Immunity and Impunity: Personal Immunities and the International Criminal Court

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There are perhaps few greater challenges to the enduring legitimacy and efficacy of the International Criminal Court (ICC) than the issue of personal immunities. While it is relatively settled law that personal immunity of sitting Heads of State cannot serve as a bar to prosecution by international courts, the question of whether personal immunity can prevent national jurisdictions from enforcing arrest warrants issued by the ICC has divided the international community. The stakes in this dispute are not merely academic: since the ICC lacks an enforcement mechanism of its own, and must instead rely on State cooperation for the arrest and surrender of accused persons, the Court stands to be hindered in its ability to bring those accused of international crimes to justice and hence to deter

the commission of these crimes in the future.

This debate played out on the international stage following the ICC's issuance of two arrest warrants for Omar Al Bashir—Sudan's then-sitting Head of State—for crimes committed in Darfur (here and here). In flagrant disregard of his possible arrest, Al Bashir travelled extensively in the years afterward, including visits to a number of States Parties to the Rome Statute, such as Jordan and Malawi. Yet, despite having had ample opportunity to do so, not one of these States arrested Al Bashir and instead sought to justify their inaction (at least in part) on the basis that Al Bashir had been immune from arrest by virtue of being a sitting Head of State.

The question at the heart of the present work is whether these States were correct in law. Can an incumbent Head of State of a non-State Party (such as Al Bashir) assert immunity against arrest by a State cooperating with the ICC? In other words, would a State cooperating with the Court violate international law by arresting a sitting Head of State of a non-State Party?

I contend that the answer to both of these questions is yes. An incumbent Head of State of a non-State Party is immune from arrest and surrender by a State executing a warrant issued by the ICC by virtue of their personal immunity. Importantly, however, this holds true only insofar as the United Nations Security Council (UNSC) has not previously set aside the individual's personal immunity through its power under Chapter VII of the UN Charter. As we will see, UNSC Resolution 1593 had precisely this effect on Al Bashir's immunity. States Parties to the Rome Statute were therefore obligated to arrest Al Bashir while he was in their power.

Scholars have termed this line of reasoning the 'Security Council approach' and frequently contrast it with the 'customary law approach' (Harmen van der Wilt, "Immunities and the International Criminal Court" at 601). The latter, which concludes that personal immunities are void before States cooperating with international courts by virtue of a rule of customary international law, was recently affirmed by the ICC in *Jordan* (para 114; see also James Hendry's article here). Nonetheless, the 'Security Council approach' is to be preferred: as I will argue, it does not rely on a contentious rule of customary law and better accords with the principles of treaty interpretation.

Personal Immunity and its Applicability under International Law

There are two types of immunity held by individuals under customary international law: (a) personal immunity and (b) functional immunity. Both serve as procedural bars to jurisdiction rather than defences (Currie & Rikhof ("C&R"), *International and Transnational Criminal Law* at 642).

Personal immunity (or immunity *ratione personae*) attaches to a select number of high offices: specifically, Heads of State, Heads of Government, and Ministers for Foreign Affairs (C&R at 647-648). Personal immunity is absolute, meaning it covers all acts undertaken in an official or private capacity committed before and during office (C&R at 647-648)—this includes the alleged commission

of international crimes (*Arrest Warrant* at para 58). Personal immunity's protection ceases once an individual leaves office (C&R at 648).

Functional immunity (or immunity *ratione materiae*), by contrast, attaches to a limited class of acts: namely, those performed in an official capacity of behalf of the State (C&R at 652). However, it is now widely accepted that functional immunity is *not available* for international crimes, including crimes against humanity, genocide and war crimes (C&R at 652). Al Bashir would thus have been unable to invoke functional immunity before the ICC and cooperating States.

Personal immunity will apply to an incumbent Head of State unless one of the following conditions is met: (i) the State represented by the Head of State waives the individual's personal immunity; (ii) personal immunity is ousted by a competing rule of conventional international law; or (iii) personal immunity is ousted by a competing rule of customary international law.

