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Missed Communications and Miscommunications: International Courts, the Fragmentation of International Law and Judicial Dialogue

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Abstract

The increase in the number of international judicial bodies has led to different international courts deciding similar issues of international law. There is the real possibility that these international judicial bodies, not subject to the supervision of a common appeal court, may rule differently on similar questions before them. While this fragmentation of decision-making may undermine the coherency and certainty of the international legal system, it may in some cases be in the interests of the international community, including where divergences in decision-making are the result of specialized regimes or where there is progressive development of the law. So that fragmentation is limited to what is beneficial and necessary for the international community, it is essential that international judicial bodies are in open and structured dialogue with one another. This analysis considers three scenarios of overlapping decision-making, over the course of the lives of two sets of international courts: the International Court of Justice, and the international criminal courts and tribunals. It also considers the recent decision of the International Criminal Court with respect to Palestine and the Court's refusal to weigh in on questions of general international law, in apparent departure from the previous three examples. It is submitted that these examples demonstrate that insufficient attention is given by these international judicial bodies to the issue of judicial dialogue and its importance. This may undermine the legitimacy of the system and introduce the risks of fragmentation without its benefits.

KEY WORDS: fragmentation, international law, international court, international criminal law, judicial dialogue, customary international law

A. Introduction

Unlike the domestic or national sphere of law, the international sphere has no single legislative body to pronounce international law and organize jurisdiction of the many judicial bodies.[1] There is no hierarchy of international laws, with the exception of the supremacy of obligations under the *United Nations Charter*.[2] The international judicial bodies that purport to interpret international law are decentralized, not bound by precedent, and not under the supervision of a court of appeal.[3] They have complex overlapping domains of influence.[4] They can arrive at their own interpretations of international law, which may be inconsistent with those of other organs that are concerned with similar issues in these overlapping domains.[5]

Such features of the international legal system may cause fragmentation in the application of the law: two or more international judicial bodies dealing with the same legal or factual issue, and arriving at contradictory decisions.[6] A related area of possible fragmentation is institutional: the competence of different judicial institutions interpreting and applying international law, as well as their "hierarchical relations" with one another.[7] Both of these types of fragmentation will be considered. This analysis will not consider what is sometimes referred to as "substantive fragmentation", which is the "splitting up of the law into

1 B. Simma, 'Universality of International Law from the Perspective of a Practitioner', *European Journal of International Law* (2009) 265, 270.

2 S. Linton & F.K. Tiba, 'The International Judge in an Age of Multiple International Courts and Tribunals', 9(2) *Chicago Journal of International Law* (2009) 407, 416.

3 P. Webb, *International Judicial Integration and Fragmentation* (2015), 195 [Webb, 'International Judicial Integration'].

4 F. Pocar, 'The International Proliferation of Criminal Jurisdictions Revisited: Uniting or Fragmenting International Law?', in H.P. Hestermeyer *et al.* (eds), *Coexistence, Cooperation and Solidarity* (2011), 1705.

5 E. Kasotti, 'Fragmentation and Inter-Judicial Dialogue: The CJEU and the ICJ at the Interface', 8(2) *European Journal of Legal Studies* (2015) 21, 34.

6 Webb, *International Judicial Integration*, *supra* note 3, 6. Webb called this type of fragmentation "decisional fragmentation". This was excluded from consideration in the International Law Commission's famous 2006 report on fragmentation. See *Report of the Study Group of the International Law Commission to the Fifty-Eighth Session, Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law*, UN Doc. A/CN.4/L.682, 13 April 2006, 30–1, paras 47–8 [ILC, 'Report of the Study Group'].

7 *Report of the Study Group*, *supra* note 6, 13, para. 13.

highly specialized 'boxes' that claim relative autonomy from each other",[8] and the differences between them.

This analysis begins in Section B by considering the interests of the international community in international judicial bodies minimizing fragmentation in decision-making. It is posited that fragmentation is a development that is value-free, or neither inherently good nor bad.[9] Broadly speaking, the international community requires that decision-making be coherent. However, it also requires that international judicial bodies resolve disputes according to the specialized regimes giving them jurisdiction. Relatedly, what is termed 'fragmentation' may in fact be a departure in decision-making that contributes to a progressive development of the law according to the changing needs of the international community. Balancing these interests requires dialogue between the international judicial bodies.

In sections C, D, E and F, the analysis considers whether these sometimes conflicting interests are upheld by the International Court of Justice (ICJ) and the international criminal courts and tribunals – primarily, the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Court (ICC). The ICJ adjudicates disputes between States, while the criminal courts adjudicate prosecutions of individuals for certain international crimes. Although their subject matter jurisdictions never overlap, they may interpret the same rules.[10] They may also consider similar factual scenarios. For example, both courts have been seized with allegations of genocide perpetrated against Rohingya Muslims at the Myanmar-Bangladesh border. These examples of international courts have been chosen because they embody conflicting goals of the international legal system. In the case of international criminal courts and tribunals, this is to ensure that perpetrators of international crimes are made accountable in the event that States Parties do not or cannot do this themselves, while in the case of the ICJ, it is to settle legal disputes between States. Nevertheless, it will be shown that international criminal courts and tribunals must frequently consider jurisdictional and substantive issues concerning States in their assessment of individual criminal liability, while the ICJ must consider

8 *Ibid*.

9 F. Zelli & H. van Asselt, 'The Institutional Fragmentation of Global Environmental Governance: Causes, Consequences, and Responses', 13(3) *Global Environmental Politics* (2013) 1, 3.

10 R. van Alebeek, 'The Judicial Dialogue Between the ICJ and International Criminal Courts on the Question of Immunity', in L. van den Herik & C. Stahn (eds), *The Diversification and Fragmentation of International Criminal Law* (2012) 93, 93 [Van Alebeek, 'The Judicial Dialogue'].

the behavior of individuals in order for it to determine or advise on the legal entitlements of States.

Specifically, four examples of institutional overlap between the ICJ and the international criminal courts and tribunals will be considered. Section C considers the law of immunities and its application in circumstances where heads of State and State officials are accused of 'core crimes' of crimes against humanity, war crimes, or genocide. Section D examines the methods by which the ICJ and the international criminal courts ascertain whether internal conflicts involving proxy actors are international. Section E explores allegations of genocide being considered by the ICJ and the ICTY in respect of similar factual scenarios, being the conflicts in Bosnia and Herzegovina and in Croatia in the 1990s. Section F examines the recent decision by the ICC Pre-Trial Chamber with respect to the ICC's territorial jurisdiction in Palestine, its refusal to assess a question of general international law, and its brief reference to the ICJ's advisory opinion with respect to the wall constructed by Israel in the Occupied Palestinian Territory.

These decisions will be described and analyzed. What is at issue is not so much the correctness of the relevant decision. Rather, it is whether the decision differs from that of another judicial body and how well the judicial body manages its overlaps with another judicial body in making its decisions, in light of the interests of the international community in coherency of decision-making. This article will also consider whether the relevant decision examines the role of the judicial body itself in interpreting the international law applicable to its particular treaty.

It is submitted that the first two examples are cases of fragmentation of legal principles, where the ICJ on the one hand and international criminal courts and tribunals on the other have each adopted and then reaffirmed interpretations of the law that conflict with each other, and exhibited differing views of their respective institutional purposes. The third example is highly instructive, but for different reasons. It is submitted that the ICJ was overly deferential to the findings of the ICTY and inadequately contextualized them, likely because the case at hand concerned facts and issues of international criminal law, perceived to be the expertise of the ICTY. It is a counter-example, and it is not an isolated one, given that the situation in Myanmar-Bangladesh is also currently being considered by the ICC and ICJ. The fourth and final example is a very recent development of the ICC's self-assessed institutional purpose, with respect to interpreting general international law, and in addition to this, the ICC's decision furthers the insufficient contextualization of ICJ advisory opinions that are evidenced in the other examples.

What emerges from these four examples is not fragmentation as a problem. Rather, reconciling the four examples reveals two more fundamental issues:

i. There is a shortage of structured dialogue between the courts. At times, courts ignore relevant decisions of other courts, while at other times they are overly reliant on each other's findings. In both cases, decisions are insufficiently contextualized; and
ii. There are significant disagreements about the institutional role of the courts – that is:
    a. whether the ICJ is paramount;
    b. whether the international criminal courts and tribunals have a lawmaking role outside of international criminal law; and
    c. whether holdings of either should be confined to their unique context and not relied upon in new contexts.

Given the importance of structured judicial dialogue, the absence of such dialogue risks producing the negative effects of fragmentation, being inconsistency and arbitrariness in decision making, without its positive effects, being plurality and adaptability of the law to the changing needs of the global community.

All of the issues in these examples are directly or indirectly being considered by the ICJ and the international criminal courts to this day. Immunities for Heads of State and for State officials from prosecution for international crimes will likely continue to come before international courts, including the ICC. The classification of conflict as *international* will be relevant for conflicts involving States exerting a degree of control over armed groups located in the territory of another State. The ICC and the ICJ are likely to once again consider identical factual scenarios, as the treatment of the Rohingya people in Myanmar is currently before both the ICJ and the ICC. Finally, it is entirely possible that the ICC will be seized by a Prosecutor who is seeking to investigate crimes perpetrated in a territory controlled by a nascent State or quasi-State entity.

The examples considered here are not dated to their context, but rather are illustrative of the continued potential for ruptures in dialogue. Resolving these issues is of great importance to the certainty and legitimacy of the international legal system.[11] This analysis hopes to contribute to an emerging acceptance

[11] *Legitimacy* is used in this article to refer to what Cohen *et al.* have called "sociological legitimacy", sometimes referred to as "descriptive legitimacy". Cohen *et al.* define

of fragmentation in international systems as an inevitable consequence of the international treaty-based legal system,[12] but this analysis argues that fragmentation must be managed by judicial dialogue in order for its negative effects to be mitigated. It may not be the existential threat previously conceived, but this does not justify inattention to its occurrence.

B. Fragmentation and the Interests of the International Community

For many, the concept of fragmentation has a negative connotation. There are a number of interests in long-term consistency between the decisions of different institutions.[13] Generally, like cases should be treated by judicial bodies alike, so that subjects of the law are treated equally.[14] Where decisions on similar issues are not consistent with one another and not explained by distinction of issues, the decision-making is or appears to be arbitrary. Arbitrariness or the perception of arbitrariness undermines the legitimacy of

sociological legitimacy as "perceptions or beliefs that an institution has such a right to rule" and which might be measured by the levels of support that a judicial body enjoys from its constituents. They contrast sociological legitimacy with normative legitimacy, the latter being "concerned with the right to rule according to predefined standards": H.G. Cohen *et al.*, 'Legitimacy and International Courts – A Framework', in N. Grossman *et al.* (eds), *Legitimacy and International Courts* (2018) 1, 4. As Follesdal observes, most international judicial bodies acquire the right to rule upon a State providing consent to their jurisdictions, meaning a State's perception of an international court's authority is important to its acceptance of that court's jurisdiction and the enforcement of its interpretations: A. Follesdal, 'The Legitimacy of International Courts', 28(4) *Journal of Political Philosophy* (2020) 476, 481. Legitimacy is to be contrasted with legality, which is the "conformity or nonconformity of a body politic […] with the legal rules that regulate its establishment": A. Cassese, 'The Legitimacy of International Criminal Tribunals and the Current Prospects of International Criminal Justice', 25 *Leiden Journal of International Law* (2012) 491, 492.

12 See e.g. C. Kreuder-Sonnen, 'After fragmentation: Norm collisions, Interface Conflicts, and Conflict Management', 9(2) *Global Constitutionalism* (2020) 241; B. Faude & F.G. Kreul, 'Let's Justify! How Regime Complexes Enhance the Normative Legitimacy of Global Governance', 64 *International Studies Quarterly* (2020) 431; S.A. Benson, 'Fragmentation or Coherence? Does International Dispute Settlement Achieve Comprehensive Justice', 3(1) *International Journal of Public Administration* (2020) 77.

13 Webb, *International Judicial Integration*, *supra* note 3, 6.

14 ILC, *Report of the Study Group*, *supra* note 6, 18, 19, 100, paras 55, 491.

a judicial institution, especially where there is no appeal court supervision.[15] It may also undermine the strength of the belief of the international community in the existence in the norm.[16] A legitimacy deficit in a judicial institution is all the more devastating on the international plane, as international judicial bodies rely on State governments for enforcement of their decisions.[17] Differing interpretations of similar legal principles can engender doubt over the existence or survival of international law as a whole, or lead to the rejection of treaties by international actors.[18] Inconsistent decisions of international judicial bodies also create uncertainty and unpredictability, as international actors are unclear about how the law will be interpreted in their circumstances and how to comply with these interpretations.[19] Further, national courts are sometimes required to interpret and apply international law, and inconsistency in the formulations of international judicial bodies breeds confusion in these domestic settings. These considerations all point to the conclusion that there must be some constraint in the plurality of decision-making in international courts.[20]

Uncertainty of interpretation of the law has particular consequences for criminal defendants. This is especially so for differing interpretations among international criminal courts and tribunals, but also between the collective international criminal court and tribunal system and other judicial bodies such as the ICJ who interpret international criminal law doctrines. International criminal law enshrines the principle of legality, which is that specific crimes and punishments be established legally and allow actors to perpetrate acts with

15 G. Guillaume, 'Address by H.E. Judge Gilbert Guillaume, President of the International Court of Justice, to the United Nations General Assembly' (26 October 2000). Where a State perceives that the interpretation of one judicial body differs to that of another judicial body for similar subject matter, the "claims to legitimate authority" to interpret the law by either or both body may be doubted by States: Cohen *et al.*, *supra* note 11, 20–1.

16 Simma, *supra* note 1, 279.

17 Kasotti, *supra* note 5, 35.

18 P.-M. Depuy, 'A Doctrinal Debate in the Globalisation Era: On the Fragmentation of International Law', 1(1) *European Journal of Legal Studies* (2006) 25, 33.

19 P. Webb, 'Binocular Vision: State Responsibility and Individual Criminal Responsibility for Genocide', in L. van den Herik & C. Stahn (eds), *The Diversification and Fragmentation of International Criminal Law* (2012) 117, 148 ['Binocular Vision'].

20 G. McIntyre, 'The Impact of a Lack of Consistency and Coherence: How Key Decisions of the International Criminal Court Have Undermined the Court's Legitimacy', 67 *Questions of International Law* (2020) 25, 26 [McIntyre, 'Lack of Consistency and Coherence'].

certainty as to their legal consequences.[21] Gallant also argues that the principle of legality affects legitimacy of the law, as actors who have certainty over what is forbidden are likely to view the law as deserving compliance.[22] Of course, strict requirements for certainty about a law's application are necessarily tempered by some expectation that qualifications or evolved meanings will be discerned by judicial officers when interpreting the law so that the margins of a law can be ascertained in dealing with cases at its boundaries, so the law can have effect in a range of situations that were not anticipated by the drafters, and so that the law progressively develops to stay abreast of social changes and maintains its relevance to a rapidly evolving system.[23] Nevertheless, the principle of legality is particularly important for criminal law as this area of law more than others is attempting to shape human behavior, impose behavioral values, imprint a strong condemnation of behavior, and enforce severe consequences of loss of freedom and property.[24] If two judicial bodies have differences of interpretation of laws which have criminal consequences, actors face uncertainty which has the undesirable effect of undermining these purposes.

