A LOGICAL STEP: MAKING A CASE FOR AN ICJ ADVISORY OPINION ON HEAD OF STATE IMMUNITY

Table of Contents

I. INTRODUCTION

As a result of Russia's unlawful invasion of Ukraine, the controversial legal doctrine of head of state immunity has been thrust to the forefront of conversation once again.[1] There is near-universal consensus in the legal community that, at least principally, Russian President Vladimir Putin and his leadership corps should be vulnerable to an international court's jurisdiction for the unlawful invasion of Ukraine and subsequent alleged atrocity crimes against Ukrainian soldiers, civilians, and children.[2] But the jurisdictional limits of courts—or tribunals—to lawfully pursue such prosecutions are up for debate. The boundaries of head of state immunity have never been fully established—or at least fully tested—against a sitting head of state, let alone a sitting head of state of a permanent member of the Security Council.[3] Although many scholars argue that sitting heads of state should hardly have any immunity protections if accused of atrocity crimes, many scholars assert the opposite—that head of state immunity remains a valid defense but has its limits.[4] Under either

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[1] *See* Carrie McDougall, *The Imperative of Prosecuting Crimes of Aggression Committed Against Ukraine*, 28 J. CONFLICT & SEC. L. 203, 203, 214–18, 220–22 (2023) (acknowledging the importance of holding Putin accountable for his invasion of Ukraine but recognizing the roadblock of immunity for Putin as a current head of state); Dilara Karmen Yaman, *Heads of State Before the ICC: On the Arrest Warrant Against Putin and Its Consequences*, VÖLKERRECHTSBLOG (Apr. 5, 2023), https://voelkerrechtsblog.org/heads-of-states-before-the-icc/ (explaining how head of state immunity applies to Putin's invasion of Ukraine); *see also* Miguel Lemos, *The Law of Immunity and the Prosecution of the Head of State of the Russian Federation for International Crimes in the War Against Ukraine*, EJIL: TALK! (Jan. 16, 2023), https://www.ejiltalk.org/the-law-of-immunity-and-the-prosecution-of-the-head-of-state-of-the-russian-federation-for-international-crimes-in-the-war-against-ukraine/.

[2] *See World Reaction to the Invasion of Ukraine*, WILSON CTR. (Feb. 24, 2022), https://www.wilsoncenter.org/article/world-reaction-invasion-ukraine (listing States' responses to Russia's invasion of Ukraine); *How to Hold Russia Accountable for War Crimes in Ukraine*, OPEN SOC'Y FOUNDS., https://www.opensocietyfoundations.org/explainers/how-to-hold-russia-accountable-for-war-crimes-in-ukraine (last updated July 2022); Joanna York, *"Too High a Price": Ukraine's War Widows Forge a Path Towards an Uncertain Future*, FRANCE 24 (Dec. 19, 2023), https://www.france24.com/en/europe/20231219-too-high-a-price-ukraine-s-war-widows-forge-a-path-towards-an-uncertain-future (reporting death tolls of approximately 10,000 civilians and 25,000–30,000 soldiers).

[3] *See* Federica D'Alessandra, *Pursuing Accountability for the Crime of Aggression Against Ukraine*, 4 GROUPE D'ÉTUDES GÉOPOLITIQUES 54, 59, 61 (2024) (acknowledging that no sitting Head of State has been held accountable for aggression crimes due to immunity); *see also* Vassilis P. Tzevelekos, *Immunities Barring the Prosecution of the Crime of Aggression Against Ukraine: The Contribution of the ECtHR Case Law*, 4 EUR. CONVENTION ON HUM. RTS. L. REV. 105, 107 (2023) (explaining that prosecuting Russian leadership would be difficult due to immunity grounds and its veto power as a permanent member).

[4] *Compare Immunity = Impunity*, J. COAL. FOR ICC, no. 46, 2014–2015, at 1, 4–6 ("No immunity for heads of state or high-ranking officials is fundamental to the object and purpose of the Rome Statute (RS) of the International Criminal Court (ICC): to bring to

school of thought, inferences are drawn from the International Court of Justice (ICJ) opinion in *Congo v. Belgium*, better known as the *Arrest Warrant* case.[5] There, the ICJ established that head of state immunity unequivocally prohibits national—or domestic—courts from exercising jurisdiction over a foreign sitting head of state.[6] But the ICJ continued on to say that such immunity is not absolute, stating that head of state immunity cannot be asserted when facing prosecution from an "international court."[7] What remains unclear, however, is what makes a court "international" *enough* to side-step an assertion of head of state immunity.[8] This ambiguity, in combination with a watershed arrest warrant issued by the International Criminal Court (ICC)[9] is what inspired the drafting of this Article.

The ICC's issuance of an arrest warrant against Vladimir Putin has given the issue of jurisdiction and head of state immunity new life.[10] As a result, the jurisdictional question this Article seeks to answer is, what makes a court "international" *enough* for its jurisdiction to overrule the

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justice those most responsible for war crimes, crimes against humanity and genocide."), *with* Dapo Akande, *Head of State Immunity is a Part of State Immunity: A Response to Jens Iverson*, BLOG OF THE EUR. J. INT'L L.: EJIL: TALK! (Feb. 27, 2012), https://www.ejiltalk.org/head-of-state-immunity-is-a-part-of-state-immunity-a-response-to-jens-iverson/ (defending head of state immunity for the "benefit of the State," because "grant[ing] immunity to the State without providing for some immunity to State officials would completely defeat the immunity of the State itself.").

[5] Case Concerning the Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), Judgment, 2002 I.C.J. 121 (Feb. 14) [hereinafter Arrest Warrant case]; *see* Antonio Cassese, *When May Senior State Officials Be Tried for International Crimes? Some Comments on the* Congo v. Belgium *Case*, 13 EURO. J. INT'L L. 853, 855, 867–68, 870–71, 874 (2002) (listing inferences about immunities drawn from the Arrest Warrant case).

[6] *Arrest Warrant* case ¶ 58; *see also* Steffen Wirth, *Immunity for Core Crimes? The ICJ's Judgment in the* Congo v. Belgium *Case*, 13 EURO. J. INT'L L. 877, 877–78 (2002).

[7] *Arrest Warrant* case ¶ 61.

[8] Chile Eboe-Osuji, *The Absolute Clarity of International Legal Practice's Rejection of Immunity Before International Criminal Courts*, JUST SEC. (Dec. 8, 2022), https://www.justsecurity.org/84416/the-absolute-clarity-of-international…l-practices-rejection-of-immunity-before-international-criminal-courts/ ("[I]t must also be observed that there is a real significance in customary international law's consistent recognition of certain conduct as criminal, although that recognition does not entail automatic jurisdiction upon every tribunal characterized as 'international.'").

[9] Mike Corder & Raf Casert, *International Court Issues War Crimes Warrant for Putin*, AP NEWS (Mar. 17, 2023, 9:35 PM), https://apnews.com/article/icc-putin-war-crimes-ukraine-9857eb68d827340394960eccf0589253.

[10] *See* Peter Beaumont, *What Does the ICC Arrest Warrant for Vladimir Putin Mean in Reality?*, THE GUARDIAN (Mar. 17, 2023, 2:08 PM) ("The [ICC] has issued arrest warrants for the Russian president, Vladimir Putin, and Russia's commission for children's rights, Maria Alekseyevna Lvova-Belova, in relation to the forced deportation of children from Ukraine to Russia where many have been adopted by Russian families. Forced deportation of populations is recognized as a crime under the Rome Statute that established the court."). While the ICC arrest warrant included Lvova-Belova as well as Putin, this Article focuses solely on Heads of State and case precedent pertaining to Head of State prosecutions.

doctrine of head of state immunity? While it is clear customary international law applies to all states,[11] it is unclear what the customary international law is as it pertains to immunity.[12] Accordingly, this Article suggests that the only way that the customary international law of immunity can be established is by an ICJ advisory opinion.[13]

This Article argues that a logical conclusion can be drawn as to what qualifies as an "international court" by using the *Arrest Warrant* case and linking it with the precedent of the Nuremberg Tribunals and cases concerning heads of state in subsequent decades—such as Augusto Pinochet (Chile), [14] Slobodan Milosevic (Serbia), [15] Charles Taylor (Liberia), [16] and Omar al-Bashir (Sudan). [17] Reviewing the totality of precedent dating back to Nuremberg, it is reasonable to conclude that UN-created tribunals or the ICC—in select circumstances[18]—are the only truly "international courts" whose jurisdiction *may* overrule an assertion of immunity by a sitting head of state.[19] To that end, there are a pair of barriers which may prevent a UN tribunal or the ICC asserting

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[11] *See* Gennady M. Danilenko, *The Theory of International Customary Law*, 31 GER. Y.B. INT'L L. 9, 13, 46 (1988) (describing international customary law's creation and its application to States).

[12] *See* Michael Ramsden & Isaac Yeung, *Head of State Immunity and the Rome Statute: A Critique of the PTC's Malawi and DRC Decisions*, 16 INT'L CRIM. L. REV. 703, 704–05 (2016) ("The applicability of immunities before the ICC remain unresolved and highly contentious. . . . [J]udicial dicta on point from international courts such as the ICJ in *Arrest Warrant*, are by no means unequivocal.").

[13] Unfortunately, as clever as this author thinks he is, this is not the first time this suggestion has been made. In 2020, Adil Ahmad Haque addressed the difficulties of establishing customary international law of immunity and argued that asking the ICJ for an advisory opinion on arrest warrants for heads of state was risky. *See* Adil Ahmad Haque, *Head of State Immunity is Too Important for the International Court of Justice*, JUST SEC. (Feb. 24, 2020), https://www.justsecurity.org/68801/head-of-state-immunity-is-too-important-for-the-international-court-of-justice/.

[14] *See infra* note 45 and accompanying text.

[15] *See infra* note 123 and accompanying text.

[16] *See infra* note 146 and accompanying text.

[17] *See infra* notes 185, 188 and accompanying text.

[18] As a general matter, the ICC's jurisdiction can supersede head of state immunity if the Head of State has ratified the Rome Statute, or if the ICC has been granted jurisdiction by referral from the Security Council. Rome Statute of the International Criminal Court arts. 12 ¶ 2, 13–15, 27, Jul. 17, 1998, 2187 U.N.T.S. 38544 [hereinafter Rome Statute]. For a deeper analysis on how the ICC's jurisdiction cooperates with head of state immunity, see *infra* Part IV**Error! Reference source not found.**.

[19] Astrid Reisinger Coracini & Jennifer Trahan, *The Case for Creating a Special Tribunal to Prosecute the Crime of Aggression Committed Against Ukraine (Part VI): On the Non-Applicability of Personal Immunities*, JUST SEC. (Nov. 8, 2022), https://www.justsecurity.org/84017/the-case-for-creating-a-special-trib…ainst-ukraine-part-vi-on-the-non-applicability-of-personal-immunities/ ("As long as the individual remains in office, only an international criminal court or tribunal may prosecute a head of state, head of government, or minister for foreign affairs for crimes under customary international law.").

jurisdiction: Security Council gridlock,[20] and the sovereignty of States not party to the Rome Statute.[21] Competing theories exist regarding the modern role of head of state immunity. An ICJ advisory opinion, while not binding, is necessary to affirm a *jus cogens*[22] norm which would render head of state immunity ineffective if jurisdiction is asserted by a recognized "international court."[23]

The author of this Article is not unmindful of the utopian hope that head of state immunity should be declared extinct entirely when a head of state is charged with the commission of atrocity crimes. But to that end, precedent is scant, if not absent entirely,[24] and declaration of a dramatic new norm—while not impossible—could create undesirable and unforeseeable negative repercussions in the international legal and diplomatic communities.[25] This Article suggests that by reviewing precedent, it is logical to recognize that head of state immunity can still effectively be asserted, but the ICJ has an opportunity to establish where the limit of such immunity falls and when a court is international enough to have standing over a sitting head of state.

To support this, Part II begins with a review, as most articles do, of the types of immunities that heads of state can assert—functional and personal—and further, explains from a practical perspective why head of state immunity matters. Part III provides a historical recap of the trials at Nuremberg. As examined through a head of state lens, Nuremberg demonstrates that "'international courts' act on behalf of the international

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[20] *See* Gwendolyn Whidden, *The Role of the United Nations in Atrocity Response: Limited, But Not Obsolete*, JUST SEC. (Jan. 5, 2024), https://www.justsecurity.org/90812/the-role-of-the-united-nations-in-atrocity-response-limited-but-not-obsolete/.

[21] *See, e.g.*, Yaman, *supra* note 1 (noting that non-members of the Rome Statute, such as Russia, are not bound by its rules and obligations).

[22] *See* Int'l L. Comm'n, Rep. on the Work of Its Seventy-First Session, U.N. Doc. A/74/10, at 142–43 (2019) ("A peremptory norm of general international law (*jus cogens*) is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.").

[23] *See id.* at 143, 172 ¶ 4, 173 ¶ 7.

[24] *See* Guénaël Mettraux et al., *Heads of State Immunities, International Crimes and President Bashir's Visit to South Africa*, 18 INT'L CRIM. L. REV. 577, 582 (2018) (referencing the limited number and precedential scope of head-of-state immunity cases).

