and the International Criminal Court’ (2004) 98 *American Journal of International Law* 407 at 416.

<sup>64</sup> Van Alebeek, *supra*, p 219.

<sup>65</sup> *Ibid*, p 222.

<sup>66</sup> *Ibid*, p 219.

international criminal tribunals the founding instrument of which the state whose official claiming immunity is not a party.<sup>67</sup>

The normative proposition that state officials including heads of state enjoy no immunity from accountability for international crimes is not motivated by mere policy that urges a change in the law. It is motivated by the dynamics of customary international law that *actually changed* the morphology of international law since end of World War II, in order to accommodate that profound change in international law that van Alebeek rightly recognized, which thenceforth stressed the profound importance of human rights, with correlative obligation upon those who violate human rights. It is not always necessary to invite Wesley Hohfeld<sup>68</sup>—or even the trite rule of *ubi jus ibi remedium*—to explain the correlation between a right in someone and a resulting obligation in someone else whose acts or omissions bear on that right.

It may be enough to recall here the words of the Appeals Chamber of the ICTY Appeals Chamber in that regard:

[T]he impetuous development and propagation in the international community of human rights doctrines, particularly after the adoption of the Universal Declaration of Human Rights in 1948, has brought about significant changes in international law, notably in the approach to problems besetting the world community. A State-sovereignty-oriented approach has been gradually supplanted by a human-being-oriented approach. Gradually the maxim of Roman law *hominum causa omne jus constitutum est* (all law is created for the benefit of human beings) has gained a firm foothold in the international community as well.<sup>69</sup>

### ***B. Academic scholarship***

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<sup>67</sup> He was notably cited ‘as a leading academic expert on question of immunities before the ICC’ in Astrid Kjeldgaard-Pedersen, ‘Is the Quality of the ICC’s Legal Reasoning an Obstacle to Its Ability to Deter International Crimes?’ *Journal of International Criminal Justice* (2021) 939 at p 953. Another scholar indicated that a certain theory within that orbit of scholarship is known within academic circles as ‘the Akande route’: see Sarah Nouwen, ‘Return to Sender: Let the International Court of Justice Justify or Qualify International-Criminal-Court Exceptionalism Regarding Personal Immunities’ 78 *Cambridge Law Journal* (2019) 596 at p 603. See further, Roseanne van Alebeek, *The Immunity of States and Their Officials in International Criminal Law and International Human Rights Law* (2008) at 276.

<sup>68</sup> See generally Wesley Newcomb Hohfeld, ‘Some Fundamental Legal Conceptions as Applied in Judicial Reasoning’ 23 *Yale Law Journal* (1913) 16.

<sup>69</sup> Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, *Prosecutor v Tadić*, ICTY Appeals Chamber, 2 October 1995, § 97.

Although there has been a division of *academic* opinions on the subject of immunity; it must nevertheless be kept in mind that academic opinions on the law do not amount to ‘legal practice’ as to what the law is. Without a doubt, the robust clash of worthy academic opinions is generally *always* helpful to judges in their own task. It holds the potential to shine the light in all the possible nooks and crevices of a difficult legal question that judges are called upon to settle. It is for that reason that the ICC Appeals Chamber during this author’s tenure instituted as standard the practice of inviting eminent scholars to intervene in cases that raised more than routine legal questions.

Article 38(1)(d) of the ICJ Statute mentions ‘the teachings of the most highly qualified publicists of the various nations,’ alongside ‘judicial decisions’ as ‘subsidiary means for the determination of rules of law.’ There is need for caution, to avoid overstating the value or contribution of academic writings to the development of international law. This is especially the case when the proposition in question is merely the normative opinion of a given ‘publicist’ as to what the law should be, as opposed to a scientific survey (s)he conducted to assist in ‘the determination of rules of law’ as they really are.

Some of the difficulties attending the interpretation of article 38(1)(d) of the ICJ Statute are these. There is no debate about what ‘judicial decision’ means. It is a judgment rendered by a judge. At the international stage, ‘judicial decision’ is usually rendered by a panel comprising a minimum of three judges or five judges at the International Criminal Court. At the ICJ, judicial decisions are usually rendered by the entire bench of fifteen judges. And there is usually no debate about who a judge is. It is possible to quarrel about the intellectual acumen or industry of individual judges, but there is usually no extended argument about whether or not someone is a judge.

