

# The Effects of the Law of War on the Question of Immunity and Inviolability of Heads of State: With Particular References to the Prosecution of the President of the Russian Federation for Aggression and other War Crimes

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The debate on how to prosecute the international crimes linked to the aggression of the Russian Federation against Ukraine is ongoing. This Article explores an aspect of that debate, i.e., whether international or national courts may prosecute those who are allegedly entitled to a personal immunity under international law, particularly Vladimir Putin, the head of state of the Russian Federation. The debate has so far been particularly alive in relation to the question of which type of international court is able to “pierce the veil of head of state immunity.” This is because—according to the nearly unanimous view on the matter—foreign national courts cannot prosecute a foreign head of state without the consent of his or her state. The assumption is, therefore, that heads of state enjoy absolute immunity from foreign jurisdiction and inviolability. A decision of the International Court of Justice (ICJ) in the *Arrest Warrant* case strongly supports this view. In contrast, according to a minority of scholars, foreign domestic prosecutions of heads of state for international crimes are possible. They argue that the history of International Criminal Law (ICL) contradicts the position adopted by the ICJ in *Arrest Warrant*. The most important support for their argument is the judgment of the Nuremberg International Military Tribunal (IMT). In its decision, the IMT set forth a non-immunity principle for international crimes. This Article introduces a novel perspective on the matter. It puts forward that, even though the judgments of the ICJ and the IMT are apparently incompatible, they can be reconciled. The main argument of the Article is that, whereas the judgment of the ICJ sets out a general

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rule of head of state immunity which applies in times of peace, the IMT judgment supports the conclusion that the law of war, *as lex specialis*, provides an exception to such rule for situations of international armed conflict.

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Introduction

This Article focuses on the effects of the laws of war on the question of the immunity and inviolability of heads of state. It contrasts the relatively recent position of the ICJ in the *Arrest Warrant* case with the position adopted by the IMT in the aftermath of the Second World War and attempts to find a pathway to reconcile the two. Section I (*The Current Debate*) surveys the intense discussion about which type of courts are able to “pierce the veil of head of state immunity.” Section II (*The Immunity Principle set out by the International Court of Justice*) recalls the basic tenets of the majority and dissenting opinions in the *Arrest Warrant* decision. Section III (*The Non-Immunity Principle set out by the International Military Tribunal*) dissects the Nuremberg principle of non-immunity as it flows from the words of the IMT. Section IV (*Reconciliation between the decisions of the International Military Tribunal and the International Court of Justice*) attempts to reconcile the decisions of the ICJ and the IMT. The last section (*Conclusion*) argues that all persons—“without distinction of rank, including Chiefs of States”—who are responsible for international crimes perpetrated in connection with the international armed conflict between Ukraine and the Russian Federation can be prosecuted in both national and international courts.<sup>1</sup>

1. *Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties*, 14 AM. J. OF INT’L L. 95, 116, 135, 152, 154 (1920) [hereinafter *Commission on the Responsibility*] (upholding in 1919 the view that all persons—“however highly placed”—may be prosecuted for international crimes in both international and national courts).

## I. The Current Debate

There is an intense debate in current international affairs concerning the question of how to prosecute the international crimes linked to the aggression of the Russian Federation against Ukraine.<sup>2</sup>

The debate is particularly concerned with resolving the issue of which type of courts have the power to prosecute the persons who—despite being the most responsible for such crimes—are allegedly entitled to personal immunity under international law.<sup>3</sup> The question has been particularly salient concerning the head of state of the Russian Federation and commander-in-chief of its armed forces, Vladimir Putin.<sup>4</sup>

It would appear that, a decision of the ICJ in the *Arrest Warrant* case leaves no room for doubt that, apart from prosecution in their own country, heads of state, heads of government, and foreign ministers may only be prosecuted in an international court.<sup>5</sup> In that case, the ICJ ruled that, although they are entitled to both “full immunity” from foreign jurisdiction and inviolability, heads of state, heads of government, and foreign ministers can be prosecuted before “certain international criminal courts, where they have jurisdiction.”<sup>6</sup>

Influenced by the *Arrest Warrant*, the debate has so far focused on the possibility of these officials’ prosecution at the International Criminal Court (ICC)

2. For two overviews of the debate, see Alexander Komarov & Oona Hathaway, *The Best Path for Accountability for the Crime of Aggression Under Ukrainian and International Law*, JUST SEC. (Apr. 11, 2022); *International Institutions Mobilize to Impose Accountability on Russia and Individual Perpetrators of War Crimes and Other Abuses*, 116 AM. J. OF INT’L L. 631, 635-42 (2022).

3. Personal immunity (or immunity *ratione personae*) protects some high-level officials from foreign national prosecutions while they are in office. Differently, functional immunity (or immunity *ratione materiae*) “attaches not to the office of the individual but to the type of act performed. It applies only to official, not private, conduct, and it continues to apply after the individual leaves office.” Ingrid Wuerth, *Pinochet’s Legacy Reassessed*, 106 AM. J. OF INT’L L. 731, 736 (2012).

4. See Philippe Sands, *Putin’s Use of Military Force Is a Crime of Aggression*, FIN. TIMES (Feb. 28, 2022); Claus Krefß, *The Ukraine War and the Prohibition of the Use of Force in International Law*, 13 TOAEP’S OCCASIONAL PAPER SERIES 1, 22 (2022); Carrie McDougall, *Prosecuting Putin for His Crime of Aggression Against Ukraine: Part Two*, OXFORD HUM. RTS. HUB (Mar. 8, 2022). On the Russian side, other most responsible persons allegedly include Nikolai Patrushev (Secretary of the Russian Security Council), Sergei Shoigu (Defense Minister of Russia), Sergei Naryshkin (Director of the Russian Foreign Intelligence Service), Valentina Matviyenko (Chairwoman or Speaker of the Federation Council) Sergei Beseda (Head of the 5<sup>th</sup> Service of the Russian Federal Security Service), Sergei Lavrov (Foreign Minister of Russia), and Valery Gerasimov (Chief of the General Staff of the Russian Armed Forces and First Deputy Minister of Defense). See Model Indictment for the Crime of Aggression Committed against Ukraine, Open Society, Justice Initiative (May 2022). On this “model indictment,” see James A. Goldston, *Model Indictment for the Crime of Aggression Committed against Ukraine*, JUST SEC. (May 9, 2022). On the Ukrainian side, so far there have not been credible allegations of commission of international crimes by its most prominent leaders.

5. Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.) (Feb. 14, 2002), 41 ILM ¶¶ 1, 58-61 (2002) [hereinafter *Arrest Warrant*].

6. *Id.*, at ¶¶ 54, 58-61. Immunity relates to freedom from process, i.e., it serves as a protection from the exercise of jurisdiction by a court. Inviolability relates to freedom from arrest, i.e., it serves as a protection from physical interference with a person’s body. On the difference, see Thomas Weatherall, *Inviolability Not Immunity, Re-evaluating the Execution of International Arrest Warrants by Domestic Authorities of Receiving States*, 17 J. OF INT’L CRIM. JUST. 45, 45-76 (2019).

or at a new international court specifically created for the prosecution of the crime of aggression. The debate has been particularly intense regarding crimes of aggression. The reasons for this are well known. Not only does the ICC not have jurisdiction over the crime of aggression committed against Ukraine,<sup>7</sup> but other avenues to trigger the jurisdiction of the court—like a referral by the United Nations Security Council (UNSC)—are also in practice blocked because Russia holds a veto power at the UNSC.

The most prominent proposals to overcome the problem are: an amendment of the ICC Statute to permit a referral to the ICC by the United Nations General Assembly (UNGA);<sup>8</sup> a Nuremberg-style tribunal;<sup>9</sup> an international tribunal established by the UNGA;<sup>10</sup> a hybrid tribunal created by agreement between Ukraine and the Council of Europe, or between Ukraine and the European Union;<sup>11</sup> and a hybrid or international tribunal created by agreement between the UN and Ukraine.<sup>12</sup>

All these proposals rest on the same premise. That is, Vladimir Putin's personal immunity is not a bar to his prosecution at the ICC or such new international tribunal. Based on this premise, the Pre-Trial Chamber II of the ICC has already issued a warrant for his arrest for the war crimes of unlawful deportation of population (children) and of unlawful transfer of population (children) from occupied areas of Ukraine to the Russian Federation.<sup>13</sup>

Here, it is necessary to mention some of the arguments put forward by scholars to support the idea that the ICC is—and the other new international tribunals would be—able to “pierce the veil of head of state immunity.”<sup>14</sup> Adil Ahmad Haque supports an amendment of the ICC Statute to allow the ICC to exercise jurisdiction over the crime of aggression if the UNGA, acting under the Uniting for Peace framework, refers the situation to the court.<sup>15</sup> In relation to jurisdiction and immunity, he states:

With Ukraine's consent and the *support of the large majority of states*, no one could accuse the Court of asserting jurisdiction it does not possess or should not exercise. Nor could Russian leaders plausibly assert personal immunities should the General Assembly refer the situation knowing full well that the Court famously denies the

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7. Rome Statute of the International Criminal Court, Art. 15 *bis* (5), 2187 UNTS 90, entered into force July 1, 2002.

8. See e.g., Statement on Russia's Invasion of Ukraine: A Crime of Aggression, GLOB. INST. FOR THE PREVENTION OF AGGRESSION (Mar. 24, 2022).

9. See e.g., Combined Statement and Declaration Calling for the Creation of a Special Tribunal for the Punishment of the Crime of Aggression against Ukraine, EURO INTEGRATION (Mar. 4, 2022).

10. See e.g., Komarov & Hathaway, *supra* note 2.

11. See e.g., Jennifer Trahan, *Revisiting the History of the Crime of Aggression in Light of Russia's Invasion of Ukraine*, 26 ASIL INSIGHTS (Apr. 19, 2022).

12. See e.g., Mary Robinson & Zeid Ra'ad Al Hussein, *The Elders Call for a Criminal Tribunal to Investigate Alleged Crime of Aggression in Ukraine*, THE ELDERS (5 Mar., 2022).

13. See Situation in Ukraine: ICC Judges Issue Arrest Warrants against Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Belova, ICC (Mar. 17, 2023).

14. Larry D. Johnson, *United Nations Response Options to Russia's Aggression: Opportunities and Rabbit Holes*, JUST SEC. (Mar. 1, 2022).

15. Adil Ahmad Haque, *An Unlawful War*, 116 AM. J. OF INT'L L. UNBOUND 115, 156 (2022).

applicability of such immunities against the Court or against states parties executing the Court's request for arrest and surrender of a sitting head of state.<sup>16</sup>

Carrie McDougall addresses the issue of whether an ad hoc international tribunal or a court created under a hybrid model would be able to overcome the issue of immunity.<sup>17</sup> McDougall states:

There is a good argument to be made that either model is at least potentially capable of being *sufficiently international in nature* to exclude the applicability of immunities for a prosecution of a serious international crime, in line with the decisions of the SCSL in relation to Charles Taylor, the ICC Appeals Chamber in relation to Omar Al-Bashir, and consistent with the comments on the ICJ in the Arrest Warrants Case which recognised that an incumbent immunity holder “may be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction”.<sup>18</sup>

Along the same lines, Claus Kress, Stephan Hobe, and Angelika Nußberger emphasize that the UNGA would vest a “special tribunal with a *genuinely universal character*.”<sup>19</sup> They note that:

This would be relevant in one important legal respect: It would mean that the determination reached by the ICC Appeals Chamber in the case against al-Bashir that customary international law personal immunities enjoyed by acting heads of State, heads of government and foreign ministers are inapplicable before international criminal courts would apply also in the vertical relationship between relevant Russian suspects and the special tribunal.<sup>20</sup>

To a greater or lesser extent, all proposals claim to be “sufficiently international” and grounded on “crystal clear” relevant judicial precedents (particularly, *Jordan Referral re Al-Bashir*) to prevent defendants from successfully invoking immunity.<sup>21</sup>

These claims are controversial. The Advisory Committee on Public International Law (CAVV), a group of legal scholars who advise the government of the Netherlands on matters of international law, has argued that none

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16. *Id.* (emphasis added).

17. Carrie McDougall, *Why Creating a Special Tribunal for Aggression Against Ukraine Is the Best Available Option: A Reply to Kevin Jon Heller and Other Critics*, OPINIO IURIS (Mar. 15, 2022).

18. *Id.* (emphasis added).

19. Claus Kress, Stephan Hobe & Angelika Nußberger, *The Ukraine War and the Crime of Aggression: How to Fill the Gaps in the International Legal System*, JUST SEC. (Jan. 23, 2023) (emphasis added).

20. *Id.*

21. Chile Eboe-Osuji, *The Absolute Clarity of International Legal Practice's Rejection of Immunity Before International Criminal Courts*, JUST SECURITY (December 8, 2022); Prosecutor v. Omar Hassan Ahmad Al-Bashir, ICC-02/05-01/09 OA2, Judgment in the Jordan Referral re Al-Bashir Appeal, ¶ 1 (May 6, 2019) (“There 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”). See also Shane Darcy, *Aggression by P5 Security Council Members: Time for ICC Referrals by the General Assembly*, JUST SEC. (Mar. 16, 2022); Komarov & Hathaway, *supra* note 2; Astrid Reisinger Coracini & Jennifer Trahan, *The Case for Creating a Special Tribunal to Prosecute the Crime of Aggression Committed Against Ukraine (Part VI): On the Non-Applicability of Personal Immunities*, JUST SEC. (Nov. 8, 2022).

of the proposals on the table are able to pierce the veil of head of state immunity.<sup>22</sup> Two main arguments buttress its opinion.

On the one hand, the CAVV emphasizes the controversial nature of the decisions of the SCSL in *Taylor* and of the ICC in *Jordan Referral re Al-Bashir*. According to the CAVV, the “core of the criticism is that international law does not permit a group of states to impose obligations on third states without the latter’s consent.”<sup>23</sup> Thus, states cannot “simply decide among themselves that the immunity of a third state (or a representative of a third state) no longer applies, without the consent of the third state concerned.”<sup>24</sup>

On the other hand, the CAVV takes issue with the vague nature of the concept of an “international tribunal.” It not only holds that not every international tribunal acts on behalf of “the international community as a whole,” but it also emphasizes that it is unclear what makes a tribunal “truly international.”<sup>25</sup> As a result,

[T]he CAVV interprets the case law of the International Court of Justice as meaning that an international tribunal that has been established without the involvement of the defendant’s home state and that lacks a basis under Chapter VII of the UN Charter must respect the personal immunity of heads of state, heads of government and ministers of foreign affairs.<sup>26</sup>

Kevin Jon Heller has stressed that “a hybrid tribunal established as part of the Ukrainian judicial system with the support of the Council of Europe . . . would not be sufficiently international to set aside Putin and Lavrov’s personal immunity.”<sup>27</sup> For Heller, only a court backed by an “overwhelming[]” quantity of states at the UNGA would be fit for purpose.<sup>28</sup>

According to Jennifer Trahan, a hybrid tribunal on the crime of aggression established within Ukraine’s court system “is not the answer.”<sup>29</sup> For Trahan, the proposal for the creation of such court could place diplomatic efforts on the wrong track and risks being a “nullity or worse.”<sup>30</sup> Consider her words:

The tribunal that is established needs to be *fully* international. Otherwise, it could be handicapped *ab initio* (hobbled at the knees) and unable to prosecute the very leaders who are allegedly most responsible for the commission of the crime. [Such tribunal would] immuniz[e] high-level leaders . . . Immunities

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22. Advisory Committee on Issues of Public International Law, *Challenges in Prosecuting the Crime of Aggression: Jurisdiction and Immunities*, ADVISORY REP. NO. 40, 1-21 (Sep. 12, 2022) [hereinafter Advisory report no. 40].

23. *Id.* at 11.

24. *Id.*

25. *Id.* at 14.

26. *Id.* at 16.

