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The balance of immunity and impunity in the prosecution of international crimes

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Resumen

Es una realidad que las inmunidades han desempeñado un importante papel en el orden legal internacional. Sin embargo, con frecuencia parece ser el caso de que esta figura jurídica no se utiliza de manera justa y que en repetidas ocasiones se abusa de ella, inclusive hasta el punto de inducir impunidad para crímenes internacionales. He aquí donde radica el persistente esfuerzo que conlleva equilibrar los diferentes intereses protegidos por el derecho internacional, así como el eterno debate sobre cómo balancearlos. Por un lado, la soberanía nacional y los intereses individuales de cada Estado, y por el otro el inmanente derecho de la colectividad internacional de que se haga justicia. Este estudio analiza el progresivo desarrollo del derecho internacional con respecto a esta paradoja, partiendo de la premisa de que es de suma importancia detener la perpetuación de crímenes auspiciados por el Estado mediante el encubrimiento de los responsables bajo un velo de inmunidad e impunidad.

La relevancia y el propósito de este análisis se basan en la pretensión de expandir el entendimiento de las leyes que gobiernan los mecanismos penales en instancias nacionales e internacionales, para determinar si restringen o fomentan sus funciones inherentes e instrumentales en la lucha contra la impunidad.

Abstract

It has been concluded that immunities have played an important role in the international legal order. Howbeit, it seems to be the case that more often than not, they are not righteously used and rather abused, to the point of inducing impunity for international crimes. Herein lies the persistent struggle of balancing the different interests protected by international law, and the perpetual debate as to how to weigh them. On the one hand State sovereignty and individual State interests, and on the other hand the right of the international community to justice and accountability. This study will analyze the flourishing development of international law with respect to this paradox, departing from the understanding that it is of paramount importance to stop the perpetuation of State sponsored crimes, which shelter perpetrators under a veil of immunity, i.e. cloaking them with impunity.

The relevance and purpose of this analysis lay in furthering the understanding of the laws that govern national and international criminal mechanisms, in order to ascertain if they restrain or enhance their inherent functions as vehicles in the fight against impunity.

Palabras clave

Inmunidad, impunidad, crímenes internacionales, jurisdicción universal, juicios internacionales, ius cogens, jerarquía de normas internacionales.

Keywords

Immunity, impunity, international crimes, universal jurisdiction, international prosecutions, ius cogens, hierarchy of international norms.
Introduction

In the twentieth century alone, the increasing and abusive use of violence has been responsible for over 187 million people being killed or allowed to die by human decision. The gravity of this appalling reality cannot be overstated, “it is man’s inhumanity to man... we have no excuses for inaction and no alibis for ignorance.”

In light of this scenario, the development of international criminal law has become imminent and indispensable in order to restore human consciousness and to achieve international peace and security through the rule of law.

The starting point of this transition lies within the understanding that violations of international humanitarian law and other prohibitions under international law constitute international crimes, and those who commit them incur in individual criminal responsibility, regardless of the official capacity that they may hold under their domestic legal system. It is of paramount importance to stop the perpetuation of State sponsored crimes, which shelter perpetrators under a veil of immunity, i.e. cloaking them with impunity, and to prosecute them to the full extent of the law.

Nevertheless, the traditional State-centered vision myopia of public international law has been gradually maturing into a more holistic view, evincing a progressive development that allocates and engages the maxim *hominum causa omne jus constitum est*, i.e. all law is created for the benefit of human beings. Furthermore, the rise of human rights law is a manifestation of a more reasonable approach on the matter, by upholding the protection of individuals to a higher standard, yet without disregarding the legitimate interest of States. Hence, one of the main challenges of international criminal law lies in balancing the objectives of the laws that protect immunities and of the laws that prevent impunity, which *prima facie* would seem to be mutually exclusive.

Therefore, the purpose of this study is twofold; the first part is dedicated to analyze the status of the *lex lata* of immunities from criminal jurisdiction afforded to State officials in international law, and the second part deals with the different avenues for prosecution of State officials for international crimes in the national and international arena, considering the existence of immunities in the international legal order.

This separation abides to the interaction of the theoretical and conceptual aspects of immunities on the one hand, and on the other, the actual role that they play in practice and how they are applied.

The relevance and purpose of this thesis lies in furthering the understanding of the laws that govern national and international criminal mechanisms, in order to ascertain if they restrain or enhance their inherent functions as vehicles in the fight against impunity.

It is of paramount importance to stop the perpetuation of State sponsored crimes, which shelter perpetrators under a veil of impunity, i.e. cloaking them with impunity, and to prosecute them to the full extent of the law.

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3. ICJ, *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment of 3 February 2012, *Dissenting opinion of Judge Cançado Trinidade*, part XVI.
The history and rationale of immunities

Etymologically, the word «immunity» derives from the Latin immunitas, a variant of immunity, which means «the condition of someone being exempted from taxes, or from any charges or duties». The use of this term dates back to the mid-eighteenth century, yet it was not until the end of the nineteenth century when it was introduced into the lexicon of national and international law.\(^6\) Within the field of criminal law, it evolved as to be associated with a «cause of impunity»\(^7\) and in international law with the «prerogatives» of the sovereign State\(^8\), hereby evincing the dichotomy of concepts and their struggling balance.

By definition, the term «immunity» allocates an exceptional character to the exemption from jurisdiction.\(^9\) Therefore, it is argued that it was never intended to be a «principle», nor a norm of general application, especially one that would allow its invocation to condone the commission of international crimes.\(^10\)

Historically, the concept of immunity is a heritage that dates back to the absolutist monarchical regimes, where the King was the ultimate authority, and as such did not have to respond to anyone about his actions, because he was understood to be parallel to God. The monarch was the author of the law, yet, paradoxically he was not bound by it. He had absolute sovereign power attached to no legal responsibilities. We herein find origin of rulers being cloaked with impunity,\(^11\) to be «untouchable» was a royal privilege that the Crown assured and maintained at all costs.

In modern times, the personal and functional immunities accorded to individuals are a natural consequence of the immunity correspondent to the State itself,\(^12\) granted that the manner in which the State manifests itself is via its physical agents. Hence, the rationale behind the transferal of State immunities to its officials is based on the premise that the former would be illusory unless they are extended to the individuals who are acting on its behalf.\(^13\) If it was possible to claim jurisdiction over such agents, it could be assessed as a circumvention of State immunity for its actions. This would contradict the maxim par in parem non habet imperium, which was originally the bedrock of the doctrine of absolute immunity.\(^14\) The basis of this adage lies on the principle that all States are equals,\(^15\) and consequently one cannot try another, i.e. one sovereign shall not adjudicate the conduct of another.\(^16\) Thereby precluding an unacceptable infringement\(^17\) resulting from the forum State attempting to exercise its adjudicatory competence over a foreign State official who

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13. See Zoernsch v. Waldock and another [1964] 2 All ER 256 (CA) 266. This was actually a case relating to the immunity of former employees of an international organization (the European Commission of Human Rights).

