A Confusing ICC Appeals Judgment on Head-of-State Immunity

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The Appeals Chamber of the International Criminal Court (ICC) delivered its much-anticipated [judgment](https://www.icc-cpi.int/Pages/item.aspx?name=pr1452) yesterday on whether then-President Omar al-Bashir of Sudan was entitled to head-of-state immunity when he travelled to Jordan in March 2017. Given that the Darfur situation had been [referred](https://www.icc-cpi.int/nr/rdonlyres/85febd1a-29f8-4ec4-9566-48edf55cc587/283244/n0529273.pdf) to the ICC by the United Nations Security Council, the outcome was not a surprise – the Court concluded that Bashir had not been entitled to immunity and that Jordan was obliged to arrest him.

This is the correct outcome, as a matter of both law and policy. However, the means by which the Appeals Chamber arrived at this decision was unusual. And its implications – including the way the Court sees its own jurisdiction and its relations with states which are not party to the Rome Statutes even when it is not acting under a Security Council referral — are [already raising](https://www.ejiltalk.org/icc-appeals-chamber-holds-that-heads-of-state-have-no-immunity-under-customary-international-law-before-international-tribunals/) [eyebrows](https://dovjacobs.com/2019/05/06/you-have-just-entered-narnia-icc-appeals-chamber-adopts-the-worst-possible-solution-on-immunities-in-the-bashir-case/). Indeed, some of the judges may even have tried to walk back the more controversial implications of this decision, tucked away in one paragraph at the very end.

**The Issues**

As I [outlined last week](https://www.justsecurity.org/63879/preview-of-the-international-criminal-court-appeals-judgment-on-al-bashir-and-head-of-state-immunity/), the issue on this appeal is “whether the head of state of a country which is not party to the ICC Statute (then-President Al-Bashir of Sudan) is immune from the jurisdiction of another state which is an ICC state party (Jordan) when enforcing an arrest warrant issued by the ICC in relation to a situation that the U.N. Security Council referred to it (Darfur).”

Or, as the Appeals Chamber put it with admirable clarity and succinctness, “whether Head of State immunity finds application in a situation where the Court requests a State Party of the Rome Statute to arrest and surrender the Head of State of another State (in this instance, Sudan), which, while not being party to the Rome Statute, is the subject of a referral to the Court by the UN Security Council and, in terms of Resolution 1593, obliged to fully cooperate with the Court.” (para. 96)

Unfortunately, that clarity and succinctness would abandon the Chamber as the judgment wore on. And it did wear on:  a [98-page judgment](https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-02/05-01/09-397); a [190-page thesis-like concurring opinion](https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-02/05-01/09-397-Anx1) by four of the five judges (which raises the question of what the fifth judge did not agree with); and a dissent on the question of consultation and referral of Jordan’s non-cooperation (which is still to be issued).

The Appeals Chamber did a solid job of parsing the challenging question of how a U.N. Security Council referral interacts with the Rome Statute obligations and with the immunity of a non-party state. The Chamber’s reasoning that the referral places the same cooperation obligations on the target state (here, Sudan) as if it were a state party, and this means that it cannot assert state immunity in light of the fact that the Rome Statute does not recognize this immunity (paras. 135-145, 149), was compelling. Indeed, these findings provided a basis on which the entire appeal could (and some argue should) have been resolved.

But the key controversy in this judgment is the Appeals Chamber’s finding that, under customary international law, states not party to the Rome Statute have no head-of-state immunity when arrest is sought by the ICC for international crimes, regardless of whether the case was referred by the Security Council.

**Customary Law Immunities and International Courts**

The finding that there is no immunity for a head of state once before an international court is not entirely outside the mainstream legal discourse. As the Chamber notes, head-of-state immunity is built upon the sovereign equality of states (i.e. the judicial authorities of one state may not interfere with or sit in judgment of the sovereign of another). And the International Court of Justice (ICJ) expressly contemplated that immunity may not apply “to criminal proceedings before certain international criminal courts, where they have jurisdiction” ([Arrest Warrants case](https://www.icj-cij.org/files/case-related/121/121-20020214-JUD-01-00-EN.pdf), para. 61).

The challenge — and the danger — of this decision is the nature of the jurisdiction that the Appeals Chamber believes the ICC is exercising. I had previously [outlined two visions](https://www.justsecurity.org/63879/preview-of-the-international-criminal-court-appeals-judgment-on-al-bashir-and-head-of-state-immunity/) of the ICC’s jurisdiction. Each begins with the agreed-upon foundation of a consent-based court where states parties have pooled the jurisdiction they have and delegated it to the ICC (including waiving their state immunities vis-à-vis the Court and each other for ICC crimes). The disagreement is whether this consent-based intra-partes nature of the Court applies also in the situation of a Security Council referral, or whether this becomes a coercion-based jurisdiction that applies the Rome Statute as the default legal framework when a referral is made under Chapter VII of the U.N. Charter.

