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Holding an Arsonist's Feet to the Fire? - The Legality and Enforceability of the ICC's Arrest Warrant for Sudanese President Omar Al-Bashir

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**HOLDING AN ARSONIST’S FEET TO THE
FIRE? – THE LEGALITY AND
ENFORCEABILITY OF THE ICC’S ARREST
WARRANT FOR SUDANESE PRESIDENT
OMAR AL-BASHIR**

LUCAS BUZZARD*

“The Sudanese Government tolerates the firefighters and promotes the arsonists at the same time. The international community cannot ignore the arsonists; if they remain, there will never be enough firefighters.”¹

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* J.D. Candidate, 2010, American University, Washington College of Law; B.A. Political Science, 2003, Drew University. First, I am grateful to the editors and staff of the American University International Law Review. Special thanks to my editor, Molly McBurney, for her valuable advice and perseverance. Second, deepest gratitude to my parents and brothers whose support, encouragement, and companionship throughout the years has made every accomplishment of mine possible. Finally, to Mia: I am so lucky.

1. Luis Moreno-Ocampo, Prosecutor of the Int’l Criminal Court, Statement to the United Nations Security Council Pursuant to UNSCR 1593 (June 5, 2008), *in* U.N. SCOR, 63d Sess., 5905th mtg. at 3, U.N. Doc. S/PV.5905 (June 5, 2008).

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INTRODUCTION

On March 4, 2009, the International Criminal Court (“ICC”), in response to an application filed by the ICC Prosecutor, issued an arrest warrant for Omar Hassan Ahmad Al-Bashir, the current sitting president of Sudan.² The judges of the ICC’s Pre-Trial Chamber I determined that there were “reasonable grounds to believe” that Al-Bashir bears personal criminal responsibility under the Rome Statute

2. See generally Prosecutor v. Omar Al Bashir, Case No. ICC-02/05-01/09, Warrant of Arrest for Omar Hassan Ahmad Al Bashir (Mar. 4, 2009), available at <http://www.icc-cpi.int/iccdocs/doc/doc639078.pdf>; Int’l Criminal Court, Office of the Prosecutor, *Situation in Darfur, the Sudan: Public Redacted Version of the Prosecutor’s Application under Article 58*, ¶ 416, ICC-02/05 (July 14, 2008), available at <http://www.icc-cpi.int/iccdocs/doc/doc559999.pdf> [hereinafter *Prosecutor’s Application*] (urging the Pre-Trial Chamber to find that there are “reasonable grounds to believe that [President] Al-Bashir committed” crimes under the Rome Statute of the International Criminal Court and to issue a warrant for his arrest).

of the ICC (“Rome Statute”) for war crimes and crimes against humanity committed in Darfur, Sudan.³ Specifically, the Court found reason to believe that Al-Bashir directed branches of the Sudanese government to implement a “common plan” with the aim of subjecting the civilian population of the Fur, Masalit, and Zaghawa ethnic groups to “unlawful attacks, forcible transfers and acts of murder, extermination, rape, torture, and pillage”⁴ Ultimately, the Court satisfied itself that, under Article 58 of the Rome Statute, Al-Bashir’s arrest was necessary to guarantee his appearance at trial, prohibit him from endangering the proceedings, and prevent further atrocities in Darfur.⁵

The ICC was formally established as a permanent international criminal court in 2002 with the entry into force of the Rome Statute, and Al-Bashir’s warrant represents the latest installment in a long line of “firsts” that the ongoing conflict in Sudan has presented to the fledgling institution.⁶ The Darfur conflict is the first situation in

3. See Prosecutor v. Omar 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, ¶¶ 209-223 (Mar. 4, 2009), available at <http://www.icc-cpi.int/iccdocs/doc/doc639096.pdf> [hereinafter Al-Bashir Warrant Decision] (finding that Al-Bashir was an “indirect” perpetrator of crimes directly committed by the Sudanese Armed Forces, the Janjaweed Militias, and other branches of the Sudanese state). Though the Prosecutor initially alleged that Al-Bashir was complicit in genocide as well as war crimes and crimes against humanity, the Pre-Trial Chamber majority found that the totality of the Prosecutor’s evidence failed to establish reasonable grounds to believe the Government of Sudan acted with the requisite specific intent necessary to support a charge of genocide. *Id.* ¶¶ 205-206. See generally Rome Statute of the International Criminal Court art. 5, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute] (granting the court jurisdiction over: “(a) The crime of genocide; (b) Crimes against humanity; (c) War crimes; [and] (d) The crime of aggression”).

4. See Al-Bashir Warrant Decision, *supra* note 3, ¶¶ 214-216 (finding that the unlawful attacks on civilians were a part of a larger counter-insurgency strategy against rebel groups in Darfur).

5. See *id.* ¶¶ 227-236 (stressing Al-Bashir’s refusal to execute two previous ICC warrants, his public defiance of the Court’s jurisdiction in Sudan, the conviction of a Sudanese official for treason because of his cooperation with the ICC, and the recent attack on an internally displaced persons (“IDP”) camp by Sudanese government forces); see also Rome Statute, *supra* note 3, art. 58(1)(b) (authorizing the Court to issue an arrest warrant if it appears necessary: “(i) To ensure the person’s appearance at trial; (ii) To ensure that the person does not obstruct or endanger the investigation or the court proceedings; or (iii) Where applicable, to prevent the person from continuing with the commission of that crime . . .”).

6. See Rome Statute, *supra* note 3, pmb1. (recognizing that the numerous

which the Court's jurisdiction has been activated by a referral from the Security Council acting under Chapter VII of the U.N. Charter.⁷ The cases arising out of Darfur are the first instances that the Court has sought to exercise its jurisdiction over nationals of a non-State Party to the Rome Statute that has not consented to the Court's jurisdiction.⁸ Finally, although the Rome Statute allows the ICC to disregard a suspect's official title,⁹ Al-Bashir's indictment is the first time that the ICC has been asked to exercise its jurisdiction over an

atrocities committed over the course of the twentieth century were the impetus for the creation of the ICC); Julie Flint & Alex de Waal, *'This Prosecution Will Endanger the People We Wish to Defend in Sudan'*, The Observer, July 13, 2008, available at <http://www.guardian.co.uk/world/2008/jul/13/sudan.humanrights> (noting that Al-Bashir is the first incumbent Head of State indicted by the ICC and arguing that the indictment is a mistake because of the danger it will be ineffective, spur Al-Bashir to retreat from peace negotiations, and cause more suffering among Darfur's civilian population); see also *A Dilemma Over Darfur: Calculating the Consequences of Indicting Sudan's President, Omar al-Bashir, for Genocide and More*, Economist.com, July 15, 2008, http://www.economist.com/world/international/displaystory.cfm?story_id=11737170 [hereinafter *A Dilemma Over Darfur*] (recognizing the unprecedented nature of the Prosecutor's request and the diplomatic pressure on the Prosecutor not to "aim for the top" in acting against the Sudanese government).

7. See Rome Statute, *supra* note 3, art. 13(b) (stipulating that the Security Council must act under Chapter VII of the U.N. Charter in order to refer a situation to the ICC); S.C. Res. 1593, pmb., ¶ 1, U.N. Doc. S/RES/1593 (Mar. 31, 2005) (referring the situation in Darfur to the ICC because the conflict threatens international peace and security); Young Sok Kim, *The Law of the International Criminal Court 1* (2007) (asserting that the ICC is meant to "contribute to the preservation, restoration and maintenance of international peace and security"); Corrina Heyder, *The U.N. Security Council's Referral of the Crimes in Darfur to the International Criminal Court in Light of U.S. Opposition to the Court: Implications for the International Criminal Court's Functions and Status*, 24 BERKELEY J. INT'L L. 650, 652-53 (2006) (recognizing that the referral was unexpected, as the United States had voiced its opposition to using the Court to address the situation in Darfur and was expected to veto such a move). See generally U.N. Charter arts. 39-51 (providing the Security Council with the power to act when international peace is threatened or breached, or in response to acts of aggression).

8. See Philipp Kastner, *The ICC in Darfur—Savior or Spoiler?*, 14 ISLA J. INT'L & COMP. L. 145, 146 (2007) (recognizing that although Sudan is a signatory to the Rome Statute, it has not yet ratified the Statute and has repeatedly rejected ICC jurisdiction over Sudanese nationals).

9. See Rome Statute, *supra* note 3, pmb., art. 27 (making official titles, such as Head of State, irrelevant before the ICC and directing the Court to ignore the privileges usually associated with such titles).

individual who, as a sitting president, is entitled to the international protections provided by the doctrine of Head of State immunity.¹⁰

The focus of this Comment is twofold. First, it analyzes the bases of the ICC's authority to exercise jurisdiction over Al-Bashir given Sudan's rejection of the Court's validity and Al-Bashir's position as Head of State.¹¹ After concluding that the Rome Statute and U.N. Resolution 1593, which referred the Darfur situation to the ICC, furnish the Court with the legal authority to prosecute Al-Bashir, the analysis then shifts to the second focus: the practical limitations that these two documents and customary international law impose on the enforcement of Al-Bashir's arrest warrant.¹² This Comment argues that, given the Rome Statute's prohibition on trials *in absentia* and the ICC's dependence on states to carry out its warrants, Al-Bashir's Head of State immunities could prevent states from arresting him, even in the face of a valid ICC warrant.¹³

10. See *Braced for the Aftershock*, *The Economist*, Mar. 7, 2009, at 66-67 (highlighting the possible ramifications of the ICC's arrest warrant on United Nations forces in Sudan and presenting arguments for and against the U.N. Security Council's decision to defer Al-Bashir's warrant); see also *A Dilemma over Darfur*, *supra* note 6 (reporting that although other Heads of State such as Charles Taylor and Slobodan Milosevic have been indicted in international tribunals, Al-Bashir's case represents the first time the ICC has done so). See generally Yitiha Simbeye, *Immunity and International Criminal Law* 106-08 (2004) (providing a general history of the Head of State immunity doctrine from the 16th century through the creation of the Rome Statute).

11. See, e.g., Dapo Akande, *International Law Immunities and the International Criminal Court*, 98 AM. J. INT'L L. 407, 419-32 (2004) (discussing how immunity-possessing officials of non-State Parties, State Parties, and international organizations may be treated under the Rome Statute).

12. See, e.g., Heyder, *supra* note 7, at 654-59 (exposing potential problems caused by the language of the Security Council referral including the lack of a requirement that states not party to the conflict in Darfur render assistance to the Prosecutor, the failure to provide any material support to the ICC's investigations, and an exemption from ICC jurisdiction for all American citizens and all "current or former officials or personnel" from non-State Parties other than Sudan).

13. See Rome Statute, *supra* note 3, art. 63 (providing that "[t]he accused shall be present during the trial"); Philippe Kirsch, *The Role of the International Criminal Court in Enforcing International Criminal Law*, in *The International Criminal Court: Challenges to Achieving Justice and Accountability in the 21st Century* 285, 287, 291 (Mark S. Ellis & Richard J. Goldstone eds., 2008) (arguing that the ICC is needed as a mechanism to enforce international criminal law and urging states to cooperate with the Court because the ICC does not have a police force that can execute its warrants); see also Remigius Oraeki Chibueze, *The International Criminal Court: Bottlenecks to Individual Criminal Liability in the Rome Statute*, 12 ANN. SURV. INT'L & COMP. L. 185, 209-16 (2006) (raising

In order to give some context to the ICC's involvement in Sudan, Part I of this Comment traces the history of the conflict in Darfur and the response of the international community. It also lays out a brief history of the initial rationales behind the Head of State immunity doctrine and traces the evolution of the doctrine to its current boundaries. Part II analyzes the legality and enforceability of the ICC's warrant for Al-Bashir in light of the relevant Rome Statute provisions, previous cases in international courts, customary international law, and the limitations imposed by U.N. Resolution 1593. Part III then argues that the U.N. Security Council should refrain from deferring Al-Bashir's warrant and instead recommends that the Security Council issue a more definitive resolution to ensure that Al-Bashir's immunities do not prevent states from executing his warrant. It also suggests amending the Rome Statute to ensure that, in the case of a Security Council referral, all U.N. Member States are placed under international obligations to disregard a suspect's international immunities and enforce ICC warrants.

I. BACKGROUND

A. HISTORY OF THE SITUATION IN DARFUR AND THE INTERNATIONAL RESPONSE

The Darfur region of Sudan is a vast, arid, and ethnically diverse territory.¹⁴ It covers some 150,000 square miles and, by some accounts, its six million inhabitants belong to some forty to ninety tribes or ethnic groups.¹⁵ These tribes can be roughly grouped into

questions about the ICC's ability to function effectively given its reliance upon the cooperation of individual states and the impact of immunity agreements on cooperation).

14. See Gérard Prunier, *Darfur: The Ambiguous Genocide* 2 (2005) (contrasting the fairly uniform geography and climate of the region to the diverse ethnic makeup of its inhabitants).