[25] *See* Christopher D. Totten, *Head-of-State and Foreign Official Immunity in the United States After* Samantar*: A Suggested Approach*, 34 FORDHAM INT'L L.J. 332, 332 (2011) ("A concept of immunity for foreign heads of state has existed since ancient times."); Nadia Banteka, *No Longer Immune? How Network Theory Decodes Normative Shifts in Personal Immunity for Heads of State*, 59 VA. J. INT'L L. 391, 392–94 (2019) ("[I]mmunity seeks to protect freedom of movement and negotiations among state and their agents, recognizing their need to perform those functions without impediment by other states.").

community as a whole,"[26] and in such circumstances, immunities are not absolute.[27] Part IV jumps forward to the UN *ad hoc* tribunal—the International Criminal Tribunal for the former Yugoslavia (ICTY), the UN-created hybrid tribunal—the Special Court for Sierra Leone (SCSL), and the multilateral treaty based court, the ICC. The effective assertions of jurisdiction over heads of state Slobodan Milosevic at the ICTY, Charles Taylor at the SCSL, and Omar al-Bashir at the ICC demonstrate not only the importance of UN-backed tribunals in upholding the UN's mission but also provide precedent of "international court's" jurisdictional standing over sitting heads of state.[28] Part V addresses jurisdictional standing limitations by reviewing the ICJ opinion in the *Arrest Warrant* case in 2002 and piecing the opinion together to cooperation with the precedent in the aforementioned cases. Part VI draws from the aforementioned precedent and determines that when considered in its totality, a court is "international"—and thus head of state immunity cannot apply—when jurisdiction is asserted by a UN-created tribunal or if the Security Council has granted the ICC jurisdiction over a non-ICC member state.[29] In that, there are competing academic perspectives, each of which must be considered. This Part serves as a call to action to the ICJ for an advisory opinion to establish sound guidelines on head of state immunity as it pertains to the jurisdiction of "international courts."

The days of boundless head of state immunity are limited. And an ICJ advisory opinion—while not binding—can straightforwardly identify that limit. While law abiding heads of state do not need a *jus cogens* norm to keep them from committing atrocity crimes, and offenders will not be stopped from pursuing their interests because of an advisory piece of paper,[30] the fact remains that the Russian invasion of Ukraine and

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[26] Yunqing Liu, *Do States Party to the International Criminal Court Statute Have the Obligation to Arrest Vladimir Putin?*, BLOG EUR. J. INT'L L.: EJIL: TALK! (Apr. 14, 2023), https://www.ejiltalk.org/do-states-party-to-international-criminal-court-statute-have-the-obligation-to-arrest-vladimir-putin/.

[27] *Id.*; *see* Christian Tomuschat, *The Legacy of Nuremberg*, 4 J. INT'L CRIM. JUST. 830, 838–40 (2006) ("Nuremberg did away with the protective umbrella that state sovereignty provided perpetrators. The Statute of the [International Military Tribunal] did not allow political leaders to shield behind their official functions any longer.").

[28] *See* Eboe-Osuji, *supra* note 8.

[29] If the Head of State's own State has ratified the Rome Statute, then there is no need for Security Council referral. By ratification, that State, and in turn, the Head of State, has already accepted the ICC's jurisdiction. *See* Rome Statute, *supra* note 18, arts. 12, 27(2).

[30] For an analogous argument concerning the laws of war, see OONA A. HATHAWAY & SCOTT J. SHAPIRO, THE INTERNATIONALISTS: HOW A RADICAL PLAN TO OUTLAW WAR REMADE THE WORLD 54 (2017) ("No rule can stop someone who is intent on breaking it, but it can make the offender pay dearly nonetheless."). This was evidenced by the fact that "[o]utlawing war did not immediately stop interstate war, as the Second World War makes all too clear. But it helped set in motion a series of events that would eventually lead to an unprecedented period of peace between states." *Id.* at 334.

subsequent ICC arrest warrants have revealed damaging grey area in international law. Before the next blatant breach of international law begins—as already seen in Syria, Ukraine, Sudan, and elsewhere—it is important to revise the traditional and inconsistent legal framework surrounding head of state immunity.

II. THE DEVELOPMENT OF HEAD OF STATE IMMUNITY

The concept of head of state immunity has evolved over time through diplomatic practices, agreements, and legal precedents.[31] "A defense of Head of State immunity is a claim of immunity from jurisdiction of a particular state" and can typically be made by heads of state, foreign ministers and select high-ranking officials.[32] While the exact origin of head of state immunity is difficult to pinpoint, the principle can be traced back to the ancient civilizations and practices of granting special protection and privileges to rulers.[33] As time passed, the concept of head of state immunity gained recognition and codification through various international agreements and establishment of norms.[34] A good starting point to the review of the current status of head of state immunity is to define the two relevant types of immunities: functional immunity[35] and personal immunity,[36] and the reason behind them. In breaking down the principle of head of state immunity, it is also necessary to recognize the

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[31] *See* Eboe-Osuji, *supra* note 8 (presenting Head of State precedent in international law); Paul J. Toner, *Competing Concepts of Immunity: The (R)evolution of the Head of State Immunity Defense*, 108 DICK. L. REV. 899, 901–02 (2004) ("Head of State immunity is a derivative of sovereign immunity and diplomatic immunity.").

[32] *See* Toner, *supra* note 31, at 901.

[33] *See, e.g.*, Jerrold L. Malloy, *Resolving the Confusion Over Head of State Immunity: The Defined Rights of Kings*, 86 COLUM. L. REV. 169, 170 (1986) ("Head of state immunity has its origins in sovereign immunity, dating from a time where the state and its ruler were considered one. Questions involving immunity for heads of state and immunity for states were formerly treated alike."); Totten, *supra* note 25, at 336 ("In the United States, the concept of head-of-state immunity and foreign sovereign immunity for states can be traced back to the 1812 US Supreme Court Case of *The Schooner Exchange*.").

[34] *See* Malloy, *supra* note 33, at 177–78 ("[B]oth the United Kingdom and Canada have enacted sovereign immunity statutes defining the head of state as the state. French courts, in contrast, grant immunity to heads of state based on their status as government officials, an immunity similar to diplomatic immunity. . . . The Soviet Union and most East European socialist states grant a broad degree of immunity to all state officials, including heads of state. . . . Thus, the Soviet Union has consistently claimed absolute immunity in foreign courts."). Of note, this source was authored in 1986, prior to the breakup of the Soviet Union, but it nevertheless demonstrates the standards and expectations of head of state immunity on a global scale.

[35] Generally, functional immunity attaches to sitting and former heads of states, and only applies to activities conducted during the role of head of state. Cassese, *supra* note 5, at 862–64; *see infra* Part II(A).

[36] Personal immunity typically extends to cover all activities of an individual while sitting as a head of state but ceases to extend to that individual after they have left office. *See infra* Part II(A); *see also* Cassese, *supra* note 5, at 862–64.

bigger principle of international law that it upholds: State sovereignty—the legal concept that recognizes the independence and equality of States in the international community.[37] In cooperation with sovereignty, typically, Heads of State are immune from the jurisdiction of foreign courts.[38] The ultimate goal of immunity and sovereignty is to strike a balance between effective performance of a Head of State's duties and accountability for any potential wrongdoing.[39] This Part examines the concepts of functional immunity and personal immunity and briefly reviews how courts' jurisdictions have superseded the defense of immunity.

A. Types of Immunities

As mentioned above, heads of state enjoy two different sets of jurisdictional immunities.[40] The first, functional immunity, applies to heads of state and other high-ranking government officials while they are performing their official functions and duties on behalf of the state.[41] Foundationally, functional immunity exists to ensure that heads of state can effectively perform their official duties without the fear of legal actions or interference from other states.[42] And at its core, functional immunity

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[37] *See* Montevideo Convention on the Rights and Duties of States, art. 3, Dec. 26, 1934, 165 L.N.T.S. 19 [hereinafter Montevideo Convention] ("The political existence of the state is independent of recognition by the other states. Even before recognition the state has the right to defend its integrity and independence, to provide for its conservation and prosperity, and consequently to organize itself as it sees fit, to legislate upon its interests, administer its services, and to define the jurisdiction and competence of its courts. The exercise of these rights has no other limitation than the exercise of the rights of other states according to international law.").

[38] Lemos, *supra* note 1 ("[T]he predominant practice and *opinion* of states, and the virtually unanimous view of courts and scholars, is that heads of state *undoubtedly* enjoy an absolute immunity from foreign jurisdiction and inviolability.").

[39] *See* Michael A. Tunks, *Diplomats or Defendants? Defining the Future of Head of State Immunity*, 52 DUKE L.J. 651, 658–59, 677, 682 (2002) ("The concept of restrictive sovereign immunity has accepted the notion that seeking accountability for international crimes and other unofficial acts does not undermine the principles of sovereign equality and independence . . . . [H]ead-of-state immunity for international crimes is now justifiable primarily to protect world leaders' ability to effectively carry out their diplomatic functions.").

[40] Cassese, *supra* note 5, at 862–64.

[41] *Id.* at 862 (referring to immunities that apply to state officials with respect to acts they perform in their official capacity).

[42] *See* Totten, *supra* note 25, at 335 ("For example, potentially strong policy reasons related to the maintenance of peaceful foreign relations among nations, and equally potent conceptual reasons related to the sovereignty of individual states, appear to support US court's deferring to ongoing or pending non-U.S. national trials of heads of state and certain foreign government officials, particularly when these trials have a clear connection to the foreign country and are legitimate."); Dapo Akande & Sangeeta Shah, *Immunities of State Officials, International Crimes, and Foreign Domestic Courts*, 21 EURO. J. INT'L L. 815, 825–

recognizes that heads of state require a certain level of protection to carry out their responsibilities, engage in diplomatic activities, and represent their countries on the international stage.[43] While functional immunity provides important protections to heads of state, it is not absolute and is subject to limitations and exceptions.[44]

The limits of what constitutes official functions of a head of state was addressed in the House of Lords' indictment of former Chilean President Augusto Pinochet in 1999.[45] During Pinochet's rule of Chile, numerous human rights abuses were committed under his supervision or direction, including illegal instances of torture.[46] After relinquishing his role as President,[47] British authorities arrested Pinochet while he was in London.[48] The arrest was prompted by a warrant issued by a Spanish judge seeking Pinochet's extradition to Spain, where he was wanted for charges of torture.[49] In review of the Pinochet arrest warrant and subsequent House of Lords opinion on the issue, scholars determined that Pinochet lacked immunity from the jurisdiction of British and Spanish courts—or any other court asserting universal jurisdiction—over charges

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26, 831 (2011) ("[T]he very purpose of the rule according immunity is to prevent national courts from determining the legality or otherwise of certain acts of foreign states.").

[43] The exercise of official powers is one of the main elements in identifying who is entitled to functional immunity. *See* Gian Maria Farnelli, *A Controversial Dialogue Between International and Domestic Courts on Functional Immunity*, 14 L. & PRAC. INT'L CTS. & TRIBUNALS 255, 260 (2015) ("[F]unctional immunity . . . is a matter of attribution of official conduct, which is attributable to the State itself.").

[44] *Id.* at 267–68 (identifying exceptions to functional immunity).

[45] R v. Bow St. Metro Stipendiary Magistrate & Others, *Ex parte* Pinochet Ugarte (No. 3) [2000], 1 AC (HL) 147 (appeal taken from Eng.) [hereinafter *Ex parte* Pinochet]; *see* Rebecca Zaman, *Playing the Ace? Jus Cogens Crimes and Functional Immunity in National Courts*, 17 AUSTL. INT'L L.J. 53, 53–54 (2010).

[46] *See Ex parte* Pinochet, 1 AC (HL) at 147. Following the Chilean military coup in 1973 that gave rise to Pinochet's reign, the "Caravan of Death" was established under his direction. *See Chile Convicts Ex-Army Chief for Role in Caravan of Death Murders*, AL JAZEERA (Nov. 10, 2018), https://www.aljazeera.com/news/2018/11/10/chile-convicts-ex-army-chief-for-role-in-caravan-of-death-murders. The Caravan of Death traveled across the country executing and torturing political prisoners. *Id.* Further, Pinochet established numerous covert detention centers where beatings, electric shocks, sexual abuse, and other forms of torture took place. *Life Under Pinochet: "They Were Taking Turns to Electrocute Us One After the Other,"* AMNESTY INT'L (Sept. 11, 2013), https://www.amnesty.org/en/latest/news/2013/09/life-under-pinochet-they-were-taking-turns-electrocute-us-one-after-other/.

[47] Tom Gjelten, *Augusto Pinochet: Villain to Some, Hero to Others*, NPR (Dec. 10, 2006, 3:39 PM), https://www.npr.org/templates/story/story.php?storyId=6606013 ("Not until 1988 did Pinochet put his rule to any democratic test, and even then he did so reluctantly. He promised years earlier to let the Chilean people decide in a [vote] whether he should continue as president or resign and allow free elections. . . . Pinochet lost the [vote]; 18 months later, he was replaced by an elected president.").

[48] David Connett et al., *Pinochet Arrested in London*, THE GUARDIAN (Oct. 17, 1998, 8:29 PM), https://www.theguardian.com/world/1998/oct/18/pinochet.chile.