14. See The Cristina (1938) 60 LR 147 (HL) 162 (Lord Wright).

15. The principle of sovereign equality among all Members of the UN, is laid down in Article 2, paragraph 1, of the Charter of the United Nations, 24 October 1945, 1 UNTS XVI.


The UN General Assembly adopted a Declaration on the Inadmissibility of Intervention and Interference in the Domestic Affairs of States (UNGA Resolution 2131 (XX) 1965); however, as will be explained in detail in Section II, International Criminal Courts and Tribunals do not participate in this inter-state dynamic and therefore do not allow immunities to bar prosecutions. It could be understood that this dissociation is automatic and axiomatic given the mandated supranational nature of these Courts, which naturally would preclude the aforementioned rationale from applying to them. Moreover, the explicit rejection of immunities has always been embedded in their constitutive instruments in order to ensure the fulfillment of the object and purpose they were created for.

**Types and scope of immunities**

There are two different types of immunities that are afforded to State officials, personal immunity and functional immunity. The fact that they abide to different rationales and exist for their own specific purposes, means that naturally, each one of them applies for and under particular circumstances. These two types of immunity might happen to reside in the same person simultaneously and/or exist temporarily separated; or it may also be that they are correspondent to completely different individuals. The distinction is depending on the type of office held, on the kind of conduct carried out and its temporal ambit, and on the material scope of the issue raised. The relevance of their individual characteristics lies on the form of procedural bar that each one of them represents in practice.

20. See, art 2(7) of the UN Charter “Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State...” Furthermore, the prohibition of intervention «is a corollary of every State’s right to sovereignty, territorial integrity and political independence» (Oppenheims International Law, p 428). Additionally, The Friendly Relations Declaration [UNGA res. 2625(XXV) 1970] includes an entire section on «The principle concerning the duty not to intervene in matters within the domestic jurisdiction of any State, in accordance with the Charter.» The UN General Assembly adopted a Declaration on the Inadmissibility of Intervention and Interference in the Domestic Affairs of States (UNGA Resolution 2131 (XX) 1965); Wirth, Immunities, Related Problems, and Article 98 of the Rome Statute, 12 Criminal Law Forum, 2001, pp 429-458.
25. Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including
IMMUNITY RATIONE PERSONAE

The so-called «personal» immunity is the broadest type of immunity. The absolute nature of the immunity *ratione personae* prohibits the exercise of criminal jurisdiction for conduct performed in the individual’s official and private capacities. The rationale behind personal immunity aims at facilitating international relations through diplomacy. This term is understood as an essential instrument for effective cooperation within the international community, geared towards resolving any differences by peaceful means.

It is justified by the legal fiction of personification i.e. the personal representation of the State by the official, who in turn absorbs the immunities afforded to the State. Hence, the State is the real beneficiary of said immunity, and therefore it is empowered to waive them if necessary to lift the procedural bar to jurisdiction.

The goal is to prevent the State officials who bear this immunity to be hindered from the free and full exercise of their functions if they were arrested and detainted while in a foreign State, irrespectively of when the act in question was committed. Consequently, it is limited to the period that the individual remains in office, to avoid being subjected to a constraining act of authority, whilst endowed with immunity.

Albeit the preservation of international relations might *prima facie* justify this type of immunity, it is inevitable to observe that while an alleged perpetrator is in office and thus covered by it, there is no international customary law that supports prosecution by national foreign courts, not even in the case of international crimes. The ICJ explains that:

«It has been unable to deduce... that there exists under customary international law any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers for Foreign Affairs, where they are suspected of having committed war crimes or crimes against humanity.»

Following this judgment, a large number of national courts have dismissed claims against these officials over the alleged commission of international crimes on the grounds that they recognize and respect that immunity *ratione personae* bars jurisdiction over proceedings. The seriousness of the alleged crime generates no exception of the rule, for the rationale behind it is unconnected to...
the conduct and therefore, the nature of the charge, for it is aimed at protecting the role of the person concerned.35

«No immunity from jurisdiction other than personal immunity in accordance with international law applies with regard to international crimes.»36

The ICJ in the Arrest Warrant case, explicitly declined the exception of immunity for the prosecution of international crimes, by assessing the customary law respective to foreign national courts.37 The ratio decidendi in this judgment would seem to be that, when it comes to the balance of interests, the interest of States to protect their sovereignty from the potential «abuse» of a foreign criminal law system would outweigh the international community’s interest in the fiduciary exercise of the collective jus puniendi by the forum State over a perpetrator who bears immunity ratione personae.38

Albeit the Court did offer alternatives to prevent this practice from translating into impunity,39 these are still subordinated to the sovereign will of the State to which the alleged perpetrator owes his allegiance.

At this point, seems we are at a crossroads: the Sovereignty panorama seems to render international prosecutions a perplex challenge – especially when personal immunities have a role to play.

To remedy this situation, the least drastic measure would be to hold the prosecution until the individual in question ceases to hold office, thereby expiring the personal immunity attached to it and thus exposing the impugned actions to be safeguarded only to the extent that may correspond to the residual domain of his functional immunity.

On the other hand, a less subtle and more immediate course of action, would be to abide by the principle of aut detere aut judicare, in the sense that the official could be tried in his or her own domestic courts, or conversely, that the State waive the accorded immunity to said person in order to be prosecuted in a foreign national court.40

In any case, the jurisdictional door to international criminal tribunals is meant to be the last, yet perhaps, the safest resort for this endeavor.

In this regard, special attention must be paid to the increasing tendency of international law steering towards recognizing the importance of prosecuting international crimes, which by evolving in this direction is preventing the abusive use of the rules of immunity.

IMMUNITY RATIONE MATERIAE

The second form of immunity is ratione materiae or functional immunity. This type of immunity is granted to a broader scope of State officials for the functions they perform on behalf of the State.41 Consequently, said immunity is circumscribed to the acts carried out while in exercise of their official duties and its duration is confined to be their term of office. However, since the immunity is atta-
Conduct of the state official versus acts of state

ATTRIBUTABILITY OF A CONDUCT TO THE STATE OR TO THE OFFICIAL FOR THE PURPOSES OF IMMUNITY

As was established in Chapter 3, immunity for State officials can be either ratione personae, or ratione materiae, or both, depending on the circumstances of each case in which immunity is pleaded. In practice, problems arise for officials that do not carry out the most straightforward representation of the State, e.g. as that of a Head of State. This lacuna is due to the apparent lack of specificity in the regimes governing the very wide hierarchical range of State officials. In principle, the personal scope of State immunity is to be determined by the rule of attribution of State responsibility in international law. The ILC Draft Articles on State Responsibility serve as support for this conclusion.