15. See Int'l Comm'n of Inquiry on Darfur, *Report of the International Commission of Inquiry on Darfur to the Secretary-General*, ¶ 51, U.N. Doc. S/2005/60 (Feb. 1, 2005) [hereinafter *ICID Report*] (stating that while there are various urban centers across the region, most of the population live in small villages made up of "a few hundred families"); JULIE FLINT & ALEX DE WAAL, *DARFUR: A SHORT HISTORY OF A LONG WAR* 8-10 (2005) (explaining how Darfur's history as an independent sultanate, human migration route, and target for invasion led to the ethnic diversity of the region); Prunier, *supra* note 14, at 2-3 (describing the territory as an enormous plain encircling a relatively small

those that live mainly sedentary lifestyles, and those who are nomadic or semi-nomadic.¹⁶ Today, Darfur is most known for the brutal conflict that exploded in 2004 and has now led to allegations that the most serious of all international crimes—genocide—was committed in the region.¹⁷

Historically, inter-tribal conflicts in Darfur that arose out of land disputes were effectively settled through traditional legal systems administered by tribal leaders.¹⁸ By the mid-1980s, however, these structures had been abolished by the Government of Sudan (“GoS”) in favor of local administrations consisting of officials appointed from the Sudanese capitol, Khartoum.¹⁹ These imposed arrangements, however, proved to be ineffective in resolving renewed clashes between the Darfur tribes that were fueled by long droughts, increasing desertification, and the proliferation of weapons throughout the region.²⁰ Through the remainder of the 1980s and into the 1990s, these inter-tribal conflicts continued to simmer.²¹ During

mountainous area).

16. See *ICID Report*, *supra* note 15, ¶ 52 (explaining further that the sedentary tribes are composed of both agriculturalist tribes including the Fur and Masalit, and cattle herding tribes including the Zaghawa, while the nomadic tribes are primarily cattle or camel herders).

17. See Prunier, *supra* note 14, at vii-xi (tracing the international community’s recognition and response to the unfolding situation in Darfur in 2004); see also *Prosecutor’s Application*, *supra* note 2, ¶ 1 (accusing Al-Bashir of genocide against the Fur, Masalit, and Zaghawa ethnic groups by deliberately imposing “conditions of life calculated to bring about [the groups’] physical destruction in part”); *ICID Report*, *supra* note 15, ¶¶ 52, 55, 62 (finding that the recent violence in Darfur is attributable, in part, to historical divisions in identity between tribes, disputes over scarce resources, limited opportunities for participation in the national political system, and the government’s perceived marginalization of Darfur).

18. See *ICID Report*, *supra* note 15, ¶ 57 (describing traditional conflict resolution structures in which tribal leaders would negotiate mutually acceptable compromises to disputes).

19. See *id.* (explaining that the change in structure weakened the power of the tribal dispute resolution mechanism because the state was no longer viewed as impartial in mediating such disputes).

20. See *id.* ¶¶ 55, 59 (establishing the relationship between desertification and increased conflicts because of land shortages and describing the failure of the government to effectively mediate these conflicts); *id.* ¶ 58 (implicating Chad and Libya in the spread of arms throughout the area and describing the formation of tribal militias).

21. See *id.* ¶ 59 (describing clashes between the “Arab Gathering,” composed mostly of the region’s nomadic tribes, and the “African Belt” that was created by members of the sedentary Fur tribe).

this time, tribal divisions in Darfur widened, and, for the first time, the terms “Arab” and “African” arose as meaningful distinctions between the region’s mostly sedentary African tribes and the mainly nomadic Arab tribes who otherwise shared a common language (Arabic) and religion (Islam).²²

As disputes in Darfur rose to a boil in the late 1990s, President Al-Bashir’s government effectively ignored the region.²³ This neglect led to the formation of several rebel groups in protest to the political and economic marginalization of Darfur’s population.²⁴ Although their policies differed, the two largest rebel groups both stressed the need for greater political participation in Sudan, and drew their members from the same three African tribes: the Fur, the Masalit, and the Zaghawa.²⁵

Finally, in early 2003, the Darfur cauldron boiled over.²⁶ By this time, a low-level war was already smoldering across the region, with the rebels’ staging numerous attacks on police stations and army encampments to which the government responded with both ground and air attacks.²⁷ Between February and April, 2003, the rebels

22. See *id.* ¶ 60 (detailing the increasing significance of the “Arab” or “African” distinction throughout this time period, which in the past was more of a “passive distinction”); *id.* ¶ 52 (pointing out the religious and linguistic commonalities of the inhabitants of Darfur); see also Kastner, *supra* note 8, at 156-57 (detailing the “Arab-Islamist” GoS’s alleged complicity in the creation of racist divisions between the Arab and African tribes); Rosanna Lipscomb, *Restructuring the ICC Framework to Advance Transitional Justice: A Search for a Permanent Solution in Sudan*, 106 COLUM. L. REV. 182, 188-89 (2006) (describing how the government encouraged the formation of an Arab alliance in Darfur to prevent dissent among the African tribes and then forcibly disarmed non-Arabs).

23. See Kastner, *supra* note 8, at 155-56 (outlining the government’s continuation of the British colonial policy of “deliberate underdevelopment” of Darfur throughout the 1980s and 1990s).

24. See *ICID Report*, *supra* note 15, ¶ 62 (outlining the formation and motivations of the Sudan Liberation Movement/Army (“SLM/A”) and the Justice and Equality Movement (“JEM”), which included, inter alia, greater political participation for the inhabitants of Darfur in the national government).

25. See *id.* (recognizing that despite their similar policies and support base, the policies of the SLM/A and the JEM formed as a result of different influences: the JEM was influenced largely by the ideals of political Islam, and the SLM/A drew its principles from the “New Sudan” policies of the SPLM/A, the main rebel group in the South Sudan civil war that began in 1983).

26. See Kastner, *supra* note 8, at 157 (describing a February 2003 SLM/A attack on the town of Golu, which killed two hundred government soldiers).

27. See FLINT & DE WAAL, *A LONG WAR*, *supra* note 15, at 76 (positing that the rebellion began in 2001, but was not noticed by the international community

conducted a series of high profile attacks on government forces in several towns in Darfur.²⁸ Initially, it appeared that the GoS was ill-equipped to respond to these attacks.²⁹ At the time, the GoS was conducting peace negotiations with the Sudanese People's Liberation Movement/Army ("SPLM/A"), its main opponent in the civil war in South Sudan that had been raging since 1983.³⁰ Most of the GoS forces were still located in the south, and the forces it did have in Darfur were composed mostly of local Darfuris whom the government did not trust to fight their "own" people.³¹ This lack of government resources in the area led the GoS to use two tactics that proved instrumental in shaping the nature of the conflict in Darfur and ultimately contributed to the massive humanitarian violations that followed.³²

First, faced with a severe lack of military capabilities on the ground and a dearth of training in desert warfare, Khartoum began to call upon local tribes in Darfur to aid in the fight against the rebels.³³ Members of the mostly nomadic Arab tribes, sensing an opportunity

until 2003).

28. See generally Prunier, *supra* note 14, at 92, 95-96 (providing a timeline of major rebel attacks in Darfur, culminating with the audacious attack on the town of El Fashir during which the rebels occupied a government military airport). Prunier further reports that, "according to U.S. sources [the rebels] also executed around 200 army prisoners after they had surrendered . . ." *Id.* at 96.

29. See *ICID Report*, *supra* note 15, ¶ 66 (attributing the government's inability to respond to the attacks to the significant deployment of the military to the south and the minimal presence of the military in Darfur's urban centers); see also FLINT & DE WAAL, *A LONG WAR*, *supra* note 15, at 99-101 (stating that the government's forces were initially overwhelmed by the tactics employed by the rebels, who utilized small, highly mobile teams of vehicles to strike unexpectedly in different areas).

30. See *ICID Report*, *supra* note 15, ¶ 50 (describing the civil war in South Sudan and the peace process that culminated with a 2005 agreement providing for the possibility of self-determination for southern Sudan).

31. See *id.* ¶ 66; cf. Kastner, *supra* note 8, at 157 (stating further that the GoS hoped to destroy the insurrection in Darfur before it could unravel the peace process in South Sudan).

32. See FLINT & DE WAAL, *A LONG WAR*, *supra* note 15, at 101-02 (asserting that the GoS knew that arming and using Darfuri tribes against each other would inevitably result in violations of human rights).

33. See *ICID Report*, *supra* note 15, ¶ 67 (indicating that the choice to use local tribes was consciously made to take advantage of existing tribal tensions); FLINT & DE WAAL, *A LONG WAR*, *supra* note 15, at 99 (detailing how the army's lack of training in desert ground warfare resulted in numerous defeats and forced the army to rely almost exclusively on the air force).

to gain lands and resources, volunteered to serve in militias used to supplement government forces in Darfur.³⁴ These militias, now known by the name given to them by their victims—Janjaweed (“devil on horseback”)—served to augment the regular army and proved to be extremely effective tools in the government’s efforts to crush the Darfur rebellion.³⁵ Second, fearful of the support that the Fur, Masalit, and Zaghawa tribes were providing to the rebels, the Sudanese army and its affiliated Janjaweed militias began to indiscriminately target civilian villages.³⁶ As the conflict progressed, a general pattern of these attacks began to emerge.³⁷ According to the victims, GoS bombers usually arrived first, raining cluster-bombs down upon the villages.³⁸ Following the air assaults, Janjaweed militias, at times accompanied by the regular army, emerged and surrounded the targeted village.³⁹ Moving in, the Janjaweed proceeded to loot the property, execute military-aged men, rape the women and girls, and burn what was left, leaving the survivors to find their way to ever-growing displacement camps.⁴⁰ It is this pattern of attacks that the ICC Prosecutor cited as evidence that the Sudanese government, led by Al-Bashir, deliberately created

34. See *ICID Report*, *supra* note 15, ¶ 68 (explaining that the government recruited militiamen not only from certain tribes within Darfur, but from Chad and Libya as well); FLINT & DE WAAL, *A LONG WAR*, *supra* note 15, at 102-03 (illustrating how the GoS gained the support of Arab tribes through bribing tribal leaders, offering development assistance to Arab communities, and updating the militias’ weaponry).

35. See *ICID Report*, *supra* note 15, ¶ 100 (defining the term “Janjaweed”); see also FLINT & DE WAAL, *A LONG WAR*, *supra* note 15, at 104-05 (concluding that the militias were integral for the government in “turning the tide” of the war).

36. See, e.g., Kastner, *supra* note 8, at 159 (positing that villages were attacked with little regard for the presence of rebel soldiers); see also *ICID Report*, *supra* note 15, ¶ 236 (finding that some 700 villages had been wholly or partially destroyed across the region).

37. See *ICID Report*, *supra* note 15, ¶ 241 (stating further that most attacks began at or before dawn when most of the civilians were at prayer or still asleep).

38. See Prunier, *supra* note 14, at 99-100 (recounting how the GoS used transport planes as bombers by rolling oil barrels filled with explosives out of the cargo-bays with the clear intent of these devices to impact civilians).

39. See generally Jennifer Trahan, *Why the Killing in Darfur is Genocide*, 31 *FORDHAM INT’L L.J.* 990, 1009-12 (2008) (giving a series of eye-witness accounts highlighting the cooperation between the Sudanese armed forces and the Janjaweed).

40. See Prunier, *supra* note 14, at 100, 102-03 (concluding that the ultimate goal of these attacks was to concentrate the populace in certain areas to prevent support of the rebels).

“conditions of life calculated to bring about [the] physical destruction” of a substantial part of the Fur, Masalit, and Zaghawa ethnic groups.⁴¹

1. *The United Nations and the Darfur Conflict*

The United Nations Security Council initially addressed the situation in Darfur in 2004.⁴² In September of that year, the Security Council authorized the Secretary-General to create a Commission of Inquiry to “investigate reports of violations of international humanitarian and human rights law in Darfur by all parties”⁴³ In January 2005, the Commission of Inquiry reported its findings to the Security Council.⁴⁴ The Commission ultimately concluded that the GoS had not pursued a policy of genocide in Darfur.⁴⁵ The Commission did, however, implicate the GoS and the Janjaweed in “serious violations of international human rights and humanitarian law amounting to crimes under international law.”⁴⁶ In light of these findings, the Commission recommended that the Security Council refer the Darfur situation to the ICC.⁴⁷

Article 13(b) of the Rome Statute allows the Security Council, acting under Chapter VII of the U.N. Charter, with the purpose of maintaining international peace and security, to refer situations to the Prosecutor of the ICC.⁴⁸ In Resolution 1593 of March 31, 2005, the

41. See *Prosecutor’s Application*, *supra* note 2, ¶ 10 (holding Al-Bashir personally responsible for the actions of the Sudanese armed forces and their Janjaweed extensions).

42. See S.C. Res. 1556, ¶¶ 7-8, U.N. Doc. S/RES/1556 (July 30, 2004) (prohibiting arms sales to non-state actors in Darfur and specifically mentioning the Janjaweed).

43. S.C. Res. 1564, ¶ 12, U.N. Doc. S/RES/1564 (Sept. 18, 2004) (calling on all parties to the conflict in Sudan to cooperate with the Commission of Inquiry).

44. *ICID Report*, *supra* note 15, at 1.

45. See *id.* at 4 (reporting that while two elements of the crime of genocide, the *actus reus* and the existence of a protected group, were present, the essential element of genocidal “intent to annihilate, in whole or in part, a group distinguished on racial, ethnic, national or religious grounds,” was lacking).

46. See *id.* at 3 (finding that the GoS and Janjaweed militias committed numerous crimes, including indiscriminate attacks against villages, torture, killing of civilians, rape, and forced displacement of civilians).

47. See *id.* ¶ 569 (concluding that Sudan’s judicial system is unable to hold perpetrators accountable and the government authorities are disinclined to do so).