27. Kevin Jon Heller, *The Jordan Appeal Supports a Hybrid Tribunal Denying Personal Immunity*, OPINIO JURIS (Feb. 6, 2023).

28. *Id.* Slightly in a different way, see Kevin Jon Heller, *The Best Option: An Extraordinary Ukrainian Chamber for Aggression*, OPINIO JURIS (Mar. 16, 2022) (“skeptical” about whether the proposals on the table “would be sufficiently international in the sense of *Arrest Warrant* to ignore personal immunities”).

29. Jennifer Trahan, *Why a “Hybrid” Ukrainian Tribunal on the Crime of Aggression Is Not the Answer*, JUST SEC. (Feb. 6, 2023).

30. *Id.*

would attach before a tribunal, including before a hybrid tribunal, within a single state's national court system . . . . This means that if diplomatic efforts end up with a hybrid tribunal, established under national law and placed within a domestic court system that cannot overcome immunities for senior leaders, they will have ended up leaving the most glaring accountability loophole in place.<sup>31</sup>

The arguments put forward by the CAVV, Heller, and Trahan are apparently grounded on a sound premise, namely that two or more states cannot disregard immunities owed to other states by simply pooling their jurisdictions together.<sup>32</sup> In this regard, the statement of the CAVV that not all international courts prosecuting international crimes act on behalf of “the international community as a whole” hits at the heart of the matter.

That is so because only a very particular type of courts can be said to act on behalf of the “the international community of States as a whole” in the peremptory (*jus cogens*) sense of this expression, as set out in the Vienna Convention on the Law of Treaties.<sup>33</sup> That is, only courts with constituent instruments that have a peremptory force are able to set aside rules of international law (including, immunity rules) which would otherwise be applicable.

An example of such a court is the International Criminal Tribunal for the Former Yugoslavia (ICTY). The ICTY was created by the UNSC. Where the maintenance of international peace and security is concerned, the UNSC acts on behalf of “the international community of States as a whole,” and it might endow its Chapter VII measures with peremptory force.<sup>34</sup> The ICTY's constituent instrument—UNSC Resolution 827 (1993)—established the ICTY to prosecute the persons responsible for serious violations of international humanitarian law committed in the former Yugoslavia.<sup>35</sup>

In order to enable the ICTY to conduct effective prosecutions, UNSC Resolution 827 (1993) imposed an obligation on all states to “cooperate fully” with the tribunal and authorized the ICTY to issue arrest warrants for all those persons responsible, however highly ranked.<sup>36</sup> Put together, these rules meant that the UNSC *peremptorily mandated all states* to comply with such warrants.<sup>37</sup>

31. *Id.* (emphasis added).

32. See also e.g., ROSANNE VAN ALEBEEK, *THE IMMUNITY OF STATES AND THEIR OFFICIALS IN INTERNATIONAL CRIMINAL LAW AND INTERNATIONAL HUMAN RIGHTS LAW* 276-77 (2008) (correctly highlighting that the “argument that personal immunity does not apply before international courts because the *par in parem* rationale does not apply to international courts *reasons in a circle*”) (emphasis added); Sergey Vasiliev, *Aggression against Ukraine: Avenues for Accountability for Core Crimes*, EJIL:TALK! (March 3, 2022) (similar).

33. Vienna Convention on the Law of Treaties, arts. 53, 64, May 23, 1969, 1155 U.N.T.S. 331.

34. On the peremptory authority of the UNSC, see Miguel Lemos, *Jus Cogens Versus the Chapter VII Powers of the Security Council: With Particular References to Humanitarian Intervention and Terrorism*, 19 CHINESE J. OF INT'L L. 1, 10 (2020).

35. S.C. Res. 827, ¶ 4 (May 25, 1993).

36. *Id.*; Updated Statute of the International Criminal Tribunal for the Former Yugoslavia, art. 29 (May 25, 1993).

37. On the “exceptional legal basis of Article 29 [. . .] [and] the novel and indeed unique power granted to the International Tribunal to issue orders to sovereign States,” see *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-T, Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, ¶ 26. (Int'l Crim. Trib. for the Former Yugoslavia July 2, 1997).

As a result, there was no controversial question about whether treaty or customary law rules on immunity could work as a bar to arrest warrants against a sitting head of state or any other high official of a state. In effect, the ICTY issued warrants for the arrest and surrender of many high officials, including Slobodan Milošević, a sitting head of state.<sup>38</sup>

Apart from tribunals created by the UNSC, only courts which are created by “all states”—or, at least, by a “very large majority of states”—can be considered to act on behalf of the “international community of States as a whole” in the peremptory sense of the expression.<sup>39</sup> A tribunal created by two states, many states, a majority of states or even a large majority of states does not meet the required standard.

Thus, for example, the ICC cannot—on its own, i.e., without the authorization of the UNSC—set aside rules of international law (including, immunity rules) that would otherwise be applicable. The ICC only has 123 state parties. Although that number clearly signifies a majority of states (or even a large majority of states), it is not an overwhelming or “very large majority” of states. What is more, those 123 states only represent a minority of the world population, and do not include the major powers, like the United States, China, Russia, and India.<sup>40</sup> Finally, its constituent instrument (the ICC Statute) is not endowed *per se* (i.e., absent UNSC intervention) with peremptory force.

Most probably, the preceding applies to any future international or hybrid court created for the prosecution of those most responsible for the aggression against Ukraine. This is because the prospect is that no such court will have the support of an overwhelming or “very large majority” number of countries (not even a UNGA backed one will have such support).<sup>41</sup> Nor will such court be endowed with peremptory force by the UNSC (as mentioned, Russia has a veto power at the UNSC).

From this point of view, one could easily conclude that the ICC is not, and such a court will not be, able to “pierce the veil of head of state immunity.” Hence, the current warrant of the ICC for the arrest of Vladimir Putin—and

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38. On the arrest warrants against Slobodan Milošević, see IRMCT, *President Miošević and Four Other Senior Fry Officials Indicted for Murder, Persecution and Deportation in Kosovo*, ICTY (May 27, 1999); IRMCT, *Milosevic and Others Case: Warrants Re-Issued to the Federal Republic of Yugoslavia*, ICTY (Jan. 23, 2001).

39. See Int'l L. Comm'n Rep. on the Work of Its Seventy-First Session, U.N. Doc. A/74/10, 143 (2019) (stressing that, despite the fact that the expression “international community of States as a whole” is not synonymous with unanimity, a “very large majority of States is required”); Lemos, *supra* note 34, at 17, 52 (holding that only action of “all States in the world”—or, at least, the “very large majority”—can be considered as the true (*jus cogens*) expression of the “international community of States as a whole”).

40. Relatedly, see Georges Abi-Saab, *The Specificities of Humanitarian Law*, in STUDIES AND ESSAYS ON INTERNATIONAL HUMANITARIAN LAW AND RED CROSS PRINCIPLES IN HONOUR OF JEAN PICTET 265, 265 (Christophe Swinarski ed., 1984) (suggesting that the “major contenders in society” have an essential role in determining the applicable international rules of war “at any moment in time”).

41. See e.g., G.A. Res. ES-11/1, U.N. Doc. A/ES-11/L/1 (Mar. 1, 2022) (“Deplor[ing] in the strongest terms the aggression by the Russian Federation against Ukraine in violation of Article 2 (4) of the Charter;”) (in favour: 141 states; against: 5 states; abstentions: 35 states; absences: 12 states). This resolution, and other resolutions condemning Russia's aggression, failed to gain the support of around ¼ of the countries of the world representing more than half of the world's population.

any other arrest warrant against him issued by such future court—would contravene international law. In this sense, the criticism of the CAVV, Heller, and Trahan would be sound because the circumstance that the proposals on the table rely on “crystal-clear” precedents does not actually mean that such precedents provide a compelling rationale for why the ICC or any of those new international or hybrid courts would be able to sidestep immunity rules.

Moreover, absent such rationale, states might be reluctant (or even hostile) to comply with warrants against an official who is entitled to a personal immunity. As a result, one could expect that the lamentable story that occurred in connection with the arrest warrants against Al-Bashir—i.e., refusal by states parties and non-parties to the ICC to execute the court’s warrant for the arrest and surrender of Al-Bashir—will repeat itself in relation to the arrest warrant against Vladimir Putin.<sup>42</sup> That would constitute an additional blow for international criminal justice in general and for the reputation of an already embattled ICC in particular.<sup>43</sup>

However, these critiques from the CAVV, Heller, Trahan and other scholars, incur in the same foundational problem that is inherent to the proposals for the creation of sufficiently international courts which allegedly are able to bypass the issue of head of state immunity. They all rest upon the same flawed premise, namely that, because heads of state, heads of government, and foreign ministers enjoy full immunity from foreign jurisdiction and inviolability, their prosecution in foreign national courts is absolutely barred.<sup>44</sup>

This Article rejects the absoluteness of this premise and demonstrates that the debate is fundamentally misguided.<sup>45</sup> This is mainly because the debate does not seriously engage with the most relevant precedent on the matter, i.e., the judgment of the IMT in the aftermath of the Second World War. As elaborated throughout this Article, even though the IMT was an international court, its judgment did not proceed on the assumption that immunities could not be invoked before an international court specifically. Instead, it proceeded on the assumption that immunities could not be invoked before a single national court of any of the states which created the IMT. That is why immunities could not be invoked before the IMT, the tribunal that all those states decided to set up together.

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42. On this scenario, see Miles Jackson, *The ICC Arrest Warrants against Vladimir Putin and Maria Lvova-Belova – An Outline of Issues*, EJIL:TALK! (Mar. 21, 2023); Associated Press, *Hungary Would Not Act on Putin Arrest Warrant, Official Says* (Mar. 24, 2023), <https://apnews.com/article/putin-arrest-ukraine-war-hungary-72fe1c977619b87b4c0b87c502b4a8e3> [<https://perma.cc/ZQ6L-NV3N>].

43. But see—for more optimistic assessments—Mark Kersten, *Straight to the top: The International Criminal Court Issues an Arrest Warrant for Russia’s Vladimir Putin*, JUSTICE IN CONFLICT (Mar. 17, 2023); Rebecca Hamilton, *The ICC Goes Straight to the Top: Arrest Warrant Issued for Putin*, JUST SEC. (Mar. 17, 2023); Sergey Vasiliev, *The International Criminal Court Goes All-In: What Now?*, EJIL:TALK! (Mar. 20, 2023).

44. See e.g., Vasiliev, *supra* note 32; McDougall, *supra* note 17. But see PUBLIC INTERNATIONAL LAW & POLICY GROUP, *Draft Law for a Ukrainian High War Crimes Court*, (2022) (the draft legislation actually does not preclude such prosecutions, at least explicitly).

45. For the first extensive analysis setting out the ideas on which the premise rests, see generally, Dapo Akande, *International Law Immunities and the International Criminal Court*, 98 AM. J. OF INT’L L. 407 (2004) (particularly, at 409-412).

Before extensively dissecting the position of the IMT on the question of immunity, let us recall the basic tenets of the decision of the majority and dissenting opinions in the *Arrest Warrant*.

## II. The Immunity Principle set out by the International Court of Justice

On 14 February 2002, the ICJ ruled that a national court in Belgium contravened international law when it issued an arrest warrant against Mr. Yerodia, the foreign minister of the Democratic Republic of the Congo (DRC) for international crimes he had allegedly perpetrated in the DRC.<sup>46</sup> Although the judgment of the ICJ specifically focused on a foreign minister, there is general agreement that the rationale set forth therein applies, *a fortiori*, to heads of state and heads of government.<sup>47</sup>

In relation to the immunity and inviolability issue, the judgment of the majority was straightforward. It first considered as “firmly established” that—as it occurs with diplomatic and consular agents—heads of state, heads of government and foreign ministers enjoy immunities from jurisdiction in other states.<sup>48</sup> Subsequently, it provided the rationale for the existence of such immunities, namely to ensure the effective performance of functions on behalf of states.<sup>49</sup> Ultimately, it concluded that, throughout the duration of their office, heads of state, heads of government, and foreign ministers when abroad enjoy “full immunity from criminal jurisdiction and inviolability.”<sup>50</sup> This protects them against “any act of authority” of another state which would hinder the performance of official duties.<sup>51</sup>

The majority claimed to have “carefully examined” various legislation and judgments that allegedly support a different conclusion, including the judgment of the IMT.<sup>52</sup> However, it did not provide any insight about the content of said examination. Apart from that claim, the majority merely declared that state practice, rules on immunity and decisions of international courts led it to be “unable to deduce . . . any form of exception” to immunity and inviolability from foreign jurisdiction.<sup>53</sup>

The different separate and concurring declarations and opinions of eight of the thirteen judges that formed part of the majority focused on the issue of

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46. The literature on this decision is voluminous. For an immediate and influential reaction by a renowned scholar and judge, see generally Antonio Cassese, *When May Senior State Officials Be Tried for International Crimes? Some Comments on the Congo v. Belgium Case*, 13 EUR. J. OF INT'L L. 853 (2002).

47. *Id.* at 855.

48. *Arrest Warrant*, *supra* note 5, at ¶ 51.

49. *Id.* at ¶ 53 (also stressing the representative nature of the functions of heads of state, heads of government and foreign ministers: “a Minister for Foreign Affairs, responsible for the conduct of . . . relations with all other States, . . ., like the Head of State or the Head of Government, . . . is recognized under international law as representative of the State solely by virtue of his or her office”).

50. *Id.* at ¶ 54.

51. *Id.*

52. *Id.* at ¶ 58.

53. *Id.* (emphasis added).

universal jurisdiction.<sup>54</sup> They do not bring relevant contributions in relation to the immunity and inviolability issue. In contrast, the three dissenting opinions do.

Judge Oda pointed out that the majority provided “a hornbook-like explanation” to the question of whether a foreign minister is entitled to the same immunity as diplomatic agents, and identified two questions for which the majority did not provide a reasoned answer.<sup>55</sup> First, the question of whether diplomatic immunity can also be claimed in respect to serious breaches of humanitarian law.<sup>56</sup> Second, the question of whether a foreign minister is entitled to greater immunity than ordinary diplomatic agents.<sup>57</sup> For Judge Oda, these issues were “too new to admit of any definite answer.”<sup>58</sup>

Similarly, Judge Al-Khasawneh considered that the nature and extent of immunities of foreign ministers “is far from clear.”<sup>59</sup> To illustrate the point, he alluded to the view of the Special Rapporteur on Jurisdictional Immunities of States and Their Property, who had expressed the opinion that the immunities of foreign ministers are granted on the basis of comity.<sup>60</sup> He also alluded to the Draft Code of Offences against the Peace and Security of Mankind of 1996 and its Commentary, particularly to the following passage:

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.<sup>61</sup>

Judge Al-Khasawneh noted that the absence of procedural immunity was also intended to apply to national courts, and not just to international ones.<sup>62</sup> As if answering Judge Oda’s second question, Judge Al-Khasawneh considered that a foreign minister should not be granted such a “broad immunity” from criminal process as the one enjoyed by diplomatic representatives.<sup>63</sup> Nonetheless, he suggested that heads of state might be entitled to a broad immunity in this regard because they personify the State.<sup>64</sup>

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54. *Id.*, Separate opinion of President Guillaume, at ¶ 1; Declaration of Judge Ranjeva; Separate opinion of Judge Koroma; Joint separate opinion of Judges Higgins, Kooijmans and Buergenthal; Separate opinion of Judge Rezek; Separate opinion of Judge ad hoc Bula-Bula. For a brief and poignant analysis on what the judgment means for universal jurisdiction, see Antonio Cassese, *Is the Bell Tolling for Universality? A Plea for a Sensible Notion of Universal Jurisdiction*, 1 J. OF INT’L CRIM. JUST. 589, 589 (2003). On the issue of universal jurisdiction, see also *infra* Section III.C.

55. *Arrest Warrant*, *supra* note 5, Dissenting Opinion of Judge Oda, at ¶ 14.