In order of appearance, State immunity, State immunity granted to officials acting on its behalf and State responsibility conform a tripod that might prima facie seems to be woven out of intrinsically intertwined concepts in regards to the conduct generating them all. It is not the purpose of this study to go in depth within these concepts, so we shall remain on the area of what is relevant for the topic at hand. As has been authoritatively stated:

42. Cryer, p. 551.
43. Text of the draft articles and commentaries thereto, provisionally adopted by the Commission at its sixty-sixth session, commentary (Commentaries) (3).
45. Idem, Commentary (11).
46. Akande and Shah at 11.
48. As the ILC Special Rapporteur stated in his report on this matter: «an official performing an act of a commercial nature enjoys immunity from foreign criminal jurisdiction if this act is attributed to the State.»Kolodkin, x 94 (e).
"A State can only act through servants and agents; their official acts are the acts of the State; and the State’s immunity in respect of them is fundamental to the principle of State immunity." 49

Indeed, the Draft Articles of the ILC on Responsibility of States for International Wrongful Acts were created to serve the purpose of enabling States for international accountability, 50 and in the context of this regime, the attribution of the conduct of State officials to their State is confirmed in its fourth Draft Article: 51

1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State.

2. An organ includes any person or entity which has that status in accordance with the internal law of the State. 52

Accordingly, even when the impugned acts were carried out ultra vires, they are still considered to be within the scope attributable to governmental instructions - for the purpose of its immunity coverage - due to the official capacity in which the conduct were executed. 53

Evidently, where the immunity owed to the State is assured, immunity for its State officials will follow as a corollary. 54 If the immunity of a State’s government from criminal jurisdiction before foreign domestic courts is cinched under international law, then no law is likely to simultaneously withhold that immunity from those officials who have carried out the instructions of the government in question.

The tension in this regard emerges from the increasing cases in which the immunity of State officials has been put under the microscope in cases of violations of peremptory norms of international law. This increasing tendency of considering that the acts of the officials should not be immune, even though their governments are, brings the forum court to draw a line between the State immunity per se and the immunity of its agents, 55 thereby dismantling the notion of «State sponsored crimes».

Moreover, these Draft Articles deal strictly with the ambit correspondent to the responsibility of the State, and when it comes to individual responsibility, this regime seems to abstain from stipulating anything at all, thereby conceding that the issue must be dealt with by the regime of international criminal law as lex specialis.

«These articles are without prejudice to any question of the individual responsibility under international law of any person acting on behalf of a State.» 56

A crime is a crime, irrespective of who committed it. Any other interpretation would be erroneous and manifestly inequitable.

52. Idem.
55. Idem, p.1305
56. ARSIWA, Article 58.
INTERNATIONAL CRIMES ARE NOT PART OF STATE FUNCTIONS

History shows that the most serious crimes, such as genocide, war crimes and crimes against humanity, are almost exclusively committed by individuals with the support of the State’s apparatus and avail of material resources; and this infrastructure paradoxically would seem to veil the individual’s conduct under the alleged pursuance of State policies.  

The traditional approach to determine the status of an act carried out by the State is to distinguish between the acts of a purely sovereign nature from those of non-sovereign activities, i.e. acta jure imperii and acta jure gestionis.

However, it is a matter of logic and fact that no State can - nor was ever allowed - to invoke sovereignty to commit an international crime. Therefore, the abovementioned criteria is of no assistance, for they are conclusively not normal State functions, nor are they acts the State can perform in any sort of private capacity. A crime is a crime, irrespective of who committed it. Any other interpretation would be erroneous and manifestly inequitable.

This passage is a strong expression of the position held by Lord Phillips in the Pinochet case:

«An international crime is as offensive, if not more offensive, to the international community when committed under the colour of office.»

It follows that any alleged «authority» to commit acts in violation of an international norm with peremptory status is naturally null and void, and such acts could never be legally ratified by any State.

The abovementioned views are now increasingly claimed in legal doctrine, and also gradually finding expression in State practice, as evinced in judicial decisions and opinions, since the Eichmann case, and more vehemently, after the Pinochet judgment.

Individual criminal responsibility and State responsibility for core international crimes are not mutually exclusive notions as they co-exist in parallel, and there is no legal standing whatsoever for the invocation of State immunities in the face of these crimes.

INDIVIDUAL CRIMINAL RESPONSIBILITY OF STATE OFFICIALS

It has been established in the previous Sections that, the acts of the State official cannot be considered to be the acts of the State for the purposes of being covered by State immunity if such acts are directed to the commission of an international wrong by that State. Moreover, acts constituting international crimes cannot legitimately be incidental to the functions of any State official. International law cannot, on the one hand, confer immunities on a functional basis to certain State officials, and on the other

57. Dissenting opinion of Cançado Trindade, at 182.
59. Pinochet Queen’s Bench Appeal, at 189-190 Lord Philips.
60. Prosecutor v Furundzija, (Judgment), ICTY Trial Chamber Caase IT-95-17/1-T, 10 December 1988, at 155.
63. See Article 1 of the ARSIWA, in relation to Article 58.
hand be blind to the nature of the «function» exercised by those State officials. Naturally, acts amounting to a criminal result cannot be characterized as acts in discharge of any public duty or function, nor does it give any legal standing to invoke the State’s entitlement to jurisdictional immunity because international law vehemently prohibits the individual from serving the State in that manner. Any claim of functional immunity to this effect fails automatically when the charge is one of committing international crimes, precisely because the issue at stake is the individual’s criminal liability of the person concerned for the perpetration of said crimes and not the representativeness of the State.

It is important to understand that individuals are not simply actors under international law, but they are subjects as well, and as such they are titulaires of both, rights and obligations, which emanate directly from international law as jus gentium. Additionally, individuals have onuses that transcend the national obligations of obedience imposed by their State; in other words, “it is an accepted part of international law that individuals who commit international crimes are internationally accountable for them.”

Moreover, the doctrine of sovereign immunities, which followed the myopia of a State-centric approach «unduly underestimated and irresponsibly neglected the position of the human person in international law, in the law of nations, droit des gens.» The scope of conducts carried out by State official that can be imputed to the State for the purposes of invoking State immunity is delimited by the norms of international law that are directed at acknowledging the criminal responsibility of individuals; and by virtue of the nature of the protected legal interest that has been vulerated, these have attained a peremptory status within the international legal order. International crimes are executed by men and women, not by abstract entities (i.e. States), and only by prosecuting the individuals who commit such crimes can the rule of law be respected. Therefore, under international law these perpetrators cannot seek to avoid the legal consequences of those anti-juridical acts by the invocation of immunities.

Contemporary jurisprudence and international legal doctrine finally appear to be prepared to acknowledge the righteous duties of responsibility in the international context. It is recognized that these criminal conducts can no longer be regarded as attributable only to the impersonal State and not to the individuals who ordered or executed them, without it being unrealistic and offensive to all common notions of justice.

