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CHALLENGING THE INTERNATIONAL LAW OF IMMUNITIES:
NEW TRENDS ON ESTABLISHED PRINCIPLES

# Sumário

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# **Immunities of state officials and the "fundamentally different nature" of international courts:** the appeals chamber decision in the Jordan referral re Al Bashir*

# **Imunidades de altos funcionário e a "natureza fundamentalmente diferente" dos tribunais internacionais:** a decisão do juízo de recursos relativa ao incumprimento da Jordânia no processo contra Al Bashir

Rita Guerreiro Teixeira**

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## Abstract

On 6 May 2019, the Appeals Chamber of the ICC found that Al Bashir, then president of Sudan, could not benefit from head of State immunity because such rule had never emerged in customary law in relation to international courts, which are of a "fundamentally different nature" as opposed to domestic courts. This article investigates the merits of this argument of non-transferability of the rule of immunity before foreign criminal jurisdictions to the international plan, contrasting it with the more classical discussion on the existence of a customary exception before these fora. To this end, it analyzes the precedents of the international criminal tribunals, the *Arrest Warrant* case, and the rationale behind immunities of State officials and inquires: first, whether there is enough evidence for the recognition of an exception to immunity and, second, whether there is support for the claim that international courts have a *fundamentally different nature*. It argues that a distinction must be made between those international courts that exercise jurisdiction on behalf of the international community and those that merely constitute a pooling of national jurisdictions, and that only in relation to the former immunities are not applicable. The article concludes by discussing where the ICC falls in this distinction and the implications for the immunity rule before this court.

**Keywords:** Immunity of state officials; International Criminal Court; International crimes; International criminal tribunals; UN Security Council; Customary international law.

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## Resumo

A 6 de maio de 2019, o Juízo de Recursos do TPI determinou que Al Bashir, à data presidente do Sudão, não podia beneficiar da imunidade conferida a Chefes de Estado uma vez que uma regra costumeira de imunidade aplicável perante tribunais internacionais nunca se havia formado, tendo aqueles tribunais uma "natureza fundamentalmente diferente" dos tribunais nacionais. O presente artigo investiga o mérito deste argumento de não transferibilidade das regras de imunidade aplicáveis perante jurisdições penais estrangeiras para o plano internacional, contrastando-o com a discussão mais clássica sobre a existência de uma exceção costumeira aplicável perante estes fóruns. Neste sentido, o artigo analisa os precedentes dos tribunais penais internacionais, o caso sobre o Mandato de Prisão do TIJ e a ratio subjacente às imunidades de altos funcionários, questionando, numa primeira parte, se existem elementos suficientes para demonstrar a existência de uma exceção à imunidade e, numa segunda parte, se existe fundamento para o argumento de que os tribunais internacionais têm uma natureza fundamentalmente diferente. Argumenta-se, em seguida, que é necessário distinguir entre aqueles tribunais internacionais que exercem a sua jurisdição em representação da comunidade internacional e aqueles que constituem um mero agrupamento de jurisdições nacionais. O artigo termina com a análise da posição do TPI na distinção acima delineada e as respetivas implicações para o regime de imunidades aplicável perante este tribunal.



**Palavras-chave:** Imunidade de altos funcionários; Tribunal Penal Internacional; Crimes internacionais; Tribunais penais internacionais; Conselho de Segurança da ONU; Costume internacional.


## 1 Introduction

International law has long included a customary international law rule according to which certain State officials cannot, as a result of the office they hold, be subject to the criminal jurisdiction of foreign States.[1] In particular, personal immunity attaches to the holders of the highest-ranking offices in a State – the troika head of State, head of government and minister for foreign affairs – and covers all their public and private acts, for as long as they hold office.[2] Since the judgment delivered by the ICJ in the *Arrest Warrant* case, it is widely accepted that no exception is admitted to this immunity, even in cases of international crimes.[3]

However, the status of a customary international law exception to immunities of State officials before international criminal courts and tribunals – and, in particular, before the International Criminal Court (ICC) – is more controversial.

In the context of the proceedings against several State parties for their failure to comply with the Rome Statute of the ICC (Rome Statute) by not arresting Al Bashir, serving president of Sudan at the time, the Trial Chambers of the ICC had to make a pronouncement on the rule of immunity applicable to officials of non-party States. Since Sudan is not a party to the Rome Statute and, as such, has not consented to the rule in article 27(1) excluding immunity of State officials, the status of customary international law on immunities became relevant. While all proceedings ended with a decision of non-compliance, Pre-Trial Chambers I and II used a different reasoning to determine that Al Bashir did not enjoy immunity before the ICC: while the former relied on the finding that customary international law now includes an exception to immunity of heads of State when they face prosecution for international

[1] INTERNATIONAL COURT OF JUSTICE. *Arrest Warrant of April 11, 2000 (Democratic Republic of the Congo v Belgium)*. 2002. Available in: https://www.icj-cij.org/en/case/121 Access in: 11 Oct. 2020; ICJ Reports 2002 p. 3 (Arrest Warrant case), para. 58; UBÉDA-SAILLARD, Muriel. Foreign officials entitled to (absolute) personal immunity during their time in office. *In:* RUYS, Tom; ANGELET, Nicolas; FERRO, Luca (eds.). *The Cambridge Handbook of Immunities and International Law*. Cambridge: Cambridge University Press, 2019. p. 481–495. p. 484; FRANEY, Elizabeth Helen. Immunity from the Criminal Jurisdiction of National Courts. *In:* ORAKHELASHVILI, Alexander (ed.). *Research Handbook on Jurisdiction and Immunities in International Law*. Cheltenham, Reino Unido: Edward Elgar Publishing, 2015. p. 205. AKANDE, Dapo; SHAH, Sangeeta. Immunities of state officials, international crimes, and foreign domestic courts. *European Journal of International Law*, v. 21, n. 4, p. 815–852, 2010. p. 818.

[2] Arrest Warrant case, para. 53. See also, INTERNATIONAL LAW COMMISSION. *Second Report on the Immunity of State Officials from Foreign Criminal Jurisdiction*. 2013. UN Doc. A/CN.4/661. p. 59-60; UBÉDA-SAILLARD, Muriel. Foreign officials entitled to (absolute) personal immunity during their time in office. *In:* RUYS, Tom; ANGELET, Nicolas; FERRO, Luca (eds.). *The Cambridge Handbook of Immunities and International Law*. Cambridge: Cambridge University Press, 2019. p. 481–495. p. 484–485.

[3] Arrest Warrant case, para. 58. See also, INTERNATIONAL LAW COMMISSION. *Fifth Report on Immunity of State Officials from Foreign Criminal Jurisdiction*. 2016. UN Doc. A/CN.4/701. p. 237-240.

crimes before international courts,[4] the latter focused on the binding effects of the UN Security Council resolution that referred the situation to the ICC for investigation.[5]

Finally, the question was brought before the Appeals Chamber which, in its judgment of 6 May 2019 in the *Jordan Appeal*, found that:

> given the *fundamentally different nature* of an international court as opposed to a domestic court exercising jurisdiction over a Head of State, it would be wrong to assume that an exception to the customary international law rule on Head of State immunity applicable in the relationship between States has to be established; rather, the onus is on those who claim that there is such immunity in relation to international courts to establish sufficient State practice and *opinio juris*. […] [T]here is no such practice or *opinio juris*.[6]

By establishing that international courts have a *fundamentally different nature* as opposed to domestic ones – and that, consequently, a rule of immunity applicable before the former had never emerged in customary international law – the Appeals Chamber introduced a new argument in the debate, departing from previous reasonings in the decisions of the Pre-Trial Chambers. Regrettably, it offered thin argumentation in support of this claim, immediately polarizing commentators as to its merits.[7]

This article explores the novel reasoning on the inapplicability of immunity of State officials before international criminal courts put forward by the Appeals Chamber of the ICC, contrasting it with the more classical discussion on the existence of a customary international law exception before these fora. Our aim is to determine whether this new approach can shed some light on the status of the customary international law on personal immunities before international criminal courts – a point which has remained the subject of discussion to date. To this end, we will analyze (i) the rationale behind the customary international law regime of immunities of State officials and (ii) the practice of international criminal courts and tribunals, inquiring whether support can be found for either of the approaches mentioned above. Finally, we focus on the concept of the *fundamentally different nature* of international courts to inquire what is its content and whether it applies to all international criminal courts.

Two delimitations apply to the scope of this article. First, our focus is on determining the status of customary international law in relation to the enjoyment of personal immunities and, as such, the status of the rules on functional immunities will only be marginally referred to.[8] Second, while the decision on the *Jordan Appeal* also dealt with the effect of immunities in the

[4] INTERNATIONAL CRIMINAL COURT. *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 (The Prosecutor v Omar Hassan Ahmad Al Bashir)*. 13 December 2011. Pre-Trial Chamber I ICC-02/05-01/09-140. p. 13. INTERNATIONAL CRIMINAL COURT. *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 (The Prosecutor v Omar Hassan Ahmad Al Bashir)*. 13 December 2011. Pre-Trial Chamber I. ICC-02/05-01/09-139-Corr. p. 42.