In Al Bashir's case, Sudan did not waive his personal immunity. Indeed, such waivers have proven to be exceedingly rare. Therefore, here, as in the majority of cases, the applicability of personal immunity will be determined by the final two conditions.

II. Discussion

Under Article 27 of the Rome Statute, no accused can claim personal or functional immunity before the ICC. Article 27(2) states: "Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person." That is, by becoming parties to the Rome Statute, and hence to the application of Article 27(2), States Parties have effectively waived the personal immunities of their officials before the Court (C&R at 670). Further, through the joint operation of Articles 27, 86, 89 and 120 of the Statute, States Parties also appear to have waived their right to invoke personal immunity against other States cooperating with the court (C&R at 671).

Sudan is not a party to the Rome Statute and is therefore not bound by Article 27(2). It is a fundamental principle of the international law of treaties that they cannot impose obligations on 'third states' (*Vienna Convention* at Article 34). Simply put, the Rome Statute cannot affect the availability of a Head of State's personal immunity if they hold office in a non-State Party.

Yet, there are two grounds remaining which could potentially strip Al Bashir of his immunity before domestic jurisdictions cooperating with the ICC: (i) the 'customary law approach;' and (ii) the 'Security Council approach.' These will be discussed in turn.

(i) Customary Law Approach

As noted above, the 'customary law approach' proceeds from the purported existence of a rule of

customary international law which renders personal immunities inapplicable before international courts. In Arrest Warrant, the ICJ noted in obiter that immunities under international law do not represent a bar to criminal jurisdiction before “certain international courts” (para 61). In *Malawi*, the ICC held that this rule reflects customary international law (para 36)—a finding later upheld by the Appeals Chamber in *Jordan* (para 113).

Evidencing the rule’s customary nature, the ICC in *Malawi* cited the repeated rejection of Head of State immunity before international courts dating back to World War I (para 23), the increase in Head of State prosecutions by international courts (para 39), the Nuremberg Charter and Nuremberg Principles (para 28), and the decisions of international courts including the ICTY, ICTR, and the Special Court for Sierra Leone (paras 29-33).

The customary law approach concludes that, because Al Bashir's personal immunity was void before the ICC, his immunity must likewise have been void before national jurisdictions cooperating with the Court (*Malawi* at para 43). States Parties were therefore not only able, but were in fact required, to arrest Al Bashir (*Malawi* at para 47).

There are two problems with this approach, however. First, a number of scholars have cast doubt on the claim that there is sufficient state practice and *opinio juris* to support the existence of the customary rule. As Robert Currie and Joseph Rikhof note, there are alternative explanations for the inapplicability of personal immunities in much of the jurisprudence cited by the ICC (C&R at 677). For instance, the unavailability of personal immunities before the *ad hoc* tribunals could be explained solely on the basis of the UNSC’s power under Chapter VII to set aside immunities (C&R at 664). It is thus at the very least controversial whether the customary law rule exists at all (C&R at 649-650).

Yet, even accepting that the rule exists and applies to Al Bashir, the approach faces a second problem. As Paola Gaeta has argued, an international court’s vertical jurisdiction over an accused does not automatically entail horizontal jurisdiction between national jurisdictions and the accused (Paola Gaeta, “Does President Al Bashir Enjoy Immunity from Arrest?” at 325). The Appeals Chamber in *Jordan* sought to justify this inference on the basis that the purpose of Article 27(2) (namely, to ensure that immunities do not stand in the way of the Court’s jurisdiction) would be substantially defeated if States were permitted to invoke Head of State immunity before domestic jurisdictions cooperating with the Court (para 122). That is, because the ICC would be frustrated in enforcing its jurisdiction against incumbent leaders of non-State Parties (when they visit States Parties), the personal immunity of these leaders must be interpreted as void through Article 27(2).

This reasoning is unconvincing, however. First, there is nothing inconsistent about a treaty-based Court having gaps in its enforcement regime. The mere existence of such gaps is not a ‘problem’ in need of an interpretive solution, nor an occasion to ‘perfect’ an imperfect treaty.

