Personal Immunity and President Omar Al Bashir: An Analysis Under Customary International Law and Security Council Resolution 1593

Dan Terzian

Abstract

When the International Criminal Court issued an arrest warrant for President Omar Al Bashir, the court unconvincingly argued that Al Bashir does not possess personal immunity before the ICC. Although the court's argument was unconvincing, I argue that the court can still arrest and prosecute Al Bashir because he does not possess personal immunity due to reasons not analyzed by the court. I ground my argument on the theory that the Security Council removed Al Bashir's personal immunity—and not on the incorrect theory that customary international law removed his personal immunity.

I argue that the customary international law theory is incorrect because the practice of removing heads of state's personal immunities lacks sufficient acceptance to establish a new customary international law. Thus, under customary international law, current heads of state possess inviolate personal immunities that absolutely prohibit international tribunals from indicting, arresting or prosecuting them.

However, I also argue that the Security Council overrode customary international law and removed Al Bashir's personal immunity when it referred the Darfur conflict to the International Criminal Court in Security Council Resolution 1593. In this resolution, the Security Council granted the International Criminal Court substantial jurisdiction to adjudicate serious violations of international humanitarian law. Whenever the Security Council grants this type of jurisdiction to an international tribunal, it impliedly removes government officials' personal immunities. Furthermore, the Security Council confirmed this implicit removal of personal immunities by noting that personal immunities do not exist for purposes of Article 98(1) of the Rome Statute.

Introduction

Darfur is rife with crime, "including killing of civilians, torture, enforced disappearances, destruction of villages, rape and other forms of sexual violence, pillaging and forced displacement."[1] In Security Council Resolution 1593, the United Nations Security Council referred the situation in Darfur existing since July 1st, 2002 (the "Darfur conflict"), to the International Criminal Court ("ICC").[2] The ICC subsequently indicted Sudanese President Omar Al Bashir for committing war crimes, crimes against humanity and genocide and later issued a warrant for his arrest.[3] However, the ICC's indictment and arrest warrant may violate international law because President Al Bashir may have personal immunity.

Although the ICC analyzed this issue of Al Bashir's immunity and concluded that he does not possess personal immunity before the ICC for his acts in the Darfur conflict,[4] the court's scant analysis was unconvincing.[5] Despite the ICC's unconvincing analysis, I argue below that the ICC can legally indict, arrest and prosecute Al Bashir because the Security Council removed government officials' personal immunities for the Darfur conflict before the ICC (the "ICC-Darfur matter"). However, absent the Security Council removing personal immunities, I argue that all current heads of state possess inviolate personal immunity under

---

1 Rep. of the Int'l Comm. of Inquiry on Darfur to the Secretary-General, 3, U.N. Doc. S/2005/60 (Feb. 1, 2005) [hereinafter Rep. of the Int'l Comm. of Inquiry on Darfur].

2 S.C. Res. 1593, ¶ 1, U.N. Doc. S/RES/1593 (Mar. 31, 2005).

3 *Genocide Continues as Sudan's Indicted Leader Games World—ICC Prosecutor*, UNITED NATIONS (Dec. 9, 2010), http://www.un.org/apps/news/story.asp?NewsID=37011.

4 *See* Prosecutor v. Al Bashir, Case No. ICC-02/05-01/09, Decision on the Prosecution's Application for a Warrant of Arrest Against Omar Hassan Ahmad Al Bashir, ¶¶ 41–45 (Mar. 4, 2009), http://www.icc-cpi.int/iccdocs/doc/doc639096.pdf (stating that "the current position of Omar Al Bashir as Head of a state which is not party to the [Rome] Statute[] has no effect on the court's jurisdiction over the present case").

5 *E.g.*, Paola Gaeta, *Does President Al Bashir Enjoy Immunity from Arrest*, 7 J. INT'L CRIM. JUST. 315, 323–24 (2009).

customary international law that absolutely prohibit international criminal tribunals from indicting, arresting or prosecuting them.

This Comment will proceed in the following manner. Part I provides background information on international law and immunities. Part II argues that, under customary international law, current heads of state have inviolate personal immunities that absolutely prohibit an international tribunal from indicting, arresting or prosecuting them. Parts II.A and B argue that the international tribunals created by the Security Council and the treaty-based ICC—both of which remove personal immunities for crimes within their jurisdiction—have not established a new customary international law removing personal immunities. Part II.C argues that the International Court of Justice ("ICJ") has not acknowledged the existence of a new customary international law removing personal immunities. Concluding Part II, Part II.D argues that the rationale for providing heads of state with personal immunities still exists before international tribunals.

Lastly, Part III argues that the Security Council implicitly removed government officials' personal immunities for the ICC-Darfur matter by granting the ICC substantial jurisdiction to adjudicate serious violations of international humanitarian law. Furthermore, Part III.C argues that Security Council implicitly confirmed this removal of personal immunities in Security Council Resolution 1593 and in its actions taken and statements made after Resolution 1593.

I. Background on international law and immunities

International law derives from primarily two sources: Treaties and customary international law.[6] Treaties are international agreements that contain "expressly accepted

[6] *E.g.*, Jack L. Goldsmith & Eric A. Posner, *A Theory of Customary International Law*, U. CHI. L. REV. 1113, 1116 (1999); Phillip R. Trimble, *A Revisionist View of Customary International Law*, 33 UCLA L. REV. 665, 669 (1986).

obligations."[7] The treaties' obligations legally bind only the nations party to the agreement—not non-parties.[8] However, it's possible for a treaty's principles to legally bind states not party to the treaty if the treaty's principles transform into customary international law.[9]

Unlike treaties, customary international law legally binds all states, "regardless of whether a state has expressly accepted it."[10] Customary international law is established when: (1) There is "a widespread and uniform practice of nations" and (2) nations "engage in th[at] practice out of a sense of legal obligation [(i.e., *opinio juris*)]."[11] Additionally, although establishing customary international law depends on the practice of nations generally, it particularly depends on the practice of the most powerful nations.[12] To determine whether a

---

[7] Trimble, *supra* note 6, at 669; *see also* Goldsmith & Posner, *supra* note 6, at 1116.

[8] Vienna Convention on the Law of Treaties art. 34, May 23, 1969, 1155 U.N.T.S. 331 ("A treaty does not create obligations for a [non-party] without its consent."); Goldsmith & Posner, *supra* note 6, at 1116; *see also* Ilias Bantekas, *Head of State Immunity in the Light of Multiple Legal Regimes and Non-Self-Contained System Theories: Theoretical Analysis of ICC Third Party Jurisdiction Against the Background of the 2003 Iraq War*, 10 J. OF CONFLICT & SECURITY L. 21, 29–31 (2005) (stating that a treaty creates a "distinct legal regime" and its principles only apply to the parties of that regime); Trimble, *supra* note 6, at 669.

[9] *See, e.g.*, Goldsmith & Posner, *supra* note 6, at 1117 (stating that "[t]reaties—especially multilateral treaties, but also bilateral ones—are often used as evidence of [customary international law]").

[10] *E.g.*, Trimble, *supra* note 6, at 669; *see also* Goldsmith & Posner, *supra* note 6, at 1116.

[11] Goldsmith & Posner, *supra* note 6, at 1113, 1116; *see also* Jean-Marie Henckaerts, *Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict*, 87 INT'L REV. RED CROSS 175, 179 (2005) (stating that state practice must be "virtually uniform"); *cf.* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987) ("Customary international law results from a *general* and *consistent* practice of states followed by them from a sense of legal obligation.") (emphasis added); *but see* Trimble, *supra* note 6, at 679 (stating that the state practice "need only be general, not universal").

[12] Goldsmith & Posner, *supra* note 6, at 1114, 1117 ("The content of [customary international law] seems to track the interests of powerful nations. . . . [Customary international law] is usually based on a highly selective survey of state practice that includes only major powers and interested nations."); *see* Statute of the International Court of Justice art. 38(1), 38, June 26, 1945, 59 Stat. 1055 [hereinafter ICJ Statute] (stating that in determining customary international law, the court shall apply "the general principles of law recognized by *civilized* nations") (emphasis added).

customary international law is established, courts examine custom, general principles of law, international conventions, judicial decisions and treaties.[13] Furthermore, a treaty may, by itself, establish customary international law if it achieves widespread and uniform acceptance.[14]

A. Immunities

Under well-established principles of customary international law, government officials possess immunities.[15] These immunities come in two forms: Functional immunities and personal immunities.[16] Both forms have the same effect: They each prohibit international and foreign national criminal tribunals from indicting, arresting or prosecuting a government official.[17] Although functional and personal immunities have the same effect, they differ in whom, what and how long they protect government officials. Functional immunities protect all government officials indefinitely, but its protection is limited to only official government acts.[18] Thus, if a government official commits an international core crime (i.e., genocide, crime against humanity,

---

[13] *See* ICJ Statute, *supra* note 12, at art. 38.

