



AL - HAQ



EXPLAINER

The International Criminal Court, Immunities and International Crimes



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I. Introduction

The 21 November 2024 decision of Pre-Trial Chamber I of the International Criminal Court (ICC) to issue arrest warrants against Israeli Prime Minister, Benjamin Netanyahu and then Minister of Defence, Yoav Gallant,¹ offered renewed hope in the pursuit of justice for the Palestinian people. The decision of the Court to issue the arrest warrants, amidst Israel's relentless campaign of genocide against Palestinians, represented a positive signal that the progressive development of international law in the ongoing struggle against impunity would bear fruit. However certain State Parties to the Rome Statute, such as France, have indicated that they will not comply with the order for the arrest warrants, arguing that Prime Minister Netanyahu and former Minister of Defence Gallant have international law immunities from suit.²

The immunity of State officials, generally understood as referring to Heads of State and to Defence and Foreign Ministers, from prosecution for the

1 ICC, 'Situation in the State of Palestine: ICC Pre-Trial Chamber I rejects the State of Israel's challenges to jurisdiction and issues warrants of arrest for Benjamin Netanyahu and Yoav Gallant' (21 November 2024) <<https://www.icc-cpi.int/news/situation-state-palestine-icc-pre-trial-chamber-i-rejects-state-israels-challenges>>.

2 Rebecca Inger 'Mapping State Reactions to the ICC Arrest Warrants for Netanyahu and Gallant' <https://www.justsecurity.org/105064/arrest-warrants-state-reactions-icc/>



perpetration of international crimes is, unlike immunity for diplomatic officials, not established by any particular treaty but a product of customary international law.³ Such immunity represents a clear and intolerable obstacle to the prevention and deterrence of international crimes. Such immunities were rejected by the Allied Powers in the establishment of the Nuremberg Tribunal and again declared inapplicable in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. Official capacity as a ground for immunity from prosecution was similarly not included in the statutes mandated by the UN Security Council to establish the ad hoc international criminal tribunals for the Former Yugoslavia and for Rwanda, nor was it included in the Rome Statute establishing the International Criminal Court.⁴

At the same time, when it comes to inter-State disputes outside of the international criminal justice system, the nature and scope of State official immunity for perpetrators of international crimes has resulted in clear contradictions, visible for example in how the International Court of Justice considered that: ‘Immunity from criminal jurisdiction and individual criminal responsibility are quite separate concepts [...] Accordingly, the immunities enjoyed under international law by an incumbent or former Minister for Foreign Affairs do not represent a bar to criminal prosecution in certain circumstances’.⁵

Against such a backdrop, in 2007 the International Law Commission (ILC) decided to include in its programme of work the topic of ‘Immunity of State officials from foreign criminal jurisdiction’, an ongoing process which indicates, that despite a significant number of states desiring to retain the right of immunities, that there are a critical mass of states of the view that the progressive development of international law requires acknowledgment that personal immunity can no longer be regarded as applicable to the perpetrators of international crimes.

The existence of exceptions to functional immunity is widely recognised as a *conditio sine qua non* for the application of international criminal law in national courts and the fight against impunity generally. Nevertheless, States continue to selectively invoke the principle of immunities – with its applicability wholly

3 *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, I.C.J. Reports 2002, para 51.

4 Art. 7(2) ICTY Statute; Art. 6(2) ICTR Statute; Art. 27(1) ICC Statute.

5 *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, I.C.J. Reports 2002, paras. 60 and 61

dependent on the nationality of the State official and the respective geopolitical, economic interests States have in regards to the country in question.

This basic Explainer outlines the status of Head of State immunity under international law generally and the Rome Statute specifically. The Explainer examines how the law on immunities is often employed as a means of shielding perpetrators of international crimes from accountability. The Explainer begins with an outline of the relevant legal framework governing immunities, before discussing how this has been interpreted and upheld in practice. From here, an overview of the ongoing work of the ILC is provided, including States' divergent views on the draft articles and their scope of applicability. With the position of immunities in public international law established, the paper's focus will shift to the relevance of State official immunity before the ICC through an examination of both the Rome Statute and the Court's case law. Prior to concluding, the blatant double standards of certain States will be highlighted in order to showcase the true, undeniable political undertones to the regard for immunities when it comes to the prosecution of perpetrators of international crimes in the Situation in Palestine.



II.

The Status of Immunities in Public International Law

The concept of immunities, which restricts States capacity to bring legal proceedings against other States before domestic courts is drawn from the international law principle of sovereign equality between States. While the 1961 Vienna Convention on Diplomatic Relations (VCDR) and the 1963 Vienna Convention on Consular Relations (VCCR) legally enshrine diplomatic immunity, the immunity of other State organs derives from customary international law. Within customary international law, there are two forms of immunity – *ratione personae* (personal immunity) and *ratione materiae* (functional immunity) – both of which were intended to maintain a stable international order.

Ratione personae, also known as personal immunity, extends to acts performed by a State official in their private and official capacity while in office, with a view towards facilitating diplomatic relations. On the other hand, *ratione materiae*, often referred to as functional immunity, only extends to acts performed by a State official to fulfil the function of the State and derives from the principle of sovereign equality.⁶ However, unlike personal immunity, functional immunity

⁶ Darryl Robinson, Sergey Vasiliev, Elies van Sliedregt and Valerie Oosterveld, *An Introduction to International Criminal Law and Procedure* (5th edn, Cambridge 2024) 488.

continues to apply to official acts once the individual leaves office.

State official immunity, therefore, applies to either the *ratione materiae* or *ratione personae* (or both when applicable) immunities from a national court's jurisdiction, in the context of horizontal, inter-state relations.⁷ As will be discussed, the same immunities do not apply in the context of vertical relations between a State and an international court or tribunal. Moreover, various legal instruments and judicial decisions have carved out exceptions to immunity for serious human rights violations.

1. Legal Instruments Governing Immunities

International law establishes that, in the case of war crimes, crimes against humanity, genocide, and torture, no one may use his or her official status to claim immunity and avoid facing justice. The construction of principles of official immunity emerged in reaction to the shift from theoretical to actual existing international criminal law and the development of the principle of universal jurisdiction. As demonstrated in Claus Kreß's summary, 'the non-applicability of functional immunity in international criminal law was already customary international law when the renaissance of international criminal justice in the 1990s also led to increased national prosecution of crimes under international law'.⁸

Standing 'at the centre of the beginning of the history of international criminal law *stricto sensu*', was the statement of the Judgment of the International Military Tribunal at Nuremberg which rejected the claim of Nazi defendants at Nuremberg that they enjoyed immunity as former state officials:

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 facts cannot shelter themselves behind their official position in order to be freed from punishment in appropriate proceedings. Article 7 of the Charter expressly declares:

⁷ Matt Killingsworth, 'Head of State immunity, order, justice and the international criminal court: limits of international criminal justice in international society' (2024) *International politics* 1, 7.

⁸ Claus Kreß *Germany and International Criminal Law: Reflections in Light of Current Developments* (12 March 2024) <<https://www.ejiltalk.org/germany-and-international-criminal-law-reflections-in-light-of-current-developments/>>.

“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 the State if the State in authorising action moves outside its competence under international law.

