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ORIGINAL ARTICLE

INTERNATIONAL CRIMINAL COURTS AND TRIBUNALS

The indictments against Adolf Hitler, their endorsement by the UNWCC, the IMT judgment and a twenty-first century immunity myth

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Abstract

Foreign national courts are categorically prohibited from prosecuting a head of state of another country. From the beginning of the twenty-first century until very recently, this view was nearly unanimous. A 2002 decision of the International Court of Justice, in the *Arrest Warrant* case, strongly supports it. According to the court, heads of state enjoy 'full immunity' from foreign criminal jurisdiction. Thus, the prohibition to prosecute foreign heads of state even extends to those who perpetrate aggression and other war-related crimes. That view is based on a twenty-first century myth. According to the myth, heads of state have long – 'from time immemorial' – enjoyed an absolute personal immunity from foreign jurisdiction. This article identifies the origin of the myth and parses through crucial historical facts that disprove it, particularly, the indictments against Hitler as the sitting head of state of Germany, their endorsement by the United Nations War Crimes Commission, and the judgment of the International Military Tribunal. A proper debunking of this myth is not only important as a matter of setting the historical record straight but is also relevant for present-day debates about the prosecution of heads of state (or heads of government) who – like Vladimir Putin, Bashar al-Assad, Min Aung Hlaing, and Benjamin Netanyahu – might be responsible for aggression, genocide, war crimes, crimes against humanity, and other crimes.

Keywords: aggression; customary law; Hitler; ICL; immunity

1. Introduction

A twenty-first century comprehensive analysis of the subject that lies at the core of this article – *The Immunity of States and Their Officials in International Criminal Law and International Human Rights*, by Rosanne Van Alebeek – starts with a question:

*The author would like to thank the comments and suggestions of participants in: the international conference 'Prosecution of Crimes in Ukraine and Automated Weapons under the Law of War', International Association of Penal Law, 7 December 2023, Opatija; the workshop 'The Contribution of the United Nations War Crimes Commission to International Criminal Law', 12 July 2024, Maynooth University; and the roundtable 'Lessons from the United Nations War Crimes Commission for Contemporary Immunities Law', British Institute of International and Comparative Law, 16 October 2024, London. Special thanks to Claus Kress for the availability to engage in exceedingly valuable exchanges of ideas over the most controversial points of this immunity issue, André Klip for clarifications concerning the episode of the Kaiser addressed in Section 3, and Dan Plesch for clarifications concerning the work of the United Nations War Crimes Commission. Thanks are also due to the anonymous reviewers of the *Leiden Journal of International Law*.

> Are the well-established immunity rules that shield states and their officials from foreign adjudicative jurisdiction affected by the relatively recent developments in international human rights law and international criminal law?[1]

The same question inspires the prevailing narrative about the tug of war between the law on immunity, on the one hand, and international criminal law, on the other. According to such narrative, for a long time, head of state immunity was absolute but, today, there is a challenge to such absoluteness coming from international criminal law. As Dapo Akande puts it,

> The tension between the protection of human rights and the demands of state sovereignty is reflected in the debate on whether state officials should be held responsible in external fora for international crimes committed while in office. This debate involves the interplay between two branches of international law. Firstly, [an older international law on immunity] . . . . This law proceeds from notions of sovereign equality and is aimed at ensuring that states do not unduly interfere with other states and their agents. On the other hand, there are those newer principles of international law that are based on humanitarian values and define certain types of conduct as crimes under international law (international criminal law). One of the challenges in this latter area has been to develop international and national mechanisms by which individuals who commit these crimes may be held responsible.[2]

In tune with this dichotomy between an older international law on immunity and a newer law on international crimes, Akande states: 'it has long been clear that serving heads of state . . . possess absolute immunity *ratione personae* in criminal cases'.[3] Similarly, the International Criminal Court (ICC) Judge Joanna Korner states: 'traditionally, of course, customary international law granted heads of state absolute immunity in respect of all criminal . . . acts'.[4] These statements by Akande and Korner reflect a statement of the International Court of Justice (ICJ) in the *Arrest Warrant* case. In this judgment, the ICJ claimed to have 'carefully examined State practice' and said it was 'unable to deduce from this practice . . . any form of exception to the rule according [head of state] immunity from criminal jurisdiction'.[5] Thus, it conveyed the idea that, under customary international law, heads of state have long been entitled to a 'full immunity' from foreign criminal jurisdiction.[6]

As explained throughout this article, the 'absoluteness' or 'fullness' of these statements are based on a twenty-first century myth, namely the idea that, during the past centuries – or even from time immemorial – heads of state have been entitled to an absolute immunity from foreign criminal jurisdiction.[7] According to the myth, this absolute immunity only started to be challenged by the 'recent developments' mentioned by Van Alebeek.

[1] R. Alebeek, *The Immunity of States and Their Officials in International Criminal Law and International Human Rights Law* (2008), at 1.

[2] D. Akande, 'International Law Immunities and the International Criminal Court', (2004) 98 *American Journal of International Law* 407, at 407.

[3] Ibid., at 411.

[4] J. Korner, 'Grotius Lecture', British Institute of International and Comparative Law, November 2023, at 10 minutes, 28 seconds, available at youtu.be/CAUSNLHOF0U.

[5] *Arrest Warrant of 11 April 2000* (*Democratic Republic of the Congo v. Belgium*), Jurisdiction and/or Admissibility, Judgment of 14 February 2002, [2002] ICJ Rep. 3, Para. 54.

[6] Ibid., Para. 58.

[7] See also, e.g., International Law Commission, Immunity of State Officials from Foreign Criminal Jurisdiction, Comments and Observations Received from Governments, 7 May 2024, A/CN.4/771 (7 May 2024) ('Comments and Observations'), at 43 ('The Nordic countries consider . . . immunity *ratione personae* [of heads of state] to represent long established customary international law'); Ibid., at 43 ('over the course of the twentieth century . . . , [t]here is no doubt that such individuals [including, *de jure* and *de facto* heads of state] enjoyed personal immunity from foreign criminal jurisdiction') (opinion of the Russian Federation).

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This myth is incompatible with state practice and *opinio juris* resulting, on the one hand, from the indictments against Hitler as a sitting head of state and their endorsement by the United Nations War Crimes Commission (UNWCC), during the Second World War (Section 4.1) and, on the other hand, the judgment of the International Military Tribunal (IMT), in its aftermath (Sections 4.2 and 4.3). Still, such state practice and *opinio juris* did not form suddenly at that time. It has deeper roots in the history of international law. These roots are often neglected by present-day mainstream scholars writing on this immunity issue.

To properly address such neglect, it is necessary to conduct two surveys. First, a survey on how the head of state immunity issue was addressed in the beginning of the nineteenth century in a judgment that is widely perceived as the first jurisprudential articulation of a state immunity theory (Section 2). This judgment is often erroneously invoked to support the notion that heads of state have long been entitled to an absolute immunity from foreign criminal jurisdiction. Second, a survey on how the issue was addressed in the aftermath of the First World War (Section 3). These two perfunctory surveys are essentially a collection of information provided by other scholars and, in that sense, they are not original. However, they are essential to demonstrate that the indictments against the sitting head of state of Germany, their endorsement by the UNWCC, and the no-head-of-state-immunity position of the IMT are just a mere reflection of what – for centuries – had been the prevailing position on the specific immunity issue analyzed in this article.

2. The *Schooner Exchange* – A misguided assumption or 'presumption'

There is an inextricable link between that twenty-first century myth and a widespread assumption about a case decided by the Supreme Court of the United States in the nineteenth century. Here is the assumption (and the origin of the myth), as put forward by Ingrid Wuerth:

> In general, the international law of state immunity prevents foreign national courts from adjudicating or enforcing claims against states. U.S. Supreme Court Justice John Marshall first articulated the basis for this kind of immunity in the 1812 Schooner Exchange case. A strong doctrine of immunity – sometimes termed *absolute immunity* – prevailed in most countries in the nineteenth century.[8]

This 'original concept of absolute immunity' was 'based on status (*par in parem non habet imperium*)'.[9] The principle *par in parem non habet imperium* reflects the 'sovereign equality' of states and is the 'foundation and the sum of the rule of immunity'.[10] Because the assumption is that the scope of immunity enshrined in that original concept and this principle was once absolute, the widespread belief is that originally there were no exceptions to immunity from foreign jurisdiction. Hence, national courts were 'categorically' precluded from exercising jurisdiction over foreign states.[11] Exceptions to the absoluteness of this immunity of the state – and, by implication, of its sovereign – only emerged in the twentieth century.[12]

[8]I. Wuerth, 'Pinochet's Legacy Reassessed', (2012) 106 *American Journal of International Law* 731, at 736.

[9]See *Arrest Warrant of 11 April 2000*, *supra* note 5 (Judges Higgins, Kooijmans, and Buergenthal, Joint Separate Opinion), Para. 72; see Alebeek, *supra* note 1, at 47–53.

[10]R. Jennings, 'The Pinochet Extradition Case in the English Courts', in L. Boisson de Chazournes, and V. Gowland-Debbas (eds.), *The International Legal System in Quest of Equity and Universality: Liber Amicorum Georges Abi-Saab* (2001), 677 at 692; *Prosecutor v. Blaškić*, Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, Case No. IT-95-14, Appeals Chamber, 27 October 1997, at 41.

[11]See Alebeek, *supra* note 1, at 1, 13.

[12]See Wuerth, *supra* note 8, at 736.

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In 2019, that assumption received a strong jurisprudential endorsement by none other than the appeals chamber of the ICC in *Jordan Referral Re Al-Bashir*.[13] In a decision replete with allusions to the *Schooner Exchange*,[14] the 'controlling principle' *par in parem non habet imperium*,[15] and a concept of 'sovereign immunity' deriving from a 'presumption' which has 'firmly controlled' its rationale 'from time immemorial',[16] the appeals chamber attempted to explain how that case and other later developments might support the existence of head of state immunity before national criminal courts but not international ones.

For present purposes, it is unnecessary to dissect the appeals chamber's allusions to that case, principle, concept, and presumption. Naturally, the *Schooner Exchange* had nothing to do with international criminal courts. There were no such international courts at the time. However, it is necessary to highlight what the appeals chamber did not realize about the rationale underlying the judgment of the United States Supreme Court. Even though the *Schooner Exchange* only concerned state immunity, the appeals chamber missed the fact that the Supreme Court of the United States insinuated that heads of state are not entitled to an absolute immunity before foreign national courts, particularly, because the immunity of heads of state might be simply inapplicable in wartime situations.