[49] *Id.*

surrounding torture because Chile had ratified the International Convention Against Torture and other Cruel, Inhuman, or Degrading Treatment or Punishment (the Torture Convention).[50] Not only had Chile ratified the Torture Convention, but the House of Lords also held that torture could not possibly be an official act of a head of state.[51] Accordingly, Pinochet's assertion of functional immunity was deemed invalid, serving as one example—of many as we shall see—that head of state immunity, while an available defense, is not absolute.[52] In the end, Pinochet never had his day in court, as he was allowed to return to Chile in 2000 amid health concerns.[53]

The Pinochet situation is not squarely on point with the object of this Article as the arrest warrant was prior to the precedent of the *Arrest Warrant* case, and Pinochet was a former head of state, as opposed to a sitting Head of State.[54] Additionally, the Pinochet warrant involved a national court asserting universal jurisdiction,[55] as opposed to a court claiming to be of "international" status. The Pinochet case and the House of Lords opinion is significant, however, in that it serves as an example that former heads of state can be held accountable for acts that are clearly outside that of the role, functional immunity is not unlimited, and a State court—let alone an international court—may assert jurisdiction over certain categories of crimes.[56]

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[50] *See* Frederic L. Kirgis, *The Pinochet Arrest and Possible Extradition to Spain*, ASIL INSIGHTS (Oct. 31, 1998), https://www.asil.org/insights/volume/3/issue/12/pinochet-arrest-and-possible-extradition-spain ("One specific form of terrorism that has been discussed in connection with Pinochet is systematic torture of political opponents. Chile, Spain, and the U.K. have all ratified the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. . . . A [S]tate such as the United Kingdom, which finds the alleged offender in its territory, is required to establish its own jurisdiction over the offense unless it extradites the accused to the state where the offenses were committed, the state of the alleged offender's nationality, or the state of the victim's nationality if that state considers it appropriate. . . . There also may be a basis for Spanish prosecution of Pinochet for crimes against humanity, which could include torture."); *see also* Milena Sterio, *The Evolution of International Law*, 31 B.C. INT'L & COMPAR. L. REV. 213, 249 (2008) ("General Augusto Pinochet's extradition proceedings between the United Kingdom and Spain required domestic courts, particularly in the United Kingdom, to interpret the multilateral Torture Convention and how its diplomatic immunity provision would affect Great Britain's legal obligations *vis-á-vis* the relevant parties.").

[51] *Ex parte* Pinochet, 1 AC (HL) at 203–05.

[52] Michael Byers, *The Law and Politics of the Pinochet Case*, 10 DUKE J. COMPAR. & INT'L L. 415, 429–30 (2000).

[53] *Former Chilean Dictator Pinochet Dies Aged 91*, THE GUARDIAN (Dec. 10, 2006, 2:25 PM), https://www.theguardian.com/world/2006/dec/10/pinochet.chile.

[54] *See* Ingrid Wuerth, *Pinochet's Legacy Reassessed*, 106 AM. J. INT'L L. 731, 735, 741 (2012).

[55] Kirgis, *supra* note 50 ("The international community has recognized universal jurisdiction in such cases [as the Pinochet case], meaning essentially that whichever government obtains custody over the accused may prosecute him.").

[56] Byers, *supra* note 52.

The second type of immunity, personal immunity, may extend to acts that are not squarely within the duties of a head of state or unrelated to the head of state's official functions.[57] "As such, personal immunity is also referred to as 'absolute' or 'full' immunity, which means that those subjects entitled to it will enjoy immunity from foreign jurisdiction irrespective of the official or private nature of their actions."[58] The ICJ held in the *Arrest Warrant* case that heads of state enjoy personal immunity in other States for any civil or criminal proceeding regarding official and unofficial acts while sitting as a head of state.[59] And similar to that of functional immunity, personal immunity is ensured for the purpose of the "efficient performance of the functions of diplomatic missions as representing States."[60] The key difference between the two immunities is that "[f]unctional immunity is applicable to former Heads of State, whereas personal immunity" can only be asserted by a sitting heads of state.[61] What remains unsettled, and the subject of the below parts of this Article, is which types of courts, or at least what attributes courts must have in order to rise to the status of "international" as per the *Arrest Warrant* case and permissibly overrule an assertion of personal immunity of a sitting head of state.

B. Why Immunity Matters

As impeding as head of state immunity can be to holding bad actors accountable, it is an essential component to a State's sovereignty.[62] State sovereignty is the exclusive right to exercise supreme political authority over a defined territory and the people within that territory.[63] And it is

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[57] Toner, *supra* note 31, at 903 ("[T]here is often a very fine line between official and private acts. When either the legitimacy of the official authority is in question or the action itself is disputed as not an act of state, it becomes increasingly difficult to differentiate between official and unofficial acts."); *see also* Cassese, *supra* note 5, at 862 (asserting that claims of immunity are valid when one's acts are closely related to an official state function).

[58] Farnelli, *supra* note 43, at 257–58.

[59] *Arrest Warrant* case, 2002 I.C.J. 121, ¶ 51. The President or Prime Minister of a State is not the only position that can assert immunity. In the *Arrest Warrant* case, the ICJ included holders of high-ranking office in a State such as the head of state, head of government, and minister for foreign affairs. *Id.*

[60] *Id.* ¶ 52 (quoting Vienna Convention on Diplomatic Relations pmbl., Apr. 18, 1961, 500 U.N.T.S. 95 (entered into force Apr. 24, 1964)).

[61] Ramsden & Yeung, *supra* note 12, at 722; *see also* Farnelli, *supra* note 43, at 258 ("Indeed, the broad scope of personal immunity is counterbalanced by its temporary nature, since it is limited to the term of office.").

[62] *See* Heidi M. Spalholz, Note, *Saddam Hussein and the 1st on Trial: The Case for the ICC*, 13 BUFF. HUM. RTS. L. REV. 255, 257–60 (2007) ("This concept of absolute state immunity reflects the fundamental principle that all sovereigns are equal under international law, and that subjecting a state to a foreign court's jurisdiction would undermine this principle." (citation omitted)).

[63] Ramona Gabriela Tătar & Adela Moişi, *The Concept of Sovereignty*, 24 J. PUB. ADMIN., FIN. & L. 292, 293 (2022).

rooted in the principles of autonomy and self-determination, enabling states to pursue their own interests and shape their own destiny.[64] The principles of self-determination were outlined in the Montevideo Convention in 1933, an international treaty recognizing the criteria for valid statehood, the principle of sovereignty among states, principles of state independence, and the right of states to establish diplomatic relations with one another.[65] To these ends, sitting Heads of State must be able to travel freely, conduct business, and meet the demands of the job without fear of prosecution from the court system of another state.[66] Moreover, respect for State sovereignty contributes to international order and stability and ensures cultural diversity.[67]

Finally, the preservation of State sovereignty, in theory, influences accountability at the national level.[68] States are granted primacy jurisdiction and are responsible for protecting the rights and welfare of their own citizens, and those who violate those rights are accountable to

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[64] Samantha Besson, *Sovereignty*, *in* 10 MAX PLANCK ENCYC. OF PUB. INT'L L. ¶ 49 (Oxford Univ. Press 1987) ("[I]nternational sovereignty protects a collective entity of individuals—a people—and not individual human beings per se. Of course, their fates are connected, in the same way democracy and human rights are correlated. But sovereignty, and sovereign equality, in particular, protects democratic autonomy in a State's external affairs and remains justified for this separately from international human rights.").

[65] Montevideo Convention, *supra* note 37, arts. 1, 3–4, 8.

[66] *See* AISL, *Head of State Immunity*, YOUTUBE (Sep. 9, 2020, 28:43–30:15), https://www.youtube.com/watch?v=znHErfBwhmY&ab_channel=asil1906. During the online roundtable discussion on immunity, Professor Ingrid Worth made the following statement:

> It's not very attractive to shield leaders from the bad stuff that they do. . . . [But] some of the values of immunity that have been put forward are the basic sovereign equality of states, a basic respect for other sovereigns . . . a need for communication, . . . travel, ... discourse, [and] a desire to have countries interacting with one another.

Id.

[67] *See* William Magnuson, *The Responsibility to Protect and the Decline of Sovereignty: Free Speech Protection Under International Law*, 43 VAND. J. TRANSNAT'L L. 255, 290 (2010) (discussing the tension between state sovereignty and international law and emphasizing the need for both concepts to be respected); *see also* Karinne Coombes, *Universal Jurisdiction: A Means to End Impunity or a Threat to Friendly International Relations?*, 43 GEO. WASH. INT'L L. REV. 419, 442 (2011) ("In July 2008, A.U. Assembly of the Union noted that the 'abuse' of universal jurisdiction could 'endanger international law, order and security.'") (citations omitted); Alexander Gillespie, *Aboriginal Subsistence Whaling: A Critique of the Inter-Relationship Between International Law and the International Whaling Commission*, 12 COLO. J. INT'L ENV'T L. & POL'Y 77, 90, 93–94 (2001) (noting importance of respecting state sovereignty while maintaining efforts to support and appreciate indigenous people groups).

[68] *See* Oisín Tansey, *Does Democracy Need Sovereignty?*, 37 REV. INT'L STUD. 1515, 1522 (2011) ("If domestic actors do not have final authority within the boundaries of the political system, . . . the channels of representation and accountability required for democracy break down.").

their own domestic laws.[69] However, when States are unwilling or unable to take accountability measures against their own heads of state—an all too common occurrence—there is precedent demonstrating that national courts operating under universal jurisdiction and international courts can have lawful jurisdiction over former and, at times sitting, heads of state when those heads of state have been accused of violating customary international law.[70]

III. THE LEGACY OF NUREMBERG

Prior to the establishment of the Nuremberg Tribunals, UN-sponsored tribunals, the ICC and alike, States in the early twentieth century expressed little appetite to hold heads of state accountable, as demonstrated by a lackluster effort to try the German Kaiser after World War I for his engagement in aggressive war.[71] The legal proceedings—set out in the Treaty of Versailles[72]—were halted before they ever began, and the world order, at the time, showed nearly no interest in compelling a head of state to sit as a defendant before a tribunal.[73] It wasn't until the close of World War II and the overwhelming magnitude of the Nazi atrocities that head of state prosecutions were not only envisioned, but the focus of a tribunal.[74] The modern legal foundation and recognition of the importance of holding heads of state accountable came out of the

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[69] *See, e.g.*, Xavier Philippe, *The Principles of Universal Jurisdiction and Complementarity: How Do the Two Principles Intermesh?*, 88 INT'L REV. RED CROSS 375, 380–81 (2006); Eric A. Posner, *Do States Have a Moral Obligation to Obey International Law?*, 55 STAN. L. REV. 1901, 1904 (2003).

[70] *See* Brian Man-ho Chok, *The Struggle Between the Doctrines of Universal Jurisdiction and Head of State Immunity*, 20 U.C. DAVIS J. INT'L L. & POL'Y 233, 234–36, 239–43 (2014).

[71] *See* Arshan Barzani, *Trying (and Failing) to Put Kaiser Wilhelm II on Trial*, LAWFARE (July 30, 2019, 4:57 PM), https://www.lawfareblog.com/trying-and-failing-put-kaiser-wilhelm-ii-trial#:~:text=Wanted%20by%20the%20world%2C%20Kaiser,a%20country%20onto%20one%20man.

[72] Treaty of Peace with Germany (Treaty of Versailles) arts. 227–30, June 28, 1919, 1919 U.S.T. 7 (entered into force Jan. 10, 1920).

[73] *Compare id.* art. 227 ("The Allied and Associated Powers publicly arraign William II of Hohenzollern, formerly German Emperor, for a supreme offence against international morality and the sanctity of treaties."), *with* Leila Nadya Sadat, *Heads of State and Other Government Officials Before the International Criminal Court: The Uneasy Revolution Continues*, *in* THE ELGAR COMPANION TO THE CRIMINAL COURT 96, 98 (Margaret M. deGuzman et al. eds., 2020) ("It was thus unsurprising that, although the Treaty of Versailles provided for the trail of the Kaiser, following Germany's defeat, the Netherlands nonetheless refused his extradition.").

[74] Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis and the Charter of the International Military Tribunal pmbl., art. 7, Aug. 8, 1945, 82 U.N.T.S. 251, [hereinafter London Agreement]; *see also* Int'l Law Comm'n, Rep. on the Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgement of the Tribunal, U.N. Doc. A/1316, at 2 (1950).

Nuremberg experience.[75] Nuremberg demonstrates the impetus of the new way of doing business and a recognition that absolute immunity for heads of state is an impractical shield.[76]

A. Nuremberg: The First International Court

The watershed moment exemplifying limitations of head of state immunity and upholding individual accountability took place with the prosecution of high-ranking Nazi officials at Nuremberg.[77] The validity of the jurisdiction of the Nuremberg Tribunal has been the subject of significant legal debate, but it nevertheless has been instrumental in guiding the evolution of the principles of international law.[78] Similar to that seen decades later with the establishment and functioning of the ICC, the Nuremberg Tribunal was a treaty-based court which exercised its jurisdiction over the territory and nationals of a non-State party—Germany.[79] The Latin expression, "*nullum crimen sine lege, nulla poena sine lege*," is the foundation of criminal law.[80] Generally, then, criminal law may not assign guilt for acts not considered crimes when committed.[81] The trials at Nuremberg challenged this criminal law principle, and the Tribunal itself noted as much,[82] but nevertheless, the Tribunal proceeded

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[75] Heather Noel Doherty, Note, *Tipping the Scale: Is the Special Tribunal for Lebanon International Enough to Override State Official Immunity?*, 43 CASE W. RSRV. J. INT'L L. 831, 834, 837–38, 848 (2011).

