

2019

No Longer Immune? How Network Theory Decodes Normative Shifts in Personal Immunity for Heads of State

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No Longer Immune? How Network Theory Decodes Normative Shifts in Personal Immunity for Heads of State

NADIA BANTEKA*

The customary international law (CIL) norm of personal immunity for Heads of State has come under significant fire in the past decade. While immunity norms have traditionally been absolute, the increasing influence of the human rights and anti-impunity movements, coupled with pleas for international criminal responsibility for egregious human rights and humanitarian violations, have eroded them, particularly within international jurisdictions. These changes reflect a larger challenge to the traditional state-centric model. Although states remain the primary makers of international law, many other participants, including international organizations, courts, and non-governmental organizations (NGOs), are crucial to the development of international legal norms today. But there is, of yet, no formal model integrating these actors into existing legal frameworks. The goal of this Article is to provide an analytical framework to apply to the shifting norm of personal immunity for Heads of State based on the relationships and connections among actors. Using the tools of network theory, this Article determines the defining properties of this network of actors, including its topology, density, centrality, and actor similarity, which explain current normative shifts and predict developments. Based on this quantitative analysis, this Article puts forward two arguments. First, non-state actors, even though not formally accepted as capable of contributing to international law, have a clear normative effect. Second, insofar as the hubs in this network continue to pursue an exception to Head of State immunity before International Criminal Courts, we are likely to see an exception crystallize as a new rule of CIL. Viewing international law through networks of actors provides lawyers and policy-makers with a descriptive tool that translates and maps the elusive global realities that lead to international law-making.

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I. INTRODUCTION

State officials are entitled to two types of immunity from criminal prosecution in a foreign court: functional immunity (*immunity ratione materiae*)¹ and personal immunity (*immunity ratione personae*).² This Customary International Law (CIL) rule derives from the principles of state sovereignty and sovereign equality,³ and reflects the idea that foreign entities should not be able to hinder the official performance of state representatives by means of their domestic jurisdiction.⁴ In other words, immunity seeks to protect freedom of movement and negotiation among states and their agents, recognizing their need to perform those functions without impediment by other states.⁵ The International Court of Justice

1. For an excellent discussion of the doctrine of functional immunity, see Prosecutor v. Blaskic, Case No. IT-95-14-AR108, Appeals Chamber Decision, ¶¶ 38–45 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 29, 1997). Other expressions are also used to refer to functional immunity, such as immunity *ratione materiae* or immunity from jurisdiction for official acts. See IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 361-62 (5th ed. 1998).

2. See YITHA SIMBEYE, IMMUNITY AND INTERNATIONAL CRIMINAL LAW 109-111 (2004) (“[I]mmunity *ratione personae* relates to the individual and *materiae* to the acts.”); Chanaka Wickremasinghe, *Immunities Enjoyed by Officials of States and International Organizations*, in INTERNATIONAL LAW 387, 389-90, 395 (Malcolm D. Evans ed., 1st ed. 2003) (discussing the differences between functional and personal immunity and when they are applied); Dapo Akande, *International Law Immunities and the International Criminal Court*, 98 AM. J. INT'L L. 407, 409 (2004) (noting that some officials enjoy broad immunity while others have immunity only for official acts).

3. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14, ¶ 202 (June 27); see also MALCOLM N. SHAW, INTERNATIONAL LAW 697 (6th ed. 2008) (arguing that international law requires respect for territorial integrity and the political independence of other states).

4. See BRUCE BROOMHALL, INTERNATIONAL JUSTICE AND THE INTERNATIONAL CRIMINAL COURT: BETWEEN SOVEREIGNTY AND THE RULE OF LAW 129 (2003) (“[T]he purpose of . . . privileges and immunities is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing States.”).

5. See Michael A. Tunks, *Diplomats or Defendants? Defining the Future of Head-of-State Immunity*, 52 DUKE L.J. 651, 656 (2002) (“Head-of-State immunity allows a nation’s leader to engage in his official duties, including travel to foreign countries, without fearing arrest, detention, or other treatment inconsistent with his role as the head of a sovereign State. Without the guarantee that they will not be subjected to trial in foreign courts, Heads of State may simply choose to stay at home rather than assume the risks of engaging in international diplomacy.”). The same may be said of others entitled to *immunity ratione personae*. In 2010, Gordon Brown, then prime minister of the UK, expressed a similar concern. Gordon Brown, *Britain Must Protect Foreign Leaders from Private Arrest Warrants*, THE TELEGRAPH (Mar. 3, 2010, 10:00 PM), <https://www.telegraph.co.uk/news/politics/gordon-brown/7361967/Britain-must-protect-foreign-leaders-from-arrest.html> (“There is already growing reason to believe that some people are not prepared to travel to this country for fear that such a private arrest warrant – motivated purely by political gesture – might be sought against them. These are

(ICJ) has emphasized that there is “no more fundamental prerequisite for the conduct of relations between States than the inviolability of diplomatic envoys and embassies.”⁶ These immunities have traditionally been perceived as necessary for the maintenance of a system of peaceful cooperation and co-existence among states.⁷

Functional immunity attaches to state officials strictly while they hold office and is confined to the official acts carried out during that period alone. This stems from the notion that official acts by a representative of a state are fully attributable to the state and not individually to the representative.⁸ Officials with functional immunity may be subject to legal proceedings for acts that fall outside of their office period, or for acts they commit in personal capacity even while holding office.

Personal immunity originally represented the idea that the person and her position reflected the sovereignty of the state.⁹

sometimes people representing countries and interests with which the UK must engage if we are not only to defend our national interest but maintain and extend an influence for good across the globe.”)

6. U.S. Diplomatic and Consular Staff in Tehran (U.S. v. Iran), Judgment, 1980 I.C.J. Rep. 3, ¶ 91 (May 24).

7. See Arrest Warrant of 11 April 2000 (D.R.C. v. Belg.), Judgment, 2002 I.C.J. Rep. 3 (Feb. 14) [hereinafter 2000 Arrest Warrant Case] (full immunity allows a Minister of Foreign Affairs to perform her duties). “[I]mmunities are granted to high State officials to guarantee the proper functioning of the network of mutual inter-State relations, which is of paramount importance for a well-ordered and harmonious international system.” *Id.* ¶ 75 (joint separate opinion by Higgins, J., Kooijmans, J., and Buergenthal, J.)

8. Paola Gaeta, *Official Capacity and Immunities*, in THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 976 (Antonio Cassese et al. eds., 2002) [hereinafter Gaeta, *Official Capacity and Immunities*]; Akande, *supra* note 2, at 412-13; see also, Zoernsch v. Waldock [1964] AC 675 (HL) 691-92 (appeal taken from UK) (“A foreign sovereign government, apart from personal sovereigns, can only act through agents, and the immunity to which it is entitled in respect of its acts would be illusory unless it extended also to its agents in respect of acts done by them on its behalf.”).

9. See Arthur Watts, *The Legal Position in International Law of Heads of states, Heads of Governments and Foreign Ministers*, 247 RECUEIL DES COURS [Collected Courses] 9, 53, 102-03 (1994) (noting that Heads of States enjoy different immunities through the differences in what their respective roles symbolize); see also, R. v. Bow St. Metrop. Stipendiary Magistrate, Ex Parte Pinochet Ugarte [2000] 1 AC (HL) 119, 135, 239 (UK) (“[A] Head of State...enjoyed by reason of his status absolute immunity from all legal process. This had its origin in the times when the Head of State truly personified the state. It mirrored the absolute immunity from civil process in respect of civil proceedings and reflected the fact that an action against a Head of State in respect of his public acts was, in effect, an action against the state itself. There were, however, other reasons for the immunity. It would have been contrary to the dignity of a Head of State that he should be subjected to judicial process and this would have been likely to interfere with the exercise of his duties as a Head of State. Accordingly, the immunity applied to both criminal and civil proceedings and, in

Contemporary international law now emphasizes the need to ensure the effective performance of the official's functions on behalf of the state as grounds for personal immunity.¹⁰ Personal immunity thus represents the notion that certain state officials must be able to operate freely in the sphere of international relations without any restrictions arising from arrest, detention, or legal proceedings in foreign jurisdictions. This immunity is absolute in that it extends to both official and private acts.¹¹ It further attaches to the position itself. Whereas functional immunity continues and may be invoked after the expiration of one's office, personal immunity survives only up to the end of the term of the official involved.¹² Thus, in determining whether an official is entitled to immunity, courts ask whether the process initiated by the foreign state seeks to subject an official currently holding a certain position to its jurisdiction when entitled to immunity.

The scope of immunity remains an open question. In the Arrest Warrant Case, for example, the ICJ recognized that State officials "such as Heads of State,¹³ Heads of Government,¹⁴ and Ministers for Foreign Affairs"¹⁵ undoubtedly enjoy immunity by virtue of their role representing the State in its international relations.¹⁶ The use of the phrase "such as" may indicate that the Court did not

so far as civil proceedings were concerned, to transactions entered into by the Head of State in his private as well as his public capacity?").

10. Memorandum from the Secretariat on Immunity of State Officials from Foreign Criminal Jurisdiction, 1-206, U.N. Memorandum A/CN.4/596 (Mar. 31, 2008) [hereinafter Secretariat Memorandum].

11. See 2000 Arrest Warrant Case, *supra* note 7, ¶ 58 (holding that it could not find "under customary international law any form of exception to the rule according immunity from criminal responsibility and inviolability to incumbent Ministers for Foreign Affairs, where they are suspected of having committed war crimes or crimes against humanity"). One scholar, Akande, notes that this principle has been applied by several national courts, that "judicial opinion and state practice on this point are unanimous," and that courts have unanimously held that immunity *ratione personae* applies to international crimes). See Akande, *supra* note 2, at 407, 411; see also Tunks, *supra* note 5, at 663 (noting that no nation has passed judgement against a sitting head of a foreign state).

12. *Khurts Bat v Investigating Judge of the German Federal Court* [2011] EWHC (Admin) 2029 [55]; see also Secretariat Memo, *supra* note 10, at 58-59.

13. See, e.g., *Certain Questions of Mutual Assistance in Criminal Matters (Djib. v. Fr.)*, Judgment, 2008 I.C.J. Rep. 177, ¶ 18, 47 (June 4) [hereinafter *Certain Questions Judgment*]; Concepción Escobar Hernández (Special Rapporteur), *Second Report on the Immunity of State Officials from Foreign Criminal Jurisdiction*, ¶ 66-67, U.N. Doc. A/CN.4/661 (Apr. 4, 2013) [hereinafter *Second Report on Immunity*]; 2000 Arrest Warrant case, *supra* note 7, ¶ 51.

14. 2000 Arrest Warrant case, *supra* note 7, ¶ 51; *Second Report on Immunity*, *supra* note 13.

15. See sources cited *supra* note 14.

16. *Id.*; see also Dapo Akande & Sangeeta Shah, *Immunities of State Officials, International Crimes, and Foreign Domestic Courts*, 21 EUR. J. INT'L L. 815, 825 (2011).

intend for this list of officials to be exhaustive.¹⁷ Other officials have increasingly come to represent the State in international relations,¹⁸ and a number of domestic cases have found that a limited number of ministers, other than Ministers for Foreign Affairs, also enjoy personal immunity.¹⁹ Yet International Law has yet to explicitly establish this extension of personal immunity.²⁰ Despite this ambiguity in jurisprudence, personal immunity has generally been understood to attach to Heads of State and government, foreign ministers, and possibly some additional principal officials on account of their office. Due to the nature of their position and acts performed, such officials may be endowed with both personal and functional immunity at once, with each type of immunity bearing its own legal effect and application.²¹

Despite the customary nature of these immunities, advances in the fields of human rights and international criminal justice have begun to challenge them. The Nuremberg and Tokyo trials were the first to reveal a “strain between yet unsystematized notions of international public order and the traditional precepts of international law, largely based on the sovereignty paradigm.”²² These Courts enforced the principle that international crimes implicate the responsibility of the state but also the personal criminal responsibility of the perpetrator.²³ The increasing

17. *Re Mofaz* [2004] 119 I.L.R. 709, 712 (Bow St. Magis Ct.) (UK); *see also* Akande & Shah, *supra* note 16, at 820-21.

18. *Armed Activities on the Territory of the Congo (D.R.C. v. Rwanda)*, Judgment, 2006 I.C.J. Rep. 6, ¶¶ 47-48 (Feb. 3).

19. *Khurts Bat v Investigating Judge of the German Federal Court* [2011] EWHC (Admin) 2029 [60-61]; *Re Mofaz* [2004] 119 I.L.R. 709, 712 (Bow St. Magis Ct.) (UK); *Re Bo Xilai* [2005] 128 I.L.R. 713, 714 (Bow St. Magis Ct.) (UK).

20. *See sources cited supra* note 14; *see also* *Certain Questions Judgment*, *supra* note 13.

21. Michiel Blommesteijn & Cedric Ryngaert, *Exploring the Obligations for States To Act Upon The ICC's Arrest Warrant for Omar Al-Bashir*, 6 ZEITSCHRIFT FÜR INTERNATIONALE STRAFRECHTSDOGMATIK [Magazine for International Criminal Theory] 429-33 (2010).

22. Andrea Bianchi, *Immunity Versus Human Rights: The Pinochet Case*, 10 EUR. J. INT'L L. 237, 271 (1999).

23. The Treaty of Peace between the Allied and Associated Powers and Germany Signed at Versailles art. 227, June 28, 1919 (“The Allied and Associated Powers publicly arraign William II of Hohenzollern, formerly German Emperor, for a supreme offence against international morality and the sanctity of treaties.”); Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, and Charter of the International Military Tribunal art. 7, Aug. 8, 1945, 82 U.N.T.S. 280 (“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.”); *Prosecutor v. Furundzija*, Case No. IT-95-17/1-T, Judgment, ¶ 147 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998); G.A. Res. 95 (I) 1 (Dec. 11, 1946)

influence of the human rights and anti-impunity movements, coupled with pleas for international criminal responsibility for egregious human rights and humanitarian law violations, have further eroded traditional immunities norms particularly within international jurisdictions, causing a clash between the traditional CIL rules of foreign officials immunity and the developing field of International Criminal Law.²⁴ The relatively recent establishment of international criminal justice and the actors involved have blurred the exact scope of protection that the rules of immunity offer.

These challenges that raise issues of immunities are often rooted in a larger challenge to the traditional state-centric model and an increase in the number of actors that participate in the contemporary international system. Although states remain the primary makers of international law, many other participants including international organizations, courts, as well as influential entities in international law advocacy, such as non-governmental organizations (NGOs), are also crucial to the development of international legal norms today.²⁵ But there is, of yet, no formal model integrating these actors into existing frameworks that are theoretically and legally structured only for states. The goal of this Article is to provide such an analytical framework and to apply it to the shifting CIL norm of personal immunity for Heads of State before International Criminal Courts and Tribunals.

Using the tools of network theory, this Article will track the shift of this norm through descriptive mapping of the rule's development. This analysis will be premised on links, relationships, and connections among the actors involved in the normative development processes. Seeing international law-making processes through networks of actors will provide international lawyers and international policy-makers with a descriptive tool that translates and maps this elusive process. To perform this network analysis, the Article will identify the relevant actors who participate in the relevant international legal processes, and their various degrees of

(affirming “the principles of international law recognized by the Charter of the Nuremberg Tribunal”).

24. ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 309 (2d ed. 2008); *see also* Akande, *supra* note 2, at 407.

