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**Domestic and International Criminal Justice:
Challenges Ahead**

Berlin Potsdam Research Group "The International Rule of Law – Rise or Decline?"

A decorative graphic at the bottom of the page features three overlapping diagonal bars. The top bar is dark blue, the middle bar is bright green, and the bottom bar is grey. They intersect to form a central white diamond shape.

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Domestic and International Criminal Justice: Challenges Ahead*

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Abstract:

This paper consists of two parts: In the first part, some of the challenges with which the International Criminal Court is currently confronted are being presented. First of all, the article will describe the current state of the International Criminal Court and the Rome Statute. Afterwards, the article analyses the Court's efforts to deal with cases against third-country nationals and the challenges it is facing in that regard. In addition, the Court's case law will be analyzed in order to determine an increasing 'emancipation' of the case law of the International Criminal Court from international humanitarian law. The second part of the paper will briefly discuss the role of domestic international criminal law and domestic courts in the further development and enforcement of international criminal law. As an example of the role that domestic courts may have in clarifying classic issues in international law, the judgment of the German Supreme Court of January 28, 2021 (3 StR 564/19), which deals with the status of customary international law on functional immunity of State officials before domestic courts, shall be assessed.

* Revised and enlarged version of a German article 'Internationaler Strafgerichtshof am Scheideweg', *Juristenzeitung* 77 (2022), 261-266. The text was finalized prior to the armed attack undertaken by the Russian Federation against Ukraine and thus does not reflect developments related to the International Criminal Court and its position in the international legal order since then.

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1. International Criminal Court, Quo Vadis?

In 2022, twenty years after the entry into force of the Rome Statute creating the International Criminal Court (ICC), the Court stands at a crossroad in view of the meanwhile significantly changed world situation. It has to face multiple challenges.

On the one hand, these challenges are reflected in the stagnating number of States parties, a partially declining support of the existing States parties to the Statute and a rather mixed track record of its practical work to date. Furthermore, such challenges are also evident in cases against nationals of non-member States, and in the dependence of the Court on volatile political developments in States, to which his investigations refer, as well as in a jurisprudence that deviates from general international law in some cases.

On 17 July 1998, at the UN Diplomatic Conference on the Establishment of an International Criminal Court in Rome, 120 States voted to adopt the text of the Rome Statute.³ In 2022, almost 25 years later 123 States are parties to the Statute.⁴ After an initially impressive rate of ratifications in the first few years, which enabled the Statute to enter into force in 2002 after the 60th ratification document had been deposited, it has become apparent in recent years that the number of States parties has by now largely stagnated.⁵ Since 2015 there have been only three smaller States acceding to the Rome Statute, namely Palestine in 2015, El Salvador in 2016 and Kiribati in 2019,⁶ while important States such as the United States, China, the Russian Federation or India are still not among the 123 States parties. Also, since 2015, two States parties, namely Burundi in 2016⁷ and the Philippines in 2018⁸, have decided to terminate their treaty membership.⁹ Two additional withdrawals, namely the ones by South Africa and The Gambia, were reversed before entering into effect, in the case of South Africa for domestic constitutional reasons¹⁰ and in the case of The Gambia due to a change of government.¹¹

³ United Nations Press Release L/2889, 'UN Diplomatic Conference concludes in Rome with Decision to establish permanent International Criminal Court', 20 July 1998, available online at <https://www.un.org/press/en/1998/19980720.l2889.html> (visited 14 February 2022).

⁴ List of States parties available online at https://asp.icc-cpi.int/en_menus/asp/states%20parties/Pages/states%20parties%20%20chronological%20list.aspx (visited 14 February 2022).

⁵ For a comprehensive graphic overview of the development of the number of States parties, see A. Zimmermann, 'Finally... Or Would Rather Less Have Been More? The Recent Amendment on the Deletion of Article 124 of the Rome Statute and the Continued Quest for the Universality of the International Criminal Court', *Journal of International Criminal Justice* 14 (2016), 505, at 512.

⁶ List of acceding States with accession date available online at https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=XVIII-10&chapter=18&clang=en (visited 14 February 2022).

⁷ Depositary Notification available online at <https://treaties.un.org/doc/Publication/CN/2016/CN.805.2016-Eng.pdf> (visited 14 February 2022).

⁸ Depositary Notification available online at <https://treaties.un.org/doc/Publication/CN/2018/CN.138.2018-Eng.pdf> (visited 14 February 2022).

⁹ For details on Burundi's withdrawal, see M. Ssenyonjo, 'State Withdrawal Notifications from the Rome Statute of the International Criminal Court: South Africa, Burundi and the Gambia', *Criminal Law Forum* 29 (2018), 63.

¹⁰ For details, see N. Pavlopoulos, 'South Africa's Withdrawal: A Lesson Learned?', *EJIL: Talk! Blog of the European Journal of International Law*, 6 December 2016, available online at <https://www.ejiltalk.org/south-africas-withdrawal-a-lesson-learned/> (visited 14 February 2022); the underlying decision of the North Gauteng High Court (Pretoria) is available online at <http://www.saflil.org/za/cases/ZAGPPHC/2017/53.html> (visited 14 February 2022).

¹¹ Depositary Notification available online at <https://treaties.un.org/doc/Publication/CN/2017/CN.62.2017-Eng.pdf> (visited 14 February 2022).

What is more is that during the same period the Russian Federation in 2016 informed the depositary of the Rome Statute that it no longer intended to ratify the Statute and thus 'withdrew' its signature to the Rome Statute.¹² As a result, its obligation under Art. 18 lit a) of the Vienna Convention on the Law of Treaties to refrain from acts which would defeat the object and purpose of the Rome Statute no longer applies. The Russian Federation thereby followed the examples of the United States, Israel and Sudan in this regard.¹³ Overall, it seems that the Statute with its current ratification status has at least largely 'exhausted' the group of States that can realistically be expected to accede to the Rome Statute in the foreseeable future. Even the other 27 signatory States, that have already signed the Statute but not ratified it yet, are unlikely to join in the near future, especially since this group includes, besides small States such as São Tomé und Príncipe or the Solomon Islands, also States such as Morocco, Syria, Yemen or Zimbabwe, which are currently involved in conflicts in which violations of the Rome Statute by State actors are, if not likely, at least not to be dismissed out of hand.¹⁴

However, a decline of enthusiasm for international criminal law can also be observed among the current States parties to the Rome Statute. For example, the various amendments to the Rome Statute adopted from 2010 onwards, have, at least so far, not been met with much support by States parties. Most of the various amendments related to the war crimes provisions of the Rome Statute have so far been ratified by fewer than ten States parties,¹⁵ the extension of the prohibition of the use of certain weapons such as asphyxiating, poisonous or other gases and dum-dum bullets to non-international armed conflicts being the sole exception with 42 ratifications.¹⁶ But even these 42 States are still less than a third of the current 123 contracting parties. The same holds true for the deletion of Art. 124 Rome Statute, the introduction of which had been very controversial during the negotiations¹⁷ and which allows newly acceding States to exempt themselves from the jurisdiction of the ICC for war crimes for a period of seven years. This amendment, too, although only affecting

¹² Communication available online at https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=XVIII-10&chapter=18&clang=en#4, fn 9 (visited 14 February 2022); for more details, see S. Sayapin 'Russia's Withdrawal of Signature from the Rome Statute Would not Shield its Nationals from Potential Prosecution at the ICC', *EJIL: Talk! Blog of the European Journal of International Law*, 21 November 2016, available online at <https://www.ejiltalk.org/russias-withdrawal-of-signature-from-the-rome-statute-would-not-shield-its-nationals-from-potential-prosecution-at-the-icc/> (visited 14 February 2022).