Conclusively, customary international law has clearly been crystalized in numerous regimes to ensure that any State official, including a Head of State, will personally be held accountable if there is sufficient evidence to conclude that, he or she, ordered, authorized, acquiesced or personally perpetrated any core international crimes.

65. See Kolodkin II, n. 1, at. 68 ff, Lord Lloyd in Pinochet n. 1, at. 74-76.
66. Dissenting opinion Cançado Trinidade, at 180.
68. Pinochet n. 3, at. 151.
69. Jurisdictional Immunities, Dissenting opinion of Judge Cançado Trinidade at 181.
70. See Douglas.
71. International Military Judgment at Nuremberg, Judgments and Sentences, 1 October 1946, reproduced in (1947) 41 AJIL 172, 220-1.
72. Arrest warrant, at 183.
74. Watts, pp 82, 84.
Dilemma of conflicting normativity: *Jus cogens* violation and the upholding of immunity

*Jus cogens* norms are a category of norms that contain fundamental and overriding principles of international law, from which no derogation is possible. However, while there is nearly universal agreement for the existence of the category of *jus cogens* norms, there is far less concurrence regarding the actual content of this classification.\(^75\)

To engage in the perpetual debate as to which norms of international law have this peremptory status is beyond the scope of this analysis, yet, there is notable consensus that the prohibition of genocide, slavery, racial discrimination, torture and crimes against humanity are included within this category.\(^76\) These fundamental human rights are protected by elementary norms that lie at the epicenter of the international legal order, and prevail over all other conventional and customary norms, arguably including those relating to State immunity.

It is paramount to comprehend that in any case, *jus cogens* norms prohibit committing the crimes that would amount to a violation of these norms; and does not *per se* imply that all international laws regarding immunity and prosecution, would *ipso facto* cease to apply.\(^77\)

Therefore, the following question is raised: Which rules should prevail?

There is a clear bifurcation when it comes to the balance of such norms, and to accurately answer this question, it is precise to analyze both approaches.

The first approach argues that the rules of immunity and *jus cogens* norms are on two different plains of application, the former being strictly procedural and therefore, a preliminary aspect of the judicial process, which means that the actual content of the merits cannot be evaluated, or even accessed to at this stage, albeit there might be strong evidence indicating violations of peremptory norms.

The second approach expresses that the nature of said violations trumps any procedural restriction and gives access to the court in question to exercise jurisdiction over the person concerned for the crimes described above. It entails an analysis based on the merits of the case, which effectively dismantles the procedural shield. In essence, it catalogues the rules of immunity as part of the «ordinary» bulk of international law, as opposed to those with peremptory status.\(^78\) This view reveals a substantive understanding of *jus cogens* focusing on the basic values of the international community,\(^79\) which would justify lifting the veil of immunity when the gravity of the case so requires.

**PRIMACY OF THE SUBSTANTIVE *JUS COGENS* VIOLATIONS APPROACH**

According to this approach and in light of the offered description of *jus cogens* norms, it is argued that by recognizing the immunity from criminal jurisdiction for violations of these norms would clearly stand in stark contrast to their peremptory nature. Further explained in the sense that such recognition does not assist, but rather impedes, the protection of those norms and principles. To this effect, it is claimed that in the case of a contradiction between two equally binding legal norms, the conflict ought to be resolved by giving precedence to the norm with the highest status.\(^80\) Following this line of thought, it could be argued that, since peremptory norms embody the protection of the international

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76. ILC Commentary to the ARSIWA, Commentary to Article 26 and 85, at 5.
79. Tams, *Enforcing Obligations Erga Omnes in International Law*, 1st ed. Cambridge University Press, 2005 at 141; *See also* Orakhelashvili, at 255, defining *jus cogens* as peremptory norms of general international law which «serve as a public order embodying material constitutional provisions of international law».
80. Ferrini v. Federal Republic of Germany, Corte Suprema di Cassazione (Italian Supreme Court), 5044/2004, English
community as a whole, this might be the highest interest to preserve.

Albeit this reasoning might *prima facie* evince plausibility, it rather simplifies the consequences that *jus cogens* norms have on «ordinary» international law norms, if they were to operate unimpeded in case of a conflict.82

Judicial decisions, such as the one from the *Corte di Cassazione* in the *Ferrini case*, have approached this matter not as a conflict of norms, but as a conflict of values by stressing the importance of *jus cogens* norms for the purposes of demystifying State immunity.83 In doing so, the doctrine of immunities has been demoted as being conceived as a principle and not a rule, granting that as such they may remain flexible to be reinterpreted.84

This assimilation serves as an arguably fair attempt to counterbalance the tendency of upholding the rules of immunities with such a conviction that could almost parallel the respect due to *jus cogens* norms. It contrasts the more formalistic perception, by emphasizing the protection of the most fundamental human rights, thereby strengthening the position of the individual *vis-à-vis* the State.85

As was authoritatively stated in the *Pinochet* case:

«International law cannot be supposed to have established a crime having the character of a *jus cogens* and at the same time to have provided an immunity which is coextensive with the obligation which it seeks to impose.»86

**UPHOLDING OF IMMUNITY AS A PROCEDURAL BAR**

This approach is based on the aforementio ned notion that *jus cogens* norms prohibit the commission of acts that violate them, and do not *per se* imply a change or cessation of the application of the international laws regarding immunity from prosecution.87

This is a more formal or systematic perception, which encompasses the adherence to rules that are inherent to the functioning of the international legal system *lato sensu*, such as *pacta sunt servanda*, *bona fides*, and the sovereign equality and independence of States.88 Following this line of thought, the upholding of immunities is necessary for the maintenance of a system of peaceful cooperation and coexistence among States. Hence, based on the increased need of global cooperation, respecting immunities is especially important.89
Interestingly enough, in several occasions the ICJ has been given the opportunity to discern the relation between the law of State immunity and the \textit{jus cogens} nature of international crimes. In the corresponding Judgments, the Court has remained firm on the fact that the two sets of rules address different matters and reflect different layers of obligations.

The Court differentiates and states that the rules of State immunity are procedural in nature and, as such, are confined to determining whether or not the courts of one State may exercise jurisdiction in respect of another State's officials. The Court then recognizes that it is not its bearing to rule upon the question of whether or not the conducts that gave rise to the proceedings brought before the Court are lawful or unlawful.\textsuperscript{90}

It is however noted that the distinction between procedural and substantive law was a dominant recourse in their \textit{ratio decidendi}, as exhibited in the following passage:

«A \textit{jus cogens} rule is one from which no derogation is permitted but the rules which determine the scope and extent of jurisdiction and when that jurisdiction may be exercised do not derogate from those substantive rules which possess \textit{jus cogens} status, nor is there anything inherent in the concept of \textit{jus cogens} which would require their modification or would displace their application.»\textsuperscript{91}

The Court maintains that its jurisdiction is not affected by the nature of the \textit{litis}, even if it alludes to the violation of a \textit{jus cogens} norm, because to gauge it as such would entail an evaluation of the merits, and this discussion is not \textit{sub judice} until the case passes the stage of jurisdiction and admissibility.\textsuperscript{92} Furthermore, if the Court was to surpass the preliminary phases and found jurisdiction regardless, it would amount to rendering both stages superfluous, thus contravening its statutory provisions.

