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Reconciling Conflicting Norms of CIL

Towards a Method of Practical Concordance at the ICJ

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1 Introduction

The risk of possibly conflicting norms of customary international law (CIL) has received increased attention in recent international legal scholarship and practice.[1] In the absence of commonly accepted or authoritative rules of conflict that may mitigate the ramifications which stem from a possible clash of opposing obligations under CIL, legal scholars and practitioners alike almost instinctively turn towards competent (judicial) authorities, thereby seeking advice on how to strike a balance between conflicting norms in conformity with applicable legal frameworks and regimes. The emergence of this 'legal dilemma' hence calls for, and even heralds, an established and accepted modus operandi to which international judges and adjudicators – as competent authorities – can resort in relevant situations. This basic constellation of juxtaposing norms pointing in different directions is of significant relevance, most importantly with regard to the operations of the International Court of Justice (ICJ), designated as 'the principal judicial organ of the United Nations'[2] and competent to adjudicate on 'any question of international law'.[3]

[1] One possible conceptualization of this clash was proposed by Jeutner, who framed it as a 'legal dilemma' arising from situations in which 'an actor confronts an irresolvable and unavoidable conflict between at least two legal norms so that obeying or applying one norm necessarily entails the undue impairment of the other'. See V Jeutner, *Irresolvable Norm Conflicts in International Law: The Concept of a Legal Dilemma* (Oxford University Press 2017) 20. The contingency of opposing international legal norms has previously been expounded by Pauwelyn, who distinguished between 'genuine' and 'apparent' conflict(s); see J Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (Cambridge University Press 2003) 237–74.

[2] Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 892 UNTS 119, art 92.

[3] Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 892 UNTS 119, art 36(2)(b).

The tension inherent in the coincidence of contrary, yet equally valid and established, norms of CIL has hence become an increasingly real issue in recent years. For example, it arises in relation to the scope and application of *ratione personae* immunity from prosecution and adjudication enjoyed by heads of state, heads of government, and ministers of foreign affairs for international (core) crimes. The underlying conflict has become especially manifest in the *Al Bashir*[4] case at the International Criminal Court (ICC). The case concerns acts committed by the former Sudanese president Omar Al Bashir, who has been charged with genocide, crimes against humanity, and war crimes in the context of the situation in Darfur – referred to the International Criminal Court by the United Nations (UN) Security Council under its Chapter VII powers[5] – and is the subject of two arrest warrants issued in recent years.[6] Beyond the question of Al Bashir's imputed individual criminal responsibility for these international crimes, this case subsequently triggered a series of interrelated legal and legislative developments in a number of states parties to the Rome Statute[7]. Most importantly, they concerned constitutional issues flowing from the fact that Al Bashir had sojourned on the territory of states parties to the Rome Statute notwithstanding the pending arrest warrants and related legal obligations under the Statute.[8] Accordingly, the case of Al Bashir has offered an enduring illustration of some of the inherent tensions that might arise between two possibly conflicting, yet imperative, norms of CIL:[9] on the one hand, the established principle of *ratione personae* immunity applicable to heads of state,

[4] *The Prosecutor v Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09 (6 June 2005).

[5] UNSC Res 1593 (31 March 2005), UN Doc S/S/RES/1593, para 1.

[6] *The Prosecutor v Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09-1 (4 March 2009); *The Prosecutor v Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09-94 (12 July 2010).

[7] Rome Statute of the International Criminal Court (opened for signature 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90.

[8] The notion of legal obligations incumbent on state parties under the Rome Statute's regime of co-operation for purposes of arrest was expeditiously addressed by the Appeals Chamber of the International Criminal Court in connection with a visit Al Bashir had made to Jordan in March 2017. See *Judgment in the Jordan Referral re Al Bashir Appeal*, Appeals Chamber, Decision, ICC-02/05-01/09-397-Corr (6 May 2021).

[9] The issue on a CIL norm (i.e. immunity *ratione personae*) and corresponding treaty obligations for state parties under Articles 27 and 98 of the Rome Statute. It is submitted that for the purposes of this chapter – leaving aside the question of legal obligations stemming directly from the Rome Statute regime – the Al Bashir case suits as a blueprint for illustrating a clash of conflicting CIL norms of necessitating the application of practical concordance *in situ*.

heads of government, and ministers of foreign affairs;[10] and, on the other, the imperative to end impunity for international (core) crimes by facilitating individual criminal responsibility under international law.