[14] See Anthea Elizabeth Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 AM. J. INT'L L. 757, 758 (2001); see also R. R. Baxter, *Multilateral Treaties as Evidence of Customary International Law*, 41 BRIT. Y.B. INT'L L. 275, 277 (1966). Since parties to a treaty expressly accept the treaty's legal obligations, the *opinio juris* requirement for establishing customary international law is usually satisfied. Roberts, *supra*, at 758.

[15] *E.g.*, Dapo Akande, *International Law Immunities and the International Criminal Court*, 98 AM. J. INT'L L. 407, 409 (2004).

[16] *E.g.*, *id.*

[17] *E.g.*, Antonio Cassese, *When May Senior State Officials Be Tried for International Crimes? Some Comments on the* Congo v. Belgium *Case*, 13 EUR. J. INT'L L. 853, 862–65 (2002).

[18] Akande, *supra* note 15, at 412–13; Cassese, *supra* note 17, at 863; Micaela Frulli, *The Question of Charles Taylor's Immunity: Still in Search of a Balanced Application of Personal Immunities?*, 2 J. INT'L CRIM. J. 1118, 1125 (2004); Steffen Wirth, *Immunities, Related Problems, and Article 98 of the Rome Statute*, 12 CRIM. L. FORUM 429, 431 (2001).

war crime or torture), the official does not have functional immunity for that crime because it is not considered an official government act.[19]

In addition to functional immunities, government officials may be simultaneously protected by personal immunities.[20] Unlike functional immunities, personal immunities protect only a few high-ranking government officials, such as heads of state, heads of government and ministers for foreign affairs.[21] Furthermore, personal immunities protect all their acts—official and unofficial.[22] However, personal immunities only protect these officials while they hold the high-ranking position.[23] Thus, after a high-ranking official vacates her position, she is only protected by functional immunity.[24]

---

[19] Andrea Bianchi, *Immunity Versus Human Rights: The* Pinochet *Case*, 10 EUR. J. INT'L L. 237, 262–66 (1999); Cassese, *supra* note 17, at 864–65; Frulli, *supra* note 18, at 1126; Wirth, *supra* note 18, at 437; Salvatore Zappallà*, Do Heads of State in Office Enjoy Immunity from Jurisdiction for International Crimes? The* Ghaddafi *Case before the French* Cour de Cassation, 12 EUR. J. INT'L L. 595, 601 (2001).

[20] Cassese, *supra* note 17, at 864 (stating that "the two classes of immunity *coexist* and somewhat *overlap* as long as the foreign minister (or any state official who may also invoke personal or diplomatic immunities) is in office"); *see* Wirth, *supra* note 18, at 431–32.

[21] HAZEL FOX, THE LAW OF STATE IMMUNITY 423, 429 (2002) (stating that the 1969 Convention on Special Missions granted personal immunities only to heads of state but the 1972 Convention on Internationally Protected Persons granted personal immunities to heads of state, heads of government, and ministers for foreign affairs); Akande, *supra* note 15, at 409 (stating that personal immunity "is conferred on officials with primary responsibility for the conduct of the international relations of the state"); Frulli, *supra* note 18, at 1125–26; Wirth, *supra* note 18, at 432; *see* Cassese, *supra* note 17, at 864; Gaeta, *supra* note 5, at 315 .

[22] Cassese, *supra* note 17, at 863–64; Wirth, *supra* note 18, at 432. However, the personal immunity of a current high-ranking government official may be removed by her own state. *See* FOX, *supra* note 21, at 430–31; JOE VERHOEVEN, INST. OF INT'L LAW, IMMUNITIES FROM JURISDICTION AND EXECUTION OF HEADS OF STATE AND OF GOVERNMENT IN INTERNATIONAL LAW art. 7, ¶ 1 (2001) ("Head[s] of State may no longer benefit from the inviolability, immunity from jurisdiction or immunity from measures of execution conferred by international law, where the benefit thereof is waived by his or her State."); Sarah Williams & Lena Sherif, *The Arrest Warrant for President al-Bashir: Immunities of Incumbent Heads of State and the International Criminal Court*, 14 J. CONFLICT & SECURITY L. 71, 75 (2009) (stating that the "state may always waive the immunity of an incumbent senior official").

[23] Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3, ¶ 61 (Feb. 14) ("[A]fter a person ceases to hold the office of Minister for Foreign Affairs, he or she will no

Although personal immunities have historically protected all acts, some argue that personal immunities no longer protect all acts because a new customary international law has emerged.[25] Specifically, they argue that personal immunities do not protect an official who has committed an international core crime from indictment, arrest or prosecution by an international tribunal.[26] However, I argue below that personal immunities still protect all acts—including international core crimes—and that no new customary international law has emerged.

II. Inviolate personal immunities under customary international law

Current heads of state has inviolate personal immunities under customary international law: Personal immunities are not removed for international core crimes before an international

---

longer enjoy all the immunities accorded by international law in other States."); Akande, *supra* note 15, at 409; Frulli, *supra* note 18, at 1126; Wirth, *supra* note 18, at 432.

[24] *Arrest Warrant*, 2002 I.C.J. at ¶ 61; Akande, *supra* note 16, at 409; Frulli, *supra* note 18, at 1126; Wirth, *supra* note 18, at 432.

[25] *E.g.*, Gaeta, *supra* note 5, at 320; *see also* Paola Gaeta, *Official Capacity and Immunities*, *in* THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 975, 991 (Antonio Cassesse, Paola Gaeta & John R.W. Jones eds., 2002).

[26] Contrarily, personal immunities always protect a high-ranking government official before a foreign state's national criminal tribunal. *E.g.*, *Arrest Warrant*, 2002 I.C.J. at ¶ 58; Dapo Akande, *The Legal Nature of the Security Council Referrals to the ICC and its Impact on Al Bashir's Immunities*, 7 J. INT'L CRIM. J. 333, 334 (2009) ("Under customary international law, the person of the head of state is regarded as inviolable when abroad and immunity from criminal jurisdiction includes immunity from arrest."); Akande, *supra* note 15, at 411; Frulli, *supra* note 18, at 1122 (2004); Gaeta, *supra* note 5, at 318; Zappallà, *supra* note 19, at 599. The ICJ acknowledged this principle in the *Arrest Warrant* case:

> [The Court] has been unable to deduce from [State] practice that there exists under customary international law any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers for Foreign Affairs, where they are suspected of having committed war crimes or crimes against humanity.

Arrest Warrant, 2002 I.C.J. at ¶ 58. Although the court does not expressly articulate whether this sentence is referring to immunities before both national and international tribunals, the sentence's overall context elucidates that the court is referring only to immunity before national tribunals. *But see* Akande, *supra*, at 334. For example, later in the paragraph, the ICJ states that ICTY and IMT Nuremberg trials "likewise do not enable it to conclude that any such an exception exists in customary international law in regard to national courts." *Arrest Warrant*, 2002 I.C.J. at ¶ 58.

tribunal. Although the Security Council and a treaty, the Rome Statute, have created international tribunals that remove personal immunities, these tribunals have not established a new customary international law because they are either not a state practice or not sufficiently accepted. Additionally, contrary to what some have argued, the ICJ *Arrest Warrant*[27] case does not acknowledge the existence of a new customary international law removing personal immunities because the court's dicta was merely referring to examples of international tribunals where personal immunities were removed—not acknowledging the existence of a new customary international law.

A. Security Council-created international tribunals

The international tribunals created by the Security Council have not established a new customary international law that removes personal immunities for international core crimes before international tribunals. Although the Security Council removed personal immunities within these international tribunals' jurisdiction, they do not establish a new customary international law because they are not a state practice and do not have *opinio juris*. Furthermore, several Security Council resolutions indicate that these international tribunals are merely exceptions to customary international law and do not establish a new customary international law.

1. Security Council-created international tribunals do not establish customary international law

The Security Council has created or co-created three international tribunals that remove personal immunities within each tribunal's jurisdiction for "serious violations of international humanitarian law": The International Criminal Tribunal for the former Yugoslavia ("ICTY"), the International Criminal Tribunal for Rwanda ("ICTR") and the Special Court for Sierra Leone

[27] Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3 (Feb. 14).