The Convention on the Prevention and Punishment of the Crime of Genocide, expressly states that ‘[p]ersons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals’.⁹ Several states in written submissions to the International Court of Justice have recently emphasized how immunity cannot be permitted to apply to those responsible for the perpetration of genocide. For example, the Maldives has submitted ‘that punishment is required “whether [the persons] are constitutionally responsible rulers, public officials or private individuals.” States cannot create exceptions to criminal liability based on the perpetrators’ official capacity’.¹⁰ Similarly, Slovenia is of the view that ‘[t]he obligation to prosecute those responsible for the crime of genocide applies to all persons. This article must be interpreted in the light of developments in international law, in particular the provisions of other international agreements. Notably, the existence of immunities, including for heads of State, does not preclude prosecutions when conducted by either the State of nationality of the person or international jurisdictions.’¹¹ The joint declaration of intervention of Canada, Denmark, France, Germany, the Netherlands and the United Kingdom, observes that: ‘A judicial system which in effect maintains impunity, or which conducts sham trials meant only to shield the accused from justice, does not meet the Genocide Convention’s purpose of “liberat[ing] mankind” from the “odious

9 Article IV.

10 Declaration of Intervention of the Republic of Maldives, Intervention pursuant to Article 63 of the Statute of the International Court of Justice In the case of Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*The Gambia v. Myanmar*), 10 November 2023, para 35.

11 Declaration of Intervention of the Republic of Slovenia, Intervention pursuant to Article 63 of the Statute of the International Court of Justice In the case of Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*The Gambia v. Myanmar*), 22 November 2024, para 62.

scourge” of genocide.’¹²

All four of the 1949 Geneva Conventions dedicate an article to the need to provide effective penal sanctions for breaches thereof.¹³ Likewise, the 1984 Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment requires each State Party to take, without exception, effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.¹⁴

Considering that international crimes include the most serious human rights violations, for which exceptions to immunity have been expressly and implicitly provided, it is unsurprising that the statutes of the international criminal tribunals also rejected the notion that the official position of perpetrators could free them from criminal responsibility. The Statute of the Nuremberg Tribunal and the Charter of the International Military Tribunal for the Far East, the Tokyo Tribunal, both barred the defendant’s position as a basis for protection from prosecution.¹⁵ The Statutes of the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda, as well as the Statute of the Special Court for Sierra Leone,¹⁶ followed the same approach, stating that the “official position of any accused person, whether as Head of State or government or as a responsible government official, shall not relieve such person of criminal responsibility nor mitigate punishment.”¹⁷ Finally, the Rome Statute, the founding instrument of the ICC, unequivocally rejects the existence of immunities through Article 27, which provides that the Statute shall apply ‘equally to all persons without any distinction based on official capacity’.

12 Joint Declaration of Intervention of Canada, The Kingdom of Denmark, The French Republic, The Federal Republic of Germany, The Kingdom of The Netherlands, and the United Kingdom of Great Britain and Northern Ireland Pursuant to Article 63 of the Statute of the International Court of Justice in the case of Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar) 15 November 2023, para 79.

13 GCI Article 49, GCII Article 50, GCIII Article 129, and GCIV Article 146.

14 Article 2.

15 Articles 7 and 6, respectively.

16 Article 6(2).

17 Articles 7(2) and 6(2), respectively.



2. Jurisprudence

After carefully examining State practice and the rules concerning immunity contained in the legal instruments establishing the international criminal tribunals, the ICJ has confirmed that, in the context of horizontal inter-state relations, there is no exception to the principle of immunity from the criminal jurisdiction of national courts enjoyed by incumbent high-ranking State officials under customary international law.¹⁸

Still, immunities such as exist under international law have never represented an absolute bar to the possibility of criminal prosecution. In the *Arrest Warrant* case – centred on the principle of diplomatic immunity and Belgium’s international arrest warrant against the incumbent Minister for Foreign Affairs of the Democratic Republic of the Congo – the ICJ clarified that immunity from jurisdiction enjoyed by certain officials ‘does not mean that they enjoy impunity in respect of any crimes they might have committed, irrespective of their gravity.’¹⁹ It continued:

Immunity from criminal jurisdiction and individual criminal responsibility are quite separate concepts. While jurisdictional immunity is procedural in nature, criminal responsibility is a question of substantive law. Jurisdictional immunity may well bar prosecution for a certain period or for certain offences; it cannot exonerate the person to whom it applies from all criminal responsibility.²⁰

The “certain circumstances” referred to by the Chamber were, in a nutshell: if the official is tried by their domestic courts; if the State which the official represents, or has represented, waives immunity; the official has left office, resulting in the cessation of personal immunity in respect of acts committed prior or subsequent to their period in office, as well as in relation to acts committed during that period of office in a private capacity, which may consequently be tried by a national court of another State.²¹ Lastly, and crucially for the present analysis, the ICJ noted, as was cited in the *Mongolia* decision of the ICC, that:

18 *Arrest Warrant* para. 58.

19 *Arrest Warrant*, para. 60.

20 *Arrest Warrant*, para. 60.

21 *Arrest Warrant*, para 61.

[a]n incumbent or former Minister for Foreign Affairs may be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction. Examples include the International Criminal Tribunal for the former Yugoslavia, and the International Criminal Tribunal for Rwanda, established pursuant to Security Council resolutions under Chapter VI1 of the United Nations Charter, and the future International Criminal Court created by the 1998 Rome Convention. The latter's Statute expressly provides, in Article 27, paragraph 2, that '[i]mmunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person'.²²

Hence, alongside the ICJ's judgment in the *Arrest Warrant* case, international criminal law jurisprudence has shown that no State official may benefit from immunity for international crimes – with the irrelevance of official capacity being upheld in the Nuremberg trials and in the case law of both the ad hoc tribunals of the former Yugoslavia and Rwanda and the ICC.

22 *Arrest Warrant*, para 61.

3. The Ongoing Work of the International Law Commission

In 2006, during its 58th session, the International Law Commission (ILC) identified the topic ‘Immunity of State officials from foreign criminal jurisdiction’ for inclusion in its long-term programme of work.²³ The work of the ILC has since been proceeding in accordance with the resolutions adopted by the UN General Assembly. In 2004, at its 75th session, the Commission had before it the first report of Special Rapporteur Claudio Grossman Guiloff, as well as comments and observations received from Governments. The first report addressed the comments and observations of Governments on the draft articles on immunity of State officials from foreign criminal jurisdiction, together with proposals for consideration at second reading.²⁴ Upon consideration of the report of the Drafting Committee,²⁵ the Commission took note of draft articles 1, 3, 4 and 5.²⁶ The Commission also welcomed further comments and observations from Governments, by 15 November 2024, concerning draft articles 7 to 18 and the draft annex of the draft articles on immunity of State officials from foreign criminal jurisdiction, as adopted on first reading at its 73rd session in 2022, and the commentaries thereto.

3.1 Scope of the Draft Articles

Draft article 1 refers to the scope of the project, namely that it applies only to “foreign criminal jurisdiction” – as stated in paragraph 1. As expressed in the ILC’s commentary to this draft article:

Paragraph 1 covers the three elements defining the purpose of the draft articles, namely: (a) who are the persons enjoying immunity? (State officials); (b) what type of jurisdiction is affected by immunity? (criminal

23 ILC, ‘Summaries of the Work of the International Law Commission - Immunity of State officials from foreign criminal jurisdiction’ (Last updated: 8 October 2024) <https://legal.un.org/ilc/summaries/4_2.shtml>.

24 See UN General Assembly, *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://docs.un.org/en/A/CN.4/L.1001>>. ILC, *Report of the International Law Commission*, UN Doc. A/79/10 (8 August 2024), Chapter VII.

25 See UN General Assembly, *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://docs.un.org/en/A/CN.4/L.1001>>.

26 See ILC, *Report of the International Law Commission*, UN Doc. A/79/10 (8 August 2024), Chapter VII.

jurisdiction); and (c) in what domain does such criminal jurisdiction operate? (the criminal jurisdiction of another State).²⁷

During the discussion of draft article 1, a range of views were raised on the need for clarification of certain terms and the scope of the draft articles generally.²⁸ The Drafting Committee did consider rewording the paragraph to include “from the exercise” of foreign criminal jurisdiction, as this was included elsewhere in the draft articles. Considering States were also generally satisfied with the wording,²⁹ no changes were adopted.

