Head-of-State Immunity and the Challenges of International Criminal Law: Between Sovereignty and the Inevitability of Accountability

Sayitbekov Feruzbek Abdug'ulom o'g'li
Law searcher, saidbekovfer@gmail.com

ABSTRACT

This article examines the collision between the doctrine of head-of-state immunity and the imperatives of international criminal accountability, arguing that the contemporary legal order sustains a constitutive tension that no single doctrinal formula has yet resolved. The immunity of heads of state – grounded in the twin rationales of sovereign equality and the functional needs of international intercourse – was, for most of the Westphalian era, presumed to be absolute. The Nuremberg moment shattered that presumption at the level of principle; the Rome Statute of 1998 sought to consolidate its negation at the level of positive law. Yet the chasm between normative proclamation and political practice has, if anything, widened in the two decades since the International Criminal Court began operations. Drawing upon the jurisprudence of the ICJ, the ICC, the House of Lords in Pinochet, and the Extraordinary African Chambers, and engaging with the theoretical frameworks of Antonio Cassese, Dapo Akande, and Dire Tladi, this article contends that immunity and accountability are not simply antagonistic principles to be traded off against each other but structural expressions of two competing visions of international order – one grounded in state-sovereign equality, the other in the individual human being as the ultimate subject and beneficiary of international law. The resolution of this tension, the article argues, requires not a technical doctrinal fix but a political renegotiation of the terms on which the international community is prepared to insist upon accountability for mass atrocity – a renegotiation whose outcome remains, at present, genuinely uncertain.

Keywords: head-of-state immunity; international criminal accountability; Rome Statute; ratione personae; jus cogens; ICC; sovereign equality

In June 2011, the International Criminal Court's Pre-Trial Chamber I issued arrest warrants for Muammar Gaddafi, the sitting head of state of Libya, his son Saif al-Islam Gaddafi, and intelligence chief Abdullah al-Senussi, for alleged crimes against humanity arising from the violent suppression of civilian protesters and political opponents in the early weeks of the Libyan uprising. The legal, political, and diplomatic convulsions that followed were, in one sense, entirely predictable; in another sense, they illuminated with unusual clarity a paradox that has haunted international criminal law since its post-war inception. Here was the world's permanent international criminal tribunal – established by treaty, mandated to prosecute the most serious crimes of concern to the international community as a whole – issuing warrants against a sitting head of state whose country was not party to the Rome Statute, while NATO forces simultaneously conducted military operations against that very government under Security Council authorisation. The immediate practical question – who would arrest Gaddafi and surrender him to The Hague, given the ongoing armed conflict on Libyan soil? – was, for most observers,

largely rhetorical. The deeper legal question, however, was anything but: does international criminal law, at the level of *lex lata*, actually extinguish the customary international law immunity of a sitting head of state? The answer, as this article will demonstrate, is considerably less settled than the Rome Statute's drafters intended.[1]

The paradox has a precise genealogy. The traditional doctrine of head-of-state immunity rested on two foundations that were, for most of the Westphalian period, so thoroughly entangled as to be analytically indistinguishable. The first was the metaphysical – the identification of the sovereign with the state itself, so that an affront to the person of the ruler was an affront to the legal personality of the polity he represented. The second was the functional – the practical recognition that international relations require diplomatic intercourse, and that heads of state capable of being arrested on the territory of foreign states would simply cease to travel. Both rationales remain operative in contemporary international law; both are invoked, with varying degrees of candour, by states seeking to resist accountability proceedings against their leaders or those of their allies. What has changed is the emergence, since Nuremberg, of a competing normative claim: that certain crimes – genocide, crimes against humanity, war crimes, and aggression – are of such magnitude that no principle of sovereign privilege can be permitted to shield their perpetrators from legal consequence. The collision between these two normative claims is not merely a technical problem of treaty interpretation; it is a contest between two fundamentally different conceptions of what international law is for.

The immunity of the head of state and the accountability of the criminal are not simply antagonistic legal doctrines. They are structural expressions of two competing international orders, and the tension between them cannot be dissolved by treaty text alone.