[76] *See id.* at 848–49.

[77] *See id.* at 834, 837–38; *see also* London Agreement, *supra* note 74, at art. 1; Charter of the International Military Tribunal art. 7, Aug. 8, 1945, 82 U.N.T.S. 279 [hereinafter Nuremberg Charter].charter 7.

[78] *See generally* Kevin Jon Heller, *Jurisdiction and Legal Character of the Tribunals*, *in* THE NUREMBERG MILITARY TRIBUNALS AND THE ORIGINS OF INTERNATIONAL CRIMINAL LAW 107, 107–38 (2011) (describing the debate on whether the Nuremberg Tribunal qualified as an international tribunal, which affected whether it had jurisdiction over particular parties and crimes).

[79] At the conclusion of WWII in Europe, the big four Allied Powers (the United Kingdom, the United States, the Soviet Union, and France) and nineteen additional countries consented to the treaty-created tribunal. *See* Leila Nadya Sadat, *The Conferred Jurisdiction of the International Criminal Court*, 99 NOTRE DAME L. REV. 549, 560 (2023). Professor Sadat argues that "[i]t was the atrocities of World War II that prompted States to turn draft proposals and legal theories into legal percepts." *Id.* at 560–61; *see also* HATHAWAY & SHAPIRO, *supra* note 30, at 267 ("The proposed war crimes tribunal was not intended to be an American affair. It was envisioned as an international court, a concerted effort by the Allies to punish the Axis war criminals.").

[80] *See* Beth Van Schaack, *Crimen Sine Lege: Judicial Lawmaking at the Intersection of Law and Morals*, 97 GEO. L.J. 119, 121 (2007). The literal translation of the expression is, "no crime without law, no punishment without law." *Id.* at 121.

[81] *Id.*

[82] *See* 1 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 218 (1947) ("The making of the Charter [is] the exercise of the sovereign legislative power by the countries to which the German Reich unconditionally surrendered; and the

with the prosecutions.[83] Not only were prosecuted crimes—such as genocide—codified after the trials,[84] but also, the Charter of Nuremberg established that "[t]he official position of defendant[] whether as Heads of State or responsible officials in [g]overnment [d]epartments, shall not be considered as freeing them from responsibility of mitigating punishment."[85] The latter demonstrated a dramatic shift in the moral compass of the international legal order, affirming that the purpose of international criminal law is to attribute responsibility to individuals, even heads of state, regardless of the defense of acting in their official capacity.[86]

The Nuremberg Charter and the subsequent proceedings were soon recognized as customary international law.[87] Scholars have argued that "[f]or those who had a conception of the Nuremberg Tribunal as an international judicial body, its legal character mostly entailed that its basis of jurisdiction was universal jurisdiction."[88] Moreover, "[t]he movement from Nuremberg to the [ICC] demonstrates the international community's willingness to hold individuals accountable for their conduct when their acts, under color of state authority, go beyond contemporary

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undoubted right of these countries to legislate for the occupied territories has been recognized by the civil[] world. . . . The Signatory Powers created this Tribunal, defined the law it was to administer, and made regulations for the proper conduct of the Trial. In doing so, they have done together what any one of them might have done singly; for it is not to be doubted that any nation has the right thus to set up special courts to administer law.").

[83] *See* Shahram Dana, *Criminal Law: Beyond Retroactivity to Realizing Justice: A Theory on the Principle of Legality in International Criminal Law Sentencing*, 99 J. CRIM. L. & CRIMINOLOGY 857, 884 (2009).

[84] After the Nuremberg Trials, the international legal community realized that to avoid further retroactivity issues, it would be preferable to codify international crimes. Convention on the Prevention and Punishment of the Crime of Genocide art. 1, Dec. 9, 1948, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951).

[85] London Agreement, *supra* note 74.

[86] *See* Akande & Shah, *supra* note 42, at 840 (explaining how developments in international law are leading to international crimes now being viewed as the acts of state officials rather than actions solely attributable to the state).

[87] Antonio Cassese, *Affirmation of the Principles of International Law Recognized by the Charter of the Nürnberg Tribunal*, *Introductory Note*, U.N. AUDIOVISUAL LIBR. OF INT'L L. (2009), https://legal.un.org/avl/ha/ga_95-I/ga_95-I.html ("In resolution 95(I), the General Assembly affirmed the principles of international law recognized by the Charter of the [Nuremburg] Tribunal and the judgment of the Tribunal . . . Translated into law-making terms, this approval and support meant that the world community had robustly set in motion the process for turning the principles at issue into general principles of customary law binding on member States of the whole international community.").

[88] Alexandre Skander Galand, *UN Security Council Referrals to the International Criminal Court: Legal Nature, Effects, and Limits*, *in* 5 LEIDEN STUDIES ON THE FRONTIERS OF INTERNATIONAL LAW 1, 18 (Carsten Stahn et al. eds., 2019).

legal limits."[89] And to even further make a case for the shift in the international communities renewed perspective, the creation of the United Nations (UN) was fundamental in the post-World War II world, in its obligation to secure the peace, and provide "a permanent machinery for security and disarmament."[90]

B. A Giant Leap for Jurisdictional Precedent

There are a pair of guiding factors that can be drawn from Nuremberg for immunity purposes. First, in considering whether a court is "international," it is important to recognize how the court was created.[91] At the time of the establishment of the Nuremberg Tribunal—June 1945—the League of Nations had crumbled and ceased to exist.[92] The UN, while technically in existence, could hardly be said to be fully-functioning at the time.[93] Therefore, there was no international body which was comprised of a collection of States with universal membership that had the capacity to make binding decisions.[94] Scholars have considered Nuremberg to be a shift to the "New World Order," where aggressive wars

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[89] Ronald A. Brand, *Sovereignty: The State, the Individual, and the International Legal System in the Twenty First Century*, 25 HASTINGS INT'L & COMPAR. L. REV. 279, 292 (2002); *see also* Justice Robert H. Jackson, Chief of Counsel for the United States at Nuremberg, Opening Statement before the International Military Tribunal (Nov. 21, 1945) ("That four great nations, flushed with victory and stung with injury stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of the law is one of the most significant tributes that Power ever has paid to Reason."); HATHAWAY & SHAPIRO, *supra* note 30, at 251 ("There were numerous legal problems with criminal prosecution for aggression as well, and the international lawyers were split on them. The most difficult was the so-called retroactivity problem . . . . No civilized legal system impose[d] criminal punishment—let alone the death penalty—ex post facto.").

[90] HATHAWAY & SHAPIRO, *supra* note 30, at 196.

[91] *See* HELLER, *supra* note 78, at 110–11 (examining four theories concerning what characteristics make a court "international").

[92] Although the League of Nations officially dissolved on April 20, 1946, it had been rendered ineffective long before then. *Predecessor: The League of Nations*, UNITED NATIONS, https://www.un.org/en/about-us/history-of-the-un/predecessor# (last visited Jan. 26, 2024); *see* Erin Blakemore, *Why the League of Nations Was Doomed Before It Began*, NAT'L GEOGRAPHIC (Jan. 13, 2020, 11:58 AM), https://www.nationalgeographic.com/history/article/league-nations-doomed-before-began.

[93] *See* HATHAWAY & SHAPIRO, *supra* note 30, at 213 ("On June 26, 1945, all fifty nations signed the United Nations Charter. The United Nations organization was now born, but the war was not yet over.").

[94] *See* Emily Lowder, *The Prosecution of War Crimes and Grave Breaches: A Jus Cogens Obligation*, 29 U.C. DAVIS J. INT'L L. & POL'Y 24, 36–37 (2022); *see also* Lisa J. Laplante, *Outlawing Amnesty: The Return of Criminal Justice in Transitional Justice Schemes*, 49 VA. J. INT'L L. 915, 932–33 (2009). The principles of international law articulated at the Nuremburg Tribunal were later enshrined in subsequent international treaties and resolutions of the United Nations, indicating that at its inception, the United Nations had not yet developed the necessary jurisprudence to carry out the prosecution of war criminals seen at Nuremburg.

are illegal and human rights violations are condemned.[95] So the international community, at the time, had no choice but to turn to a treaty-based court, which represented all of humanity.[96] In that, it can—and must—be inferred that there was near-universal international agreement that the prosecutions and trials should have been held.[97] And while only the Big Four powers were adjudicating from the bench,[98] an additional nineteen States had acceded the agreement to try the Nazi perpetrators.[99] Arguably, had there been a functional international organization—such as the UN—at the time, a valid "international court" would have had to have been created through that organization. Such contemplation or speculation need not exist today, as the UN serves as the international organization comprised of and representing the international community as a whole.[100]

The second set of guiding factors from Nuremberg indicating when a court may be "international" are the attributes and makeup of the court. The crimes prosecuted by Nuremberg such as genocide, war crimes, crimes against humanity, and crimes against peace, are considered to be of grave concern to the international community as a whole.[101] Nuremberg showed that when the crimes in question transcend national borders and

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[95] *See* HATHAWAY & SHAPIRO, *supra* note 30, at xvi—xvii ("The Old World Order . . . granted immunities to those who waged war. . . . To wage war was to be *necessarily* immune from criminal prosecution. . . In the New World Order, aggressive wars are illegal. And because aggressive wars are illegal, states no longer have the right to conquer other states; waging an aggressive war is a grave crime; gunboat diplomacy is no longer legitimate; and economic sanctions are not only legal, but the standard way in which international law is enforced.").

[96] *See* Lowder, *supra* note 94; *see also* Laplante, *supra* note 94.

[97] *See* London Agreement, *supra* note 73, at pmbl. n.1. This type of inference no longer needs to be made because the United Nations exists. And based on the United Nation's purpose and structure, if the Security Council agrees—and sometimes the General Assembly—that a certain "action" should be done, that determination is accepted as representative of the majority of the international community as a whole. *See* Amber Fitzgerald, *Security Council Reform: Creating a More Representative Body of the Entire U.N. Membership*, 12 PACE INT'L L. REV. 319, 321, 325 (2000).

[98] *See* Zachary D. Kaufman, *The Nuremberg Tribunal v. The Tokyo Tribunal: Design, Staffs, and Operations*, 43 J. MARSHALL L. REV. 753, 759 (2010).

[99] In addition to the Big Four, Australia, Belgium, Czechoslovakia, Denmark, Ethiopia, Greece, Haiti, Honduras, India, Luxembourg, Netherlands, New Zealand, Norway, Panama, Paraguay, Poland, Uruguay, Venezuela, and Yugoslavia adhered to the London Agreement. *See* London Agreement, *supra* note 74, at pmbl. n.1.

[100] *See* HATHAWAY & SHAPIRO, *supra* note 30, at 211 (quoting President Harry Truman discussing the creating of the United Nations, "[W]e who have lived through the torture and the tragedy of two world conflicts must realize the magnitude of the problem before us . . . We still have a choice between the alternatives: The continuation of international chaos, or the establishment of a world organization for the enforcement of peace. . . . We must provide the machinery which will make future peace not only possible, but certain.").

[101] *See* London Agreement, *supra* note 74, at pmbl.; Nuremberg Charter, *supra* note 77, at art. 6.

have an impact on international peace and security, the tribunal may have jurisdiction over heads of state.[102] Nuremberg consisted of judges and staff members from various countries, representing a diverse and international makeup. [103] Nuremberg's jurisprudence and legal interpretations influenced the development of international criminal law as a whole and demonstrated the jurisdictional reach of an internationally created tribunal.[104] And further, the international community had the right to create new laws, set evolving jurisdictional limits, and establish "international courts" that usurp traditional limitations faced by national courts.[105] And finally that "[f]or customary international law to rapidly crystallize, norm pioneers must be consistent in their articulation of the new rule, its contours, and application." [106] It was among the most transformative events of legal history, one that has ultimately shaped how international prosecutions have proceeded in subsequent decades.[107]

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[102] London Agreement, *supra* note 74, at pmbl. 1; Nuremberg Charter, *supra* note 77, at arts. 6–7. A detail that is perhaps overlooked by some today is that the "Nuremberg trials" were not just one trial. The United States decided that it was useful to conduct twelve trials in addition the International Military Tribunal, which saw the likes of *inter alia*, Karl Dönitz—Germany's sitting head of state after Adolf Hitler's suicide—in the defendants' dock. *International Military Tribunal at Nuremberg*, U.S. HOLOCAUST MEM'L MUSEUM, https://encyclopedia.ushmm.org/content/en/article/international-military-tribunal-at-nuremberg (last modified Nov. 17, 2020); *Karl Donitz*, U.S. HOLOCAUST MEM'L MUSEUM, https://encyclopedia.ushmm.org/content/en/article/karl-doenitz (last visited Mar. 11, 2024). These subsequent trials prosecuted the industrialists, doctors, lawyers, and other perpetrators that did not fall squarely within the Nazi inner circle. *International Military Tribunal at Nuremburg*, *supra* note 102. The point was, to show the world—via a court of law—how a civilized country like Germany could permit, or at least tolerate the crimes that had occurred. *See* Jaime Malamud Goti, *State Criminals and the Limits of Extra-Communitarian Criminal Justice*, 11 NEW CRIM. L. REV. 505, 521 (2008) (explaining how millions of ordinary Germans contributed to the atrocities committed by the Nazi regime).