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*, Dissenting Opinion of Judge Al-Khasawneh, at ¶ 1.

60. *Id.*

61. U.N. GAOR, 51st Sess., Supp. No. 10 at 27, U.N. Doc. A/51/10 (May 6-Jul. 26, 1996).

62. *Arrest Warrant*, *supra* note 5, Dissenting opinion of Judge Al-Khasawneh, at ¶ 5.

63. *Id.* at ¶¶ 2, 4.

64. *Id.*

Likewise, Judge Van den Wyngaert alluded to the fact that the Draft Code was intended to apply to national authorities,<sup>65</sup> and to the difference between the roles of heads of state and foreign ministers. In relation to the latter, she categorically rejected the existence of an immunity rule extending to situations of international crimes.<sup>66</sup> In relation to the former, she apparently endorsed the view that heads of state are entitled to an immunity that extends to such situations.<sup>67</sup> This view is in line with the concern of Judge Van den Wyngaert that the rationale of the majority for assimilating foreign ministers with diplomatic agents and heads of state also exists for other ministers.<sup>68</sup> According to her, that could be problematic because “[m]ale fide governments” may appoint persons to cabinet posts in order to shelter them from prosecutions for international crimes.<sup>69</sup>

A striking aspect arising from the decision of the majority, and the vast array of declarations and opinions appended by the different judges of the ICJ, is that not even one amongst the sixteen judges in the *Arrest Warrant* case analyzed the position of the IMT about the effects of the law of war on the immunity issue.

### III. The Non-Immunity Principle set out by the International Military Tribunal

Had the judges in the *Arrest Warrant* analyzed the position of the IMT, they would have realized that both the “full immunity” conclusion of the majority, and the suggestion in the dissenting opinions that heads of state might be entitled to immunity, are not in tune with the judgment of the IMT. Section III of this Article has four subsections. Section III.A (*The Nuremberg Non-immunity Principle*) introduces the non-immunity principle, as set out in the judgment of the IMT. Section III.2 (*The Non-immunity Principle in light of Past Precedents, Academic Literature and Historical Facts*) explains why the non-immunity principle was attuned with: (1) the *Schooner Exchange* case decided by the Supreme Court of the United States; (2) the legal position adopted in the aftermath of the First World War; (3) influential analyses by renowned scholars; and (4) the fact that Hitler was indicted while he was the sitting head of state of Germany. Section III.C (*The Non-immunity Principle in light of the Logics of the Law of War*) explains why the non-immunity principle is consistent with—and perhaps even mandated by—the logics of both the *jus ad bellum* and the *jus in bello*. Section III.D (*Concluding remark*) concludes that the IMT’s non-immunity principle is sound and was not subject to serious controversy at the time.

65. *Arrest Warrant*, *supra* note 5, Dissenting opinion of Judge ad hoc Van den Wyngaert, at ¶ 17.

66. *Id.* at ¶ 39.

67. *Id.* at ¶¶ 13, 16, 18, 20-22 (“Foreign Ministers do not ‘impersonate’ the State in the same way as Heads of State, who are the State’s alter ego”). *But see id.* at ¶ 37.

68. *Id.* at ¶ 87.

69. *Id.* at ¶ 87.

## A. The Non-Immunity Principle

The IMT was established for the punishment of the major war criminals of the European Axis,<sup>70</sup> i.e., for the trial and punishment of German high officials who perpetrated aggression, war crimes, and crimes against humanity in “connection” with the international armed conflict known as the Second World War.<sup>71</sup> At the end of the trial, the IMT issued what is arguably the most important judgment in the history of international law. Not only for this fact, but also because the principles of international law affirmed therein either reflected customary law or turned into customary law soon after the judgment was delivered, the importance of the judgment of the IMT will weigh heavily on the analysis carried out throughout this Article.<sup>72</sup>

On the question of immunity, the position of the IMT consisted of the following:

The principle of International Law, which under certain circumstances protects the representatives of a State, cannot be applied to acts which are condemned as criminal by International Law. The authors of these acts cannot shelter themselves behind their official position in order to be freed from punishment in appropriate proceedings. Article 7 of the Charter expressly declares: ‘The 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.’ On the other hand the very essence of the Charter is that individuals have international duties which transcend the national obligations of obedience imposed by the individual State. He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of

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70. Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, with annexed Charter of the International Military Tribunal, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279 [hereinafter IMT Charter].

71. *Id.* at arts. 1, 6. On the illogicality and obsolescence of the Nuremberg’s “connection to international armed conflict” link, which no longer exists under current customary international law, see *Prosecutor v. Tadić*, Case No. IT-94-1-I, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, ¶¶ 139-141 (Int’l Crim. Trib. For the Former Yugoslavia Oct. 2, 1995).

72. Affirmation of the Principles of International Law Recognised by the Charter of the Nuremberg Tribunal, GA Res. 95(I), U.N. Doc. A/236 (Dec. 11, 1946) (“*The General Assembly . . . [a]ffirms the principles of international law recognized by the Charter of the Nurnberg Tribunal and the judgment of the Tribunal*) (emphasis on “judgment” added). On the meaning of this “affirmation,” see Antonio Cassese, *Affirmation of the Principles of International Law Recognized by the Charter of the Nürnberg Tribunal* (Dec. 11, 1946) (holding that, by affirming those principles, the UNGA intended to express its approval of “the general concepts and legal constructs of criminal law that could be derived from the IMT Charter and had been set out, either explicitly or implicitly, by the IMT”); Claus Kreß, *Article 98, ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, ARTICLE-BY-ARTICLE COMMENTARY* 2613 (Kai Ambos ed., 4<sup>th</sup> ed., 2022) (suggesting that the principles of international law “affirmed” in the Nuremberg Judgment crystallized as customary law with the unanimous adoption of the Nuremberg Principles by the UNGA). On the meaning of the “affirmation” for the issue of head of state immunity, see *Prosecutor v. Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09-397-Anx16, ¶ 151 (May 6, 2019) [hereinafter Joint Concurring Opinion] (holding that another stage in the evolution of customary international law regarding the rejection of immunity for heads of state consisted of the “UN’s approval of the principles of law that emanated from both the Nuremberg Charter and the judgment of the Nuremberg Trial”).

the State if the State in authorizing action moves outside its competence under International Law.<sup>73</sup>

Often, scholars narrow the scope of this excerpt of the judgment [hereinafter immunity excerpt] to functional immunities and international courts.<sup>74</sup> Such is not in tune with the excerpt.

Its first sentence highlights that the protections of international law for representatives of states are not absolute, i.e., immunities, inviolabilities and exemptions from punishment apply “under certain circumstances,” but not in all circumstances. Specifically, those protections are set aside if the acts “are condemned as criminal by International Law.” This sentence alone suggests that personal and functional immunities and inviolabilities cannot be invoked if international crimes are at stake. As the authors of the *History of the United Nations War Crimes Commission* noted, a “remarkable feature” of the judgment of the IMT is that “the irrelevance of the doctrines of heads of State and State administrators was pronounced in regard to the whole field of international crimes covered by the Nuremberg Charter.”<sup>75</sup>

According to the Nuremberg Charter, the field of international crimes consisted of three sets of criminal acts. First, acts of planning, preparation, initiation or waging of an international armed conflict in violation of international law (aggression or crimes against peace).<sup>76</sup> Second, violations of the laws or customs of war perpetrated during an international armed conflict (war crimes).<sup>77</sup> Third, inhumane acts perpetrated in execution of, or in connection with, aggression or war crimes, i.e., linked to an international armed conflict (crimes against humanity).<sup>78</sup>

As to the second sentence of the immunity excerpt, the expression “appropriate proceedings” encompasses both national and international proceedings. That is particularly manifest in the French version of the judgment, which states that the authors of international crimes cannot invoke their official

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73. Prosecutor v. Göring, International Military Tribunal Sitting at Nuremberg, Germany, 447 (Oct. 1, 1946) [hereinafter IMT Judgment].

74. See e.g., GERHARD WERLE & FLORIAN JESSBERGER, PRINCIPLES OF INTERNATIONAL CRIMINAL LAW 316(4th ed. 2020).

75. U.N. War Crimes Comm. on the History of the United Nations War Crimes Commission and the Development of the Laws of War, 273 (1948) [hereinafter History of the United Nations].

76. IMT Charter, *supra* note 70, at 6(a). At the time of the adoption of the IMT Charter—in tune with what is still the general view today—the notion of aggression allegedly only encompassed acts of one state against another state (it did not cover non-international situations). See e.g., Carrie McDougall, *The Crime of Aggression*, in ELGAR ENCYCLOPEDIA OF CRIME AND CRIMINAL JUSTICE (Pedro Caeiro, et al., (eds.), 2022); G.A. Res. 3314, art. 1 (Dec. 14, 1974); Rome Statute of the International Criminal Court, art. 8 *bis*, July 17, 1998, 2187 U.N.T.S. 38544 [hereinafter Rome Statute].

77. IMT Charter, *supra* note 70, at 6(b). At the time of the adoption of the IMT Charter—in contrast to what is widely accepted today—the notion of war crimes allegedly only encompassed crimes committed in international armed conflicts (it did not cover non-international armed conflicts). See e.g., ROBERT CRYER ET AL., AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE 266-67 (4th ed. 2019); Rome Statute, *supra* note 76, at art. 8.

78. At the time of adoption of the IMT Charter—in contrast to what is widely accepted today—the notion of crimes against humanity was not generally viewed as applicable to purely internal situations. See e.g., CARSTEN STAHN, A CRITICAL INTRODUCTION TO INTERNATIONAL CRIMINAL LAW 52 (2018); Rome Statute, *supra* note 76, at art. 7.

capacity in order to escape the normal proceedings or to be freed from punishment.<sup>79</sup> At the time, the normal proceedings for the prosecution, arrest and punishment of war crimes were proceedings in national courts (before the establishment of the IMT, there were no international criminal courts).<sup>80</sup> For the Nuremberg judges, because national courts would normally have the power to prosecute the perpetrators of such acts, so would the IMT. The Allies “have done together what any one of them might have done singly”.<sup>81</sup>

Accordingly, the words of the IMT undoubtedly mean that a prosecution, arrest, or punishment of a high official of a state (or any other person) for international crimes can be carried out by both national and international authorities. Nothing in the IMT judgment (or in the IMT Charter) suggests that a national prosecution, an issuance of an arrest warrant, or an actual arrest and punishment would be inappropriate or that immunity or inviolability constituted an obstacle to such national endeavors.<sup>82</sup>

At the time, the assumption was that—because immunity could not be invoked before a national tribunal of one of the Allies—it could not be invoked before a tribunal created by them together.<sup>83</sup> Also, the allusion in the second sentence to an “official position” naturally covers a person’s entitlement to personal immunities because of the very fact that he or she holds such official position.<sup>84</sup> An argument to the effect that the words of the IMT only cover former officials or functional immunities would be contrary to such words.<sup>85</sup>

79. See TRIBUNAL MILITAIRE INTERNATIONAL, PROCÈS DES GRANDS CRIMINELS DE GUERRE, DEVANT LE TRIBUNAL MILITAIRE INTERNATIONAL : NUREMBERG 14 novembre 1945-1er octobre 1946 235 (1947) (“Les auteurs de ces actes ne peuvent invoquer leur qualité officielle pour se soustraire à la procédure normale ou se mettre à l’abri du châtement”) (emphasis added). The Russian version is equivalent to the English version. See The Digital Library of Historical Document, Russian Historical Society, The State Archive of the Russian Federation (“Исполнители этих действий не могут прикрываться своим должностным положением, чтобы избежать наказания в надлежащем порядке”).

80. See also THE PINOCHET PAPERS: THE CASE OF AUGUSTO PINOCHET IN SPAIN AND BRITAIN 113 (Michael Ratner & Reed Brody eds., 2000) (pointing out that the trial of war crimes has “historically been largely a matter for national courts”).

81. IMT Judgment, *supra* note 73, at 444.

82. But see Werth, *supra* note 3, at 763 (unduly reducing the scope of the words of both the IMT Charter and the IMT Judgment). No discussion about the nature of the jurisdiction of the IMT will change the clear meaning of its words. For a short summary of such discussion with relevant references, see VAN ALEBEEK, *supra* note 32, at 210 (n.53). For persuasive analysis, see MICHAEL SCHARF, CUSTOMARY INTERNATIONAL LAW IN TIMES OF FUNDAMENTAL CHANGE RECOGNIZING GROTIAN MOMENTS 105 (2013) (arguing that—although there is a strong argument for characterizing the IMT as a court applying universal jurisdiction—one does “need not definitively decide the age-old debate since Nuremberg could have been based on multiple and overlapping types of jurisdiction”).

83. See e.g., Guénaél Mettraux, John Dugard & Max du Plessis, *Heads of State Immunities, International Crimes and President Bashir’s Visit to South Africa*, 18 INT’L CRIM. L. REV. 577, 587 (2018) (analyzing the position of the United Nations War Crimes Commission at the time, and pointing out that—according to the commission—immunities could not be invoked with regard to war crimes *tout court*, i.e. irrespective of the international or national nature of the court).

84. For a rare example of a scholar who acknowledges the plain meaning of the words of the IMT, see Harmen van der Wilt, *The Immunities and the International Criminal Court*, in CAMBRIDGE HANDBOOK OF IMMUNITIES AND INTERNATIONAL LAW 595, 596 (Ruys, Angelet & Ferro eds., 2019).

85. See also Mettraux, Dugard & du Plessis, *supra* note 83, at 587 (pointing out that—according to the United Nations War Crimes Commission—there was no distinction between functional and personal immunities).

The same conclusion flows from the third sentence of the immunity excerpt where the IMT quotes Article 7 of the Charter. As correctly observed seven decades later by the appeals chamber of the ICC,

[A]rticle 7 of the Nuremberg Charter contains no words of limitation, to the effect that any immunity was reserved for serving Heads of State or senior State officials. Immunity by reason of official position was precluded simpliciter.<sup>86</sup>

In the fourth sentence of the immunity excerpt, the IMT speaks of “international duties which transcend . . . national obligations” and—in the fifth sentence—it alludes to the “laws of war.” The IMT uses the latter expression *lato sensu*, i.e., laws that cover aggression, war crimes *stricto sensu*, and crimes against humanity. This is particularly salient when the IMT says the following:

To initiate a war of aggression . . . is not only an international crime; it is the supreme international crime differing only from *other war crimes* in that it contains within itself the accumulated evil of the whole.<sup>87</sup>

For the IMT, aggression, war crimes *stricto sensu*, and crimes against humanity are part of the larger genus of war crimes *lato sensu*, and the ones who commit such crimes in violation of “the laws of war cannot obtain immunity.” These words are not compatible with a 21<sup>st</sup> century argument that personal immunities were not a bar for the IMT because of an implicit waiver of immunities. Although this argument finds no support in the judgment of the IMT, it is today disseminated in scholarship.

For example, Kevin Jon Heller argues that “Nazi officials did not enjoy personal immunity at the IMT because the Allied Control Council, which served as the government of Germany following the war, implicitly waived their immunity.”<sup>88</sup> Ingrid Wuerth puts forward a slightly different rationale:

Germany, after its unconditional surrender, was under four-party occupation and in no position to assert immunity. Indeed, it was not even clear whether Germany was, or would continue to be, a state, so the issue did not arise. The focus at Nuremberg was thus not on Germany itself or on any immunities that it might have been able to assert on behalf of its nationals but, instead, on establishing that the individual defendants could be held criminally liable for international crimes despite their official positions.<sup>89</sup>

Heller, Wuerth, and many other scholars “conveniently” use the implicit waiver idea (or other similar notions) to make past precedents compatible with the personal immunity ruling of the *Arrest Warrant*.<sup>90</sup> In actual fact, what is

86. The Prosecutor v. Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09-397-Anx1, Joint Concurring Opinion of Judges Eboe-Osuji, Morrison, Hofmański, & Bossa, ¶ 148 (May 6, 2019).