Regarding paragraph 2, the Special Rapporteur noted the general support for retaining the wording of the first reading text,³⁰ which stated that the draft articles are ‘without prejudice to the immunity from criminal jurisdiction enjoyed under special rules of international law, in particular by persons connected with diplomatic missions, consular posts, special missions, international organizations and military forces of a State’. This provision signals that relevant rules of international law related to immunity will not be affected by the draft articles. While the Drafting Committee agreed with the overall purpose of the provision, it did redraft the provision slightly to enhance the clarity of its wording – namely, by replacing “military forces” with “armed forces”:³¹

The present draft articles are without prejudice to special rules of international law on immunity from criminal jurisdiction enjoyed in particular by persons connected with diplomatic missions, consular posts, special missions, international organizations and armed forces of a State.³²

27 ILC, *Report of the International Law Commission: Seventy-third session (18 April–3 June and 4 July–5 August 2022)*, UN Doc. A/77/10, Chapter VI <<https://documents.un.org/doc/undoc/gen/g22/448/48/pdf/g2244848.pdf>> 199.

28 ILC, *Report of the International Law Commission*, UN Doc. A/79/10 (8 August 2024), Chapter VII, paras. 168–78.

29 UN General Assembly, *First report on immunity of State officials from foreign criminal jurisdiction*, by Claudio Grossman Guiloff, *Special Rapporteur*, UN Doc. A/CN.4/775 (3 May 2024) <<https://documents.un.org/doc/undoc/gen/n24/084/34/pdf/n2408434.pdf>> paras. 43–46.

30 ILC, *Report of the International Law Commission*, UN Doc. A/79/10 (8 August 2024), Chapter VII, para. 171.

31 ILC, *Report of the International Law Commission*, UN Doc. A/79/10 (8 August 2024), Chapter VII, para. 171; ILC, *Immunity of State officials from foreign criminal jurisdiction: Statement of the Chairperson of the Drafting Committee*, Ms. Phoebe Okowa (30 July 2024) <https://legal.un.org/ilc/documentation/english/statements/2024_dc_chair_statement_iso.pdf> 3–4.

32 UN General Assembly, *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://docs.un.org/en/A/CN.4/L.1001>>.

The final paragraph of draft article 1, which is the most relevant to the present discussion, concerns the relationship between the draft articles and the provisions on immunity in international criminal courts and tribunals, which are governed by separate and specific legal regimes and are beyond the scope of the draft articles (which address the immunity of State officials from the criminal jurisdiction of another State).³³ However, that is not to say that the draft articles have no bearing on the activity of international criminal courts and tribunals, ‘including the effect that existing international rules imposing an obligation on States to cooperate with such courts and tribunals may have on the present draft articles’.³⁴ Of note, during the ILC’s debates in its 73rd session, attention was repeatedly drawn to the ‘need to preserve the achievements of recent decades in the field of international criminal law, especially the establishment of international criminal courts and tribunals, in particular the [ICC] as a permanent international criminal jurisdiction . . . so that their value and significance are not diminished as a result of the elaboration of the present draft articles.’³⁵ Moreover, without this provision, article 30 of the Vienna Convention on the Law of Treaties enshrining the principle of *lex posterior derogate legi priori* – that a later treaty takes precedence over an earlier one – would apply.³⁶

As explained in the ILC’s respective commentary, the purpose of the provision is to preserve “the rights and obligations of States” under international agreements establishing international criminal courts and tribunals “as between the parties to those agreements” – thereby highlighting the view that conventional legal regimes applicable to international criminal tribunals, as a matter of treaty law, apply only as between the parties to the agreement establishing a particular international criminal court or tribunal.³⁷

33 ILC, *Report of the International Law Commission: Seventy-third session (18 April–3 June and 4 July–5 August 2022)*, UN Doc. A/77/10, Chapter VI <<https://documents.un.org/doc/undoc/gen/g22/448/48/pdf/g2244848.pdf>> 202.

34 ILC, *Report of the International Law Commission: Seventy-third session (18 April–3 June and 4 July–5 August 2022)*, UN Doc. A/77/10, Chapter VI <<https://documents.un.org/doc/undoc/gen/g22/448/48/pdf/g2244848.pdf>> 202.

35 ILC, *Report of the International Law Commission: Seventy-third session (18 April–3 June and 4 July–5 August 2022)*, UN Doc. A/77/10, Chapter VI <<https://documents.un.org/doc/undoc/gen/g22/448/48/pdf/g2244848.pdf>> 202.

36 ILC, *Report of the International Law Commission*, UN Doc. A/79/10 (8 August 2024), Chapter VII, para. 174.

37 ILC, *Report of the International Law Commission: Seventy-third session (18 April–3 June and 4 July–5 August 2022)*, UN Doc. A/77/10, Chapter VI <<https://documents.un.org/doc/undoc/gen/g22/448/48/pdf/g2244848.pdf>> 203.

State reactions to paragraph 3 have been varied, leading the Drafting Committee to engage in extensive debate on the text of the provision, which was ultimately adopted with changes to the first reading text. Austria, Ireland, Norway (on behalf of the Nordic countries), Switzerland, the United Kingdom, and the United States were all in favour of paragraph 3, and made some suggestions towards enhancing the clarity, and consequently the legal certainty, of the provision.

Austria requested further clarification as to whether the mention of international courts and tribunals in the paragraph also encompassed hybrid or internationalized criminal courts and tribunals,³⁸ and Ireland raised the idea of including ‘international agreements “relating to the operation of” international criminal courts and tribunals as well as to “other instruments establishing and relating to the operation of international tribunals” (such as Security Council resolutions).³⁹ The United Kingdom, while stating it recognises the importance of the international community preserving the progress it has made over the years in tackling impunity and ensuring the accountability of those accused of international crimes, encouraged, though without further clarification, the Commission to look again at the wording of the paragraph to see whether it could be further clarified or improved.⁴⁰

Norway (on behalf of Denmark, Finland, Iceland and Sweden) and Brazil agreed with the distinction drawn between the autonomy of the separate legal regimes, with international criminal tribunals being a matter of treaty law that is applicable only to the contracting parties and is distinct from inter-state relations.⁴¹ This view was also shared by the United States.⁴² Switzerland took a more expansive approach, stating that as ‘an international court acting on behalf of the international community, the [ICC’s] jurisdiction may also extend to the officials of States that are not parties to the Rome Statute, regardless of any immunities they might enjoy’ and paragraph 3 should be amended to ensure that the draft articles

38 UN General Assembly, *Immunity of State officials from foreign criminal jurisdiction: Comments and observations received from Governments*, UN Doc. A/CN.4/771 (7 May 2024) <<https://docs.un.org/en/A/CN.4/771>> 22.

39 UN General Assembly, *Immunity of State officials from foreign criminal jurisdiction: Comments and observations received from Governments*, UN Doc. A/CN.4/771 (7 May 2024) <<https://docs.un.org/en/A/CN.4/771>> 23.

40 The United Kingdom did not provide any further explanation or suggestions on how this could be achieved. UN General Assembly, *Immunity of State officials from foreign criminal jurisdiction: Comments and observations received from Governments*, UN Doc. A/CN.4/771 (7 May 2024) <<https://docs.un.org/en/A/CN.4/771>> 28-29.

41 UN General Assembly, *Immunity of State officials from foreign criminal jurisdiction: Comments and observations received from Governments*, UN Doc. A/CN.4/771 (7 May 2024) <<https://docs.un.org/en/A/CN.4/771>> 22, 24.