25 *See generally* ALAN BOYLE & CHRISTINE CHINKIN, THE MAKING OF INTERNATIONAL LAW (2007).

participation, and capabilities.²⁶ These state and non-state actors connect in networks through which they pursue their normative agendas and contribute to international law. Descriptive quantitative work that analyses these actors' normative contributions in these networks will clarify dynamics such as levels of socialization within a network or networks, diffusion of norms based on the nature and strength of actors or ties, the importance of certain individual actors, and the levels of development of distinct emerging or shifting norms.²⁷ These insights will hopefully shed some different light on the Head of State immunity debate in international criminal justice.

In the first part of this Article, I discuss the shifting landscape of the CIL norm of personal immunity for Heads of State. I begin by analyzing the existing jurisprudence and debate on personal immunity before domestic and international courts, tracing the relevant actors eroding the absolute nature of personal immunity before International Criminal Courts and Tribunals (ICCTs). Then, I determine the actors involved in the network responsible for this normative shift: The Nuremberg and Tokyo Tribunals provide the first instance where senior governmental officials with immunities were prosecuted for international crimes; The International Criminal Tribunal for the Former Yugoslavia (ICTY) established the CIL nature of the exception to personal immunity for the crimes that fall within its jurisdiction; The Special Court for Sierra Leone (SCSL) found that personal immunity does not prevent a Head of State from being prosecuted before an international criminal tribunal; Most recently, the International Criminal Court (ICC), through its various organs and actors involved, weakened personal immunity within its jurisdiction. Finally, I discuss the positions of other relevant International Organizations such as the United Nations (UN), African Union (AU), and epistemic communities such as the Institute of International Law on the removal of immunities.

In the second part of this Article, I apply the tools of Social Network Analysis (SNA) to the information and data from Part I to describe and evaluate the shift in personal immunity norms for Heads of State. Through graphing the network of actors involved,

²⁶ Andrea Bianchi, *The Fight for Inclusion: Non-State Actors and International Law*, in FROM BILATERALISM TO COMMUNITY INTEREST: ESSAYS IN HONOUR OF BRUNA SIMMA (Ulrich Fasenrath et al. eds., 2011).

²⁷ Emilie M. Hafner-Burton et al., *Network Analysis for International Relations*, 63 INT'L ORG. 559, 569 (2009).

I discover its defining properties, including its topology, density, centrality, and actor similarity, which together explain the growing shifts in personal immunity norms and predict further normative development within the network. Based on this quantitative analysis, I put forward two main arguments. First, non-state actors, even though not formally accepted as capable of contributing to international law making, have a clear normative position and law-making effect. Second, insofar as the predominant hubs in this network continue to pursue the establishment of an exception for Heads of States before ICCTs, we are likely to see it crystallize as a new rule of CIL.

II. THE CUSTOMARY INTERNATIONAL LAW NORM OF PERSONAL IMMUNITY

Due to the absence of a comprehensive international treaty regulating the rules on immunity of governmental officials, these rules are largely part of CIL. Under CIL, there are two instances where the jurisdictional bar of personal immunity may be relevant: (1) national proceedings and (2) proceedings before international criminal courts and tribunals. The main purpose of personal immunity has traditionally been to allow high-level state officials to operate in the international sphere without being subjected to foreign jurisdictions. The purpose of this facet of personal immunity remains relevant today to permit Heads of State to fully pursue their domestic affairs and to maintain equilibrium in international relations. For these reasons, it is largely accepted²⁸ that

28. This position has received some pushback even by the ICJ. A criticism is found in 2000 Arrest Warrant Case, *supra* note 7. Judges Higgins, Kooijmans, and Buergenthal noted that “the Court diminishe[d] somewhat the significance of Belgium’s arguments” and expressed their doubts as to the practical significance of the circumstances, highlighted by the Court at paragraph 61, in which immunity would not represent a bar to criminal prosecution. *See* 2000 Arrest Warrant Case, *supra* note 7. In his dissenting opinion, Judge Al-Khasawneh took the view that “the effective combating of grave crimes has arguably assumed a *jus cogens* character reflecting recognition by the international community of the vital community interests and values it seeks to protect and enhance. Therefore, when this hierarchically higher norm comes into conflict with the rules on immunity, it should prevail.” In her dissenting opinion, Judge *ad hoc* Van den Wyngaert found a “fundamental problem” in the Court’s general approach “that disregards the whole recent movement in modern international criminal law towards recognition of the principle of individual accountability for international core crimes,” preferring “an extremely minimalist approach by adopting a very narrow interpretation of the ‘no immunity clauses’ in international instruments”; *see also* Int’l Law Comm’n, Rep. on the Work of Its Sixtieth Session, 1-206, U.N. Doc. A/63/10 (Aug. 2008).

personal immunity extends to instances of domestic foreign jurisdiction, even if the official in question is alleged to have committed international crimes.²⁹

The Arrest Warrant case is notorious as to issue of immunity for high-ranking officials before domestic courts. The ICJ adjudicated Belgium's indictment of Abdoulaye Yerodia, who was then the serving Minister of Foreign Affairs for the Democratic Republic of Congo (DRC), for alleged international crimes violated his immunities.³⁰ It found Belgium had violated the immunity of the Congolese minister of foreign affairs by issuing an arrest warrant against him.³¹ The ICJ confirmed the rule of personal immunity in the Certain Questions of Mutual Assistance in Criminal Matters Case regarding France's failure to execute Djibouti's letter rogatory in accordance with the states' bilateral agreements for cooperation and mutual legal assistance in criminal matters.³² It emphasized that a Head of State enjoys "full immunity from criminal jurisdiction"³³ protecting "against any act of authority of another State, which would hinder him or her in the performance of his or her duties."³⁴ With these cases, the IJC established that personal immunity governs domestic jurisdiction over foreigners, even if the official in question is alleged to have committed international crimes.³⁵

The issue of personal immunity for high-level state officials is less clear regarding the jurisdiction of international criminal courts and tribunals. The ICJ ruled in the Arrest Warrant Case that it "has been unable to deduce [...] that there exists under customary

29. See Dapo Akande, *The Legal Nature of the Security Council Referrals to the ICC and its Impact on Al Bashir's Immunities*, 7 J. INT'L CRIM. JUST. 333, 334 (2009) ("Under customary international law, the person of the Head of State is regarded as inviolable when abroad and immunity from criminal jurisdiction includes immunity from arrest."); Paola Gaeta, *Does President Al Bashir Enjoy Immunity from Arrest?*, 7 J. INT'L CRIM. JUST. 315, 318 (2009); Akande, *supra* note 2, at 407, 411. The ICJ has acknowledged this principle. See 2000 Arrest Warrant Case, *supra* note 7, ¶ 58. Other jurisdictions have also recognized this principle. See Cour de cassation [Cass.] [supreme court for judicial matters] crim., Mar. 13, 2001, Bull. crim. No. 1414 (Fr.) (arrest warrant for Muammar al-Gaddafi); Tachione v. Mugabe, 169 F.Supp.2d 259 (S.D.N.Y. 2001), *affm'd*, 386 F.3d 285 (2004); Prosecutor v. Furundzija, Case No. IT-95-17/1-T, Judgment ¶¶ 140, 156 (Int'l Crim. Trib. for the Former Yugoslavia, Dec. 10, 1998); Re Sharon & Yaron [Cass.] [Court of Cassation], 2003, 42 I.L.M. 596; Tania Branigan, *Mugabe Arrest Bid Fails*, THE GUARDIAN (Jan. 14, 2004, 9:16 PM), <https://www.theguardian.com/uk/2004/jan/15/zimbabwe.world>.

30. 2000 Arrest Warrant Case, *supra* note 7, ¶ 58.

31. *Id.*

32. Certain Questions Judgment, *supra* note 13.

33. *Id.*

34. *Id.*

35. See sources cited *supra* note 29.

international law any form of exception to the rule according immunity from criminal jurisdiction and inviolability [...], where they are suspected of having committed war crimes or crimes against humanity.”³⁶ But, the Court felt compelled to add, “immunity from jurisdiction [...] does not mean that [Heads of State] enjoy impunity in respect of any crimes they might have committed.”³⁷ It is on this premise that the Court introduced an exception to the general rule of immunities in four circumstances.³⁸ First, immunities do not bar criminal prosecution when the accused is brought to trial before the domestic courts of her own state.³⁹ Second, the official’s own state may decide to waive the immunity afforded to said official.⁴⁰ Third, a high ranking state official may be subject to criminal jurisdiction once she has left office and is brought before the courts of a foreign state for acts committed before or after the period of office, or acts committed during office but in a private capacity subject to any subsisting functional immunity.⁴¹ Finally, and this is the point that is most interesting for present purposes, the Court suggested that high-ranking officials may be prosecuted before “certain international criminal courts, where they have jurisdiction.”⁴² As evidence of this last exception, the Court mentioned several examples of international criminal courts that possess the authority to prosecute high-ranking officials, including the ICTY, the International Criminal Tribunal for Rwanda (ICTR), and the ICC.⁴³

The Court provided only limited material support for this statement and was satisfied with mere reference to the statutes of these International Criminal Courts and Tribunals. It noted that Article 27(2) of the Rome Statute provides that “immunities [...] 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.”⁴⁴ The implication is that personal immunity exists only in relation to horizontal criminal

36. See 2000 Arrest Warrant Case, *supra* note 7, ¶ 213 (although concerning the immunity held by Ministers of Foreign Affairs, considering the process of analysis, it applies by analogy to Heads of State).

37. *Id.* ¶ 217.

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. 2000 Arrest Warrant Case, *supra* note 7, ¶ 213.

43. *Id.*

44. Rome Statute of the International Criminal Court art. 27, July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002) [hereinafter Rome Statute].

proceedings before foreign domestic courts, but such immunity would not apply in vertical proceedings before international criminal courts.⁴⁵

What transpired from the ICJ's analysis in the Arrest Warrant Case is the emergence,⁴⁶ and in some cases the crystallization,⁴⁷ of a set of exceptions to the previously absolute personal immunity CIL rule. It is true that the ICJ did not elaborate on the issue. Nevertheless, the Court went out of its way to assert what seems to be a principle of general support, suggesting that the very existence of international criminal courts constitutes sufficient grounds to lift the bar on personal immunity for high-ranking officials under these courts' jurisdiction.

The ICJ's statement triggered extensive debate, despite its limited dispositive value as an *obiter dictum*.⁴⁸ The ICJ was not asked to determine in the Arrest Warrant Case the immunities of high-ranking officials before an international criminal court or tribunal. The Judges offered only a general remark which was not based on a specific analysis of facts relating to immunities before international criminal courts and tribunals.⁴⁹ Nevertheless, the SCSL referred to the dictum in a decision concerning the personal immunity of former President Charles Taylor.⁵⁰ Having established its nature as an international criminal tribunal,⁵¹ the SCSL found that the immunity normally accorded to an incumbent Head of State does not bar the exercise of jurisdiction by the SCSL.⁵² The

45. See ROSANNE VAN ALEBEEK, *THE IMMUNITY OF STATES AND THEIR OFFICIALS IN INTERNATIONAL CRIMINAL LAW AND INTERNATIONAL HUMAN RIGHTS LAW* (2008).

46. Phillip Wardle, *The Survival of Head of State Immunity at the International Criminal Court*, 18 AUSTL. INT'L L. J. 181, 181 (2011).

47. *Id.*

48. See, e.g., Jan Wouters, *The Judgment of the International Court of Justice in the Arrest Warrant Case: Some Critical Remarks*, 16 LEIDEN J. INT'L L. 253, 253 (2003); Alexander Orakhelashvili, *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, 96 AM J. INT'L L. 677, 677 (2002); Antonio Cassese, *When May Senior State Officials Be Tried for International Crimes? Some Comments on the Congo v Belgium Case*, 13 EUR. J. INT'L L. 853, 854 (2002); Steffen Wirth, *Immunity for Core Crimes? The ICJ's Judgment in the Congo v Belgium Case*, 13 EUR. J. INT'L L. 877, 877-78 (2002); Akande, *supra* note 2, at 407, 409.

49. Asad G. Kiyani, *Al-Bashir & the ICC: The Problem of Head of State of State Immunity*, 12 CHINESE J. INT'L L. 467, 492 (2013).

50. Prosecutor v. Charles Taylor, SCSL-03-01-I-059, Decision on Immunity from Jurisdiction, ¶ 42 (Special Court for Sierra Leone, May 31, 2004) [hereinafter Charles Taylor Case].

51. *Id.*

52. *Id.* ¶¶ 38, 41, 53. This decision can be subject to criticism for failing to consider the treaty-based nature of the SCSL. See Agreement on the Establishment of a Special Court for Sierra Leone, U.N.-Sierra Leone, Jan. 16, 2002, 2178 U.N.T.S. 137. As such it may not affect the immunity accorded to the incumbent Head of State of a third state, Liberia,

ICJ in the Arrest Warrant case referred to “certain international criminal tribunals.” But, beyond reference to the ICTY, ICTR, and ICC, the IJC did not offer an exhaustive list of courts that may exercise jurisdiction regardless of personal immunity. With no crystallized CIL rule on the issue, the applicability of immunities is regulated by each tribunal's constitutive instrument unless these statutes reflect a CIL norm that personal immunity is no longer absolute for those falling within their jurisdiction.⁵³

III. THE NETWORK OF ACTORS INVOLVED IN THE NORMATIVE DEVELOPMENT OF PERSONAL IMMUNITY

If we are to explore the ways in which actors shift these norms, it is critical to establish an analytical framework. The network of actors responsible for the normative developments around personal immunity for Heads of State can include states, international organizations, non-governmental organizations, international or domestic courts and tribunals, and even individuals. There is no preestablished rule as to which actors may be involved in this network for the descriptive purposes of exploring the sources of its normative effect. Configuring the relationships among the actors, or, as we will call them, nodes, will help us map how the network affects the normative development of personal immunity internationally as well as measure the resulting legislative effect of each node individually and of the network as a whole.⁵⁴

A. *The Nuremberg and Tokyo Tribunals*

The first explicit articulation of individual criminal responsibility for international crimes is found in Article 7 of the Charter of the International Military Tribunal in Nuremberg, which

without that state's waiver of immunity. See Akande, *supra* note 2, at 417-18; see also Sarah Nouwen, *The Special Court for Sierra Leone and the Immunity of Taylor: The Arrest Warrant Case Continued*, 18 LEIDEN J. INT'L L. 654 (2005); Zsuzsanna Deen-Racsmany, *Prosecutor v Taylor: The Status of the Special Court for Sierra Leone and Its Implications for Immunity*, 18 LEIDEN J. INT'L L. 299 (2005).

53. Dan Terzian, *Personal Immunity and President Omar Al Bashir: An Analysis Under Customary International Law and Security Council Resolution 1593*, 16 UCLA J. INT'L L. & FOR. AFF. 279, 287 (2011); Ilias Bantekas, *Head of State Immunity in the Light of Multiple Legal Regimes and Non-Self-Contained System Theories*, 10 J. CONFLICT SEC. L. 21, 27 (2005).