The same is not true in relation to ‘the writings of the most highly qualified publicists.’ There is always a subjective opinion, inviting a debate, whether a particular ‘publicist’ meets the

qualification of ‘the most highly qualified publicist.’ Shabtai Rosenne summed up the matter thus: ‘There is, of course, no way of establishing who is a ‘most highly qualified publicist’ of any nation.’<sup>70</sup>

Notably, it was Baron Descamps, the eminent Belgian international law professor, who introduced the idea of teachings of jurists a subsidiary source for the determination of the rules of law. He did so during his role as the President of the Committee for the Establishment of the Permanent Court of International Justice.<sup>71</sup> His evident aim was to avoid a situation of *non liquet*, by allowing PCIJ judges an expanded opportunity to do ‘objective justice’ when all the other sources of international law are silent on the question presented for judicial determination.<sup>72</sup> But, Descamps did not mean to give individual scholars or section of them, however well-regarded, an entitlement to shape the direction of international law. What Descamps had in mind was that ‘*la doctrine concordante des jurisconsultes qui font autorité*’—‘the concurrent teachings of jurisconsults of authority’<sup>73</sup>—may help judges to do justice. We see the orientation of Descamp’s mind more fully in his observation that he would allow the judge ‘to make use of the *concurrent* teaching of the authors whose opinions have authority: at this point allow me to recall the memorable and characteristic words of the great Chancellor Kent, to the effect that *when the greater part of jurisconsults agree upon a certain rule* the presumption in favour of that rule becomes so strong, that only a person who makes a mock of justice would gainsay it.’<sup>74</sup> It should not be too difficult to see Descamp’s drift. When the views of publicists of the pedigree of Alberico Gentili, Hugo Grotius, Richard Zouche, Samuel Puffendorf, Emer Vattel—eminent jurists of their various nations—*concur* on a point of

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<sup>70</sup> See Shabtai Rosenne, *Practice and Methods of International Law* (1984) at 119. See also Michael Peil, ‘Scholarly Writings as a Source of Law: A Survey of the Use of Doctrine by the International Court of Justice’ *Cambridge Journal of International and Comparative Law* (2012) 1(3) 136, at p 142.

<sup>71</sup> *Ibid*, p 138. See also Process-Verbaux of the Proceedings of the Committee for the Establishment of the Permanent Court of International Justice, 16 June to 24 July 1920, p 307.

<sup>72</sup> See also Process-Verbaux of the Proceedings of the Committee for the Establishment of the Permanent Court of International Justice, 16 June to 24 July 1920, pp 322–323.

<sup>73</sup> *Ibid*, pp 324–325.

<sup>74</sup> *Ibid*, p 323, emphasis added.

international, a judgment of an international court of law would have been ‘objective’ on the basis of that united view. It is quite a different order from one in which a sectional—even minority—academic view is persistently pushed through law review articles, let alone blog posts and twitter.

In view of the many questions presented by article 38(1)(d) of the ICJ Statute as outlined above, Baron Descamp’s view, as recalled above, is the most sensible approach to the interpretation of the provision. In other words, it is only when a plurality of the *most authoritative* scholars of the *various nations* concur on a point of international law that such concurrence may amount to a subsidiary source for the determination of a rule of international law. Indeed, this requirement of concurrence might have been captured in the original French version of article 38(1)(d) of the PCIJ Statute rendered in the singular sense of ‘*la doctrine des publicistes les plus qualifiés.*’ The definite article ‘*la doctrine*’ signifies a united doctrine of the most authoritative jurists, rather than diverse hypotheses of various authors. As shown in Part 1.C above, the *concurrence* of the most eminent legal scholars leans emphatically against the existence of immunity for heads of state from accountability before international courts that are exercising jurisdiction over international crimes.