¹³ Communication available online at https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=XVIII-10&chapter=18&clang=en#4, note 4 (Israel), note 10 (Sudan) and note 12 (USA) (visited 14 February 2022).

¹⁴ Other states, that have signed but have not yet ratified the Statute are Algeria, Angola, Armenia, Bahamas, Bahrain, Cameroon, Egypt, Eritrea, Guinea-Bissau, Haiti, Iran, Jamaica, Kuwait, Kyrgyzstan, Monaco, Mozambique, Oman, Thailand, the United Arab Emirates, Uzbekistan and Ukraine (which, however, has issued a declaration under Art. 12 (3) Rome Statute by which it accepted the exercise of jurisdiction by the ICC for the situation in eastern Ukraine and in Crimea, see ICC Press Release 'Ukraine accepts ICC jurisdiction over alleged crimes committed since 20 February 2014', available online at <https://www.icc-cpi.int/Pages/item.aspx?name=pr1146> [visited 14 February 2022]); List of States having signed but not yet ratified the Statute is available online at https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=XVIII-10&chapter=18&clang=en (visited 14 February 2022).

¹⁵ Overview of the States Parties that have ratified amendments to the Rome Statute is available online at https://asp.icc-cpi.int/en_menus/asp/RomeStatute/pages/default.aspx (visited 14 February 2022).

¹⁶ List of States Parties having ratified the amendment is available online at https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=XVIII-10-a&chapter=18&clang=en (visited 14 February 2022).

¹⁷ For details on the drafting history, see A. Zimmermann, *supra* note 6.

newly acceding States, was only ratified so far by only 17 States parties¹⁸ and will therefore not enter into force in the foreseeable future, since the approval of seven eighths of the States Parties is required for the deletion of Art. 124 to take effect under Art. 121 (4) Rome Statute. And even the amendment of the Rome Statute to define the crime of aggression will for a long time remain a mere ‘law on the bookshelf’-provision given the limitations of the Court’s jurisdiction under Art. 15bis Rome Statute and the ratification of only 43 States parties to date,¹⁹ especially since the States that have ratified the amendment so far almost exclusively belong to those that, given their size, will hardly ever be involved in acts of aggression.²⁰

The record of the ICC’s previous practice is also mixed. Almost twenty years after the entry into force of the Rome Statute and with approximately 2 billion Euros²¹ spent, only nine defendants have been convicted so far, with five convictions relating to offences against the administration of justice committed in former ICC cases.²² Four people have been acquitted of alleged war crimes and crimes against humanity.²³ Seven other defendants are currently held in ICC custody, either because their main trial is ongoing, has not yet started or a verdict has been appealed.²⁴ An arrest warrant was issued against another twelve people, while none of them has so far yet been executed.²⁵ In nine cases the charges were not confirmed, vacated or withdrawn.²⁶ In another case, the Court declared that it lacks jurisdiction.²⁷ Four suspects died while proceedings against them were ongoing.²⁸ Overall, after almost twenty years in ICC, only 45 defendants were involved in proceedings resulting in only nine convictions.²⁹ Notwithstanding the obvious complexities of the cases and situations involved, and the poor record of cooperation on the part of both, States parties and third States,

¹⁸ List of States Parties having ratified the amendment is available online at https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtmsg_no=XVIII-10-c&chapter=18&clang=en (visited 14 February 2022).

¹⁹ List of States Parties having ratified the amendment is available online at https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtmsg_no=XVIII-10-b&chapter=18&clang=en (visited 14 February 2022).

²⁰ For details, see A. Zimmermann, ‘*Alea Iacta Est: The Kampala Amendment on the Crime of Aggression Post-2017: A Response to Koh and Buchwald*’, *American Journal of International Law Unbound* 109 (2015), 240; A. Zimmermann, ‘A Victory for International Rule of Law? Or: All’s Well that Ends Well? The 2017 ASP Decision to Amend the Kampala Amendment on the Crime of Aggression’, *Journal of International Criminal Justice* 16 (2018), 19; A. Zimmermann/E. Freiburg-Braun, *Aggression under the Rome Statute*, 2019, *passim*.

²¹ An overview of the respective yearly budget of the ICC is available online at https://asp.icc-cpi.int/en_menus/asp/bureau/WorkingGroups/budget/Pages/default.aspx (visited 14 February 2022).

²² The defendants Al-Mahdi, Katanga, Lubanga, and Ntaganda while the defendants Bemba, Kilolo Musamba, Mangenda Kabongo, Babala Wandu and Arido have been convicted for offences against the administration of justice. A list of defendants and the status of their trials is available online at <https://www.icc-cpi.int/defendants> (visited 14 February 2022).

²³ The (former) defendants L. Gbagbo, Blé Goudé, Ngudjolo Chui and Bemba, although the latter was convicted of offenses against the administration of justice under Art. 70 Rome Statute, *ibid*; for details in regard to the latter case see K. H. Brodersen/L. Papadopoulos, ‘Guilty but Free: The ICC Renders its First Contempt Case Judgement’, *EJIL: Talk! Blog of the European Journal of International Law*, 1 November 2016, available online at <https://www.ejiltalk.org/guilty-but-free-the-icc-renders-its-first-contempt-case-judgment/> (visited 14 February 2022).

²⁴ The defendants Abd-Al-Rahman, Al Hassan, Gicheru, Ngaissona, Ongwen, Said and Yekatom; *supra* note 23.

²⁵ The defendants Al Bashir, Al-Werfalli, Banda, Barasa, Bett, Saif Al-Islam Gaddafi, Harun, Hussein, Khaled, Kony Mudacumura and Otti, *ibid*.

²⁶ The defendants Abu Garda, Ali, S. Gbagbo, Kenyatta, Kosgey, Mbarushimana, Muthaura, Ruto and Sang, *ibid*.

²⁷ The defendant Al-Senussi, *ibid*.

²⁸ The defendants M. Gaddafi, Jerbo Jamus, Lukwiya and Odhiambo, *ibid*.

²⁹ *Ibid*.

these case numbers, also in comparison with earlier ad hoc tribunals, at the very least do not provide any evidence of a clear success story.³⁰

Structurally complicating the Court's work, it has recently been dealing with an increasing number of situations involving nationals of non-States parties which are politically delicate. According to Art. 12 para. 2 Rome Statute, the ICC may exercise its jurisdiction against nationals of non-States parties if they are suspected to have committed a crime under international law on the territory of a State party. So far, such constellations before the ICC have concerned nationals of the United States with regard to the situation in Afghanistan,³¹ Israel with regard to the situation in Palestine,³² Myanmar in regard to the situation in Bangladesh³³ and the Russian Federation with regard to the situation in Georgia³⁴ and Ukraine.³⁵ In addition, the ICC exercises its jurisdiction over nationals of Sudan³⁶ and Libya³⁷ on the basis of resolutions of the UN Security Council, which provide for the Court's jurisdiction by virtue of Article 13 lit b) Rome Statute. To state the obvious, non-States parties are not obliged to cooperate with the ICC in proceedings against their nationals, except the just mentioned case of a referral to the ICC by the UN Security Council under Chapter VII of the UN Charter. Many of the non-States parties therefore do not cooperate with the ICC in relation to their own nationals, which makes it difficult to conduct such cases. In these constellations, identifying the facts, accessing evidence and also accessing the accused are more difficult, if at all possible.

