

Pursuant to PTCII order ICC-01/22-90, dated 24 October 2024, this document has been reclassified as "Public"

ANNEX I
Confidential *EX PARTE*
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**EMBASSY OF MONGOLIA
BRUSSELS**

CONFIDENTIAL

Nº A/24-090

The Embassy of Mongolia in Brussels presents its compliments to the Registry of the International Criminal Court and with reference to the latter's Note Verbal REG-JCSS-2024-108 dated 20 September 2024, has the honour to forward a Note Verbal Nº A/24-1441 from the Ministry of Foreign Affairs of Mongolia on asking the Registry's kind assistance in transmitting the attached written submission to the Pre-Trial Chamber II of the International Criminal Court.

The Embassy of Mongolia in Brussels avails itself of this opportunity to renew to the Registry of the International Criminal Court the assurances of its highest consideration.

Enclosed: Note Verbal and written submission /34 pages/



THE REGISTRY OF THE INTERNATIONAL CRIMINAL COURT
The Hague

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MONGOLIA
MINISTRY OF FOREIGN AFFAIRS

AS
/24-1441

The Ministry of Foreign Affairs of Mongolia presents its compliments to the Registry of the International Criminal Court and has the honour to request the latter to kindly transmit to the Pre-Trial Chamber II of the International Criminal Court the attached written submission as invited by the Chamber's Decision No. ICC-01/22 dated 10 September 2024 and the Registry's communication REG-JCSS-2024-108 dated 20 September 2024.

The Mongolian side has further the honour to indicate its readiness to attend an oral hearing, should the Court deem it necessary, to elaborate upon and clarify critical issues and to engage the Court on the most pertinent matters of this case, in accordance with the Regulation 109(3) of the Court.

In addition, the Mongolian side hereby expresses no objection to public disclosure of the submission in full.

The Ministry of Foreign Affairs of Mongolia avails itself of this opportunity to renew to the Registry of the International Criminal Court the assurances of its highest consideration.



REGISTRY
INTERNATIONAL CRIMINAL COURT

The Hague

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I. Introduction

Mongolia, a landlocked country bordering Russia and China, shares a 3,485 km border with Russia. Diplomatic relations between Mongolia and Russia, established in 1921, are deeply rooted in a longstanding historical tradition. In 1993, the parties signed the "Friendly Relations and Cooperation Agreement" which was expanded in 2019 into the "Friendly Relations and Comprehensive Strategic Partnership Agreement". Today, the two countries continue to expand and develop cooperation in all fields within the framework of this basic document.

In accordance with its foreign policy concept, Mongolia pursues a peaceful, transparent, independent, and multi-pillar foreign policy. Maintaining friendly relations with its immediate neighbors, Russia and China, is a top priority, and Mongolia seeks to maintain a balanced, good-neighborly relationship with both countries. It is also outlined in the concept that the historical traditions and unique characteristics of economic cooperation between the two countries will be taken into account when developing and maintaining extensive cooperation.

Mongolia's foreign policy concept is a document based on the national interests and shaped by the country's both internal and external conditions.

This year marks the 85th anniversary of the victory in the Battle of Khalkh River, one of the historical events of the 20th century that significantly contributed to Mongolia's freedom, independence, and national security.

It is a tradition to invite the President of the Russian Federation to Mongolia to participate in the anniversary events commemorating the victory at the Battle of Khalkh River. For instance, during the 70th anniversary in 2009, the 75th anniversary in 2014, and the 80th anniversary in 2019, the Head of State of the Russian Federation paid official visits to Mongolia.

Within the framework of high-level visits, which have become a historical tradition, the parties discuss pressing issues in their bilateral relations. For the two countries that have friendly ties and comprehensive strategic partnership agreements, these visits offer an opportunity to strengthen cooperation across all fields.

In particular, Mongolia imports the majority of its strategically important goods from Russia. Consequently, a stable and reliable supply of these goods is directly tied to the economic growth and stability of the country.

As of today, 95 percent of Mongolia's oil products and 25 percent of its electricity needs are imported from Russia. This reliance significantly impacts the country's economy and energy security, as well as its overall existential security.

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II. Submission

1. Mongolia emphasizes that it is not, in any capacity, defying or rejecting the International Criminal Court ("ICC" or "Court"). Instead, Mongolia is addressing specific legal concerns grounded in its obligations under international law and the Rome Statute of the International Criminal Court ("Rome Statute" or "Statute"). Mongolia remains fully committed to upholding the principles of international justice and peace, and its actions are neither related to the merits of the charges nor intended to circumvent its obligations under the Rome Statute. Rather, Mongolia seeks to ensure that all its actions are fully consistent with its responsibilities under international law.
2. Mongolia notes that immunity from criminal jurisdiction and individual criminal responsibility are distinct and separate concepts under international law, with jurisdictional immunity being procedural in nature. Accordingly, this submission will address only the issue of Head of State Immunity from criminal jurisdiction, without engaging with matters related to official capacity.
3. Mongolia underscores that the matter at hand is purely legal in nature and should be addressed exclusively within the framework of international law. Accordingly, any actions or decisions related to this issue should be based solely on international law, without influence from political considerations or other external factors.
4. As a sovereign state, Mongolia recognizes its obligation under general international law to respect the principle of the sovereign equality of States, to accord State Immunity to the Russian Federation, and to grant President Vladimir Putin the immunities of a Head of State.
5. Mongolia observes that the Russian Federation is not a State Party to the Rome Statute.
6. Mongolia notes that, unlike in previous cases of a similar nature before the ICC, there is no United Nations Security Council ("UNSC") referral or resolution—acting under Chapter VII of the UN Charter—imposing an obligation to cooperate fully with the ICC in relation to the current situation.
7. Mongolia affirms that President Vladimir Putin is the incumbent Head of State of the Russian Federation. Accordingly, under international law, he is entitled to immunity *ratione personae* as well as immunity *ratione materiae*. Consequently, President Putin enjoys absolute immunity from criminal jurisdiction and inviolability.
8. Mongolia asserts that this immunity extends to proceedings before international courts, including the ICC, unless the Russian Federation explicitly waives the immunity of its Head of State. In the absence of such a waiver, President Putin remains protected by both immunity *ratione personae* and *ratione materiae*.

9. Mongolia observes that the Rome Statute is an international multilateral treaty and, under international law, it does not prevail over or supersede other obligations stemming from customary international law or treaties.
10. Mongolia maintains that its commitments under the Rome Statute must be interpreted in harmony with its existing obligations under international legal frameworks.
11. Mongolia submits that this document should be read in its entirety. Mongolia reserves the right to further elaborate its position and to supplement or amend this submission as necessary in the future.

A. Article 27(2) of the Rome Statute does not reflect customary international law

12. In the *Jordan Appeal* case the ICC Appeals Chamber held that:

1. There is neither State practice nor *opinio juris* that would support the existence of Head of State Immunity under customary international law *vis-à-vis* an international court. To the contrary, such immunity has never been recognised in international law as a bar to the jurisdiction of an international court.¹

13. In support for its statement above, Appeals Chamber held that:

102. The most direct effect of article 27(2) of the Statute is that a Head of State cannot claim Head of State Immunity when he or she appears before the ICC for prosecution in accordance with the provisions on the exercise of jurisdiction under articles 12 et seq. of the Statute. Nor does Head of State Immunity present a bar to the Court opening an investigation in relation to or issuing a warrant of arrest against a Head of State. This was specifically recognised by the ICJ in the Arrest Warrant Case.

103. It is of note that article 27(2) of the Statute is a clear provision in conventional law; but it also reflects the status of customary international law. In this regard, the Appeals Chamber notes, first, article 7 of the Nuremberg Charter of the International Military Tribunal at Nuremberg, [...]

115. The Appeals Chamber considers that the absence of a rule of customary international law recognising Head of State Immunity *vis-à-vis* an international court is also explained by the different character of international courts when compared with domestic jurisdictions. While the latter are essentially an expression of a State's sovereign power, which is necessarily limited by the sovereign power of the other States, the former, when adjudicating international crimes, do not act on behalf of a particular State or States. Rather, international courts act on behalf of the international community as a whole. Accordingly, the principle of *par in parem non habet imperium*, which is based on the sovereign equality of States, finds no application in relation to an international court such as the International Criminal Court.²

¹ Prosecutor v Al Bashir (Judgment in the Jordan Referral re Al-Bashir Appeal) ICC-02/05-01/09-397-Corr (Appeals Chamber, 6 May 2019) para 1.

² Ibid, paras 102, 103, and 115.

14. Mongolia disagrees with the reasoning of the ICC Appeals Chamber that Article 27(2) does reflect customary international law.
15. It is a well-established principle under international law that the existence of customary international law must be grounded in a two-element approach: state practice and *opinio juris*.³
16. To ascertain the existence and content of a rule of customary international law, one must determine whether there is a *usus* (general state practice) that is accepted as law (*opinio juris sive necessitatis*). This was affirmed by the International Court of Justice ("ICJ") in the *North Sea Continental Shelf* case:

[...] two conditions must be fulfilled. Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation.⁴
17. The International Law Commission ("ILC") has underscored that each of the two constituent elements must be independently established, meaning that:

[...] the existence of one element may not be deduced merely from the existence of the other, and that a separate inquiry needs to be carried out for each.⁵
18. Mongolia asserts that, at present, there is neither sufficient general practice nor *opinio juris* to support the contention that Article 27(2) of the Rome Statute reflects customary international law.