("SCSL").[28] These tribunals all have the same statutory provision removing personal immunities: "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."[29]

The practice of removing personal immunities in the ICTY, ICTR and SCSL does not establish customary international law because it doesn't satisfy customary international law's requirements: It is not a practice by states, and it does not have *opinio juris*. First, the practice of removing personal immunities in the ICTY, ICTR and SCSL is not a state practice.[30] Customary international law "arises out of state practice"—not "UN Resolutions and other majoritarian

---

[28] Statute of the Special Court for Sierra Leone art. 6, S.C. Res. 1315, ¶ 3, U.N. Doc. S/RES/1315 (Aug. 14, 2000) [hereinafter SCSL Statute] (recommending that the SCSL "have personal jurisdiction over persons who bear the greatest responsibility[,] . . . including those leaders who, in committing such crimes, have threatened the establishment of and implementation of the peace"); Statute of the International Criminal Tribunal for Rwanda art. 6, S.C. Res. 955, Annex, U.N. Doc. S/RES/955 (Nov. 8, 1994) [hereinafter ICTR Statute]; Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 art. 7, U.N. Doc. S/25704 Annex (1993), S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993) [hereinafter ICTY Statute]; *see also* S.C. Res. 1626, U.N. Doc. S/RES 1626 (Sept. 19, 2005) ("*reiterating* its appreciation for the essential work of the Special Court for Sierra Leone and its vital contributions to the establishment of the rule of law in Sierra Leone and the subregion").

The ICTY and ICTR were international tribunals created entirely by the UN Security Council. However, the SCSL was a hybrid international tribunal created by both the Security Council and the government of Sierra Leone. *E.g.*, William A. Schabas, *Amnesty, the Sierra Leone Truth and Reconciliation Commission and the Special Court for Sierra Leone*, 11 U.C. DAVIS J. INT'L L. & POL'Y 145, 154 (2004); Celina Schocken, *The Special Court for Sierra Leone: Overview and Recommendations*, 20 BERKELEY J. INT'L L. 436, 436 (2002). For background on the establishment of the SCSL, see generally Schabas, *supra*.

[29] SCSL Statute, *supra* note 28, art. 6; ICTR Statute, *supra* note 28, art. 6; ICTY Statute, *supra* note 28, art. 7.

[30] *Cf.* JEFFREY DUNOFF ET AL., INTERNATIONAL LAW: NORMS, ACTORS, PROCESS: A PROBLEM-ORIENTED APPROACH 78 (2010) (stating that "[d]ecisions of international tribunals are not state practice per se but may contribute to the formation of customary international law by their persuasive value and influence on subsequent state practice").

political documents."[31] Since the ICTY, ICTR and SCSL were either created or co-created by Security Council resolutions,[32] they are not a state practice and thus cannot establish customary international law.

Additionally, the practice of removing personal immunities in the ICTY, ICTR and SCSL does not have *opinio juris* because states do not comply with the Security Council's removal of personal immunities out of a sense of legal obligation under customary international law. Rather, states comply with the removal of personal immunities because they have a legal obligation under Articles 25 and 103 of the UN Charter to accept the Security Council's removal of personal immunities.[33] Complying with legal obligations under the UN Charter does not

---

[31] Anthony D'amato, *Trashing Customary International Law*, 81 AM. J INT'L L. 101, 102 (1987).

[32] *See* Part III.B.1, *infra*; *see also* Beth K. Dougherty, *Right-Sizing International Criminal Justice: The Hybrid Experiment at the Special Court for Sierra Leone*, 80 INT'L AFF. 311, 311 (2004); *see generally* WILLIAM A. SCHABAS, THE UN INTERNATIONAL CRIMINAL TRIBUNALS: THE FORMER YUGOSLAVIA, RWANDA AND SIERRA LEONE (2006).

[33] U.N Charter arts. 25, 103 (Article 25 stating that "[t]he Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter" and Article 103 stating that "[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail"); Akande, *supra* note 15, at 417 (stating that nations only comply because they "are bound by and have indirectly consented (via the UN Charter) to the decision to remove immunity"); Gaeta, *supra* note 5, at 326; *see also* U.N. Charter art. 29 (stating that "[t]he Security Council may establish such subsidiary organs as it deems necessary for the performance of its functions").

In fact, some states have refused to comply with the SCSL's removal of personal immunities because the Security Council did not invoke its Chapter VII powers when it co-created the tribunal. Williams & Sherif, *supra* note 22, at 78–79 (arguing that the Security Council must invoke its Chapter VII powers to remove personal immunities). For example, in the SCSL case of *Prosecutor v. Taylor*, the prosecutor issued a sealed indictment for the head of state Charles Taylor's arrest. *See, e.g.*, Frulli, *supra* note 18, at 1118. The prosecutor made the indictment public when Taylor was visiting Ghana for peace talks and urged the Ghanan government to arrest Taylor and turn him over to the court. *See, e.g.*, Frulli, *supra* note 18, at 1118. The Ghanan government refused on the grounds that Taylor possessed personal immunity. *See, e.g.*, Frulli, *supra* note 18, at 1118.

establish *opinio juris*.[34] Instead, *opinio juris* exists when states feel *psychologically* bound to a widespread and uniform practice—not when they are *legally* bound to a Security Council resolution.[35]

Furthermore, in several Security Council resolutions, the Security Council indicated that these tribunals are exceptions to the customary international law of inviolate personal immunities and do not establish a new customary international law that removes personal immunities. For example, in Security Council Resolution 1593, the Council stated: "[Officials] from a contributing State outside Sudan which is not a party to the Rome Statute of the International Criminal Court shall be subject to the *exclusive* jurisdiction of that contributing State for *all* alleged acts or omissions . . . ."[36] Similarly, in Security Council Resolution 1422, the Council declared that the ICC shall not exercise jurisdiction over government officials of states that are not party to the Rome Statute for their "acts or omissions relating to a United Nations established or authorized operation . . . ."[37] Thus, since these resolutions prohibit the ICC—a treaty-based international tribunal that removes personal immunities—from exercising jurisdiction over non-parties, the Security Council clearly rejects the notion of a new customary international law removing personal immunities before any international tribunal.

2. Specific cases from these tribunals are irrelevant

---

[34] D'amato, *supra* note 31, at 102.

[35] *See id.*

[36] S.C. Res. 1593, *supra* note 2, at ¶ 6 (emphasis added).

[37] *See* S.C. Res. 1422 ¶ 1, U.N. Doc. S/RES/1422 (July 12, 2002). Security Council Resolution 1422 prohibited ICC jurisdiction "for a twelve-month period starting 1 July 2002," and the Security Council "expresse[d] the intention to renew [the resolution's prohibition of ICC jurisdiction] . . . for as long as may be necessary . . . ." *Id.* at 1–2 (emphasis removed). The Security Council renewed it the following year in Resolution 1487. *See generally* S.C. Res. 1487, U.N. Doc. S/RES/1487 (June 12, 2003). For background on Security Council Resolution 1422, see generally Carsten Stahn, *The Ambiguities of Security Council Resolution 1422*, 14 EUR. J. INT'L L. 85 (2003).

Although I argue that these international tribunals do not establish customary international law, some scholars incorrectly argue that specific cases from these tribunals—in addition to the tribunals themselves—help establish customary international law. Specifically, they argue that a customary international law that removes personal immunities for international core crimes before an international tribunal has been established because (1) in the ICTY case of *Prosecutor v. Milošević*[38], the ICTY didn't even consider the possibility of personal immunity barring the indictment and (2) in the SCSL case of *Prosecutor v. Taylor*[39], the SCSL held the head of state did not have personal immunity.[40]

This argument is mistaken because specific cases of the ICTY and SCSL are irrelevant to establishing customary international law.[41] Rather, these cases are merely illustrations of each court's respective statute in action and do not provide an additional basis for establishing customary international law. Thus, the ICTY didn't consider personal immunity potentially barring the head of state's indictment because the court applied the ICTY Statute, which clearly removed his personal immunity.[42] Similarly, the SCSL held the head of state did not have

---

[38] Case No. IT-02-54 (Int'l Crim. Trib. for the Former Yugoslavia).

[39] Case No. SCSL-2003-01-I.

[40] *See* Gaeta, *supra* note 5, at 320–21. In both *Prosecutor v. Milošević* and *Prosecutor v. Taylor*, the international tribunals indicted two current heads of state. *E.g.*, Mikhail Wladimiroff, *Former Heads of State on Trial*, 38 CORNELL INT'L L.J. 949, 961, 963 (2005). However, the heads of state were not arrested until after they vacated the position. *E.g.*, *Id.* at 961; Craig Timberg, *Liberia's Taylor Found and Arrested*, WASH. POST (Mar. 30, 2006), http://www.washingtonpost.com/wp-dyn/content/article/2006/03/29/AR2006032900879.html.

[41] This argument is also mistaken because both Milošević and Taylor—though indicted as current heads of state—were arrested as former heads of state. *E.g.*, Wladimiroff, *supra* note 40, at 961; Timberg, *supra* note 40. Even if these cases could support establishing customary international law, they would arguably only support establishing a customary international law that removes personal immunities for indictment but not arrest. *See* notes 68–70, *infra*, and accompanying main text; *see generally* Part II.D, *infra*.