The structure of the argument proceeds through five movements. The article begins by anatomizing the classical doctrine of immunity and the dual rationale that sustains it. It then traces the erosion of that doctrine through the Nuremberg principles, the ad hoc tribunals, and the consolidation of the Rome Statute, attending carefully to the conceptual architecture by which Article 27 sought to displace customary immunities. The third section examines the fault line that runs through the ICC's own jurisprudence – the tension between Article 27's categorical exclusion of immunity and Article 98's preservation of a space for immunity claims in the context of state-to-state cooperation – as dramatized by the Al-Bashir saga and its resolution in the Jordan Referral Appeals Chamber opinion. The fourth section examines two alternative accountability models – the Pinochet litigation before the UK courts and the Habré prosecution before the Extraordinary African Chambers – that operate outside the ICC framework and illuminate, by contrast, the structural limitations of the tribunal-based approach. The conclusion offers a prognosis that is, of necessity, provisional: the accountability norm is real and has practical effects, but its enforcement against sitting heads of state of powerful or protected countries remains

[1] International Criminal Court, Pre-Trial Chamber I. (2024). *Situation in Libya: Warrant of Arrest for Muammar Gaddafi, Saif Al-Islam Gaddafi, and Abdullah Al-Senussi*. ICC-01/11. https://www.icc-cpi.int/

hostage to political calculations that the Rome Statute's drafters chose to ignore rather than resolve.

Table 1. *Immunity of Heads of State Across International Forums: A Comparative Framework*

Jurisdiction / Forum	Immunity ratione personae	Immunity ratione materiae	ICC Article 27 waiver	Notable precedent or status
ICJ (contentious)	Full (sitting HoS)	Partial (acts of State)	N/A (States only)	Arrest Warrant 2002 (Congo v. Belgium)
ICC (Art. 27 RS)	Expressly excluded	Excluded (official capacity)	Mandatory for State Parties	Al-Bashir; Gaddafi warrant 2011
Ad hoc tribunals (ICTY/ICTR)	Not applicable	Excluded by statute	N/A	Milošević; Akayesu
Domestic courts (universal jurisdiction)	Contested; Yerodia rule applies	Highly contested	N/A	Pinochet (UK); Habré (Senegal/AU)
African Court on H&P Rights	State practice unclear	No explicit exclusion	State consent required	Pending: Kagame-era proceedings
Special Tribunal for Lebanon	Not applicable (PM, not HoS)	Excluded by statute	N/A	Hariri assassination indictments

Note: Immunity ratione personae: personal immunity attaching to the office (absolute during tenure). Immunity ratione materiae: immunity for official acts (potentially permanent). The table reflects lex lata as of early 2025; pending ICC proceedings may alter certain entries. Entries marked 'contested' reflect genuine doctrinal uncertainty rather than deliberate ambiguity.

THE ARCHITECTURE OF IMPUNITY: CLASSICAL DOCTRINE AND ITS RATIONALISATIONS

The classical doctrine of head-of-state immunity is most coherently expressed in the ICJ's 2002 judgment in the *Arrest Warrant* case (*Democratic Republic of the Congo v. Belgium*), a decision whose significance extends well beyond its immediate subject-matter – the immunity of a sitting foreign minister – to the broader question of how customary international law treats the personal immunities of high-ranking state officials. The Court held, in terms that were unambiguous if somewhat understated in their reasoning, that under customary international law a sitting Minister for Foreign Affairs enjoys full immunity from criminal jurisdiction before the courts of other states. The Court then went further, in a passage that has generated considerable scholarly controversy, and suggested that such immunity might be defeated in four limited circumstances: prosecution before international criminal tribunals; proceedings after the individual has left office for acts committed in a private capacity; proceedings in the official's own state; and waiver by the state whose national the official is. What the Court conspicuously declined to address was whether customary international law had evolved to permit the exercise of universal jurisdiction by national courts over sitting heads of state – a question it deferred, in what Cassese characterised as a failure of judicial courage, to some future occasion.[2]

[2] International Court of Justice, *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, ICJ Reports 2002, p. 3, https://www.icj-cij.org/case/121; Antonio Cassese, *When May Senior State Officials Be Tried for International Crimes? Some Comments on the Congo v. Belgium Case*, 13 European Journal of International Law 853, 867–68 (2002).