1. *There is no general practice*

(a) Lack of widespread, representative, and consistent practice

19. As codified by the ILC the relevant state practice for evidence of existence of customary international law must be *general*, meaning that it must be *sufficiently widespread and representative, as well as consistent*.⁶

[...] the notion of generality, which refers to the aggregate of the instances in which the alleged rule of customary international law has been followed, embodies two requirements. First, the practice must be sufficiently widespread and representative. Second, the practice must exhibit consistency. In the words of the International Court of Justice in the *North Sea Continental Shelf* cases, the practice in question must be "both extensive and virtually uniform": it must be a "settled practice". As is explained below, no absolute standard can be given for either requirement; the threshold that needs to be attained for each has to be assessed taking account of context. In each case, however, the practice should be of such a character as to make it possible to discern a virtually

³ International Law Commission, 'Draft Conclusions on Identification of Customary International Law, with Commentaries' [2018] II(2) YBILC, Conclusion 2.

⁴ *North Sea Continental Shelf*, Judgment [1969] ICJ Rep 3, para 77.

⁵ International Law Commission, 'Draft Conclusions on Identification of Customary International Law, with Commentaries' [2018] II(2) YBILC, Conclusion 3 and Commentary (8) to Conclusion 3.

⁶ *Ibid.*, at Conclusion 8.

uniform usage. Contradictory or inconsistent practice is to be taken into account in evaluating whether such a conclusion may be reached.

The requirement that the practice be consistent means that where the relevant acts are divergent to the extent that no pattern of behaviour can be discerned, no general practice (and thus no corresponding rule of customary international law) can be said to exist. For example, in the Fisheries case, the International Court of Justice found that "although the ten-mile rule has been adopted by certain States ... other States have adopted a different limit. Consequently, the ten-mile rule has not acquired the authority of a general rule of international law".⁷

20. In the *Jordan case*, the evidence presented by the Appeals Chamber to demonstrate state practice, which is necessary to establish a rule of customary international law, falls short of being widespread, representative, or consistent. The actions of states and regional bodies reveal a fragmented and inconsistent approach, undermining any assertion of a well-established or "settled practice" regarding a customary rule that would negate Head of State Immunity before international courts.
21. Multiple African states, for instance, have explicitly refused to arrest Heads of State, invoking the principle of immunity. In these cases, States, *inter alia*, Malawi and Djibouti, cited immunity obligations when declining to arrest Sudanese President Omar al-Bashir, despite ICC warrants.⁸
22. Similarly, the African Union ("AU") has consistently asserted that sitting Heads of State should retain immunity from prosecution before international courts.⁹ The AU's stance, further codified in the Malabo Protocol, which explicitly grants immunity to sitting African leaders, demonstrates strong opposition to the ICC's interpretation of international law.¹⁰
23. The AU adopted a resolution calling "all Member States to oppose the Decision of the Appeals Chamber in the Hashemite Kingdom of Jordan's Appeal Against the '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 of Omar Al-Bashir', which is at variance with the Rome Statute of

⁷ Ibid, at Commentary (2) and (3) to Conclusion 8.

⁸ Prosecutor v Omar Al Bashir, 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 (13 December 2011); Prosecutor v Omar Al Bashir, Decision on the Non-compliance by the Republic of Djibouti with the Request to Arrest and Surrender Omar Al-Bashir to the Court and Referring the Matter to the United Nations Security Council and the Assembly of the State Parties to the Rome Statute, ICC-02/05-01/09-266-ENG, ICC-02/05-01/09-266-FRA (11 July 2016).

⁹ The African Union's Submission in the "Hashemite Kingdom of Jordan's Appeal Against the '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 of Omar Al-Bashir'.

¹⁰ Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, art 46A bis.

the International Criminal Court, customary international law and the AU Common Position."¹¹

24. Similarly, the League of Arab States (LAS) has mirrored this resistance.¹² For instance, during President al-Bashir's tenure, LAS member state Jordan, refused to arrest him when requested by the ICC.¹³ Their refusal emphasized the principle that sitting Heads of State should retain immunity, further highlighting the inconsistency in state practice concerning this issue. The positions of both the AU and LAS underscore a regional divergence that is incompatible with the idea of a settled practice for a customary international law.
25. Further evidence of inconsistency can be found in the debates within various international legal bodies, such as the UNSC, the ILC, and the UN Sixth Committee.
26. At the UNSC, the Russian Federation, the United States of America, and the People's Republic of China, as permanent members of the Security Council, have clearly expressed their opposition to the negation of Head of State immunity before the ICC.
27. Russian Federation maintained that existing international law guarantees immunity for State officials from the criminal jurisdiction of foreign states, regardless of the specific jurisdiction claimed by international criminal tribunals.¹⁴
28. The United States of America reiterated its long-standing and principled objection to any assertion of ICC jurisdiction over nationals of states not party to the Rome Statute, absent a Security Council referral or the consent of such states. The United States of America emphasized its concern over what it termed illegitimate attempts by the ICC to assert such jurisdiction.¹⁵ Similarly, People's Republic of China stressed, "we cannot accept any exercise of the ICC's jurisdiction against the will of non-State parties."¹⁶
29. Within the UNSC, other states, including Kingdom of Morocco, Arab Republic of Egypt, Republic of Rwanda, and Bolivarian Republic of Venezuela, have

¹¹ Decisions, Declarations, Resolution and Motion, Assembly of the Union, Thirty-Third Ordinary Session (9-10 February 2020) SC26504-9/1, p 2.

¹² The League of Arab States' Observations on the Hashemite Kingdom of Jordan's Appeal Against the "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 of Omar Al-Bashir"; The League of Arab States' Post-Hearing Submissions.

¹³ Prosecutor v Omar 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 of Omar Al-Bashir, ICC-02/05-01/09-309 (11 December 2017).

¹⁴ Russia, during the UN Security Council 6887th Meeting (13 December 2012) UN Doc S/PV.6887.

¹⁵ UNGA, 'Reports of the Secretary-General on the Sudan and South Sudan' (Security Council, 74th year, 8554th meeting, 19 June 2019) UN Doc S/PV.8554.

¹⁶ Statement by Wang Guangya, Representative of China to the UN, at the Security Council 5158th Meeting (31 March 2005) UN Doc S/PV.5158.

defended the proposition that President Omar Al-Bashir is still entitled to Head of State immunity.¹⁷ In addition, Republic of Equatorial Guinea and State of Kuwait, which are also not parties to the Rome Statute, have similarly expressed their refusal to recognize the ICC's jurisdiction.¹⁸

30. The topic of state official immunity, particularly the exceptions to immunity for international crimes, has been intensely debated at the ILC, with no consensus emerging.¹⁹ While some members argued that there is an evolving trend toward limiting immunity *ratione materiae*, others contested this view, asserting that state practice does not support such exceptions as established customary law. The division was so significant that the ILC, which typically operates by consensus, had to resort to a rare vote on the matter.²⁰ This highlights the deep disagreements among states, demonstrating that the consistent state practice required for such exceptions to become customary international law does not yet exist.
31. The Sixth Committee of the United Nations General Assembly ("Sixth Committee of the UNGA") has also seen prolonged debates on this issue, with states unable to reach a consensus on whether there exists a customary rule that negates immunity for Heads of State before international courts. Several states have expressed that such limitations on immunity conflict with principles of sovereign equality and non-interference, central tenets of international law.²¹ The continuing contention and unresolved debate in international legal forums further demonstrate the absence of a settled practice, which is essential for establishing customary international law.
32. Even the jurisprudence of the ICC demonstrates notable inconsistency on the issue of Head of State Immunity. In the Republic of South Africa ("South Africa") and Democratic Republic of the Congo ("DRC") cases, the Pre-Trial Chamber held that there is no customary international law removing Head of State Immunity before international courts.²² Conversely, in the Malawi and Chad cases, the Pre-Trial Chamber determined that the traditional rule of Head of State Immunity does create exception for when international courts

¹⁷ Egypt, during the UN Security Council 7710th Meeting, 9 June 2016, S/PV.7710; Morocco, during the UN Security Council 6887th Meeting, 13 December 2012, S/PV.6887; Rwanda, during the UN Security Council 6974th Meeting, 5 June 2013, S/PV.6974; Venezuela, during the UN Security Council 7478th Meeting, 29 June 2015, S/PV.7478.

¹⁸ UNGA, 'Reports of the Secretary-General on the Sudan and South Sudan' (Security Council, 74th year, 8554th meeting, 19 June 2019) UN Doc S/PV.8554.

¹⁹ Report on the Work of the Sixty-Ninth Session (2017) UN Doc A/72/10, Chapter VII.

²⁰ A/CN.4/3378, 'Summary Record of the 3378th Meeting' in Yearbook of the International Law Commission (2017) vol I, UN Doc A/CN.4/3378.

²¹ UN General Assembly Sixth Committee GA/L/3673; GA/L/3557; GA/L/3585.

²² Prosecutor v Omar 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) (Pre-Trial Chamber II, 6 July 2017) para 68; Prosecutor v Omar 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 of Omar Al-Bashir (ICC-02/05-01/09-309) (Pre-Trial Chamber II, 11 December 2017) para 27.

seek arrest.²³ Adding further complexity, the Appeals Chamber in the Jordan case concluded that neither state practice nor *opinio juris* supports the existence of Head of State Immunity under customary international law when it comes to international courts. This divergence in ICC rulings highlights a significant lack of consensus, with decisions oscillating between upholding traditional immunity and rejecting it.

