

On the Rise of Universal Criminal Justice

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1. Towards Universal Criminal Justice?

Undoubtedly, the international legal order is currently undergoing a period of change and metamorphoses. Scholars eagerly engage in debates about the rise or decline of the international rule of law,¹ with some even proposing ways to reimagine the international legal order.² Of course, crises and wars around the world – especially those in Eastern Europe and the Middle East – strain the existing international legal framework. Certain international legal regimes have been shaken; for example, human rights and refugee protection are increasingly under threat. However, there are sufficient grounds to argue that international criminal justice is experiencing a modest rise, illustrated especially by the recent work of the International Criminal Court (‘ICC’).

However, the ICC’s work is not without its critics. Given the criticism of the ICC³ and its allegedly biased⁴ approach to cases, scholars have often questioned whether, for instance, the ICC is inappropriately targeting Africa. This criticism is understandable, as the majority of investigations opened by the ICC have concerned the leaders of African states. A similar bias-based critique of the ICC is now circulating in the context of the war in Ukraine and the Palestine–Israel conflict.⁵

Apart from these critiques, the existence of other international, special or *ad hoc* criminal tribunals with *ratione materiae* jurisdiction over core international crimes further questions the Court’s role in ensuring global criminal justice. Moreover, the increasing use of universal criminal jurisdiction by national judiciaries – as a tool to ensure universal criminal justice and avoid impunity, and as an alternative to the ICC – casts a shadow over the ‘World Criminal Court’. Arguably, the ICC risks further scrutiny with the rise of a fragmented system of *universal criminal justice* – international, national and hybrid criminal justice for core international crimes – which manifests not only at the institutional level but also normatively. This suggests that, on one hand, there are more avenues for administrating universal criminal justice, but on the other hand, it may lead to challenges in ensuring accountability and effectively prosecuting such offenses.

2. Between Law and Politics

Universal criminal justice is arguably one of the fields most susceptible

to political influence. Its legal architecture – its norms and institutions – is often subject to political backlash, which can ultimately lead to institutional and normative fragmentation.

After World War II, the establishment of two International Military Tribunals (Nuremberg and the Tribunal for the Far East) marked a historic moment when the notion of criminal justice was firmly embedded in the global legal order. It was also the time when the expression ‘international crimes’ and the principle of individual criminal responsibility were introduced to international law.⁶ With the adoption of the ICC Statute, the first permanent international criminal court, an independent body, was created through a multilateral treaty. Many crimes enshrined in the Statute are recognized as *ius cogens* norms. According to Article 5 of the Statute, the ICC has jurisdiction *ratione materiae* over the crimes of genocide, crimes against humanity, war crimes and the crime of aggression. Thus, the Court’s jurisdiction is limited to “the most serious crimes of concern to the international community as a whole”.⁷

Despite the promise of a court operating above politics, state consent remains crucial in international criminal law, with some agreeing to and supporting international investigations, while others oppose them or remain ambiguous. This distinct perspective on the ICC’s investigations can be observed today in the context of the investigations into the alleged crimes committed in Ukraine and Palestine. On the one hand, Russia and Israel question the Court’s jurisdiction as they are not parties to the Rome Statute, have not accepted the Court’s jurisdiction, and there has been no referral from the United Nations Security Council (‘UNSC’). This is the position asserted by Israel and its allies,⁸ and the same holds true for Russia.⁹ On the other hand, states’ reactions to these investigations are also quite diverse. In the case of the arrest warrant for Russian President Putin, support primarily comes from Western-aligned states, while the majority of Global South states have either remained silent or expressed disagreement.¹⁰ Regarding the request for arrest warrants for Israel’s Prime Minister and former Defence Minister, the ICC’s move was met with divided reactions within the

¹ Heike Krieger, Georg Nolte and Andreas Zimmermann (eds.), *The International Rule of Law: Rise or Decline?*, Oxford University Press, 2019.

² Vesselin Popovski and Ankit Malhotra (eds.), *Reimagining the International Legal Order*, Routledge, London, 2023.