48. Rome Statute, *supra* note 3, art. 13(b); see Heyder, *supra* note 7, at 652-53 (stating further that because the Court’s jurisdiction granted pursuant to an Article

Security Council, following the recommendations of the Commission of Inquiry, invoked Article 13(b) for the first time and referred the situation in Darfur to the ICC.⁴⁹ Resolution 1593 provided the ICC with jurisdiction over alleged crimes committed in Darfur since July 1, 2002, the date the Rome Statute entered into force.⁵⁰ By making this referral, the Security Council acknowledged that the events in Darfur represented a threat to international peace and security and, for the first time, designated the ICC as a major instrument in rectifying such threats.⁵¹

2. Previous Actions Taken by the International Criminal Court with Respect to Darfur

Following the Security Council's referral, the ICC Prosecutor formally opened his investigation on June 6, 2005, promising to focus on "the individuals who bear the greatest criminal responsibility for crimes committed in Darfur."⁵² In April 2007, subsequent to the Prosecutor's investigations, the ICC issued arrest warrants for Ahmad Harun, Sudan's Minister of State for the Interior from 2003 to 2005, and Ali Kushayb, a Janjaweed militia leader.⁵³ The ICC found that there were "reasonable grounds" to believe that both Harun and Ali Kushayb were responsible for war crimes and

13(b) referral is anchored in the U.N. Charter, its jurisdiction is much stronger than it otherwise would be, "rendering irrelevant the consent of the state where the crime occurred").

49. S.C. Res. 1593, *supra* note 7, ¶ 1; see U.N. SCOR, 60th Sess., 5158th mtg. at 7, U.N. Doc. S/PV.5158 (Mar. 31, 2005) [hereinafter Argentina's Statement] (acknowledging the important precedent set by the Security Council's referral to the ICC).

50. Rome Statute, *supra* note 3; S.C. Res. 1593, *supra* note 7, ¶ 1.

51. S.C. Res. 1593, *supra* note 7, pmb.; see Argentina's Statement, *supra* note 49, at 7 (characterizing the ICC as an "essential tool" in the international human rights system).

52. See Press Release, Int'l Criminal Court, The Prosecutor of the ICC Opens Investigation in Darfur (June 6, 2005), available at <http://www2.icc-cpi.int/NR/exeres/31F3684F-43BC-4D5E-9E0A-A6A8DAC308EB.htm> (calling on the international community to support the Office of the Prosecutor during the investigations).

53. See Prosecutor v. Harun & Al Abd-Al-Rahman, Case No. ICC-02/05-01/07, Decision on the Prosecution Application under Article 58(7) of the Statute, ¶¶ 80-88, 95-103 (Apr. 27, 2007), available at <http://www2.icc-cpi.int/iccdocs/doc/doc279807.PDF> (citing evidence that Harun oversaw the recruitment of Janjaweed militias, and Kushayb commanded Janjaweed in their attacks upon the villages).

crimes against humanity committed in Darfur and requested Sudan to transfer both suspects to The Hague.⁵⁴ Then, on July 14, 2008, in light of Al-Bashir's continued obstructions of the ICC's prosecution of Sudanese officials, the Prosecutor applied for an arrest warrant for President Al-Bashir himself.⁵⁵ In granting the Prosecutor's warrant application on March 4, 2009, the Court's Pre-Trial Chamber I explicitly determined that Al-Bashir's position as head of state of a non-state party to the Rome Statute had "no effect on the Court's jurisdiction"⁵⁶

For its part, Sudan has completely rejected the Court's jurisdiction over its territory, and Al-Bashir has "categorically refused" to surrender any Sudanese national, including himself, to the ICC.⁵⁷ As noted by the Prosecutor in his application for Al-Bashir's arrest warrant, Sudan has not arrested either Ali Kushayb or Ahmad Harun, the latter of whom now serves as Sudan's Minister of State for Humanitarian Affairs.⁵⁸ In addition to Al-Bashir's repeated denunciations of the ICC's jurisdiction in Sudan, it is likely that Al-Bashir will contest his ICC arrest warrant on the grounds that his Head of State immunities present a complete bar to his arrest and

54. *See id.* ¶¶ 56, 89, 94, 107 (recognizing that Resolution 1593 placed an international obligation on Sudan to arrest and transfer the two suspects).

55. *See Prosecutor's Application*, *supra* note 2, ¶¶ 44, 65, 343 (describing how Al-Bashir protected those who followed his orders by refusing to cooperate with the Court as well as his refusal to turn Harun over to the ICC).

56. *See Al-Bashir Warrant Decision*, *supra* note 3, ¶¶ 40-41 (citing the Security Council's referral as authority to exercise jurisdiction over Sudanese nationals despite Sudan's non-party status). The Court found that it had the authority to disregard Al-Bashir's position as head of state based upon four considerations. *Id.* ¶ 42. First, one of the Rome Statute's fundamental goals is to "put an end to impunity for the perpetrators of the most serious crimes" *Id.* Second, Article 27 of the Rome Statute provides that no international immunities "shall . . . exempt a person from criminal responsibility under [the Rome] Statute." *Id.* ¶ 43. Third, the Court will only resort to general principles and rules of international law when there is an explicit lacuna in the text of the Rome Statute. *Id.* ¶ 44; *see also* Rome Statute, *supra* note 3, art. 21. Fourth, when the Security Council referred the Darfur situation to the ICC, it accepted that the investigation and prosecutions would "take place in accordance with the statutory framework provided for in the [Rome] Statute" *Id.* ¶ 45.

57. *See Prosecutor's Application*, *supra* note 2, ¶ 412 (alleging further that Al-Bashir's position as Head of State allows him the unique ability to obstruct the judicial proceedings in Sudan).

58. *See id.* ¶ 65 (stating further that the GoS has completely terminated any cooperation with the Prosecutor's office).

prosecution.⁵⁹ The success of this argument depends upon the nature and the scope of the doctrine of Head of State immunity and its applicability to international criminal tribunals such as the ICC.⁶⁰

B. THE EVOLUTION AND CURRENT STATUS OF THE DOCTRINE OF HEAD OF STATE IMMUNITY IN INTERNATIONAL COURTS

Before discussing whether Al-Bashir's position protects him from ICC prosecution, it is necessary to highlight the difference between the rules that govern the jurisdiction of a court and those that govern international immunity from jurisdiction.⁶¹ The concept of jurisdiction relates to the power of a specific court to exercise its authority over a specific individual.⁶² International immunities, on the other hand, serve to protect certain individuals from trial in foreign courts in the interests of international comity and sovereign equality.⁶³ In the *Arrest Warrant Case*, the International Court of Justice ("ICJ") stated that "jurisdiction does not imply absence of immunity, while absence of immunity does not imply jurisdiction."⁶⁴ Thus, in the case of Darfur, the ICC may have valid jurisdiction over Al-Bashir as a Sudanese national and yet still be prevented from

59. See Nsongurua J. Udombana, *Pay Back Time in Sudan? Darfur in the International Criminal Court*, 13 TULSA J. COMP. & INT'L L. 1, 38 (2005) (arguing that Al-Bashir and other Sudanese officials will seek to rely on the customary international law of absolute inviolability of Heads of State, which prevents foreign courts from prosecuting sovereigns when acting within their official duties).

60. See Akande, *International Law Immunities*, *supra* note 11, at 417-18 (asserting that the use of an international immunity before an international court depends upon the type of immunity and the nature of the tribunal).

61. See *Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.)*, 2002 I.C.J. 3, 24-25 (Feb. 14, 2002) [hereinafter *Arrest Warrant Case*] (stressing the importance of distinguishing between the separate concepts of jurisdiction and jurisdictional immunities).

62. See, e.g., Kim, *supra* note 7, at 111 (defining jurisdiction as "the right, power, or authority to administer justice").

63. See *Regina v. Bow St. Metro. Stipendiary Magistrate, ex parte Pinochet Ugarte (No. 3) (Pinochet III)*, (1999) 1 A.C. 147, 201, 210 (H.L.) (U.K.) [hereinafter *Pinochet III*] (emphasizing that, under international law, sovereigns should not pass judgment on one another).

64. See *Arrest Warrant Case*, *supra* note 61, at 24-25 (explaining further that even when a court's jurisdiction is granted pursuant to an international convention, the availability of customary international law immunities remains).

exercising that jurisdiction by the international immunities he enjoys as Head of State.⁶⁵

1. Origins and Twentieth Century Evolution of the Doctrine

The doctrine of Head of State immunity originally arose out of the combined concepts of sovereign equality among states and the “absolute” identification between the state itself and the leader of the state.⁶⁶ Under this system, the Head of State, as the embodiment of the sovereign power of the state itself, was absolutely immune from the jurisdiction of foreign courts.⁶⁷ This customary rule was based upon reciprocity between states, as well as the need to facilitate inter-state communication and negotiation.⁶⁸

In the twentieth century, concurrent with the rise of supra-national institutions, cracks began to emerge in the absolute nature of the Head of State immunity doctrine, especially when it came to the most serious international crimes.⁶⁹ Following the end of the Second World War, the Charter of the Nuremberg Tribunal explicitly revoked Head of State immunity for Nazi war criminal suspects under its jurisdiction.⁷⁰ Such efforts worked to separate the

65. Cf. Daniel M. Singerman, *It's Still Good to be the King: An Argument for Maintaining the Status Quo in Foreign Head of State Immunity*, 21 EMORY INT'L L. REV. 413, 441-46 (2007) (asserting that despite the erosions caused by the proliferation of international criminal law, the doctrine of Head of State immunity is highly resilient).

66. See Mark A. Summers, *Immunity or Impunity? The Potential Effect of Prosecutions of State Officials for Core International Crimes in States Like the United States that are not Parties to the Statute of the International Criminal Court*, 31 BROOK. J. INT'L L. 463, 466-67 (2006) (positing that the earliest forms of Head of State immunity were based on “reciprocity, convenience, and practicality”); see also Singerman, *supra* note 65, at 418 (describing the principle of sovereign equality as a bar to states’ passing judgment on the actions of other states).

67. Cf. *The Schooner Exch. v. McFaddon*, 11 U.S. (7 Cranch) 116, 137-38 (1812) (discussing the absolute inviolability of the person of the sovereign when he is within the territory of a consenting foreign state).

68. See *id.* at 136 (declaring that states mutually benefit by communicating with each other).

69. See, e.g., Summers, *supra* note 66, at 482-86 (stating that the Nuremberg Charter was the culmination of a series of attempts to narrow the scope of the doctrine that began shortly after World War I).

70. See Charter of the International Military Tribunal art. 7, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 280 (“The official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be

individual ruler of a state from that state's inherent sovereignty, a notion that increasingly became identified with the will of a state's citizens rather than personified by its leader.⁷¹ As the century progressed and international criminal law began to solidify through various treaties, the use of international criminal tribunals proliferated, and more wrinkles emerged in the Head of State immunity doctrine.⁷²

2. *The Current Status of the Doctrine: Two Important Distinctions*

Unlike diplomatic immunity, which is codified in the Vienna Convention on Diplomatic Relations, there is no international agreement delineating the parameters of Head of State immunity.⁷³ Thus, determining the doctrine's current boundaries requires sifting through the increasingly numerous decisions emanating from both domestic and international courts.⁷⁴ The picture that emerges from this process, while somewhat muddled, can be roughly characterized

considered as freeing them from responsibility or mitigating punishment.”); *see also* Singerman, *supra* note 65, at 429-30 (describing the post-World War II recognition that Heads of State were subject to international law).

71. *See* Singerman, *supra* note 65, at 427-28 (illustrating the shifts in customary international law philosophy that de-emphasized the role of the leader and placed him on a level of immunity similar to that enjoyed by a diplomat).

72. *See, e.g.*, Rome Statute, *supra* note 3, art. 27 (revoking the Head of State immunity doctrine as a defense to crimes prosecuted through the ICC); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1112 Stat. 2681, 1465 U.N.T.S. 85 (establishing torture as an international crime with no qualifications on who may be held accountable, and creating a Committee to investigate alleged instances of torture); Convention on the Prevention and Punishment of the Crime of Genocide art. 4, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 278 (criminalizing genocide committed by any individual, regardless of whether he or she is a Head of State); The Secretary-General, *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, ¶¶ 53-59, *delivered to the Security Council*, U.N. Doc. S/25704 (May 3, 1993), *adopted by* S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993) [hereinafter ICTY Statute] (setting forth the law and principles guiding the ICTY's approach to individual criminal responsibility and explicitly repudiating the defense of Head of State immunity).

73. *See* Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 500 U.N.T.S. 95 (laying out the rights and obligations of states with respect to foreign ambassadors); Singerman, *supra* note 68, at 427 (lamenting the lack of codified principles for Head of State immunity).

74. *See generally* Akande, *International Law Immunities*, *supra* note 11, at 409-15 (relying on numerous cases, both domestic and international, to outline the extent of immunity *ratione materiae* and immunity *ratione personae*).

by two important distinctions that dominate the current debate about when Head of State immunity is applicable.⁷⁵

a. The Immunity Ratione Personae and Immunity Ratione Materiae Distinction

The first of these distinctions is between personal immunity (immunity *ratione personae*) and act of state immunity (immunity *ratione materiae*), and serves to separate the immunities available to sitting Heads of State from those available to former Heads of State.⁷⁶ Immunity *ratione personae* is absolute and attaches to an incumbent Head of State's *person* while he is in office, rendering him completely immune and inviolable from prosecution in foreign courts, even when he is suspected of committing crimes against humanity.⁷⁷ Further, this complete prosecutorial bar applies regardless of whether the Head of State committed the acts in question in his official capacity.⁷⁸ Immunity *ratione personae* is justified by the recognition that the international system is dependent upon peaceful cooperation between states and, as the primary representatives of states, Heads of State must be allowed to conduct relations without fear of prosecution.⁷⁹

75. See Singerman, *supra* note 65, at 427.

76. See Prosecutor v. Taylor, Case No. SCSL-03-01-I, Decision on Immunity from Jurisdiction, ¶ 18(b) (May 31, 2004) (presenting Professor Diane Orentlicher's arguments from her amicus brief that stress the need to differentiate between immunity *ratione personae* and immunity *ratione materiae* when deciding whether Charles Taylor, as a Head of State, should be immune from the jurisdiction of the Special Court for Sierra Leone ("SCSL")); see also Akande, *International Law Immunities*, *supra* note 11, at 409 (highlighting the difference between the "broad" immunity *ratione personae* that some officials are granted because of the office they hold, and the more limited immunity *ratione materiae* that attaches only to an individual's official acts).