33. In light of these factors, it is evident that the practice of states is neither sufficiently widespread, representative, nor consistent enough to establish a customary international law negating Head of State immunity before international courts.
34. The refusal of numerous states to comply with ICC warrants, the formal opposition by regional bodies, and the lack of consensus within key international legal bodies such as the UNSC, ILC, and Sixth Committee of the UNGA reveal a fragmented and contested practice.
35. Customary international law, as articulated by the ICJ, requires both "extensive and virtually uniform" practice and *opinio juris*, neither of which exists in this context. Therefore, any assertion of a customary rule negating head of State Immunity before international courts is premature and unsupported by the current state of international practice.

(b) The distinction between Immunity and Official Capacity

36. In support of the assertion, that Article 27(2) reflects customary international law, the ICC references several key legal instruments, including the Nuremberg Charter of the International Military Tribunal, the Nuremberg Principles, the ILC's Draft Code of Offences against the Peace and Security of Mankind, the Convention on the Prevention and Punishment of the Crime of Genocide, and the statutes of various international criminal tribunals, such as the International Criminal Tribunal for the former Yugoslavia ("ICTY"), the International Criminal Tribunal for Rwanda ("ICTR"), and the Statute of the Special Court for Sierra Leone ("SCSL").²⁴
37. Notably the ICC Appeals Chamber noted article 7 of the Nuremberg Charter of the International Military Tribunal at Nuremberg, which provides as follows:

²³ Prosecutor v Omar Al Bashir, 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, para 43; Prosecutor v Omar 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, para 13.

²⁴ Judgment in the Jordan Referral re Al-Bashir Appeal, ICC-02/05-01/09-397-Corr (Appeals Chamber, 6 May 2019) Situation in Darfur, Sudan, The Prosecutor v Omar Hassan Ahmad Al Bashir, paras 100–119.

The official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment.²⁵

38. The statutes of the ICTY, ICTR, and the SCSL contain provisions similar to those found in the Rome Statute. For example, the Statute of the ICTY provides as follows:

Article 7 Individual criminal responsibility

2. The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.²⁶

39. Similarly, the Statute of ICTR states:

Article 6: Individual Criminal Responsibility

2. The official position of any accused person, whether as Head of state or government or as a responsible government official, shall not relieve such person of criminal responsibility nor mitigate punishment.²⁷

40. The Statute of SCSL provides:

Article 6 Individual criminal responsibility

2. The official position of any accused persons, whether as Head of State or Government or as a responsible government official, shall not relieve such person of criminal responsibility nor mitigate punishment.²⁸

41. These tribunals and their Statute do not substantiate the proposition that "Head of State Immunity has never been recognized in international law as a bar to the jurisdiction of an international court." This is because the statutes of international criminal tribunals do not specifically address immunities; rather, they simply state that the official position of an accused does not exempt them from criminal responsibility (*nulla poena sine culpa*) or mitigate punishment (*reductio poenae*). As emphasized by the ICJ in the *Arrest Warrant* case:

[...] Finally, none of the decisions of the Nuremberg and Tokyo international military tribunals, or of the International Criminal Tribunal for the former Yugoslavia, cited by Belgium deal with the question of the immunities of incumbent Ministers for Foreign Affairs before national courts where they are accused of having committed war crimes or crimes against humanity.²⁹

²⁵ Charter of the International Military Tribunal, Article 7.

²⁶ Statute of the International Criminal Tribunal for The Former Yugoslavia, Article 7, Section 2.

²⁷ Statute of the International Tribunal for Rwanda, Article 6, Section 2.

²⁸ Statute of Special Court for Sierra Leone, Article 6, Section 2.

²⁹ *Arrest Warrant* of 11 April 2000 (Democratic Republic of the Congo v Belgium), Judgment [2002] ICJ Rep 3, para 60; *Jurisdictional Immunities of the State* (Germany v Italy: Greece intervening), Judgment [2012] ICJ Rep 99, para 58.

42. Furthermore, in the *Arrest Warrant* case, the ICJ clearly distinguished between immunity from criminal jurisdiction and individual criminal responsibility, emphasizing:

The Court emphasizes, however, that the immunity from jurisdiction enjoyed by incumbent Ministers for Foreign Affairs does not mean that they enjoy impunity in respect of any crimes they might have committed, irrespective of their gravity. *Immunity from criminal jurisdiction and individual criminal responsibility are quite separate concepts. While jurisdictional immunity is procedural in nature, criminal responsibility is a question of substantive law.* (emphasis added)³⁰

43. Similarly, the ICJ in the *Jurisdictional Immunities of the State* case further elucidated:

Moreover, as the Court has stated [...], the law of immunity is essentially procedural in nature [...]. It regulates the exercise of jurisdiction in respect of particular conduct and is thus entirely distinct from the substantive law which determines whether that conduct is lawful or unlawful. (emphasis added)³¹

44. Accordingly, the applicability of procedural immunity does not conflict with the principle that official capacity is irrelevant to individual criminal responsibility, as established in the statutes of the Nuremberg Tribunal, ICTR, ICTY, and SCSL.

45. As the referenced practices do not address immunity, it cannot be inferred that the statutes and practices of these international tribunals, as cited by the ICC, contribute to the formation or expression of customary international law rules that negate Head of State immunity when an international court seeks arrest. In light of the fact that these statutes and practices do not explicitly engage with the issue of immunity, it is not legally sound to conclude that they support the development of a customary rule negating such immunity.

2. There is no *opinio juris*

46. *Arguendo*, if ICC deems that there is general practice, the presence of only one constituent element does not suffice for the identification of a rule of customary international law. The ILC provided that:

(4) As draft conclusion 2 makes clear, the presence of only one constituent element does not suffice for the identification of a rule of customary international law. Practice without acceptance as law (*opinio juris*), even if widespread and consistent, can be no more than a non-binding usage, while a belief that something is (or ought to be) the law unsupported by practice is mere aspiration; it is the two together that establish the existence of a rule of customary international law. While writers have from time to time sought to devise alternative approaches to the identification of customary international law, emphasizing

³⁰ *Arrest Warrant* of 11 April 2000 (Democratic Republic of the Congo v Belgium), Judgment [2002] ICJ Rep 3, para 60.

³¹ *Jurisdictional Immunities of the State* (Germany v Italy: Greece intervening), Judgment [2012] ICJ Rep 99.

one constituent element over the other or even excluding one element altogether, such theories have not been adopted by States or in the case law.³²

47. The ICC relies on the statutes of previous international criminal tribunals to support its claim that Article 27(2) embodies customary international law. Reliance on these treaties, however, does not adequately establish the requisite *opinio juris* necessary to form a customary international law rule.
48. The mere existence of treaties does not automatically elevate the rules they contain therein to the status of customary law. It can be particularly challenging to demonstrate *opinio juris* in such circumstances, because state practices under treaties are typically viewed as fulfilling treaty obligations rather than expressing a belief that such practices are required under international law.
49. In the *North Sea Continental Shelf case* the ICJ established that when state practices are required by treaty obligations, they should primarily be presumed to reflect treaty compliance, unless additional evidence of *opinio juris* can be provided. In the absence of such evidence, as was the case in the *North Sea Continental Shelf case*, the ICJ was unable to ascertain such additional evidence and ultimately concluded that:

From their action no inference could legitimately be drawn as to the existence of a rule of customary international law in favour of the equidistance principle.³³

50. The ILC has elaborated on this principle, stating:

(4) Seeking to comply with a treaty obligation as a treaty obligation, much like seeking to comply with domestic law, is not acceptance as law for the purpose of identifying customary international law: practice undertaken with such intention does not, by itself, lead to an inference as to the existence of a rule of customary international law. A State may well recognize that it is bound by a certain obligation by force of both customary international law and treaty, but this would need to be proved. On the other hand, when States act in conformity with a treaty provision by which they are not bound, or apply conventional provisions in their relations with non-parties to the treaty, this may evidence the existence of acceptance as law (*opinio juris*) in the absence of any explanation to the contrary.³⁴

51. Furthermore, as the number of Parties to a treaty increases, it becomes increasingly difficult to ascertain the state of customary international law outside the treaty framework. This complexity underscores the importance of establishing both general state practice and *opinio juris* beyond treaty obligations. The ICJ addressed this issue in the *Ahmadou Sadio Diallo case*, stating:

90. The fact invoked by Guinea that various international agreements, such as agreements for the promotion and protection of foreign investments and the Washington

³² International Law Commission, 'Draft Conclusions on Identification of Customary International Law, with Commentaries' [2018] II(2) YBILC, Commentary (4) to Conclusion 2

³³ *North Sea Continental Shelf*, Judgment [1969] ICJ Rep 3, para 76.

³⁴ International Law Commission, 'Draft Conclusions on Identification of Customary International Law, with Commentaries' [2018] II(2) YBILC, Commentary (4) to Conclusion 9.

