



## DIFFICULT PATHS OF INTERNATIONAL CRIMINAL JUSTICE: Exercise of criminal jurisdiction against the constitutional bodies in office charged with international crimes in Special Tribunal for Sierra Leone.\*

### Abstract

The present research is characterized by the attempt to make a *de jure* seasoned reconstruction that avoids the easy temptation to interpret in an overly extensive manner the jurisprudential practice, both internal and international, in favor of overcoming the rules on immunity, seen as a "hateful privilege" to be fought at any cost. Indeed, the recognition of the judicial exemption, protecting the State and the bodies acting on its behalf, has allowed, over time, the preservation of international relations and, ultimately, the same peaceful coexistence of the international community.

### Keywords

State Head immunities, STSL, ICC, ICTY, ICTR, international criminal law, UN Charter.

## CAMINHOS ÁRDUOS DA JUSTIÇA CRIMINAL INTERNACIONAL: Exercício da jurisdição criminal em face de órgãos constitucionais processados por crimes internacionais no Tribunal Especial para Serra Leoa

### Resumo

A presente pesquisa se caracteriza pela tentativa de fazer uma reconstrução "a de jure seasoned" que evita tendências de interpretação extensiva as práticas jurisprudenciais, tanto internas como internacionais, sendo a favor de superar as normas sobre imunidade, vistas como "privilégio odioso" que se deve combater a qualquer custo. De fato, o reconhecimento de isenção judicial, protegendo o Estado e os órgãos atuando em seu nome, tem permitido, ao longo do tempo, a preservação de relações internacionais e, por fim, a mesma coexistência pacífica da comunidade internacional.

### Palavras-Chave

Imunidade dos Estados, Direito Penal Internacional, Carta das Nações Unidas

## 1 INTRODUCTION

The international community has recognized head of State immunity as absolute for a very long time since the origin of such immunity. However, with the development of international crimes, the community also has developed *opinio juris* in holding perpetrators accountable. The international tribunals, in fact, have prosecuted a number of heads of state by denying their immunity. Although immunity should not mean impunity, heads of states still practically enjoy impunity because of

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the notion of functional and personal immunity. This requirement of categorizing international crime committed by a head of state as private or functional allows him to possibly evade criminal prosecution forever. Since this categorization is vague, and does not promote bringing justice to the international community, we should eliminate this categorization requirement when a head of state commits an international crime. Usually international tribunals are not responsive in prosecuting responsible heads of states for international crimes because of its procedural and jurisdictional requirements, and that's the reason why we need to utilize domestic courts to prosecute heads of States.

Looking at the prosecution of heads of states and other officials in hybrid tribunals, which had similarities with domestic courts, the international community should trust domestic courts' ability in handling the same cases. Although removing head of state immunity does bring risks of degrading the state's status and political influence, we should prosecute heads of states in domestic courts, and further develop the trend of holding perpetrators of international crimes accountable. We can achieve this goal by not categorizing a head of state's act as private or functional, and removing all immunity when he commits an international crime. Our research aims to answer the following questions: What is the legal rationale and accompanying state obligations regarding personal Head of State immunity governed by international customary law? What is the legal rationale and accompanying state obligations regarding personal Head of State immunity before international criminal courts and tribunals? What is the legal rationale and accompanying state obligations regarding personal Head of State immunity before the International Criminal Court (ICC)? Specifically, what is art. 27(2) and 98(1) of the Rome Statute scope of application and what is the relationship between them?

## 2. THE IRRELEVANCE OF THE OFFICIAL POSITION OF THE ACCUSED IN THE STATUTES OF THE HYBRID CRIMINAL TRIBUNALS.

The issue of the relevance to be attributed to the official qualification held by a top individual-body accused by the commission of serious international crimes has also been referred to the international and Hybrid Criminal Tribunals, such as the Special Court of Sierra Leone (SCSL), the Special Panels of East Timor, the Extraordinary Chambers in the Courts of Cambodia (ECCC) and Kosovo Specialist Chambers. Generally, all the Statutes and regulations applicable by these tribunals contain norms aimed at sanctioning the irrelevance of the position held by the accused in the state organization and of the immunities (*immunitas*) connected to it.

The hybrid criminal Tribunals are different institutions, with respect to which they can be reconstructed in unitary terms, but there are still some differences in doctrine points of view<sup>7</sup>. The Special Court for Sierra Leone (SCSL) was formally established by an agreement settled between the United Nations and the Government of Sierra Leone on the Establishment of a SCSL, concluded in 2002 in order to prosecute the perpetrators of the serious crimes committed in the territory of the country, in which the Security Council, substantially, became a promoter. Based on Resolution 1315/2000 the Security Council, reaffirming that the situation in the country continued to pose a threat to international peace and security, without using the powers set

out in Chapter VII of the Charter of the UN, "requested" to the Secretary General of the United Nations to negotiate with Sierra Leone an agreement for the establishment of a High Court, "consistent"<sup>9</sup> with the indications contained in Resolution<sup>10</sup>. Our investigation will focus on the SCSL, the only instance in which the problem of recognition of the personal immunity of a constitutional body of the State has been placed<sup>11</sup>.

### 3. THE PROSECUTOR V. TAYLOR CASE IN FRONT OF THE SPECIAL COURT FOR SIERRA LEONE.

In 2003, shortly after the start of the activity of the SCSL<sup>12</sup>, the Prosecutor obtained the issuing of an arrest warrant against the President-in-Office of Liberia, Charles Ghankay Taylor<sup>13</sup>, while he was on a state visit in Ghana<sup>14</sup>. The President, through his own defense, claimed the recognition of personal immunity asking for the annulment of the provision. The issue was addressed by the Appeals Chamber of SCSL which, with the Decision on immunity from jurisdiction of May 31, 2004, rejected Taylor's application<sup>15</sup>.

In the relevant proceedings, the circumstance that both the defense and the accusation attribute to the ruling of the International Court of Justice (ICJ) in the Arrest Mandate case<sup>16</sup> is an almost binding precedent value, making constant reference to it almost as if it were a text regulatory. In fact, both the parties' discussion and the ICJ decision focused on the two circumstances identified in the ICJ ruling in order to be able to proceed against a top management body: the international nature of the Court and the legal basis for the exercise of its powers<sup>17</sup>. According to the judges of the Hague, a constitutional body of the state can be submitted to trial in the following situations: in its own country; in the event that the country of origin has renounced immunity<sup>18</sup>; at the termination of office but only for acts carried out privately; before an ICJ with jurisdiction<sup>19</sup>. Actually, the ICJ did not specify the exact scope of the asserted non-application of personal immunities before international courts and tribunals. In fact, the ICJ did not distinguish between the power of an international court to issue an arrest warrant and the obligations of states to disregard the customary rules of international law on immunities in order to comply with a request for arrest and surrender issued by such court or tribunal. These hypotheses do not always appear to be connected with the respect of the immunity norms and the exceptions for its application provided by international law<sup>20</sup>. In the first hypothesis, in fact, the situation clearly remains an internal phenomenon, unrelated to the dynamics of international law. The second concerns the waiver of immunity by the same State holding the relevant right and therefore can not obviously be counted as a practice with regard to the consolidation of an exception to the immunity rules. The third hypothesis concerns functional immunity<sup>21</sup>. The only hypothesis in which the ICJ seems to admit the possibility of proceeding against a constitutional body in charge accused of international crimes, by way of derogation from the general regime on immunities. The ICJ in indicating a hypothesis in which immunity *ratione personae* can not be invoked has failed to clarify the two main issues of the proposed case: the indication of the principle by which to identify the international nature of a ICJ and the criterion to evaluate its jurisdiction over the case.

In the same spirits returning to the reasoning made by the judges of Freetown in the decision in the commentary unfolds according to an argumentative process that tends to greatly enhance the elements that accumulate the SCSL to ad hoc criminal tribunals and which, overall, it seems difficult to share<sup>22</sup>.

The Appeals Chamber brings back the powers exercised by the SCSL to the United Nations Charter and, in particular, to the action of the Security Council for the maintenance of international peace and security. This organ, it is argued in the motivation, carries out its activity on behalf of all the members of the United Nations, for which the Agreement between the United Nations and Sierra Leone would be rebuilt as an agreement between all the members of the United Nations and the Sierra Leone. From this data, in the interpretation of the Chamber of Appeals, derives the "truly international" nature of SCSL<sup>23</sup>.

Analyzing the internal legal basis of UN Charter, the Chamber of Appeals overcomes the absence of references to the exercise of the powers referred to in Chapter VII, stating that the creation of an international court is to be found in art. 39<sup>24</sup>, which recognizes to the Security Council the power to determine the existence of a threat or violation of international peace and security<sup>25</sup>. The possible reference to the powers referred to in Chapter VII, according to the judges of Freetown, is only necessary to establish obligations of cooperation, with the established court, to be charged to the member states of the United Nations<sup>26</sup>.

The Appeals Chamber after having thus argued the legal basis of SCSL itself, concludes by the irrelevance from the official position held by President Taylor at the time of issuance of the arrest warrant, by virtue of the provision referred to in article 6 (2) of Statute of SCSL (StSCSL). Similar to the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) Statutes, art. 6 StSCSL includes the Nuremberg formula<sup>27</sup>. In contrast to the ICTY and the ICTR, the authority of the SCSL is not enhanced through a resolution in accordance with the UN Charter Chapter VII<sup>28</sup>. The SCSL is "a treaty-based sui generis court of hybrid jurisdictions and composition"<sup>29</sup>. The SCSL is established on the legal basis of the Agreement on the Establishment of a SCSL. Therefore, there is no established obligation for UN member states to comply with any requests by the SCSL. The SCSL in the case *Prosecutor v. Taylor* addressed the issue of arrest warrants and immunities. According to our opinion a general exception based on the court's international nature breaches the fundamental *pacta tertiis* rule codified in art. 34 of the VCLT. We believe that the reasoning by the SCSL fails to explain how the fairness of the tribunal can disregard important immunity principles of international law and we have doubts whether the international mandate can remove established immunity rules under international law.

According to a formula that is now considered "classical", this provision states that "the official position of an accused, as head of state or government or of a government official in a position of responsibility, does not exempt him from criminal responsibility or mitigate it the penalty"<sup>30</sup>. In declaring this provision applicable, the Appeals Chamber retraces the different stages of the evolution of the principle of the irrelevance of the official position held by the accused<sup>31</sup>. The provision in question is compared with those in the ad hoc Tribunal Statutes and, firstly, in the Statutes of the

Nuremberg and Tokyo Courts. The judges of Freetown seem to want to point out the historical continuity existing between the norm of its own Statute and those that have instituted the other international criminal tribunals without, however, getting to affirm its *expressis verbis* the correspondence to a norm of customary law<sup>32</sup>.

Now, the conclusions reached by the Appeals Chamber regarding the identification of the pre-eminence role that the Security Council has played in the establishment of the SCSL can be shared. However, the argument used appears, in some respects, artificial and presents several critical points. Moreover, as will be demonstrated, even though it may lead to the establishment of the SCSL to the Security Council of the United Nations, the extension of the provisions contained in its Statute to the prerogatives of a head of state in charge of a formally third State is excessive compared to the Agreement establishing the SCSL. In order to justify its jurisdiction, the Freetown judges considered the Agreement concluded between the United Nations and Sierra Leone directly imputable to the Member States of UN, making a total overlap between the will expressed by the international organization and that of the Member States of the Nations United in the conclusion of the treaty. This argument, assessed in the light of the general principles of international organizations' law, according to which an act carried out by an international organization that is subject to international law is directly attributable only to the latter and not to the Member States too excessively extensive<sup>33</sup>, and therefore makes difficult to share what emerges from the actual content of the UN-Sierra Leone Agreement.

According to the writer, in fact, the Appeals Chamber could have reached the conclusion of bringing the United Nations and Sierra Leone Agreement back to the action of the Security Council on the maintenance of peace and international security, by configuring Resolution 1315 (2000) as a delegation of functions to the Secretary General by the Security Council. Article 98 of the Charter of the UN provides that the Secretary General may perform, in addition to the functions that are proper to him, those entrusted to him by the other main organs of the United Nations. The practice offers numerous examples of delegation of functions to the Secretary General by the Security Council, in the field of international peace and security, particularly in the case of peace-keeping operations<sup>34</sup>. From this case it shows that there is no formal model of delegation, on the basis of which the legal basis established by art. 98 of UN Charter<sup>35</sup>.

In fact, the cases in which the Security Council "permit"<sup>36</sup> o "requests" o "invites"<sup>37</sup> the Secretary General to carry out activities are also reconstructed as delegations of functions<sup>38</sup>. In addition to the defense elements now defined in the International Criminal Court Statute (StICC), it is worth keeping the basic distinction analyzed by the ICTY. In particular, between the invocation of the defense in the context of the *ius ad bellum* on the lawfulness of a defense firm of a State or a quasi-State entity which is intended to lead subsequently to the legal defense and to the person of the defendant and the rights of the person in the defense that does not depend on the legitimacy of collective action, but refers to the personal right of the accused to defend himself or a third person from an illegal assault. By combining the categories of this distinction, it has been proposed to recognize a third category that defines defense in international criminal law and deals with acts of self-defense in bello in order to ex-

amine ad hoc each time the assistance conditions for the exercise of this right, taking into account the specificities of international crime<sup>39</sup>.

In Resolution 1315 (2000) the Security Council<sup>40</sup>, after having noted the existence of a threat to international peace and security, in point 1 "requests" to the Secretary General to negotiate an agreement establishing an independent court with Sierra Leone, specifying- and this is what matters most -that this agreement must be "consistent with this resolution". The delegation conferred to the Secretary-General, therefore, also poses a series of specific directives and conditions that he is obliged to follow during the negotiations.

This last element, constituted by the presence of criteria and limits to be followed compulsorily in the negotiations for the establishment of the SCSL, is the main argument that allows to demonstrate how the conclusion, by the Secretary General, of the Agreement establishing the SCSL, it can not be framed among the powers exercisable by them freely and discretionally, but represents the exercise of a function delegated to him by the Security Council. It remains, however, to consider the fact that although the establishment of the SCSL can be attributed to the action of the Security Council in the above terms, it is not possible to derive obligations of cooperation towards States that have remained formally unrelated to the Agreement given the absence in Resolution 1315 (2000) of any reference to the powers envisaged by Chapter VII of UN<sup>41</sup> on the basis of which derive obligations on third States with respect to the SCSL institution. If, in fact, a delegation of functions may be envisaged in order to negotiate the establishment of an ICC, any obligations arising for third States (such as Liberia, the State of President Taylor's membership at the time the arrest warrant was issued against him) should be explicitly evinced by the normative content of the act. Immunity *ratione personae* recognized by general international law to certain organs of state leadership represents a subjective legal position of the State of belonging.

This distinction appears in the motivation of the Freetown judges who propose some interesting considerations on the personal immunity of a head of state in office. This is the differentiation that the judges operate between the relationship between the SCSL and the State of belonging of the individual-body, on the one hand, and those with the third States required to execute the coercive measure issued. The first is regulated by the StSCSL standard which establishes the irrelevance of the official position of the organs of the summit, by waiving the rule on personal immunity directly opposable only to the country of belonging of Taylor as the establishment of the SCSL stands as a measure response to a threat to international peace and security. However, any cooperation obligations between third States and SCSL could exist only if expressly provided for in a binding instrument, represented by a Resolution of the Security Council adopted pursuant to Chapter VI of the UN<sup>42</sup>.