At the same time, however, some of the non-States parties affected or politically affiliated with them, and even some States parties sometimes exercise significant political pressure to get the ICC to discontinue such proceedings. This applies not least to the United States. It is true that the current US government under President Biden (fortunately) revoked the sanctions previously imposed by the Trump administration against the then ICC Prosecutor Fatou Bensouda and some of her staff in April 2021.³⁸ Nevertheless, also the new US administration expects that the new ICC Prosecutor Karim Khan will 'refocus' his efforts on cases and situations not involving third States nationals, although the

³⁰ For instance, during the comparable 22-year period, the International Criminal Tribunal for the former Yugoslavia managed to indict 161 people, 90 of whom were convicted and 19 acquitted, while 13 cases were referred to domestic courts, 2 were in retrial before the MICT and 37 proceedings were terminated or the indictments withdrawn. Case statistics are available online at <https://www.icty.org/node/9590> (visited 14 February 2022).

³¹ Judgment on the appeal against the decision on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan, *Situation in the Islamic Republic of Afghanistan* (ICC-02/17 OA4), Appeals Chamber, 5 March 2020.

³² Decision on the 'Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine', *Situation in the State of Palestine* (ICC-01/18), Pre-Trial Chamber I, 5 February 2021.

³³ Decision on the 'Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute', *Request under Regulation 46 (3) of the Regulations of the Court* (ICC-RoC46(3)-01/18), Pre-Trial Chamber I, 6 September 2018.

³⁴ Decision on the Prosecutor's request for authorization of an investigation, *Situation in Georgia*, (ICC-01/15) Pre-Trial Chamber I, 27 January 2016.

³⁵ 'Statement of the Prosecutor, Fatou Bensouda, on the conclusion of the preliminary examination in the situation in Ukraine', 11 December 2020, available online at <https://www.icc-cpi.int/Pages/item.aspx?name=201211-otp-statement-ukraine> (visited 14 February 2022).

³⁶ UNSC Res 1593 (31 March 2005), UN Doc S/RES/1593.

³⁷ UNSC Res 1970 (26 February 2011), UN Doc S/RES/1970.

³⁸ Exec. Order 14,022, 86 Fed. Reg. 17,895 (Apr. 1, 2021); Cf. A. J. Blinken, 'Ending Sanctions and Visa Restrictions against Personnel of the International Criminal Court – press statement', available online at <https://www.state.gov/ending-sanctions-and-visa-restrictions-against-personnel-of-the-international-criminal-court/> (visited 14 February 2022); For details, see K. Eichensehr, 'Biden Administration Rescinds Sanctions Against International Criminal Court Officials', *American Journal of International Law* 115 (2021), 729.

pressure exerted is now more subtle compared to the previous administration. For example, in its April 2021 press release on the ending of the sanctions against ICC staff, the new US Secretary of State Anthony Blinken has reconfirmed the United States' longstanding but incorrect objection to the Court's efforts to assert jurisdiction over personnel of non-States Parties such as the United States and Israel.³⁹ It is problematic that the United States is thereby implying that the ICC should apply the same policy of not exercising jurisdiction over non-party nationals vis-à-vis nationals of Myanmar in the context of the Rohingya crisis.

However, there is much to be said for assuming that the message behind this statement did not remain without effect on the new ICC Prosecutor. In his September 27, 2021 press release regarding his request to resume investigations concerning the Afghanistan situation, he indicated that he would focus his Office's investigations in Afghanistan on crimes allegedly committed by the Taliban and the Islamic State, while at the same time deprioritizing 'other aspects of this investigation'.⁴⁰ Background to this is the fact that, in the context of the situation in Afghanistan, the Prosecutor initially also looked at possible crimes within the jurisdiction of the ICC that might have been committed by US nationals in Afghanistan. Since the ICC Prosecutor thereby effectively held out the prospect of a suspension of investigations into possible crimes under international law committed by US citizens in connection with the situation in Afghanistan, this message has likely been taken by the US State Department as a confirmation of its own position. This reaction of the ICC Prosecutor to the attempts of the USA to exert political influence appears to be quite alarming. The acts for which the Taliban and the Islamic State are responsible undoubtedly constitute core crimes under international law worthy of investigation. However, it would not have been necessary to announce at the same time the at least de facto end to the investigation of such crimes committed by US nationals and members of the former Afghan armed forces, especially since the likelihood that alleged offenders will be caught is equally low under the given circumstances for all group of offenders.

But the ICC is also under pressure from some European States parties. European States are still perceived to be the most important political supporters of the ICC. However, it remains to be seen how they will react once the Prosecutor will focus on Israeli nationals as possible defendants. As a matter of fact, it is worth noting that the UK Prime Minister Boris Johnson published a statement in April 2021, after the Court's finding that it has jurisdiction over any war crimes committed on the territory of Palestine, including the crime of transferring its own civilian population into occupied territories,⁴¹ that the United Kingdom does not 'accept that the ICC has jurisdiction in this instance, given that Israel is not a party to the Statute of Rome'.⁴² This statement was issued even though the United Kingdom, with its ratification of the Rome Statute, has accepted such an extension of jurisdiction to third State nationals inherent in Art. 12 of the Statute. In February 2021, the then German Minister of Foreign Affairs Heiko Maas also explicitly objected to the finding of the Pre-Trial Chamber I of the ICC on the jurisdiction in these cases and took the position that Germany's 'legal

³⁹ *Ibid.*

⁴⁰ 'Statement of the Prosecutor of the International Criminal Court, Karim A. A. Khan QC, following the application for an expedited order under article 18(2) seeking authorization to resume investigations in the Situation in Afghanistan', 27 September 2021, available online at <https://www.icc-cpi.int/Pages/item.aspx?name=2021-09-27-otp-statement-afghanistan> (visited 14 February 2022).

⁴¹ *Supra* note 33.

⁴² B. Johnson, Letter to Stephen Crabb, 9 April 2021, available online at <https://static.jewishnews.co.uk/jewishndev/uploads/2021/04/Ey4lckOXMacGiwf.jpeg> (visited 14 February 2022).

view on jurisdiction of the International Criminal Court regarding alleged crimes committed in the Palestine territories remains unchanged' because 'the court has no jurisdiction'.⁴³ What is striking here is that in other parallel constellations, such as in the dispute between the Philippines and China regarding claims over maritime areas in the South China Sea⁴⁴ and in the dispute between Slovenia and Croatia regarding their sea border in the Gulf of Piran,⁴⁵ in which China⁴⁶ and Croatia⁴⁷ respectively disputed the jurisdiction of the court seized, the German government had correctly argued that an international court is able to make binding decision on its own jurisdiction within the framework of its *competence de la competence*.⁴⁸

Overall, these statements do not augur very well for the actual political support of the Court when it comes to future political sensitive cases. However, as one of the current judges at the ICC *Bertram Schmitt* once aptly put it, the Court was never meant to be a comfort zone,⁴⁹ which must have also been apparent to the contracting parties. Rather it was clear that the principle of territoriality underlying Article 12 Rome Statute, almost inevitably would lead to political conflicts with third States.