Convention, have established special legal regimes governing investment protection, or that provisions in this regard are commonly included in contracts entered into directly between States and foreign investors, is not sufficient to show that there has been a change in the customary rules of diplomatic protection; it could equally show the contrary).³⁵

52. This underscores that treaty provisions, even if widely adopted, do not necessarily reflect customary international law without additional evidence of *opinio juris*.
53. While states may voluntarily accept obligations under certain treaty-based legal regimes, this does not necessarily reflect their willingness to accept the same obligations under customary international law. Treaties and UNSC resolutions, as binding legal instruments, often face challenges in establishing *opinio juris*, particularly when state practice is confined to fulfilling specific treaty or resolution commitments rather than demonstrating a broader intent to create or abide by a customary international norm.
54. The international criminal courts and tribunals cited by the ICC were established either through UNSC resolutions or by treaties. In the cases of the Nuremberg Tribunal and the International Military Tribunal for the Far East, the tribunals were established by the Allied powers following World War II, with the surrender of officials from Germany and Japan. Therefore, States actions in complying with these tribunals reflect their adherence to treaty or UNSC obligations, rather than an intention to create a customary rule that universally negates Head of State immunity before all international courts.
55. Furthermore, while the practice of international courts is significant, it does not establish customary international law. As outlined in Article 38(1)(d) of the ICJ Statute, decisions of international courts are regarded as "subsidiary means for the determination of rules of law." Accordingly, the decisions of international criminal tribunals, *per se*, do not form customary international law rules nor do they express the *opinio juris* of States.
56. Consequently, statutes, treaties, UNSC resolutions, and decisions of international courts, *per se*, are insufficient to establish a customary rule negating Head of State immunity before international courts. In the absence of demonstrable general state practice and *opinio juris* supporting this position, the assertion that Article 27(2) reflects customary international law remains unsubstantiated.
57. Lastly, it should be noted that there is no indication in the *travaux préparatoires* of Article 27 of the Rome Statute that state parties considered it a reflection of customary international law.

³⁵ Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo), Preliminary Objections, Judgment [2007] ICJ Rep 582, 615, para 90.

3. Observation regarding concept of "international community"

58. The Appeals Chamber in *Jordan case* asserts that the absence of Head of State Immunity under customary international law arises from the distinct nature of international courts, such as the ICC, as opposed to domestic courts. The Chamber further elaborates that international courts operate on behalf of the international community as a whole, rather than representing the authority of any individual state. As a result, the principle of *par in parem non habet imperium*—which holds that equal sovereigns have no authority over one another—does not apply to international courts in the same way it does to domestic jurisdictions.³⁶
59. Mongolia disagrees with this position and contends that it does not constitute a valid legal argument for the following reasons.

(a) Observation regarding *Arrest Warrant case*

60. The Appeals Chamber relied on the *Arrest Warrant case* of the ICJ where it held:

[...] an incumbent or former Minister for Foreign Affairs may be subject to criminal proceedings before *certain international criminal courts, where they have jurisdiction*.

61. The above *obiter dictum* from the ICJ in the *Arrest Warrant case* is, at best, ambiguous. The ICJ does not explicitly articulate the legal basis for the non-application of immunity before international courts, nor does it clarify whether this non-applicability is grounded in customary international law.
62. Additionally, the ICJ does not define the term "*certain*," leaving it unclear which specific courts are being referred to, nor does it provide a clear definition of "*international criminal courts*." Moreover, the ICJ offers no detailed explanation of the "*jurisdiction*" these courts are presumed to exercise, further contributing to the ambiguity of the ruling.
63. While Mongolia observes that the decisions of international courts, especially the ICJ, are important subsidiary means for determining the existence and content of customary international law, Mongolia notes that the value of such decisions varies greatly as noted by the ILC in Draft Conclusions on Identification of Customary International Law:³⁷

(3) Decisions of courts and tribunals on questions of international law, in particular those decisions in which the existence of rules of customary international law is considered and such rules are identified and applied, may offer valuable guidance for determining the existence or otherwise of rules of customary international law. *The value of such decisions varies greatly, however, depending both on the quality of the reasoning (including primarily the extent to which it results from a thorough examination of evidence*

³⁶ Prosecutor v Al Bashir (Judgment in the Jordan Referral re Al-Bashir Appeal) ICC-02/05-01/09-397-Corr (Appeals Chamber, 6 May 2019) para 115.

³⁷ Statute of the International Court of Justice, Article 38(1)(d).

of an alleged general practice accepted as law) and on the reception of the decision, in particular by States and in subsequent case law.³⁸

64. In this respect, the persuasiveness of this *obiter dictum* from the ICJ is undermined by the lack of any supporting legal reasoning. It did not present any evidence for the existence of such a rule in customary international law, nor did it provide the necessary legal definitions. This lack of clarity undermines the authority of the *obiter* as a definitive legal position on the matter.

(b) On the definition of "international criminal court"

65. The Appeals Chamber notes that the absence of Head of State Immunity under customary international law is attributed to the distinct nature of international courts, which differ from domestic courts:

[...] when adjudicating international crimes, do not act on behalf of a particular State or States. Rather, international courts act on behalf of the international community as a whole.³⁹

66. Similar to the *obiter dictum* of *Arrest Warrant* case, the fundamental question arises regarding the definition of "international criminal court" under international law.

67. In the Joint Concurring Opinion of Judges in the *Jordan Appeal Case*, the following definition was provided:

But, what is an 'international court'? An 'international court' or an 'international tribunal' or an 'international commission' (in the context of administration of justice)—nothing turns on the choice of nomenclature—is an adjudicatory body that exercises jurisdiction at the behest of two or more states. Its jurisdiction may be conferred in one of a variety of ways: such as by treaty; by instrument of promulgation, referral or adhesion made by an international body or functionary empowered to do so; or, indeed, by adhesion or referral through an arbitral clause in a treaty. A court that operates physically or in principle within a domestic realm exercises international jurisdiction where such jurisdiction results in any manner described above.⁴⁰

68. According to the Joint Concurring Opinion of the Judges, if only two states are able to establish an "international court" that bypasses immunity, this conclusion carries a significant risk of abuse in practice.

69. This implies that if states accept the proposition that there is no immunity before international criminal courts, while they would be prohibited from unilaterally arresting and trying foreign state officials within their own domestic

³⁸ ILC, 'Draft Conclusions on Identification of Customary International Law, with Commentaries' [2018] II(2) YBILC, Commentary (3) to Conclusion 13.

³⁹ Prosecutor v Al Bashir (Judgment in the Jordan Referral re Al-Bashir Appeal) ICC-02/05-01/09-397-Corr (Appeals Chamber, 6 May 2019) para 115; Joint Concurring Opinion of Judges Eboe-Osuji, Morrison, Hofmański and Bossa in Prosecutor v Al Bashir ICC-02/05-01/09-397-Corr (Appeals Chamber, 6 May 2019) paras 52–174; see also paras 431–445.

⁴⁰ Ibid, para 56.

courts, they could nevertheless circumvent this by forming an "international court" in collaboration with other states. Such a court could then potentially request its States Parties to arrest officials from non-State Parties, raising concerns about the potential for misuse of this mechanism.

70. It should be emphasized that immunities do not automatically *vanish* simply because a tribunal is "*international*," as highlighted by Judge Shahabuddeen in his dissenting opinion in *Prosecutor v. Krstic*:

In my view, however, there is no substance in the suggested automaticity of disappearance of the immunity just because of the establishment of international criminal courts. If that is the result, it does not come about, as it were, through some simple repulsion of opposed juridical forces; a recognisable legal principle would have to be shown to be at work, such as an agreement to waive the immunity.

International criminal courts are established by States acting together, whether directly or indirectly as in the case of the Tribunal, which was established by the Security Council on behalf of States members of the United Nations. There is no basis for suggesting that by merely acting together to establish such a court States signify an intention to waive their individual functional immunities. A presumption of continuance of their immunities as these exist under international law is only offset where some element in the decision to establish such a court shows that they agreed otherwise. It may be thought that, in the case of the Tribunal, Article 29 of the Statute shows that they agreed otherwise, but that provision is directed to an obligation to cooperate; that obligation can be satisfied by a binding order which does not involve criminal sanctions inconsistent with the traditional functional immunity of States. Neither is an agreement to waive that immunity shown by Article 7(2) of the Statute, which has already been dealt with. It is difficult to see what else in the Statute shows that the establishment of the Tribunal as an international criminal court indicated an intention by States to abandon their individual functional immunities.⁴¹

71. Thus, under international law, the mere establishment of an "*international criminal court*" does not automatically negate the immunity of state officials.

(c) On the concept of "international community as a whole"

72. In addition to addressing the term "*international criminal court*," the Appeals Chamber highlights the distinction between the functions of domestic and international courts:

While the latter are essentially an expression of a State's sovereign power, which is necessarily limited by the sovereign power of the other States, the former, when adjudicating international crimes, do not act on behalf of a particular State or States. Rather, international courts act *on behalf of the international community as a whole*. (emphasis added)⁴²

⁴¹ *Prosecutor v. Krstic* (Decision on Application for Subpoenas) IT-98-33-A (ICTY, 1 July 2003) Dissenting Opinion of Judge Shahabuddeen, paras 11–12.

⁴² *Prosecutor v. Al Bashir* (Judgment in the Jordan Referral re Al-Bashir Appeal) ICC-02/05-01/09-397-Corr (Appeals Chamber, 6 May 2019) para 115.

