EXCEPTIONS TO THE INTERNATIONAL CUSTOMARY LAW RULE ON HEAD OF STATE IMMUNITY UNDER INTERNATIONAL CRIMINAL LAW

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ABSTRACT

In the past, when the positivist conception of law and national sovereignty was in vogue, and before the development of democratic governance and republicanism, absolutist monarchs claimed immunity from their own laws and legal processes under the slogan, "the king does no wrong." States committed all manner crimes against their subjects with impunity. At the same time, with the idea of national sovereignty came also the concept of national sovereign independence. Under this concept, the sovereign state had absolute and exclusive authority over all persons, property and affairs taking place on its territory. From sovereign independence also sprang the notion of non-intervention in the internal affairs of states, today considered a fundamental principle of international law. Under this notion, other states or outside bodies could not implead a sovereign state or its representatives in their courts without its consent, let alone remonstrate against its conduct against its subjects or others, however facinorous the conduct. Mongolia relied on this notion when it declined to arrest and surrender Mr. Vladmir Vladimirovich Putin to the ICC for trial for the horrendous crimes he allegedly committed on the territory of Ukraine. The only exception to the notion was in respect of foreigners who enjoyed diplomatic protection from their countries of nationality in case their treatment fell below the

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international minimum standard of civilization. Despotic rulers continued to commit "atrocities that deeply shock the conscience of humanity" with impunity. Modern international criminal law, as analyzed in this Article, repudiates this sorry state of the law and gives pre-eminence to the protection of the individual. Already there is a dawn of a new idea when states are reminded that they are not celestial bodies, but creations of man for man.

I. INTRODUCTION

Under the positivist theory of jurisprudence, law was conceived as the commands of a sovereign. The sovereign was understood as a strongman, or the *Leviathan*, who subdued his subjects and imposed his authority over them. He had untrammeled power to issue, amend, or repeal commands at will, which his subjects had to obey under the threat of punishment. Those commands were law for the subjects. Because of his ability to establish, enforce, and maintain his authority over his subjects, the sovereign was considered the ultimate or supreme power in the country in which he exercised authority. He was not subject to the commands or laws that he made, nor amenable to the courts that he established to enforce them on his behalf. To subject him to his own laws or to make him amenable to the powers of his courts was believed to negate his supremacy and diminish his sovereignty. He could therefore violate his own laws at will with impunity, hence the old English saying that "the King or Queen does no wrong." He or she was above the law—*legibus solutus*.

Totalitarian states continue to conceive sovereignty in these or similar absolutist terms. Force continues to be the source of their authority and legitimacy. Democratic states, on the other hand, consider the people as the repositories of national sovereignty; rulers

are merely servants who exercise authority on behalf of and according to the will and consent of the people. The people delegate to the rulers the power to govern and to pass laws on their behalf through regular, free, and fair elections. The laws do not merely express the will of the rulers or legislators but, notionally, the will of the people. Being a ruler does not catapult or elevate a person above the rest of the citizenry. In democracies, all citizens are equal before the law and are subject to the same law and legal processes—no one is above the law. This democratic notion is poignantly encapsulated under the American Declaration of Independence of July 4, 1776, wherein the original thirteen states declared that:

> We hold these truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights, which among these are Life, Liberty, and the pursuit of Happiness,
>
> That to secure these Rights, Governments are instituted among Men, deriving their just Powers from the Consent of the governed,
>
> That whenever any Form of Government becomes destructive of these Ends, it is the Right of the People to alter or abolish it, and to institute new Government . . . .[1]

Article 21(3) of the Universal Declaration of Human Rights of 1948 echoes that ethos when it proclaims:

> The will of the people shall be the basis of the authority of the government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.[2]

Therefore, in democracies, governments and rulers are not only subordinate to the people of whom they are part but are also subject to the law and to the legal processes. This Article critiques the practice

1 THE DECLARATION OF INDEPENDENCE pmbl. (U.S. 1776).

2 G.A. Res. 217 (III) A, Universal Declaration of Human Rights, ¶ 21(3) (Dec. 10, 1948).

of head of state immunity in some countries and the ban of such immunity under international criminal law.

II. IMMUNITY FROM LEGAL PROCESSES

A. Under National Constitutions

In many countries, both democratic and totalitarian, national laws vest in heads of state immunity from court processes in both civil and criminal matters whilst in office or performing governmental functions.[3] Any proceedings, civil or criminal, that might have been commenced against them earlier, are automatically stayed during their tenure in office. In most countries, the immunity is absolute, no matter the nature or seriousness of the head of state's conduct. Such conduct may not have been for the benefit of the public, but of the head of state personally.[4] It may have been partisan, malicious or vindictive, and aimed at hurting political adversaries. Still, it cannot be the basis of legal proceedings against the wrongdoer if he or she dons the mantle

3 *See, e.g.*, CONSTITUTION OF BOTSWANA art. 41, ¶ 1. It provides that:

> Whilst any person holds or performs the functions of the office of President no criminal proceedings shall be instituted or continued against him or her in respect of anything done or omitted to be done by him or her either in his or her official capacity or in his or her private capacity and no civil proceedings shall be instituted or continued in respect of which relief is claimed against him or her in respect of anything done or omitted to be done in his or her private capacity.

As for the United States, the Constitution is silent on the issue of presidential immunity. Nevertheless, the Supreme Court, drawing on historical precedents and constitutional tradition, recognizes immunity for a sitting president in civil cases or arising out of their official duties or "outer perimeter" of such duties. *See, e.g.*, Nixon v. Fitzgerald, 457 U.S. 731, 755 (1982). *But see, e.g.*, Trump v. Vance, 591 U.S. 786, 795 (2020) (a sitting president does not enjoy absolute immunity; he or she is amenable to court processes). Nonetheless, there is no authoritative judicial pronouncement on whether a sitting president can be indicted or prosecuted.

4 *See, e.g.*, Motswaledi v. Botswana Democratic Party [2009] 2 BLR 284 (Bots.). In this case, the plaintiff sued the second defendant, who was the President of Botswana, in his capacity as President of the first defendant, the ruling party. The suit had nothing to do with state matters or the second defendant as President of Botswana. It related solely to internal party disputes between the plaintiff and the first defendant and its President. The suit was dismissed on the ground that the second defendant enjoyed absolute immunity from lawsuits.

of head of state.[5] In some countries, any wrongs not of a criminal nature committed by a sitting head of state in his or her official capacity may be the subject of court proceedings against the government, but not against the head of state individually. This is a salutary practice that assures aggrieved individuals and communities access to justice.

Democratic countries generally justify such head of state immunity on two purely functional grounds. The first ground is the need to protect the dignity of the head of state. A head of state personifies the state and is sometimes referred to as "father of the nation" or the "fountain of honor." Lawsuits or criminal prosecutions apparently degrade or lower the dignity of that high office. The second ground is that the head of state should not be hampered in any way, by, among other things, being sued or prosecuted and having to defend themselves against lawsuits or prosecutions whilst executing their high and exacting functions,[6] nor should they be embarrassed whilst doing so.[7] *Ex facie*, immunity appears to run counter a central element of the rule of law: that no one is above the law and that all citizens are equal before the law and must account for their conduct. It also tends

5 *See, e.g.*, De Lima v. President Duterte, 865 PHIL. REP. 578 (Oct. 15, 2019) (Phil.) In this case, the petitioner, a Member of the Philippine Senate, sought a *writ of habeas data* against the respondent whilst he was in office as President of the Philippines. The respondent made statements against the petitioner, accusing her of involvement in drug trafficking, threatening the petitioner's life and personal security. The respondent also accused the petitioner of involvement in immoral conduct. Dismissing the petition on the ground that the respondent enjoyed immunity, the Philippine Supreme Court stated that:

> Presidential immunity in this jurisdiction attaches during the entire tenure of the President. The immunity makes no distinction with regard to the subject matter of the suit; it applies whether the acts subject matter of the suit are part of his duties and functions as President. Furthermore, no balancing of interest has ever been applied to the Presidential immunity under our jurisprudence.

Id. at 606.

6 On the exacting nature of the office of President of the United States, Lyndon Johnson remarked after completing his term that, "Of all the 1,886 nights I was President, there were not many when I got to sleep before 1 or 2 A.M., and there were few mornings when I didn't wake up by 6 or 6:30." Clinton v. Jones, 520 U.S. 681, 698 (1997) (quoting LYNDON B. JOHNSON, THE VANTAGE POINT 425 (1971)).

7 The U.S. Supreme Court opined in *Nixon* that because of the importance of the President's duties, diversion of his energies by concerns with private lawsuits would "raise unique risks to the effective functioning of government." 457 U.S. at 751.

to condone and insulate from judicial censure a president's untoward conduct and deny aggrieved persons access to justice. In explaining this dilemma, the Botswana Court of Appeal stated:

> [I]t is common cause that many democratic countries throughout the world have similar immunity clauses . . . . They are all justified on the basis that it is in the public interest that the democratic good (equality before the law) should in this instance accommodate another good (that the Head of State be not impeded in the execution of his duties in the service of that democracy).[8]

A remedy that may be used to check or minimize the deleterious effects of immunity is political and parliamentary accountability. In democratic countries with vibrant and independent legislatures, the parliament may "punish" an erring president by moving a motion of no confidence or by instituting impeachment proceedings against them. However, this remedy would not work in the absence of a free political environment and an independent legislature. Probably the only consolation extant in most democracies is that immunity, being functional, is temporary and ceases as soon as an incumbent vacates the office of head of state or ceases to exercise the functions of that office. In this respect, it must be underscored that immunity merely serves to protect an incumbent from court proceedings or processes whilst in office. It does not release them from legal liability or the obligation to observe the law whilst in or before assuming the office of head of state. Therefore, as soon as they vacate the office, their shield of protection falls away, and they may thereafter be sued or prosecuted for every civil obligation incurred or criminal act committed before assuming or whilst in the office. They are not *legibus solutus.* The constitutions of some countries facilitate the possibility of an ex-head of state being sued or prosecuted by providing that statutes of limitations do not begin to tick until the day when a head of state vacates office. In other words, the time an ex-head of state stayed in office is not considered when computing the period within which a lawsuit or prosecution may be instituted against them.[9]

8 *Motswaledi*, [2009] 2 BLR at 289-90.