The Appeals Chamber appears to have created a third vision of the Court’s jurisdiction that it is inherently international in nature. In this vision, the Court is exercising authority not on behalf of (and delegated to it consensually by) its [122 states parties](https://asp.icc-cpi.int/en_menus/asp/states%20parties/pages/the%20states%20parties%20to%20the%20rome%20statute.aspx), but on behalf of the entire international community. In contrast to national courts that “are essentially an expression of a State’s sovereign power, which is necessarily limited by the sovereign power of the other States,” the Appeals Chamber considers that the ICC “when adjudicating international crimes, do[es] not act on behalf of a particular State or States. Rather, international courts act on behalf of the international community as a whole” (para. 115).

This matters because only if the Court has jurisdiction that exceeds that of its member states could it have transcended the obligation its states parties hold to respect the immunity of other (non-member) states. In effect, the Appeals Chamber believes that states parties have created, by a treaty between themselves, a Court that has affected the rights (i.e. to immunity) that non-party states previously held vis-à-vis those states-parties. This sounds very much like a violation of the principle that a treaty affects only the rights and obligations of its parties (pacta non tertiis) – a principle that is never addressed in the Chamber’s judgment.

**Confusion and Implications**

This judgment is confusing — and frustrating — on a number of levels:

**First,**it is unclear in a number of places how the Court’s initial discussion on the absence of immunity before international courts relates to the subsequent discussion of cooperation obligations of member states.  The discordance is even worse in the Concurring Opinion, which spends 104 pages discussing customary law of immunities before international courts, before turning to the “Dispositive Considerations” and declaring that the primary focus should instead be on the construction of the Rome Statute and Security Council Resolution 1593 (para. 269).

**Second,**the broad initial findings put the Chamber in an awkward position of later discussing the impact of Security Council referrals on an immunity which, just a few pages earlier, the Chamber had declared invalid. Indeed, the Chamber discusses with real sophistication and compelling analysis whether in light of the Security Council referral Sudan was entitled to assert, or must be assumed to have waived (or been precluded from asserting), head-of-state immunity – despite the fact that this immunity apparently did not actually exist (see e.g. paras. 135, 143-144, 149).

**Third**, the Appeals Chamber never clearly engages with the distinction between an immunity that exists vis-à-vis the Court, and an immunity that might exist vis-à-vis a national authority complying with a request by the Court to cooperate. Its entire analysis is limited to the horizontal obligations between states parties, not the impact of an immunity of a non-party state (e.g. paras. 127, 130, 132). The lead judgment never considers that even if there is no immunity vis-à-vis the ICC’s jurisdiction to proscribe, there may still be immunity vis-à-vis a domestic authority’s jurisdiction to enforce an ICC warrant (although the Concurring Opinion does engage with this challenge, at paras. 414 and following).

**Fourth,**if there is no immunity for heads of state (or other state officials) before international courts — whether of a member state or not, and whether under Security Council referral or not — then there seems to be little substance left for Article 98(1) of the Rome Statute, which prevents the Court from requesting surrender (or other assistance) if it would require a state to violate the state immunity of another. (Again, while the lead judgment does not consider this question, the Concurring Opinion does, albeit briefly at paras. 406-407).

The confusing nature of the decision is a bit of an own-goal for the Court. But does it matter, given that it seems to have reached a reasonable result, and one that would still stand based on its mainstream analysis of the impact of the Security Council referral? Yes.

The risk is that if there is no customary law immunity for heads of state vis-à-vis the ICC, regardless of a Security Council referral, then any state official of a non-member state – even a sitting President – could in theory be arrested if they were responsible for crimes committed on the territory of a state which is an ICC State Party (Article 12(2)(a) of the [Rome Statute](https://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf)).  For example, Afghanistan. This is the very situation that everyone believed Article 98(1) was designed to avoid. But suddenly, there is no “State … immunity of a person” that applies; and the protections of Article 98(1) do not come into play.

**Back from the brink?**

Or so one would think.  Until you persevere all the way to paragraph 447 of the Concurring Opinion:

447. … That is to say, a claim of immunity will not bar the Court from the exercise of the jurisdiction that it has.

448. For the ICC, the international instrument concerned is primarily the Rome Statute (where the suspect or accused is the high official of a State Party), together with the relevant Security Council resolution and the UN Charter (where the suspect or accused is the high official of a UN Member State that is not party to the Rome Statute, in a situation referred under article 13(b) of the Rome Statute). It is the latter scenario that now concerns the Appeals Chamber.

Suddenly the concurring judges are back in conventional territory. Just as the ICJ said, the abrogation of head-of-state immunity before international courts only applies where there is jurisdiction. And when it comes to state immunity, the Concurring Opinion sees this as limited to high officials of states parties (that have consented by joining the Court) or where the Security Council has referred the situation (in which case the immunity is removed through Chapter VII of the U.N. Charter). All you have to do is ignore Article 12(2)(a).

I hope that the Court is wise enough never to push the envelope on this. I hope that it never pursues a case against a sitting head of state (or comparable high official) of a non-party state absent a U.N. Security Council resolution. But if it ever does, then the starting point to unravelling the mess created by the Appeals Chamber’s digressions lies here – three pages from the end of a 190-page concurring opinion.