[5] INTERNATIONAL CRIMINAL COURT. *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 (The Prosecutor v Omar Hassan Ahmad Al Bashir)*. 6 July 2017. Pre-Trial Chamber II. ICC-02/05-01/09-302. p. 91, 107; INTERNATIONAL CRIMINAL COURT. *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*. 11 December 2017. Pre-Trial Chamber II. ICC-02/05-01/09. p. 40, 44; INTERNATIONAL CRIMINAL COURT. *Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court*. 9 April 2014. Pre-Trial Chamber II. ICC-02/05-01/09-195. p. 11; INTERNATIONAL CRIMINAL COURT. *Decision on the non-compliance by the Republic of Djibouti 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 the State Parties to the Rome Statute (The Prosecutor v Omar Hassan Ahmad Al Bashir)*. 11 July 2016. Pre-Trial Chamber II. ICC-02/05-01/09-266. p. 11.

[6] INTERNATIONAL CRIMINAL COURT. *Judgment in the Jordan Referral re Al-Bashir Appeal of 6 May 2019 (The Prosecutor v Omar Hassan Ahmad Al Bashir)*. 2019. Appeals Chamber. ICC-02/05–01/09 OA2.

[7] SADAT, Leila. *Why the ICC's Judgment in the Al-Bashir Case Wasn't So Surprising*. 2019. Available in: https://www.justsecurity.org/64896/why-the-iccs-judgment-in-the-al-bashir-case-wasnt-so-surprising/ Access in: 11 Oct. 2020; BATROS, Ben. *A confusing ICC appeals judgment on head of state immunity*. 2019. Available in: https://www.justsecurity.org/63962/a-confusing-icc-appeals-judgment-on-head-of-state-immunity/ Access in: 11 Oct. 2020; AKANDE, Dapo. *ICC Appeals Chamber Holds that heads of state have no immunity under customary international law before international tribunals*. 2019. Available in: https://www.ejiltalk.org/icc-appeals-chamber-holds-that-heads-of-state-have-no-immunity-under-customary-international-law-before-international-tribunals/ Access in: 11 Oct. 2020; JACOBS, Dov. *You have just entered Narnia*: ICC Appeals Chamber adopts the worst possible solution on immunities in the Bashir case. 2019. Available in: https://dovjacobs.com/2019/05/06/you-have-just-entered-narnia-icc-appeals-chamber-adopts-the-worst-possible-solution-on-immunities-in-the-bashir-case/ Access in: 11 Oct. 2020.

[8] Exceptions to this immunity are also generally less controversial – see INTERNATIONAL LAW COMMISSION. *Fifth Report on Immunity of State Officials from Foreign Criminal Jurisdiction*. 2016. UN Doc. A/CN.4/701. p. 240.

horizontal relation between State parties to the ICC and non-parties, that question falls outside the scope of the present analysis.

With these objectives in mind, section 1 of this article briefly discusses the customary regime of immunities of high-ranking State officials and its rationale and analyzes whether the precedents of the international criminal courts established since the post-World War II and the ICJ decision in the *Arrest Warrant* case support the recognition of an exception when State officials face prosecution before these courts. It concludes that, while a norm explicitly or implicitly excluding immunity of State officials was included in the statutes of most international tribunals established to date, there have been few instances of practice in which serving heads of State were effectively prosecuted, making the argument difficult to sustain. Section 2 deals with the crux of the discussion, namely whether there is support in international practice for the claim that international criminal courts have a different nature from national courts and whether that excludes the application of immunities. We argue that a distinction must be made between those international courts that exercise jurisdiction on behalf of the international community and those that constitute a mere pooling of national jurisdictions, and that only in relation to the former the immunity enjoyed before domestic jurisdictions is not transferable. Finally, we note that the status of the ICC as an international court of a fundamentally different nature is currently not well defined and that the Appeals Chamber missed an opportunity to address this question.

## 2 Precedents on immunity of State officials before international criminal courts

The main rationale underlying the customary international law regime of immunities of State officials is the safeguard of the principle of sovereign equality, which requires that States not be subject to other States' jurisdiction nor interfere with each other's agents and their actions when they represent the State abroad.[9] Immunities are instrumental in enabling officials to carry out their functions and they play an important role in ensuring a smooth conduct of international relations.[10]

In relation to criminal proceedings before foreign domestic courts, there is widespread agreement that no exceptions are admitted to personal immunity, including in cases of international crimes.[11] Notably, this immunity has been successfully invoked in several cases during the last decades.[12] Furthermore, the International Law Commission (ILC) has confirmed this understanding in its ongoing work on the immunity of States officials, where it only considered possible exceptions to functional immunity.[13]

However, the issue of whether the absolute rule of personal immunity of high-ranking State officials continues to apply before international criminal tribunals has been the subject of a lengthy debate. Commentators have dueled over whether it can be said that sufficient practice and *opinio iuris* has emerged since the creation of the first international tribunals to sustain the recognition of an exception when the State official faces prosecution before an international court or tribunal.[14] This

[9] AKANDE, Dapo. International law immunities and the international criminal court. *American Journal of International Law*, v. 98, n. 3, p. 407–433, 2004. p. 407; INTERNATIONAL CRIMINAL COURT. *Joint Concurring Opinion issued by Judges Eboe-Osuji, Morrison, Hofmanski, and Bossa (The Prosecutor v Omar Hassan Ahmad Al Bashir).* 6 May 2019. Appeals Chamber. ICC-02/05-01/09-397-Anx1. p. 23–24.

[10] AKANDE, Dapo; SHAH, Sangeeta. Immunities of state officials, international crimes, and foreign domestic courts. *European Journal of International Law*, v. 21, n. 4, p. 815–852, 2010. p. 818; GAETA, Paola. Official capacity and immunities. *In:* CASSESE, Antonio; GAETA, Paola; JONES, John R.W.D. (eds.). *The Rome Statute of the International Criminal Court:* a commentary. Oxford: Oxford University Press, 2002. p. 975–1002. p. 986; INTERNATIONAL LAW COMMISSION. *Immunity of State Officials from Foreign Criminal Jurisdiction, Memorandum by the Secretariat*. UN Doc. A/CN.4/596. p. 148.

[11] See supra note 3.

[12] SPAIN. *Castro case, Order of 4 March 1999*. 1999. Audiencia Nacional. No. 1999/2723; FRANCE. *Ghaddafi case, Arrêt du 13 mars 2001*. 2001. Cour de Cassation Crim. No. 1414. 125 ILR 490; BELGIUM. *HSA et al v SA*. 2003. Cour de Cassation 2e civile. P.02.1139.F. 42 ILR 596. Akande notes that "no case can be found in which it was held that a State official possessing immunity *ratione pers*onae is subject to the criminal jurisdiction of a foreign State when it is alleged that he or she has committed an international crime". AKANDE, Dapo. International law immunities and the international criminal court. *American Journal of International Law*, v. 98, n. 3, p. 407–433, 2004. p. 663.

[13] INTERNATIONAL LAW COMMISSION. *Report of the International Law Commission, Sixty-ninth Session (1 May-2 June and 3 July-4 August 2017)*. UN Doc. A/72/10. p. 141.

[14] Advocating in favor of the inapplicability of immunities before international criminal courts, see generally SADAT, Leila. Heads of state and other government officials before the international criminal court: the uneasy revolution continues. *Washington Univer-*

section considers those precedents and discusses the arguments in the exception debate.

### 2.1 The Nuremberg and Tokyo Tribunals in the post-World War II

The proposition that the official status of perpetrators of serious crimes should not prevent their prosecution was already discussed in the aftermath of World War I. The Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, established at the Versailles Peace Conference, noted in its report that the rank should not "protect the holder of it from responsibility," including in the case of heads of State.[15] However, the preconized tribunal where criminal responsibility for crimes committed during the First World War would be assessed was never constituted.

In 1945, the signature of the London Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, containing the Charter of the International Military Tribunal (Nuremberg Charter) marked the establishment of the first ever international criminal tribunal for the prosecution of grave violations of international law. Article 7 of the Nuremberg Charter established that "[t]he official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment".[16] The Charter of the International Military Tribunal for the Far East, signed in 1948, contained a similar provision, establishing that "the official position, at any time, of an accused, […] shall [not], of itself, be sufficient to free such accused from responsibility for any crime with which he is charged […]."[17]

It has been argued that these provisions primarily concern criminal responsibility and would, therefore, be irrelevant for the analysis of the rule of immunity applicable.[18] While we do not claim that the distinction between substantive criminal responsibility and procedural rules of immunity is without relevance, it would be highly artificial to force this distinction into the text of the charters of the military tribunals. There is no indication in the charters that the negotiating States intended to reserve the immunity of any officials when providing for their individual criminal responsibility. The text of the first "Draft of Proposed Agreement" presented by the Government of the United States at the outset of negotiations for the Nuremberg Charter supports this interpretation, by deeming that "*any defense* based upon the fact that the accused is or was the head or purported head or other principal official of a State" is legally inadmissible.[19] Furthermore, an interpretation according to which immunities of State officials would remain applicable would deprive articles 7 and 6 of any *effet utile*. According to this argument, the charters would establish the principle that the defendants could not shield themselves from criminal responsibility behind the high-ranking offices that they occupied, while simultaneously not offering the possibility to prosecute them before the newly created tribunals – at least to the extent that they could claim that the acts they stood accused for were official acts of the State.[20] That is har-

*sity in St. Louis Legal Studies Research Paper Series, Paper No. 19-01-12,* 2019. Available in: https://ssrn.com/abstract=3321998. Access in: 11 Oct. 2020; METTRAUX, Guénaël; DUGARD, John; PLESSIS, Max du. Heads of state immunities, international crimes and president Bashir's visit to South Africa. *International Criminal Law Review*, v. 18, n. 4, p. 577–622, 2018. p. 620; GAETA, Paola. Official capacity and immunities. *In:* CASSESE, Antonio; GAETA, Paola; JONES, John R.W.D. (eds.). *The Rome Statute of the International Criminal Court:* a commentary. Oxford: Oxford University Press, 2002. p. 975–1002. p. 991. Arguing that personal immunities continue to apply in those fora, see generally KIYANI, A. G. Al-Bashir & the ICC: the problem of head of state immunity. *Chinese Journal of International Law*, v. 12, n. 3, p. 467–508, 2013. p. 500–501; AKANDE, Dapo. International law immunities and the international criminal court. *American Journal of International Law*, v. 98, n. 3, p. 407–433, 2004. p. 421.