### C. An ‘International’ Court or Tribunal

One persistent confusion generated by the proposition that customary international law recognizes no immunity before an international court or tribunal results from misapprehension about the significance of characterizing a tribunal as ‘international.’ That confusion is also evident in the report of the CAVV<sup>75</sup> amongst other commentaries.<sup>76</sup>

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<sup>75</sup> See Advisory Committee on Public International Law, ‘Challenges in prosecuting the crime of aggression: jurisdiction and immunities,’ Advisory Report No 40, dated 12 September 2022, p 14.

<sup>76</sup> See James Goldston and Anna Khalfaoui, ‘In Evaluating Immunities before a Special Tribunal for Aggression Against Ukraine, the Type of Tribunal Matters’ *Just Security* 1 February 2023, available at <[www.justsecurity.org/84959/in-evaluating-immunities-before-a-special-tribunal-for-aggression-against-ukraine-the-type-of-tribunal-matters/](http://www.justsecurity.org/84959/in-evaluating-immunities-before-a-special-tribunal-for-aggression-against-ukraine-the-type-of-tribunal-matters/)>; Astrid Kjeldgaard-Pedersen, ‘Is the Quality of the ICC’s Legal Reasoning

The misapprehension entails the supposition that the classification of any criminal court as ‘international’ has the *automatic* effect of enabling that tribunal with jurisdiction that it may exercise over a particular defendant, if that defendant is found to enjoy no immunity before that tribunal by the operation of international law. The supposition is faulty, as it results from the conflation of *jurisdiction* with the *absence of immunity*. These are different jural concepts that require epistemic decoupling: in the sense of understanding what each of them means and does separately, in order to see how they interact when they must. In the outcome, the fact that immunity is not applicable before a particular court does not mean that the court in question has jurisdiction in a given case.

In other words, the jural value of characterising a criminal tribunal as ‘international’ is not to enable it ‘to prosecute the head of state of another country,’<sup>77</sup> let alone ‘to remove in effect the head of state of another state.’<sup>78</sup> It is not even to ‘remove the immunity’ that a State not party to the tribunal’s founding treaty has in international law.

The value of classifying a tribunal as ‘international’ is bound up with the very significance of the maxim *par in parem non habet imperium* as fully encapsulating the principle of immunity. Robert Jennings explains it well:

[I]t must be remembered that the immunity applies *only* in circumstances which involve the principle that one sovereign state will not exercise its jurisdiction over another sovereign state; *par in parem non habet imperium*. That aphorism is the *foundation and the sum* of the rule of immunity. For that reason even heads of state do not by international law have any immunity from the jurisdiction of an international tribunal; nor indeed from the domestic courts of their home state.<sup>79</sup>

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an Obstacle to Its Ability to Deter International Crimes?’ *Journal of International Criminal Justice* (2021) 939 at p 951. Another scholar indicated that a certain theory within that orbit of scholarship is known within academic circles as ‘the Akande route’: see Sarah Nouwen, ‘Return to Sender: Let the International Court of Justice Justify or Qualify International-Criminal-Court Exceptionalism Regarding Personal Immunities’ 78 *Cambridge Law Journal* (2019) 596 at pp 607-608.

<sup>77</sup> Dapo Akande, oral remarks, Wayamo Foundation Conference, 24-26 March 2016, Panel VII: Immunity of Heads of State under International Law. Available at: <[https://youtu.be/A\\_O1Yzvhcp0](https://youtu.be/A_O1Yzvhcp0)> at counter 1:15:34 to 1:16:28.

