

No Head of State Immunity for Al Bashir in Jordan

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By: James Hendry

On May 6, 2019, the Appeals Chamber of the International Criminal Court (ICC) held that Jordan failed to comply with the Rome Statute when it did not arrest Al Bashir, the former Head of State of Sudan, when he was attending the Summit of the Arab League in Amman, Jordan in March, 2017 (majority, concurrence (C) and dissent (D)). This Journal has published a Case Comment on South Africa's refusal to arrest Al Bashir (here), an article reviewing arguments relevant to the Appeal Chamber hearing (here) and an interview with Darryl Robinson, a Canadian *amicus curiae*, on his appearance before the Appeal Chamber (here). The Chamber held there is no Head of State immunity at customary international law that can be invoked against an 'international court' acting properly within its jurisdiction; cooperation in cases with charges against a Head of State before the ICC is mandatory for States Party under the Rome Statute; and cooperation is generally not mandatory for States not party to the Rome Statute unless full cooperation is specifically ordered in a UN Security Council Resolution. The decision of the Appeals Chamber has caused some controversy. Early reactions can be found (here) with links to other blogs. Some of these early reactions criticize a broad reading of the holding that there is no Head of State immunity before an 'international court' in customary international law. In this article, I argue that the Reasons of the Appeals Chamber have at

their core the proper focus on the interpretation of the Rome Statute and the Security Council Resolution 1593 that requires Sudan to “cooperate fully” with the Court and the Reasons answer many of the criticisms made of the many previous decisions arising from the many occasions that Al Bashir has avoided arrest.

The Pre-Trial Decision

The Pre-Trial Chamber II (here) held that Jordan failed to comply with its obligations under the Statute and should be referred to the Assembly of States Parties and the Security Council under article 87(7). The Appeals Chamber summarized the Pre-Trial Chamber’s interpretation of the operation of articles 27(2) and 98(1) which were central to its reasoning. Article 27(2) says that immunities attaching to someone acting in their official capacity under national or customary international law do not bar the Court from exercising its jurisdiction over him. Article 98(1) provides that the Court cannot proceed with a request for surrender which would put the requested State in breach of its international obligations, unless the State to which those obligations are owed waives them. The Pre-Trial Chambers interpretation of the Statute was conducted in the context of the referral by the Security Council to the Prosecutor under article 13(b) by Resolution 1593. The Appeal Chamber noted the Pre-Trial Chambers conclusions: a State Party could not invoke Head of State immunity at customary international law to refuse the Court’s jurisdiction to execute a warrant on the Head of State of another State Party because article 27(2) removed the immunity. Further, where the Security Council referred the matter to the Prosecutor, the Court is required to exercise its jurisdiction ‘in accordance with this Statute’ (*chapeau* of article 13) which includes article 27(2) thereby creating an obligation in this case for Sudan to cooperate with the Court as if it were a State Party even though it is not. This is because the Security Council can impose obligations on UN member States under Chapter VII of the UN Charter (para. 49). Thus, in this case, no article 98 waiver was required from Sudan because there was nothing to waive.

Appeals Chamber decision: introduction

The Appeals Chamber clearly noted that the Pre-Trial Chamber drew a distinction between the effect of article 27(2) on immunities in the case of States Parties and in the case of non-States Parties based on the source of the Court’s jurisdiction over these two categories of States in this context. The Court’s jurisdiction over States Parties is derived from the Rome Statute. Its jurisdiction over non-States Parties was derived from the Resolution 1593 referral under article 13(b) that says that the Court shall exercise its jurisdiction given it by the Security Council ‘in accordance with [this] Statute’ which includes article 27(2) and the same obligation to cooperate with the Court as a State Party. This flowed from Resolution 1593 through Part 9 of the Statute (Pre-Trial Chambers, paras. 34-9). The Appeals Chamber makes it clear throughout its reasons that it is dealing with a situation of a referral by the Security Council to the Prosecutor and its effect on the jurisdiction of the Court under the Statute. Thus, despite the Chamber’s pronouncement that there is no Head of State immunity that can be pleaded in customary international law before an international court, this decision is about the interpretation of the Rome Statute in light of a Security Council Resolution referring the case to the

Prosecutor and not one about an international court created theoretically under customary international law against which there is no Head of State immunity (Concurrence paras. 447-449).