This cursory sketch of two CIL norms in possible conflict with one another points, however, to a more structural tension – namely the question of applying and reconciling (seemingly) opposing legal principles in concrete circumstances. Thus far, international courts and tribunals, including the ICJ, have regularly refrained from outlining, conceiving, and imposing coherent analytical and prescriptive means of establishing an equilibrium between (partially) opposing norms of CIL *in situ*. Yet, devising such means – i.e. the creating transparent and selective rules of collision – could arguably assist international judges in striking a reasonable and credible balance in reconciling conflicting norms of CIL in concrete cases. In this chapter it is submitted that in such circumstances international adjudicative bodies could contemplate resorting to the German constitutional law principle of practical concordance (*praktische Konkordanz*) and thereby draw on a legal methodology that has become well established and is regularly applied by the German Federal Constitutional Court when ruling on fundamental rights.[11] The principle is applied in cases where there is a conflict between fundamental norms of equal (constitutional) rank, neither of which can be fully or partially overridden.[12] A core objective of practical concordance is thus the careful balancing of the two legal norms so as to allow each to be as fully effective as possible. Given that any legal arrangement needs to be assessed in context, practical concordance denotes essentially both a relationship of qualified precedence and a method of resolving

[10] See eg ILC, 'Immunity of State Officials from Foreign Jurisdiction: Texts and Titles of the Draft Articles adopted by the Drafting Committee on First Reading' (31 May 2022) UN Doc A/CN.4/L.969, Draft Article 3.

[11] For a cursory overview of the German Federal Constitutional Court's legal-theoretical reasoning and approach, including the notion of practical concordance, see M Heilbronner and S Martini, 'The German Federal Constitutional Court' in A Jakab, A Dyevre, and G Itzcovich (eds), *Comparative Constitutional Reasoning* (Cambridge University Press 2017) 356–93.

[12] This notion prima facie resembles an approach commonly referred to as 'harmonization through interpretation', as found in the case law of the European Court of Human Rights (ECtHR). See eg *Al-Adsani v The United Kingdom* App no 35763/97 (ECtHR21 November 2001), in which the ECtHR had to reconcile rules of state immunity with an individual's right of access to a court. While conceptually related, given that practical concordance applies to rules of equal rank, it is argued that 'harmonization through interpretation' and practical concordance operate on different conceptual planes.

conflicting legal standards – that is, establishing a specific rule of conflict *in situ*.

This chapter's objective is threefold. Firstly, it discusses an example of a dichotomous conflict of CIL norms – namely, between the rule on immunity *ratione personae* and the rule on individual criminal responsibility. Secondly, the notion of practical concordance is introduced and then (re-)conceptualized as a form of an adjudicative reasoning that international courts and tribunals, including the ICJ, can apply to (better) address situations in which there is a potential conflict between CIL norms. Thirdly, the chapter will offer some tentative thoughts on how to address possible ramifications arising for international judges called upon to adjudicate in cases where such conflicts occur and thereby outline how practical concordance might assist in addressing underlying legal dilemmas.

2 The Interplay between Personal Immunity and Individual Criminal Responsibility

There has been much scholarly debate around the controversial question of immunity *ratione personae*, or personal immunity from criminal jurisdiction. It appears to be a well-established principle of CIL that heads of state, heads of government, and foreign ministers are considered to enjoy extensive immunity as individuals during their time in office, such immunity covering both private and official conduct.[13] It implies that since these officeholders represent and even incarnate the state throughout their tenure, any affront to their dignity and inviolability should, by extension, amount to an affront to the state they represent.[14]

This understanding of immunity *ratione personae* was confirmed the International Court of Justice in the *Armed Activities* case, affirming that 'it is a well-established rule of international law that the Head of State, the Head of Government and the Minister for Foreign Affairs are deemed to represent the State merely by virtue of exercising their functions,

[13] For a comprehensive introduction, see D Akande and S Shah, 'Immunities of State Officials, International Crimes, and Foreign Domestic Courts' (2010) 21 EJIL 815.

[14] This understanding is echoed the International Law Commission's work on the immunity of State officials from foreign criminal jurisdiction See ILC (n 10) Draft Articles 3 ('[H]eads of State, Heads of Government, and Ministers for Foreign Affairs enjoy immunities *ratione personae* from the exercise of foreign criminal jurisdiction') and 7 (personal immunities 'shall not apply in respect of . . . crimes under international law', listing the crime of genocide, crimes against humanity, war crimes, the crime of apartheid, torture, and enforced disappearance).

including for the performance, on behalf of the said State, of unilateral acts having the force of international commitments'.[15] Further substantiation of immunity *ratione personae* for heads of state as CIL can be found in the Vienna Convention on the Law of Treaties.[16] Codifying pre-existing CIL,[17] the Convention states: 'In virtue of their function and without having to produce full powers, the following are considered as representing their State: (a) Heads of State, Heads of Government and Foreign Ministers, for the purpose of performing all acts relating to the conclusion of a treaty.'[18]

The notion of immunity *ratione personae* under CIL becomes particularly relevant in matters concerning international criminal justice and related questions of jurisdiction. In the *Arrest Warrant* case, the ICJ examined whether individuals entitled to personal immunity might be charged and subsequently prosecuted in domestic courts for having allegedly committed international crimes. It clarified that 'in international law it is firmly established that … 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'.[19] As far as criminal proceedings before foreign courts were concerned, however, the court underlined that foreign affairs ministers would enjoy full and unlimited *ratione personae* immunity, elaborating that:

> throughout the duration of his or her office, he or she when abroad enjoys full immunity from criminal jurisdiction and inviolability …
>
> In this respect, no distinction can be drawn between acts performed by a Minister of Foreign Affairs in an 'official' capacity, and those claimed to have been performed in a 'private capacity', or, for that matter, between acts performed before the person concerned assumed office as Minister for Foreign Affairs and acts committed during the period in office.[20]

[15] *Case Concerning Armed Activities on the Territory of Congo (Democratic Republic of Congo v Rwanda)* (Jurisdiction and Admissibility) [2006] ICJ Rep 6 [46].
[16] Vienna Convention on the Law of Treaties (opened for signature 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT).
[17] On codification of CIL, see H Thirlway, *International Customary Law and Codification: An Examination of the Continuing Role of Custom in the Present Period of Codification of International Law* (Brill 1972). See also *Legal Consequences for State of the Continued Presence of South Africa in Namibia* (Advisory Opinion) [1971] ICJ Rep 3 [94].
[18] VCLT (n 16) art 7(2).
[19] *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium)* [2002] ICJ Rep 3 [51].
[20] ibid [54]–[55].

Confirming and further substantiating the applicability of immunity *ratione personae* in proceedings before domestic courts, the ICJ acknowledged and, moreover, clarified in what circumstances the personal immunity enjoyed by an officeholder would not preclude criminal prosecution. This would be the case if the proceedings took place in their home country, or if the home state decided to waive their immunity. Beyond that, once an individual ceased to hold office, they would no longer enjoy the privileges and immunities accorded by international law in third states. Thus, provided it had jurisdiction under international law, a foreign court could try a former foreign affairs minister of another state for acts allegedly committed prior to or after their term in office, as well as for acts alleged to have been committed in a private capacity during the minister's term in office.[21]

In an obiter dictum, the court pointed out that both incumbent and former foreign affairs ministers could be pursued in criminal proceedings before 'certain international criminal courts, where they have jurisdiction'.[22] In particular, this would apply to the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda,[23] and – though still in the process of being created at the time the judgment was rendered – the International Criminal Court. It was also noted that the latter's founding legal document, the Rome Statute, expressly provided that: '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.'[24] Although this differentiation in the application of *ratione personae* immunity between the international and domestic spheres expressed in an obiter dictum was not unequivocally endorsed by the entire bench,[25] the judgment pointed to

[21] ibid [61].
[22] ibid.
[23] In both instances the authority to adjudicate individuals accorded *ratione personae* immunity stemmed from the tribunal's creation and mandate under Chapter VII of the United Nations Charter. See UNSC Res 827 (25 May 1993) UN Doc S/RES/827, as amended by UNSC Res 1877 (7 July 2009) UN Doc S/RES/1877 (Statute of the International Criminal Tribunal for the Former Yugoslavia); UNSC Res 955 (8 November 1994) UN Doc S/RES/955 (Statute of the International Criminal Tribunal for Rwanda).
[24] Rome Statute (n 7) art 27(2).
[25] See *Arrest Warrant Case* (n 19), Joint Separate Opinion of Judges Higgins, Kooijmans, and Buergenthal [51] – 'The international consensus that the perpetrators of international crimes should not go unpunished is being advanced by a flexible strategy, in which newly established international criminal tribunals, treaty obligations, and national courts all

a tacit consensus *in statu nascendi*, according to which certain and future international criminal courts and tribunals with the necessary jurisdiction over international core crimes might indict and prosecute both incumbent and former holders of the highest offices of state. Accordingly, the *ratione personae* immunity to which such individuals would otherwise be entitled in connection with such offences would no longer apply.

As a relatively new development, this re-configuration of the legal and conceptual understanding of the role and functions of *ratione personae* immunity under (customary) international law has become the object of increasingly close scholarly scrutiny in recent years, particularly in relation to heads of state. Historically, heads of state have been seen as enjoying considerably broad, if not absolute, immunity from foreign jurisdiction – in part, reflecting and reinforcing the prevailing belief in states' sovereign immunity. However, a tangible decline in the deference paid to incumbents of highest state offices and the concomitant replacement of the former absolute immunity by a more qualified and conditional approach towards immunity, as well as an increasing emphasis on functional rather than personal status as the referential frame for according immunity, have, in sum, led to the above-described legal and conceptual re-alignment. As a result, *ratione personae* immunity for heads of states is now scrutinized in a far more critical manner. That said, the degree and extent of this change, and thus of the re-conceptualization of the scope of *ratione personae* immunity in respect of both substance and application have remained rather unclear.[26] This may in part be due to the fact that the legal construct of *ratione personae* immunity resembles a *sui generis* phenomenon: accordingly, analogies with the legal categorization of other state offices – such as, most importantly, diplomatic

have their part to play. We reject the suggestion that the battle against impunity is "made over" to international treaties and tribunals, with national courts having no competence in such matters.'). In emphasizing both a future role for domestic judicial systems and increased importance for international adjudicative strategies, the joint separate opinion takes an unequivocal stance (albeit not explicitly) in favour of positive complementarity, which has become something of a leitmotif in contemporary international criminal justice. See eg C Stahn, *A Critical Introduction to International Criminal Law* (Cambridge University Press 2019) 223.