³ See Laurel Hart, “The International Criminal Court: Biased or Simply Misunderstood?”, *UNA-UK Magazine*, 28 October 2018.

⁴ Sabina Grigore, “Justice Delayed, Justice Denied: Bias, Opacity and Protracted Case Resolution at the International Criminal Court”, *Just Access*, 2 May 2023.

⁵ Triestino Marinello, “The ICC Prosecutor’s Double Standards in the Time of an Unfolding Genocide”, *Opinio Juris*, 3 January 2024; for an opposite critique, see Eugene Kontorovich, “The ICC’s Brazen Anti-Israel Bias”, *WSJ Opinion*, 9 June 2024.

⁶ Chao Yi, “The Role of International Criminal Law in the Global Legal Order”, Policy Brief Series No. 46 (2015), Torkel Opsahl Academic EPublisher (‘TOAEP’), Brussels, 2015 (<https://www.toaep.org/pbs-pdf/46-chao>).

⁷ Article 5 of the Rome Statute of the International Criminal Court, 17 July 1998 (<https://www.legal-tools.org/doc/7b9af9/>).

⁸ Alan Dershowitz, “The ICC Lacks Jurisdiction Over Israel in Gaza”, *The Hill*, 5 May 2024.

⁹ “Problems of Legality of the International Criminal Court: Opinion of the International Law Advisory Board under the Ministry of Foreign Affairs of the Russian Federation”, Ministry of Foreign Affairs of the Russian Federation, 8 May 2024 (<https://www.legal-tools.org/doc/8tbq2olz/>).

¹⁰ For a detailed analysis of state reactions, see Alonso Gurmendi, “Tracking State Reactions to the ICC’s Arrest Warrant Against Vladimir Putin”, *Opinio Juris*, 29 March 2023.

Western-aligned states and received support from Global South states.¹¹

Despite the varying reactions of states – which have been portrayed as manifestations of double standards¹² – one should acknowledge an ‘awakening’ of international criminal justice and the ICC. This is how many see the opening of investigations into the alleged crimes committed in Ukraine and the Middle East. For universal justice, this could be seen as representing a step forward. Of course, as discussed above, states have different reactions to the Court’s work, with some viewing it as an example of international justice in practice, while others see it as another instance of the West weaponizing institutions to isolate its geopolitical rivals. The critiques of the ICC highlight concerns about the Court’s efficiency and its politicized nature. This has contributed to a considerable backlash against the ICC, as also reflected in a visible fragmentation of states’ perspectives on universal criminal justice.

There are simultaneous discussions regarding the establishment of specialized tribunals, for example, the ongoing talks about creating a special tribunal for the crime of aggression against Ukraine. In May 2022, the Council of Europe called on its members to establish an *ad hoc* international criminal tribunal for Ukraine. The proposal involves the creation of a special tribunal through a treaty between Ukraine and the Council of Europe or its members to prosecute the crime of aggression committed in Ukraine. The key question, however, is whether such a tribunal can override the immunities of sitting heads of state.

In the *Arrest Warrant* case, the International Court of Justice stated that, “in international law it is firmly established that, as also diplomatic and consular agents, certain holders of high-ranking office in a State, such as the Head of State, Head of Government and Minister for Foreign Affairs, enjoy immunities from the jurisdiction in other States, both civil and criminal”.¹³ This orthodox view on the immunities of sitting state officials is shared by the International Law Commission (‘ILC’)¹⁴ and much of the scholarly literature.¹⁵ However, in the case of the ICC, the situation is slightly different. Article 27(2) of the Statute establishes that “immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person”. This implies that the immunities of heads of state do not apply to the Court’s exercise of criminal jurisdiction.