The Appeals Chamber decision: Head of State immunity

The Appeals Chamber described the central issue in the appeal as whether Al Bashir had Head of State immunity before the Court that Jordan was bound to respect without an article 98(1) waiver from Sudan under the Rome Statute. This required an analysis of the effect of article 27(2) on requests for cooperation of States Party in proceedings against Heads of State of States Parties and then the specific effect of Resolution 1593 on Sudan (para. 97). But rather than directly getting at the task of interpreting the Statute and Resolution 1593, the Chamber decided that it would start with the issue of whether customary international law creates a Head of State immunity, even though Jordan argued that the issue was not on appeal.

The Chamber held that while customary international law prevented a State from prosecuting another's Head of State as a matter between sovereign States (para. 101), article 27(2) prevents a Head of State from claiming immunity when prosecuted before the Court in accordance with the provisions of the Statute on the exercise of jurisdiction or opening an investigation or issuing a warrant of arrest.

The Appeal Chamber held that article 27(2) is not only conventional law, but customary international law (para. 103). The Chamber then reviewed Nuremberg Principle III, the Convention against Genocide article IV and the statutes of the *ad hoc* ICTY (which indicted President Milosovic of Serbia) and ICTR adopted by the Security Council, and the agreement between the Security Council with Sierra Leone to establish the SCSL, all of which enshrined the principle that Heads of State could be held responsible for their international crimes. The SCSL Appeal Chambers confirmed an indictment and issuance of a warrant of arrest against President Charles Taylor of Liberia on the ground that Head of State immunity did not apply before "an international court" such as itself. The Chamber noted that the SCSL Appeal Chamber relied on the Arrest Warrant decision of the International Court of Justice. (That case says at para. 46, referred to by the Chamber at footnote 322, "…it is only where a State has jurisdiction under international law in relation to a particular matter that there can be any question of immunities in regard to the exercise of that jurisdiction".) The Chamber also expressed its agreement with Pre-Trial Chamber I when it came to the same conclusion when Malawi refused to arrest Al Bashir (here). Thus, it appears that the Appeals Chamber connected the various provisions creating Head of State responsibility for international criminal acts with the lack of Head of State immunity to properly establish international court jurisdiction and process.

The Chamber agreed with the *Malawi* decision in the ICC and the SCSL Appeal Chamber in *Taylor* and noted that there was no state practice nor *opinio juris* supporting Head of State immunity before international courts exercising their jurisdiction. It noted its agreement with the concurrence in this case which showed, in more detail, that there never was such a principle that could be invoked before 'international courts in the exercise of jurisdiction' contrary to the Pre-Trial Chamber position on this point (para. 113). The absence of this immunity applies vertically when an international court

exercising its jurisdiction issues an arrest warrant for a Head of State and conducts proceedings against him, but also horizontally between States where such a court requests one State to arrest and surrender the Head of State of another (para. 114). International courts act on behalf of the international community, while domestic courts were limited by Head of State immunity by sovereign equality (para. 115). Thus, there was no Head of State immunity for Jordan to justify its refusal to arrest Al Bashir and so did not comply with its duty to cooperate with the Court required by article 89(1). The Chamber disagreed with the Pre-Trial Chamber's finding that there was a customary international Head of State immunity when the arrest was sought by the Court, but found no error in the Pre-Trial Chamber's conclusion that Jordan breached its duty because the Security Council resolution on Darfur caused the Rome Statute to apply where article 27(2) overrode his immunity (para. 118).

Thus, the Appeals Chamber decision is not about the non-existence of Head of State immunity before a hypothetical international court, but about the case before the Court established with conventional authority under the Rome Statute and further jurisdiction conferred by Security Council Resolution.

