The International Criminal Court Act 2001 and State or Diplomatic Immunity

The Case of the Prime Minister of Israel

Lord Verdirame KC and Professor Richard Ekins KC (Hon)

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Summary

The International Criminal Court Act 2001 is an Act to give effect to the Statute of the International Criminal Court (the ICC Statute or Rome Statute). Part 2 of the Act makes provision for the arrest, detention and delivery up to the International Criminal Court (ICC) of persons against whom the ICC has issued an arrest warrant. But section 23 of the Act does not allow any action under Part 2 of the Act to be taken in relation to a person to whom state or diplomatic immunity attaches by reason of a connection with a state that is not a State party to the Rome Statute. The only exceptions to this limitation are if (a) the ICC obtains a waiver from that state or (b) the United Nations Security Council (UNSC) makes a resolution.

The ICC has issued an arrest warrant against Prime Minister Benjamin Netanyahu of Israel. Israel is not a State party to the Rome Statute and has not waived state or diplomatic immunity. There is no relevant UNSC resolution. As a matter of customary international law, a Head of Government is entitled to absolute immunity against arrest. For this reason, it would be unlawful, as a matter of UK law and international law, to attempt to arrest Prime Minister Netanyahu.

If the Government were to attempt to comply with the arrest warrant it would be acting beyond the parameters of the powers conferred on it by an Act of Parliament and would be violating the UK's obligations in international law to respect state or diplomatic immunity. To the extent that the Government has indicated that it would attempt to execute an arrest warrant, its actions warrant strong denunciation. Any court hearing an application from the Secretary of State under Part 2 of the Act should reject the application on the grounds that it is incompatible with section 23 and with the rules about state or diplomatic immunity incorporated into and having effect in UK law

The terms of the International Criminal Court Act 2001

The International Criminal Court Act 2001 is the Act of Parliament that gives effect to the ICC Statute in UK law and thus allows for execution of ICC arrest warrants.

Section 2(1) of the 2001 Act provides that:

> *Where the Secretary of State receives a request from the ICC for the arrest and surrender of a person alleged to have committed an ICC crime… he shall transmit the request and the documents accompanying it to an appropriate judicial officer.*

Section 2(3) provides that:

> *If the request is accompanied by a warrant of arrest and the appropriate judicial officer is satisfied that the warrant appears to have been issued by the ICC, he shall endorse the warrant for execution in the United Kingdom.*

The subsequent sections in Part 2 of the Act make provision for a person to be arrested, detained and delivered up to the ICC, or to another state, in connection with an ICC warrant of arrest that has been endorsed by an appropriate judicial officer.

Section 23 is entitled "Provisions as to state or diplomatic immunity". The key provisions are subsections (1) and (2), dealing respectively with immunity attaching to a person "by reason of a connection with a state party to the ICC Statute", and immunity attaching to a person "by reason of a connection with a state other than a State party to the ICC Statute".

Section 23(1) provides that:

> *Any state or diplomatic immunity attaching to a person by reason of a connection with a state party to the ICC Statute does not prevent proceedings under this Part in relation to that person.*

The point of this enactment is to provide that arrest and surrender of a person to the ICC, or another state, may proceed despite the fact that the person enjoys state or diplomatic immunity and thus, but for section 23(1), would be immune from arrest, detention or delivery up.

The subsection is limited to a person who enjoys state or diplomatic immunity by reason of a connection with a State party to the ICC statute because states that are party to the ICC statute have waived state or diplomatic immunity. This is the point of the Rome Statute, namely that states who agree to be bound by the Rome Statute accept that their citizens,

even those who would otherwise enjoy state or diplomatic immunity, are subject to the jurisdiction of the ICC and thus of any state that is executing an ICC arrest warrant and surrendering the relevant person to the ICC.

By contrast, section 23(2) provides:

> *Where—*
>
> > *(a) state or diplomatic immunity attaches to a person by reason of a connection with a state other than a State party to the ICC Statute, and*
> >
> > *(b) waiver of that immunity is obtained by the ICC in relation to a request for that person's surrender,*
>
> *the waiver shall be treated as extending to proceedings under this Part in connection with that request.*

Section 23(2) thus addresses the situation in which a person has state or diplomatic immunity by reason of a connection to a state that is not a State party to the Rome Statute. The subsection provides that state or diplomatic immunity will not be a bar to the person's arrest, detention and delivery up to the ICC if and, it follows, only if the ICC has obtained a waiver of immunity from that state. If the ICC does not obtain a waiver from the state that is not a State party to the Rome Statute, then state or diplomatic immunity continues to apply, which means that as a matter of UK law the person cannot lawfully be arrested or surrendered to the ICC.