The scope of the judgment of the Supreme Court only comprised peacetime situations. As emphasized by Sheldon Glueck in his 1944 seminal work *War Criminals: Their Prosecution and Punishment*, Chief Justice Marshall was 'careful' to indicate as much.[17] In the words of the Supreme Court, '[a] public vessel of war of a foreign sovereign at peace with the United States, coming into our ports and demeaning herself in a friendly manner, is exempt from the jurisdiction of the country'.[18] These words imply that a foreign sovereign at war with the United States who violated the laws of war and, particularly, a sovereign who aggressively attacked the United States might not be exempt from the jurisdiction of the country. That is, the *Schooner Exchange* cannot serve as support for the idea that, once upon a time, there was a *par in parem non habet imperium* principle or 'presumption' of sovereign immunity extending to heads of state who perpetrate aggression or other war-related violations.

Also, there is no reason to assume that the *Schooner Exchange* was unaligned with centuries-old assumptions and practices which were still very much alive at the time. As Larry May has noted, according to such assumptions and practices, the sovereign of one country who aggressively invaded another would simply 'receive capital punishment, either summarily or as a strong likelihood', once he or she was brought before tribunals of the victim state or of other states.[19] According to such assumptions and practices, which are reflected in the writings of numerous of the most qualified publicists of the seventeenth, eighteenth, and nineteenth centuries, no 'special immunity' was granted to kings or other heads of state in such war-related situations (see Section 3.1, *infra*).

In sum, if anything, the *Schooner Exchange* might be used as an instance of state practice and *opinio juris* upholding those centuries-old assumptions and practices and, hence, the notion that the scope of protection for heads of state deriving from the *par in parem non habet imperium* principle and associated presumption of sovereign immunity has never extended to situations of heads of state who perpetrate aggression and other war-related crimes.

[13] *Prosecutor* v. *Al Bashir*, Joint Concurring Opinion of Judges Eboe-Osuji, Morrison, Hofmański and Bossa, ICC-02/05-01/09-397-Anx1, May 2019 ('Joint Concurring Opinion').

[14] Ibid., Paras. 49–174, 181, 431, 432.

[15] Ibid., Paras. 51, 54, 72, 181, 213, 431, 436, 441.

[16] Ibid., Paras. 41, 47–51, 92–4, 103, 104, 107, 112, 113, 129, 143, 189, 222, 243, 295, 433, 434, 437.

[17] See also S. Glueck, *War Criminals: Their Prosecution and Punishment* (1944), 122, at 123.

[18] *Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) (1812), at 116 (emphasis added).

[19] L. May, 'Just War Theory and the Crime of Aggression', in C. Kreß and S. Barriga (eds.), *The Crime of Aggression, A Commentary* (2016), 273, at 273–8.

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This is precisely the same notion endorsed by the overwhelming majority of actors at the time of the two world wars.

3. The First World War

3.1. British and French reports

In the aftermath of the First World War, the British and the French issued two officially sanctioned legal reports supporting an indictment against the German Emperor for crimes perpetrated in connection with the war.[20] The two reports are a gem. The first report of January 1919 ('British Report') focused on the case of the head of state 'who invades and occupies foreign territory in spite of the resistance of its Sovereign'.[21] It noted:

> For immunity in [this] case there seems to be no authority. Ancient practice was against it. Francis I was imprisoned after the battle of Pavia. No modern usage establishing such immunity appears to exist. In recent times sovereigns have been made prisoners of war, e.g., Napoleon III in 1870 and the Elector of Hesse in 1866. The German Manual of Military Law includes sovereigns among possible prisoners of war; and there seems no reason why, if captured, they should not be treated according as they have or have not violated the laws of war.[22]

Subsequently, the authors of the report conducted an illuminating 'examination of the authorities', particularly, an examination of the writings of some of the most qualified publicists of the seventeenth, eighteenth, and nineteenth centuries.[23] *Inter alia*, they alluded to Sir Christopher Hatton, Ward, Hallam, Kluber, Wildman, Phillimore, Bynkershoek, and Wheaton.[24] They also appealed to the most prominent publicist in the history of the international law of war and peace, Hugo Grotius, and noted that he knew 'nothing of the special immunity of Kings taken prisoners in war'.[25] They noted that, if a head of state exemption from jurisdiction exists, 'it must be derived from express agreement, or implied usage; and none … exists'.[26]

Having found no evidence of such agreement or usage, the authors of the British Report naturally concluded that the result 'would seem to be that there is no rule or usage exempting from criminal jurisdiction sovereigns who have invaded the territory of another sovereign'.[27] Appropriately, they also used the *Schooner Exchange* as support for this conclusion.[28]

Quoting another authority, who is another of the most qualified publicists in the history of international law, the second report also of January 1919 ('French Report') alluded to the position of Emmerich de Vattel. For Vattel, a Prince who is guilty of an unjust war was subject to punishment. The authors of the French Report noted that Vattel did not even attempt to substantiate his position, 'so self-evident' it appeared to him.[29] It was also self-evident for the authors of the French Report that national military laws, which permitted the capture and prosecution of sitting heads of state for trial before national courts, did not violate international

[20]K. Sellars, 'The First World War, Wilhelm II and Article 227: The Origin of the Idea of "Aggression" in International Criminal Law', in Kreß and Barriga, *supra* note 19, 21 at 22.

[21]First Interim Report from the Committee of Enquiry into Breaches of the Laws of War (13 January 1919), at 31.

[22]Ibid., at 31.

[23]Ibid., at 32–35.

[24]Ibid.

[25]Ibid., at 33.

[26]Ibid., at 35.

[27]Ibid., at 35.

[28]Ibid., at 32–35.

[29]'Examen de la responsabilité de l'Empereur Guillaume II d'Allemagne', (1919) 46 *Journal du droit international* 131, at 151.

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law. Since, at the time, international military courts did not exist, prosecution of war-related crimes perpetrated by whomsoever, including heads of state, was a matter to be handled by national military courts.[30]

That meant there was no rule of international law granting heads of state any sort of immunity from foreign jurisdiction with regard to war crimes. Nonetheless, due to the inadequacy of 'municipal penal law' (particularly, French ordinary law) to investigate and prosecute the vast criminality associated with the German Emperor, the authors of the French Report were particularly insistent on the creation of a new international tribunal. According to their view, this tribunal would apply a 'new international law' and would be 'able to deliver the most solemn judgment the world has ever heard'.[31]

'Anticipating' the words of the IMT proffered three decades later (see Section 4.3, *infra*), the authors of the French Report considered that there could be no doubt about the legitimacy of this new 'international' way of delivering criminal punishment because, if the Allied nations had themselves the power to capture, prosecute and try the international crime of 'premeditated unjust war' and other war-related crimes committed by a head of state, they 'cannot cease' to have that power 'if united'.[32]

Significantly, while analyzing the French Report, the appeals chamber of the ICC in *Jordan Referral Re Al-Bashir* did not highlight this fact but – instead – conveyed the notion that, according to the report, only an international tribunal in application of a 'new international law' would be able to bypass the question of head of state immunity from foreign jurisdiction.[33] That does not correspond to the notion that is set out in the report.

3.2. The Report of the Commission and the Treaty of Versailles

Another enlightening report is the one produced by the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties of March 1919 ('Report of the Commission').[34] On the issues of immunity and inviolability, the position of the Report of the Commission was the following:

> The Commission desire[s] to state expressly that in the hierarchy of persons in authority, there is no reason why rank, however exalted, should in any circumstances protect the holder of it from responsibility when that responsibility has been established before a properly constituted tribunal. This extends even to the case of heads of states. An argument has been raised to the contrary based upon the alleged immunity and in particular the alleged inviolability, of a sovereign of a state. But this privilege, where it is recognized, is one of practical expedience in municipal law, and is not fundamental. However, even if, in some countries, a sovereign is exempt from being prosecuted in a national court of his own country the position from an international point of view is quite different.[35]

It is important to highlight two facts in relation to this no-immunity position set out in the Report of the Commission. First, the expression 'properly constituted tribunal' encompassed prosecutions before national courts (on this, see also Sections 4.2 and 4.3, *infra*, the parallel with the expression 'appropriate proceedings' used by the IMT). Second, this no-immunity position was broader in scope than the no-immunity position set out in the British and French reports. This is because it

[30]Ibid., at 132–6, 150.
[31]Ibid., at 143, 152–5.
[32]Ibid., at 154.
[33]See *Joint Concurring Opinion*, *supra* note 13, Paras. 87–93.
[34]'Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties', (1920) 14 *American Journal of International Law* 95, at 121.
[35]Ibid., at 116.

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applied not only to violations of the 'laws and customs of war' but also to violations of the 'laws of humanity' committed by a sovereign.[36]

The United States did not endorse this no-immunity position and Japan expressed concerns.[37] However, it is important to note two facts. First, even though the Japanese delegation was sceptical about the idea of prosecuting heads of state in the courts of the enemy, it did not convey the notion that, in its opinion, heads of state were ever entitled to an absolute immunity from foreign jurisdiction.[38] Second, the American delegation invoked the *Schooner Exchange* as jurisprudential support for its position that heads of state could not be prosecuted in foreign courts.[39] However, it blatantly overlooked not only the fact that the *Schooner Exchange* solely addressed peacetime situations, but also the circumstance that this decision of the Supreme Court of the United States actually suggested that heads of state might not be entitled to immunity in cases of aggression and other war-related crimes.

Most importantly, the reality is that the views of those delegations were vehemently rejected by the Report of the Commission,[40] and were also not endorsed in the Treaty of Versailles, which 'has no trace of an immunity for sitting or former emperors'.[41] The United States and Japan were also parties to the treaty, along with more than 30 other countries.

The notion that heads of state were not entitled to immunity at the time of the First World War in relation to aggression and other war-related crimes is also reflected in three other historical facts. First – during the war – German military leaders intended to prosecute King Ferdinand on charges of 'launching war against Austria and Germany'.[42] Second, a coroner's jury in Ireland delivered a 'verdict' charging the German Emperor with the 'crime of willful and wholesale murder'.[43]

Third, even though the Dutch government did not surrender the former German Emperor to the Allies for special trial, this was not based on the argument that he was entitled to absolute immunity from foreign jurisdiction. The Netherlands did not surrender because it was not a party to the Treaty of Versailles, could not extradite to an international criminal tribunal, had not criminalized the conduct for which the Emperor was arraigned and did not have a treaty with the associated powers on surrender.[44] The prevailing view in the Netherlands at the time – as reflected in an important legal opinion submitted to the Dutch government by three international law specialists – was that under Dutch law a head of state could be extradited for criminal prosecution in national courts 'for acts by his troops, committed under his orders, that were contrary to the *penal code of the country* where the conduct was committed'.[45] The legal opinion to the government stated that Dutch law would allow an individual extradition request for the Emperor from the states with which it had an extradition treaty, such as Belgium, the United Kingdom, France, and Germany.[46]

In sum, at the time of the First World War, the prevailing view – as reflected in an abundance of state practice and *opinio juris* – was that head of state immunity did not extend to situations of aggression and other war-related crimes.