[15] COMMISSION on the responsibility of the authors of the war and on enforcement of penalties, report presented to the preliminary peace conference. *American Journal of International Law*, v. 14, n. 1/2, p. 95-54, jan. 1920. p. 116. The States represented at the Commission were Belgium, France, Greece, Italy, Japan, Poland, Romania, Serbia, the United Kingdom and the United States.

[16] UNITED NATIONS. *Charter of the International Military Tribunal*. 1945. p. 279. Available in: https://www.legal-tools.org/doc/64ffdd/pdf/ Access in: 11 Oct. 2020.

[17] UNITED NATIONS. *Charter of the International Military Tribunal for the Far East*. 1948. Available in: https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.3_1946%20Tokyo%20Charter.pdf Access in: 11 Oct. 2020. Notably, no direct reference was made to heads of State in this provision.

[18] JACOBS, Dov. The frog that wanted to be an ox: the ICC's approach to immunities and cooperation. *In*: STAHN, Carsten (ed.). *The law and practice of the international criminal court*. Oxford: Oxford University Press, 2015. p. 281-302. p. 286–287. See also, establishing the difference between the two concepts, Arrest Warrant case, para. 60.

[19] INTERNATIONAL LAW COMMISSION. *Formulation of Nürnberg Principles*. 1950. Yearbook of the International Law Commission, 1950, Vol. II, p. 181. UN Doc. A/CN.4/22. p. 3 (emphasis added).

[20] At the time of the Nuremberg and Tokyo trials, the defendants had lost the official positions held in their respective States during the war. However, were it to be considered that their immunity was

dly a reasonable interpretation of the intention of the contracting parties.

A more relevant distinction in the interpretation of these provisions is the distinction between personal and functional immunity. In what concerns functional immunity, its unavailability before these tribunals results from the fact that, by establishing that individuals are responsible for their criminal conduct even when they are high-ranking State officials, the Nuremberg Charter and the Charter for the Far East Tribunal removed these conducts from the scope of acts of State, eliminating the very rationality for immunity.[21]

Accordingly, the Nuremberg Tribunal, when faced with the question of immunities, stated that:

> The principle of international law, which under certain circumstances, protects the representatives of a State, cannot be applied to acts which are condemned as criminal by international law. […] He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the State if the State in authorizing action moves outside its competence under international law.[22]

The interpretation of article 7 of the Nuremberg Charter according to which it excludes the procedural defenses of immunity was confirmed by the ILC in the commentary to Principle III of the Nuremberg Principles.[23]

Personal immunity, in turn, was not at issue in Nuremberg given that all defendants had lost their official positions at the time of the trial. However, the emphasis placed on the position of the official in article 7 of the Nuremberg Charter, rather than on the nature of the acts,[24] the express reference to the head of State,[25] and the broad interpretation given to the article by the Nuremberg Tribunal leave room to argue that this provision also excluded personal immunity.

Moreover, the ILC has noted a close interconnection between the provisions concerning individual criminal responsibility and the exclusion of all immunities in the commentary to the Draft Code of Crimes Against the Peace and Security of Mankind:

> 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 defense. 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.[26]

Similar provisions on individual criminal responsibility and irrelevance of the official position of the accused were included in the statutes of international tribunals created afterwards, providing opportunities for further clarification of the relationship between this rule and immunity of high-ranking State officials.

### 2.2 The ad hoc tribunals of the 1990's

In 1993, when the Security Council adopted resolution 827 (1993) on the establishment of the International Criminal Tribunal for the former Yugoslavia (ICTY), the report prepared by the UN Secretary-General noted that "[v]irtually all the written comments received" from States had suggested that the statute of the new tribunal contained provisions regarding individual criminal responsibility of State officials and

not removed by the charters, they could still have claimed functional immunity for their acts performed in an official capacity.

[21] GAETA, Paola. Official capacity and immunities. *In:* CASSESE, Antonio; GAETA, Paola; JONES, John R.W.D. (eds.). *The Rome Statute of the International Criminal Court:* a commentary. Oxford: Oxford University Press, 2002. p. 975–1002. p. 981; Akande develops this argument in some length in relation to article 27(1) of the Statute of the ICC, which has a very similar wording. AKANDE, Dapo. International law immunities and the international criminal court. *American Journal of International Law*, v. 98, n. 3, p. 407–433, 2004. p. 419–420.

[22] TRIAL of the Major War Criminals before the International Military Tribunal. Nürnberg, 1947. p. 223. Available in: https://www.loc.gov/rr/frd/Military_Law/NT_major-war-criminals.html Access in: 11 Oct. 2020.

[23] INTERNATIONAL LAW COMMISSION. *Text of the Nürnberg Principles Adopted by the International Law Commission.* 1950. Yearbook of the International Law Commission, 1950, Vol. II, pp. 374. UN Doc. A/CN.4/L.2. p. 103. Principle III reads: "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 Mm from responsibility under international law."

[24] Akande makes a similar argument in relation to Art. 27(1) of the Statute of the ICC. AKANDE, Dapo. International law immunities and the international criminal court. *American Journal of International Law*, v. 98, n. 3, p. 407–433, 2004. p. 420.

[25] A reference to the head of State was absent in the Charter of the Far East Tribunal, most likely because of the political decision not to prosecute the Japanese Emperor Hirohito. GAETA, Paola. Official capacity and immunities. *In:* CASSESE, Antonio; GAETA, Paola; JONES, John R.W.D. (eds.). *The Rome Statute of the International Criminal Court:* a commentary. Oxford: Oxford University Press, 2002. p. 975–1002.

[26] INTERNATIONAL LAW COMMISSION. *Draft Code of Crimes against the Peace and Security of Mankind with commentaries*. 1996. Report of the International Law Commission on the work of its forty-eighth session (6 May - 26 July 1996), p. 7, UN Doc. A/51/10. p. 26-27.

persons acting in an official capacity. Accordingly, he suggested that the statute should contain a provision specifying that "a plea of head of State immunity or that an act was committed in the official capacity of the accused will not constitute a defense"[27] - *i.e.*, that personal and functional immunities would not be applicable before the tribunal. His proposal was adopted as Article 7(2) of the Statute of the ICTY, which states that

"The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment."[28]

A similar Article 6(2) was included in the Statute of the International Criminal Tribunal for Rwanda (ICTR), adopted on 8 November 1994 by Security Resolution 955 (1994).[29] The Commission of Experts constituted by the Security Council to examine violations of international humanitarian law in Rwanda noted, in its final report, that the Nuremberg trials had established "the principle that any individual, regardless of office or rank, shall be held responsible in international law for war crimes, crimes against peace or crimes against humanity."[30]

The ICTY provided the first relevant practice of prosecution of an incumbent head of State. On 22 May 1999, the indictment against Slobodan Milošević, incumbent president of Yugoslavia, was unsealed.[31] While he only faced trial after his term of office, which made it possible to arrest and transfer him to the custody of the ICTY, there is no doubt that the indictment would, in itself, have violated his personal immunity, had it remained applicable.[32] The Trial Chamber addressed this issue in the decision on preliminary motions of 8 November 2002, finding that article 7(2) of the Statute of the ICTY reflected a rule of customary international law that could be traced back to the development of the doctrine of individual criminal responsibility after the Second World War and that had later been incorporated in several instruments, including the recent Rome Statute.[33] On the date of this decision, however, Milošević was no longer president of Yugoslavia.

### 2.3 Developments in the new millennium

In February 2002, the ICJ issued a landmark decision on personal immunities in the *Arrest Warrant* case, where it was asked to make a pronouncement on the enjoyment of immunity by a minister for foreign affairs before foreign criminal courts in case of prosecution for war crimes and crimes against humanity. The Court, after it had "carefully examined State practice", found that it was not possible to deduce that there existed, under customary international law, any form of exception to the rule according personal immunity from criminal jurisdiction and inviolability to incumbent ministers for foreign affairs where they were suspected of having committed those crimes.[34] In an often-cited *obiter dictum*, the Court added that an incumbent minister for foreign affairs "may be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction."[35] Examples of such courts included the ICTY, the ICTR and the ICC.[36]

The Rome Statute of the ICC was adopted in 1998 and entered into force on 1 July 2002. For the first time, it included an express mention to the inapplicability of

[27] UNITED NATIONS. *Report of the Secretary-General pursuant to paragraph 2 of Security Council Resolution 808 (1993)*. 1993. UN Doc. S/25704. p. 55.

[28] UNITED NATIONS. *Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991*. 1993. UN Doc. S/25704, Annex.

[29] UNITED NATIONS. *Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994*. 1994. UN Doc S/RES/955 (adoption); UN Doc. S/RES/1717 (last amendment).