54 David Lazer, *Networks and Politics: The Case of Human Rights*, in UNDERSTANDING SOCIAL ACTION, PROMOTING HUMAN RIGHTS 244, 245 (Ryan Goodman, Derek Jinks, & Andrew K. Woods eds., 2012).

states 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 or mitigating punishment.”⁵⁵ This was later emphasized by the Tribunal in its judgment, where it explained that “the principle of International Law which, under certain circumstances, protects the representatives of a state cannot be applied to acts condemned as criminal by International Law. The authors of these acts cannot shelter themselves behind their official position to be freed from punishment.”⁵⁶ In dismissing the same argument on immunities, the Military Tribunal for the Far East, otherwise known as the Tokyo Tribunal, made direct reference to the Nuremberg Judgment and declared:

In view of the fact that in all material respects the Charters of this Tribunal and the Nuremberg Tribunal are identical, this Tribunal prefers to express its unqualified adherence to the relevant opinions of the Nuremberg Tribunal rather than by reasoning the matters anew in somewhat different language to open the door to controversy by way of conflicting interpretations of the two statements of opinions.⁵⁷

On December 11, 1946, the United Nations General Assembly (UNGA) unanimously adopted Resolution 95(1) affirming both the principles of International Law reflected in the Charter of the Nuremberg Tribunal as well as the judgment of the Tribunal. By means of Resolution 177(II), the UNGA asked the International Law Commission (ILC) to systematically formulate and elaborate on the principles contained in the Nuremberg Charter. When the ILC was considering them, it discussed whether it was within the scope of its mandate to ascertain if the principles constituted principles of international law.⁵⁸ The ILC concluded that, since the Nuremberg Principles had already been affirmed by the UNGA in

55. 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, Fr.-U.K.-Un. of Soviet Soc. Rep.-U.S., Aug. 8, 1945, 82 U.N.T.S. 279, 59 Stat. 1544 [hereinafter London Charter] (“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.”).

56. Alan Bullock, *The Trial of German Major War Criminals: Proceedings of the International Military Tribunal Sitting at Nuremberg in Germany Part XXII*, 27 INT’L AFF. 503 (1951) (summarizing the trials in Aug. 1946 and Oct. 1946).

57. International Military Tribunal for the Far East, Judgment, chp. 2(a), Nov. 4, 1948.

58. See Secretariat Memorandum, *supra* note 10.

Resolution 96(I), its task was not to express its appreciation of them but to formulate them with a focus on their substantive elements.

On the issue of immunities, the ILC adopted Principle III based on Article 7 of the Nuremberg Charter. “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.”⁵⁹ In other words, the official capacity in which an agent of a state acts does not justify crimes against peace, war crimes, or crimes against humanity, or “[t]he fact that a person committed an act which constitutes a crime under International Law acted as a Head of State or responsible Government official does not relieve him from responsibility under international law.”⁶⁰ The UNGA accepted by Resolution 488(V) the principles formulated by the ILC based on the Nuremberg Charter, thus codifying its proposals for individual criminal responsibility and a code of crimes protecting the security of mankind.⁶¹

B. *The International Criminal Tribunal for the Former Yugoslavia*

Nearly fifty years after these developments, the International Criminal Tribunal for the Former Yugoslavia (ICTY) was the first international criminal court to hold high-level officials criminally liable for international crimes performed on behalf of a state. UNSC Resolution 808⁶² had requested the UNSG to report on the legal basis for the establishment of an International Tribunal for the Former Yugoslavia.⁶³ In his report, the UNSG states:

It should be pointed out that, in assigning to the International Tribunal the task of prosecuting persons responsible for serious violations of international humanitarian law, the Security Council would not be creating or purporting to “legislate” the law. Rather, the International Tribunal would have the task of applying existing international humanitarian law.⁶⁴

59. *Id.*

60. *Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal*, [1950] 2 Y.B. Int'l L. Comm'n 2, U.N. Doc. A/CN.4/25.

61. *Draft Code of Crimes Against Peace and Security of Mankind*, [1996] 2 Y.B. Int'l L. Comm'n 26, U.N. Doc. A/43/10 (“The official position of an individual who commits a crime against the peace and security of mankind, even if he acted as Head of State or Government, does not relieve him of criminal responsibility or mitigate punishment.”).

62. S.C. Res. 808, ¶ 2 (Feb. 22, 1993).

63. Rep. of the S.C., U.N. Doc. S/25704 (1996).

64. *Id.* at 8.

This rationale was applied not only to acts for which an official bore individual criminal responsibility but also to the offenses included in the Statute of the Tribunal. The UNSG Report confirms that an individual alleged to have committed actions that would fall within the crimes covered by the jurisdiction of the Tribunal may be prosecuted even if the act was performed on behalf of a state. The ICTY Statute provides that the official position of any accused person, whether as Head of State or government or as a responsible government official, “shall not relieve such person of criminal responsibility nor mitigate punishment.”⁶⁵ This was stipulated as existing international law at the time for the purposes of the ICTY and the way the court was to handle the potential immunity claims of the indicted individuals.

The ICTY considered personal immunity as a bar for prosecution for the first time in *Prosecutor v. Slobodan Milosevic*.⁶⁶ During the proceedings, *amici curiae* argued that the tribunal lacked jurisdiction to try Milosevic due to his status as President. The argument was that the Statute of the Tribunal, and Article 7 in particular, could not override existing principles of CIL that accorded him Head of State immunity.⁶⁷ The Trial Chamber not only dismissed this argument but also established that Article 7 of the ICTY Statute reflected CIL.⁶⁸ It based this finding on Article IV of the Convention for the Prevention and the Punishment of the Crime of Genocide, Principle III of the Nuremberg Principles, Article 6(2) of the Statute of the Special Court for Sierra Leone, Article 7 of the ILC’s Draft Code of Crimes against the Peace and Security of Mankind, and Article 27 of the Rome Statute of the ICC, all of which preclude official immunity.⁶⁹ This was the first act of an international criminal court after Nuremberg and Tokyo confirming the diminished importance of official capacity in international criminal proceedings.

The ICTY applied this principle in subsequent cases. The Appeals Chamber in *Prosecutor v. Blaskic*, for instance, emphasized that “those responsible for [war crimes, crimes against humanity and genocide] cannot invoke immunity from national or international

65. S.C. Res. 827 (July 7, 2009) (amended, S.C. Res. 1877 (2009)).

67. *Prosecutor v. Milosevic*, Case No. ICTY-IT-02-54, Decision on Preliminary Motions, ¶ 27 (Int’l Crim. Trib. for the Former Yugoslavia, Nov. 8, 2001) [hereinafter *Milosevic*, ICTY, Preliminary Motions].

67. *Id.*

68. *Id.* ¶ 28.

69. *Id.* ¶¶ 29-32.

jurisdiction even if they perpetrated such crimes while acting in their official capacity.”⁷⁰ In *Prosecutor v. Furundžija* it held that “individuals are personally responsible, whatever their official position, even if they are Heads of State or government ministers.”⁷¹ And this in *Prosecutor v. Kunarac*:

...[T]he doctrine of “act of State,” by which an individual would be shielded from criminal responsibility for an act he or she committed in the name of or as an agent of a state, is no defense under international criminal law. This has been the case since the Second World War, if not before. Articles 1 and 7 of the Statute make it clear that the identity and official status of the perpetrator is irrelevant insofar as it relates to accountability.⁷²

C. *The Special Court for Sierra Leone*

The Special Court for Sierra Leone (SCSL) took a similar view in its proceedings against the former Head of State of Liberia, Charles Taylor. Taylor challenged the jurisdiction of the Court on the basis that the indictment was issued while he was still in office and thus he was protected by the personal immunity afforded to Heads of State in international law.⁷³ The Appeals Chamber dismissed this argument, relying on the Statutes of the Nuremberg and Tokyo Tribunals, the ICTY, ICTR, and the Rome Statute, as well as the Arrest Warrant Case and the Pinochet Cases. The Chamber first established that the SCSL was an “international tribunal,”⁷⁴ then confirmed that immunity derives from the principle of state equality but that simply “does not prevent a Head of State from being prosecuted before an international criminal tribunal or court.”⁷⁵ The SCSL established that there was an

70. *Prosecutor v. Blaskic*, Case No. IT-9-14-A, Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, ¶ 41 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 29, 1997).

71. *Prosecutor v. Furundžija*, Case No. IT-95-17/1-T, Judgment, ¶ 140 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998).

72. *Prosecutor v. Kunarac*, Case No. IT-96-23/1-T, Judgment, ¶ 494 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 22, 2001).

73. Charles Taylor Case, *supra* note 50, ¶ 6.

74. *Id.* ¶ 42.

75. *Id.* ¶ 52. The Court's judgment drew from and approved the submissions of amici curiae Philippe Sands, Alison McDonald, and Diane Orentlicher. The former argued that “[i]nternational practise and a majority of academic commentary supports the view that...an international criminal court or tribunal (whether or not it has been established under

inherent difference between domestic and international courts for the purposes of prosecuting highly ranked state officials. While immunities have a place in domestic courts, where, under the principle of state equality, one state may not adjudicate the conduct of another, international tribunals “are not organs of a state but derive their mandate from the international community.”⁷⁶ Thus, the reason for immunity in the first place fades away before international tribunals. This caused many to argue that a CIL exception to normal principles of personal immunity for Heads of State exists for international crimes within the jurisdiction of international courts and tribunals.⁷⁷

D. *The International Criminal Court*

The ICC was established by the Rome Statute, which is a treaty. The Rome Statute’s central provision regarding immunities is Article 27, which was adopted relatively easily and with no considerable debate at the Rome Conference.⁷⁸ The first paragraph of Article 27 of the Rome Statute provides that “the international law doctrine of functional immunity and of national legislation sheltering State officials with immunity for official acts” may not be used in order to avoid individual criminal responsibility, or to mitigate punishment.⁷⁹ Article 27(2) further provides that “immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international

Chapter VII of the UN Charter) may exercise jurisdiction over a serving Head of State and that such person is not entitled to claim immunity under customary international law in respect of international crimes.” *Id.*

76. Secretariat Memorandum, *supra* note 10, ¶ 72.

77. Sophie Papillon, *Has the United Nations Security Council Implicitly Removed Al Bashir’s Immunity?*, 10 INT’L CRIM. L. REV. 275, 280 (2010); Michael Frulli, *Are Crimes Against Humanity More Serious Than War Crimes?*, 12 EUR. J. INT’L L. 329 (2001).

78. Per Saland, *International Criminal Law Principles*, in THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE 189, 202 (Roy S. Lee ed., 1999); *see also* U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, U.N. Doc. A/Conf.183/2/Add.1 (Apr. 14, 1998) [hereinafter U.N. Conference on the ICC].

79. Gaeta, *Official Capacity and Immunities*, *supra* note 8, at 978; *see also* Dapo Akande, *The Application of International Law Immunities in Prosecutions for International Crimes*, in BRINGING POWER TO JUSTICE? THE PROSPECTS OF THE INTERNATIONAL CRIMINAL COURT 47, 59 (Michael Milde et al. eds., 2006) (arguing that Article 27(1) eliminates the affirmative defense of immunity based on official position).

law, shall not bar the Court from exercising its jurisdiction over such a person.”⁸⁰

Several aspects of this provision are important. First, the provision concretizes similar provisions from other international criminal courts and tribunals by establishing that immunities will not apply whether they derive from international or national law.⁸¹ Second, the wording of the second paragraph implies that the provision is intended to address only personal immunities, as such immunities “attach to the official capacity” of a person, whereas functional immunity attaches to the acts involved and not the office held by the person.⁸² Article 27 read as a whole results in the removal of all immunities held by an individual before the ICC irrespective of their office.⁸³ According to Article 27, the states that have ratified the Rome Statute have agreed to waive their right to the procedural immunities that they had under CIL.

This is a strong expression of general practice and *opinio juris*. But insofar as the exception to immunities before international criminal courts and tribunals has not reached CIL level, the Rome Statute may create rights and obligations only for the states party to the treaty and not for third states without their express consent.⁸⁴ This means that states have to opt into Article 27 by ratification of the Rome Statute.⁸⁵ Immunity that has been waived continues to normatively exist, which is the reason why courts and tribunals have specifically sought to exclude immunity by carving out an exception within their proceedings.

An important issue at the Rome Conference was the need to consider the relationship between existing state obligations, such as

⁸⁰ Rome Statute, *supra* note 44, at art. 27(2).

⁸¹ Similar provisions may be found in the Special Proclamation for the Establishment of an International Military Tribunal for the Far East art. 6, Jan. 19, 1946, T.I.A.S. 1589; S.C. Res. 955, art. 6(2) (1994) (establishing a tribunal for crimes committed in Rwanda); S.C. Res. 827 (1993) (same but for Yugoslavia); S.C. Res. 1315 (2002) (same but for Sierra Leone); the London Agreement, *supra* note 55. Article 27(1) of the Rome Statute also contains a similar provision. *See* Rome Statute, *supra* note 44. Commentators, however, have suggested that it is intended to prevent the substantive defense that an official acted in an official capacity when committing a crime and is not a rule as to the applicability of international law immunities. *See* Sarah Williams & Lena Sherif, *The Arrest Warrant for President al-Bashir: Immunities of Incumbent Heads of state and the International Criminal Court*, 14 J. CONFLICT & SEC. L. 71, 77 n.39 (2009).

⁸² Gaeta, *supra* note 8, at 978.

⁸³ Blommestijn & Ryngaert, *supra* note 22, at 437.

⁸⁴ Vienna Convention on the Law of Treaties art. 34, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter *Treaty on Treaties*].

⁸⁵ Williams & Sherif, *supra* note 81, at 77-78.

bilateral extradition treaties or the Vienna Convention on Diplomatic Relations, on the one hand, and obligations deriving from the Rome Statute on the other.⁸⁶ The drafters tried to address this through Article 98 barring requests for surrender or assistance that would require the requested state to act inconsistently with its obligations under international law with respect to the state or diplomatic immunity, unless that third state waived the immunity.⁸⁷ According to the ILC, Article 98 does not serve the purpose of granting immunity from prosecution before the ICC.⁸⁸ Instead, it places an obligation on the ICC to not put a state in a situation where it would have to violate an already existing international obligation relating to immunity.⁸⁹

Article 27 has largely been interpreted as a waiver by state parties of immunities that would otherwise apply, limiting the application of Article 98 “to the case of officials from a state that is not a party to the Rome Statute.”⁹⁰ The basis of this is that the effect of Article 27(2) would be nullified if Article 98(1) applied to state parties. Under the principle of effectiveness in treaty interpretation, “the removal of immunity in Article 27 must be understood as applying not only in relation to the ICC itself, but also in relation to states acting at the request of the ICC.”⁹¹ Another interpretation

86. Proposal Submitted by Singapore, Preparatory Committee on the Establishment of an International Criminal Court, A/AC.249/WP.40 (1996), <http://www.legal-tools.org/doc/eb34fa/>; see also Kimberly Prost & Angelika Schlunck, *Article 98, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT* 1131, 1131-33 (Otto Triffterer ed., 1999) (discussing the interplay between Articles 27 and 98).

87. See Rome Statute, *supra* note 44, at art. 98 (“1. The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law...2. The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court...”).

88. See Prost & Schlunck, *supra* note 86, at 1131.

89. *Id.*

90. BRUCE BROOMHALL, *INTERNATIONAL JUSTICE AND THE INTERNATIONAL CRIMINAL COURT: BETWEEN SOVEREIGNTY AND THE RULE OF LAW* 145 (2003); W.A. SCHABAS, *INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT* 64 (2001); Steffen Wirth, *Immunities, Related Problems and Article 98 of the Rome Statute*, 12 CRIM. L.F. 429, 452-54 (2001); Gaeta, *supra* note 8, at 993-96; Akande, *supra* note 2, at 425.