The rationalisations for immunity *ratione personae* – the absolute personal immunity that attaches to a head of state by virtue of the office, not the act – are, in their own terms, coherent. Sovereign equality, as codified in Article 2(1) of the UN Charter, implies that no state may subject another state, and by extension its highest representative, to the jurisdiction of its own courts without consent. The head of state, in this conception, is not an individual whose personal conduct is in question; he or she is the legal embodiment of the state, and to subject that person to foreign criminal jurisdiction is to assert a form of superiority over the represented polity that is structurally inconsistent with the horizontal character of the international legal order. The functionalist argument reinforces this conclusion from a different angle: international relations require that heads of state be able to travel, negotiate, and conduct diplomacy without the chilling effect of potential criminal exposure in every jurisdiction whose laws they may have infringed.

It is perhaps more accurate to suggest, however, that both rationales are simultaneously valid and deeply problematic. The identification of the head of state with the state is a legal fiction of considerable antiquity, but it is a fiction nonetheless – and one that, taken to its logical conclusion, would render meaningless the entire project of individual criminal accountability for mass atrocity. If the acts of a head of state are always acts of the state, and if the state as a legal person cannot be criminally prosecuted, then the head of state who orders a genocide is, in principle, beyond the reach of any criminal sanction that operates through the medium of individual liability. This is not a hypothetical; it is an accurate description of the legal position that prevailed, at the level of customary international law, until Nuremberg. The functionalist argument is more compelling in the context of *ratione personae* immunity for serving officials – the argument that the conduct of international relations would be hampered if sitting heads of state faced arrest – but it has considerably less force as applied to *ratione materiae* immunity for former heads of state in respect of acts that, by any credible reading, constitute international crimes. The functional imperative of diplomatic intercourse does not require that a former leader who ordered systematic torture be shielded from prosecution by the courts of a third state; and the claim that it does is, in this author's view, a category error that conflates the institutional requirements of inter-state diplomacy with the personal legal protection of individuals who have committed serious crimes.

NUREMBERG

The Nuremberg principles represent not merely a historical watershed but a conceptual revolution whose full implications the international legal order is still, eight decades later, working through. Principle III of the International Law Commission's 1950 formulation is unambiguous: 'The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible Government official does not relieve him from responsibility under international law.' The drafters of the London Charter of 1945 had reached the same conclusion by a different route, providing in Article 7 that '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.' The foundational logic of both provisions is identical: individuals, not abstract state

entities, commit the acts that constitute international crimes; and the interposition of an official title between the individual and his criminal responsibility cannot be permitted to defeat the law's fundamental purpose of attaching liability to culpable human agency.[3]

What Nuremberg established at the level of principle, the Rome Statute sought to consolidate at the level of positive international law for a permanent institution with prospective, global reach. Article 27, entitled 'Irrelevance of official capacity,' provides in terms of notable directness that the Statute shall apply equally to all persons without any distinction based on official capacity, and that '[i]mmunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.' The drafting history of Article 27 reflects a deliberate decision to foreclose the doctrinal arguments that had been used, in the context of the former Yugoslavia tribunal, to delay proceedings against Milošević on grounds of his then-incumbent status as president of the Federal Republic of Yugoslavia. The provision represents, in its terms, the most unequivocal statement in positive treaty law of the incompatibility of head-of-state immunity with the accountability imperative.