87. IMT Judgment, *supra* note 73, at 421 (emphasis added).

88. Kevin Jon Heller, *Creating a Special Tribunal for Aggression Against Ukraine Is a Bad Idea*, OPINIO JURIS (July 7, 2022).

89. Wuerth, *supra* note 3, at 763.

90. Ian Brownlie, *Contemporary Problems Concerning the Jurisdictional Immunity of States*, 62 ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL 45, 94 (1987) (suggesting that the implied consent idea is used “to aggrandize ‘exceptions’ to the principle of immunity, so to speak, as

crucial to note is that—far from implying some sort of national waiver of immunity or some Allied Control Council power derived from Germany's unconditional surrender—the considerations of the IMT in the immunity excerpt are based on international law (and on the “international duties” of individuals).<sup>91</sup> In particular, the IMT also took into account what the *international law of war* prescribes on the matter of immunities, inviolabilities and exemptions from punishment.<sup>92</sup>

Moreover, the IMT did not in any way reduce the scope of its words to a question of holding individuals criminally liable despite their official positions. The first sentence of the immunity excerpt does not indicate that it is addressing only that question. For the IMT, the protections for the representatives of a State “cannot be applied to acts which are condemned as criminal by International Law.” This covers not only the question of holding individuals accountable in proceedings before a court of law but also the mechanisms (prosecutions, arrest warrants, actual arrests, etc.) that are the very premise of such proceedings.<sup>93</sup>

This conclusion is even more certain considering that the IMT employed the following words in the last sentence of the immunity excerpt (“[h]e who violates the laws of war cannot obtain immunity”). As further elaborated in the following sections, these words must be understood in context. On the one hand, the words must be read in light of past precedents, academic literature, and historical facts (Section III.B). On the other hand—and most importantly—they must be considered in light of the specific logics of both the *jus ad bellum* and the *jus in bello* (Section III.C). Put in this law of war context, the position of the IMT was uncontroversial. Five sets of considerations are indispensable to understand why.

## B. The Non-Immunity Principle in Light of Past Precedents, Academic Literature and Historical Facts

First, in contrast to what some might think, the position of the IMT did not deviate from an alleged “traditional” or “absolute” international rule of state immunity which prevented foreign national courts “from adjudicating or enforcing claims against states.”<sup>94</sup> That is simply because such “traditional” or

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a flag of convenience”). For a dismissal of the implied waiver theory, see also Miguel Lemos, *The ICC as a “Tool” of the United Nations Security Council and the “Absurdity” of Head of State Immunity with Regard to International Crimes*, 32 *IND. INT’L & COMP. L. REV.* 313, 339-40, 357-58 (2022); Kreß, *supra* note 72, at 2619-20. On how the implied waiver theory is also often used today to justify the exercise of jurisdiction over commercial acts of foreign states, see VAN ALEBEEK, *supra* note 32, at 50-53 (holding that the theory has been “spurned in legal theory and practice . . . to accommodate the theoretical constraints of status thinking”).

91. On the IMT as a “criminal tribunal applying international law directly”, see ROBERT CRYER, *PROSECUTING INTERNATIONAL CRIMES: SELECTIVITY AND THE INTERNATIONAL CRIMINAL LAW REGIME* 38-39 (2005).

92. See *infra* Section III.C.

93. On the prosecutions and arrest warrants that constituted the basis for the IMT’s proceedings (including the prosecution and arrest warrants against Hitler, which occurred while he was the sitting head of state of Germany), see *infra* Section III.B.

94. Wuerth, *supra* note 3, at 736.

“absolute” rule was never thought to be applicable to war situations. According to current accounts on the matter,

U.S. Supreme Court Justice John Marshall first articulated the basis for this kind of immunity in the 1812 *Schooner Exchange* case. A strong doctrine of immunity—sometimes termed *absolute immunity*—prevailed in most countries in the nineteenth century.<sup>95</sup>

There are two assumptions that current accounts seem to take for granted. First, these old and “well-established” state (and head of state) immunities were so “absolute” that there were no exceptions to them, i.e., they could be invoked even in cases of aggression and international armed conflict; second, it was only at a later stage—in the 20<sup>th</sup> century—that exceptions were established.<sup>96</sup> The two assumptions are misguided.

In the *Schooner Exchange*, the question at stake was a mere issue of property rights.<sup>97</sup> The Supreme Court was not concerned with how immunities operate in situations of aggression or international armed conflict. To the contrary, the decision merely “dealt with the normal, peacetime relations of friendly sovereigns.”<sup>98</sup> The words of Chief Justice John Marshall do not leave room for doubt:

One sovereign being in no respect amenable to another, and being bound by obligations of the highest character not to degrade the dignity of his nation, by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to *enter a foreign territory* only under an *express license*, or in the *confidence* that the immunities belonging to his independent sovereign station, though not expressly stipulated, are reserved by implication, and will be extended to him.<sup>99</sup>

Of course, these words of Chief Justice Marshall were not meant to apply to a situation where one sovereign enters foreign territory violently and without permission. That is also particularly manifest in the following excerpt:

Should one sovereign enter the territory of another, without the consent of that other, expressed or implied, it would present a question which does not appear to be perfectly settled, a decision of which, is not necessary to any conclusion to which the Court may come in the cause under consideration.<sup>100</sup>

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95. *Id.*

96. *Id.* See also VAN ALEBEEK, *supra* note 32, at 1, 13 (questioning whether “well-established” immunity rules—which are “rooted” in the classic inter-state system of international law—are in some way affected by the “relatively recent” developments in international human rights law and ICL, and alluding to a “foreign state immunity doctrine” which was often viewed as an “absolute” rule which “categorically” precluded national courts from exercising jurisdiction over foreign states).

97. See SHELDON GLUECK, *WAR CRIMINALS: THEIR PROSECUTION AND PUNISHMENT* 122 (1944).

98. Sheldon Glueck, *The Nuremberg Trial and Aggressive War*, 59 HARV. L. REV. 396, 422-24 (1946). See also *The Schooner Exch. V. McFaddon*, 11 U.S. 116, 116 (1812) [hereinafter *Schooner Exchange*] (“A public vessel of war of a foreign sovereign at peace with the United States, coming into our ports and demeaning herself in a friendly manner, is exempt from the jurisdiction of the country”).

99. *Schooner Exchange*, *supra* note 98, at 137 (emphasis added).

100. *Id.* at 138.

In sum, considering that such question was unsettled, to use the *Schooner Exchange* as support for the idea that, once upon a time, there was some sort of head of state absolute immunity rule extending to war situations is unwarranted.<sup>101</sup>

The inexistence of head of state personal immunity in war situations is perhaps even more plainly suggested in a case decided by the Supreme Court three decades earlier.<sup>102</sup> In *Santissima Trinidad*, the court considered that—although a foreign sovereign cannot be compelled to appear in the courts of the United States or “be made liable to their judgment so long as he remains in his own dominions,” that is not the case if the sovereign comes “personally” within the “limits” of the United States.<sup>103</sup> In such case, and despite the fact that a sovereign “generally enjoy[s] a personal immunity,” he or she can become “liable to judicial process.”<sup>104</sup> The Supreme Court emphasized that exceptions to the general rule that “all persons” within the United States are amenable to its territorial jurisdiction, are only those which “by common usage and public policy have been allowed *in order to preserve the peace and harmony of nations* and to regulate their intercourse in a manner best suited to their dignity and rights.”<sup>105</sup> For the Supreme Court, it would be “strange if a license implied by law from the general practice of nations *for the purposes of peace* should be construed as a license to do wrong to the nation itself.”<sup>106</sup>

Clearly, the reasoning of the Supreme Court means—a *fortiori*—that a sovereign who aggressively invades the United States (or is at war with the United States) would not be entitled to any sort of personal immunity.

It is also important to note two facts regarding the stance of courts of the United States. On the one hand, from “the dawn of [its] constitutional history”, such courts have recognized the existence of international crimes.<sup>107</sup> On the other, never did they accept any sort of absolute personal immunity for heads of state which would extend to such crimes.<sup>108</sup>

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101. Relatedly, see VAN ALEBEEK, *supra* note 32, at 21-47 (providing an insightful overview of the *Schooner Exchange* and other contemporary cases, and demonstrating that the absolute immunity rule was never as absolute as one is sometimes led to believe, even in situations of friendly relations between nations).

102. See *The Santissima Trinidad*, 20 U.S. 283, 353-54 (1822).

103. *Id.*

104. *Id.*

105. *Id.* (emphasis added).

106. *Id.* (emphasis added).

107. See Jordan Paust, *Federal Jurisdiction Over Extraterritorial Acts of Terrorism and Nonimmunity for Foreign Violators of International Law Under the FSIA and the Act of State Doctrine*, 23 VA. J. OF INT'L L. 191, 191-251 (1983) (with abundant information); Jordan Paust, *My Lai and Vietnam: Norms, Myths and Leader Responsibility*, 57 MIL. L. REV. 99, 113-18, 130-31 (1972) (with information focusing specifically on war crimes); JORDAN PAUST, M. CHERIF BASSIOUNI, SHARON A. WILLIAMS, MICHAEL SCHARF, JIMMY GURULÉ & BRUCE ZAGARIS, *INTERNATIONAL CRIMINAL LAW: CASES AND MATERIALS* 217-33 (2007) (for numerous early cases and opinions demonstrating that violations of the law of nations entail criminal punishment). *But see* VAN ALEBEEK, *supra* note 32, at 202-05 (providing scholarship holding a different view and conveying the idea that the Supreme Court of the United States did not allow prosecutions for acts in violation of the laws of war).

108. Paust, *Federal*, *supra* note 107, at 191-251. See also *Johnson v. Eisentrager*, 339 U.S. 763, 765, 789 (1950) (rejecting personal immunity for war crimes). Relatedly, see *The Right of Expatriation: The President*, 9 Op. Att'y's Gen. 356, 357 (1859) (asserting that a sovereign

Second, the position of the IMT was in line with the position adopted in the important report of the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, which was adopted in the aftermath of the First World War:

An argument has been raised [. . .] based upon the alleged immunity and in particular the alleged inviolability, of a sovereign of a state. But this privilege, where it is recognized, is one of practical expedience in municipal law, and is not fundamental. However, even if, in some countries, a sovereign is exempt from being prosecuted in a national court of his own country *the position from an international point of view is quite different*.<sup>109</sup>

This report, elaborated by “[s]everal of the world’s leading international lawyers” representing their respective countries,<sup>110</sup> constitutes unequivocal and substantial state practice and *opinio juris* that head of state immunity and inviolability for violations of the “laws and customs of war” and the “laws of humanity” do not exist under international law.<sup>111</sup> Often, it is said that the United States and Japan did not subscribe to this position. That does not provide the full picture of what—in the opinion of the delegations of those two countries—the real issue was. The position of the United States was not that immunity or inviolability can be invoked even regarding international crimes. Rather, the idea of the American delegation to the Paris Peace Conference was that international criminal law (ICL) did not exist.<sup>112</sup> For its part, the Japanese delegation thought that the existence of ICL was not established beyond doubt.<sup>113</sup>

Of course, if ICL did not exist, there could be no question of immunity regarding ICL crimes. To put it differently, the position of these delegations should not be viewed—as it often is—as an instance of state practice and *opinio*

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who “tramples upon the public law of the world cannot excuse himself by pointing to a provision in his own municipal code”). On the situation in the United States regarding head of state immunity more generally, see Keith Highet, George Kahale III & Joseph W. Dellapenna, *Lafontant v Aristide*, 844 F.Supp. 128, U.S. District Court, E.D.N.Y., January 27, 1994, 88 AM. J. OF INT’L L. 528, 531 (1994) (“an at best amorphous legal doctrine whose very existence is not entirely settled in U.S. law and whose reach is almost completely uncertain”). See also *Doe v United States* 860 F.2d 40, 44 (2nd Cir. 1988) (similar). For extensive overviews, see generally, Jerrold Mallory, *Resolving the Confusion Over Head of State Immunity: The Defined Rights of Kings*, 86 COLUM. L. REV. 169 (1986) (“The law of head of state immunity is undeveloped and confused”); Christopher Totten, *Head-of-State and Foreign Official Immunity in the United States After Samantar: A Suggested Approach*, 34 FORDHAM INT’L L. J. 332, 368-83 (2011) (“in a state of disarray”).

109. *Commission on the Responsibility*, *supra* note 1, at 116 (emphasis added).

110. WILLIAM SCHABAS, *THE TRIAL OF THE KAISER* 5 (2018).

111. *Commission on the Responsibility*, *supra* note 1, at 118-25. See also HISTORY OF THE UNITED NATIONS, *supra* note 75, at 268 (stating that the principle that heads of state “could not shelter under the cloak of immunity, was clearly established by the majority of the Commission’s members”).

112. *Commission on the Responsibility*, *supra* note 1, at 136, 146 (holding that there was “no international statute or convention making a violation of the laws and customs of war [. . .] an international crime”). On the position of the United States’ delegation as tributary of a “rigid positivist approach to sovereignty”, see PAUST, BASSIOUNI, WILLIAMS, SCHARF, GURULÉ & ZAGARIS, *supra* note 107, at 10.

113. *Commission on the Responsibility*, *supra* note 1, at 152 (questioning whether “international law recognizes a penal law as applicable to those who are guilty”).

*iuris* supporting the proposition that there is some sort of immunity or inviolability regarding international crimes.<sup>114</sup>

Even more importantly, this view of the delegations of the United States and Japan was not reflected not only in the position adopted in the commission's report but also in the Treaty of Versailles, a treaty which has "no trace of an immunity" for any person.<sup>115</sup> Actually, the Treaty of Versailles, particularly articles 227 and 228, constitute a "clear-cut" rejection of any sort of high official immunity with regard to international crimes.<sup>116</sup> The United States and Japan were also parties to this treaty, along with more than thirty other countries.

In sum, in the aftermath of the First World War, the prevailing view was that there was no sort of head of state immunity or inviolability that could be invoked in the case of international crimes.<sup>117</sup>

Third, the position of the IMT was also in line with influential analyses of the problem of war criminals by prominent jurists published in some of the world's most preeminent law journals not long before the IMT delivered its judgment, namely the analyses of Quincy Wright and Sheldon Glueck, writing on *The American Journal of International Law* and the *Harvard Law Review*, respectively.<sup>118</sup>

Focusing on the *jus in bello*, Quincy Wright had emphasized that the logic of the absence of head of state immunity for war criminals is related to the nature of war:

The principle of the independence and equality of states . . . is suspended in relations of opposing belligerents to each other by the very nature of war. Each is seeking to impose his will on the other and is free to use measures of coercion permitted by the law of war in order to bring about a complete submission of the enemy to his will. Thus the reasons which accord immunity to chiefs of state in the courts of another state in times of peace do not apply to actions against an enemy ruler for breaches of the law of war . . .<sup>119</sup>

Looking into the past—and alluding to the cases of Francis I, Napoleon III, and the Elector of Hesse—Wright noted that enemy heads of state have been

114. *But see, e.g.,* Mettraux, Dugard & du Plessis, *supra* note 83, at 586 (speaking of the "traditionalist" view of immunities of those delegations); Lemos, *supra* note 90, at 338 (speaking of the "pro-immunity of heads of state" position of Secretary Lansing of the United States).

115. Lemos, *supra* note 90, at 339.

116. *See* Eboe-Osuji, *supra* note 21 (albeit only speaking of Article 227 and international tribunals). On articles 227 and 228 of the Treaty of Versailles, *see also infra* Section IV.B.

117. *See also* Lemos, *supra* note 90, at 337-344 (elaborating on how—in the aftermath of the First World War—state practice and *opinio iuris* unequivocally supported the notions that ICL was already in existence for a long time and had never recognized any sort of immunity or inviolability with regard to international crimes).