Given these twofold, both political and practical, hurdles with reference to third States, it remains to be seen whether the new Prosecutor, as he has already indicated, will change course by henceforth focusing exclusively, or at least primarily, on somewhat 'easier' and politically less sensitive cases. Such a focus in turn might then however incite allegations of the Court being one-sided and politically and/or region-wise biased in the selection of cases. At least so far, the Court itself seems to remain unimpressed by the challenges involved in cases against nationals of third States. This is confirmed by the 2020 decision of the Appeals Chamber regarding the situation in Afghanistan,⁵⁰ as

⁴³ H. Maas, Twitter post, 9 February 2021, available online at <https://twitter.com/heikomaas/status/1359215215913623564> (visited 15 February 2022).

⁴⁴ Award in the Matter of the South China Sea Arbitration, *The Republic of the Philippines v. The People's Republic of China* (PCA Case No 2013-19), An Arbitral Tribunal Constituted under Annex VII to the 1982 United Nations Convention on the Law of the Sea, 12 July 2016.

⁴⁵ Final Award in the Matter of an Arbitration under the Arbitration Agreement between the Government of the Republic of Croatia and the Government of the Republic of Slovenia, signed on 4 November 2009, *Arbitration Between the Republic of Croatia and the Republic of Slovenia* (PCA Case No. 2012-04), 29 June 2017.

⁴⁶ 'Position Paper of the Government of the People's Republic of China on the Matter of Jurisdiction in the South China Sea Arbitration Initiated by the Republic of the Philippines', 7 December 2014, available online at https://www.fmprc.gov.cn/nanhai/eng/snhwtlcwj_1/201606/t20160602_8527277.htm. (visited 15 February 2022).

⁴⁷ Partial Award in the Matter of an Arbitration under the Arbitration Agreement between the Government of the Republic of Croatia and the Government of the Republic of Slovenia, signed on 4 November 2009, *Arbitration Between the Republic of Croatia and the Republic of Slovenia* (PCA Case No. 2012-04), 30 June 2016. The Permanent Court of Arbitration 'In the matter of an arbitration under the arbitration agreement between the government of the republic of Croatia and the government of the Republic of Slovenia, signed on 4 November 2009 - Partial Award 30 June 2016', § 88 *et seq.*

⁴⁸ Cf. S. Talmon, 'Arbitration between Croatia and Slovenia', *German Practice in International Law*, 1 October 2017, available online at <https://gpil.jura.uni-bonn.de/2017/10/arbitration-croatia-slovenia/> (visited 15 February 2022); S. Talmon, 'Germany takes a more outspoken and active position on the South China Sea disputes', *German Practice in International Law*, 30 March 2021, available online at <https://gpil.jura.uni-bonn.de/2021/03/germany-takes-a-more-outspoken-and-active-position-on-the-south-china-sea-disputes/> (visited 15 February 2022).

⁴⁹ B. Schmitt, 'ICC Judge Schmitt Counsels Resilience to Preserve International Justice', *Just Security*, 13 February 2019, available online at <https://www.justsecurity.org/62577/icc-judge-schmitt-counsels-resilience-preserve-international-justice/> (visited 15 February 2022).

⁵⁰ *Supra* note 32.

well as the decision of the Pre-Trial Chamber I concerning the situation in Palestine,⁵¹ in each of which the Court correctly confirmed its jurisdiction.

Some challenges to International Criminal Law also emerged from the Court's jurisprudence. When studying the jurisprudence of the ICC, it is striking that on several occasions its chambers, including the Appeals Chamber, have attempted to 'progressively' further develop international criminal law, and by the same token also the rules of international humanitarian law and general international law, on which it is partly based. This development raises the question of whether international criminal law is beginning to detach itself too much from humanitarian and general international law, thereby these branches of international law thus eventually becoming more and more 'alienated' from one another. This would call into question the effectiveness of international law at large. Two cases, the Ntaganda case and the Al Bashir case, show particularly clearly how the ICC, when interpreting the war crimes provisions of the Rome Statute, which are rooted in and based on international humanitarian law and must therefore also be interpreted in the light and in accordance with it, breaks away from these very roots.

On the one hand, in June 2017 the ICC Appeals Chamber confirmed the decision of Trial Chamber VI on the jurisdiction of the ICC in the Ntaganda case from January of the same year, in which it had found that the Rome Statute does not exclude members of an armed group from protection against acts committed by members of the very same armed group.⁵² The ICC's chambers thus deviated without convincing justification from the opposite view that had previously prevailed in the field of international humanitarian law, which, in the light of its protective scope, assumed that only members of the respective enemy in an armed conflict were protected by the rules of international humanitarian law.⁵³ According to these decisions, as under general human rights law, the nationality of the victims or their affiliation with an enemy party in the armed conflict is apparently no longer relevant. In contrast, the Special Court for Sierra Leone, for example, had still correctly assumed that the limitation of the protective scope of international humanitarian law to enemy parties was a fundamental rule of this branch of law that should not be called into question.⁵⁴ With such an extended interpretation of war crimes to also include acts against one's own combatants, the ICC's interpretation goes beyond the original protective purpose of this norm, namely to ensure the protection of the members of the other party to the armed conflict. To put it another way, the ICC converts these rules originally specifically developed for armed conflicts into quasi-human rights norms, which also apply regardless of the nationality of the victims. At the same time, such an interpretation leads to the fact that violations of international humanitarian law, i.e. war crimes, almost gain the character of crimes against humanity, though without the other requirements of this

⁵¹ *Supra* note 33.

⁵² Judgment on the appeal of Mr Ntaganda against the 'Second decision on the Defence's challenge to the jurisdiction of the Court in respect of Counts 6 and 9', *Situation in the Democratic Republic of Congo in the Case of the Prosecutor v. Bosco Ntaganda* (ICC-01/04-02/06 OA5), The Appeals Chamber, 15 June 2017, § 2, 46 et seq; Second decision on the Defence's challenge to the jurisdiction of the Court in respect of Counts 6 and 9, *Situation in the Democratic Republic of Congo in the Case of the Prosecutor v. Bosco Ntaganda* (ICC-01/04-02/06), Trial Chamber VI, 4 January 2017, § 38 et seq.

⁵³ See *inter alia* A. Cassese, *Cassese's International Criminal Law*, 78; for a differing view on this, see *inter alia* C. Kenny/Y. McDermott, 'The Expanding Protection of Members of a Party's own Armed Forces under International Criminal Law', *International & Comparative Law Quarterly* 68 (2019), 943.

⁵⁴ Judgement, *Prosecutor v. Issa Sesay, Morris Kallon and Augustine Gbao* (SCSL-04-15-T), Trial Chamber I of the Special Court for Sierra Leone, 2 March 2009, § 1453.

crime, such as in particular the existence of a widespread or systematic attack against a civilian population, having to be met at the same time.