9 *See, e.g.*, CONSTITUTION OF BOTSWANA art. 41, ¶ 2.

However, the above position appears to be different from the one recently enunciated by the U.S. Supreme Court in *Trump v. United States*. There, the Court held that a President of the United States is immune from prosecution for "official acts" committed whilst carrying out their "core" constitutional duties (i.e., duties within his or her exclusive mandate). This immunity is absolutely irrespective of the nature of the acts in question, even when they are criminal in character. The Court also held that a president is presumptively immune from prosecution for other acts within the outer perimeter of his or her responsibilities, unless the government can show that prosecution would not pose a danger of intrusion on the authority of the executive branch. The immunity in both instances subsists even *after* an individual ceases to be president.[10] One of the justifications for the Court's decision was that the Framers of the U.S. Constitution had a desire for "an energetic and vigorous President,"[11] and the president should, in effect, not be deterred from exercising their constitutional powers energetically and vigorously by the specter of lawsuits or criminal prosecutions whilst serving as president or after ceasing to be one. Assuming that it is true that the Framers had a desire for an active and "vigorous" president,[12] it is nevertheless hard to fathom that they ever envisioned having a lawless president who disregards the law and commits crimes with impunity with no legal consequences even after leaving office. As President Joe Biden remarked soon after the pronouncement of the decision:

> For all – for all practical purposes, today's decision almost certainly means that there are virtually no limits on what a president can do. [13]

Biden went on to say:

> This is a fundamentally new principle, and it's a dangerous precedent because the power of the office

10 Trump v. United States, 603 U.S. 593, 604, 611 (2024).

11 *Id.* at 639.

12 *Id.*

13 *Remarks by President Biden on the Supreme Court's Immunity Ruling*, THE WHITE HOUSE (July 1, 2024), https://bidenwhitehouse.archives.gov/briefing-room/speeches-remarks/2024/07/01/remarks-by-president-biden-on-the-supreme-courts-immunity-ruling/ [https://perma.cc/3XAA-A67T].

> will no longer be constrained by the law, even including the Supreme Court of the United States. The only limits will be self-imposed by the president alone.[14]

Yet, it is accepted that the Framers of the U.S. Constitution crafted a constitution that would ensure that the American people had "a government of laws and not of men." Indeed, America has always been acknowledged to be a country of laws. America is also acclaimed by much of the free world as a champion of the rule of law. A core element of the rule of law is equality before the law: everyone being subject to the law without exception. As President Joe Biden again categorically stated:

> This nation is founded on the principle that there are no kings in America. Each – each of us is equal before the law. No one – no one is above the law, not even the president of the United States.[15]

The Framers of the Constitution vested in the president all the executive power of the federal government. Part of that power was for the president to "take care that the Laws be faithfully executed . . . ."[16] The president is thus the "Chief Law Enforcement Officer." As such, the president must be exemplary in all their official or private conduct. When they exercise their powers, the president must make sure that this is done in conformity with the law. They must observe the law even in the exercise of the most awesome and sensitive facet of executive power: the waging of war as the Commander-in-Chief of the United States Armed Forces. They must abide by the rules and customs of war, known as international humanitarian law. If the president were to act outside the bounds of the law, they would not be an effective Chief Law Enforcement Officer. As the Special Court for Sierra Leone opined while sentencing former Liberian President, Charles Taylor, "[l]eadership must be carried out by example, by the prosecution of crimes not the commission of crimes."[17] Where the

14 *Id.*

15 *Id.*

16 U.S. CONST. art. 2, § 3.

17 Prosecutor v. Taylor, Case No. SCSL-03-1-01-A, Judgment, ¶ 678 (Sept. 26, 2013) (quoting Prosecutor v. Taylor, Case No. SCSL-03-1-01-A, Sentencing

president miscalculates in executing their official duties, takes a bona fide misstep, or makes a mistaken decision or action that results in some harm, that decision or action is not criminal and should not be taken against them personally. Individuals or communities adversely affected by that decision or action may seek relief against the state or government according to the laws of the country. However, where the president consciously and deliberately makes a decision or commits an act that they know or ought to know to be against the law, or does not advance public but a personal interest, that decision or act cannot be excused or condoned under the cover of "officialdom." It is not part of a president's mandate to violate the law but to obey and enforce the law. To condone or excuse it would be to stamp an *imprimatur* on a former president's illegal or criminal conduct and to encourage an incumbent and their officials to engage in such conduct with impunity. Any president who behaves that way must be subject to prosecution and punishment when they leave office.[18] Prosecution and punishment serves to uphold the rule of law, particularly the tenet that no one, regardless of status or position, is above the law: "Be ye never so high, the law is above you." It also acts as a powerful deterrent to other would-be transgressors.

Judgment, ¶ 102 (May 30, 2012)), https://www.rscsl.org/Documents/Decisions/Taylor/1285/SCSL-03-01-T-1285.pdf [https://perma.cc/VE4Q-3F27].

18 President Biden has suggested an amendment to the U.S. Constitution by adding a statement to the effect that "[t]he Constitution does not confer any immunity from federal criminal indictment, trial, conviction, or sentencing by virtue of previously serving as President." *See FACT SHEET: President Biden Announces Bold Plan to Reform the Supreme Court and Ensure No President Is Above the Law*, AM. PRESIDENCY PROJECT (July 29, 2024), https://www.presidency.ucsb.edu/documents/fact-sheet-president-biden-announces-bold-plan-reform-the-supreme-court-and-ensure-no [https://perma.cc/YCD2-ZRCY]; *see also Remarks by President Biden on the Supreme Court's Immunity Ruling*, *supra* note 13; Mary Clare Jalonick, *In An Attempt to Reverse the Supreme Court's Immunity Decision, Schumer Introduces the No Kings Act*, AP NEWS (Aug. 1, 2024), https://apnews.com/article/supreme-court-schumer-immunity-senate-king-149763b93d62599eac7d0a7c77ff4d4a [https://perma.cc/P4RD-9BY7]. In support of his proposal, Sen. Schumer said that "[g]iven the dangerous and consequential implications of the court's ruling, legislation would be the fastest and most efficient method to correcting the grave precedent the Trump ruling presented." Jalonick, *supra*.

B. Under Customary International Law

Another aspect of national sovereignty is the twin concept of sovereign independence. Notionally, not only is the sovereign not subject to the laws or amenable to the jurisdiction of their own court processes, but they are also not subject to the authority of any other state, including its court processes, without consent. However, this claim to extraterritorial immunity would only be applicable in relation to countries that acknowledge or recognize the sovereign's independence. Since many countries wished for their heads of state to be treated by other countries as they treat them at home, there developed a practice of mutual recognition of each other's immunity for their duly recognized heads of state visiting their territory. They explained this immunity in terms of sovereign equality and independence. According to the Latin maxim *par in parem non habet imperium*, "an equal has no power over an equal." This practice has become so widespread that it has crystalized into a rule of customary international law.[19] The rule was developed further to apply to duly accredited foreign state representatives, including ambassadors and Ministers of Foreign Affairs. It is today reflected under such international treaties as the Vienna Convention on Diplomatic Relations of April 24, 1964, and the New York Convention on Special Missions of December 8, 1969.

It is true that absent a treaty providing to the contrary, a state's jurisdiction, including its criminal jurisdiction, is limited to persons, property on, or conduct that takes place partly within and partly without, its jurisdiction. That is why under customary international law individuals and their rights fell exclusively within the jurisdiction of their states of residence. Save in the case of foreigners who enjoyed diplomatic protection from their state of nationality, other states and outside organizations were forbidden to intervene, comment, or let alone remonstrate with a state over the manner it treated its inhabitants. To do so was to intervene or interfere in that state's internal affairs. Non-intervention in the internal affairs of a sovereign state is a fundamental principle of international law that undergirds the sovereignty and territorial independence of states.

However, an age old exception to the rule against non-intervention was in respect of conduct that amounts to crimes *jus*

19 *See* Statute of the International Court of Justice art. 38, ¶ 1(b), June 26, 1945, 33 U.N.T.S. 993, 59 Stat. 1055.

gentium or crimes against international law. These are crimes which involve conduct that is "universally recognized as criminal, which is considered a grave matter of international concern and for some valid reason cannot be left within the exclusive jurisdiction of the State that would have control over it under ordinary circumstances."[20] Conduct which has to date been recognized to fall under this genre includes piracy *jus gentium*, crimes against the peace, genocide, crimes against humanity and war crimes; these crimes threaten the international order and impinge on common and universal international interests and values. They are committed against the entire international community. Their perpetrators are an enemy of humanity or *hostis humanis*. One way of combating them is for all nations to have a right, nay, a duty to apprehend, try, and punish the perpetrators, irrespective of their nationality or the nationality of the victims, or place where they committed their crimes. When they do, we say that they are exercising universal jurisdiction over the perpetrators and are acting as agents of the international community. Thus, while justifying its assumption of jurisdiction over and trial of Adolf Eichmann, who oversaw the identification, assembly and transportation of Jews in the parts of Europe under German occupation to extermination camps in Poland during World War II—events that took place before the State of Israel was established—the Israeli Supreme Court stated:

> Not only are all the crimes attributed to the Appellant of an international character, but . . . [their] harmful and murderous effects were so embracing and widespread as to shake the international community to its very foundations. The State of Israel therefore was entitled, pursuant to the principle of universal jurisdiction and in the capacity of a guardian of international law and an agent for its enforcement, to try the Appellant. That being the case, no importance attaches to the fact that the State of Israel did not exist when the offenses were committed.[21]

When a state is either unable or unwilling to exercise universal jurisdiction over perpetrators of these crimes, it must, under the *aut dedere aut judicare* principle, extradite them to other states that may

20 In re List & Others, 15 Ann. Dig. 632, 636 (U.S. Mil. Tribunal 1948).

21 Attorney General of Israel v. Eichmann, 36 I.L.R. 277, 304 (1962) (Isr.).

be able and willing to do so. For lack of political will and moral authority, states have in the past been reluctant to invoke universal jurisdiction and exercise their criminal jurisdiction over an individual who commits heinous crimes abroad.[22] However, thanks to the heightened international human rights culture and awareness, states—particularly in Europe—are increasingly invoking universal jurisdiction and trying and punishing individuals with no nexus to them who commit international crimes abroad.[23] As highlighted by the *Yerodia* case between the Democratic Republic of the Congo (DRC) and Belgium, Belgium also tried to exercise universal jurisdiction over a foreign individual who allegedly committed international crimes abroad. It issued an arrest warrant for Mr. Abdulaye Yerodia Ndombasi (then Minister for Foreign Affairs of the Democratic Republic of the Congo), seeking to try him in Belgian courts under Belgian law for, *inter alia*, crimes against humanity which he allegedly committed outside Belgium. Alas, its efforts came to naught. Yerodia, as a duly accredited representative of a sovereign nation, could not be impleaded in Belgian courts without the DRC's consent. He enjoyed immunity. Ordinary Congolese citizens could be impleaded, tried, and punished in Belgium or other foreign courts, but not the Foreign Minister who embodied the national sovereignty of the DRC. Relying on both customary international law and the Vienna Convention on Diplomatic Relations (to which both Belgium and the DRC are parties), the International Court of Justice held Belgium's actions to be illegal. It stated:

> Accordingly, the Court concludes that the circulation of the warrant, whether or not it significantly interfered with Mr. Yerodia's diplomatic activity, constituted a violation of an obligation of Belgium towards the Congo, in that it failed to respect the immunity of the

22 In 1995 Professor Theodor Meron observed that "the record of national prosecutions of violators of such international norms as the grave breaches of the Geneva Conventions is disappointing, even when the obligation to prosecute or extradite violators is unequivocal." Theodor Meron, *International Criminalization of Internal Atrocities*, 89 AM. J. INT'L L. 554, 555 (1995).

23 For a list of states that have recently exercised universal jurisdiction over foreign individuals who committed international crimes abroad, see TRIAL INT'L, UNIVERSAL JURISDICTION ANNUAL REVIEW 2024 (2024), https://trialinternational.org/wp-content/uploads/2024/04/UJAR-2024_digital.pdf [https://perma.cc/72XD-QM54]. The United States has exercised universal jurisdiction on three occasions. In Africa, only three states (Ghana, Senegal, and South Africa) have done so to date.

> incumbent Minister for Foreign Affairs of the Congo and, more particularly, infringed the immunity from criminal jurisdiction and the inviolability then enjoyed by him under international law.[24]

The immunity enjoyed by a sovereign and their envoys abroad is thus absolute, no matter the nature or seriousness of the crime allegedly committed. Nevertheless, it is apposite to emphasize here that *Yerodia* is principally precedent only in matters concerning trials before domestic courts and not those before international tribunals.

III. EXCEPTION TO THE CUSTOMARY LAW RULE

Customary international law, as illustrated by *Yerodia*, has previously worked to encourage impunity, particularly in totalitarian states, where, unless overthrown by extra-legal means, heads of state stay in office indefinitely and are virtually beyond the reach of the law. The *raison d'être* of international criminal law is to end that impunity for international crimes. According to the Preamble to the Rome Statute of the International Criminal Court, international crimes "deeply shock the conscience of humanity" [25] and are so grave that they "threaten the peace, security and well-being of the world."[26] One need look no further than the rubble of Gaza, Israel, Lebanon, Syria, and Ukraine to find examples of such crimes. It is from this standpoint, then, that these crimes "concern the international community as a whole,"[27] and must not be left to the exclusive concern of any one nation. Moreover, given their heinous nature, seriousness, magnitude, and effect, international crimes are invariably committed by powerful individuals—politicians, military commanders, businessmen, and heads of state. Yet, alas, because these perpetrators' powerful and influential positions in society, they are usually beyond the reach of the law, no matter how facinorous their conduct. The law in some countries, as noted above, protects them from prosecution and punishment even after they leave office.

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24 Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3, ¶ 71 (Feb. 14).

25 Rome Statute of the International Criminal Court pmbl., *adopted* July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

26 *Id.*

27 *Id.*

However, governments that hide behind the state fiction to tyrannize their citizens with impunity are reminded of the dawn of a new idea that "states are not celestial bodies but creations of man for man."[28] When various groups of people coalesced and organized themselves into states, they did so for the sole purpose that those states would protect them and their rights, but not to be used as masks behind which powerful individuals amidst them would commit horrific crimes with impunity. The Philippine situation during the presidency of Mr. Rodrigo Roa Duterte is a good example. In response to the international community's outcry against his government's extrajudicial execution of thousands of citizens, Mr. Duterte, then President of the Philippines, said in 2016: "Hitler massacred 3 million Jews. Now, there is 3 million drug addicts. . . . I'd be happy to slaughter them."[29] He also defiantly declared that "[t]he campaign against drugs will continue. . . . Plenty will be killed until the last pusher is out of the streets. And I don't give a s—- about anybody observing my behavior." [30] Mr. Duterte apparently believed that he was beyond international censure because he was president of a sovereign state. He stated: "I am president of a sovereign state. And we have long ceased to be a colony. I do not have any master except the Filipino people."[31] Thanks to the new developments in international law as discussed in this Article, Mr. Duterte could no longer get away with such conduct with impunity. After ceasing to be president on June 30, 2022, he was arrested at the Manila airport on March 12, 2025, by the Philippine Police and handed over to the International Criminal Court to stand trial for murder, torture and rape as crimes against humanity which he allegedly committed before and whilst in office.[32] Thus, today, given the need to ensure justice as a

28 Eduard Reut-Nicolussi, *Displaced Persons and International Law*, 73 LE RECUEIL DES COURS 14 (1948).

29 Sammy Westfall, *Now in ICC Custody, Duterte Long Courted Censure over Deadly Drug War*, WASHINGTON POST, March 13, 2025, at A11.

30 *Id.*

31 *Id.*

32 *See* Situation in the Republic of the Philippines, ICC-01/21-83, Warrant of Arrest for Mr. Rodrigo Roa Duterte (Mar. 7, 2023), https://www.icc-cpi.int/sites/default/files/CourtRecords/0902ebd180aeb09d.pdf [https://perma.cc/6YXR-P8LD]; *see also* Press Release, Int'l Crim. Ct., Situation in the Philippines: Rodrigo Roa Duterte ICC Custody (Mar. 12, 2025), https://www.icc-cpi.int/news/situation-philippines-rodrigo-roa-duterte-icc-custody [https://perma.cc/E9HF-HRE3]. Mr. Duterte served as President of the Philippines from June 30, 2016 to June 30, 2022. The Philippines withdrew from the Court's Statute effective March 17, 2019. The Court nonetheless retained jurisdiction to try

prerequisite for peace, the state vail can and is increasingly being easily lifted to get at those who perpetrate injustice to fellow men.

With the founding of the United Nations in 1945 and with the peoples of the world being determined "to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, [and] in the equal rights of men and women,"[33] the customary international law on the issue of head of state immunity has inexorably evolved and adapted itself to the needs and aspirations of the international community. Specifically, it has evolved to make protection of the individual its overarching goal and, accordingly, to facilitate global efforts to combat impunity for international crimes that threaten the peace, security and wellbeing of humankind.

First, conceptually, the notion that states are solely and exclusively the only subjects of international law capable of deriving rights and incurring obligations has become obsolescent. Non-state entities and even individuals may be subjects of international law, capable of deriving rights and incurring duties. As was pronounced by the International Court of Justice:

> The subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community. Throughout its history, the development of international law has been influenced by the requirements of international life, and the progressive increase in the collective action of States has already given rise to instances of action upon the international plane by certain entities which are not States.[34]

Individuals, though still lacking full procedural capacity to enforce rights on the international plane, can be beneficiaries of rights under that law. Today myriad international instruments directly confer rights on individuals and set up mechanisms for their enforcement at the

Duterte for the alleged crimes which occurred on the territory of the Philippines from November 1, 2011 up to and including March 16, 2019 (while it was a State Party to the Statute). *See also supra* note 5.

33 U. N. Charter pmbl.

34 Reparation for Injuries Suffered in the Service of the United Nations Case, Advisory Opinion, 1949 I.C.J. 174, 178 (Apr. 11).

international level. It is equally true that individuals may incur direct obligations under international law, both customary and treaty, and suffer sanctions for failure to carry them out. Therefore, individuals can no longer commit or otherwise participate in crimes under international law and plead that only states bear responsibility to observe international law. Indeed, this was the very argument that the Nazi defendants made before the Nuremberg International Tribunal to absolve themselves from responsibility for their heinous crimes. The Tribunal responded that:

> Crimes against [i]nternational [l]aw are committed by men, not by abstract entities; and by punishing individuals who commit such crimes can the provisions of [i]nternational [l]aw be enforced.[35]

This opinion was reformulated as Principle I of the Principles of the International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal. It reads:

> Any person who commits an act which constitutes a crime under international law is responsible therefor and is liable to punishment.[36]

The principle has since crystalized into a rule of customary international law. The need to ensure observance of international law as a prerequisite for a peaceful and harmonious international community has necessitated this development.