118. Quincy Wright, *War Criminals*, 39 AM. J. OF INT'L L. 257-85(2017); Glueck, *supra* note 98, at 422-24. On the influence of Sheldon Glueck on the prosecution at the IMT, *see e.g.,* Franz B Schick, *Crimes against Peace*, 38 J. OF CRIM. L. & CRIMINOLOGY 445, 458-59 (1948); Florian Jeßberger, *The Modern Doctrinal Debate on the Crime of Aggression*, in *THE CRIME OF AGGRESSION, A COMMENTARY* 287, 294-96 (Claus Kress & Stefan Barriga eds., 2016) (describing how Glueck became a "key architect of the Nuremberg proceedings").

119. Wright, *supra* note 118, at 278.

made prisoners of war, and had been punished for breaches of the law of war.<sup>120</sup> Indeed, the five centuries preceding the 20<sup>th</sup> century are not devoid of examples of demands for capture, arrests, declarations of outlawry, prosecutions, punishments, and executions of rulers who violated the law of nations.<sup>121</sup>

For Wright, the reasons that justify immunity do not apply to actions against an enemy head of state “while the war is in progress nor would they apply to acts against an ex-ruler after the war is over.”<sup>122</sup> Note, however, that the scope of non-immunity resulting from Wright’s words is narrower than the IMT’s. According to the words of the IMT, also rulers that continue to be rulers after the war is over cannot also invoke immunity for violations of the laws of war.

The position of the IMT is sounder than the position of Wright. This is because the end of a war does not efface the international crimes perpetrated during the war. The power to prosecute such crimes should not depend on whether the head of state is dethroned or is somehow able to maintain its status, during or after the war. Moreover, the position of the IMT is the only one in tune with the idea that the laws of war are supposed to have a strong deterrent effect. That effect would be substantially diminished if the end of a war prevented the possibility of such prosecutions.<sup>123</sup>

Naturally, other considerations—most prominently, but not exclusively, the maintenance of peace and security—might vouch for non-prosecution after the war is over. A case in point is the one of Emperor Hirohito, in post-war Japan. His status as a head of state was maintained after the war and, even though he was not prosecuted, there was never any suggestion that his status would impede prosecution because of a personal immunity.<sup>124</sup> The policy position of the United States (not challenged by the other countries) was not that Emperor Hirohito was immune from prosecution, but that not prosecuting him was vital for the successful occupation of Japan.<sup>125</sup> Although there were several attempts to prosecute him, “including a dogged effort by the Australians,” the United States’ position ultimately prevailed.<sup>126</sup>

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120. *Id.* See also FIRST INTERIM REPORT FROM THE COMMITTEE OF ENQUIRY INTO BREACHES OF THE LAWS OF WAR 31 (Jan. 13, 1919) (providing examples, noting that the German Manual of Military Law included sovereigns as possible prisoners of war, and holding: “there seems no reason why, if captured, they should not be treated according as they have or have not violated the laws of war”). See also WILLIAM EDWARD HALL, TREATISE ON INTERNATIONAL LAW 497 (1924) (speaking of persons, like the sovereign, who can be captured during war because of their importance in the structure of the enemy’s state).

121. See Lemos, *supra* note 90, at 327-31 (providing additional examples).

122. Wright, *supra* note 118, at 278.

123. See also GLUECK, *supra* note 97 (holding that the most effective method of enforcing the rules of war is punishment of individual perpetrators “both during and after the war”).

124. NEIL BOISTER & ROBERT CRYER, THE TOKYO INTERNATIONAL MILITARY TRIBUNAL – A REAPPRAISAL (2008); NEIL BOISTER & ROBERT CRYER, DOCUMENTS ON THE TOKYO INTERNATIONAL MILITARY TRIBUNAL: CHARTER, INDICTMENT AND JUDGMENTS xxxix-xliv (2008); Miguel Lemos & Sten Verhoeven, *The International Military Tribunal for the Far-East*, in ELGAR ENCYCLOPEDIA OF CRIME AND CRIMINAL JUSTICE (Valsamis Mitsilegas, Pedro Caeiro & Sabine Gless eds., 2022).

125. DAVID COHEN & YUMA TOTANI, THE TOKYO WAR CRIMES TRIBUNAL: LAW, HISTORY, AND JURISPRUDENCE 39-40 (2018).

126. BOISTER & CRYER, DOCUMENTS, *supra* note 124, at xlv-xlvi.

Focusing on the *jus ad bellum*, Sheldon Glueck highlighted not the nature of war itself, but the nature of aggressive war:

[B]y invading neighboring countries in flagrant violation of treaty obligations and for purposes of aggression, conquest and the mass-extermination of the subjects of neighboring States, an offending sovereign destroys any implied consent that he be exempt from the jurisdiction of others, and strips himself and his agents of any mantle of immunity . . .<sup>127</sup>

This stripping of the mantle of immunity advocated by Glueck was perfectly attuned with centuries-old assumptions and practices according to which heads of state responsible for aggressive wars were subject to capital punishment “once they were brought before tribunals.”<sup>128</sup> Glueck also stressed that the immunity of a sovereign is a privilege granted by other sovereigns and is based upon international comity and courtesy.<sup>129</sup> For Glueck, the recognition of such immunity is dependent upon an important condition precedent, namely that the sovereign in question “be conducting himself in conformity with international law.”<sup>130</sup> Otherwise, the “host sovereign can . . . refuse to grant immunity.”<sup>131</sup> Glueck also remarked that “an issue of this kind ought not to be disposed of on the basis of blind legalistic conceptualism.”<sup>132</sup> Instead, it should be handled “realistically in the light of the practical as well as logical results to which one or the other solution will lead.”<sup>133</sup>

Broadly speaking, the *jus in bello* and *jus ad bellum* rationales of Wright and Glueck are sound. Particularly sound is the final argument of Glueck (“practical as well as logical results”), which underscores one of the cruxes of the issue. This, because—as further explained in Section III.C—the realities and logics of international armed conflict and aggression do not leave “logical” or “practical” room for any sort of head of state immunity or inviolability for crimes perpetrated in such contexts.

Fourth, the position of the IMT was aligned with an important historical fact which—unexpectedly—is rarely mentioned in present day immunity-related debates, namely, the fact that Hitler was indicted in the course of the Second World War while he was the sitting head of state of Germany.<sup>134</sup> In March 1945, the United Nations War Crimes Commission (UNWCC) constituted by sixteen states “endorsed at least seven separate indictments”

127. Glueck, *supra* note 98, at 424.

128. See Larry May, *Just War Theory and the Crime of Aggression*, in *THE CRIME OF AGGRESSION, A COMMENTARY* 273-78 (Claus Kreß & Stefan Barriga eds., 2016). See also Quincy Wright, *The Law of the Nuremberg Trial*, 41 AM. J. OF INT'L L. 63 (n.102) (1947) (speaking of cases where heads of state and other high officials “were tried by judicial or political procedures for initiating or contributing to the initiation of aggressive war”). But see VAN ALEBEEK, *supra* note 32, at 267 (perfunctorily dismissing Glueck’s “outdated” argumentation).

129. Glueck, *supra* note 98, at 424.

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. On the indictments against Hitler and their significance for present-day discussions about head of state immunity, see Lemos, *supra* note 90, at 344-54, 378-84.

against him, which were based upon national “formal charges” brought by the Czechs.<sup>135</sup>

Many of the indictments/arrest warrants that ended up leading to the arrests of the major war criminals—and their surrender to the IMT—were actually issued during the war and while the targets of the warrants were still in office. Thus, the issue could have arisen of whether an arrest warrant against Hitler or another high official violated a rule of international law granting them personal immunity. However, there is no news of anyone ever suggesting that Hitler (or any other high official) was entitled to personal immunity while in office or that the proceedings before the IMT could have been, in some cases, grounded on illegitimate indictments, arrest warrants, or arrests. To the contrary, not only was Hitler placed on the lists of war criminals on several occasions, but also the UNWCC consistently expressed the view that war criminals “would, as a matter of international law, be deprived of the benefit of immunity-based defences.”<sup>136</sup> This view was “re-affirmed” in an impressive “number of surrender documents and other instruments calling for the arrest, transfer and prosecution of State officials.”<sup>137</sup>

The idea prevailing at the time was entirely different from the one that prevails today. At the time, prosecution, arrest and punishment of any high official responsible for international crimes was viewed as a kind of *lex mitior*, as they could have simply been “subject to summary execution when captured or surrendered.”<sup>138</sup> In all probability, no one at the time even pondered the possibility that Hitler—the chief aggressor and war criminal—could be entitled to any sort of protection under international law.<sup>139</sup>

On the other hand, the virtually unanimous view today is that the existence of an absolute personal immunity from foreign jurisdiction for heads of state has “long been clear” and “uncontroversial.”<sup>140</sup> It is curious to note that, in case this view is correct, the UNWCC violated international law when it endorsed the prosecution of Hitler.

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135. DAN PLESCH, *HUMAN RIGHTS AFTER HITLER: THE LOST HISTORY OF PROSECUTING AXIS WAR CRIMES* 158 (2017).

136. Mettraux, Dugard & du Plessis, *supra* note 83, at 586-91. *See also* HISTORY OF THE UNITED NATIONS, *supra* note 75, at 266-69.

137. Mettraux, Dugard & du Plessis, *supra* note 83, at 586-91. *See e.g.*, Declaration regarding the defeat of Germany and the assumption of supreme authority with respect to Germany by the Governments of the United States of America, the Union of Soviet Socialist Republics, the United Kingdom and the Provisional Government of the French Republic (Jun. 5, 1945); Protocol of the Proceedings of the Berlin Conference (Aug. 2, 1945); Potsdam Declaration (Jul. 26, 1945); Instrument of Surrender (Surrender of Japan) (Sep. 2, 1945).

138. GLUECK, *supra* note 97, at 77. *See also* Joint Concurring Opinion, *supra* note 72, at ¶ 147; Lemos, *supra* note 90, at 346-47. On the British policy of summary execution “at six hours’ notice”, *see* Richard Overly, *The Nuremberg trials: international law in the making*, in P Sands (ed), *FROM NUREMBERG TO THE HAGUE: THE FUTURE OF INTERNATIONAL CRIMINAL JUSTICE* 3-4 (2003).

139. Relatedly, *see* May, *supra* note 128, at 273-78 (on centuries-old uncontested assumptions that aggressors could be summarily executed).

140. Dapo Akande and Sangeeta Shah, *Immunities of State Officials, Immunities of State Officials, International Crimes, and Foreign Domestic Courts*, 21 EUR. J. OF INT’L L., 818-20 (2011).

### C. The Non-Immunity Principle in Light of the Logics of the Law of War

The fifth—and most important—set of considerations indispensable to understand why the position of the IMT was uncontroversial is related with the logics of both the *jus ad bellum* and the *jus in bello*. The position of the IMT was attuned with—and one might even say, was mandated by—these logics. While Section III.C.1 will look at the issue from a *jus ad bellum* perspective, Section III.C.2 will focus on the *jus in bello*.

#### 1. Non-Immunity in Light of the *Jus ad Bellum*

From a *jus ad bellum* perspective, even if—before the Nuremberg Charter—aggression was not a crime under international law,<sup>141</sup> this did not mean that heads of state were entitled in the past to any sort of immunity or inviolability shielding them from being prosecuted, arrested or punished in foreign countries on account of their *de facto* aggressive war acts. Indeed, it is illogical to argue that a head of state, who is responsible for an invasion of another country, is entitled to immunity or inviolability vis-à-vis the *sovereign jurisdiction of the invaded country*.<sup>142</sup>

As to inviolability, the illogicality is particularly manifest if the head of state physically leads his or her forces into the invaded country. In such a case, it is impossible to argue that the country victim of aggression cannot—on its own territory—arrest, detain, attack or otherwise use force against said head of state. This means that a head of state in this type of scenario is not entitled to inviolability. However, the absence of inviolability does not confine itself to the territory of the state victim of aggression. The law on the use of force is rather permissive in this regard.<sup>143</sup> There is no prohibition to use force against an aggressor head of state (or any other person involved in the aggressive campaign) on his or her own country as a means of self-defense by the victim state.<sup>144</sup>

As to immunity, a similar rationale applies. This, because there is no prohibition to prosecute an aggressor head of state (or any other person involved in the aggressive campaign) as a means of self-defense by the victim state.<sup>145</sup> As noted by Dapo Akande, the prosecution of the crime of aggression by the victim state is “a form of self-help.”<sup>146</sup> But the legitimacy of such prosecution does not rest only (or even primarily) in a self-help rationale. An even more

141. According to the predominant view, aggression was not an international crime before the adoption of the Nuremberg Charter. See e.g., CARRIE McDUGALL, *THE CRIME OF AGGRESSION UNDER THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT* 174 (2021) (holding that it seems “quite clear” that the crime of aggression was “invented” by the Allies and was not part of customary law in 1945). But see *infra* Section IV.B.

142. Relatedly, see HAZEL FOX, *THE LAW OF STATE IMMUNITY* 316 (2002) (speaking of state immunity and alluding to the fact that, where a state is occupied by force, the principles of independence and equality are set aside by the law of armed conflict).

143. On the law on use of force, see generally YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENCE* 195-380 (6th ed., 2017).

144. *Id.*

145. *Id.*

146. Dapo Akande, *Prosecuting Aggression: The Consent Problem and the Role of the Security Council*, LEGAL RESEARCH PAPER SERIES, Paper No 10/2011 33, 35 (Feb. 2011) (arguing that such form of self-help “is what overcomes the *par in parem non habet imperium* principle”).

powerful rationale on which to ground the legitimacy of such prosecution relates to the very idea that international law could prohibit the invaded country from prosecuting or issuing a warrant for the capture of said head of state.

That idea would not square with a simple notion, which flows from the very concept of sovereignty. It would defy logic—and it would be contrary to the most basic rule of criminal jurisdiction—to prohibit a state victim of aggression from exercising jurisdiction over all aggressive war acts of death, injury and destruction perpetrated in its own sovereign territory by a foreign head of state who violently and without permission disrupted its territorial sovereignty.<sup>147</sup>

Again, the illogicality is particularly manifest if the head of state physically leads his or her forces into the invaded country and is captured there. However, there is no reason why prosecution should be precluded just because the head of state leads the invasion from within the borders of his or her own country and is captured there (or in any other country). There is also no discernible reason why prosecution should be precluded just because the head of state was not captured (prosecution and trials *in absentia* are not outlawed under international law).

As seen from the preceding, the assumption in this Article is that a state victim of aggression has the power to prosecute the persons who are responsible for the aggression. However, on more than one occasion, the International Law Commission (ILC) has suggested that such an assumption is incorrect.<sup>148</sup> CAVV has recently agreed with the ILC on this point.<sup>149</sup> While this is not the place to carry out an extensive rebuke of their position, I will briefly address what the central issue to determine the customary law on the matter is. CAVV argues that there is “no consistent and uniform state practice” demonstrating that “states other than the aggressor state” may prosecute aggression.<sup>150</sup> As a result, only the aggressor state can prosecute aggression.<sup>151</sup>

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147. WERLE & JESSBERGER, *supra* note 74, at 600, marg. 1599 (holding that under “general principles of (criminal) jurisdiction”, a state must have the authority to prosecute the “participation in an aggressive war waged against it”); McDOUGALL, *supra* note 141, at 378-9 (describing the exercise of territorial jurisdiction as “uncontroverted”). Relatedly, see *Banco Nacional de Cuba v. Sabbatino*, 376 US 398, 423 (1964) (“the public law of nations can hardly dictate to a country which is in theory wronged how to treat that wrong within its domestic borders”); James Crawford, *International Law and Foreign Sovereigns: Distinguishing Immune Transactions*, 54 BRITISH YEARBOOK OF INT’L L., 111 (1983) (speaking of state immunity and alluding to the exercise of territorial jurisdiction over acts of invasion as an assertion of local control over “obvious forms of harm or damage”). VAN ALEBEEK, *supra* note 32, at 71 (also speaking of state immunity and holding that, “if the activity of a foreign state *in itself* . . . violates the law of the territorial state, there is at least a strong presumption that the territorial state cannot have consented to that”) (emphasis in the original).