This would be unlikely to be accepted by the State Parties to this and probably all international judicial bodies, which jurisdiction is as a matter of principle consensual in nature, in view of the current structure of the international judicial order.\textsuperscript{93} This statement is not to undermine the fact that once consent is given, the judicial functions of the correspondent body, the establishment of jurisdiction, as well as any other matter concomitant to their own authoritative functions, are to be determined by the judicial entity itself, following the \textit{kompetenz-kompetenz} doctrine.\textsuperscript{94}

In this sense, it would seem that the Court assimilates as analogous the plea for immunity to a claim of lack of jurisdiction, on the basis of absence of consent.\textsuperscript{95} «The fact that a dispute relates to compliance with a norm having such a character [\textit{jus cogens}], which is assuredly the case with regard to the prohibition of genocide, cannot of itself provide a basis for the jurisdiction of the Court to entertain that dispute. Under the Court’s Statute that jurisdiction is always based on the consent of the parties.»\textsuperscript{96}

The Court however, tried to balance its position regarding the merits of the claim by stating that:

«While jurisdic\textit{tional immunity is procedural in nature, criminal responsibility is a question of substantive law. Jurisdictional immunity may well bar prosecution for a certain period or for certain offences; it cannot exonerate the person to whom it applies from all criminal responsibility.}»\textsuperscript{97}

\textsuperscript{90.} Arrest warrant, at 93.  
\textsuperscript{91.} Idem at 95.  
\textsuperscript{92.} Kreß, p. 92.  
\textsuperscript{93.} Idem.  
\textsuperscript{94.} Statute of the International Court of Justice 1945, 33 UNTS 933, Article 36(6).  
\textsuperscript{95.} See Bing.  
\textsuperscript{97.} Arrest warrant, at 60.
It would clearly amount to a substantive inconsistency and a deep-rooted failure within the international legal system if the immunities regime were to allow their use as a shield, in order to avoid the criminal responsibility of those who breach international law; this practical application materializes within the context of international prosecutions. A prosecution becomes international, for the purposes of this study, when the domestic courts of the nationality of the perpetrator or of territorial state where the crimes were committed are unwilling or unable to do so themselves. To this effect there are two fora to carry out the prosecution of international crimes.

The Court thereby justifies itself by disassociating the elements of the case and trying to convey that immunity and individual criminal responsibility are not necessarily linked concepts in international criminal law, attempting to transpire that their judgment should not be construed as a factor for absolution, when criminal responsibility in fact exists and applies.

Although these arguments might sound reasonable enough, there is one undeniable problem: they over-institutionalize the concept of administering justice and leave the door wide open for impunity. What would intuitively be fair and just fades over what would appear to be technicalities when seen under the light of the maxim ubi jus ubi remedium.

It would clearly amount to a substantive inconsistency and a deep-rooted failure within the international legal system if the immunities regime were to allow their use as a shield, in order to avoid the criminal responsibility of those who breach international law.

**Fora of prosecution of international crimes**

This Section is dedicated to the development and implementation of the theoretical framework of immunities elaborated in Section I; this practical application materializes within the context of international prosecutions. A prosecution becomes international, for the purposes of this study, when the domestic courts of the nationality of the perpetrator or of territorial state where the crimes were committed are unwilling or unable to do so themselves. To this effect there are two fora to carry out the prosecution of international crimes.

The first avenue consists of foreign domestic courts by way of universal jurisdiction, and the second one of International Criminal Courts and Tribunals set out by the international community. However, their existence should not be mutually exclusive, for both avenues are equally relevant in the overarching aim of ending impunity. Yet, within the context of this individual study, the analysis of foreign national courts will be succinct, for their jurisprudence and practice abide to the conventional use of immunities as explained in Section I. The emphasis will be placed on the advancements regarding immunities in International Criminal Courts and Tribunals, more specifically in the International Criminal Court.

**FOREIGN NATIONAL COURTS AND UNIVERSAL JURISDICTION**

Traditionally, national courts were the sole avenue of crime pursuit and have thus had an important role in prosecuting the perpetrators of international crimes, even if they were committed outside their borders. This is possible based on the international law doctrine of universal jurisdiction, which permits all States to apply their laws to an act «even if [it] [...] occurred outside its territory, even if it has been perpetrated by a non-national, and even if [its] nationals have not been harmed by [it] [...].»

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98. See Bing.
99. Arrest warrant, at 60.
While the origins and historical use of universal jurisdiction attended mainly acts of piracy, the bedrock of this doctrine lies on the premise that the perpetrators of such acts are *hostis humani generis*, i.e., the enemy of all mankind. The exercise of universal jurisdiction still abides to this description, and by means of custom and treaty, has gradually extended its scope of application to acts of genocide\(^{103}\), torture\(^{104}\), enforced disappearances\(^{105}\), crimes against humanity, grave breaches of international humanitarian law\(^{106}\) and even terrorism.\(^{107}\) This practice is based on the notion that some crimes are so heinous that they affect all human kind and indeed, they imperil civilization itself.\(^{108}\) Hence, it is in the interest of any and all States to prosecute those responsible for them, for as has been observed, these crimes are often committed by high officials «in the name of the State» and are therefore highly unlikely to be held accountable in their territorial State.\(^{109}\)

However, given that the *forum* State is applying through means of its national law, international law\(^{110}\) this does not come without obstacles. The most recurrent handicap to this effect is the claim of immunity as a bar to criminal jurisdiction.

However, particularly in claims regarding immunity ratione materiae there is an increasing tendency to dissociate these terms,\(^{111}\) «while immunity is procedural in nature... it cannot exonerate the person to whom it applies from all criminal responsibility»\(^{112}\), for it is well established in international law that accountability is expected from the perpetrators of international crimes.\(^{113}\)

### INTERNATIONAL COURTS AND TRIBUNALS AND THE «NO IMMUNITY, NO IMPUNITY» DEVELOPMENT

In light of all of the above, in order to end the global culture of impunity,\(^{114}\) there was an undeniable need for an institutional response to the exorbitant reality of the proliferating armed conflicts. The establishment of adequate tribunals to prosecute the crimes committed within these contexts became absolutely necessary, and for the sake of ensuring their success in attaining accountability, it was clear that official capacity could not bar proceedings.