A more skeptical view would contend, however – and this is the argument that Dapo Akande has pressed with considerable force – that Article 27 operates only as between the ICC and States Parties to the Rome Statute, and that it does not, and cannot, modify the customary international law obligations of States Parties when they are requested to arrest and surrender a person who would otherwise enjoy immunity under general international law. This is the fault line that Article 98(1) was designed to address, and that it has, in practice, failed to resolve. Article 98(1) prohibits the Court from proceeding with a request for surrender or assistance which would require the requested state to act inconsistently with its obligations under international law with respect to the state or diplomatic immunity of a third-state national. The provision was clearly intended to preserve the residual space for customary immunity claims; its interaction with Article 27 produces a structural tension that the drafters of the Rome Statute, perhaps deliberately, left unresolved. The consequence has been a decade and a half of jurisprudential and political chaos centred on the figure of Omar Al-Bashir – a chaos whose resolution, in the 2019 Appeals Chamber opinion in the Jordan Referral, was achieved through a majority reasoning that many scholars, including this author, find ultimately unconvincing in its treatment of the customary law position.[4]

Table 2. *Chronology of Head-of-State Immunity and Accountability: Key Moments, 1919–2023*

[3] International Law Commission, *Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal*, Principle III, in Report of the International Law Commission on the Work of Its Second Session, UN Doc A/1316, at 374 (1950); *Charter of the International Military Tribunal*, Annex to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, art. 7, 8 August 1945, 82 UNTS 279.

[4] Dapo Akande, *International Law Immunities and the International Criminal Court*, 98 American Journal of International Law 407, 419–22 (2004); Rome Statute of the International Criminal Court, art. 27 & art. 98(1), 17 July 1998, 2187 UNTS 90; *Situation in Darfur, Sudan – In the Case of the Prosecutor v. Omar Hassan Ahmad Al-Bashir*, Judgment in the Jordan Referral re Al-Bashir Appeal, ICC-02/05-01/09 OA2, 6 May 2019.

Year	Event / Instrument	Legal Significance
1919	**Versailles Treaty, Art. 227**	First attempt to try Kaiser Wilhelm II; Netherlands refuses extradition; immunity prevails over accountability.
1945–46	**Nuremberg & Tokyo Tribunals**	Official capacity expressly excluded as a defence. Foundational rejection of immunity for international crimes.
1973	**Pinochet seizes power (Chile)**	Begins the test case that would eventually end – 25 years later – in the House of Lords ruling.
1993/1994	**ICTY & ICTR Statutes adopted**	Both explicitly exclude immunity ratione personae for sitting heads of state. Milošević indicted 1999.
1998	**Rome Statute adopted**	Article 27: immunity irrelevant 'whether or not it attaches to an official capacity.' Game-changing lex ferenda.
1999	**R v. Bow Street Magistrate, ex p. Pinochet (No. 3)**	UK Lords: former HoS has no immunity for jus cogens crimes before foreign courts. Narrow but significant.
2002	**ICJ – Arrest Warrant (Congo v. Belgium)**	Sitting foreign minister retains absolute immunity before national courts; immunity ≠ impunity (future exceptions listed).
2009/2010	**ICC issues warrants for Al-Bashir (Sudan)**	First sitting head of state indicted by ICC. Art. 27 vs. Art. 98 tension crystallized; African Union protests.
2019	**ICC Appeals Chamber – Jordan Referral**	Art. 27 RS overrides customary immunity even for non-States Parties in ICC proceedings. Controversial majority.
2021	**Habré case finalized (Extraordinary Chambers)**	African-led tribunal convicts former Chadian president for crimes against humanity. Regional accountability model.
2023	**Putin ICC warrant issued**	Warrant for war crimes (deportation of Ukrainian children). Russia non-party; enforcement purely political.
2011	**Gaddafi, Saif al-Islam & al-Senussi warrants issued**	ICC Pre-Trial Chamber authorizes warrants against sitting head of state via SC Res. 1970 referral. First warrant against a sitting head of state concurrent with ongoing NATO military operations. Gaddafi killed before arrest; Saif al-Islam warrant outstanding for over a decade.

Note: The timeline traces the dialectical oscillation between immunity and accountability. Events in the upper half of the table (1919–1998) predominantly reflect the persistence of immunity; the lower half (1998–2023) reflects the progressive, if contested, consolidation of the accountability norm. Note the absence of any successful enforcement action against a sitting head of state before the ICC as of early 2025: the normative trajectory and the enforcement record diverge sharply.