[36]Ibid.

[37]Ibid., at 135–6, 146, 152.

[38]Ibid., at 152.

[39]Ibid., at 136, 146.

[40]Ibid., at 116 ('If the immunity of a sovereign is claimed to extend beyond the limits above stated, it would involve laying down the principle that the greatest outrages against the laws and customs of war and the laws of humanity, if proved against him, could in no circumstances be punished. Such a conclusion would shock the conscience of civilized mankind').

[41]M. Lemos, 'The ICC as a "Tool" of the UNSC and the "Absurdity" of Head of State Immunity with Regard to International Crimes', (2022) 32 *Indiana International and Comparative Law Review* 313, at 339.

[42]W. Schabas, *The Trial of the Kaiser* (2018), at 12–14.

[43]Ibid.

[44]On this, see A. Klip, 'De Keizerquaestie, 100 jaar uitlevering van Wilhelm II', (2018) *Nederlands juristenblad*, at 2885–7.

[45]Ibid. (emphasis added; on charges against heads of state for the violation of national laws, see also Section 4.1, *infra*).

[46]Ibid.

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4. The Second World War

4.1. The indictments against Adolf Hitler and their endorsement by the UNWCC

During the Second World War, some years before the IMT delivered its judgment, several demarches occurred to ensure that the major war criminals would not escape criminal punishment. Most prominent amongst such demarches were the indictments against Hitler while he was the sitting head of state of Germany brought about by Poland, Belgium, and Czechoslovakia. Because such indictments have thus far not been assigned their due value in present-day debates about the topic of this article, they merit to be reproduced here at some length.

Before that, seven considerations are worth pondering. The *History of the United Nations War Crimes Commission* where such indictments are documented has been in the public domain since 1948.[47] However, (i) neither the main judgment in the *Arrest Warrant* case nor any of the numerous judges who wrote concurring, separate, or dissenting opinions in that case mention the indictments. Moreover, (ii) none of the 26 reports of the International Law Commission (ILC) and its *Special Rapporteurs* produced during the last two decades on the issue of immunity of foreign officials reports them.[48] As far as the author of this article was able to ascertain, (iii) no decision amongst the many delivered by the ICC's different chambers during the last two decades about the head of state immunity issue, and (iv) no document produced by the office of the ICC's Prosecutor discusses the indictments.

In what the ICC is concerned, (v) it is also important to stress that none of the judges of the appeals chamber of the ICC in *Jordan Referral Re Al-Bashir* – a judgment delivered in May 2019 – cites the indictments. Note that, at the time of this judgment, the minutes of the UNWCC were available online at the Legal Tools site of the ICC Prosecutors Office.[49] Two years before the judgment, a book by Dan Plesch – published by the Georgetown University Press and publicized in the media – alluded to the indictments.[50] One year before the judgment, the hundreds of pages of the indictments against Hitler made by Belgium, Czechoslovakia, and Poland were already publicly available.[51]

Nine months before the judgement was delivered, oral proceedings before the appeals chamber took place from 10 to 14 September 2018. During the proceedings, the judges of the appeals chamber heard the opinions of numerous of the world's most prominent experts in international criminal law about the head of state immunity issue. However, (vi) no one alluded to the Hitler case.[52] Indeed, (vii) scholars writing about the head of state immunity issue during the last two decades rarely mention the Hitler's case or the relevance of the indictments filed against the sitting head of state of Germany.

Let us now turn to the actual indictments (the following is a relatively lengthy citation and allusion to some parts of the indictments relevant for the purposes of this article, but it is by no

[47]See History of the United Nations War Crimes Commission and the Development of the Laws of War, compiled by the United Nations War Crimes Commission (H.M. Stationery Office, 1948); Dan Plesch's collaborative paper 'Precedents and Practice for the Ukraine: The UNWCC Indictments of Adolf Hitler, Myths of Head of State Immunity, Domestic and International Indictments after WWII', available at unwcc.org/wp-content/uploads/2023/02/Precedents-and-practice-for-the-Ukraine.pdf ('Dan Plesch's Collaborative Paper').

[48]All reports can be found here: legal.un.org/ilc/guide/4_2.shtml.

[49]See 'Dan Plesch's Collaborative Paper', *supra* note 47.

[50]D. Plesch, *Human Rights after Hitler: The Lost History of Prosecuting Axis War Crimes* (2017).

[51]See 'Dan Plesch's Collaborative Paper', *supra* note 47.

[52]*The Prosecutor v. Omar Hassan Ahmad Al-Bashir,* Appeals Hearing, Transcript, ICC-02/05-01/09-T-4-ENG, 10 September 2018; *The Prosecutor v. Omar Hassan Ahmad Al-Bashir*, Appeals Hearing, Transcript, ICC-02/05-01/09-T-5-ENG, 11 September 2018; *The Prosecutor v. Omar Hassan Ahmad Al-Bashir* Appeals Hearing, Transcript, ICC-02/05-01/09-T-6-ENG, 12 September 2018; *The Prosecutor v. Omar Hassan Ahmad Al-Bashir*, Appeals Hearing, Transcript, ICC-02/05-01/09-T-7-ENG, 13 September 2018; *The Prosecutor v. Omar Hassan Ahmad Al-Bashir*, Appeals Hearing, Transcript, ICC-02/05-01/09-T-8-ENG, 14 September 2018.

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means exhaustive). In 1942, the Czechoslovak Government issued a statement regarding all 'German crimes committed on Czechoslovak territory or against Czechoslovak citizens' emphasizing the personal responsibility of Adolf Hitler.[53] In 1944, Czechoslovakia submitted several charges to the UNWCC. Under the Penal Code of Czechoslovakia, Hitler and others, including 24 members of highest officials of the Reich Government, were charged with murders, massacres, systematic terrorism, torture of civilians, and wanton devastation of property perpetrated in Czechoslovakia.[54] For the Czechoslovak Government,

> The responsibility of Adolf Hitler for the national Socialist legislation and its being carried into effect does not need discussion. In our particular case, it is easy to prove .... According to Czechoslovak Criminal Law, /para.5 Penal Code/, Adolf Hitler is to be considered as the instigator of these activities and as the activities of the 'Standrgerichte' are to be qualified as murder, /Para.134 Penal Code/ in particular as murder through agents, /para.135, 3 Penal Code/, he is perpetrator of the crime of murder through agents and is, according to para.136 Penal Code, punishable by death.[55]

In the opinion of Czechoslovak Government, the invasion and occupation of Czechoslovakia were criminal actions violating international law and Czechoslovak criminal law.[56] Thus,

> The Czechoslovak Government hold[s] Adolf Hitler ... personally and penally responsible for the invasion and occupation of Czechoslovakia. Moreover ... [Hitler is] penally and personally responsible for all war crimes, committed in Czechoslovakia ... within the framework of ... [a] criminal general policy towards the non-German people .... The legal basis of the present charge is for the time being the laws and customs of war. Although the Czechoslovak Government keeps to her opinion that the invasion and occupation is in itself a crime to be punished according to the Allied declarations on the punishment of Nazi crimes, the present charge is based on the fact that all acts described in it are plainly war crimes i.e. violations of the laws and customs of war.[57]

In relation to a system of slavery called 'forced labour', the Czechoslovak Government held that:

> Adolf Hitler and the members of the German government who were in office at the time of the alleged crimes ... bear the general responsibility for the alleged crimes, because they established in the occupied countries [such] a system ... either with deportation into Germany and later on into other occupied countries, or without such deportation, in the interests of the German war machine .... The Czechoslovak men, women and even children were and still are forced to work on German armament works, on fortifications and so on, either in their country or in Germany or other occupied countries (France, Holland, etc.) .... Adolf Hitler bears special responsibility for having signed ... the Decree of March 21st,

[53]C-G 7 Lidice.pdf, at 0278, available at drive.google.com/file/d/1vbFpcYF0OTQ4pIkHsI6eS_zLkNSJEYYo/view (via UNWCC Archives, available at unwcc.org/unwcc-archives/).

[54]C-G 6 Legal systems and Lidice.pdf, at 0140, available at drive.google.com/file/d/1VKS_CNXje9jof5JMgeXKgd4GTH3MhdPR/view (via UNWCC Archives, available at unwcc.org/unwcc-archives/).

[55]C-G 6 Legal systems and Lidice.pdf, at 0257, 0259, available at drive.google.com/file/d/1VKS_CNXje9jof5JMgeXKgd4GTH3MhdPR/view (via UNWCC Archives, available at unwcc.org/unwcc-archives/).

[56]C-G 8 Dachau.pdf, at 0345, available at drive.google.com/file/d/1VcM4vK5vkrAsDj8AaKQSTueOUnZTAeOn/view (via UNWCC Archives, available at unwcc.org/unwcc-archives/).

[57]C-G 8 Dachau.pdf, at 0345, available at drive.google.com/file/d/1VcM4vK5vkrAsDj8AaKQSTueOUnZTAeOn/view (via UNWCC Archives, available at unwcc.org/unwcc-archives/).