[103] *See* Nuremberg Charter, *supra* note 77, at arts. 1–2; *see also* Kevin R. Chaney, *Pitfalls and Imperatives: Applying the Lessons of Nuremburg to the Yugoslav War Crimes Trials*, 14 DICK. J. INT'L L. 57, 83 (1995).

[104] *See* Nuremberg Charter, *supra* note 77, at art. 7; *see also* Brenton L. Saunders, Comment, *The World's Forgotten Lesson: The Punishment of War Criminals in the Former Yugoslavia*, 8 TEMP. INT'L & COMPAR. L.J. 357, 366–68 (1994).

[105] *See* Bruce L. Ottley & Theresa Kleinhaus, *Confronting the Past: The Elusive Search for Post-Conflict Justice*, 45 IRISH JURIS. 107, 113–15, 121, 124–25 (2010).

[106] MICHAEL P. SCHARF ET AL., THE SYRIAN CONFLICTS IMPACT ON INTERNATIONAL LAW 23, 123, 134 (2020) (describing a Grotian Moment as "an instance in which there is such a fundamental change to the international system that a new principle of customary international law can arise with exceptional velocity."). *See generally* MICHAEL P. SCHARF, CUSTOMARY INTERNATIONAL LAW IN TIMES OF FUNDAMENTAL CHANGE: RECOGNIZING GROTIAN MOMENTS (2014) (discussing momentous developments in international law).

[107] *See* Saunders, *supra* note 104.

IV. GUIDING LIGHTS: THE ICTY, SCSL, AND THE ICC

Since Nuremberg, several "international courts" and tribunals have been established to address serious international crimes and, in that, prosecute heads of state.[108] While there are numerous situations and tribunals available for analysis, this Article primarily makes its case—calling for an ICJ advisory opinion to define "international court"—using details from the ICTY's jurisdictional standing over Slobodan Milosevic, the SCSL's jurisdictional standing over Charles Taylor, and the ICC's jurisdictional claims over Omar al-Bashir. Drawing from each of these situations, a picture begins to come into focus as to how an "international court" must be constructed—whether it be via an *ad hoc* tribunal, hybrid tribunal, or treaty-based court—and what a court must entail to lawfully assert jurisdiction over a head of state. In each, the UN plays a key role in granting—or approving—courts to have jurisdictional standing over heads of state.[109] To supplement this argument, this Part also makes reference—albeit sparingly—to useful instruction that can be inferred from the Extraordinary Chambers in the Courts of Cambodia (ECCC). The permissions of the courts discussed in this Part will then be compared with the limitations set forth in the *Arrest Warrant* case later in this Article.

A. ICTY: An International ad hoc Tribunal

The next impactful example of enforcement of international humanitarian law through criminal jurisdiction after Nuremberg was the ICTY in 1993.[110] The ICTY—established by Security Council Resolution 827 [111] —aimed at prosecuting perpetrators of grave violations of international law which took place during the breakup of Yugoslavia.[112]

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[108] *See* Theodor Meron, *Reflections on the Prosecution of War Crimes by International Tribunals*, 100 AM. J. INT'L L. 551, 563, 565–66 (2006) (reflecting on the activities of the ICTY, ICTR, ICC, and Japan and Nuremberg tribunals).

[109] *See* John Cerone, *The Politics of International Justice–U.S. Policy and the Legitimacy of the Special Tribunal for Lebanon*, 40 DENV. J. INT'L L. & POL'Y 44, 44, 48, 57 (2012); *see also* Michael P. Scharf & Laura Graham, *Bridging the Divide Between the ICC and UN Security Council*, 52 GEO. J. INT'L L. 977, 984–85, 1014–15 (2021).

[110] Antonio Cassese, *On the Current Trends Towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law*, 9 EUR. J. INT'L L. 2, 7–8 (1998) ("[T]he Cold War in international relations from the 1960s until the beginning of the 1990s made it impossible for international humanitarian law to be enforced through such international judicial institutions . . . . In this climate, the likelihood of establishing an international criminal court was very remote.").

[111] S.C. Res. 827, ¶ 2 (May 25, 1993).

[112] *Id.* Yugoslavia was a multi-ethnic and multi-religious country composed of six republics. *See Former Yugoslavia 101: The Balkans Breakup*, NPR (Feb. 18, 2008, 4:00 PM), https://www.npr.org/templates/story/story.php?storyId=19148459. Fueled by historical

As the conflict in Yugoslavia escalated and reports of severe human rights violations emerged, there was an international consensus that those responsible for these crimes should be held accountable.[113] The UN, in particular, recognized the need for a specialized tribunal to address the complex and large-scale crimes committed in the region.[114] Security Council Resolution 827 was invoked under Chapter VII, article 39 of the UN Charter, which grants the Security Council authority to take action to maintain international peace and security.[115] For purposes of determining whether the ICTY was "international," it is important to consider the source of its origination. Because of its mandate to maintain international peace and security, Security Council resolutions pertaining to the establishment of tribunals and jurisdiction over perpetrators and crimes carry significant weight and legitimacy.[116] A Security Council resolution is not only representative of the position of the Security Council, but, by design, it is also reflective of a broader consensus among States and the international community as a whole.[117]

The ICTY—an *ad hoc* tribunal[118] mandated to prosecute individuals responsible for serious violations of international humanitarian law—

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divisions and political differences, there were several efforts from the republics to assert their independence from the others. *See also Balkans War: A Brief Guide*, BBC (Mar. 18, 2016), https://www.bbc.com/news/world-europe-17632399. As a result, a series of armed conflicts and wars broke out in 1990 and lasted for most of the decade, most notably between Croatia, Bosnia and Herzegovina, and Serbia. *Id.* The Yugoslav Wars witnessed widespread human rights abuses, war crimes, and genocide. Emma Daly, *Beyond Justice: How the Yugoslav Tribunal Made History*, HUM. RTS. WATCH (Dec. 19, 2017, 6:06 PM), https://www.hrw.org/news/2017/12/19/beyond-justice-how-yugoslav-tribunal-made-history.

[113] *See* Ivan Simonovic, *The Role of the ICTY in the Development of International Criminal Adjudication*, 23 FORDHAM INT'L L. J. 440, 442–43 (1999) (highlighting the role of world public opinion and media coverage of atrocities in Yugoslavia that led to the creation of the ICTY). *See generally* Priyamvada Yarnell, *Relativising Atrocity Crimes: The Message of Unconditional Early Release of Perpetrated Convicted by the ICTY (1998–2018)*, 21 INT'L CRIM. L. REV. 67, 95–96 (2021) (explaining that punishment of perpetrators of atrocity crimes signifies a condemnation of such heinous acts and recognizes the humanity of victims).

[114] Simonovic, *supra* note 113.

[115] *Id.*; U.N. Charter art. 39.

[116] Sally Morphet, *Resolutions and Vetoes in the UN Security Council: Their Relevance and Significance*, 16 REV. INT'L STUD. 341–42, 344 (1990) ("[O]ver the past 43 years the Security Council has increasingly become the main political and legal focus of the growing international community *when* it has been able to reach agreement on its approach to intractable political issues.").

[117] *See id.* at 342 ("One notable example [of the relevance of the Security Council] is the development of peacekeeping forces. . . . These forces have . . . represented the will of the whole international community as expressed by the Security Council and thus had a certain durability which a force mounted by one power, or a particular group of powers, was unlikely to have.").

[118] The ICTY was "ad hoc" in that as it was established for a specific purpose and limited duration. *See* S.C. Res. 827, ¶ 2 (May 25, 1993) ("Decides hereby to establish an

played a significant role in shaping jurisdictional standing to hold heads of state individually criminally responsible.[119] In the case of the former Yugoslavia, the ICTY was granted, though not expressly, jurisdiction over Heads of State and, more specifically, Serbian President Slobodan Milosevic,[120] based on the non-discriminatory text of Resolution 827, which granted the tribunal the authority to prosecute persons deemed responsible for serious violations of international humanitarian law.[121] Milosevic was indicted and brought to trial for charges of crimes against humanity and war crimes.[122] The court rejected his claims of absolute immunity, affirming that individuals, including Heads of State, can be held accountable for serious international crimes.[123] In considering the gravity and nature of the charges against Milosevic, the court determined that the need for accountability outweighed any claimed immunity.[124] The successful trial of Milosevic emphasized that the principle of individual criminal responsibility—similar to that seen at Nuremberg—is not limited to "lower level" perpetrators.[125]

While the legal proceeding against Milosevic itself is a useful guiding light for the lawful assertion of jurisdiction, in actuality, the argument for

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international tribunal for the sole purpose of prosecuting persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia between 1 January 1991 and a date to be determined").

[119] Simonovic, *supra* note 113, at 443–44, 448, 458.

[120] Masaya Uchino, Note, *Prosecuting Heads of State: Evolving Questions of Venue—Where, How, and Why?*, 34 HASTINGS INT'L & COMPAR. L. REV. 341, 349 (2011). Slobodan Milosevic gained political power within the Communist Party of Yugoslavia in the late 1980's. *Id.* at 374. In 1989, he became the President of Serbia, where he remained until 1997. Jared Olanoff, Note, *Holding a Head of State Liable for War Crimes: Command Responsibility and the Milosevic Trial*, 27 SUFFOLK TRANSNAT'L L. REV. 327, 328–29 (2004). He then served as President of the Federal Republic of Yugoslavia from 1997 to 2000. *Id.*

[121] S.C. Res. 827, ¶ 2 (May 25, 1993).

[122] *See* Prosecutor v. Milosevic, Case No. IT-01-51-I, Indictment, ¶ 5 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 22, 2001); Michael P. Scharf, *The Indictment of Slobodan Milosevic*, ASIL (June 5, 1999) https://www.asil.org/insights/volume/4/issue/3/indictment-slobodan-milosevic ("The charges are based on two theories of liability. The first is command responsibility . . . As the civilian commander of the Yugoslav military and police forces, Milosevic holds an affirmative legal obligation to prevent his forces from committing, encouraging, or enabling others to commit atrocities . . . . The second is personal responsibility for committing, planning, instigating order or aiding and abetting war crimes and crimes against humanity.").

[123] *See Milosevic*, Case No. IT-01-51-I, ¶ 5 (showing the Prosecutor's willingness to charge Milosevic for his "participation in a joint criminal enterprise as a co-perpetrator"); *see also* Scott Grosscup, *The Trial of Slobodan Milosevic: The Demise of Head of State Immunity and the Specter of Victor's Justice*, 32 DENV. J. INT'L L. & POL'Y 355, 364–65, 370 (2004).

[124] S.C. Res. 1877, art. 7 (July 7, 2009) ("The official position of any accused person whether as Head of State or Government . . . shall not relieve such person of criminal responsibility nor mitigate punishment.").

[125] *See* Timothy William Waters, *The Forum: The International Criminal Tribunal for the Former Yugoslavia*, *in* THE MILOSEVIC TRIAL: AN AUTOPSY 34, 37 (Timothy William Waters, ed., 2013).

jurisdiction over Milosevic was solidified by member state cooperation with the ICTY's indictment of Milosevic.[126] The ICTY's indictment against Milosevic would have been ineffective had the UN Member States not cooperated to facilitate his surrender and arrest. [127] Out of such cooperation came an example and precedent that if a court is created and granted jurisdiction by the Security Council over atrocity crimes, then there is acquiescence by member states that immunities are suspended.[128]

The position taken by the ICTY in the Milosevic case solidified that "customary international law provides an exception to personal immunity [for sitting heads of state] that applies exclusively to international courts."[129] But even then, while the ICTY was successful in its indictment for Milosevic when he was a sitting head of state, he was no longer a head of state when he was actually prosecuted.[130] "Indeed, there [are] only two actual examples of ostensibly international tribunals prosecuting individuals who, at the time of their prosecution, would have been entitled to personal immunity before national courts: Charles Taylor at the SCSL and Uhuru Kenyatta at the ICC."[131]

Placing the ICTY in a boarder context, it is fair to consider the tribunal and its features are "international" for immunity purposes. As the first court of its kind, the acquiescence of the ICTY to exercise jurisdiction by member states demonstrated that the power of head of state immunity can be limited if jurisdiction is granted by the Security Council, the makeup of the bench is comprised of a diverse group of jurists, and customary international laws are in question. [132] The ICTY—established by the UN Security Council under Chapter VII—featured a diverse body of judges [133] and concerned atrocity crimes, showing that when these factors are in play, head of state immunity is squarely on the

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[126] *See* Grosscup, *supra* note 123, at 371–73, 377–78.