77. See *Pinochet III*, *supra* note 63, at 201-02 (explaining further that the immunity of a sitting Head of State is the "same immunity as the state itself"); *Arrest Warrant Case*, *supra* note 61, at 24-25 (finding that there is no exception to the customary international law of absolute immunity *ratione personae* for crimes against humanity).

78. *Arrest Warrant Case*, *supra* note 61, at 22 (stating that when immunity *ratione personae* is found there is "no distinction" between official and private acts, and the immunity covers acts performed by the individual before taking office).

79. See Akande, *International Law Immunities*, *supra* note 11, at 409-10 (noting that this immunity is afforded only to that small group of officials with the responsibility of conducting foreign relations, including (1) heads of State, (2)

In contrast, immunity *ratione materiae* is more limited in scope but broader in the number of officials that it protects.⁸⁰ Immunity *ratione materiae* attaches to the *acts* of state representatives performed in their official capacity.⁸¹ Unlike immunity *ratione personae*, immunity *ratione materiae* applies to the acts of state officials that were conducted in their official capacity even after the individuals have left office.⁸² This immunity is justified by the theory that official actions are not done to benefit the individual, but rather are performed on behalf of the state.⁸³ The purposes of immunity *ratione materiae*, therefore, are to protect the individual from responsibility for state actions and to prevent foreign courts from passing judgment on a sovereign state by prosecuting those who act on its behalf.⁸⁴ While in office, Heads of State possess *both* immunity *ratione personae* and immunity *ratione materiae*.⁸⁵

b. The Distinction between the Availability of Head of State Immunities in Domestic Courts Versus their Use in International Courts

In the *Arrest Warrant Case*, the International Court of Justice (“ICJ”) held that a Belgian arrest warrant issued for the incumbent Foreign Minister of the Democratic Republic of Congo on charges of crimes against humanity violated international law because it “failed to respect the immunity from criminal jurisdiction” enjoyed by the

heads of government, and (3) foreign ministers).

80. See *Pinochet III*, *supra* note 63, at 148 (holding that immunity *ratione materiae* does not extend to official acts that violate *jus cogens* norms); Akande, *International Law Immunities*, *supra* note 11, at 412-13 (asserting that immunity *ratione materiae* extends to lower-level state officials whose positions do not warrant immunity *ratione personae*).

81. See *Pinochet III*, *supra* note 63, at 202 (finding that any state official has immunity in foreign courts with respect to his official actions).

82. See Simbeye, *supra* note 10, at 123 (stating that upon leaving office, an official’s immunity *ratione materiae* becomes his only protection from prosecution, regardless of whether he had previously been granted immunity *ratione personae*).

83. See *id.* at 109-10 (declaring further that immunity *ratione materiae* applies to all conduct that is “directly attributable to state action”).

84. See Akande, *International Law Immunities*, *supra* note 11, at 413; see also Simbeye, *supra* note 10, at 123 (describing the “two pronged” protection of immunity *ratione materiae*, which includes immunity for the individual and the “non-justiciability for the act itself”).

85. See Simbeye, *supra* note 10, at 109.

Minister.⁸⁶ This decision made clear that, at the time, under international law domestic courts could not exercise jurisdiction over sitting foreign ministers or Heads of State who possess valid immunity *ratione personae*, even when they are charged with crimes against humanity.⁸⁷ The power of domestic courts to adjudicate over former Heads of State, however, has been greatly enhanced in recent years.⁸⁸ Although still somewhat in flux, it seems settled that domestic courts can exercise jurisdiction over former Heads of State for violations of international criminal law they committed while in office.⁸⁹

In the *Arrest Warrant Case*, the ICJ also recognized that the limitations that a Head of State's immunities impose on domestic courts would not always present a difficulty to certain international criminal tribunals.⁹⁰ Indeed, the enacting documents of various international courts, including the ICC, contain provisions that explicitly make a suspect's international immunities irrelevant.⁹¹ In *Prosecutor v. Charles Taylor*, the Special Court for Sierra Leone ("SCSL") concluded that because the court was "part of the machinery of international justice" with jurisdiction over international crimes committed in Sierra Leone, it possessed the

86. See *Arrest Warrant Case*, *supra* note 61, at 33 (declaring further that Belgium was obligated to cancel the arrest warrant and inform international authorities that it had done so).

87. See *id.* at 22 (finding that sitting Heads of State, heads of government, and foreign ministers are afforded absolute immunity and inviolability while they are in office).

88. See *Arrest Warrant Case*, *supra* note 61, at 25 (recognizing exceptions to the immunities granted to a former foreign minister, including that he does not have immunity from suit in courts in his home state, he cannot claim immunity if immunity is waived by his home state, he can be subject to the criminal courts of another state for "private" acts committed while in office, and where international courts have jurisdiction, he can be forced to participate in their criminal proceedings).

89. See *Pinochet III*, *supra* note 63, at 148 (determining that in the light of the International Convention against Torture, former heads of state do not have immunity for official acts of torture); see also Akande, *International Law Immunities*, *supra* note 11, at 413-15 (stating that immunity *ratione materiae* does not apply to an individual charged with an international crime); Summers, *supra* note 66, at 480-81 (finding an exception to immunity *ratione materiae* in the case of "core" international crimes).

90. See *Arrest Warrant Case*, *supra* note 61, at 25 (listing the ICTY, ICTR, and ICC as possible venues).

91. See Rome Statute, *supra* note 3, art. 27 (eliminating both immunity *ratione personae* and immunity *ratione materiae* as defenses before the ICC).

authority to disregard the immunities of Charles Taylor, the incumbent Liberian Head of State at the time the SCSL issued his arrest warrant.⁹² In light of the above, it is apparent that international criminal tribunals have much greater authority under international law than domestic courts to prosecute sitting Heads of State.⁹³ As the case of Al-Bashir illustrates, however, the assumption that an international court's judicial power extends to all Heads of State in every situation is subject to several caveats. The most important caveat is whether the individual's state is bound by that court's rulings.⁹⁴

II. ANALYSIS

The Rome Statute was enacted with the dual objectives of eliminating impunity for the perpetrators of crimes that "shock the conscience of humanity," while guaranteeing respect for the internal affairs of states.⁹⁵ These goals led to the creation of a juridical system tasked with the sometimes competing mandates of holding accountable those individuals most culpable of international crimes, while ensuring that doing so does not infringe upon the rights of states.⁹⁶ The situation in Sudan, and especially the warrant for Al-Bashir, provides a unique opportunity to observe the ICC's ability to walk this fine and sometimes precarious line between the need for individual accountability and respect for state sovereignty.⁹⁷

92. See *Prosecutor v. Taylor*, Case No. SCSL-03-01-I, Decision on Immunity from Jurisdiction, ¶¶ 37-39, 53 (May 31, 2004) (determining that the SCSL had this authority because its treaty was enacted by the Security Council acting under Chapter VII of the U.N. Charter).

93. See Simbeye, *supra* note 10, at 91 (suggesting that even though immunities are not irrelevant to international courts, the "vertical" relationship between the international tribunal and the state limits the state's sovereignty).

94. See, e.g., Akande, *International Law Immunities*, *supra* note 11, at 418 (concluding that before an international court has the authority to disregard an individual's immunities, the tribunal's founding instruments must provide for the removal of immunities, and the individual's state must be bound by those instruments).

95. See Rome Statute, *supra* note 3, pmbl.

96. See *Prosecutor v. Blaskic*, Case No. IT-95-14, Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, ¶ 40 (Oct. 29, 1997) (recognizing the reality that international tribunals take into account the sovereignty of independent states).

97. See Jo Stigen, *The Relationship between the International Criminal Court and National Jurisdictions: The Principle of Complementarity* 16-18 (2008)

A. THE ROME STATUTE AND SECURITY COUNCIL RESOLUTION
1593 GRANT THE ICC POWER TO EXERCISE JURISDICTION OVER
ACTS COMMITTED IN SUDAN

Before the ICC may exercise jurisdiction over a specific crime, its authority over the situation in which the crime was committed must be activated by one of the three “trigger mechanisms” outlined in the Rome Statute.⁹⁸ Article 13 of the Rome Statute allows triggering of the ICC’s jurisdiction by a referral from a State Party, a Security Council referral, or through the Prosecutor’s independent initiation of an investigation.⁹⁹ Once the ICC’s authority over a general situation has been triggered, the Court is also required, *sua sponte*, to verify that it has jurisdiction over a specific individual before it.¹⁰⁰

In the case of Sudan, the Security Council triggered the ICC’s authority by referral in Resolution 1593.¹⁰¹ The extent of the ICC’s jurisdiction over crimes committed in Sudan, therefore, requires a concurrent reading of the applicable Rome Statute provisions and Security Council Resolution 1593.¹⁰² Thus, in determining whether it has specific jurisdiction over Al-Bashir, the ICC must first establish

(stating that the Rome Statute “challenges traditional views on state sovereignty” by placing constraints on sovereignty to allow the ICC to pursue its mandate).

98. Rome Statute, *supra* note 3, art. 13; *see also* Philippe Kirsch, QC & Darryl Robinson, *Referral by States Parties*, in *The Rome Statute of the International Criminal Court: A Commentary* 619, 619 (Antonio Cassese et al. eds., 2002) (describing the term “trigger mechanism” as “the ability to direct the Court’s attention to events in a particular time and place, . . . with a view to initiating an exercise of jurisdiction over those events”).

99. *See* Rome Statute, *supra* note 3, art. 13.

100. *See id.* art. 19(1) (providing further that the Court, after establishing that it has jurisdiction, may decide to make a determination of the admissibility of a specific case); *see also* Al-Bashir Warrant Decision, *supra* note 3, ¶ 35 (acknowledging that Article 19(1) requires the Court to establish its jurisdiction in every case brought before it).

101. *See* S.C. Res. 1593, *supra* note 7, ¶ 1 (using Chapter VII authority to do so).

102. *See* Luigi Condorelli & Santiago Villalpando, *Referral and Deferral by the Security Council*, in *The Rome Statute of the International Criminal Court: A Commentary*, *supra* note 98, at 627, 634 (asserting that while a Security Council referral does not have any impact on the Court’s subject-matter jurisdiction, the binding nature of Security Council actions under Chapter VII allows the Security Council to extend the Court’s jurisdiction over the territory or nationals of a state that has not ratified the Rome Statute); *see also* Heyder, *supra* note 7, at 654 (arguing that an in-depth analysis of Resolution 1593 is necessary in order to determine the extent of the Court’s mandate in Sudan).

that Resolution 1593 permits the Rome Statute's immunity-stripping Article 27 to apply to the Head of State of Sudan, a non-consenting, non-State Party to the Rome Statute.¹⁰³

1. The Rome Statute and Security Council Resolution 1593 Provide the Legal Basis for ICC Jurisdiction over Sudanese Nationals for Crimes Committed in Sudan

Once the ICC's authority over a general situation is activated through one of the Article 13 trigger mechanisms, the two concepts of jurisdiction and admissibility work to limit the ICC's ability to adjudicate specific cases.¹⁰⁴ In this scheme, the ICC's jurisdiction denotes the four legal parameters—"subject matter (jurisdiction *ratione materiae*), time (jurisdiction *ratione temporis*), space (jurisdiction *ratione loci*)[,] and . . . individuals (jurisdiction *ratione personae*)"—over which the Court may properly exercise its authority.¹⁰⁵ In contrast, the concept of admissibility, enshrined in Article 17 of the Rome Statute, arises when the ICC must determine whether it *should* exercise its authority in a specific case over which the ICC possesses jurisdiction.¹⁰⁶ The structure of the Rome Statute provides that either concept—jurisdiction or admissibility—may be

103. See Rome Statute, *supra* note 3, art. 27 (stripping those accused of crimes under the Rome Statute of immunity *ratione personae* and immunity *ratione materiae*, regardless of their position in a government).

104. Compare *id.* arts. 5, 11, 12 (establishing the limits of the Court's jurisdiction over subject matter, time, space, and individuals), with *id.* art. 17 (listing the cases when the Court should determine that a specific case is inadmissible, including when a state has already initiated proceedings over the accused).

105. Kim, *supra* note 7, at 111. See generally Rome Statute, *supra* note 3, arts. 5, 11, 12 (detailing the Court's jurisdiction *ratione materiae*, jurisdiction *ratione temporis*, jurisdiction *ratione loci*, and jurisdiction *ratione personae*).