[42] ICTY Statute, *supra* note 28, art. 7; *see* Williams & Sherif, *supra* note 22, at 78–79.

personal immunity because it applied the SCSL Statute, which clearly removed his personal immunity.[43]

B. The Rome Statute

Similar to the three international tribunals created by the Security Council, government officials do not have personal immunities for international core crimes before the ICC.[44] However, unlike the three Security Council-created tribunals, the ICC is based on a treaty, the Rome Statute, that is ratified by 114 countries.[45] The Rome Statute, as a treaty, cannot remove President Al Bashir's personal immunity because Sudan is not a party to the Rome Statute. However, if the Rome Statute's principle of removing personal immunities for international core crimes before the ICC has become customary international law, Al Bashir would not have personal immunity for the ICC-Darfur matter.

I argue that the Rome Statute's principle of removing personal immunities has not established a customary international law because: (1) The Rome Statute lacks widespread and universal acceptance, (2) the Rome Statute itself limits its application solely to its parties and (3) several parties to the Rome Statute do not practice this principle in matters involving non-parties. Furthermore, comparing the Rome Statute to the Genocide Convention helps illustrate why the Rome Statute has not established customary international law.

---

[43] SCSL Statute, *supra* note 28, art. 6.

[44] Rome Statute of the International Criminal Court arts. 5, 27, *entered into force on* July 1, 2002, 2187 U.N.T.S. 3 [hereinafter Rome Statute] (Article 5 stating that the ICC only has jurisdiction over "the following crimes: (a) The crime of genocide; (b) Crimes against humanity; (c) War crimes; (d) The crime of aggression" and Article 27 stating that government officials do not have personal immunities before the ICC).

[45] *Rome Statute of the International Criminal Court*, UNITED NATIONS TREATY COLLECTION (Jan. 6, 2011, 9:06 AM), http://treaties.un.org/Pages/ViewDetails.aspx?src=UNTSONLINE&tabid=2&mtdsg_no=XVIII-10&chapter=18&lang=en#Participants; *The States Parties to the Rome Statute*, INTERNATIONAL CRIMINAL COURT, http://www.icc-cpi.int/Menus/ASP/states+parties (last visited Jan. 6, 2011).

First, the Rome Statute does not have widespread and universal acceptance because nearly half the world and the world's most powerful countries reject it. Only 114 nations accept the Rome Statute,[46] which is barely a majority of the world's roughly 192 countries.[47] Furthermore, seven G20 states reject the Rome Statute.[48] These seven G20 states are China, India, Indonesia, Russia, Saudi Arabia, Turkey and the United States.[49] The population of these seven states alone amounts to nearly half the world.[50] Thus, the Rome Statute cannot establish customary international law because it lacks the crucial requirement of widespread and uniform acceptance by both the world's most powerful states and states generally.

In addition to the Rome Statute lacking sufficient acceptance to establish customary international law, the Rome Statute itself declares that its practice of removing personal immunities is not customary international law because Article 98(1) of the Rome Statute recognizes that officials of non-party states still have personal immunities.[51] Article 98(1) of the Rome Statute states: "The [ICC] may not proceed with a request for surrender . . . [when it] 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 . . .

---

[46] *Rome Statute of the International Criminal Court*, *supra* note 45; *The States Parties to the Rome Statute*, *supra* note 45.

[47] To estimate the number of countries in the world, I used the number of official UN members as a proxy. *UN at a Glance*, UNITED NATIONS, http://www.un.org/en/aboutun/index.shtml (last visited Jan. 6, 2011) (stating that there are 192 UN Member States).

[48] *See Rome Statute of the International Criminal Court*, *supra* note 45; *The States Parties to the Rome Statute*, *supra* note 45.

[49] *See Rome Statute of the International Criminal Court*, *supra* note 45; *The States Parties to the Rome Statute*, *supra* note 45.

[50] *Total Midyear Population for the World: 1950–2050*, U.S. CENSUS BUREAU (Dec. 28, 2010), http://www.census.gov/ipc/www/idb/worldpop.php (estimating the world population in the year 2010 at 6.853 billion); *World Population Prospects: The 2008 Revision Population Database*, UNITED NATIONS (Mar. 11, 2009), http://esa.un.org/UNPP/ (estimating the cumulative population of these seven states in the year 2010 at 3.348 billion people).

."[52] Thus, since "third states" includes states not party to the Rome Statute,[53] the Rome Statute expressly recognizes that an official of a non-party state may have immunity under customary international law that law prohibits the ICC from arresting her.[54]

Additionally, several states party to the Rome Statute do not practice a principle of removing the personal immunities of government officials of non-party states before the ICC. For a treaty's principle to become a customary international law, states party to the treaty must actually practice that principle.[55] Yet, three African states that are party to the Rome Statute refuse to practice the principle of removing the personal immunities of non-parties that were referred to the ICC. Chad, Ghana and Kenya, all of whom are party to the Rome Statute, believe Al Bashir has personal immunity and have refused to comply with the ICC's warrant for Al Bashir's arrest.[56]

---

[51] Bantekas, *supra* note 8, at 29–31.

[52] Rome Statute, *supra* note 44, at art. 98(1).

[53] *See* COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS' NOTES, ARTICLE BY ARTICLE 1606–14 (Otto Triffterer ed., 2008); Akande, *supra* note 26, at 339; Gaeta *supra* note 5, at 328.

[54] Bantekas, *supra* note 8, at 29–31; *see* Roberts, *supra* note 14, at 758; *see generally* notes 107–112, *infra*, and accompanying main text.

[55] *See* Roberts, *supra* note 14, at 758 (stating that "[w]hether [treaties] become [customary international law] depends on factors such as whether they are . . . confirmed by state practice") (citing Michael Akehurst, *Custom as a Source of International Law*, 47 BRIT. Y.B. INT'L L. 1, 2, 35 (1974); Jonathan I. Charney, *Universal International Law*, 87 AM. J. INT'L L. 529, 544–45 (1993)).

[56] *E.g.*, Materneau Chrispin, *Some Remarks on the Legal Implications of Foreign Visits by Sudanese President Omar Al Bashir After the ICC Arrest Warrant*, EJIL: *TALK!* (May 11, 2009, 5:29 PM), http://www.ejiltalk.org/some-remarks-on-the-legal-implications-of-foreign-visits-by-sudanese-president-omar-al-bashir-after-the-icc-arrest-warrant/; *Obama Criticizes Kenya over Bashir's Visit, Local Divisions Emerge in Nairobi*, SUDAN TRIB. (Aug. 28, 2010), http://www.sudantribune.com/spip.php?article36078; *see Ghana will not arrest Al Bashir if…*, MODERN GHANA (Aug. 5, 2009), http://www.modernghana.com/news/231260/1/ghana-will-not-arrest-al-bashir-if.html.

Furthermore, Kenya openly defied the ICC's arrest warrant by inviting Al Bashir to attend the "signing ceremony for the new Kenyan Constitution." *E.g.*, Nangayi Guyson, *ICC Presses Kenya to Arrest Bashir*, SHOUT-AFRICA (Oct. 27, 2010), http://www.shout-

Finally, comparing the Rome Statute to the Genocide Convention helps illustrate why the Rome Statute has not become customary international law.[57] Unlike the Rome Statute, there is a strong argument that the Genocide Convention has become customary international law. Comparatively, the Genocide Convention has significantly greater acceptance than the Rome Statute: 141 states have ratified the Genocide Convention, including nineteen G20 states.[58] Additionally, the Genocide Convention itself purports to apply some of its principles to all states, including states not party to the Genocide Convention,[59] whereas the Rome Statute limited its application solely to parties.

---

africa.com/news/icc-presses-kenya-to-arrest-bashir/; *Kenya Criticised for Refusing to Arrest al-Bashir*, AFRICA NEWS (Sept. 10, 2010), http://www.africa-news.eu/african-news/1121-kenya-criticised-for-refusing-to-arrest-al-bashir.html.

[57] Some have incorrectly argued that the Genocide Convention removes President Al Bashir's personal immunity before the ICC for the charge of genocide. *See, e.g.*, Akande, *supra* note 26, at 350–51. However, this argument fails because the ICC is not competent to adjudicate charges based on the Genocide Convention. Article VI of the Genocide Convention states:

> Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.

Convention on the Prevention and Punishment of the Crime of Genocide art. 6, *entered into force on* Jan. 12, 1951, 78 U.N.T.S. 277 [hereinafter Genocide Convention]. Applying Article VI of the Genocide Convention to a potential ICC prosecution against Al Bashir, the ICC is not a competent tribunal for adjudicating charges based on the Genocide Convention because it is neither a "tribunal of the State in the territory of which the act was committed" nor has Sudan "accepted its jurisdiction."