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> 1942, concerning the mobilization of man-power and for having signed the Decree of July 28th, 1944, concerning the so-called total war effort.[58]

In relation to crimes committed against the Czechoslovak Jews, the Czechoslovak Government held the following:

> The persecution of Jews, confiscation of their property, their mass extermination and other crimes against them are wellknown Nazi crimes. The Germans do not deny these crimes at all, on the contrary they publicly announced them .... Crimes committed against the Czechoslovak Jews belong to this category of systematic extermination of the Jewish race. The criminal responsibility of all accused, according to the Czechoslovak Criminal Law and according to the International Law, is without doubt. The crimes were committed on Czechoslovak and Polish territory, thus on territory, the inhabitants of which are protected by the Criminal Law in force on this territory and by International Law as well. As to the crimes committed against Czechoslovak Jews in Germany, the criminal responsibility is established by the fact that the victims were Czechoslovak citizens.[59]

As to the criminal responsibility of Adolf Hitler and the other accused, the Czechoslovak Government stated it was 'a double one':

> [1] All are responsible for crimes committed in invaded and occupied allied countries because they established in these countries, a criminal system of expropriation, starvation, mass murders and mass terrorism etc., in violation of the International Law and of the laws of the respective countries, in accordance with their general criminal policy and nazi doctrine .... [2] In addition to ... general criminal responsibility, they are especially responsible for crimes committed against Jews.[60]

According to charges received by the UNWCC Secretariat on 5 January 1945, Poland indicted Hitler and others for 'Violation of Regulations attached to the Hague Convention No.4, of 1907, ... [and the] War Crimes Responsibilities Decree /1943/ Art. 34, 3, 4, 6 and 10'.[61] The crimes occurred in 'Germany and Poland/in the incorporated territories as well as in the General Government/where the decrees in question were signed and published, and then enforced and carried out'.[62] Their 'aim' was the 'achievement of the German Reich's final aim: the biological extermination of Jews in Poland'.[63] According to Poland,

> In having done what the present charge submits they have violated: 1. the paramount principles of International Law both written and unwritten ... 2. the general principles accepted by civilized nations, which are a source of Internationa[l] Law /art.8 of the Statute of the International Court of Justice at the Hague/ ... 3. the law their country voluntary

[58]C-G 12 Forced Labour.pdf, at 0577, 0585, available at drive.google.com/file/d/1-NDQTesOIwghIAFyYmwkoDUBhYNzTfbw/view (via UNWCC Archives, available at unwcc.org/unwcc-archives/) (underlining in words or expressions omitted).

[59]C-G 15 Terezin Cz Jews.pdf, at 0690, available at drive.google.com/file/d/11tbh19R2Oz28OucVF9MotfNL6Bkzr1Cj/view (via UNWCC Archives, available at unwcc.org/unwcc-archives/).

[60]C-G 15 Terezin Cz Jews.pdf, at 0690, 0691, available at drive.google.com/file/d/11tbh19R2Oz28OucVF9MotfNL6Bkzr1Cj/view (via UNWCC Archives, available at unwcc.org/unwcc-archives/).

[61]P-G 34 Polish Jews.pdf, at 0968, available at drive.google.com/file/d/1Bpljubmb2Yjei4pxqa5cwycft-T4N4j-/view (via UNWCC Archives, available at unwcc.org/unwcc-archives/).

[62]Ibid.

[63]Ibid.

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> subscribed to and never revoked, namely the Hague Regulations, particularly their art.46 . . .
> 4. the laws of Poland.[64]

For Belgium, according to a UNWCC's document dated 7 March 1945, the list of Hitler's crimes emerging from Auschwitz and Birkenau – punishable under the crimes of homicide and offence to physical integrity of the Belgium Penal Code – comprised:

> Assassinations; beatings and mistreatment of internees .... Assassination of numerous Belgians (exclusively Jews seemingly) transported to . . . camps where they were gathered in especially equipped rooms and where gas was circulated leading very quickly to the death of the victims/The bodies were then burned in crematoriums. On the other hand, in 1944 Belgians were constrained into forced labour in absolutely inhumane conditions, being subjected to numerous mistreatments.[65]

Also punishable under the Belgium Penal Code were the following offences perpetrated at Buchenwald: 'Internment of civilians in inhumane conditions. Ill-treatment, beatings, torture, assassinations of internees'.[66] In relation to the 'Great Escape', pursuant to crimes punishable under Articles 2, 5, and 54 of the Convention relative to the Treatment of Prisoners of War of 1929, Belgium drew up charges against Hitler for the assassination of prisoners of war.[67] The charges inform that a Belgian prisoner was amongst the ones murdered.[68] Hitler was also supposed to be indicted, under the Belgium Penal Code, of crimes of pillage, confiscation of property, and theft of works of art perpetrated not only in Belgium, but also in France (in relation to theft of Belgian works of art).[69]

As summarized by Dan Plesch, the charges included in the Belgium, Czechoslovakia, and Poland's indictments were put forward in accordance with the domestic laws of the nations concerned, the Hague Conventions, the Versailles list, and ranged 'from the extermination of the Jews through the illegality of Nazi courts, to pillage'.[70] They certainly amount to an impressive list of charges against a sitting head of state.

In all indictments, Hitler's name was always on top of the list. Sometimes, such lists comprised dozens or even hundreds of other high, mid or low level accused occasionally merely labelled as 'others'. Hitler's name often appeared in capital letters, with the number '1' attached, in bold or underlined. In no such legal document was that prominent position accompanied by any suggestion that Hitler would be entitled to any form of special treatment, immunity, inviolability or protection as a sitting head of state. If anything, that prominent position on top of the list, and the several remarks specifically concerning Hitler, suggested that the sitting head of state of

[64]P-G 34 Polish Jews.pdf, at 0974, available at drive.google.com/file/d/1Bpljubmb2Yjei4pxqa5cwycft-T4N4j-/view (via UNWCC Archives, available at unwcc.org/unwcc-archives/).

[65]B-G 22 Auschwitz.pdf, at 0261, available at drive.google.com/file/d/1wFuYA-rtEmjlX42KVoDgWUfzxpWdZ55g/view (via UNWCC Archives, available at unwcc.org/unwcc-archives/).

[66]B-G 31 Buchenwald.pdf, at 0472, available at drive.google.com/file/d/1P4mDC6MHkaW0cKAUylK7Kdvv3xbvykzp/view (via UNWCC Archives, available at unwcc.org/unwcc-archives/).

[67]B-G 32 Great Escape.pdf, at 0478, available at drive.google.com/file/d/101OhciUdq1wvK8IuiZR2IqEMvVZ0B4A8/view (via UNWCC Archives, available at unwcc.org/unwcc-archives/). See also D. Plesch, 'Head of State Immunities', paper circulated to the participants in the workshop, The Contribution of the United Nations War Crimes Commission to International Criminal Law, 12 July 2024, Maynooth University (on file with the author).

[68]B-G 32 Great Escape.pdf, at 0478, available at drive.google.com/file/d/101OhciUdq1wvK8IuiZR2IqEMvVZ0B4A8/view (via UNWCC Archives, available at unwcc.org/unwcc-archives/).

[69]B-G 33 Pillage Art Thief.pdf, at 0485, 0486, available at drive.google.com/file/d/1xM4hPVC3LAWjdj24XHwQPpqzRNv7IaYR/view (via UNWCC Archives, available at unwcc.org/unwcc-archives/).

[70]D. Plesch, 'The Criminal Liability of Heads of State and Senior Officials Considered by the 1943–1948 United Nations War Crimes Commission, Its Member States and Members', available at at unwcc.org/wp-content/uploads/2023/08/UNWCC-and-Head-of-State-Immunity-master.pdf.

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Germany was precisely the person who in no circumstance would be entitled to any sort of protection from arrest or punishment on allegations of inviolability, immunity, superior orders, duress, error in law, error in fact, or any other ground susceptible of impeding criminal proceedings or excluding criminal responsibility.

Also important is that all charges against Hitler were not grounded upon an international charter for the punishment of international crimes (the IMT Charter only came later) or an idea that a new subset of international law on international crimes was to be created in the aftermath of the Second World War to ground such charges. Instead, the state practice and *opinio juris* enshrined in the charges was grounded on a belief that pre-existing international and national law were both directly applicable to – and immediately enforceable against – the sitting head of state of Germany and all other sitting high officials of the German Reich.

As to the national laws of Belgium, Czechoslovakia, and Poland, it is of note that these countries' governments in exile in London had passed such laws on war crimes in 1943 which 'they then put to use'.[71] Do also recall that, at the time – just like for a long time before – international military courts did not exist. Thus, prosecution of war-related crimes perpetrated by whomsoever, including heads of state, was an issue that would normally have to be handled by national military tribunals or, indeed, by common national courts (the IMT only came later).

In March 1945, the UNWCC constituted by 16 states 'endorsed at least seven' separate indictments against the sitting head of state of Germany based upon those national 'formal charges'.[72] The fact that the UNWCC 'listed' Hitler as an accused war criminal, 'subject to arrest' by those 16 states,[73] suggests that in the opinion of the 16 countries that constituted the UNWCC – the sitting head of state of Germany was not entitled to any sort of inviolability or immunity with regard to the crimes listed in the seven indictments filed by Belgium, Czechoslovakia, and Poland. This is the state practice and *opinio juris* of those 16 countries.

The truth of the matter is that a great number of the indictments that led to the arrests of many of the major war criminals or other officials of the German Reich, and their surrender to the IMT and other courts, were issued during the war and while the persons targeted by the warrants were still in office. No one apparently suggested that Hitler or any other high official was entitled to immunity while in office or that the proceedings before the IMT or other tribunals against certain officials might have been, in some cases, the result of indictments which violated international law at the time of filing because the officials were still in office. To the contrary, not only Hitler appeared on the list of war criminals on several occasions while still in office,[74] but also the UNWCC consistently expressed the view that war criminals would not be entitled to invoke immunity.[75]

This view is reflected in an impressive 'number of surrender documents and other instruments calling for the arrest, transfer and prosecution of State officials'.[76] Indeed, all other bodies that preceded the UNWCC consistently expressed the same view. The London International Assembly was created in 1941 under the auspices of the League of Nations Union. Its members were 'designated by the Allied Governments, so that it indirectly reflected their views'.[77] It agreed that 'rank or position, however high, conferred no immunity in respect of war crimes'.[78]

The International Commission for Penal Reconstruction and Development started functioning on 14 November 1941. According to the majority of its members, 'in the field of war crimes no

[71]See 'Dan Plesch's Collaborative Paper', *supra* note 47.

[72]See Plesch, *supra* note 50, at 158.

[73]See 'Dan Plesch's Collaborative Paper', *supra* note 47.

[74]Ibid., at 269.

[75]See History of the United Nations, *supra* note 47, at 267–9.

[76]G. Mettraux, J. Dugard, and M. du Plessis, 'Heads of State Immunities, International Crimes and President Bashir's Visit to South Africa', (2018) 18 *International Criminal Law Review* 577, at 586–91.

[77]See History of the United Nations, *supra* note 47, at 266.

[78]Ibid.

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such immunity could be accepted'.[79] The argument was that 'immunity was an accepted principle in time of peace, for reasons of expediency and courtesy vital to peaceful intercourse between nations, but that it ceased to exist in time of war and could not be maintained for the benefit of the aggressor'.[80] The abovementioned 'practice of making and detaining heads of State and other State administrators prisoners, such as in the case of Napoleon I, Napoleon III, King Leopold of Belgium and Rudolf Hess, were also invoked as evidence that immunity did not exist in war time'.[81]

In sum, many of the views expressed during the Second World War and, most prominently, the actual charges against Hitler and their endorsement by the 16 countries of the UNWCC constitute state practice and *opinio juris* which serve as support for the notion that, at the time, a sitting head of state was not entitled to immunity with regard to the conduct underlying such charges. Basically, this conduct consisted of war crimes *stricto sensu* and specific criminal violations of national laws (on the reason for the '*stricto sensu*', see Section 4.3, *infra*).