21 K.S. Gallant, *The Principle of Legality in International and Comparative Criminal Law* (2008), 15.

22 *Ibid*., 23.

23 A. Bufalini, 'The Principle of Legality and the Role of Customary International Law in the Interpretation of the ICC Statute', 14(2) *Law & Practice of International Courts and Tribunals* (2015) 233, 235; J. Powderly, 'Judicial Interpretation at the Ad Hoc Tribunals: Method From Chaos?', in S. Darcy & J. Powderly, *Judicial Creativity at the International Criminal Tribunals* (2011) 17, 18–20; M. Frulli, 'The Contribution of International Criminal Tribunals to the Development of International Law: The Prominence of *Opinion Juris* and the Moralization of Customary Law', 14 *The Law and Practice of International Courts and Tribunals* (2015) 80, 82–3; J. Nicholson, 'Strengthening the Effectiveness of International Criminal Law through the Principle of Legality', 17 *International Criminal Law Review* (2017) 656, 672. Schabas points out that the process of negotiations by "diplomats qua legislators" can produce texts such as the Rome Statute that are "riddled with inconsistencies, compromises, lacunae and 'constructive ambiguities'": see W. Schabas, 'Customary Law or "Judge-Made" Law: Judicial Creativity at the UN Criminal Tribunals', in J. Doria *et al.* (eds), *The Legal Regime of the International Criminal Court Essays in Honour of Professor Igor Blishchenko* (Brill Nijhoff, Leiden, 2009) 75, 101. Former Judge of the ICTY David Hunt has argued that a "general lack of precision" of international criminal law has required judges to give the body of law the "precision expected from a body of criminal norms": see David Hunt, 'The International Criminal Court: High Hopes, 'Creative Ambiguity' and an Unfortunate Mistrust in International Judges' (2004) 2 *Journal of International Criminal Justice* 56, 58–60.

24 Gallant, *supra* note 21, 16–17.

However, fragmentation in decision-making may simply reflect the unique institutional context of an international court. Generally, international judicial bodies are established by treaty or by international organizations themselves created by treaties, and there is significant diversity in the content and members of these treaties.[25] It should be remembered that a treaty is often the result of a *bargain* between a limited number of States, each of which may have conflicting objectives.[26] A treaty can be a relatively self-contained legal regime, providing its own specialized definitions of legal terms and embodying a unique "mission".[27] It may give a unique (often limited and specialized) mandate to an international court in response to new needs of the international community.[28] Moreover, it may be to the benefit of the international community that specialized judicial bodies are able to decide matters in their area of expertise efficiently.[29]

Nevertheless, even the most specialized international legal instruments do not operate in vacuums.[30] Treaties are interpreted with reference to a wider body of international law, and their interpretation may even change as this wider body of law changes.[31] Indeed it is this general international law, that is, general customary law and general principles of law recognized by civilized nations, which gives treaties their force and validity.[32] Specialized regimes are not cut off from principles of interpretation of international obligations, and more specifically legal concepts such as *legal title*, *nationality* or *acquiescence* lose sense and recognition to subjects of the law if there is no common understanding of their meaning.[33] Indeed, international courts and experts are at pains to point

25 ILC, *Report of the Study Group*, *supra* note 6, 10f., para. 15.

26 *Ibid*., para. 34.

27 Y. Shany, 'One Law to Rule Them All: Should International Courts Be Viewed as Guardians of Procedural Order and Legal Uniformity?', in O.K. Fauchald & A. Nollkaemper (eds), *The Practice of International and National Courts and the (De-) Fragmentation of International Law* (2014) 15, 18–19, 25–27.

28 C. Stahn & L. van den Herik, '"Fragmentation", Diversification and "3D" Legal Pluralism: International Criminal Law as the Jack-in-the-Box?', in L. van den Herik & C. Stahn (eds), *The Diversification and Fragmentation of International Criminal Law* (2012) 21, 33; Kassoti, *supra* note 5, 30.

29 L.E. Popa, *Patterns of Treaty Interpretation as Anti-Fragmentation Tools: A Comparative Analysis With a Special Focus on the ECtHR, WTO and ICJ* (2018,) 22.

30 T. Treves, 'Fragmentation of International Law: The Judicial Perspective', 27 *Agenda Internacional* (2009) 213, 220.

31 M. Andenæs & E. Bjorge, 'Introduction: From Fragmentation to Convergence in International law' in M. Andenæs and E. Bjorge (eds), *A Farewell to Fragmentation: Reassertion and Convergence in International Law* (2015), 4.

32 ILC, *Report of the Study Group*, *supra* note 6, 46, 55, paras 208, 254.

33 Depuy, *supra* note 18, 32.

out that the conceptualization of international law as detached specialist fields is neither helpful nor principled; rather there are underlying connections and unities in these diverse fields.[34] Moreover, it is argued that the process of legal interpretation and reasoning should bridge disparate fields of law and ensure that particular laws are conceptualized as part of a wider human purpose.[35]

Fragmentation of legal interpretation may be a symptom of healthy plurality in legal interpretation. Legitimate differences in interpretation may exist.[36] The relative lack of hierarchy in the international system permits exploration, and allows courts to collectively contribute ideas to the body of general international law.[37] In theory, this can lead to improvements in legal doctrines, as a greater range of legal ideas are considered and oversights by one institution are corrected by itself or other institutions,[38] and judicial "cross-fertilisation" allows ideas rooted in one tradition to contribute to creative development in another.[39] Law should be allowed to grow, and adapt to the changing needs of the international system.[40] It is often the failures of existing institutions to meet a challenge that give rise to treaties and new judicial bodies, and an insistence on harmony and consistency in interpretation may at times be unreasonable adherence to the *status quo*.[41] In this regard, divergences in legal interpretation may catalyze "progressive development of the law".[42]

However, this process of improvement of judicial interpretation presupposes that there is dialogue between courts, so that different interpretations can be openly debated, and convergences or clarified differences can be reached.[43] Dialogue here refers to an institution's receptiveness to the decisions of other courts, and structured discussion, evaluation and application or rejection of them.[44] It is an acknowledgement by courts that they do not operate in isolation and must actively engage with relevant decisions of other courts; if relevant

34 Andenæs & Bjorge, *supra* note 31, 6.
35 ILC, *Report of the Study Group*, *supra* note 6, 15, para. 35.
36 Stahn & van den Herik, *supra* note 28, 51.
37 J.I. Charney, 'The Impact on the International Legal System of the Growth of International Courts and Tribunals', 31(4) *New York University Journal of International Law and Politics* (1999) 697, 700.
38 *Ibid*.
39 Popa, *supra* note 29, 24.
40 Pocar, *supra* note 4, 1722.
41 M. Koskenniemi & P. Leino, 'Fragmentation of International Law? Postmodern Anxieties', 15 *Leiden Journal of International Law* (2002) 553, 577-8.
42 Simma, *supra* note 1, 279.
43 Pocar, *supra* note 4, 1722.
44 Webb, *International Judicial Integration*, *supra* note 3, 177; Kasotti, *supra* note 5, 35.

decisions of other courts are not accepted, there must be convincing reasons provided for such a departure.[45] This dialogue leads to greater (long-term) coherence.[46] The interpretations of the law that give improved expression of the law and its purpose by their technical qualities and sensitivity to the needs of the time should prevail.[47] However, if they are ignored by other judicial bodies then they will not prevail.

These interests of the international community in coherency, specialized decision-making and plurality are in a tense but dependent relationship with each other. Judicial dialogue ensures that these interests are balanced with one another. Ultimately, it will be argued that the legitimacy of international law depends not necessarily on eliminating fragmentation, but rather on institutions taking each other into account, resolving conflicts in a transparent way, and contributing to both general principles of law and forms of hierarchy between institutions.[48]

C. Immunities

The position of international law for centuries has been that incumbent high-ranking representatives of States enjoy immunity from civil and criminal jurisdiction in other States ("personal immunity" or immunity *ratione personae*).[49] This immunity is said to derive from the status of the particular official and the position that they occupy, as well as the functions of the State that the individual is required to exercise in that position.[50] It is enjoyed by senior officials, including the head of State, head of government and Minister for Foreign Affairs, in respect of acts committed in a private or official capacity.[51] It is only enjoyed during the term of office.[52]

45 P. Webb, 'Scenarios of Jurisdictional Overlap Among International Courts', 19(2) *Revue Québécoise de Droit International* (2006) 277, 284; A. Cassese, 'The *Nicaragua* and *Tadić* Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia', 18 *European Journal of International Law* (2007) 649, 662-3 [The *Nicaragua* and *Tadić* Tests Revisited].

46 Webb, 'Binocular Vision', *supra* note 19, 134.

47 Treves, *supra* note 30, 226.

48 Andenæs & Bjorge, *supra* note 31, 2-3.

49 R. Cryer *et al.*, *An Introduction to International Criminal Law and Procedure*, 4th ed. (2019), 508.

50 R.A. Kolodkin, *Preliminary Report on Immunity of State Officials From Foreign Criminal Jurisdiction*, UN Doc. A/CN.4/601, 29 May 2008, 37 para. 78.

51 ILC, *Report of the International Law Commission: Sixty-Fifth Session (6 May–7 June and 8 July–9 August 2013)*, UN Doc. A/68/10, 66.

52 *Ibid.*, 66–7.

Separately, State officials also enjoy immunity for acts carried out in an official capacity ("functional immunity" or immunity *ratione materiae*).[53] It is enjoyed by all "State officials", defined by the Special Rapporteur on Immunity of State Officials from Foreign Criminal Jurisdiction as a person "who acts on behalf and in the name of the State, […] whatever the position the person holds in the organization of the State".[54] It is only enjoyed in respect of acts performed in an official capacity, not in a private one.[55] The primary justification for functional immunity is usually based on the principle of the sovereign equality of States (*par in parem non habet imperium*), and the concern to prevent one State from bringing suit indirectly against another State by means of bringing a suit against the latter State's official .[56]

These rules of immunities are predominantly the result of customary international law.[57] Treaty regimes in this area are highly specific.[58]

The rise of individual criminal responsibility for violations of international law has challenged these doctrines. In 1945, the four main Allied powers signed the *London Agreement*, and in the annexed Charter article 7 provided that an "official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment".[59] The International Military Tribunal sitting in Nuremberg considered the "principle of international law"

53 S. Wirth, 'Immunity for Core Crimes? The ICJ's Judgment in the *Congo v. Belgium* Case', 13 *European Journal of International Law* (2002) 877, 882.

54 C.E. Hernández, *Third Report on the Immunity of State Officials from Foreign Criminal Jurisdiction*, UN Doc. A/CN.4/673, 2 June 2014, 50, para. 144.

55 C.E. Hernández, *Fourth Report on the Immunity of State Officials from Foreign Criminal Jurisdiction*, UN Doc. A/CN.4/686, 29 May 2015, 10–12, paras 27–33.

56 *Ibid*., 45, para. 102.

57 R.A. Kolodkin, *Second Report on Immunity of State Officials from Foreign Criminal Jurisdiction*, UN Doc. A/CN.4/631, 10 June 2010, para. 7(a); U. Owie, 'The Special Court for Sierra Leone and the Question of Head of State Immunity in International Law: Revisiting the Decision in Prosecutor v. Charles Ghankay Taylor', in C. Eboe-Osuji and E. Emeseh (eds), *Nigerian Yearbook of International Law 2017* (2018).

58 Webb, *International Judicial Integration*, *supra* note 3, 63.

59 This was not the first time States prepared a treaty that sought to centre criminal responsibility on State officials notwithstanding the effect of personal or functional immunity. Following WWI, the Treaty of Versailles contained article 227 which levelled responsibility at Kaiser Wilhelm II for "a supreme offence against international morality and the sanctity of treaties", however the refusal of the Netherlands to extradite the former German leader meant that the effect of this clause on traditional immunity was never tested: see Y. Simbeye, *Immunity and International Criminal Law* (2016), 232–4. *The Charter of the International Military Tribunal for the Far East* prepared by General

that representatives of a State are protected from personal responsibility when they carry out an act which is an 'act of State', and the Tribunal held that such a principle "cannot be applied to acts which are condemned as criminal by international law".[60] The Tribunal also found that individuals have international duties that "transcend the national obligations of obedience imposed by the individual State", meaning individuals who are in breach of laws of war cannot benefit from immunity even when acting "in pursuance of the authority of the State", if the State authorizes action that is "outside its competence under international law".[61] These two holdings would be the basis for Nuremberg Principle III as formulated by the International Law Commission.[62] The UN General Assembly never formally adopted these principles, but invited member States to present observations on them and requested the ILC to take them into account when drafting a code of offences against the peace and security of "mankind".[63]

These rulings by the International Military Tribunal made in the context of criminal prosecutions for core international crimes rulings were highly influential for subsequent judgments that State officials cannot avoid accountability for core international crimes.[64] They brought to the surface a conflict between two different purposes of international legal regimes: on the one hand making accountable those responsible for international crimes and

Douglas MacArthur provided in article 6 that an "official position" cannot of itself "free such accused from responsibility for any crime with which he is charged".

60 *France v. Göring*, Judgment and Sentence, 22 IMT 203 (1946), paras 245–248. This holding was later accepted by the International Military Tribunal for the Far East: see 'International Military Tribunal for the Far East, Judgment of 12 November 1948', in J. Pritchard & S.M. Zaide (eds), *The Tokyo War Crimes Trial*, Vol. 22, 48, 413, 48, 439. It was later applied by the Supreme Court of Israel when that Court found that "there is no basis for the [act of State] doctrine when the matter pertains to acts prohibited by the law of nations, especially when they are international crimes of the class of 'crimes against humanity' (in the wide sense)": *Attorney-General of Israel v. Eichmann*, Judgment, Supreme Court of Israel (1968) 36 *International Law Reports* 277, 309–11, para. 14.

61 *France v. Göring*, *supra* note 60, para. 249.

62 "The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible Government official does not relieve him from responsibility under international law." See ILC, *Report of the International Law Commission to the General Assembly, Second Session*, UN Doc. A/CN.4/34, 1950 at 375.

63 See GA Res. 488(V), UN Doc. A/RES/488(V), 12 December 1950. The draft code would be completed in 1954, but its adoption would be postponed for many decades: see R. Pedretti, *Immunity of Heads of State and State Officials for International Crimes* (2014), 269.

64 Pedretti, *supra* note 63, 252.

gross human rights violations, and on the other hand allowing States and their officials to enjoy "sovereign equality and freedom of action" in the international sphere and avoiding infringement of this enjoyment.[65] This is no mere matter of judicial discourse and perception.

I. International Criminal Tribunal Decisions on Immunity

It would be some time after the judgments in Nuremberg and Tokyo that an international court would be tasked with adjudicating the criminal responsibility of State officials again. The United Nations Security Council adopted resolutions 827 (1993) and 955 (1994) which established, respectively, the ICTY and the International Criminal Tribunal for Rwanda (ICTR). These resolutions adopted the ICTY Statute and the ICTR Statute. Article 6(2) of these statutes provided that the official position of an accused person "shall not relieve such person of criminal responsibility", while article 29 required all States to cooperate with the respective Tribunals.