The distinction proposed by the Appeals Chamber between vertical and horizontal relationships with respect to SCSL appears, in theory, correct but it is incorrectly applied to its own statement. In fact, formally Liberia remains a foreign State with respect to the UN-Sierra Leone Agreement. The removal of Taylor's personal immunity, therefore, can not be based on the consideration that the establishment of the SCSL is brought back to the exercise of the functions of the Security Council in

matters of international peace and security. The mere acknowledgment of the existence of a threat to peace and international security contained in Resolution 1315 (2000), in fact, does not appear sufficient in itself to cause mandatory effects to fall in the absence of a specific reference to the powers referred to in Chapter VII of Charter of the UN<sup>43</sup>.

In practice, after the issuing of the arrest warrant against President Taylor, the Security Council has, in a certain way, "endorsed" the work of SCSL with the approval of Resolution 1638 (2005) adopted pursuant to of Chapter VII of the UN Charter<sup>44</sup>. With this act, the Security Council has expanded the mandate of UNMIL, the peace-keeping force present in Liberia, assigning it the task of arresting Taylor and transferring it to Sierra Leone for the celebration of the trial before the SCSL<sup>45</sup>. At the time of the approval of Resolution 1638 (2005), the Security Council decided to follow up the arrest warrant issued by the SCSL.

We could say that the personal Head of State immunity under customary international law will continue to be subjected to intense scrutiny, and perhaps there will be sufficient evidence of state practice for an exception under customary international law removing personal immunity before international courts in the future. The ICC has provided for a conclusion not affecting customary international law as such. Instead, it concluded that the Rome Statute is applicable in a situation referred to the ICC by the UNSC. When the Rome Statute is applicable, customary international law on personal immunity pursuant to art. 27(2) of the Rome Statute<sup>47</sup> is not applicable, leaving the latter legal regime unchanged in substance. Instead, the scope of the application of customary international law before the ICC is clarified. As such, the rationale of personal Head of State immunity under customary international law renders unchanged, applicable absolute before both domestic and international courts. However, it is not applicable before an ICC established by a Statute where State Parties to the Statute has agreed upon this fact, or in the case of a UNSC referral, agreed upon the international community as a whole to make the Rome Statute the legal regime applicable to a situation referred. The Pre-Trial Chamber provides a credible legal rationale of the legal question in its two latest decision, through both textual and teleological interpretation, including considerations of customary international law, UN law and the Rome Statute. With this legal rationale, the legal effect of a UNSC resolution referring a situation to the ICC is that the Rome Statute is applicable in its entirety to that situation, and is also binding upon the relevant non-party. Thus, art. 27(2) is applicable (both with regards to jurisdiction and arrest warrants) when a Head of State is subjected to prosecution pursuant to such referral, prohibiting that state to invoke immunity as a procedural bar. Thus, leaving art. 98(1) inapplicable, as well as customary international law on personal immunities<sup>48</sup>.

The provision contained in the provision in question follows the objectives pursued with the establishment of the ICC and indicated in the Preamble of the Rome Statute<sup>49</sup>, where the will to end the impunity of the perpetrators of the serious international crimes that threaten peace and security is reaffirmed international and are a cause for alarm for the entire international community.

The labile border between impunity and immunity, already highlighted by the ICJ in the Arrest mandate judgment, has made it necessary to provide for the possibi-

lity of proceeding to ascertain the personal criminal liability of the individual-organ, overcoming the traditionally recognized jurisdictional exemption to the high offices of the foreign state<sup>30</sup>. Moreover, the ICC will not find the exception to have carried out the international crimes contested in the exercise of their functions, since the individual-body will have to answer for its conduct even when this could, in the abstract, involve the international responsibility of the State, although it may proceed to ascertain this additional profile in other appropriate locations.

In the drafting of the norm, it is clear that the former have been preceded by strenuous negligent sentences of the ad hoc criminal tribunals (article 7 (2) ICTY<sup>31</sup> and art. 6 (2) ICTR) and art. 7 StICC<sup>32</sup>. In fact, in the context of the Preparatory Committee for the Rome Statute, the question of the importance to be attributed to the official qualification of an individual-body subject to trial, was strongly placed after the two judicial experiences in question<sup>33</sup>.

Indeed, the norm of the Rome Statute is characterized by having a more specific formulation. In addition to the traditional assertion of the irrelevance of the official position held as exemption from personal criminal liability, in fact, the standard specifies a paragraph expressly dedicated to ensuring that the immunities traditionally inherent to official offices, provided for by both domestic and international law, do not represent a limit to the exercise of jurisdiction by the ICC.

The scope *ratione materiae* of art. 27 was interpreted according to different opinions. A first approach reconstructs the first paragraph of the norm as aimed at sanctioning the irrelevance of functional immunity and the second the personal one<sup>34</sup>. Another thesis, instead, moving from the literal data, underlines that only in the second paragraph the immunities from the jurisdiction are expressly mentioned, for which this paragraph must be considered a derogation of both immunity regimes inferring, from the general tenor of the norm, that from the point of view of the procedure before the criminal justice system established by the Rome Statute, the distinction between personal and functional immunity is irrelevant. This second reconstruction appears to be endorsed by the ICC's first practice that the problem of the application of art. 27 it was placed, it was generally referred to the provision without making distinctions between the two immunities in question<sup>35</sup>.

The application *ratione personae* of the provision contained in the art. 27 StICC can be emphasized in three distinct hypotheses, each of which poses different problems that need to be analyzed separately<sup>36</sup>.

The first hypothesis is in the case where a State party is required to arrest or deliver to the ICC its own individual-body, in office or terminated by the function. The solution is basically peaceful and finds a solution in terms of adaptation of domestic law to international law. In fact, here are highlighted the immunities provided by the domestic law to which the States parties have renounced with the ratification of the Rome Statute. Therefore, this hypothesis is not relevant for the purposes of this study. The other two cases occur when a State is required to comply with the enforcement of a coercive measure issued against a constitutional body of another State. In this case, the immunities provided for by international law are highlighted. However, a distinction must be made between the hypothesis in which the state of belonging of the individual-organ is part of the Rome Statute from that in which the State has not

adhered to it. Furthermore, the provision contained in art. 27-in the Part of the Statute dedicated to personal criminal liability-must be adequately coordinated with art. 98, par. 1, entitled "cooperation with regard to the waiver of immunity and consent to surrender"<sup>57</sup> which, in the first sub-paragraph states "the Court can not make a request for delivery and assistance which implies for the requested State to act contrary to its obligations under international law with respect to the immunity of a state or diplomatic of a person or of an asset of a third State, unless the ICC obtains in advance the cooperation of that third State which renounces the immunity it enjoys (...)"<sup>58</sup>.

This provision, inserted in Part IX of the Rome Statute that regulates "international judicial cooperation and assistance" at the instigation of the US delegation<sup>59</sup>, is aimed at resolving the conflict between obligations on the State party required to execute an arrest warrant against a individual-body of a third State providing for the obligation of the ICC not to issue decisions that place the States parties in the situation of not being able to comply with the rules on immunity from jurisdiction, both of the State and its individual bodies, provided by international general law<sup>60</sup>. The terminology adopted by the first paragraph of the standard in question raises some interpretative problems regarding the definition of "third State" which could be considered, in a first hypothesis, to any other State other than the one to which the request is made, independently of participation in the system of ICC or, secondly, to foreign States only with respect to the Rome Statute. The doubt arises due to the overall ambiguity of the language used in the Statute. In fact, in some norms the term "third state" appears to refer to all the States outside the conventional system, while at other times the reference to the States that do not adhere to the Rome Statute is unequivocally expressed with the formulas "Non-Contracting States" or "States not parts of the Bylaws"<sup>61</sup>.

The lack of uniformity in the terminology used is due to a lack of coordination in the editorial office between the various subcommittees of the Diplomatic Conference, in which the two provisions were drafted<sup>62</sup>. Therefore, not allowing a reconstruction of the actual meaning to be attributed to the phrase "following the ordinary meaning to be attributed to the terms of the treaty" it is necessary to proceed by investigating further interpretative clues, also through the aid of complementary interpretation tools<sup>63</sup>.

A first argument, of general application, which supports the idea that the term "third state" refers to the non-party states of the Rome Statute can be drawn from the definitive provisions of art. 2 of the Vienna Convention on the Law of Treaties (VCLT) of 1969, whose letter h) states that the term "third State" refers to a state that is not a party to the treaty. This first element in favor of interpretation for which the exemption provided by art. 98 does not operate in the relations between States Parties of the Statute is not, in itself, proving because the States are free to use the phrase in comment according to a definition different from that provided for in the VCLT (article 32)<sup>64</sup>.

A more stringent argument is obtained through an interpretation consistent with the object and purpose of the treaty which imposes the attribution to the norms of the Rome Statute of the sense that allows its wider application as an instrument for

the repression of international crimes and which, therefore, imposes a restrictive interpretation of any norm suitable to block, or limit, its application<sup>65</sup>.

This is confirmed by a logical argument. With the ratification of the Rome Statute, the States have renounced the possibility of opposing the immunity of domestic law to the ICC, agreeing to consider irrelevant any benefit associated with the official position held by an individual suspected of having committed serious international crimes. It would be at least contradictory to conclude that the immunities provided for under international law remain in force if the individual-body of a State party is to be found on the territory of another State party to the ICC. Article 98 can not be invoked by a State party to the Rome Statute if it is required to comply with an act of a coercive nature against a top management body of another State party<sup>66</sup>. The problem of the value to be attributed to the norm, therefore, will arise only with respect to the States that have not joined the ICC for which the Rome Statute represents *res inter alios acta*<sup>67</sup>.

It follows that the ICC can issue an arrest warrant, or other act of a coercive nature, against individuals-organs of States parties to the Rome Statute, requesting indiscriminately the execution both to the State of belonging of the organ and to the other States Parties to the Treaty. Instead, by virtue of the clause contained in art. 98, par. 1 StICC, when the State party is required to implement an arrest warrant issued against individuals/organs of third States with respect to the Rome Statute, may give precedence to the rules on immunity from jurisdiction, thus overcoming the situation of conflict between customary and conventional obligations<sup>68</sup>.

Now, the hypothesis considered here, or the request addressed to a State party to execute an arrest warrant issued against a top-level body of another State party to the Rome Statute, can not be counted among those relevant for the purposes of the present survey since, as has been shown above, the irrelevance of the customary rules on the personal immunity of the constitutional bodies must here refer to the general renunciation made by the State of belonging of the individual-organ at the time of ratification of the Rome Statute. These conclusions cover only the case in which the "conventional" operating system established by the Rome Statute is taken into consideration, represented by the cases in which the ICC exercises its jurisdiction on the basis of the consensual criteria envisaged by art. 13, lett. a) and c)<sup>69</sup>.

On the other hand, we come to different conclusions when we take into consideration the other, more articulated mechanism of activation of the jurisdiction of the ICC constituted by the initiation of a proceeding following the referral of the Security Council.

#### 4. ISSUING OF ARREST WARRANTS FROM THE ICC. THE IRRELEVANCE OF THE OFFICIAL QUALIFICATION OF THE ACCUSED IN THE MOTIVATIONS OF THE I PRE-TRIAL CHAMBER

The StICC provides, in art. 13 lett. (b) that its jurisdiction may be exercised if "a situation in which one or more of the aforementioned crimes appears to be committed, is submitted to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the UN (...)"<sup>70</sup>.

The referral institute, which creates a close link between the Security Council's action on international peace and security and the ICC, is based on the experience of the two ad hoc Tribunals, whose model is clearly inspired<sup>71</sup>. The discussion about the introduction of such a provision in the Rome Statute began immediately after the experiences of ICTY and ICTR in order to avoid that, faced with the repetition of serious situations, the Security Council was forced to set up new ad hoc criminal tribunals<sup>72</sup>. In this sense, the judicial model created in this way has been defined as a permanent ad hoc Tribunal. Therefore, within the ICC, two different models of jurisdiction operate. The first, based on the consensual element, operates on the basis of the will of the state expressed through the ratification of the Rome Statute and is characterized by the general relationship of complementarity between national and international jurisdiction<sup>73</sup>. The beginning of an investigation by the ICC, in this case, follows the reporting of a situation by a State Party or the launching of a proper investigation by the Prosecutor. The second, defined as "sanctions", is implemented in the provision of art. 13 lett. (b) of the Statute and is reconnected to the traditional postulate according to which each State has a perfect subjective right to respect for its state organization which, by pursuing its organ-individuals, the other States would violate as a countermeasure against the commission of offenses qualified.

The hypotheses, not expressly contemplated by the Rome Statute, of the so-called "autoreferral"<sup>74</sup>, which constituted the first investigations carried out by the Prosecutor after the entry into force of the Statute (Democratic Republic of the Congo, Uganda, Central African Republic). In these cases, on the legitimacy of which is discussed, the initiation of the investigation was requested by the State itself of international crimes pertaining to the ICC. Thus, two normative modules have been proposed to proceed with the repression of individuals who are responsible for international crimes. The first, to which one adheres in the research, postulates the existence of a subjective right of States to respect their internal organization which the other States would violate, as a form of "privative" guarantee or sanction, pursuing its individual organs. Its foundation, therefore, is linked to the considerations already expressed about the two ad hoc Tribunals<sup>75</sup>.

During the work of the Diplomatic Conference the model of functioning of the ICC taken into consideration, primarily, was the consensual one. The entire statutory structure in matters of cooperation and assistance of States, assumption of the means of proof, execution of the decisions of the ICC, therefore, is structured to operate with respect to this system. The relationship between the Security Council and the ICC, on the other hand, although it represents one of the most "delicate" steps in the compromise reached in Rome, has not been the object of a complete discussion, so that various issues will have to be addressed and resolved by the interpreter<sup>76</sup>.

In spite of the pessimistic forecasts formulated at the time of the entry into force of the Rome Statute, the referral soon became a measure concretely adopted by the Security Council which brought to the attention of the ICC the situation of two countries not parties to the Rome Statute : Sudan and Libya.

The first referral on the situation in Darfur/Sudan is contained in Resolution 1593/2005 of 31 March 2005 adopted pursuant to Chapter VII of the Charter of UN<sup>77</sup>. After the opening of the investigations, on March 4, 2009, the I Pre-Trial Chamber

upheld the request made by the Prosecutor to issue an arrest warrant against Omar Hassan Ahmad Al Bashir, President of the Sudan in office<sup>78</sup>. The arrest warrant was sent to the Government of Sudan, to States Parties to the ICC and to the Member States of the Security Council not parties to the StICC<sup>79</sup>.

With the Resolution 1970 (2011) of 26 February 2011, approved unanimously, the Security Council asked the ICC to investigate the situation in Libya. On June 27, 2011, the I Pre-Trial Chamber upheld the request made by the Prosecutor to issue an arrest warrant against Libyan leader Muammar Gaddafi, the incumbent Head of State<sup>80</sup>.

The issue of the relevance to be attributed to the official position of head of state in office was addressed for the first time by the I Pre-Trial Chamber (to which both proceedings were assigned) in the decision on the case *Al Bashir* to whose motives was operated a mere reference in the decision concerning the *Gaddafi* case<sup>81</sup>. Given that at the time the arrest warrant was issued against the Libyan leader, President Al Bashir had not yet been insured for international justice, mainly due to the personal immunity he enjoys under international law, the Trial Chamber, in the decision against Gaddafi, could have dealt with more widespread and systematic the issue by offering a reasoning logic-juridical more argued to States Parties to the Statute that, as you will have to account, on several occasions have expressed doubts about the possibility of implement the arrest warrant<sup>82</sup>.

The subsequent death of the Libyan leader has effectively closed the procedure against him, so in the rest of the work we will refer only to the mandate against Al Bashir<sup>83</sup>. The ICC's Pre-Trial Chamber comes to affirm that the position of head of state in charge has no effect on its jurisdiction based on four considerations expressed in an increasing order of importance and incisiveness<sup>84</sup>.