Two final remarks about the indictments against Hitler and their endorsement by the UNWCC are due. First, the indictments filed by Poland, Belgium, and Czechoslovakia might suggest that prosecutions against Hitler in Polish, Belgian, and Czechoslovak courts were legitimate on the basis that the crimes were committed in their territory or against their citizens or interests.[82] However, their endorsement by the other countries of the UNWCC might suggest otherwise, namely, that Hitler could be prosecuted for such crimes – particularly, war crimes *stricto sensu* – in the courts of any country.

Second, even though the Czechoslovak Government mentioned Hitler's personal and penal responsibility for the invasion of Czechoslovakia, the actual charges put forward by Poland, Belgium, and Czechoslovakia did not contemplate responsibility for a crime of aggression. Thus, the national indictments surveyed in this section do not constitute state practice and *opinio juris* supporting the notion that, at the time, prosecution of a head of state for a crime of aggression could be carried out by national authorities. One might speculate whether this fact might lend some support to the view of those who – today – are of the opinion that the issue of jurisdiction and immunity concerning the crime of aggression is different from the issue of jurisdiction and immunity concerning war crimes *stricto sensu* and crimes against humanity.

The relevance of these two remarks will become apparent below in Section 4.3.

4.2. The IMT Judgment and its two-fold rationale for the no-immunity principle

Unawareness of the indictments against Hitler as a sitting head of state can no longer be alleged as a reason to continue to uphold the abovementioned twenty-first century myth concerning a long in existence 'full' head of state immunity and 'absolute' prohibition of prosecutions of heads of state by national authorities. However, scholars continue to appeal to the IMT judgment, and its statement 'he who violates the laws of war cannot obtain immunity', as a source of support for the idea that heads of state are not entitled to personal immunity only if prosecution takes place before international courts. Indeed, according to a widespread view, all immunity considerations put

[79] Ibid.

[80] Ibid.

[81] Ibid.

[82] This suggestion is grounded not only in the indictments which links to the respective files were already provided above, but also in the information it is possible to gather (some information contained therein is unreadable) from all the other indictments against Hitler currently available at drive.google.com/drive/folders/1CUw7FO63oJAXPfM6GaFfNv1D0J1gKlLs, via UNWCC Archives, available at unwcc.org/unwcc-archives/ (see files: C-G 9 Buchenwald.pdf; C-G 10 Sondergerichte Illegal courts and their staff jud.pdf; C-G 11 Natzweiler.pdf; C-G 13 Prague-Brno-Orienburg.pdf; C-G 14 Prague and Brno.pdf).

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forward by the IMT – and, particularly, such statement – only concern functional immunities and international courts.[83]

Very recently, a group of distinguished German scholars – Kai Ambos, Stefanie Bock, Julia Geneuss, Florian Jeßberger, Claus Kreß, Stefan Oeter, Andreas Paulus, Stefan Talmon, and Andreas Zimmermann – seemingly endorsed that view. Focusing on German national law, which 'explicitly excludes *functional* immunity for crimes under international law', they argue that such statement of the IMT judgment supports the notion that heads of state enjoy 'no *personal* immunity before international criminal tribunals'.[84]

True, as they emphasize, this view about the inexistence of personal immunity before international criminal tribunals is attuned with the position of the appeals chamber of the ICC in *Jordan Referral Re Al-Bashir*, and it also finds support in the *Arrest Warrant* case.[85] However, such view does not pay due homage to the Second World War legacy resulting from the indictments against Hitler, the work of the UNWCC, that statement in the IMT's judgment, and the no-immunity principle flowing from the IMT judgment as a whole. Nothing in such indictments, work, statement, and judgment suggests that personal immunity was inapplicable only in connection with international criminal courts.

To the contrary, in relation to the subject-matter here at stake, such indictments, work, statement, and judgment support the notion that there was no personal or functional immunity preventing heads of state from being prosecuted in courts of individual countries or, as a natural consequence, in international courts which countries decide to create together. In fact, no document of the time even contemplated the distinctions between personal and functional immunities or national and international courts.[86] At the time, the view – enshrined in all documents and, more explicitly, in that statement of the IMT Judgment – was that all sitting or former high officials prosecuted under 'laws of war' did not 'obtain' immunity.

The no-immunity position of the IMT has recently been analyzed both from the point of view of the history of international criminal law (ICL) and from the point of view of the logics of the laws of war. With a specific focus on the long-forgotten history of ICL and the 'absurdity' of the existence of head of state immunity with regard to international crimes, it has been argued that the IMT Judgment supports the notion that international criminal law, along with its co-natural no-immunity principle, have been in existence since the beginnings of international law.[87] From a different angle, with a specific focus on the 'laws of war' statement of the IMT, it has been argued that the law of war is incompatible with the head of state immunity principle upheld in the *Arrest Warrant* case.[88]

In fact, despite the present-day widely acceptance by states of the principle upheld in the *Arrest Warrant* case,[89] a minority of scholars 'maintain' that head of state immunity with regard to international crimes simply does not exist under customary international law.[90] However, it is important to note that the scope of the no-immunity principle resulting from the IMT judgment as a whole, on the one hand, and the indictments against Hitler and the work of the UNWCC,

[83]See, e.g., G. Werle and F. Jeßberger, *Principles of International Criminal Law* (2020), at 316, marg. 830.

[84]K. Ambos et al., 'Without Fear or Favour: For an Effective International Criminal Court', *Verfassungsblog*, 14 June 2024, available at verfassungsblog.de/without-fear-or-favour/ (emphasis added).

[85]Ibid.

[86]See Mettraux, Dugard, and du Plessis, *supra* note 76, at 587; J. Paust, 'Genocide in Rwanda, State Responsibility to Prosecute or Extradite, and Nonimmunity for Heads of State and Other Public Officials', (2011) 34 *Houston Journal of International Law* 57, at 77 (note 83).

[87]See Lemos, *supra* note 41, *passim*.

[88]M. Lemos, 'The Law of Immunity and the Prosecution of the Head of State of the Russian Federation for International Crimes in the War against Ukraine', *EJIL:Talk!,* 16 January 2023.

[89]For the most recent compilation of states' views, see 'Comments and Observations', *supra* note 7, at 4–21, 40–6. See also 'Summary and Final Remarks', *infra*.

[90]See A. Pellet, 'Response to Koh and Buchwald's Article: Don Quixote and Sancho Panza Tilt at Windmills', (2015) 109 *American Journal of International Law* 557, at 563–4; see Paust, *supra* note 86, at 71; see Lemos, *supra* note 41, at 316.

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on the other, is broader than the one suggested by those scholars. This, because, while those scholars mostly focus on the inexistence of immunity with regard to international crimes, the no-immunity principle flowing from such indictments, work and judgment does not exclusively encompass such crimes. Let us recall the no-immunity position of the IMT, which can be distilled from the following excerpt of the IMT judgment (hereinafter 'excerpt' or 'no-immunity excerpt'):

> The principle of International Law, which under certain circumstances protects the representatives of a State, *cannot be applied to acts which are condemned as criminal by International Law*. The authors of these acts cannot shelter themselves behind their official position in order to be freed from punishment in appropriate proceedings. Article 7 of the Charter expressly declares: "The official position of defendants, whether as heads of State, or responsible officials in government departments, shall not be considered as freeing them from responsibility, or mitigating punishment." *On the other hand* the very essence of the Charter is that individuals have international duties which transcend the national obligations of obedience imposed by the individual State. He who *violates the laws of war cannot obtain immunity* while acting in pursuance of the authority of the State if the State in authorizing action moves outside its competence under International Law.[91]

As it results from the highlighted parts of the excerpt, the IMT did not ground its no-immunity position exclusively on the perpetration of international crimes mentioned in the first sentence of the excerpt (protection does not cover 'acts which are condemned as criminal by International Law'). It also grounded it on the violations of the *jus ad bellum* and the *jus in bello* mentioned in the last sentence of the excerpt (he who violates the laws of war 'cannot obtain immunity' – on why this expression encompasses both the *jus ad bellum* and the *jus in bello*, see Section 4.3, *infra*).

That is, the IMT used a two-fold rationale for its non-immunity position. This two-fold rationale not only flows from a textual interpretation of the words of the IMT, but it was also acknowledged by IMT's French judge writing in a private capacity after the proceedings. While addressing the 'plea of immunity' of heads of state and diplomats, Henri Donnedieu de Vabres justified the position of the IMT by alluding, on the one hand, to the universal values protected by international criminal law and, on the other, to the logics of the laws of war. As to the second justification, in a paragraph concerning domestic legal provisions granting immunities to leaders and diplomats, de Vabres said:

> These provisions form the law of peacetime: they cease to apply in times of war because they have then lost their raison d'être, which is to maintain relations of courtesy. A monarch fallen in the hands of an enemy is treated by them just as any other prisoner would be ....[92]

This paragraph reflects the last sentence of the IMT's no-immunity excerpt. As to the first justification, in a subsequent paragraph and while alluding to what he had just said about international courtesy as 'the basis for the recognition of immunities of leaders and diplomats', de Vabres added:

> However, when values that are guarded by the universal community are at stake, *not only* are the rules of courtesy relegated to the background, *but* public order which is characterized by the reciprocal respect of each state's independence vanishes in favour of the idea of a superior public order.[93]

[91] *International Military Tribunal (Nuremberg),* Judgment of 1 October 1946, at 447 (emphasis added).

[92] H. D. de Vabres, 'The Nuremberg Trial and the Modern Principles of International Criminal Law', in G. Mettraux (ed.) *Perspectives on the Nuremberg Trial* (2008), 213 at 265–6.

[93] Ibid. (emphasis added).

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This paragraph, and its notion of a superior public order, reflect the first sentence of the immunity excerpt ('acts which are condemned as criminal by International Law'). According to de Vabres, this notion is the proper justification for Article 7 of the IMT Charter and it is what 'inspired' the first and second sentences of the excerpt.[94] De Vabres' considerations shed an authoritative light on the values underpinning the IMT's two-fold rationale for its no-immunity position. Still, they do not fully clarify what is the scope of no-immunity resulting from each rationale.

That scope becomes manifest if one duly considers the past practice surveyed in the previous sections of this article, which must have influenced the words employed by the judges of the IMT. Indeed, there is no reason to believe that the judges were unaware of: how the question of immunity was handled in the aftermath of the First World War; the national indictments against Hitler while he was a sitting head of state; the work of the UNWCC and its endorsement of the indictments against Hitler; the fact that many of the high officials who sat on the bench before them were arrested and surrendered to the IMT as a consequence of the work of the UNWCC.