There are different views on whether international tribunals can override the immunity *ratione personae* of the Troika (that is, the head of state, head of government and minister for foreign affairs). On one hand, some argue that if the concerned state does not waive immunity or if there is no decision by the UNSC under Chapter VII of the United Nations (‘UN’) Charter, the international nature of the tribunal alone is not sufficient to override immunity.¹⁶ On the other hand, the Appeals Chamber of the ICC, in the case of former President al-Bashir, asserted that there is no customary international law rule on immunity for heads of state from the jurisdiction of international courts.¹⁷ The underlying

rationale was that international courts “when adjudicating international crimes, do not act on behalf of a particular state or states. Rather, international courts act on behalf of the international community as a whole”.¹⁸ Thus, the al-Bashir¹⁹ and Putin²⁰ cases demonstrate that the personal immunities of a sitting state official do not bar the jurisdiction of an international criminal court.

Scholars debate what is necessary for a tribunal to be truly international and to overcome questions of immunities.²¹ It is believed that when a tribunal is created under the auspices of the UNSC pursuant to Chapter VII of the UN Charter, the UNSC is acting on behalf of the international community. This was the case, for example, with the International Criminal Tribunal for the former Yugoslavia,²² the International Criminal Tribunal for Rwanda,²³ and the Special Tribunal for Lebanon,²⁴ all established by UNSC resolutions under Chapter VII of the UN Charter. Also, the Special Court for Sierra Leone, established through an agreement between the UN and Sierra Leone, is considered truly international.²⁵ Heads of state are not immune before the international criminal tribunals because, as the ICC has explained, international courts do not act on behalf of a particular state. They do not represent the exercise of a state’s sovereign power, as a national court does. This means that personal immunity does not bar prosecution before an international criminal court; however, it does bar such prosecutions before domestic courts.

3. Increased Use of Universal Jurisdiction and the Challenge of Functional Immunity of State Officials

According to recent data, there has been a significant increase in the exercise of universal criminal jurisdiction in the European Union (‘EU’) Member States²⁶ and globally.²⁷ The use of universal criminal jurisdiction is justified by the fact that some violations are so morally heinous that they warrant the exercise of jurisdiction, regardless of territorial or national links – factors that normally guide a state’s exercise of criminal jurisdiction over crimes committed within its borders or involving suspects or victims of its nationality.²⁸ In 1998, Spain set the trend

peals Chamber’s Judgement of 6 May 2019 in the Jordan Referral re Al-Bashir Appeal”, Occasional Paper Series No. 8 (2019), TOAEP, Brussels, 2019 (<https://www.toaep.org/ops-pdf/8-kress/>).

¹⁸ ICC, *Situation in Darfur, Sudan*, Judgement in the Jordan Referral re Al-Bashir Appeal, 6 May 2019, ICC-02/05-01/09 OA2, para. 115 (<https://www.legal-tools.org/doc/53c62c/>).

¹⁹ *Ibid.*, paras. 113–115.

²⁰ ICC, “Situation in Ukraine: ICC Judges Issue Arrest Warrants Against Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Belova”, Press Release, 17 March 2023 (<https://www.legal-tools.org/doc/ux75v4/>).

²¹ Gaiane Nuridzhanian, “International Enough? A Council of Europe Special Tribunal for the Crime of Aggression”, *Just Security*, 3 June 2024.

²² UNSC Resolution 827 (1993), UN Doc. S/RES/827 (1993), 25 May 1993, on the establishment of the International Criminal Tribunal for the former Yugoslavia (<https://www.legal-tools.org/doc/dc079b/>).

²³ UNSC Resolution 955 (1994), UN Doc. S/RES/955 (1994), 8 November 1994, on the establishment of the International Criminal Tribunal for Rwanda (<https://www.legal-tools.org/doc/97d395/>).

²⁴ UNSC Resolution 1757 (2007), UN Doc. S/RES/1757 (2007), 30 May 2007, on the establishment of the Special Tribunal for Lebanon (<https://www.legal-tools.org/doc/c8fb1a/>).

²⁵ Special Court for Sierra Leone, *Prosecutor v. Charles Ghankay Taylor*, Decision on Immunity from Jurisdiction, 31 May 2004, SCSL-2003-01-AR72(E), para. 38 (<https://www.legal-tools.org/doc/3128b2/>).