[127] *Id.* at 371.

[128] *See* Waters, *supra* note 125, at 45–46.

[129] Kevin Jon Heller, *Options for Prosecuting Russian Aggression Against Ukraine: A Critical Analysis*, 26 J. GENOCIDE RSCH. 1, 9 (2024).

[130] The UN confirmed Milosevic's indictment on May 27, 1999. *Timeline: The Political Career of Slobodan Milosevic*, RADIOFREEEUROPE (Mar. 13, 2006, 11:31 AM), https://www.rferl.org/a/1066641.html. Milosevic relinquished his presidential seat on October 6, 2000, was arrested by Yugoslav authorities on April 1, 2001, and began his trial in February of 2002. *Id.*

[131] Heller, *supra* note 129.

[132] *See* Christopher "Kip" Hale, *Does the Evolution of International Criminal Law End with the ICC? The "Roaming ICC": A Model International Criminal Court for a State-Centric World of International Law*, 35 DENV. INT'L L. & POL'Y 429, 449–51, 459 (2007).

[133] Cassese, *supra* note 110, at 9, 11 ("The 'judicial reckoning' of perpetrators of serious violations of international humanitarian law before an independent tribunal, composed of judges from various nations not parties to the conflict and applying 'impartial justice,' can serve to blunt the hatred of the victims and their desire for revenge.").

chopping block. But what remained unsettled, even after Milosevic, is the power of immunity asserted by a sitting and active Head of State.

B. The SCSL: An International Hybrid Tribunal

By the time the SCSL was established, Sierra Leone had experienced several years of civil war.[134] The SCSL was created in August 2000 through an agreement between the UN Security Council and the government of Sierra Leone—via Resolution 1315 [135] — after the government formally requested international assistance to address the crimes committed during the civil war.[136] The discussions at the Security Council centered on the establishment of a special court that would have both national and international elements.[137] In that, it was recognized that the national judicial system in Sierra Leone would be supplemented with international and impartial jurists[138] and enforcement mechanisms to ensure fair and effective prosecutions, while applying customary international law.[139] The SCSL was established in Freetown, Sierra Leone in 2002[140] and was granted jurisdiction by the Security Council over those

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[134] *International Criminal Law—Accessory Liability—Special Court for Sierra Leone Rejects "Specific Direction" Requirement for Aiding and Abetting Violations of International Law*—Prosecutor v. Taylor*, Case No. SCSL-03-01-A, Judgment (Spec. Ct. for Sierra Leone Sept. 26, 2013)*, 127 HARV. L. REV. 1847, 1847–48 (2014) [hereinafter *Specific Direction*] ("In March 1991, Foday Sankoh's Revolutionary United Front (RUF) launched an insurgency in Sierra Leone, seeking to overthrow the government of then-President Joseph Momoh. For eleven years, RUF fighters brutalized the country, using forced labor and child abduction to fuel their military objectives while terrorizing the civilian population with mass amputations, sexual violence, and indiscriminate murder. During the closing years of the Sierra Leone Civil War, the RUF relied 'heavily and frequently' on shipments of weapons and ammunition furnished or orchestrated by [Charles] Taylor, who had provided the RUF with operational and logistical support throughout the war.").

[135] S.C. Res. 1315, ¶ 1 (Aug. 14, 2000) [hereinafter Special Court] (establishing the Special Court for Sierra Leone).

[136] *Statute for the Special Court for Sierra Leone*, *Introductory Note,* U.N. AUDIOVISUAL LIBR. OF INT'L L., https://legal.un.org/avl/ha/scsl/scsl.html (last visited May 17, 2023) ("On 9 August 2000, the President of Sierra Leone addressed a letter to the President of the Security Council requesting him to set up a special court for Sierra Leone in order to 'try and bring to justice those members of the Revolutionary United Front and their accomplices responsible for committing crimes against the people of Sierra Leone.").

[137] *See* U.N. Secretary-General, *Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone*, ¶ 1, U.N. Doc. S/2000/915 (Oct. 4, 2000).

[138] Special Court, *supra* note 135, arts. 12–13 (calling for eight to eleven judges nominated by the U.N. and the Sierra Leone government).

[139] *Id.* art. 3 (granting the court the power to prosecute persons who violated, or ordered others to violate, the Geneva Conventions and Additional Protocol II).

[140] Lansana Gberie, *The Special Court for Sierra Leone Rests—for Good*, AFR. RENEWAL Apr. 2014, available at: https://www.un.org/africarenewal/magazine/april-2014/special-court-sierra-leone-rests-%E2%80%93-good.

"persons who bear the greatest responsibility for serious violations of international humanitarian law."[141]

Among the dozens of accused perpetrators, the SCSL set its sights on prosecuting Charles Taylor, [142] the President of Liberia, following accusations and evidence of his perpetration of, *inter alia*, crimes against humanity and war crimes in connection with his support for rebel groups in Sierra Leone.[143] In June 2003, an arrest warrant was announced after Taylor was indicted—over his claims of immunity as a sitting head of state—by the SCSL. [144] And Taylor officially appealed the SCSL's assertion of jurisdiction. [145] Soon thereafter, after reviewing the post-Nuremberg jurisprudence, the decisions of the ICTY and accompanying state acquiescence and state practice, the Appeals Chamber of the SCSL rendered a judgment affirming the SCSL's jurisdiction over Taylor and every person who bore the greatest responsibility for serious violations of international humanitarian law, regardless of their status.[146]

By August 2003, facing mounting international pressure, Taylor was removed as President of Liberia.[147] Similar to the lengthy process to bring Milosevic to trial by the ICTY, it wasn't until 2006 that Taylor was arrested and subsequently transferred to the Hague to stand trial before the SCSL.[148] During the trial, Taylor's defense team continued to argue

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[141] Special Court, *supra* 135, art. 1.

[142] In 1997, Taylor was elected president of Liberia in a special election. *Charles Taylor Fast Facts*, CNN (Jan. 10, 2024, 9:43 AM), https://www.cnn.com/2013/04/26/world/africa/charles-taylor-fast-facts/index.html. On August 11, 2003, he stepped down as president. *Id.*

[143] *Specific Direction*, *supra* note 134, at 1848 ("[Taylor] faced charges of five war crimes, five crimes against humanity, and one serious violation of international humanitarian law pursuant to article 6(I) of the Statute of the Special Court for Sierra Leone.").

[144] *See Charles Taylor: Q&A on The Case of Prosecutor v. Charles Ghankay Taylor at the Special Court for Sierra Leone*, HUM. RTS. WATCH (Apr. 16, 2012, 11:45 PM), https://www.hrw.org/news/2012/04/16/charles-taylor-qa-case-prosecutor-v-charles-ghankay-taylor-special-court-sierra (summarizing the indictment's allegations stating that Taylor could be held responsible for crimes based on individual criminal responsibility, joint criminal enterprise, and command responsibility).

[145] *Charles Taylor*, RESIDUAL SPECIAL CT. FOR SIERRA LEONE, https://rscsl.org/the-scsl/cases/charles-taylor/ (last visited Jan. 26, 2024).

[146] As the court explained, while the decisions of Nuremberg and the ICTY are not formally "binding" on the SCSL, they serve as applications of customary international law. *See* Prosecutor v. Taylor, Case No. SCSL-03-01-A, Judgment, ¶ 472 (Sept. 26, 2013).

[147] *Charles Taylor*, *supra* note 145.

[148] While the SCSL was formally in Freetown, Sierra Leone, the Taylor trial was held in the Hague, for sake of ensuring the safety of all parties involved and maintaining the integrity of the trial. *See* Owen Bowcott, *Charles Taylor Aided and Abetted Sierra Leone War Crimes, Hague Court Finds*, THE GUARDIAN (Apr. 26, 2012, 1:14 PM), https://www.theguardian.com/world/2012/apr/26/charles-taylor-war-crimes-hague; Charles Chernor Jalloh, *The Law and Politics of the Charles Taylor Case*, 43 DENV. J. INT'L L. & POL'Y 229, 235, 260–62 (2015).

for his immunity as a former head of state.[149] However, in April 2012, the SCSL officially deemed that defense moot and found Taylor guilty of, *inter alia*, aiding and abetting war crimes and crimes against humanity.[150] Affirming yet again, that UN-sponsored courts are indeed international *enough* to overrule assertions of immunity.

Other than the obvious differences between the SCSL and the ICTY—such as the geographical focus and perpetrators—there are characteristics unique to the SCSL that further provide guidance as to when a court is "international." First, that a court need not be outside the territory of the state in question. Put another way, where the court is physically situated is immaterial as to whether or not it is "international."[151] Second, the court does not need to be a complete creation of the Security Council; rather, merely the jurisdiction of the court must be permitted by the Security Council.[152] Not only that, the exercise of jurisdiction by the SCSL demonstrates that an "international" court can have a working relationship with a national court, so long as the international component is endorsed by the UN.[153]

1. The General Assembly Alternative

There may be room to argue that the General Assembly also wields some amount of overarching representative power analogous to that of the Security Council. It is at least possible, although unlikely, that a tribunal created by the General Assembly could be able to set aside immunity, but considering General Assembly resolutions are not binding,[154] this argument faces additional hurdles.[155] The Extraordinary Chambers in the

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[149] Prosecutor v. Taylor, Case No. SCSL-2003-01-1, Decision on Immunity from Jurisdiction, ¶¶ 6, 12 (May 31, 2004).

[150] *See Charles Taylor*, *supra* note 145; *CRC Welcomes Charles Taylor Conviction as Deterrent to Use of Children in Armed Conflict*, U.N. OFF. OF COMM. HUM. RTS. (Oct. 3, 2013), https://www.ohchr.org/en/statements/2013/11/crc-welcomes-charles-taylor-conviction-deterrent-use-children-armed-conflict.

[151] *The Special Court for Sierra Leone*, HUM. RTS. WATCH (Apr. 11, 2012), https://www.hrw.org/news/2012/04/11/special-court-sierra-leone ("The court was the first stand-alone 'hybrid' or 'mixed' international-national war crimes tribunal that is not part of a domestic justice system but is located in the country where the crimes were committed.").

[152] *See* John Cerone, *The Special Court for Sierra Leone: Establishing a New Approach to International Criminal Justice*, 8 ILSA J. INT'L & COMPAR. L. 379, 379–80 (2002) ("Unlike [the ICTY and ICTR], which were established by the United Nations Security Council as United Nations subsidiary bodies, the legal basis for the Special Court for Sierra Leone is a treaty between the United Nations and Sierra Leone.").

[153] *See id.* at 382.

[154] U.N. Charter art. 12; Stephen M. Schwebel, *The Effect of Resolutions of the U.N. General Assembly on Customary International*, 73 AM. SOC'Y INT'L L. 301, 301 (1979).

[155] *Are UN Decisions Binding?*, U.N., https://ask.un.org/faq/15010 (last visited Mar. 22, 2024) ("In general, resolutions adopted by the Security Council acting under Chapter VII of the Charter, are considered binding, in accordance with Article 25 of the Charter.").

Courts of Cambodia[156] serves as some indication of this, as it was a hybrid tribunal created through the General Assembly but did not have *per se* jurisdiction over heads of state as seen with the ICTY and SCSL.[157] "That said, if any tribunal not created by the Security Council could plausibly claim to be an 'international court' within the meaning of *Arrest Warrant*, it would be a Special Tribunal overwhelmingly endorsed by the General Assembly."[158] Thus, extraordinary courts or internationalized courts are likely not international enough for immunity purposes.

C. The ICC: A Conditional-International Court

The ICC is a permanent international court—dissimilar from that of the ICTY and SCSL—established via multilateral treaty to prosecute individuals for the four atrocity crimes: genocide, crimes against humanity, war crimes, and the crime of aggression.[159] The Rome Statute serves as the ICC's founding treaty and provides the legal framework for its jurisdiction.[160] The ICC has jurisdiction over crimes committed by nationals of member states and non-member states when a situation is referred to the ICC by the Security Council.[161] There is a third problematic provision within the Rome Statute article 12(2)(a) which grants the ICC jurisdiction: jurisdiction over crimes committed on the territory of a member state, regardless of whether the perpetrator or their State is party to the Rome Statute.[162]

1. State Parties to the Rome Statute

When a State ratifies the Rome Statute, the jurisdiction is—generally—straightforward and does not require in-depth discussion for

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[156] SCHARF, *supra* note 106, at 1 ("[T]he Extraordinary Chambers in the Courts of Cambodia (ECCC), [was] the tribunal created by the United Nations [and] government of Cambodia to prosecute the former leaders of the Khmer Rouge for the atrocities committed during their reign of terror (1975–9)."); *see also* G.A. Res. 57/228, at pmbl., art. 9 (May 22, 2003).

[157] *Compare* Rome Statute, *supra* note 18, art. 1, *with* Statute of the International Tribunal for the Former Yugoslavia art. 7(2), May 25, 1993, 32 I.L.M. 1192 (establishing jurisdiction over "any accused person, whether as Head of State or Government or as a responsible Government official"), *and* Statute of the Special Court for Sierra Leone, art. 6(2), Jan. 16, 2002, 2178 U.N.T.S. 145 (establishing, in an identical clause, jurisdiction over "any accused person, whether as Head of State or Government or as a responsible government official").

