

impossible situation, the Panel in the Russia–Ukraine dispute did the best it could to reach a balanced and defensible position on the meaning of GATT Article XXI(b)(iii).

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ICC Appeals Chamber—no immunity for sitting heads of state—non-compliance—non-referral to the UN Security Council and Assembly of States Parties

PROSECUTOR V. OMAR HASSAN AHMAD AL-BASHIR, JUDGMENT IN THE JORDAN REFERRAL RE AL-BASHIR APPEAL. At https://www.icc-cpi.int/CourtRecords/CR2019_02856.PDF. International Criminal Court, May 6, 2019.

In 2009, the International Criminal Court (ICC) stepped into uncharted waters as it issued its first arrest warrant for a sitting head of state, then President of Sudan Omar Al-Bashir. Following the UN Security Council’s referral of the situation in the Darfur region of Sudan to the ICC, Al-Bashir was charged by the Court with war crimes and crimes against humanity, and in 2010, he was also charged with genocide. As a consequence, all of the states parties to the Rome Statute had a duty to arrest Al-Bashir. Several states have nonetheless failed to arrest him during country visits, allowing Al-Bashir to evade the ICC. This has given rise to a number of cases before the ICC Chambers, including this Appeals Chamber judgment regarding the Hashemite Kingdom of Jordan.

The purpose of this case note is not to revisit years of legal scholarship on this issue but to highlight the core features of the decision, including: its impact on the African Union’s (AU) quest for an advisory opinion from the International Court of Justice (ICJ) on the question of head of state immunity; the notion that states are “lending assistance” to the ICC when they arrest wanted individuals; the admission of numerous amici curiae; and the failure to refer acts of non-compliance to the United Nations Security Council (UNSC) and the Assembly of States Parties (ASP).

On May 6, 2019, the ICC Appeals Chamber handed down a highly anticipated judgment regarding: (1) Jordan’s failure to comply with its obligations as a state party to the Rome Statute and arrest a person indicted by the ICC; and (2) whether this act of non-compliance warranted a referral to the UNSC and the ASP. In order to adequately answer those questions, the Appeals Chamber was also forced to take on the controversial, contentious question of head of state immunity.

Pre-trial Chamber II was the first to hear the Jordan matter. On December 11, 2017, the Chamber ruled that “Jordan failed to comply with its obligations under the Statute by not executing the Court’s request for the arrest of Omar Al-Bashir and his surrender to the Court while he was on Jordanian territory on 29 March 2017.”¹ The Chamber also decided to refer the matter, in accordance with Regulation 109(4) of the Regulations of the Court, to the ASP

¹ Prosecutor v. Omar Hassan Ahmad Al-Bashir, Decision Under Article 87(7) of the Rome Statute on the Non-compliance by Jordan with the Request by the Court for the Arrest and Surrender of Omar Al-Bashir, ICC-02/05-01/09, at 21 (Dec. 11, 2017), available at <https://www.legal-tools.org/doc/5bdd7f/pdf>.

and the UNSC.² On December 18, 2017, Jordan requested leave to appeal, which the Chamber granted on February 21, 2018.³

In its decision, the Appeals Chamber “unanimously confirmed” the December 2017 judgment “to the extent that [it] found that the Hashemite Kingdom of Jordan had failed to comply with its obligations under the Statute by not executing the Court’s request for the arrest of Mr Omar Hassan Ahmad Al-Bashir and his surrender to the Court while he was on Jordanian territory on 29 March 2017” (p. 4, para. 1). Further, “[t]he Appeals Chamber unanimously [found] that Jordan’s failure to comply with the Court’s request prevented the Court from exercising an important function and power” (p. 4, para. 2). Over the dissents of Judges Ibáñez and Bossa, however, the Appeals Chamber reversed the decision to refer Jordan to the ASP and UNSC, finding that the Pre-Trial Chamber had “erroneously exercised its discretion” (*id.*).