[58] *Convention on the Prevention and Punishment of the Crime of Genocide*, UNITED NATIONS TREATY COLLECTION (Jan. 6, 2011, 9:59 AM), http://treaties.un.org/pages/ViewDetails.aspx?src=UNTSONLINE&tabid=2&mtdsg_no=IV-1&chapter=4&lang=en#Participants. The only G20 state that has not ratified the Genocide Convention is Indonesia. *See generally id.*

[59] *See* Genocide Convention, *supra* note 57, at art. IV (stating that "*[p]ersons* committing genocide or any of the other acts enumerated in article III shall be punished") (emphasis added); *but cf.* Genocide Convention, *supra* note 57, at art. V (stating that "[t]he *Contracting Parties* undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention, and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in article III")

C. *ICJ* Arrest Warrant *case*

Some scholars incorrectly argue that dicta in the ICJ *Arrest Warrant* case acknowledges the existence of a new customary international law that removes personal immunities for international core crimes before an international tribunal. However, this argument is incorrect because it is an unsupported and unnecessarily expansive reading of the ICJ's dicta. In the *Arrest Warrant* case, the ICJ addressed the issue of whether a minister of foreign affairs had personal immunity for international core crimes before a *national* court.[60] The ICJ, while answering in the negative, stated in passing: "[A] Minister for Foreign Affairs may be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction."[61] To support this statement, the court cited the ICTY and ICTR Statutes and the Rome Statute.[62]

This dicta should not be interpreted as the ICJ acknowledging the existence of a new customary international law because the court was merely referring to examples of where personal immunities are removed—not stating that these examples have established a new customary international law.[63] Additionally, even if this dicta could be interpreted as the court mistakenly acknowledging the existence of a new customary international law, the dicta still does not acknowledge a customary international law that removes the personal immunities of *heads of state*. Rather, the court expressly limited its dicta to removing only the personal

---

(emphasis added).

[60] Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3, ¶ 1 (Feb. 14).

[61] *Id.* at ¶ 61.

[62] *Id.*

[63] *See* Cassese, *supra* note 17, at 867 (implying that the ICJ was not acknowledging the existence of a new customary international law because the dicta was limited to "when treaty law or binding international instruments[,] such as Security Council resolutions taken under Chapter VII," already removed personal immunities).

immunities of ministers of foreign affairs.[64] Furthermore, it's reasonable to limit this dicta to ministers of foreign affairs because the rationale for providing personal immunities is stronger for heads of state than it is for ministers.

D. Rationale for providing personal immunities

Current heads of state should have inviolate personal immunities because the rationale for providing personal immunities still exists before an international tribunal, even if a head of state committed international core crimes. Current heads of state have personal immunities to address two concerns. And although one of those concerns does not exist before an international tribunal, the other concern still remains. Thus, to address this remaining concern, current heads of state need personal immunities before international tribunals.

Customary international law provides personal immunities for primarily two reasons: (1) To prevent a foreign state from exercising—and potentially abusing—jurisdiction over another state's high-ranking government official and (2) to protect a state's interests in the international community by protecting its "prime representative."[65] Some incorrectly argue that the rationale for personal immunity does not support granting heads of state personal immunities before international tribunals because there is no danger of other states abusing jurisdiction over a

---

[64] *Arrest Warrant*, 2002 I.C.J. at ¶ 61.

[65] FOX, *supra* note 21, at 427 (stating that the purpose of personal immunities is to "protect[] . . . the ability of [a State's] prime representative to carry out his international functions"); *see* HAZEL FOX, INST. OF INT'L LAW, RESOLUTION ON THE IMMUNITY FROM JURISDICTION OF THE STATE AND OF PERSONS WHO ACT ON BEHALF OF THE STATE IN CASE OF INTERNATIONAL CRIMES art. II, ¶ 1 (2009) (stating that the purpose of immunities is "[(1)]to ensure an orderly allocation and exercise of jurisdiction[,] . . . [(2)] to respect the sovereign equality of States and [(3)] to permit the effective performance of the functions of persons who act on behalf of States"); Akande, *supra* note 15, at 412; Gaeta, *supra* note 5, at 320; Wirth, *supra* note 18, at 432. For background information on personal immunities for heads of state, see generally FOX, *supra* note 21, at 421–48.

foreign official.[66] Furthermore, they argue that international tribunals cannot exercise jurisdiction abusively because they "act on behalf of the international community as a whole to protect collective or even universal values."[67]

This argument fails for three reasons: (1) It ignores personal immunities' "prime representative" rationale, (2) it ignores the salient peacekeeping functions of providing a current head of state with inviolate personal immunity and (3) it ignores the danger of judicial tyranny. First, this argument only addresses one of the primary rationales for providing personal immunities: It entirely ignores the "prime representative" rationale. A head of state, as a country's prime representative, needs inviolate personal immunity to effectively represent her state's interests in international affairs.[68] Allowing an international tribunal to prosecute a head of state—or even merely issue a warrant for her arrest—hinders her ability to represent her state's interests in the international community.[69] For example, if an international tribunal issues an arrest warrant for a current head of state, she may be reluctant to visit another country to discuss important matters of state interest, such as peace talks.[70]

In addition to ignoring the prime representative rationale, this argument also ignores the salient peacekeeping functions of personal immunities. Providing heads of state with inviolate

---

[66] Prosecutor v. Taylor, Case No. SCSL-2003-01-I Decision on Immunity from Jurisdiction, ¶¶ 51–52 (May 31, 3004); Gaeta, *supra* note 5, at 320–21.

[67] Gaeta, *supra* note 5, at 320–21.

[68] *See* Akande, *supra* note 15, at 412; Wirth, *supra* note 18, at 432; *see generally* VERHOEVEN, *supra* note 22 (stating that "[w]hen in the territory of a foreign State, the person of the Head of State is inviolable").

[69] Cassese, *supra* note 17, at 855 (stating that "the mere issuance of an arrest warrant[] may seriously hamper or jeopardize the conduct of international affairs . . ."); Wirth, *supra* note 18, at 432 (stating that "procedures—including arrest—against a head of state or leading state officials might seriously impair the state's ability to discharge its functions properly, including the function to maintain peace"); *cf.* Williams & Sherif, *supra* note 22, at 74 (stating that "[t]his freedom would be restricted if such officials were susceptible to legal proceedings before *foreign* courts, including arrest and detention") (emphasis added).

personal immunities helps maintain both "international and internal peace."[71] Contrarily, if international tribunals could freely indict, arrest or prosecute current heads of state, it would substantially increase the risk of war or violence.[72]

Lastly, this argument ignores the inherent dangers of abuse by an unfettered international court. Removing personal immunities creates the danger of an international court abusing judicial process over a country's head of state, thus "substituting the tyranny of judges for that of governments . . . ."[73]

E. Concluding remarks

Under customary international law, government officials still possess personal immunities for international core crimes before international tribunals: A new customary international law removing these immunities has not been established. Although the Rome Statute has established a global trend of removing personal immunities for international core crimes before the ICC, this trend currently lacks sufficient acceptance to establish a new customary international law. Moreover, personal immunities' rationale is of paramount

---

[70] *See* Wirth, *supra* note 18, at 432.

[71] Akande, *supra* note 15, at 410; Steffen Wirth, *Immunity for Core Crimes? The ICJ's Judgment in the* Congo v. Belgium *Case*, 13 EUR. J. INT'L L. 877, 888 (2002) (providing quoted phrase).

[72] Wirth, *supra* note 71, at 888; Wirth, supra note 18, at 444–45.

[73] Henry Kissinger, *The Pitfalls of Universal Jurisdiction: Risking Judicial Tyranny*, FOREIGN AFF., July–Aug. 2001, *available at* http://www.icai-online.org/kissingerwatch/the_pitfalls_of_uj.pdf. Judicial tyranny in international courts is not merely a hypothetical danger: It's evidenced in a recent decision of the Special Tribunal for Lebanon. The court essentially attempted to change the well-established principles of customary international law. Marko Milanovic, *Formation of Custom and the Inherent Powers of the Special Tribunal for Lebanon*, EJIL: *TALK!* (Nov. 11, 2010), http://www.ejiltalk.org/formation-of-custom-and-the-inherent-powers-of-the-special-tribunal-for-lebanon. The court claimed that customary international law could be established by international practice and lack of states' objection to the practice—as opposed to customary international law's actual requirements of widespread practice and *opinio juris*. *Id.*; *see* Prosecutor v. El Sayed, Case No. CH/AC/2010/02, Decision on Appeal of Pre-Trial Judge's Order Regarding Jurisdiction and Standing, ¶ 47

importance and necessitates requiring a particularly widespread acceptance before establishing a new customary international law removing personal immunities. Thus, under the current customary international law, the ICC cannot indict, arrest or prosecute current heads of state because they possess personal immunities.