[158] Heller, *supra* note 129, at 15.

[159] Rome Statute, *supra* note 18, at arts. 1, 5.

[160] *Id.* art. 1.

[161] *Id.* art. 13.

[162] *Id.* art. 12(2)(a) (establishing that the Court may exercise its jurisdiction if "[t]he State on the territory of which the conduct in question occurred" is party to the statute).

purposes of immunity.[163] Ratification of the Rome Statute suscepts the ratifying State to the jurisdiction of the ICC over enumerated crimes: genocide,[164] crimes against humanity,[165] war crimes,[166] and crimes of aggression.[167] And article 27 denotes the irrelevance of official capacity, thereby signaling that any State party to the Rome Statute expressly waives head of state immunity as a defense.[168] So, it is relatively clear then, that when, from the perspective of a State that has ratified the Rome Statute, the ICC is "international" as it pertains to its assertion of jurisdictional standing over said State because said State has acquiesced to the jurisdiction of the ICC and the consents that come with it.[169] When a State is not party to the Rome Statute, the "international" status of the ICC for sake of sitting head of state immunity is conditioned on one thing: Security Council referral.[170]

2. Non-State Parties & The Al-Bashir Case

When a State is not party to the Rome Statute, the ICC's jurisdiction over that State's head of state is conditioned by Security Council referral—coordinating article 13(b) of the Rome Statute and Chapter VII of the UN Charter.[171] This method is the only means of obtaining jurisdiction—supported by precedent—which raises the ICC to "international" status for purposes of standing over sitting heads of state.[172] As Kevin Jon Heller has pointed out, the

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[163] *Id.* art. 12(1) ("A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5.").

[164] *Id.* arts. 5–6.

[165] Rome Statute, *supra* note 18, arts. 5, 7.

[166] *Id.* arts. 5, 8.

[167] *Id.*

[168] *Id.* art. 27(1) ("This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or Parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence."); *see also* Sadat, *supra* note 73, at 104 ("States ratifying the Rome Statute after its adoption in 1998 accepted the common understanding of Article 27 as removing Head of State (and other official) immunities in from of the Court.").

[169] *See* Rome Statute, *supra* note 18, arts. 1, 12.

[170] *Id.* art. 13(b).

[171] *Id.*; U.N. Charter arts. 39–41.

[172] This claim is not likely to be received well, but the language of article 12(2)(b) of the Rome Statute serves as an example of how the statute seemingly permits the ICC to step outside the legal limits of its jurisdiction. Rome Statute, *supra* note 18, art. 12(2)(b). When considered in totality with the developments since Nuremberg, there is not any supporting caselaw that affirms that the ICC can assert jurisdiction over a sitting Head of State without coordination with the Security Council. *See id.* art 13. The invalidity of the ICC's jurisdiction over a non-State party without Security Council referral ties back to the preservation of the

> distinction between international courts created by the Security Council and international courts created by treaty—which is widely supported by scholars—indicates that a Special Tribunal created by a group of states would not have the power to set aside [] personal immunity. . . . Such a court would be international in the literal sense, but it would not be the kind of 'international' court that could transcend the jurisdictional limits of the states that created it.[173]

To that end, the case of Omar al-Bashir, the former President of Sudan, is vitally related to the argument concerning ICC jurisdiction by the fact that his case concerns sitting heads of state and non-party States to the Rome Statute.

Omar al-Bashir served as the President of Sudan from 1989 until his ousting in 2019.[174] Since 2009, arrest warrants[175] have been issued by the ICC against al-Bashir for alleged atrocity crimes committed in Darfur, Sudan since 2003.[176] Sudan is not a State party to the ICC.[177] But, the ICC has jurisdictional standing over al-Bashir—despite his objection[178]—a

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concept of State sovereignty. *See* Malloy, *supra* note 33. Admittedly, if Security Council referral or consent is needed for a court to be international, the Ukraine-Russia situation poses a tremendous challenge. McDougall, *supra* note 1, at 212–13. A potential workaround is the capacity of the General Assembly to step in and share the power of the Security Council to create an international tribunal. *Id.* But even then, in the case of the ICC, article 13 of the Rome Statute would need to be amended to account for the General Assembly. *Id.*

[173] Heller, *supra* note 129, at 11. Not to mention, it would defeat the very purpose of a treaty if the terms of the treaty could be applied to States or Parties who have not agreed to the treaty.

[174] *A Timeline of Key Events in Rule of Sudan's al-Bashir*, AP NEWS (Apr. 11, 2019, 9:23 AM), https://apnews.com/article/1e66f573e9e34ebba48a56a9c3811241.

[175] *ICC: Jordan Was Required to Arrest Sudan's Bashir*, HUM. RTS. WATCH (May 6, 2019, 5:33 AM), https://www.hrw.org/news/2019/05/06/icc-jordan-was-required-arrest-sudans-bashir ("Sudan is not a member of the ICC, but in 2005 the United Nations Security Council referred the Darfur situation to the ICC. The ICC prosecutor opened an investigation, and arrest warrants were issued in 2009 and 2010 against al-Bashir."); *see also Why Former Sudan President Omar al-Bashir Must Not Escape Justice*, AMNESTY INT'L (Apr. 17, 2019) [hereinafter *No Escape*], https://www.amnesty.org/en/latest/press-release/2019/04/why-former-sudan-president-omar-al-bashir-must-not-escape-justice/.

[176] *No Escape*, *supra* note 175. "The charges against al-Bahir relate[d] to human rights violations carried out by his security forces including the Sudanese army and their allied Janjaweed militia." *Id.* "[T]hese forces were allegedly responsible for numerous unlawful attacks against civilians—mainly from the Fur, Masalit and Zaghawa groups" during the Darfur campaign, and "[a]l-Bashir [was] accused of being responsible for pursuing the extermination of these groups." *Id.*

[177] *Sudan*, COAL. FOR THE INT'L CRIM. CT., https://www.coalitionfortheicc.org/country/sudan (last visited Feb. 6, 2024).

[178] Sadat, *supra* note 73, at 106 ("The first Pre-Trial Chamber hearing [Al-Bashir's] complaint [of immunity] disagreed. It found that Article 27 answered the question of al-Bashir's immunity, and concluded, without much analysis, that he was not immune, and that Sudan's status as a non-State Party had no effect on the Court's jurisdiction.").

then-sitting, now former Head of State based on two key factors. First, al-Bashir was accused of three of the four crimes that fall within the jurisdiction of the ICC: war crimes, crimes against humanity, and genocide.[179] Second, the Security Council referred the situation in Darfur to the ICC—via Resolution 1593—in 2005.[180] The real issue in the al-Bashir context is state cooperation with the arrest warrants issued by the ICC.[181] And since the jurisdiction of the ICC was granted by the Security Council, all member states of the UN are obligated to comply.[182] Moreover, if a State is also a state party to the ICC, then it is obligated to comply with article 98(1) of the Rome Statute.[183] Article 98(1) obligates States parties to cooperate with the ICC with respect to a request for assistance in surrendering a person wanted by the ICC.[184]

States such as Mawali and Jordan have objected to the jurisdictional standing of the ICC in the al-Bashir case, even though both have ratified the Rome Statute.[185] Specifically, in 2017, Jordan deliberately chose not to apprehend al-Bashir while he was visiting Jordan—in direct violation of Jordan's obligation to do so per the UN Charter and the Rome

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[179] *Omar al-Bashir: Will Genocide Charge Against Sudan's Ex-president Stick*, BBC (Feb. 13, 2020), https://www.bbc.com/news/51489802; Rome Statute, *supra* note 18, art. 5.

[180] S.C. Res. 1593, pmbl. (Mar. 31, 2005) ("Determining that the situation in Sudan continues to constitute a threat to international peace and security, . . . [the Security Council] [d]ecides to refer the situation in Darfur since 1 July 2002 to the Prosecutor of the International Criminal Court.").

[181] *See Omar al Bashir: Sudan's Ousted President*, BBC (Aug. 14, 2019), https://www.bbc.com/news/world-africa-16010445. Al-Bashir has visited several countries where those states had an opportunity to arrest him based on the ICC arrest warrants. Al-Bashir has safely traveled to South Africa, Jordan, Egypt, Saudi Arabia and the United Aram Emirates. *Id.*; *ICC: Jordan Was Required to Arrest Sudan's Bashir*, HUM. RTS. WATCH, (May 6, 2019, 5:33 AM), https://www.hrw.org/news/2019/05/06/icc-jordan-was-required-arrest-sudans-bashir; Khalid Abdelaziz et al., *Abandoned by the UAE, Sudan's Bashir Was Destined to Fall*, REUTERS (July 3, 2019, 6:00 AM), https://www.reuters.com/investigates/special-report/sudan-bashir-fall/.

[182] U.N. Charter art. 25.

[183] Rome Statute, *supra* note 18, art. 98(1) ("The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the wavier of the immunity.").

[184] *Id.*

[185] *See* Prosecutor v. Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09, Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir, ¶¶ 4, 8 (Dec. 12, 2011) (noting that Malawi argued it could not arrest Al Bashir because he is afforded immunity as a Head of State over a State not party to the Rome Statute); Prosecutor v. Omar Hassan Ahmad Al-Bashir, ICC-02/05-01/09 OA2, Judgment in Jordan Referral re Al-Bashir Appeal, ¶¶ 12–15 (May 6, 2019) (noting Jordan's failure to abide by and request to appeal from a pretrial order to arrest al-Bashir).

Statute.[186] The ICC's pre-trial chamber II reviewed Jordan's breach of its obligations.[187] And upon formal review, the ICC pre-trial chamber II held that Jordan breached its obligations and that the ICC has lawful jurisdiction over al-Bashir given the two conditions: the accused crimes and the Security Council referral.[188]

So, in review of precedent and coordinating it with the ICC pre-trial chamber opinion in the al-Bashir case, it is logical to conclude that not even the ICC—a court whose jurisdiction has been accepted by 123 States[189]—is always international *enough* to unequivocally set aside the personal immunity of a head of state who has not ratified the Rome Statute. Therefore, it is reasonable for the ICJ—in an advisory opinion—to formally establish that for the ICC to have jurisdiction over a non-State party and function as an "international court," two conditions must apply: the accused crimes must be of the crimes expressed in the Rome Statute, and the situation must be referred to the ICC by the Security Council. If there were to be any recognition of wiggle room, it would come from the side of the UN. Heller supports this conclusion as well, claiming "if any tribunal not created by the Security Council could plausibly claim to be an 'international court' within the meaning of *Arrest Warrant*, it would be a Special Tribunal overwhelmingly endorsed by the General Assembly."[190]

V. TYING IN THE ARREST WARRANT CASE

In April 2000, Belgium issued an arrest warrant for Abdulaye Yerodia Ndombasi, the Minister of Foreign Affairs of the Democratic Republic of the Congo (DRC).[191] The arrest warrant accused Ndombasi of

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[186] *Al-Bashir*, ICC-02/05-01/09 OA2, Judgment in Jordan Referral re Al-Bashir Appeal ¶ 1.

[187] *Id.* ¶ 14.

[188] *Id.* ¶¶ 37, 123; Ramsden & Yeung, *supra* note 12, at 704 ("In a contentious decision, the [pre-trial chamber] held that such immunities were inapplicable before an international court with jurisdiction, in this case, the ICC. Despite receiving praise for expanding the ICC's reach to address the impunity gap, the [pre-trial chamber's] decision was controversial. In April 2014, the [pre-trial chamber again] revisited the application of Head of State immunity, again in the context of assessing the duties of States Parties to the Rome Statute (in this instance, the Democratic Republic of Congo) to cooperate with the ICC in arresting Al Bashir."). Malawi also declined to apprehend al-Bashir in 2011 which became subject of litigation at the ICC Pre-Trial Chamber. Sadat, *supra* note 73, at 107 ("The Pre-Trial Chamber noted that . . . 'immunity for either former or sitting Heads of State cannot be invoked to oppose a prosecution by an international court' whether or not the State in question is a party to the Rome Statute. . . . The international community's commitment to rejecting immunity in circumstances where international courts seek arrest for international crimes has reached a critical mass.'").

[189] *The States Parties to the Rome Statute*, ICC, https://asp.icc-cpi.int/states-parties#J (last visited Feb. 13, 2024).

[190] Heller, *supra* note 129, at 15.