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106. I. Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; II. Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; III. Convention relative to the Treatment of Prisoners of War; IV Convention relative to the Protection of Civilian Persons in Time of War; Geneva, 12 August 1949; Dutch Treaty Series 1951, 72, 73, 74, 75; Protocol additional to the Geneva Conventions of 12 August 1949 relating to the Protection of Victims of International Armed Conflicts (Protocol I); Protocol additional to the Geneva Conventions of 12 August 1949 relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II); Bern, 8 June 1977, Common articles 49, 50, 129, 149.
112. Arrest warrant, at 60.
113. *Pinochet* n. 3, at 151.
Impunity is defined as «the impossibility, de jure or de facto, of bringing the perpetrators of human rights violations to account whether in criminal, civil, administrative or disciplinary proceedings since they are not subject to any inquiry that might lead to their being accused, arrested, tried and, if found guilty, convicted, and to reparations being made to their victims.»\textsuperscript{115}

To fight and end this abhorrent reality is the international community's underlying motivation to create and establish International Criminal Courts and Tribunals. Ergo, it follows that the rejection of immunities within their jurisdictions is axiomatic.

Furthermore, by virtue of their own nature as supranational entities they do not abide to the principles described in Section I, as national courts do, since they derive their mandate from the international community and their operation is not subject or under the comprehension of any State.\textsuperscript{116}

Additionally, literal exclusion any immunity claim is laid down in each one of the tribunals founding instruments, consistent with the purpose of their establishment.\textsuperscript{117}

The International Military Tribunals of Nuremberg\textsuperscript{118} were the first of its kind to accomplish a successful prosecution of high State officials. The waiver of immunities was possible given the fact that the Allies were in a position of national legislators,\textsuperscript{119} and as such, they could adequate the applicable law to the necessity of doing so and therefore, pioneering in the endeavor of ending impunity for the most serious crimes.

«The principle of international law, (immunity) which under certain circumstances, protects the representative of a State, cannot be applied to acts which are condemned as criminal by international law. The authors of these acts cannot shelter themselves behind their official position in order to be freed from punishment in appropriate proceedings.»\textsuperscript{120}

It was seconded by the often forgotten International Military Tribunal for the Far East,\textsuperscript{121} which reaffirmed the standing of its recent predecessor by providing that official capacity does not exempt criminal responsibility. From that moment on, the precedent seemed to be set in stone.

Fifty years later, when the International Criminal Tribunal for the former Yugoslavia,\textsuperscript{122} (ICTY) and the International Criminal Tribunal for Rwanda,\textsuperscript{123} (ICTR) were created by Chapter VII Security Council Resolutions, the exclusion of immunity for Heads of State and other government officials followed as a means to the correct execution of their mandate. Hence, this provision was identically ingrained in their respective Statutes.

«The official position of any accused person, whether as Head of State or Government

\textsuperscript{116}. Special Court for Sierra Leone, Prosecutor v. Charles Ghankay Taylor, Decision on Immunity from Jurisdiction, 31 May 2004, SCSL-2003-01-I, at 51.
\textsuperscript{119}. Cryer, p. 550.
\textsuperscript{120}. Judgment of the International Military Tribunal for the Trial of German Major War Criminals (with the dissenting opinion of the Soviet Member) Nuremberg 30th September and 1st October 1946, Cmd. 6964, Misc. No. 12 (London: H.M.S.O. 1946), at 41-42.
\textsuperscript{121}. Charter of the International Military Tribunal for the Far East, Tokyo, 19 January 1946, TIAS 1589 (Tokyo Charter), Article 6.
or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.»

The first time it was taken into practice was in 1999, when the ICTY issued an indictment for Slobodan Milošević, the sitting Head of State of the Federal Republic of Yugoslavia at the time.124

Moreover, the ICTY declared in 2001 that Article 7(2) of its Statute reflected «the customary character of the rule that a Head of State cannot plead his official position as a bar to criminal liability in respect of crimes over which the International Tribunal has jurisdiction».125 To this effect the Chamber cited as support the Pinochet case126 and the 1996 Draft Code of Crimes against the Peace and Security of Mankind,127 which was intended to apply to both, international and national courts.128 The International Law Commission clarified in this respect:

«The author of a crime under international law cannot invoke his official position to escape punishment in appropriate proceedings. The absence of any procedural immunity with respect to prosecution or punishment in appropriate judicial proceedings is an essential corollary of the absence of any substantive immunity or defence. It would be paradoxical to prevent an individual from invoking his official position to avoid responsibility for a crime only to permit him to invoke this same consideration to avoid the consequences of this responsibility.»129

The aforementioned custom also transpired in the emerging so-called «hybrid» Tribunals, which are national courts with international elements. This is the case of the Extraordinary Chambers in the Courts of Cambodia,130 (ECCC) and the United Nations Transitional Administration in East Timor Regulation establishing the Special Panel for Serious Crimes in Timor-Leste, (UNTAET) which include an explicit rejection of not only functional, but also personal immunities.131

It naturally followed that the 2000 Statute of the Special Court for Sierra Leone, (SCSL) also excluded immunity for Heads of State.132 However, the Taylor case brought a new ratio decidendi to this effect. It set forward the notion that it is not due to the States’ consent to relinquish the personal immunities concerned that International Criminal Courts can supersede them; instead, it acknowledged that it is the international character of these Courts what renders such immunity inapplicable.133

This conclusion is drawn from the mootness of the par in pares non habet imperium principle, and from the irrelevance of the role of inter-State relations in respect to the mandate of International Courts. This particular Court derives its international nature from its inception method, i.e. a special agreement between the UN and Sierra Leone.

Nevertheless the Appeals Chamber authoritatively affirmed that:

«The principle seems now established that the sovereign equality of States does not prevent

126. Idem, at 33.
128. Idem, Articles 8, 9.
129. Idem, Commentary on Article 7, at 27. The Commission has consistently excluded immunity for heads of state for six decades in each of the instruments it has adopted regarding crimes under international law, beginning with the previously mentioned 1950 Nuremberg Principles, as in earlier drafts adopted in 1954 and 1991.
130. Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, 27 October 2004 (NS/RKM/1004/006), Article 29(2).
131. UNTAET Regulation No. 2000/15 on the establishment of panels with exclusive jurisdiction over serious criminal offences, (UNTAET/REG/2000/15), 6 June 2000. Article 15(2) of the Regulation provides: «Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the panels from exercising their jurisdiction over such a person.»
The balance of immunity and impunity

Consequently, in 2002 the International Court of Justice confirmed obiter dicta the existence of this practice by stating that immunity of State officials would not bar prosecution before an international tribunal:

«An incumbent or former Minister for Foreign Affairs may be subject to criminal proceedings before certain International Criminal Courts, where they have jurisdiction. Examples include the International Criminal Tribunal for the former Yugoslavia, and the International Criminal Tribunal for Rwanda... and the future International Criminal Court created by the 1998 Rome Convention.»