III. Security Council removed Al Bashir's personal immunities

Since current heads of state have inviolate personal immunities under customary international law, the only way the ICC can legally indict, arrest or prosecute Al Bashir while he is president is if the Security Council's referral of the Darfur conflict to the ICC overrode customary international law and removed his personal immunity. Although the Security Council did not expressly remove personal immunities for the ICC-Darfur matter,[74] the Council implicitly removed these immunities in Resolution 1593 because it invoked its Chapter VII powers under the UN Charter to grant substantial jurisdiction to the ICC to adjudicate serious violations of international humanitarian law. Furthermore, the unique nature of a referral to the ICC explains why the Security Council did not expressly remove personal immunities. Additionally, the Security Council confirmed its removal of personal immunities by implying that these immunities don't exist for Article 98(1) of the Rome Statute, and it also confirmed its removal in its subsequent actions and statements.

A. A Security Council referral can *remove personal immunities*

The Security Council has the power to refer any situation involving international core crimes to the ICC—even if the situation entirely involves states not party to the Rome Statute.[75] In order to refer a situation to the ICC, the Security Council must invoke its Chapter VII powers

---

(Special Trib. for Lebanon Nov. 10, 2010); *cf.* Part I, *supra*.

[74] *See generally* S.C. Res. 1593, *supra* note 2.

[75] Rome Statute, *supra* note 44, at art. 13; *see, e.g.*, Akande, *supra* note 26, at 34–41.

under the UN Charter.[76] The effect of a Security Council referral is that it allows the ICC to exercise its jurisdiction over all international core crimes committed in the referred situation, including crimes committed by government officials of states not party to the Rome Statute.[77]

Furthermore, a Security Council referral to the ICC can do more than just merely confer jurisdiction to hear a matter:[78] It can also override customary international law and remove the personal immunities of government officials of states not party to the Rome Statute.[79] The Security Council can remove the personal immunities of non-parties because the Council has substantial power when acting under Chapter VII of the UN Charter.[80] For example, the Security

---

[76] Rome Statute, *supra* note 44, at art. 13 (stating that "[t]he [ICC] may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if: . . . (b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations").

[77] Rome Statute, *supra* note 44, at art. 13.

[78] *But see* Gaeta, *supra* note 5, at 324 (stating that "a referral by the Security Council is *simply* a mechanism envisaged into the [Rome] Statute to trigger the jurisdiction of the ICC: it does not and cannot turn a state non-party to the [Rome] Statute into a state party").

[79] ARISTOTLE CONSTANTINIDES, AN OVERVIEW OF LEGAL RESTRAINTS ON SECURITY COUNCIL CHAPTER VII ACTION WITH A FOCUS ON POST-CONFLICT IRAQ 4, *available at* http://www.esil-sedi.eu/fichiers/en/Constantinides_782.pdf (stating that "the [Security] [C]ouncil is empowered to derogate *temporarily* from rules of both treaty *and* customary [international] law, as long as it is acting under Chapter VII to maintain and restore international peace and security"); Williams & Sherif, *supra* note 22 , at 78.

[80] Williams & Sherif, *supra* note 22, at 78–79 (arguing that the Security Council must invoke its Chapter VII powers to remove personal immunities); CONSTANTINIDES, *supra* note 79, at 4 (arguing that the Security Council must invoke its Chapter VII powers to remove personal immunities); *see generally* note 92, *infra*, and accompanying main text.

Additionally, the Rome Statute does not limit a Security Council referral to merely conferring jurisdiction. *See* Rome Statute, *supra* note 44, at art. 13(b). Even if the Rome Statute expressly prohibited removing immunities in a referral, the Security Council could arguably still remove a non-party's personal immunities. This is because Article 103 of the UN Charter provides that "[i]n the event of a conflict between the obligations of the Members of the United Nations under the Present Charter [(e.g., the obligation to comply with Security Council resolutions)] and their obligations under any other international agreements [(e.g., the Rome Statute)], their obligations under the present Charter shall prevail."

Council invoked its Chapter VII powers to remove the personal immunities of government officials within the ICTY and ICTR's jurisdiction.[81]

B. Security Council removed personal immunities for the ICC-Darfur matter

The Security Council removes government officials' personal immunities whenever it invokes its Chapter VII powers to grant an international tribunal substantial jurisdiction to adjudicate serious violations of international humanitarian law. Thus, since the Security Council, in Resolution 1593, invoked its Chapter VII powers to grant the ICC substantial jurisdiction to adjudicate the serious violations of international humanitarian law that occurred in the Darfur conflict, the Council implicitly removed government officials' personal immunities—including Al Bashir's—for the ICC-Darfur matter.

1. Security Council's past removals of personal immunities

Whenever a conflict involves serious violations of international humanitarian law and the Security Council invokes its Chapter VII powers to grant an international tribunal substantial jurisdiction to adjudicate those violations, the Security Council removes personal immunities in that tribunal's jurisdiction.[82] For example, the Security Council created the ICTY and ICTR and co-created the SCSL to adjudicate serious violations of international humanitarian law.[83] For all three tribunals, the Security Council removed government officials' personal immunities within

---

[81] Williams & Sherif, *supra* note 22, at 78–79. Moreover, all nations must accept the Security Council's removal of personal immunities because Article 25 of the UN Charter obligates "[m]embers of the United Nations . . . to accept and carry out the decisions of the Security Council . . . ."

[82] The Security Council has created five international criminal tribunals: The ICTY, ICTR, SCSL, Special Tribunal for Lebanon and the International Residual Mechanism for Criminal Tribunal ("Residual Mechanism Tribunal"). William A. Schabas, *Security Council establishes "International Residual Mechanism for Criminal Tribunals'*, PHD STUDIES IN HUMAN RIGHTS (Dec. 23, 2010, 9:25 AM), http://humanrightsdoctorate.blogspot.com/2010/12/security-council-establishes.html. The Residual Mechanism Tribunal was intended as a replacement for the ICTY and ICTR. *Id.*

each tribunal's jurisdiction.[84] Contrastingly, when the Security Council co-created the Special Tribunal for Lebanon ("STL"), it did not remove government officials' personal immunities because the conflict did not involve serious violations of international humanitarian law.

When the Security Council created the ICTY and ICTR and co-created the SCSL, the Council noted the existence of serious violations of international humanitarian law that necessitated creating the international tribunals.[85] For example, when the Security Council created the ICTY, the Council

> [e]xpress[ed] . . . its grave alarm at continuing reports of widespread and flagrant violations of international humanitarian law occurring within the territory of the former Yugoslavia, . . . including reports of mass killings, massive, organized and systematic detention and rape of women, and the continuance of the practice of 'ethnic cleansing', including for the acquisition and holding of territory . . . .[86]

Similarly, when the Security Council created the ICTR, the Council "[e]xpress[ed] . . . its grave concern at the reports indicating that genocide and other systematic, widespread and flagrant violations of international humanitarian law have been committed in Rwanda . . . ."[87] Likewise, when the Security Council co-created the SCSL, the Council expressed "[d]eep concern[] . . . [with] the very serious crimes committed within the territory of the Sierra Leone . . . ."[88]

In addition to the Security Council's noting the existence of serious violations of international humanitarian law, the Council granted the ICTY, ICTR and SCSL substantial jurisdiction to adjudicate those violations. For example, the Security Council granted the ICTY and ICTR substantial subject matter jurisdiction to "prosecut[e] . . . serious violations of

---

[83] For greater background of these three tribunals, see generally SCHABAS, *supra* note 32.

[84] SCSL Statute, *supra* note 28, art. 6, ICTR Statute, *supra* note 28, art. 6; ICTY Statute, *supra* note 28, art. 7.

[85] *See generally* S.C. Res. 1315, U.N. Doc. S/RES/1315 (Aug. 14, 2000); S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994); S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993).

[86] S.C. Res. 827, *supra* note 85 (emphasis removed).

[87] S.C. Res. 955, *supra* note 85 (emphasis removed).

international humanitarian law committed in" Yugoslavia and Rwanda, respectively.[89] Additionally, the Security Council granted substantial temporal jurisdiction to the ICTY for all crimes committed between January 1st, 1991, and a date to be later determined.[90] Similarly, the Security Council granted substantial temporal jurisdiction to the ICTR for all crimes committed between January 1st, 1994, and December 31st, 1994.[91] Furthermore, in granting this substantial jurisdiction to the ICTY and ICTR, the Security Council invoked its significant powers under Chapter VII of the UN Charter in an effort to "maintain[] . . . international peace and security."[92] Thus, since the Security Council granted the ICTY and ICTR substantial jurisdiction to adjudicate serious violations of international humanitarian law, the Council removed personal immunities within each tribunal's jurisdiction.

Contrastingly, when the Security Council and the Lebanese government created the hybrid tribunal of the STL,[93] the Council did not remove personal immunities of government

---

[88] S.C. Res. 1315, *supra* note 85 (emphasis removed).