The Appeals Chamber decision: co-operation

The Chambers went on to explore the vertical effect of article 27(2) based on a purposive reading of the Rome Statute. The purpose of the Statute is to punish heinous crimes which would be frustrated if a State Party could refuse to cooperate. Article 86 evidences an agreement of the States Parties to cooperate fully with the Court which may request a State to execute its arrest warrants under article 89. Article 27(2) prevents the recipient of a request to assert Head of State immunity under international or domestic law. The seeming anomaly argued by Jordan that article 27(2) is found in Part 3 of the Statute dealing with General Principles of Criminal Law while article 89 is found in Part 9 on International Cooperation is resolved by the Chambers by reading the Statute as a whole. The purpose of the Statute would be ineffective if Head of State immunity could be invoked where cooperation is requested because the Court would not be able to exercise its jurisdiction to punish heinous international crimes which depends on the cooperation of States. A reading of article 27(2) narrowly to encompass only the adjudicatory function of the Court under Part 3 would undermine the Court's purpose. Further, the reference to 'national law' in article 27(2), which could not be invoked before the Court, is relevant to the International Cooperation section of the Statute when national authorities act to cooperate with the Court (para. 125, references in footnote 352). Further, the Chamber rejected Jordan's argument that article 27(2) has no impact on the existence of horizontal effect of Head of State immunity between States because a State executing an arrest warrant is not proceeding to prosecute the Head of State before its own courts, but assisting an international Court acting within its jurisdiction (para. 127).

The Chamber rejected Jordan's argument that article 98(1) preserves convention or customary international law immunities of States Parties and non-State Parties. It held that article 98 does not recognize immunities but is a procedural rule determining how the Court should proceed when such immunities otherwise exist under law binding on the Court (para. 130). However, article 27(2) prevents

reliance on Head of State immunity either vertically or horizontally when the Court requests cooperation, so there is no immunity to be waived (para. 130). Article 98 functions as a procedural safeguard to require the Court to consider an obligation claimed to be owed to a third State before executing process.

The Appeals Chamber decision: the effect of a Security Council Resolution

The Appeals Chamber next turned to Resolution 1593 and its effect on Article 27(2). It rejected Jordan's argument that the referral only affected the vertical relationship between the Court and Sudan. The article 13(b) referral obviated the need to create new *ad hoc* tribunals by employing the Court's jurisdiction under the Rome Statute to the Darfur situation including Part 9 dealing with cooperation (para. 135). Part 9 requires States Parties to cooperate by operation of article 86, while the Court may invite non-States Party to cooperate by agreement under article 87(5). Where the Security Council obligates non-State Parties to cooperate, it does not specify a separate cooperation regime in the resolution. Here, the obligation of Sudan to cooperate with the Court in Resolution 1593 is stronger than that generally imposed on non-States Parties to the Rome Statute and similar to that under article 86 owed by States Parties making it logical that that should be the regime imposed on Sudan (paras. 140-1). Without the obligation to fully cooperate in Resolution 1593, the non-States Party regime would have applied to Sudan; Sudan is not made a State Party by the referral, it is just made subject to the Statute's cooperation regime which must be interpreted in light of article 27(2) (paras. 142-3).

The Appeals Chamber noted that the 1953 Convention on the Privileges and Immunities of the Arab League addressed the issue of immunities of delegates relevant to article 98(1), though Sudan's obligation to cooperate under Resolution 1593 prevented Sudan from invoking them (para. 158, referring to the Prosecutor's Response at paragraph 44 which cites article 27(2) (here). It dismissed Jordan's argument that article 98(2) applied to these immunities. Article 98(2) provides that the Court cannot proceed with a request for surrender which would violate an *agreement* between States not to surrender officials without consent. The Appeal Chamber held that article 98(2) concerned *agreements* not to surrender officials without consent, not immunities. The Appeal Chamber addressed this question, though Jordan specifically said the issue of Sudan's immunities under the Convention was not on appeal (para. 160).

The Chambers added that both Jordan and Sudan are parties to the *Convention against Genocide*, a crime alleged to have been committed by Al Bashir, obliging Jordan to surrender him to the Court as a State Party to the Rome Statute as well as a party to that Convention because of the duty of parties to prevent and punish the crime of genocide (para. 161).