Secondly, in line with the universal tenet of the rule of law that no one is above the law, Principle II of the Principles of the International Law Recognized in the Charter of the Nuremberg Tribunal repudiates any claims to immunity based on official status. It reads:

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35 *Judgment of 1 October 1946*, *in* 22 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 411, 447 (1948) [hereinafter France v. Göring].

36 *Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal*, at 374, [1950] 2 Y.B. Int'l L. Comm'n 374, U.N. Doc. A/CN.4/L.2.

> 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.[37]

This principle was adopted by the International Law Commission and accepted by the UN General Assembly in 1950.[38] Today, it forms part of customary international law.

Third, the principle of non-intervention in the internal affairs of states, though still fundamental, has been considerably moderated. Today, intervention is permitted in matters that are not "essentially within the domestic jurisdiction of any state."[39] For instance, protection of the individual and of human rights in any country on the globe is an international obligation that may and often necessitates intervention in a country's internal affairs without its consent. This is often done under the aegis of the United Nations and other regional organizations, such as the African Union, the American Union and the European Union.[40]

Now that the conceptual hurdles that denied individuals direct access to rights and duties under international law were overcome, was the battle won? As *Yerodia* demonstrates, not completely. There remain procedural obstacles in the way to the enforcement of the individual's rights and duties on the international plane. Here we are particularly concerned with enforcing international law, beside using armed force, against powerful government officials, including heads of state who tyrannize their citizens. Thanks to the organic and dynamic nature of the law, the solution has been found in international tribunals. As explained by the International Military Tribunal at Nuremberg by the states setting up that Tribunal, "they have done together what any one of them might have done singly; for it is not to be doubted that any nation has the right thus to set up special courts to administer law."[41] While the customary international law rule of equality of states, expressed under the maxim *par in parem non habet*

37 *Id.* at 375.

38 G.A. Res. 95 (I) (Dec. 11, 1946).

39 U.N. Charter art. 2, ¶ 5.

40 *See generally* HENRY J. STEINER, PHILIP ALSTON & RYAN GOODMAN, INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS (3d ed. 2008)

41 France v. Göring, *supra* note 35, at 444.

imperium, disables states from subjecting foreign heads of state and their emissaries to their criminal jurisdictions and processes, that rule may not be invoked before international tribunals. The Appeals Chamber of the Special Court of Sierra Leone explained the matter this way:

> [T]he principle of state immunity derives from the equality of sovereign states and therefore has no relevance to international criminal tribunals which are not organs of a state but derive their mandate from the international community.[42]

This Article will now proceed to discuss the *raison d'être* for the international criminal tribunals and their role and effectiveness in combatting impunity for international crimes. However, in doing so, the Article will make a distinction between those tribunals created under the aegis of the United Nations on the one hand and courts, such as the ICC, set up under special treaty, on the other.

A. UN Tribunals

We have noted that international crimes threaten international peace and security and that the very *raison d'être* for the establishment of the UN was the maintenance of that peace and security and the removal of threats to the peace.[43] Toward this end, the UN Charter entrusts the Security Council with the primary responsibility for the maintenance of international peace and security. Article 24 (1) explicitly provides that:

> In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.[44]

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42 Prosecutor v. Taylor, Case No. SCSL-03-01-I, Decision on Immunity from Jurisdiction, ¶ 51 (May 31, 2004), https://docs.rscsl.org/document/SCSL-03-01-0059 [https://perma.cc/2YGL-3V2S].

43 U.N. Charter art. 1, ¶ 1.

44 *Id.* art. 24.

The UN Charter, under Chapter VII, authorizes the Security Council to determine whether a situation in a particular country in any part of the world constitutes a threat to peace.[45] It also authorizes the Council to decide what measures involving the use of force to take or to recommend other measures not involving force to be employed to maintain or to restore peace.[46] In recent years the Security Council has determined that certain conflict situations amidst which barbarities, outrages, and other violations of international humanitarian law were committed constituted threats to the peace. The Council then set up international criminal tribunals to try and punish the perpetrators as peaceful measures for maintaining or restoring peace in the affected countries.[47] It did so with respect to situations in the former Yugoslavia (International Criminal Tribunal for the former Yugoslavia), Rwanda (International Criminal Tribunal for Rwanda), and Lebanon (Special Tribunal for Lebanon).[48] The Council envisaged that the prosecution and trial of suspected perpetrators would deter them and other would-be perpetrators from further peace-threatening activities and would generally contribute to the restoration of peace, reconciliation, and amity in the affected countries. Another beneficial effect of judicial measures would be to prevent victims or victim communities from taking up arms to seek justice on their own terms—action that may have calamitous consequences.

Interestingly, some accused persons before the International Criminal Tribunal for the former Yugoslavia (ICTY) and the Special Tribunal for Lebanon (STL) challenged the authority of the Security

45 *See id.* art. 39.

46 *Id.* arts. 41-42.

47 For example, Article 1 of the Statute of the International Criminal Tribunal for the former Yugoslavia provides that the Tribunal was established to prosecute "persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991." S.C. Res. 827, annex art. 1 (May 25, 1993) [hereinafter Statute for the Int'l Crim. Tribunal for the former Yugoslavia], https://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf [https://perma.cc/WXK9-QU7F]. The Statute was established pursuant to U.N. Security Council Resolution 827 (1993) on Establishing an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law committed in the territory of the Former Yugoslavia.

48 Under different permutations, similar mechanisms have been set up to deal with situations in Sierra Leone (Special Court for Sierra Leone), Timor-Lester (Special Panels for Serious Crimes) and Cambodia (Extraordinary Chambers in the Courts of Cambodia).

Council to set up those tribunals and, in effect, questioned the tribunals' jurisdiction to try them. In the case of *Prosecutor v. Duško Tadić* before the ICTY,[49] the defense challenged the jurisdiction of the Tribunal to try Mr. Tadić, contending that the Tribunal was established illegally.[50] The defense argued that in purporting to establish it, the Security Council abused its Chapter VII authority.[51] It based its arguments on the grounds that, *inter alia*, the Tribunal should not have been established by a mere Security Council resolution but rather "by treaty, the consensual act of nations, or by an amendment to the Charter of the United Nations."[52] According to the defense, the Council acted beyond its authority when it purported to act under Chapter VII and determined that the situation in the former Yugoslavia was a "threat to peace."[53] They also contended that in establishing the Tribunal, the Council was inconsistent in that it did not establish similar institutions to deal with other conflict situations in which violations of humanitarian law might have occurred[54]; that the adoption of judicial measures was *ultra vires* the Charter because such measures are not included among the "measures not involving the use of armed force" expressly mentioned in Article 41 of the Charter[55]; and that in any case the establishment of the Tribunal was not capable of promoting or restoring international peace.[56] The Trial Chamber declined to pronounce itself on these issues, holding that it had no power to review Security Council Chapter VII decisions.[57] On appeal, the Appeals Chamber held otherwise. It held that the Tribunal had jurisdiction "to examine the plea against its jurisdiction based on the invalidity of its establishment by the Security Council."[58] It based its

49 Prosecutor v. Tadić, No. IT-94-1, Decision on the Defence Motion on Jurisdiction (Int'l Crim. Trib. for the Former Yugoslavia Aug. 10, 1995), https://www.refworld.org/jurisprudence/caselaw/icty/1995/en/61172 [https://perma.cc/GW8H-X4W9].

50 *Id.* ¶ 1.

51 *Id.* ¶ 2.

52 *Id.*

53 *Id.*

54 *Id.*

55 *Tadić*, No. IT-94-1, Decision on the Defence Motion on Jurisdiction, ¶¶ 26-27.

56 *Id.* ¶ 27.

57 *Id.* ¶ 13.

58 Prosecutor v. Tadić, No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 22 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995), https://www.refworld.org/jurisprudence/caselaw/icty/1995/en/61438 [https://perma.cc/83YQ-DNVT].

decision on the *compétence de la compétence* of a court to determine its own jurisdiction and ascertain whether it has power to hear the case on the merits.[59] It also held that it was not barred to review the Council's decision merely because the decision to establish the Tribunal involved complex political considerations.[60] This was particularly so on the question whether the situation in the former Yugoslavia constituted "a threat to the peace."[61] On the merits, it dismissed the appeal, holding that, in effect, the Security Council acted *intra vires* its powers and within the law.[62]

The issues before the Appeals Chamber of the STL in *Prosecutor v. Ayyash*[63] were like those in the *Tadić* case. The defense challenged the legality of the Tribunal on virtually the same grounds.[64] Nevertheless, the Chamber by majority (Riachy, Chamseddine, Nsereko, and Bjornberg), with Baragwanath dissenting, held that "the Tribunal does not possess the authority to judicially review the Security Council's actions when creating the Tribunal, in particular Security Council Resolution 1757 [embodying the Council's decisions and actions]."[65] Having participated in the case as a judge, I am constrained from commenting extensively on the Chamber's decision. However, for present purposes and the completeness of this discourse, I merely state that the Chamber rejected any existence of an analogy between the powers of the Tribunal and those of national courts as state organs possessing the power to check the decisions of other organs. The Chamber stated:

> Unlike those courts, the Tribunal is not endowed with any legal guidelines with which to undertake such an exercise. Moreover, as a body not integrated in the United Nations system, the Tribunal cannot pretend to possess power to supervise any of the organs of the

59 *Id.* ¶ 19.

60 *Id.* ¶ 39.

61 *See id.* ¶¶ 29-30.

62 *Id.* ¶ 142.

63 Prosecutor v. Ayyash, STL-11-01/PT/AR90.1, Decision on the Defense Appeals Against the Trial Chamber's 'Decision on the Defense Challenges to the Jurisdiction and Legality of the Tribunal' (Oct. 24, 2012), https://www.worldcourts.com/stl/eng/decisions/2012.10.24_Prosecutor_v_Ayyash_1.pdf [https://perma.cc/DW3F-3VZP].