148. See DRAFT CODE OF CRIMES, *supra* note 61, at 27-30; Int’l Law Comm’n, Rep. of the Seventy-Third Session, U.N. Doc. 10, at 238 (2022); see also Harold Hongju Koh & Todd F. Buchwald, *The Crime of Aggression: The United States Perspective*, 109 AM. J. INT’L L. 257, 273-77 (2015) (describing a similar position of the United States adopted during the negotiations on including the crime of aggression in the ICC Statute); see also VAN ALEBEEK, *supra* note 32, at 108-10, 127-28 (analyzing the *Caroline* incident).

149. Advisory report no. 40, *supra* note 22, at 8.

150. *Id.*

151. *Id.*; DRAFT CODE OF CRIMES, *supra* note 61, at 30.

With all due respect, CAVV's argument that non-aggressor states cannot prosecute aggression is inaccurate, particularly their conception of the exercise of territorial jurisdiction by a state victim of aggression. In fact, the conclusion that states cannot exercise jurisdiction over aggressive war acts perpetrated on their own territories is itself only possible if there is consistent and uniform state practice to that effect.<sup>152</sup> There is no such evidence of such practice. Instead, there is plenty of evidence to the contrary, not least the fact that numerous states have rules providing for territorial jurisdiction over foreign states committing crimes of aggression against themselves.<sup>153</sup>

While the better interpretation of extant international law is that there is no customary law rule prohibiting the state victim of aggression from prosecuting, issuing an arrest warrant, arresting, or punishing the head of state of an aggressor nation (or any other person responsible for the aggression), a customary law rule prohibiting other countries from undertaking such actions themselves does not exist, suggesting that third-party nations unrelated to the crime can exercise "universal jurisdiction" to the same extent as a victim state.<sup>154</sup> To suggest otherwise would ignore the existence of universal jurisdiction for other lesser international crimes.

Moreover, it is difficult, if not impossible, to argue that all existing national laws allowing for the exercise of universal jurisdiction in relation to the crime of aggression are illegal under international law.<sup>155</sup> The fact that

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152. That is surely the case (at least) for those who accept the *Lotus* principle that "states can do those things which are not prohibited by the established principles and rules of [international] law." See U.N. WAR CRIMES COMM'N, TRIAL OF WAR CRIMINALS BY MIXED INTER-ALLIED MILITARY TRIBUNALS: MEMORANDUM BY OFFICE OF THE UNITED STATES REPRESENTATIVES 1 (1944) [hereinafter UNITED STATES 1944 WAR CRIMES MEMORANDUM]; see also S.S. "Lotus" (Fra. Turk.), Judgment, 1927 P.C.I.J. (Ser. A) No. 10 (Sept. 7), at 19; but see VAN ALEBEEK, *supra* note 32, at 211 (suggesting that the *Lotus* principle no longer corresponds to extant law and that it is now "generally accepted" that a state must establish "the intimacy and legitimacy" of its interest in the facts at stake). Whatever the correct legal position on the endurance of the *Lotus* principle, there can be no doubt about the "intimacy and legitimacy" of the interest of a victim state of aggression to prosecute the persons responsible for the aggression.

153. According to CAVV, seventy-four states have included the crime of aggression in their national law, and it is safe to assume that the majority (if not all) of these states establish territorial, protective, or universal jurisdiction over the crime of aggression. See Advisory report no. 40, *supra* note 22, at 8; see also McDUGALL, *supra* note 141, at 169-82, 194-98 (regarding national laws related to aggression).

154. See WERLE & JESSBERGER, *supra* note 74, at 600 (regarding why third-party states should have the power to establish universal jurisdiction over the crime of aggression); but see Beth Van Schaack, *Par in Parem Imperium Non Habet: Complementarity and the Crime of Aggression*, 10 J. INTL CRIM. J. 144 (2012) (arguing that, because there is no "strong support" for the notion that the victim state can prosecute the crime of aggression, "*a fortiori*" there is no strong support for universal jurisdiction). On the issue of universal jurisdiction more generally, see also *Arrest Warrant* (Joint separate opinion of Judges Higgins, Kooijmans and Buergenthal), ¶ 45 (noting that national legislation and case law, i.e. state practice, "is neutral as to exercise of universal jurisdiction"); *Arrest Warrant* (Dissenting opinion of Judge ad hoc Van den Wyngaert), ¶ 56, 67 (noting that—although "politically inconvenient"—trials based upon universal jurisdiction are not illegal under international law); see *contra*, *Arrest Warrant* (Separate opinion of President Guillaume), at 15 (arguing that universal jurisdiction would "risk creating total judicial chaos").

155. But see Akande, *supra* note 146, at 34-35 (suggesting that only the aggressor state and the victim state can prosecute aggression, and that the laws of countries which are broader must be read down in order "to be compatible with the *par in parem non habet imperium* notion").

several countries passed laws allowing universal jurisdiction with regard to aggression<sup>156</sup> without international protest, is evidence that universal jurisdiction over aggression is not barred under international law, not evidence of the contrary.<sup>157</sup>

Even if we do not take the preceding into account, prosecuting, issuing an arrest warrant, arresting, or punishing an aggressor head of state are all forms of help to the victim state. In that sense, other states are entitled to deploy such actions as a form of—and under the umbrella of the customary law norm allowing for—collective self-defense.<sup>158</sup> The notion that other states might also have a legitimate “real interest”<sup>159</sup> in undertaking such actions is highlighted in the following statement of the IMT:

The charges in the Indictment that the defendants planned and waged aggressive wars are charges of the utmost gravity. War is essentially an evil thing. Its consequences are not confined to the belligerent States alone, *but affect the whole world*.<sup>160</sup>

Finally, the idea that states would be legally unable to prosecute those most responsible for all the death, injury and destruction caused by an aggressor state would, from a *jus ad bellum* effectiveness perspective, be difficult to justify. The purpose of the prohibition on the use of force and the criminalization of aggression is to also have a deterrent effect on the initiation of wars in violation of international law.<sup>161</sup> Such effect would be substantially diminished if states were prohibited from prosecuting, issuing arrest warrants, arresting, or punishing those who are normally most responsible for initiating aggressive wars.<sup>162</sup>

All these *jus ad bellum* considerations help to understand why it is hard to find scholarly pieces or legal documents before *Arrest Warrant* and *Pinochet* (the latter case will be discussed below in Section IV.A) that support the notion that immunities or inviolabilities under international law apply to a head of state who initiates and wages an aggressive war. To the contrary, scholarly pieces

156. According to CAVV, seventy-four states have included the crime of aggression in their national law, “[about eighteen] allow prosecution of the crime on the basis of the principle of universality.” See Advisory report no. 40, *supra* note 22, at 8; see also McDougall, *supra* note 4 (informing that eighteen states assert universal jurisdiction over the crime of aggression).

157. But see Advisory report no. 40, *supra* note 22, at 8.

158. U.N. Charter art. 51; see also May, *supra* note 128, at 273-78 (regarding centuries-old assumptions that states other than the victim state can cross state borders in order to—remove from power and—prosecute “leaders of states that act aggressively”).

159. See *infra* Section III.C.2.

160. *Judgment of the Nuremberg International Military Tribunal 1946*, 41 AJIL 172, 421 (1947) (emphasis added).

161. Opening Speech of United States’ Chief Prosecutor, *reprinted in* INTERNATIONAL MILITARY TRIBUNAL, TRIAL OF GERMAN MAJOR WAR CRIMINALS BY THE INTERNATIONAL MILITARY TRIBUNAL SITTING AT NUREMBERG GERMANY 118, 154 (William S Hein & Co. ed., 2001) (“The ultimate step in avoiding periodic wars, which are inevitable in a system of international lawlessness, is to make statesmen responsible to law”); see also McDougall, *supra* note 141, at 58-60, 81-83 (regarding the deterrent value of the crime of aggression).

162. Kings, princes, kaisers, führers, and other sorts of heads of state and government have always been the most prominent perpetrators of international crimes and, particularly, the most responsible for the initiation and waging of aggressive wars. Lemos, *supra* note 90, at 319-20.

and all legal documents concerning warfare pre-dating the *Arrest Warrant* and *Pinochet* consistently express the opposite view.<sup>163</sup>

It is also worth noting that—apart from the contemporary general observation that heads of state enjoy absolute immunity and inviolability from foreign jurisdiction—the specific issue of the immunity and inviolability of the head of state who invades another country is rarely addressed in scholarship and was never expressly addressed in jurisprudence. In short, similar to a statement in a British report released at the end of the First World War regarding the case of a head of state “who invades” another country, one can simply point out that most scholars and courts today use “comprehensive language as to such immunity without having in mind the exact point mentioned in the text.”<sup>164</sup>

## 2. *Non-immunity in Light of the Jus in Bello*

The reasoning and outcome are not substantially different if the issue is viewed from only a *jus in bello* perspective. A head of state responsible for an armed invasion is a combatant and, therefore, a legitimate target according to the rules of war. Not only can he or she be lethally attacked but also can be merely arrested or detained *a fortiori*.<sup>165</sup> This means non-inviolability.

From a *jus in bello* perspective only, an aggressor head of state—as any other person involved in an aggressive campaign—cannot be prosecuted for acts of death, injury and destruction carried out in accordance with the *jus in bello* rules (they are all entitled to combatant immunity).

However, if the aggressor head of state (or any other person, including the head of state of the country victim of aggression) perpetrates acts of death, injury and destruction in violation of the *jus in bello*, this subset of the law of war determines that he or she may be subject to immediate prosecution for war crimes. This means non-immunity regarding such crimes. As Sheldon Glueck said in one of the first extensive analyses of the issue of “*War Criminals: Their Prosecution and Punishment*”,

Since prisoners of war are subject to trial for violations of the laws and customs of war, as well as for ordinary crimes, sovereigns may be so treated. They cannot have the advantages of a prisoner of war’s status without its obligations.<sup>166</sup>

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163. The conclusions drawn by the ones who thoroughly studied the question at the end of the First World War are revealing. See FIRST INTERIM REPORT, *supra* note 120, at 31-35 (conducting an illuminating analysis of ancient and modern practice and concluding that there was “no rule or usage exempting from criminal jurisdiction sovereigns who have invaded the territory of another sovereign”). See also *supra* Sections III.A. and III.B (providing revealing conclusions drawn at the end of the Second World War by scholars and the IMT).

164. FIRST INTERIM REPORT, *supra* note 120, at 31, 33.

165. See GLUECK, *supra* note 97, at 123; see also THE JOINT SERVICE MANUAL OF THE LAW OF ARMED CONFLICT, Joint Service Publication 383 (2004 Edition), at 148 n.52 (alluding to the fact that heads of state are in some cases commanders-in-chief of the armed forces, and to the circumstance that, if a head of state “is actively serving in the armed forces, he may be treated as having combatant status and would, therefore, be a legitimate target for military action”).

166. GLUECK, *supra* note 97, at 123. Relatedly, see THE JOINT SERVICE MANUAL, *supra* note 165, at 148 (n.52), 440 (prescribing that heads of state are in some cases entitled to prisoner of war status and are not immune from prosecution for war crimes).

As suggested above, from a *jus in bello* effectiveness perspective, states' legal inability to prosecute any war crime perpetrators is difficult to justify. The purpose of the rules of war and the proscription of war crimes is to also have a strong deterrent effect on the commission of war crimes. This effect would be substantially diminished if states were prohibited from prosecuting, issuing arrest warrants, arresting, or punishing those normally most responsible for war crimes.

Not only is it correct to interpret extant international law as lacking customary rules preventing a primarily affected state from prosecuting, arresting and punishing ahead of state responsible for war crimes, but there is also no evidence in the legal history of warfare of a rule preventing other countries from taking such actions. As an influential United States 1944 War Crimes Memorandum has put it (during the Second World War, and after compelling review of practice):

While the state whose nationals are directly affected has a *primary interest*, all civilized states have a *real interest* in the punishment of war crimes . . . An offence against the laws of war is a violation of the law of nations; and a matter of general interest and concern . . . Both on principle and in practice . . . [national] military courts are empowered to try and adjudge punishment of war criminals . . . *no matter who* or against whom the offence was committed.<sup>167</sup>

These *jus in bello* considerations help us understand why it is hard to find scholarly pieces or legal documents pre-dating the *Arrest Warrant* and *Pinochet* supporting the notion that—under international law—immunities or inviolabilities exist in the case of a head of state who perpetrates war crimes.<sup>168</sup>

### 3. Concluding Remark

All told, it is paramount to be abundantly clear about the conclusion in Section III, i.e., the position of the IMT was an undisputable and sound rejection of any type of personal or functional immunity for representatives of a state regarding the three types of international crimes (war crimes *lato sensu*) provided for in the Nuremberg Charter. Section IV will scrutinize whether it is possible to reconcile the position of the IMT with the position of the ICJ in the *Arrest Warrant*.

167. UNITED STATES 1944 WAR CRIMES MEMORANDUM, *supra* note 152, at 4-8 (emphasis added) (focusing on the military courts of the belligerents); see also Advisory report no. 40, *supra* note 22, at 7 (speaking of the issue of universal jurisdiction over international crimes and affirming the “shared” interest of all states in prosecuting acts prohibited by international law).

168. The conclusions drawn by the ones who studied the question thoroughly at the end of the First World War are revealing. See FIRST INTERIM REPORT, *supra* note 120, at 31 (alluding to the fact that sovereigns were in the past made prisoners of war, and stating “no modern usage establishing such immunity appears to exist”); F. Larnaude and A. de Lapradelle, Annex to the Minutes of the First Meeting, INQUIRY INTO THE PENAL LIABILITIES OF THE EMPEROR WILLIAM II (English translation), at 250-253 (alluding to the right of national military courts to prosecute heads of state of other countries, and stating: [i]f it is not possible to punish a nation [. . .] it by no means follows that the German Emperor is immune”); *supra* Section III.A and Section III.B (providing revealing conclusions drawn at the end of the Second World War by scholars, the UNWCC, and the IMT).

#### IV. Reconciling the decisions of the International Military Tribunal and the International Court of Justice

On its face, the conclusion drawn in Section III means that the position of the IMT is at odds with the *Arrest Warrant's* holding that heads of state enjoy full immunity from foreign jurisdiction and inviolability, along with the view upheld by the majority of scholars that, as regards personal immunities, “the absence of any international crime exception is plain.”<sup>169</sup>

Instead, the position of the IMT is attuned with the minority view of scholars who argue that the centuries old history of ICL disavows the position adopted by the ICJ in the *Arrest Warrant*.<sup>170</sup> Section IV of this Article is divided into two subsections. Section IV.A appeals to the work of Professor Jordan Paust in order to understand why the House of Lords is, side by side with the ICJ, one of the main culprits of the current state of affairs. Section IV.B attempts to reconcile the decisions of the IMT and the ICJ while exploring a novel way of addressing the issue.

##### A. Minority views and *Pinochet*

According to a minority of scholars, the customary non-immunity principle is all-encompassing, i.e., it covers “any form of immunity” for any person, including a sitting or former head of state. In other words, head of state immunity for international crimes “simply does not exist, be it before national courts or international ones.”<sup>171</sup>

Let us consider the view of Professor Jordan Paust who, for a long time, and along with Professor Cherif Bassiouni, was one of the most prolific scholars writing about ICL and the criminal aspects of the law of war. In several texts published during the three decades before the *Arrest Warrant*, Paust extensively dissected the customary international law non-immunity principle.<sup>172</sup>

Tellingly, scholarly views challenging the non-immunity principle were virtually non-existent before the *Pinochet* case in the House of Lords. Before this case, ICL books did not even allude to a possible existence of an immunity

169. Roger O'Keefe, *An “International Crime” Exception to the Immunity of State Officials from Foreign Criminal Jurisdiction: Not Currently, Not Likely*, 119 AM. J. INT'L L. UNBOUND 167, 167-68 (2015).