The Appeals Chamber prudently discussed whether head of state immunity is applicable and found that “[t]here is neither State practice nor *opinio juris* that would support the existence of Head of State immunity under customary international law vis-à-vis an international court” (p. 5, para. 1). “To the contrary,” it continued, “such immunity has never been recognised in international law as a bar to the jurisdiction of an international court” (*id.*). Moreover, “[t]he absence of a rule of customary international law,” the Appeals Chamber explained,

is relevant not only to the question of whether an international court may issue a warrant for the arrest of a Head of State and conduct proceedings against him or her, but also for the horizontal relationship between States when a State is requested by an international court to arrest and surrender the Head of State of another State. No immunities under customary international law operate in such a situation to bar an international court in its exercise of its own jurisdiction. (P. 5, para. 2).

“States Parties to the Rome Statute, have, by virtue of ratifying the Statute, accepted that Head of State immunity cannot prevent the Court from exercising jurisdiction—which is in line with customary international law” (para. 4), the Chamber continued. “There is no reason why article 27(2) should be interpreted in a way that would allow a State Party to invoke Head of State immunity in the horizontal relationship if the Court were to ask for the arrest and surrender of the Head of State by making a request to that effect to another State Party” (*id.*).⁴ “In such situations,” the Chamber explained, “the requested State Party is not proceeding to arrest the Head of State in order to prosecute him or her before the courts of the requested State Party: it is only lending assistance to the Court in its exercise of the Court’s jurisdiction” (*id.*).

² *Id.* at 21–22.

³ Prosecutor v. Omar Hassan Ahmad Al-Bashir, Judgment in the Jordan Referral re Al-Bashir Appeal, ICC-02/05-01/09 OA2, at 10 (May 6, 2019), available at https://www.icc-cpi.int/CourtRecords/CR2019_02856.PDF [hereinafter Judgment].

⁴ *Id.*, para. 4. See also Rome Statute of the International Criminal Court, Art. 27(2), July 17, 1998 [hereinafter Rome Statute]: “Irrelevance of official capacity . . . 2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.”

The Appeals Chamber also considered the effect of the UNSC referral in this case. The Court reasoned that the referral put Sudan in the position of a state party (paras. 135–45). Article 27⁵ of the Rome Statute, it explained, does not recognize immunity, and Sudan was thus prohibited from raising it.

The immunity question has been framed in many ways but mostly around the “clash”⁶ between Articles 27 and 98, and the Appeals Chamber judges neatly put this to bed: “Article 98(1) of the Statute,” they explained, “does not itself stipulate, recognise or preserve any immunities. It is a procedural rule that determines how the Court is to proceed where any immunity exists such that it could stand in the way of a request for cooperation” (para. 5).

There has been support⁷ for the judgment, but there has also been severe criticism.⁸ Dapo Akande, for example, found the judgment’s treatment of customary international law “stunning” and stated that it “appears to be deeply misguided.”⁹ Be that as it may, the judgment does make one thing very clear—as far as the judges of the ICC are concerned, there can be no immunity for sitting heads of state before an international court, and member states acting at the Court’s behest should arrest wanted suspects in accordance with the Rome Statute.

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This case note focuses on four points of interest: (1) the judgment’s impact on the AU’s quest for an advisory opinion from the ICJ on head of state immunity; (2) the participation of numerous amici curiae; (3) the idea of state parties “lending assistance” to the ICC; and (4) the failure to refer Jordan to the UNSC and ASP.

The timing of the Appeals Chamber ruling had the potential to affect the AU’s request for an ICJ advisory opinion. In an effort to resolve what they perceive to be a “dispute” over the relationship between head of state immunity and state party obligations under the Rome Statute, the AU established a working group to formulate a question to be put before the

⁵ Rome Statute, *supra* note 4, Art. 27: “Irrelevance of official capacity: 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 . . . 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. 2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.”