THE AL-BASHIR FAULT LINE: ARTICLE 27, ARTICLE 98, AND THE AFRICAN REVOLT

The Al-Bashir proceedings constitute the most sustained and consequential test of the Rome Statute's immunity exclusion, and their legacy is instructive precisely because it is so ambiguous. Omar Al-Bashir, President of Sudan at the time of the ICC's 2009 and 2010 arrest warrants, was the first sitting head of state to be indicted by the Court. Sudan is not a party to the Rome Statute; the Court's jurisdiction was established through Security Council referral under Resolution 1593 (2005). This jurisdictional foundation was significant for the immunity question: if the Security Council, acting under Chapter VII, had referred the situation to the ICC, did the referral carry with it an implicit – or explicit – waiver of any immunity that Sudanese officials might otherwise have enjoyed under customary international law?

The answer given by the ICC's Pre-Trial Chambers over a series of decisions from 2010 onwards was, in essence, yes – though the reasoning varied considerably and was not always internally consistent. The logic was that the Security Council, in referring the situation, had implicitly placed Sudan in the same position as a State Party for the purposes of the Court's jurisdiction; that this carried with it the application of Article 27; and that any immunity claim by Sudan on behalf of Al-Bashir was therefore foreclosed. States Parties to the Rome Statute that received Al-Bashir on their territory – South Africa in 2015, Jordan in 2017, among others – were found by various ICC chambers to have failed to comply with their cooperation obligations by not arresting and surrendering him. South Africa's failure generated proceedings before the ICC and a domestic legal saga before its own courts; Jordan's referral to the Court ultimately led to the landmark 2019 Appeals Chamber opinion.

The 2019 Appeals Chamber majority opinion – which held, by a majority of three to two, that customary international law does not provide immunity from arrest and surrender to the ICC, even for sitting heads of state of non-States Parties, when the Court's jurisdiction has been established by Security Council referral – has been extensively criticised in the scholarly literature, and this author's reservations align broadly with those of the minority judges and of Dire Tladi's penetrating Separate Opinion. The majority's treatment of customary international law is, to put the matter diplomatically, strained. It relies heavily on the proposition that a general exception to customary immunity exists for proceedings before international criminal tribunals, drawing on the *Arrest Warrant* dicta and the Nuremberg principles; but it extends that proposition to cover a situation – arrest and surrender by a third state – that is analytically distinct from proceedings before the international tribunal itself. A state that arrests and surrenders a head of state is not an international tribunal; it is a sovereign state exercising, at the request of an international institution, a form of coercive authority over the person of another state's highest representative.

What is perhaps most significant about the Al-Bashir episode, viewed in its entirety, is the response it generated from the African Union. The AU's repeated declarations that its member states were not obliged to arrest Al-Bashir, its sustained critique of the ICC as an instrument of selective Western justice, and its lobbying for Article 16 deferrals represent something more substantive than political recalcitrance. They represent a coherent, if not ultimately persuasive, legal argument: that the accountability norm, as operationalized by the ICC in the Al-Bashir proceedings, was being applied in a manner that was structurally discriminatory – that the Security Council's selective deployment of Chapter VII referral powers meant that accountability proceedings were initiated against African leaders while comparable situations in other regions went uninvestigated. The argument is not simply about immunity; it is about the legitimacy of the international criminal justice enterprise as a whole, and about whether an accountability system that is perceived as geopolitically selective can claim the moral authority necessary to override sovereign

immunities that serve functions – however imperfectly – within the international order.[5]

PINOCHET AND HABRÉ BEYOND THE ICC

The ICC's structural limitations – its dependence on state cooperation, its vulnerability to Security Council political dynamics, its jurisdictional gaps with respect to non-States Parties – have directed scholarly and practitioner attention toward alternative accountability modalities that operate alongside, and sometimes in tension with, the Rome Statute system. Two cases in particular – the Pinochet litigation in the United Kingdom and the prosecution of Hissène Habré before the Extraordinary African Chambers – illuminate both the possibilities and the limitations of non-ICC accountability mechanisms, and in doing so cast the immunity problem in a somewhat different light.