Also, in the Ntaganda case, the ICC Appeals Chamber gave the term 'attack', as used in Art. 8 para. 2 lit e, iv) Rome Statute, a significantly broader meaning divorced from international humanitarian law, although the drafters of the Rome Statute obviously wanted to use the term 'attack' to refer to its meaning in international humanitarian law, where it had a long tradition and has been developed in detail.⁵⁵ As is well-known international humanitarian law has traditionally distinguished between the protection of individuals from the conduct of hostilities, known as Hague law, and the protection of certain groups of people who are in the hands of a belligerent party, known as Geneva law. So far, this has meant that war crimes in the context of 'attacks' have, in accordance with the relevant provisions of international humanitarian law, required the attack to take place as part of conduct of hostilities as a mandatory requirement in addition to the general requirement for all types of war crimes, that the relevant act needs be related to the armed conflict.⁵⁶ The ICC has now detached itself from this former requirement and has assumed that the looting of a hospital after the end of current hostilities could also constitute a prohibited 'attack' on a civilian target.⁵⁷ This broader interpretation of the term prohibited 'attack', divorced from international humanitarian law, is of far-reaching importance, since the term is used on eleven occasions in Art. 8 Rome Statute alone.⁵⁸ Again, the Appeals Chamber is thereby breaking away from the dogmatic roots of the war crimes provisions of the Rome Statute to extend the scope of criminal liability.⁵⁹

All and all, these and other recent decisions of the ICC⁶⁰ show an ever-increasing divergence between international criminal law on the one hand and international humanitarian law on the other, which on the long term could lead to an increasing further, unfortunate since conflict-prone, disentanglement of these two branches of international law. Apart from that, this would also involve the danger that the two epistemic communities, namely international criminal lawyers on the one hand and those applying international humanitarian law as such, e.g. as legal advisers to armed

⁵⁵ Regarding the background of that term, see *inter alia* M. Bothe/W. Solf, 'Art. 49' in M. Bothe/K. J. Partsch/W. Solf, *New Rules for Victims of Armed Conflicts: Commentary on the two 1977 Additional Protocols to the Geneva Conventions of 1949*, 329 *et seq.*

⁵⁶ See *inter alia*, C. Pilloud/J. De Preux 'Art. 124' in C. Pilloud/ Y. Sandoz/C. Swinarski/B. Zimmermann (ed.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, marginal note 1880.

⁵⁷ Judgment on the appeals of Mr Bosco Ntaganda and the Prosecutor against the decision of Trial Chamber VI of 8 July 2019 entitled 'Judgment', *Situation in the Democratic Republic of Congo in the Case of the Prosecutor v. Bosco Ntaganda* (ICC-01/04-02/06 A A2), The Appeals Chamber, 30 March 2021, § 1164 *et seq.*

⁵⁸ Art. 8 (2) lit. b i), ii), iii), iv), v), ix), xxiv), lit. e i), ii), iii), iv) Rome Statute.

⁵⁹ For a critical assessment of the judgement, see A. G. Jain, 'The Ntaganda appeal judgement and the meaning of 'attack' in conduct of hostilities war crimes', *EJIL: Talk! Blog of the European Journal of International Law*, 2 April 2021, available online at <https://www.ejiltalk.org/the-ntaganda-appeal-judgment-and-the-meaning-of-attack-in-conduct-of-hostilities-war-crimes/> (visited 15 February 2022); for a more approving assessment of the judgement, see P. Clancy, 'Ntaganda and the 'Conduct of Hostilities Crimes'', *EJIL: Talk! Blog of the European Journal of International Law*, 20 August 2021, available online at <https://www.ejiltalk.org/ntaganda-and-the-conduct-of-hostilities-crimes/>.

⁶⁰ For other decisions of the ICC in this regard, see F. G. Pinto, 'The International Committee of the Red Cross and the International Criminal Court: Turning international humanitarian law into a two-headed snake?' *International Review of the Red Cross* 102 (2020), 745 *et seq.*; more generally in this regard, see V. Nerlich, 'The International Criminal Court and Substantive Criminal Law: Progressive Development or Cautious Reluctance?', in G. Werle/A. Zimmermann (ed.), *The International Court in Turbulent Times*, 145 *et seq.*; regarding earlier developments, see A. Zimmermann, 'Das Völkerstrafgesetzbuch im Spiegel des Völkerrechts und seiner Anwendungspraxis' in F. Jeßberger/ J. Geneuss (ed.), *Zehn Jahre Völkerstrafgesetzbuch – Bilanz und Perspektiven*, 231 *et seq.*

forces or the ICRC, on the other would also diverge even further from each other than they are already doing.

But the ICC is also setting a new tone in general international law, more specifically with regard to the immunity of heads of State. For example, in its 2019 decision on Jordan's possible extradition obligation regarding the long-standing former Sudanese President Al-Bashir, who was still in office at the time of the possible extradition obligation, and against whom an arrest warrant from the ICC had been issued for genocide, crimes against humanity and war crimes in the context of the Darfur conflict, the Court took the opportunity to not only address the question whether in case of a Security Council referral according to Art. 13 lit. b) Rome Statute, the immunity of a current head of State of a non-State party is set aside, to which question the Appeals Chamber, and rightly so, replied in the affirmative.⁶¹ Rather, the Appeals Chamber also addressed the more general, but also more controversial and difficult, question of whether under customary international law a current head of State of a non-State party enjoys immunity before a domestic court when such court is asked to take this head of State into custody to surrender him or her to the ICC what the court ultimately denied.⁶²

In fact, in this case, however, there was no need, for the Appeals Chamber to decide this issue given that, as mentioned, it had already previously found that the UN Security Council resolution referring the Al Bashir case to the ICC had set aside President Al-Bashir's immunity anyhow. Thus, as a matter of judicial policy, especially in the light of the current challenges for the ICC, it might have been more wise to leave the second question aside and unanswered for the time being, and to wait for another occasion where this question would indeed arise - namely where the ICC's jurisdiction is not based on a referral of the UN Security Council, but on the fact that the head of state or government or minister of foreign affairs of a non-State party is accused of having committed crimes within the territory of a party, which falls within the jurisdiction of the ICC.

The recent history of the ICC shows that volatile domestic political developments in States parties or States that are otherwise obliged to cooperate with the ICC, especially by an UN Security resolution, have a decisive influence on the functioning of the ICC. In addition to the above-mentioned domestically motivated revocations of the declarations of withdrawal from the Rome Statute by Gambia and South Africa,⁶³ also a change in the domestic situation in Sudan seems to have been decisive progress for the work of the ICC. As recently as August 2021, the Sudanese interim government, which had come to power in the wake of the protests in 2019, announced its intention to surrender Al-Bashir to the Court.⁶⁴ In addition, the transitional government in power at the time stated that Sudan wanted to accede to the Rome Statute.⁶⁵ The developments of the last few months

⁶¹ Judgment on the appeals of M the Jordan Referral re Al-Bashir Appeal, *Situation in Darfur, Sudan in the Case of the Prosecutor v. Omar Hassan Ahmad Al-Bashir* (ICC-02/05-01/09 OA2), The Appeals Chamber, 6 May 2019, § 133 *et seq.*

⁶² *Ibid* para. 100 *et seq.*

⁶³ *Supra* note 9 and note 10.

⁶⁴ Cf. K. Elsadig *et al.*, 'Sudan Cabinet: 'Unanimous decision' to hand Darfur war crimes accused to ICC', *Dabanga*, 27 June 2022, available online at <https://www.dabangasudan.org/en/all-news/article/sudan-cabinet-unanimous-decision-to-hand-darfur-war-crimes-accused-to-icc> (visited 15 February 2022); see also 'Press Release – The Prosecutor of the International Criminal Court, Mr Karim A. A. Khan QC, concludes his first visit to Sudan with the signing of a new Memorandum of Understanding ensuring greater cooperation', 17 August 2021, available online at <https://www.icc-cpi.int/Pages/item.aspx?name=PR1607> (visited 15 February 2022).