73. The Appeals Chamber's argument is rooted in the distinction between international and domestic courts, particularly concerning the source of an international court's power.
74. According to the ICC, the power of international courts derives from the delegation of authority by states:

The source of the jurisdiction that the court is meant to exercise is the *ultimate element* of its character as an international court. That source of jurisdiction is the *collective sovereign will of the enabling States*, expressed directly or through the legitimate exercise of mandate by an international body (such as the Security Council) or an international functionary (such as the UN Secretary-General, when properly empowered to set up a court of law).

The exercise of jurisdiction by an international tribunal is no contradiction—but an enhancement—to the idea of sovereign equality of States and their independence from one another. For, the court or tribunal derives its jurisdiction from the agreement of the States concerned to pool their sovereignty and independence for purposes of peaceful settlement of disputes of interest to the international community within that domain. Hence, an international court exercises the jurisdiction of no one sovereign. It exercises the jurisdiction of all the concerned sovereigns *inter se*, for their overall benefit. - conjuring⁴³

75. The ICC argues that the exercise of jurisdiction by an international tribunal enhances, rather than contradicts, the idea of sovereign equality. Such courts derive their jurisdiction from the collective agreement of states to *pool* their sovereignty for the purpose of resolving disputes of international concern, acting in the interests of the *international community* rather than any individual sovereign.

76. Similar argument was used in the Taylor case before the SCSL:

"international criminal tribunals [...] are not organs of a state but derive their mandate from international community".⁴⁴

77. In the *Chad* case of 2011, the Pre-Trial Chamber similarly held that the *international community's* commitment to rejecting immunity in cases where international courts seek the arrest of individuals for international crimes had reached a critical mass. In the Malawi case the Pre-Trial Chamber found that international courts have been entrusted with the *jus puniendi* by the *international community*, thereby justifying the rejection of immunity of Head of State.⁴⁵

⁴³ Joint Concurring Opinion of Judges Eboe-Osui, Morrison, Hofmański and Bossa in Prosecutor v Al Bashir ICC-02/05-01/09-397-Corr (Appeals Chamber, 6 May 2019) paras 58–59.

⁴⁴ Prosecutor v Taylor (Decision on Immunity from Jurisdiction) SCSL-2003-01-I (Special Court for Sierra Leone, 31 May 2004) para 51.

⁴⁵ Prosecutor v Al Bashir (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 46; Prosecutor v 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

78. Neither the Appeals Chamber nor the Pre-Trial Chamber of the ICC has provided a clear and definitive legal definition of the term "*international community*." While ICC jurisprudence implies that the term refers to a collective of states, the Court has not clarified how many states must be involved to meet the threshold for such a designation. Additionally, the ICC has not specified which types of courts may be regarded as those "*delegated by the international community*" or as "*entrusted with the jus puniendi by the international community*" under international law.
79. This ambiguity raises critical legal questions concerning the precise definition and constituent elements, under international law, of the concepts of "*jus puniendi*" and "*international community as a whole*."
80. Without a clear legal foundation, these notions cannot be presumed to grant the ICC with authority or legitimacy to override established international legal norms. As former President Guillaume of the ICJ has cautioned, assumptions in this regard require careful legal scrutiny:

15. [...] But at no time has it been envisaged that jurisdiction should be conferred upon the courts of every State in the world to prosecute such crimes, whoever their authors and victims and irrespective of the place where the offender is to be found. To do this would, moreover, risk creating total judicial chaos. It would also be to encourage the arbitrary for the benefit of the powerful, purportedly acting as agent for an *ill-defined "international community"*. Contrary to what is advocated by certain publicists, such a development would represent not an advance in the law but a step backward. (emphasis added)⁴⁶

81. Accordingly, the legal question of whether an international court acts on behalf of the "*international community as a whole*" requires a careful examination of the court's source of power, its method of establishment, and the legal effects it may have on third states.
82. International courts or tribunals may be embedded within international organizations, such as the ICJ, which is a principal organ of the United Nations ("UN") under UN Charter.⁴⁷ Other courts, such as the ICTY and the ICTR, were created by UNSC resolutions under the UN's Chapter VII authority.
83. Alternatively, some courts are independent entities established by treaty. The ICC, established under Rome Statute, derives its authority from the founding treaty and is binding only on its State Parties. As such it cannot impose obligations on Non-State Parties.⁴⁸ Any attempt to do so would violate the principle of *pacta tertiis nee nocent nee prosunt*.

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) para 42.

⁴⁶ Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium) [2002] ICJ Rep 3, Separate Opinion of President Guillaume, para 15.

⁴⁷ Charter of the United Nations, Article 92.

⁴⁸ The Vienna Convention on the Law of Treaties, Article 34.

84. Therefore, the ICC cannot be equated with other courts established through different mechanisms, as its nature and source of authority are fundamentally distinct.
85. In essence, the ICC does not derive its authority from, nor has it progressively evolved to act on behalf of the "*international community as a whole*." Rather, its authority stems from the consent of its member states, which have signed, ratified, or acceded to the Rome Statute. With only 124 member states, the ICC lacks universal acceptance, raising serious doubts as to whether it can genuinely be regarded as exercising "*jus puniendi on behalf international community as a whole*."
86. Based on the principle *nemo plus iuris ad alium transferre potest quam ipse habet*, if individual states cannot unilaterally exercise jurisdiction over a foreign Head of State, they cannot collectively delegate such authority to an international court unless the relevant third State has explicitly waived its immunity.

(d) Observation regarding "jurisdiction"

87. The Joint Concurring Opinion of Judges recognizes the distinction between immunity and jurisdiction, stating that international criminal tribunals derive their jurisdiction from specific legal instruments, such as treaties or UNSC resolutions, and once jurisdiction is established, even high-ranking officials such as Heads of State can be prosecuted, as claims of immunity under customary international law do not apply:

The primary lesson is that there is no rule of customary international law that recognises immunity for high officials of states, including Heads of State, before an international criminal tribunal that has *jurisdiction* to try suspects of crimes under international law. Article 27 of the Rome Statute appropriately reflects this reality of customary international law.⁴⁹

88. According to the Appeals Chamber, this assertion would remove immunity even in the horizontal relationship between the requesting state and the state of the accused, thereby permitting for the arrest and surrender of a Head of State from a non-State party to the Rome Statute. However, such a rule is unlikely to be accepted by sovereign States.
89. Affirming such rule of customary international law, which denies Head of State immunity in relation to international courts, could inadvertently create judicial chaos. This could pave the way for States to create their own international criminal tribunals.
90. While States are prohibited from unilaterally arresting and prosecuting an incumbent Head of State of a foreign State within their domestic jurisdiction,

⁴⁹ Joint Concurring Opinion of Judges Eboe-Osuji, Morrison, Hofmański and Bossa in Prosecutor v Al Bashir ICC-02/05-01/09-397-Corr (Appeals Chamber, 6 May 2019) paras 446–49.

two or more states could establish an international court by treaty, claiming that the court represents the "international community as a whole," even if only ratified by a limited number of states. Such a Court could assert jurisdiction conferred by the treaty over international crimes and request its member States—and potentially even non-member States, based on the binding nature of customary international law—to arrest the Head of State of a non-State party, proclaiming that no immunity exists before international courts entrusted with the "*jus puniendi on behalf of the international community*."

91. Accordingly, rather than advancing international law, such a rule would contribute to its regression. Such developments risk fragmenting the international legal order, leading to inconsistent jurisdictional claims and the politicization of justice, all under the pretext of representing the "international community."

B. Immunity of Head of State is absolute

(a) State Immunity and Head of State Immunity

92. The principle of State Immunity—which protects a sovereign state from being subjected to the jurisdiction of foreign national courts without its consent—is a well-established rule of customary international law as affirmed by the ICJ in Jurisdictional Immunities of the State case:

[...] the International Law Commission concluded in 1980 that the rule of State Immunity had been "adopted as a general rule of customary international law solidly rooted in the current practice of States" [...] That conclusion was based upon an extensive survey of State practice and, in the opinion of the Court, is confirmed by the record of national legislation, judicial decisions, assertions of a right to immunity and the comments of States on what became the United Nations Convention.⁵⁰

93. The ICJ further elaborated that State Immunity is a fundamental component of the principle of sovereign equality, which forms the basis of international law and relations:

The Court considers that the rule of State Immunity occupies an important place in international law and international relations. It derives from the principle of sovereign equality of States, which, as Article 2, paragraph 1, of the Charter of the United Nations makes clear, is one of the fundamental principles of the international legal order. This principle has to be viewed together with the principle that each State possesses sovereignty over its own territory and that there flows from that sovereignty the jurisdiction of the State over events and persons within that territory. Exceptions to the immunity of the State represent a departure from the principle of sovereign equality. Immunity may represent a departure from the principle of territorial sovereignty and the jurisdiction which flows from it.⁵¹

⁵⁰ Jurisdictional Immunities of the State (Germany v Italy: Greece intervening) [2012] ICJ Rep 99, para 56.

⁵¹ Ibid, at para 57.

94. The immunity enjoyed by an incumbent Head of State derives from the principle of State Immunity. Such immunities ensure that Heads of State can perform their official duties without interference from the judicial processes of other states. The ICJ in the *Arrest Warrant* case underscored the functional necessity of these immunities:

51. The Court would observe at the outset that in international law it is firmly established that, as also diplomatic and consular agents, certain holders of high-ranking office in a State, such as the Head of State, Head of Government and Minister for Foreign Affairs, enjoy immunities from jurisdiction in other States, both civil and criminal.