106. See Rome Statute, *supra* note 3, art. 17(1). Article 17 sets forth four instances when the Court will find a specific case inadmissible: when a case is already being prosecuted by a state with valid jurisdiction, unless that state is "unwilling or unable" to "genuinely" carry out the prosecution; when a case has been previously investigated by a state with valid jurisdiction and that state has decided not to prosecute; when the person in question "has already been tried for conduct which is the subject of the complaint"; and when the case "is not of sufficient gravity to justify further action by the Court." *Id.* See, e.g., Kim, *supra* note 7, at 111 (recognizing that there may be situations where the ICC has jurisdiction over an issue, but would find cases arising from it inadmissible because domestic proceedings had already been initiated).

contested by an accused individual or a state with valid jurisdiction.¹⁰⁷

a. The ICC Jurisdiction Granted under the Rome Statute is Insufficient to Prosecute Nationals of Non-Consenting, Non-State Parties

Article 34 of the Vienna Convention on the Law of Treaties (“VCLT”) provides that a treaty “does not create either obligations or rights for a third State without its consent.”¹⁰⁸ Furthermore, a treaty cannot create an obligation for a non-State Party unless that state “expressly accepts that obligation in writing.”¹⁰⁹ Nothing in the Rome Statute violates the VCLT because no article creates obligations for non-State Parties.¹¹⁰ Indeed, Article 12 of the Rome Statute provides that when a State Party has referred a case to the ICC or when the Prosecutor initiates an investigation of his own volition, the ICC may only exercise jurisdiction if the alleged crimes were committed on the territory of a State Party or if the alleged perpetrators are nationals of a State Party.¹¹¹

Thus, in the case of Sudan, it is evident that the plain text of the Rome Statute, without more, is insufficient to support the ICC’s jurisdiction over Sudanese nationals for crimes committed in Sudan.¹¹² Although Sudan initially signed the Rome Statute, it never ratified the agreement.¹¹³ In addition, on August 27, 2008, the GoS

107. See Rome Statute, *supra* note 3, art. 19(2) (providing that a state may challenge the Court’s jurisdiction on the grounds that the state is investigating or prosecuting the individual).

108. Vienna Convention on the Law of Treaties art. 34, May 23, 1969, 1155 U.N.T.S. 331.

109. *Id.* art. 35.

110. See Chibueze, *supra* note 13, at 205-06 (arguing that the text of the Rome Statute does not violate the Vienna Convention because the Rome Statute itself does not create obligations for non-State Parties—it only allows them the option of consenting to ICC jurisdiction).

111. Rome Statute, *supra* note 3, art. 12(2); see Chibueze, *supra* note 13, at 203-04 (asserting that, absent a Security Council referral, the Court’s jurisdiction is limited to the territory or nationals of State Parties).

112. See Kim, *supra* note 7, at 131 (finding that the extent of the Court’s authority with respect to non-State Parties is to “invite” them to assist the Court).

113. United Nations Treaty Collection, Status of Multilateral Treaties Deposited with the Secretary General, Rome Statute of the International Criminal Court, <http://treaties.un.org/doc/Publication/MTDSG/Volume%20II/Chapter%20XVIII/XVIII-10.en.pdf> (last visited Apr. 10, 2009) (listing all state accessions, reservations, or withdrawals from the Rome Statute).

sent the Secretary General of the United Nations a communication stating that “Sudan does not intend to become a party to the Rome Statute. Accordingly, Sudan has no legal obligation arising from its signature on 8 September 2000.”¹¹⁴ Because Sudan has specifically withheld consent to obligations under the Rome Statute, the VCLT bars the Court’s jurisdiction over crimes committed on Sudanese territory by Sudanese nationals without some further grant of authority independent of the Rome Statute.¹¹⁵

b. The Authority Needed for ICC Jurisdiction in Sudan is Derived from Security Council Resolution 1593

The additional required authority is derived from Security Council Resolution 1593, which invokes Chapter VII of the U.N. Charter in referring the Darfur situation to the ICC.¹¹⁶ The U.N. Charter requires that all U.N. Member States carry out decisions made by the Security Council.¹¹⁷ Therefore, when the operative paragraphs of a Security Council resolution made pursuant to Chapter VII authority indicate a direct order, the resolution becomes “binding as law and mandatory as policy” upon those states the resolution is directed

114. The Secretary-General, *Rome Statute of the International Criminal Court: Sudan: Notification*, C.N.612.2008.TREATIES-6 (Depositary Notification) (Aug. 27, 2008), available at <http://treaties.un.org/doc/Publication/CN/2008/CN.612.2008-Eng.pdf>.

115. Rome Statute, *supra* note 3, art. 12 (precluding the exercise of jurisdiction in the territory or over nationals of non-State Parties to the Statute without express consent from the non-State Party); see also Dapo Akande, *The Jurisdiction of the International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits*, 1 J. INT’L CRIM. JUST. 618, 618-19 (2003) (describing the three instances when the ICC can exercise jurisdiction over nationals of non-Parties: (1) as a result of a Security Council referral, (2) when non-Party nationals have committed crimes in the territory of a State Party, or the territory of a state that has consented to the Court’s jurisdiction, and (3) when a non-State Party has consented to the Court’s jurisdiction over a certain crime).

116. S.C. Res. 1593, *supra* note 7, pmb., ¶ 1 (recognizing the validity of the Security Council’s actions under Chapter VII following a determination that Sudan “continues to constitute a threat to international peace and security”); see also Rome Statute, *supra* note 3, art. 13(b) (allowing the court to exercise its jurisdiction when a “situation . . . is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations”).

117. See U.N. Charter art. 25 (“The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.”).

towards.¹¹⁸ With respect to Sudan, it is clear that Resolution 1593 is a direct order that obligates Sudan, as a U.N. Member State, to cooperate with the ICC.¹¹⁹ The second operative paragraph of Resolution 1593 states that “the Government of Sudan and all other parties to the conflict in Darfur[] *shall* cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution.”¹²⁰ In reliance on the wording of Resolution 1593, and citing the authority derived from the U.N. Charter, the ICC concluded that Sudan has an international obligation to cooperate with the Court’s decisions emanating from the situation in Darfur.¹²¹

As Sudan is under an international obligation to cooperate with the ICC and the Prosecutor, it follows that Sudan must also respect and enforce the Prosecutor’s decisions about whom to prosecute.¹²²

118. Christopher C. Joyner, *Strengthening Enforcement of Humanitarian Law: Reflections on the International Criminal Tribunal for the Former Yugoslavia*, 6 DUKE J. COMP. & INT’L L. 79, 88 (1995) (discussing the sources of state obligations to comply with requests from the ICTY and stating further that when the Security Council issues a resolution framed as a command by using the word “decides,” that resolution becomes a legal order binding upon U.N. Member States); cf. *Prosecutor v. Blaskic*, Case No. IT-95-14, Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, ¶ 47 (Oct. 29, 1997) (determining that when the Security Council created the ICTY using its Chapter VII authority, it established a “vertical relationship” between the ICTY and states that confers primacy on the ICTY over domestic courts).

119. See Joyner, *supra* note 118, at 88 (explaining that Security Council resolutions with a direct imperative included in the operative paragraphs are binding as law); see also Kim, *supra* note 7, at 114 (stressing the “mandatory nature” of Security Council actions made under Chapter VII of the U.N. Charter).

120. S.C. Res. 1593, *supra* note 7, ¶ 2 (emphasis added).

121. See *Al-Bashir Warrant Decision*, *supra* note 3, ¶¶ 241-248 (noting further that if Sudan chooses not to comply, the Court may refer the lack of compliance back to the Security Council which may then choose to take further action as authorized under the U.N. Charter); see also *Prosecutor v. Harun & Al Abd-Al-Rahman*, Case No. ICC-02/05-01/07, Decision on the Prosecution Application under Article 58(7) of the Statute, ¶ 16 (Apr. 27, 2007), available at <http://www2.icc-cpi.int/iccdocs/doc/doc279807.PDF> (“[T]he Court may, where a situation is referred to it by the Security Council, exercise jurisdiction over crimes committed in the territory of States which are not Party to the [Rome] Statute and by nationals of States not Party to the [Rome] Statute.”).

122. See *Al-Bashir Warrant Decision*, *supra* note 3, ¶¶ 242, 247 (highlighting the fact that Al-Bashir’s prosecution stemmed from the Security Council’s referral of the Darfur situation); Udombana, *supra* note 59, at 23-24 (arguing that when the Security Council has referred a situation to the ICC, the Prosecutor is given the

Unlike when the ICC's jurisdiction is triggered by a State Party referral or when the Prosecutor initiates an investigation, there is no subsequent article in the Rome Statute that defines the processes or powers that flow from a Security Council referral.¹²³ It has been argued that this was a purposeful omission that allows the Security Council the widest latitude to act under Chapter VII and maintains the Court's independence by giving the Prosecutor the final say over which individuals, if any, to prosecute pursuant to the grant of jurisdiction.¹²⁴

Read concurrently, the jurisdictional articles of the Rome Statute and Security Council Resolution 1593 provide sufficient authorization for the Prosecutor to investigate and prosecute Sudanese nationals for crimes committed in Sudan.¹²⁵ Resolution 1593, with its Chapter VII underpinnings, provides the Prosecutor with the broad mandate to act in Sudan, while the Rome Statute supplies the ability to target specific individuals for the commission of specific crimes.¹²⁶ However, additional jurisdictional difficulties arise when the alleged perpetrator of these crimes happens also to be the sitting Head of State.¹²⁷

final decision over whether to initiate the Court's jurisdiction over a specific case).

123. See Rome Statute, *supra* note 3, art. 14 (stating that a State Party may refer a situation to the Prosecutor in order to determine whether specific individuals should be charged with crimes under the Rome Statute); *id.* art. 15 (listing the powers of the Prosecutor to initiate an investigation on his own and the process to follow).

124. See Udombana, *supra* note 59, at 16-17 (arguing that while the Security Council has wide power to determine what actions to take under Chapter VII, when the Security Council refers a situation to the ICC, the Prosecutor retains discretion over whom to prosecute).

125. Cf. Akande, *The Jurisdiction of the International Criminal Court*, *supra* note 115, at 618 (asserting that the ICC may exercise jurisdiction over nationals of non-State Parties when the Security Council has referred the situation to the Court).

126. See Simbeye, *supra* note 10, at 19 (highlighting that in the case of a Security Council referral, non-State Parties to the Rome Statute may nevertheless be bound by its provisions because of their U.N. membership and the obligations that flow from it).

127. See Claire de Than & Edwin Shorts, *International Criminal Law and Human Rights* 52-53 (2003) (describing the difficulties faced by a court attempting to indict a current Head of State including his "technical" identification with the state itself).

2. *Resolution 1593 and Relevant International Cases Provide the Necessary Authority for the ICC to Apply the Rome Statute's Immunity-Stripping Provisions to Al-Bashir*

Article 27 of the Rome Statute explicitly provides that an “official capacity as a Head of State or Government . . . shall in no case exempt a person from criminal responsibility.”¹²⁸ Further, “[i]mmunities . . . which may attach to the official capacity of a person, whether under national or international law, shall not bar the ICC from exercising its jurisdiction over such a person.”¹²⁹ Taken together, these two provisions are intended to strip both immunity *ratione personae* and immunity *ratione materiae* from suspects brought before the ICC.¹³⁰ Thus, at first, it seems evident that if the ICC has valid jurisdiction over Sudanese nationals, Al-Bashir’s position as Head of State should not have any impact upon the ICC’s jurisdiction over him.

a. *Arguments Against the ICC’s Possessing the Power to Remove Al-Bashir’s Head of State Immunities*

The automatic conclusion that Al-Bashir’s immunities are not relevant before the ICC somewhat understates the nature and the purpose of customary international law immunities as they relate to courts established by a treaty in two important ways.¹³¹ First, it ignores the fact that although international immunities are designed to shield individuals from foreign jurisdictions, the purpose of these immunities has always been to protect *states* from judicial proceedings to which they have not consented.¹³² The ultimate owner

128. Rome Statute, *supra* note 3, art. 27(1).

129. *Id.* art. 27(2).

130. See Kim, *supra* note 7, at 162 (stating that the drafters of the Rome Statute easily came to agreement that all suspects before the court would be treated equally, regardless of their official positions).

131. See generally Akande, *International Law Immunities*, *supra* note 11, at 415-19 (finding that the use of immunities as a prosecutorial bar in international tribunals depends on the nature of the statute creating the tribunal, and whether the state concerned is bound by it).

132. See *Pinochet III*, *supra* note 63, at 201 (emphasizing that state representatives are afforded immunity in foreign courts in “recognition of the dignity” of their home state).

of the immunity, therefore, is not the individual but the state of which he is a national.¹³³

Second, the above conclusion does not take sufficient account of the fact that the ICC, unlike the International Criminal Tribunal for the Former Yugoslavia (“ICTY”) or the International Criminal Tribunal for Rwanda (“ICTR”), was established through a treaty and not through a Chapter VII action taken by the United Nations.¹³⁴ This is an important distinction because the power of an international court to remove immunities is dependent upon the mechanism under which it was created.¹³⁵ It is generally accepted that when the Security Council, acting under Chapter VII of the U.N. Charter, creates an international tribunal such as the ICTY or the ICTR, that tribunal is empowered to disregard the immunities of nationals of all U.N. Member States.¹³⁶ This power derives from the binding nature of Security Council decisions and the notion that Member States, by virtue of their ratification of the U.N. Charter, have indirectly assented to the removal of immunities in such occasions.¹³⁷ When, however, an international court has been created through a treaty (like the ICC), its power to remove immunities is somewhat more suspect.¹³⁸ If this were not the case a small number of states could

133. Cf. Press Release, Int’l Court of Justice, Liberia Applies to the International Court of Justice in a Dispute with Sierra Leone Concerning an International Arrest Warrant Issued by the Special Court for Sierra Leone against the Liberian President (Aug. 5, 2003), available at <http://www.icj-cij.org/presscom/index.php?pr=1027&pt=1&p1=6&p2=1> (detailing the argument of the Liberian government, which alleged that the arrest warrant issued by the SCSL for Charles Taylor while he was the sitting president infringed upon Liberian sovereignty and violated international law).