[30] UNITED NATIONS. *Final Report of the Independent Commission of Experts Established in Accordance with Security Council Resolution 935 (1994)*. Annex to Letter dated 9 December 1994 from the Secretary-General Addressed to the President of the Security Council, UN Doc No S/1994/1405. p. 171.

[31] INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA. *Initial Indictment on Kosovo against Slobodan Milosevic and others*. 22 May 1999. Case No IT-99-37. The indictment was addressed to five high-ranking State officials, including also Milan Milutinović, incumbent President of Serbia.

[32] This was made clear by the ICJ in *Arrest Warrant* case, para. 71. See also, INTERNATIONAL LAW COMMISSION. *Sixth Report on Immunity of State Officials from Foreign Criminal Jurisdiction*. 2018. UN Doc. A/CN.4/722. p. 62.

[33] INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA. *Prosecutor v Slobodan Milosevic, Decision on Preliminary Motions*. 2001. Case No IT-02-54. p. 28–31; SCHABAS, William A. *The UN International Criminal Tribunals*: the Former Yugoslavia, Rwanda and Sierra Leone. Cambridge: Cambridge University Press, 2006. p. 328.

[34] Arrest Warrant case, para. 58.

[35] Arrest Warrant case, para. 61.

[36] Arrest Warrant case, para. 61.

immunity of State officials before the Court in article 27(2), which reads: "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."

Since it started functioning, the ICC has opened investigations and issued arrest warrants against serving heads of State in a number of occasions: on 4 March 2009 and 12 July 2010, it issued two arrest warrants against Omar Hassan Ahmad Al Bashir, president of Sudan; in 2011, it issued one against Muammar Mohamed Abu Minyar Gadaffi, president of Libya (27 June) and one against Laurent Gbagbo, president of Côte d'Ivoire (23 November).

The Special Court for Sierra Leone (SCSL) was established in 2002 by an agreement between the UN and the government of Sierra Leone,[37] negotiated pursuant to Security Council resolution 1315 (2000), of 14 August. Its statute contained the exact same provision found in articles 7(2) and 6(2) of the Statutes of the ICTY and ICTR.[38] On 7 March 2003, the SCSL confirmed the indictment and issued an arrest warrant against Charles Taylor, who was then incumbent president of Liberia. Taylor challenged this indictment on the grounds that it violated the head of State immunity to which he was entitled. In May 2004, the Appeals Chambers reiterated the distinction between national and international courts made by the ICJ in the *Arrest Warrant* case and stated that "the principle seems now established that the sovereign equality of States does not prevent a head of State from being prosecuted before an international criminal tribunal or court".[39]

The SCSL is one of the so-called internationalized, mixed or hybrid criminal tribunals that were set up jointly by the UN and a national government to prosecute war crimes and crimes against humanity in its territory, and they contain elements of both national and international jurisdictions.[40] Other examples include the Extraordinary Chambers in the Courts of Cambodia (ECCC), introduced in the domestic court system of that State, and the Special Tribunal for Lebanon (STL), established by UN Security Council resolution 1757 (2007), of 30 May, and not forming part of the Lebanese court system. The Law on the Establishment of the ECCC provides for individual criminal responsibility regardless of position or rank of the offenders.[41] In the Statute of the STL, such provision is absent, which has been linked with the fact the tribunal does not have jurisdiction over international crimes.[42]

Deviating from the trend of rejecting any defense based on the official position of the accused, the member States of the African Union (AU) adopted, in 2014, the Malabo Protocol on amendments to the Statute of the African Court of Justice and Human Rights, introducing article 46A *bis*, which establishes that

> No 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 officials based on their functions, during their tenure of office.[43]

Additionally, a caveat was introduced in the provision establishing the irrelevance of the official position of the accused for individual criminal responsibility, subjecting its application to the operation of article 46A *bis*.[44] The introduction of this express limitation to the scope of the article adds to the argument that a waiver of immunity is normally implicitly included in this type of provisions.

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[37] UNITED NATIONS. *Statute for the Special Court for Sierra Leone*. 2002. p. 137. Available in: http://www.rscsl.org/Documents/scsl-statute.pdf Access in: 11 Oct. 2020.

[38] UNITED NATIONS. *Statute for the Special Court for Sierra Leone*. 2002. Available in: http://www.rscsl.org/Documents/scsl-statute.pdf Access in: 11 Oct. 2020.

[39] SPECIAL COURT FOR SIERRA LEONE. *Decision on Immunity from Jurisdiction (Prosecutor v Charles Gankay Taylor)*. 31 May 2004. Appeals Chamber. SCSL-2003-01-I. p. 52.

[40] See FERREIRA, Gustavo Bussmann. The peace process in Sierra Leone: an analysis on marriages between culture and crime. *Brazilian Journal of International*, v. 13, n. 1, p. 364-376, 2016. p. 372.

[41] UNITED NATIONS. *Agreement between the United Nations and the Royal Government of Cambodia concerning the Prosecution under Cambodian Law of crimes Committed During the Period of Democratic Kampuchea*. 2003. p. 117. Available in: https://www.eccc.gov.kh/sites/default/files/legal-documents/Agreement_between_UN_and_RGC.pdf Access in: 11 Oct. 2020.

[42] DOHERTY, Heather Noel. Tipping the scale: is the Special Tribunal for Lebanon international enough to override state official immunity. *Case Western Reserve Journal of International Law*, v. 43, p. 831-876, 2011. p. 861–862; SCHABAS, William A. The Special Tribunal for Lebanon: is a 'tribunal of an international character' equivalent to an 'international criminal court'? *Leiden Journal of International Law*, v. 21, n. 2, p. 513–528, 2008. p. 525–526.

[43] AFRICAN UNION. *Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights*. Adopted by the Twenty-third Ordinary Session of the Assembly, held in Malabo, Equatorial Guinea, 27 June 2014. Art. 46A bis.

[44] Art. 46B(2) reads: "Subject to the provisions of Article 46A*bis* of this Statute, the official position of any accused person shall not relieve such person of criminal responsibility nor mitigate punishment."

The adoption of this protocol, however, raises the question of whether we are in presence of an instance of contrary State practice, that could compromise the identification of a customary rule of inapplicability of immunity of State officials before international criminal tribunals, or whether the member States of the AU wished to derogate from an existing rule of custom through a treaty provision. It is noteworthy, however, that, to this date, only 15 member States of the AU have signed the Malabo Protocol and none has ratified it yet. Furthermore, neither the protocol nor the Statute of the African Court have entered into force.

### 2.4 Limited practice for an exception to immunity rule

The analysis of the previous precedents shows that the existence of a customary law exception to the rule of personal immunity of State officials remains difficult to demonstrate. While a norm explicitly or implicitly excluding immunity of State officials was typically included in the statutes of international tribunals, there have been few instances of practice in which serving heads of State faced prosecution. In addition, to the extent that State officials were prosecuted before these tribunals, the States that they represented were always bound by the provisions of the statute (either by treaty, such as Germany in relation to the Nuremberg Charter, or by a Security Council resolution, such as Yugoslavia in relation to the ICTY Statute), including the rule removing immunity.

The exception is the prosecution of Al Bashir before the ICC, to which Sudan is not a member. However, the decisions issued so far in these proceedings were not well received by all member States of the ICC, facing particular opposition from African and Arabian States,[45] and were heavily criticized in literature, with several authors considering that the evidence advanced in the Malawi and Chad proceedings in support of the customary status of the exception was not sufficient.[46]

The discussion assumes a different configuration if we depart from the premise that, as a result of the international criminal jurisdiction being sufficiently autonomous and different in nature from the criminal jurisdiction of States, it is not possible to assume that the rules of immunity of State officials applicable before foreign courts would automatically become applicable internationally.[47] In case we assume the non-transferability of the immunity rule before national criminal jurisdictions to international criminal jurisdictions, it is no longer necessary to demonstrate the emergence of an exception in customary international law. Instead, the discussion turns to the question whether a rule granting immunity to serving heads of State, heads of governments, and ministers for foreign affairs has never emerged before international courts.

This was the novel argument put forward by the ICC Appeals Chamber in the judgment on the *Jordan Appeal*, and it is analyzed in the next section.

## 3 The different nature of international criminal jurisdictions and the non-transferability of the rule of immunity of State officials

The judgment in the *Jordan Appeal* brought a new dimension to the debate on the rule of immunity applicable before international criminal tribunals, by arguing that the issue had been inadequately framed by the Pre-Trial Chambers. In particular, in the proceedings on

[45] AFRICAN UNION. *Decision on Africa's Relationship with the International Criminal Court (ICC)*. 2013. Ext/Assembly/AU/Dec.1 (Oct. 2013). p. 10; INTERNATIONAL CRIMINAL COURT. *The League of Arab States' Observations on the Hashemite Kingdom of Jordan's appeal against the 'Decision under article 87(7) of the Rome Statute on the noncompliance by Jordan with the request by the Court for the arrest and surrender [of] Omar Al-Bashir' (The Prosecutor v. Omar Hassan Ahmad Al Bashir)*. 16 July 2018. Appeals Chamber. ICC-02/05-01/09. p. 31.