⁶ For a detailed discussion on Articles 27 and 98, see Leila N. Sadat, *Heads of State and Other Government Officials Before the International Criminal Court: The Uneasy Revolution Continues* (Washington University in St. Louis Legal Studies Research Paper No. 19-01-12, Jan. 23, 2019) (THE ELGAR COMPANION TO THE INTERNATIONAL CRIMINAL COURT (Margaret DeGuzman & Valerie Oosterveld eds., forthcoming)), available at <https://ssrn.com/abstract=3321998>.

⁷ Though she has what she refers to as “quibbles” with the judgment, Sadat states that “[t]he decision is correct as a matter of international law.” Leila Sadat, *Why the ICC’s Judgment in the al-Bashir Case Wasn’t So Surprising*, JUST SECURITY (July 12, 2019), at <https://www.justsecurity.org/64896/why-the-iccs-judgment-in-the-al-bashir-case-wasnt-so-surprising>.

⁸ Dov Jacobs, *You Have Just Entered Narnia: ICC Appeals Chamber Adopts the Worst Possible Solution on Immunities in the Bashir Case*, SPREADING THE JAM (May 6, 2019), at <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>; Ben Batros, *A Confusing ICC Appeals Judgment on Head-of-State Immunity*, JUST SECURITY (May 7, 2019), at <https://www.justsecurity.org/63962/a-confusing-icc-appeals-judgment-on-head-of-state-immunity>; Dapo Akande, *ICC Appeals Chamber Holds that Heads of State Have No Immunity Under Customary International Law Before International Tribunals*, EJIL: TALK! (May 6, 2019), at <https://www.ejiltalk.org/icc-appeals-chamber-holds-that-heads-of-state-have-no-immunity-under-customary-international-law-before-international-tribunals>.

⁹ Akande, *supra* note 8.

ICJ. In August 2018, it was reported that the Kenyan government had, on behalf of the AU, requested that the UN General Assembly put the matter on its September 2019 agenda.¹⁰ However, this occurred prior to the Appeals Chamber judgment and prior to Al-Bashir's ouster as president on April 11, 2019. Many thought that these two developments would take the wind out of the AU's sails. It has been reported, however, that the AU found the Appeals Chamber judgment disappointing and are still pursuing the issue.¹¹

In a "Q&A" document prepared by the ICC, the question about whether an ICJ advisory opinion should be sought, produced the following response:

Article 119(1) of the Rome Statute requires that any dispute concerning the judicial functions of the ICC is to be settled by a decision of the ICC, and not be referred to any other body. That provision is consistent with the international law principle known as *kompetenz kompetenz*: meaning that it is for each court to pronounce on the limits of its own jurisdiction. No international court may purport to circumscribe the jurisdiction of another international court. Ultimately, the fact remains that the ICJ is not bound by ICC jurisprudence; nor is the ICC bound by the jurisprudence of the ICJ.

All that international law could expect is that the body of jurisprudence that serves its purposes is a complement of persuasive case law to which each international court must do its best to contribute from its own perspective—generated from each court's exercise of its own specific jurisdiction.¹²

There is a long road¹³ before the immunity question reaches the ICJ. The UN General Assembly must first be convinced to request an advisory opinion from the Court. The ICJ's advisory opinion would not be legally binding and may or may not appease the AU, but the organization's ongoing pursuit of the ICJ's views speaks to their deep dissatisfaction with the Appeals Chamber judgment.

Also of significance is that this is the first time so many amici curiae have been admitted to the proceedings before the Appeals Chamber. There were thirteen amici curiae submissions from regional bodies and academics. This positive development shows the Chamber's interest in the plethora of views that exist outside the confines of the parties themselves. As noted by Claus Kress, the Court "genuinely engaged with these arguments during an intensive legal conversation in open court."¹⁴

¹⁰ Edith M. Lederer, *News Africa Asks UN to Seek Court Opinion on Immunity for Leaders*, ASSOC. PRESS (Aug. 1, 2018), at <https://www.apnews.com/2af4da235eb14a238e6ddff23981bb00>.