64 *See id.* ¶¶ 4-6.

65 *Id.* ¶ 53.

> United Nations in the discharge of their mandate under the Charter. We do not therefore consider decisions of national courts in this respect to be relevant or helpful.[66]

Regarding the question whether the Security Council's determination on the existence of "threat to peace" was correct, the Chamber opined:

> What the Defense effectively asks the Tribunal is to evaluate the Security Council's assessment that the attack of 14 February 2005 and its implications were a threat to international peace and security. However, the United Nations Charter does not specify any legal criteria that the Security Council had to take into account when making this determination. Nor does the Charter define or spell out the prerequisites of what precisely constitutes 'peace', 'security' or the 'threat to peace.' This appears to be a deliberate choice in order to ensure that the Security Council enjoys a great measure of freedom and flexibility when carrying out its responsibility to maintain international peace and security. As such, any findings by the Security Council are necessarily subjective in nature and influenced by a plethora of complex legal, political and other considerations. Furthermore, the Security Council is not required to provide the specific reasons behind such calculations. Any outside attempt to evaluate whether the Security Council made a 'correct' decision would therefore amount to mere speculation. It would be impossible to verify the facts on which the Security Council based its decision, how it weighed those facts, and whether it did so properly.[67]

Lastly, regarding the appropriateness of the measures the Security Council may adopt, the Chamber held that the choice was a matter within the "broad discretion" of the Council.[68] In answer to the argument that judicial institutions are not included on the list of

66 *Id.* ¶ 50.
67 *Id.* ¶ 51.
68 *Id.* ¶ 52.

measures mentioned under Article 41, the Chamber pointed out that the list is not exhaustive but constitutes mere indications of the types of measures the Council may adopt—after all, the article reads, "may include . . . ."[69] Therefore, the Council is not precluded from adopting other measures not included in the list, such as judicial mechanisms, which it deems appropriate to meet the exigencies of a situation.

Reverting to the tribunals, it is instructive to note that their statutes repudiate any immunity for anyone suspected of committing any of the crimes within their jurisdiction. Thus, Article 7(1) and (2) of the ICTY Statute, in common with that of Rwanda,[70] explicitly provides that:

> 1. A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime.
>
> 2. The official position of any accused person, whether as Head of State or Government or a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment . . . .[71]

In the *Milošević* case*,* the *amicus curiae* challenged the legality of the proceedings against Mr. Slobodan Milošević on account of his status as President of the Federal Republic of Yugoslavia. The Trial Chamber curtly reminded the *amicus curiae* that "[t]here is absolutely no basis for challenging the validity of Article 7, paragraph 2, which at this time reflects a rule of customary international law."[72] In the *Karadžić* case, the Appeals Chamber similarly stated that it "recall[ed] that one of the fundamental aims of international criminal courts and

69 *Ayyash*, Case No. STL-11-01/PT/AR90.1, Decision on the Defense Appeals Against the Trial Chamber's 'Decision on the Defense Challenges to the Jurisdiction and Legality of the Tribunal', ¶ 52.

70 S.C. Res. 955, annex art. 6, ¶¶ 1-3 (Nov. 8, 1994) [hereinafter Statute of the Int'l. Crim. Tribunal for Rwanda], https://legal.un.org/avl/pdf/ha/ictr_ef.pdf [https://perma.cc/WA8J-54F9].

71 Statute for the Int'l Crim. Tribunal for the former Yugoslavia, *supra* note 47, art. 7(1)-(2).

72 Prosecutor v. Milošević, IT-02-54-PT, Decision on Preliminary Motions, ¶ 28 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 8, 2001), https://www.icty.org/x/cases/slobodan_milosevic/tdec/en/1110873516829.htm [https://perma.cc/2A75-2EAC].

tribunals is to end impunity and ensure that serious violations of international humanitarian law are prosecuted and punished. Individuals accused of such crimes can have no legitimate expectation of immunity from prosecution."[73] The Chamber reiterated this position in the *Blaskic* case, saying that "those responsible for such crimes [i.e. war crimes, crimes against humanity and genocide] cannot invoke immunity from national or international jurisdiction even if they perpetrated such crimes while acting in their official capacity."[74]

Under Article 25 of the UN Charter, UN Member States are obligated to "accept and carry out the decisions of the Security Council in accordance with the present Charter."[75] In other words, Member States, having given the Council the power to establish the tribunals and promulgate their statutes and rules (as measures not involving the use of force), are also deemed to have accepted what the Council has decided and have undertaken to cooperate with the Council and the mechanisms it establishes to enable it to fulfill its mandate.[76]

A Member State cannot decline to cooperate with a UN tribunal when requested to do so by pleading constraints under domestic or customary international law. In the first place, the law of treaties forbids states to plead their domestic law as an excuse for failure to observe or carry out obligations they assume under treaties.[77] Secondly, states have a right by constant practice or by treaty to modify or to create exceptions as between themselves to a rule of customary international law. When they do so, the new practice, having the force of law, or treaty overrides the pre-existing rule of customary international law affecting their relations *inter se*. Consequently, UN Member States by the operation of Articles 24(1) and 25 of the Charter have authorized the Security Council "acting on

73 Prosecutor v. Karadžić, IT-95-5/18-AR73.4, Decision on Karadžić's Appeal of Trial Chamber's Decision on Alleged Holbrooke Agreement, ¶ 52 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 12, 2009), https://www.icty.org/x/cases/karadzic/acdec/en/091012.pdf [https://perma.cc/K476-4LWA].

74 Prosecutor v. Blaskiić, IT- 95-14- AR108 *bis*, ¶ 41, Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 29, 1997), https://www.icty.org/x/cases/blaskic/acdec/en/71029JT3.html [https://perma.cc/RK2Q-NXEE].

75 U.N. Charter art. 25.

76 *Milošević*, No. IT-02-54-PT, Decision on Preliminary Motions, ¶ 28.

77 Vienna Convention on the Law of Treaties art. 27, *adopted* May 23, 1969, 1155 U.N.T.S. 331.

their behalf" to create exceptions to the pre-existing customary law rule on head-of-state immunity with respect to matters before the UN tribunals. [78]

Lastly, UN Member States cannot plead competing obligations under other treaties as an excuse for not cooperating with a tribunal established by the Security Council. For instance, they cannot rely on the provisions of the Vienna Convention on Diplomatic Relations or similar treaties to decline to arrest or to surrender to the tribunal an indicted visiting sitting head of state or diplomat. Article 103 of the UN Charter trumps those treaties, providing that "[i]n the event of a conflict between the obligations of the members of the United Nations under the present Charter and their obligations under any other international agreements, their obligations under the present Charter shall prevail."[79]

When read in conjunction with Articles 24 and 25, the language of Article 103 leaves no doubt as to Member States' obligation to cooperate in all matters legitimately required of them by a tribunal established by the Security Council.

B. The International Criminal Court

While the UN tribunals have done commendable work, they have also had limitations. One such limitation is that they are ad hoc; they were set up to deal with specific situations, and when they finished their work in relation to those situations, their mandates came to an end. Their territorial jurisdiction was also restricted to specific countries, and their temporal jurisdiction was similarly restricted to specific periods. Situations or episodes that equally constituted a threat to peace and deserved the intervention of the law to maintain the peace and to protect affected victims fell outside their territorial or temporal jurisdiction. For instance, the temporal jurisdiction of the International Criminal Tribunal for Rwanda was restricted to violations committed on the territory of Rwanda or committed by Rwandan citizens on the territory of neighboring countries "between 1 January 1994 and 31 December 1994."[80] The Rwanda Patriotic Front (RPF) Government wanted the jurisdiction of the Tribunal to date back to 1990, when the RPF first launched its incursions into the country from neighboring

78 U.N. Charter arts. 24(1), 25.

79 *Id.* art. 103.

80 Statute of the Int'l. Crim. Tribunal for Rwanda*, supra* note 70, art. 1.

Uganda. Yet the same RPF Government vehemently opposed extending the jurisdiction beyond December 31, 1994, after they seized power.[81]

Man's yearning for justice is universal, perpetual, and unquenchable. As time lasts, so will man's proneness to hurt fellow man also continue; and so will the yearning for justice. Therefore, the international community needed a permanent international court which would be poised to take action whenever and wheresoever on the globe injustice occurs. The International Criminal Court (ICC) largely satisfies that yearning: it is permanent and international or virtually global. Nevertheless, it must be emphasized that the Court is "complementary to national criminal jurisdictions."[82] States retain the right and primary responsibility to exercise their respective criminal jurisdiction over individuals who commit international crimes on their territory.[83] It is only when they demonstrably appear to be unable or unwilling to exercise their jurisdiction or, when they do, they do so for the purpose of or in a manner that reveals an intention of shielding the perpetrators from international justice, that the ICC intervenes and exercises jurisdiction on behalf of the international community.[84] That intervention serves to ensure that "the most serious crimes of concern to the international community as a whole must not go unpunished . . . ."[85]

81 *See generally* Daniel D. Ntanda Nsereko, *Genocidal Conflict in Rwanda and the ICTR*, 48 NETH. INT'L L. REV. 31, 39 (2001). A U.N.-led team that investigated the activities of the Rwandan Army in the Democratic Republic of the Congo in 1998 found that the army had committed atrocities against civilians, including the systematic murder of Hutu refugees. *See generally* Daniel D. Ntanda Nsereko, *The International Criminal Court: Jurisdictional and Related Issues*, 10 CRIM. L.F. 87, 109 (1999).