[26] As can be seen from a motion moved by African UN member states provisionally tabled for the seventy-third session of the General Assembly, requesting an advisory opinion on the matter from the ICJ. See UNGA, 'Request for an Advisory Opinion of the International Court of Justice on the Consequences of Legal Obligations of States under Different Sources of International Law with Respect to Immunities to Heads of State and Government and other Senior Officials' (18 July 2018) UN Doc A/73/144.

agents – are far from ideal, as they do not fully account for the specificities of personal immunity. Given that only a few international courts have thus far addressed the jurisdictional implications of *ratione personae* immunity in a comprehensive and authoritative manner, its legal status – both internationally and in domestic contexts – is still being dealt with primarily as a matter of CIL.[27] Thus, while neighbouring foundational principles of international law, such as the sovereign equality of states or sovereign immunity, are clearly helpful in delineating the scope and nature of immunities *ratione personae*, those principles are insufficient to arrive at a comprehensive and contemporary determination of the formers' status under CIL.

The last twenty-five years have thus seen growing unease in international legal scholarship over unconditionally according almost unlimited personal immunity, given the emergence of an array of international crimes and the growing number of capable international adjudicative bodies having jurisdiction to rule on them.[28] The concern to guarantee human rights protection has led to increasing deliberation on the possibility of legally challenging the conduct of heads of state, heads of government, and ministers of foreign affairs, including, in a limited number of cases, also in the courts of foreign states and, in particular, in a growing number of international criminal courts and tribunals, with a view to possibly overriding the previously accepted conceptualization of personal immunity conferred on those selected individuals under CIL.

Assuming that immunity for heads of state, heads of government, and ministers of foreign affairs is still – notwithstanding the aforementioned efforts, most notably on the part of the International Law Commission,[29] to codify it – primarily based on CIL, no clear indication has been given as to how this principle may be properly reconciled with other, potentially conflicting customary norms that have the same legal rank. This is most importantly the case when the principle of *ratione personae* immunity comes up against that of individual criminal responsibility, aimed at ending impunity for international core crimes. This latter

[27] Recognizing this fact, the ILC included the topic of immunity of state officials from foreign criminal jurisdiction in its long-term working agenda in December 2007 and has since published (preliminary) results of its progress in periodic reports. See also UNGA Res 62/66 (8 January 2008) UN Doc A/RES/62/66 ('Report of the International Law Commission on the Works of its Fifty-Ninth Session') operative para 7.

[28] See eg KJ Alter, 'The Multiplication of International Courts and Tribunals after the End of the Cold War' in CPR Romano, KJ Alter, and Y Shany (eds), *The Oxford Handbook of International Adjudication* (Oxford University Press 2014).

[29] See n 27.

principle has two fundamental dimensions: firstly, it confirms that individuals can be held accountable directly under international law for certain criminal offences, thereby becoming subjects of international law and bypassing the state as an intermediary. Secondly, it implies that individuals may incur personal culpability for these specific offences and can therefore be held accountable for their conduct within the international arena.

Outside the laws of war – in which context individual combatants, are to be held liable, albeit to a limited degree, in the case of violations of international humanitarian law in their home jurisdictions – individual criminal responsibility has been recognized under CIL for offences such as piracy, crimes against peace, and crimes against humanity, and has subsequently been affirmed for other kinds of crimes in various international treaties that address the protection of human rights, both in times of war and peace.[30] Conversely, certain international crimes that have been codified in international treaties are considered to have (subsequently) entered the corpus of CIL – for example, the crime of genocide.[31]

Individual criminal responsibility as a norm of CIL has its foundations in the so-called Nuremberg Principles, espoused in the wake of World War II. On 11 December 1946, the United Nations General Assembly unanimously adopted Resolution 95(I),[32] in which it '[a]ffirms the principles of international law recognized by the Charter of the Nuremberg Tribunal and the judgment of the Tribunal'.[33] Simultaneously, the General Assembly instructed the body that later became known as the International Law Commission to draft guiding principles essentially reflecting the Nuremberg and Tokyo Charters' foundational provisions

[30] See D Guilfoyle, *International Criminal Law* (Oxford University Press 2016) 185.