[89] S.C. Res. 955, *supra* note 85, at ¶ 1; S.C. Res. 827, *supra* note 85, at ¶ 1. Similarly, when the Security Council co-created the SCSL, the Council recommended the international tribunal have jurisdiction for "crimes against humanity, war crimes and other serious violations of international humanitarian law . . . ." S.C. Res. 1315, *supra* note 85, at ¶ 2.

[90] S.C. Res. 827, *supra* note 85, at ¶ 1.

[91] S.C. Res. 955, *supra* note 85, at ¶ 1.

[92] DAVID SCHWEIGMAN, THE AUTHORITY OF THE SECURITY COUNCIL UNDER CHAPTER VII OF THE UN CHARTER: LEGAL LIMITS AND THE ROLE OF THE INTERNATIONAL COURT OF JUSTICE 33 (2001) (discussing the Security Council's powers under Chapter VII of the UN Charter); *see* Christopher C. Joyner, 6 DUKE J. COMP. & INT'L L. 79, 88, 94–95; Williams & Sherif, *supra* note 22, at 79; *see also* James A.R. Nafziger & Edward M. Wise, *The Status in United States Law of Security Council Resolutions under Chapter VII of the United Nations Charter*, 46 AM. J. COMP. L. SUPP. 421, 428 (1998) (stating that "decisions by the Security Council under Chapter VII carry greater legal weight"); Ralph Zacklin, *Bosnia and Beyond*, 34 VA. J. INT'L L. 277, 279 (2004).

Contrarily, the Security Council did not invoke its Chapter VII powers when granting jurisdiction to the SCSL. Williams & Sherif, *supra* note 22, at 78–79 (arguing that the Security Council's failure to invoke its Chapter VII powers meant the Council could not legally remove personal immunities in the SCSL's jurisdiction); *see generally* S.C. Res. 1315, *supra* note 85.

[93] The Security Council co-created the STL in Resolution 1757. Nidal Nabil Jurdi, *The*

officials for the STL's jurisdiction[94] because the conflict did not involve serious violations of international humanitarian law. Unlike the ICTY, ICTR and SCSL, the STL was not created to adjudicate systemic conflicts involving serious violations of international humanitarian law. Instead, the Security Council co-created the STL "to prosecute persons responsible for the attack of 14 February 2005 resulting in the death of former Lebanese Prime Minister Rafiq Hariri and in the death or injury of other persons."[95] This attack was not a serious violation of international humanitarian law.[96] Furthermore, the Security Council did not even grant the STL subject matter jurisdiction over international crimes.[97] Additionally, the Security Council limited the STL's temporal jurisdiction primarily to the single date of February 14th, 2005.[98] Thus, since the STL only had limited jurisdiction and no jurisdiction to adjudicate serious violations of international

---

Subject-Matter Jurisdiction of the Special Tribunal for Lebanon, 5 J. INT'L CRIM. JUST. 1125, 1125–26 (2007); *see* S.C. Res. 1757, U.N. Doc. S/RES/1757 (May 30, 2007).

[94] PROSECUTIONS PROGRAM, INT'L CTR. FOR TRANSNATIONAL JUST., HANDBOOK ON THE SPECIAL TRIBUNAL FOR LEBANON 11 (2008), *available at* http://www.ictj.org/images/content/9/1/914.pdf [hereinafter ICTJ, HANDBOOK ON THE STL]; *see generally* Statute of the Special Tribunal for Lebanon, *approved in* S.C. Res. 1757, *supra* note 93, at Annex.

[95] S.C. Res. 1757, *supra* note 93, at Annex art. 1; Jurdi, *supra* note 93, at 1125–26. Additionally, the Security Council and Lebanese government granted the STL jurisdiction to adjudicate:

> [O]ther attacks that occurred in Lebanon between 1 October 2004 and 12 December 2005, or any later date decided by the Parties and with the consent of the Security Council, [that] are connected in accordance with the principles of criminal justice and are of a nature and gravity similar to the attack of 14 February 2005 . . . .

S.C. Res. 1757, *supra* note 93, at Annex art. 1.

[96] U.N. Secretary-General, *Report of the Secretary-General on the Establishment of a Special Tribunal for Lebanon*, ¶ 25, U.N. Doc. S/2006/893 (Nov. 15, 2006) (stating that "there was insufficient support for the inclusion of crimes against humanity in [the STL's] subject matter jurisdiction" and that the STL's subject matter jurisdiction is "limited to common crimes under the Lebanese Criminal Code"); Jurdi, *supra* note 93, at 1128; *see also* ICTJ, HANDBOOK ON THE STL, *supra* note 94, at 10.

[97] Jurdi, *supra* note 93, at 1126–28; *see generally* S.C. Res. 1757, *supra* note 93, at Annex art. 1.

[98] *See* note 95, *supra*, and accompanying main text.

humanitarian law, the Security Council did not remove government officials' personal immunities before the tribunal.

2. *Security Council's grant of jurisdiction to the ICC for the Darfur conflict*

The Security Council removed personal immunities for the ICC-Darfur matter because, in Resolution 1593, it invoked its Chapter VII powers to grant the ICC substantial jurisdiction to adjudicate the Darfur conflict's serious violations of international humanitarian law. Thus, the Security Council's referral of the Darfur conflict to the ICC is akin to when the Council granted the ICTY, ICTR and SCSL substantial jurisdiction to adjudicate their respective conflicts.

Like the ICTY, ICTR and SCSL, the Security Council noted that the Darfur conflict involved serious violations of international humanitarian law. In referring the Darfur conflict to the ICC, the Security Council "note[d] . . . the report of the International Commission of Inquiry on violations of international humanitarian law and human rights law in Darfur,"[99] which had concluded:

> [T]he Government of the Sudan and the Janjaweed are responsible for serious violations of international human rights and humanitarian law, . . . including killing of civilians, torture, enforced disappearances, destruction of villages, rape and other forms of sexual violence, pillaging and forced displacement . . . . These acts were conducted on a widespread systematic basis, and therefore may amount to crimes against humanity.[100]

After noting the existence of serious violations of international humanitarian law in the Darfur conflict, the Security Council invoked its Chapter VII powers to grant the ICC substantial jurisdiction.[101] The Security Council granted the ICC substantial subject matter jurisdiction to

---

[99] S.C. Res. 1593, *supra* note 2 (emphasis removed).

[100] Rep. of the Int'l Comm. of Inquiry on Darfur, *supra* note 1, at 3.

[101] S.C. Res. 1953, *supra* note 2 (stating that the Security Council was "[a]cting under Chapter VII of the Charter of the United Nations) (emphasis removed).

adjudicate all serious violations of international humanitarian law in the Darfur conflict.[102] Additionally, the Security Council granted the ICC substantial temporal jurisdiction for all crimes committed "in Darfur since 1 July 2002 . . . ."[103] Furthermore, it is immaterial that the Security Council granted this substantial jurisdiction to the already-existing ICC, as opposed to granting jurisdiction to a previously non-existing tribunal like the ICTY and ICTR. The Security Council probably chose to refer the Darfur conflict to the ICC because it wished to avoid the difficulties of managing an international tribunal.[104]

Thus, since the Security Council invoked its Chapter VII powers to grant the ICC substantial jurisdiction to adjudicate serious violations of international humanitarian law, the Council implicitly removed government officials' personal immunities for the ICC-Darfur matter. Moreover, the nature of a referral to the ICC explains why the Security Council did not expressly remove personal immunities. The Security Council never expressly removes personal immunities contemporaneous with granting jurisdiction to an international tribunal. Rather, the Security Council has only expressly removed personal immunities *after* granting jurisdiction to an international tribunal, when it created that tribunal's statute.[105] Furthermore, the ICC's Rome Statute already removed personal immunities for matters within its jurisdiction.[106]

---

[102] S.C. Res. 1593, *supra* note 2, at ¶ 1 (stating that the Security Council "refer[red] the situation in Darfur since 1 July 2002 to the Prosecutor of the International Criminal Court").

[103] S.C. Res. 1593, *supra* note 2, at ¶ 1.

[104] *See* Dougherty, *supra* note 32, at 311–14 (stating that the ICTY and ICTR each "suffer[from] its own particular difficulties, but there is a core set of criticisms routinely leveled at both: they are expensive, enormous, slow, inefficient and ineffective"); Schabas, *supra* note 82 (stating that the ICTY and ICTR have "have fallen far short of [their completion strategy's] target").

[105] *See generally* Part III.B.1, *supra*.

[106] Rome Statute, *supra* note 44, at art. 27 ("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.").