⁶⁵ Cf. K. Elsadig *et al.*, 'Sudan Cabinet unanimous on bill to join Rome Statute of ICC', *Dabanga*, 3 August 2021, available online at <https://www.dabangasudan.org/en/all-news/article/sudan-cabinet-unanimous-on-bill-to-join-rome-statute-of-icc> (visited 15 February 2022).

show, however, that at least at present there is little chance of these earlier announcements being implemented. In addition, the Security Council, on whose referral, as mentioned, the ICC's jurisdiction in Sudan rests, has not taken any steps whatsoever since that referral to bring Sudan into compliance with its UN Charter obligation to cooperate with the ICC. In this context, it may be helpful to recall that in Serbia too it was a fundamental political change that led, albeit after some time, to the extradition of former President Slobodan Milošević and, even later, to the extradition of Radovan Karadžić and Ratko Mladić to the United Nations Yugoslavia Tribunal.⁶⁶

2. Domestic International Criminal Law, Quo Vadis?

Domestic international criminal law, too, has played a major role in the further development of international criminal law in recent years. Domestic international criminal law became more relevant notably when a significant number of States parties of the Rome Statute, although not all, have, when they respectively acceded to the Statute, *mutatis mutandis* replicated in their domestic criminal law the provisions of the Rome Statute.⁶⁷

There are several reasons for such a replication. On the one hand, the priority of the exercise of jurisdiction by domestic criminal courts vis-à-vis that of the ICC, i.e. the so-called principle of complementarity, is explicitly laid down in the Rome Statute. By introducing domestic international criminal law, a State can thus ensure that it can itself exercise criminal jurisdiction over its own nationals once they allegedly commit crimes under international law.

In addition, some States have enacted such domestic statutes to also fulfil other pre-existing international obligations. An example for such an obligation is the obligation of States parties to the four Geneva Conventions of 1949 relating to the protection of victims of international armed conflicts to punish persons that have committed or ordered to commit grave breaches of the Conventions and its Additional Protocol I, such as torture.⁶⁸

However, not infrequently States have gone beyond these existing obligations and the implementation of the principle of complementarity when transposing international criminal law into domestic law. Many States have, at least to a certain extent, established universal jurisdiction for their courts when it comes to genocide, crimes against humanity and war crimes, even when committed in non-international armed conflicts, meaning that the exercise of jurisdiction is independent of any specific link to the State exercising jurisdiction.⁶⁹ As a matter of fact it is safe to

⁶⁶ Cf. A. Rusbridger *et al.*, 'Milosevic extradited', *The Guardian*, 29 June 2001, available online at <https://www.theguardian.com/world/2001/jun/29/warcrimes.guardianleaders> (visited 15 February 2022).

⁶⁷ In 2012, 166 States have defined one or more of the four crimes under international law for universal jurisdiction over one or more crimes under international law (although, given the number, not all of those States did this due to their accession to the Rome Statute) according to Amnesty International, 'Universal Jurisdiction – A preliminary Survey of Legislation around the World – 2012 Update', 9 October 2012, available online at <https://www.amnesty.org/en/documents/ior53/019/2012/en/> (visited 15 February 2022), 1 *et seq.*, 23 *et seq.*; for more details, see also J. K. Kleffner, 'Complementarity in the Rome Statute and National Criminal Jurisdictions', 31 *et seq.*

⁶⁸ Art. 49 and 50 Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva, 12 August 1949; Art. 50 and 51 Convention (II) for the Amelioration of the Condition of Wounded Sick and Shipwrecked Members of Armed Forces at Sea, Geneva, 12 August 1949; Art. 129 and 130 Convention (III) relative to the Treatment of Prisoners of War, Geneva, 12 August 1949; Art. 146 and 147 Convention (IV) relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949.

⁶⁹ In 2012, 147 States have provided for universal jurisdiction over one or more crimes under international law, according to Amnesty International, 'Universal Jurisdiction – A preliminary Survey of Legislation around the

assume that the exercise of such universal jurisdiction by domestic courts for crimes under international law committed in both international and non-international armed conflicts, is permissible under international law, at least from today's perspective.⁷⁰

In addition to the work of the ICC, both, the implementation of universal jurisdiction in domestic legal systems as well as convictions of those accused of crimes under international law can make an important contribution to the effective enforcement of international criminal law. After all, according to Art. 12 Rome Statute, the jurisdiction of the ICC is already as a matter of principle limited to crimes committed on the territory of States parties or by their nationals. Furthermore, the Court is, as a matter of practical limitations, *de facto* not in a position to address all crimes that come within its jurisdiction *ratione loci* and *ratione personae*.

At the same time it should also be noted that at least so far such domestic proceedings relating to crimes under international law have mainly, if not almost exclusively, been undertaken by Western States, and here again mainly by European States.⁷¹ Those States should therefore be careful to avoid any impression that such domestic criminal proceedings are aiming exclusively at potential defendants from States, who are not politically close to the respective forum State, or *vice versa*, that defendants from States that are politically affiliated with the forum State are not subject to prosecution. Hence, there is much to be said for structuring the national judiciary, at least in the field of international criminal law, in such a way that the triggering of an investigation is not subject to a requirement of governmental authorization and thus possibly depending on political considerations, but is to be decided, depending on the judicial system of the forum State, by either an independent prosecutor or by a *juge d'instruction*.

Also, the substance of international criminal law can be effectively further developed through domestic implementation of the Rome Statute since the States can deviate from the provisions of the Rome Statute when implementing substantive legal norms. The wording of the Rome Statute is mostly based on compromises that were made to reach the widest possible consensus among the negotiation parties during the negotiations that lead to the adoption of the Rome Statute.⁷² The national legislators, who are freed from such constraints, can, if they wish, formulate broader provisions and thus better reflect the current status of customary international law or advance its further development. That way, domestic statutes may be also closer to the current state of customary international law as compared to the Rome Statute which for the just mentioned political reasons has remained below the threshold which may safely be considered to form part of customary international law. It is therefore sometimes the case, that the domestic implementation of international criminal law norms anticipates possible future amendments of the Rome Statute. Two examples from the German Code of Crimes Against International Law (Völkerstrafgesetzbuch) might provide examples in that regard.

While the Rome Statute initially only classified the use of certain prohibited weapons such as poison and dum-dum bullets to constitute a war crime in international armed conflicts as per Art. 8 para. 2

World – 2012 Update', available online at <https://www.amnesty.org/en/documents/ior53/019/2012/en/> (visited 15 February 2022), 2, 23 *et seq.*

⁷⁰ See *inter alia* G. Werle/F. Jeßberger, *Principles of International Criminal Law*, marginal note 218 *et seq.*

⁷¹ For an overview as of 2011, see M. Langer 'The Diplomacy of Universal Jurisdiction: The Political Branches and the Transnational Prosecution of International Crimes', *American Journal of International Law* 105 (2011), 1, at 44.