[31] See Convention on the Prevention and Punishment of the Crime of Genocide (opened for signature 9 December 1948, entered into force 12 January 1951) 78 UNTS 277. The inherent *dédoublement fonctionnel* of (individual) criminal responsibility and the responsibility of states parties to give effect to its fundamental purposes, inter alia through prosecutorial activities, has subsequently been endorsed in a number of international treaties; see A Cassese, 'Remarks on Scelle's Theory of "Role Splitting" (*dédoublement fonctionnel*) in International Law' (1990) 1 EJIL 210.

[32] This provides further substantiation of the norm's CIL status, given that unanimous acceptance of a UNGA resolution could be interpreted as an authentic interpretation of the UN Charter, thus expressing the international community's belief in the creation of a new CIL norm. See BD Lepard, *Customary International Law: A New Theory with Practical Applications* (Cambridge University Press 2010) 208–17.

[33] UNGA Res 95(I) (11 December 1946) UN Doc A/RES/95 ('Affirmation of the Principles of International Law Recognized by the Charter of the Nuremberg Tribunal').

and the jurisdictional mandates of their respective tribunals. During the ILC's deliberations, the question of the need to determine whether the rules applied by both adjudicative bodies already constituted applicable principles of international law arose. Given that this was the interpretation of the UN General Assembly in its Resolution 95(I), the legal nature of the principles was considered sufficiently established. During the following years, a growing number of domestic criminal courts of different kinds referred to the Nuremberg Principles, thereby endorsing and accepting their nature and scope as general principles of (international) criminal law. For example, in the *Eichmann* case, the District Court of Jerusalem emphasised that Resolution 95(I) showed the Nuremberg Principles to be part of CIL.[34] Following similar reasoning, the International Criminal Tribunal for the Former Yugoslavia confirmed the overall customary law status of individual criminal responsibility in *Tadić*.[35]

The notion of individual criminal responsibility therefore lies at the very core of the international criminal justice system. However, it increasingly depends upon interactions with cognate legal concepts and other sub-realms of international law. Therefore, how individual criminal responsibility develops in the future will be a function of related legal principles such as an (international) duty to prosecute for defined criminal offences; international legal rules on immunities and amnesties; and the likelihood of co-operation between international criminal courts and tribunals, domestic justice systems, and states more broadly. The actual extent to which individual criminal responsibility might thus (still) be evaded through the application of particular legal principles – such as *ratione personae* immunity – has therefore remained a controversial and steadily evolving phenomenon, featuring in an ever-increasing number of cases before international criminal courts and tribunals – for example, *Taylor*[36] and *Kallon and Kamara*[37] before the Special Court for Sierra Leone and *Karadzic*[38] before the International Criminal Tribunal for the Former Yugoslavia.

[34] *Attorney General v Adolf Eichmann*, District Court of Jerusalem, Judgment, Criminal Case no 40/61, 11 December 1961.
[35] *The Prosecutor v Dusko Tadić* (Interlocutory Appeal) ICTY-94-1-A (2 October 1995).
[36] *Prosecutor v Charles Ghankay Taylor* (Judgment) SCSL-03-01-T (18 May 2012).
[37] *Prosecutor v Morris Kallon and Brima Buzzy Kamara* (Decision on Challenge to Jurisdiction) SCSL-2004-15-AR72(E) (13 March 2004) (in relation to issues of amnesty).
[38] *Prosecutor v Radovan Karadzic* (Judgment) ICTY-95-5/18-T (24 March 2016) (in relation to the issue of a promise not to prosecute).

It is this complex legal entanglement that is at the root of the somewhat uneasy interplay and interdependence between *ratione personae* immunity and individual criminal responsibility as potentially conflicting CIL norms. As explained in Section 1, this predicament has been notably highlighted by the case of (former) Sudanese president Al Bashir and the charges brought against him before the International Criminal Court for his alleged role in the Darfur conflict.

3 Introduction of Practical Concordance into International Adjudication

The notion of practical concordance has its origin in German constitutional law; it can be thought of as a guiding (legal) principle and is particularly characteristic of human rights jurisprudence. Deriving from the Latin *concodare* (to agree), the principle of practical concordance is regularly applied as a means of arriving at a legal equilibrium in human rights cases in which there is a risk of conflict between constitutional norms of equal rank, neither of which should take precedence over the other and both of which call for protection. In relation to possibly conflicting constitutional principles, the intention is to strike a deliberate balance that allows both legal principles to produce their effects as harmoniously and fully as possible. Typically applied to concrete constitutional scenarios, in which possibly conflicting fundamental norms need to be reconciled, practical concordance is informed by case-specific logic, in which legal interests and preferences need to be interpreted in the light of other constitutional principles and purposes. It therefore represents a conditional and, possibly, temporary prioritisation between norms of equal constitutional rank. As a distinct method of reconciling conflicting constitutional norms by balancing them against one another and scrutinising them vis-à-vis other legal considerations, practical concordance can thus be conceived as a specific rule on collision. This is not to say, however, that practical concordance is to be applied unconditionally; it is not applicable in cases in which the legal norm in question might collide with higher-ranking or more specific norms, or in which the norm might contradict general legal norms and principles – the colliding norm would in such cases lie outside practical concordance's scope of application.[39]

[39] An elaborate exploration of the factual limitations of practical concordance (in German) can be found in M Schladebach, 'Praktische Konkordanz als Verfassungsrechtliches Kollisionsprinzip: Eine Verteidigung' (2014) 53 Der Staat 263.