The first reason is represented by the provision, already contained in the Preamble of the Rome Statute, according to which one of the objectives pursued with the establishment of the ICC is the end of impunity for the perpetrators of the most serious crimes that affect the international community in its together. In order to achieve this objective, the second motivation of the ICC continues, the provision contained in art. 27 (1) and (2) on the irrelevance of the official position and the immunities, of domestic and international law, connected to it<sup>85</sup>.

Then, the Pre-trial Chamber continues, rules different from those of the Rome Statute can be highlighted, pursuant to art. 21, only if there is a gap in the written law of the ICC constituted by its Statute, the Elements of crimes and the Rules of Procedure and Proof, which can not be filled through the use of the traditional interpretive criteria provided for in articles 31 and 32 of the VCLT<sup>86</sup>.

According to the Chamber, the Security Council, through referral to the ICC, has accepted that investigations and any subsequent proceedings initiated take place in accordance with the provisions governing the functioning and activity of the Court (Statutes, Crime Elements and Procedure and Test). The reconstruction proposed by the Pre-Trial Chamber even puts on the table all the argumentative "tools" suitable to demonstrate the thesis it intends to support, it is not without shadows.

From a methodological point of view, its motivations recall, *mutatis mutandis*, the decision of the ICTY in the *Tadić* case<sup>87</sup>, in an attempt to contain the entire argumentative system within the statutory system, avoiding digressions that escape the international criminal justice system within which the ICC is called to operate. This is confirmed by the first three reasons, well structured and solid with respect to a conventional system, but which, however, are used, as in the present case, against a third State with respect to the Statute (therefore according to a normative model different from the express consent by the parties) are not shared. An attempt to Resolution of this limit is found in the reference contained in the last reason, to the referral of the Security Council, with respect to which, indeed, the whole analysis must be concentrated. In particular, it will be necessary to investigate the impact that the start of the procedure on referrals of the Security Council can have with respect to two distinct areas of operation of the rules on the personal immunity of a constitutional organ: the vertical one, related to the relationship between the individual-organ and the ICC; the horizontal one, relating to the obligations on third States with respect to the StICC.

The reconstructions proposed by the doctrine on the irrelevance of the official qualification in front of the ICC criticizes the central role to be attributed to the referral of the Security Council. The irrelevance of the personal immunity due to the top organs of the State in the course of a procedure celebrated before the ICC has been rebuilt and justified in doctrine according to different argumentative schemes compared to those proposed by the I Pre-Trial Chamber<sup>88</sup>.

On the one hand, the opinions of those who consider the derivation of the immunity of President Al Bashir's personal immunity directly from the fact that the proceeding has been initiated on referrals of the Security Council can be attributed. This orientation seems to want to resume and develop the reasons given by the Pre-Trial Chamber<sup>89</sup>. The activation of the jurisdiction by the Security Council is reconstructed as a mandatory act that, pursuant to art. 25 of the UN Charter, all UN member states must respect. In particular, the forecast for which Sudan "must be fully cooperated with the Court" contained in Resolution 1593 (2005), would be able to place the country in the same position as a State party to the Rome Statute<sup>90</sup>.

It follows that the state of belonging of the individual-organ (in this case the Sudan) could not claim the personal immunity of its head of state since removed under the application of art. 27 of the StICC; while the other States parties of the ICC should proceed to the arrest and delivery of the foreign individual-organ, since art. 98 could not come here in relief. No obligation to cooperate, however, would be borne by third States with respect to the Statute<sup>91</sup>.

This thesis, although it has the merit of highlighting the peculiarity of the referral of the Security Council as a mechanism for activating the jurisdiction of the ICC, does not seem to be shared, proving, in some passages, even contradictory. In fact, this theory proposes a construction based on the commingling of the mode of operation of two systems: the one onus (according to which obligations can be imposed on UN member states) and that of the ICC (consensual in nature). The emphasis is placed on the contents of the Resolution of the Security Council 1593 (2005) which places a duty of cooperation on Sudan, to be considered binding pursuant to art. 25 of Char-

ter UN<sup>92</sup>, to then draw consequences and effects for the other States parties to the Rome Statute, on the other hand, however, no explicit obligations have been provided in the Resolution itself. Resolution 1593 (2005) in placing a duty to cooperate against Sudan in the above terms, also takes into consideration the other States, with respect to which it specifies "while recognizing that the United States has not, urges all States and concerned regional and other international organizations to fully cooperate"<sup>93</sup>. In other words, the Resolution emphasizes the absence of obligations for third States, providing a mere call to "all States" (therefore both parties and third parties with respect to the Rome Statute) to cooperate with the ICC.

A second orientation, instead, reconstructs the irrelevance of the official position and the unenforceability of personal immunity to the ICC as the object of a customary norm<sup>94</sup>. This thesis appears to be more cautious than the role to be attributed to the Security Council referral, here considered only as a "trigger mechanism"<sup>95</sup> to activate the jurisdiction of the ICC with respect to whose functioning it would not have the repercussions proposed by the Pre-Trial Chamber orientation previously exposed. The fundamental issue to be solved, according to this approach, is to be found in the question of the existence of an exception established in the general right to the recognition of immunity *ratione personae* in the case of accusation of international crimes brought before an international court.

It follows that, in the relationship between the ICC and the State of belonging of the individual-body, art. 27 StICC is considered to be in compliance with a principle in force in general international law and therefore applicable to all States, regardless of their adherence to the Rome Statute. In terms of relations between States parties and third States of the Statute, however, the traditional discipline on the inviolability of the Head of State would still be in full force, so that Sudan could continue to demand respect for the personal immunity of its top bodies by all States. The thesis in question has the merit of providing a reconstruction that moves according to traditional legal schemes of relations between norms, customary and conventional. Furthermore, by proposing an analysis of the state of general international law in this field, it takes into due consideration the different cases of the practice on which we have focused in the course of this study. What, however, can not be accepted is the reconstruction of the irrelevance of personal immunity as a general principle that operates in front of any international criminal tribunal, without distinction of any kind about the title under which the individual court exercises its jurisdiction. In an international order, in which the judicial function is of an arbitrary nature, the analysis on the operation of the customary rules which sanction the irrelevance of the official qualification can not be detached from the investigation of the legal basis on which a given court international is called to exercise its jurisdiction. Only where it is shown, according to the teaching of the ICJ, that a given court is on the one hand "truly international" and, on the other, has jurisdiction, it will be possible to highlight the customary rule in question.

It is inferred that, if the cases in which the State of belonging of the top management is part of a conventional system such as that established by the ICC in which case the irrelevance of immunities must be rebuilt in terms of renunciation by the State - the only known hypothesis in which an international criminal tribunal is "com-

pulsorily" competent- (that is, independently of the will of the State of belonging of the individual-organ) is that in which the Security Council establishes or activates it as measure for the maintenance of international peace and security.

The role of this organ is fundamental: the referral, in fact, introduces in the conventional system established by the Rome Statute the possibility for the Security Council to activate the ICC by subjecting it to those situations that, for the consequences that may have for the purposes of geo-stability politics, can pose a threat to international peace and security. The provision contained in art. 13 that allows the Security Council to start the activity of the ICC according to an operating model that recalls the experience of ad hoc international criminal tribunals, has introduced in the Rome Statute a link with the collective security system provided by the Charter of the UN, while at the same time overcoming the objection previously expressed against the two institutions operating for the former Yugoslavia and the Rwanda of Tribunals created ex post facto<sup>96</sup>.

Because of this similarity, the power of the Security Council to activate the ICC has the same legal basis that justifies the establishment of ad hoc tribunals: a custom established in general law that gives the Council exorbitant powers compared to the original system of the Charter of United Nations. The use of these powers is explained by the publicistic role assumed by the Security Council in the management of collective assets and values of interest to the international community as a whole. It follows that the removal of immunity *ratione personae* of which the heads of state in charge are beneficiaries would be rebuilt in terms of sanctions against the State of belonging of the organ.

Now, the failure, in the terms just described, of the operation of the norm of customary law that recognizes the personal immunity of the heads of state in office implies that the States parties to the Rome Statute are obliged to comply with the requirements of the Pre-Trial Chamber, since the other obligations under the general international law to which art. 98, par. 1 StICC<sup>97</sup>. In fact, they are no longer subject to two conflicting obligations for which the conditions necessary to justify the application of the latter rule fall. Instead, we reach different conclusions by analyzing the situation of states that have not adhered to the Rome Statute. If, in fact, even for these there is no longer the obligation to respect the personal immunity from the criminal jurisdiction of the governing bodies in office, as removed from the Security Council by way of sanctions, as no State Parties to the ICC do not have obligations to perform of the acts of this system with respect to which they remain unrelated.

No obligation, then, can be derived from the two referral resolutions (whose normative content is identical), since the Security Council, while exercising the powers provided for in Chapter VII of the UN Charter, has limited itself to exhorting all States to collaborate and assist the ICC, without placing any obligations imposed on them<sup>98</sup>.

Therefore, for the reasons set out above, since the general rule on immunity *ratione personae* has ceased to exist, States not parties to the Rome Statute may decide to proceed to the arrest of the accused person who is in their territory without that act is detrimental to general international law. For these States, in fact, the execution of the arrest warrant against a foreign body becomes the object of a faculty.

This reconstruction makes it possible to highlight the close relationship that exists between the commission of international crimes by individuals-bodies that hold the highest positions in the State and the international responsibility of the State to which they belong. Referrals from Sudan and Libya cases, therefore, must be traced back to the broader range of coercive measures taken by the Security Council against the two countries. Now, the theses just proposed, according to which the heads of state in office can be translated and tried before the ICC without being able to invoke the immunity from the jurisdiction they enjoy according to international law must be compared and analyzed with attitudes and the positions taken by the States, both individually and within international organizations, have dealt with the issue on the basis of their competence, in order to extract elements of practice and *opinio juris* in support.

## 5. REACTIONS TO THE ISSUANCE BY THE ICC OF THE ARREST WARRANT AGAINST THE PRESIDENT OF SUDAN AL BASHIR.

What is expressed is confirmed by the practice of the States developed after the issue of the two arrest warrants in comment. The issuance of the mandate against Al Bashir involved a series of reactions both within Sudan<sup>99</sup>, and internationally. To date it is still inexistent but it is interesting to evaluate the considerations expressed in this regard by the countries receiving the arrest order the current Head of State in charge, both individually and within the regional organizations. The harshest reactions to the arrest warrant against the Sudanese President have been directed more to the criminal policy of the ICC, and in particular its Prosecutor Luis Moreno-Ocampo. He was accused of concentrating his action exclusively on the events of the African continent. Now, although these considerations go beyond the scope of the present research, it is necessary to underline that all the proceedings initiated before the one on Sudan began on "autoreferral" of the country and not by the independent investigative choice of the Prosecutor<sup>100</sup>.

By launching the survey from the positions expressed by the competent regional organizations, the line followed by the African Union presents interesting profiles. This organization, already at the time when the Prosecutor had filed an application for the issuance of the arrest warrant, had approved a decision asking the Security Council to block the ongoing proceedings against Sudan, exercising the power of recognized deferral to the United Nations political body by art. 16 StICC<sup>101</sup>. Subsequently, in July 2009, the Union adopted unanimously, a Resolution articulated on the issue, with which the African Union member states expressed their concern about the arrest warrant against President Al Bashir and disappointment for the Security Council's failure to take into consideration the invitation to block the proceeding, deciding not to cooperate with the ICC in the execution of the mandate<sup>102</sup>, citing as a legal basis of this decision the provisions of art. 98 of the Statute on immunity<sup>103</sup>. However, in the same decision, a request was made to the African Union Commission to organize a conference of African Union member states and parts of the ICC-also open to the participation of the other member states of the organization-with the task of analyzing some issues to be brought to the attention of the States Parties to the ICC

during the Kampala Review Conference. Among the points to be addressed, the Assembly of the African Union indicated the application of articles 13, 16, 27 and 98 StICC<sup>104</sup>, as well as a general clarification of the procedures that the ICC must follow and, in particular, of the regime of immunities due to the organs of third States with respect to the Statute<sup>105</sup>.

Now, the Resolution of the African Union, can be considered as an absolutely legitimate act and, according to the writer, to be shared for the "balance" of the positions expressed there<sup>106</sup>. The Assembly of the African Union does not dispute the power of referrals, nor does it firmly endorse the resistance of Al Bashir's personal immunity to the ICC, but asks to specify the functioning of the ICC "model" of operation based on the referral of Security Council<sup>107</sup>. The Kampala Conference has not provided any clarification on any of the issues referred to by the African Union, which therefore continue to be reconstructed on the basis of the analysis of practice data. The Arab League, another major regional organization operating in the area, instead, at the request of President Al Bashir, despite having expressed its disapproval of the arrest warrant issued by the ICC, did not reach agreement on the proposal to formally request the Security Council the deferral of the proceeding, pursuant to art. 16 StICC<sup>108</sup>.

In *speciem*, according to Al-Bashir, PTC II, Jordan Decision, 11.12.2017<sup>109</sup> we could say that in neither the South Africa nor the Jordan Decision does the majority of the Pre-Trial Chamber II properly explain the legal sources and reasoning applied. It merely points to the Namibia ICJ Advisory Opinion without explaining its relevance or weight as an argument. Namibia simply recalls the binding nature of UNSCRs on UN Member States under article 25 UN Charter. However, this is not the central issue; the question is what the legal consequences of referral resolutions are and not whether they are binding *per se*. The decision on Jordan's non-compliance will likely not address whether Al-Bashir's personal immunity is a hinder to the Court's exercise of adjudicatory jurisdiction over a non-State party such as Sudan, because the decision only concerns cooperation. However, should the ICC Chamber rule on exercise of adjudicatory jurisdiction over a non-State party, they should simply apply article 27(2)<sup>110</sup>. In line with the Arrest Warrant Decision I, the best stance *de lege ferenda* is that the Court must apply its own framework when there is no lacuna in the Statute. As Article 27(2) addresses the irrelevancy of immunities before the Court, the ICC should find that there is no lacuna and that it is bound to apply the article. This argument is supported by the fact that Article 27(2) addresses limitations to the ICC's exercise of jurisdiction, and not obligations put on States Parties. Consequently, as long as the Court's jurisdiction over a non-State party is triggered by a UNSC referral, the ICC should issue arrest warrants in spite of personal immunities. The application of article 27(2)<sup>111</sup> should be limited to the adjudicatory jurisdiction, as Sudan's status as a non-State party hinders the Court's ability to demand cooperation solely by virtue of the decision in par. 1 of UNSCR 1593 to refer the Darfur situation to the ICC. The decision in par. 2 to obligate Sudan to cooperate fully has implicitly waived immunities horizontally in face of States Parties' cooperation with the Court for arrest and surrender and believe that a judicial process against Al-Bashir in principle does not hinder a political solution to the Darfur conflict. The ICC should continue to apply justifiable interpretations of UNSCR 1593<sup>112</sup>, and find that States Parties must arrest and surren-

der Al-Bashir when he visits their territory. African and other States Parties will likely continue to oppose such requests. In the long-term. We believe an offensive approach by the ICC with continued international pressure better serves the goals of peace and justice<sup>113</sup>.

From the positions expressed by the States in these important multilateral fora, it is possible to grasp the uncertainty regarding the current state of international law in this field which, from the careful reading of the commented resolutions, tends to focus on the issue of obligations on third States as the jurisdiction of the ICC is activated with referrals from the Security Council.