¹¹ In an interview with JusticeInfo.net, Dr. Namira Negm, the African Union legal counsel, explained: "The decision came as a no surprise but it's highly disappointing. . . ." Franck Petit, *Al-Bashir: Jordan Should Have Arrested Him, The ICC Says Again*, JUSTICE INFO.NET (May 7, 2019), at <https://www.justiceinfo.net/en/tribunals/icc/41359-al-bashir-jordan-should-have-arrested-him-the-icc-says-again.html>.

¹² Q&A Regarding Appeals Chamber's 6 May 2019 Judgment in the Jordan Referral re Al-Bashir Appeal, ICC-PIOS-Q&A-SUD-02-01/19, available at <https://www.icc-cpi.int/itemsDocuments/190515-al-bashir-qa-eng.pdf>.

¹³ Angela Mudukuti, *Immunity, Accountability and Politics – the AU's Bid for an ICJ Advisory Opinion*, GROJIL BLOG (June 25, 2018), at <https://grojil.org/2018/06/25/immunity-accountability-and-politics-the-aus-bid-for-an-icj-advisory-opinion/#more-2190>.

¹⁴ Claus Kress, *Preliminary Observations on the ICC Appeals Chamber's Judgment of 6 May 2019 in the Jordan Referral re Al-Bashir Appeal*, TORKEL OPSAHL ACAD. EPUBLISHER OCCASIONAL PAPERS SERIES (2019), at <http://www.toaep.org/ops-pdf/8-kress>.

The various views and positions put before the Appeals Chamber gave the judges much to consider. While the inclusion of numerous *amici curiae* does increase the length of proceedings, it is of great value. Perhaps this will become a trend at the ICC and additional voices will be given an opportunity to weigh-in on pertinent issues in international criminal justice.

Another point of interest is that state parties are only “lending assistance” (para. 4)¹⁵ to the Court when they arrest individuals wanted by the ICC for subsequent transfer to The Hague. This conclusion is of significant practical value, as the ICC has no police force of its own and relies on the cooperation of state parties. Concluding that there is no immunity for heads of state once they find themselves before an international court is not “entirely outside the mainstream legal discourse.”¹⁶ Given that the only way such an individual would end up before the Court is through states “lending assistance,” the Appeals Chamber’s conclusion is logical and consistent with the objectives of an international criminal court. How else, in the most practical sense of the issue, would a sitting head of state end up before the ICC save for a member state arresting him/her for subsequent transfer to the Hague?

Failure to arrest Al-Bashir has generated significant jurisprudence from the ICC. Previously, eight judgments from different judges at the Pre-Trial level—Malawi (2011), Chad (2011 and 2013), Nigeria (2013), the Democratic Republic of Congo (2014), South Africa (2015), Uganda (2016), and Djibouti (2016)—followed different paths but resulted in the same conclusion regarding state parties’ duty to arrest. The prevailing view from the various judges is that Al-Bashir ought to be arrested and transferred to The Hague to face the charges brought against him.¹⁷

The Jordan case was the first and only time that the Appeals Chamber has been seized with the matter. The judgment is supplemented by a 190-page joint concurring opinion and a 110-page joint dissenting opinion resulting in quite lengthy, yet comprehensive, coverage of all the issues. There can be no appeal and this truly could constitute “the final word” as far as the ICC is concerned. (Of course, the ICJ option still looms.)

The Appeals Chamber’s chosen legal justification carries significant weight and will no doubt be referred to in every judgment that comes after it. The judgment will also make it considerably more difficult for another state party to argue that there is a legal impediment to the arrest of sitting heads of state charged by the ICC, should there ever be another indictment of this nature.

As for the Appeals Chamber’s failure to refer Jordan to the UNSC and the ASP, that topic is the focus of the joint dissenting opinion. As previously mentioned, the ICC has been faced with numerous cases of non-cooperation with regard to the arrest of Al-Bashir. All cases have been referred to the ASP and UNSC except Nigeria, South Africa, and now, per this judgment, Jordan. Prior to Nigeria’s case, non-compliant states simply asserted that their hands were tied by head of state immunity¹⁸ and referral of their non-compliance was automatic.