53. In customary international law, the immunities accorded to Ministers for Foreign Affairs are not granted for their personal benefit, but to ensure the effective performance of their functions on behalf of their respective States. In order to determine the extent of these immunities, the Court must therefore first consider the nature of the functions exercised by a Minister for Foreign Affairs. [...] His or her acts may bind the State represented, and there is a presumption that a Minister for Foreign Affairs, simply by virtue of that office, has full powers to act on behalf of the State."⁵²

95. Furthermore, the ICJ confirmed that Head of State enjoys full immunity from criminal jurisdiction and inviolability under customary international law:

54 The Court accordingly concludes that the functions of a Minister for Foreign Affairs are such that, throughout the duration of his or her office, he or she when abroad enjoys full immunity from criminal jurisdiction and inviolability. That immunity and that inviolability protect the individual concerned against any act of authority of another State which would hinder him or her in the performance of his or her duties.⁵³

96. The ICJ also rejected any exceptions to immunity for serious international crimes such as war crimes or crimes against humanity:

It has been unable to deduce from this practice that there exists under customary international law any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministry for Foreign Affairs, where they are suspected of having committed war crimes or crimes against humanity.⁵⁴

97. This position was reinforced in *Jurisdictional Immunities of the State*, where the ICJ asserted that the gravity of violations does not affect the applicability of State Immunity:

91. The Court concludes that, under customary international law as it presently stands, a State is not deprived of immunity by reason of the fact that it is accused of serious violations of international human rights law or the international law of armed conflict. In reaching that conclusion, the Court must emphasize that it is addressing only the immunity of the State itself from the jurisdiction of the courts of other States; the question

⁵² Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium) [2002] ICJ Rep 3, para 60; Jurisdictional Immunities of the State (Germany v Italy: Greece intervening) [2012] ICJ Rep 99, para 58.

⁵³ Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium) [2002] ICJ Rep 3, para 54;

⁵⁴ Ibid, at para 58.

of whether, and if so to what extent, immunity might apply in criminal proceedings against an official of the State is not in issue in the present case.⁵⁵

98. The ICJ also addressed the relationship between *jus cogens* norms and State Immunity, clarifying that there is no conflict between the two. While *jus cogens* norms are substantive, State Immunity is procedural, determining whether a court has jurisdiction over a state:

97. Accordingly, the Court concludes that even on the assumption that the proceedings in the Italian courts involved violations of *jus cogens* rules, the applicability of the customary international law on State Immunity was not affected.⁵⁶

99. Consequently, under customary international law, an incumbent Head of State enjoys absolute immunity from criminal jurisdiction in foreign courts, even when accused of serious international crimes such as war crimes or violations of international humanitarian law. This immunity, including that of the Head of State, can only be waived by the State itself.

(b) Head of State immunity before International Criminal Court

100. The Head of State Immunity, as a rule of customary international law, remains inviolate even before international criminal tribunals, including the ICC. Permitting the prosecution of incumbent Heads of State before the ICC would contravene foundational principles such as sovereign equality and non-interference in the domestic affairs of states. Accordingly, under customary international law, the immunity conferred upon a sitting Head of State persists unless the state to which the Head of State belongs explicitly consents to its waiver, typically through a treaty or a formal declaration. In the absence of such expressed consent, an incumbent Head of State retains full immunity from the ICC's jurisdiction, irrespective of the gravity of the alleged international crimes or existence of peremptory norms (*jus cogens*).

101. The Pre-Trial Chamber in the Malawi and Chad cases advanced a divergent interpretation:

[...] the Chamber finds 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. There is no conflict between Malawi's obligations towards the Court and its obligations under customary international law; therefore, article 98(1) of the Statute does not apply.⁵⁷ (emphasis added)

⁵⁵ Jurisdictional Immunities of the State (Germany v Italy; Greece intervening) [2012] ICJ Rep 99, para 91.

⁵⁶ *Ibid.*, at para 97.

⁵⁷ Prosecutor v Al Bashir (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 43; Prosecutor v 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) para 13.

102. However, it must be emphasized that there is neither sufficient *state practice* nor *opinio juris* to support the assertion that an exception to the customary rule of Head of State immunity before international courts has crystallized. As elaborated in Section A of this submission, current State practice and *opinio juris* does not substantiate any departure from the established rule of customary international law regarding the Head of State immunity.

103. In this regard, Mongolia notes the reasoning of the Pre-Trial Chamber in the *South Africa case*, as well as the *DRC case*, which was subsequently echoed by the Pre-Trial Chamber in the *Jordan case*:

The Chamber is unable to identify a rule in customary international law that would exclude immunity for Heads of State when their arrest is sought for international crimes by another State, even when the arrest is sought on behalf of an international court, including, specifically, this Court.⁵⁸

104. Consequently, the principle of Head of State immunity remains unequivocal and affords protection from both national and international criminal jurisdiction. The proposition that the commission of international crimes or the issuance of an arrest warrant by the ICC can override the immunity of an incumbent Head of State lacks any basis in customary international law. In the absence of an explicit waiver by the state concerned, the immunity of Head of State continues to serve as a legal bar to prosecution.

C. Persistent Objector Doctrine and Horizontal Immunity

1. *Persistent objector doctrine*

105. *Arguendo*, should the ICC reject the argument and adopt the position that, under customary international law, Head of State Immunity does not apply before international courts, such a rule would nevertheless not be applicable to the Russian Federation. This is due to the fact that the Russian Federation has persistently objected to the formation of such a particular norm, thereby excluding itself from its application in accordance with established principles of international law.

106. The ILC in its draft conclusions on the Identification of Customary International Law, held that:

⁵⁸ Prosecutor v 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 (Pre-Trial Chamber II, 6 July 2017) para 68; Prosecutor v 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 of Omar Al-Bashir) ICC-02/05-01/09-309 (Pre-Trial Chamber II, 11 December 2017) para 27.

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Where a State has objected to a rule of customary international law while that rule was in the process of formation, the rule is not opposable to the State concerned for so long as it maintains its objection.⁵⁹

107. The doctrine of the persistent objector enables States which have consistently opposed the existence of a customary rule to declare that they are not bound by it. In the *Asylum* case, the ICJ held that, even if a local rule of customary international law concerning the qualification of offences in matters of diplomatic asylum did exist between certain Latin American States, this rule could not bind Peru, as it had consistently repudiated it:

The Court cannot therefore find that the Colombian Government has proved the existence of such a custom. But even if it could be supposed that such a custom existed between certain Latin-American States only, it could not be invoked against Peru which, far from having by its attitude adhered to it, has, on the contrary, repudiated it by refraining from ratifying the Montevideo Conventions of 1933 and 1939, which were the first to include a rule concerning the qualification of the offence in matters of diplomatic asylum.⁶⁰

108. The Russian Federation has made numerous statements in various international fora, including the UNSC, affirming its position on the matter of immunity.⁶¹

109. For instance, in the 6887th meeting of the Security Council, the Russian Federation stated:

In that context, we note the importance of the implementation by States of their relevant obligations regarding cooperation with the Court, while complying with the norms of international law in the matter of the immunity of senior State officials.⁶²

110. Similarly, in the 8554th meeting of the Security Council, the Russian Federation further reiterated:

The position of the Russian Federation on the question of the immunity of senior State officials is well known.[...] Existing international law provides for State officials' immunity vis-à-vis foreign States' criminal jurisdiction, without regard to the subject of the jurisdiction of international criminal tribunals.⁶³

111. Additionally, the Russian Federation, in its comments on the draft articles concerning the immunity of State officials from foreign criminal jurisdiction,

⁵⁹ International Law Commission, 'Draft Conclusions on Identification of Customary International Law, with Commentaries' [2018] II(2) YBILC, Conclusion 15.

⁶⁰ *Asylum Case (Colombia v Peru)* [1950] ICJ Rep 266, 277.

⁶¹ UN Security Council, 'Reports of the Secretary-General on the Sudan and South Sudan' (19 June 2019) UN Doc S/PV.8554; UN Security Council, 7478th Meeting (29 June 2015) UN Doc S/PV.7478.

⁶² Statement by Russia during UN Security Council 6887th Meeting (13 December 2012) UN Doc S/PV.6887.

⁶³ UN Security Council, 'Reports of the Secretary-General on the Sudan and South Sudan' (19 June 2019) UN Doc S/PV.8554.

supported the provision establishing *absolute* personal immunity for the "troika" of senior State officials.⁶⁴

112. Similar statements have also been made in the Sixth Committee of the UNGA, consistently echoing the same position.⁶⁵

113. Russian Federation's non-ratification and subsequent withdrawal from the Rome Statute further exemplify its unequivocal objection to the ICC's jurisdiction over its officials, including the Head of State.⁶⁶

114. Russian Federation's response to the ICC's issuance of arrest warrants for President Vladimir Putin in March 2023 further underscores its persistent objection. Kremlin spokesperson Dmitry Peskov stated:

Russia, as well as several other states, do not recognize the jurisdiction of this court and, accordingly, any decisions of this kind are null and void for Russia in terms of law.⁶⁷

115. The practice and expressions of *opinio juris* by the Russian Federation, as evidenced through official statements, diplomatic engagements, and other actions, demonstrate its consistent and ongoing objection to the negation of Head of State immunity before international courts.⁶⁸

116. Consequently, under the doctrine of the *persistent objector*, the Russian Federation is not bound by the purported customary international law rule that seeks to negate Head of State Immunity before international courts.