The notion of practical concordance owes its place in the German constitutional law debate above all to the German academic Konrad Hesse, who defined the principle as a method according to which '[c]onstitutionally protected legal interests must be co-ordinated with each other in the solution in such a way that each of them becomes reality. . . . [L]imits must thus be set for both legal interests so that each may attain optimal effectiveness.[40] According to the definition provided by Hesse, the realization of one legal interest shall not be at the expense of the other, which also excludes an over-hasty weighing or accommodation of conflicting legal positions. In that sense, practical concordance is geared towards an overall imperative of constitutional unity and thus of both coherence and impartiality, the ultimate aim being to establish a lasting balance while at the same time furthering both legal interests at issue. In this respect, practical concordance could be considered an emanation of the principle of proportionality. Expressed differently, practical concordance realizes two seemingly different, yet inherently interlinked, objectives – namely, to reconcile conflicting norms through a harmonized interpretation and to facilitate an equilibrium among norms.

This explains the widespread attention and approval given to practical concordance in domestic constitutional debates in several (mostly German-speaking) countries. The principle is today generally recognized as a constitutionally grounded balancing mechanism between potentially conflicting legal norms, the aim of which is to achieve an equilibrium between those norms and thereby generate a state of practical concordance. The concrete scope and character of practical concordance has been delineated first and foremost by the German Federal Constitutional Court in its fundamental rights jurisprudence.[41] In general, the principle serves in cases of collision between fundamental rights that are guaranteed without qualification and is thus applicable to a broad range of fundamental rights collisions and interrelated conflicting constitutional principles. It has been questioned, however, whether the factual

[40] K Hesse, *Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland* (20th edn, CF Müller 1999) 74 ('Verfassungsrechtlich geschützte Rechtsgüter müssen in der Problemlösung einander so zugeordnet werden, dass jedes von ihnen Wirklichkeit gewinnt. [. . .] [B]eiden Gütern müssen Grenzen gesetzt werden, damit beide zu optimaler Wirksamkeit gelangen können.' English translation by this chapter's author.)

[41] See eg Bundesverfassungsgericht, Order of First Senate (17 December 1975) 1 BvR 63/68; Bundesverfassungsgericht, Order of First Senate (3 November 1987) 1 BvR 1257/84; Bundesverfassungsgericht, Order of First Senate (7 March 1990) 1 BvR 1215/87.

application of practical concordance in the sense of a systemic method of interpretation can place limits (possibly unintended) on the protective scope normally inherent in an unconditionally guaranteed fundamental right. If the conflicting constitutional provision amounts to a limitation in itself, this may justify the imposition of limits, provided the norm collision concerned is addressed and balanced in the spirit of practical concordance. On this particular issue, constitutional jurisprudence has remained rather patchy.

The foundational idea on which practical concordance is grounded also constitutes the basis for what other constitutional scholars, such as Peter Lerche, have identified as the components of an appropriate balancing of conflicting, yet constitutionally protected and relevant, interests as a way of legitimizing contingent restrictions on fundamental rights.[42] This approach lends itself to situations in which the absence of an explicit authorization to restrict fundamental rights may need to be compensated by imparting constitutional legitimation. The rationale implicitly underlying practical concordance has subsequently been adopted by constitutional orders outside Germany – for example, in France[43] and Switzerland,[44] where the notion has been taken up, sometimes unchanged, in both constitutional law scholarship and fundamental rights jurisprudence.

Although international law recognizes the existence of conflicting norms and provisions and has long-developed rules of conflict at its disposal, including general principles of law such as *lex specialis derogat legi generali*,[45] – the tension between conflicting CIL norms may lead to profound legal dilemmas when adjudicative bodies, including the ICJ, are confronted with such conflicts. As the corpus of international law expands and becomes more fragmented, this legal-theoretical problem is likely to have ramifications and repercussions in both scholarly discourse and judicial practice. In the absence of authoritative rules of conflict that address this enduring tension, practical concordance can be used by international judges, alongside existing methods of

[42] P Lerche, *Übermaß und Verfassungsrecht: Zur Bindung des Gesetzgebers an die Grundsätze der Verhältnismäßigkeit und der Erforderlichkeit* (Heymann 1961).

[43] Conseil constitutionnel (18 January 1995) Decision no 94-352.

[44] Federal Supreme Court of Switzerland (12 October 2012) BGE 139 I 16.