In the ICTY case of *Prosecutor v. Blaškić*,[66] the Appeals Chamber acknowledged the "general rule" of functional immunity weighing in favor of a finding of personal immunity, but stated that there was an exception for individuals accused of core international crimes.[67] Such persons "cannot invoke immunity from *national or international* jurisdiction even if they perpetrated such crimes while acting in their official capacity".[68] Interestingly, the Appeals Chamber was enquiring into "general principles and rules of customary international law relating to State officials" when making this ruling,[69] rather than interpreting international criminal law or the ICTY Statute specifically. In *Prosecutor v. Milošević*,[70] the incumbent head of State Slobodan Milošević was indicted and arrested, notwithstanding any personal immunity that he might have enjoyed. The ICTY Trial Chamber held that ICTY Statute article 7(2) "reflects a rule of customary international law", referring to several international

65 S.M.H. Nouwen, 'Return to Sender: Let the International Court of Justice Justify or Qualify International-Criminal-Court Exceptionalism Regarding Personal Immunities', 78(3) *Cambridge Law Journal* (2019) 596, 610; Simbeye, *supra* note 59, 88–9.

66 ICTY Appeals Chamber, Case No. IT-95-14, 29 October 1997.

67 *Prosecutor v. Blaškić*, Judgment, Case IT-95-14, 29 October 1997, para. 41 ('*Blaškić*') (emphasis added).

68 *Ibid*.

69 *Ibid*.

70 *Prosecutor v. Slobodan Milosevic*, Decision on Preliminary Motions, Case No. IT-99-37-T, 8 November 2001.

legal instruments and two cases in support of this proposition.[71] Similarly in *Kambanda v. Prosecutor*,[72] the ICTR indicted, arrested and convicted (by guilty plea) the former Rwandan Prime Minister Jean Kambanda. The conviction was rendered despite the fact that the former Prime Minister may have benefited from functional immunity for acts that he perpetrated while he held office.

II. The ICJ Considers Immunity

The ICJ considered immunities from prosecution for core international crimes in the case *Arrest Warrant of 11 April 2000* (*DRC v. Belgium*) ('*Yerodia*').[73] In 2000, Belgium requested the extradition of the then-Minister for Foreign Affairs for the Democratic Republic of the Congo (DRC), Mr Abdulaye Yerodia Ndombasi, for alleged war crimes and crimes against humanity perpetrated in 1998. The DRC sought a declaration from ICJ that Belgium should annul the warrant, on the ground that the warrant violates the obligations of customary international law to extend "absolute inviolability and immunity from criminal process of incumbent foreign ministers" to the DRC. A majority of the Court decided that it was "unable to deduce from [State practice] any form of exception" to the rule for personal immunity of incumbent Ministers for Foreign Affairs, even where such officials were suspected of having perpetrated war crimes or crimes against humanity.[74] Jurisdictional immunity was "procedural", while criminal responsibility was "a question of substantive law", and immunity did not exonerate the individual from responsibility.[75] The majority declared that Belgium was required to cancel the warrant.

The first ambiguity in this decision concerned functional immunity. The ICJ majority stated that once the minister left office, a State could prosecute

71 *Prosecutor v. Milošević*, Decision, Case No. IT-99-37-T, 8 November 2001, paras 28–33. See also *Prosecutor v. Karadžić*, 16 May 1995, para. 23; *Prosecutor v. Furundžija*, Case No. IT-95-17/1, 10 December 1998, para. 140 for similar rulings.

72 *Prosecutor v. Kambanda*, Judgment and Sentence, Case No. CTR 97-23-S, 4 September 1998.

73 *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, ICJ Reports 2002, 3 [Yerodia].

74 *Ibid*. Judge van den Wyngaert and Judge Al-Khasawneh did not agree with the opinion of the majority with respect to immunity for war crimes and crimes against humanity. See Dissenting Opinion of Judge van den Wyngaert, para 25; Dissenting Opinion of Judge Al-Khasawneh, para 8(b). Judge Oda did not agree with the majority opinion on procedural grounds and did not consider the issue of immunity: see Dissenting Opinion of Judge Oda, para 16.

75 *Ibid*., para. 60.

that former minister for "acts committed during that period of office *in a private capacity*".[76] It did not refer to acts committed "in a public capacity" and did not state that international crimes are "private" acts. Thus, the judgment implies that functional immunity for public acts persists after the official leaves office, even if such acts are war crimes and crimes against humanity.[77] Many commentators have asserted that this position does not reflect international law, arguing that international law does not extend functional immunity to former officials who perpetrated core international crimes in a public or private capacity.[78] It contradicts the rulings in the tribunal cases set out above. Yet the ICJ majority did not refer to any of the ICTY and ICTR cases, which it is argued are relevant to the issue of State practice and in which rulings were made on the issue of customary international law with respect to immunities. This absence of reference was notwithstanding the reference by the ICJ majority to the ICTY and ICTR Statutes. Contrary to the view of the ICJ majority that the ICTY and ICTR Statutes did not reveal an exception to immunity under customary

76 *Ibid*., para. 61 (emphasis added).

77 In *Yerodia*, the relevant State official was suspected by Belgium of having committed war crimes and crimes against humanity. However, there is no reason why the Court's logic concerning acts committed in a public capacity would not extend to other core international crimes of similar seriousness, such as genocide or torture. To prove a crime of torture under the Convention Against Torture, it must be shown that the relevant act was perpetrated by a public official or other person "acting in an official capacity". The ICJ in *Yerodia* did elsewhere consider the House of Lords decision *R v. Bow Street Metropolitan Stipendiary Magistrate, ex Parte Pinochet Ugarte (No. 3)* [1993] 2 All ER 97, which was a case concerned with arguments of head of State immunity from national prosecution for torture under the Convention Against Torture. States Parties to the Genocide Convention are required to punish persons committing acts of genocide regardless of their status: see *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, 78 UNTS 277, Art. IV.

78 See e.g. H. van der Wilt, 'Immunities and the International Criminal Court', in T. Ruys, N. Angelet & L. Ferro (eds), *The Cambridge Handbook of Immunities and International Law* (2019) 595, 596; A. Cassese, 'When May Senior State Officials Be Tried for International Crimes? Some Comments on the *Congo v. Belgium* Case', 13(4) E*uropean Journal of International Law* (2002) 853, 868–70; R. van Alebeek, 'National Courts, International Crimes and the Functional Immunity of State Officials', 59(1) *Netherlands International Law Review* (2012) 5, 22; H. King, 'Immunities and Bilateral Immunity Agreements: Issues Arising from Articles 27 and 98 of the Rome Statute', 4 *New Zealand Journal of Public International Law* (2006) 269, 274; A. S. Galand, 'Judicial Pronouncements in International Law: The *Arrest Warrant Case Obiter Dicta*', in L. Vicente & H.–W. Micklitz (eds), *Interdisciplinary Research: Are We Asking the Right Questions in Legal Research*, EUI Working Paper LAW 2015/04, 1, 7; Wirth, *supra* note 53, 888. Cassese further observes that core international crimes are "seldom" committed in a private capacity: see 868.

international law for national prosecutions, the ICTY Appeals Chamber ruled that such an exception existed.[79] The ICJ majority did not provide reasons for not considering these decisions.

The second ambiguity arose from the *obiter* statement of the ICJ majority that:

> "an incumbent or former Minister for Foreign Affairs may be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction. Examples include the International Criminal Tribunal for the former Yugoslavia, and the International Criminal Tribunal for Rwanda, established pursuant to Security Council resolutions under Chapter VI1 of the United Nations Charter, and the future International Criminal Court created by the 1998 Rome Convention. The latter's Statute expressly provides, in Article 27, paragraph 2, that '[i]mmunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person'".[80]

It does not follow from the phrase '*certain* international criminal courts, *where they have jurisdiction*' (emphasis added) that immunity is removed for *all* international courts.[81] This was not a blanket permission to international courts to prosecute. However, the ICJ majority did not specify which types of international courts could avoid the barrier of immunity and did not specify the reasons why they could do so, an omission that would prove unfortunate.[82]

Further, the ICJ majority extracted one paragraph of the *Rome Statute* relevant to the issue of immunities. At the time of the ICJ decision, the *Rome Statute* was signed but it would only enter into force three months following the decision. Despite extracting article 27(2), the ICJ majority does not specify whether leaders of *non-State Parties* to the *Rome Statute* enjoy immunity,[83]

79 *Blaškić*, *supra* note 67, paras 41–2. See Section C(I) above.

80 *Yerodia*, *supra* note 73, 25-26, 26-27, para. 61.

81 W. A. Schabas, *An Introduction to the International Criminal Court* (2017), 62; van Alebeek, 'The Judicial Dialogue', *supra* note 10, 106 ['An Introduction to the ICC'].

82 Van der Wilt, *supra* note 78, 598.

83 Van Alebeek, 'The Judicial Dialogue', *supra* note 10, 106.

and does not consider article 98 of the Rome Statute which preserves some immunities.[84] These issues would trouble the ICC much later.[85]

In the 2012 case *Jurisdictional Immunities of the State (Germany v. Italy)*,[86] after many of the cases set out below, the ICJ doubled down on the opinion of the ICJ majority in *Yerodia* without referring to these cases. It maintained that the law of immunity was procedural in nature, and that functional immunity prevented the exercise of jurisdiction by States, notwithstanding the peremptory nature of the substantive rules alleged to have been breached.[87]

III. Special Court for Sierra Leone

Unlike the ICTY and ICTR, the Special Court for Sierra Leone (SCSL) was a criminal tribunal established by a treaty between the UN and Sierra Leone. Nevertheless, its Appeals Chamber considered that it was an "international criminal court".[88] Article 6(2) of the *Statute of the Special Court for Sierra Leone* provided that the official position of any accused person "shall not relieve such person of criminal responsibility nor mitigate punishment".

President Taylor of Liberia was indicted by the SCSL for core international crimes. Taylor argued he was protected by personal immunity. The Appeals Chamber decided that sovereign equality does not prevent a head of State from being prosecuted before an international criminal court, and that accordingly article 6(2) was not in conflict with any "peremptory norm of general international law" for immunity.[89] Although it referred to *Yerodia*, the Appeals Chamber did not refer to the other reasons for personal immunity provided by the ICJ in that case for personal immunity, including the need for State representatives to travel freely, but rather placed significant weight on paragraph 61 of *Yerodia* extracted above.[90] It did not engage fully with that decision.

84 Schabas, *An Introduction to the ICC*, *supra* note 81, 62.
85 For these issues, see Section C(IV).
86 *Jurisdictional Immunities of the State (Germany v. Italy)*, Judgment, ICJ Reports 2012, 99.
87 *Ibid*., para. 95.
88 *Prosecutor v. Taylor*, Decision, SCSL AC, SCSL-2003-01-1, 31 May 2004, paras 36–37, 42 [*Taylor*].
89 *Ibid.,* paras 52–3.
90 Cryer et al, *supra* note 49, 528.

IV. ICC

On 31 March 2005, following concerns about alleged grave human rights violations in Darfur, the UN Security Council adopted resolution 1593. This resolution referred the situation in Darfur to the ICC Prosecutor. It also determined that, *inter alia*, "the Government of Sudan and all other parties to the conflict in Darfur, shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution and, while recognizing that States not party to the *Rome Statute* have no obligation under the Statute, urges all States and concerned regional and other international organizations to cooperate fully".

In 2009 and 2010, the ICC Pre-Trial Chamber authorized two warrants for the arrest of Omar al-Bashir for core international crimes, despite the fact that he was a sitting President of Sudan at the time of the issuing of those warrants.[91] The ICC Registry then issued requests to States Parties to arrest and surrender President al-Bashir. Pursuant to article 89(1) of the *Rome Statute*, States Parties are required to comply with requests for arrest and surrender, while pursuant to articles 87(1) and 87(7), States Parties are required to comply with requests for States Parties to cooperate with the Court. This is subject to article 98, which provides that the ICC cannot require a State Party to "act inconsistently" with its obligations under international law to respect State or diplomatic immunity of a third State, unless the third State provides a waiver of that immunity. This effectively means that the Court cannot require a State Party to arrest the official of a non-State Party where to do so would require the State Party to violate the immunity of an official of the non-State Party.[92]

91 *Situation in Darfur, Sudan in the Case of Prosecutor v. Omar Hassan Ahmad Al-Bashir*, Warrant of Arrest, ICC-02/05-01/09-1 (Pre-Trial Chamber I), 4 March 2009; *Situation in Darfur, Sudan in the Case of Prosecutor v. Omar Hassan Ahmad Al Bashir*, Second Warrant of Arrest, ICC-02/05-01/09-95 (Pre-Trial Chamber I), 12 July 2010. Similarly, after the UN Security Council referred the situation in Libya to the ICC Prosecutor, the Pre-Trial Chamber I also issued a warrant of arrest for Muammar Gaddafi: *Prosecutor v. Muammar Gaddafi*, Warrant of Arrest, ICC-01/11-13 (Pre-Trial Chamber I), 27 June 2011. This was despite the fact that Gaddafi was the head of State of Libya at the time of the issuing of the warrant. However, the case against Muammar Gaddafi was terminated by the Prosecutor upon his death on 22 November 2011 before it could progress.

92 See *Situation in Darfur, Sudan in the Case of Prosecutor v. Omar Hassan Ahmad Al Bashir*, Decision under article 87(7) of the Rome Statute on the non-compliance by South Africa with the request by the Court for the arrest and surrender of Omar Al-Bashir, ICC-02/05-01/09-302 (ICC Pre-Trial Chamber II), 6 July 2017, para. 82. This is notwithstanding article 27(2) of the *Rome Statute*, which provides that immunities attaching to an official position shall not bar the Court from exercising its jurisdiction.

Following the issuing of the warrants, President al-Bashir travelled to the territories of a number of States Parties to the *Rome Statute*. None of these States Parties effected an arrest of President al-Bashir. The Pre-Trial Chambers considered the failure to arrest by some of these States Parties, and in each of these cases decided that the failure of the respective State Party to arrest President al-Bashir was a breach of article 87(7) of the *Rome Statute*.[93] The Pre-Trial Chambers justified this decision under various grounds. In the case of Malawi, Pre-Trial Chamber I held that "customary international law creates an exception to head of State immunity when international courts seek a head of State's arrest for the commission of international crimes".[94] For Chad, Pre-Trial Chamber I dismissed a defense that Chad was required to cooperate with a position of the African Union not to arrest President al-Bashir, which Chad argued exempted it from its obligations under article 98(1) of the *Rome Statute*.[95] For the Democratic Republic of the Congo, Pre-Trial Chamber II held that the Security Council resolution *requiring* Sudan to "cooperate fully" with the ICC "implicitly waived" the immunity of President al-Bashir.[96] For Jordan and South Africa, Pre-Trial Chamber II determined that the Security Council resolution

93 See e.g. *Situation in Darfur, Sudan in the Case of Prosecutor v. Omar Hassan Ahmad Al Bashir*, Corrigendum to the Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09-139-Corr (Pre-Trial Chamber I), 12 December 2011, para. 47 [*Malawi*]; *Situation in Darfur, Sudan in the Case of Prosecutor v. Omar Hassan Ahmad Al Bashir*, Decision pursuant to article 87(7) of the Rome Statute on the refusal of the Republic of Chad to comply with the cooperation requests issued by the Court with respect to the arrest and surrender of Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09-140-tENG (Pre-Trial Chamber I), 13 December 2011) [14] [*Chad*]; *Situation in Darfur, Sudan in the Case of Prosecutor v. Omar Hassan Ahmad Al Bashir*, Decision under article 87(7) of the Rome Statute on the non-compliance by Jordan with the request by the Court for the arrest and surrender or Omar Al-Bashir, ICC-02/05-01/09-309 (Pre-Trial Chamber II), 11 December 2017) para. 50 [*Jordan*]; *Situation in Darfur, Sudan in the Case of Prosecutor v. Omar Hassan Ahmad Al Bashir*, Decision under article 87(7) of the Rome Statute on the non-compliance by South Africa with the request by the Court for the arrest and surrender or Omar Al-Bashir, ICC-02/05-01/09 (Pre-Trial Chamber II), 6 July 2017, para. 123 [*South Africa*]; *Situation in Darfur, Sudan in the Case of Prosecutor v. Omar Hassan Ahmad Al Bashir*, Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court, ICC-02/05-01/09-195 (Pre-Trial Chamber II), 9 April 2014 para. 34 [*DRC*].