²⁶ European Union Agency for Criminal Justice Cooperation, “New investigations on core international crimes increase by 44% since 2016”, Press Release, 23 May 2022. See also Wolfgang Kaleck and Andreas Schüller, “Universal Jurisdiction Gains New Momentum”, Policy Brief Series No. 96 (2019), TOAEP, Brussels, 2019 (<https://www.toaep.org/pbs-pdf/96-kaleck-schuell/>).

²⁷ TRIAL International, “Universal Jurisdiction Annual Review”, 2024.

²⁸ On the idea of universal jurisdiction and its challenges, see Erkki Kourula, “Universal Jurisdiction for Core International Crimes”, in Morten Bergsmo and Ling Yan (eds.), *State Sovereignty and International Criminal Law*, TOAEP, Beijing, 2012 (<https://www.toaep.org/ps-pdf/15-bergsmo-ling/>); Zhu Lijiang, “Universal Jurisdiction Before the United Nations General Assembly: Seeking Common Understanding under International Law”, in *ibid.*

¹¹ For a striking reaction, see United States, Imposing Sanctions on the International Criminal Court, Executive Order, 6 February 2025 (<https://www.legal-tools.org/doc/ahgsb70/>). See also Nathalie Weatherald and Ben Munster, “European Leaders Divided on ICC Arrest Warrant Bid for Netanyahu”, *Politico*, 20 May 2024; Selman Aksünger, “West Divided Over ICC Arrest Warrants for Netanyahu, Gallant”, *Anadolu Agency*, 22 May 2024.

¹² See, generally, James A. Goldston, “International Crimes and Double Standards: Old Wine in Many Bottles”, in *Journal of International Criminal Justice*, 2024, vol. 22, no. 2.

¹³ International Court of Justice, *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, 14 February 2002, ICJ Reports 2002, para. 51 (<https://www.legal-tools.org/doc/c6bb20/>).

¹⁴ Since 2007, the ILC produced eight reports on the topic of “Immunity of State Officials from Foreign Criminal Jurisdiction”.

¹⁵ Rosanne van Alebeek, *The Immunity of States and Their Officials in International Criminal Law and International Human Rights Law*, Oxford University Press, 2008, p. 169.

¹⁶ Advisory Committee on Public International Law, “Challenges in Prosecuting the Crime of Aggression: Jurisdiction and Immunities”, Advisory Report no. 40, 12 September 2022, pp. 13–14.

¹⁷ Further on this, see Claus Kieß, “Preliminary Observations on the ICC Ap-

by indicting former Chilean dictator Pinochet,²⁹ sending the message that governments should prosecute those responsible for international crimes.

Despite its role in filling enforcement gaps in international law, universal jurisdiction faces significant political and legal resistance. The cases over which a state exercises universal criminal jurisdiction are often politically sensitive, frequently involving former political leaders of foreign states. There is also a risk of diplomatic relations being strained, as some countries may deliberately shield others, while other states might abusively wield universal criminal jurisdiction.³⁰ To address these issues, some scholars propose that universal jurisdiction be exercised by an international court, which would provide an institutional structure to co-ordinate disagreements without arbitrary subjection and ensure equal control by states over institutions that challenge their sovereignty and punish their constituents.³¹

Normatively, the resistance arises from the use of universal criminal jurisdiction in conflict with the principle of immunity for state officials. As discussed in the previous section, sitting heads of state cannot be prosecuted before national judiciaries. However, in November 2023, a French magistrate issued an arrest warrant against then-acting Syrian President Bashar al-Assad and other senior officials. On appeal, the French Court of Appeal upheld the arrest warrant against al-Assad due to his alleged role as an accomplice in crimes against humanity and war crimes committed during the chemical attacks in Eastern Ghouta, Syria, in August 2013. The Court argued that its decision was driven by the fact that the Syrian president would never be prosecuted in Syria, and Syria would never renounce the personal immunity of the president. Moreover, there was no international tribunal competent to prosecute the Syrian president, and Syria was not a party to the ICC Statute. Exercising universal criminal jurisdiction was seen as the only available tool to bring the suspect to justice. The Court established specific conditions under which a foreign state can override the personal immunity of heads of state, opening a supplementary pathway for the fight against crimes against humanity. In doing so, the Court detached the prohibition of the use of chemical weapons – as a customary international law norm of *jus cogens* nature – from the functions of the head of state, which are tied to sovereignty.³²