<sup>78</sup> *Ibid.*

<sup>79</sup> Robert Jennings, ‘The Pinochet Extradition Case in the English Courts’ in L Boisson de Chazoumes and V Gowlland-Debbas (eds), *The International Legal System in Quest of Equity and Universality I L’ordre juridique*

The point of it is this. The rule that recognizes immunity for sovereign states from the jurisdiction of one another was driven *only* by the basic mischief which the rule was devised to overcome; when it was first articulated in 1812 in the *Schooner Exchange* case<sup>80</sup>—long before the idea of an international criminal tribunal was first broach in 1919 in article 227 of the Versailles Treaty (which came with the rejection of the idea of head of state immunity) and actualized in 1945 in the Charter of the International Military Tribunal at Nuremberg (which also rejected such immunity for heads of state). That *Schooner Exchange* mischief was the concern that one state (the forum state), by exercising jurisdiction over the sovereign head of another state was seen to be exercising hegemony over the second state, hence negating the principle of equality between the two states, described in the *Schooner Exchange* case as that ‘perfect equality and absolute independence of sovereigns.’<sup>81</sup> In that case law, that mischief was expressed in the terms that ‘[o]ne sovereign being *in no respect amenable to another*, and being bound by obligations of the highest character not to degrade the dignity of his nation by *placing himself or its sovereign rights within the jurisdiction of another [sovereign] ...*’.<sup>82</sup>

Perhaps, that mischief of indignity will be seen in greater relief in the light of two further considerations at play in 1812 when the rule of immunity was articulated: (1) the forum state whose court would have been exercising jurisdiction over the sovereign head of another state was only doing so to satisfy the requirements of its own domestic laws that would be applied in the judicial proceedings in question; and, (2) the sovereign head of the forum state was invariably immune from the jurisdiction of his or her own courts, thus radically engaging the asymmetry of subjecting the foreign sovereign to the jurisdiction of the forum court.

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*international, un systeme en quete d’equite et d’universalite, Liber Amicorum Georges Abi-Saab* (2001) 677 at 692 (emphasis added).

<sup>80</sup> See *The Schooner Exchange v McFaddon*, 11 US 116 (1812) [US SC].

<sup>81</sup> *Ibid* at p 137.

<sup>82</sup> *Ibid*, emphasis added.



Beginning with the basic mischief, none of these considerations is engaged in the circumstances of an *international* criminal tribunal. That is the entire essence of the principle which precludes immunity before international criminal tribunals. Hence, the essence of characterizing a court as ‘international’ does not lie in any idea of inherent jurisdiction of such a court to try any particular defendant, merely because the processes of international courts are immunity proof.

Beyond considerations of non-applicability of immunity, the bigger question is whether such a court, especially of limited membership, has any *jurisdiction* that it may exercise in relation to a state that is not a party to the court’s founding treaty.

Here, it is important to understand that the *jurisdiction* of an international court is not conferred by customary international law. Rather, an international tribunal acquires its jurisdiction through a specific instrument that confers that jurisdiction in terms. This could be a treaty (like the Rome Statute that established the ICC in 1998) or a constative resolution of an international organisation [such as the UN Security Council Resolutions that established the ICTY and International Criminal Tribunal for Rwanda]. And then, through the usual process of treaty interpretation, a determination is made about whom the treaty binds for purposes of the court’s jurisdiction.

Where a particular international court has no jurisdiction to begin with, the rule of non-recognition of immunity cannot subject the sovereign of any state to the processes of that court.<sup>83</sup> In those circumstances, the rule of non-recognition of immunity in customary international law is very much a lovely ball gown on a beautiful damsel that has no ball to go to. But it remains a lovely ball gown the damsel can wear when she has a ball to go to.

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<sup>83</sup> See Judgment Jordan Referral re Al-Bashir, *Prosecutor v Al-Bashir*, ICC Appeals Chamber, 6 May 2019, Joint Concurring Opinion of Judges Eboe-Osuji, Morrison, Hofmanski and Bossa, § 446-44.

*Immunity*, on the other hand, serves a different function. It only operates against any jurisdiction that is available, from a different source. Immunity or its absence can come through either customary international law or through an instrument that binds those that are party to it—or both. Even a resolution of the UN Security Council derives its binding effect from the UN Charter that binds the UN member states.