The Appeals Chamber allowed Jordan's appeal on the exercise of discretion by the Trial Chamber to refer Jordan's refusal to cooperate to the Assembly of States Parties and the Security Council under article 87(7). The Chamber commenced its purposive analysis by recalling an earlier Appeals Chamber decision that held that the purpose of such a referral was to foster cooperation between States Parties and the Court by engaging third parties. The failure of Jordan to comply with the Court's

request to cooperate met the first condition for the exercise of this jurisdiction. Its non-action prevented the Court from exercising its function and powers of arrest and surrender under the Statute and so met the second condition for the use of this discretion (para. 191). However, the Appeal Chamber held that Jordan's notice sent to the Registrar the day before Al Bashir arrived in Jordan saying that it was consulting the Court under article 97 was a request for consultation and that the Pre-Trial Chamber should have reacted with necessary directions rather than ignoring it (para. 203). The notice could be viewed as setting out the problem Jordan wanted to consult on given that article 97 did not prescribe a procedure for consulting with the Court. The fact that the request to consult was made the day before Al Bashir arrived in Jordan did not raise a presumption of bad faith, though earlier consultations would have had a better chance at resolving the problem. The problem of timeliness seems to have been resolved by noting that Jordan's article 97 request was made before Al Bashir arrived on Jordanian territory (para. 205). The Chamber held that the Pre-Trial Chamber's interpretation that the notice was a refusal to comply and not a request for consultation was an error that affected it reasons for referral under article 87(7). The similarity of the late request of South Africa for consultation on immunity which was not referred under article 87(7) would make the Pre-Trial Chamber's referral of Jordan unequal and based on error.

The Appeals Chamber: Concurrent reasons

Four of the five Judges in the Appeal Chamber wrote an extensive concurrence based on the premise that the ultimate question of the existence of Al Bashir's immunity against the Court in this case was 'accessible only' through the procedural question of whether the Court was bound by the Rome Statute to obtain a waiver from Sudan before requesting Jordan to arrest and surrender him. While agreeing with the full Chamber on what they call the ultimate substantive question about immunity, the concurrence appears to focus their more detailed analysis on the narrower procedural question of the need for a waiver, because Sudan would not have waived its immunity if the answer to the ultimate substantive question was that there was an immunity to be asserted (C paras. 4-5). They agreed with the Pre-Trial Chamber that Head of State immunity from arrest cannot be invoked against the Court vertically or horizontally in any case referred under article 13(b) and they held that there was no 'reserve' of immunity under customary international law, as reflected by article 27(2), that can be asserted before an international court "in the exercise of its own proper jurisdiction" in agreement with the full Chamber (paras. 113-114)(C paras. 8, 454). The concurrence limited its reasoning to this case involving the Rome Statute and a Security Resolution that expressly imposes on a non-State Party a duty of full cooperation (C para. 10).

The concurrence discusses the concept of an 'international court' that might be a body of two or more States (C para. 56). However, such a court's ultimate character is determined by the source of its jurisdiction, being the sovereign will of participating States expressed directly or through the mandate of an international body such as the Security Council or an international functionary such as the UN Secretary General when empowered to set up a court of law (C para. 58). The concurrence reviewed the advantages of the international court: independence, objectivity and impartiality and concern for international peace and security (C para. 62). It also noted that an international court could be

ineffective if hindered in its exercise of jurisdiction by the same concerns as a national court if they were irrelevant to the circumstances of an international court (C para. 55). This led to a statement that customary international law has evolved through the history of instruments that have created international criminal courts since WW II not to recognize the availability of Head of State immunity (C para. 66) as generally restated by the ICJ in the *Arrest Warrant case* (C para. 75).

The concurrence then engaged with its interpretation of the Rome State and Resolution 1593 for the solution to the issue in this case. While Resolution 1593 obligated Sudan to fully cooperate with the Court, the concurrence helpfully added that where the Security Council resolution urges all UN Member states to cooperate, this would have the minimum effect of affording a legal justification to fully cooperate and arrest and surrender Al Bashir (C paras. 283-5, 451). Article 98(1) is not left without content as there may be other State immunities to which it applies (C para. 407).