The first rationale – in line with the idea that international law's 'superior public order' includes a subset on international crimes – means that there is no immunity for whoever commits international crimes. Whoever commits international crimes becomes immediately prosecutable under the law of crimes against peace, war crimes *stricto sensu* and crimes against humanity, which were the three sets of international crimes recognized in the IMT Charter.[95]

The second rationale – in line with the idea that immunities 'form the law of peacetime' – means that there is no immunity for whoever violates *jus ad bellum* or the *jus in bello* rules.[96] Whoever violates such rules becomes not only immediately prosecutable for such violations under international law proper (which to large extent coincided with the law on international crimes recognized in the IMT Charter), but also under national laws which, in wartime situations, might be used for a prosecution against a person who is entitled to immunity in peacetime situations. In other words, the person who commits such violations becomes fully exposed to the normal criminal law of foreign countries or to any special criminal law that such countries enact for wartime situations.

Let us illustrate this two-fold rationale while imagining how the *actual charges* included in the indictments against Hitler would have worked in practice. The first rationale would have served as a basis for prosecutions against Hitler under the law of international crimes – for the war crimes *stricto sensu* and crimes against humanity perpetrated in Czechoslovakia, Belgium, and Poland – not only in the national courts of these countries but also before the IMT. The second rationale would have served as a basis for prosecutions against Hitler under the laws of Czechoslovakia, Belgium, and Poland – for the national crimes of murder, torture, theft, deportation for forced labour, etc. perpetrated in Czechoslovakia, Belgium, and Poland – not only in the national courts of these countries but also before the IMT (had the IMT been endowed with jurisdiction over national crimes). It would also, for example, have served as a basis for prosecutions under Czechoslovak criminal law – for the whole range of crimes prescribed therein perpetrated in Czechoslovakia, Germany or elsewhere against the Czechoslovak Jews – not only in the national courts of Czechoslovakia but also before the IMT (had it been endowed with jurisdiction over crimes under Czechoslovak criminal law).

[94]Ibid.

[95]In Art. 5 of the International Military Tribunal for the Far East Charter (IMTFE), war crimes *stricto sensu* were labeled 'conventional war crimes'.

[96]For influential analyses based on the *jus ad bellum* and *jus in bello*, published in two of the most important law journals of the time, see also S. Glueck, 'The Nuremberg Trial and Aggressive War', (1946) 59 *Harvard Law Review* 396, at 424 (focusing on the *jus ad bellum* and stating: 'by invading neighboring countries … an offending sovereign destroys any implied consent that he be exempt from the jurisdiction of others, and strips himself and his agents of any mantle of immunity'), and Q. Wright, (1945), 'War Criminals', (2017) 39 *American Journal of International Law* 257, at 278 (focusing on the *jus in bello* and stating: 'the reasons which accord immunity to chiefs of state in the courts of another state in times of peace do not apply to actions against an enemy ruler for breaches of the law of war …').

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Setting now aside the actual charges against Hitler, there are two important questions that must be brought to the fore (they are related to the two remarks left unaddressed in the two final paragraphs of Section 4.1). First, would the first rationale have served as a basis for prosecutions against Hitler under international law – for crimes against peace, war crimes *stricto sensu* and crimes against humanity, irrespective of where they were perpetrated – not only before the IMT but also national courts worldwide? Second, would the second rationale have served as a basis for prosecutions against Hitler under the international laws of war or national laws – for violations of the *jus ad bellum* and the *jus in bello*, irrespective of where they were perpetrated – not only before the IMT but also national courts worldwide?

According to the IMT, the answer to both questions is affirmative (see next section).

4.3. The IMT's no-immunity position and national prosecutions for aggression and 'other war crimes'

As mentioned above, the indictments against Hitler did not contemplate responsibility for what the IMT called the 'supreme international crime' of aggression. Nonetheless, the conclusion to draw from the words of the IMT is that worldwide national or international prosecutions for international crimes (including, aggression) and violations of the laws of war can be carried out, not only pursuant to the law on international crimes and the law of the countries directly affected by a violation of the laws of war, but also pursuant to the laws of any country in the world willing to assert jurisdiction over international crimes (including, aggression) and violations of the laws of war. This conclusion might constitute the most relevant contribution of this article for present-day debates about the prosecution of heads of state like Bashar al-Assad, Benjamin Netanyahu, and, particularly, Vladimir Putin.

In order to dissect why such conclusion is relevant for present-day debates and inevitable in light of the IMT judgment, it is necessary to address the notion that the crime of aggression can only be prosecuted in the national court of the aggressor state or in an international criminal court. This notion seems to have originated in the ILC, which work on the question of immunity of state officials has, as mentioned above, largely overlooked – since its beginnings, in 2006 – much of the state practice and *opinio juris* surveyed in the previous sections of this article.

This practice and *opinio juris* were also overlooked in the ILC's earlier work relating to the implementation of a future *Code of Crimes Against the Peace and Security of Mankind*. In 1996, the ILC put forward that states (other than the aggressor state) should not have jurisdiction over the crime of aggression.[97] It proposed a jurisdictional regime for the crime of aggression providing for the 'exclusive' jurisdiction of an international criminal court with the 'singular exception' of the national jurisdiction of the aggressor state over its own nationals.[98] While not considering the state practice and *opinio juris* supporting the notion that head of state immunity does not apply to wartime situations, one of the arguments used by the ILC to justify its view is that the exercise of domestic jurisdiction over aggression would violate the principle underpinning that immunity, i.e., it would violate the abovementioned principle *par in parem imperium non habet*.[99]

Much more recently, in 2022 – in its fifteenth report on the issue of immunity of state officials from foreign criminal jurisdiction – the ILC alluded to that 1996 view as a justification for its decision not to include the crime of aggression in the list of international crimes in respect of which functional immunities do not apply.[100] This means that, according to the ILC, an aggressor head of state cannot be prosecuted for aggression in national courts not only while in office

[97]See ILC Commentary to the Draft Code of Crimes against the Peace and Security of Mankind, 1996 YILC, Vol. II, (Part Two), Art. 8, Commentary 14, at 27–30.

[98]Ibid.

[99]Ibid.

[100]ILC Report of the Seventy-Third Session, UN Doc. 10 (2022), at 238, Para. 21.

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eventually perpetrating the very crime of aggression – during this period a head of state is entitled both to a personal immunity by virtue of the fact that he or she is in office and to a functional immunity, because the act of aggression is a sovereign act of a state which cannot be adjudicated in foreign courts – but also after he or she leaves office. While head of state personal immunity ceases when he or she leaves office, functional immunity does not. Also in 2022, a group of legal scholars advising the government of the Netherlands on matters of international law (CAVV) considered that:

> Given the difficulty with which the crime of aggression was introduced into the Rome Statute . . . , it is also apparent that states even wished to allow prosecution by the ICC only if the aggressor state has consented to the exercise of jurisdiction. This is also consistent with the precedent of the Nuremberg Tribunal, which based its jurisdiction over aggression . . . on the transfer of jurisdiction by the Allied Powers that occupied Germany after the Second World War and thereby assumed the powers of the German aggressor state.[101]

The message that the CAVV wants to convey with this idea is that the jurisdiction of the IMT over aggression was based on the fact that the Allied Powers assumed the powers of Germany, *the aggressor state*.[102] This message, if accurate, would provide the ILC with strong historical support for the notion that the crime of aggression can only be prosecuted in the national court of the aggressor or in an international criminal court.

Throughout the last two decades, this and similar messages have been propping the head of state absolute immunity twenty-first century myth. For example, speaking about the current problem of how to prosecute the major war criminals of the Russian Federation, Kevin Jon Heller claims that the explanation as to why the IMT did not have to respect immunity is 'relatively straightforward': 'Nazi officials did not enjoy personal immunity at the IMT because the Allied Control Council, which served as the government of Germany following the war, *implicitly waived* their immunity'.[103] Elaborating on a similar type of claim, Ingrid Wuerth says:

> Germany, after its unconditional surrender, was under four-party occupation and in no position to assert immunity . . . . The *focus* at Nuremberg was . . . *not* . . . on any immunities that [Germany] might have been able to assert on behalf of its nationals but, instead, on establishing that the individual defendants could be held criminally liable for international crimes despite their official positions.[104]

All these messages are the result of the fact that their authors accepted that heads of state have long been entitled to an absolute immunity from foreign jurisdiction. However, they are not compatible with the way according to which the IMT actually focused on the issue of immunity and with its explicit justification for its own jurisdiction over the crime of aggression and other international crimes set out in the IMT Charter. While it is not the main purpose of this article to extensively engage with the debate about the overall nature of the jurisdiction of the IMT,[105] some engagement is a must. Let us start by recalling the most famous words of the IMT about this issue:

[101]Advisory Committee on Issues of Public International Law, Challenges in Prosecuting the Crime of Aggression: Jurisdiction and Immunities, Advisory Report no. 40 (12 September 2022), at 8.

[102]Similarly, see D. Akande, 'Prosecuting Aggression: The Consent Problem and the Role of the Security Council', *Legal Research Paper Series*, Paper No 10/2011, at 30–2.

[103]K. Heller, 'Creating a Special Tribunal for Aggression Against Ukraine Is a Bad Idea', *Opinio Juris*, 7 March 2022 (emphasis added).

[104]See Wuerth, *supra* note 8, at 763 (emphasis added).

[105]For discussion, see, e.g., M. Morris, 'High Crimes and Misconceptions: The ICC and Non-Party States', (2001) 64 *Law and Contemporary Problems* 13, at 37–42 (with references to the debate about this issue in the aftermath of the Second World

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> The making of the Charter was the exercise of the sovereign legislative power by the countries to which the German Reich unconditionally surrendered; and the undoubted right of these countries to legislate for the occupied territories has been recognized by the civilized world. The Charter is not an arbitrary exercise of power on the part of the victorious nations, but in the view of the Tribunal . . . it is the expression of International Law existing at the time of its creation; and to that extent is itself a contribution to International Law.[106]

The first thing to say about these words is that, even though the IMT naturally mentioned the right of the countries to which the German Reich surrendered to legislate for the occupied territory, there is no trace in such words – nor in other words of the IMT Judgment – that the IMT viewed its own jurisdiction over aggression as grounded on the circumstance that Germany was the aggressor state or that the aggressors were German nationals. Indeed, some passages of the IMT Judgment clearly point in the opposite direction (see below in this Section), and the IMT's jurisdiction was not even restricted to German nationals.[107] Similarly, there is no suggestion in the IMT Judgment that jurisdiction was grounded on the fact that the IMT itself was an international tribunal.