82 Rome Statute, *supra* note 25, art. 1.

83 *See, e.g.*, Prosecutor v. Saif Al-Islam Gaddafi & Abdul Al-Senussi, ICC-01/11-01/11, Decision on the Admissibility of the Case Against Abdullah Al-Senussi (Oct. 11, 2013); *see also* Ephrat Livni, *Israel Challenges U.N. Court's Jurisdiction to Issue Warrant for Netanyahu's Arrest*, N.Y. TIMES (Oct. 7, 2024), https://www.nytimes.com/2024/10/07/world/middleeast/israel-netanyahu-arrest-warrest.html [https://perma.cc/UG6G-K68E]. Israel complained that the ICC Prosecutor failed to provide it with sufficient scope of his inquiry to give Israel time to show that it was capable of independently investigating the same matter.

84 *See generally* Rome Statute, *supra* note 25, arts. 17-19. *See also* Daniel D. Ntanda Nsereko, *The ICC and Complementarity in Practice*, 26 LEIDEN J. INT'L L. 427 (2013); Daniel D. Ntanda Nsereko & Manuel J. Ventura, *Article 19: Challenges to the Jurisdiction of the Court or the Admissibility of a Case*, *in* ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: ARTICLE-BY-ARTICLE COMMENTARY 1033 (Kai Ambos ed., 2022).

85 Rome Statute, *supra* note 25, pmbl.

Unlike the UN tribunals, the ICC was established by treaty, the Rome Statute. The Statute is binding on all states that are parties to it (known as States Parties). Save, as we shall see presently, in cases relating to Security Council referrals, the Statute is not directly binding on states that are not State Parties. It does not directly oblige them to cooperate with the Court.[86] Though associated with the UN by special agreement, the ICC is independent of the UN.

Like the statutes of the UN tribunals, the Rome Statute explicitly excludes immunity for heads of state and other government officials granted to them under both national and customary international law. Article 27(1) provides as follows:

> The Statute shall apply to all persons without distinction based on official capacity. In particular, official capacity as Head of State or Government, a member of a Government or Parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.[87]

Also pivotal to our discussion is Article 27(2), which also provides that "[i]mmunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such person."[88]

Some of the advantages of these provisions, as with those of the UN tribunals, is that the Prosecutor does not have to wait for an incumbent head of state or government official to leave office and to lose their immunity under national or customary international law before they can commence proceedings against them. Indeed, this eventuality may never come to pass. As Kenneth Roth, the former Executive Director of Human Rights Watch, aptly observed, "a policy of refusing to prosecute sitting heads of state could easily become an incentive for leaders facing criminal charges to do whatever it takes to

86 Article 34 of the Vienna Convention on the Law of Treaties provides that "[a] treaty does not create either obligations or rights for a third State without its consent." Vienna Convention on the Law of Treaties, *supra* note 77, art. 34.

87 Rome Statute, *supra* note 25, art. 27, ¶ 1.

88 *Id.* ¶ 2.

remain in office, including committing more of the mass atrocities that the ICC is supposed to be helping to prevent."[89]

With great respect, this observation is particularly apposite to Africa, where some heads of state hold on to power for as long as forty years or longer. Moreover, we should not forget the adage that "justice delayed is justice denied." This includes justice to both victim groups and to the international community. A delay may adversely affect the availability or the quality of evidence and thus frustrate the desire of the international community to ensure that "the most serious crimes of concern to the international community as a whole [do] not go unpunished . . . ."[90]

A cardinal rule of the international law on treaties ordains that "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith."[91] Accordingly, Article 86 of the Rome Statute stipulates that "States Parties shall, in accordance with the provisions of the present Statute, cooperate fully with the Court in its investigations and prosecution of crimes within the jurisdiction of the Court."[92] Article 88 of the Statute also requires that States Parties "ensure that there are procedures under their national law for all of the forms of cooperation which are spelt out under this part."[93] One critical area of cooperation required of States Parties is the arrest and surrender of suspects or accused persons on their territory to the Court. This is as it should be, because the Court does not have a police force of its own to execute its warrants of arrest and other orders and decrees. On this subject, Article 89(1) of the Rome Statute pointedly provides that "States Parties shall, in accordance with the provisions of this Part and under the procedure under their national law, comply with requests for arrest and surrender."[94]

The mode of how the Court's jurisdiction over a situation is triggered is irrelevant to a State Party's obligation to cooperate, be it by state or Security Council referral or by the Prosecutor initiating

89 Kenneth Roth, *Africa Attacks the International Criminal Court*, N.Y. REV. OF BOOKS (Feb. 6, 2014), http://www.nybooks.com/articles/archives/2014/feb/06/africa-attacks-international-criminal-court/?page=2 [https://perma.cc/J2SH-JWQY].

90 Rome Statute, *supra* note 25.

91 Vienna Convention on the Law of Treaties, *supra* note 77, art. 26 (on codifying international law).

92 Rome Statute, *supra* note 25, art. 86.

93 *Id.* art. 88.

94 *Id.* art. 89, ¶ 1.

proceedings *proprio motu*.[95] For instance, Mongolia recently sought to absolve itself from its obligation to arrest and surrender Mr. Vladimir Vladimirovich Putin to the Court on the pretext that there was no Security Council referral or resolution obliging it to cooperate with the Court.[96] Mongolia also argued that Mr. Putin, as an incumbent Head of State of the Russian Federation, enjoyed absolute immunity under customary international law, that the immunity extended to proceedings before international tribunals unless the Russian Federation waived it, and that the Rome Statute's provisions could not supersede other obligations emanating from customary international law.[97] Citing the object and purpose of the Rome Statute, its binding nature on States Parties and the centrality of the no-immunity provisions, the Pre-Trial Chamber held that:

> [A]ny arguable bilateral obligation that Mongolia may owe to the Russian Federation to respect any applicable immunity that international law may allow to Heads of State is not capable of displacing the obligation that Mongolia owes to the Court, which is tasked with exercising its jurisdiction on grave crimes of international concern that threaten the peace and security of the States Parties to the Statute, and even of the international community as a whole. Given its nature and purpose, such a multilateral obligation cannot be altered or superseded by any bilateral commitments that may conflict with the Rome Statute's objectives.[98]

Ultimately, the Chamber found Mongolia to have violated its international obligations under the Rome Statute by not executing the Court's request for the arrest and surrender of Mr. Putin while he was in Mongolia in August 2024, and referred the matter to the Assembly

95 *Id.* art. 13.

96 Situation in Ukraine, ICC-01/22, Finding Under Article 87(7) of the Rome Statute on the Non-Compliance by Mongolia with the Request by the Court to Cooperate in the Arrest and Surrender of Vladimir Vladimirovich Putin and Referral to the Assembly of States Parties, ¶ 18 (Oct. 24, 2024), https://www.icc-cpi.int/sites/default/files/CourtRecords/0902ebd1809d1971.pdf [https://perma.cc/U36K-SEFX].

97 *Id.*

98 *Id.* ¶ 28.

of States Parties, as per Article 87(7) of the Statute.[99] It also subsequently denied Mongolia's application for leave to appeal the decision to the Appeals Chamber.[100]

Another person who has been the subject of considerable controversy in the matter of arrest and surrender is Mr. Omar Al Bashir, the former President of Sudan. He was indicted before the ICC for war crimes, crimes against humanity, and genocide whilst still serving as President of Sudan. Before his overthrow from power by the Sudanese military in April 2019, he traveled with relative ease to Malawi, Chad, the Democratic Republic of the Congo, Djibouti, South Africa, Uganda, and Jordan—all States Parties to the Rome Statute. These countries declined to arrest and surrender him to the ICC. Some did so in violation of their own laws providing that official status shall not constitute a bar to the arrest and surrender of anyone sought by the ICC.[101]

Sudan is not a State Party to the Rome Statute, nor has it ever made a declaration under Article 12(3) of the Rome Statute accepting the Court's jurisdiction.[102] Therefore, neither a States Party nor the Prosecutor acting *proprio motu* could have triggered the jurisdiction of the Court over Mr. Al Bashir for events that took place in the Darfur region of Sudan. However, the UN Security Council, exercising its Chapter VII powers, determined on March 30, 2005, that the situation in the Darfur region constituted a threat to the peace and then proceeded to decide the appropriate measures wherewithal to maintain or restore the peace.[103] Instead of creating a new ad hoc tribunal to deal with that situation, as it did in the cases of other peace-threatening situations, the Council in its discretion invoked Article 13(b) of the Rome Statute and referred the situation to the ICC Prosecutor for

99 *Id.* at 17.

100 Situation in Ukraine, ICC-01/22, Decision on Mongolia's Request for Leave to Appeal, Temporary Stay of Proceedings and Related Matters (Nov. 29, 2024), https://www.icc-cpi.int/sites/default/files/CourtRecords/0902ebd180a22268.pdf [https://perma.cc/MCA4-NA7G].

101 *See, e.g.*, Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 § 4(2) (S. Afr.); International Criminal Court Act 2010 § 25 (Uganda).

102 *See Rome Statute of the International Criminal Court*, UN TREATY COLLECTION, https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&clang=_en#10 [https://perma.cc/S6EA-2TEN] (last visited Mar. 24, 2025).

103 S.C. Res. 1593 (Mar. 31, 2005).

investigation and prosecution.[104] When the Security Council, acting under its Chapter VII mandate, makes such a referral, it is immaterial that the state where the situation arose is not a States Party to the Rome Statute. Nor does that state have to consent—as in this case, Sudan did not consent—to such a referral. As noted with respect to UN Security Council ad hoc tribunals, the Council's decision to refer a matter to the ICC brings into play *all* UN Member States' obligations under Article 25 to "agree to accept and carry out the decisions of the Security Council in accordance with the present Charter."[105] The resolution referring the Sudan situation to the ICC underscored this point when it provided that:

> [T]he Government of Sudan and all other parties to the conflict in Darfur, shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution and, while recognizing that States not party to the Rome Statute have no obligation under the Statute, urges all States and concerned regional and other international organizations to cooperate fully.[106]

It is true that states that are not party to the Rome Statute do not incur any direct obligation under the Statute to cooperate with the Court. Nevertheless, all UN Member States, irrespective of whether they are also States Parties to the Rome Statute, are *ipso facto* obliged to cooperate with the Court when it is carrying out, on behalf of the Security Council, a Chapter VII mandate. Therefore, the language of the resolution "urging" non-States Parties to cooperate is not merely hortatory, because no UN Member State can resile from its Charter obligations to cooperate.[107] As for States Parties, their obligation to

104 That provision vests in the Court jurisdiction with respect to crimes within its mandate "if a situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations." Rome Statue, *supra* note 25, art. 13, ¶ b.