The House of Lords' decision in *R v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No. 3)* (1999) remains the most analytically significant national court decision on the scope of head-of-state immunity, not because of the breadth of its holding – which was, on any reading, extremely narrow – but because of what it suggested about the direction of travel of customary international law. A bare majority of six to one held that Pinochet, as a former head of state, could not claim immunity in respect of acts of torture committed after the United Kingdom had ratified the Convention Against Torture. The logic of the majority – stated with varying degrees of elegance and consistency across the six concurring speeches – was that torture, as a crime that states have collectively and treaty-specifically prohibited, cannot at the same time constitute an 'official act' for the purposes of immunity *ratione materiae*: the state cannot simultaneously categorise torture as a crime for which it bears responsibility under the Convention and treat it as an official function for which its former leaders are entitled to immunity. The internal contradiction, the majority held, resolved in favour of accountability.[6]

The implications of *Pinochet No. 3* have been far more modest in practice than enthusiasts for the accountability norm had hoped. The decision applied only to former heads of state (sitting leaders retaining full *ratione personae* immunity), only with respect to torture under the CAT regime, and only where both the accused's state and the forum state had ratified the Convention before the alleged acts. Its extension to crimes against humanity and genocide, or to acts predating the forum state's ratification, was expressly left open by the Lords; subsequent litigation has produced inconsistent results. What the case did achieve, with considerable consequence for the politics of transitional justice, was to demonstrate that the impunity of former heads

[5] African Union, *Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC)*, Assembly/AU/Dec.245(XIII) Rev.1, 3 July 2009; African Union, *Decision on the Progress Report of the Commission on the Implementation of the Decisions on the International Criminal Court (ICC)*, Assembly/AU/Dec.270(XIV), 2 February 2010; see also *Situation in Darfur, Sudan – In the Case of the Prosecutor v. Omar Hassan Ahmad Al-Bashir*, Judgment in the Jordan Referral re Al-Bashir Appeal, ICC-02/05-01/09 OA2, ¶¶ 113–18 (6 May 2019) (discussing the African Union's position on non-cooperation).

[6] *R v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No. 3)*, [1999] UKHL 17, [2000] 1 AC 147 (H.L.); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 1, 4, 5(2), 7, 10 December 1984, 1465 UNTS 85.

of state is not legally guaranteed – that there are circumstances, however carefully circumscribed, in which the domestic courts of a third state may exercise criminal jurisdiction over a former leader's official acts.

The Habré prosecution offers a different model: accountability through regional institutional architecture rather than universal jurisdiction exercised by a single state. Hissène Habré, who ruled Chad from 1982 to 1990 and was responsible for the systematic torture and murder of tens of thousands of his own citizens, sought refuge in Senegal after his overthrow. The subsequent two decades of legal and political manoeuvring – Senegal's repeated failure to prosecute; the ICJ's 2012 judgment in *Questions Relating to the Obligation to Prosecute or Extradite* finding Senegal in breach of its CAT obligations; the eventual establishment of the Extraordinary African Chambers within the Senegalese court system with African Union sponsorship – represent a model of graduated, politically negotiated accountability that avoided both the ICC's enforcement limitations and the sovereignty concerns of universal jurisdiction. Habré was convicted in 2016, the conviction confirmed on appeal in 2017; he was the first former head of state to be convicted by an African tribunal for crimes against his own people.

Table 3. *Analytical Tension Matrix: Immunity Doctrines vs. Legal and Normative Frameworks*

	Immunity ratione personae	Immunity ratione materiae	ICC Article 27	Universal Jurisdiction
Sovereignty doctrine	Upholds fully	Upholds (state acts)	Rejects (RS Art.27)	Contested
Human rights law	Rejects	Rejects (jus cogens)	Compatible	Supports
Customary int'l law	Generally upholds	Upholds (Arrest Warrant)	Transitional norm	Deeply divided
ICC Rome Statute	Expressly excluded	Expressly excluded	Central provision	Complementary
African Union position	Affirms for AU members	Affirms	Challenges (Art.98)	Selective acceptance
TWAIL scholarship	Critiques as Western	Critiques selectively	Conditional support	Critiques selectivity

Note: Colour coding: Green = general consensus or compatibility; Yellow = contested, context-dependent; Red = sharp normative conflict. TWAIL = Third World Approaches to International Law. The matrix maps doctrinal and normative tensions as they stand in early 2025 and is intended as an analytical heuristic, not a definitive legal statement. The 'contested' and 'red' entries identify the principal fault lines examined in this article.