[45] For a comprehensive account, see S Borelli, 'The (Mis-)Use of General Principles of Law: *Lex Specialis* and the Relationship between International Human Rights Law and the Laws of Armed Conflict' in Laura Pineschi (ed), *General Principles of Law: The Role of the Judiciary* (Springer 2015) 265.

interpretation such as the principle of effectiveness, systemic integration, or the principle of harmonization,[46] as a distinct analytical lens through which they can balance conflicting legal norms instead of preferring one norm to another one.

Section 4, sketches a possible way of introducing practical concordance into the legal toolkit employed by judges of international courts, including the ICJ. This transposition exercise seeks not to delineate yet another legal-methodological concept that can be regularly applied in a formal manner but rather to draw intellectual inspiration from the principle of practical concordance. The aim is to provide a tangible dimension and a name to the dilemma of reconciling conflicting CIL norms. The exercise aspires to raise awareness of this distinctive quandary among adjudicators, with a view to contributing to their reasoning and encouraging reflection on possible ways of establishing an equilibrium of legal interests in the concrete cases they handle.

4 'What a Judge Gotta Do': Thoughts on Reconciling Conflicting CIL Norms at the ICJ

So, how can the judges of international adjudicative bodies make use of practical concordance in their daily work on the bench, and in particular at the ICJ? This section will propose various adjudicative 'lenses' whereby practical concordance might possibly contribute towards a more comprehensive assessment.

In recent years, international judges have increasingly become an object of research in themselves for international legal scholars.[47] Matters such as (legal) socialization[48] or international judges' role in constituting court authority[49] have featured extensively in recent academic writings. These studies have shown that international judges carry with them an individualized legal fingerprint and trajectory, which

[46] See eg A Peters, 'The Refinement of International Law: From Fragmentation to Regime Interaction and Politicization' (2017) 15 IJCL 671.

[47] See eg D Terris, CPR Romano, and L Swigart, *The International Judge: An Introduction to the Men and Women Who Decide the World's Cases* (Brandeis University Press 2007); R Mackenzie and others, *Selecting International Judges: Principle, Process, and Politics* (Oxford University Press 2010). For a view more focused on international criminal law, see J Powderly, *Judges and the Making of International Criminal Law* (Brill 2020).

[48] MR Madsen, 'Who Rules the World? The Educational Capital of the International Judiciary' (2018) 3 UC Irvine J Intl Transl Comp L 97.

[49] KJ Alter, LR Helfer, and MR Madsen (eds), *International Court Authority* (Oxford University Press 2018).

determines the (legal) reasoning they pursue in any given case before them. Recalling that the principle of practical concordance has its origins in German constitutional law – and has thus far been mostly restricted thereto – it is no surprise that the concept has not (yet) expanded more broadly across international legal scholarship and penetrated the everyday practice of international judges.[50] Mindful of this caveat, the following thoughts are but a tentative and initial attempt to introduce the notion of practical concordance into contemporary international legal thinking.

In brief, practical concordance may fulfil a threefold function for international judges called upon to reconcile conflicting CIL norms. Firstly, it may serve as a methodological-analytical prism through which the customary norm(s) in question may be viewed, scrutinized, and de-constructed while being mindful of the need to achieve an equilibrium of norms. This implies that the substantive scope of each norm will necessarily be circumscribed. It could be said that this readiness to engage in a balancing process requires a mindset similar to that displayed when judges rule *ex aequo et bono*.

Secondly, although the above-mentioned equilibrium of norms is to be sought *in situ* – that is, pursued by international judges in the concrete cases before them – applying practical concordance at the same time requires the broader picture to be taken into consideration – that is, international judges must ponder the results of weighing different norms against one another and take account of the legal effects that might result across various (sub-)branches of international law. This applies particularly to the ICJ, which, as the 'principal judicial organ of the United Nations'[51] is of fundamental significance in the future development and practice of international law. With each decision they render, the ICJ judges address not only the legal interests at issue in the case before them but also the repercussions this may have for the domain of international law more broadly. Practical concordance could be regarded as a further aid in performing this role, accommodating international judges' dual role as, on the one hand, authoritative arbitrators and legal interpreters in any given case before them and, on the other hand, international legal

[50] For an insightful (and external) perspective on international legal scholarship in Germany, see E Benvenisti, 'The Future of International Law Scholarship in Germany: The Tension between Interpretation and Change' (2007) 67 Heidelberg J Intl L 585. On the conceptual difference between harmonization of conflicting legal norms and practical concordance, see also n 12.

[51] UN Charter (n 2) art 92.

norm entrepreneurs, entrusted with developing international law in accordance with a constantly changing legal-political environment.