Indeed, the foregoing explanation of the difference and relationship between immunity and jurisdiction is wholly consistent with the observations of the majority of the ICJ majority in the *Arrest Warrant* case, a legal dispute concerning the immunity of foreign ministers from the criminal jurisdiction of peer nations. As noted earlier, the Court observed, in passing, that: ‘an incumbent or former Minister for Foreign Affairs may be subject to criminal proceedings before certain international criminal courts, *where they have jurisdiction*.’<sup>84</sup> [Emphasis added.] The Court cited the International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda and the ICC, as examples of international courts that may exercise such jurisdiction without immunity.<sup>85</sup>

#### ***D. A change of heart?***

Thanks to the war in Ukraine, we are hopefully witnessing a reorientation of the scholarship falling outside of the broad scholarly concurrence indicated above. That nascent shift is discernible in the views of Professor Akande,<sup>86</sup> who had, as noted earlier, consistently insisted that there *is* immunity *in customary international law* for heads of state who are not parties to

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<sup>84</sup> See *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)*, Judgment [2002] ICJ Reports p 3, para 61.

<sup>85</sup> *Ibid.*

<sup>86</sup> Cited ‘as a leading academic expert on question of immunities before the ICC’ in Astrid Kjeldgaard-Pedersen, ‘Is the Quality of the ICC’s Legal Reasoning an Obstacle to Its Ability to Deter International Crimes?’ *Journal of International Criminal Justice* (2021) 939 at p 953. Another scholar indicated that a certain theory within that orbit of scholarship is known within academic circles as ‘the Akande route’: see Sarah Nouwen, ‘Return to Sender: Let the International Court of Justice Justify or Qualify International-Criminal-Court Exceptionalism Regarding Personal Immunities’ 78 *Cambridge Law Journal* (2019) 596 at p 603. See further, Roseanne van Alebeek, *The Immunity of States and Their Officials in International Criminal Law and International Human Rights Law* (2008) at 276.

the founding treaty of an international criminal tribunal with jurisdiction over international crimes, because under treaty law, a treaty can hold no obligation or right for states not parties to that treaty.<sup>87</sup> In that connection, he had argued:

I don't believe in regime change by force. And I don't believe in regime change by international tribunals either. Because that's in effect what we are talking about. To the extent that we take the view that there's no immunity before international tribunals which are created by states, then all we are saying is that two states, three states, fifteen states can set up an 'international tribunal' to remove in effect the head of state of another state. I don't think that's conducive to good international relations.<sup>88</sup>

For those reasons, he repeatedly reproached the Appeals Chamber of the SCSL as having delivered a 'flawed'<sup>89</sup> judgment, when they held that the Special Court had jurisdiction to try Charles Taylor and that he had no immunity before that court, because 'the principle seems now established that the sovereign equality of states does not prevent a Head of State from being prosecuted before an international criminal tribunal or court.'<sup>90</sup>

When in 2019 the ICC Appeals Chamber held that '[t]here 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,'<sup>91</sup> Akande immediately posted a one-page blog branding the ruling as 'extremely controversial' and wrong. Notably, his reaction was motivated by his understanding that 'this reasoning appears to assert that parties to the Rome Statute have, by creating the Court, taken away the right of non-party states under international law.'<sup>92</sup>

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<sup>87</sup> Dapo Akande, oral remarks, Wayamo Foundation Conference, 24-26 March 2016, Panel VII: Immunity of Heads of State under International Law. Available at: <[https://youtu.be/A\\_O1Yzvhp0](https://youtu.be/A_O1Yzvhp0)> at counter 1:15:34 to 1:16:28, emphasis received.

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

<sup>89</sup> See Dapo Akande, 'ICC Issues Detailed Decision on Bashir's Immunity (...At long Last...) But Gets the Law Wrong' *EJIL:Talk!* 15 December 2011. Available here: <[www.ejiltalk.org/icc-issues-detailed-decision-on-bashir-s-immunity-at-long-last-but-gets-the-law-wrong/](http://www.ejiltalk.org/icc-issues-detailed-decision-on-bashir-s-immunity-at-long-last-but-gets-the-law-wrong/)> See also, Dapo Akande, 'The Immunity of Heads of States of Non-parties in the Early Years of the ICC' 112 *AJIL Unbound* (2018) 172 at p 174.

<sup>90</sup> See Decision on Immunity from Jurisdiction, *Prosecutor v Charles Taylor*, SCSL Appeals Chamber, 31 May 2004, § 52.