94 *Malawi*, *supra* note 93, para. 43.

95 *Chad*, *supra* note 93, paras 12–13.

96 *DRC*, *supra* note 93, para. 29.

worked to render applicable to Sudan the terms of the *Rome Statute*, and that accordingly article 27(2) of the *Rome Statute* prevented States Parties from raising immunities under a treaty-based regime as justifying a failure to arrest Sudan's head of State.[97]

Jordan appealed the ruling of the Pre-Trial Chamber II that it was in non-compliance with the *Rome Statute*. In considering the legality of the al-Bashir warrants *vis-à-vis* personal immunity, the Appeals Chamber could have dismissed the issue on the basis that a Security Council resolution required Sudan to "cooperate fully" with the ICC and waive the immunity of its head of State,[98] and followed the reasoning of Pre-Trial Chamber II with respect to the Democratic Republic of the Congo.

However, the Appeals Chamber went further. Despite the fact that counsel had not argued the issue before it,[99] the Chamber stated that:

> "immunity has never been recognised in international law as a bar to the jurisdiction of an international court. […] the pronouncements of both the Pre-Trial Chamber in the *Malawi* Decision and of the Appeals Chamber of the Special Court for Sierra Leone [in the *Taylor* case] have adequately and correctly confirmed the absence of a rule of customary international law recognising Head of State immunity before international courts in the exercise of jurisdiction."[100]

The Appeals Chamber referred to *Yerodia* as "specific" recognition by the ICJ that head of State immunity did not prevent the ICC from investigating or issuing a warrant of arrest against a "Head of State", apparently whether of a State Party or otherwise.[101] Yet the ICJ majority in the relevant passage (extracted in Section C(II)) had merely referred to article 27(2) of the *Rome Statute* and had

97 *Jordan*, *supra* note 93, paras 33, 37–39 ; *South Africa*, *supra* note 93, para. 107.

98 *Situation in Darfur, Sudan in the Case of Prosecutor v. Omar Hassan Ahmad Al-Bashir*, Judgment in the Jordan Referral re Al-Bashir Appeal, ICC-02/05-01/09-397-Corr (Appeals Chamber), 6 May 2019, para. 149 [*Al Bashir*].

99 See e.g. *Situation in Darfur, Sudan in the Case of Prosecutor v. Omar Hassan Ahmad Al-Bashir*, Final Submissions of the Prosecution following the Appeal Hearing, ICC-02/05-01/09-392, 28 September 2018, para. 5.

100 *Situation in Dafur, Sudan in the Case of the Prosecutor v. Omar Hassan Ahmad Al-Bashir*, Judgement in the Jordan Referral re Al-Bashir Appeal, ICC-02/05-01/09 OA2, 06 May 2019, 57, para. 113.

101 *Ibid.,* para 102. The Appeals Chamber's use of the term "Head of State" in this passage was unqualified.

indicated that the State official could be subject to the criminal proceedings of an international courts "where they have jurisdiction". Although this extract of the ICJ majority opinion could have benefited from greater specificity, it does not provide direct support for the proposition that heads of any State may be prosecuted by the ICC because of article 27(2), nor for the proposition that any international court may prosecute a head of State because no rule of customary international law prohibits it. Further, as mentioned above, the ICJ majority had not in its decision considered the complicated jurisdictional issues associated with the ICC and *non*-States Parties, which are not directly bound by the *Rome Statute*.[102]

V. Fragmentation?

There is fragmentation on the issue of immunities. It exists firstly for functional immunity: whether States or international courts can prosecute acts committed by State officials in an official capacity, including where they are serious international crimes.[103] The ICJ indicates that functional immunity applies, while international criminal courts and tribunals indicate otherwise.

Secondly, fragmentation exists in relation to whether international courts can prosecute the incumbent heads of non-States Parties, for core international crimes.[104] The ICJ indicates that "certain international criminal courts" may prosecute heads of State "where they have jurisdiction", referring to examples of legal instrument provisions, but that no national court may do so. The international criminal courts and tribunals indicate that no rule of customary international law recognizes the "existence" of head of State immunity for international courts investigating or prosecuting heads of States,[105] and that the ICJ ruling provides a measure of support for this reasoning, at least in respect of the ICC. Some of the international criminal tribunal decisions above even extended this disavowal of immunity for national prosecutions. The legal implications of two or more

102 Where nationals of a non-State Party perpetrated core international crimes on the territory of a State Party (*Rome Statute* article 12(2)(a)), or where the UN Security Council refers a situation in a non-State Party to the ICC (article 13(b)), the nationals of that non-State Party may be subject to the jurisdiction of the ICC. However, the ruling of the Appeals Chamber which cites the ICJ majority decision in *Yerodia*, *supra* note 73, extends beyond these situations.

103 King, *supra* note 78, 273.

104 Nouwen, *supra* note 65, 611.

105 See e.g. *Al Bashir*, *supra* note 98, para. 113.

States jointly establishing an "international criminal court" to prosecute a head of another State are unclear.[106]

Thirdly, there is confusion over the implications of *jus cogens* violations for immunities.[107] In the *Yerodia* case, ICJ Judge ad hoc Van den Wyngaert criticized her judicial colleagues for their "brevity" and "minimalist approach", and considered that the majority of the Court "disregards" the recent movement for individual accountability for core international crimes.[108] Indeed, Schabas also calls the ICJ majority's discussion on immunities and international criminal law "rather laconic".[109] It cannot be said that it was limited by the facts before it, as it showed a readiness to make *obiter dicta* statements.

What is disquieting is not only the confusion, but this minimalism: the lack of principles governing the relations *between* the courts. There is firstly an almost total absence of engagement by the ICJ with ICTY case law, despite the latter institution being an international criminal tribunal. Similarly, the international criminal courts cite the ICJ authority (alongside the ICTY authorities) in support of a ruling that international courts *per se* may exercise jurisdiction over heads of State. A careful reading of the ICJ decision shows that the judgment does not go so far, or at least it is not so clear on this point. It is argued that there is a lack of care given by these courts to the decisions made by other courts, and insufficient deliberation over the relationship between them.

The ICC took a bold (legally unnecessary) step in *Al Bashir*, without explaining this decision *vis-à-vis* a ruling from the ICJ that was relevant to the issue. In so doing, the ICC not only confused the legally necessary path to its decision, but exposed itself to the criticism of its States Parties, on whom it depends for enforcement of its decisions.[110] Indeed, the African Union has since initiated a "non-cooperation policy towards the ICC" and signaled by resolution an intention to seek an ICJ advisory opinion on immunities of State officials.[111]

106 See *Situation in Darfur, Sudan in the Case of Prosecutor v. Omar Hassan Ahmad Al-Bashir*, Joint Concurring Opinion of Judges Eboe-Osuji, Morrison, Hofmański and Bossa, ICC-02/05-01/09-397-Anx1-Corr (Appeals Chamber), in which a majority of the Appeals Chamber defined "international criminal court" as "an adjudicatory body that exercises jurisdiction at the behest of two or more states".

107 Stahn & van den Herik, *supra* note 28, 78.

108 *Yerodia*, *supra* note 73, 153, 154 (Dissenting opinion of Judge ad hoc Van den Wyngaert).

109 Schabas, *An Introduction to the ICC*, *supra* note 81, 61.

110 D. Guilfoyle, 'Lacking Conviction: Is the International Criminal Court Broken? An Organisational Failure Analysis', 20(2) *Melbourne Journal of International Law* (2020) 401, 438 [Guilfoyle, 'Lacking Conviction'].

111 S.–D.D. Bachmann & N.A. Sowatey-Adjei, 'The African Union-ICC Controversy Before the ICJ: A Way Forward to Strengthen International Criminal Justice to Strengthen

This issue has exacerbated deficits of legitimacy and trust, and the confusion may have contributed to the refusal by some African States to comply with the Court's exhortations for arrest and surrender.[112]

VI. The Future of Immunities

An ICJ opinion on this issue may help "pave the way for convergence" and bolster legitimacy.[113] However, this is not a surety. The ICC public information service has noted in response to a question about a possible request for an ICJ advisory opinion that: "it is for each court to pronounce on the limits of its own jurisdiction. No international court may purport to circumscribe the jurisdiction of another international court".[114] This is a further indication of a lack of principles about engagement with other court decisions, and of differences in opinion as to jurisdiction. States Parties to the *Rome Statute* may be in the difficult position of fearing a referral of a case by a United Nations member to the ICJ should they effect an arrest, and fearing an ICC disciplinary hearing if they do not. If the lack of dialogue continues, this will not be resolved.

The issues extend beyond African States. In the ICC Prosecutor's request for authorization to investigate crimes perpetrated by members of the *Tatmadaw*, the Myanmar military forces, the Prosecutor argued that: "the potential case(s) against senior members of the *Tatmadaw*, other Security Forces and other Myanmar authorities would be admissible under the complementarity criterion".[115] In its evidence, the Prosecutor referred to Senior General and *de facto* head of State of Myanmar, Min Aung Hlaing, alleging his Facebook posts

International Criminal Justice?', 29(2) *Washington International Law Journal* (2020) 247; Assembly of the African Union, *Thirtieth Ordinary Session: Decisions, Declarations and Resolution*, Assembly Doc. AU/Dec.665-689(XXX), 29 January 2018. Such a request would require a UN General Assembly majority in order for the question to come before the ICJ. In such an event, the ICJ would consider whether to provide the advisory opinion, although it has never refused before: Bachmann and Sowatey-Adjei 268.

112 Van der Wilt, *supra* note 78, 610.

113 J. Petrovic, D. Stephens and V. Nastevski, 'To Arrest or not to Arrest the Incumbent Head of State: The Bashir case and the Interplay between Law and Politics', 42(3) *Monash University Law Review* (2016) 740.

114 International Criminal Court, 'Questions and Answers', ICC-PIOS-Q&A-SUD-02-01/19_Eng, May 2019, available at: https://www.icc-cpi.int/itemsDocuments/190515-al-bashir-qa-eng.pdf. (last visited 8 June 2021).

115 'Request for Authorisation of an Investigation Pursuant to Article 15', *Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar*, ICC-01/19-7 (Pre-Trial Chamber III) 4 July 2019, para. 235. See also paras 6, 272.

and public comments "condon[ed], if not encourag[ed], the commission of crimes".[116] These are indications that the Prosecutor may in the future seek the arrest and prosecution of another head of a non-State Party. If General Hlaing becomes subject of a warrant and the *Al Bashir* decision by the Appeal Chamber is followed by later ICC chambers, the saga may repeat itself. In such a case, the ICC risks suffering from further non-cooperation by States Parties, and it is no exaggeration to say that this may undermine the legitimacy of not only international judicial bodies but also of international criminal law.[117]

D. Classifying Conflict *International*

A further illustrative example of fragmentation of international law lies in relation to the thorny issue of classifying a conflict as *international*. In the situation of a State grappling with internal rebel military groups in a conflict, where a foreign State is providing assistance to those rebel groups, the question of whether this conflict is *international* is of particular importance for the ICJ and the international criminal courts and tribunals, especially the ICC.

I. ICJ

The issue arose for the ICJ in the *Nicaragua* case, where the Court was required to consider whether the degree of control exercised by the United States over *Contra* rebel groups in Nicaragua was such that the alleged violations perpetrated by the *Contras* were the legal responsibility of the United States.

The ICJ decided that the conflict would be an international one if it was proven that the United States had "effective control" over the rebel group's operations in the course of which violations were committed.[118] This appears to require proof that the outside State had "directed or enforced the perpetration of the acts contrary to human rights and humanitarian law", acts which were physically perpetrated by the rebel group.[119] The ICJ was clear to distinguish

116 *Ibid.,* para. 195.

117 D. Guilfoyle, 'The ICC Pre-Trial Chamber Decision on Jurisdiction over the Situation in Myanmar', 73(1) *Australian Journal of International Affairs* (2019) 2, 5; G. McIntyre, 'The ICC, Self-created Challenges and Missed Opportunities to Legitimize Authority over Non-states Parties', *Journal of International Criminal Justice* (2021) 1 [McIntyre, 'The ICC'].

118 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment, ICJ Reports 1986, 14, 64, para. 115 [Nicaragua].

119 *Ibid*.

this from control in a general sense over the rebel group, and to distinguish this from significant or "decisive" financing, organizing, training and supplying of the non-State group by the United States, both of which were insufficient on their own to establish the requisite degree of effective control.[120] This test is very difficult to meet, and was not met in the *Nicaragua* case.

In fact, the ICJ set down an alternative test to establish the responsibility of the United States for actions of the *Contra* rebel groups in Nicaragua. This was the strict control test, which required that the relationship between the United States and the group perpetrating the relevant acts was "so much one of dependence on the one side and control on the other" that this group should be equated with an "organ" of the United States government or as acting on its behalf.[121] If a group is acting on behalf of a foreign State, it is far less controversial than for the first test to consider the conflict as *international*. However, this degree of control was not proven in the *Nicaragua* case.

II. ICTY

The ICTY had in its earlier years relied on principles propounded in the *Nicaragua* case, however as it developed its own body of jurisprudence, it shifted its reference to its own case law.[122] In assessing Duško Tadić's criminal responsibility for grave breaches of the Geneva Convention as an individual, the Appeals Chamber had to consider whether the conflict *within* Bosnia and Herzegovina in the 1990s between the State and the Army of Republika Srpska was *international*. Specifically, it was tasked with considering what degree of control exercised by the Federal Republic of Yugoslavia over the Army of Republika Srpska was required for the conflict in Bosnia and Herzegovina to be considered international in nature.

The ICTY Appeals Chamber was careful to acknowledge that the *Nicaragua* test related to State responsibility (that of the US), not individual responsibility (that of a member of the rebel military group).[123] However, it stated: "What is at issue is not the distinction between the two classes of responsibility. What is at issue is a *preliminary* question: that of the conditions

120 *Ibid*., 64, para. 114. This formulation is similar to the test that would be adopted by the ICTY (discussed below).

121 *Ibid*., 62, para. 109.

122 A.Z. Borda, 'The Direct and Indirect Approaches to Precedent in International Criminal Courts and Tribunals', 14(2) *Melbourne Journal of International Law* (2013) 608, 623.