42 *Ibid.*, para. 29.

do not inadvertently provide a basis for calling into question the jurisdiction and functioning of the International Criminal Court, which lies at the very heart of the achievements made in the field of international criminal law, and consequently suggested deleting the phrase “as between the parties to those agreements”.⁴³

The Netherlands suggested paragraph 3 be deleted entirely, on the basis that the rights and obligations of States concerning international criminal tribunals, including whether or not immunity should be granted under a statute or founding treaty of an international criminal tribunal, is a matter for the contracting parties and not to be governed by the draft articles which apply to national criminal jurisdiction.⁴⁴ Russia also opposed draft article 1, paragraph 3, but for a different reason. It felt that ‘it raises more questions than it answers. [...] Such an approach would in fact mean giving the constituent instruments of international tribunals greater legal force than the rules set out in the draft articles’ and it would be necessary to make clear that ‘the obligations of a State in the context of the constituent treaty of an international justice body do not exempt that State from obligations to respect the immunity of officials of States that are not parties to that treaty’.⁴⁵

Ultimately, the Drafting Committee felt that clarifying the relationship between the draft articles and the rules establishing international criminal court and tribunals was necessary and therefore retained draft article 1, paragraph 3. It felt it is particularly important in cases where an international criminal court or tribunal requested the cooperation of a domestic criminal court or tribunal to secure the arrest and surrender of an individual. Hence, the main difference between the provision adopted by the Committee and the first reading text is the inclusion of the phrase “or relating to the operation of”.⁴⁶ This addition is intended to broaden the scope of the provision to better accommodate the complexity of international criminal law, including the obligations that stem from the UN Charter and binding Security Council resolutions.⁴⁷

43 *Ibid.*, paras. 27–28.

44 *Ibid.*, para. 24.

45 *Ibid.*, para. 27.

46 UN General Assembly, *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://docs.un.org/en/A/CN.4/L.1001>>.

47 ILC, *Immunity of State officials from foreign criminal jurisdiction: Statement of the Chairperson of the Drafting Committee, Ms. Phoebe Okowa* (30 July 2024) <https://legalun.org/ilc/documentation/english/statements/2024_dc_chair_statement_iso.pdf> 5.

3.2 Exclusion of International Crimes

States have been particularly active in negotiations concerning the exclusion of international crimes from the scope of the State official immunity. At its 3378th meeting, on 20 July 2017, the Commission provisionally adopted draft article 7 by a recorded vote and at the 3387th to 3389th meetings on 3 and 4 August 2017, the commentaries thereto. Draft article 7 lists crimes under international law in respect of which immunity from foreign criminal jurisdiction *ratione materiae* shall not apply. As noted by the ILC in its report, several members observed that the content of draft article 7 would be central to the success of the draft articles as a whole, which was also acknowledged by the Special Rapporteur who felt that draft article 7 would be a core focus of the second reading.⁴⁸

Draft article 7 contains two paragraphs: paragraph 1 lists the crimes which, if committed, would prevent the application of such immunity from criminal jurisdiction to a foreign official, even if those crimes had been committed by the official acting in an official capacity during his or her term of office. Therefore, draft article 7 complements the normative elements of immunity from foreign criminal jurisdiction *ratione materiae* as defined in draft articles 5 and 6.⁴⁹ The crimes for which functional immunity will not apply include genocide, war crimes,⁵⁰ crimes against humanity, apartheid, torture and enforced disappearances. Paragraph 2 identifies the definition of those crimes, with the relevant legal instruments attached in the Annex.

The ILC included draft article 7 for a number of reasons. First, it considers that there has been a discernible trend – showcased in the judicial decisions of national courts and domestic legislation⁵¹ –towards limiting the applicability of immunity from jurisdiction *ratione materiae* in respect of certain international crimes, which has also been reflected to some extent in proceedings before international

48 ILC, *Report of the International Law Commission*, UN Doc. A/79/10 (8 August 2024), Chapter VII, para. 162.

49 ILC, *Report of the International Law Commission: Seventy-third session (18 April–3 June and 4 July–5 August 2022)*, UN Doc. A/77/10, Chapter VI <<https://documents.un.org/doc/undoc/gen/g22/448/48/pdf/g2244848.pdf>> 231.

50 War crimes, for the purposes of the draft article are designated in the annex as those war crimes provided for at article 8(2) of the Rome Statute of the ICC.

51 ILC, *Report of the International Law Commission: Seventy-third session (18 April–3 June and 4 July–5 August 2022)*, UN Doc. A/77/10, Chapter VI <<https://documents.un.org/doc/undoc/gen/g22/448/48/pdf/g2244848.pdf>> fn 1012-1013.

tribunals.⁵² Second, the draft articles are to apply in an international legal order ‘whose unity and systemic nature cannot be ignored’.⁵³ In this context:

[T]he consideration of crimes to which immunity from foreign criminal jurisdiction does not apply must be careful and balanced, taking into account the need to preserve respect for the principle of the sovereign equality of States, to ensure the implementation of the principles of accountability and individual criminal responsibility and to end impunity for the most serious international crimes, which is one of the primary objectives of the international community.⁵⁴

Review of the form and function of any doctrine of immunity in international law must centre on the imperative that the intangible nature of sovereign equality not be permitted to trump every effort at establishing the criminal responsibility of State officials that have perpetrated the most serious crimes under international law.⁵⁵ Such a view is shared by the International Committee of the Red Cross (ICRC) which, at the UN General Assembly in October 2024, emphasised the importance of investigating and prosecuting serious violations of international humanitarian law (IHL). Advocating for a strengthening of the international legal framework, the ICRC drew attention to the crucial role of accountability, which not only promotes respect for, and trust in, IHL, but is also an important deterrent and tool against impunity, which provides civilians with justice and strengthens respect for international humanitarian law.⁵⁶

52 ILC, *Report of the International Law Commission: Seventy-third session (18 April–3 June and 4 July–5 August 2022)*, UN Doc. A/77/10, Chapter VI <<https://documents.un.org/doc/undoc/gen/g22/448/48/pdf/g2244848.pdf>> 232–234.

53 ILC, *Report of the International Law Commission: Seventy-third session (18 April–3 June and 4 July–5 August 2022)*, UN Doc. A/77/10, Chapter VI <<https://documents.un.org/doc/undoc/gen/g22/448/48/pdf/g2244848.pdf>> 234.

54 ILC, *Report of the International Law Commission: Seventy-third session (18 April–3 June and 4 July–5 August 2022)*, UN Doc. A/77/10, Chapter VI <<https://documents.un.org/doc/undoc/gen/g22/448/48/pdf/g2244848.pdf>> 234.

55 ILC, *Report of the International Law Commission: Seventy-third session (18 April–3 June and 4 July–5 August 2022)*, UN Doc. A/77/10, Chapter VI <<https://documents.un.org/doc/undoc/gen/g22/448/48/pdf/g2244848.pdf>> 234.

56 ICRC, ‘Investigating and prosecuting serious violations: an important tool against impunity’ (14 October 2024) <<https://www.icrc.org/en/statement/79-UN-crimes-against-humanity-investigating-and-prosecuting-serious-violations-tool-against-impunity>>.

Despite a significant number of States desiring to retain the right of impunity,⁵⁷ there are a critical mass of States of the view that the progressive development of international law requires acknowledgment that official immunity can no longer be regarded as applicable to the perpetrators of international crimes, including for perpetrators of grave breaches of the Fourth Geneva Convention. Further, a number of prominent States, while *prima facie* sceptics of the draft article, are experiencing significant developments where differing state organs are acting in a manner such as to dispute the application of immunities for international crimes.