Second, the Court's interpretation of Article 27(2) has the effect of waiving personal immunities on behalf of all States—not just States Parties. Such an interpretation is patently at odds with the principle that treaties cannot affect the legal rights of 'third states.'

Third, in its attempt to prevent Article 27(2) from being rendered "potentially meaningless," the Court has deprived Article 98(1) of any meaning. Under Article 98(1), the ICC is barred from requesting the arrest and surrender of individuals entitled to personal immunity where this would require the requested State to act inconsistently with its obligations under customary intentional law. But seeing as the Appeals Chamber's interpretation of Article 27(2) would void personal immunities for *all States* (and not simply for States Parties), Article 98(1) could never actually apply—there would be no immunity to invoke under the article.

Following the principle that treaty provisions ought to be interpreted so as to give them meaningful effect (Dapo Akande, "International Law Immunities and the International Criminal Court" at 409), Article 98(1) must instead be read as applying only to non-State Parties (Akande, "International Law" at 424). As I have argued, Article 27(2) cannot waive personal immunities of *non-State Parties* at the horizontal level—i.e. before States executing ICC arrest warrants—without violating basic principles of international treaty law (Akande, "The Legal Nature of Security Council Referrals to the ICC and its Impact on Al Bashir's Immunities" at 339). If Article 98(1) is to have any effect, therefore, it must be to preserve immunities of non-State Parties at the horizontal level.

As a result, States Parties would be justified in refusing to arrest an incumbent Head of State of a non-State Party pursuant to Article 98(1). The customary law approach thus fails to impose a legal obligation on Parties to the Rome Statute to cooperate in the arrest of sitting Heads of State of non-State Parties, such as Al Bashir.

(ii) Security Council Approach

The 'Security Council approach' proceeds from the UNSC's power under Chapter VII to set aside personal immunities of sitting Heads of State—including before States Parties acting on behalf of the ICC. According to proponents of this view, UNSC Resolution 1593's requirement that Sudan "cooperate fully with and provide any necessary assistance to the [ICC]" had the effect of setting aside the personal immunity of Sudanese officials (Akande, "Legal Nature" at 347). Since personal immunity was not available to be invoked under Article 98(1), it follows that States Parties were required to arrest Al Bashir.

As Dapo Akande has argued, by intending the ICC to take action without providing a procedure by which the investigation and prosecution was to take place, "the Security Council must be taken as expecting the Statute to be the governing law" (Akande, "Legal Nature" at 340). Indeed, the ICC can only act in accordance with its constitutive statute pursuant to Article 1. Thus, by intending the ICC to

take action, Resolution 1593 “[put] Sudan in an analogous position to a party to the Statute” (Akande, “Legal Nature” at 342).

Since the Rome Statute applied to Sudan, it follows that Article 27(2) barred Sudan from invoking personal immunity against States cooperating with the ICC. As noted by the Court in DRC, raising immunity in this context would render the UNSC’s demand that Sudan “cooperate fully” effectively meaningless (para 29). Further, the combined effect of Articles 27, 86, 89 and 120 likely waived Sudan’s right to invoke Head of State immunity against States acting on behalf of the ICC.

States Parties were therefore unable to rely on Article 98(1) to refuse to arrest Al Bashir. Article 98(1) only applies to non-State Parties, yet Resolution 1593 had effectively placed Sudan in the same position as a State Party. States Parties thus owed no competing obligations to Sudan to respect the immunity of its officials. Simply put, Article 98(1) did not apply to Sudan, and as such, States Parties could not rely on it to justify their failure to execute the ICC’s requests.

III. Conclusion

As I have argued, an incumbent Head of State of a non-State Party is immune from arrest by States cooperating with the ICC provided that the UNSC has not ousted the State’s right to invoke personal immunity through its powers under Chapter VII.

This conclusion may be worrisome to some scholars and States: after all, Article 98(1) can serve as a potential source of impunity before the ICC. Yet it is nevertheless the case that Article 98(1) is a limit built into the Rome Statute; States consented to its inclusion. Article 98(1) must therefore be given meaningful effect even though this may lead to unjust results in some cases. It is ultimately for States rather than Courts to decide the fate of this potential impediment to international justice.

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