In other words, there is no support in the IMT judgment for the opinion of the ILC and the CAVV that jurisdiction over the crime of aggression can only be exercised by the aggressor state over its own nationals or by an international criminal court. Such an opinion is also at odds with the fact that prosecutions for aggression in national courts of victim states did in fact occur in the aftermath of the Second World War.[108] As far as the author of this article is aware, no one ever questioned the lawfulness of such prosecutions. It is possible that, at the time, the unchallenged view was that there was no rule of international law prohibiting states – particularly, the victim states – from prosecuting aggression.

The very notion that all states have a legitimate interest in prosecuting aggression was encapsulated in the following two passages of the IMT Judgment:

> The charges in the Indictment that the defendants planned and waged aggressive wars are charges of the utmost gravity. War is essentially an evil thing. Its consequences are not confined to the belligerent States alone, *but affect the whole world.*[109]
>
> To initiate a war of aggression, therefore, is not only an international crime; it is the supreme international crime *differing only* from *other war crimes* in that it contains within itself the accumulated evil of the whole.[110]

The notion that all states have a legitimate interest in prosecuting not only aggression but all violations of the laws of war was also omnipresent in Second World War agreements, judgments, reports, etc.[111] As an influential United States 1944 War Crimes Memorandum has put it,

War); M. Scharf, 'Universal Jurisdiction and the Crime of Aggression', (2012) 53 *Harvard International Law Journal* 358, at 374–9 (same).

[106]See IMT Judgment, *supra* note 91, at 443–4.

[107]As it results from the title of the agreement that created it, the IMT's purpose consisted of the prosecution of major war criminals of the 'European Axis' irrespective of their nationality. See 1945 Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, 59 Stat. 1544, 82 UNTS at 279, 281, 282 ('London Agreement').

[108]See Trial of Takashi Sakai, Chinese War Crimes Military Tribunal of the Ministry of National Defence, Nanking, 29 August 1946, Law Reports of Trials of War Criminals Selected and Prepared by the United Nations War Crimes Commission, Vol. XIV (London, 1949), at 1–6; Trial of Gauleiter Artur Greiser, Supreme National Tribunal of Poland, 21 June–7 July 1946, Law Reports of Trials of War Criminals Selected and Prepared by the United Nations War Crimes Commission, Vol. XIII (London, 1949), at 74–8, 104–12; Comments of the Republic of Poland to the topic 'Immunity of State Officials from Foreign Criminal Jurisdiction', at 1, available at legal.un.org/ilc/sessions/75/pdfs/english/iso_poland.pdf.

[109]See IMT Judgment, *supra* note 91, at 421 (emphasis added).

[110]Ibid. (emphasis added).

[111]See Scharf, *supra* note 105, at 374–9 (citing judgments delivered under Control Council Law No. 10, reports from the UN Secretary-General, statements at the IMT by the British and American prosecutors, etc.).

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> While the state whose nationals are directly affected has a primary interest, *all* civilized *states* have a real interest in the punishment of war crimes .... An offence against the laws of war is a violation of the law of nations; and a matter of *general interest* and concern .... Both on principle and in practice ... [national] military courts are empowered to try and adjudge punishment of war criminals ... *no matter who or against whom* the offence was committed.[112]

Also, it would be strange if – at the time – international law did not stand as a bar to the exercise of jurisdiction by all states in relation to war crimes *stricto sensu* and crimes against humanity but considered the exercise of jurisdiction by all states over the 'supreme international crime' of aggression as unlawful.[113] In short, the crime of aggression was (and still is) a 'crime against the whole international community and consequently, the whole community' could and can 'respond to it'.[114] Naturally, the acknowledgement of the interest of all states to prosecute a crime of aggression was also 'fully in line' with the UN Charter,[115] which was already in force at the time the IMT delivered its judgment, and presumably well-known to the judges of the IMT.

The notion that all states can prosecute not only a crime of aggression but also – and most importantly for present purposes – a head of state who is responsible for aggression also flows unequivocally from the IMT's no-immunity excerpt cited in Section 4.2. Let us recall that, in the first sentence of that excerpt, the IMT highlighted that the protections of international law for representatives of a state are not absolute and are set aside for 'acts which are condemned as criminal by international law'. This sentence alone suggests that there was neither a *par in parem non habet imperium* protection nor a personal or functional immunity protection that would prevent national (or international) courts from prosecuting a head of state for international crimes, including, naturally, aggression.[116] According to the Nuremberg Charter, the field of international crimes included – first and foremost – aggression.[117]

The notion that no such type of protection could prevent national courts from prosecuting aggression is confirmed in the second sentence of the no-immunity excerpt where the IMT uses the expression 'appropriate proceedings'. This expression encompasses both national and international proceedings. That is particularly manifest in the French version of the judgment, which states that the authors of international crimes cannot invoke their official capacity in order to escape normal proceedings.[118] At the time of the Second World War – as at the time of the First World War and before it – the normal proceedings for any type of war-related prosecution were proceedings before national courts.

For the IMT, because any of the 'signatory Powers' to the London Agreement that created the IMT would have alone the power to provide its own national courts with jurisdiction to prosecute acts which are criminal under international law, they could jointly provide that same jurisdiction

[112]United Nations War Crimes Commission, Trial of War Criminals by Mixed Interallied Tribunal, Memorandum by the Office of the United States Representative (31 August 1944), at 4–8 (emphasis added).

[113]On how prosecution for aggression under a principle of universality can be traced back to Nuremberg, see also Scharf, *supra* note 105, at 379.

[114]P. Grzebyk, 'Crime of Aggression against Ukraine, The Role of Regional Customary Law', (2023) 21 *Journal of International Criminal Justice* 435, at 455.

[115]Ibid. (specifically focusing on Arts. 2(5) and 2(6) of the UN Charter).

[116]As the authors of the History of the UNWCC have noted, a remarkable feature of the judgment of the IMT is that the irrelevance of the doctrines of state officials was pronounced for the whole field of international crimes covered by the Nuremberg Charter. See History of the United Nations, *supra* note 47, at 273.

[117]Charter of the International Military Tribunal, Annexed to the London Agreement, *supra* note 107, Art. 6(a).

[118]Procès des grands criminels de guerre devant le Tribunal Militaire International, Nuremberg (14 novembre 1945–1er octobre 1946), Texte officiel en langue française, Édité à Nuremberg, Allemagne 1947, at 235, available at gallica.bnf.fr/ark:/12148/bpt6k9758859r/f10.item.texteImage#.

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to the IMT.[119] As an echo of the French Report mentioned in Section 3.1, the IMT said: 'The signatory powers ... have done together what any one of them might have done singly'.[120] This is in line with what the signatory powers had said in the London Agreement:

> *Nothing* in this Agreement shall prejudice the jurisdiction or the powers of any *national* or occupation *court* established or to be established in an allied territory or in Germany for the trial of war criminals.[121]

The same conclusion flows from the third sentence of the no-immunity excerpt where the IMT quotes Article 7 of the IMT Charter. Such article 'contains no words of limitation' to the effect that a *par in parem non habet imperium* protection or personal or functional immunity protection could be invoked before national courts.[122] In the fourth sentence of the excerpt, the IMT speaks of 'international duties' which transcend national obligations and, in the last sentence, it alludes to the 'laws of war'. While sometimes the IMT uses the latter expression as specifically concerning war crimes *stricto sensu* – i.e., violations of the subset of the law of war traditionally known as *jus in bello* – other times it uses it *lato sensu* so as to encompass crimes of aggression, i.e., violations of the subset of the laws of war traditionally known as *jus ad bellum*.[123] This use is noticeable throughout the judgment and manifest when the IMT said that the crime of aggression is different 'from other war crimes'.[124] Do also note that the no-immunity considerations of the IMT and its many allusions to the 'laws of war', 'law of war' or 'International Law of war' appear in a section of the judgment entitled 'The Law of the Charter', a section which essentially consists of considerations about the crime of aggression.[125]

For the IMT, aggression was part of the larger genus of war crimes *lato sensu*, and the persons who commit aggression in violation of the laws of war, cannot obtain immunity. All no-immunity considerations put forward by the IMT are therefore incompatible with the notion that the IMT did not focus on immunities that Germany could allegedly invoke on behalf of its nationals or the idea that the Allied Control Council implicitly waived the personal immunity of Reich officials. For the IMT, there were no personal or functional immunities which Germany or the defendants could invoke to begin with and, consequently, nothing to be waived. Naturally, all general considerations of the IMT – and all specific no-immunity considerations concerning 'acts which are condemned as criminal by international law', 'international duties of individuals', 'laws of war', etc. – also demonstrate that the IMT did not view itself as a tribunal merely applying sovereign national law enacted by the countries exercising sovereignty over the occupied territories of Germany, but also as a 'criminal tribunal applying international law directly'.[126]

[119]The four signatory powers, which acted 'in the interests of all the United Nations', were the United States, France, Great Britain, and the Soviet Union. See London Agreement, *supra* note 107, Preamble, Art. 1. The London Agreement also foresaw the possibility of adherence to it by other states of the United Nations and 19 states have done so. Ibid., Art. 5.

[120]See IMT Judgment, *supra* note 91, at 444.

[121]See London Agreement, *supra* note 107, Art. 6 (emphasis added).

[122]See Joint Concurring Opinion, *supra* note 13, Para. 148.

[123]See IMT Charter, *supra* note 117, Arts. 1, 6. The expression also covers crimes against humanity perpetrated in '*connection*' with aggression or war crimes. Ibid.

[124]See IMT Judgment, *supra* note 91, at 421. It is also manifest when the IMT addressed the arguments that 'no sovereign power had made aggressive war a crime at the time that the alleged criminal acts were committed, that no statute had defined aggressive war', and that 'the pact does not expressly enact that such wars are crimes', Ibid., at 444–7. For example, while justifying why aggressive wars were indeed crimes under international law, the IMT said: 'The *law of war* is to be found not only in treaties, but in the customs and practices of States, which gradually obtained universal recognition ...', Ibid. (emphasis added).

[125]Ibid., at 444–7.

[126]R. Cryer, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime* (2005), at 38–9.

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In sum, according to the IMT judgment, there was no *par in parem non habet imperium* principle or head of state immunity rule barring national or international prosecutions against a head of state for a crime of aggression.