Thirdly, the application of practical concordance both enables and obliges international judges to take a 'think outside the box' approach when addressing legal dilemmas arising from the concurrence of possibly conflicting CIL norms and thereby to engage in judicial creativity. When applied in a given case, practical concordance requires established norms of (customary) international law to be balanced against one another in order to find an equitable solution to a previously disregarded legal dilemma. For this, interdisciplinary thinking and unorthodox legal approaches are needed. It also offers a way of upholding past precedence while striving for *de lege ferenda*.

Practical concordance should not therefore be regarded as a sophisticated and novel concept in legal theory. Rather, it denotes a distinct methodological lens through which cases that deal with conflicting CIL norms may be viewed, analysed, and resolved – hence putting a strong emphasis on considerations of balancing and compensation. Whether, to what extent, and in what way practical concordance may make inroads into the practices of international courts, especially the ICJ, remains to be seen. The compensatory character of practical concordance, which seeks an accommodation between prima facie contradictory CIL norms could emerge as a potential game-changer particularly whenever the ICJ is called upon to provide advisory opinions. It could, for example, help in answering the question of how to reconcile the *ratione personae* immunity enjoyed by heads of state, heads of government, and ministers of foreign affairs under international law with the pursuit of individual criminal accountability for international core crimes.

How, to what extent, and with what results might practical concordance be used by ICJ judges? While it might seem a somewhat vain exercise to ponder potential decisions *in abstracto*, and without wishing to interfere with judicial autonomy, a brief thought experiment will help to show how practical concordance could be applied to resolve conflicting CIL norms.

For this thought experiment, let us suppose that the ICJ is to render an advisory opinion at the request of the United Nations General Assembly[52] on whether, how, and under what conditions two prima facie conflicting CIL norms–*ratione personae* immunity and individual criminal responsibility – may be reconciled. Our illustration will involve

[52] See n 26.

the (fictious) case of a sitting head of state accused of being responsible for an international crime falling within the jurisdiction of an international criminal tribunal legally empowered to adjudicate on such a situation. Faced with this (simplified) scenario, an international judge will need to take two initial steps. The first will be to analyse each (customary) norm and define its scope of application and the legal interests it protects, so as to distil the legal dilemma posed by the concurrence of the legal interests each norm seeks to protect. The second step will consist in delineating each norm's legal nucleus – that is, the normative core to be preserved and without which the norm in question would become meaningless. This exercise will necessarily need to be placed within the context of the concrete case at hand and thus take account of the notional and circumstantial specifics of the case.

Taking this line of thinking a step further and applying it to the norms of *ratione personae* immunity and individual criminal responsibility, the establishment of an equilibrium between the norms would mean that neither norm is applied unrestrictedly, yet their overall applicability is upheld. As regards *ratione personae* immunity, this balancing could lead to confirmation that, for example, heads of state continue to enjoy extensive privileges, in particular before domestic courts, and that their previously unconditional immunity could be curtailed only where the individual is charged with a core crime of concern to the international community as a whole and this charge is made before a competent international criminal court or tribunal with the necessary jurisdiction. This qualified understanding of *ratione personae* immunity is the direct result of its being confronted with the other norm in question – namely, individual criminal responsibility. Although a bedrock principle in individualizing international justice, allowing the actual perpetrators of atrocious crimes (humans as opposed to states) to be held accountable, this principle would have to comport with the importance accorded to individuals who enjoy *ratione personae* immunity on account of their unique role as state representatives. For its part, therefore, the principle of individual criminal responsibility will have to be curtailed so that this limited circle of officeholders are prosecuted only before a competent international criminal court or tribunal with the necessary jurisdiction and only for a crime of concern to the international community as whole.

This (hypothetical) act of balancing can truly be considered an instance of practical concordance as the international judge will have engaged in a deliberate process of weighing both norms against one another and safeguarding each by ensuring that it remains intact and is

not compromised or conceptually subordinated to the other. It should be pointed out that the balancing process could also lead to a different result, depending on the circumstances of the case. In our illustration, it can be claimed that both norms conserve their overall legitimacy and efficiency in protecting the fundamental legal interest(s) to which they relate and thus the substantive validity of those norms. *In concreto*, it would mean that a competent international criminal tribunal is required to prosecute a sitting head of state who enjoys *ratione personae* immunity save where that head of state is charged with crimes of concern to the international community as a whole. Although in this case the pendulum could be said to have swung more towards one of the two norms, the other norm's overall applicability and validity in similar or different constellations is not undermined.

5 Conclusion

The present contribution has sought to introduce the notion of practical concordance into international adjudication and, in particular, into the everyday practice of international judges, thereby making the principle applicable in situations where possibly conflicting norms of CIL must be reconciled *in situ*. Far from a full-fledged legal-theoretical concept, practical concordance as presented here is rather a state of mind conducive to establishing an equilibrium between legal norms of equal rank and a distinct methodological approach in addressing legal dilemmas. It is hoped this contribution will spur further reflection on how to confront cases in which norms of CIL may conflict with one another, and thus point to the greater leverage offered by a more nuanced weighing of contradictory legal norms and principles.