C. Security Council confirmed its removal of immunities

The Security Council confirmed its implicit removal of personal immunities for the ICC-Darfur matter in Security Council Resolution 1593 by implying that personal immunities do not exist under international law for Article 98(1) of the Rome Statute. Additionally, the Security Council also confirmed its removal of personal immunities in both its actions taken and statements made after Resolution 1593.

1. Article 98(1) of the Rome Statute

The Security Council confirmed its removal of government officials' personal immunities for the ICC-Darfur matter by implying that these officials do not have personal immunities under international law for Article 98(1) of the Rome Statute. Article 98 of the Rome Statute contains two provisions limiting the ICC's ability to arrest: Article 98(1), for when international law prohibits the ICC from arresting a person, and Article 98(2), for when an international agreement prohibits the ICC from arresting a person. In Security Council Resolution 1593, the Council implied that Article 98(1) doesn't limit the ICC's ability to arrest—even though Sudan is not a party to the Rome Statute. Thus, the Security Council implied that these officials do not have personal immunities under international law for the ICC-Darfur matter because the Security Council had removed them.

Article 98 of the Rome Statute limits the ICC's ability to arrest in two circumstances, when requesting a state to arrest would make the prospective arresting state violate its obligations under international law or international agreements. The first circumstance, provided in Article 98(1), prohibits the ICC from requesting a state to arrest when that state has conflicting obligations under international law. Article 98(1) states: "The [ICC] 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 . . . of a third State . . . ."[107] For this provision, "obligations under international law" include a state's obligations under customary international law.[108]

Article 98(1) typically prohibits the ICC from arresting the head of a state that is not a party to the Rome Statute because all states have an obligation under customary international law to not arrest her.[109] Since the ICC does not have the capacity to make its own arrests, it must rely on states to effectuate arrests.[110] Thus, when all states have an obligation under international law to not arrest the head of a non-party state, the ICC is effectively prohibited from arresting that head of state because no state is capable of making the arrest.[111] Furthermore, the ICC cannot even issue an arrest warrant for the head of a non-party state because it would be tantamount to a "request" for all states to act inconsistently with their obligations under customary international law.[112]

The second circumstance limiting the ICC's ability to arrest, provided in Article 98(2), prohibits the ICC from requesting a state to arrest where that state has conflicting obligations under international agreements. Article 98(2) states:

> The [ICC] 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 . . . .[113]

---

[107] *Id.* at art. 98(1).

[108] Wirth, *supra* note 18, at 453–54.

[109] *See id.* at 453–54; *see also* Gaeta *supra* note 5, at 325–26 (arguing that states cannot arrest a current head of state, even though the ICC can legally issue an arrest warrant for that head of state); *see generally* Part II, *supra*.

[110] *See* Frulli, *supra* note 18, at 1128–29; *see generally* Rome Statute, *supra* note 44.

[111] *See* Frulli, *supra* note 18, at 1128–29.

[112] *But see* Gaeta, *supra* note 5, at 326 (arguing that an arrest warrant is not the equivalent of an Article 98 "request" to arrest and that the ICC can issue an arrest warrant for a head of a state that is not party to the Rome Statute).

[113] Rome Statute, *supra* note 44, at art. 98(2).

The Security Council confirmed its removal of government officials' personal immunities for the ICC-Darfur matter because, in Resolution 1593, it implied that these officials do not have personal immunities for Article 98(1). In Security Council Resolution 1593, the Council stated that Article 98(2) limited the ICC's ability to arrest because the "[international] agreements referred to in Article 98-2 of the Rome Statute [existed]."[114] However, the Security Council did not state that Article 98(1) limited the ICC's ability to arrest.[115] Since the Security Council noted the existence of international agreements that triggered Article 98(2) and didn't note the existence of personal immunities under international law that would trigger Article 98(1), the Security Council implied that it overrode customary international law and removed government officials' personal immunities for the ICC-Darfur matter.

2. Subsequent resolutions and statements

The Security Council also confirmed its removal of government officials' personal immunities for the ICC-Darfur Matter in both its actions taken and statements made after Resolution 1593. First, the Security Council has not acted in any way that even implies government officials have personal immunities for the Darfur matter.[116] Furthermore, the Security Council has entirely ignored the African Union's repeated urgings for the Council to publically declare that President Al Bashir has personal immunity.[117]

---

[114] S.C. Res. 1593, *supra* note 2, at 3 (emphasis removed).

[115] *See generally* S.C. Res. 1593, *supra* note 2.

[116] *See generally* S.C. Res. 1769, U.N. Doc. S/RES/1769 (July 31, 2007); S.C. Res. 1755, U.N. Doc. S/RES/1755 (Apr. 30, 2007); S.C. Res. 1714, U.N. Doc. S/RES/1714 (Oct. 6, 2006); S.C. Res. 1713, U.N. Doc. S/RES/1713 (Sept. 29, 2006); S.C. Res. 1709, U.N. Doc. S/RES/1709 (Sept. 22, 2006); S.C. Res. 1706, U.N. Doc. S/RES/1706 (Aug. 31, 2006); S.C. Res. 1679, U.N. Doc. S/RES/1679 (May 16, 2006); S.C. Res. 1672, U.N. Doc. S/RES/1672 (Apr. 25, 2006); S.C. Res. 1665, U.N. Doc. S/RES/1665 (Mar. 29, 2006); S.C. Res. 1651, U.N. Doc. S/RES/1651 (Dec. 21, 2005); S.C. Res. 1627, U.N. Doc. S/RES/1627 (Sept. 23, 2005).

[117] *See generally* Press Release, African Union, On the Decision of the Pre-Trial Chamber of

Additionally, statements by some Security Council members indicate that these members intended to remove personal immunities for the ICC-Darfur matter, even though these members abstained from the resolution referring the Darfur conflict to the ICC. These members stated that their abstention was solely due to political opposition to the ICC—not opposition to removing personal immunities. For example, United States representative Anne Woods Patterson explained why the United States abstained from the vote: "While the United States believed that a better mechanism would have been a hybrid tribunal in Africa, it was important that the international community spoke with one voice in order to help promote effective accountability."[118] Since all past Security Council-created international tribunals with jurisdiction for international core crimes removed personal immunities,[119] the United States implicitly endorsed the removal of personal immunities for the Darfur conflict.[120]

IV. Conclusion

---

the ICC Informing the UN Security Council and the Assembly of the State Parties to the Rome Statute About the Presence of President Omar Hassan Al-Bashir of the Sudan in the Territories of the Republic of Chad and the Republic of Kenya, African Union Press Release No. 119/2010 (Aug. 29, 2010) (stating that "the repeated appeals to the UN Security Council by the Assembly of Heads of State and Government of the African Union as well as the AU Peace and Security Council to defer the proceedings against President Omar Hassan Bashir of The Sudan for one year in application of the provisions of Article 16 of the Rome Statute have never been acted upon by the UN Security Council"); Press Release, African Union, Decision on the Meeting of the African Union Parties to the Rome Statute of the International Criminal Court (July 14, 2009), *available at* http://www.africa-union.org/root/au/Conferences/2009/july/Press%20Release%20-%20ICC.doc (stating that "[t]he decision by the AU Assembly not to cooperate with the ICC pursuant to the provisions of Article 98 of the Rome Statute relating to immunities for the arrest and surrender of President Omar Hassan Bashir of The Sudan is a logical consequence of . . . the refusal by the UN Security Council to address the request made by the African Union").

[118] Press Release, Security Council, Security Council Refers Situation in Darfur, Sudan, to Prosecutor of International Criminal Court, U.N. Press Release SC/8351 (Mar. 31 2005), *available at* http://www.un.org/News/Press/docs/2005/sc8351.doc.htm.

[119] *See* Part III.B.1, *supra*, and accompanying main text.

[120] See Payam Akhavan, *The Lord's Resistance Army Case: Uganda's Submission of the First State Referral to the International Criminal Court*, 99 AM. J. OF INT'L L. 403, 405, 405 n.4

The ICC can legally indict, arrest and prosecute President Al Bashir because the Security Council implicitly removed his personal immunity when it referred the Darfur conflict to the ICC. This removal of immunity is implied from the Security Council's invoking its Chapter VII powers under the UN Charter to grant jurisdiction to the ICC to adjudicate the Darfur conflict's serious violations of international humanitarian law. Furthermore, this removal of immunity is confirmed by the Security Council's indicating that Al Bashir does not have personal immunity under international law for Article 98 of the Rome Statute. Additionally, it's also confirmed by the Security Council's subsequent actions and statements.

However, even though President Al Bashir does not have personal immunity before the ICC, current heads of state generally have inviolate personal immunity under customary international law because the Rome Statute lacks sufficient acceptance to establish a new customary international law that removes personal immunities. Thus, until the Rome Statute gains greater acceptance, the only way an international tribunal can indict, arrest or prosecute the current head of a state that is not party to the Rome Statute is if the Security Council removes her personal immunity.

(2005).