This last passage bears great importance in light of current affairs following the abovementioned flourishing of the International Criminal Court, as will be explained in the next section.

The International Criminal Court

The International Criminal Court (ICC) is a sui generis institution, for it is the first permanent and independent judicial body. Its source of creation is different from all previous International Criminal Tribunals insofar as it was established by a universal multilateral treaty, a.k.a the Rome Statute; not by a Security Council Resolution or by a Special Agreement between a State and the UN, or an agreement amongst the victorious powers or a peace treaty. Moreover, unlike the ad hoc Tribunals, the ICC’s jurisdiction is deliberately non-retroactive to the entry into force of the Rome Statute, i.e. its jurisdiction is established a priori for future crimes. The Statute was conceived on July 17, 1998, yet it did not enter into force until sixty days posterior to its sixtieth ratification, which occurred on July 1st, 2002.

Furthermore, this Court represents the pinnacle of a very long line of attempts to establish a specialized forum to counteract impunity for the crimes of genocide, crimes against humanity, war crimes and aggression. Nevertheless, it was established as a «last resort» mechanism, abiding to the principle of complementarity.

By acceding to this treaty, States consent to avail their nationals to the jurisdiction of the Court, including those who fall under the category of Article 27.

Article 27 Irrelevance of official capacity:

1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a 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.

2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.

135. Arrest warrant, at 61.
136. As the ICTY, ICTR and Special Tribunal for Lebanon, (STL).
137. As SCSL, ECCC and UNTAET.
138. As the International Military Tribunal for the Trials of the German Major War, and the International Military Tribunal for the Far East.
141. Idem, Article 5.
142. Idem, Article 12.
143. Idem, Article 12(2)(b).
Accordingly, the vast negotiations leading to this statutory provision constitute the digested embodiment of the evolution of international criminal law, from the viewpoint of all legal traditions around the world. Naturally including the recognition that no one, irrespective of their official capacity or rank, is above the law and immune from prosecution of these crimes.144

By accession to the Statute, State Parties have agreed to Article 27, thereby expressly accepting that Heads of State are not entitled to immunity for the abovementioned crimes. In other words, they waived any immunity owed to their Heads of State and high-ranking officials,145 both before the ICC itself and before all other State Parties in respect of their cooperation with the Court.146

Novelly, the ICC’s foundations manage to counterbalance the principles of State sovereignty that give rise to immunities in the first place. Postulating a State consent regime by keeping the ratification of the Statute on a voluntary basis, it acknowledges and concedes to the sovereignty of States.

In regards to our topic of interest, once States accept the Court’s jurisdiction, they ipso facto renounce the right to claim immunities. Yet, by virtue of the treaty nature of the Rome Statute, this provision will only be binding upon those State Parties that have ratified it.147

To this date, there are 124 State Parties to the Rome Statute148, in other words, there are 72 States who are not; this amounts to a very large jurisdictional gap. Therefore, there are many possible scenarios involving nationals of those non State Parties that can unfold before this Court, as was the case concerning Omar Al-Bashir; this raises the question of what would be the adequate way to deal with these situations, especially in the light of Article 98(1) of the Statute, which reads:

Article 98 Cooperation with respect to waiver of immunity and consent to surrender

1. The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.

One may pose the question: what obligation to respect immunities could remain at this point and how could States act inconsistently with them? The next section addresses this query.

It is understandable that prima facie there would seem to be conflicting obligations between Articles 27 and 98 of the Rome Statute. However, we can correctly assert that Articles 27 and 98 are inherently different in nature. The former confirms that the existence of immunity ratione personae is neither a bar to the Court’s prescriptive jurisdiction (Article 27(1)), nor to its enforcement jurisdiction (Article 27(2)),149 and the latter deals with the cooperation of the requested State in terms of surrendering the suspect, and thus, with the exercise of the domestic enforcement jurisdiction of said State-Party.

In addition, they are contextually set in separate sections of the Rome Statute because they lay down different layers of obligations. Part 9 of the Rome Statute contains the cooperation duties of States Parties,

148. See https://www.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx
which should in no way condition the Court’s exercise of jurisdiction. Nevertheless, they are interrelated because without the latter, and without State cooperation \textit{lato sensu}, the Court is practically barred from exercising its jurisdiction, due to the fact that it cannot execute arrest warrants by itself, nor can it conduct trials \textit{in absentia}.^{150}

Consistent with the generally accepted rules of treaty interpretation\textsuperscript{151}, Article 98(1) needs to be read in the light of the entirety of the object and purpose of the Rome Statute, which is \textit{«to end impunity for genocide, crimes against humanity and war crimes»}\textsuperscript{152}, \textit{i.e.}, to hold accountable those responsible for such crimes and to ensure that they are brought to justice in all cases, \textit{ergo}, in unison with Article 27.\textsuperscript{153} Hence, the applicable interpretation cannot allow States to \textit{«easily eschew their responsibilities to execute requests for surrender or assistance»}.\textsuperscript{154}

The generally adopted approach has been to interpret Article 27 as a waiver of any immunity that might otherwise apply to the officials of State Parties before the ICC, limiting the application of Article 98(1) to cases involving officials of non-State Parties.\textsuperscript{155} Despite this bifurcation in the Statute, the two provisions are intertwined for \textit{«the removal of immunity in Article 27 must be understood as applying not only in relation to the ICC itself, but also in relation to States acting at the request of the ICC»}.\textsuperscript{156}

Consequently, effective cooperation of States with their respective requests is key to the exercise of the Court’s functions: \textit{«When cooperating with this Court and therefore acting on its behalf, States Parties are instruments for the enforcement of the jus puniendi of the international community whose exercise has been entrusted to this Court when States have failed to prosecute those responsible for the crimes within this jurisdiction.»}\textsuperscript{157} Any contrary conclusion would undermine the Rome Statute’s mandate and circumvent Article 27, rendering it practically meaningless.