The same conclusions are reached by reviewing the positions taken individually by the States requested to implement the mandate. In fact, after the issuance of the arrest warrant, the Prosecutor has constantly monitored the international movements made by President Al Bashir asking, promptly, to the host States parties explanations about the reasons on the basis of which they have not stopped and deliver to the ICC the accuser<sup>114</sup>. States have constantly expressed uncertainty about the possibility of complying with the ICC's request. This situation of uncertainty can not be considered surmountable in the light of the Resolution of referrals which, as we said, does not impose obligations but merely "invites" third States with respect to the Rome Statute to cooperate with the ICC<sup>115</sup>.

The I Pre-Trial Chamber approved a series of decisions with which it informed the Security Council and the Assembly of States Parties of the visits made by President Al Bashir and his failure to stop by host states, Kenya, Chad and Djibouti, to which the Security Council, again, has not given feedback. From the examination of the practice of States immediately following the issuance of arrest warrants against the presidents in charge of Sudan and Libya, it is clear that the main issue around which the most important statements are expressed is the fact that proceedings have been brought to the knowledge of the ICC through a referral contained in a Security Council Resolution approved under Chapter VII of the UN. In particular, it is striking that even if it was decided not to follow up the requests for arrest and translation of the defendants in front of the ICC (as in the case of the Decision of the General Assembly of the African Union), the reasons given relied more on the poor clarity of the obligations incumbent on the States based on the content of the Referral Resolutions, which on the resistance of the general rule of personal immunity of the heads of state in charge.

#### 6. THE VALUE, AS A RELEVANT PRACTICE, OF THE ALMOST TOTAL ABSENCE OF INTERNAL PROCEEDINGS BROUGHT AGAINST CONSTITUTIONAL BODIES OF THE FOREIGN STATE IN OFFICE: THE CASE OF PERSONAL IMMUNITY.

Following the ICJ ruling in the case of the arrest warrants, in national jurisprudence there is a trend that is exactly the opposite of that recorded in international jurisprudence. This is demonstrated by the fact that after the opening of the procedure against Minister Yerodia, numerous situations of diplomatic tension had arisen between Belgium and several other countries concerned about the consequences of a

possible consolidation, in the national jurisprudence, of the application of the jurisdiction of a "pure" universal criterion<sup>116</sup>. In fact, it is important to bear in mind that many international organizations are located on the Belgian territory, in which foreign bodies of foreign countries are constantly visiting. In these hypotheses, the constitutional organs on an official visit are protected not only by the norms of customary international law, but also by the contractual norms contained in the rules governing official missions abroad and, in particular, by the rules on privileges and immunities contained in the headquarters agreements between the host State and the international organization. However, on the political level, it is evident that the fear of the trend initiated by the *Yerodia* case has led many States to put pressure on Belgium to limit the possible effects of the legislation in question.

Simultaneously with the development of the Congo procedure, see Belgium before the ICJ, the country's national courts had been called upon to rule on the criminal responsibility of Ariel Sharon and other top organs of Israel for the indictment of the commission of acts of genocide and crimes against humanity<sup>117</sup>. The issue was definitively decided by the Belgian Court of Cassation with a sentence, issued in February 2003, which recognized immunity *ratione personae* to Sharon, Prime Minister in office<sup>118</sup>. The reasons given by the Belgian Court of Cassation in this decision are clearly aimed at the development of every possible argument to block the application of the law on the repression of serious violations of humanitarian law, at the time still in force with the same formulation that had allowed to open the proceedings against *Yerodia*. There is no doubt, in fact, that the omission of the search for elements of the practice that could justify the initiation of the proceedings against Sharon was dictated by the fear of exposing Belgium again to international disputes<sup>119</sup>. The conclusions reached by the Court of Cassation were then confirmed by the decisions of the Belgian judiciary to file all appeals against constitutional bodies of foreign states in office<sup>120</sup>. The same fate, namely the filing or rejection, are affected by other appeals filed before the Swiss courts<sup>121</sup>, Spain<sup>122</sup> and the US<sup>123</sup>.

It is evident that to widen the international responsibility of the State to include also an "obligation of secrecy" regarding procedures in which the foreign constitutional organ is marginally involved-and, in any case without any complaint about its individual personal responsibility-it moves in the direction absolutely opposed to any attempt to suppress international crimes and, more importantly, from a technical-juridical point of view it is difficult to justify in the light of the *ratio legis* of personal immunity from the criminal jurisdiction expressed by the *brocardo ne impediatur legatio*. In the ruling of 3 February 2012<sup>124</sup>, the ICJ has ruled on the relationship between rules on the repression of international crimes and rules on the immunity of the foreign state from civil jurisdiction, defining the controversy that has been opposed by Germany and Italy. This procedure has placed the thorny issue at the ICJ dispecifying the effects resulting from the recognition of imperative value to the rules on the repression of international crimes. The ICJ has hastily resolved the issue by denying the configurability of a conflict between the rules that recognize the jurisdictional immunity of the foreign State and those of *jus cogens* that prohibit the commission of serious international crimes<sup>125</sup>. According to the judges of the Hague, the former are procedural, unlike the latter, which are of substantial content. The ICJ

has thus avoided giving adequate indications about the way to follow for the State burdened by two obligations of an opposite nature.

Even if it is so small, the practice in question, characterized by the uniformity of decisions always favorable to the recognition of personal immunity to the constitutional bodies of the foreign State, without possible exceptions linked to the accusation of international crimes, is to be considered an important index of the consolidation of the *opinio juris* about the inviolability of the organs of the summit in front of the national jurisdictions.

In fact, from the comparison of the practice of national courts, before and after the ICJ ruling, there are no significant differences, in the sense that even in the period before the decisions in the case *Yerodia* no proceedings were filed against the bodies in office arrived at the sentence. However, to a more careful reading, from the comparison emerge elements certainly relevant for the reconstruction of the *opinio juris* of the States: the cases reviewed in this part of the research show that attempts to assert the demand for justice of individuals victims of crimes have been constantly blocked at the earliest stage of criminal proceedings, according to the relevant national procedural rules. If, therefore, before the Mandate Arrest judgment, some national courts had posed the problem of the need to reconcile the obligations of States with regard to the recognition of immunities with that of the prevention and repression of the most serious international crimes, after this sentence national courts strongly deny the idea that there exists, or a derogation from the personal immunity rule is configurable. This fact, which is concrete in the absence of proceedings celebrated by national courts, demonstrates the persistence of an *opinio juris* according to which the recognition of absolute immunity to the constitutional bodies in office is required by general international law in which, at present, no exception is found.

The abandonment of the principle of "pure" universal jurisdiction in favor of the "conditioned" jurisdiction as an index of the consolidation of a *opinio juris* concerning the treatment of foreign constitutional bodies: the repeal of the Belgian law and the modification of the Spanish and English national laws on the repression of international crimes.

The conclusions arrived at by analyzing national jurisprudence are supported by another practice, represented by the tendency to abandon the principle of "pure" universal jurisdiction in various national legal systems that had adopted legislation to that effect<sup>26</sup>. The criteria for the exercise of criminal jurisdiction pertain to the general punitive power that the State chooses to exercise, in some cases also due to obligations conventionally assumed. However, the legislative changes made always find their occasional legislation in judicial controversies or diplomatic pressures suffered by the states in business concerning the denial of immunity to foreign individuals/bodies.

The first case of this practice on which we must dwell is undoubtedly represented by the amendments gradually made to the Belgian legislation that had given rise to the Congo dispute. Belgium, culminating in the repeal of the legislation on universal criminal jurisdiction. In fact, despite the decision on the *Sharon* case, the Belgian national courts have provided an interpretation of the legislation on the applicability, *ratione personarum*, of the 1993 law on serious violations of international humanita-

rian law, the international pressure on the country, to formally modify the law in question did not cease<sup>127</sup>. Thus, in May 2003 a first amendment was approved which rewrites art. 5, par. 3 on the irrelevance of the official function in these terms "l'immunité internationale attachée à la qualité officielle d'une personne n'empêche l'application de la présente loi que dans les limites établies par le droit international"<sup>128</sup>. In this way a clear reference was made to the full validity of the rules on immunities provided for by international law. Now, the formulation of the law, which tautologically affirmed the importance of the immunities recognized by international law according to the limits established by international law, certainly could have left the door open to different interpretations. The question that arose was that of assessing the existence of limits to immunities in international law, not in the internal legal system. It would have been sufficient to argue that the irrelevance of the official function and of the immunities connected to it was consolidated in the international order in order to open new national proceedings against foreign constitutional bodies. Therefore, the aforementioned pressures against Belgium have not ceased until the country has formally repealed the legislation in question<sup>129</sup>. On the contrary, this abrogation was also followed by the inclusion in Chapter I of the Preliminary Title of the Criminal Procedure Code of a new law, art. 1 bis, which explicitly recognizes personal immunity to heads of state, government and foreign foreign affairs ministers, as well as to other foreign bodies to which such immunity is recognized by international law<sup>130</sup>.

The legislation thus introduced in Belgian legislation not only takes a step back from the immunity generally recognized to the troika of the top bodies of the state, but also leads to a widening also towards other top management, inserting itself into that practice which tends to increase the beneficiaries of the immunity in question, up to including all the organs of ministerial rank having international responsibilities. According to the writer, the opinion according to which the first paragraph of art. 1 bis would always make it possible to investigate any person officially invited into the country, having to refer to his dictation only to coercive measures. The generic reference to "other persons to whom immunities are recognized according to international law" seems to echo the formulation of the ICJ sentence in the Mandate Arrest sentence, which so many criticisms drew into doctrine<sup>131</sup>, and therefore lends itself to the same findings about its suitability to expand the list of beneficiaries of the immunities in question, which has already been discussed.

The same path can be found in the process that led to the approval in Spain of the Ley orgánica 1/2009 of 4 November 2009 which modified the Ley orgánica 6/1985 of the poder judicial<sup>132</sup>. Article 23, par. 4 of the 6/1985 law introduced the principle of "pure" universal jurisdiction into the Spanish legal system, making the national courts competent to investigate the individuals considered responsible for the commission of serious international crimes without there being any particular connection between the criminal offense and Spain<sup>133</sup>.

The law in question had allowed the celebration of numerous criminal proceedings against individuals-bodies of foreign states of high rank. This is the legal basis on which the Spanish judges had initiated the proceedings against General Pinochet, during which they had requested extradition to Britain. And, again according to the

wider application of the principle of universal criminal jurisdiction, over the years the Spanish judges had carried out investigations against top organs of Latin American countries, but also against Chinese, US and Israeli officials. However, formally the legislation in question was still in force and the jurisdiction of the Spanish courts could still have been exercised, with the sole risk for the judges who did not comply with the criteria elaborated by the Supreme Court, to see their decision pleaded. Interference in the performance of international relations, therefore, could continue to materialize. Hence the decision to change the *Ley orgánica*<sup>134</sup>. The amending law does nothing more than codify what has already been affirmed by the Supreme Court, given that the exercise of Spanish jurisdiction is subject to three conditions: the presence of the alleged perpetrator of the crime on Spanish territory; the Spanish nationality of one of the victims or the existence of some connection constraint with Spain. The initiation of a proceeding before the national courts, then, is possible only after ascertaining the absence of pending proceedings, for the same offense and against the same defendants, before an internal or international court.

Finally, the same trend is registered in the recent approval by the English Parliament of a law amending the law that makes the request for consent of the Director of Public Prosecutions mandatory for the issuance of an arrest warrant based on national legislation on the subject of universal criminal jurisdiction<sup>135</sup>. The amendment in question, as soon as it was approved, is also dictated by the same reasons as for the Belgian and Spanish legislation, among other things made "manifest" on the same website of the English Parliament where, in the Summary of the Bill it is specified that "the Government's aim in introducing this change is to prevent the courts being used for political purposes".

The changes to the national legislation on the exercise of universal criminal jurisdiction have been dictated, as has been shown above, above all by the desire to avoid the establishment of proceedings against bodies at the top of foreign states. This figure is even more relevant if we consider that the legislation of the countries that had made the "breaking" procedures of the traditional system of recognition of immunities from the jurisdiction of the individual-body in favor of repression was the object of restrictive changes of serious international crimes. Therefore, the general tendency to confirm the full vigor of the norms guaranteeing the absolute immunity of the individuals-organs of the summit before the national courts is deduced from the reconstructive ends of the *opiniús juris* of the States.

## 7. CONCLUDING REMARKS AND OUTLOOK

At the end of the present survey it is possible to affirm that the analysis of the most recent case studies has allowed to identify some manifestations of the practice supported by an appropriate opinion of the States regarding the application of the law on the personal immunity of the state's constitutional bodies accused of international crimes.

The attempt by some national courts to resolve the conflict between the recognition of judicial exemption to the constitutional organs of the state and the repression of international crimes, calling into question the validity of the traditional regime of immunities, has been blocked by the ICJ which, in the Arrest Mandate, confirmed the

application of the rule of absolute impropriety against the individual-foreign body before the national courts. The inquiry into the practice of internal tribunals following this decision shows that in the national courts the principle of the personal inviolability of the constitutional bodies in office has found renewed vigor. States have become increasingly reluctant to "deal" directly with the punishment of crimes committed within foreign states, as demonstrated by the changes made to the national laws of those systems that had initially upheld the principle of universal jurisdiction. "Pure", precisely in order to prevent criminal proceedings against constitutional bodies of foreign states. On the international level, however, the observed practice allows to reach different conclusions. In fact, in recent years there has been a process of "institutionalization" of international criminal justice precisely in order to put an end to the impunity of the authors of the most serious international crimes that are often committed by those who hold top positions in the state organization. The creation of the ad hoc criminal tribunals, first, and of the ICC, then, demonstrate the consolidation in the juris juris of the States of the idea that the repression of international crimes committed by the constitutional organs of the State must be implemented in front of an international court, even with the limits connected to the exercise of the judicial function in international law.

It is precisely the presence of the structural limit constituted by the absence of a compulsory court that allows us to grasp the common element of the practice under examination: the action of the international tribunals before which trials have been celebrated against the heads of state in office it is always due to a measure adopted by the Security Council on the basis of the powers envisaged by Chapter VII in terms of maintaining international peace and security. In particular, in the cases reviewed in the second part of the work (ex-Yugoslavia, Sudan, Libya) it was not possible to configure an aggressive behavior held by a State against another State, in itself suitable to lead to an armed conflict international, but rather the extended and systematic commission of serious international crimes perpetrated under the direction and with the collaboration and complicity of the highest offices of the state. It follows that the formal qualification of the commission of serious international crimes of the individual as a threat to international peace and security can be traced back to the consolidation of a "trend" emerging for some time within the Security Council to broaden the concept in, in order to justify the adoption of measures aimed at sanctioning the State of belonging of the individuals/organs of the summit that are responsible for them. In fact, at the rise of fundamental interests and values for the international community as a whole, also protected by the rules on the repression of international crimes, the consolidation of a regime of "aggravated" responsibility for the State of belonging of the individual author of the crimes is followed. The existence of this most unfavorable regime of responsibility for the State that violates rules aimed at safeguarding the fundamental values of the international community has been the subject of discussion in the codification work on the international responsibility of the State, finding recognition at first in the distinction between offenses and international crimes provided for by the well-known art. 19 of the Draft of Articles on International State Responsibility of 1996 and, subsequently, in the Draft of Articles of 2001<sup>36</sup>. The latter, even if he no longer contemplates the distinction between crimes and crimes of the State, continues to regulate the consequences of "serious violations of obligations deriving

from imperative rules of general international law"<sup>137</sup>. However, in this Draft of articles of more recent codification no references to the procedure for implementing the aggravated responsibility of the State are found. In particular, the Project does not exclude or clarify, on the basis of the uncertainty of the practice on the matter, whether the management of the aggravated responsibility regime can be advanced by any single State or whether it should be administered collectively by the Security Council of the Nations United. Thus the disregard of the principle of respect for the internal organization of the State, which derives from the exemption of the rule on immunity from the jurisdiction of individuals-organs of the summit, codified in the Statutes of the Tribunals examined can be interpreted as a countermeasure of a sanctioning nature against the State of belonging of the organ, responsible for having violated norms of fundamental importance for the international community as a whole.