123 *Prosecutor v. Tadić*, Judgment, IT-94-1-A, 15 July 1999, para. 101 [*Tadić*].

on which under international law an individual may be held to act as a de facto organ of a State."[124]

The Appeals Chamber made it clear that it was ruling on the general question of legal imputability of the acts of non-State groups, rather than a question specific to individual criminal responsibility.[125] It stated its findings relied on such "general rules", as international humanitarian law did not provide criteria.[126] After a comprehensive analysis of the *Nicaragua* judgment, the ICTY Appeals Chamber concluded that the ICJ "effective control" test was not persuasive.[127] It ruled the Prosecutor was required to prove that a foreign State had "overall control" of the non-State military group for the conflict to be international.[128] This required proof that the foreign State was involved in "coordinating or helping in the general planning" of the group.[129] However, it was not necessary to prove that the particular activities of the group were "specifically imposed, requested or directed" or instructed by the outside State,[130] which was required by the *Nicaragua* test.

As an aside, the Appeals Chamber considered that where the relevant non-State group was a single individual or a group that was not "military organized", it was necessary to prove that the foreign State issued specific instructions to commit the particular act to the individual or group.[131]

An appeal in a later ICTY case considered firstly whether the ICTY was bound by the ICJ's *Nicaragua* case precedent, and secondly whether it was undesirable for two international courts to have "conflicting decisions on the same issue".[132] In answer to the first issue, the Appeals Chamber held that while it was necessary to take into consideration other decisions of international courts, it could arrive at different conclusions after careful consideration and was not

124 *Ibid*., para. 104 (emphasis added).

125 *Ibid*.

126 *Ibid.,* para. 105.

127 *Ibid*., paras 102–120.

128 *Ibid*., paras 120; 131. It should be noted that for individuals or groups not organized into military structures that are engaged to perform illegal acts on another State's territory, the ICTY adopted the effective control test: *Tadić*, *supra* note 123, paras 118, 141.

129 *Ibid*., para 131.

130 *Ibid*., paras 122, 131.

131 *Ibid.,* para. 137. Important to this distinction between military groups and non-military groups was the fact that the former are "organised and hierarchically structured" and so group members are unlikely to act on their own but subject to the authority of the head: see para. 120.

132 *Prosecutor v. Delalić, Mucić, Delić and Landžo*, Judgement, IT-96-21-A, 20 February 2001, para. 21 [*Čelebići*].

bound by the decisions of the ICJ.[133] It did not explicitly address the second issue, beyond affirming the interests in "consistency, stability, and predictability" of interpretation and the importance of considering the "general state of the law in the international community" in its rulings.[134] The Appeals Chamber confirmed that the "overall control" test was the applicable criteria for determining the existence of an international armed conflict.[135]

III. Return to the ICJ

In the *Bosnia v. Serbia* case, the ICJ decided to reaffirm the *Nicaragua* test of "effective control" as being necessary for a State to be legal responsible for the acts of non-State groups.[136] Important to this discussion is not the divergence, but the reasons given for it, and the dialogue between it and the ICTY judgments. The ICJ stated that the ICTY was not called upon to rule on questions of State responsibility, "since its jurisdiction is criminal and extends over persons only".[137] Although "utmost importance" was attached to the ICTY's legal and factual findings on criminal liability of the accused before it, the situation was not the same for "issues of general international law which do not lie within the specific purview of its jurisdiction and, moreover, the resolution of which is not always necessary for deciding the criminal cases before it".[138]

The ICJ declined to resolve the issue of two different tests, as it was not necessary to decide the *Bosnia v. Serbia* case.[139] It noted that there did not necessarily need to be the same test for characterizing a conflict for issues of State responsibility and for individual criminal responsibility.[140] Yet it also criticized the "overall control" test as being unsuitable for stretching "almost to breaking point" the nexus between a State's organs and its international responsibility.[141]

133 *Ibid*., para. 24.
134 *Ibid*.
135 *Ibid*., para. 26.
136 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, ICJ Reports 2007, 43, 208, paras 399–400 [*Bosnia v. Serbia*].
137 *Ibid.,* para 403.
138 *Ibid*.
139 *Ibid.,* para 404.
140 *Ibid.,* para 405.
141 *Ibid.,* para 403.

IV. The ICC Weighs in

The principles in *Tadić* have been relied upon in subsequent rulings of the ICC, including in the case of *Prosecutor v. Lubanga*. The Prosecutor in that case had referred to the ICJ ruling, submitting that the difference between the *Tadić* test and the *Nicaragua* test was explicable by the difference in their purposes: State responsibility and individual responsibility.[142] Notwithstanding these submissions, the Trial Chamber simply stated that: "As regards the necessary degree of control of another State over an armed group acting on its behalf […] the 'overall control' test is the correct approach".[143] For this issue, it did not refer at all to the ICJ jurisprudence and the purview of its jurisdiction. Further, the absence of specification and the phrasing used makes it unclear whether its test is confined to individual criminal responsibility only, or whether it could also apply to State responsibility.[144] In effect, it did not engage with the ICJ decision in form or substance.

V. Fragmentation?

Going to the first fundamental issue described above, the ICTY engaged in a comprehensive analysis of the ICJ test and considered it unpersuasive.[145] This practice is to be encouraged. The point is not so much that its test differed from that of the ICJ, but that it was challenging long-held consistency and preferences.[146]

However, the ICJ did not respond to this analysis of its previous judgment. Rather, the ICTY judgment was sidelined by the ICJ because of "the criminal responsibility (institutional) context" in which it lay.[147] The ICJ did not assail the ICTY judgment on its merits (issues of "state practice and judicial precedent"),

142 *Situation in the Democratic Republic of the Congo in the Case of The Prosecutor v. Thomas Lubanga Dyilo*, Prosecution's Closing Brief, ICC-01/04-01/06-2748-Red (Trial Chamber I), 1 June 2011, 22, para. 39.

143 *Situation in the Democratic Republic of the Congo in the Case of The Prosecutor v. Thomas Lubanga Dyilo*, Judgment, ICC-01/04-01/06-2842 (Trial Chamber I), 14 March 2012, 246–8, para. 541.

144 M.J. Ventura, 'Two Controversies in the Lubanga Trial Judgment of the ICC', in S. Casey-Maslen (ed.), *The War Report: 2012* (2013) 473, 490.

145 *Tadić*, *supra* note 123, paras 102–120.

146 Koskenniemi & Leino, *supra* note 41, 566-7.

147 K.N. Trapp, 'Of Dissonance and Silence; State Responsibility in the *Bosnia Genocide* Case', 62 *Netherlands International Law Review* (2015) 243, 247.

but rather dismissed its relevance due to differences in institutional context.[148] Ventura criticizes the ICJ for not analyzing the reasons why the imputability of acts is dependent on context: "whether there is anything inherent in the respective contexts that serves to modify or negate the relevant rule of international law".[149] Put another way, the ICJ failed to engage with the underlying normative framework in *Tadić*.[150]

For its part, the ICC subsequently did not refer to the ICJ case law, despite receiving submissions on this issue by advocates. It did not attempt to address the issue of differing tests. The earlier ICJ refusal to engage in dialogue certainly did not encourage it to do so. Writing in 1999, Charney feared that without dialogue, "centrifugal forces" of specialized court mandates would push courts further and further away from other courts.[151] This is borne out in this example.

The second fundamental issue concerning jurisdiction of courts is also evidenced in this example. Arguably an international court charged with applying a body of law has inherent jurisdiction to apply rules belonging to other bodies of international law *incidenter tantum*.[152] If true, the ICTY had jurisdiction to rule on questions of general international law for the purpose of applying its primary rules, or at least it considered itself to have such jurisdiction. It is submitted that the ICC also did so in respect of immunities in the *Al Bashir* case. Contrary to what is implied in the ICJ's reasoning in *Bosnia v. Serbia*,[153] the ICTY knew it was interpreting a matter of general international law (even italicizing the point). The ICJ disagreed, without referring to the relevant extracts or even fully analyzing the point. The ICJ did not give consideration to the "single, unified" nature of international law, which it has acknowledged elsewhere.[154]

To be sure, the ICJ was in a difficult position, as the ICTY had developed jurisprudence based on the 'overall control' test, and overruling this legal principle may have had undesirable consequences for the ICTY's previous cases

148 Cassese, 'The *Nicaragua* and *Tadić* Tests Revisited', *supra* note 45, 663; Ventura, *supra* note 144, 489.

149 Ventura, *supra* note 144, 488.

150 Trapp, *supra* note 147, 246.

151 Charney, *supra* note 37, 706.

152 Cassese, 'The *Nicaragua* and *Tadić* Tests Revisited', *supra* note 45, 661.

153 Stahn & van den Herik, *supra* note 28, 76.

154 See e.g. *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Compensation*, Judgment, ICJ Report 2012, 324, 394 para. 8 (Declaration of Judge Greenwood).

and its overall legitimacy.[155] Its permanent status and the consequent tendency for caution may have reduced its willingness to pronounce on controversial legal questions.[156] Nevertheless, it is submitted that it should have done more to discuss the ICTY's role in general international law, with reference to its judicial reasoning, and manage their interrelationship.

There is a lack of clarity about the role of the two tests, but the fission is deeper: the dialogue between the courts on this issue is fractured and piecemeal, and there is no direct and clear communication about the role of the institutions themselves, their jurisdiction and how they are to consider each other. Goldstone and Hamilton have posited that this is at least in part a result of the absence of "formal and enforced guidelines" to govern the interrelationship between the ICJ and the criminal courts.[157]

E. Alleged Violations of the Genocide Convention

When a matter squarely within the realms of international criminal law is considered by another court, it will be shown the ICJ response has been different to the previous examples, and arguably can be labelled as overly deferential.

I. The ICJ's Examination of Previous ICTY Proceedings

In 1993, the ICJ was requested by Bosnia and Herzegovina to consider whether Serbia had violated the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. In 1999, Croatia did likewise. In both cases, the ICJ was considering law and facts in the context of international criminal law, much of which was being exhaustively examined by the ICTY at the same time.

There were similar rulings by the ICJ and the ICTY with respect to controversial legal issues: for example, the law of complicity,[158] the distinction between ethnic cleansing and genocide,[159] and the requirement to prove a specific

155 R.J. Goldstone & R.J. Hamilton, '*Bosnia v. Serbia*: Lessons from the Encounter of the International Court of Justice with the International Criminal Tribunal for the Former Yugoslavia', 21 *Leiden Journal of International Law* 95 (2008) 102-3, 111; Stahn and van den Herik, *supra* note 28, 75.

156 Webb, *International Judicial Integration*, *supra* note 3, 149.

157 Goldstone & Hamilton, *supra* note 155, 103.

158 M. Milanovic, 'State Responsibility for Genocide: A Follow-Up', 18(4) *European Journal of International Law* (2007) 669, 682.

159 *Bosnia v. Serbia*, *supra* note 137, para. 190; *Prosecutor v. Krstić*, Trial Judgment, IT-98-33, 2 August 2001, 196–7, para. 562.

genocidal intent to destroy the targeted group in addition to the requirement to prove intent to commit the underlying act.[160]

The ICJ noted that it was required to make its own determinations of facts relevant to the law it was applying.[161] Notwithstanding, it did very little independent fact-finding, but rather in both cases referred extensively to the legal and factual findings of the ICTY.[162]

In the *Bosnia v. Serbia* case, the ICJ analyzed the weight it would attach to findings made at various stages of the ICTY proceedings,[163] which is a careful way to mitigate the problems of using evidence from separate proceedings.[164] The ICJ stated that findings of fact made at trial were "highly persuasive".[165]

However, the evidence tendered in the ICTY was not without its problems, and by adopting the findings without appropriate qualifications, the ICJ arguably furthered these issues. The ICTY had no way of collecting evidence without the consent of the former Yugoslav. States.[166] Most infamously, Serbian defense council meeting minutes were redacted in the ICTY hearings as part of an agreement between the Prosecutor and Serbia, and although in the *Bosnia v. Serbia* case the ICJ had the power to require Serbia to produce the non-redacted versions, it did not do so.[167] It effectively relied on the ICTY's limited evidence rather than the possibility of obtaining more comprehensive evidence itself.

Further, the ICJ concluded that the massive killings in an area outside of Srebrenica were not accompanied by the requisite specific intent. For this ruling, it gave weight to the fact that those convicted of genocide by the ICTY were not found by the ICTY to have "acted with specific intent".[168] However, in the appeal of the acquittal of Goran Jelisić for the crime of genocide, the Appeals Chamber considered that the evidence "could have provided the basis for a reasonable Chamber to find beyond a reasonable doubt that the respondent had the intent to destroy the Muslim group in Br-ko", and found that the verdict by the Trial

160 *Bosnia v. Serbia*, *supra* note 137, para. 148; see also *Prosecutor v. Popović*, Judgment, IT-05-88-T, 10 June 2010, para. 808, in which the ICTY Trial Chamber affirmed this ICJ *Bosnia v. Serbia* ruling.

161 *Bosnia v. Serbia*, *supra* note 136, para. 212.

162 A. Gattini, 'Evidentiary Issues in the ICJ's Genocide Judgment', 5 *Journal of International Criminal Justice* (2007) 889, 899.

163 *Bosnia v. Serbia*, *supra* note 136, paras 214–220.

164 Webb, 'Binocular Vision', *supra* note 19, 145.

165 *Bosnia v. Serbia*, *supra* note 136, para. 223.

166 M.A. Hoare, 'A Case Study in Underachievement: The International Courts and Genocide in Bosnia-Herzegovina', 6(1) *Genocide Studies and Prevention* (2011) 81, 85.

167 Goldstone & Hamilton, *supra* note 155, 108.

168 *Bosnia v. Serbia*, *supra* note 136, paras 277, 354.

Chamber in respect of the charge of genocide "does not pass the approved standard for acquittal".[169] However, a majority of the Appeals Chamber declined to order a retrial in the circumstances of the case. This is hardly support for the ICJ's contention that the requisite intent was not found in that case, even if one only considers the intent of Mr Jelisić and not the other actors involved in those crimes. The ICJ answered the crucial question of whether genocide had been committed with the requisite intent in one paragraph, in reliance on the lack of convictions for in the ICTY, without recording in the judgement a rigorous independent assessment of the source evidence.[170]

II. Fragmentation?

It has been argued that, in considering whether genocide occurred, it was *inappropriate* for the ICJ to draw inferences about whether genocide took place based on a lack of finding of genocide in the ICTY. This was because the ICTY, with limited resources, was concerned with whether a (relatively small) set of persons were each individually responsible for acts of genocide.[171] Its inquiries were not directed towards whether a single, cumulative crime of genocide had been committed.[172] The Tribunal was never determining whether genocide occurred at a particular location or time, but whether an individual was responsible for a particular act.[173] Meanwhile, the ICJ was required to consider

169 See *Prosecutor v. Jelisić*, Appeal Judgment, Case No. IT-95-10-A, 5 July 2001, paras 66–72. In *Miolsević*, the Trial Chamber made a finding that a joint criminal enterprise comprising the Bosnian Serb leadership had an aim and intention to destroy the Bosnian Muslim population in some of the relevant areas: *Prosecutor v. Miolsević*, Decision on Motion for Judgement of Acquittal, Case No. IT-02-54-T, 16 June 2004, paras 246, 288–9. The charge of genocide was not before the respective Trial Chambers presiding over the *Tadić* and *Krnojelac* cases, which as stated above may indicate genocide was not perpetrated by those particular defendants at the relevant time periods, but is not strong support for the proposition that the specific intent was absent in *all* agents or officers, especially as the respective Trial Chambers were not required to consider this issue. Additionally, Gattini points out that the requisite intent for an accomplice charged with complicity in genocide was not settled: see Gattini, *supra* note 162, 896, fn. 33.