5. Summary and final remarks

For a long time, few actors argued that there was immunity for heads of state extending to situations of aggression and other war-related crimes. The nineteenth-century judgment of the Supreme Court of the United States in the *Schooner Exchange* does not specifically address such situations. In fact, it suggests that the head of state immunity does not extend to those situations. The inexistence of a 'special immunity' for kings or other heads of state for such situations is supported by writings of the most qualified publicists of the seventeenth, eighteenth, and nineteenth centuries.

In the twentieth century, at the end of the First World War, both the French Report and the English Report considered that heads of state responsible for invasions and war crimes were not entitled to immunity. The Report of the Commission concurred. The delegation of the United States argued otherwise (while erroneously invoking the *Schooner Exchange* as a support for its position), and the delegation of Japan expressed doubts about the issue, but their memorandums are the only documents on the laws of war where an immunity principle extending to these situations was envisaged. Soon after, these two countries were party to the Treaty of Versailles. This treaty has no trace of immunity for said heads of state.

In the middle of the twentieth century, during the Second World War, individual countries indicted – and the UNWCC endorsed charges against – Hitler while he was the sitting head of state of Germany. In Nuremberg, the IMT set forth that protections for the representatives of a state do not apply to crimes under international law. It also said that those who violate the laws of war cannot obtain immunity.

The no-immunity position of the IMT is a 'principle' identified in the IMT Judgment. The 'principles' identified by the IMT either reflected customary law or, arguably, turned into customary law when the states of the United Nations *unanimously* endorsed them soon after the IMT Judgment was delivered. In December 1946, the General Assembly affirmed 'the principles of international law recognized by the *Charter of the Nurnberg Tribunal* and the judgment of the Tribunal'.[127] This endorsement by the vast majority of the existing states in 1946 is an expression of the view of the international community at the time.[128] Apparently, it was therefore well established in 1946 that heads of state were not entitled to immunity with regard to aggression and other war-related crimes.

However, even if one accepts that the Nuremberg principles corresponded to customary law at the time, they are not immutable and, indeed, a strong argument can be put forward to the effect that a 'full' no-immunity Nuremberg principle is not part of current customary international law. The first (soft) blow to this principle came at the end of the twentieth century. In *Pinochet* – a case ironically heralded as a 'breathtaking' development that first challenged the idea of absolute immunity for heads of state –[129] the British judges of the House of Lords 'without exception'

[127]Affirmation of the Principles of International Law Recognised by the Charter of the Nuremberg Tribunal, GA Res. 95(I), UN Doc. A/236 (11 December 1946).

[128]The original members of the United Nations were 51: Argentina, Australia, Belgium, Bolivia, Brazil, Byelorussian Soviet Socialist Republic, Canada, Chile, China, Colombia, Costa Rica, Cuba, Czechoslovakia, Denmark, Dominican Republic, Ecuador, Egypt, El Salvador, Ethiopia, France, Greece, Guatemala, Haiti, Honduras, India, Iran, Iraq, Lebanon, Liberia, Luxembourg, Mexico, The Netherlands, New Zealand, Nicaragua, Norway, Panama, Paraguay, Peru, Philippine Republic, Poland, Saudi Arabia, Syria, Turkey, Ukrainian Soviet Socialist Republic, Union of South Africa, Union of Soviet Socialist Republics, United Kingdom, United States, Uruguay, Venezuela, Yugoslavia.

[129]See Wuerth, *supra* note 8, at 731–68.

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endorsed in *dicta* the idea that, under customary international law, sitting heads of state are entitled to a personal immunity which extends to international crimes.[130]

The second (strong) blow came in the beginning of the twenty-first century when the ICJ embraced such *dicta* and, as mentioned in the beginning of this article, ruled that heads of state are entitled to 'full immunity' from foreign jurisdiction, and that it had 'carefully examined State practice' and had been 'unable to deduce from this practice ... *any form of exception* to the rule according [head of state] immunity from criminal jurisdiction'.[131] Throughout the last two decades most scholars, courts and states embraced that 'full immunity' position.

Revealingly, from November last year to January this year, all countries which submitted their comments and observations to the ILC on the topic of this article endorsed *without exception* – or, at least, did not in any way challenge – the position adopted by the ICJ in the *Arrest Warrant* case.[132] The list of such countries is long: Australia, Austria, Brazil, the Czech Republic, Estonia, France, Germany, Iran, Ireland, Israel, Japan, Latvia, Liechtenstein, Lithuania, Luxembourg, Malaysia, Mexico, Morocco, The Netherlands, Norway (on behalf of Nordic countries), Panama, Poland, Portugal, Republic of Korea, Romania, the Russian Federation, Saudi Arabia, Sierra Leone, Singapore, Spain, Switzerland, Ukraine, United Arab Emirates, the United Kingdom of Great Britain and Northern Ireland and the United States of America.[133] Even Poland – which 'reminded' de ILC of its indictments against Hitler – did not challenge the absolute personal immunity of heads of state ruling put forward in the *Arrest Warrant* case.[134]

From this perspective, it might as well be true that all these 'recent developments' changed the content of the Nuremberg no-immunity principle. As a consequence, even though the situations and crimes that lie at the core of present-day debates about the prosecution of sitting heads of state – like Vladimir Putin, Bashar al-Assad, Min Aung Hlaing, and Benjamin Netanyahu – concern the same or similar type of situations and crimes as the ones covered in this article, their handling today by the international community perhaps cannot be based on such principle. In other words, scholars might be correct when they affirm that, 'in the current state of international organization, resistance to personal immunities is futile!'[135]

On the other hand, there are signs coming from some judiciary authorities – which apparently continue to interpret the current state of international organization in tune with a 'full' Nuremberg no-immunity principle – suggesting that the question might not be as settled as sometimes one is led to believe. Indeed, also very recently, on 8 June 2024, a prosecutor in Argentina asked a Federal Court to issue an arrest warrant for the sitting head of state Min Aung Hlaing on account of crimes against humanity and genocide.[136] Earlier, on 14 November 2023, a French court issued an arrest warrant for Syria's President Bashar al-Assad on 'charges of

[130]E. Denza, 'Ex parte Pinochet: Lacuna or Leap?', (1999) 48 *International & Comparative Law Quarterly* 949, at 954. But compare with the British Manual of Military Law of 1958 ('Heads of state and their ministers enjoy no immunity from prosecution and punishment for war crimes') and the British Joint Service Manual of 2004 ('Heads of state and their ministers are not immune from prosecution and punishment for war crimes'). British Manual of Military Law, The Law of War on Land (1958), Para. 632; The Joint Service Manual of the Law of Armed Conflict, Joint Service Publication 383 (2004 Edition), at iii, 440.

[131]See *Arrest Warrant of 11 April 2000*, *supra* note 5, Para. 58 (emphasis added).

[132]All these comments and observations can be found here: legal.un.org/ilc/guide/4_2.shtml.

[133]Ibid.

[134]See Comments of the Republic of Poland to the Topic 'Immunity of State Officials from Foreign Criminal Jurisdiction', at 1, available at legal.un.org/ilc/sessions/75/pdfs/english/iso_poland.pdf. Poland is of the view that the '*functional immunity* is not applicable to crimes covered by the Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal'. Ibid. (emphasis added).

[135]A. Hoogh, 'Personal Immunities Redux before A Special Tribunal for Prosecuting Russian Crimes of Aggression: Resistance is Futile!', *EJIL:Talk!*, 5 January 2024.

[136]E. Buzo et al., 'Argentinian Arrest Warrants for Crimes against the Rohingya: The Power of Small States', *Opinio Juris*, 16 July 2024.

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complicity in crimes against humanity and complicity in war crimes'.[137] On 26 June 2024, this decision was upheld by the Paris Court of Appeal.[138] The Paris Court of Appeal said:

> [T]he purpose of personal immunity is the exercise of representational functions at the international level. The use of chemical weapons by a Head of State against his own population does not fall within the scope of his normal duties. By not behaving like a Head of State, Bashar al-Assad has therefore excluded himself from the benefit of personal immunity.[139]

This decision is currently under appeal to the French Court of Cassation. In 2001, one year before the ICJ delivered its judgment in *Arrest Warrant* case, the French Court of Cassation had said the following:

> [I]n the absence of international provisions to the contrary ..., customary law prevents heads of state in office from being prosecuted before the criminal courts of a foreign state .... [C]onsidering that, at this stage of the development of international customary law, the crime charged, no matter how serious, does not fall within the exceptions to the principle of immunity from jurisdiction of foreign heads of state in office, the [Court of Appeal] has misunderstood the above-mentioned [immunity] principle.[140]

Implicitly, the court recognized there are exceptions to the principle of immunity from jurisdiction of foreign heads of state in office, but the crime charged (terrorism, namely a charge of complicity in the destruction of property by the effect of an explosive substance leading to the death of others, in connection with a terrorist enterprise) is not one of them. As far as one can tell, those exceptions correspond to the situations in relation to which the IMT rejected immunity.

Whether the French Court of Cassation will maintain its past practice and, more in general, what this very recent French and Argentinian practice means for the current state of international organization only time will tell. Be that as it may, this article has demonstrated that the past state of international organization was attuned with this French and Argentinian practice, and that is why it is safe to say that the notion according to which heads of state have for centuries enjoyed an absolute immunity from foreign jurisdiction is a myth.[141]

[137]'France Issues Arrest Warrant for Syria's President Assad-Source', *Reuters*, 15 November 2023, available at www.reuters.com/world/france-issues-arrest-warrants-against-syrias-president-assad-source-2023-11-15/.

[138]'French Court Upholds Warrant for Syria's Assad over Chemical Weapons', *SwissInfo*, 26 June 2024, available at www.swissinfo.ch/eng/french-court-upholds-warrant-for-syria%27s-assad-over-chemical-weapons/81880177.

[139]'Summary of the Judges' Motivation in Validating the Arrest Warrant for Syrian President Bashar al-Assad', available at scm.bz/en/summary-of-the-judges-motivation-in-validating-the-arrest-warrant-for-syrian-president-bashar-al-assad/; K. Andreikovets, and O. Kovalenko, 'A French Court Believes that Syrian Leader Assad May Not Have Imuunity. The Other Day, the Court Confirmed the Warrant for His Arrest', *Babel*, 27 June 2024, available at babel.ua/en/news/108499-a-french-court-believes-that-syrian-leader-assad-may-not-have-immunity-the-other-day-the-court-confirmed-the-warrant-for-his-arrest.

[140]M. Lemos, 'French Contributions to the issue of Head of State Immunity with regard to International Crimes', *EJIL:Talk!*, 24 April 2024.

[141]As these proceedings in Argentina and France are very recent, and the decisions of the French courts on the Bashar al-Assad case are still confidential, it is not possible – at the moment – to determine to what extent have the historical precedents mentioned throughout this article informed this Argentinian and French practice.

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