In *speciem* the International Law Commission of the UN (ILC) which, in the course of its 58th session, in 2006, approved the Report of the Study Group "Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission (Finalized by Martti Koskenniemi) with the Conclusions of the work of the Study Group on the Fragmentation of International Law"<sup>138</sup>. The ILC study distinguishes itself, as explicitly desired, for the essentially pragmatic and concrete cut that the members have decided to give to the results of the work. The declared purpose, in fact, was to create a "tool-box", to which to draw to resolve possible conflicts of international norms safeguarding the consistency of the legal system. This study moves from some fundamental methodological premises, clearly stated at the start of the Conclusions, where we read that international law is a legal system and that, as such, is not composed of "a random collection of such norms"<sup>139</sup>. The need arises to make an interpretation that takes into due account the relationships between the different rules, in light of their characteristics of specialty, of succession over time and of hierarchical value. According to the firm, therefore, when one has to apply two apparently colliding rules, it will be necessary, first of all, to identify the relationship that exists between them. This can be a relationship of interpretation, in which case a standard is helpful in understanding the other's disposition; or a conflict report, in which case two standards are simultaneously valid and applicable to the case in point. In both cases, according to the Commission, it will be a good idea to attempt an interpretation based on the principle of harmonization, including through the interpretation forecasts contained in the Vienna Convention on the Law of Treaties (VCLT)<sup>140</sup>. Having clarified the basic approach, the study focuses on four "rupture" hypotheses of the system, attempting to provide adequate tools to solve the problem. The ILC prefers to refer to special regimes, rather than to self-contained regimes, in order to bring the solution of the case in the more general operation of the principle of the *lex specialis*, as well as to avoid dangerous definitions that seem to separate these legal regimes from the legal system international general. In the Study three different special regimes are distinguished: the first is represented by those hypotheses of groups of primary norms accompanied by their own secondary norms operating in case of violation of the former; the second one consists of those norms, attributing rights or obligations, linked to each other for the reference object; the third is constituted by norms and principles that regulate a specific area of the international order and which, al-

though having a different formal source, must be read as a whole because they have the same object and purpose. The first category certainly belongs to the rules on diplomatic immunity, while in the third category, both international humanitarian law and international human rights law fall within the scope of the Commission's Conclusions.

The problematic of the relationship between the norms contemplating the diplomatic immunity traditionally recognized to individuals-constitutional organs of the State and those on the repression of serious international crimes that violate humanitarian law and human rights arises as a problem of relationship between special regimes that could, therefore, find solution by applying the principle of *lex specialis*. The Commission is concerned only with identifying the relations and conflicts between a special regime and general international law, both in the case of the physiological operation of the special scheme and in the case of failure of the guarantee rules provided for therein. On the other hand, any reference to the specialty relationship between special norms is omitted, which perhaps would have had a greater need for further analysis, also in light of the problems highlighted in the same premise of the UN study. In fact, the UN Commission is working to provide a definition of conflict relevant to the problem of fragmentation. The criterion adopted, however, is extremely restrictive because it aims to consider conflict only the hypothesis in which the behavior of a State aimed at fulfilling an obligation (deriving from the treaty) is ex if a non-fulfillment of another obligation. The UN Commission is not concerned with providing new concepts or concepts, but assumes that the well-known previous definers of both categories are shared. With regard to imperative law, for example, he considers the nature and effects of the ICTY ruling in the *Furundžija* case to be well specified, in which the prohibition of torture states that "(...) because of the importance of the values it protects, this principle has evolved into a peremptory norm of jus cogens, that is, a norm that enjoys a higher rank in the International hierarchy than treaty law and even "ordinary" customary rules. The most conspicuous consequence of this higher rank is that principle at issue cannot be derogated from by States through treaties or local or special customs or even general customary rules not endowed with the same normative force"<sup>141</sup>.

According to the law, the juridical regime of jus cogens is linear. In fact, three possible hypotheses of conflict are identified: the one with the patent law, the one with the general right and the one with another norm of equal rank. In both the first and second case the prevailing norm should prevail. While in the third case the following binding rule could well derogate from the previous one, as foreseen by art. 53 VCLT<sup>142</sup>. It must be noted that the UN Commission agrees in recognizing that, with regard to the relations between the latter and the repression of international crimes, the ICJ ruling in the case of Mandate Arrest represents a major watershed that requires a different analysis of the data of the practice, previous and following. It is not possible to imagine that the final outcome of the UN Commission can reach particularly advanced solutions regarding the issue of the repression of serious international crimes through the refusal of the immunity of the individuals/organs of the State held responsible. In the Second Report, in fact, the Special Rapporteur Kolodkin, after outlining the data of the practice taken as a reference, concludes that there are no elements of practice capable of supporting the hypothesis of consolidation of forms of

exception to the traditional immunity regime<sup>143</sup>. Nonetheless, the ILC, in the discussion on the Report, intends to analyze the possible exceptions that the immunity regime could suffer in the case of accusation of international crimes, while remaining firm to clearly indicate, where proposed, solutions that are characterized by their character of progressive development of international law<sup>144</sup>. The thorniness of the problem of the delimitation of the purpose and the goal of the work is clear from reading the proceedings of the discussions during which many members express the conviction that the UN Commission's investigation should be based on a careful analysis of the law in force. The material discipline of the Resolution of Vancouver of 2001 to Naples of 2009<sup>145</sup>, apart from the important definitive articles, is entirely in art. III entitled "immunity of persons who act on behalf of a State" which provides:

- "1. No immunity from jurisdiction other than personal immunity in accordance with international law applies with regard to international crimes.
2. When the position or mission of any person enjoying personal immunity has come to an end, such personal immunity ceases.
3. The above provisions are without prejudice to: (a) the responsibility under international law of a person referred to in the preceding paragraphs; (b) the attribution to a State of the act of any such person constituting an international crime"<sup>146</sup>.

The intent to protect the need to repress the most serious international crimes is captured by the wording "in negative" of art. III which excludes immunity from jurisdiction in cases of commission of international crimes, except for personal crimes. Without prejudice, therefore, to the substance of the content, the approach of the members of the Institut seems to be changed compared to previous works. The norm, in fact, seems to affirm, as a general principle, the non-invocability of rules on immunity in the case of international crimes, relegating the application, though absolute, of the personal one in a sentence of the sentence. In essence, art. III, paragraph 1, continues to consider personal immunity in the face of national courts, absolute and resistant to the accusation of international crimes.

On the contrary, the change in approach that is perceived compared to the invocation of functional immunity is not unimportant. The literal interpretation of the provision, in fact, makes it possible to infer that the relationship between the commission of international crimes and the recognition of immunity represents an exception to the general rule without distinction regarding the "public" or "private" nature of the acts performed. The individual-body accused will have to answer for his own conduct without being allowed to claim the "official functions" previously held. The norm can be interpreted according to the thesis that here is held for which a system of repression of international crimes would be established based on a complementary mechanism of the national and international jurisdictions, for which the individual-organs ceased by the their functions, they could be subjected to criminal trials according to internal rules on universal criminal jurisdiction, while against the constitutional bodies of the State in office one could proceed only before an international court having jurisdiction over the case. In fact, in the latter hypothesis the ratio legis would fall to the recognition of personal immunity since the judgment would not be between equal entities and the ICC proceeding would be entrusted with the func-

tions of guaranteeing the established mandatory norms to protect the fundamental values of the community international, according to the possible ways of managing these collective interests already outlined above. The criminal responsibility of political and military leaders with respect to international crimes must remain anchored to the fundamental principles of criminal international law: legality, personality and materiality. It is precisely the respect of these principles that guarantees the individual that he is not subject to arbitrary punishment, which is the foundation of all systems of law. The law on individual criminal liability for international crimes, while taking into account its peculiar characteristics, can not deviate from the common general principles that govern the internal norms on the criminal responsibility of the individual. This perspective is the reason why it is indefatigable that the rules on responsibility that reconstruct the criminally relevant conduct is not interpreted extensively but that particular attention is paid to the reconstruction of both the objective and subjective elements of this conduct. The practice is still uncertain perhaps because up to now moved by the need to break with the past and clearly assign responsibilities in individual for those international crimes that are the expression of state policies or parastatals. It seems to us that the time has come to overcome this initial phase of affirming the principle of individual responsibility at the international level to move towards the creation of a more reliable and effective system of penal norms. In the moment in which the systems of attribution of the unidirectional responsibility of the highest representatives are clear and clear, it will be more difficult to confuse the punishment of one with the consequences that on the international level must have for the State the pursuit of criminal policies. The attribution of criminal sanctions to non-recognition, in accordance with the principle of personality of criminal responsibility, must not be an excuse to punish the representatives of those States that the international community can not sanction with the use of the instruments proper to general international law.

In finis, the most important point of all, however, may be that the law in this area is in flux. At issue are perhaps the two most salient sets of norms modern international law knows: state sovereignty and the prohibition on violations of jus cogens. It is understandable to try to avoid clashes between them-and international law has largely done so thus far with respect to foreign sovereign and status-based immunities by classifying them as jurisdictional. Arguments equating conduct-based immunity to foreign sovereign immunity make conceptual sense. But they rely too much on analogy and what must at some level be false equivalences between the various immunities-immunities that international law itself tells us are different. It's cannot so easily set aside actual state practice and *opinio juris*, which classify conduct-based immunity differently. Some arguments in favor of jus cogens trumping immunity are many. But they have been under attack and have largely failed. So something new must be advanced or re-advanced in a way that can counter the prior rejection of these arguments. In my view, casting conduct-based immunity as a substantive defense is a promising way to do that.

According to our opinion: "(...) the absence of enforcement mechanisms in the international tribunals and the lack of co-operation of States has led to a delay in the international judicial process. In speciem, the controversy in relation to the status personal immunity before international tribunals and domestic courts has to be clari-

fied. Besides the impact of the UNSC referral in the personal immunity of head of States of non-State parties to the Rome Statute is one of the major issues that need to be explained and asserted by the ILC in order to acquire co-operation of states in the indictment of high-level government officials. The current stand-off between a number of African States (for example) and the ICC seems to trigger a chain of action where African states are threatening and even few are in the process of the withdrawing their membership from the ICC. Thus, in order to maintain functionality of the ICC there needs to be a constructive discussion between African States and the ICC and with the participation of other Member States of the ICC. This perhaps will contribute to tackle negative perceptions against the ICC. The ICC has to reassure the ICC States by investigating and prosecuting atrocities in a global level. It is goes without saying that the criticism of bias against the global international justice system is mostly raised by threatened political leaders. Therefore, African states have to stop campaigning against the ICC. After all, the ICC can only acquire jurisdiction based on the principle of 69 StICC (complementarity principle). Thus, it is only when the domestic courts are unwilling and incapable of bringing to justice those accountable for crimes that the ICC takes charge of a case. If States are committed to respecting human rights and ending the culture of impunity, then the ICC will have a very limited significance over the continent. If States are serious about providing a solution for the impunity of international criminal crimes the undertaken efforts should be appreciated and encouraged. Establishing a regional court particularly to try crimes is going to need huge amount of resources. The issue of finance and political independence has to be managed as well. Most importantly, the immunity provision has to be omitted from the Protocol if it is going to have any success of maintaining justice and security in international level (...)<sup>147</sup>.

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Head of State or Government, a member of Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence;" and (iii) "Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person" (para. 43). The Pre-Trial Chamber also stated that there is a provision in the ICC Statute dealing with the immunity of state officials and that this provision must, according to its interpretation of Article 21 of the ICC Statute, be used also in relationship to non-party states (para. 44). See for details: S. KRESS, *The International Criminal Court and immunities under international law for States not party to the Court's statute*, in M. BERGSMO, L. YAN (eds.), *State sovereignty and international criminal law*, FICHL Publication Series No. 15, Torkel Opsahl Academic EPublisher, Beijing, 2012, pp. 224ss. W.A. SCHABAS, *The International Criminal Court: A commentary on the Rome Statute*, Oxford University Press, Oxford, 2010, pp. 448ss. J. PETROVIC, J. STEPHENS, V. NASTEVSKI, *To arrest or not to arrest the incumbent head of State: The "bashir" case and the interplay between law and politics*, in *Monash University Law Review*, 42 (3), 2016, pp. 742ss.

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- Press, Cambridge, 2011, pp. 142-176. M. CUPIDO, The policy underlying crimes against humanity. Practical reflections on a theoretical debate, in *Criminal Law Forum*, 22, 2011, pp. 294ss. T.O. HANSEN, The policy requirement in crimes against humanity: Lessons from and for the Case of Kenya, in *George Washington International Law Review*, 43, 2001, pp. 1-42. C. CHERNOR JALLOH, What makes crimes against humanity crimes against humanity?, in *American University International Law Review*, 28, 2013, pp. 408ss. R.S. CLARK, Crimes against humanity and the Rome Statute of the International Criminal Court, in M. POLITI, G. NESI (a cura di), *The Rome Statute of the International Criminal Court: A challenge to impunity*, Ashgate Publishing, Aldershot, 2001. P. HWANG, Defining crimes against humanity in the Rome Statute of the International Criminal Court, in *Fordham International Law Journal*, 22, 1998, pp. 502 ss. For the policy element see: J. PÉREZ CABALLERO, El elemento político en los crímenes contra la humanidad. La expansión de la figura al crimen organizado transnacional y el caso de las organizaciones de narcotraficantes mexicanas en el sexenio 2006-2012, *Dykinson S.L.*, Madrid, 2015, pp. 72ss. W.A. SCHABAS, State policy as an element of international crimes, in *Journal of Criminal Law and Criminology*, 98, 2008, pp. 953-982. G. METTRAUX, Crimes against humanity in the jurisprudence of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda, in *Harvard International Law Journal*, 43, 2002, pp. 237-316. In national implementation of the Statute some countries-above all those that have used an adjustment model based on the technique of the legislative reference-have maintained the requirement of the policy element: among these we want to mention the case of Malta (art. 2 of the International Criminal Court Act, n. 24, 13 December 2003) and the Sud Africa (part. 2 of the Implementation of the Rome Statute of the International Criminal Court Act, n. 27/2002). See, M. DU PLESSIS, South Africa's implementation of the ICC Statute. An african example, in *Journal of International Criminal Justice*, 5, 2007, pp. 460-479. G. KEMP, The Implementation of the Rome Statute in Africa, in G. WERLE, L. FERNÁNDEZ, M. VORMBAUM (a cura di), *Africa and the International Criminal Court*, ed. Springer, The Hague, 2014. D. LIAKOPOULOS, International Criminal Court: Impunity status and the situation in Kenya, op. cit., On the other hand, other systems have not resorted to the policy element in the national definition of crimes against humanity: among these, Germany (sez. 7 VStGB), Republic of Belgium (art. 136-ter of criminal code, introduced from the law n. 32/2003) and the Georgia (art. 408 of criminal code).
- 52C. KRESS, On the outer limits of crimes against humanity: The concept of organization within the policy requirement: Some reflections on the March 2010 ICC Kenya decision, in *Leiden Journal of International Law*, 23, 2010, pp. 863ss. See also: ICC, Prosecutor v. Ruto, Kosgey and Sang, Dissenting Opinion by Judge Hans-Peter Kaul to Pre-Trial Chamber II's "Decision on the Prosecutor's Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, P-TC II, ICC-01/09-01/11, 15 March 2011, par. 21-70. In our opinion it is necessary to consider the extension of the sphere of application of crimes against humanity resulting from the adoption of an extensive approach. If by organization we mean any entity capable of carrying out an extensive or systematic attack, it should be concluded that a whole series of non-State actors-such as those belonging to organized crime-can commit crimes against humanity. A restrictive reading of the concept of organization seems therefore preferable in order to prevent excessive dilation of the category of crimes against humanity. In a consistent sense. See, M. CHERIF BASSIOUNI, *The legislative history of the International Criminal Court: Introduction, analysis and integrated text. Volume I*, ed. Brill/Martinus Nijhoff Publishers, New York, 2005, pp. 151ss. J. PÉREZ CABALLERO, El elemento político en los crímenes contra la humanidad, op. cit., pp. 195ss. N. LUBELL, *Extraterritorial use of force against non-State actors*, Oxford University Press, Oxford, 2010. G. KEMP, South Africa's (possible) withdrawal from the ICC and the future of the criminalization and prosecution of crimes against humanity, war crimes and genocide under domestic law: A submission informed by historical, normative and policy considerations, in *Washington University Global Studies Law Review*, 14, 2017, pp. 414ss. O. OLUSANYA, Do crimes against humanity deserve a higher sentence than war crimes?, in *International Criminal Law Review*, 4, 2004, pp. 431-473. P. AKHAVAN, *Reducing genocide to law. Definition, meaning, and the ultimate crime*, Cambridge University Press, Cambridge, 2012, pp. 58ss.
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- 55G.M. LENTNER, *The United Nations Security Council and the International Criminal Court*, op. cit.
- 56O. TRIFFTERER, Article 27. Irrelevance of official capacity, in O. TRIFFTERER (a cura di), *Commentary on the Rome Statute, Observers Notes, Article by article*, op. cit.
- 57Art. 98, in particular in the second paragraph, makes no reference to the impunity agreements and previous and subsequent sanctions for the purpose of taking away the jurisdiction of ICC who has been charged with crimes. The Vienna Convention on the Law of Treaties of 23 May 1969 emphasizes that the textual interpretation of a patrimonial rule must be taken into account also in the context in which the terms of the provision are inserted, bearing in mind the content of the preamble of the Treaty and every further agreement between the parties. Following the textual criterion of the interpretation of par. 2 of article 98 would mean introducing into the mechanism of ICC a serious omission as it is prevented from exercising its judicial function of a complementary nature to that of the States Parties. So we can say that this provision has been included in the Statute as a safeguard clause of the Status of Force Agreements (SOFAs) (proposed by the United States) stipulated before the entry into force of the Statute, and not for any subsequent agreement. Regarding the rationale

