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Hello, this is Roger Clark again, this time talking to you about article 27 of the Rome Statute which is entitled “Irrelevance of official capacity.”

While the heading of article 27 refers to the irrelevance of official capacity, it in fact contains two paragraphs, one of which deals with that issue, and the other which deals with the related, but conceptually distinct, issue of immunity. I shall call these the “act of state” and “immunity” issues.

Article 27 reads:

1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.
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.

Paragraph 1 recognizes the demise of the old “act of State” principle whereby it was said to be a defense for one acting on behalf of the State that, if there was any responsibility, it was that of the State itself, not its agents. That principle was denied in the Nuremberg Charter, article 7 of which provided that “The official position of defendants, whether as Heads of States or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment.” This position rapidly established itself as a principle of customary international law. Nuremberg represented a paradigm shift in thinking, namely that, in addition to state responsibility for breaches of fundamental norms of international law, there could also be individual criminal responsibility. As the Nuremberg Tribunal so famously put it:

Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced. The very essence of the Charter [the Tribunal said] is that individuals have international duties which transcend the national obligations of obedience imposed by the individual State. He who violates the laws of war cannot

obtain immunity while acting in pursuance of the authority of the State, if the State in authorizing action which moves outside its competence under international law.

Paragraph 1 of article 27 lists a number of categories of officials but it is plain that these are only exemplary. The principle that no one can hide behind the veil of the State before the ICC applies to all officials high and low, from the Head of State to the foot soldier who kills on behalf of the State.

You will notice that paragraph 1 insists that not only is official status not a complete defense but also that it has its limits as a partial defense, a mitigating factor when it comes to punishment. Official status may, in fact, be an aggravating factor in some cases, such as a rape or murder that is done in the name of the State. The paragraph though has that puzzling phrase “official status shall not in and of itself constitute a ground for the reduction of sentence.” I do not think that the “in and of itself” phrase means that all servants of the State have to be treated when it comes to punishment alike. The general and the foot soldier may be guilty of the same offence. Neither can hide behind the State. But when it comes to sentence, the general may well be subject to a greater penalty, not because he has official capacity in itself but because he is in charge.

The field of application of paragraph 2 is narrower than that of paragraph 1. Under international customary law and often under domestic constitutional or statutory law, a small group of officials including in some cases diplomats are regarded as immune from the jurisdiction of courts, especially those in another country, but sometimes in the courts of their own country. Thus, while they may have committed a crime, they may not be tried for it. Some like diplomats and officials of and representatives to international organizations may have such status pursuant to treaty; others rely on customary international law for their immunity.

There are, in fact two categories of such immunities, personal or in Latin, *ratione personae* immunity and functional immunity or immunity *ratione materiae*. Personal immunity applies to a small cast of characters, perhaps only the Head of State, Head of Government and Foreign Minister, who are under international customary law, immune from all jurisdiction in all other States during the time they are in office. The importance of their function demands that they be left free to pursue those functions while in office. After they leave office, they may still retain functional immunity for what they did in the course of their official duties. But they may be brought to trial to litigate the issues. Functional immunity may apply to a wider group of officials, but the extent to which this is governed by international law is often obscure.

Be that as it may, article 27 paragraph (2) amounts to a waiver by all the States Parties to the Rome Statute of any immunity of such of their officials who find themselves in front of the International Criminal Court. Indeed, some of the parties to the Statute found it necessary in legislating to give effect to the waiver to specifically strip such officials of immunity under domestic and international law for the purposes of surrender to the Court and trial there. Other states no doubt relied on the treaties effect under their domestic law to itself give effect to their obligations.

Article 27 has to be read alongside article 98 of the Statute, especially its first paragraph, which may make it difficult for the Court to obtain the surrender of accused persons who are nationals of States that are not party to the Statute even in cases where the Security Council has made a referral to the Court. In such instances, while a person in question would have no immunity in front of the Court, his or her immunity status *vis-à-vis* another State may prevent surrender to the Court. Such problems have arisen in respect to the President of Sudan, Mr. Al-Bashir, and the

Court's efforts to bring him to trial. Please keep these issues of the inter-relationship between articles 27 and 98 in mind when you come to watch the presentation on article 98.

For now though, this is all from me.