170 A. Seibert-Fohr, 'The ICJ Judgment in the Bosnian Genocide Case and Beyond: A Need to Reconceptualize?', in C. Safferling & E. Conze (eds), *The Genocide Convention: Legal and Historical Reflection 60 Years after its Adoption* (2010) 245, 252 citing *Bosnia v. Serbia*, *supra* note 137, paras 361, 367.

171 Goldstone & Hamilton, *supra* note 155, 105.

172 Gattini, *supra* note 162, 902.

173 Goldstone & Hamilton, *supra* note 155, 105.

the cumulative impact of different acts committed over a large area by a number of perpetrators, many of whom were not identifiable.[174]

Legally-speaking, there are firmly established "structural and substantial differences" between individual criminal responsibility for genocide, and State responsibility for genocide, especially in relation to intent.[175] There are differences in standard of proof.[176] Considered in light of the ICJ's efforts to distinguish individual criminal responsibility from State responsibility in the same judgment for the issue of classifying conflict *international* (discussed above),[177] this reliance on the ICTY findings without contextualizing such findings in their legal regime becomes, with respect, even more difficult to understand. This is especially so given what was submitted in the previous Section D, about the readiness of the ICJ to dismiss an international criminal court's findings because of the latter's distinct legal regime.

What is troubling was also the ICJ's dependence on the ICTY's *lack* of finding. The ICJ seemed to give weight to the lack of conviction for genocide where the accused died before the proceedings finished,[178] or where indictments were pending.[179] Further, the ICJ considered that the decision of the Prosecutor not to include a charge of genocide was significant in assessing whether genocide occurred.[180] This is controversial, as when the particular context of a Prosecutor's decision not to charge is analyzed, it may reveal a plea agreement, resource constraints, or lack of *mens rea* evidence for the individual concerned, none of which are relevant to the ICJ proceedings on State responsibility.[181] The ICJ did not attempt to inquire into such contextualization. The ICJ placed reliance on similar material in the *Croatia v. Serbia* case.[182] However, its comments in this respect have been criticized as being "ambiguous" and "nebulous", and the degree to which its own findings and those of the ICTY were used is not delineated.[183]

174 I. Gillich, 'Between Light and Shadow: the International Law Against Genocide in the International Court of Justice's Judgment in *Croatia v. Serbia* (2015)', 28(1) *Pace International Law Review* (2016) 117, 139.

175 *Ibid*.

176 Webb, 'Binocular Vision', *supra* note 19, 143.

177 See Section D above.

178 *Bosnia v. Serbia*, *supra* note 136, paras 374(e), 374(f).

179 *Ibid*., paras 374(g).

180 *Ibid*., paras 217; 374.

181 Goldstone & Hamilton, *supra* note 155, 106.

182 Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Croatia v. Serbia*), Judgment, I.C.J. Reports 2015, 3, 75-76, 128, paras 187, 440.

183 Gillich, *supra* note 175, 140-1.

Schabas has opined that the ICJ "took an exceedingly deferential approach" to the ICTY's findings, and adopted "virtually uncritically" its findings in fact and holdings in law, despite apparent inconsistencies in the body of ICTY case law.[184] He interprets this as an acknowledgement of the ICTY's expertise on issues of fact and law within international criminal law.[185] Indeed, the main instance of ICTY–ICJ divergence in this case was in relation to the ICTY's ruling on a general international law issue, namely, State responsibility for the actions of non-State groups as a component of classifying a conflict as *international*.[186]

However, it is submitted that this case is further evidence of the problems of judicial dialogue and misapprehension of the ICTY's institutional mandate. The ICJ methodology with respect to its reliance on the ICTY's findings and holdings required greater clarity and transparency.[187] The ICJ perceived the ICTY to be pronouncing on matters of international criminal law. It behaved in the opposite manner to what has been described in sections above: it was uncritical in adopting many of the ICTY's findings and holdings.

When considering *legal* issues relating to genocide, such as distinctions between ethnic cleansing and genocide, or the requirement to prove specific intent, the ICJ made an effort to engage with the jurisprudence of the ICTY and ICTR and produce a coherent set of rules.[188] This was reciprocated in the ICTY Trial Chamber's subsequent judgment in *Prosecutor v. Popović*,[189] in which the Trial Chamber attempted in its judgement on legal issues to justify such findings with reference to both the ICTY jurisprudence and the *Bosnia v. Serbia* case on the status of customary international law during the Yugoslav wars,[190] the requirement to prove specific genocidal intent,[191] the definition of targeted group,[192] the examples of acts causing serious bodily or mental harm,[193] the finding that forcible transfer does not *per se* constitute a genocidal act,[194]

184 W.A. Schabas, 'Genocide and the International Court of Justice: Finally, a Duty to Prevent the Crime of Crimes', 2(2) *Genocide Studies and Prevention* (2007) 101, 113.
185 *Ibid*.
186 See Section D.
187 Gattini, *supra* note 162, 903; Goldstone and Hamilton, *supra* note 155, 111.
188 Schabas, *supra* note 184, 109–110.
189 *Prosecutor v. Vujadin Popovic*, Judgment, IT-05-88-T, 10 June 2010 [*Popović*].
190 *Ibid*., para. 807, fn 2911.
191 *Ibid*.. para. 808, fn 2913.
192 *Ibid*., para. 809, fn 2916.
193 *Ibid*., para. 812, fn 2925.
194 *Ibid*., para. 813, fn 2926.

the meaning of "destroy" in customary international law,[195] and the extent of targeting of a group that is required for genocide to be made out.[196]

Nevertheless, when considering factual issues of whether the relevant elements were proven in the Bosnian and Croatia cases, it is submitted that the ICJ was overly reliant on the findings of the ICTY, and it is in this sense that it failed to contextualize the findings of another international court.

III. The Future of This Issue

If this conclusion is accepted, such considerations are concerning for the reason that both the ICJ and the ICC are presently seized of proceedings in respect of the situation in Myanmar and of alleged acts committed by members of the Myanmar military *Tatmadaw* and other State security forces against the Rohingya people. What was described above for *Bosnia v. Serbia* and *Croatia v. Serbia* may recur if cases concerning allegations of crimes against the Rohingya progress through their respective fora.

On 11 November 2019, The Gambia filed a written application with the Registry of the ICJ. Similar to Bosnia and Herzegovina's and Croatia's allegations against Serbia, The Gambia alleges that "acts adopted, taken and condoned by the Government of Myanmar against members of the Rohingya group" constituted violations of the Genocide Convention.[197] Such alleged violations include committing genocide, attempting to commit genocide, incitement to commit genocide, failing to prevent genocide, and failing to punish genocide.[198] It appears that the impugned acts are alleged to have been perpetrated after the commencement of "clearance operations" targeting Rohingya villages on 9 October 2016, which lasted until at least May 2019.[199] The ICJ indicated a number of provisional measures to Myanmar to prevent both future acts and the destruction of evidence, and it considered that for these provisional measures, it had *prima facie* jurisdiction and that the case should not be removed from its list.[200] On 20 January 2021, Myanmar filed preliminary objections to the

195 *Ibid*., para. 822, fn 2943.

196 *Ibid*., para. 831, fn 2968.

197 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Application Instituting Proceedings, 11 November 2019, General List No 178, para. 2.

198 *Ibid*., para. 111.

199 *Ibid*., paras 48, 100.

200 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Order of Provisional Measures, 23 January 2020, ICJ Reports

jurisdiction of the Court, the nature of which have not been disclosed to the public.[201] This issue as to jurisdiction may forestall consideration of the merits of the claim for 12 to 24 months.[202]

Meanwhile, on 4 July 2019, the Prosecutor of the ICC requested Pre-Trial Chamber III to authorize an investigation into the "Situation in Bangladesh/ Myanmar". The request was for

> "authorisation to investigate crimes within the jurisdiction of the Court in which at least one element occurred on the territory of Bangladesh, and which occurred within the context of two waves of violence in Rakhine State on the territory of neighbouring Myanmar, as well as any other crimes which are sufficiently linked to these events".[203]

The Prosecutor relied on the aforementioned violence attending the "clearance operations" from October 2016 to March 2019,[204] but made a case for crimes against humanity to justify the investigation "without prejudice to other possible crimes" which might be revealed by the investigation,[205] including genocide.[206]

2020, 3, 16 paras 37–38.

201 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Order, International Court of Justice, General list No 178, 28 January 2021.

202 Global Justice Centre, 'Q&A: Preliminary Objections in The Gambia v. Myanmar at the International Court of Justice' (2021), available at https://www.globaljusticecenter.net/files/20210203_ICJpreliminaryObjections_QA.pdf (last visited 18 February 2022).

203 Request for Authorisation of an Investigation Pursuant to Article 15, *supra* note 115, 11-12, para. 20.

204 *Ibid*., 14-15, para. 27.

205 *Ibid*., 40, para. 75; This was accepted by the Pre-Trial Chamber III: see *Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar*, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation, ICC-01/19-27 (Pre-Trial Chamber III), 14 November 2019, 50, para. 111 [*Bangladesh/Myanmar*, Decision].

206 'Request for Authorisation of an Investigation Pursuant to Article 15', *supra* note 115, 11-12, para. 20, fn 33: The Pre-Trial Chamber III determined that the Prosecutor's investigation was to be limited to crimes "where at least one element of the crime occurred on the territory of Bangladesh"; *Bangladesh/Myanmar*, Decision, *supra* note 205, 52-53, para. 120. However, the ICC Elements of Crimes contemplate "systematic expulsion from homes" as possibly constituting genocide: see International Criminal Court, *Elements of Crimes*, Doc No. ICC-PIDS-LT-03-002/11_Eng (2011), 3, fn. 4.

Both of these proceedings are nascent. Further, there are differences between them. The international criminal law proceedings concern the individual criminal liability of officials and agents of Myanmar, while the ICJ proceedings concern the alleged violation of the Genocide Convention by the State. However, this was also the case for the proceedings concerning Serbia, and if the latter are an indication of the treatment by the respective courts of parallel proceedings, there is reason to believe that unless a clear and consistent basis for treating findings made in other fora is laid down, problems associated with insufficient contextualization of findings made in other courts will continue to affect the international legal system.

F. Palestine and the General International Law of Statehood

The final example to be considered concerns, it is submitted, a recent decision by the ICC to retreat from its previous convictions about its role in interpreting general international law. In considering the *Situation of Palestine*, the Court was seized with complicated questions about its role in determining, or refraining from determining, questions of general international law. ICC Pre-Trial Chamber I avoided what is argued to be a necessary consideration of the meaning of "State" under general international law. In doing so, it contributed to ambiguity about its role in deciding questions of general international law, when this decision is considered alongside previous examples of this analysis.

The issue being considered here is not the heavily debated question of whether Palestine currently fulfils the criteria for statehood under international law. Rather, what is being considered in this section is how the ICC considers its role in interpreting or applying the body of law outside the *Rome Statute*, through the example of the statehood question.

I. The ICC Refuses to Interpret General International Law

The ICC may only exercise jurisdiction over a situation if:

1. an accused person is a national of a State Party to the *Rome Statute* (*ratione personae* jurisdiction);[207] or
2. an accused person is a national of a State, which is not a State Party to the *Rome Statute*, but which has nevertheless accepted the jurisdiction of the ICC by lodging a declaration with the Registrar of the ICC (*ratione personae* jurisdiction);[208] or
3. an accused person perpetrates certain crimes on a territory of a State Party to the *Rome Statute* (*ratione loci* jurisdiction);[209] or
4. an accused person perpetrates certain crimes on a territory of a State, which is not a State Party to the *Rome Statute*, but which has nevertheless accepted the jurisdiction of the ICC by lodging a declaration with the Registrar of the ICC (*ratione loci* jurisdiction);[210]
5. if the United Nations Security Council refers a situation to the ICC Prosecutor.[211]

Israel has never been a State Party to the *Rome Statute*, and the United Nations Security Council has never referred any situation in Israel or Palestine to the ICC Prosecutor. Accordingly, if any crimes under the *Rome Statute* were perpetrated by individuals in the territory of the Gaza Strip, the West Bank or East Jerusalem, the only basis on which the ICC could exercise jurisdiction over such crimes would be if Palestine was a State Party to the *Rome Statute* or if it validly accepted the jurisdiction of the ICC.[212]

207 *Rome Statute of the International Criminal Court*, 17 July 1998, Art. 12(2)(b), 2187 UNTS 90 [Rome Statute].

208 *Ibid*., Arts 12(2)(a) and (3).

209 *Ibid*., Art. 12(2)(a).

210 *Ibid*., Arts 12(2)(b) and (3).

211 *Ibid*., Art. 13(b).

212 A further (unlikely) exception is where a dual national commits a crime under the Rome Statute, and one of the nationalities of that person is that of a State Party to the Rome Statute: see Y. Ronen, 'ICC Jurisdiction Over Acts Committed in the Gaza Strip: Article 12(3) of the ICC Statute and Non-State Entities', in C. Meloni & G. Tognoni (eds), *Is There a Court for Gaza?* (2012), 469, 473.

On 4 December 2012, the United Nations General Assembly adopted Resolution 67/19 which, *inter alia*, reaffirmed the right of Palestinian people to "self-determination and to independence in their State of Palestine on the Palestinian territory occupied since 1967". Resolution 67/19 also afforded to Palestine "non-member observer State status in the United Nations". [213]

On 1 January 2015, the Government of Palestine lodged with the Registrar of the ICC a declaration under article 12(3) of the *Rome Statute* which purported to accept the jurisdiction of the ICC over alleged crimes committed "in the occupied Palestinian territory, including East Jerusalem, since June 13, 2014". The following day, on 2 January 2015, the Government of Palestine purported to accede to the *Rome Statute* pursuant to article 125(3) of the *Rome Statute*, by depositing its instrument of accession with the UN Secretary-General. On 22 May 2018, Palestine referred the Situation in the State of Palestine to the ICC Prosecutor pursuant to article 13(a) and article 14 of the *Rome Statute*.

On 22 January 2020, the Prosecutor submitted a request that initiated the proceedings subject of this analysis. Having already completed some of the investigation of alleged crimes perpetrated in the Occupied Palestinian Territory, the Prosecutor sought to ensure the "soundest legal foundation" to her work and requested that the ICC Pre-Trial Chamber "rule on the scope of the Court's territorial jurisdiction in the situation in Palestine", specifically whether the ICC could exercise jurisdiction under article 12(2)(a) of the *Rome Statute* over crimes perpetrated in the Occupied Palestinian Territory.

Article 12(2) of the *Rome Statute* provides that:

(2) the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:

(a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;

(b) The State of which the person accused of the crime is a national.