⁷² See F. Benedetti/K. Bonneau/J. L. Washburn, *Negotiating the International Criminal Court*.

lit b xvii-xix) Rome Statute, the German Code of Crimes Against International Law had from the very outset (for almost twenty years) already made it a crime under German domestic criminal law to use such weapons in both international, *as well as in non-international armed conflicts*.⁷³ It was however only in 2010 that the Rome Statute by way of an amendment provided that the use of such weapons provision in non-international armed conflicts did amount to a war crime as per the newly introduced Art. 8 para. 2 lit e).⁷⁴ *Mutatis mutandis*, the same holds true with regard to the crime of starvation of civilians as a method of warfare, which is punishable under Section 11 para. 1 No. 5 of the German Code of Crimes Against International Law regardless of the character, international or non-international, of the underlying armed conflict, while as far as the Rome Statute is concerned, a parallel norm for non-international armed conflicts was only adopted by December 2019 as per Article 8 para. 2 lit e xix) Rome Statute.⁷⁵

Domestic extensions of the scope of norms of international criminal law, such as the two examples mentioned, can therefore pave the way for similar extensions at the international level. In this way, further developments in international criminal law reinforce each other at both levels of the legal system. Vice versa, if an already existing norm of international criminal law is replicated at the domestic level, this also leads to a further consolidation of the validity of these norms under customary international law.

In addition, the implementation of international criminal law at domestic level and any decisions by domestic courts in this area can provide new impetus to classic debates about the scope of customary international law as far as international criminal law is concerned. By way of example, the debate on immunity *ratione personae* (personal immunity) and immunity *ratione materiae* (functional immunity) in proceedings for violations of international criminal law will be discussed in more detail here.⁷⁶

For international criminal courts such as the ICC, the legal situation has been largely clarified by the above-mentioned judgement of the ICC Appeals Chamber in the Al Bashir case.⁷⁷ With regard to domestic criminal proceedings initiated for crimes under international law, that may have been committed, the issue of the immunity *ratione personae* of high-ranking officials such as heads of State and government or foreign ministers, as well as the issue of functional immunity (immunity *ratione materiae*) of State officials acting on behalf of their respective States, is however less clear.

As far as immunity *ratione personae* is concerned, it is probably safe to state that the 2002 judgement by the International Court of Justice in the *Arrest Warrant of 11 April 2000 [Democratic Republic of the Congo v. Belgium]* case, according to which under customary international law the so-called 'big three', i.e. heads of State, heads of government and minister of foreign affairs, are not subject to the criminal jurisdiction of foreign States as long as they hold on to their positions, still reflects the current state of customary international law.⁷⁸ This is also confirmed by the more recent work of the

⁷³ Section 12 para 1 of the German Code of Crimes against International Law.

⁷⁴ Amendment to the Rome Statute of the International Criminal Court, Kampala, 10 June 2010, Adoption of Amendment to Article 8, C.N.533.2010.TREATIES-6.

⁷⁵ Amendment to Article 8 of the Rome Statute of the International Criminal Court (Intentionally using starvation of civilians), The Hague, 6 December 2019, Adoption of Amendment to Article 8, C.N.394.2020.TREATIES-XVIII.10.g.

⁷⁶ For the difference between both forms, see *inter alia*: *supra* note 71, marginal note 724 *et seq.*

⁷⁷ *supra* note 62, § 46 *et seq.*

⁷⁸ ICJ, Case concerning the arrest warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment of 14 February 2002, § 51 *et seq.*

International Law Commission (ILC) on the immunity of State officials from foreign criminal jurisdiction.⁷⁹ Article 3 of the ILC's 2013 draft articles on the matter also provides that 'Heads of State, Heads of Government and Ministers for Foreign Affairs enjoy immunity *ratione personae* from the exercise of foreign criminal jurisdiction'.⁸⁰ Unlike Article 7 of the draft articles, which regulates exceptions to immunity *ratione personae*, this norm was largely uncontroversial in the ILC⁸¹ and was supported by a significant number of States in the 6th Committee of the General Assembly.⁸²

With regard to *lower-ranking* State officials, where obviously only the issue of functional immunity arises, the situation is less clear-cut under customary international law. In that regard, in addition to the just-mentioned work of the ILC, a recent judgment by the German Supreme Court comes into play. In a case involving a former Afghan officer who was tried in Germany for committing war crimes during the non-international armed conflict in Afghanistan, the German Supreme Court in early 2021 found that State officials that hold subordinate positions do not enjoy functional immunity under customary international law in foreign criminal proceedings when having allegedly committed war crimes.⁸³ Since the Court also held that the issue whether such a rule of customary international law curtailing immunity does exist or not is so 'clear-cut' and obvious, it also held that it was not obliged to submit the question to the German Constitutional Court⁸⁴ given that the Court would have been obliged to submit such a submission in case of doubts about the existence of such a rule of customary international law under Art. 100 para. 2 German Basic Law. In reaching its conclusion, the Court notably attached considerable weight to the Statute of the International Military Tribunal (London Charter), the Nuremberg principles developed by the ILC on behalf of the UN General Assembly following the Nuremberg trials, as well as the ICTY's jurisprudence.⁸⁵ The result reached by the Court, i.e. that low-ranking officials cannot claim immunity when it comes to acts of war crimes even before domestic courts and tribunals, is convincing.

However, it is questionable whether the solution found was actually that obvious so that the Court would not have had to submit the question to the Constitutional Court under Art. 100 para. 2 German Basic Law. According to the case law of the Constitutional Court, the German Supreme Court must do so, as the Supreme Court itself explained in the decision, when the deciding court does not have doubts itself, but, when examining the question, it encounters serious doubts of 'third parties' and additionally that the deciding court's result deviates from the opinion of a constitutional body or from the decisions of high German, foreign or international courts or from the teachings of

⁷⁹ The ILC's work in this field is available online at https://legal.un.org/ilc/guide/4_2.shtml (visited 15 February).

⁸⁰ International Law Commission, Immunity of State officials from foreign criminal jurisdiction Text of draft articles 1, 3 and 4 provisionally adopted by the Drafting Committee at the sixty-fifth session of the International Law Commission (2013), UN Doc A/CN.4/L.814.

⁸¹ Cf. International Law Commission, Report of the International Law Commission, Sixty-fifth session (6 May – 7 June and 8 July – 9 August 2013), UN Doc A/68/10, 43 *et seq.*

⁸² Statements of the States at the sixty-eight session of the Sixth Committee, UN General Assembly (2013) available online at <https://www.un.org/en/ga/sixth/68/ILC.shtml> (visited 15 February 2022).

⁸³ German Supreme Court (Bundesgerichtshof), Judgement of 28 January 2021, 3 StR 564/19, § 22 *et seq.*

⁸⁴ *Ibid* § 60.