<sup>91</sup> Judgment Jordan Referral re Al-Bashir, *Prosecutor v Al-Bashir*, ICC Appeals Chamber, 6 May 2019, § 113. See also, *ibid.*, Joint Concurring Opinion of Judges Eboe-Osuji, Morrison, Hofmanski and Bossa, § 70.

<sup>92</sup> See Dapo Akande, 'ICC Appeals Chamber Holds that Heads of State Have No Immunity Under Customary International Law Before International Tribunals', 6 May 2019, *EJIL:Talk!*, available at <<https://www.ejiltalk.org/icc-appeals-chamber-holds-that-heads-of-state-have-no-immunity-under-customary-international-law-before-international-tribunals/>> [Hereafter 'Akande's *EJIL:Talk!* blog of 6 May 2019'].

Akande's disagreements, it seems, resonated with some scholars who have sympathized with the idea of persistent immunity.<sup>93</sup> That sympathy is also evident in the report of the CAVV.<sup>94</sup>

Three years after the ICC Appeals Chamber handed down the decision in *Al-Bashir* outlined above, President Vladimir Putin ordered Russian soldiers to invade Ukraine in a blatant war of aggression. The world was shocked. US President Joe Biden famously called Putin a 'criminal' that needed to be put on trial.<sup>95</sup> In a coordinated move Western nations imposed crippling sanctions of every imaginable kind on Russia and its leaders. And the powerful leaders of many Western nations desired to see Putin prosecuted for international crimes, especially the crime of aggression that the invasion entailed, with some of them saying so openly.<sup>96</sup>

But, a gap that exists in the Rome Statute, ensured that Russian leaders could not be prosecuted before the ICC, though Russian nationals could be prosecuted at the ICC for any other international crime (genocide, crimes against humanity and war crimes) alleged against them as part of their conduct on Ukraine's territory.<sup>97</sup>

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<sup>93</sup> See Astrid Kjeldgaard-Pedersen, 'Is the Quality of the ICC's Legal Reasoning an Obstacle to Its Ability to Deter International Crimes?' *Journal of International Criminal Justice* (2021) 939 at p 951. Another scholar indicated that a certain theory within that orbit of scholarship is known within academic circles as 'the Akande route': see Sarah Nouwen, 'Return to Sender: Let the International Court of Justice Justify or Qualify International-Criminal-Court Exceptionalism Regarding Personal Immunities' 78 *Cambridge Law Journal* (2019) 596 at p 608. Yet another scholar approvingly described his scholarship as 'perceptive': Roseanne van Alebeek, *The Immunity of States and Their Officials in International Criminal Law and International Human Rights Law* (2008) at 275–277.

<sup>94</sup> See Advisory Committee on Public International Law, 'Challenges in prosecuting the crime of aggression: jurisdiction and immunities,' Advisory Report No 40, dated 12 September 2022, p 14.

<sup>95</sup> See Jon Henley and David Smith, 'Biden calls for Putin to face war crimes trial over civilian killings in Ukraine' *The Guardian* 4 April 2022: available at <[www.theguardian.com/us-news/2022/apr/04/joe-biden-vladimir-putin-face-war-crimes-trial-ukraine](http://www.theguardian.com/us-news/2022/apr/04/joe-biden-vladimir-putin-face-war-crimes-trial-ukraine)> See also 'Biden calls Putin a war criminal' *NPR* dated 16 March 2022: available at <[www.npr.org/2022/03/16/1087011897/biden-putin-war-criminal](http://www.npr.org/2022/03/16/1087011897/biden-putin-war-criminal)>

<sup>96</sup> See for instance, Murray Brewster and Christian Paas-Lang, 'Trudeau says Canada backs Ukraine in seeking justice for Putin's 'heinous war crimes'' *CBC* dated 8 May 2022: available at <[www.cbc.ca/news/politics/trudeau-ukraine-visit-1.6445929](http://www.cbc.ca/news/politics/trudeau-ukraine-visit-1.6445929)>. See also Cristina Gallardo, 'Boris Johnson: Vladimir Putin guilty of war crimes' *Politico* dated 2 March 2022: available at <[www.politico.eu/article/boris-johnson-accuse-vladimir-putin-war-crime/](http://www.politico.eu/article/boris-johnson-accuse-vladimir-putin-war-crime/)>