In its determination of the issue, the Pre-Trial Chamber decided that the ICC had criminal jurisdiction with respect to the situation in Palestine pursuant to article 12(2)(a), on the basis that the State of Palestine was a State Party to the

213 GA Res. 67/19, UN Doc. A/RES/67/19, 4 December 2012, Arts 1 & 2.

Rome Statute.[214] Further, it decided that the territorial scope of such jurisdiction extended to Gaza, and the West Bank including East Jerusalem.[215]

Of interest for this analysis is the Pre-Trial Chamber's examination of the role of the ICC in interpreting general international law. In the *Palestine* decision, the Pre-Trial Chamber made a clear declaration that the ICC could not rule on the question of the status of statehood under general international law:

> "[G]iven the complexity and political nature of statehood under general international law, the Rome Statute insulates the Court from making such a determination, relying instead on the accession procedure and the determination made by the United Nations General Assembly. *The Court is not constitutionally competent to determine matters of statehood that would bind the international community. In addition, such a determination is not required for the specific purposes of the present proceedings or the general exercise of the Court's mandate.* As discussed, article 12(2)(a) of the Statute requires a determination as to whether or not the relevant conduct occurred on the territory of a State Party, for the sole purpose of establishing individual criminal responsibility. Such an assessment enables the Prosecutor to discharge her obligation to initiate an investigation into the present Situation, which would eventually permit the Court to, in accordance with the Statute, exercise its jurisdiction over persons alleged to have committed crimes falling within its jurisdiction."[216]

This refusal to consider the issue of statehood with respect to Palestine could constitute a retreat from the path taken in previous cases by the ICC and other international criminal courts. As discussed above, in *Al Bashir* the ICC Appeals Chamber went further than requested by the parties and purported to make a determination under customary international law with respect to immunities of heads of State.[217] In that case, it decided not only that immunity did not protect President al-Bashir from prosecution, but that customary

214 *Situation in the State of Palestine*, Decision on the Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine, ICC-01/18-143 (Pre-Trial Chamber I), 5 February 2021, 49-50, paras 109–112 [ICC, *Palestine*].

215 *Ibid*., 51, para. 118.

216 *Ibid*., 48-49, para. 108 (emphasis added).

217 Al Bashir, *supra* note 98, 57-58, para. 113.

international law did not protect *any* head of State from prosecution before "international courts".[218] The Appeals Chamber did not need to do so to decide the case before it. Similarly, as set out in Section D(IV), the ICC in *Lubanga* continued an interpretation of *international* that diverged from that of the ICJ. In the *Palestine* decision, the Pre-Trial Chamber was at pains to avoid determining issues under general international law, even when such issues were raised in alternative argument by the Prosecutor.[219] Certainly, there is no requirement for the ICC chambers to follow previous decisions.[220] Nevertheless, discordance on the fundamental question of a court's powers of interpretation is concerning, and may be deleterious for the "normative force" of its decisions.[221]

As part of its reasoning in the *Palestine* decision, the Pre-Trial Chamber appeared to accept that the Court is not competent to determine matters of "statehood that would bind the international community", and in that same passage it referred to the *Rome Statute* "insulat[ing]" the Court from being required to determine matters of "general international law". The majority considered that the object and purpose of the *Rome Statute*, and the purpose of the ICC, were confined to adjudicating matters of individual criminal responsibility.[222] The Pre-Trial Chamber I referred to the earlier decision of Pre-Trial Chamber III on Article 19(3) of the ICC Statute in relation to the alleged deportation of Rohingya persons from Myanmar, in which Pre-Trial Chamber III had asserted that "[t]he territoriality of criminal law […] is not an absolute principle of international law and by no means coincides with territorial sovereignty".[223] However, it is difficult to see how the word "territory" in article 12(2) of the *Rome Statute* could otherwise be defined. To extend criminal jurisdiction beyond territorial sovereignty may undermine the "overriding principle" of State sovereignty and the importance of State consent that is assumed and respected by the *Rome Statute*,[224] and the delegated jurisdiction adopted by the accession procedure of

218 *Ibid*.

219 See *Situation in the State of Palestine*, Prosecution Request Pursuant to Article 19(3) for a Ruling on the Court's Territorial Jurisdiction in Palestine, ICC-01/18-12 (Pre-Trial Chamber I), 22 January 2020, 74, para. 136.

220 *Rome Statute*, *supra* note 207, Art. 21(2).

221 McIntyre, 'Lack of Consistency and Coherence', *supra* note 20, 29.

222 ICC, *Palestine*, *supra* note 214, 48, para. 108.

223 *Ibid*., 30, para. 62.

224 See e.g. B. Broomhall, *International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law* (2004), 73–74. It would also complicate the view that the authority of the ICC is limited to that which is delegated to it by States: see McIntyre, The ICC, *supra* note 117.

the *Rome Statute*, which requires that a State accept the ICC's jurisdiction before its nationals or territory are subject to it. On this point, the Pre-Trial Chamber recognized that the Court's jurisdiction extended to the territorial boundaries as recognized in Resolution 67/19 of the United Nations General Assembly.[225]

Article 12(2) refers to a State which becomes a party, rather than a "State Party". As Professor Shaw QC submitted in his observations to the Pre-Trial Chamber for the Palestine decision, the term "State" is not defined under the *Rome Statute*, and as such, it is arguable that "there is no authority for the proposition that the Court may exercise jurisdiction […] with regard to a state defined other than on the accepted basis of international law".[226] In contrast, examining the ICTY Rules of Procedure and Evidence, State is defined in Rule 2(A) as a "State Member or non-Member of the United Nations", the Federation of Bosnia and Herzegovina and the Republic Srpska, or a "self-proclaimed entity de facto exercising governmental functions, whether recognized as a State or not".[227] These Rules were drafted by the judges of the ICTY pursuant to article 15 of the ICTY Statute, which expressly authorized the judges to adopt rules of procedure and evidence relating to the conduct of proceedings.

This lack of definition of "State" in the Rome Statue was certainly noted by the Pre-Trial Chamber. Nevertheless it determined that:

> "The word 'following' [in article 12(2)] connects the reference to 'States Parties to this Statute' contained in the chapeau of article 12(2) of the Statute with *inter alia* the reference to '[t]he State on the territory of which the conduct in question occurred' in article 12(2)(a) of the Statute. In more specific terms, this provision establishes that *the reference to '[t]he State on the territory of which the conduct in question occurred' in article 12(2)(a) of the Statute must, in conformity with the chapeau of article 12(2) of the Statute, be interpreted as referring to a State Party to the Statute. It does not, however, require*

225 See ICC, *Palestine*, *supra* note 214, 51, paras 116-118.

226 See *Situation in the State of Palestine*, Amicus Curiae of Professor M.N. Shaw QC, ICC-01/18-75 (Pre-Trial Chamber I), 16 March 2020, 7-8, para. 11; also *Situation in the State of Palestine*, Amicus Curiae of Professor R. Badinter et al., ICC-01/18-97 (Pre-Trial Chamber I), 17 March 2020, 5-8, paras 5-10 for similar views that the term "State" in article 12(2)(a) of the *Rome Statute* is defined with reference to principles of general international law in the absence of any special meaning to the word. See e.g. *Situation in the State of Palestine*, Amicus Curiae of R. Heinsch & G. Pinzauti, ICC-01/18-107 (Pre-Trial Chamber I), 16 March 2020 for different views.

227 *ICTY Rules of Procedure and Evidence*, IT/32/Rev.50, 8 July 2015, rule 2(A).

> *a determination as to whether that entity fulfils the prerequisites of statehood under general international law.*"[228]

However, the chapeau of article 12(2) does not only refer to States who "are Parties", but also States who *otherwise* "have accepted the jurisdiction of the Court". This distinction adopted by the *Rome Statute* indicates that the word "State" in article 12(2)(a) *should not* be interpreted as only referring to a State Party to the Statute but also a State which accepts the jurisdiction of the Court, even if it is not a party to the Statute. The word "State" in article 12(1) and article 12(2) is not confined in its meaning to State Party.

On a strict reading of articles 12(1) and 12(2), it would appear that being a "State" is a necessary precondition to becoming a "State Party", and thus a jurisdictional issue for the Court. If this is so, the question then becomes how one defines "State". Quigley argues that only States have the capacity to confer jurisdiction over acts committed within their territory on the ICC.[229] The ICC does not have "original, universal jurisdiction".[230]

This is so under the *Rome Statute*, along with acts that are perpetrated by a national of a State Party, or acts in a situation that the UN Security Council refers to the ICC. If this view is accepted, then in the absence of definition under the terms of the *Rome Statute*, the only basis on which statehood can be

228 ICC, *Palestine*, *supra* note 214, 40, paras 92-93 (emphasis added).

229 J. Quigley, 'The Palestine Declaration to the International Criminal Court: The Statehood Issue' in C. Meloni and G. Tognoni (eds), *Is There a Court for Gaza?* (2012), 429, 431. Quigley argues that, on the separate question of whether Palestine fulfils the criteria of statehood under international law, the answer is "yes". Ash responds to this argument with an opposing view: see R.W. Ash, 'Is Palestine a 'State'? A Response to Professor John Quigley's Article, "The Palestine Declaration to the International Criminal Court: the Statehood Issue"', in C. Meloni & G. Tognoni (eds), *Is There a Court for Gaza?* (2012), 441. Ash however agrees that statehood is an essential pre-condition to an entity granting jurisdiction to the ICC over territory: *Ibid*., 442. See also *Situation in the State of Palestine*, Amicus Curiae of T.F. Buchwald & S.J. Rapp, ICC-01/18-83 (Pre-Trial Chamber I), 16 March 2020, 20, 27 in which the authors argue that the drafting context of article 12 of the Rome Statute "strongly supports the conclusion that the drafters presumed that a 'State' would need to have the ability under international law to delegate the relevant territorial jurisdiction to the Court with respect to the relevant case". The only exception is jurisdiction upon UN Security Council referral. They argue that this is not the case with respect to Palestine and as a result, the ICC does not have jurisdiction for acts committed in this territory: see *Ibid*., 27.

230 See Y. Ronen, 'ICC Jurisdiction Over Acts Committed in the Gaza Strip: Article 12(3) of the ICC Statute and Non-State Entities' in C. Meloni & G. Tognoni (eds), *Is There a Court for Gaza?* (2011) 469, 491.

determined is the basis of general international law. This is perhaps why it is sometimes said that the ICC is no normal criminal court, but an institution that will sometimes be called upon to determine "fundamental issues of general public international law".[231]

This is also salient for the later consideration by the Pre-Trial Chamber of article 125(3) of the *Rome Statute*. Article 125(3) provides that "[t]his Statute shall be open to access by all States. Instruments of accession shall be deposited with the Secretary-General of the United Nations". In the *Palestine* decision, the Pre-Trial Chamber determined that a resolution adopted by the UN General Assembly "renders an entity capable to accede to the Statute pursuant to article 125 of the Statute".[232] However, as the European Centre for Law and Justice submitted to the Pre-Trial Chamber, it is arguable that these functions are administrative and not determinative of statehood.[233] Further, a State may under article 12 of the *Rome Statute* "[accept] the jurisdiction of the Court", and in this scenario the procedure of accession is irrelevant.

II. The Future of the Statehood Issue

It is suggested that the facts giving rise to the *Palestine* decision are not unique. It is not difficult to imagine a case in which an embryonic nation developing into statehood is subject to occupying forces. In such cases, not only are atrocities imaginable but so is the incapacity to prosecute. One such example is the situation in Western Sahara, a territory which was a Spanish colony until 1975.[234] The United Nations General Assembly and the ICJ have

231 A. Zimmermann, 'Palestine and the International Criminal Court Quo Vadis?: Reach and Limits of Declarations under Article 12(3)', 11 *Journal of International Criminal Justice* (2013) 2, 303, 329; see also Buchwald & Rapp, *supra* note 229, 17–19.

232 Palestine, *supra* note 214, 42, para. 97; see also *Situation in the State of Palestine*, Amicus Curiae of Professor R. Falk, ICC-01/18-77 (Pre-Trial Chamber I), 16 March 2020, 9, para. 7.

233 *Situation in the State of Palestine*, Amicus Curiae of European Centre for Law and Justice, ICC-01/18-70 (Pre-Trial Chamber I), 13 March 2020, 8-9, para. 8; see also Buchwald & Rapp, *supra* note 229, 8-10 in relation to the administrative role of the Secretary-General, who is the treaty depositary of the *Rome Statute*.

234 Khoury argues that there are some similarities between the situations of Palestine and Western Sahara, although the latter has not achieved the renown of the former. This is perhaps owing to the unity of the Arab public concerning Palestine and the widespread significance of Jerusalem to this public. See R. B. Khoury, 'Western Sahara and Palestine: A Comparative Study of Colonialisms, Occupations, and Nationalisms', 1 *New Middle Eastern Studies* (2011). For a history of recent political events in Western Sahara, see M. Porges, 'Western Sahara and Morocco: Complexities of Resistance and Analysis' in L.

opined that the Saharawi people in the Western Sahara territory have a right of self-determination, and the Western Sahara has been listed as a non-self-governing territory by the General Assembly since 1963.[235] Commentators have categorized the presence of Moroccan forces in the Western Saharan territory as occupation, and have indicated that there is a strong possibility that human rights violations and even core international crimes have been perpetrated by these forces against Saharawis in that territory.[236] Approximately 84 United Nations member States have recognized the Sahrawi Arab Democratic Republic which controls a proportion of the Western Sahara territory, although 38 of these States have since cancelled or suspended this recognition,[237] while only the United States has formally recognized Morocco's right to sovereignty over the territory.[238] Morocco is not a State Party to the *Rome Statute*, which means that if a government authority purporting to represent the Saharawi attempts to accede to the *Rome Statute*, an investigation into alleged core international crimes would depend on the ICC's judgment as to its statehood.

de Vries, P. Englebert & M. Schomerus (eds), *Secessionism in African Politics* (2019), 127. See also I. Fernández-Molina & M. Porges, 'Western Sahara' in G. Visoka, J. Doyle & E. Newman (eds), *Routledge Handbook of State Recognition* (2019), 376, an edited volume that considers other examples of limited statehood recognition, including for Palestine, Taiwan, Kosovo, Somaliland, Abkhazia and South Ossetia, and Transdniestria and Northern Cyprus.

235 See *Western Sahara*, Advisory Opinion, ICJ Reports 1975, 12, 68 para. 162. See also P. Wrange, 'Self-Determination, Occupation and the Authority to Exploit Natural Resources: Trajectories from Four European Judgments on Western Sahara', 52 *Israel Law Review* (2019) 1, 3.

236 See e.g. H. Sántha, Y.L. Hartmann & M. Klamberg, 'Crimes Against Humanity in Western Sahara: The Case Against Morocco', *Juridisk Publikation* (2010) 2, 175; P.P. Leite, 'Independence by Fiat: A way out of the Impasse – the Self-determination of Western Sahara, with Lessons From Timor-Leste', 27 *Global Change, Peace & Security* (2015) 3, 361, 362. Smith argues that senior Moroccan officials may have perpetrated the crime of aggression in Western Sahara: see J.J. Smith, 'A Four-Fold Evil? The Crime of Aggression and the Case of Western Sahara', 20 *International Criminal Law Review* (2020) 3, 492.

237 See Universidade de Santiago de Compostela, *SADR Recognitions*, available at https://www.usc.es/en/institutos/ceso/RASD_Reconocimientos.html (last visited 19 February 2022).