170. See e.g., Jordan Paust, *Genocide in Rwanda, State Responsibility to Prosecute or Extradite, and Nonimmunity for Heads of State and Other Public Officials*, 34(1) Hous. J. INT'L L. 57, 71-84 (2011) (providing a “striking array of relevant judicial recognitions and other precedent[s]” which had never used the “Latinized nonsense”—i.e. the distinction between immunities *ratione personae* and immunities *ratione materiae*—in a ICL context, and holding that the *Arrest Warrant* was based on such “nonsense” and “little else”); Lemos, *supra* note 90, at 318-65 (providing an overview of centuries' old practice and *opinio iuris* supporting the idea that ICL—as well as its no-immunity principle—have existed since the beginnings of international law, and qualifying the *Arrest Warrant* as “hair-raising”).

171. Paust, *supra*, at 70; Lemos, *The ICC*, *supra* note 90, at 316; see Mettraux, *supra* note 83, at 577-622 (also upholding a principle of non-immunity under customary international law, which is nevertheless narrower in scope).

172. See Paust, *supra* note 170, at 71-84 (summarizing Paust's analysis on the customary international law non-immunity principle and providing numerous references to his publications pre-dating *Pinochet* and the *Arrest Warrant*).

principle extending to situations of international crimes.<sup>173</sup> *Pinochet* changed the legal landscape, albeit not in the way normally assumed.<sup>174</sup> Consider the following narrative:

One of the most dramatic moments in twentieth-century international law transpired in 1999 when the House of Lords denied immunity to Augusto Pinochet, the former dictator of Chile. The “breathtaking” judgment cleared the way for the possible prosecution of Pinochet in Spanish national courts on charges of torture committed during his rule. By limiting immunity, the House of Lords’ rulings turned the world “upside down” and ushered in a new era of accountability for egregious violations of human rights. At least that is the prevailing narrative, one that pits accountability against the international law of immunity and sees Pinochet as a watershed moment in that struggle.<sup>175</sup>

According to this narrative, the landmark *Pinochet* decision marks the moment when functional immunities for former heads of State stopped being “sacrosanct”.<sup>176</sup> But ironically, *Pinochet* is the moment when personal and functional immunities for international crimes—which no one had ever seriously considered to exist under international law before *Pinochet*—began to be recognized as part of international law.

In *Pinochet*, all Lords “without exception” endorsed in *dicta* the notion that, under customary international law, sitting heads of state are entitled to a personal immunity which extends to international crimes.<sup>177</sup> The Lords were dealing with a case that did not concern aggression or international armed conflict. As such, they were not focused on the “war and peace questions confronted and tackled by the IMT.”<sup>178</sup> Instead, they were primarily attempting to reach a correct interpretation of the provisions in the UK State Immunity Act of 1978 and the UN Convention against Torture.<sup>179</sup>

It is easy to explain the *dicta* of the Lords about the issue of personal immunity. It all boils down to Section 20 of the UK State Immunity Act. Under

173. See, e.g., M. CHERIF BASSIOUNI & VED P. NANDA, A TREATISE ON INTERNATIONAL CRIMINAL LAW: CRIMES AND PUNISHMENT (1973); PAUST, BASSIOUNI, WILLIAMS, SCHARF, GURULÉ & ZAGARIS, INTERNATIONAL CRIMINAL LAW: CASES AND MATERIALS (2007); M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW (2d ed., rev. 1999).

174. See Richard A. Falk, *Assessing the Pinochet Litigation: Whither Universal Jurisdiction?*, in UNIVERSAL JURISDICTION: NATIONAL COURTS AND THE PROSECUTION OF SERIOUS CRIMES UNDER INTERNATIONAL LAW (Stephen Macedo ed., 2004) (regarding *Pinochet*, generally).

175. Wuerth, *supra* note 3 (criticizing such narrative, but upholding an even more “breathtaking” counter-narrative according to which even the head of state functional immunity rule is absolute); Curtis A. Bradley & Laurence R. Helfer, *International Law and the U.S. Common Law of Foreign Official Immunity*, 2010 SUP. CT. REV. 213, 238-40 (2011) (describing *Pinochet* as a “watershed” moment in what the immunity issue is concerned).

176. Harmen van der Wilt, *The Immunities and the International Criminal Court*, in CAMBRIDGE HANDBOOK OF IMMUNITIES AND INTERNATIONAL LAW 595, 596 (Ruys, Angelet and Ferro eds. 2019).

177. Eileen Denza, *Ex parte Pinochet: Lacuna or Leap?*, 48 INT’L & COMPAR. L. Q. 949, 954 (1999).

178. Lemos, *The ICC*, *supra* note 90, at 353-54.

179. VAN ALEBEEK, *supra* note 32, at 2-3 (highlighting that “denial of immunity turned on the specific terms of the 1984 Convention against Torture [...] rather than on considerations applicable to crimes against international law in general”); U.N. ILC, 69th Sess., 3363rd mtg. at 7, U.N. Doc. A/CN.4/SR.3363 (June 19, 2017) (affirming that the case was concerned “not with the position under international law, but exclusively with domestic law”).

the heading of “Heads of State”, it says that the Diplomatic Privileges Act 1964 shall apply to heads of state “as it applies to the head of a diplomatic mission.”<sup>180</sup> Conjugating the privileges set out in the Diplomatic Privileges Act with the recognition in the UK State Immunity Act that such privileges apply to heads of state, the Lords concluded that inasmuch as diplomats enjoy an absolute personal immunity, so do heads of state.<sup>181</sup> That is, the Lords automatically (and uncritically) interpreted Section 20 as a reflection of customary law.

In the same manner as it later occurred in the *Arrest Warrant*, a striking aspect arising from the decision of the House of Lords is that not even one amongst the Lords considered the immunity excerpt of the IMT or the effects of the law of war on the issue of immunity. This is perhaps excusable considering that they were not dealing with a war situation. However, had they dealt with such a situation and consulted their own British Manual of Military Law of 1958 on the law of war, they would have realized that “[h]eads of state and their ministers enjoy *no immunity* from prosecution and punishment for war crimes.”<sup>182</sup>

This passage of the British Manual is particularly important because, as mentioned above, in Britain and other countries, the trial of war crimes had always been predominantly a matter for national courts.<sup>183</sup> Thus, there can be no doubt that, according to the British Manual of 1958, heads of state who perpetrate war crimes were not entitled to immunity in national courts.<sup>184</sup>

In sum, because the Lords were not dealing with a war situation, they bypassed crucial international and national documents on the law of war. Thus, their immunity *dicta* carry very little weight for solving the ultimate question addressed in this Article.<sup>185</sup>

None other than Professor Jordan Paust acutely described what had occurred in *Pinochet* and unveiled the *link* between what the Lords perfunctorily stated and the subsequent decision of the ICJ in the *Arrest Warrant*. In the first part of a long footnote, Paust noted:

The majority of judges [in *Pinochet*] understandably recognized that torture violated the Convention Against Torture, was non-immune, and international criminal acts of torture are *ultra vires* and, therefore, are not lawful state or head of state functions . . . Quite *surprisingly*, however, some stated in *dicta* that sitting heads of state have immunity *ratione personae* and after leaving office might have immunity *ratione materiae*, but only for lawful conduct and not for the international

180. State Immunity Act 1978, c. 33, § 20, (Eng.).

181. Christine Chinkin, *United Kingdom House of Lords: Regina v. Bow Street Stipendiary Magistrate, ex parte Pinochet Ugarte*, 93 AM. J. INT'L L. 703, 706 (stressing that, under the State Immunity Act of 1978, a head of state is accorded “absolute immunity from all actions or prosecutions”).

182. THE LAW OF WAR ON LAND, BEING PART III OF THE MANUAL OF MILITARY LAW (LONDON, HMSO, 1958), par. 632 (emphasis added).

183. See *supra* Section III.

184. This continues to be the position as adopted in the recent 2004 “first major statement of the British approach to the Law of Armed Conflict since 1958”. THE JOINT SERVICE MANUAL, *supra* note 165, at iii, 440 (“Heads of state and their ministers are not immune from prosecution and punishment for war crimes”).

185. See *infra* Sections IV.A, IV.B (parallels with the weight that should be assigned to the position adopted by the majority of judges in the *Arrest Warrant*).

crime of torture . . . . Nonetheless, no international criminal law treaty or instrument had used such Latinized nonsense, it is completely inconsistent with the overwhelming trends in decision and the instruments noted herein . . . . Further, there were no citations to anything in support of such alleged *ratione* . . . . Later, the I.C.J. issued an extremely controversial decision using such phrases and little else to conclude that Belgium did not have jurisdiction over a sitting official, instead stating an international criminal tribunal can prosecute such a person.<sup>186</sup>

Paust's surprise and his grasp of that "Later" link (which unveils where the whole absolute personal immunity story truly originates) is illuminating. Because—apart from brief allusions to protecting international relations and ensuring the effective performance of functions by the highest representatives of the states—the judges in the *Arrest Warrant* (just like the judges in *Pinochet*) did not put forward one single compelling reason that would justify a deviation from what the IMT had said more than half-century before.

As a result, one could be tempted to simply endorse the argument that—since the ICJ deviated (perhaps unintentionally) from the Nuremberg non-immunity principle and the most authoritative judgment in the field of international crimes—the "full immunity" holding of the *Arrest Warrant* should be simply set aside as "bad law".<sup>187</sup>

Nonetheless, this argument might not sufficiently consider the effect of the *Arrest Warrant* in current state practice and *opinio iuris* because today, the predominant practice and *opinio* of states is that heads of state enjoy an absolute personal immunity from foreign jurisdiction and inviolability.<sup>188</sup>

Such a view is reflected in the opinions of most of the members of the International Law Commission (ILC).<sup>189</sup> It is also reflected in the most recent ILC report on the matter.<sup>190</sup> Dire Tladi summarizes the situation at the ILC:

The conclusion that international law does not recognize any exceptions to immunity *ratione personae* is not controversial and it is unnecessary to explore the Report's basis for this conclusion. It is the conclusion that there are exceptions to immunity *ratione materiae* that resulted in controversy and division with the Commission.<sup>191</sup>

186. Paust, *Genocide*, *supra* note 170., at 77 n.83 (emphasis added).

187. Lemos, *supra* note 90, at 364 (holding that the ICJ's lack of engagement with the decision of the IMT is "on the sole authority, strength and legal force of the IMT Judgment, sufficient reason to consider that the law set out in the *Arrest Warrant* is irredeemably flawed").

188. See, e.g., Akande and Shah, *Immunities*, *supra* note 140, at 818-20 ("uncontroversial and has been widely applied by national courts in relevant cases, as well as being upheld in state practice").

189. Of the thirty members of the ILC only three opposed or expressed concerns about the view that heads of state, heads of government, and foreign ministers enjoy absolute immunity from foreign jurisdiction. See U.N. ILC, 66th Sess., 3361st mtg. at 14-15, U.N. Doc. A/CN.4/SR.3361 (June 14, 2017) (speaking against "a broad and unrestricted view of immunity *ratione personae*"); *Summary Record of the 3328th Meeting*, [2016] 1 Y.B. Int'l L. Comm'n 329, U.N. Doc. A/CN.4/SR.3328, at 9-11 (expressing "serious concerns regarding draft article 7(2), pursuant to which immunity applied to State officials 'during their term of office'"); U.N. ILC, 69th Sess., *supra* note 179, at 10-11 (stating that Draft Article 7 (2) "made very little, if any, sense").

190. Rep. of Int'l L. Comm'n, Supp. No. 10, U.N. Doc. A/77/10, at 188-286 (2002).

191. Dire Tladi, *The International Law Commission's Recent Work on Exceptions to Immunity: Charting the Course for a Brave New World in International Law?*, 32 LEIDEN J. INT'L L. 169, 169-87 (2019).

Indeed, the effect of the *Arrest Warrant* was so powerful that the terms of the whole discussion turned upside down. Present-day debates do not revolve around what justified the ICJ's departure from the Nuremberg non-immunity principle. To the contrary, the premise of the debates is that the absoluteness of the head of state personal immunity rule is not subject to challenge. Thus, the controversy only revolves around the functional immunity rule, and what might justify a departure from this rule, as Sean Murphy aptly depicts in his question, "*Immunity Ratione Materiae of State Officials from Foreign Criminal Jurisdiction: Where is the State Practice in Support of Exceptions?*".<sup>192</sup>

Because the terms of the discussion turned upside down, it is also necessary *today* to explain why several international and national courts did not consider immunity to be an obstacle to prosecuting and punishing people who—according to the *Arrest Warrant*—are entitled to immunity.

As a result, the above-mentioned idea that the IMT's decision on the immunity issue was based on an implicit waiver is also today "conveniently" used to explain why defendants at the ICTY, ICTR, ICC, and other international criminal tribunals could not invoke personal immunity.<sup>193</sup> As paradigmatically put by Steffen Wirth, "in *all cases* of international criminal tribunals, the respective states *must be considered* to have waived their right to immunity."<sup>194</sup> A similar idea is also used to explain prosecutions in foreign domestic criminal courts against former officials.<sup>195</sup>

Considering the conclusion in Section III, it is obvious that the current way of addressing the issue is troubling. Nonetheless, because the terms of the discussion are highly influenced by the *Arrest Warrant* and by the state practice generated by the ICJ's decision, the following warning by Roger O'Keefe should not be ignored:

It would be a mistake to think that there exists among member states of the General Assembly the political will for the acceptance, even by explicit way of progressive development, of an international crime exception to the immunity of state officials, *ratione personae* or *materiae*, from foreign criminal jurisdiction.<sup>196</sup>

## B. The Third Path

To consider a third, different path, one should ask the following question: what is the underlying factor explaining the departure in the *Arrest Warrant* from the non-immunity principle set out in the judgment of the IMT? As suggested above in the previous section, the answer lies in the different factual background of the two decisions.

192. Sean Murphy, *Immunity Ratione Materiae of State Officials from Foreign Criminal Jurisdiction: Where is the State Practice in Support of Exceptions?*, 112 AM. J. OF INT'L L. UNBOUND 4, 4-8 (2018) (not finding such state practice).

193. See Section III.A; see, e.g., Akande, *International*, *supra* note 45, at 417 n.70, 420; HAZEL FOX & PHILIPPA WEBB, *THE LAW OF STATE IMMUNITY* 556 (3rd ed. 2013).

194. Steffen Wirth, *Immunity Core Crimes? The ICJ's Judgment in the Congo v. Belgium Case*, 13 EUR. J. INT'L L. 877, 884 n.47 (2002) (emphasis added).

195. See, e.g., Wuerth, *Pinochet's*, *supra* note 3, at 754-55.

196. O'Keefe, *An "International Crime"*, *supra* note 169, at 171.

The factual background of the IMT's decision concerned the perpetration of aggression, war crimes, and crimes against humanity by the highest officials of a state in connection with an international armed conflict. As a result, the IMT focused on the effects that, in such a scenario, the law of war has on the immunity issue ("he who violates the laws of war cannot obtain immunity"). In fact, the immunity excerpt of the IMT came immediately on the heels of considerations about the law of war.

The IMT had to address the following three submissions made on behalf of the defendants. First, "no sovereign power had made aggressive war a crime at the time that the alleged criminal acts were committed, . . . , and no court had been created to try and punish offenders."<sup>197</sup> Second, "International Law is concerned with the actions of sovereign States and provides no punishment for individuals."<sup>198</sup> Third, "where the act in question is ad [sic] act of State, those who carry it out are not personally responsible, but are protected by the doctrine of the sovereignty of the State."<sup>199</sup>

The IMT persuasively rejected the three submissions. It alluded to consistent declarations of virtually all states in the world—made before the Kellogg-Briand Pact of 1928—to the effect that a "war of aggression constitutes an international crime."<sup>200</sup> These declarations enabled it to conclude that the view "which the Tribunal takes of the true interpretation of the Pact", i.e., aggression is an international crime, "is supported by the international history which preceded it."<sup>201</sup>

Subsequently, it resorted to the provisions of Article 228 of the Treaty of Versailles. These provisions recognized the right of every country to bring before national or international military tribunals virtually all "persons accused of having committed acts in violation of the laws and customs of war" during the First World War, including heads of government and foreign ministers.<sup>202</sup> Article 228 applied to any high official except the Kaiser (the former head of state of Germany), a case that was to be dealt with under a special provision, namely Article 227. The fact that the Kaiser's case was to be dealt under a unique provision providing for a special international tribunal was not based on any kind of legal argument that the Kaiser was entitled to some sort of immunity in national courts, but solely on political considerations and negotiations.<sup>203</sup>

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197. IMT Judgment, *supra* note 73, 444 (1946).