91. See, e.g., Akande, *supra* note 2, at 423-24 (“[A]n interpretation that allows officials of states parties to rely on international law immunities when they are in other states would deprive the Statute of its stated purpose of preventing impunity and ensuring that the most serious crimes of international concern do not go unpunished. Furthermore, the removal of immunity from the exercise of the Court’s jurisdiction contained in Article 27 would be nullified in practice if Article 98(1) were interpreted as allowing parties to rely on the same immunities in order to prevent the surrender of their officials to the Court by other states.”).

argues that the wording “third states” of Article 98 ought to be understood as referring to non-state parties to the ICC.⁹² This means that the ICC recognizes the obligation prescribed under Article 98 only in respect to non-state parties.⁹³ This interpretation effectively creates a bifurcated immunity system within the ICC: one system for officials from state parties, and one for officials from non-state parties. Officials from state parties would not enjoy any kind of immunity before the ICC by virtue of Article 27. Non-state parties’ officials could retain their immunity under Article 98(1) as their states have not, as a matter of treaty law, waived their rights to immunities, and their arrest and surrender may only take place if “the Court can first obtain the cooperation of that third State for the waiver of the immunity.”⁹⁴ The upshot is the same in any case: state parties to the treaty have waived immunity for their officials regarding crimes that fall within the jurisdiction of the ICC.

1. *The International Criminal Court Pre-Trial Chamber*

Immunities came up in the ICC for the first time on July 14, 2008, when the Office of the Prosecutor (OTP) requested the Pre-Trial Chamber (PTC) of the ICC to issue an arrest warrant against the incumbent president of Sudan, Omar Hassan al-Bashir.⁹⁵ On the basis of the evidence presented to it, the PTC granted the

This is supported by the principle that “[a]n interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility.” *Id.* Thus, the removal of immunity in Article 27 must be understood as applying not only in relation to the ICC itself but also in relation to states acting at the request of the ICC.

92. Gaeta, *supra* note 8, at 993-94.

93. The PTC confirmed this in *Prosecutor v. Al-Bashir*, Case No. ICC-02/05-01/09-195, Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court, ¶ 27 (Apr. 9, 2014) (“It follows that when the exercise of jurisdiction by the Court entails the prosecution of a Head of State of a non-State Party, the question of personal immunities might validly arise. The solution provided for in the Statute to resolve such a conflict is found in Article 98(1) of the Statute. This provision directs the Court to secure the cooperation of the third State for the waiver or lifting the immunity of its Head of State. This course of action envisaged by Article 98(1) of the Statute aims at preventing the requested State from acting inconsistently with its international obligations towards the non-State Party with respect to the immunities attached to the latter's Head of State.”).

94. *See* Rome Statute, *supra* note 44.

95. *See* Press Release, International Criminal Court, ICC Prosecutor Presents Case Against Sudanese President, Hassan Ahmad Al Bashir, for Genocide, Crimes Against Humanity and War Crimes in Darfur, ICC-OTP-20080714-PR341 (July 14, 2008); *see also* *Prosecutor v. Al Bashir*, ICC-02/05-01/09, Decision on Prosecutor's Application for Warrant of Arrest Under Article 58 Against Omar Hassan Ahmad Al Bashir (Mar. 4, 2009) [hereinafter *al-Bashir Case*].

application in part.⁹⁶ The PTC was satisfied that there were reasonable grounds to believe al-Bashir had committed a crime within the jurisdiction of the ICC, and that the Court could exercise its jurisdiction over him.⁹⁷ Although this was not the first time that an arrest warrant had been issued against a Head of State before an international criminal court and tribunal, it was the first time that an arrest warrant was executed against an incumbent Head of State. Neither Milosevic nor Taylor were serving Heads of State when they were brought before the respective international tribunals.⁹⁸ The arrest warrant of al-Bashir implicated two unresolved issues: the immunity of an incumbent and the immunity of a Head of State of a non-state party to the ICC.

The PTC addressed the issue of al-Bashir's immunities on four principle arguments and concluded that al-Bashir's official position "has no effect on the Court's jurisdiction over the present case."⁹⁹ First, it referred to the object and purpose of the Rome Statute by means of its preamble, that is, to end impunity for the perpetrators of the most egregious international crimes. Second, in order for the Statute to be effective and achieve those goals, the PTC referred to Articles 27 (1) and (2) of the Rome Statute as incorporating three principles: (1) that the Rome Statute "shall apply equally to all persons without any distinction based on official capacity;"¹⁰⁰ (2) that official capacity does not exempt a person from individual criminal responsibility before the Court;¹⁰¹ and (3) that immunities shall not bar the exercise of jurisdiction by the ICC.¹⁰² Third, the PTC noted that, according to the jurisprudence of the Court, the additional sources of law provided for in Article 21(1)(b) and (c) including other treaties, CIL, and general principles of international law are only to be resorted to when there is a legal lacuna in the Statute and the legal framework of the Court, and when such lacuna

96. al-Bashir Case, *supra* note 95.

97. *See* Rome Statute, *supra* note 44. The PTC decided that the arrest of al-Bashir was necessary under all three parts of this test. *See* al-Bashir Case, *supra* note 95.

98. Slobodan Milosevic, President of Yugoslavia, was first *indicted* by the ICTY while in office. *See* Prosecutor v. Milosevic, Case No. IT-99-37, Indictment (Int'l Crim. Trib. for the former Yugoslavia May 22, 1999). Charles Taylor, President of Liberia, was also *indicted* by the SCSL while in office. *See* Prosecutor v. Charles Taylor, Case No. SCSL-03-01-PT-263, Second Amended Indictment (Special Ct. for Sierra Leone Mar. 3, 2003). So too was President Milutinovic. *See* Prosecutor v. Milutinovic, Case No. IT-05-87, Indictment (Int'l Crim. Trib. for the former Yugoslavia May 22, 1999).

99. al-Bashir Case *supra* note 96, ¶ 41.

100. *Id.* ¶¶ 42-43.

101. *Id.*

102. *Id.*

may not be cured by applying the general rules of treaty interpretation.¹⁰³ Finally, the PTC took note of the role of the UNSC and argued that, by referring the Sudan situation to the ICC, the UNSC accepted that any proceeding investigation and prosecution is to take place according to ICC's legal framework.¹⁰⁴

Despite having established in several instances that immunities, and personal immunity in particular, do not bar the Court's jurisdiction, it is unclear whether Article 27 of the Rome Statute represents a comprehensive CIL norm or simply a conventional rule. The prevailing assumption is that the PTC believes CIL has already changed with respect to immunities before international criminal courts and tribunals, and that it is applying this law. In finding jurisdiction over Heads of State, the PTC has referenced several texts and precedents it finds relevant. These include the 1919 Report of the Commission on the Responsibility of the Authors of the War, the statutes of the previous international criminal courts and tribunals, and the ICJ Arrest Warrant decision.¹⁰⁵

Beyond the case of al-Bashir, the PTC has denied immunity before international criminal courts and tribunals for Laurent Gbagbo, Muammar Gaddafi, Charles Taylor, and Slobodan Milošević. Out of these four examples the last three are more straightforward regarding the court's jurisdiction. In the case of Gaddafi, the situation in Libya had been referred to the ICC by the UNSC under Article 13(b) of the Rome Statute granting jurisdiction to the Court. This was despite the fact that the situation concerned the alleged criminal liability of nationals of a state that is not party to the Statute, and crimes committed in the territory of a state that is not party to the Statute.¹⁰⁶ In justifying jurisdiction, the PTC made note of its earlier findings in the al-Bashir Case regarding the irrelevance of an individual's official position for the purposes of the Court's jurisdiction, and concluded that Gaddafi's case fell within the jurisdiction of the ICC.¹⁰⁷ Charles Taylor was also a sitting Head of State at the time of his indictment even though he

103. *Id.* ¶ 44.

104. *Id.* ¶ 45.

105. Comm'n on the Responsibility of the Authors of the War and on Enforcement of Penalties, *Report Presented to the Preliminary Peace Conference*, 14 AM. J. INT'L L 95, 116–17 (1920); *see also* 2000 Arrest Warrant Case, *supra* note 7.

106. Prosecutor v. Gaddafi, ICC-01/11-12, Decision on the Prosecutor's Application Pursuant to Article 58 as to Muammar Muhammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah al-Senussi, ¶ 9 (June 27, 2011).

107. *Id.* ¶ 10.

had been out of office for almost three years at the time of his arrest and surrender to the SCSL.¹⁰⁸ Milosevic was a sitting Head of State at the time of his indictment as well,¹⁰⁹ but had already lost his reelection bid, resigned as President of the Socialist Federal Republic of Yugoslavia, and had been arrested on charges of domestic corruption and abuse of power¹¹⁰ at the time the ICTY reissued a warrant for his arrest.¹¹¹

Gbagbo's example is quite different to the above regarding the issue of contested immunity. Unlike the situations in Libya and Sudan, the ICC did not rely on a UNSC Resolution to exercise jurisdiction over the situation in Cote d'Ivoire. Instead, the state itself in April 2003 declared its ad hoc acceptance of ICC jurisdiction "*sans retard et sans exception*"¹¹² and reiterated this unconditional acceptance up to nearly a year before Gbagbo was arrested in 2011.¹¹³ The effect of such acceptance is to render all provisions of the Statute applicable to Gbagbo, including Article 27(2) of the Rome Statute that operates as an explicit waiver of an official's immunity by state parties to the Statute. Indictments against individuals whose immunity has been waived by their own state would appear to be in line even with older conceptions of the CIL rules on immunities. But the issue of whether Article 27(2) restates an existing CIL rule remains contested.

108. A sealed indictment was issued in Mar. 2003. See *Prosecutor v. Charles Taylor*, SCSL-03-01-PT-263, Indictment (Special Ct. for Sierra Leone Mar. 3, 2003). Taylor resigned as President of Liberia on Aug. 11, 2003, and was not arrested until Mar. 29, 2006.

109. One of his contemporaries, Milan Milutinović, was also indicted while serving as President of Serbia. However, Milutinović surrendered to the ICTY after his term ended in 2002, and did not raise immunity as an issue during his trial. See *Prosecutor v. Šainović*, Case No. IT-05-87, Decision on Milutinović Motion for Provisional Release, ¶ 10 (Int'l Crim. Trib. for the former Yugoslavia May 22, 2007).

110. Milošević lost to Vojislav Koštunica. While his term was not set to end until June 2001, he resigned on Oct. 7, 2000, after public protests due to manipulation of electoral results by his allies. See Steven Erlanger, *Showdown in Yugoslavia: The Overview; Milosevic Concedes His Defeat; Yugoslavs Celebrate New Era*, N.Y. TIMES (Oct. 7, 2000), <https://www.nytimes.com/2000/10/07/world/showdown-yugoslavia-overview-milosevic-concedes-his-defeat-yugoslavs-celebrate.html>.

111. The warrants were re-issued on Jan. 22, 2001. See Press Release, International Criminal Tribunal for the former Yugoslavia, Milosevic and Others Case: Warrants Re-issued to the Federal Republic of Yugoslavia, U.N. Press Release SJP/P.I.S./557-e (Jan. 23, 2001).

112. That self-referral was for any crimes that had been committed during an armed rebellion against Gbagbo's rule that started on Sept. 19, 2002. See Déclaration de Reconnaissance de la Compétence de la Cour Pénale Internationale [Letter from Bamba Mamadou, Minister of State, to the ICC] (April 18, 2003).

113. On Dec. 14, 2010, Alassane Ouattara, President of Cote d'Ivoire, confirmed the State's ongoing acceptance of ICC jurisdiction. See Confirmation de la Déclaration de Reconnaissance [Letter from Alassane Ouattara, President, to the ICC] (Dec. 14, 2010).

2. *State Cooperation*

In addition to indictments, which serve as the first step through which the ICC exercises its jurisdiction over individuals, the Rome Statute also requires the cooperation of states in order to arrest and surrender them to the Court. In addressing the obligations of states regarding arrest and surrender, the PTC has made its perhaps most unequivocal findings on the issue of immunities for Heads of State and the Court's jurisdiction. It has not only reinforced its original decisions on issuing the indictments, but has also elaborated on its consideration regarding the CIL nature of the rules on immunity before international criminal courts and tribunals.

In the case of al-Bashir, the Court has had to demand the cooperation of states on multiple instances due to the case's complicated nature and al-Bashir's general disregard for the Court's orders. Despite the indictment against him, al-Bashir frequently exercised his Head of State visits to other states, thus presenting multiple instances in which the international community sought the cooperation of third states in his arrest. In its decision on the cooperation of the DRC regarding al-Bashir's arrest and surrender, the PTC elaborated on where the Court stands on the issue of immunity. In response to the DRC's concerns of being "guided by the principle of immunity,"¹¹⁴ the PTC found that the DRC not only ignored the requests issued by the Court for arrest and surrender but also did not discharge its obligation to notify or consult with the Court.¹¹⁵ In response to the DRC's argument that it had to "wonder about the decision it should take,"¹¹⁶ the PTC made clear that "nowhere in any decision issued by the Court is there the slightest ambiguity about the Chambers' legal position regarding Omar al-Bashir's arrest and surrender to the Court, despite the arguments invoked relating to his immunity under international law."¹¹⁷

But the PTC did not stop here. In addressing the DRC's arguments on the issue of immunities and competing obligations, it stated that, while immunities for sitting Heads of State are

114. Prosecutor v. al-Bashir, ICC-02/05-01/09-195, Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court (Apr. 9, 2014) [hereinafter al-Bashir Case, DRC Cooperation].

115. *Id.* ¶ 21.

116. *Id.* ¶ 22.

117. *Id.*

undisputed before domestic courts, an exception to the personal immunities of Heads of State is explicitly provided in Article 27(2) of the Rome Statute for prosecution before an *international* criminal jurisdiction.¹¹⁸ However, the PTC noted that there is a question *sub judice* regarding how far this provision extends and whether it applies to non-state parties—in this case Sudan. To resolve this question, the PTC turned to the UNSC Resolution 1593, which stated that “the government of Sudan... shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution.”¹¹⁹ It argued that immunities represent a procedural bar, and since the cooperation requested by the UNSC incorporates the elimination of all impediments to the proceedings before the Court that would otherwise not allow Sudan to “cooperate fully”¹²⁰ and “provide any necessary assistance to the Court,”¹²¹ it eliminates such procedural bars. Thus, what the PTC effectively argued is that the UNSC implicitly waived immunities granted to al-Bashir under International Law that are attached to his position as Head of State for the purposes of the ICC proceedings.¹²²

The PTC came to similar decisions regarding the non-executed arrest warrants against al-Bashir on the part of Kenya. It reiterated that the enforcement obligation of the arrest warrants stems from UNSC Resolution 1593 that “urge[d] all States and concerned regional and other international organizations to cooperate fully” with the ICC,¹²³ and Article 87 of the Rome Statute to which Kenya is party.¹²⁴ The PTC also noted in response to Chad’s refusal to arrest al-Bashir that it is under the obligation of the Rome Statute, to which it is a party, to execute the pending Court’s decisions on his arrest and surrender to the Court.¹²⁵ The PTC also noted that Chad, contrary to Article 97, avoided consultations with the Court

118. *Id.* ¶ 25.

119. S.C. Res. 1593, ¶ 2 (Mar. 31, 2005).

120. *Id.*

121. *Id.*

122. al-Bashir Case, DRC Cooperation, *supra* note 114, ¶ 29.