- personae scope, protected by such agreements, is not just military personnel but also individuals who simply travel for private or leisure purposes. This is a limitation clause that allows for judicial assistance once it is opposed to the delivery of its own nationals (in this case American citizens) or foreign employees to ICC or to a Third State and is willing to process them in its territory, the impunity agreements do not seem to be in complete harmony with the American national legislation. See for more details: J. IVERSON, *The continuing functions of article 98 of the Rome Statute*, in *Goettingen Journal of International Law*, 4 (1), 2012, pp. 134ss. D. SCHEFFER, *Article 98 (2) of the Rome Statute: America's original intent*, in *Journal of International Criminal Justice*, 5 (3), 2005, p. 333 ss.
- 58G.M. LENTNER, *The United Nations Security Council and the International Criminal Court*, op. cit.
- 59See art. 108 StICC. For analysis: S.K. HAYES, *Interpreting the new language of the national defense authorization act: A potential barrier to the extradition of high value terror suspects*, in *Wayne Law Review*, 58, 2012-2013, pp. 570ss. D. LIAKOPOULOS, *State responsibility and the obligation of aut dedere aut judicare obligation*, in *International and European Union Legal Matters*, 2017. B. MARTINS AMORIUM DUTRA, *Criminal responsibility in the crimes committed by organized structures of power: Jurisprudence analysis in the light of international criminal law*, in *Revista de Faculdade de Direito da UERJ*, 22 (1), 2012, pp. 5ss. G. DANCY, F. MONTAL, *Unintended positive complementarity: Why International Criminal Court investigations may increase domestic human rights prosecutions*, in *American Journal of International Law*, 111 (4), 2017, pp. 690ss.
- 60See art. 73 StICC. W.A. SCHABAS, *The International Criminal Court: A commentary on the Rome Statute*, Oxford University Press, Oxford, 2010, pp. 872ss, and art. 90, par. 4 StICC (competing requests). C. KRESS, K. PROST, *Article 90-Competing requests*, in O. TRIFTERER (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, 2nd ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2008, pp. 1550ss. In the context of non-party states, a decision was issued by the PTC regarding non-cooperation in the case *Prosecutor v. Abdullah Al-Senussi*.<sup>254</sup>UN Security Council, Security Council Resolution 1970 (2011), 26 February 2011. The ICC had issued an arrest warrant against Al-Senussi for his alleged criminal responsibility for crimes against humanity committed in Benghazi, Libya, as Head of Military Intelligence of the Libyan Armed Forces (Warrants of Arrest for Abdullah Al Senussi, ICC-01/11, 27 June 2011). The Pre-Trial Chamber issued a decision pursuant a request by the Defence of Al-Senussi, to make a finding of non-cooperation against Mauritania. *The Prosecutor v. Gaddafi and Al Senussi, Decision on non-cooperation*, Pre-Trial Chamber I, ICC-01/11-01/11-420, 28 August 2013 (Decision against Mauritania). Also in the case *Prosecutor v. Gbagbo*<sup>260</sup>*Prosecutor v. Gbagbo*, Pre-Trial Chamber I, ICC-02/11-01/15-1124., in which the PTC issued an arrest warrant against the incumbent President of Côte d'Ivoire. Although Côte d'Ivoire is a party to the Rome Statute today, it was not at the time of the arrest warrant. We take in consideration that Côte d'Ivoire ratified the Rome Statute on 15 February 2013, However, Côte d'Ivoire had accepted the jurisdiction of the ICC. Such acceptance of the Court's jurisdiction made art. 27(2) applicable, thereby revoking the immunity of Gbagbo under customary international law. Gbagbo was transferred to the custody of ICC by the authorities of Côte d'Ivoire. See in argument: P. WARDLE, *The survival of Head of State immunity at the International Criminal Court*, in *Australian International Law Journal*, 9, 2011, pp. 184ss.
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- 63C. KRESS, K. PROST, *Article 98. Cooperation with respect to waiver of immunity and consent to surrender*, in O. TRIFFTERER (a cura di), *Commentary on the Rome Statute*, op. cit., pp. 1606.
- 64O. CORTEN, P. KLEIN, *The Vienna Conventions on the law of treaties. A commentary*, Oxford University Press, Oxford, 2011. O. DÖRR, *Article 31. General rule of interpretation*, in O. DÖRR, K. SCHMALENBACH (a cura di), *Vienna Convention on the Law of Treaties. A commentary*, Springer, Heidelberg-New York 2012, pp. 536ss.M. SAMSO, *High hopes, scant resources: A word of scepticism about the anti-fragmentation function of article 31(3)(c) of the Vienna Convention on the Law of Treaties*, in *Leiden Journal of International Law*, 24, 2011, pp. 5ss.
- 65S. WIRTH, *Immunities, related problems, and article 98 of the Rome Statute*, in *Criminal Law Forum*, 12 (3), 2001, pp. 429ss. D. AKANDE, *The jurisdiction of the International Criminal Court over nationals and non-parties: Legal basis and limits*, in *Journal of International Criminal Justice*, 1 (4), 2003, pp. 620ss. A.W. SCHABAS, *An introduction to the International Criminal Court*, Cambridge University Press, Cambridge, 2011, pp. 92ss.
- 66M. DANILENKO, *The statute of the International Criminal Court and third States*, in *Michigan Journal of International Law*, 22 (3), 2000, pp. 446ss.
- 67See, *Rapport de la Commission du droit International sur les travaux de sa quarante-sixième session*, doc. A/49/10, p. 91ss. Immediately after the setting up of ad hoc criminal tribunals, the International Law Commission suggested that the Security Council should also be assigned a role in the project of the Statute of the International Criminal Court in progress. In particular, it was submitted to an ad hoc committee created by the General Assembly with Resolution 49/53 a new version of the art. 23, par. 1 (which later became Article 13 (b), which provided 'nonobstant les dispositions de l'article 21, la Cour est compétente conformément au présent statut pour connaître des crimes visés à l'article 20 comme suite au renvoi d'une question devant de la Conseil de sécurité agissant dans la cadre du Chapitre VII de la Charte des Nations Unies (...)'. In the commentary, then, it was clarified that: "(...) la Commission a estimé qu'une telle disposition était nécessaire pour permettre au Conseil de sécurité de faire appel à la Cour au lieu de créer un tribunal spécial et lui permettre de réagir face à des crimes qui font offense à la conscience de l'humanité (...)".
- 68J. IVERSON, *The continuing functions of article 98 of the Rome Statute*, op. cit.

- 69G.M. LENTNER, *The United Nations Security Council and the International Criminal Court*, op. cit. A.W. SCHABAS, *An introduction to the International Criminal Court*, op. cit.
- 70G.M. LENTNER, *The United Nations Security Council and the International Criminal Court*, op. cit. A.W. SCHABAS, *An introduction to the International Criminal Court*, op. cit.
- 71W.A. SCHABAS, *United Nations hostility to the International Criminal Court: It's all about the Security Council*, in *European Journal of International Law*, 15 (4), 2004, p. 701. A. AMBOS, *International criminal law at the crossroads: From ad hoc imposition to a treaty based universal system*, in C. STAHN, L. VAN DER HERIK (a cura di), *Future perspectives on international criminal justice*, T.M.C. Asser Press, The Hague, 2010, pp. 162ss.
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In the event of referrals by the Security Council there is a possibility that the Court may report on the non-cooperation of a state but without any measures envisaged by the Council in the event of non-compliance by "forcing" the Council, based on Chapter VI of the Charter, exercise its conciliatory functions. The Security Council has the power to block proceedings before the Court after the adoption of a decision after a favorable vote of a majority of the members of the Council and the decision should be of a temporary nature and without prejudice to the nature of the Court's independence and impartiality. See also: United Nations Security Council, Report of the Secretary-General on the implementation of Security Council Resolutions 2139 (2014), 2165 (2014) and 2191 (2014), 11 November 2015, UN Doc. S/2015/862 e United Nations Security Council, 7419th meeting, 27 March 2015, UN Doc. S/PV.7419. See in argument: F. JESSBERGER, J. GENEUSS, *Down the drain or down to earth? 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Ch., Trial Judgment, 22 February 2001, para. 847). *Prosecutor v. Blaškić* (Case No. IT-95-14), ICTY A. Ch., Appeals Judgment, 29 July 2004, para. 697; *Prosecutor v. Blagojević and Jokić* (Case No. IT-02-60) ICTY T. Ch., Trial Judgment, 17 January 2005, para. 850; *Prosecutor v. Babić* (Case No. IT-03-72), ICTY A. Ch., Appeals Judgment, 18 July 2005, para. 43; *Prosecutor v. Lubanga*, ICC T. Ch., Decision on Sentence pursuant to article 76 of the Statute, ICC-01/04-01/06-2901, 10 July 2012; *Prosecutor v. Katanga*, ICC T. Ch., Decision on Sentence pursuant to article 76 of the Statute, ICC-01/04-01/07-3484, 23 May, 2014, para. 35; *Prosecutor v. Lubanga*, ICC A. Ch., Judgment, ICC-01/04-01/06-3121-Red, 1 December 2014). *Prosecutor v. Blagojević and Jokić* (Case No. IT-02-60), ICTY T. Ch., Trial Judgment, 7 January 2005, paras. 858-860; *Prosecutor v. Plavšić* (Case No. IT-00-39&40/1), ICTY T. Ch., Sentencing Judgment, 27 February 2003, paras. 85-94 and 110; *Prosecutor v. 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gations (and thus open the situation called “Central African Republic II”) the events committed in central African territory starting in August 2012, which would fall into the grip of war crimes. Following the Security Council Resolution 2127 (2013), a Commission of inquiry has been set up to investigate human rights and human rights violations committed in the State concerned from 1 January 2013. It should be recalled that the Referral power was first exercised with Resolution no. 1593 (2005) and there were four Security Council resolutions that explicitly referred to art. 16 of the Statute. We refer to the resolutions: 1422 (2003), 1487 (2003), 1497 (2003) and 1593 (2005). In the event of referrals by the Security Council there is a possibility that the Court may report on the non-cooperation of a state but without any measures envisaged by the Council in the event of non-compliance by “forcing” the Council, based on Chapter VI of the Charter, exercise its conciliatory functions. The Security Council has the power to block proceedings before the Court after the adoption of a decision after a favorable vote of a majority of the members of the Council and the decision should be of a temporary nature and without prejudice to the nature of the Court's independence and impartiality. See also: United Nations Security Council, Report of the Secretary-General on the implementation of Security Council Resolutions 2139 (2014), 2165 (2014) and 2191 (2014), 11 November 2015, UN Doc. S/2015/862 e United Nations Security Council, 7419th meeting, 27 March 2015, UN Doc. S/PV.7419. See in argument: F. JESSBERGER, J. GENEUSS, Down the drain or down to earth? International criminal justice under pressure, in *Journal of International Criminal Justice*, 11 (4), 2013, pp. 502ss. M. FALKOWSKA, L'opposition de l'Union Africaine aux poursuites contre Omar al Bashir: Analyse des arguments juridiques avancés pour entraver le travail de la Cour pée nale internationale et leur expression sur le terrain de la coopération, in *Revue Belge de Droit International*, 55 (2), 2012, pp. 201-236. M. WELDEHAIMANOT, Arresting Al-Bashir: the African Union's Opposition and the Legalties, in *African Journal of International and Comparative Law*, 19 (2), 2011, pp. 208-235. D. ROBINSON, The controversy over territorial State referrals and reflections on ICL discourse, in *Journal of International Criminal Justice*, 9 (3), 2011, pp. 355-384. E. DE WET, Referrals to the International Criminal Court under Chapter VII of the United Nations Charter and the immunity of foreign State officials, in *AJIL Unbound*, 112, 2018, pp. 34ss.

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77The adoption of the resolution is the result of the compromise reached between the position of most of the members of the Council, in favor of the appeal to the International Criminal Court, and the position of the United States of America. Resolution 1593 (2005) was approved with the favorable vote of 11 states and four abstentions (Algeria, Brazil, China and the United States). The non-permanent members of the Security Council were: Algeria, Argentina, Denmark, the Philippines, Japan, Greece, Tanzania, Romania, Benin and Brazil. For details see. Y. AKSAR, The UN Security Council and the enforcement of individual criminal responsibility: The Darfur case, in *African Yearbook of International Law*, 2006, pp. 104-119. F. AUMOND, La situation au Dorfour deferée a la CPI. Retour sur uneresolution "historique" du Conseil de sécurité, in *Revue Générale de Droit International Public*, 108, 2008, pp. 111-134. R. CRYER, Sudan, Resolution 1593, and international criminal justice, in *Leiden Journal of International Law*, 16 (1), 2006, pp. 195-222. M. HAPPOLD, Darfur, the Security Council, and the International Criminal Court, in *International and Comparative Law Quarterly*, 55, 2006, pp. 226-236. C. HEYDER, The UN Security Council's referral of the crimes in Darfur to the International Criminal Court in light of the US opposition to the Court: Implications for the International Criminal Court's functions and status, in *Berkeley Journal of International Law*, 24 (2), 2006, pp. 650-671.