¹⁵ Judgment, *supra* note 3, at 6.

¹⁶ Batros, *supra* note 8. The International Court of Justice’s *Arrest Warrant Case* also states that there can be no immunity before international criminal courts vested with jurisdiction. Case Concerning the Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 ICJ Rep. 3, para. 61 (Feb. 14).

¹⁷ Sadat, *supra* note 7.

¹⁸ Hemi Mistry, *Guest Post: Appeals Chamber’s Chastisement of PTC II for Its Article 87(7) Referral Game Playing*, SPREADING THE JAM (May 8, 2019), at <https://dovjacobs.com/2019/05/08/guest-post-the-appeals-chambers-chastisement-of-ptc-ii-for-its-article-87-7-referral-gameplaying>.

Nigeria provided a fuller explanation for its failure to arrest Al-Bashir, explaining in part that his departure from the country took place while the relevant Nigerian authorities were considering their options (para. 11)¹⁹ under pressure from local civil society actors. In light of the explanation provided, and noting that Article 87(7)²⁰ grants it discretion to make a referral, the Pre-Trial Chamber decided that referring Nigeria was unwarranted (para. 13).²¹ Thereafter, the Chamber decided referral was unwarranted in South Africa's case, taking into consideration that South Africa was the first nation to invoke Article 97²² consultations (para. 128),²³ the existence of domestic proceedings in South Africa, and whether or not referral was an effective way to "achieve" cooperation. (paras.139–40).

In Jordan's case, the Pre-Trial Chamber found referral to be the appropriate course of action because Jordan was clearly aware of its obligations and "Jordan took a very clear position, chose not to execute the Court's request for arrest and surrender of Omar Al-Bashir and did not require or expect from the Court anything further that could assist it in ensuring the proper exercise of its duty to cooperate" (para. 53).

The Court went on to note that, "at the time of Omar Al-Bashir's presence in Jordan in March 2017, the Chamber had already expressed in unequivocal terms that another State Party, the Republic of South Africa, had, in analogous circumstances, the obligation to arrest Omar Al-Bashir and that consultations had no suspensive effect on this obligation" (para. 54). Pointing out the difference between the Jordan case and that of South Africa, the Chamber stated that "while the Chamber has previously held that the fact that South Africa was the first State Party to approach the Court with a request for consultations militated against a referral of non-compliance, this circumstance does not exist in the case at hand" (*id.*). The Pre-Trial Chamber concluded this part of the judgment by unequivocally referring Jordan to the ASP and the UNSC (para. 55).

Jordan's legal counsel submitted that the referral was "an abuse of discretion" (para. 30)²⁴ and pointed out what it deemed to be the inconsistent treatment of South Africa and Jordan despite what they felt were similar circumstances. On appeal (Judges Ibáñez and Bossa dissenting), the Appeals Chamber found that the Pre-Trial Chamber had "misconstrued"

¹⁹ Prosecutor v. Omar Hassan Ahmad Al-Bashir, Decision on the Cooperation of the Federal Republic of Nigeria Regarding Omar Al-Bashir's Arrest and Surrender to the Court, ICC-02/05-01/09 (Sept. 5, 2013), available at https://www.icc-cpi.int/CourtRecords/CR2013_05860.PDF [hereinafter Nigeria Cooperation Decision].

²⁰ Rome Statute, *supra* note 4, Art. 87(7) ("Where a State Party fails to comply with a request to cooperate by the Court contrary to the provisions of this Statute . . . the Court *may* make a finding to that effect and refer the matter to the Assembly of States Parties or, where the Security Council referred the matter to the Court, to the Security Council.") (emphasis added).

²¹ Nigeria Cooperation Decision, *supra* note 19.

²² Rome Statute, *supra* note 4, Art. 97 ("Where a State Party receives a request under this Part in relation to which it identifies problems which may impede or prevent the execution of the request, that State shall consult with the Court without delay in order to resolve the matter. Such problems may include . . . (c) The fact that execution of the request in its current form would require the requested State to breach a pre-existing treaty obligation undertaken with respect to another State.").