Moreover, it would be contradictory to provide that immunities shall not bar the exercise of jurisdiction by the Court while simultaneously leading way to claim such immunities as to avoid arrests by national authorities.\textsuperscript{158}

Furthermore, according to the \textit{travaux préparatoires} conducted during the negotiations of this Statute, Article 98(1) is applicable only to State or diplomatic immunity of property.\textsuperscript{159} It was the inviolability of diplomatic premises that was at the heart of the debate on article 98(1) and not the issue of personal immunity, which was already comprehensively dealt with in the drafting and inclusion of Article 27.\textsuperscript{160}

\begin{itemize}
\item \textsuperscript{150} Kreß and Prost, pp 1607, 1613.
\item \textsuperscript{151} Vienna Convention on the Law of Treaties, 1969, 1155 UNTS 331, Article 31.
\item \textsuperscript{152} Preamble of the Rome Statute. And once defined, the crime of aggression.
\item \textsuperscript{153} Tladi, \textit{The ICC Decisions on Chad and Malawi}, 11 Journal of International Criminal Justice, 2013, at 209.
\item \textsuperscript{154} \textit{Amnesty International Report}, at 7.
\item \textsuperscript{156} Akande, pp 423-424.
\item \textsuperscript{157} Kreß, p. 246.
\item \textsuperscript{159} Tladi, pp 216-218.
\item \textsuperscript{160} Kreß and Prost, p. 1606. Kreß was a member of the German delegation at the Rome Diplomatic Conference on the International Criminal Court and Prost was a member of the Canadian delegation.
\end{itemize}
Withal, even if, *arguendo*, one were to concede that there is a tension between these provisions, there are different points to contemplate.

As a starting point and given that the Court is bound to apply first its Statute and only suppletorily recourse to principles of international law,\textsuperscript{161} it follows that since the Statute explicitly precludes immunity for officials, its provisions remain authoritative.\textsuperscript{162}

Moreover, the fact that customary - or arguably merely comity - obligations to respect immunity apply solely to national courts,\textsuperscript{163} deference should be granted to stipulations under Article 27, which prevent impunity for international crimes. This interpretation is consistent with both jurisprudence and international practice.\textsuperscript{164}

State Parties to the Court, are legally obliged by Article 86 to cooperate with the arrest and surrender of suspects when requested,\textsuperscript{165} thereby enhancing international cooperation.\textsuperscript{166} Failure to comply with such ratified provisions would be a blatant obstruction of the Court’s *animus* by encouraging impunity, and a clear breach of the international obligations set forth by the Rome Statute regime.\textsuperscript{167}

Conclusively, Article 98(1) provides no justification to any State to refuse to arrest and surrender a person sought in an ICC arrest warrant.

Finally, it must be noted that Article 98(1) refers only to (pre)existing obligations and it is not intended to revive immunities that are no longer accepted under international law.\textsuperscript{168} In light of the relevant case law, the *lex lata* as it stands rejects immunities as a bar for prosecution of international crimes in international tribunals, which reflects a teleological compliance with the pertinent customary international law.

Therefore, there could be no conflict between a request of cooperation by the Court and the requested State’s alternate obligations under international law with respect to immunities,\textsuperscript{170} because they have already been redefined by international custom.

**Conclusion**

It has been concluded that immunities have played an important role in the international legal order. Howbeit, it seems to be the case that more often than not, they are not righteously used and rather abused, to the point of inducing impunity. Herein lies the persistent struggle of balancing the different interests protected by international law, and the perpetual debate as to how to weigh them. On the one hand State sovereignty and individual State interests, and on the other hand the international collective desire for accountability and justice.

\textsuperscript{161} Rome Statute, Article 21.
\textsuperscript{162} Akande, p. 414.
\textsuperscript{163} Fox 2008, p. 668.
\textsuperscript{164} UNGA Resolution 2840 (XXVI), 2025th Plenary Meeting, 18 December 1971, at 4; ICC Prosecutor v Al Bashir, Decision pursuant to Article 87(7) of the Rome Statute on the refusal of the Republic of Chad to comply with the cooperation requests issued by the Court with respect to the arrest and surrender of Omar Hassan Ahmad Al Bashir, ICC-02/05-01-09-140, at 18, 38.
\textsuperscript{165} Tladi p. 202; Rome Statute, Article 86.
\textsuperscript{166} Rome Statute Preamble at 5; ICRC, Customary International Humanitarian Rules, CUP, 2005, Rule 161.
\textsuperscript{167} Tladi, p. 200; ICC Prosecutor v. Al Bashir, at 41,43.
\textsuperscript{168} Kreß and Prost, p. 1606.
\textsuperscript{169} See ICC Prosecutor v. Al Bashir, SCSL Prosecutor v. Taylor, Decision on Immunity from Jurisdiction, Case no. SCSL-2003-01-I, Appeals Chamber, 31 May 2004, at 17(a), 18(a); Arrest Warrant, at 61. Makes specific mention of the possibility of prosecution before the ICC.
\textsuperscript{170} Amnesty International Report, at 30.
Nevertheless, placing State sovereignty in this equation seems to be a mere excuse to shield State officials who commit international crimes; yet, it is an axiomatically futile premise due to the fact that clearly no State can claim that type of conduct as their own.

Furthermore, the gravity and transcendence of these crimes annihilates any respect for the official capacity of who committed them regardless of their rank, and if international law is to have any value, it cannot be mocked by allowing perpetrators to escape their criminal responsibility for these heinous calculated actions under the false pretense of State immunity.

For this purpose, the international community has created International Criminal Courts and Tribunals, to operate in a complementary manner to national courts towards the overarching aim of fighting impunity.

However, it must be noted that the prosecution of international crimes bifurcates when it comes to the immunities regime, inasmuch as immunity from national criminal jurisdiction seems to be fundamentally different to the immunity from international criminal jurisdiction, and therefore, the two should not be normatively linked.

This distinction was addressed in the Eichmann case, when it was argued that «the crime against Jews was also a crime against mankind and consequently the verdict can be handed down only by a court of justice representing all mankind.» i.e. an International Court.

Finally, it is evident that the perpetuation of «State sponsored crimes» is antagonistic to the very core notions of an international legal system and cardinally defeats its ultimate purpose which is the safeguard of worldwide peace and security for the sake of humanity.

As analyzed in the previous Sections, the flourishing development of international law in this regard is adequately responding in the form of custom and jurisprudence, to the increased alertness of this paradox. Hence, national and international enforcement measures must follow by consciously coalescing to put an end to impunity, and to propitiate the consolidation of a lasting respect for international justice.

The most efficient way to achieve these desired results is to raise the appropriate homogeneous awareness amongst States about the importance of this universal goal in order to achieve an interconnected system of willing States availing upright cooperation, amongst themselves and in respect of International Criminal Courts and Tribunals, for this is in practice an indispensable element to carry out their mandates.

This unprejudiced cooperation is absolutely vital for the international quest of accountability and justice to thrive; for it is our collective societal duty to shift the course of our unnecessarily violent and unadmonished history.

171. Kolodkin, Preliminary report on immunity of State officials from foreign criminal jurisdiction, 29 May 2008, A/ CN.4/601, [103]. It is interesting that even the Special Rapporteur Kolodkin, who normally expressed divergent opinions, held this position.
This might sound almost utopian to the most cynical of us, however, it is reassuring and highly encouraging to realize that the current state of the law is to the fore of the unavoidable myopic political will that interferes in the international legal order, and that the rule of law is leading the way into the accountability and justice necessities of the international community.
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