- 78ICC-02/05/157 e ICC-02/05-157-AnxA-Public Redacted Version of Prosecution's Application under Article 58 filed on 14 July 2008. Following the issuance of the arrest warrant, the Prosecutor appealed against the decision of the preliminary Chamber that had not considered sufficient evidence to contest the imputation of genocide. The Chamber of Appeals, in the Judgment on the Appeal of Prosecutor against the 3 February 2010, considered that the preliminary Chamber had rejected the request on the basis of an erroneous evaluation of the standard of the tests reached and, therefore, referred to the preliminary Chamber for a new decision. The First Preliminary Chamber, by decision of 12 July 2010, considered that there was reasonable doubt that President Al Bashir was responsible, pursuant to art. 25, (3) (a) of the Bylaws, of the crime of genocide as provided for by art. 6, (a), (b), (c) of the Bylaws, issuing a second arrest warrant against him. For more details see: D. AKANDE, The Legal nature of Security Council referrals to the ICC and its Impact on Al Bashir's Immunities, in *Journal of International Criminal Justice*, 7 (3), 2009, pp. 333-352. A.T. CAYLEY, The Prosecutor's strategy in seeking the arrest of Sudanese President Al Bashir on charges of genocide, in *Journal of International Criminal Justice*, 6 (4), 2008, pp. 830ss. R. CRYER, The definitions of international crimes in the Al Bashir arrest warrant decision, in *Journal of International Criminal Justice*, 7 (4), 2009, pp. 284ss. G. FALLIGANT, The Prosecution of Sudanese president Al Bashir: Why a Security Council deferral would harm the legitimacy of the International Criminal Court, in *Wisconsin International Law Journal*, 27, 2009-2010, pp. 728ss. P. GAETA, Does President Al Bashir enjoy immunity from arrest?, in *Journal of International Criminal Justice*, 7, 2009, pp. 316ss. F. JESSBERGER, J. GENEUSS, On the application of a theory of indirect perpetration in Al Bashir: German doctrine at The Hague, in *Journal of International Criminal Justice*, 6 (4), 2008, pp. 854ss. M. SSENYONJO, The International Criminal Court and the warrant of arrest for Sudan's President Al-Bashir: A crucial step towards challenging impunity or a political decision? in *International and Comparative Law Quarterly*, 59 (1), 2009, pp. 398ss. S. WILLIAMS, L. SHERIF, The arrest warrant for President al-Bashir: Immunities of incumbent Heads of State and the International Criminal Court, in *Journal of Conflict and Security Law*, 14 (1), 2009, pp. 71-92. J. FOAKES, The position of Head of State and senior officials in international law, Oxford University Press, Oxford, 2014.
- 79ICC-02/05-01/09-5 Request to the Republic of the Sudan for the arrest and surrender of Omar Al Bashir; ICC-02/05-01/09-7 Request to all State Parties to the Rome Statute for the arrest and surrender of Omar Al Bashir; ICC-02/05-01/09-8 Request to all United Nations Security Council Members that are not States Parties to the Rome Statute for the arrest and surrender of Omar Al Bashir. In argument see: G. SLUITER, Obtaining cooperation from Sudan. Where is the law? in *Journal of International Criminal Justice*, 6 (4) 2008, pp. 872ss.
- 80Arrêt of the Cour de Cassation, 13 March 2001, No. 1414. Another case concerning Qaddafi occurred more recently in front of the ICC. Following the revolution and military operations in Libya, the UN Security Council adopted Resolution 1970 (2011) on the 26 February 2011. In this instrument the situation in Libyan Arab Jamahiriya was referred to the Prosecutor of the ICC. On the 16 May 2011, the Prosecutor, according to Art. 58 of the ICC Statute, applied to the Trial Chamber to issue an arrest warrant for Qaddafi, together with two other persons. In his statement he asserted that the system in Libya 'confers on Gaddafi absolute power and authority'. By these words it is affirmed that de facto heads of states might be taken into consideration as high state officials for the purposes of international criminal law. See: UN SC Resolution 1970 (2011), S/RES/1970 (2011), 26.02.2011 and Situation in the Libyan Arab Jamahiriya. Prosecutor's Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar GADDAFI, Saif Al-Islam GADDAFI and Abdullah AL-SENUSSI, Pre-Trial Chamber I, case no. ICC-01/11, 16.05.2011. see also: P. AKHAVAN, Complementarity conundrums: The ICC clock in transitional times, in *Journal of International Criminal Justice*, 14 (5), 2016, pp. 1045ss.
- 81ICC-01/11-12 of 27 June 2011. Decision on the "Prosecutor's Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar Gaddafi, Saif-Al-Islam Gaddafi and Abdullah Al-Senussi, par. 9: "(...) insofar as the situation in Lybia has been referred to the Court by the Security Council acting pursuant to article 13 (b) of the Statute, the present case falls within the jurisdiction of the Court despite the fact that it concerns the alleged criminal liability of nationals of a State that is not party to the Statute and for crimes which have been committed in the territory of a State that is non party to the Statute. At this juncture, the Chamber also note that, consistent with its findings in the Al Bashir Case, the official position of an individual, whether he or she is a national of a State party or of a State which is not party to the Statute, has no effect on the Court's jurisdiction (...)". S. WILLIAMS, L. SHERIF, The arrest warrant for President al-Bashir, op. cit., pp. 72ss.
- 82V.J. VANDER, The Al Bashir debacle, in *African Human Rights Law Journal*, 15, 2015, pp. 562ss.
- 83ICC, Prosecutor v. Omar Al Bashir, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, P-TC, ICC-02/05-01/09, 4 March 2009, par. 95-97. S. VALIANI, Genocide left unchecked: Assessing the ICC's difficulties detaining Omar al-Bashir, in *Berkeley Journal of International Law*, 35, 2017, pp. 152ss. ICC, Prosecutor v. Katanga and Ngudjolo Chui, Decision on the Confirmation of Charges, op. cit., par. 401. ICC, Prosecutor v. Omar al Bashir, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, PTC, ICC-02/05-01/09-3, 4 March 2009, par. 86ss. In critical sense, see. S. KIRSCH, Two kinds of wrong: On the context element of crimes against humanity, in *Leiden Journal of International Law*, 22, 2009, pp. 539ss. With the exception of persecution and apartheid, it is not required that the author acts with a discriminatory intent as was instead foreseen by articles of the statute of the ICTR.
- 84ICC-02/05-01/09-3 of 04-03-2009-1/146 CB PT-Public Redacted Version Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, parr. 41-45.

- 85G.M. LENTNER, *The United Nations Security Council and the International Criminal Court*, op. cit. A.W. SCHABAS, *An introduction to the International Criminal Court*, op. cit.
- 86M. FITZMAURICE, O. ELIAS, P. MERKOURIS (eds), *Treaty interpretation and the Vienna Convention on the Law of Treaties*, 30 years on, Martinus Nijhoff, The Hague, 2010, pp. 9ss. G. NOUTE, *Treaties and subsequent practice*, Oxford University Press, Oxford, 2013, pp. 224ss. E. BJORGE, *The evolutionary interpretation of treaties*, Oxford University Press, Oxford, 2014. O. CORTEN, P. KLEIN, *The Vienna Conventions on the law of treaties. A commentary*, op. cit., O. DÖRR, Article 31. General rule of interpretation, in O. DÖRR, K. SCHMALENBACH (a cura di), *Vienna Convention on the Law of Treaties. A commentary*, op. cit., pp. 536ss.M. SAMSO, *High hopes, scant resources: A word of scepticism about the anti-fragmentation function of article 31(3)(c) of the Vienna Convention on the Law of Treaties*, op. cit.,
- 87D. AKANDE, *International law immunities and the International Criminal Court*, in *American Journal of International Law*, 98 (2), 2004, pp. 408ss. S. WILLIAMS, L. SHERIF, *The arrest warrant for President al-Bashir: Immunities of incumbent Heads of State and the International Criminal Court*, in *Journal of Conflict and Security Law*, 14 (1), 2009, p. 71 ss. As already highlighted for the references to the position of Head of State in charge contained in the arrest warrants against Al Bashir Gaddafi, also Resolution 1593 (2005) on Sudan, and 1970 (2011) on Libya are mutatis mutandis identical in content. Therefore the reconstructions proposed by the doctrine about the referral on Sudan are fully extendable to the case of Libya. See also: V. DAMNJANOVIC, *Die Beteiligungsformen im deutschen und serbischen Strafrecht sowie in der ICTY-Rechtsprechung*, BWN Berliner Wissenschafts Verlag, Berlin, 2013, pp. 246ss.
- 88G.M. LENTNER, *The United Nations Security Council and the International Criminal Court*, op. cit. A.W. SCHABAS, *An introduction to the International Criminal Court*, op. cit.
- 89D. AKANDE, *The legal nature of Security Council referrals to the ICC and its impact on Al Bashir's immunities*, op. cit., pp. 344, which the author stated that: "(...) Sudan is to be treated as bound by the Statute and as if it were a party to it (...)".
- 90D. AKANDE, *The legal nature of Security Council referrals to the ICC and its impact on Al Bashir's immunities*, op. cit.,
- 91UN Security Council Resolution 1593 (2005), 31 March 2005, par. 2 e UN Security Council Resolution 1970 (2011), 26 February 2011, par. 5.
- 92R. DUBLER SC, KALYK M., *Crimes against humanity in the 21<sup>st</sup> century*, op. cit. C. BRANTS, S. KARSTEDT, *Transitional justice and the public sphere. Engagement, legitimacy and contestation*, op. cit.
- 93C. BRANTS, S. KARSTEDT, *Transitional justice and the public sphere. Engagement, legitimacy and contestation*, op. cit.
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- 97J. IVERSON, *The continuing functions of article 98 of the Rome Statute*, op. cit.
- 98UN Security Council Resolution 1593 (2005), 31 March 2005, par. 2 e UN Security Council Resolution 1970 (2011), 26 February 2011, par. 5.
- 99After the arrest warrant was issued against Al Bashir, a "popular movement" has arisen within the country, which has repeatedly demonstrated on the streets of the capital in defense of its President. Then, rejecting all the accusations made against him, he issued a decree for the expulsion of 16 non-governmental organizations operating in the country, forcing about 7,000 humanitarian workers to leave the region and confiscate the equipment and supplies they manage.
- 100A. NOWAK, *The international criminal Court: An introduction*, ed. Springer, New York, 2015.
- 101Assembly/AU/Dec. 221 (XII). *Décision sur la demande par le procureur de la Cour pénale internationale (CPI) de la mise en accusation du Président de la République du Soudan*, adottata nell'ambito della XII Sessione ordinaria della Conferenza dell'Unione africana, tenutasi ad Addis Abeba dal 1° al 3 febbraio 2009, Cfr. part. par. 3: la Conferenza «approuve le communiqué du Conseil de Paix et de Sécurité de l'Union africaine (CPS) à l'issue de sa 142<sup>ème</sup> réunion, tenue le 21 juillet 2008 et demande au Conseil de sécurité des Nations Unies, conformément aux dispositions de l'article 16 des Statuts de la CPI adoptés à Rome, et comme l'a demandé le CPS lors de sa réunion susmentionnée, de reporter le processus initié par la CPI (...)». It should be recalled that the Referral power was first exercised with Resolution no. 1593 (2005) and there were four Security Council resolutions that explicitly referred to art. 16 of the Statute. We refer to the resolutions: 1422 (2003), 1487 (2003), 1497 (2003) and 1593 (2005). In the event of referrals by the Security Council there is a possibility that the Court may report on the non-cooperation of a state but without any measures envisaged by the Council in the event of non-compliance by "forcing" the Council, based on Chapter VI of the Charter, exercise its conciliatory functions. The Security Council has the power to block proceedings before the Court after the adoption of a decision after a favorable vote of a majority of the members of the Council and the decision should be of a temporary nature and without prejudice to the nature of the Court's independence and impartiality. See also: United Nations Security Council, *Report of the Secretary-General on the implementation of Security Council Resolutions 2139 (2014), 2165 (2014) and 2191 (2014)*, 11 November 2015, UN Doc. S/2015/862 e United Nations Security Council, 7419<sup>th</sup> meeting,

- 27 March 2015, UN Doc. S/PV.7419. See in argument: F. JESSBERGER, J. GENEUSS, Down the drain or down to earth? International criminal justice under pressure, in *Journal of International Criminal Justice*, 11 (4), 2013, pp. 502ss. M. FALKOWSKA, L'opposition de l'Union Africaine aux poursuites contre Omar al Bashir: Analyse des arguments juridiques avancés pour entraver le travail de la Cour pée nale internationale et leur expression sur le terrain de la coopération, in *Revue Belge de Droit International*, 55 (2), 2012, pp. 201-236. M. WELDEHAIMANOT, Arresting Al-Bashir: the African Union's Opposition and the Legalities, in *African Journal of International and Comparative Law*, 19 (2), 2011, pp. 208-235. D. ROBINSON, The controversy over territorial State referrals and reflections on ICL discourse, in *Journal of International Criminal Justice*, 9 (3), 2011, pp. 355-384.
- 102 K.AMBOS, Expanding the focus of the "African Criminal Court", in W.A. SCHABAS, Y. MCDERMOTT, N. HAYES (eds), *The ashgate research companion to international criminal law: Critical perspectives*, Ashgate Publishing, Farnham, 2013, pp. 502ss. M. CUPIDO, The contextual embedding of genocide: A casistic analysis of the interplay between law and facts, in *Melbourne Journal of International Law*, 15, 2014, pp. 379ss. G.P. BARNES, The International Criminal Court's ineffective enforcement mechanisms: The indictment of President Omar Al Bashir, in *Fordham International Law Review*, 34, 2011, pp. 1586ss. A.G. KIYANI, Al-Bashir & the ICC: The problem of Head of State Immunity, in *Chinese Journal of International Law*, 12, 2013, pp. 470ss. P. GAETA, P.I. LABUDA, *Trying sitting Heads of State*, C. CHERNOR JALLOH, I. BANTEKAS, *The ICC and Africa*, Oxford University Press, Oxford, 2017, pp. 152ss.
- 103 Assembly/AU/Dec. 245 (XIII). *Décision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC)*. Doc. Assembly/AU/13(XIII), adopted during the XIII ordinary session of the African Union Conference, held in Sirte from 1 to 3 July 2009.
- 104 G.M. LENTNER, *The United Nations Security Council and the International Criminal Court*, op. cit. A.W. SCHABAS, *An introduction to the International Criminal Court*, op. cit.
- 105 See the par. 8 of the decision in comment: "(...) requests the Commission to convene a preparatory meeting of African States Parties at expert and ministerial levels (Foreign Affairs and Justice) but open to other Member State at the end of 2009 to prepare fully for the Review Conference of States Parties scheduled for Kampala, Uganda in May 2010, to address among others, the following issues: i.) Article 3 of the Rome Statute granting power to the Security Council to refer cases of the ICC; ii. Article 16 of the Rome Statute granting power to the UN Security Council to defer cases for one (1) year); iii.) Procedures of the ICC; iv.) Clarification on the Immunities of officials whose States are not part to the Statute; v.) Comparative analysis of the implications of the practical application of Articles 27 and 98 of the Rome Statute; vi.) The possibility of obtaining regional inputs in the process of assessing the evidence collected and in determining whether or not to proceed with prosecution; particularly against senior state officials; and vii.) Any other areas of concern to African States Parties (...)".
- 106 The relevance of the act in question to evaluate the *opinio juris* in this matter appears even more evident if we consider that, historical courses and appeals, the session of the Assembly that approved the decision was held in Sirte, under the leadership of the leader Libyan Gaddafi who, during the preparatory work, became a staunch supporter of the denial of any form of cooperation with the International Criminal Court which, in a meeting of the AU of March 2009 had defined "a new form of international terrorism".
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- 108 In particular see: A.S. HASSANEIN, *Self-referral of situations to the International Criminal Court complementarity in practice-complementarity in crisis*, in *International Criminal Law Review*, 17 (1), 2017, pp. 108ss. J.N. ESEED, *The International Criminal Court's unjustified jurisdiction claims: Libya as a case study*, in *Chicago-Kent Law Review*, 89, 2013-2014, pp. 568ss. See the case of a self-referral act sent to the Court by the Head of the transition state in Libya on May 30, 2014, the Prosecutor has decided to initiate investigations (and thus open the situation called "Central African Republic II") the events committed in central African territory starting in August 2012, which would fall into the grip of war crimes. Following the Security Council Resolution 2127 (2013), a Commission of inquiry has been set up to investigate human rights and human rights violations committed in the State concerned from 1 January 2013. It should be recalled that the Referral power was first exercised with Resolution no. 1593 (2005) and there were four Security Council resolutions that explicitly referred to art. 16 of the Statute. We refer to the resolutions: 1422 (2003), 1487 (2003), 1497 (2003) and 1593 (2005). In the event of referrals by the Security Council there is a possibility that the Court may report on the non-cooperation of a state but without any measures envisaged by the Council in the event of non-compliance by "forcing" the Council, based on Chapter VI of the Charter, exercise its conciliatory functions. The Security Council has the power to block proceedings before the Court after the adoption of a decision after a favorable vote of a majority of the members of the Council and the decision should be of a temporary nature and without prejudice to the nature of the Court's independence and impartiality. See also: United Nations Security Council, Report of the Secretary-General on the implementation of Security Council Resolutions 2139 (2014), 2165 (2014) and 2191 (2014), 11 November 2015, UN Doc. S/2015/862 and United Nations Security Council, 7419th meeting, 27 March 2015, UN Doc. S/PV.7419. See in argument: F. JESSBERGER, J. GENEUSS, Down the drain or down to earth? International criminal justice under pressure, in *Journal of International Criminal Justice*, 11 (4), 2013, pp. 502ss. M. FALKOWSKA, L'opposition de l'Union Africaine aux poursuites contre Omar al Bashir: Analyse des arguments juridiques avancés pour entraver le travail de la Cour pée nale internationale et leur expression sur le terrain de la coopération, in *Revue Belge de Droit International*, 55 (2), 2012, pp. 201-236. M. WELDEHAIMANOT, *Arresting Al-Bashir: the Af-*