In its comments on draft article 7, Germany stated that '[w]here the Commission wishes to go beyond the scope of what already has been recognized by States as applicable international law, this must be made explicit by designating the paragraph in question as *lex ferenda*.'⁵⁸ Yet, in a ruling on 21 February 2024 the German Supreme Court emphasised that State immunity was not an obstacle to prosecuting foreign State officials even if they acted at the service of a State, because the position under customary international law is that foreign official immunity does not apply to international crimes.⁵⁹ More recently, the German Parliament adopted a law on the further development of international criminal law, article 4 of which includes an amendment to Germany's Courts Constitution Act (*Gerichtsverfassungsgesetz*), to the effect that functional immunity of foreign State officials will not prevent their prosecution for core international crimes that are included in Germany's Code of International Criminal Law (*Völkerstrafgesetzbuch*).⁶⁰

France also regarded draft article 7 as an undesirable "progressive development" of the law.⁶¹ However that view directly contradicts France's own practice, with the French judiciary confirming the arrest warrant against the then sitting head of State of Syria, Bashar al-Assad in June 2024.⁶² This development has been labelled

57 ILC, *Report of the International Law Commission: Seventy-third session (18 April–3 June and 4 July–5 August 2022)*, UN Doc. A/77/10, Chapter VI <<https://documents.un.org/doc/undoc/gen/g22/448/48/pdf/g2244848.pdf?235-236>>.

58 UN General Assembly, *Immunity of State officials from foreign criminal jurisdiction: Comments and observations received from Governments*, UN Doc. A/CN.4/771 (7 May 2024) <<https://docs.un.org/en/A/CN.4/771>> 54.

59 German Supreme Court, AK 4/24, Decision of 21 February 2024, para. 54.

60 Bundesgesetzblatt Nr.255, Gesetz zur Fortentwicklung des Völkerstrafrecht (30 July 2024).

61 UN General Assembly, *Immunity of State officials from foreign criminal jurisdiction: Comments and observations received from Governments*, UN Doc. A/CN.4/771 (7 May 2024) <<https://docs.un.org/en/A/CN.4/771>> 57.

62 See BBC, 'French court confirms Bashar al-Assad arrest warrant over Syria chemical attack' (26 June 2024) <<https://www.bbc.co.uk/news/articles/cn0090vrwgwo>>.



as the ‘first time a national court has recognised that a sitting Head of State does not have total personal immunity’. At the time the arrest warrant was issued, not only immunity *ratione materiae* but also immunity *ratione personae* would have to yield.⁶³ In the face of such inconsistency, it is vital that the struggle for accountability not yield to the efforts of states which seek to block progressive legal developments at the national level.

Finally, States in favour of blanket immunity, including Iran, Russia, and Singapore blatantly ignore the *erga omnes* obligations of States to prevent and punish the crime of genocide and respect and ensure respect for the Geneva Conventions,⁶⁴ as well as the principle of *aut dedere aut judicare* which imposes a duty to prosecute or extradite perpetrators of international crimes.

63 See Alexander Orakhelashvili, ‘Is the ILC about to endorse the absolute immunity of foreign State officials from criminal jurisdiction?’ (9 October 2024, Birmingham Law School Research and Scholarship Blog) <<https://blog.bham.ac.uk/lawresearch/2024/10/is-the-ilc-about-to-endorse-the-absolute-immunity-of-foreign-state-officials-from-criminal-jurisdiction/>>.

64 See Convention on the Prevention and Punishment of the Crime of Genocide, article 1 & Geneva Conventions of 1949, common article 1.



III.

Immunities and the International Criminal Court

As previously outlined, there are different principles of immunities which apply to State officials when before national or international courts. As noted by immunities expert Leila Sadat, '[n]o international court has ever found that a Head of State or high-ranking individual has immunity before it'.⁶⁵ The ICC is no exception, with the *obiter dicta* of the ICJ even considering the ICC to be the archetypal example of a court of an international nature.⁶⁶ That inapplicability of immunities at the ICC is well established. It has been made abundantly clear in both the Court's founding statute and subsequent case law. The Preamble of the Rome Statute explicitly affirms the Court's determination to put an end to impunity for the perpetrators of international crimes,⁶⁷ and 'that the most serious crimes of concern to the

65 Sondos Asem, 'Why experts say Netanyahu has no immunity before ICC as France claims' (Middle East Eye, 27 November 2024) <<https://www.middleeasteye.net/news/experts-say-netanyahu-has-no-immunity-icc-france-claims>>.

66 Alexandre Skander Galand, 'Looking for Middle Ground on the Immunity of Al-Bashir? Take the Third 'Security Council Route' (EJIL:Talk!, 23 October 2018) <<https://www.ejiltalk.org/looking-for-middle-ground-on-the-immunity-of-al-bashir-take-the-third-security-council-route/>>; Alexandre Skander Galand, 'Judicial Pronouncements in International Law: The Arrest Warrant Obiter Dicta' in L. Vicente and H.-W. Micklitz (eds), *Interdisciplinary Research: Are We Asking the Right Questions in Legal Research?*, EUI Department of Law Research Paper No. 2015/04.

67 Preamble, para. 5.

international community as a whole must not go unpunished'.⁶⁸ Article 27 of the Rome Statute, on the irrelevance of official capacity, reads:

1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.
2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.

Heads of State are therefore not immune before the ICC, even if they belong to a non-State Party. On a *prima facie* reading of the Rome Statute, however, there is an apparent tension between article 27 and article 98. Addressing the position of State officials vis-à-vis other States, article 98 provides that the Court may not proceed with a request for surrender or assistance 'which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State', unless it can first obtain the cooperation of that third State for the waiver of the immunity. Case law has since resolved the perceived inconsistency between these provisions, thereby eliminating any residual doubt surrounding the position of State officials, from ICC members or third States, and their potential to invoke immunity against prosecution by the Court.

⁶⁸ Preamble, para. 4.

1. The Jordan Referral

The notion that a Head of State or high-ranking official enjoyed immunity from prosecution for international crimes was first raised at the ICC by Jordan, in circumstances where it was held by a Pre-Trial Chamber to have failed to comply with its obligations under the Rome Statute by not arresting the then President of Sudan, Omar Al-Bashir, and surrendering him to the Court while he was on Jordanian territory for the purpose of attending the League of Arab States' Summit on 29 March 2017. The Situation in Darfur had been referred to the Court by UN Security Council Resolution 1593, which urged all States concerned and regional and international organisations to cooperate fully.

Since the issuance of the arrest warrant, Al-Bashir travelled abroad to a number of States Parties including Malawi, Chad, South Africa and Jordan – all of which had been requested to arrest and surrender Al-Bashir in their territories but refrained from doing so by reference to article 98(1) and their alleged customary international law obligations. Said refusal led to non-compliance proceedings, as each State had failed to uphold their obligations under article 86 of the Rome Statute which creates a “general obligation to cooperate” with the Court’s investigation and prosecution of crimes. As per article 89, this obligation extends to a duty to comply with a request for the arrest and surrender of a person found on the territory of a State Party.

On the basis of article 98(1), Jordan submitted on appeal arguing that Al-Bashir, in his capacity as Head of State of Sudan, enjoyed immunity before the ICC and that a waiver of that immunity was required from Sudan before presenting a request to Jordan to arrest and surrender Al-Bashir. The Appeals Chamber rejected such contention, affirming that:

[B]y ratifying or acceding to the Statute, States Parties have consented to the inapplicability of Head of State immunity for the purpose of proceedings before the Court. As a result, *both in the State Parties’ vertical relationship with the Court and in the horizontal relationship between States Parties there is no Head of State immunity if the Court is asking for the arrest and surrender of a person.*⁶⁹

69 Judgment in the Jordan Referral re Al-Bashir Appeal, ICC-02/05-01/09-397 (06 May 2019) Appeals Chamber ('Al-Bashir'), para 132 (emphasis added).