Such a decision is not without critique, as it questions the customary international law principle of personal jurisdictional immunity for acting heads of state. Where do states stand regarding the immunity of state officials? The immunity of state officials from foreign criminal jurisdiction has long been an ILC topic. During its seventy-fifth session, the ILC provisionally adopted the text and titles of Articles 1, 3, 4 and 5 [6], which address issues related to immunity *ratione personae* and *materiae*.³³ It is not surprising that a provisional agreement was reached among ILC members, as the provisions outline the generally accepted rules of the principle of immunity of state officials from criminal prosecution. Draft Articles 3 and 4 affirm that heads of state, heads of government, and ministers for foreign affairs, during their time in office, enjoy immunity *ratione personae* from the exercise of foreign criminal jurisdiction, covering all acts performed. This aligns with the

“Resolution on Immunities from Jurisdiction and Execution of Heads of State and of Government in International Law” by the Institut de Droit International, which states in Article 2: “in criminal matters, the Head of State shall enjoy immunity from jurisdiction before the courts of a foreign State for any crime he or she may have committed, regardless of its gravity”.³⁴ Thus, the personal immunity of acting heads of state is absolute and should act as a bar to prosecution before national courts.

Under heated debate are the exceptions to functional immunity for international crimes provided in draft Article 7 – genocide, crimes against humanity, war crimes, apartheid, torture, and enforced disappearance. Functional immunity must be clearly distinguished from personal immunity (*ratione personae*), which shields a limited circle of individuals from prosecution – namely, foreign heads of state, heads of government, and ministers of foreign affairs – but only during their time in office.³⁵ The ICC³⁶ is currently the only permanent criminal authority with the power to prosecute *sitting* heads of state, heads of government, and foreign ministers. Thus, personal immunity generally prevents the domestic prosecution of heads of state, regardless of the severity of the alleged crimes.

The debate is active not only among ILC members³⁷ but also in the Sixth Committee of the UN General Assembly, where the number of supportive states slightly exceeds those expressing concerns or disagreements.³⁸ The clear trend is that functional immunity does not apply to the crimes of genocide, crimes against humanity, and war crimes.³⁹ However, overall, states are divided concerning draft Article 7, as reflected in the written comments submitted by states regarding the ILC Draft Articles. This division reflects a fragmentation in states’ approaches to exceptions to functional immunity, and to the immunity of state officials in international law more generally. Of 39 submissions, 27 (the majority of which are EU members) were in favour of including restrictions. Eleven states (including the United States, the United Kingdom, France and Russia) were critical of the provision enshrined in draft Article 7. States are also divided regarding the customary nature of the exception. Eleven states (including EU members and Ukraine) consider the exception reflective of customary international law, at least for the crimes of genocide, crimes against humanity, and war crimes. Ten states (France, as well as developed and emerging economies) expressed a lack of sufficient state practice and *opinio juris* for this provision to attain customary law status.⁴⁰

France’s position is intriguing. It reflects a nuanced opposition to the exceptions, while simultaneously acknowledging a trend toward the inapplicability of immunity to crimes under draft Article 7, provided it is conditioned on the express indication that it constitutes *lex ferenda* and is not reflective of customary international law. However, national judiciaries, as the case against al-Assad demonstrated, are endorsing a different approach by exercising universal criminal jurisdiction against an acting head of state.

A similar attitude may be observed in the case of Germany, which, in its submissions, claimed that the non-applicability of functional immunity for the crimes prescribed in draft Article 7 is a norm of custom-

²⁹ See Richard J. Wilson, “Prosecuting Pinochet: International Crimes in Spanish Domestic Law”, in *Human Rights Quarterly*, 1999, vol. 21, no. 4.