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- 112 M. WOOD, The interpretation of Security Council Resolutions, revisited, in *Max Planck Yearbook of United Nations Law*, 20 2017, pp. 8ss.
- 113 M. WOOD, The interpretation of Security Council Resolutions, revisited, op. cit.
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- 115 ICC-02/05-01/09-107 del 27-08-2010, Pre-Trial Chamber I, 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; ICC-02/05-01/09-109 del 27-08-2010, Pre-Trial Chamber I, Decision informing the United Nations Security Council and the Assembly of the States Parties to the Rome Statute about Omar Al-Bashir's recent visit to the Republic of Chad; ICC-02/05-01/09-129 del 12-05-2011, Decision informing the United Nations Security Council and the Assembly of the States Parties to the Rome Statute about Omar Al-Bashir's recent visit to Djibouti.
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- 117 L. NADYA SADAT, Elements and innovations in a new global treaty on crimes against humanity, in M. LATIER, P. SANDS, *The grey zone: Civilian protection between human rights and the laws of war*, Hart Publishing, Oxford & Oregon, Portland, 2018.
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- 120 With the Ordonnance de refus de donner suite of May 8, 2003, the Attorney General of the Swiss Confederation decided not to proceed with the criminal complaint filed against the President of the United States of America, Bush, for international crimes committed in the course of American intervention in Iraq. Indeed, in the motivation by which it is reaffirmed that a foreign head of state visiting abroad enjoys total and absolute immunity from criminal jurisdiction, the Prosecutor General affirms that the head of state in exercise is "comparable" to the country he represents, thus operating an overlap between personal immunity of the individual-organ and immunity of the foreign state. On the dubious value to be attributed to the tendency, widespread in the motivations of the sentences on the constitutional bodies in office, to make the immunity of the individual-organ coincide with that of the State.
- 121 Despite the conclusion in favor of the recognition of the personal immunity with which the Audencia Nacional had closed the proceedings instituted in 1999 against the Cuban head of state Castro, in 2005 Human rights activists of the Fundación para los Derechos Humanos in Cuba have filed a new appeal against Castro accusing him of the commission of crimes against humanity, genocide, torture and acts of terrorism. The Audencia Nacional, once again invested with the matter, has substantially reaffirmed the full and absolute validity of the personal immunity of the incumbent Head of State with respect to which general international law does not contemplate any form of exception.
- 122 See the decision in the proceedings against the incumbent Chinese President Zemin taken on 8 September 2004 by the Federal Court of Appeal for the seventh circuit in the case *Wei Ye v. Jiang Zemin* (383 F.3d, p.620, (2004 U.S. App. LEXIS 18944) and the decision taken in the proceedings against the President of Zimbabwe Mugabe at first instance by the Court for the southern district of New York in the case *Tachiona v. Mugabe*, 169 F. Supp. 2d, p. 259 ss. (S.D.N.Y. 2001).
- see in argument D.A. MUNDIS, *Tachiona v. Mugabe: A US Court bows to personal immunities of a foreign Head of State*, in *Journal of International Criminal Justice*, 1, (4), 2003, p. 462 ss. Indeed, the decisions of the US courts on the issue of immunity, both of the organ-individuals and of foreign States, take on relative importance because the conclusions reached are to be ascribed to the internal practice of following in this field the Suggestions of Immunity of the State Department and then, ultimately, dictated by the provisions of domestic law rather than by the application of international law.
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- of Germany, 12 June 2009, part. p. 48 ss. For analysis and details see: C.I. KEITNER, Germany v. Italy and the limits of Horizontal enforcement: Some reflections from a United States Perspective, 11 in *Journal of International Criminal Justice*, 11, 2013, pp. 168ss. J.C. BARKER, International Court of Justice: Jurisdictional immunities of the State (Germany v. Italy) judgment of 3 February 2012, in *International and Comparative Law Quarterly*, 62 (3), 2013, pp. 742ss. R. O'KEEFE, C.J. TAMS, The United Nations Convention on jurisdictional immunities of States and their property. A commentary, Oxford University Press, Oxford, 2013, pp. 13ss. C.J. TAMS, J. SLOAN, The development of international law by the International Court of Justice, Oxford University Press, Oxford, 2013, pp. 316ss. S. TALMON, Jus cogens after Germany v. Italy: Substantive and procedural rules distinguished, in *Leiden Journal of International Law*, 25 (4), 2012, pp. 98ss.
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- 129For the purposes of understanding the scope of the changes introduced by the law in question, to report the text of art. 1 bis of the Belgian Code of Criminal Procedure: "1. Conformément au droit international, les poursuites sont exclues à l'égard: -des chefs d'État, chefs de gouvernement et ministres des Affaires étrangères, pendant la période où ils exercent leur fonctions, ainsi que d'autres personnes don't l'immunité est reconnue per le droit international; -des personnes qui disposent d'une immunité, totale ou partielle, fondée sur un traité qui lie la Belgique. 2. Conformément au droit international, nul acte de contrainte relative à l'exercice de l'ation ublque ne peut être pose pendant la durée de leur séjour, à l'encontre de toute personne ayant été officiellement invitée à séjourner sur le territoire du Royaume par les autorités bleges ou par une organization international établie en Belgique et avec laquelle la Belgique a conclu un accord de siège (...)".
- 130D. LIAKOPOULOS, Schutz des angeklagten im Strafverfahren, op. cit.
- 131On the consequences, compared to the recognition of personal immunity to other organs of ministerial rank. The reference is in par. 51 of the judgment of the International Court of Justice in the case of the Arrest Order in which: "(...) The Court would observe at the outset that in international law it is firmly established that, as also diplomatic and consular agents, certain holders of high-ranking office in a State, such as Head of State, Head of Government and Minister for Foreign Affairs, enjoy immunities from jurisdiction in other States, both civil and criminal (...)", thus giving rise to the hypothesis that the list contained therein is not exhaustive, but merely exemplary.
- 132Boletín oficial del Estado, 4 November 1999, n. 266, sec. I, p. 92089 ff., The case in which the Spanish Supreme Court had identified the limits described, in fact, concerned a proceeding under way in the country against a group of Guatemalan generals, which ended with sentence no. 327 of 25 February 2003.
- 133W.A. SCHABAS, N. BERNAZ, *Routledge Handbook of international criminal law*, ed. Routledge, London & New York, 2011. K. CHAINOGLOU, B. COLLINS, M. PHILLIPS, *Injustice, memory and faith in human rights*, ed. Routledge, new York, 2018. C. RYNGAERT, *Jurisdiction in international law*, Oxford University Press, Oxford, 2015, pp. 130ss. J. HANDMAKER, K. ARTS, *Mobilising international law for "global justice"*, Cambridge University Press, Cambridge, 2018, pp. 181ss.
- 134The amending law also introduces the category of crimes against humanity into the category of those that, pursuant to art. 23 of Law 6/1985, legitimize the exercise of universal criminal jurisdiction. The reason lies in the numerous controversies triggered after the conviction, with this imputation, of Adolfo Scilingo, an Argentine military involved in the c.d. flights of death organized during the dictatorship of the military junta between 1976 and 1983. The polemics against the conviction of the accused, by the Spanish courts, (for a total of 640 years) for crimes against humanity in application of Law 6/1985, is even more emblematic if we consider that the proceedings against Scilingo.
- 135See, Police Reform and Social Responsibility Bill, Commons disagreements, amendments in lieu and amendments to amendments at Human Rights Bill 62 printed under Standing Order 50, 12th September 2011. For details see: P. WANKHADE, D. WEIR, *Police services leadership and management perspective*, ed. Springer, London, 2015, pp. 98ss.

- 136 ILC, Draft Articles on Responsibility of States for Internationally Wrongful Acts, 2001, UN Doc. A/56/10, pp. 31- 143. ILC, Draft Articles on the Responsibility of International Organisations, with commentaries 2011, "Report of the International Law Commission on the Work of its Sixty-third session", General Assembly Official Records, Supp. No. 10 (A/66/10), pp. 69-172. International Law Commission in its 2011 Articles on the Responsibility of International Organisations (ARIO Articles on the Responsibility of International Organisations, with commentaries, in Report of the International Law Commission on the work of its sixty-third session, UN Doc A/66/10, in (2011) Yearbook of the International Law Commission vol II, pt 2. The ARIO (adopted as a resolution by the UN General Assembly on 9 December 2011, Doc A/RES/66/10) were drafted on the model of the Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA) adopted as a resolution by the UN General Assembly on 12 December 2001 (International Law Commission, A/RES/56/83). G. NOLTE, The International Law Commission facing the second decade of the twenty first century, in U. FASTENRATH et al., From bilateralism to community interests, Oxford University Press, Oxford 2011, pp. 782ss. S. VILLALPANDO, Codification light. A new trend in the codification of international law at the United Nations, in Brazilian Yearbook of International Law, 2013, pp. 118ss. Y. CHEN, Structural limitations and possible future of the work of the ILC, in Chinese Journal of International Law, 2010, pp. 478ss. M. WOOD, The General Assembly and the International Law Commission: What happens to the Commission's work and why?, in I. BUFFARD et al., International law between universalism and fragmentation, Martinus Nijhoff Publishers, The Hague, 2008, pp. 373ss. N. JANSEN, The making of legal authority. Non-legislative codifications in historical and corporating perspective, Oxford University Press, Oxford, 2010, pp. 8ss. P. BEHRENS, Diplomatic interference and the law, Hart Publishing, Oxford & Oregon, Portland, 2016. K. E. BONN, "New directions in responsibility: assessing the International Law Commission's Draft Articles on the Responsibility of International Organisations", in The Yale Journal of International Law Online, 37, 2011, pp. 4ss.
- 137 P. WANKHADE, D. WEIR, Police services leadership and management perspective, op. cit.
- 138 UN Doc. A/CN.4/L.682 13 April 2006, in YILC, 2006, vol. II, Part two par. 251. "Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law". See also: Official Records of the General Assembly, Fifty-seventh Session, Supplement NO. 10 (A/55/10), paras. 492-494.
- 139 Official Records of the General Assembly, Fifty-seventh Session, Supplement NO. 10 (A/55/10), op. cit.
- 140 For analysis and details see: M. FITZMAURICE, O. ELIAS, P. MERKOURIS (eds), Treaty interpretation and the Vienna Convention on the Law of Treaties, 30 years on, Martinus Nijhoff, The Hague, 2010, pp. 9ss. G. NOUËT, Treaties and subsequent practice, Oxford University Press, Oxford, 2013, pp. 224ss. E. BJORGE, The evolutionary interpretation of treaties, Oxford University Press, Oxford, 2014. O. CORTEN, P. KLEIN, The Vienna Conventions on the law of treaties. A commentary, Oxford University Press, Oxford, 2011. O. DÖRR, Article 31. General rule of interpretation, in O. DÖRR, K. SCHMALENBACH (a cura di), Vienna Convention on the Law of Treaties. A commentary, Springer, Heidelberg-New York 2012, pp. 536ss. M. SAMSO, High hopes, scant resources: A word of scepticism about the anti-fragmentation function of article 31(3)(c) of the Vienna Convention on the Law of Treaties, in Leiden Journal of International Law, 24, 2011, pp. 5ss. R. GARDINER, Treaty Interpretation, Oxford University Press, Oxford, 2008.
- 141 Prosecutor v. Anto Furundžija, Judgment of 10 December 1998, Caso No. IT-95-17/1, Trial Chamber II, cit. al par. 363.
- 142 O. CORTEN, P. KLEIN, The Vienna Conventions on the law of treaties. A commentary, op. cit.
- 143 Official Records of the General Assembly, Sixty-first Session, Supplement No. 10 (A/61/10), par. 311 "The Special Rapporteur concluded with some comments on his methodology and approach on the topic. In his view, the 2002 Judgment of the International Court of Justice in the Arrest Warrant case was both a correct and also a landmark decision".
- 144 UN Doc. A/CN.4/631 10 June 2010. Second Report on Immunity of State officials from foreign criminal jurisdiction, by Roman Anatolevich Kolodkin, Special Rapporteur, F. Are there exceptions to immunity? pp. 29-58; part. p. 56, par. 90, which is concluded: "(...) in the opinion of the Special Rapporteur, the arguments set out above demonstrate that the various rationales for exceptions to the immunity of officials from foreign criminal jurisdiction prove upon close scrutiny to be insufficiently convincing". Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 10 (A/66/10 and Add 1). Chapter VII. Immunity of State officials from foreign criminal jurisdiction, par. 121-122.
- 145 See, Travaux préparatoires de la 13ème Commission, in AIDI, 2001, I-Vancouver, p. 443 ss. "Les immunités de juridiction et d'exécution du chef d'Etat et de gouvernement en droit international", in AIDI, 2001, I-Vancouver, pp. 742 ss. "Resolution on the Immunity from Jurisdiction of the State and of Persons Who Act on Behalf of the State in the case of International Crimes", in AIDI, 2009, Naples, pp. 226 ss.
- 146 A. BELLAL, The 2009 Resolution of the Institute of International Law on Immunity and International Crimes. A partial codification of the law?, in Journal of International Criminal Justice, 9 (2), 2011, pp. 227-241.
- 147 D. LIAKOPOULOS, International Criminal Court: Impunity status and the situation in Kenya, in International and European Union Legal Matters, 2014.