[46] VAN DER WILT, Harmen. Immunities and the International Criminal Court. *In:* FERRO, Luca; ANGELET, Nicolas; RUYS, Tom (eds.). *The Cambridge Handbook of Immunities and International Law*. Cambridge: Cambridge University Press, 2019. p. 595–613. p. 600; JACOBS, Dov. The frog that wanted to be an ox: the ICC's approach to immunities and cooperation. *In*: STAHN, Carsten (ed.). *The law and practice of the international criminal court*. Oxford: Oxford University Press, 2015. p. 281-302. p. 286–287; RAMSDEN, Micheal; YEUNG, Isaac. Head of state immunity and the Rome Statute: a critique of the PTC's Malawi and DRC decisions. *International Criminal Law Review*, v. 16, p. 703-729, 2016. p. 728-729; KRESS, Claus. The international criminal court and immunities under international law for states not party to the Court's Statute. *In:* BERGSMO, Morten; LING, Yan (eds.). *State sovereignty and international criminal law*. Beijing: Torkel Opsahl Academic EPublisher, 2012. p. 223–265. p. 263.

[47] See Al-Bashir Jordan Appeal, paras. 116.

non-compliance against Chad[48] and Malawi[49] for failing to arrest and surrender Al Bashir, Pre-Trial Chamber I found that the Sudanese president had no immunity before the ICC because customary international law had evolved to recognize an exception to the rule granting immunity to heads of State when they faced prosecution for international crimes before international courts.[50] Article 27 was, therefore, a mere codification of this rule, remaining applicable even in relation to officials of non-party States.

In its decision, the Appeals Chamber of the ICC found that this reasoning wrongly assumed that the immunity that certain State officials enjoy before domestic jurisdictions of foreign States is transferable to criminal prosecutions before international courts. It argued that international courts have a "fundamentally different nature" as opposed to domestic jurisdictions: while the latter are an expression of a State's sovereign power, which is limited by the sovereign power of other States, the former do not act on behalf of a particular State or States but, instead, on behalf of the "international community a whole".[51] From this premise, it went on to sustain that this different nature of international tribunals determines that the principle of *par in parem non habet imperium* is not applicable before them and, as such, there is no rationale for granting jurisdictional immunities to certain State officials.

This argument effectively shifts the burden of proof, as it now falls on the party relying on immunity to demonstrate that such a rule has emerged in customary law. In this respect, the Appeals Chamber notes that this immunity has never been applied before international courts as of yet. It concludes that:

> [T]here is neither State practice nor *opinio juris* that would support the existence of Head of State immunity under customary international law vis-à-vis an international court. To the contrary, such immunity *has never been recognized* in international law as a bar to the jurisdiction of an international court.[52]

A long Joint Concurring Opinion issued by Judges Eboe-Osuji, Morrison, Hofmanski and Bossa sheds some light on the reasoning behind these claims.[53] In their Opinion, the judges of the Appeals Chamber (all but for Judge Carranza) analyze the precedents of international criminal tribunals since World War II which, they argue, demonstrate that "customary international law has never evolved to recognize immunity — even for heads of State — before an international court exercising jurisdiction over crimes under international law."[54]

This reasoning raises several questions deserving further discussion, namely whether the different nature of international criminal courts had been recognized in international practice before, what exactly is an international court, and whether the same immunity regime applies to all international courts.

### 3.1 The "fundamentally different" nature of international criminal jurisdiction

Before the decision in the *Jordan Appeal* was issued, the most extensive discussion of the nature of international criminal courts was found in the decision on immunity of the Appeals Chamber of the SCSL in the *Taylor* case. When confronted with the question of whether the defendant, which was still president of Liberia at the time of his indictment, enjoyed immunity before the SCSL, the Appeals Chamber turned to discussing the nature of the tribunal – an element that, it claimed, had always been "a relevant consideration in the question whether there is an exception to the principle of immunity."[55] It then argued that a distinction should be

[48] INTERNATIONAL CRIMINAL COURT. *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 (The Prosecutor v Omar Hassan Ahmad Al Bashir)*. 13 December 2011. Pre-Trial Chamber I ICC-02/05-01/09-140. p. 13.

[49] INTERNATIONAL CRIMINAL COURT. *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 (The Prosecutor v Omar Hassan Ahmad Al Bashir)*. 13 December 2011. Pre-Trial Chamber I. ICC-02/05-01/09-139-Corr. p. 41.

[50] INTERNATIONAL CRIMINAL COURT. *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 (The Prosecutor v Omar Hassan Ahmad Al Bashir)*. 13 December 2011. Pre-Trial Chamber I. ICC-02/05-01/09-139-Corr. p. 42.

[51] Al-Bashir Jordan Appeal, paras. 115–116.

[52] Al-Bashir Jordan Appeal, para. 113. (emphasis added).

[53] The Appeals Chamber itself directly refers to the Joint Concurring Opinion for a more developed reasoning - Al-Bashir Jordan Appeal, para. 116.

[54] Joint Concurring Opinion, Jordan Appeal, para. 66.

[55] SPECIAL COURT FOR SIERRA LEONE. *Decision on Immunity from Jurisdiction (Prosecutor v Charles Gankay Taylor)*. 31 May 2004. Appeals Chamber. SCSL-2003-01-I .p. 49.

made between the rules of immunity applicable before national and international courts, due to the fact that international courts "derive their mandate from the international community," rather than from the sovereign powers of any particular State.[56] Accordingly, the exercise of jurisdiction by international courts did not affect the principle of sovereign equality between States.

In support of its findings, the Appeals Chamber of the SCSL referred to the famous ICJ *obiter dictum* in the *Arrest Warrant* case. After finding that a customary international law exception to the rule of immunity from foreign criminal jurisdiction could not be established, the ICJ declared that "an incumbent or former Minister for Foreign Affairs may be subject to criminal proceedings before *certain international criminal courts*, where they have jurisdiction." [57] The Court further stressed the difference between the rules applicable to national and international courts by noting that the provisions on immunities contained in the legal instruments creating international criminal tribunals (which had been relied on by Belgium in its arguments) had no bearing on the status of immunities before national courts.[58]

The ILC has also made occasional reference to this difference in the context of its work on immunities of State officials from foreign criminal jurisdiction. In its Preliminary Report, Special Rapporteur Roman Kolodkin noted that "immunity from international criminal jurisdiction appears to be fundamentally different from immunity from national criminal jurisdiction," which was relevant in defining the boundaries of the work of the ILC on the topic.[59] He added that the jurisdiction of international courts and tribunals is of a different nature because they have a mandate from the international community and, as such, the principle of sovereign equality "cannot be the rationale for immunity from international jurisdiction".[60] More recently, as the ILC approaches the conclusion of its work on the topic, Special Rapporteur Concepción Escobar Hernández proposed to include a provision in the draft articles to clarify that these "are without prejudice to the rules governing the functioning of international criminal tribunals".[61] The objective was to guarantee that the final outcome of the work of the ILC did not undermine the substantive and institutional norms being developed in the area of international criminal law and, as the Special Rapporteur put it, "to preserve the rightful place of international criminal tribunals in contemporary international law."[62]

The reference to the different nature of international tribunals in the judgment in the *Jordan Appeal* is in line with these previous studies. However, the reasoning begs the question of what is to be considered as an "international court".

### 3.2 The concept of an "international court"

The Appeals Chamber of the ICC does not provide a definition of what is an international court. However, assistance can be found in the Joint Concurring Opinion, where the four ICC judges did engage with the question and argued that:

> An 'international court' or an 'international tribunal' or an 'international commission' […] is an adjudicatory body that exercises jurisdiction at the behest of two or more States. Its jurisdiction may be conferred in one of a variety of ways: such as by treaty; by instrument of promulgation, referral or adhesion made by an international body or functionary empowered to do so; or, indeed, by adhesion or referral through an arbitral clause in a treaty.[63]

They further added: "The source of the jurisdiction that the court is meant to exercise is the ultimate element of its character as an international court. That source of jurisdiction is the collective sovereign will of the enabling States […]."[64]

This definition encompasses a large variety of international courts, constituted on different legal basis, with different mandates and memberships. This diversity becomes evident by looking at the examples of international courts that the ICJ mentioned in the *Arrest Warrant* case. While the ICTY and the ICTR were established by Security Council resolutions and had jurisdiction over

[56] SPECIAL COURT FOR SIERRA LEONE. *Decision on Immunity from Jurisdiction (Prosecutor v Charles Gankay Taylor)*. 31 May 2004. Appeals Chamber. SCSL-2003-01-I. p. 51.

[57] Arrest Warrant case, para. 61 (emphasis added).

[58] Arrest Warrant case, para. 58.

[59] INTERNATIONAL LAW COMMISSION. *Preliminary Report on Immunity of State Officials from Foreign Criminal Jurisdiction*. 2008. UN Doc. A/CN.4/601. p. 103.

[60] INTERNATIONAL LAW COMMISSION. *Preliminary Report on Immunity of State Officials from Foreign Criminal Jurisdiction*. 2008. UN Doc. A/CN.4/601. p. 103.

[61] INTERNATIONAL LAW COMMISSION. *Eighth Report on Immunity of State Officials from Foreign Criminal Jurisdiction*. 2020. UN Doc. A/CN.4/739. p. 30–31.

[62] INTERNATIONAL LAW COMMISSION. *Eighth Report on Immunity of State Officials from Foreign Criminal Jurisdiction*. 2020. UN Doc. A/CN.4/739. p. 32.

[63] Joint Concurring Opinion, Jordan Appeal, para. 56.

[64] Joint Concurring Opinion, Jordan Appeal, para. 58.

crimes within a limited geographical and temporal scope, the ICC is a treaty-based court which aims to be global and permanent.