238 J. Kestler-D'Amours, 'US recognised Morocco's Claim to Western Sahara. Now what?', *Al Jazeera* (online), 11 December 2020, available at https://www.aljazeera.com/news/2020/12/11/us-recognised-moroccos-claim-to-western-sahara-now-what (last visited 19 February 2022). Most States adopt a neutral position as to the status of Western Sahara: 'United States Recognizes Morocco's Sovereignty Over Western Sahara', 115 *American Journal of International Law* (2021) 2 , 318, 320.

A similar situation may also arise where there is a dispute as to the legitimate government of a territory, and one body purports to accept the jurisdiction of the ICC under article 12(3). As set out above, Myanmar is not a State Party to the *Rome Statute*, notwithstanding that some of its nationals may be subject to an investigation owing to crimes allegedly perpetrated on the territory of the State Party Bangladesh. Nevertheless, on 21 August 2021, the Myanmar National Unity Government (NUG) published a statement on its Twitter account setting out that it had accepted the jurisdiction of the ICC with respect to crimes perpetrated on Myanmar territory.[239] The statement asserts that the NUG's Acting President Duwa Lashi La "lodged a declaration with the registrar of the ICC, accepting the Court's jurisdiction with respect to international crimes committed in Myanmar territory since 1 July 2002". The statement further asserts that "[t]he declaration was lodged in accordance with article 12(3) of the Statute of the International Criminal Court, which enables a State not party to the Rome Statute to accept the exercise of jurisdiction of the Court".

The NUG is composed of elected representatives of the National League for Democracy, which won the 2020 general election, as well as representatives of other political parties and who are independents. However, the State Administration Council which is a military body led by Senior General Min Aung Hlaing is the *de facto* government of the State at this time, and on 1 August 2021 it announced that it would assume the role of caretaker government of Myanmar until at least August 2023 under state of emergency laws.[240] It remains unclear whether the caretaker government will be recognize by the United Nations as the legitimate government of Myanmar.[241] If the Office of the Prosecutor decides to widen its current investigation to alleged crimes perpetrated *within* the territory of Myanmar, the NUG's declaration purportedly lodged with the registrar appears to require the ICC to determine whether the NUG is a "State" within the meaning of article 12(3).

239 @NUGMyanmar (National Unity Government Myanmar) (Twitter, 21 August 2021, 1:22am AEST) https://twitter.com/NUGMyanmar/status/1428739347717648389, archived at https://perma.cc/V2KP-4C7P.

240 H. Beech, 'Top Myanmar General Says Military Rule Will Continue Into 2023', *New York Times* (August 2021), available at https://www.nytimes.com/2021/08/01/world/asia/myanmar-state-emergency.html (last visited 19 February 2022).

241 C. Lynch, R. Gramer & J. Detsch, 'U.S. and China Reach Deal to Block Myanmar's Junta From U.N.', *Foreign Policy* (13 September 2021), available at https://foreignpolicy.com/2021/09/13/yanmar-united-nations-china-biden-general-assembly/ (last visited 19 February 2022).

Although the ICC purported in the *Palestine* decision to confine its role to a determination of the "question of jurisdiction set forth in the Prosecutor's Request",[242] to do this arguably required a determination of statehood under general international law. Certainly such determinations are very complicated, and there are few more legally and politically complicated factual scenarios against which to consider this issue than the Israeli-Palestinian context. However, the Pre-Trial Chamber was quick in its decision to point out that not only is it required to make legal determinations quite apart from their political consequences,[243] but that any situation in which core crimes under the Rome Statute are alleged will be a situation in which "political issues are sensitive and latent", and that "the judiciary cannot retreat when it is confronted with facts which might have arisen from political situations and/or disputes".[244]

If one accepts the interpretative logic above, then the unwillingness of the ICC to consider the meaning of "State" under principles of general international law indicates a refusal to interpret general international law, when in truth there is a good argument that it is required to do so in order to determine the limits of its jurisdiction. Such a refusal is to be contrasted with the aforementioned decisions in *Al Bashir* and *Lubanga*, in which the respective ICC Chambers clearly considered that they could interpret matters of customary international law to a degree beyond what was strictly necessary to resolve the disputes before them, and in a way that could be used by other Chambers confronted with a different dispute or set of facts. If so, this demonstrates a discordance within the ICC about its role in interpreting international law.

The Pre-Trial Chamber in the *Palestine* decision concludes with an emphatic declaration that the determination is "without prejudice to any matters of international law arising from the events in the Situation in Palestine that do not fall within the Court's jurisdiction".[245] In this case, the ICC was at pains to clarify that it would not rule on questions of general international law, but rather was concerned with the terms of the *Rome Statute* and the criminal responsibility of individuals. Nevertheless, it is submitted that it is difficult to understand what the "jurisdiction" of the Court might be without a consideration of the meaning of "State" in article 12,[246] and more generally, a refusal to consider issues of general international law. The role of the ICC to adjudicate individual

242 ICC, *Palestine*, *supra* note 214, 29, para. 60.
243 *Ibid*., 28, para. 57.
244 *Ibid*., 27, para. 55.
245 *Ibid*., 50, 58, paras 113, 130.
246 Buchwald & Rapp, *supra* note 229, 17-18.

criminal responsibility is clear, but as the previous examples demonstrate, in the international system this necessarily includes consideration of issues affecting States and sovereignty that are not strictly limited to the terms of the *Rome Statute*.

III. ICC Consideration of ICJ Decisions

Lastly, the ICC Pre-Trial Chamber in *Palestine* did make reference to decisions of the ICJ in this refusal to interpret general international law.

As mentioned, the ICC in *Palestine* considered that article 12(2) did not "require a determination as to whether that entity fulfils the prerequisites of statehood under general international law". In a footnote to this conclusion, the Pre-Trial Chamber stated: "For example, in its advisory opinions on the Kosovo Declaration of Independence and the Wall, the International Court of Justice refrained from determining whether Kosovo or Palestine were 'States' under public international law."[247]

It is submitted that this is not a completely accurate summary of those respective cases, and it omitted important legal context to those decisions. This is a continuation of the tendencies described in previous sections for international courts and tribunals to omit appropriate contextualization of the decisions of the ICJ.

In the case *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* ('*Kosovo Declaration* Advisory Opinion'),[248] the question put by the UN General Assembly to the ICJ was simply: "Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?" The question did not ask about the statehood of Kosovo, or the legal consequences of its declaration of independence.[249] In essence, it is not that the ICJ refrained from determining the question of Kosovan statehood. It is rather that the ICJ was not asked to make this determination, that the question put to the ICJ was very specific, and that the ICJ decided not to reformulate the scope of the General Assembly's request to the ICJ.

247 ICC, *Palestine*, *supra* note 214, 40, para. 93, fn 266 (citations omitted).

248 *Accordance With International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, ICJ Reports 2010, 403.

249 *Ibid*., 423, paras 49-51.

In the case *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* ('*Wall* Advisory Opinion'),[250] the ICJ did not strictly speaking make a determination of the statehood of Palestine, and such a question was not put to it. However, it is arguable that this conclusion was essential to, or else implicit in, its reasoning. The ICJ was asked by the UN General Assembly: "What are the legal consequences arising from the construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem, as described in the Report of the Secretary-General, considering the rules and principles of international law […]?". The ICJ considered Israel's argument that the wall was not annexation but was a temporary measure "to enable it effectively to combat terrorist attacks".[251] However, without dismissing this argument, the ICJ determined that the construction of the wall could have the effect of "prejudg[ing] the future frontier between Israel and Palestine" and providing a means by which Israel could "integrate the settlements and their means of access", which the Court considered "would be tantamount to *de facto* annexation".[252] Further, the ICJ opined that "[t]he existence of a 'Palestinian people' is no longer an issue".[253]

As in the *Kosovo Declaration* Advisory Opinion, the ICJ in the *Wall* Advisory Opinion was not asked whether Palestine was an independent State. Nevertheless, in likening the construction on the wall by Israel as "tantamount to *de facto* annexation", a prejudgment of future borders between Israel and Palestine, and a violation of the right to self-determination held by Palestinian people, it is arguable that the ICJ was required to reason that the title to the West Bank territory lay with the Palestinian entity.[254] The omission by the ICC Pre-Trial Chamber in *Palestine* to deal with this issue in citing the ICJ's advisory opinion for avoidance of a determination of statehood raises the issues highlighted in other sections above.

Meanwhile, the ICC Pre-Trial Chamber in *Palestine* also referred to the opinion in the ICJ's *Wall* Advisory Opinion that the rights of the Palestinian people "include the right to self-determination", and that the right to self-determination is "owed *erga omnes*".[255] This informed the Pre-Trial Chamber's opinion that "the right to self-determination amounts to an 'internationally

250 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, 136.
251 *Ibid*., 50, para. 116.
252 *Ibid*., 52, para. 121.
253 *Ibid*., 50-51, para. 118.
254 Zimmermann, *supra* note 231, 327.
255 ICC, *Palestine*, *supra* note 214, 52-54, paras 120-121.

recognised human [right]' within the meaning of article 21(3) of the [Rome] Statute".[256]

G. Conclusion

The multiplicity of international judicial bodies presents both opportunities and problems. Which category fragmentation of judicial opinion falls into depends on its circumstances. It may merely reflect the existence of different branches of law (standard in domestic law) and the unique institutional context of these branches. In fact, fragmentation may be inescapable.[257] There is not necessarily an issue with diverging opinions of international courts, provided that relevant decisions from other courts are carefully considered and placed in their judicial context, so that unnecessary fragmentation may be minimized and greater certainty about judicial principle is provided. Attentive consideration and respect of other relevant judgments ensures stability of international law.[258] It is essential that differences in interpretation are clearly explained with reference to the conflicting view.[259] As Steer points out, the goal is not a unified system, but rather a system that is "self-aware of the concurrently existing plural legal spaces, and of the process by which these spaces interact".[260]

Unfortunately, the examples provided show that there is no clear methodology of the international courts in addressing these issues. This is politically and legally problematic.

The ICJ rarely cites external jurisprudence, which limits dialogue.[261] It sometimes ignores relevant international criminal court approaches, or rejects them based on the institutional context of criminal law. When a sophisticated international judicial body analyses general international law relevant to its case, it is thought that the ICJ should engage with this discussion,[262] not deny that the discussion is necessary. Further, if the ICJ does not refer to the relevant rulings of other courts, it is possible that those courts may refer less to relevant rulings of the ICJ. This was observable for the effective control or overall

256 *Ibid*., 55, para. 122.
257 Report of the Study Group, *supra* note 6, para 493.
258 Treves, *supra* note 30, 234, 252.
259 Kasotti, *supra* note 5, 35.
260 C. Steer, 'Legal Transplants or Legal Patchworking? The Creation of International Criminal Law as a Pluralistic Body of Law', in E. v. Sliedregt & S. Vasiliev, *Pluralism in International Criminal Law* (2014), 39, 62.
261 Webb, *International Judicial Integration*, *supra* note 3, 193; Simma, *supra* note 1, 287.
262 Trapp, *supra* note 147, 248.

control issue. Notwithstanding the ICC Prosecutor's submission concerning the distinction between the ICJ test and the ICC and ICTY test, the Trial Chamber completely ignored the ICJ's ruling on this issue in its judgement. Rather than a beneficial pluralism and interlocking jurisprudence, there is a confusing array of contradictory opinions.

There is room for improvement for the other courts as well. In some areas of the law, the criminal courts and tribunals have not contextualized the ICJ's relevant judgments, such as for immunities or for the statehood question, or have not referred to them at all, as for the control test. The ICTY in relation to *Nicaragua* was a notable exception.

On the other hand, when required to consider a factual scenario and a criminal law issue almost identical to those dealt with by international criminal courts and tribunals, the ICJ was overly deferential to the latter and did not sufficiently contextualize their findings. When considered alongside the other two examples, what emerges is not a problem of fragmentation, but a lack of structured cooperation between judicial international organizations.[263] The interactions between them are chaotic and unregulated.[264] A measured balance of these different approaches is required.

Finally, there is an apparent lack of agreement between the courts on each other's institutional purpose. In the first two examples of immunities and characterization of conflict as international, the ICJ did not consider the criminal courts to have much of a role outside of criminal law issues, while the criminal courts considered themselves as authorities on questions of general international law. Further indications were that the criminal courts did not consider that the ICJ could rule on their jurisdiction, as shown in the recent immunities cases. In contrast, for criminal issues, the ICJ arguably delegated much of its role to the ICTY. In the fourth example of the *Palestine* decision, the ICC emphatically refused to consider an issue of general international law, in circumstances it was arguably called upon to adjudicate on one such question in order to define its jurisdictional limits with respect to quasi-State entities.

As Judge Bennouna observed extrajudicially, comity between courts does not prevent improving processes of recognition, and giving greater attention to the relationship between different jurisdictions and conflicts between them.[265]

263 Kasotti, *supra* note 5, 31.

264 Van Alebeek, 'The Judicial Dialogue', *supra* note 10, 110.

265 M. Bennouna, 'How to Cope with the Proliferation of International Courts and Coordinate Their Action' in A. Cassese (ed.), *Realizing Utopia: The Future of International Law* (2011) 287, 290.

Firstly, when the judgments of other courts are referenced, it is essential that the context that these other judgments were adjudicating is fully explicated. It is hazardous and confusing to cite such other judgments when they provide only partial or qualified support for the relevant proposition. Secondly and conversely, it is important to ensure that the deliberation of another court on a similar legal issue is not omitted. When a well-respected international judicial body provides its interpretation of a legal issue, it is important that a subsequent judicial body considering a similar issue engages with the ruling of that court, accepting or dismissing its relevance or correctness with detailed reasoning. Such an approach is collaborative and in fact improves the second judicial body's judgment by ensuring it is responsive to a multiplicity of situations that come or will come before the court. Moreover, it is expected in a rapidly evolving international system that a ruling by another judicial body made many years prior may have less relevance today, but this is no justification to ignore it. Thirdly, there needs to be coordination within and between judicial bodies over the role of each judicial body in interpreting customary international law and non-specialized legal terms. At present, separate judicial bodies and even differently constituted chambers within the same judicial body display contrasting views on this question. There may be a place for the ICJ to lead this coordination as a court of general jurisdiction and one that was established under the widely-ratified UN Charter.[266]

The ICTY Appeals Chamber majority judgment in *Tadić* is a rare example set out above that displays these approaches.[267] The ICJ, in dismissing this interpretation as being confined to issues of criminal responsibility and not to issues of "general international law", displayed insufficient respect for other international judicial authority and insufficient acknowledgement of the pluralist nature of the international legal system. A later international criminal court, the ICC, would then ignore the ICJ's ruling completely, notwithstanding attempts by the Prosecutor in submissions to reconcile the differing tests of the two judicial bodies.

The relationships between the (sometimes overlapping) legal regimes of the international system are still in the process of being clearly defined and require inter-court cooperation. Resolving these issues is of singular and pressing

266 Shany, *supra* note 27, 31; Milanovic, *supra* note 158, 693.

267 See *Tadić*, *supra* note 123, paras 115–145 in which the majority analyse the *Nicaragua* test and explain with detailed reasons why they believe this test "does not appear to be persuasive".

importance to the certainty and legitimacy of the international legal system.[268] Avoiding them will only allow them to fester.[269]

[268] Guilfoyle, 'Lacking Conviction', *supra* note 110, 438.
[269] Ventura, *supra* note 144, 491.