123. S.C. Res. 1593, *supra* note 119, ¶ 2.

124. Prosecutor v. al-Bashir, ICC-02/05-01/09-107, Decision Informing the United Nations Security Council and the Assembly of the States Parties to the Rome Statute About Omar Al-Bashir’s presence in the Territory of the Republic of Kenya (Aug. 27, 2010).

125. Prosecutor v. al-Bashir, ICC-02/05-01/09-151, Decision on the Non-Compliance of the Republic of Chad with the Cooperation Requests Issued by the Court Regarding the Arrest and Surrender of Omar Hassan Ahmad Al-Bashir, ¶ 20 (Mar. 26, 2013).

prior to al-Bashir's visits in order to resolve any issues concerning the execution of the cooperation requests. Chad deliberately disregarded both its obligations stemming from the Rome Statute and UNSC Resolution 1593.¹²⁶ The PTC followed the same rationale concerning Nigeria's inaction on the execution of the cooperation requests due to al-Bashir's "sudden departure" before the official closing of the AU Summit. According to Nigerian authorities this happened at the time when "officials of relevant bodies and agencies of...Nigeria were considering the necessary steps to be taken in respect of his visit in line with Nigeria's international obligations."¹²⁷

The PTC has also dealt with the issue of non-cooperation from non-state parties. It found that, although Qatar had no obligations towards the Court from the Rome Statute, the Sudan situation was referred by UNSC Resolution 1593 urging all states to cooperate with the Court and could thus execute the outstanding arrest warrant.¹²⁸

The PTC made its most elaborate finding regarding the nature of the CIL rules on immunity before international criminal courts and tribunals in its decisions regarding Malawi's noncooperation. After it reiterated Malawi's obligations to cooperate under both the Statute and the UNSC Chapter VII Resolution, the PTC addressed Malawi's arguments on whether sitting Heads of States of non-state parties enjoy immunities in the enforcement of ICC arrest warrants by national authorities. The PTC found that:

The principle in International Law is that immunity of either former or sitting Heads of State cannot be invoked to oppose a prosecution by an international court. This is equally applicable to former or sitting Heads of State not Parties to the Statute whenever the Court may exercise jurisdiction.¹²⁹

126. *Id.* ¶ 21.

127. Prosecutor v. al-Bashir, ICC-02/05-01/09-159, Decision on the Cooperation of the Federal Republic of Nigeria Regarding Omar Al-Bashir's Arrest and Surrender to the Court, ¶¶ 7-12 (Sept. 9, 2013).

128. Prosecutor v. al-Bashir, ICC-02/05-01/09-204, Decision on the "Prosecution's Urgent Notification of Travel in the Case of The Prosecutor v Omar Al Bashir," ¶¶ 8, 11 (July 7, 2014).

129. Prosecutor v. al-Bashir, ICC-02/05-01/09-139-Corr, Corrigendum to the Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir, ¶ 36 (Dec. 13, 2011).

It even added that the PTC considers “the international community’s commitment to rejecting immunity in circumstances where international courts seek arrest for international crimes has reached a critical mass”¹³⁰ and that “it is certainly no longer appropriate to say that customary international law immunity applies in the present context.”¹³¹ In a conclusive finding, the PTC declared that there is a CIL exception to Head of State immunity before ICCTs and thus there is no conflict between Malawi’s obligations toward the Court and its obligations under customary international law.¹³²

On June 13, 2015, al-Bashir visited South Africa to attend the AU Summit. The South Africa High Court issued an order that al-Bashir was not to leave the country. Yet, as the Court deliberated, he was already on his way back to Sudan on a private jet. The PTC had already issued an urgent decision asserting that there was “no ambiguity or uncertainty” with regard to South Africa’s obligation to arrest al-Bashir,¹³³ by referencing the Court’s jurisprudential history on issues of non-cooperation.¹³⁴ In the South African High Court’s ruling, the Court confirmed that South Africa’s obligations under the Rome Statute trump its obligations to the AU. It found governmental officials responsible for a “clear violation of the order,”¹³⁵ and that the argument that the duty to cooperate with the ICC had been suspended by al-Bashir’s immunity was “ill-advised and ill-founded”¹³⁶ and “misguided.”¹³⁷ It concluded that the

130. *Id.* ¶ 42.

131. *Id.*

132. *Id.* ¶ 43.

133. Prosecutor v. al-Bashir, ICC-02/05-01/09-242, Decision Following the Prosecutor’s Request for an Order Further Clarifying that the Republic of South Africa is Under the Obligation to Immediately Arrest and Surrender Omar Al Bashir, ¶ 1 (June 13, 2015).

134. *See id.* at ¶ 9. The Chamber held that it was unnecessary to further clarify that South Africa is obliged to arrest al-Bashir and surrender him to the Court given that “the Republic of South Africa is already aware of its obligation under the Rome Statute to immediately arrest Omar Al-Bashir and surrender him to the Court, as it is aware of the Court’s explicit position ... that the immunities granted to Omar Al-Bashir under international law and attached to his position as a Head of State have been implicitly waived by the Security Council of the United Nations by resolution 1593(2005) referring the situation in Darfur, Sudan to the Prosecutor of the Court, and that the Republic of South Africa cannot invoke any other decision, including that of the African Union, providing for any obligation to the contrary.” *Id.*

135. *S. Afr. Litig. Ctr. v. Minister of Justice & Constitutional Dev.* 2015 (5) SA 1 (GP) at 7 ¶ 9 (S. Afr.) [hereinafter *S.A.L.C v. MoJ et al.*].

136. *Id.* at 25 ¶ 31.

137. *Id.* at 26 ¶ 32.

government had acted in breach of the South African Constitution,¹³⁸ the Implementation of the Rome Statute of the International Criminal Court Act, and the Rome Statute, and invited the National Prosecuting Authority “to consider whether criminal proceedings are appropriate.”¹³⁹ The South African Supreme Court of Appeal unanimously confirmed that the South African government had breached its obligations under the South African domestic statute implementing the Rome Statute, and under the Rome Statute, by failing to arrest and detain al-Bashir for surrender to the ICC.¹⁴⁰

3. *The Assembly of State Parties: States*

The ICC, apart from its judicial organs, is also comprised of other governing entities. The Assembly of State Parties (ASP) is the body responsible for the management and oversight of the Court, and the legislative body comprised of the state parties to the Rome Statute. States that have only signed the Rome Statute but have not yet ratified it may participate as observers. The ICC is also unique in incorporating NGOs under Coalition for the ICC (CICC) that have accreditation and participate actively in the sessions of the ASP. At its yearly meetings, the ASP discusses both logistical and substantive issues relating to the functioning of the Court. Naturally, the issue of immunity has been discussed both in the panels for amendments to the Rome Statute and the Court’s Rules of Procedure and Evidence, as well as the considerations of questions of non-cooperation with the Court. Though at the ASP the states involved are already party to the Rome Statute and have *prima facie* consented to its substantive and procedural rules, a review of how they interpret their obligations and those of third states is instructive in better understanding the role of this network in shaping the CIL rules on personal immunity.

At the ASP, several states have expressed their position on the issue of immunities. Canada, Australia, and New Zealand (CANZ) have responded to the non-execution of al-Bashir’s arrest warrants by calling upon:

138. S. AFR. CONST., 1996.

139. *S.ALC v. MoJ et al.*, *supra* note 135, ¶ 39.

140. *Minister of Justice & Constitutional Dev. v. S. Afr. Litig. Ctr.* 2016 (867/15) SA 1 (SCA) at 72 ¶ 107 (S. Afr.).

[A]ll relevant actors, including the authorities in Uganda and the Democratic Republic of Congo, to cooperate closely with the Court and with one another in ensuring the full implementation of their obligations under the Rome Statute, including the execution of the outstanding arrest warrants, and assisting the Court to fulfill its mandate.¹⁴¹

They have also reiterated every year to Sudan their urge to “cooperate with the Court and to take all necessary steps to arrest [wanted individuals]” and “to help bring an end to impunity for alleged human rights abuses and war crimes.”¹⁴²

The EU has repeatedly called upon state parties “to comply unreservedly with the obligations they entered into when they ratified the Court Statute and . . . States which have not yet acceded to act in accordance with the Security Council resolutions which, let us not forget, are binding on them.”¹⁴³ The EU has also seized the opportunity to repeat to the government of Sudan that it is “obliged under the terms of United Nations Security Council Resolution 1593 to cooperate with the Court. That obligation is not negotiable.”¹⁴⁴ The EU along with several candidate states such as Croatia, the Former Yugoslav Republic of Macedonia, and Iceland, as well as the Countries of the Stabilization and Association Process and potential candidates Albania, Bosnia and Herzegovina, Montenegro, Serbia, Ukraine, the Republic of Moldova, Armenia and Georgia, have been very vocal concerning the enforcement of arrest warrants due to immunity. “The Union calls for more focused efforts from the States Parties, in line with their cooperation obligations, and from the international community as a whole, to prevent the alleged perpetrators of genocide, crimes against humanity or war crimes from escaping justice any longer.”¹⁴⁵ On the obligations of states not party to the Court the EU “points out that UN Security Council Resolution 1593 imposes obligations not least on a non-State Party—Sudan—to cooperate with the Court. It regrets Sudan’s infringements of its international obligations and expresses

141. ICC, General Debate, Seventh Sess. of the Assembly of States Parties, Statement of Australia on behalf of Canada, New Zealand and Australia at 2 (Nov. 15, 2008).

142. ICC, General Debate, Eighth Sess. of the Assembly of States Parties, Statement of Canada, Australia and New Zealand at 1 (Nov. 19, 2009).

143. ICC, General Debate, Seventh Sess. of the Assembly of States Parties, Statement of France on behalf of the European Union at ¶ 6 (Nov. 14, 2008).

144. *Id.* ¶ 10.

145. ICC, General Debate, Ninth Sess. of the Assembly of States Parties, Statement of Belgium on behalf of the European Union at 6 (Dec. 6, 2010).

concern about the difficulties recently raised by two States Parties in relation to the performance of their cooperation obligations.”¹⁴⁶

Hungary has viewed recent developments in international criminal justice as evidence that “the fight against impunity and the strengthened international cooperation to continue preventing the most serious crimes are more important than ever.”¹⁴⁷ Lichtenstein has called “on all States concerned to abide by their obligations under international law and to cooperate fully with the Court. States Parties have a special obligation in this regard, as does the Security Council with respect to situations it referred to the Court.”¹⁴⁸ Norway has also emphasized the nature of the obligations of the arrest warrants. “We urge all states involved to fulfil [sic] their responsibility to make these warrants effective. . . . We therefore urge Sudan to cooperate fully with the Court and to comply with its legal obligations without further delay.”¹⁴⁹ Denmark has strongly reiterated “those bearing the greatest responsibility for the most serious crimes must be held accountable for their actions. No one can be above the law. We urge all States to fulfill their obligations under the Rome Statute and relevant instruments of international law.”¹⁵⁰ The Netherlands has pointed out how “[l]egal history was made . . . with the issuance of an arrest warrant against a sitting Head of State, showing that the ICC exercises jurisdiction over persons regardless of political stature.”¹⁵¹ Germany recalls “one of the fundamental principles of the Rome Statute [is] that official capacity does in no case exempt a person from criminal responsibility.”¹⁵² Switzerland has expressed that “if we really want to bring the impunity of the perpetrators of the most serious crimes to an end, and prevent the recurrence of such crimes, it is imperative that States respect their obligations under the Rome Statute as well

146. *Id.*

147. ICC, General Debate, Twelfth Sess. of the Assembly of States Parties, Statement of Hungary at 1 (Nov. 27, 2013).

148. ICC, General Debate, Seventh Sess. of the Assembly of States Parties Statement of Lichtenstein at 2 (Nov. 15, 2008).

149. ICC, General Debate, Seventh Sess. of the Assembly of States Parties, Statement of Norway at 2 (Nov. 15, 2008).

150. ICC, General Debate, Ninth Sess. of the Assembly of States Parties, Statement of Denmark at 2 (Nov. 19, 2009) (reiterated at ICC, General Debate, Ninth Sess. of the Assembly of States Parties, Statement of Denmark at 3 (Dec. 6, 2010).

151. ICC, General Debate, Eighth Sess. of the Assembly of States Parties, Statement of the Netherlands at ICC 2 (Nov. 19, 2009).

152. ICC, General Debate, Ninth Sess. of the Assembly of States Parties, Statement of Germany at 2 (Dec. 6, 2010).

as the relevant Security Council resolutions.”¹⁵³ Austria has repeated that “in order to fight impunity for such serious crimes it is essential that the law applies equally to all persons without distinction based on official capacity.”¹⁵⁴ Spain has noted “the principle that the Rome Statute shall be applied equally without distinction based on official capacity, as foreseen in Article 27, which remains a basic principle to ensure the effective fight against impunity, the reason why the ICC was created.”¹⁵⁵ The UK has also repeated that “[o]ne of the key principles of the Rome Statute, to which we are all parties, is that it shall apply equally to all persons, without regard to rank, title or position. This is the fundamental principle which underpins the Court’s work.”¹⁵⁶

The voices from South America—Peru, Guatemala, Brazil, and Argentina—all agreed that immunity is equal to impunity.¹⁵⁷ Mexico has often expressed its “deep concern regarding the refusal of some States to cooperate with the International Criminal Court, in clear violation of the international obligations derived from the Rome Statute and, in certain cases, from the UN Charter.”¹⁵⁸ Trinidad and Tobago has been “hopeful that, like in the Lubanga case, other persons accused of committing severe crimes in the Democratic Republic of the Congo, Uganda, the Sudan and the Central African Republic will be brought to justice.”¹⁵⁹ Botswana has stressed that “[i]t is imperative for States Parties to fulfill their obligation to support and cooperate with the Court as required by Article 87 of the Rome Statute. Similarly, States Parties are obliged to comply with the political authority of the UN Security Council under the provisions of Chapter VII of the UN Charter.”¹⁶⁰

153. ICC, General Debate, Ninth Sess. of the Assembly of States Parties, Statement of Switzerland at 5 (Dec. 6, 2010).

154. ICC, General Debate, Twelfth Sess. of the Assembly of States Parties, Statement of Austria at 3 (Nov. 27, 2013).

155. ICC, General Debate, Twelfth Sess. of the Assembly of States Parties, Statement of Spain at 3 (Nov. 21, 2013).

156. ICC, General Debate, Twelfth Sess. of the Assembly of States Parties, Statement of the United Kingdom of Great Britain & Northern Ireland at 2 (Nov. 21, 2013).

157. Kwamchetsi Makokha, *How the African Union Battle for Immunity Was Lost at the Assembly for State Parties*, DAILY NATION (Nov. 26, 2013), <https://mobile.nation.co.ke/blogs/AU-battle-for-ICC-immunity-/1949942-2088948-format-xhtml-ssjqcwz/index.html>.

158. ICC, General Debate, Ninth Sess. of the Assembly of States Parties, Statement of Mexico at 5 (Dec. 6, 2010).

159. ICC, General Debate, Seventh Sess. of the Assembly of States Parties, Statement of Trinidad & Tobago at 3 (Nov. 15, 2008).

160. ICC, General Debate, Twelfth Sess. of the Assembly of States Parties, Statement of Botswana at ¶¶ 17-18 (Nov. 21, 2013).