³⁰ Mark Klamberg, “Universal Jurisdiction Under Threat of Hostage-Taking: Sweden’s Release of Iranian War Criminal Nouri”, Policy Brief Series No. 153 (2024), TOAEP, Brussels, 2024 (<https://www.toaep.org/pbs-pdf/153-klamberg/>).

³¹ Luise K. Müller, “Universal Jurisdiction, Pirates and Vigilantes”, in *Critical Review of International Social and Political Philosophy*, 2019, vol. 22, no. 4.

³² Appeal Court of Paris, “Decision de la chambre de l’instruction concernant la régularité du mandat d’arrêt décerné à l’encontre du président syrien Bachar al Assad [Decision of the Chamber of Instruction Regarding the Regularity of the Arrest Warrant Against the Syrian President Bachar al-Assad]”, Press Release, 26 June 2024.

³³ Immunity of State Officials from Foreign Criminal Jurisdiction: Texts and titles of draft articles 1, 3, 4 and 5 [6] as provisionally adopted by the Drafting Committee on 9 to 22 July 2024, UN Doc. A/CN.4/L.1001, 23 July 2024 (<https://www.legal-tools.org/doc/1wwzfl1d/>).

³⁴ Institut de Droit International, “Immunities from Jurisdiction and Execution of Heads of State and of Government in International Law”, 2001 (<https://www.legal-tools.org/doc/06jvv6ew/>).

³⁵ Immunity of State Officials: Information provided by the Netherlands, 2015 (<https://www.legal-tools.org/doc/21a97d/>). See also Zhong Yuxiang, “Criminal Immunity of State Officials for Core International Crimes Now and in the Future”, Policy Brief Series No. 20 (2014), TOAEP, Brussels, 2014 (<https://www.toaep.org/pbs-pdf/20-zhong/>).

³⁶ Sascha Rolf Lüder, “The Legal Nature of the International Criminal Court and the Emergence of Supranational Elements in International Criminal Justice”, in *International Review of Red Cross*, 2002, vol. 84, no. 845.

³⁷ For a critique to the draft Article 7 provision and the ILC, see Mathias Forteau, “Immunities and International Crimes before the ILC: Looking for Innovative Solutions”, in *AJIL Unbound*, 2018, p. 112.

³⁸ Adil Ahmad Haque, “Immunity for International Crimes: Where Do States Really Stand?”, *Opinio Juris*, 17 April 2018.

³⁹ Joana de Andrade Pacheco, “Where do States Stand on Official Immunity Under International Law?”, *Opinio Juris*, 19 April 2024.

⁴⁰ *Ibid.*

ary international law in status *nascendi*, despite Germany's statement that "the existence of exceptions to functional immunity *ratione materiae* when the most serious international crimes are being committed is a condition *sine qua non* for the application of international criminal law in national courts".⁴¹ In fact, there are several cases before German courts where functional immunity did not hinder criminal proceedings.⁴²

Despite different opinions⁴³ – at times confusing and lacking consistency⁴⁴ – it is difficult to determine where the majority lies. This is because 39 states that submitted written comments constitute only a quarter of the world states. Moreover, as can be seen from the list of states that engaged with the topic, and as Mathias Forteau notes,⁴⁵ the states that are usually active and submit observations are, for the most part, Western states, as well as developed and emerging economies. Small states, developing states, and, more generally, what is referred to as the 'Global South', do not engage with the work of the ILC for various reasons (for example, economic factors, lack of qualified lawyers), meaning their position on the matter remains unclear.

This discussion reveals that state practice regarding the immunity of heads of state from criminal prosecution is fragmented. The debates within the ILC regarding the immunity of state officials illustrate this. Some states emphasized that the draft Article should ensure a balance between the sovereign equality of states and the need for stability in international relations, as well as the interests of the international community in preventing and punishing the most serious crimes under international law.⁴⁶ Other members expressed concerns that exceptions to immunity might foster abuse – such as enabling politically motivated trials of state officials in foreign jurisdictions – and argued that, as a fundamental principle of international law, the courts of one state should not sit in judgment over the acts of another state.⁴⁷