2. The distinction between vertical and horizontal jurisdiction

117. *Arguendo*, even if the Court assumes that Article 27(2) of the Rome Statute reflects a rule of customary international law, its effect is confined to the vertical relationship between the accused individual and the ICC. It does not extend to the horizontal relationship between states, which is governed by a separate and distinct body of international law, particularly the rules concerning sovereign equality and State Immunity.⁶⁹

⁶⁴ International Law Commission, 'Immunity of State Officials from Foreign Criminal Jurisdiction: Comments and Observations Received from Governments', UN Doc A/CN.4/771 (7 May 2024).

⁶⁵ Russian Federation, Statement in the Sixth Committee of the 68th Session of the UN General Assembly on Agenda Item 'The Scope and Application of the Principle of Universal Jurisdiction' (17 October 2013).

⁶⁶ Russian Federation, Bylaw No 361-rp (15 November 2016).

⁶⁷ 'Russia Slams ICC's Warrant for Putin's Arrest "Null and Void"—Kremlin' (TASS, 17 March 2023) <https://tass.com/politics/1590501>

⁶⁸ It is important to note that while the foregoing examples are illustrative, they do not constitute an exhaustive representation of the Russian Federation's position.

⁶⁹ The issue of Head of State Immunity in relation to the jurisdiction of international courts necessitates a clear distinction between the vertical relationship between a state and an international criminal court and the horizontal relationships between states. Even if one accepts the existence of a rule under customary international law that immunity does not apply before international courts, this rule does not automatically apply to the horizontal relations between states.

118. The Pre-Trial Chamber in the Malawi and Chad cases observed:

When cooperating with this Court and therefore acting on its behalf, States Parties are instruments for the enforcement of the *jus puniendi* of the international community whose exercise has been entrusted to this Court.⁷⁰

119. Similarly, in the Jordan Appeal case, the Appeals Chamber opined:

The requested State Party is not proceeding to arrest the Head of State in order to prosecute him or her before the courts of the requested State Party; it is only lending assistance to the Court in its exercise of proper jurisdiction.⁷¹

120. Judges Eboe-Osuji, Morrison, Hofmański, and Bossa, in their Joint Concurring Opinion, sought to clarify this reasoning further:

They should not be seen as exercising their own criminal jurisdiction; instead, they are merely acting as jurisdictional surrogates of the ICC.⁷²

121. These assertions—characterization of States Parties as mere “jurisdictional surrogates”—however, overlook a fundamental aspect of international law: the sovereignty of states and the exercise of domestic jurisdiction.

122. The exercise of criminal jurisdiction is a quintessential expression of state sovereignty. When a state arrests an individual within its territory—whether for domestic prosecution, extradition, or surrender to an international court—the jurisdiction being exercised is that of the arresting state, not the state requesting extradition or the ICC.

123. In other words, the territorial state asserts its own sovereign jurisdiction over the individual and retains control over the legal process, rather than deferring to the jurisdiction of the requesting state or the ICC. This distinction underscores the continued sovereignty of the territorial state in matters of criminal jurisdiction, even when acting in cooperation with States or international court or organization. Customary international law governing sovereign equality and State Immunity remains relevant to such actions. As the ICJ emphasized in the *Jurisdictional Immunities of the State* case:

⁷⁰ Prosecutor v Omar Al Bashir, 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; Prosecutor v Omar 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.

⁷¹ Prosecutor v Al Bashir (Judgment in the Jordan Referral re Al-Bashir Appeal) ICC-02/05-01/09-397-Corr (Appeals Chamber, 6 May 2019).

⁷² Joint Concurring Opinion of Judges Eboe-Osuji, Morrison, Hofmański and Bossa in Prosecutor v Al Bashir ICC-02/05-01/09-397-Corr (Appeals Chamber, 6 May 2019).

This principle has to be viewed together with the principle that each State possesses sovereignty over its own territory and that there flows from that sovereignty the jurisdiction of the State over events and persons within that territory.⁷³

124. The Rome Statute itself acknowledges this reality by deferring significantly to domestic laws and procedures in the context of arrest and surrender. Articles 59 and 89 of the Statute explicitly refer to national laws, allowing domestic courts discretion in the execution of ICC arrest warrants.⁷⁴

125. This was a deliberate choice made during the drafting of the Rome Statute, where the notion of the ICC directly executing arrest warrants within the territory of States Parties was explicitly rejected to preserve national sovereignty.⁷⁵

126. Consequently, even if an alleged customary rule exists that removes Head of State Immunity before international courts, its scope is confined to the vertical relationship between the individual and the international criminal court. It does not extend to the horizontal obligations between states, where immunity remains applicable in interactions between sovereign states. This distinction is critical to preserving the fundamental principle of sovereign equality in international relations.

127. Accordingly, States are obligated to respect the sovereignty of other States and uphold the customary international law principle of Head of State immunity in their inter-state—horizontal—relations. In practice, this prohibits one State from unilaterally arresting or detaining the sitting Head of State of another sovereign State without violating its international obligations toward that State.

128. Articles 27 and 98 of the Rome Statute provide further clarity on the distinction between vertical and horizontal immunity. Article 98 specifically prevents the ICC from requesting a state to act in a manner that would violate the immunities provided under international law. This reinforces the principle that, absent a waiver the immunity of an incumbent Head of State remains intact in the relations between states.

129. In line with above reasoning, Head of State immunity remains fully respected in horizontal relationships between States. Absent an express and explicit waiver, this immunity cannot be unilaterally disregarded, even in situations where a State is requested by an international court to arrest a foreign Head of State.

⁷³ Jurisdictional Immunities of the State (Germany v Italy; Greece intervening) [2012] ICJ Rep 99, para 57.

⁷⁴ Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3, arts 89(2), 89(4), 90, 91(2)(c), 91(4), and 98.

⁷⁵ UN General Assembly, 'Report of the Preparatory Committee on the Establishment of an International Criminal Court' UN Doc A/51/22 (Vol I) (1996) para 240.

D. Revitalizing Article 98 of the Rome Statute

1. Article 27(2) as a conventional law

(a) Applicability of Article 27(2) of the Rome Statute on Non-State parties

130. Article 27(2) of the Rome Statute states that:

Article 27 Irrelevance of official capacity

2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.

131. The ICC Appeals Chamber has affirmed that the interpretation of treaties, including the Rome Statute, is governed by the VCLT:

Interpretation of treaties, and the Rome Statute is no exception, is governed by the Vienna Convention on the Law of Treaties".⁷⁶

132. In the *DRC* case the Pre-Trial Chamber considered the scope of Article 27(2). The Chamber questioned the extent to which this provision is meant to be applied, particularly whether the exception for lifting personal immunities applies to Heads of all States, including non-State Parties to the Statute (third States), or is confined solely to States that have adhered to the Statute. The Chamber concluded that:

26. Still, the question sub judice is how far reaching this provision is meant to be, and whether such an exception for lifting personal immunities applies to Heads of all States, including non-States Parties to the Statute (third States), or whether it is only confined to those States which have adhered to the Statute. Given that the Statute is a multilateral treaty governed by the rules set out in the Vienna Convention on the Law of Treaties, the Statute cannot impose obligations on third States without their consent. *Thus, the exception to the exercise of the Court's jurisdiction provided in article 27(2) of the Statute should, in principle, be confined to those States Parties who have accepted it.*⁷⁷

133. Article 34, 35 and 36 of the VCLT, which reflects customary international law, provides that:

Article 34 General rule regarding third States.

A treaty does not create either obligations or rights for a third State without its consent.

Article 35 Treaties providing for obligations for third States.

⁷⁶ Situation in the Democratic Republic of the Congo (Judgment on Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal) ICC-01/04-168 (Appeals Chamber, 13 July 2006) para 33.

⁷⁷ Prosecutor v Omar 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 26.

An obligation arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to be the means of establishing the obligation and the third State expressly accepts that obligation in writing.

Article 36 Treaties providing for rights for third States

1. A right arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to accord that right either to the third State, or to a group of States to which it belongs, or to all States, and the third State assents thereto. Its assent shall be presumed so long as the contrary is not indicated, unless the treaty otherwise provides.

134. The Rome Statute, as a multilateral treaty, does not impose obligations on non-State Parties, as Article 27(2) does not reflect customary international law.

135. In accordance with the VCLT, the immunities of officials from non-State Parties cannot be removed by Article 27(2) of the Rome Statute unless those States have explicitly waived such immunities. The principle of *pacta tertiis nec nocent nec prosunt* applies here, meaning that non-State Parties are neither bound by, nor benefit from, Article 27(2), unless they have voluntarily accepted the ICC's jurisdiction and, by doing so, renounced the immunity of their officials.

(b) Applicability of Article 27(2) of Rome Statute on State Parties

136. *Arguendo*, if the ICC were to assert that Article 27(2) obligates State Parties to disregard the immunities of officials, including those of non-State Party officials, such an interpretation would conflict with well-established norms of international law.

137. Such an interpretation would imply that the Rome Statute infringes upon the rights of non-State Parties, thereby contradicting the well-established principle of *pacta tertiis nec noent nec prosunt*, which holds that treaties cannot impose obligations or remove the rights of third states without their consent.