<sup>97</sup> That gap occurs in the words of article 15*bis*(5) of the Rome Statute which provides: 'In respect of a State that is not a party to this Statute, the Court shall not exercise its jurisdiction over the crime of aggression when committed by that State's nationals or on its territory.' This provision is unique only to the crime of aggression. There is no equivalent provision in relation to genocide, crimes against humanity or war crimes.

Thus, a need was felt to rally global support to create a special *ad hoc* international tribunal just for the crime of aggression committed against Ukraine. Former UK Prime Ministers Gordon Brown and John Major emerged as the political leaders of that effort.<sup>98</sup> In an interesting development, the effort attracted immediate support from scholars (notably Akande) who had been prominently sympathetic to immunity before international tribunals seeking to try the head of state of a country that did not subscribe to the founding instrument of the tribunal in question.<sup>99</sup>

The trouble, of course, is that the issue of immunity would always confront any effort to prosecute the crime of aggression. After all, in its current formulation, the crime of aggression is necessarily a leadership crime. Immunity and the crime of aggression are on opposite sides of the accountability coin. Akande's answer to that dilemma deserves quoting in full:

As a matter of general international law, serving heads of state have immunity, certainly from national criminal jurisdiction. And then there's the question of whether they also have immunity if they are sought to be prosecuted by an international tribunal. There's a range of views on that question. So, on whether or not they have immunity before international tribunals. The International Criminal Court gave a decision a couple of years ago, with respect to the then Sudanese President Omar Al Bashir (who was facing the charge of genocide, by the way, at the International Criminal Court) and the International Criminal Court held that though he was a serving head of state, he was not immune [from prosecution] under customary international law, because those were proceedings before an international tribunal. Now, that ruling by the ICC was one which was controversial. But that's what they held. And they relied on an earlier judgment which had been given in a case involving Charles Taylor, who was then the head of state of Liberia who was sought by the Special Court for Sierra Leone, which is also an international tribunal. So that's one view. Not everyone accepts that view.

But actually in this case there's another issue which arises, which is that: this is not just a case - - Yes, it would be an international criminal tribunal - - but it is not just a case of an international criminal tribunal. This is a case where the Government of Ukraine would be delegating the national jurisdiction that it has to prosecute the crime of aggression that occurs on its territory — and against it — to this international tribunal. And as a matter of international law, looking it more broadly, Ukraine obviously has the right to self-defence, which it is exercising in the circumstance. It has the right to act in self-help. It can use force—and it is using force—to defend itself. It would seem

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<sup>98</sup> See Gordon Brown, 'How we plan to prosecute Putin at the International Criminal Court.' Available here: <<https://gordonandsarahbrown.com/2022/04/gordon-brown-today-we-publish-the-text-of-a-criminal-indictment-against-president-putin/>>

<sup>99</sup> See Chatham House webinar, 'A Criminal Tribunal for Aggression Tribunal in Ukraine,' 4 March 2022. Available at [www.chathamhouse.org/events/all/research-event/criminal-tribunal-aggression-ukraine](http://www.chathamhouse.org/events/all/research-event/criminal-tribunal-aggression-ukraine)

to me to be far-fetched to say, ‘Yes, Ukraine can do that. Yes, it can use force. If necessary even it can use force in its aid, acting in self-defence, on the territory of the aggressor state. If necessary, it can even use force to change the government of the aggressor state. But the one thing that it cannot do is actually prosecute the head of state.’ That would seem to me to be quite far-fetched.<sup>100</sup>

That a leading voice who not long ago supported the idea of head of state immunity before international tribunals—as well as the curtailment of ICC jurisdiction over the crime of aggression—would now champion the project of creating a special international tribunal for the crime of aggression in Ukraine (STAU), for the specific purpose of prosecuting Russia’s President Putin, further demonstrates misgivings in the previous scholarship, which found traction amongst some scholars. Space constraint here does not permit extended discussion of the merits of the factors of ‘delegation’ of jurisdiction or ‘self-defence’ that Akande used to try and distinguish the situation in Ukraine (where he considers that the STAU may correctly reject the immunity of President Putin) from that in Sierra Leone (where Akande considered it wrong for the SCSL to reject the immunity of former President Charles Taylor). Suffice it to say that the same arguments made to justify the STAU jurisdiction over Putin would also very readily justify the SCSL jurisdiction over Taylor.