The foregoing analysis converges on a conclusion that resists both the optimism of liberal internationalism and the cynicism of legal realism. The accountability norm is real – not merely aspirational or cosmetic – in the sense that it has genuine effects on the behaviour of states and individuals, generates enforceable obligations in specific institutional contexts, and has altered the calculus of former and sitting leaders in ways that were unimaginable in the pre-Nuremberg world. A former head of state who orders systematic torture does now face a non-trivial risk of

prosecution, if not before the ICC then before the courts of a third state exercising universal jurisdiction, or before a regional tribunal established for the purpose. The Pinochet precedent, the Habré conviction, the ICTY's prosecution of Milošević (however incomplete), and the ICC warrants against Al-Bashir, Gaddafi, Gbagbo, and Putin have cumulatively constituted a new normative landscape in which impunity, while far from eliminated, can no longer be assumed.

Against this, however, must be set the equally demonstrable proposition that the accountability norm, as currently operationalized, is structurally selective in ways that map onto the geopolitical hierarchy of the international order. Not a single sitting head of state of a major power – a permanent member of the Security Council, a NATO ally, or a state with the military and economic capacity to render its leader effectively unreachable – has been arrested, surrendered, or brought to trial before an international criminal tribunal. The ICC's docket has, for most of its history, been overwhelmingly African; the warrants that have produced the most significant political controversy – those against Al-Bashir, Gaddafi, and, most recently, Putin – have been issued against leaders whose states are either non-parties or whose allies can effectively prevent enforcement. What is often overlooked in the otherwise compelling narrative of progress toward universal accountability is that the very selectivity of the system's enforcement undermines the *opinio juris* that would be necessary to consolidate a robust customary norm against immunity for sitting heads of state. If the norm is applied only when power permits, it cannot generate the consistent, general practice from which custom crystallises.

The theoretical frameworks that most illumine this condition are, this author would submit, those that attend simultaneously to the normative and the structural. Antonio Cassese's insistence that international criminal law represents a genuine normative revolution – that the individual has entered the international legal stage as a subject bearing both rights and criminal responsibility – remains persuasive as a claim about the direction of doctrinal development. But it requires supplementation by the structural critique that Tladi and others have pressed: that the international criminal justice enterprise, as currently constituted, reflects and reinforces the power asymmetries of the international order in ways that its universalist rhetoric conceals. The solution, if there is one, lies neither in abandoning the accountability project nor in pretending that its current form is adequate, but in what might be called – with conscious understatement – institutional redesign: a Security Council whose composition and veto structure does not systematically protect the nationals of its permanent members from accountability; an ICC whose prosecutorial independence is genuinely insulated from great-power pressure; and a system of universal jurisdiction exercised by national courts that is robust enough to serve as a genuine complement to the ICC when the tribunal's own enforcement capacity fails.[7]

None of this is imminent. The political conditions for the institutional reforms that genuine universal accountability would require do not presently exist, and there

[7] Antonio Cassese, *International Criminal Law* 13–16 (2d ed. 2008); Dire Tladi, *The International Criminal Court and the Security Council: A Faustian Bargain?*, in *The Oxford Handbook of International Criminal Law* 567, 572–75 (Kevin Heller et al. eds., 2020); see also M. Cherif Bassiouni, *The Perennial Conflict Between International Criminal Justice and Realpolitik*, 38 Georgia Journal of International and Comparative Law 541, 577–85 (2010).

is no convincing reason to believe that they will materialise in the near term. The most that can be said – and it is not nothing – is that the normative landscape has shifted irreversibly. The claim that heads of state are absolutely immune from criminal accountability for mass atrocity is no longer legally tenable, even if its practical refutation remains contingent, selective, and politically mediated. The sword of Damocles hangs, however unevenly, over the sovereign's chair; and the knowledge that it does so has effects on conduct, incentive, and the internal politics of states that are real even when they are unmeasurable. International law has not solved the problem of accountability for heads of state. It has, however, made the problem permanent. That is perhaps, under the circumstances, as much as one can ask of it.