138. Under international law, non-State Parties to the Rome Statute retain the sovereign *right* to assert immunity for their officials, and State Parties are legally bound to *respect* this right. Any failure to do so would constitute a breach of their international obligations.

139. In addition, Article 27(2) of the Rome Statute does not nullify or prevail over obligations arising from other sources of international law. As a result, State Parties to the Rome Statute remain bound by obligations derived from customary international law or treaty.

140. Consequently, Article 27(2), as a treaty provision, cannot remove immunities granted by customary international law or treaty obligations. Therefore, State Parties must continue to respect their obligations under international law, including the immunities of officials from non-State Parties.

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(c) The Interplay Between Articles 27(2) and 98 of the Rome Statute

141. The Rome Statute itself acknowledges the limitations on its jurisdiction through Article 98. This article prevent the ICC from proceeding with requests for surrender or assistance that would require the requested State to (i) breach its international obligations regarding state or diplomatic immunity, or (ii) to act inconsistently with international agreements that require the consent of a sending State for the surrender of a person.
142. However, interpreting Article 27(2) as obligating State Parties to disregard immunities, particularly those of non-State Party officials, would create a direct conflict with Article 98. Such an interpretation would undermine the internal coherence of the Statute and violate the principles of treaty interpretation established by the VCLT, which mandates that treaties be interpreted in good faith, in context, and in harmony with related provisions.
143. This principle is further affirmed by Article 19 of the "Negotiated Relationship Agreement between the ICC and the United Nations," which provides that the UN will cooperate fully with the Court, including *waiving* immunities in accordance with the Convention on the Privileges and Immunities of the United Nations.⁷⁸ This *waiver* presupposes the existence of immunities, implying that they remain *intact* unless explicitly waived. If Article 27(2) were interpreted as completely removing immunities, there would be no need for waivers, as required by Article 19 of the UN-ICC Relationship Agreement. This highlights the continued recognition of immunities in practice, even in relation to international criminal tribunals.
144. Therefore, it is incorrect to assert that non-State Parties are bound by Article 27(2) unless they have expressly accepted the Court's jurisdiction. Similarly, it is incorrect to claim that State Parties must disregard the immunities of officials from non-State Parties under Article 27(2), as this would render letter and spirit of Articles 98(1) and 98(2) obsolete. These provisions were specifically included to ensure that the Rome Statute operates in alignment with broader principles of international law, particularly regarding respect for State sovereignty and immunities.
145. Moreover, if Article 27(2) were intended to automatically remove all immunities, the inclusion of Article 98 in the Rome Statute would be rendered redundant. The drafters of the Rome Statute deliberately included Article 98 to safeguard against such conflicts and to ensure that the Statute operates within the established framework of international law.
146. Thus, Article 27(2) cannot be interpreted in isolation from this broader legal context. Its applicability does not inherently remove immunity claims under

⁷⁸ Negotiated Relationship Agreement between the International Criminal Court and the United Nations (adopted 4 October 2004) ICC-ASP/3/Res.1, art 19.

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Article 98, which remains a crucial safeguard for preserving State immunity and respecting international legal obligations.

2. Article 98(1) as a conventional law

147. Article 98(1) of the Rome Statute states that:

The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its *obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State*, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.

148. The wording of Article 98 makes the obligation of verifying possible conflicting international law obligations relating to immunities incumbent on the Court itself. It is for the Court, before issuing the request for cooperation, to establish whether an obstacle may exist to a request for cooperation, and it is for the Court to try to obtain the waiver of immunity from the third state.

149. Therefore, when the ICC requests a State to arrest and surrender a national of a non-State Party, it must first ensure that the Court is able to exercise jurisdiction over that individual, considering any immunity obligations under international law.

150. Accordingly, *arguendo*, even if the State party had an obligation not respect any immunities under Article 27(2) of the Rome Statute of non-state party, the State would still be acting inconsistently with its obligations under general international law, as provided by Article 98(1) of the Rome Statute, thus triggering its application.

151. Mongolia notes that Article 98(1) does not provide an exhaustive list of possible international law obligations concerning immunity that may obstruct cooperation requests. These obligations must be identified through an analysis of general international law beyond the Statute, requiring the consideration of customary international law.

152. Under customary international law, Mongolia remains bound by the rule of State Immunity to respect the Russian Federation's right to assert immunity and to accord Head of State immunity to President Vladimir Putin.

153. Therefore, any request by the Court for surrender or assistance that would compel Mongolia to act inconsistently with its international obligations regarding the immunity of a person or property of a third State would be *ultra vires* unless the Court first obtains a waiver of immunity from that third State.

3. Article 98(2) as a conventional law

154. Mongolia and Russian Federation are parties to the "Treaty on Friendly Relations and Comprehensive Strategic Partnership" signed in 2019, which

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renewed the "Treaty on Friendly Relations and Cooperation between Mongolia and the Russian Federation" signed in 1993.

155. Article 98(2) of the Rome Statute states that:

2. The Court may not proceed with a request for surrender which would require the requested State to act *inconsistently with its obligations under international agreements* pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.

156. The "Treaty on Friendly Relations and Comprehensive Strategic Partnership" between Mongolia and the Russian Federation falls within the scope of Article 98(2) of the Rome Statute, thereby triggering its application.

(a) The bilateral treaty as an International Agreement

157. The VCLT Article 2(1)(a) defines a "treaty" as:

"treaty" means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation

158. The 2019 treaty between Mongolia and the Russian Federation, which renewed the "Treaty on Friendly Relations and Cooperation between Mongolia and the Russian Federation" signed in 1993, satisfies these criteria. It is a formal, written agreement between two sovereign States, governed by international law, intended to regulate their legal relationship and mutual obligations. This treaty entered into force upon the exchange of instruments of ratification by both parties.

159. Therefore, "Treaty on Friendly Relations and Comprehensive Strategic Partnership" between Mongolia and the Russian Federation qualifies as a treaty under international law.

(b) Mongolia's Obligations under the Bilateral Treaty

160. The treaty encompasses the entirety of Mongolia-Russia relations, binding both parties to respect each other's sovereignty and conduct their relations based on mutual trust and cooperation.

161. Accordingly, Mongolia is legally bound to honor its commitments under the bilateral treaty, including Article 4, which obligates both parties to refrain from any acts directed against the other.

162. Under Article 26 of the VCLT, states are required to perform their treaty obligations in good faith, a principle known as *pacta sunt servanda*. Since the bilateral treaty was validly concluded and remains in force, Mongolia's obligations under this agreement are binding under international law. As such, any action that could be construed as hostile—such as the arrest and

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surrender of the Head of State of the Russian Federation—would constitute a breach of this treaty. This, in turn, triggers the application of Article 98(2) of the Rome Statute.

(c) Article 98(2) of the Rome Statute and the Requirement of Consent

163. The wording of Article 98(2) of the Rome Statute places the obligation on the Court to verify the existence of conflicting international obligations, particularly those related to immunities, before issuing a request for cooperation. It is incumbent upon the Court to ascertain whether such an obstacle exists and, if so, to obtain the necessary waiver of immunity from the third State.

164. Pursuant to the "Treaty on Friendly Relations and Comprehensive Strategic Partnership" between Mongolia and the Russian Federation, the consent of the sending State is required before any action is taken that may affect the rights or interests of State and its representatives, including the Head of State.

165. Consequently, unless the Russian Federation, as the sending State, explicitly waives its immunity, Mongolia remains bound by its treaty obligations to refrain from any action that would contravene the Russian Federation's rights. This includes an obligation to respect the State Immunity of the Russian Federation and the Head of State Immunity of President Vladimir Putin. In the absence of such a waiver, Mongolia is required to comply with its commitments under international law as reflected in the bilateral agreement.

166. Therefore, any request by the Court for surrender or assistance that would necessitate Mongolia to act inconsistently with its international obligations, including those arising under the bilateral treaty with the Russian Federation, would be *ultra vires*.

E. Mongolia's request for consultations pursuant to Article 97 of the Rome Statute

167. In accordance with Article 97 of the Rome Statute, Mongolia has demonstrated its commitment to act in *good faith* by engaging in consultations with the Court regarding perceived legal and practical impediments to compliance with the request in question. Mongolia's intention to engage in such consultations was explicitly communicated, identifying pertinent legal and practical concerns that necessitated dialogue. This approach was entirely consistent with its obligations under Rome Statute and reflective of its genuine desire to resolve the matter in a cooperative manner.

168. Regarding the timing of these consultations, there is no evidence of bad faith or any intent to delay cooperation with the Court. On the contrary, Mongolia's efforts to engage constructively were evidenced by its proactive communication of concerns through appropriate diplomatic channels. These efforts, including the articulation of a preliminary legal position, were

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undertaken with the intention of fostering further dialogue and engagement with the Court. Such actions are in full compliance with the duty to consult, as enshrined under the Statute.

169. Accordingly, the Court should not interpret Mongolia's request for consultation as a refusal to comply with its request. Rather, Mongolia's actions should be viewed as being fully consistent with the cooperative framework established by the Rome Statute, reaffirming its commitment to uphold its duties in accordance with international law.

F. Relief sought

170. Mongolia respectfully requests the Court to find that Mongolia has complied with its obligations under international law, including the Rome Statute, and has not failed to execute the request for cooperation of the Court in a manner contrary to the provisions of this Statute. Consequently, the Mongolia further requests that the Court decline to refer this matter to the Assembly of States Parties.

—oOo—