[191] *Arrest Warrant* case, 2002 I.C.J. 121, ¶ 13.

committing crimes against humanity related to the civil war in Rwanda.[192] The DRC objected to Belgium's issuance of the arrest warrant, claiming that an arrest warrant calling for Ndombasi to sit before a Belgian court violated his immunity as a sitting foreign minister.[193] In response, the DRC called on the ICJ to rule on the issue.[194] The ICJ delivered its judgment, colloquially known as the *Arrest Warrant* case, on February 14, 2002, determining that Belgium's arrest warrant breached Ndombasi's immunity as a sitting foreign minister and violated the DRC's sovereignty.[195] The ICJ's holding as it pertains to the facts of the case is simple enough—sitting heads of state (or foreign ministers) are immune from jurisdiction of national courts based on customary international law and the concept of State sovereignty.[196] But, the court recognized—perhaps in *dicta*—that immunity from criminal jurisdiction is not absolute and can be overruled by certain judicial bodies.[197]

A. Reviewing the Context

In the broader scheme, the ICJ inexplicably left the door wide open for scholars to debate and interpret the status of immunity when it determined immunity to be extinct only in certain circumstances but then not identifying what needs to happen for those circumstances to be triggered.[198] The ICJ "explicitly mentioned in the [Arrest Warrant] decision, international criminal courts . . . maintain the authority to prosecute sitting heads of state and government officials for grave crimes."[199] From a practical perspective, it makes sense to limit when a court can be considered "international" enough to overrule head of state immunity. In many States, the head of state is the *elected* leader of the country, indicating that said head of state is in such a position as head of state at the desire of the people.[200] Thus, for any court to arrest and

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[192] *See* Pieter H.F. Bekker, *World Court Orders Belgium to Cancel an Arrest Warrant Issued Against the Congolese Foreign Minister*, ASIL (Jan. 11, 2002), https://www.asil.org/insights/volume/7/issue/2/world-court-orders-belgium-cancel-arrest-warrant-issued-against-congolese; *see also* Michelle Faul, *A Second Rwanda Genocide is Revealed in Congo*, NBC (Oct. 10, 2010, 12:25 PM), https://www.nbcnews.com/id/wbna39603000.

[193] *Id.*

[194] *Id.*

[195] Press Release, U.N., ICJ Rejects Belgian Arrest Warrant for Foreign Minster of Democratic Republic of Congo (Feb. 14, 2002), https://www.ohchr.org/en/press-releases/2009/10/icj-rejects-belgian-arrest-warrant-foreign-minister-democratic-republic.

[196] *Arrest Warrant* case, ¶¶ 58, 62.

[197] *Id.* ¶ 61.

[198] *Id.* ¶¶ 60–61.

[199] Totten, *supra* note 25, at 359.

[200] Drew DeSilver, *Among Democracies, U.S. Stands Out in How It Chooses Its Head of State*, PEW RSCH. CTR. (Nov. 22, 2016), https://www.pewresearch.org/short-reads/2016/11/22/among-democracies-u-s-stands-out-in-how-it-chooses-its-head-of-state/.

prosecute them would be to damage the autonomy of the state.[201] "The main purpose and effect of such immunities is to prevent adjudication of such violations in the domestic courts of other states."[202]

Why the ICJ chose to plant the "international" court seed in the *Arrest Warrant* case without expounding upon it is unknown. But it is arguable that the *Arrest Warrant* case came at the worst possible time: the early 2000's.[203] Not only was the international community continuing to cope with the deadliest terrorist attacks in history, but the international community was also adjusting to the beginning of a global war on terror, with the world's superpowers pursuing the legal limits of self-defense and the use of force.[204]

Additionally, the ICC was just getting off the ground as the first formidable and permanent legal instrument of its kind, and the U.S. had begun to step back and hold its relationship with the ICC at arm's length. [205] The very possibility that heads of state might be under indictment by a treaty-based international court was an open question that perhaps, given the uneasy global climate, the ICJ did not think was ripe for establishing precedent.

VI. AN ICJ ADVISORY OPINION

The ICJ, acting as the chief judicial organ of the UN is permitted boundless advisory jurisdiction.[206] The UN Security Council and the UN

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[201] Akande & Shah, *supra* note 42, at 825.

[202] *Id.* at 834.

[203] *See* Goleen Samari, *Islamophobia and Public Health in the United States*, 106 AM. J. PUB. HEALTH 1920–21 (2016) ("In a poll taken directly after 9/11, 60% of Americans reported unfavorable attitudes towards Muslims. Many American associate[d] Muslims with fear-related terms such as violence, fanatic, radical, war, and terrorism."); Hannah Hartig & Carroll Doherty, *Two Decades Later, the Enduring Legacy of 9/11*, PEW RSCH. CTR. (Sept. 2, 2021), https://www.pewresearch.org/politics/2021/09/02/two-decades-later-the-enduring-legacy-of-9-11/ ("In April 2003, during the first month of the Iraq War, 71% [of Americans] said the U.S. made the right decision to go to war in Iraq. On the 15th anniversary of the war in 2018, just 43% said it was the right decision."). Admittedly, these statistics only encapsulate the opinions of Americans post-9/11, and not the opinions of the world at-large. Nevertheless, this paper argues that the global fear that was fostered by the 9/11 attacks and the subsequent U.S. military action perhaps gave the ICJ pause as to how much it would choose to open the door to the prosecution of heads of state for crimes, such as the crime of aggression.

[204] *See generally* Lisa Novri Anggina, *Global War on Terror by the United States from the Perspective of International Humanitarian Law*, 1 TIRTAYASA J. INT'L L. 37 (2022). It is important to note, however, that this observation may be entirely speculative and superfluous, as the ICJ's judgments are based on legal arguments and principles of international law, not events external to the facts of the case.

[205] *See Q&A: The International Criminal Court and the United States*, HUM. RTS. WATCH (Sept. 2, 2020, 12:00 AM), https://www.hrw.org/news/2020/09/02/qa-international-criminal-court-and-united-states.

[206] U.N. Charter art. 96.

General Assembly may request advisory opinions on any legal question.[207] It makes sense, given the climate, for the ICJ to issue an advisory opinion, consistent with the *Arrest Warrant* case and applying the framework established at Nuremberg and the precedent that followed as demonstrated by the jurisdictional standing of the ICTY over Slobodan Milosevic, the SCSL over Charles Taylor, and apparent ICC jurisdiction over Omar al-Bashir. It is logical to foresee where the customary international norm should lie as it pertains to an "international court" and the role—or lack thereof—that head of state immunity plays before such a court. As the unlawful war wages on in Ukraine and competing accountability measures are suggested, the situation is primed and ready for the ICJ to address this issue and set forth the circumstances necessary for a court to be "international."

A. A Logical Inference

Putting it all together, it can be logically inferred by the ICJ that customary international law provides an exception, per the *Arrest Warrant* case, for immunity that applies exclusively to international courts. And while there is limited precedent to guide towards the qualifications to become an "international court," [208] the Nuremberg tribunals established that there must be near-universal consensus or support of the tribunal for it to rise to "international" status.[209] This argument is also supported by the ICTY and SCSL—created by the Security Council—both of which successfully prosecuted heads of state. And lastly, taking into consideration the ICC's arrest warrant of al-Bashir, and taking cues as to the ICJ's silence on that matter in particular, it can be inferred that the method of triggering the ICC—by Security Council referral—is a permissible means to raise the ICC to "international" status. In other words, the ICC is not always "international." Dapo Akande cements this claim by stating:

> [T]here is a distinction between those tribunals established by United Nations Security Council resolution and those established by treaty. Because of the universal membership of the United Nations and because decisions of the Council are binding of all UN members . . . those states are bound by and

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[207] *Id.* art 96(1) ("The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question.").

[208] Eboe-Osuji, *supra* note 8; HELLER, *supra* note 78, at 110–11.

[209] HELLER, *supra* note 78, at 110–12.

> have indirectly consented (via the UN Charter) to the decision to remove immunity.[210]

Accordingly, the meaningful difference between a court that is international in the literal sense and "international" in the immunity sense is one that is either created by the Security Council or one which is granted jurisdiction by the Security Council. Thus, there is no substitute means of creating an international court for the prosecution and punishment of atrocity crime-accused sitting heads of state other than by forceful actions by the United Nations, which is required to restore international peace and security.

B. A Broader View

There is also a more liberal interpretation of the current status of head of state immunity and the ability of courts to assert jurisdiction. But for the ICJ to advance this conclusion, it would be breaking new ground indeed. According to Professor Jennifer Trahan and Astrid Reisinger Coracini, "[t]o qualify as an international criminal court or tribunal, a court must fulfill two conditions: (1) it must be established under international law, and (2) it must sufficiently reflect the will of the international community as a whole to enforce crimes under customary international law."[211] In making this determination, Trahan argues that a treaty-based court—such as the ICC—may qualify as an "international court," even absent Security Council input.[212] "[A]n international tribunal is one based directly on international law, established through the United Nations Security Council . . . or created by bilateral agreement between the United Nations and a country."[213] Put another way, according to this school of thought a tribunal may also be created—in addition to the methods discussed by Heller and Akande above—upon a resolution from the General Assembly via bilateral agreement between a given State and the General Assembly.[214] Trahan and other scholars have explained that significance in distinguishing international courts from national courts with international features.[215] Meaning that, according to Trahan, a court such as the ICC is, in fact, able to assert jurisdiction over Heads of State,

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[210] *See* Heller, *supra* note 129, at 11 (quoting Dapo Akande, *International Law Immunities and the International Criminal Court*, 98 AM. J. INT'L L. 407, 417 (2004)).

[211] Coracini & Trahan, *supra* note 19.

[212] Jennifer Trahan, *Don't Be Fooled by U.S. Smoke and Mirrors on the Crime of Aggression*, JUST SEC. (Apr. 14, 2013), https://www.justsecurity.org/85986/dont-be-fooled-by-u-s-smoke-and-mirrors-on-the-crime-of-aggression/.

[213] *Id.*

[214] Jennifer Trahan, *Why a "Hybrid" Ukraine Tribunal on the Crime of Aggression is Not the Answer*, JUST SEC. (Feb. 6, 2023), https://www.justsecurity.org/85019/why-hybrid-ukrainian-tribunal-on-crime-of-aggression-is-not-the-answer/.

[215] *Id.* at 1–5.

even if the head of state is not party to the Rome Statute, and the Security Council has not referred the situation.[216]

C. Looking Ahead

The ICC's arrest warrant against Russian President Vladimir Putin has generated extensive jurisdictional discussion.[217] The question of whether the warrant and the ICC's jurisdiction is legitimate is complicated by Russia's position within the Security Council,[218] Russia's abstinence from ratifying the Rome Statute,[219] and Putin's position as a sitting head of state.[220] In the situation of the ICC's jurisdiction over a non-State party head of state, the jurisdictional reach can only extend via a referral from the Security Council.[221] The Trahan perspective has *some* logical roots. But the firmest footing can be found in the positions taken by Akande and Heller. The successful prosecutions of heads of state have implicitly, although not explicitly, indicated that heads of state are not immune from prosecution if they have committed some material element of an atrocity crime of which an international court chooses to prosecute. The common thread in all of the preceding cases is the Security Council. It is up to the ICJ to turn what is implicit, explicit. And while a shift towards including the General Assembly in the conversation would be ideal, there is simply no case precedent to support the theory.[222] Either way, the fact that there is a lack of consensus among legal scholars, let alone diplomats, demonstrates the need for an authoritative body such as the ICJ to weigh in on the issue.

VII. CONCLUSION

Nothing officially prohibits a head of state from acting outside the bounds of legal limits—aggression, crimes against humanity, and genocide are fair game.[223] And defining the limits of head of state

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[216] Coracini & Trahan, *supra* note 19.

[217] *See* Catherine Gegout, *Putin and the ICC: History Shows Just How Hard it is to Bring a Head of State to Justice,* THE CONVERSATION (Mar. 22, 2023), https://theconversation.com/putin-and-the-icc-history-shows-just-how-hard-it-is-to-bring-a-head-of-state-to-justice-202247.

[218] *See* Tzevelekos, *supra* note 3.

[219] *See* Leila Nadya Sadat, *Conferred Jurisdiction and the ICC's Putin and Lvova-Belova Warrants*, JUST SEC. (Apr. 21, 2023), https://www.justsecurity.org/86079/conferred-jurisdiction-and-the-iccs-putin-and-lvova-belova-warrants/.

[220] *Id.*

[221] Rome Statute, *supra* note 18, art. 13(b).

[222] Oona A. Hathaway et al., *The Legal Authority to Create a Special Tribunal to Try the Crime of Aggression Upon the Request of the UN General Assembly*, JUST SEC. (May 5, 2023), https://www.justsecurity.org/86450/the-legal-authority-to-create-a-special-tribunal-to-try-the-crime-of-aggression-upon-the-request-of-the-un-general-assembly/.

[223] HATHAWAY & SHAPIRO, *supra* note 30, at 54–55.

immunity is unlikely to result in a paradise of legal order. Nevertheless, an ICJ advisory opinion can help settle the debate—instigated by the *Arrest Warrant* case—of when and where a head of state is vulnerable to an "international court's" jurisdiction. There are important political, legal, and practical reasons for head of state immunity to exist. But those reasons do not exist in isolation from customary international law. Far more important are the political, legal, and practical reasons to limit head of state immunity and permit jurisdiction to appropriate judicial bodies. While of course—given the issuance of an arrest warrant against Putin—the jurisdictional reach of the ICC, in particular, is at the forefront of conversation, the bigger question that remains open is: what makes a court "international"? In answering this question, this Article made a logical suggestion while calling for the ICJ to issue an advisory opinion on the issue: a court is "international" if either its jurisdictional reach is arranged by the Security Council—acting pursuant to its stated objective—or if the head of state in question is a party to the Rome Statute. If the alternative were true and any collection of states could create a court to exercise jurisdiction over a head of state, such courts would be hard-pressed to function adequately, and the legitimacy of such courts would constantly be in question.

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