#### **4. Conclusion**

In his report to President Truman on the progress of the London conference of 1945, Justice Robert H Jackson categorically asserted a very American position: ‘We do not accept the paradox that legal responsibility should be the least where power is the greatest.’<sup>101</sup> A basic reason for that rejection of immunity was that Jackson quite correctly saw heads of state

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<sup>100</sup> See Chatham House, ‘A Criminal Tribunal for aggression in Ukraine: High profile speakers launch a declaration to encourage the creation of a special criminal tribunal,’ 4 March 2022. Available here: <[www.chathamhouse.org/events/all/research-event/criminal-tribunal-aggression-ukraine](http://www.chathamhouse.org/events/all/research-event/criminal-tribunal-aggression-ukraine)>: Video timestamp: 39:27 - 42:05

<sup>101</sup> See Robert H Jackson, ‘The Report to the President from Justice Robert H. Jackson, Chief of Counsel for the United States in the Prosecution of Axis War Criminals’ 39 *American Journal of International Law* (1945) 178 at p 182.

immunity as a ‘relic of the doctrine of the divine right of kings.’<sup>102</sup> That idea was at its height in the 16th and 17th centuries, memorialized in Louis XIV famous quip ‘*l’etat c’est moi.*’ But, it is an idea that must be appreciated in its own juristic context. It originated and took hold in an era when *the law* specifically imposed or permitted much that was repugnant to natural justice, equity and good conscience. These included pernicious misogyny, racism, and xenophobia: even child abuse.

Yet, the law was always reforming to accord with its own times. Indeed, immunity was not always an original part of international law. It was enshrined on that plain in 1812 by virtue of the US Supreme Court judgment in the *Schooner Exchange* case. And even so, only in the context of relations between states when the idea of international criminal tribunals was unknown to international law, as was even less so the idea of enforceable protection of human rights.

The march of law reform has since enshrined not only the idea of respect for human rights and correlative individual responsibility for their violation, but also the idea of possible prosecution before an international criminal tribunal. These adjustments brought with them the rejection of immunity. That rejection is remarkably clear for its repetition in at least 18 international documents, at least eight decisions and judgments of international tribunals comprising the positions of at least 40 international judges, and the writings of the most eminent jurists such as Professor Antonio Cassese, Professor Roger S Clark, Professor John Duggard, Sir Robert Jennings, Professor Alain Pellet, Professor Otto Triffterer, Sir Arthur Watts, and many others who come after them.

The resulting law reform leaves no doubt that customary international law no longer accepts immunity for anyone, including heads of state, suspected or accused of gross human rights violation in the order of international crimes, especially when the suspect is being prosecuted

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<sup>102</sup> *Ibid.*

before an international criminal tribunal. The legal scholarship that denies that settled rejection of immunity in customary international law asks the question whether the attitude is attributable to lack of familiarity with these developments, failure to appreciate their true significance or stubborn rejection of that evolution in the law: while remaining uncompromisingly captive to the knowledge that there once was in international law recognition for sovereign immunity through rules laid down in the context of relations between states, at a time when there was no organized multilateral legal order with international tribunals able to exercise criminal jurisdiction, and, at a time when international law lacked a strong ethos (if any at all) of rights and correlative responsibilities on the part of individuals.

In the final analysis, in the 21st century, it is time definitively to close the chapter on immunity of any human being from accountability for vile crimes against their fellow human beings, merely because the beneficiary of immunity enjoys the privilege of public office—a privilege that many would readily accept for all the other high perks it offers, without needing to indulge in criminal conduct.