As noted, the Appeals Chamber of the SCSL also had to deal with this question in the *Taylor* case, where it had to determine whether it could be considered an international court. The decision largely followed the conclusions proposed by Philippe Sands in his *amicus curiae* brief, which found that the SCSL should be treated as an international court because, among other elements, it was established by treaty and had "the characteristics associated with classical international organizations" (such as legal personality and an autonomous will).[65] This is in line with the definition proposed above by the judges in the Appeals Chamber of the ICC.

Following this definition and admitting that any institution created by two or more States to exercise jurisdiction on their behalf can be considered an international court, the question still remains whether all of these courts have a *fundamentally different nature* as opposed to domestic courts, as proposed the Appeals Chamber of the ICC.

### 3.3 Are all international courts created equal?

It is not evident that, in establishing international criminal tribunals, States always understood to be creating a new type of jurisdiction, instead of making arrangements for the joint exercise of their national jurisdictions. When the Nuremberg Tribunal was confronted with questions concerning the right of the Allies to try war criminals and the legitimacy of the Tribunal to exercise its jurisdiction, it stated that

> The making of the Charter was the exercise of the sovereign legislative power by the countries to which the German Reich unconditionally surrendered; […]. In doing so, they have done together *what any one of them might have done singly*.[66]

This formulation seems to point towards the conception of the Tribunal as a pooling of the jurisdictions of the victorious States of World War II, rather than a tribunal of a different nature.

A different conclusion can be reached, however, when considering the ad hoc tribunals that were established by Security Council resolutions to prosecute those responsible of serious violations of international law in Yugoslavia and Rwanda. Here, the Security Council acted within its powers in the UN Charter to maintain peace and security and it did not require an agreement from the States involved in the conflicts.

The wording of the *obiter dictum* in the *Arrest Warrant* case seems to also support a differentiation between international courts, in which only before certain of them immunity for acting heads of State and other high-ranking officials would be generally inapplicable. In its judgment, the ICJ expressly referred to "*certain* international criminal courts".[67] Pointing in the same direction, the Secretariat of the ILC noted, in its memorandum on immunities of State officials, that "it is generally accepted that even an incumbent high-ranking official would not be covered by immunity when facing similar charges before *certain* international criminal tribunals where they have jurisdiction."[68] Several commentators have also highlighted the need to distinguish between different courts in asserting the rules of immunity applicable.[69]

It is disappointing that the Appeals Chamber decision in the *Jordan Appeal* did not discuss this issue, effectively brushing over the different nature of international courts in two short paragraphs and grounding it on the fact that they "act on behalf of the international community as a whole."[70] From the Joint Concurring Opinion, it becomes clear that the judges subscribing it

[65] SPECIAL COURT FOR SIERRA LEONE. *Decision on Immunity from Jurisdiction (Prosecutor v Charles Gankay Taylor)*. 31 May 2004. Appeals Chamber. SCSL-2003-01-I. p. 41.

[66] THE INTERNATIONAL MILITARY TRIBUNAL, 1947 *apud* INTERNATIONAL LAW COMMISSION. *Formulation of Nürnberg Principles*. 1950. Yearbook of the International Law Commission, 1950, Vol. II, p. 181. UN Doc. A/CN.4/22. p. 187.

[67] Arrest Warrant case, para. 61 (emphasis added).

[68] INTERNATIONAL LAW COMMISSION. *Immunity of State Officials from Foreign Criminal Jurisdiction, Memorandum by the Secretariat*. UN Doc. A/CN.4/596. p. 142 (emphasis added).

[69] JACOBS, Dov. The frog that wanted to be an ox: the ICC's approach to immunities and cooperation. *In*: STAHN, Carsten (ed.). *The law and practice of the international criminal court*. Oxford: Oxford University Press, 2015. p. 281-302. p. 288; SCHABAS, William A. *Obama, Medvedev and Hu Jintao may be prosecuted by international criminal court, pre-trial chamber concludes*. 2011. Available in: http://humanrightsdoctorate.blogspot.com/2011/12/obama-medvedev-and-hu-jintao-may-be.html Access in: 11 Oct. 2020; AKANDE, Dapo. International law immunities and the international criminal court. *American Journal of International Law*, v. 98, n. 3, p. 407–433, 2004. p. 417.

[70] Al-Bashir Jordan Appeal, para. 115.

considered that this special regime applies to all international courts, without distinction.

Such a conclusion, besides being surprising to many,[71] is also difficult to justify in light of the Appeals Chamber own reasoning, as developed in the Joint Concurring Opinion. According to its arguments, jurisdictional immunities cannot successfully be pleaded before judges of international courts because they are on an "entirely different footing": they exercise jurisdiction on behalf of the international community, represented by the aggregation of States who have authorized those international judges to exercise the jurisdiction in question, and are not the delegates of any national sovereign forbidden from exercising jurisdiction over its equals.[72]

The concept of international community and the determination of who acts on its behalf is highly problematic in itself[73] and it is certainly outside of the scope of this work to attempt a definition. However, it does seem difficult that the concept could include, for instance, the actions of a small handful of States that, *motu proprio,* decide to create an international criminal tribunal to prosecute certain cross-border crimes – even if they claimed to be acting on behalf of the international community. It is certainly controversial to argue that those States could claim that the tribunal they created is of a fundamentally different nature from their own domestic jurisdiction and, as such, immunities of State officials of third States could not be relied on before it.[74]

On the contrary, it can be argued that those international tribunals that are established by a Security Council resolution exercise a kind of *ius puniendi* of the international community and are something more than the mere pooling of the jurisdictions of the UN member States. After all, the UN, with its 193 members, is arguably the closest representation of the international community available today and the Security Council, as the organ bearing primary responsibility for the maintenance of international peace and security, expressly acts on behalf of all the member States.[75] In this respect, it has been often pointed out that the ad hoc tribunals of the 1990's were established by the international community acting collectively through the Security Council.[76]

Additionally, it is noteworthy that, when asked to consider its own nature as an international court, the SCSL emphasized the role of the Security Council in its creation. The Appeals Chamber noted that, although the SCSL was not established by a resolution, it was still pursuant to the initiative of the Security Council, acting within the powers conferred to it by the UN Charter and "on behalf of the members if the United Nations", that the Agreement on the Establishment of a Special Court for Sierra Leone was concluded.[77] This arguably made the agreement "an expression of the will of the international community."[78] This is the reasoning behind the finding that Taylor could not enjoy immuni-

[71] JACOBS, Dov. *You have just entered Narnia*: ICC Appeals Chamber adopts the worst possible solution on immunities in the Bashir case. 2019. Available in: https://dovjacobs.com/2019/05/06/you-have-just-entered-narnia-icc-appeals-chamber-adopts-the-worst-possible-solution-on-immunities-in-the-bashir-case/ Access in: 11 Oct. 2020; AKANDE, Dapo. *ICC Appeals Chamber Holds that heads of state have no immunity under customary international law before international tribunals*. 2019. Available in: https://www.ejiltalk.org/icc-appeals-chamber-holds-that-heads-of-state-have-no-immunity-under-customary-international-law-before-international-tribunals/ Access in: 11 Oct. 2020.

[72] Joint Concurring Opinion, Jordan Appeal, para. 53.

[73] To such an extent that some commentators plainly reject it – see JACOBS, Dov. *You have just entered Narnia*: ICC Appeals Chamber adopts the worst possible solution on immunities in the Bashir case. 2019. Available in: https://dovjacobs.com/2019/05/06/you-have-just-entered-narnia-icc-appeals-chamber-adopts-the-worst-possible-solution-on-immunities-in-the-bashir-case/ Access in: 11 Oct. 2020.

[74] See, in agreement, JACOBS, Dov. The frog that wanted to be an ox: the ICC's approach to immunities and cooperation. *In*: STAHN, Carsten (ed.). *The law and practice of the international criminal court*. Oxford: Oxford University Press, 2015. p. 281-302. p. 288; AKANDE, Dapo. International law immunities and the international criminal court. *American Journal of International Law*, v. 98, n. 3, p. 407–433, 2004. p. 418.

[75] UNITED NATIONS. *Charter of the United Nations and Statute of the International Court of Justice*. 1945. Available in: https://popp.undp.org/_layouts/15/WopiFrame.aspx?sourcedoc=/UNDP_POPP_DOCUMENT_LIBRARY/Public/Charter%20of%20the%20United%20Nations.pdf Access in: 11 Oct. 2020.

[76] BABAIAN, Sarah. The international criminal court: an international criminal world court?: jurisdiction and cooperation mechanisms of the Rome Statute and its practical implementation. *Springer International Publishing*, 2018. p. 10; BEKOU, Olympia. International criminal justice and security. *In:* FOOTER, Mary E. *et al.* (eds.). *Security and international law*. Australia: Hart Publishing, 2016. p. 93–114. p. 95; SCHABAS, William A. *The UN International Criminal Tribunals*: the Former Yugoslavia, Rwanda and Sierra Leone. Cambridge: Cambridge University Press, 2006. p. 4; MCGOLDRICK, Dominic. Yugoslavi: the responses of the international community and of international law. *Current Legal Problems*, v. 49, n. 1, p. 375–394, 1996. p. 386.

[77] SPECIAL COURT FOR SIERRA LEONE. *Decision on Immunity from Jurisdiction (Prosecutor v Charles Gankay Taylor)*. 31 May 2004. Appeals Chamber. SCSL-2003-01-I. p. 37.