This is due to the fact that the requested State is not proceeding to arrest a Head of State or high-ranking official for the purpose of prosecuting them before their national courts. Rather, it is upholding its obligations under the Rome Statute and cooperating with the Court in its exercise of proper jurisdiction. The Appeals Chamber also clarified that Article 98(1) ‘does not itself stipulate, recognise or preserve any immunities’, but rather that it acts as a procedural rule that determines how the Court is to proceed where any immunity exists such that it could stand in the way of a request for cooperation, hence no waiver is required as there is no immunity to be waived.⁷⁰ In effect, this means that customary international law does not award immunity to Heads of State before international courts and does not bar an international court from exercising its jurisdiction over persons who would otherwise enjoy such immunity. The Appeals Chamber found that Article 27(2) of the ICC Statute reflected customary international law in this respect.⁷¹

Finally, it is worth noting that in the course of ruling upon the various non-compliance proceedings, the Pre-Trial Chamber’s findings ranged from interpreting Sudan as having implicitly waived immunity for Al-Bashir by virtue of paragraph 2 of UN Security Council Resolution 1593, which required it to “cooperate”, to explaining that Article 98(1) does not apply in the case of a referral by the UN Security Council which takes precedence, and to viewing immunities as entirely inapplicable in relation to international court proceedings.⁷²

2. The Mongolia Decision

On 24 October 2024, less than a month prior to the issuance of the arrest warrants in the Situation in the State of Palestine, the ICC’s Pre-Trial Chamber II found that, by failing to arrest non-member State Russia’s president Vladimir Putin, subject to an ICC arrest warrant in the Situation in Ukraine, while he was on its territory and surrender him to the Court, Mongolia had failed to comply with the Court’s request to cooperate in this regard contrary to the provisions of the Rome Statute, and thereby prevented the Court from exercising its functions and powers within the meaning of article 87(7) of the Statute. The Chamber,

⁷⁰ Al-Bashir, para 130.

⁷¹ Al-Bashir, paras 103 and 113.

⁷² See Alexandre Skander Galand, ‘Looking for Middle Ground on the Immunity of Al-Bashir? Take the Third ‘Security Council Route’ (EJIL:Talk!, 23 October 2018) <<https://www.ejiltalk.org/looking-for-middle-ground-on-the-immunity-of-al-bashir-take-the-third-security-council-route/>>.

due to the seriousness of this failure, held it necessary to refer the matter to the ICC's Assembly of States Parties.

In its submissions to the Pre-Trial Chamber, Mongolia claimed that as the Head of State of Russia, Putin, under international law, 'enjoys absolute immunity from criminal jurisdiction and inviolability' and asserted 'that this immunity extends to proceedings before international courts, including the ICC, unless the Russian Federation explicitly waives the immunity of its Head of State'. Mongolia further submitted that 'the Rome Statute is an international multilateral treaty and, under international law, it does not prevail over or supersede other obligations stemming from customary international law'.⁷³

Dismissing the proposition that the issue under consideration is 'whether there exists immunity for Heads of State under customary international law vis-à-vis an international court, nor whether non-States Parties are bound by the provisions of the Statute' the Chamber stated that the matter at hand did not concern the Court's imposition of Rome Statute obligations on a non-State Party, but stated that the Court was 'seeking the cooperation of States Parties in cases against individuals who allegedly committed crimes under article 5 of the Statute on the territory of a State where the Court has jurisdiction'.⁷⁴ The Chamber proceeded to affirm that the question that the Chamber had to answer was:

[W]hether States Parties, including Mongolia, and States that have accepted the jurisdiction of the Court under article 12(3) of the Statute alike, have an obligation to execute an arrest warrant regarding the Head of a non-State Party in compliance with article 27 of the Statute.⁷⁵

Russia, like Israel, is not a State Party to the ICC. In this decision, the Court affirmed its previous finding of the Appeals Chamber in the *Jordan* referral. The Chamber first reviewed the overarching interpretation of articles 27 and 98 of the Statute, having regard to Mongolia's position that article 98 was applicable, and that a request for provisional arrest should not have been issued without first obtaining from Russia a waiver of Putin's immunity.

⁷³ PTC Mongolia November para 18.

⁷⁴ PTC Mongolia November para 19.

⁷⁵ PTC Mongolia November para 20.



Emphasising that article 27 ‘lays down the fundamental principle of irrelevance of official capacity, and represents a primary obligation within the statutory framework’, the Chamber recalled that ‘[b]y mandating accountability without exception, article 27 strengthens the integrity of the international legal framework and reinforces the commitment of States Parties to combat impunity for the most serious crimes of concern to the international community.’⁷⁶ The Chamber proceeded to confirm that article 27 removes ‘any and all international law immunities of officials, including Heads of State, and binds to that effect States Parties, as well as States that have accepted the Court’s jurisdiction, not to recognise any kind of immunity or apply special procedural rules that they may attach to any persons.’⁷⁷ This holds true whether the individuals are nationals of States Parties or non-States Parties, as nationality is in fact irrelevant as the Rome Statute does not make any distinction in this regard. All States that have accepted the Court’s jurisdiction therefore have an ‘obligation to arrest and surrender any person for whom the Court has issued a warrant of arrest, irrespective of their official capacity and nationality’.⁷⁸

The Chamber supported its finding with reference to the ICJ’s judgment in the *Arrest Warrant* case, citing the ICC as an international criminal court before which ‘an incumbent or former Minister for Foreign Affairs may be subject to criminal proceedings’.⁷⁹ Distinguishing the authority and legal function of the ICC from that of individual States, the Court held that since the ICC ‘is inherently independent of States, strictly impartial and acts in the general interests of the international community’ and the crimes falling within the Court’s jurisdiction are ‘of concern to the international community as a whole’ on the basis that they ‘threaten the peace, security and well-being of the world’,⁸⁰ immunities which may apply in a horizontal context in relations between States, ‘they do not protect individuals, including Heads of State, from prosecution by international criminal courts.’⁸¹ Based on the vertical nature of the obligations towards the Court, which supersedes traditional inter-state immunity principles such that States Parties ‘must act in accordance with their obligations under the Statute,

⁷⁶ PTC Mongolia November para 26.

⁷⁷ PTC Mongolia November para 27.

⁷⁸ PTC Mongolia November para 27.

⁷⁹ *Arrest Warrant*, para 61.

⁸⁰ PTC Mongolia November para 31.

⁸¹ PTC Mongolia November para 30.

even if it conflicts with horizontal relations with non-States Parties’,⁸² the Court clarified that article 98’s function is that of a procedural provision which cannot be read as supplementing, modifying or providing any exceptions to article 27(2). As such, the Chamber explained that the wording and the context of article 98(1), including the manner by which it refers not to official immunity ‘but that of the State *per se*’ suggests that it refers ‘only to acts of government activities which are typically conducted abroad and are protected by the safeguards on diplomatic immunity for certain officials and buildings.’⁸³

Thus, the Court concluded that while personal immunities attach to Heads of State in their bilateral, horizontal, relationships, such immunity:

[D]oes not operate in the vertical relation between the Court and States Parties. The vertical nature of the obligations towards the Court supersedes traditional inter-state immunity principles, meaning that States Parties must act in accordance with their obligations under the Statute, even if it conflicts with horizontal relations with non-States Parties.⁸⁴

While this decision offered further confirmation of the ICC’s view on immunities in *Al-Bashir*, it also served to inform States Parties that a UN Security Council referral is not necessary for the arrest and surrender of a Head of State of a non-State Party to the Court.

82 PTC Mongolia November para 33.

83 PTC Mongolia November para 34.

84 PTC Mongolia November para 33.



3. A Study on Double Standards: The Situation in Palestine

3.1 The French Pivot

The reaction to the issuance of arrest warrants against Israeli officials was swift, with several States, including States party to the Rome Statute, referencing the doctrine of immunities as a cause for potentially not enforcing the arrest warrants despite the Court's ruling in *Mongolia* expressly rejecting their applicability not even a month prior. Notable in this regard was France. On 27 November 2024, a statement from France's Ministry of European and Foreign Affairs declared that Netanyahu and Gallant benefit from 'the immunities of States not party to the ICC', indicating that 'should the ICC request of us their arrest and surrender' such immunities would have to be 'taken into account'.⁸⁵ France's decision to announce its intention not to abide by its obligations under the Rome Statute was explained by reference to obligations under international law with regards the law of State immunity.