Even though most states have spoken strongly in favor of both the irrelevance of official capacity and the absence of immunity regarding the ICC's jurisdiction, there are some state parties and IOs that have opposed the absence of immunity for sitting Heads of State. The African Union (AU) has expressed concern regarding "the issue of indictment of sitting Heads of State and Government and its consequences on peace and stability and reconciliation in African Union Member States."¹⁶¹ This was particularly relevant in AU's call "for a deferral of the ICC investigations and prosecutions in relation to the 2008 post-election violence in Kenya under Article 16 of the Rome Statute."¹⁶² Kenya has argued that "immunities for sitting Heads of State exist in many domestic jurisdictions and that this should also apply at the international level."¹⁶³ The AU also distributed a draft resolution calling explicitly for immunity from prosecution for sitting Heads of State and senior government officials. It also called for Kenyatta not to appear before the ICC until AU concerns have been addressed by the UNSC and the ICC.¹⁶⁴ "No charges shall be commenced or continued before any international court or tribunal against any serving Head of State or Government or anybody acting or entitled to act in such capacity during his/her term of office."¹⁶⁵ This was not entirely an African position though – Senegal, Cote d' Ivoire and Democratic Republic of Congo disagreed, while South Africa and Tanzania spoke with equivocation.¹⁶⁶

4. *Assembly of State Parties – NGOs*

NGOs have often affected the debate and outcomes at the ASP as a result of the symbiotic relationship the ICC has with NGOs. Despite state interpretations of what the Rome Statute provides for immunities, NGOs have an inherently more pervasive reach considering that their audience extends beyond the member states of the ICC to civil society globally. There were two instances in

161. ICC, General Debate, Twelfth Sess. of the Assembly of States Parties, Statement of Uganda on behalf of the African Union at 5 (Nov. 21, 2013).

162. *Id.*

163. Press Release, Coal. for the Int'l Crim. Ct., APS Debate on Head of State Immunity (Nov. 21, 2013).

164. Press Release, Coal. for the Int'l Crim. Ct., AU Pits Presidential Immunity Against Human Security (Oct. 15, 2013) [hereinafter CICC, Presidential Immunity].

165. *Id.*

166. Makokha, *supra* note 157.

which NGOs took a particularly active and vocal role with respect to the issue of Head of State immunity: the case of al-Bashir and the case of Kenyatta. NGOs were not only instructive in expressing what they thought the law to be, but also participated actively in drafting recommendations to the ASP on its formulation.

Amnesty International published a legal memorandum titled “Bringing Power to Justice” rejecting the argument that any state could refuse to arrest and surrender al-Bashir by claiming that he enjoys immunity as a Head of State.¹⁶⁷ This came immediately after the PTC decisions on non-cooperation requesting that both the UNSC and ASP act to urge states to enforce the arrest warrant. In its memorandum, Amnesty International emphasized the statutes of prior international criminal courts and tribunals that excluded immunity for Heads of State and other governmental officials. It also took note of the ICJ Arrest Warrant decision and the response of the SLSC to the immunity claim in the Charles Taylor case. “[T]he principle seems now established that the sovereign equality of states does not prevent a Head of State from being prosecuted before an international criminal tribunal or court.” It also addressed national legislation that rejects immunity from arrest or extradition of anyone who is the subject of a request for surrender by the ICC.¹⁶⁸

The indictment and trial of Kenyatta led to a series of reactions from AU states, the Court, and NGOs. Pre-ASP proposals circulated for a “mass withdrawal” from the Rome Statute and for total noncooperation by African states that led to a record low attendance of less than a third of 54 AU Heads of State and governments at the ASP. In response, over 130 African and international NGOs wrote to the African ICC state parties calling on them to reaffirm their support for the Court.¹⁶⁹ These pleas became even louder during the sessions in which the issue of immunity was raised, particularly in discussions relating to amending the statute’s immunity provisions. The CICC emphasized that “[t]he Rome Statute allows for no reservations, and no immunity for any individual regardless of position or office. . . . None

167. ICC, General Debate, Ninth Sess. of the Assembly of States Parties, Statement of Amnesty Int’l at 2 (Dec. 6, 2010).

168. Amnesty Int’l, *Bringing Power to Justice: Absence of Immunity for Heads of State Before the International Criminal Court*, AI Index IOR 53/017/2010, 24-25 (2010) (quoting Prosecutor v. Taylor, Case No. SCSL-2003-01-I, Decision on immunity from jurisdiction, ¶ 52 (May 31, 2004)).

169. CICC, Presidential Immunity, *supra* note 164.

of these principles is more important than the provision against immunity.”¹⁷⁰ The Kenyan Human Rights Commission pointed out in response to arguments that ICC trials hinder peace and reconciliation that “[i]f states were to offer immunity to sitting Heads of States and governments, this would negate the very purpose that [the] Court was founded.”¹⁷¹ The International Federation for Human Rights (FIDH) in its position paper responded directly to claims on both the issue of immunity and the possibility of amending Article 27. “The ICC was created to prosecute the main perpetrators of international crimes, whose commission generally implies a government policy or its tolerance. The Rome Statute is clear: no immunities can be alleged before its jurisdiction.”¹⁷² On amendments the FIDH took a position expressing general International Law: “It is a well-established principle that, before an international criminal tribunal, the official capacity of the accused should be irrelevant in relation to investigations and prosecutions trying to establish the alleged responsibility for international crimes.”¹⁷³ No Peace Without Justice (NPWJ) offered a series of recommendations to the state parties regarding the prevention of abuse of state immunities. In discussing the proposed amendments to Article 27 of the Rome Statute, NPWJ noted that “any proposed amendment that seeks to provide a shield of State immunity for the application of any provision of the Rome Statute should be resisted as an amendment that threatens the fundamental principles underpinning the Court.”¹⁷⁴

170. ICC, General Debate, Twelfth Sess. of the Assembly of States Parties, Statement by the CICC at 2 (Nov. 21, 2013).

171. ICC, General Debate, Twelfth Sess. of the Assembly of States Parties, Statement by the Kenya Human Rights Cmm’n at 2 (Nov. 21, 2013).

172. Int’l Fed’n for Human Rights (FIDH), *Recommendations to the 12th Assembly of States Parties to the Statute of the International Criminal Court* 4 (Nov. 21, 2013).

173. *Id.* at 5; *see also* ICC, General Debate, Twelfth Sess. of the Assembly of States Parties, FIDH Speech at 1-2 (Nov. 21, 2013) (“The principle, that no one, whatever the rank or position, can be above the law, constitutes a fundamental pillar of the Statute. Presidential immunities or immunities for high level State officials are inadmissible before the ICC. States have to support judicial independence as a guaranty of a fair trial for the accused and have to recognize that only judges may decide on the modalities or exceptions for the accused’ [sic] possible absence during the trial. Any threat to the principles ruling the Rome Statute are [sic] to be understood as a direct attack against victims’ rights to justice and reparation. Amendments to the ICC Rules of Procedure and Evidence must have for only goal [sic] to strengthening and improving ICC proceedings, but never to moving away from the Statute’s spirit which defines its jurisdiction. FIDH urges States to avoid the elaboration of *ad hoc* responses without a previous and genuine consultation process...”).

174. No Peace Without Justice (NPWJ), *Policy Priorities of No Peace Without Justice*, at 1-5 (Nov. 21, 2013).

In response to the AU's resolution spearheaded by Kenya calling for immunity for sitting Heads of State and government, the CICC reiterated that "[t]he provision of 'no immunity' was among the greatest achievements of the governments and NGOs that helped craft the Rome Statute. The Coalition hopes that governments will never surrender this fundamental pillar of the permanent ICC."¹⁷⁵ Amnesty International urged state parties to affirm their support for the principle set out in Article 27 of the Rome Statute: "If sitting Heads of State were exempt from prosecution by the ICC while they hold office, it would [...] be open to abuse. While in power, those accused would be able to commit crimes under the jurisdiction of the ICC with impunity."¹⁷⁶

In a report to the special plenary session, the Victims' Rights Working Group (VRWG) said it was especially concerned that, "if implemented, the recommended freeze would undermine the work of the TFV as it is currently only partially equipped to implement its goals and, to date, has only been able to implement its assistance mandate in two of seven ICC country situations."¹⁷⁷ At the same time, Human Rights Watch (HRW) submitted a memorandum stating that "the irrelevance of official capacity under Article 27 of the Rome Statute is part and parcel of the court's mission that the most serious crimes of concern to the international community as a whole must not go unpunished."¹⁷⁸ HRW also emphasized that "the irrelevance of official capacity has been a regular feature of international courts since the post-World War II trials at Nuremberg [...] Allowing official capacity to bar prosecution would thus represent a major retreat in international criminal law and practice."¹⁷⁹ The Kenyan Civil Society addressed both international

175. William R. Pace, *Delivering on the Promise of Meaningful Justice to Victims* 45 J. COAL. INT'L CRIM. CT. 1, 2 (2013), http://www.iccnw.org/documents/monitor45_eng.pdf.

176. ICC, General Debate, Twelfth Sess. of the Assembly of States Parties, Amnesty Int'l Statement to the General Debate, AI Index IOR 53/003/2013 (Nov. 21, 2013).

177. Victims' Rights Working Grp., *The International Criminal Court at 10: The Implementation of Victims' Rights* 11 (2013).

178. Memorandum from the Human Rights Watch, Human Rights Watch Memorandum for the Twelfth Session of the International Criminal Court Assembly of States Parties 6 (Nov. 12, 2013) (quoting the Rome Statute, *supra* note 44, at pmb1. ¶ 4).

179. *See id.*; *see also* ICC, General Debate, Twelfth Sess. of the Assembly of States Parties, Human Rights Watch Statement at 2-3 (Nov. 21, 2013) ("Second, we look to states parties to insist on fidelity to the Rome Statute. States parties should be clear in debates at this session that there will be no retreat from the Rome Statute's proscription of immunity for sitting governmental officials in Article 27. Granting immunity to sitting leaders would undermine the fundamental principle that no one should be above the law. It would create perverse and destabilizing incentives for gaining and holding on to power.").

and national law suggesting that “the Rome Statute system deliberately ensured that there would be no immunity for any individual on the basis of official capacity.”¹⁸⁰

In making such forceful interventions to preserve the Rome Statute provisions excluding immunity for sitting Heads of State indictments, these NGOs have contributed actively to the development of the normative agenda on personal immunity for Heads of State before the ICC.¹⁸¹

E. International Organizations

1. The United Nations Security Council

The UNSC has been a primary actor in the movement away from absolute personal immunities. The exercise of Chapter VII power to remove immunities for the protection of international peace and security would have been unthinkable under traditional CIL’s absolute personal immunity norms. Under the hierarchy established by the United Nations Charter (UNC) in Articles 25 and 103, obligations to comply with a binding UNSC Chapter VII Resolution prevail over others.¹⁸² If CIL did not provide so already, UNSC removed immunities for the first time in the prosecution of Milosevic before the ICTY.¹⁸³ Insofar as the UNSC is exercising its powers under Chapter VII in response to a threat to international

180. Njonjo Mue, Debate on Prosecuting Heads of State and Government and Its Consequences on Peace, Stability and Reconciliation 2 (Nov. 22, 2013).

181. *Id.* at 1-3.

182. See U.N. Charter art. 25, 103; see also Rudolf Bernhardt, *Article 103*, in THE CHARTER OF THE UNITED NATIONS 1298-99 (Bruno Simma ed., 2d ed. 2002) (asserting that the underlying ideas of Article 103 of the Charter extend to inconsistent obligations under CIL).

183. Prosecutor v. Milošević, Case No. IT-02-54-T, Amici Curiae Motion for Judgment of Acquittal Pursuant to Rule 98*bis* (Int’l Crim. Trib. for the Former Yugoslavia Mar. 3, 2004); Prosecutor v. Šainović et al., Case No. IT-05-87-T, Decision on Milutinović Motion for Provisional Release, ¶ 10 (Int’l Crim. Trib. for the Former Yugoslavia May 22, 2007); Prosecutor v. Milošević, Case No. IT-02-54-T, Prosecution Response to Amici Curiae Motion for Judgment of Acquittal Pursuant to Rule 98*bis* (Int’l Crim. Trib. for the Former Yugoslavia Mar. 23, 2004). The Trial Chamber considered the argument that the ICTY does not have jurisdiction over Milošević “by reason of his status as former President.” Prosecutor v. Slobodan Milošević, Case No. IT-02-54, Decision on Preliminary Motions, ¶ 26-34 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 8, 2001). The Trial Chamber interpreted this argument as a challenge to Article 7(2) of the ICTY Statute and concluded that “[t]here is absolutely no basis for challenging the validity of Article 7, paragraph 2, which at this time reflects a rule of customary international law.” *Id.* at 27-28.

peace and security,¹⁸⁴ member states are considered to have accepted the removal of immunity by having consented to the UNC framework for the protection of international peace and security.¹⁸⁵ Voices in the UNSC debate that led to the establishment of the ICTY reflected this rationale. For instance, Hungary was very vocal in this debate over immunity, stating that “the official status of the individual brought to Court, whatever it might be, does not immunize him from his criminal liability.”¹⁸⁶

Before the ICC, the exercise of jurisdiction over sitting Heads of State of non-state parties is justified through UNSC Resolutions, such as Resolution 1593. For instance, the UNSC obliged Sudan to cooperate fully with and provide any necessary assistance to the Court and the Prosecutor.¹⁸⁷ This obligation ought to incorporate either the presumption that no personal immunity exists given the nature of the Court, or the duty of Sudan to waive any immunity that could obstruct the ICC’s jurisdiction.¹⁸⁸ But the existence of this obligation under the resolution does not answer whether personal immunity exists before international criminal courts and tribunals as a matter of CIL, or whether Article 27 of the Rome Statute applies to non-state parties. In requesting a state’s full cooperation with the ICC after a UNSC referral, the UNSC extends an obligation to waive immunity altogether that is distinct from the effect of Article 27, which waives any immunity for the purposes of the ICC.¹⁸⁹ But despite the source of the obligation, the UNSC has, in practice, accepted that there are instances where, for the purposes of maintaining international peace and security, an exception to absolute personal immunity exists through the exercise of jurisdiction by international criminal courts and tribunals.

2. *The African Union*

The African Union (AU) has had a turbulent relationship with the concept of personal immunity for Heads of State even though

184. This distinguishes the question of immunity before the Special Court for Sierra Leone, which was not established pursuant to a resolution of the Security Council utilizing its powers under Chapter VII of the Charter.

185. Williams & Sherif, *supra* note 81, at 79.

186. U.N. SCOR, 48th Sess., 3217th mtg. at 21, U.N. Doc. S/PV.3217 (May 25, 1993).

187. S.C. Res. 1593, ¶ 2 (Mar. 31, 2005).

188. Kevin J. Heller, *ICC Prosecutor to Charge Sudan’s President with Genocide*, OPINIO JURIS (July 11, 2008), <http://opiniojuris.org/2008/07/11/icc-prosecutor-to-charge-sudans-president-with-genocide/>.