198. *Id.* at 446.

199. *Id.*

200. *Id.* at 445-46.

201. *Id.* As mentioned above (see *supra* Section III.C.1), according to the predominant view, aggression was not an international crime before it was "invented" in the Nuremberg Charter. According to a different view, the conclusion of the IMT was correct. See Lemos, *Jus*, *supra* note 34, at 13-15 (elaborating on why there should be no doubt that aggression was already an international crime before the Nuremberg Charter); see also PAUST ET AL., INTERNATIONAL, *supra* note 107, at 561-638 (with regard to an overview of the long history of crimes against peace, upholding the view that—contrary to what "[s]ome have assumed, wrongly"—crimes against peace were already violations of international law before the Nuremberg Charter).

202. See Lemos, *The ICC*, *supra* note 90, at 336-44.

203. *Id.*; see also Eboe-Osuji, *The Absolute*, *supra* note 21.

Finally, the IMT recalled the jurisprudence of the Supreme Court of the United States. Speaking on the Court's behalf, Chief Justice Stone said that from the very beginning of its history, the Supreme Court had "applied the law of war as including that part of the law of nations which prescribes for the conduct of war, the status, rights and duties of enemy nations as well as enemy individuals."<sup>204</sup>

As a result, the IMT concluded that these and "[m]any other authorities" illustrated that "only by punishing individuals who commit such crimes can the provisions of International Law be enforced."<sup>205</sup>

In short, the immunity excerpt of the IMT necessarily took into account the nature of aggression, the relation between enemy belligerents during the course of an international armed conflict, and the then-accepted right of enemy nations to prosecute *any* enemy person guilty of war crimes both during war and in its aftermath, either before military or non-military tribunals, and irrespective of the national, mixed, or international nature of the prosecutions and trials.<sup>206</sup> The factual background in the *Arrest Warrant* was quite different. Although at stake were also crimes under international law—namely, grave breaches of the Geneva Conventions and crimes against humanity—the case focused on a predominantly internal situation, namely the perpetration of crimes by Mr. Yerodia against his own compatriots.<sup>207</sup>

At stake were "various speeches inciting racial hatred" and "particularly virulent remarks" which allegedly "had the effect of inciting the population to attack Tutsi residents of Kinshasa."<sup>208</sup> The speeches and remarks "resulted in several hundred deaths, the internment of Tutsis, summary executions, arbitrary arrests and unfair trials."<sup>209</sup>

In the *Arrest Warrant*—just like in *Pinochet*—there was no question of an aggression of a country against another or against enemy nations fighting a war, and nothing suggests that the judges of the ICJ even pondered the law of war or how the concepts of immunity and inviolability operate between belligerent countries or in the context of aggression. Furthermore, there was no issue of indicting, arresting, or punishing major officials of an enemy nation responsible for aggression or war crimes, and the crimes allegedly committed by the Democratic Republic of Congo's foreign minister were not even perpetrated while he was in office. The arrest warrant issued by the court in Belgium

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204. IMT Judgment, *supra* note 73, at 446.

205. *Id.* at 447.

206. See *supra* Section III; Commission on the Responsibility, *supra* note 1, at 116, 135, 152-54 (alluding to the right of "every . . . State" to try and punish "any enemy"); The Treaty of Versailles arts. 227-29, June 28, 1919, 225 C.E.T.S. (alluding to a "special tribunal" to try the Kaiser and national or mixed "military tribunals" to try all others); UNITED STATES 1944 WAR CRIMES MEMORANDUM, *supra* note 152, at 3-4 (alluding to articles 227, 228 and 229 of the Treaty of Versailles, and stressing that military tribunals to try war criminals may operate both during peace time and war time); GLUECK, WAR, *supra* note 97, at 74, 78-80 (pointing out that offenders to the law of war cannot "choose the tribunal before which they are to be tried").

207. *Arrest Warrant*, *supra* note 5, at ¶ 67.

208. *Id.*

209. *Id.*

charged him with crimes allegedly committed before he assumed the position of foreign minister.

Moreover, just like in *Pinochet*, the crucial question in the *Arrest Warrant* related to an alleged “duty of a state to respond to a request for judicial assistance (regarding arrest and transfer) emanating from another jurisdiction.”<sup>210</sup> Such a request must be understood in the late 20<sup>th</sup> century context. By the end of the last century, several countries, including Belgium, had adopted laws providing for universal jurisdiction in relation to international crimes.<sup>211</sup> These laws—and the protections and mechanisms enshrined therein to enable effective prosecutions of international crimes—were the result of human rights concerns that rose to prominence at the time.<sup>212</sup> As noted by several judges in the *Arrest Warrant*, the problem arose from complaints brought by foreign victims about “serious human rights abuses committed abroad,” and it concerned “one of the challenges of present-day international law,” namely to provide for the “stability of international relations and effective international intercourse while at the same time guaranteeing respect for human rights . . . [and] ensuring that the perpetrators of serious international crimes do not go unpunished.”<sup>213</sup>

In brief, while the ICJ was focused on recent considerations relating to the post-Second World War human rights movement and their potential collision with peaceful relations between countries, the IMT focused on considerations relating to the laws of war, namely the *jus ad bellum* and the *jus in bello*, two of the “oldest subjects of international law.”<sup>214</sup>

It is not necessary to further explore the different backgrounds of the two decisions because it is already manifest that the dichotomy of human rights versus the stability of international relations that hovered over the *Arrest Warrant* (and the many other cases where national courts and prosecutors “have consistently rejected cases against sitting heads of state”)<sup>215</sup> is ostensibly different from the laws of war approach underlying the IMT judgment. This enables the assertion that the question of whether there is a narrower *law of war-based exception* to immunity and inviolability from foreign jurisdiction is different from the question of whether there is a broader *human rights exception*.<sup>216</sup>

210. Mettraux, *Heads*, *supra* note 83, at 582.

211. See, e.g., WARD N. FERDINANDUSSE, DIRECT APPLICATION OF INTERNATIONAL CRIMINAL LAW IN NATIONAL COURTS 36-87 (2006) (providing examples); see GERHARD KEMP, INDIVIDUAL CRIMINAL LIABILITY FOR THE INTERNATIONAL CRIME OF AGGRESSION 231-34 (2nd edition, 2017) (regarding the specific case of the Belgium Law adopted in 1993).

212. See WILLIAM A. SCHABAS, THE CUSTOMARY INTERNATIONAL LAW OF HUMAN RIGHTS 1-8 (2001) (regarding the post-Second World War human rights movement).

213. *Arrest Warrant*, *supra* note 5, at ¶¶ 5, 74-75, 87 (joint separate opinion of Judges Higgins, Kooijmans and Buergenthal and dissenting opinion of Judge ad hoc Van den Wyngaert). *Pinochet* also involved human rights considerations. See Reg. v. Bow Street Magistrates, ex p. Pinochet (No. 2) [1999] 2 W.L.R. 272; Chinkin, *United*, *supra* note 181, at 705; see also VAN ALEBEEK, THE IMMUNITY OF STATES, *supra* note 32, at 1 (stressing that it was the *Pinochet* case that “put the issue of immunity and human rights in the limelight of attention”).

214. STEVEN RATNER, JASON ABRAMS & JAMES BISCHOFF, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY 82 (3rd ed. 2009).

215. Wuerth, *supra* note 3, at 741. For a list of such cases, see Akande and Shah, *Immunities*, *supra* note 140, at 810 (n. 16). For other state practice, *id.*, at 810 (n. 17).

216. Wuerth, *supra* note 3, at 731-68 (arguing that, under current customary international, there is no human rights or ICL “exception” to the principle of immunity from foreign

The contextual distinctiveness of the two decisions must also be considered in light of the imprecise evolution of the scope of ICL. From its beginnings, ICL was closely—if not exclusively—related with the law of war and peace.<sup>217</sup> In recent decades, the scope of ICL has arguably extended to the “protection of internationally recognized human rights.”<sup>218</sup> However, as noted by Claus Kreß,

The precise scope of the latter’s protection through international criminal law, and the relationship between international peace and security and internationally recognized human rights as fundamental international community values behind international criminal law . . . remain to be defined in greater clarity.<sup>219</sup>

This lack of clarity and imprecise scope of ICL—which leads to theoretical difficulties in properly identifying what are true international crimes—coupled with the different factual backgrounds of the judgments of the IMT and the ICJ, make room for three important inferences.

First, the immunity rulings of the IMT and the ICJ concern different scenarios, and perhaps even different international crimes (i.e., immunity rules might operate differently depending on whether international crimes are perpetrated in connection with a war between nations or not). Second, there can be no doubt that the “full immunity” holding of the ICJ did not ponder the IMT judgment and the potential effects of the old laws of war on the whole issue. As such, the holding carries little weight for solving the question of immunity when such question arises in contexts of aggression or international armed conflict. Third, it is inevitable to conclude that in these contexts the proper judicial precedent to rely upon is the judgment of the IMT.<sup>220</sup>

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jurisdiction); see also *supra* Section III.B (with regard to the laws of war as *lex specialis*, i.e. an “exception” to a general rule, Quincy’s Wright’s stance that the principle of equality of states is “suspended” in relations between belligerents); Fox, *THE LAW*, *supra* note 143, at 316 (speaking of the law of armed conflict as superseding the principles of independence and equality of states); Lemos, *The ICC*, *supra* note 90, at 353 (arguing that the enforcement of the law on war crimes was never subject to a “*par in parem maxim*”); Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, 1996 ICJ Reports 226, ¶ 25 (speaking of the relationship between international humanitarian law and human rights law); Jurisdictional Immunities of the State (Ger. v. It.; Greece Intervening), Judgment, I.C.J. Reps. 2012, ¶ 57 (regarding the idea of immunity as deriving from the principle of sovereign equality of States and exceptions to immunity as a “departure” from such principle); Paola Gaeta, *Official Capacity and Immunities*, in *THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY* 975, 982-83 (A. Cassese, Gaeta, J. RWD Jones eds., 2002) (regarding the idea of the exception to functional immunity regarding war crimes and crimes against humanity as a *lex specialis* to the general rule of immunity).

217. See Lemos, *supra* note 90, at 316, 318-36 (noting that *jus ad bellum* and ICL “have been intertwined for a long time”); Claus Kreß, *International Criminal Law*, MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ¶10 (2009) (holding that, “[o]riginally, international peace and security constituted the fundamental community value behind international criminal law *stricto sensu*”).

218. Kreß, *International*, *supra* note 217.

219. *Id.*

220. Note, however, that reliance on the judgment of the IMT might also suggest that immunity cannot be invoked in relation to any “acts which are condemned as criminal by International Law” (see *supra* Section III.A, the first sentence of the immunity excerpt), irrespective of whether criminality arises in connection with aggression or international armed conflict. In this sense—and considering that genocide, crimes against humanity, and

## Conclusion

The main conclusion of this Article corresponds to the third inference, i.e., in the contexts of aggression or international armed conflict, the proper judicial precedent to rely upon is the IMT's judgment. Thus, this judgment, not the *Arrest Warrant*, should be relied upon in the current international armed conflict between Russia and Ukraine.

Such reliance means that the national courts of the two belligerents may legitimately prosecute any person responsible for any crime of aggression, war crimes or crimes against humanity perpetrated "in connection" with the conflict. It also means that the domestic courts of all other countries may legitimately undertake such prosecutions. After all, let us recall again the words of the IMT, the consequences of war "are not confined to the belligerent States alone, but affect the whole world."<sup>221</sup>

While one should acknowledge without qualms the interest of countries other than Ukraine and Russia in prosecuting the aggression and other war crimes perpetrated in Ukraine,<sup>222</sup> it is paramount to recognize the primary interest of the belligerents. That is particularly true in what concerns Ukraine, the country whose nationals and territory are most directly affected by the whole death, injury and destruction caused by Russia's aggression.<sup>223</sup>

In this sense, the domestic courts of Ukraine have the strongest claim to being the most appropriate forum for the initiation of proceedings, not only against the one most responsible for the initiation of the war of aggression and its continuous waging—the President of the Russian Federation—but also against all other Russian major war criminals.<sup>224</sup>

However, the fact that such Ukrainian prosecutions are legitimate from the current legal perspective, does not mean that they are sage from a purely political one. That might especially be the case in what concerns prosecutions for the "supreme international crime" and prosecutions against Vladimir Putin and other high officials.<sup>225</sup> Indeed, such prosecutions at the ICC or any

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war crimes perpetrated in internal armed conflicts are also today crimes under international law—there might be a strong support for the argument that immunity also cannot be invoked if these crimes are at stake. It is not the purpose of this Article to address this issue.

221. IMT Judgment, *supra* note 73, at 25.

222. Countries are already pursuing this interest in a variety of ways. See Michael Scharf et al., *High War Crimes Court of Ukraine for Atrocity Crimes in Ukraine*, OPINIO JURIS (July 29, 2022), <http://opiniojuris.org/2022/07/29/high-war-crimes-court-of-ukraine-for-atrocity-crimes-in-ukraine/> [https://perma.cc/Q836-PHY2] (speaking of states that "intend to prosecute using universal jurisdiction—such as Lithuania, Spain, Sweden, Germany, and Poland"); Jennifer Trahan, *The Need to Reexamine the Crime of Aggression's Jurisdictional Regime*, JUST SECURITY (April 4, 2022) <https://www.justsecurity.org/80951/the-need-to-reexamine-the-crime-of-aggressions-jurisdictional-regime/> [https://perma.cc/TAE4-RB5X] (alluding to investigations in Lithuania and Poland for the crime of aggression encompassing high level-political or military leaders).

223. See Alain Pellet, *Response to Koh and Buchwald's Article: Don Quixote and Sancho Panza Tilt at Windmills*, 109 AM. J. INT'L L. 557, 564 (2015) (stating that the victim's interest in holding leaders of the aggressive state responsible is "more pressing").

224. See Trahan, *The Need*, *supra* note 222 (alluding to investigations in Ukraine in relation to the crime of aggression encompassing high level-political or military leaders with regard to how Ukraine is pursuing its primary interest).

225. IMT Judgment, *supra* note 73, at 421.

another “sufficiently international” criminal court might even be viewed as more legitimate—and certainly more impartial—than a Ukrainian or other domestic prosecution.<sup>226</sup>

Needless to say, if Ukraine and all other countries have the power to decide whether to prosecute, they may also transfer that power—and they might find it in their political interest to do so—to any such international criminal court or tribunal.

Finally, in relation to the question left unanswered in Section I of this Article (which currently dominates the debate, i.e., “what type of international court is sufficiently international to be “able to pierce the veil of head of state immunity?”) there is nothing more to discuss. No present or future national, international, or hybrid court with jurisdiction to prosecute the aggression against Ukraine and other war crimes allegedly perpetrated by the head of state of the Russian Federation is able to pierce the veil of an immunity that does not exist to begin with.

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226. Kreß, *Article 98*, *supra* note 72, at 2639-47 (stressing the legitimacy of “international criminal courts of a credible universal orientation”); Trahan, *supra* note 222 (stating that “[j]udgments by a hybrid tribunal within the Ukrainian court system would carry nowhere near the authoritative weight as judgments by an international tribunal”).