Considering the Court has, on various occasions, unequivocally ruled out the existence of personal immunities before the Court, the timing of the French declaration on the arrest warrants for Netanyahu and Gallant, demonstrates a direct and shocking challenge to the ICC, and is suggestive of a reactionary turn in French policy towards the ICC. Furthermore, it indicates a willingness to attempt to avoid clearly and consistently interpreted State obligations under the Rome Statute.

The response of France to the arrest warrants stands at odds with comments submitted to the ILC regarding the draft articles. In fact, France expressed reservations with the wording of draft article 1, paragraph 3 (dealing with the inapplicability of the draft articles before international criminal courts and tribunals) as it viewed the reference to international agreements as limiting the effect of this and suggested excluding all international criminal jurisdictions from

⁸⁵ Ministère de L'Europe et des Affaires Étrangères, 'Israel - International criminal court' (27 November 2024) <<https://www.diplomatie.gouv.fr/fr/dossiers-pays/israel-territoires-palestiniens/article/israel-cour-penale-internationale-27-11-24>>

the scope of application of the draft articles.⁸⁶

France's declaration further illustrates a willingness to embrace irredeemable double standards. On 17 March 2023, France noted the ICC's issuance of an arrest warrant against Vladimir Putin, Head of State of non-ICC member Russia, observing that:

The Court, which launched its investigation on 2 March at the request of some 40 States, including all the European Union Member States under the French EU presidency, acts with full independence. It considers that these acts constitute war crimes and therefore cannot go unpunished.⁸⁷

When questioned, on 2 September 2024, on its view of Putin's planned visit to Mongolia, and the fact that the visit might go ahead without an arrest, and when specifically asked '[d]oes the doctrine of immunity for acting heads of State apply?' France declared that:

Each State Party to the Rome Statute has an obligation to cooperate with the International Criminal Court and execute the arrest warrants it issues, in accordance with the relevant provisions of the Rome Statute. True to its long-standing commitment to combat immunity, France will continue to lend its support to the essential work of the international courts to ensure that those responsible for all the crimes committed by Russia in Ukraine are held accountable. It lends its full support to the ICC and to the Ukrainian courts working towards that goal.⁸⁸

That France would support the execution of an ICC mandated arrest warrant against the officials of Russia as a non-State Party as a legal obligation, but would devise a legal machination by which to seek to avoid such a conclusion in the case of

86 UN General Assembly, *First report on immunity of State officials from foreign criminal jurisdiction*, by Claudio Grossman Guiloff, *Special Rapporteur*, UN Doc. A/CN.4/775 (3 May 2024) <<https://documents.un.org/doc/undoc/gen/n24/084/34/pdf/n2408434.pdf>> para. 52

87 Ministère de L'Europe et des Affaires Étrangères, 'Fight against impunity – Issuing of arrest warrants by the International Criminal Court against Mr Vladimir Putin and Ms Maria Lvova-Belova' (17 March 2023) <<https://www.diplomatie.gouv.fr/en/french-foreign-policy/international-justice/news/article/fight-against-impunity-issuing-of-arrest-warrants-by-the-international-criminal>>.

88 Ministère de L'Europe et des Affaires Étrangères, 'Q&A - Extract from the press briefing' (2 September 2024) <<https://www.diplomatie.gouv.fr/en/french-foreign-policy/international-justice/news/article/q-a-extract-from-the-press-briefing-2-sep-2024>>.

arrest warrants issued against Israeli officials, even despite the Court's intervening censure of Mongolia's conduct as being contrary to its international obligations under the Rome Statute, evidences the seriousness of double standards at play in international criminal justice, whose impact could have grievous consequences for the future of the ICC as a viable institution.

For Palestinians, victims of ongoing, incessant, and blatant repression and criminality by an occupation directed and commanded by Netanyahu and his officials, the ICC serves as a last resort for the possibility of accountability. The reference in France's statement, asserting that Israel is 'committed to the rule of law and to respect for a professional and independent justice system' has been proven false through decades of impunity for widespread and systematic abuse of Palestinians rights. The very object of the ICC's existence is to confront and abolish impunity for international crimes, an object for which it relies, and depends, on States Parties' compliance with its requests and orders.

3.2 Germany's Policy Shift

In 2023, as Israel launched its genocidal campaign in Gaza, the Permanent Mission of the Federal Republic of Germany stated:

History has taught us that there are crimes where immunity cannot be upheld. Germany has been at the forefront of this historical experience – the Nuremberg trials being the starting point of the development of modern international criminal law. Hence, Germany has always been and will always be a staunch supporter of this development.⁸⁹

Going on to state that the existence of exceptions to functional immunity *ratione materiae* when the most serious international crimes are being committed 'is a *conditio sine qua non* for the application of international criminal law in national courts, as such crimes are often committed by State officials', Germany noted the 'thousands of national court judgements against former Nazi officials' that were not once hindered by the assumption that the existence of functional immunity

⁸⁹ Permanent Mission of the Federal Republic of Germany, *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://legal.un.org/ilc/sessions/75/pdfs/english/iso_germany.pdf> para. 3.

ratione materiae would block the criminal proceedings.⁹⁰ While these comments were made regarding the draft articles on immunity of State officials from foreign criminal jurisdiction, they are highly relevant when analysing Germany's approach to ongoing proceedings in the Situation in the State of Palestine.

In May 2024, Germany cautioned that “difficult questions” arose when investigating States, which it described as being ‘governed by the rule of law’.⁹¹ Notwithstanding Germany's stated position that the Russian leadership cannot invoke immunity,⁹² following the ICC's issuance of warrants in the Situation in the State of Palestine, Germany's spokesperson responded that the legal implications required further consideration, but that, in the context of perceived historical responsibility for Israel they ‘find it hard to imagine that we would make arrests on this basis’.⁹³ Germany's likely next Chancellor, Friedrich Merz, went as far as saying that he would ‘find a way to ensure that [Netanyahu] can visit Germany and leave again without being arrested’, despite being charged with war crimes and crimes against humanity.⁹⁴ These words are antecedent to the State's previous stance regarding warrants issued in the Situation in Ukraine, in which former Chancellor Olaf Scholz – of the same political party – stated that ‘nobody is above the law’.⁹⁵

3.3 The General Disregard for the ICC

While France and Germany are two prominent examples of formerly staunch supporters of the ICC and the inapplicability of Head of State immunity, they are

90 Permanent Mission of the Federal Republic of Germany, *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://legal.un.org/ilc/sessions/75/pdfs/english/iso_germany.pdf> para. 7.

91 Federal Foreign Office, ‘Federal Foreign Office on the application for arrest warrants at the International Criminal Court’ (20 May 2024) <<https://www.auswaertiges-amt.de/en/newsroom/news/2657664-2657664>>.

92 Federal Foreign Office, “‘Strengthening International Law in Times of Crisis’ - Speech by Federal Foreign Minister Annalena Baerbock in The Hague’ (16 January 2023) <<https://www.auswaertiges-amt.de/en/newsroom/news/strengthening-international-law-in-times-of-crisis/2573492>>.

93 Reuters, ‘Berlin to study ICC warrants, no more steps until Israeli visit planned’ (22 November 2024) <<https://www.reuters.com/world/europe/berlin-study-icc-warrants-no-more-steps-until-israeli-visit-planned-2024-11-22/>>.

94 See Middle East Monitor, ‘Germany's Merz invites Netanyahu for a visit, despite ICC arrest warrant’ (25 February 2025) <<https://www.middleeastmonitor.com/20250225-germanys-merz-invites-netanyahu-for-a-visit-despite-icc-arrest-warrant/>>; Times of Israel, ‘German election winner says he'll ensure Netanyahu can visit despite ICC warrant’ (24 February 2025) <<https://www.timesofisrael.com/german-election-winner-says-hell-ensure-netanyahu-can-visit-despite-icc-warrant/>>.