105 U.N. Charter art. 25.

106 S.C. Res. 1593, *supra* note 103, ¶ 2.

107 *See generally* Prosecutor v. Al Bashir, ICC-02/05-01/09, Decision Under Article 87(7) of the Rome Statute on Non-Compliance by Jordan with the Request by the Court for the Arrest and Surrender of Omar Al-Bashir, ¶¶ 33-36 (Dec. 11, 2017), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2017_07156.PDF [https://perma.cc/4CAQ-CFJS].

cooperate flows directly from the Rome Statute and from the UN Charter.

Also significant is the fact that the Council's referral brought into play the whole panoply of the relevant provisions of the Rome Statute to the cases that arose from the referral.[108] This conclusion is borne out by the chapeau to Article 13 providing for the trigger mechanisms for the Court's jurisdiction. It reads:

> The Court may exercise its jurisdiction with respect to a crime referred to in article 5 *in accordance with the provisions of this Statute* if . . . [a] situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations.[109]

One of "*the provisions of this Statute"* that is germane to this discussion is Article 27 which, as indicated earlier, provides that immunity which may attach to a person under either national or international law "shall not bar the Court from exercising its jurisdiction over such person."[110] Its effect on the *Al Bashir* case was to trump any immunity that Mr. Al Bashir might have enjoyed as President of Sudan and emanating from national law, treaty, or customary international law. Thus, the ICC Pre-Trial Chamber, when citing the Democratic Republic of the Congo for non-cooperation when it failed to arrest Mr. Al Bashir, declared:

> [T]he [UN Security Council had] implicitly waived the immunities granted to Omar Al Bashir under international law and attached to his position as a Head of State. Consequently, there also exists no impediment at the horizontal level between the DRC and Sudan as

108 *See* Prosecutor v. Gaddafi, ICC-01/11-01/11-163, Decision on the Postponement of the Execution of the Request for Surrender of Sail Al-Islam Gaddafi Pursuant to Article 95 of the Rome Statute, ¶¶ 28-29 (June 1, 2012), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2012_06521.PDF [https://perma.cc/Q45V-CE92].

109 Rome Statute, *supra* note 25, art. 13, ¶ b.

110 *Id.* art. 27.

> regards the execution of the 2009 and 2010 Requests.[111]

It is puzzling that despite these clear obligations freely assumed under the UN Charter and under the Rome Statute, States Parties exhibited such reluctance to arrest and surrender Mr. Al Bashir to the Court to answer charges against him when he visited their territories. They came up with all sorts of excuses for their reluctance, most of which were untenable and fly in the face of elementary rules of the law of treaties.

Besides the unmaintainable claim that Mr. Al Bashir enjoyed immunity under both national and customary international law, some states argued that Sudan was not a States Party, and it had not waived Al-Bashir's immunity as Head of State. It is true that under

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111 Prosecutor v. Al Bashir, ICC-02/05-01/09, Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court, ¶ 29 (Apr. 9, 2014), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2014_03452.PDF [https://perma.cc/PXF9-QTX9]. For similar decisions, see Prosecutor v. Al Bashir, ICC-02/05-01/09, Corrigendum to the 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, ¶ 8 (Dec. 13, 2011), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2011_21750.PDF [https://perma.cc/Z6TQ-SDN5]; Prosecutor v. Al Bashir, ICC-02/05-01/09, Decision on the Non-Compliance by the Republic of Uganda with the Request to Arrest and Surrender Omar Al-Bashir to the Court and Referring the Matter to the United Nations Security Council and the Assembly of State Parties to the Rome Statute, ¶ 7 (July 11, 2016), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2016_04947.PDF [https://perma.cc/TVS7-CK49]; Prosecutor v. Al Bashir, ICC-02/05-01/09, Decision on the Non-Compliance of the Republic of Djibouti with the Request to Surrender Omar Al-Bashir to the Court and Referring the Matter to the United Nations Security Council and the Assembly of State Parties to the Rome Statute, ¶ 12 (July 11, 2016), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2016_04946.PDF [https://perma.cc/Y443-R3UA]; Prosecutor v. Al Bashir, ICC-02/05-01/09, 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, ¶¶ 74-75 (July 6, 2017), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2017_04402.PDF [https://perma.cc/BNU4-5LNB]; Prosecutor v. Al Bashir, ICC-02/05-01/09, Decision Under Article 87(7) of the Rome Statute on the Non-Compliance by Jordan with the Request by the Court for the Arrest and Surrender of Omar Al-Bashir, ¶ 7 (Dec. 11, 2017), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2017_07156.PDF [https://perma.cc/HR7R-JDJS].

international law, diplomatic immunity inures to the state and that the state has discretion to waive it. Nonetheless, in this case, as already explained, Mr. Al Bashir was not immune from ICC proceedings commenced against him at the behest of the Security Council acting under Chapter VII of the UN Charter. Therefore, Sudan had no immunity to waive.[112] Moreover, the Convention on the Prevention and Punishment of the Crime of Genocide,[113] to which all the states involved in the Al Bashir saga are party, repudiates head of state immunity. Article IV of the Convention states that "[p]ersons committing genocide or any of the acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals."[114] This provision further shows that Sudan was constrained by this provision and could not waive immunity with respect to Mr. Al-Bashir. Article I of the Convention also provides that "[t]he Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and punish."[115] Sudan and other States Parties to the Convention do thus have a bounden obligation to cooperate with all the efforts aimed at preventing and punishing genocide. *Afortiori*, they must cooperate with the ICC in its efforts to bring any genocide suspect to justice.

Another argument put forward, particularly by Jordan, was that to require States Parties to arrest Mr. Al Bashir would be to force them to act inconsistently with Article 98(1) of the Rome Statute, which provides that the ICC may not require a States Party to the Statute to assist it where, in doing so, the requested States Party would violate the immunity of persons from States that are *not* parties to the Rome Statute, unless those states have waived the immunity.[116] The short answer to this argument is, again, that Sudan had no immunity to waive. Therefore, when the Prosecutor requested States Parties to arrest and surrender Mr. Al Bashir he was not "forcing" them to act

112 Prosecutor v. Al Bashir, ICC-02/05-01/09, Judgment in the Jordan Referral re Al-Bashir Appeal, ¶ 144 (May 6, 2019), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2019_02593.PDF [https://perma.cc/2BXN-MW79].

113 Convention on the Prevention and Punishment of the Crime of Genocide, *adopted* Dec. 9, 1948, 78 U.N.T.S. 277.

114 *Id.* art. 4.

115 *Id.* art. 1.

116 Rome Statute, *supra* note 25, art. 98, ¶ 1.

inconsistently with the Rome Statute.[117] To the contrary, the Prosecutor was simply reminding them of their obligation under the Charter and the Rome Statute to cooperate.

African States Parties that refused to arrest and surrender Mr. Al Bashir to the Court pleaded that in refusing to arrest and to surrender him they were complying with resolutions of the African Union, which forbade African states from cooperating with the ICC in this matter. Members of the African Union felt aggrieved by the ICC indictments against African heads of state, such as Mr. Al Bashir and Mr. Uhuru Kenyatta of Kenya, and interpreted those indictments as a deliberate targeting of Africa and an attempt to humiliate African leaders. Probably in retaliation, the Assembly of the African Union (AU) at its meeting in July 2009 passed the non-cooperation resolution.[118] Again, at its meeting in October 2013, the Assembly decided that "no charges shall be commenced or continued before any international Court or Tribunal against any serving AU Head of State or Government or anybody acting or entitled to act in such capacity during their term of office."[119] In so deciding, the Assembly purported to be acting according to the "principles deriving from national laws and international customary law by which sitting Heads of State and other senior state officials are granted immunities during their tenure in office."[120] Apparently, states that failed to abide by AU resolutions and decisions ran the risk of incurring political and economic

117 *Al Bashir*, ICC-02/05-01/09, Judgment in the Jordan Referral re Al-Bashir Appeal, ¶ 129.

118 Assembly of the Afr. Union, *Decision on the Report of the Commission on the Meeting of African States Parties to the Rome Statute of the International Criminal Tribunal (ICC)*, ¶¶ 10-11, Assembly/AU/Dec.245(XIII) (July 3, 2009); *see also* Assembly of the Afr. Union*, Decision on International Jurisdiction, Justice and the International Criminal Court (ICC)*, ¶ 3, Assembly/AU/Dec.482(XXI) (May 27, 2013) (reaffirming "that Member States such as the Republic of Chad that had welcomed President Omar Al Bashir of The Sudan did so in conformity with the decisions of the Assembly and therefore, should not be penalized"). In Assembly of the Afr. Union, *Decision on the Progress Report of the Commission on the Implementation of Previous Decisions of the International Criminal Court (ICC)*, ¶ 18, Assembly/AU/Dec.547(XXIV) (Jan. 30-31, 2015), the Assembly "COMMEND[ED] the Democratic Republic of the Congo for complying with AU Decision for non-cooperation for the arrest and surrender of President Omar Al Bashir of the Republic of the Sudan."