134. Compare Rome Statute, *supra* note 3 (establishing the ICC), with ICTY Statute, *supra* note 72, ¶ 1 (recognizing Security Council Resolution 808 (1993) of February 22, 1993, which provided the basis for the ICTY), and S.C. Res. 955, Annex, U.N. Doc. S/RES/955 (Nov. 8, 1994) [hereinafter ICTR Statute] (establishing the ICTR).

135. See *Prosecutor v. Taylor*, Case No. SCSL-2003-01-I, Decision on Immunity from Jurisdiction, ¶¶ 34-35 (May 31, 2004) (acknowledging that the powers of the SCSL are dependent upon the fact that the SCSL was created by a treaty between the Security Council and Sierra Leone, and not directly by the Security Council).

136. See Akande, *International Law Immunities*, *supra* note 11, at 417 (stating that the ICTY and the ICTR possess the power to “remov[e] immunity with respect to practically all states”).

137. *Id.*

138. See *id.* (asserting that immunities were designed to bar states from interfering in the internal affairs of other states through prosecutions, and this

create, via treaty, “an international criminal court for the purpose, or with the effect, of circumventing the jurisdictional limitations incumbent upon national courts.”¹³⁹ Although the Rome Statute does have a significant number of State Parties, its ratification is not universal, and so determining whether the ICC has the authority to disregard the international immunities of non-State Party nationals must be done with care.¹⁴⁰

b. Arguments in Favor of the ICC's Power to Strip Al-Bashir's Immunities

All of the above is not to say that the ICC cannot disregard the immunities of non-State Party officials in certain situations; it only shows that the Rome Statute does not grant the ICC automatic authority to do so.¹⁴¹ The ICC is unique among international tribunals in that, although it was created by a treaty, Article 13(b) allows the Security Council to use the ICC as a tool to maintain international peace and security in specific situations.¹⁴² When the Security Council chooses to do so, at least with respect to the immunities of nationals of the state (or states) in question, the Security Council puts the ICC on equal footing with the ad hoc tribunals.¹⁴³ This is premised on three legal underpinnings apart from

justification holds true even if the prosecuting states seek to exercise jurisdiction through a united group).

139. Prosecutor v. Taylor, Case No. SCSL-2003-01-I, Submissions of the Amicus Curiae on Head of State Immunity by Philippe Sands, ¶ 78 (Oct. 23, 2003), available at <http://www2.icc-cpi.int/NR/rdonlyres/27928AD2-4ECB-4611-95B7-F9F0AE2DBF24/0/Sands.pdf> (urging the SCSL to conclude that, because it is an international tribunal similar in competence to the other criminal tribunals, it has the authority to disregard the immunities of Charles Taylor).

140. See Singerman, *supra* note 65, at 441 (pointing out that only 104 of the 102 United Nations Member States have ratified or acceded to both the Rome Statute and the ICC).

141. See Rome Statute, *supra* note 3, art. 12 (limiting the Court's power to the nationals or territory of State Parties in the absence of a Security Council referral).

142. See *id.* art. 13(b).

143. Cf. Al-Bashir Warrant Decision, *supra* note 3, ¶ 45 (positing that, by making the Article 13(b) referral, the Security Council understood that any prosecutions would be conducted in accordance with the Rome Statute's provisions); Dapo Akande, *The Bashir Indictment: Are Serving Heads of State Immune from ICC Prosecution?* 3 (Oxford Transnational Justice Research, Working Paper No. 6, 2008), available at <http://www.csls.ox.ac.uk/documents/Akande.pdf> (raising the possibility that when the Security Council obligated Sudan to cooperate with the ICC in Resolution 1593, this canceled Al-Bashir's immunities).

the Rome Statute: the mandatory nature of the U.N. Charter, the ICJ's decision in the *Arrest Warrant Case*, and the SCSL's decision regarding immunities in *Prosecutor v. Charles Taylor*.¹⁴⁴

It is clear that the ICC, unlike the ICTY or ICTR, was created by a treaty and not by a Security Council resolution. The ICC, therefore, normally operates as an independent entity without inherent authority to disregard the immunities conferred by non-States Parties of the Rome Statute.¹⁴⁵ However, because the Security Council acted under Chapter VII in referring the Darfur situation to the ICC, the Court's jurisdiction over Sudanese nationals is anchored in the U.N. Charter.¹⁴⁶ This anchor, and the international obligation that Resolution 1593 places on Sudan to cooperate with the Court, position the ICC in a vertical relationship with Sudan, permitting the Court to disregard Al-Bashir's immunities without violating international law.¹⁴⁷

144. See U.N. Charter art. 25 (requiring Member States to comply with Security Council resolutions); *Arrest Warrant Case*, *supra* note 64, at 25-26 (insinuating that international courts such as the ICC could remove immunities in the proper circumstances); *Prosecutor v. Taylor*, Case No. SCSL-2003-01-I, Decision on Immunity from Jurisdiction, ¶¶ 1, 42, 53, 60 (May 31, 2004) (denying Taylor's motion to quash his indictment based on Head of State immunity after determining that the SCSL was an international criminal court and, as a result, Taylor's position as incumbent Head of State was not a bar to his prosecution).

145. See Rome Statute, *supra* note 3, pmb. (recognizing the independence of the Court with respect to the U.N. system); see also *Al-Bashir Warrant Decision*, *supra* note 3, ¶ 240 (noting that Sudan is not a party to the Rome Statute and has therefore not accepted the Court's jurisdiction over its territory); cf. Akande, *International Law Immunities*, *supra* note 11, at 417 (presenting the ICTY and ICTR as examples of Security Council-created mechanisms that can remove the immunities of U.N. Member State nationals).

146. See U.N. Charter arts. 39-51 (allowing the Security Council to take action when peace is threatened or breached or an act of aggression has occurred, and providing the Security Council with the means to do so, both through authorizing the use of force and through other measures); Heyder, *supra* note 7, at 652-53 (asserting that when the ICC's jurisdiction over a situation is based on a Chapter VII referral from the Security Council, the Court's jurisdiction is universal, and the state's consent is irrelevant).

147. See S.C. Res. 1593, *supra* note 7, ¶ 2 (ordering the government of Sudan to cooperate with and provide assistance to the ICC); *Al-Bashir Warrant Decision*, *supra* note 3, ¶¶ 241-247 (asserting that although Sudan has not ratified the Rome Statute, it remains under an international obligation to cooperate with the ICC because of the binding language of Resolution 1593 and Sudan's duties under the U.N. Charter); see also *Taylor*, Case No. SCSL-03-01-I, Decision on Immunity from Jurisdiction, ¶ 38 (determining that when the Security Council creates a court with the goal of keep international peace, it may force the United Nations to

The ICC's power to remove Al-Bashir's immunities by applying Article 27 of the Rome Statute is reinforced by the *Arrest Warrant Case*.¹⁴⁸ There, the ICJ went to great lengths to separate "immunity" from "impunity" and specifically mentioned Article 27 when putting forth the ICC as a venue for holding state officials accountable if international immunities prevented domestic courts from prosecution.¹⁴⁹ Further, in *Prosecutor v. Charles Taylor*, the Appeals Chamber held that the SCSL, as an international court created by a treaty between the Security Council and Sierra Leone, possessed authority to remove Taylor's international immunities, even though he was an incumbent Head of State at the time his arrest warrant was issued.¹⁵⁰

Together, U.N. Security Council Resolution 1593 and the Rome Statute provide the foundation for the ICC to exercise jurisdiction over Sudanese nationals.¹⁵¹ These two documents, reinforced by relevant international case law, provide the ICC with the power to ignore Al-Bashir's immunities as Head of State and issue a warrant

participate).

148. See generally *Arrest Warrant Case*, *supra* note 64, at 25-26 (stating clearly that the Court is not barred from having jurisdiction if Article 27 is applied).

149. See *id.* at 25 (stating that immunity does not "exonerate" an individual of criminal responsibility and listing the ICTY, ICTR, and the ICC as valid venues for holding an incumbent foreign minister accused of war crimes accountable, if these tribunals had jurisdiction).

150. See *Taylor*, Case No. SCSL-03-01-I, Decision on Immunity from Jurisdiction, ¶ 38 (underscoring the importance of the fact that the Security Council was acting under its Chapter VII authority when it decided to enter into the agreement with Sierra Leone); see also Micaela Frulli, *The Question of Charles Taylor's Immunity: Still in Search of a Balanced Application of Personal Immunities?*, 2 J. INT'L CRIM. JUST. 1118, 1120-21 (2004) (describing that while the Security Council did not vest the SCSL with Chapter VII authority, the judges found that because the Security Council was *acting* under Chapter VII when the SCSL was established, this was enough to provide the court with an international character). Frulli criticizes the SCSL judges for, once having established that the SCSL is an international tribunal created under the context of Chapter VII, failing to utilize Chapter VII authority as a basis for disregarding Taylor's immunities, instead relying on the distinction between national and international courts. *Id.* at 1123; J. Peter Pham, *A Viable Model for International Criminal Justice: The Special Court for Sierra Leone*, 19 N.Y. INT'L L. REV. 37, 101-02 (arguing that the SCSL's decision on immunities was one of the court's most significant accomplishments).

151. See *supra* Part II.A.1 (concluding that the ICC's jurisdiction over Darfur is valid in light of the mandatory nature of Security Council Resolution 1593).

for his arrest.¹⁵² Now that the ICC judges have decided to pursue this course of action, the question becomes how Al-Bashir's warrant can be executed.¹⁵³

B. THE ICC'S RELIANCE ON DOMESTIC PROCESSES TO CARRY OUT ITS WARRANTS AND THE LIMITATIONS IMPOSED BY RESOLUTION 1593 MAY PREVENT THE EXECUTION OF AN ARREST WARRANT BECAUSE OF AL-BASHIR'S HEAD OF STATE IMMUNITIES

Although the ICC, as demonstrated above, has the legal authority to prosecute President Al-Bashir for crimes committed in Darfur, its ability to do so hinges on the enforceability of any warrant issued for his arrest.¹⁵⁴ The Rome Statute prevents trials *in absentia*; therefore Al-Bashir's physical presence in The Hague is essential before the Court can move on to the merits of the Prosecutor's case.¹⁵⁵ The ICC, however, does not have any enforcement mechanism of its own, and as a result, the Court is completely dependent upon states to carry out arrests on its behalf.¹⁵⁶ Many commentators have worried that the Court's lack of independent enforcement capabilities, along with the apparent disparities between Articles 27 and 98 of the Rome Statute, could lead to situations in which the ICC is unable to initiate trials against those most responsible for

152. See *supra* Part II.A.2 (arguing that recent cases in the ICJ and the SCSL support the finding that the ICC has the authority to lift Al-Bashir's Head of State immunities).

153. Pondai Bamu, *Head of State Immunity and ICC: Can Bashir be Prosecuted?* 2 (Oxford Transnational Justice Research, Working Paper No. 7, 2008), available at <http://www.csls.ox.ac.uk/documents/BamuF.pdf> (raising practical difficulties the ICC faces if it decided to issue a warrant for Al-Bashir, including the reliance on states for enforcement of ICC warrants and previous failures to apprehend ICC suspects in Uganda).

154. Cf. Chibueze, *supra* note 13, at 209-11 (commenting that the effectiveness of the ICC depends on states' fulfilling their obligations to arrest and surrender those accused of crimes to the ICC).

155. Rome Statute, *supra* note 3, art. 63(1) ("The accused shall be present during the trial."). But see Kim, *supra* note 7, at 212 (determining that the presence of the accused is only required at the trial, and not during pretrial proceedings).

156. See Nick Donovan, *Introduction: Enforcement of International Criminal Law*, in Aegis Trust, *The Enforcement of International Criminal Law* 3, 9 (Nick Donovan ed., 2009), available at http://www.aegitrust.org/images/PDFs/enforcement_of_international_criminal_law.pdf (characterizing the dearth of enforcement capabilities as the "Achilles' heel" of the ICC); Kirsch, *supra* note 13, at 291 (stating that trials before the Court can only occur if states cooperate with the Court's requests).

international crimes.¹⁵⁷ Sudan's refusal to apprehend Ahmed Harun and Ali Kushayb despite ICC arrest warrants shows that such concerns are especially pertinent in any discussion about the possibilities of trying Al-Bashir in The Hague.¹⁵⁸

Practically speaking, there are four primary ways that Al-Bashir could appear before the ICC judges in response to his arrest warrant. First, Al-Bashir could turn himself in to the Prosecutor.¹⁵⁹ Given Al-Bashir's animosity toward the ICC and rejection of the charges against him, this is extremely unlikely.¹⁶⁰ Second, the Sudanese authorities could arrest and extradite him to The Hague.¹⁶¹ Even though Resolution 1593 places an obligation on Sudan to comply with the Court's requests,¹⁶² and there appear to be some anti-Al-Bashir rumblings in Khartoum,¹⁶³ without a complete regime change this option seems out of the question.¹⁶⁴ Third, Al-Bashir could be

157. See, e.g., Simbeye, *supra* note 10, at 2 (lamenting that while Article 27 of the Rome Statute makes an individual's official status irrelevant before the ICC, Article 98 makes official status pertinent when states are acting to apprehend that individual); Akande, *International Law Immunities*, *supra* note 11, at 420 (noting that because the ICC does not have the power to arrest suspects on its own it must rely on states to do so, in which case the official immunities enjoyed by the suspect could become relevant to national court proceedings); Chibueze, *supra* note 13, at 210 (asserting that the Court's credibility could be damaged if states failed or refused to enforce the Court's warrants).

158. See Luis Moreno-Ocampo, *The International Criminal Court: Seeking Global Justice*, 40 CASE W. RES. J. INT'L L. 215, 222 (2007-2008) (underscoring that in failing to arrest and surrender Harun and Kushayb, Sudan is in violation of its legal obligations).