⁸⁵ *Ibid* § 24 *et seq.*

recognized authors of international law.⁸⁶ Such contrary views would however have been easy to find, at least among international law scholars.⁸⁷

In addition, the methodological approach chosen by the Court to determine the current state of customary international law warrants some remarks. The Supreme Court refers *inter alia* to the case law of the ICTY and the ICC.⁸⁸ However, transposing the practice involving *international* criminal courts and tribunals *tel quel* to domestic courts disregards the structural differences that exist between the two levels. This is particularly true where the respective tribunal, such as the ICTY or the ICC in case of a Security Council referral, is exercising delegated Chapter VII powers⁸⁹ because in that case, the UN Security Council could have set aside an otherwise existing immunity anyhow. This is confirmed by the already mentioned ICJ's 2002 judgement in the *Arrest Warrant* case where the Court was very strictly distinguishing between proceedings before domestic courts and those before international courts.⁹⁰

Besides, when looking for evidence of an exception under customary international law to the functional immunity of State officials, the Court referred to the judgements of the military courts of the four Allied occupying powers in their respective zones of occupation against German war criminals after World War II.⁹¹ However, after the unconditional surrender of Germany by virtue of the Berlin Declaration of June 5, 1945, the Allied powers, had 'assume[d] supreme authority with respect to Germany, including all the powers possessed by the German Government'.⁹² The Allied powers thus acted on behalf of the German State as a whole, even when exercising criminal jurisdiction over German nationals, so that the question of functional immunity in those cases did not play a role in from the outset.

Otherwise, apart from referring to the above-mentioned international sources, the German Supreme Court cited as further evidence for its result the more recent practice of German, Israeli, Dutch, Spanish, Italian, Swiss, French and Belgian court decisions denying functional immunity in proceedings for war crimes, crimes against humanity and genocide.⁹³ The lack of geographical diversity in this evidence, however, puts into question the required *generalized* and universal character of the State practice, which is needed to bring about a new rule of customary international law denying functional immunity.

Hence, as pointed out by Sean D. Murphy, one of the members of the ILC who, during the debates on the customary international law position on functional immunity, advocated in favor of upholding functional immunity even in the case of allegations of war crimes and crimes against humanity, one

⁸⁶ *Ibid* § 54; The order, the German Supreme Court is referring to, is German Constitutional Court (Bundesverfassungsgericht), Order of 12 October 2011, 2 BvR 2984/09, § 27.

⁸⁷ Cf. *inter alia* H. Fox/P. Webb, *The Law of State Immunity*, 570 et seq; S. Murphy, 'Immunity *Ratione Materiae* of State Officials from Foreign Criminal Jurisdiction: Where is the State Practice in Support of Exceptions?' *American Journal of International Law Unbound* 112 (2018), 4.

⁸⁸ *Supra* note 84, § 25.

⁸⁹ Cf. UNSC Res 827 (25 May 1993), UN Doc S/RES/827.

⁹⁰ *Supra* note 79, § 58 and 61.

⁹¹ *Supra* note 84, § 20.

⁹² Declaration regarding the defeat of Germany and the assumption of supreme authority with respect to Germany by the Governments of the United States of America, the Union of Soviet Socialist Republics, the United Kingdom and the Provisional Government of the French Republic, 5 June 1945, available online at <https://avalon.law.yale.edu/wwii/ger01.asp> (visited 15 February 2022).

⁹³ *Supra* note 84, § 26 et seq.

can at least ask the question of where State practice in support of exceptions to immunity *ratione materiae* of State officials from foreign criminal jurisdiction can actually be found.⁹⁴

Moreover, it is also worth noting that the German Supreme Court, somewhat akin to the approach chosen by the ICC's Appeals Chamber beforehand in the Al Bashir case,⁹⁵ also found that the debate within the ILC on whether trials for crimes under international law are subject to an exception to functional immunity under customary international law, could not have set aside a pre-existing rule of customary international law providing for an exception to functional immunity in these cases.⁹⁶ However, the Court should have, and also could have, examined whether positively a new rule of customary international law has developed as a result of the ILC's activity with this question, or whether as the ILC's Special Rapporteur had put it, there exists at least a 'clear trend' towards recognizing such exception as a matter of customary international law.⁹⁷

It remains to be seen whether other States, when implementing the Rome Statute at domestic level, will in the future expressively and unequivocally confirm that they share the view of the German Supreme Court on the customary international law exception to functional immunity in cases of crimes under international law. In particular, it would be helpful for demonstrating a general practice under international law if States outside the European context were to take a position on the issue of exceptions to functional immunity. For the sake of completeness, it has to be underlined that the sensitive issue of any such exception to the functional immunity from foreign criminal jurisdiction has to be clearly distinguished from matters of State immunity in civil proceedings.⁹⁸ This form of immunity concerns a fundamentally different issue and, since it plays an essential role for peaceful interstate relations, cannot be restricted.

3. Concluding Remarks

Overall, these developments, as just outlined, may one lead to apply and paraphrase the by now well-known and famous paradigm by the German legal scholar and constitutional judge *Ernst-Wolfgang Böckenförde* that the ICC, too, lives by basic prerequisites which it cannot guarantee itself, since it depends on the support of a large number of States parties that have an interest in a rules-based international legal order to carry out its task effectively. Though, compared to the years in which the Rome Statute was negotiated, not only times have changed, as *Bob Dylan* once put it. Rather, there are increasing indications that the relative importance of the various States within the international community is also changing. In particular, the political weight of those States favoring and supporting a rules-based legal order, within which international criminal law plays an important part, might be perceived as diminishing.

Hence, it seems as if the honeymoon in the relationship between the international community of States and international criminal law might be over. This means that the ICC finds itself increasingly in turbulent waters. The same holds true for the relationship between international criminal law and

⁹⁴ S. Murphy, *supra* note 88.

⁹⁵ *Supra* note 62, § 116.

⁹⁶ *Supra* note 84, § 35 *et seq.*

⁹⁷ International Law Commission, Fifth report on immunity of State officials from foreign criminal jurisdiction by Concepcion Escobar Hernandez, Special reporter (2016), UN Doc A/CN.4/701, § 179 and 188.

⁹⁸ Concerning the latter, see *inter alia* P.-T. Stoll, 'State Immunity' in The Max Planck Encyclopedia of Public International Law, available online at <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1106> (visited 15 February 2022).

general international law. One cannot but hope however that just like in a long-lasting marriage, while the vows of love might eventually be a thing of the past, the aging couples will not divorce but will get along, even if one from time to time one might be surprised by the other's approach and understanding of how to regulate international relations. Against this background, it seems appropriate to adhere to a strict exercise of its jurisdiction not guided by political influence, especially when dealing with third States nationals subject to its jurisdiction. On the other hand, however, an attempt should also be made to interpret and apply the provisions of the Rome Statute within the framework of other existing rules of international law, whether those of international humanitarian law or those of general international law to avoid friction between international criminal law and the ICC on the one hand and the surrounding international legal order on the other.

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The Kolleg-Forschungsgruppe “The International Rule of Law – Rise or Decline?” examines the role of international law in a changing global order. We assume that a systemically relevant crisis of international law of unusual proportions is currently taking place which requires a reassessment of the state and the role of the international legal order. Do the challenges which have arisen in recent years lead to a new type of international law? Do we witness the return of a ‘classical’ type of international law in which States have more political leeway? Or are we simply observing a slump in the development of an international rule of law based on a universal understanding of values? What role can, and should, international law play in the future?

The Research Group brings together international lawyers and political scientists from three institutions in the Berlin-Brandenburg region: Freie Universität Berlin, Humboldt-Universität zu Berlin and Universität Potsdam. An important pillar of the Research Group consists of the fellow programme for international researchers who visit the Research Group for periods up to two years. Individual research projects pursued benefit from dense interdisciplinary exchanges among senior scholars, practitioners, postdoctoral fellows and doctoral students from diverse academic backgrounds.