²³ Prosecutor v. Omar Hassan Ahmad Al-Bashir, Decision Under Article 87(7) of the Rome Statute on the Non-compliance by South Africa with the Request by the Court for the Arrest and Surrender of Omar Al-Bashir, ICC-02/05-01/09 (July 6, 2017), available at https://www.icc-cpi.int/CourtRecords/CR2017_04402.PDF [hereinafter South Africa Non-compliance Decision].

²⁴ Prosecutor v. Omar Hassan Ahmad Al-Bashir, The Hashemite Kingdom of Jordan Submissions Following the Hearing 10, 11, 12, 13, 14 September 2019, ICC-02/05-01/09 (Sept. 28, 2018), available at <http://www.legal-tools.org/doc/c7cbda/pdf>.

Jordan's efforts to consult (para. 207) and that this error "impacted on the reasons it gave for referring Jordan" (*id.*). As a result, the Appeals Chamber reversed the decision on referral, citing the Chamber's "erroneous" use of its discretion (para. 216).

The result of this decision is that yet another act of non-compliance goes unsanctioned, with the danger of rendering the ICC system toothless. What are the real consequences of failing to arrest a wanted fugitive? Time and time again, the answer has been that there are no consequences for non-compliance—not even the embarrassment of a referral to the UNSC or ASP.

In their dissenting opinion, Judges Ibáñez and Bossa went so far as to call the failure to refer Jordan, "contrary to the object and purpose of the Rome Statute" (para. 246(d))²⁵ and stated that "the non-referral of Jordan's failure to cooperate with the Court in the arrest and surrender of Mr Al-Bashir could be perceived as inaction by the Court" (*id.*). For the dissenters, referral is not punitive in nature but designed to foster cooperation.²⁶ They cited examples given by the Office of the Prosecutor where cooperation was aided by a referral.

Pre-Trial Chamber II in the South Africa non-compliance matter raised another important point—even the states that have been referred have faced no consequences (para. 138).²⁷ Referrals to the UNSC or the ASP²⁸ have been accompanied by little or no action, despite suggestions to create a follow-up mechanism for states that have been referred (*id.*).²⁹ Failure to take action when a state is referred is gravely problematic, but failure to refer an act of non-compliance when referral is warranted exacerbates the problem and exposes the ICC judges to warranted criticism.

International crimes are often perpetrated by those in power. Preventing them from appearing before the Court due to the shield provided by customary law immunities would greatly undermine justice and accountability efforts. As stated by the Appeals Chamber, member states are only "lending their assistance" to the ICC and not arresting a head of state for their own purposes. This judgment will not silence the raging academic and political debate on the implications of not preserving immunities in cases such as this, but it has added another important layer of jurisprudence aimed at furthering accountability for core international crimes.

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²⁵ Joint Dissenting Opinion of Judge Luz del Carmen Ibáñez Carranza and Judge Solomy Balungi Bossa, ICC—2/05-01/19-397-Anx2 (May 6, 2019), available at https://www.icc-cpi.int/RelatedRecords/CR2019_02622.PDF.

²⁶ *Id.*, at prolegomena, 5.

²⁷ South Africa Non-compliance Decision, *supra* note 23, para. 138.

²⁸ Other than appointing non-cooperation focal points, holding consultations, and developing a toolkit, there does not seem to be much action from the ASP on this point. The UNSC seems to have been even less responsive. The 2016 report of the Bureau on Non-cooperation reports that: "The decisions of the Court concerning non-compliance of Djibouti and Uganda were conveyed to the Security Council. To date, the Council has not taken any action in relation to these referrals." Report of the Bureau on Non-cooperation, para. 28, ICC-ASP/15/31 (Nov. 8, 2016), available at https://asp.icc-cpi.int/iccdocs/asp_docs/ASP15/ICC-ASP-15-31-ENG.pdf.

²⁹ South Africa Non-compliance Decision, *supra* note 23, para. 138.