159. See Flint & de Waal, *This Prosecution Will Endanger the People*, *supra* note 6 (stating that an ICC warrant for Al-Bashir will be effective only if Al-Bashir surrenders, is arrested, or is ousted from power).

160. See *UN Split Over Darfur Peace Force*, BBC News, July 29, 2008, <http://news.bbc.co.uk/2/hi/africa/7530501.stm> (reporting that Al-Bashir is unworried by the ICC's "politically motivated" charges).

161. See Moreno-Ocampo, *supra* note 158, at 222 (recognizing that while the Sudanese government has discussed the possible surrender of Ahmad Harun, no similar discussions have been held with regard to Al-Bashir, nor is it likely that they will).

162. See S.C. Res. 1593, *supra* note 7, ¶ 2 (obligating Sudan to cooperate with the ICC).

163. See Amber Henshaw, *Will Warrant Tip Sudan into Abyss?*, BBC News, Mar. 4, 2009, <http://news.bbc.co.uk/2/hi/africa/7887007.stm> (reporting rumors of a coup against Al-Bashir but noting that members of Al-Bashir's party continue to support him for now).

164. See *A Dilemma over Darfur*, *supra* note 6 (describing how Al-Bashir's ruling party has called the prosecutor's charges "blackmail" and threatened more

arrested and extradited by an international force in Sudan with the specific mandate to do so.¹⁶⁵ Although there is a U.N. force in Darfur (“UNAMID”), its mandate is currently limited to protecting civilians and supporting the implementation of the Darfur Peace Agreement.¹⁶⁶ Fourth, Al-Bashir could be arrested pursuant to an ICC warrant while in the territory of a third state, and then extradited from that state to The Hague for trial.¹⁶⁷ Although this option presents serious difficulties, it has historical precedent—both Charles Taylor and Ugarte Pinochet were arrested in third states and then extradited to stand trial.¹⁶⁸ The viability of this fourth option is discussed for the remainder of this Section.

*1. The Conflict between Articles 27 and 98 of the Rome Statute
Create the Possibility that an ICC Warrant for Al-Bashir Will Be
Unenforceable While He is in Power*

The first concern about the enforceability of Al-Bashir’s arrest warrant is created by the structure of the Rome Statute itself.¹⁶⁹ Article 27 of the Statute provides that neither the official capacity

violence in Darfur should the ICC issue a warrant). *But see* Flint & de Waal, *This Prosecution Will Endanger the People*, *supra* note 6 (asserting the unlikelihood of a regime change in Sudan given Al-Bashir’s grip on power and the weakness of the political opposition).

165. *See generally* Han-Ru Zhou, *The Enforcement of Arrest Warrants by International Forces*, 4 J. INT’L CRIM. J. 202, 205-08 (2006) (outlining the legal rationale of the ICTY in legitimizing the use of multi-national forces, including NATO, to enforce the court’s arrest warrants).

166. *See* S.C. Res. 1769, ¶ 15, U.N. Doc. S/RES/1769 (July 31, 2007) (declaring further that UNAMID must fulfill its mandate “without prejudice” to the responsibilities of the Sudanese government).

167. *See* Akande, *International Law Immunities*, *supra* note 11, at 420-21 (claiming that the most probable way that the Court will get custody over an accused is through the cooperation of third party states).

168. *See id.*; Craig Timberg, *Liberia’s Taylor Found and Arrested*, WASH. POST, Mar. 30, 2006, at A16, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/03/29/AR2006032900879.html> (describing Taylor’s apprehension in Nigeria, transfer to and arrest in Liberia, and extradition to Sierra Leone). *See generally* *Pinochet III*, *supra* note 63 (extraditing Pinochet from the U.K. to Spain to stand trial on charges of torture); *Prosecutor v. Taylor*, Case No. SCSL-2003-01-I, Decision on Immunity from Jurisdiction, ¶ 57 (May 31, 2004) (upholding the validity of a SCSL warrant issued for Liberian President Taylor that was supposed to be executed in Ghana).

169. *See generally* Simbeye, *supra* note 10, at 135-36 (arguing for the need to balance holding international criminals accountable through Article 27 with granting Heads of State a degree of protection under Article 98).

nor the international immunities of an accused are relevant considerations in proceedings before the Court.¹⁷⁰ In stark contrast, Article 98(1) prohibits the Court from requesting a state to arrest and surrender a third party national if doing so would violate the requested state's "obligations under international law with respect to the State or diplomatic immunity of a person."¹⁷¹ A straight reading of the two articles creates a logical knot of Gordian proportions—the court tasked with ending impunity for the perpetrators of the most serious international crimes is prevented from requesting a state to surrender those perpetrators if they are officials of another state.¹⁷²

In the case of Al-Bashir, this inconsistency may mean that the Court has issued a warrant that cannot be enforced while Al-Bashir is in power.¹⁷³ Although the loophole created by the disparity between Articles 27 and 98(1) should not apply to nationals of ICC Member States, commentators have concluded that an official's immunities conferred by a non-State Party would present a bar to the Court's exercise of jurisdiction over that person.¹⁷⁴ The only meaningful way around this obstacle is for the Court to obtain a waiver of immunity

170. See Rome Statute, *supra* note 3, art. 27 (specifically mentioning the irrelevance of "official capacity as a Head of State" in proceedings before the ICC).

171. *Id.* art. 98(1).

172. See, e.g., Simbeye, *supra* note 10, at 30 (highlighting the contradiction that the Court could have jurisdiction over an individual but be completely barred from arresting that person because of the immunities he enjoys before national courts); Paola Gaeta, *Official Capacity and Immunities, in The Rome Statute of the International Criminal Court: A Commentary, supra* note 98, at 975, 992 (detailing the possibility that Article 98 could prevent the Court from exercising its jurisdiction over state officials in contradiction of the language of Article 27(2)).

173. See Akande, *International Law Immunities, supra* note 11, at 421 (arguing that, with respect to the immunities of nationals of non-State Parties to the Rome Statute, the ICC would be prohibited by international law from acting in a way that would violate these immunities).

174. Compare Akande, *International Law Immunities, supra* note 11, at 425 (concluding that Article 98(1) must be read in a way that allows the Court to request the arrest and surrender of officials of State-Parties because, by signing the Rome Statute, states consented to Article 27), and Gaeta, *supra* note 172, at 993-94 (finding that Article 27 would be rendered "meaningless" if the Court could not request the arrest and surrender of officials of State Parties), with Akande, *International Law Immunities, supra* note 11, at 421-22 (stating that under Article 98(1), the immunities of non-State Party nationals prevent the ICC from requesting State Parties for their arrest), and Gaeta, *supra* note 172, at 994 (arguing that the limitations imposed by Article 98(1) should only apply to non-State Party officials).

from the official's home state.¹⁷⁵ Given Sudan's hostility to the Prosecutor's charges and the fact that Al-Bashir is in de facto control of Sudan's government, a waiver of his Head of State immunity appears highly unlikely.¹⁷⁶

2. The Limited Language of Security Council Resolution 1593 Does Not Impose the International Obligation on States to Cooperate with the ICC that is Necessary to Overcome State Deference to International Immunities

As noted above, the ICC, as a tribunal created through an international treaty and not through a Security Council resolution, does not have the automatic authority to disregard immunities, especially when it comes to officials of non-State Parties.¹⁷⁷ In cases where there will be a conflict between a State Party's duties under the Rome Statute and its obligation to respect the immunities of a third state official, the ICC is prevented from forcing the state to choose which international obligation it will fulfill, and which it will violate.¹⁷⁸ This limitation is not a concern with respect to the ad hoc tribunals¹⁷⁹—as they are subsidiary bodies to the U.N., the ICTY and

175. See Rome Statute, *supra* note 3, art. 98(1) (allowing the Court to request the surrender of a third state official if the Court can obtain a waiver of immunity from the third state).

176. Cf. *Prosecutor's Application*, *supra* note 2, ¶¶ 264-268 (describing the extent of Al-Bashir's control over the Sudanese state, including its political, security, and military mechanisms); Flint & de Waal, *This Prosecution Will Endanger the People*, *supra* note 6 (illustrating Sudan's and Al-Bashir's rejection of the ICC charges).

177. Compare Simbeye, *supra* note 10, at 33 (explaining that the ICTY and ICTR are "supra-state" tribunals that have the independent authority to "issue binding orders to states and can enforce compliance"), with Annalisa Ciampi, *The Obligation to Cooperate*, in *The Rome Statute of the International Criminal Court: A Commentary*, *supra* note 98, at 1607, 1631-32 (recognizing that the obligation of states to cooperate with the ICC does not necessarily prevail over their pre-existing international obligations to respect immunities of third state officials).

178. See Rome Statute, *supra* note 3, art. 98(1) (prohibiting the Court from requiring states to "act inconsistently with [their] obligations under international law"); Gaeta, *supra* note 172, at 994 (arguing that the provisions of Article 98(1) prevent the Court from asking a member state to violate its international obligations to a third, non-State Party by arresting an official of that third state).

179. See *Prosecutor v. Blaskic*, Case No. IT-95-14, Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, ¶ 26 (Oct. 29, 1997) (holding that when the Security Council created the ICTY pursuant to Chapter VII, it created *erga omnes* obligations on the part of all

ICTR are imbued with the authority of the U.N. Charter.¹⁸⁰ This means that in cases of conflict between an order from one of the tribunals and a state's existing international obligations, the tribunal's order takes primacy.¹⁸¹

When compared with the Security Council resolutions that created the ICTY and the ICTR, and established the SCSL by agreement with Sierra Leone, the language of Resolution 1593 is less broad.¹⁸² Although Resolution 1593 is explicit in authorizing the ICC to exercise jurisdiction over Sudanese territory and nationals, its language is more limited when it comes to obligating states other than Sudan to cooperate with the ICC.¹⁸³ Indeed, Resolution 1593 recognizes that, other than Sudan, non-State Parties to the Rome Statute have no obligations with respect to the ICC and only "urges" all states to assist the ICC.¹⁸⁴ Because it does not bind all U.N. Member States in its operative paragraphs, the limited language of Resolution 1593 is insufficient to support a finding that there exists a

U.N. Member States to comply with the provisions of the ICTY Statute).

180. See Pham, *supra* note 150, at 80-81 (noting the differences between the SCSL and the ICTY/ICTR, including the SCSL's creation through a treaty, which means that it does not hold primacy over state courts like the ICTY and ICTR did, and operates independently of the U.N. system).

181. See U.N. Charter art. 103 (stating that the obligations of U.N. Member States under the U.N. Charter trump any other international obligations); Bert Swart, *Arrest and Surrender, in* The Rome Statute of the International Criminal Court: A Commentary, *supra* note 198, at 1639, 1664 (describing how an ICTY order is considered to be an "enforcement measure under Chapter VII of the Charter of the United Nations" and therefore requires all U.N. Member States to comply with that order).

182. Compare S.C. Res. 1593, *supra* note 7, ¶ 2 (ordering that only those states party to the conflict in Darfur shall cooperate fully with the Court and simply "urg[ing]" other states to do so), with ICTR Statute, *supra* note 134, ¶ 2 (ordering all states to "cooperate fully" with the ICTR "and that consequently all States shall take measures necessary under their domestic law to implement the provisions of . . . the Statute"), and S.C. Res. 1315, pmb., U.N. Doc. S/RES/1315 (Aug. 14, 2000) (affirming that the international community will "exert every effort" to bring the perpetrators of international crimes committed in Sierra Leone to justice), and S.C. Res. 827, ¶ 4, U.N. Doc. S/RES/827 (May 25, 1993) (deciding that "all states shall cooperate fully" with the ICTY, which includes "comply[ing] with requests for assistance or orders").

183. See S.C. Res. 1593, *supra* note 7, ¶ 2.

184. *Id.*

general international obligation to cooperate with the ICC's efforts in Sudan.¹⁸⁵

In the absence of a general international obligation to cooperate with the ICC in cases arising out of Darfur, any state seeking to execute Al-Bashir's warrant would be prevented from doing so by the ICJ's *Arrest Warrant Case* decision. There, the ICJ held that incumbent foreign ministers (and, by extension, Heads of State) with immunity *rationae personae* are absolutely inviolable and immune from the jurisdiction of foreign domestic courts, even when they are suspected of committing war crimes or crimes against humanity.¹⁸⁶ Ironically, the very case that provided support to the conclusion that the ICC may legitimately disregard Al-Bashir's immunities presents a seemingly insurmountable hurdle to his actual arrest and extradition by domestic authorities.¹⁸⁷ If an ICC warrant for Al-Bashir is to have any teeth, significant steps are necessary to ensure the Rome Statute's pledge that "the most serious crimes of concern to the international community as a whole must not go unpunished."¹⁸⁸

III. RECOMMENDATIONS

In light of the serious enforcement issues raised by Al-Bashir's warrant, there are three specific actions the international community should take to ensure that the ICC has the ability to fulfill its current mandate in Sudan and in future situations referred to the Court by the Security Council. In the short term, the Security Council should resist calls to defer the ICC's proceedings in Sudan. Second, the Security Council should support the ICC's efforts by issuing a resolution requiring all U.N. Member States to enforce the ICC's decisions arising out of the situation in Darfur. Finally, in the long term, the international community should consider amending Article

185. See Heyder, *supra* note 7, at 654-55 (noting that the language of Resolution 1593 creates an inconsistency whereby the Court is authorized to exercise its jurisdiction in Sudan, but no states other than Sudan are ordered to support the ICC's mandate).