189. Blommesteijn & Ryngaert, *supra* note 22, at 435.

many of its members are state parties to the ICC. While it has not, in principle, been opposed to the exercise of jurisdiction of the ICC over former Heads of State, the AU's position regarding exceptions to absolute personal immunity for sitting Heads of State has been most antagonistic. In several statements, delegates within the AU have reaffirmed their conviction that national laws and CIL provide that sitting Heads of State are granted immunities during their time in office. They have agreed that "no charges shall be commenced or continued before any international court or tribunal against any serving Head of State or Government or anybody acting or entitled to act in such capacity during his/her term of office."¹⁹⁰

The first call for non-cooperation by the AU came shortly after al-Bashir's indictment and has since been reiterated.¹⁹¹ In its 2009 decision, the AU expressed concern about PTC's indictment and decided that "the AU Member States shall not cooperate pursuant to the provisions of Article 98 of the Rome Statute of the ICC relating to immunities, for the arrest and surrender of President Omar El Bashir of Sudan."¹⁹² The non-cooperation obligation has been subsequently confirmed in AU Resolutions up to 2015, noting that "the need for all Member States to comply with the position of the Assembly of the Union regarding the warrants issued by the ICC against President Bashir."¹⁹³

The indictments of the sitting Head of State of Kenya added fuel to the fire. Kenya, as party to the Rome Statute, has continuously expressed its belief that it has been cooperating with the ICC "despite national and international customary laws, including in many Western countries, which guarantee sitting Heads of State and Government immunity from prosecution during their tenure of

190. African Union [AU], *Decision on Africa's Relationship with the International Criminal Court (ICC)*, Extraordinary Session, Ext/Assembly/AU/Dec.1, ¶ 10 (Oct. 12, 2013) [hereinafter AU, *Decision on the ICC*].

191. African Union [AU], *Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court*, Thirteenth Ordinary Session, Assembly/AU/Dec.245(XIII) Rev. 1, ¶ 10 (July 3, 2009) [hereinafter AU, *Decision on the Rome Statute*]; African Union [AU], *Decision on the Progress Report of the Commission on the Implementation of Decision Assembly/AU/Dec.270(XIV) on the Second Ministerial Meeting on the Rome Statute of the International Criminal Court (ICC)*, Fifteenth Ordinary Session, Assembly/AU/Dec.296 (XV), ¶ 5 (July 27, 2010) [hereinafter AU, *Decision on the Progress Report*].

192. See AU, *Decision on the Rome Statute*, *supra* note 191.

193. *Decision on the Progress Report of the Commission on the Implementation of Previous Decisions on the International Criminal Court (ICC)*, Twenty-Fourth Ordinary Session, Assembly/AU/Dec.547(XXIV), ¶ 19 (Jan. 31, 2015).

office.”¹⁹⁴ Siding with Kenya, the AU decided that no charges will commence or continue before any international criminal court against a serving AU Head of State, and that the trials of Kenyatta and Ruto be suspended until they complete their terms of office.¹⁹⁵

The AU’s stance against any exceptions to immunity for sitting Heads of State has extended to existing Chapter VII UNSC Resolutions. The PTC has addressed this conflict in this as well as prior situations of non-cooperation by invoking Article 103 of the UNC stating that, in the event of a conflict of member states between the obligations under the UNC and their obligations under any other international agreement, their obligations under the UNSC shall prevail.¹⁹⁶ In its decision on the cooperation of DRC, the PTC emphasized that “the DRC cannot invoke any other decision, including that of the African Union, providing for any obligation to the contrary,”¹⁹⁷ considering that the UNSC implicitly lifted al-Bashir’s immunities through Resolution 1593.

The AU remains committed to ensuring personal immunity for sitting Heads of State despite its operation as a regional organization that draws its mandate on international peace and security from the UNC, and must be “consistent with the Purposes and Principles of the United Nations.”¹⁹⁸

3. *The U.N. Legal Committee, the International Law Commission, and the Institute of International Law*

The legal committee of the U.N. discussed the changing nature and scope of CIL rules on immunity. While some maintained that immunity remains absolute with no exceptions in CIL, others argued that immunity was the general rule with some exceptions. Some raised the idea of serious international crimes as criterion for identifying exceptions to immunity.¹⁹⁹ Others mentioned crimes that fall within the jurisdiction of international courts and

194. Nkosazana Dlamini-Zuma, Comm’n Chairperson, African Union, Welcome Remarks to the Extraordinary Session of the Assembly of Heads of State and Government (Oct. 12, 2013).

195. See AU, *Decision on the ICC*, *supra* note 190, ¶ 10.

196. U.N. Charter art. 103.

197. Prosecutor v. Al Bashir, ICC-02/05-01/09, Decision of the Democratic Republic of the Congo Regarding Omar Al Bashir’s Arrest and Surrender to the Court, ¶ 31 (Apr. 9, 2014) (quoting U.N. Charter art. 103).

198. *Cf.* U.N. Charter art. 52.

199. See CIARA DAMGAARD, *INDIVIDUAL CRIMINAL RESPONSIBILITY FOR CORE INTERNATIONAL CRIMES* 263 (2008).

tribunals.²⁰⁰ One delegation, however, suggested that exceptions to immunity could undermine international relations by allowing politically motivated indictments, and others asked for caution in addressing the issue of exceptions to immunity.²⁰¹

The ILC considered the issue of immunities in its discussion for the Draft Code of Crimes against the Peace and Security of Mankind after a request of the UNGA. At its forty-third session, the Commission adopted on first reading the Draft Code of Crimes against the Peace and Security of Mankind, including Draft Article 13, which states that “the official position of an individual who commits a crime against the peace and security of mankind, and particularly the fact that he acts as Head of State or Government, does not relieve him of criminal responsibility.” The Article was modeled after Principle III of the Nuremberg Principles and did not on first reading give rise to any objections by governments.²⁰² In the second draft prepared by the ILC, the placement of Draft Article 13 was changed to Draft Article 7 and read, “the official position of an individual who commits a crime against the peace and security of mankind, even if he acted as Head of State or Government, does not relieve him of criminal responsibility or mitigate punishment.”²⁰³

The Institute of International Law addressed only the issue of jurisdiction exercised by a foreign state against a person having personal immunity for the prosecution of alleged international crimes. In its Resolution on the Immunity from Jurisdiction of the State and of Persons Who Act on Behalf of the State it stated that “[n]o immunity from jurisdiction other than personal immunity in accordance with international law applies with regard to international crimes.” However, it did not address the issue of whether personal immunity subsists before an international criminal court or tribunal. Its earlier Resolution on Immunities from Jurisdiction and Execution of Heads of State and of Government in International Law that expressed a similar spirit read, “[n]othing in this Resolution implies nor can be taken to mean that a Head of

200. See Sevrine Knuchel, *State Immunity and the Promise of Jus Cogens*, 9 NW. U. J. INT'L HUM. RTS. 149, 149 (2011); see also Thomas Weatherall, *Jus Cogens and Sovereign Immunity: Reconciling Divergence in Contemporary Jurisprudence*, 46 GEO. J. INT'L L. 1151, 1153 (2015).

201. See Second Report on Immunity, *supra* note 13, ¶ 10.

202. See Secretariat Memorandum, *supra* note 10.

203. Institut de Droit International, *Immunities from Jurisdiction and Execution of Heads of State and of Government in International Law* (Aug. 26, 2001).

State enjoys an immunity before an international tribunal with universal or regional jurisdiction.”²⁰⁴

IV. WHAT INSIGHTS DOES NETWORK ANALYSIS PROVIDE?

The tools of Social Network Analysis (SNA) help describe quantitatively the shift we are currently witnessing in personal immunity norms for Heads of State before ICCTs. SNA is a collection of measures and tools for relational analysis designed to understand the most important features of social structures as networks.²⁰⁵ The indispensable elements of all networks are actors with relations.²⁰⁶ Social network analysis focuses on these relations as links among nodes. By examining international normative development through networks, we are able to analyze how certain actors shape norms, describe the process of norm-making, and largely predict the trajectory of a given norm.

A. Graphing the Network

Graph theory helps analyze and visualize the connections among the actors involved in normative development.²⁰⁷ Graph visualizations thus represent the nodes and links of a network in a way that promotes easier understanding of the structures and relationships represented by the graph. While a graph can provide a visualization for a network that we can compare to other graphs with a quick glimpse, to fully describe and compare these networks, we use a set of quantitative measures that represent some of the networks’ properties.

204. *Id.*

205. JOHN SCOTT, WHAT IS SOCIAL NETWORK ANALYSIS? 85 (2012).

206. DAVID KNOKE & SONG YANG, SOCIAL NETWORK ANALYSIS 6-7 (2d ed. 2008).

207. FABRIZIO DE VICO FALLANI & FABIO BABILONI, THE GRAPH THEORETICAL APPROACH IN BRAIN FUNCTIONAL NETWORKS: THEORY AND APPLICATIONS 13 (2010).

network on the basis of its relations with other nodes imposes constraints on that node and offers opportunities through connection to other nodes. Those nodes that face fewer constraints and have more opportunities are in structurally favorable positions over other nodes in the network, and these positions may lead to quicker or more numerous exchanges and greater influence, and may turn a node into a focal point in the network, particularly in relation to other nodes that are in less favored positions.²⁰⁸ Degree centrality specifically measures the network activity of each node using the number of direct connections of a node. In other words, degree centrality represents the amount of links each node has with other nodes in the network; it is the sum of all links connected to a node.²⁰⁹ The more links an actor has, the more power it may have.

Most nodes usually have a relatively smaller degree while fewer nodes have a much larger degree compared to all nodes in the network. In this network, even though the average degree is 14.578 (see figure below on degree distribution), which is relatively small, some nodes have a very large degree because they are connected to most, if not all, other nodes. The graph illustrates that the nodes “ICC” (ASP & PTC) and “CICC” are central nodes that accumulate the highest connectivity in the network. Nodes with higher degrees of connectivity are defined as “hubs.”²¹⁰ In other words, a hub is a node with a larger number of links surrounded by nodes that have fewer links, also known as “non-hubs.”²¹¹ Hubs are those nodes that have the most structured and intense relationships to other nodes in the network and functionally become “privileged nodes.”²¹² They are the network’s strongest links²¹³ and their structural position within the network facilitates connectivity between interacting nodes.²¹⁴ Hubs are thus the main means of management,

208. Robert A. Hanneman & Mark Riddle, *Centrality and Power*, in INTRODUCTION TO SOCIAL NETWORK METHODS (2005).

209. IAN MCCULLOH, HELEN ARMSTRONG & ANTHONY JOHNSON, SOCIAL NETWORK ANALYSIS WITH APPLICATIONS 34 (2013).

210. SYSTEMS BIOLOGY IN CANCER RESEARCH & DRUG DISCOVERY 173 (Asfar S. Azmi ed., 2012).

211. Kyaw Tun et al., *Rich Can Get Poor: Conversion of Hub to Non-Hub Proteins*, 2 SYS. & SYNTHETIC BIO. 75 (2008).

212. PETER J. TAYLOR, WORLD CITY NETWORK: A GLOBAL URBAN ANALYSIS 26 (2004).

213. RICHARD KOCH & GREG LOCKWOOD, SUPERCONNECT: HARNESSING THE POWER OF NETWORKS & THE STRENGTH OF WEAK LINKS 67 (2010).

214. Morton E. O’Kelly, *A Geographer’s Analysis of Hub-and-Spoke Networks*, 6 J. TRANSPORT GEO. 171, 186 (2008).

exchange,²¹⁵ and cooperation in a network.²¹⁶ The potential removal of a hub or hubs would cause significant levels of fragmentation in such a network.²¹⁷

Networks that include hubs are called hub-and-spoke networks. The network we have here is a hub-and-spoke network with the two nodes of ICC and CICC representing two hubs that are connected via an inter-hub link. These two hubs are each connected to an almost identical set of actors, although the strength of these connections varies. Knowing the topology of a network including the presence of a hub or hubs allows us to have a better structural sense of the network, improve our understanding of network flows, and identify the actors that are critical to network flows. Hubs hold a special place of influence within the network and are likely to be less dependent on other nodes in the network.²¹⁸ Hubs in international relations can withhold social benefits such as membership and recognition, enact social sanctions that create circumstances of marginalization or indirect coercion, and tend to harness more support from other actors in the case of conflict particularly as this relates to the interpretation and application of normative shifts.²¹⁹ Hubs are also able to more effectively set agendas, frame debates, and successfully promulgate policies of their choice.²²⁰ Thus, as hubs, these nodes—ICC and CICC—determine the norm-generating effects within this network. But other metrics and tools designed to rank nodes based on their position in the network are essential for analyzing aspects of centrality, and understanding the prominence of a node in a social structure.²²¹

215. Tun et al., *supra* note 211.

216. KOCH & LOCKWOOD, *supra* note 213.

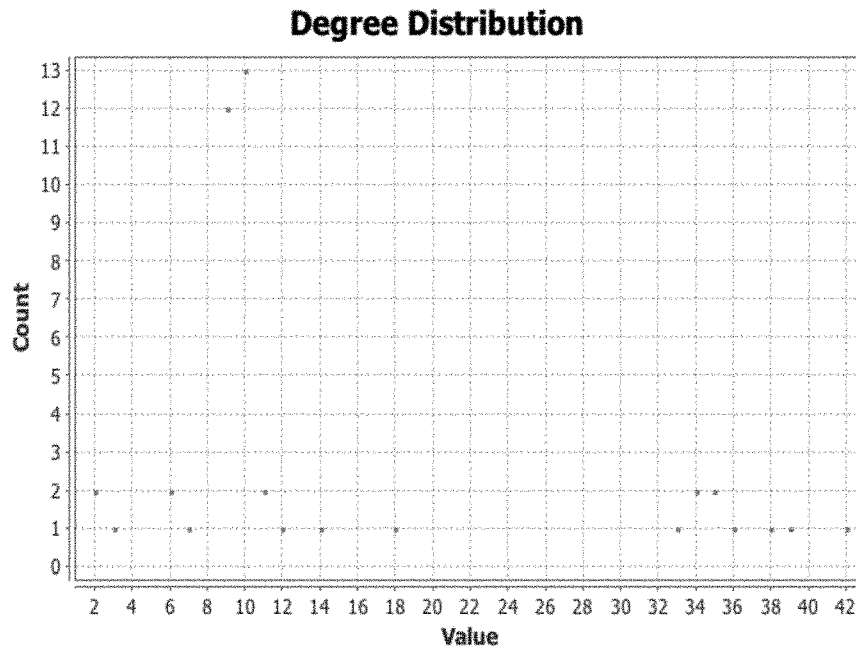
217. *Id.* at 151-52.

218. MCCULLOH, ARMSTRONG & JOHNSON, *supra* note 209, at 33; Hanneman & Riddle, *supra* note 208.

219. HAFNER-BURTON, KAHLER & MONTGOMERY, *supra* note 28, at 570.

220. *Id.*

221. Ulrik Brandes, *A Faster Algorithm for Betweenness Centrality*, 25 J. MATH. SOC. 163 (2001); Linton C. Freeman, *Centrality in Social Networks: Conceptual Clarification*, 1 SOCIAL NETWORKS 215 (1978); Gert Sabidussi, *The Centrality Index of a Graph*, 31 PSYCHOMETRIKA 581 (1966); Alex Bavelas, *A Mathematical Model for Group Structures*, 7 APPLIED ANTHROPOLOGY 16 (1948).



2. *Measuring Density*

The density of the network provides a measure of the extent to which a node's immediate contacts are mutually connected with each other. In other words, it measures how close the network is to complete, with a complete network having all possible edges connected and a density equal to 1. In social network words, the more of my friends who are also friends with one another, the greater the density of my network. Density is a good indication of the network's cohesion and by extension the cost-efficiency, effectiveness, and speed with which information and resources flow and spread within a network. Density is particularly instructive in establishing the extent of spread in a network, that is, the number of nodes affected by the diffusion of things like information, resources, and norms initiated by a single or set of nodes.²²² For networks of International Law making, density allows us to look at

²²² Habiba Habiba & Tanya Berger-Wolf, Dep't of Computer Science, Univ. of Chicago, Working for Influence: Effect of Network Density and Modularity on Diffusion in Networks, Conference: Data Mining Workshops 4 (2011).

how easily or quickly a new normative prescription can reach other nodes within the network.