There were also those who believed that the principle of immunity of state officials should not obstruct the protection of the fundamental interests of the international community, arguing that state sovereignty on the one hand, and human rights protection and the fight against impunity on the other, should be reconciled. Accordingly, "perpetrators of international crimes ought not to be allowed to hide behind the cloak of sovereignty to shield themselves from prosecution, as their acts caused severe instability in the countries and regions in which they were perpe-

trated, eventually affecting the international community as a whole".⁴⁸ In other words, "the rules on immunity should not be considered in isolation but in the light of other norms of the international legal system".⁴⁹

This fragmentation is not only evident at the declaratory level; it is also observed in practice. According to the Universal Jurisdiction Annual Review for 2024,⁵⁰ there has been an increase in cases of universal criminal jurisdiction, with the majority of prosecutions occurring in Western jurisdictions. However, the challenge becomes greater when universal criminal jurisdiction is exercised to prosecute an acting state official. If the topic of exceptions to the functional immunity of state officials provokes so many contradictory views, and there is no uniform state practice in this regard, one may reasonably conclude that there is no exception under international law to the immunity *ratione personae* of acting state officials.

4. Universal Criminal Justice Between Sovereignty and Interests of Humankind

Universal criminal justice is on the rise. Through various institutional and normative frameworks, it seeks to hold perpetrators of core international crimes accountable. While often in tension with state sovereignty – since states typically resist external interference in their internal affairs – states seem 'enchanted' by the prospect of administering universal justice. In doing so, they tend to 'relativize' international law principles, such as the immunity of state officials, in the interest of humankind. The underlying idea is that the immunity of state officials – including acting heads of state – should not hinder the protection of the international community's fundamental interests. This is also the message conveyed by the French Court of Appeal's decision. Time will tell whether such an approach will succeed. What is known, however, is that international law does not foresee exceptions to the principle of personal immunity, and there is no consensus on the limitations to functional immunity; state practice on the matter is increasingly fragmented.

Despite the normative challenges surrounding the immunity of state officials from prosecution before national judiciaries, we see increased use of universal criminal jurisdiction. This offers hope that, one day, at least some perpetrators will be held accountable for their international crimes, even if it takes decades. Because international criminal courts, for various substantive or procedural reasons, may be unable to prosecute perpetrators of international crimes, universal criminal jurisdiction could be seen as the ultimate means of seeking justice and preventing impunity.

For this promise to become a reality, it is crucial that states do not abuse universal jurisdiction as a tool in geopolitical rivalries. Rather, states should strive to maintain a 'healthy' balance between state sovereignty and the broader interests of the international community.

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⁴⁸ *Ibid.*, para. 109.

⁴⁹ *Ibid.*

⁵⁰ See *supra* note 27.

⁴¹ Permanent Mission of the Federal Republic of Germany to the United Nations, "Comments and Observations by the Federal Republic of Germany on the Draft Articles on 'Immunity of State officials from foreign criminal jurisdiction'", November 2023 (<https://www.legal-tools.org/doc/9m5bib/>).

⁴² See Isabel Walther, "Functional Immunity Exceptions for Crimes Under International Law-New Developments in German Legislation and Case Law Raising Questions Concerning the Identification of Customary International Law", *EJIL: Talk!*, 5 August 2024.

⁴³ Pacheco, 19 April 2024, see *supra* note 39.

⁴⁴ See Marko Milanović, "Two Case Studies of Clandestine Operations, Attribution and Functional Immunity for Ordinary Crimes", *EJIL: Talk!*, 16 August 2024.

⁴⁵ Mathias Forteau, "Guest Lecture CIL eAcademy", *YouTube*, 11 October 2023 (available on *YouTube*).

⁴⁶ Report of the International Law Commission on the Work of its Sixty-Ninth Session, Chapter VII Immunity of State Officials from Foreign Criminal Jurisdiction, UN Doc. A/C.6/72/SR.18, 14 November 2017, para. 107 (<https://www.legal-tools.org/doc/z0vrzv2/>).

⁴⁷ *Ibid.*, para. 108.



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