The concurrence engaged in a fuller analysis of what they called the “vexed question” of whether the Head of State immunity Al Bashir would have had on the horizontal plane against the exercise of Jordan’s national jurisdiction to help an international court execute process against a Head of another State afforded Jordan a legal excuse to decline the cooperation request to arrest him (C paras. 414-6). The principle of effectiveness of the Statute would be undermined if Al Bashir had such a form of horizontal immunity because it would undermine Security Council Resolution 1593 that uses the Court to achieve peace and security or enforcement of the *jus cogens* norm against genocide. The principle is furthered by the lack of Head of State immunity in respect of an international court with proper jurisdiction as recognized in Nuremberg Principle III (C para. 429). Further, the reasons for horizontal immunity supporting sovereign equality and autonomy of States do not apply to an international court that derives its mandate from the international community (C para. 435). Here the exercise of power of cooperation with the Court is not an exercise of a domestic criminal power of Jordan against another State because of the existence of the Security Council resolution based on the UN Charter which binds all member States (C para. 445). The fact that article 59 provides that on execution of an ICC arrest warrant the individual shall be brought before a domestic court to ensure that they have been dealt with according to proper process and may exercise the right for interim release does not change the fact that the domestic court is acting as a surrogate for the ICC, but merely respects the domestic order (C para. 445).

Appeals Chamber Concurrence’s ‘concluding lessons’

At the conclusion of its reasoning, the concurrence states ‘two vital lessons’. First, it made it clear that the fact there is no Head of State immunity at customary international law before an international court does not mean that any international criminal court may exercise its jurisdiction over any Head of State. This is a matter of the source of the court’s jurisdiction. If an international court’s jurisdiction were derived somehow from customary international law, such a court might pursue any Head of State within the jurisdiction created by that source of law (C para. 447). However, the reality of international law is that international courts are created by the exercise of jurisdiction flowing from a legal source of jurisdiction, here the Rome Statute and Security Council by Resolution 1593: the absence of head of

state immunity creates no jurisdiction by itself, but arises as it has here in the exercise of properly established jurisdiction (C paras. 448-9). The second lesson was the importance of the principle of effectiveness in the sense that a rule of customary international law that operates at the horizontal level should not operate to frustrate the properly established jurisdiction of an international criminal tribunal (C para. 450).

Appeals Chamber Dissent

Two judges who felt that the Trial Chamber had properly exercised its discretion to refer Jordan's refusal to arrest Al Bashir to the Assembly of States Party or the Security Council under article 87(7) dissented. They disagreed with the majority's finding that Jordan engaged in consultations because Jordan did not seek guidance on its concerns (D paras. 116, 126) and their belated communications to the Court showed bad faith and lack of action "without delay" as required by article 97 (D para. 122) and were aimed at defeating consultations (D para. 129). They also disagreed with the majority that felt that the Court itself should have responded to Jordan more quickly (D para. 131). The two dissenters added further reasons to support the referral. Jordan potentially infringed its obligations to comply with the Security Council resolution under article 25 of the UN Charter making a referral imperative (D paras. 176, 182), the Negotiated Relationship Agreement between the ICC and the UN provides where the Court makes a finding of non-cooperation where there is a Security Council Resolution under article 87(7) the Court *shall* inform or refer the matter to the Security Council (D para. 185) and referrals have resulted in benefits in cooperation when Jordan has refused to commit to cooperation in the future (D para, 198).

Conclusion

The Appeals Chamber in its lengthy main reasons and longer concurrence answers the central question in terms of the Security Council's use of the International Criminal Court "in accordance with the provisions of this Statute" to find that Jordan had a duty as a State Party to cooperate with the Court. This alignment of legal authority required it to execute the arrest warrant against Al Bashir while he was on its territory in aid of the Court's purpose to punish international crimes. The analysis focused on the loss of his immunity as a result of the interplay of article 27(2) and the Security Council's Resolution 1593 that required full cooperation from Sudan as a member of the UN, bound to comply with the UN Charter.

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About the Author

*James Hendry**James Hendry is the Editor-in-Chief of the PKI Global Justice Journal. He served as counsel to the Canadian Human Rights Commission before joining the Department of Justice in 1989. He was General Counsel at the DOJ until retirement in 2011, working in civil Charter social policy review, specializing in equality rights, human rights legislation, and human rights act design. He has*

also published extensively on Canadian and comparative constitutional issues and has lectured in Canada, Spain, South Africa, the United States and Hong Kong.