95 Reuters, ‘Germany's Scholz says ICC warrant for Putin shows ‘nobody is above the law’ (18 March 2023) <<https://www.reuters.com/article/markets/commodities/germanys-scholz-says-icc-warrant-for-putin-shows-nobody-is-above-the-law-idUSL8N35Q07K/>>.

not alone in their shift in perspective. Italy, despite stating that it supports the ICC, responded that it ‘will evaluate together with our allies what to do and how to interpret’ the arrest warrants issued by the Court before ultimately deciding that ‘there are immunities and immunities must be respected’.⁹⁶

Polish Prime Minister Donald Tusk guaranteed safe passage for Netanyahu to travel to an event to mark the 80th anniversary of the allied liberation of the Auschwitz-Birkenau death camp, as per the request of Poland’s President Andrzej Duda.⁹⁷ Austria described the arrest warrants as ‘utterly incomprehensible’, seemingly attempting to focus on the claim that Israel is the ‘only democracy in the Middle East’ as a basis for its view that the ICC’s decision undermines international law.⁹⁸ Romania, on the other hand, disregarded the ICC’s warrants entirely when inviting the Israeli government for a joint meeting in Bucharest⁹⁹ While on 3 April 2025, Hungary welcomed a visit from Netanyahu, in defiance of its clear legal obligation to detain and transfer him into custody to await trial at The Hague.¹⁰⁰

96 Times of Israel, ‘Hungary, Argentina blast ICC decision; Italy says it’s still reviewing it; Turkey hails arrest warrants’ (21 November 2024) <https://www.timesofisrael.com/liveblog_entry/hungary-argentina-blast-icc-decision-italy-says-its-still-reviewing-it-turkey-hails-arrest-warrants/>; Aurora Israel, ‘Italian FM on Netanyahu’s arrest warrant: ‘Immunity must be respected’ (17 January 2024) <<https://aurora-israel.co.il/en/italian-foreign-minister-on-Netanyahu%27s-arrest-warrant%3A-immunity-must-be-respected/>>.

97 Politico, ‘Netanyahu can attend Auschwitz memorial event, Poland’s Tusk says’ (10 January 2024) <<https://www.politico.eu/article/poland-president-andrzej-duda-asks-government-to-let-benjamin-netanyahu-attend-auschwitz-commemoration/>>.

98 Federal Ministry Republic of Austria, ‘Statement on the ICC’s decision to issue arrest warrants against Prime Minister Netanyahu and former Defence Minister Gallant’ (21 November 2024) <<https://www.bmeia.gv.at/en/ministerium/presse/aktuelles/2024/11/statement-on-the-iccs-decision-to-issue-arrest-warrants-against-prime-minister-netanyahu-and-former-defence-minister-gallant>>.

99 Marcel Ciolacu (@CiolacuMarcel) on X (19 January 2024) <https://x.com/CiolacuMarcel/status/1881011252752736591?ref_src=twsrc%5Etfw>.

100 Al-Haq Calls on Interpol in Hungary, Intervene to Arrest Netanyahu and for Hungarian Bar Association and Lawyers to Take Legal Actions, 03 April 2025. <https://www.alhaq.org/advocacy/26245.html>.



IV. Conclusion

Considering the gravity of international crimes and the mass victimisation they often cause, failure to bring the perpetrators to justice, or even attempt to promote accountability, risks undermining the credibility of the international legal order. Although immunities are intended to protect State sovereignty and promote friendly relations, these interests cannot be permitted to be viewed as superior to state obligations to hold to account, both under treaty and general international law, the perpetrators of international crimes, a process which to date has only fuelled impunity and criminal violence. As explained in the Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal in the *Arrest Warrant* case:

International law seeks the accommodation of this value with the fight against impunity, and not the triumph of one norm over the other . . . in view of the worldwide aversion to these crimes, such immunities have to be recognized with restraint.¹⁰¹

¹⁰¹ *Arrest Warrant, Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal*, para. 79.

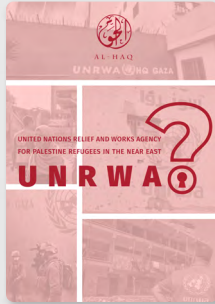


If States want to give effect to their frequently voiced desire for justice, accepting the inapplicability of State official immunity for *all* perpetrators of core international crimes is a fundamental prerequisite. Present efforts towards frustrating, or selectively applying such a principle, evidences a clear indication of States' ulterior intent to shield themselves, their allies, and their own imperialist interests.

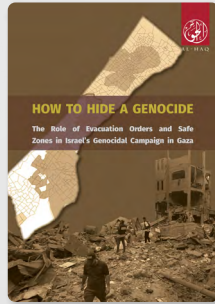


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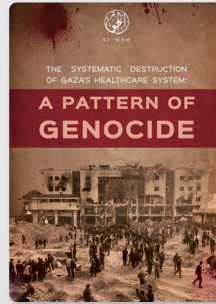
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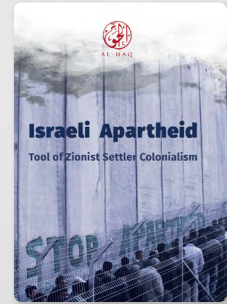
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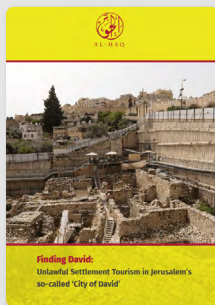
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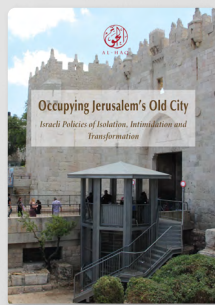
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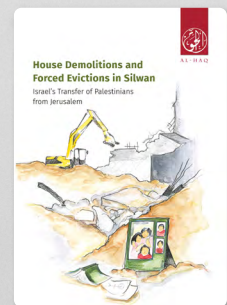
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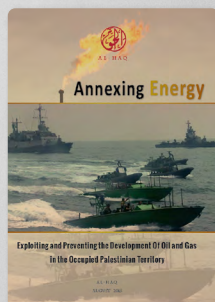
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AL - HAQ

About Al-Haq

Al-Haq is an independent Palestinian non-governmental human rights organisation based in Ramallah in the Occupied Palestinian Territory (OPT). Established in 1979 to protect and promote human rights and the rule of law in the OPT, the organisation has special consultative status with the United Nations Economic and Social Council.

Al-Haq documents violations of the individual and collective rights of Palestinians in the OPT, irrespective of the identity of the perpetrator, and seeks to end such breaches by way of advocacy before national and international mechanisms and by holding the violators accountable. Al-Haq conducts research; prepares reports, studies and interventions on the breaches of international human rights and humanitarian law in the OPT; and undertakes advocacy before local, regional and international bodies. Al-Haq also cooperates with Palestinian civil society organisations and governmental institutions in order to ensure that international human rights standards are reflected in Palestinian law and policies. Al-Haq has a specialised international law library for the use of its staff and the local community.

Al-Haq is the West Bank affiliate of the International Commission of Jurists - Geneva, and is a member of the Euro-Mediterranean Human Rights Network (EMHRN), the World Organisation Against Torture (OMCT), the International Federation for Human Rights (FIDH), Habitat International Coalition (HIC), ESCR-Net - The International Network for Economic, Social and Cultural Rights, the Palestinian Human Rights Organizations Council (PHROC), and the Palestinian NGO Network (PNGO). In 2018, Al-Haq was a co-recipient of the French Republic Human Rights Award, whereas in 2019, Al-Haq was the recipient of the Human Rights and Business Award. In 2020, Al-Haq received the Gwynne Skinner Human Rights Award presented by the International Corporate Accountability Roundtable (ICAR) for its outstanding work in the field of corporate accountability. Al-Haq was awarded the prestigious Bruno Kreisky Prize and the MESA Academic Freedom Award in 2022.