[78] SPECIAL COURT FOR SIERRA LEONE. *Decision on Immunity from Jurisdiction (Prosecutor v Charles Gankay Taylor)*. 31 May 2004. Appeals Chamber. SCSL-2003-01-I. p. 38.

ty before the SCSL, even though, at the time of indictment, he was the president of a third State.

A second element that strengthens the claim that an international court has a different nature from the national jurisdictions of its members is found in those cases where the subject-matter jurisdiction includes the core crimes under customary international law: genocide, war crimes, crimes against humanity and the crime of aggression.[79] In this respect, it is noteworthy that the fact that the STL only had jurisdiction over offenses under the Lebanese criminal law, and could not prosecute international crimes, was pointed out as the probable reason for the non-inclusion of a provision excluding official immunities in its statute.[80]

The core crimes of international law are generally regarded as mirroring *jus cogens* prohibitions from which States cannot derogate and, as a consequence, the prosecution of these offenders is considered to be in the interest of all members of the international community.[81] The destabilizing effect that the commission of these crimes can have for the maintenance of international peace and security was well-evidenced in relation to the atrocities committed in Yugoslavia.[82] Additionally, universal jurisdiction is generally accepted in relation to most of these crimes.[83]

Following from this discussion, the better answer to the question posed in the title of this section seems to be that different types of international criminal courts exist and, as such, international rules apply differently to them – including rules on immunities. It is only in relation to those international criminal courts that (i) represent the international community as a whole and (ii) have jurisdiction over the core crimes of international law – as such, having a "fundamentally different nature" in relation to national courts – that the argument put forward in the judgment in the *Jordan Appeal* on the non-transferability of the rules of immunity of State officials developed in a national setting to international jurisdictions can be considered.

Furthermore, it is only in relation to this type of international courts that a reasonable claim of impartiality of the international judges and their autonomy from the sovereignty of any State (or States) considered separately can be made.[84] Accordingly, the trial of a head of State by such judges, in accordance with international legal rules, does not represent the subjection of one sovereign power to the *imperium* of another, nor the unlawful interference by one State in the performance of official functions of another.[85] These circumstances effectively eliminate the rationale for granting official immunities.

In this regard, the precedents of the ICTY, the ICTR and the SCSL (if one agrees with its determination that it is an international court) can be referred to as relevant State practice showing that personal immunity was never upheld before international criminal jurisdictions of a fundamentally different nature. As such, a customary rule to that effect never developed in international law.[86]

[79] INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA. *Prosecutor v. Blaskic, Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997*. 1997. p. 41.

[80] See *supra* note 53. APTEL, Cécile. Some innovations in the Statute of the Special Tribunal for Lebanon. *Journal of International Criminal Justice*, v. 5, n. 5, p. 1107–1124, 2007. p. 1110–1111.

[81] SADAT, Leila. Heads of state and other government officials before the international criminal court: the uneasy revolution continues. *Washington University in St. Louis Legal Studies Research Paper Series, Paper No. 19-01-12,* 2019. p. 1. Available in: https://ssrn.com/abstract=3321998. Access in: 11 Oct. 2020; BASSIOUNI, M. Cherif. International crimes: jus cogens and obligatio erga omnes accountability for international crime and serious violations of fundamental human rights. *Law and Contemporary Problems*, v. 59, n. 4, p. 63–74, 1996. p. 68.

[82] UNITED NATIONS. *Report of the Secretary-General pursuant to paragraph 2 of Security Council Resolution 808 (1993)*. 1993. UN Doc. S/25704. p. 22; UNITED NATIONS. *UN Security Council Resolution 808 (1993), of 22 February*. UN Doc. S/RES/1993; BEKOU, Olympia. International criminal justice and security. *In:* FOOTER, Mary E. *et al.* (eds.). *Security and international law*. Australia: Hart Publishing, 2016. p. 93–114. p. 93.

[83] There is support for the application of universal jurisdiction to, at least, grave violations of the Geneva Conventions, crimes against humanity and genocide. CRYER, Robert (ed.). An introduction to international criminal law and procedure. 3rd. ed. Cambridge, United Kingdom: Cambridge University Press, 2014. p. 57; BANTEKAS, Ilias. *Criminal jurisdiction of states under international law*. 2011. Available in: https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1021?prd=MPIL Access in: 11 Oct. 2020; INSTITUT DE DROIT INTERNATIONAL. *Universal criminal jurisdiction with regard to the crime of genocide, crimes against humanity and war crimes*. 2005. p. 2. Available in: https://www.idi-iil.org/app/uploads/2017/06/2005_kra_03_en.pdf Access in: 11 Oct. 2020.

[84] Cfr. the arguments of the UN Secretary-General in favor of the establishment of an international tribunal to prosecute crimes committed in the former Yugoslavia – UN. UNITED NATIONS. *Report of the Secretary-General pursuant to paragraph 2 of Security Council Resolution 808 (1993)*. 1993. UN Doc. S/25704. p. 28; SCHABAS, William A. *The UN International Criminal Tribunals*: the Former Yugoslavia, Rwanda and Sierra Leone. Cambridge: Cambridge University Press, 2006. p. 49.

[85] Cfr. Joint Concurring Opinion, Jordan Appeal, paras. 53–54.

[86] The Appeals Chamber found that "there is no such practice or

It is also remarkable that the decisions of the ICTY and SCSL setting aside immunity did not face significant opposition, illustrating the broad approval of the international community for the non-applicability of immunity before these courts. This reasoning has important impacts in the discussion of the regime of immunities applicable before the ICC.

## 4 The nature of the ICC and the rule of immunity

If one adheres to the conclusion above, then the essential question to determine the regime of immunities applicable before the ICC is whether this court can be considered an international court of a fundamentally different nature. If that is the case, then no customary rule of immunity of State officials would be available before it, even in relation to officials of those States that have not ratified the Rome Statute. On the contrary, if it is found that the Court is a mere pooling of the jurisdictions of the State parties to the Rome Statute, those States, while they could agree to lifting the immunities enjoyed by their own officials, could not set aside those immunities enjoyed by high-ranking officials of third States.[87]

The statement that the ICC has this different nature is far from obvious and the reasoning of the Appeals Chamber in its judgment in the *Jordan Appeal* fell short of making this determination. Considering its creation, position in the international legal order, and present membership, we argue that the ICC does not have a fundamentally different nature at present.

The ICC was created with the broad ambition of constituting a permanent criminal jurisdiction "over the most serious crimes of concern to the international community as a whole."[88] Accordingly, its subject-matter jurisdiction includes the core international crimes.[89] In that sense, it could be considered that its prosecution of people accused of war crimes, genocide, crimes against humanity, and aggression would be in the interest of all members of the international community. However, the argument that the ICC acts on behalf of the international community while prosecuting those people is not very convincing.

In relation to its establishment, the ICC is a treaty-based court created by the Rome Statute. With 123 State parties at present, the Rome Statute has a broad membership – yet it is still far from universal. In particular, several of the most populous countries in the world, representing more than half of the entire world population, have not ratified the Statute as of this date (including Russia, China, the United States, India, Indonesia, Pakistan, Egypt, Ethiopia, Vietnam, Iran).[90] Membership is also geographically divided, with limited membership in Asia, the Middle East, and parts of Africa.

This non-universal membership considerably limits the territorial and personal scope of application of the Rome Statute and the jurisdiction of the ICC – which, as a consequence, lacks jurisdiction to prosecute important violations happening in certain regions of the globe.[91] Aside from the occasional acceptance of jurisdiction by a third state or a referral by the UN Security Council (as was the case in the investigation leading to the indictment of Al Bashir), the jurisdiction of the court is limited to either crimes committed on the territory of a State party or crimes committed by nationals of State parties.[92] Therefore, by its own Statute, the ICC's jurisdiction does not have a universal character, its

*opinio iuris*" – Al-Bashir Jordan Appeal, para. 116.

87 JACOBS, Dov. The frog that wanted to be an ox: the ICC's approach to immunities and cooperation. *In*: STAHN, Carsten (ed.). *The law and practice of the international criminal court*. Oxford: Oxford University Press, 2015. p. 281-302. p. 288.

88 INTERNATIONAL CRIMINAL COURT. *Rome Statute of the International Criminal Court*. 1998. p. 3. Available in: https://www.icc-cpi.int/resource-library/documents/rs-eng.pdf Access in: 11 Oct. 2020; TIVERON, Raquel. Ébano e Marfim: a justiça restaurativa e o TPI orquestrados para a paz sustentável em Uganda. *Brazilian Journal of International Law*, v. 9, n. 4, p. 151-167, 2012. p. 155.

89 INTERNATIONAL CRIMINAL COURT. *Rome Statute of the International Criminal Court*. 1998. Available in: https://www.icc-cpi.int/resource-library/documents/rs-eng.pdf Access in: 11 Oct. 2020.

90 These countries alone account for over 4 billion people. UNITED NATIONS. *Population Databases*. Available in: https://www.un.org/en/development/desa/population/publications/database/index.asp. Access in: 26 May 2021.

91 RABEN, Sarah Myers. The ISIS eradication of Christians and Yazidis: human trafficking, genocide, and the missing international efforts to stop it. *Brazilian Journal of International Law*, v. 15, n. 1, p. 238-253, 2018. p. 241.

92 INTERNATIONAL CRIMINAL COURT. *Rome Statute of the International Criminal Court*. 1998. Available in: https://www.icc-cpi.int/resource-library/documents/rs-eng.pdf Access in: 11 Oct. 2020.

scope being essentially restricted to the combination of the respective jurisdictions of its member States.