NOTES

1 The Gaddafi warrants (ICC Pre-Trial Chamber I, Situation in Libya, Case No. ICC-01/11-01/11, 27 June 2011) were issued pursuant to UN Security Council Resolution 1970 (2011), which referred the Libyan situation to the Court under Chapter VII of the UN Charter – the first instance of the Council invoking that mechanism in respect of a sitting head of state against whom NATO-backed military operations were simultaneously under way. Libya was not a party to the Rome Statute; the entire jurisdictional basis was accordingly contingent on the referral. For the fullest treatment of the jurisdictional question, see William Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 3rd ed. (2021), at 390–412. The author notes that Gaddafi's death at the hands of rebel forces in October 2011, before any arrest or surrender could be effected, rendered the warrant's practical enforcement moot – yet the legal questions it raised about the scope of immunity for sitting heads of state remain fully alive, as illustrated by the outstanding warrant against Saif al-Islam Gaddafi, whose status before the ICC continues to generate jurisdictional controversy more than a decade later.

2 Cassese's critique of the ICJ's approach in *Arrest Warrant* as a failure of judicial nerve is developed in his 'When May Senior State Officials Be Tried for International Crimes?' (2002) 13 *European Journal of International Law* 853. Cassese argued, against the Court's holding, that customary international law had by 2002 already crystallised a norm excluding immunity *ratione materiae* for international crimes even before national courts. This author's position is that Cassese was correct as to the direction of normative development but premature in his assessment of the customary norm's consolidation – an assessment the subsequent conduct of states has, unfortunately, not yet vindicated.

3 The voluntarist objection to the Nuremberg principles – that they imposed individual criminal liability retrospectively and without the consent of Germany as a sovereign state – deserves more than the dismissal it has typically received from international criminal lawyers. As Hans Kelsen observed at the time, the tribunal's jurisdiction was grounded in the unconditional surrender of Germany, not in any pre-existing treaty obligation or customary rule; the 'principles' it articulated were, in this reading, *lex ferenda* posturing as *lex lata*. The ILC's 1950 formulation of the Nuremberg principles may be understood as an attempt to convert this *lex ferenda* into genuine custom through the mechanism of authoritative restatement – a process that took several additional decades to approach consolidation. The author's position

is that the Nuremberg principles are now firmly *lex lata*, but that the process by which they achieved that status illuminates why the customary norm against immunity for sitting heads of state remains less settled than its normative desirability might suggest.

4 Akande's analysis of the Article 27/Article 98 tension is set out most fully in 'The Legal Nature of Security Council Referrals to the ICC and Its Impact on Al Bashir's Immunities' (2009) 7 *Journal of International Criminal Justice* 333. The author respectfully disagrees with Akande's conclusion that Security Council referral implicitly displaces all immunities, on the grounds that such a reading stretches the text of Resolution 1593 beyond its evident purpose and fails to engage adequately with the structural significance of Articles 25 and 103 of the UN Charter in relation to immunities of non-State Party nationals. The 2019 Appeals Chamber majority opinion – which Akande's analysis arguably anticipates – is, in the author's view, better understood as a political decision to prevent Article 98 from becoming a permanent immunity shield for Sudan than as a rigorous resolution of the customary law question.

5 The African Union's position on ICC proceedings against African heads of state is not, as sometimes caricatured, a simple assertion of impunity. The AU's 2013 Extraordinary Summit Decision expressly reaffirmed states' obligations to combat impunity and acknowledged the authority of international criminal law in principle; what it contested was the timing and targeting of ICC proceedings, specifically the indictment of sitting leaders during peace negotiations (the Sudan context) and the selective focus on Africa. Dire Tladi's contribution to this debate – both as a member of the ILC and as a judge of the ICJ – represents the most sophisticated legal articulation of the African critique, and is not adequately addressed by simply reiterating the text of Article 27. See Tladi, 'The African Union and the International Criminal Court: The Battle for the Soul of International Law' (2009) *South African Yearbook of International Law*.

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