186. See *Arrest Warrant Case*, *supra* note 64, at 24.

187. See Bamu, *supra* note 153, at 2 (stating that the precedent set by the *Arrest Warrant Case* prevents states from acting on an ICC warrant for Al-Bashir, and criticizing the ICC for often ignoring that it is dependant upon states, which often have international obligations that pre-date the Court).

188. Rome Statute, *supra* note 3, pmbl.

98 of the Rome Statute to clarify that when the Court has jurisdiction pursuant to a Security Council referral, all U.N. Member States are obligated to enforce the ICC's decisions, regardless of whether they have signed the Rome Statute.

A. THE SECURITY COUNCIL SHOULD AVOID DEFERRING AL-BASHIR'S ICC PROCEEDING

Article 16 of the Rome Statute provides a mechanism that permits the Security Council to postpone an ICC proceeding for one year.¹⁸⁹ Even before the Court issued Al-Bashir's warrant, various parties urged the Security Council to defer the proceedings, and these calls have only become more insistent since the Court issued its decision.¹⁹⁰ The central thrust of these arguments is that although Al-Bashir's past conduct is deplorable, he is an essential component of any peace arrangements in Sudan, and his arrest could create a vacuum filled with more violence.¹⁹¹ Regional bodies such as the African Union and the Arab League also oppose the warrant because they see Al-Bashir's indictment as somewhat of a double standard that "unfairly" singles out Sudan.¹⁹²

While recognizing that such concerns have validity, the Security Council must not defer the Court's proceedings for two overriding reasons. First, postponing Al-Bashir's charges would give implicit international sanction to the "climate of impunity" that fosters the perpetration of crimes against humanity.¹⁹³ Since 1945, when the

189. See Rome Statute, *supra* note 3, art. 16 (stipulating that the Security Council must adopt a resolution under Chapter VII of the U.N. Charter in order to halt the investigations).

190. See, e.g., *Braced for the Aftershock*, *supra* note 10, at 67 (describing lobbying efforts at the U.N. in favor of a deferral by a group of Arab and African ministers); Franklin Graham, Op-Ed., *Put Peace Before Justice*, N.Y. TIMES, Mar. 3, 2009, at A27 (insisting that a Security Council deferral is necessary to achieve peace in the region).

191. See, e.g., *Braced for the Aftershock*, *supra* note 10, at 67 (reporting that those advocating for a Security Council deferral argue that it would help to achieve peace in Darfur); Graham, *supra* note 190 (maintaining that Al-Bashir was critical to the peace accords that brought an end to the civil war in South Sudan, and he has shown a willingness to "cooperate" with aid groups).

192. See *UN Split over Darfur Peace Force*, *supra* note 160 (describing efforts led by South Africa and Libya to have the Security Council defer the ICC's decision on Al-Bashir's arrest warrant).

193. *Braced for the Aftershock*, *supra* note 10, at 67.

world first vowed that crimes like the Holocaust would “never be allowed to happen again,” it has broken that promise time after time in country after country.¹⁹⁴ By some accounts, the present worldwide number of “those suspected of war crimes and crimes against humanity could run into the hundreds of thousands.”¹⁹⁵ Of that group, at least several thousand suspects were in positions of command when the crimes were committed.¹⁹⁶ Should the Security Council defer Al-Bashir’s ICC proceedings—it would legitimize his impunity and set a dangerous precedent for future perpetrators.¹⁹⁷ If so, once again, the world’s post-Holocaust vow would prove to be nothing more than empty rhetoric.¹⁹⁸

Second, allowing the desire for peace to swallow the need for justice and accountability ignores that in the past, peace and justice have not proven to be mutually exclusive concepts, and instead can work to reinforce each other.¹⁹⁹ In both Serbia and Liberia, the international prosecutions of Slobodan Milosevic and Charles Taylor undermined the authority of the criminal Heads of State, paving the way for eventual lasting peace in both countries.²⁰⁰ Moreover, on both occasions, there was fear that the international prosecutions

194. Scott Lamb, *Never Again?*, Spiegel Online, Jan. 26, 2005, <http://www.spiegel.de/international/0,1518,338612,00.html> (outlining the promise made after World War II and recounting situations where it has been ignored including Bangladesh, Cambodia, Bosnia, Rwanda, and Darfur).

195. Donovan, *supra* note 156, at 3 (providing a rough estimate of the number of suspects by combining figures from Rwanda, Darfur, Democratic Republic of Congo, and Guatemala, among others).

196. *Id.*

197. See Caroline Flintoft & Nick Grono, *The Politics of Ending Impunity*, in Aegis Trust, *The Enforcement of International Criminal Law*, *supra* note 156, at 16, 18-19 (arguing that Article 16 deferrals should only be used as a “last resort” because of the possible damage to the Court’s authority, credibility, and deterrent capacity).

198. See Lamb, *supra* note 194.

199. See Flintoft & Grono, *supra* note 197, at 18 (positing that peace and justice efforts can proceed in tandem and pointing to Uganda and Sudan as two examples).

200. See Tracey Gurd, *Arresting the “Big Fish”*: *Lessons on State Cooperation for the International Criminal Court*, in Aegis Trust, *The Enforcement of International Criminal Law*, *supra* note 156, at 27, 28-29, 30-31 (describing the international prosecution and arrest of Slobodan Milosevic and Charles Taylor and how these prosecutions led to internal pressure that eventually ousted both presidents).

would endanger ongoing peace efforts, and on both occasions this fear was proven baseless.²⁰¹

B. THE SECURITY COUNCIL MUST ISSUE A DEFINITIVE
RESOLUTION OBLIGATING ALL U.N. MEMBER STATES TO
ENFORCE ICC WARRANTS THAT ARISE OUT OF THE DARFUR
CONFLICT

To be effective and maintain its credibility, the ICC must be allowed to operate as an independent body that is not swayed by political pressures or subsumed into a subordinate of the U.N.²⁰² The Security Council, therefore, must unequivocally throw its weight behind the Court's actions in Sudan.²⁰³ To do this, the Security Council should issue a resolution requiring the entire international community, not just the states that are parties to the conflict in Darfur, to assist the ICC as it carries out its proceedings against Al-Bashir.²⁰⁴ Such a resolution would reinforce the Court's mandate in Sudan and put additional domestic pressure on Al-Bashir.²⁰⁵

A definitive resolution of this nature would also greatly help to resolve the serious doubts about the practical enforcement of the ICC's warrant for Al-Bashir.²⁰⁶ When the Security Council places a legal obligation on states through an explicit resolution, that duty takes precedence over all pre-existing international obligations.²⁰⁷ If

201. See *Braced for the Aftershock*, *supra* note 10, at 67.

202. See Moreno-Ocampo, *supra* note 158, at 224 ("The Prosecutor's duty is to apply the law without bowing to political considerations, and I will not adjust my practices to political considerations. It is time for political actors to adjust to the law."); Phil Clark, *If Ocampo Indicts Bashir, Nothing May Happen* 1 (Oxford Transitional Justice Research, Working Paper No. 1, July 13, 2008), available at http://www.csls.ox.ac.uk/documents/Clark_Final.pdf (declaring that the ICC must indict Al-Bashir in order preserve its legitimacy in Darfur and fulfill its mandate in Sudan).

203. Cf. Udombana, *supra* note 62, at 50 (calling upon the Security Council to support the ICC by mobilizing a peacekeeping force in Sudan and by issuing a resolution sanctioning Sudan if it does not cooperate with the Court).

204. Cf. S.C. Res. 1593, *supra* note 7, ¶ 2 (requiring only the cooperation of the GoS and other parties to the conflict in Darfur).

205. See Heyder, *supra* note 7, at 654-56 (illustrating how the Security Council's failure to include a universal obligation in Resolution 1593 weakens the Prosecutor's position in pressuring Sudan to turn over suspects to the Court).

206. See Bamu, *supra* note 153, at 2 (asserting that it is unlikely that "any state can arrest [Al-]Bashir without violating the international law on immunity").

207. See U.N. Charter art. 103 ("In the event of a conflict between the

there were such a universal obligation to cooperate with the ICC's activities in Sudan, U.N. Member States could act to execute an ICC arrest warrant for Al-Bashir without concern that doing so would violate their obligations to respect the immunities conferred by Sudan.²⁰⁸ The Prosecutor could also use such a resolution in the courts of any State or non-State Party to the Rome Statute and be assured of its compliance with the ICC warrant.²⁰⁹

C. ARTICLE 98 OF THE ROME STATUTE SHOULD BE AMENDED TO ENSURE THAT WHEN THE ICC'S JURISDICTION IS TRIGGERED BY A SECURITY COUNCIL REFERRAL, ALL STATES ARE INTERNATIONALLY OBLIGATED TO ENFORCE ICC WARRANTS

One of the envisioned functions of the ICC was to act as a permanent tribunal that the Security Council could activate using its Chapter VII authority without the need to set up another ad hoc tribunal such as the ICTY or ICTR.²¹⁰ The benefits provided by this process are manifold. First, a permanent court that simply needs activation by the Security Council to act in a given situation drastically eliminates the expense and reduces the time needed to build a tribunal from the ground up.²¹¹ Second, the ICC has the ability to compile a significant body of case law that can be used in

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.”).

208. See Udombana, *supra* note 62, at 49 (declaring that when a state carries out a Security Council enforcement measure, it becomes an agent of the Security Council and its authority to act flows directly from the U.N. Charter).

209. See Joyner, *supra* note 121, at 88-89 (stating that when the Security Council issues a binding resolution, the provisions of that resolution carry the force of law for U.N. Member States); see generally Rome Statute, *supra* note 3, art. 59(2) (requiring a custodial state to conduct arrest proceedings in national courts to determine whether the ICC warrant is applicable to the specific person, whether the suspect was provided with the proper process during the arrest, and whether the rights of the arrested person have been respected); *id.* art. 89(1) (requiring State Parties to comply with their national laws when enforcing an ICC arrest warrant); *id.* art. 93(1) (requiring State Parties to comply with their national laws when assisting the Court in other ways).

210. See Condorelli & Villalpando, *supra* note 105, at 628 (characterizing the ICC as an “ad hoc permanent” international court that provides the Security Council with immediate access to a judicial body).

211. See Marlies Glasius, *The International Criminal Court: A Global Civil Society Achievement* 12-13 (2006) (describing the “slow start[s]” of the ICTY and the ICTR that were the result of inadequate funding and diplomatic arguments).

future situations and thus eventually reduces the number of cases of first impression that the Court must decide.²¹² Finally, a permanent tribunal gives the Security Council the flexibility to act immediately in a given situation, which could potentially reduce the number or severity of crimes.²¹³

The ICC, when activated by the Security Council, needs to have the same autonomous authority ad hoc tribunals have in order for any of these benefits to be realized.²¹⁴ One way to provide for this authority is by amending Article 98 of the Rome Statute. This could be done by adding a provision stating that when the ICC's jurisdiction over a situation has been activated by a Security Council referral under Article 13(b) of the Rome Statute, all states are obligated to cooperate with the ICC.²¹⁵ The obligation would extend to all U.N. Member States, but would be limited solely to the ICC's requests and orders arising out of the specific situation referred.²¹⁶ Thus, in practice, the authority of the ICC in such a situation would be identical to the authority enjoyed by the ad hoc tribunals: limited to the specific conflict in question, but extensive in the depth of state obligations to the Court.²¹⁷

212. Cf. William R. Pace & Jennifer Schense, *The Role of Non-Governmental Organizations*, in *The Rome Statute of the International Criminal Court: A Commentary*, *supra* note 98, at 105, 106 (commenting that the Rome Statute has resulted in the clarification and codification of many aspects of international criminal law).

213. See Condorelli & Villalpando, *supra* note 105, at 627 (arguing that from the very inception of the ICC, it was envisioned that the Security Council would use the Court as a tool to maintain international peace and security).

214. See Swart, *supra* note 183, at 1664 (describing the power of the ICTY to order states to comply with its requests).

215. See *Prosecutor v. Blaskic*, Case No. IT-95-14, Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, ¶ 26 (Oct. 29, 1997) (holding that when the Security Council created the ICTY it imposed *erga omnes* obligations on all U.N. Member States to comply with the ICTY Statute); U.N. Charter art. 103 (stipulating that states' obligations that arise under the U.N. Charter take precedence over all other international obligations).

216. See Udombana, *supra* note 62, at 49 (arguing that when the Security Council refers a situation to the ICC under Chapter VII, with respect to that specific situation, the Security Council alters the nature of the ICC from a horizontal, treaty-based institution, to a vertical, supra-national body).

217. See Joyner, *supra* note 121, at 88-89 (describing how the ICTY Statute obligates all U.N. Member States to comply with orders and requests emanating from the ICTY with regard to crimes committed in the former Yugoslavia).

CONCLUSION

In the end, it may well be that the Prosecutor's application serves a more political rather than judicial purpose.²¹⁸ The practicalities of arresting Al-Bashir, and the repercussions that could arise from a power vacuum caused by his sudden imprisonment, may prove to be insurmountable obstacles to the execution of the ICC's warrant.²¹⁹ These realities, however, do not excuse the international community of its solemn obligation to "establish conditions under which justice . . . can be maintained."²²⁰ By creating the ICC and then by referring the violence in Darfur to that Court's jurisdiction, the international community dealt the ICC a hand of cards to play. In turn, the Court placed its chips on the table. All that now remains to be seen is how the other players will react.

218. *See* *Bamu*, *supra* note 153, at 2 (theorizing that the ICC Prosecutor may have requested the arrest warrant in order to pressure Al-Bashir into peace negotiations in Darfur).

219. *See id.* (asserting that Al-Bashir's immunities most likely will prevent his arrest and surrender to the ICC).

220. U.N. Charter pmb1.