Recent case law of the Court has provided a broader interpretation of its jurisdiction. For example, in the decision on jurisdiction concerning the situation on the border of Myanmar and Bangladesh,[93] Pre-Trial Chamber III argued that only a part of the crime has to take place on the territory of a member State and that this element can be interpreted with a wide margin of discretion.[94] Nevertheless, a direct connection between (some of) the facts and one of the State parties to the Rome Statute remained necessary.

On the other hand, the involvement of the Security Council in the referral procedure could support the argument according to which the Court represents broader interests of the international community, instead of merely the interests of its member States.[95] In this context, the ICC has even concluded a cooperation agreement with the UN.[96] However, it has been rightly pointed out that the source of the power to refer situations to the ICC is the Rome Statute and not the UN Charter, implying that, in this context, the Security Council is not acting within the framework of its coercive powers for the maintenance of peace and security worldwide.[97]

The pool of judges serving at the ICC and the method for their selection also deserve some consideration. ICC judges are elected by secret ballot by the Assembly of State Parties to the Rome Statute, from a list of candidates nominated by State parties.[98] Candidates do not need to have the nationality of the State nominating them, but they must be a national of one of the State parties.[99] It is significant that, to be eligible, candidates must be persons of high moral character, impartiality, and integrity, and they shall be independent in the performance of their functions.[100] It is certainly not our intention to question that that is the case in practice; however, for the purpose of determining whether the ICC is more than the sum of the jurisdictions of its State parties, the fact that its judges are nominated and selected amongst their own nationals makes it difficult to support an argument that they act in representation of the entire international community in their judgments.[101]

In contrast, the judges of the ICTY and the ICTR were elected by the UN General Assembly from a list submitted by the Security Council, and the Secretary-General invited member States of the UN and non-member States with permanent observer missions to nominate candidates for the election.[102]

All the elements above point to the same conclusion that the ICC was established and is effectively operating as a pooling of the criminal jurisdictions of its State parties. That being the case, it must be concluded that these States could not grant the Court a power that they did not have themselves: the power to set aside immunities of State officials of foreign States. Article 98 of the Rome Statute seems to recognize exactly that, by establishing that the Court may not request the cooperation of a State party when that would require the requested State to act inconsistently with its obligations under in-

[93] INTERNATIONAL CRIMINAL COURT. *Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar*. 14 November 2019. Pre-Trial Chamber III. ICC-01/19. p. 124.

[94] INTERNATIONAL CRIMINAL COURT. *Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar*. 14 November 2019. Pre-Trial Chamber III. ICC-01/19. p. 62.

[95] BABAIAN, Sarah. The international criminal court: an international criminal world court?: jurisdiction and cooperation mechanisms of the Rome Statute and its practical implementation. *Springer International Publishing*, 2018. p. 192.

[96] INTERNATIONAL CRIMINAL COURT. *Negotiated Relationship Agreement between the International Criminal Court and the United Nations*. 2004. ICC-ASP/3/Res.1.

[97] JACOBS, Dov. The frog that wanted to be an ox: the ICC's approach to immunities and cooperation. *In*: STAHN, Carsten (ed.). *The law and practice of the international criminal court*. Oxford: Oxford University Press, 2015. p. 281-302. p. 290–291; UNITED NATIONS. *Charter of the United Nations and Statute of the International Court of Justice*. 1945. Available in: https://popp.undp.org/_layouts/15/WopiFrame.aspx?sourcedoc=/UNDP_POPP_DOCUMENT_LIBRARY/Public/Charter%20of%20the%20United%20Nations.pdf Access in: 11 Oct. 2020.

[98] INTERNATIONAL CRIMINAL COURT. *Rome Statute of the International Criminal Court*. 1998. Available in: https://www.icc-cpi.int/resource-library/documents/rs-eng.pdf Access in: 11 Oct. 2020.

[99] INTERNATIONAL CRIMINAL COURT. *Rome Statute of the International Criminal Court*. 1998. Available in: https://www.icc-cpi.int/resource-library/documents/rs-eng.pdf Access in: 11 Oct. 2020.

[100] INTERNATIONAL CRIMINAL COURT. *Rome Statute of the International Criminal Court*. 1998. Available in: https://www.icc-cpi.int/resource-library/documents/rs-eng.pdf Access in: 11 Oct. 2020.

[101] IANNATTASIO, Arthur Roberto Capella *et al.* International constitutional court: rise and fall of an international debate. *Brazilian Journal of International Law,* v. 16, n. 1, p. 130-146, 2019. p. 142.

[102] ICTY Statute, Arts. 13*ter*, 13*quarter*. ICTR Statute, Art. 12*bis*, 12*ter*.

ternational law with regards to the immunity of a national of a third State. The application of this regime has been the subject of debate in the non-compliance decisions in the Al Bashir proceedings, as it was invoked by member States to justify their refusal to arrest the president of Sudan (equally illustrating the dependance of the ICC on cooperation from its members).[103] The inclusion of this provision in the Rome Statute indicates that, in spite of its international character, the Court still has to consider the obligations of their member States, in their national criminal jurisdictions, with regard to immunities *vis-à-vis* third parties.

In conclusion, while the ICC was established with the ambition of constituting a permanent forum for prosecution of serious violations of international law committed anywhere in the world – virtually eliminating the necessity of establishing ad hoc tribunals –, it remains to be demonstrated that this ambition has materialized into conferring a different character to the court, exceeding the jurisdiction of its member States. In its judgment in the *Jordan Appeal*, the Appeals Chamber lost an opportunity to persuade skeptical States and commentators that this is the case. Absent this demonstration, the argument of the non-transferability of the customary rule of immunity applicable in domestic jurisdictions to international criminal proceedings and the precedent that immunities of State officials were never applied before international criminal courts of a fundamentally different nature – the very argument relied on in the judgment in the *Jordan Appeal* – cannot apply to the ICC. Accordingly, this Court remains bound to respect the same immunities that State officials from foreign States would enjoy if they were facing prosecution before the criminal courts of its member states.5

## 5 Conclusion

The prosecution of Al Bashir before the ICC, initiated while he was a serving head of State of Sudan, a non-party to the ICC Statute, reignited the debate on the customary law status of immunities of State officials before international criminal jurisdictions.

While it remains controversial whether there is enough practice and evidence of *opinio iuris* since the post-World War II to assert that an exception has emerged to the customary rule granting absolute immunity from foreign criminal jurisdiction to heads of State, heads of government and ministers for foreign affairs, the terms of the debate are different if we start from the premise that international courts are of a *fundamentally different nature* as opposed to domestic courts.

This different nature is founded on the fact that international courts do not represent the exercise of sovereign powers by a State, but the exercise of jurisdiction by the international community as a whole, effectively eliminating the rationale behind the granting of immunities to certain State officials before foreign domestic courts. As such, the rules of immunity of State officials developed in the framework of the horizontal relations between States cannot be transferred to the jurisdiction of international courts. Instead, it is up to the officials (or States) wishing to avail themselves of a rule of immunity before an international criminal court to demonstrate that such rule has emerged as customary law. This is a difficult task, considering that the immunity of State officials was never upheld in international criminal proceedings.

This was the new reasoning put forward by the Appeals Chamber of the ICC in its judgment in the *Jordan Appeal*, where it found that State officials, including those of the highest ranking, do not enjoy immunity before the ICC, even when the States they represent have not ratified the Rome Statute.

It is disappointing that the Appeals Chamber provided little support for its argument, missing the opportunity to develop a convincing reasoning that could engage even those that have been critical of earlier decisions by the Pre-Trial Chambers on the subject. The most problematic part of the judgment in the *Jordan Appeal* is that it did not establish how to identify those international courts that have a sufficiently different nature that warrants the non-transferability of the rules of immunity of State officials applicable before domestic courts. Instead, it seemed to assume that this is the case for all international courts.

Consequently, the decision (and the lengthy Joint Concurrent Opinion) also fails to provide any reasoning as to why the ICC would itself be a court of a fundamentally different nature, rather than simply being

[103] RAMSDEN, Micheal; YEUNG, Isaac. Head of state immunity and the Rome Statute: a critique of the PTC's Malawi and DRC decisions. *International Criminal Law Review*, v. 16, p. 703-729, 2016. p. 728-729.

a treaty-based court, operating "by 'delegation' from (or in the place of) its State parties."[104] As was demonstrated above, this determination is far from obvious. Even though the ICC prosecutes international crimes posing a threat to the peace and security of all mankind, it is not established that it truly represents the international community while doing so. This means that the Court remains bound to respect the customary rule of personal immunity before foreign criminal jurisdictions enjoyed by State officials of non-party States.

The potential of the ICC to represent the international community as a whole in the prosecution of the most serious crimes of the international legal order is not beyond reach. However, a broader global support for the Court is needed for it to achieve this status, as well as a demonstration, beyond any reasonable doubt, that it surpassed the mere combination of the sovereignties of its member States and truly attained a *fundamentally different nature*.

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[104] AKANDE, Dapo. International law immunities and the international criminal court. *American Journal of International Law*, v. 98, n. 3, p. 407–433, 2004. p. 421.

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INTERNATIONAL CRIMINAL COURT. *Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar*. 14 November 2019. Pre-Trial Chamber III. ICC-01/19.

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*by the Court for the arrest and surrender [of] Omar Al-Bashir' (The Prosecutor v. Omar Hassan Ahmad Al Bashir)*. 16 July 2018. Appeals Chamber. ICC-02/05-01/09.

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