119 Assembly of the Afr. Union, *Decision on Africa's Relationship with the International Criminal Court (ICC)*, ¶ 10(i), Ext/Assembly/AU/Dec.1 (Oct. 12, 2013).

120 *Id.* ¶ 9.

sanctions.[121] The Assembly also requested African States Parties "to propose relevant amendments to the Rome Statute," [122] presumably to expunge the no-immunity provision from the Statute. With great respect, given that the *Al Bashir* indictments were based on a Security Council referral, it is apparent that the Assembly's understanding of the applicable rules of international law was flawed. As the ICC Pre-Trial Chamber ruled in the Uganda non-cooperation case, "a State Party [to the Rome Statute] could not invoke any other decision, including that of the African Union directed to its members, providing for any obligation to the contrary."[123] As, noted earlier, under Article 103 of the UN Charter where there is a conflict between Member States' obligations under the Charter and their obligations under any other international agreement, their obligations under the Charter prevail.

African states also cited political considerations and exigencies as an excuse for not complying with the ICC Prosecutor's request to arrest and surrender Mr. Al Bashir. They argued that good relations among all countries of the African region were essential to the maintenance of peace and security and that arresting Mr. Al Bashir would disturb such relations. The Pre-Trial Chamber rejected the arguments:

> The Chamber, while sensitive to these political considerations, stresses that States Parties to the Statute must pursue any legitimate, or even desirable political objectives within the boundaries of their obligations vis-à-vis the Court. Indeed, it is not in the nature of legal obligations that they can be put aside for political expediency.[124]

121 Constitutive Act of the African Union art. 23, ¶ 2.

122 *Decision on Africa's Relationship with the International Criminal Court (ICC)*, *supra* note 119, ¶ 10(vi).

123 Prosecutor v. Al Bashir, Case No. ICC-02/05-01/09, Decision on the Non-Compliance by the Republic of Uganda with the Request to Arrest and Surrender Omar Al-Bashir to the Court and Referring the Matter to the United Nations Security Council and the Assembly of State Parties to the Rome Statute, ¶ 12 (July 11, 2016), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2016_04947.PDF [https://perma.cc/TVS7-CK49].

124 *Id.* ¶ 14.

Also germane to this discussion is the June 27, 2014, adoption of a protocol by the African Union by which the African Court on Human and People's Rights would be merged with the Court of Justice of the African Union and would vest the new Court with criminal jurisdiction over international crimes.[125] Of particular interest to us here is Article 46A *bis* of the Court's Draft Statute which provides that "[n]o charges shall be commenced or continued before the Court against any serving AU Head of State or Government, or anybody acting or entitled to act in such capacity, or other senior state officials based on their functions, during their tenure of office."[126]

To date, none of the fifty-five member states has ratified or acceded to the protocol.[127] It is submitted that if or when the protocol comes into force, its immunity provision will be ineffectual to supersede the ICC States Parties' obligations under the Rome Statute or to bar the trial of their serving heads of state by the Court. Under the law of treaties, a states party to a treaty may not unilaterally disable itself from fulfilling its terms by entering another treaty that is inconsistent with its terms.[128] Therefore, the terms of the Rome Statute will continue to operate in all cases involving the Heads of State of African States Parties, and non-State Parties in case of Security Council referrals.

Finally, one assumes that when African and other State Parties to the Rome Statute ratified or acceded to the Rome Statute, they knew or must be presumed to have known and accepted the provisions of the Statute and the obligations it imposes on them. A basic rule of the law of treaties ordains that a treaty freely and voluntarily entered is binding upon the parties and must be carried out in good faith—

125 Afr. Union, *Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights* [*Malabo Protocol*] (June 27, 2014), https://au.int/sites/default/files/treaties/36398-treaty-0045_-_protocol_on_amendments_to_the_protocol_on_the_statute_of_the_african_court_of_justice_and_human_rights_e.pdf [https://perma.cc/8YGW-FTYF].

126 *Id.* art. 46A *bis*; *see also* Dire Tladi, *The Immunity Provision in the AU Amendment Protocol*, J. INT'L CRIM. JUST. 1 (2015).

127 Afr. Union, *List of Countries Which Have Signed, Ratified/Acceded to the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights* [*Malabo Protocol*] (May 20, 2019), https://au.int/sites/default/files/treaties/36398-sl-PROTOCOL%20ON%20AMENDMENTS%20TO%20THE%20PROTOCOL%20ON%20THE%20STATUTE%20OF%20THE%20AFRICAN%20COURT%20OF%20JUSTICE%20AND%20HUMAN%20RIGHTS.pdf [https://perma.cc/2RM7-NT96].

128 *See* Vienna Convention on the Law of Treaties, *supra* note 77, art. 30, ¶ 4(b).

pactum sunt servanda.[129] According to a Luganda maxim, *Akalagaane: tekajja buliika*: i.e., when you freely enter into a bargain, you should not consider it undue pressure or extortion when the other party to the bargain demands that you fulfil the terms of the bargain or the obligation you assumed under it. Carrying out that obligation is one of the consequences of living in a rules-based community. States Parties to the Rome Statute must not approbate and reprobate at the same time.[130] In doing so they would be subjecting themselves to public ridicule. The ICC is a serious and solemn venture that the plenipotentiaries at the Rome Diplomatic Conference created to combat impunity for international crimes and for keeping aloft the banner of the rule of law.[131] It was not set up to try rebel and opposition personalities only, but to try *all* perpetrators of international crimes, regardless of their official status under national or international law.

IV. CONCLUDING REMARKS

As the ICJ stated in the *Reparations* case, international law, like any other legal system, grows and adapts itself to the needs of society. To meet these needs, states, the primary actors of international law, have a right, by state practice or by treaty, to modify or make exceptions to existing rules of international law as it concerns their

129 *Id.* art. 26.

130 *See* Prosecutor v. Al Bashir, Case No. ICC-02/05-01/09, Corrigendum to the 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, ¶ 41 (Dec. 13, 2011), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2011_21750.PDF [https://perma.cc/E5GE-C9GK] ("[A]ll the States referenced above have ratified this Statute and/or entrusted this Court with exercising 'its jurisdiction over persons for the most serious crimes of international concern.' It is facially inconsistent for Malawi to entrust the Court with this mandate and then refuse to surrender a Head of State prosecuted for orchestrating genocide, war crimes and crimes against humanity. To interpret article 98 (1) in such a way as to justify not surrendering Omar Al Bashir on immunity grounds would disable the Court and international justice in ways completely contrary to the purpose of the Statute Malawi has ratified.").

131 *See generally* Daniel D. Ntanda Nsereko, *The Rule of Law, the International Justice System and Africa*, *in* FOR THE SAKE OF PRESENT AND FUTURE GENERATIONS: ESSAYS ON INTERNATIONAL LAW, CRIME AND JUSTICE IN HONOUR OF ROGER S. CLARK 82 (Suzannah Linton, Gerry Simpson & William A. Schabas eds., 2015).

relations *inter se*.[132] For instance, in the not-too-distant past, the waging of war was a sovereign right, *jus ad belum*, and an essential attribute of national sovereignty. Today, however, given "the scourge of war, which twice in our lifetime has brought untold sorrow to mankind," that right has been rendered obsolescent and resort to war, save in the exercise of the right to self-defense or Security Council authorization, is prohibited.[133] The prohibition has since crystalized into a rule of customary international law having the character of *jus cogens*. Similarly, given the preeminence that international law attaches to the imperative to promote universal human rights observance and to protect the individual—its ultimate beneficiary—old conceptions of national sovereignty have also been drastically modified. The rule on non-intervention in the internal affairs of states under which other states were forbidden to intervene in matters of a state's treatment of its inhabitants has also been modified to permit outsiders a say in such matters. National sovereignty must not be set up and used as an impregnable wall behind which people with power and authority commit with impunity crimes that deeply shock the conscience of humanity. Under the UN Charter, ECOSOC Resolution 1503 (XLVIII) of May 27, 1970, human rights treaties and the nascent concept of the responsibility to protect, treatment of individuals is no longer an exclusively internal matter.[134]

Regarding the rule on head of state immunity, States Parties to the Rome Statute have made the needed exceptions to the customary international law rule in respect of grave crimes such as genocide, crimes against humanity, war crimes and aggression—crimes which "threaten the peace, security and well-being of the world." Likewise, Parties to the Genocide Convention made a similar exception in respect of genocide. So did all the UN Member States, albeit indirectly, when they authorized the Security Council, acting on their behalf, to take appropriate measures to restore or maintain international peace and security.

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132 In a slightly different context, see Curtis A. Bradley & Mitu Gulati, *Withdrawing from International Custom*, 120 YALE L.J. 202 (2010).

133 *See* General Treaty for Renunciation of War as an Instrument of National Policy (Kellog-Briand Pact), Aug. 27, 1928, 94 L.N.T.S. 57; U.N. Charter art. 2, ¶ 4.

134 *See* U.N. Charter arts. 1(3), 2(7), 55. In addition to various human rights treaties, see also INT'L DEV. RSRCH. CTR., THE RESPONSIBILITY TO PROTECT: REPORT OF THE COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY (2001).

These and other exceptions constitute veritable contributions and indispensable tools to the maintenance of international peace, justice, and to the fight against impunity for international crimes.

ICC arrest warrants, such as those issued for the arrest of key actors in the current conflict situations in Gaza and Ukraine, including Israeli Prime Minister, Benjamin Netanyahu, and Russian Federation President, Vladimir Putin, may remain unexecuted for a while. Nevertheless, they will not fade away with time. Absent a judicial decision to the contrary, they will remain in force until such time as the persons named therein leave this earth to meet their maker. Moreover, they have some desirable deterrent effect: the indicted persons are no longer free to travel anywhere in the world as before, knowing that they may be arrested on arriving at some airports. Finally, their very issuance is symbolically significant: no one is above the law.