The concept of “effective density” more specifically reflects the correlation of density and spread²²³ and is particularly useful here as it helps us assess the probability of a normative effect within a network. Effective density also allows us to assess the optimal spreaders in a network, in other words those nodes that have the capacity to maximize the extent of a spread of resources, information, and anything else that might flow through the network. However, networks may not always have particularly influential nodes in this regard. Habiba and Berger-Wolf’s epidemiological study found that, in networks with low effective densities ($\leq .004$ for real networks and $\leq .001$ for synthetic or artificial networks), a spread will always be low irrespective of who generates it or the sophistication of the approach.²²⁴ In such networks, only hubs or other high-weighted nodes are able to influence the spread, if at all.²²⁵ Similarly, the study observes that at high densities (≥ 0.25 for real networks and $\geq .0035$ for synthetic networks), most nodes are well connected and the spread by any random node is high and comparable to the optimal spread due to high similarity in connectivity of nodes. In such a network, spreads are “almost deterministically” likely to affect the entire network.²²⁶ In other words, high degree nodes achieve optimal spreads in low density networks while in denser networks any spread initiators may achieve optimal spreads.²²⁷

The density in this network is 0.331 (see figure below). While this density may not be of the highest possible, it is ≥ 0.25 , suggesting that a spread by any random node is high and comparable to the optimal spread due to high similarity in connectivity of nodes.²²⁸ This means that any node in this network could reach all other nodes in advancing its own or a shared agenda.

223. *Id.*; see also B. ADITYA PRAKASH ET AL., VIRUS PROPAGATION ON TIME-VARYING NETWORKS: THEORY & IMMUNIZATION ALGORITHMS (J.L. Balcazar & F. Bonchi eds., 2010); David Kempe, Jon Kleinberg & Eva Tardos, *Maximizing the Spread of Influence Through a Social Network* in PROCEEDINGS OF THE NINTH INT’L CONF. ON KNOWLEDGE DISCOVERY & DATA MINING (2003); Hanghang Tong et al., On the Vulnerability of Large Graphs, IEEE 10th Int’l Conf. (2010); Nicholas C. Valler et al., Epidemic Spread in Mobile Ad Hoc Networks: Determining the Tipping Point, Int’l Conf. on Res. in Networking (2011).

224. Habiba & Berger-Wolf, *supra* note 224, at 5.

225. *Id.*

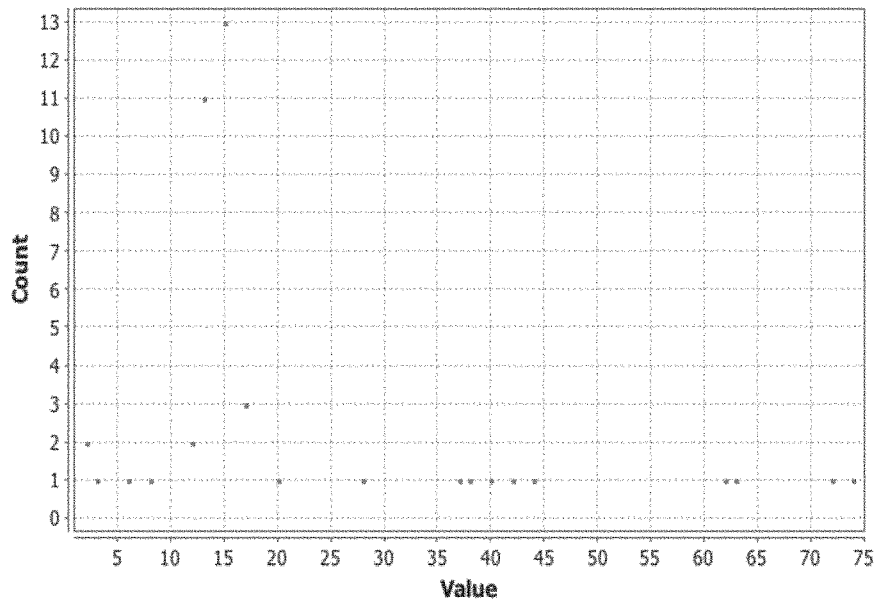
226. *Id.*

227. *Id.* at 7-8.

228. See *supra* Part IV.

This explains both the large spread of the changing nature of personal immunity before the ICC as well as the quick spread of the AU's hesitance and pushback regarding sitting Heads of State. The fact that the spread isn't sensitive to the identity of the initiator explains the developments in both the trend of change in the rules of personal immunity and the outcome of the pushback from the AU. Even though the change in rules of personal immunity within

Degree Distribution



this network was supported by one of the hubs (CICC), as opposed to the AU pushback that was not initiated by a hub, both received high levels of reception. In other words, in this network the degree centrality of the initiator isn't particularly relevant in achieving optimal spread and will unlikely affect the final outcome of a norm's development. Most actors could likely initiate and achieve an almost optimal spread, which allows the actors involved to reach all other actors in the network and pursue their agendas more easily and efficiently.

3. *Eigenvector Centrality*

Despite the idea that the spread itself is not sensitive to the identity of the actor, the result produced is. Here another metric of centrality is helpful. While degree centrality, as we examined above,

determines influence through a simple measure of links per actor, eigenvector centrality brings

forward the idea that not all links are of equal value. A node will have high eigenvector centrality if it is connected to other highly connected nodes. In

other words, the importance of a node likely increases if it is connected to other nodes that are themselves important. Therefore, links to nodes that are very highly connected will give a certain node more influence than links to nodes that are less connected.²²⁹ Because of their connectedness to such highly connected nodes, nodes with high eigenvector centrality are also particularly influential nodes in the network.²³⁰ This means that eigenvector centrality is strictly dependent on the degree centrality of the nodes to which a node connects.

The eigenvector centrality distribution which incorporates the weight of the links to certain nodes in this network is 9.479 (see figure below on eigenvector centrality distribution). In examining the distribution of centralities, we can assess their variability against the mean. Though we see that for most actors there is relatively little variability in centralities, there are two actors, the hubs in this network, with particularly high centrality.²³¹ This suggests that, although between most actors there are not great inequalities in actor centrality or power, the two hubs of this network accumulate significantly high centrality and therefore influence. This explains why the actors of this network have received the changing nature of the rules of personal immunity that the two hubs have promulgated more positively than the AU's or individual countries' calls for retention of the old CIL regime and amendment of the Rome Statute to codify this. This phenomenon is particularly significant to recognize due to the fact that the status quo always has inertia on its side. The normative shift from the status quo suggests that the influence exerted here to promulgate a normative shift is substantial.

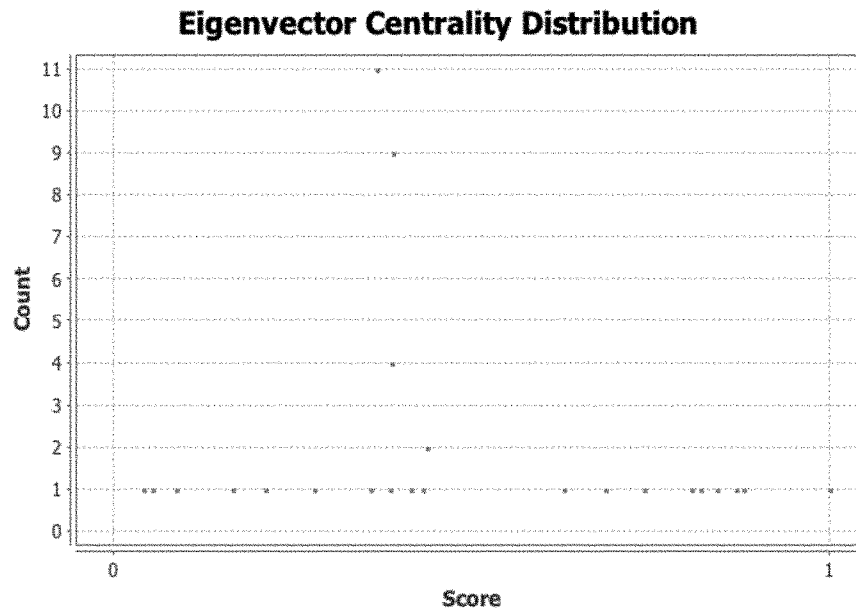
There is a structural explanation for this outcome in the network. A hub may perhaps not occupy a superior position in the information it can spread given the effective density of this network, but it enjoys more influence on whether this information will likely be adopted by the rest of the network. Should the interests and agendas of the actors collide, a hub is likely to exercise more influence and therefore achieve higher levels of support and

229. MCCULLOH, ARMSTRONG & JOHNSON, *supra* note 209, at 46.

230. *Id.*

231. Hanneman & Riddle, *supra* note 208.

compliance than a non-hub. This means that we are likely to see normative suggestions initiated by the hubs of this network succeed. For the rules on personal immunity this means that insofar as the hubs in this network continue to pursue the establishment of an exception for Heads of States before ICCTs, we are likely to see it crystallize as a new rule.



Number of iterations: 50
Sum change: 9.479538697364995E-4

4. *Similarity of Actors*

Finally, this network has another interesting structural quality relating to its actors' similarity and their potential contribution to normative development. Notions of similarity force us to think about actors not only individually as entities but also within sets of categories by systematizing what makes them similar, what makes them different, and from which other actors or categories of actors they differ. In social network analysis, we base this taxonomy on similarities of patterns of relations among actors rather than individual actor attributes.²³² These often represent the “social

232. A. James O'Malley & Peter V. Marsden, *The Analysis of Social Networks*, 8 HEALTH SERV. & OUTCOMES RES. METHODOLOGY 222 (2008).

positions” actors might share, or similar building blocks that provide regularities in patterns of relations among them.²³³ For instance, the social role of a “wife” typically implies a patterned set of interactions with a member of other social categories such as “wife,” “husband,” or “child.”

In networks, this suggests that similar nodes are connected to the same or similar nodes and can therefore be substitutable if one fails or decides to leave the network. When two nodes share most of the same network nodes then these nodes are considered to be sufficiently similar to be regarded as equivalent.²³⁴ The idea behind equivalence is to identify uniform or highly similar actions and links that define certain social positions within a network.²³⁵ Actors in a network may occupy positions of equivalence without the rest of the network’s actors knowing or having recognized this effect. This is one of the ways in which new roles emerge in a network out of actions and relations among agents that begin to crystallize before the rest of the network fully identifies what they are. The two hubs in this network have almost identical links to the rest of the network which satisfies a fairly high threshold to regard them as sufficiently similar and therefore structurally equivalent.

$$SE(ICC, CICC) = J(ICC, CICC) = \frac{|ICC \cap CICC|}{|ICC \cup CICC|}$$

= 0.92(out of 1 for identical nodes)

But what effect does this have in this network? Structurally equivalent actors are effectively substitutable in that they occupy equivalent positions of connectivity, and therefore power, and influence in a network. Though social equivalence was primarily used as a means to describe social structure, it has increasingly been used in order to predict the behavior of actors based on their social role in the network.²³⁶ Structurally equivalent actors are more likely to behave similarly in a given network; they are, in fact, likely to behave more similarly than even actors grouped on the basis of

233. STANLEY WASSERMAN & KATHERINE FAUST, *SOCIAL NETWORK ANALYSIS: METHODS AND APPLICATIONS* 463 (1994).

234. *Id.*

235. *See* JOHN SCOTT, *SOCIAL NETWORK ANALYSIS: A HANDBOOK* 124-26 (2d ed. 2000).

236. RONALD S. BURT, *TOWARD A STRUCTURAL THEORY OF ACTION: NETWORK MODELS OF SOCIAL STRUCTURE, PERCEPTION, & ACTION* (1982).

cohesion and substantive similarity such as actors that belong substantively to the same kind or class.²³⁷

The position of the two structurally equivalent nodes here, ICC and CICC, as hubs in the network suggests that they are also in structurally favorable positions. They face less constraints and enjoy more exchanges and greater influence in the network.²³⁸ Nodes with privileged positions in a network are able to set agendas, frame debates, and promulgate laws and policies that are in line with their interests and to their benefit.²³⁹ Despite the fact that institutionally CICC is an NGO and the ICC is an organization comprised of states with sovereign rights and privileges, the two nodes in this network enjoy both a similar structural position as well as power and influence. What we see is that, regardless of the legal barriers that CICC's nature as a coalition of NGOs carries, it has established itself in a *de facto* position where it is able to influence the network just as much, and in a similar manner, as the states involved. Non-state actors, even though not formally accepted as lawmakers, in this network have a normative effect absent formal legal justification. The recognition of this fact is particularly important in understanding both the inclining role of non-state actors in networks that generate normative legal developments but also conceptualize better their structural *de facto* position in international law and international legislative action.

V. CONCLUSION

This Article has sought to provide a set of new insights through the use of the quantitative tools of SNA to the currently shifting norm of personal immunity for Heads of State. After examining existing jurisprudence and identifying the actors involved in the development of the CIL norm before ICCTs, I used the data collected to perform SNA.

There, I found a hub-and-spoke network that involves two hubs, the ASP & PTC on the one hand, and the CICC on the other, connected through an inter-hub link. Other nodes in this network

237. RONALD S. BURT & MICHAEL J. MINOR, *APPLIED NETWORK ANALYSIS: A METHODOLOGICAL INTRODUCTION* 272 (1983); *see also* Joseph Galaskiewicz & Ronald S. Burt, *Interorganization Contagion in Corporate Philanthropy*, 36 *ADMIN. SCI. Q.* 88 (1991); BURT, *supra* note 238.

238. Richard Medina & George Hepner, *Geospatial Analysis of Dynamic Terrorist Networks*, in *VALUES & VIOLENCE: INTANGIBLE ASPECTS OF TERRORISM* 151 (Ibrahim A. Karawan, Wayne McCormack & Stephen E. Reynolds eds., 2009).

239. HAFNER-BURTON, KAHLER & MONTGOMERY, *supra* note 28, at 579.

involve several states, IOs, and ICCTs. I examined the network's density and effective density, which, being relatively high, suggest that any actor in the network can efficiently spread normative prescriptions to other actors. I addressed eigenvector centrality and uncovered that there are two actors, the hubs in this network, with particularly high eigenvector centrality, which explains why they are able to exert much influence over shifting the CIL norms on personal immunity. Finally, I assessed the similarity of actors in the networks and determined that the structural equivalence of the two hubs in this network assists in explaining why the CICC is able to play a highly influential role in this CIL normative shift despite its status as a non-state actor. The quantitative analysis confirms the changes we have intuitively witnessed in practice followed by academic debate, and further predicts that insofar as the hubs in this network continue to pursue the establishment of an exception for Heads of States personal immunity for international crimes, we are likely to see it crystallize in CIL.

SNA and other descriptive quantitative work can help examine how actors connect and behave in small or large groups that introduce, adopt, or dissolve international legal norms. Graph theory allows us to transform these three-dimensional processes into two-dimensional graphs of nodes (actors) and edges (links), and to quantify relationships and their properties. This insight helps us quantify and map actors' and networks' contributions to international legislative processes as well as uncover the elusive global realities that lead to international law making. It is my hope that international lawyers, through the framework this Article provides, are encouraged to use more systematically these descriptive, quantitative tools in order to assist in explaining and substantiating international legal developments in the future.