The terms of section 23(1) and (2) are clear and unambiguous in distinguishing State parties from non-State parties for the purpose of immunities. The Explanatory Notes relating to the Act confirm the position (emphasis added):

> *46. Article 27 [of the Rome Statute] states that the Statute shall apply equally to all persons without any distinction based on official capacity and that immunities attaching to the official capacity of a person, whether under national or international law, shall not bar the ICC from exercising its jurisdiction over such a person. Article 98.1 provides that the ICC 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 ICC can first obtain that third State's co-operation for the waiver of the immunity. These Articles mean that a State Party to the ICC Statute, in accepting Article 27, has already agreed that the immunity of its representatives, officials or agents, including its Head of State, will not prevent the trial of such persons before the ICC, nor their arrest and surrender to the ICC.* ***But non-States Parties have not accepted this provision and so the immunity of their representatives would remain intact unless an express waiver were given by the non-State Party concerned to the ICC.***

As a non-State party, the immunities of Israel's representatives therefore "remain intact". Those immunities include all state and diplomatic immunity defined in section 23(6) as follows:

> *any privilege or immunity attaching to a person, by reason of the status of that person or another as Head of State, or as representative, official or agent of a state, under—*
>
> > *(a) the Diplomatic Privileges Act 1964 (c. 81), the Consular Relations Act 1968 (c.18), the International Organisations Act 1968 (c.48) or the State Immunity Act 1978 (c.33),*
> >
> > *(b) any other legislative provision made for the purpose of implementing an international obligation, or*
> >
> > *(c) any rule of law derived from customary international law.*

The Head of a Government, such as Prime Minister Netanyahu, enjoys absolute immunity *ratione personae* as well as inviolability in the same way as an Ambassador under customary international law, and thus comes within the meaning of section 23(6)(c). Israel is not a State party to the Rome Statute, which means that section 23(1) does not qualify its state or diplomatic immunity. The ICC has not obtained a waiver from Israel in relation to a request for Prime Minister Netanyahu's surrender. It would thus be incompatible with section 23(2), and thus unlawful, for His Majesty's Government, or any constable or any other person whose acts are attributable in international law to the UK, to arrest or to detain the Prime Minister of Israel in connection with an ICC arrest warrant or otherwise. Arresting the Prime Minister of Israel would further breach the UK's international obligations vis-à-vis Israel and would involve a breach of the UK domestic law which incorporates this international obligation. There is no power in UK law to arrest or detain the Prime Minister of Israel.

Customary international law and the *Bashir* case

Some may seek to rely on the ICC Appeals Chamber decision in *The Prosecutor v Al-Bashir* (2019)[1] to argue that the serving Head of Government of a non-State party, like the serving Head of State in that case, does not enjoy immunity from arrest pursuant to an arrest warrant issued by an international court under customary international law..

The ICC had issued two arrest warrants for the then President of Sudan, Omar Al-Bashir. Sudan was and is not a State party to the Rome Statute. The basis for the ICC's jurisdiction in that case was a United Nations Security Council, UNSC Resolution 1593 (2005), which had referred the situation in Darfur to the ICC.

In 2017, Al-Bashir travelled to Jordan, a State party to the Rome Statute, which refused to arrest him. Jordan justified its, entirely proper, decision not to arrest on the basis that under customary international law the immunity of a Head of State from foreign criminal jurisdiction is not subject to any exceptions, as decided by the International Court of Justice (ICJ) in the 'Case concerning the arrest warrant of 11 April 2000' [the 'Arrest Warrant Case'].[2] Accordingly, Jordan maintained that it was obliged vis-à-vis Sudan not to execute the arrest warrant in relation to President Al-Bashir. Jordan's position was supported in two amicus curiae submissions by the African Union and the League of Arab States, representing collectively the views of nearly 70 states. No state or inter-governmental organisation intervened to support the contrary position.

Occasionally, there is some uncertainty as to which officials enjoy such immunity. But it is again universally accepted that a "troika" of high officers, namely heads of state, heads of government, and ministers of foreign affairs, enjoy such immunity. As the ICJ ruled in the Arrest Warrant Case, which concerned the immunity of a Minister of Foreign Affairs, whose position is assimilable to that of a Head of Government:

> *The Court would observe at the outset that in international law it is firmly established that, as also diplomatic and consular agents, certain holders of high-ranking office in a State, such as the Head of State, Head of Government and Minister for Foreign Affairs, enjoy immunities from jurisdiction in other States, both civil and criminal.*[3]

The ICJ ruled that "It has been unable to deduce from this practice that there exists under customary international law any form of exception to the rule according immunity from criminal jurisdiction and inviolability

1. ICC Appeal Chamber, *The Prosecutor v Omar Hassan Ahmad Al-Bashir*, ICC-02/05-01/09 OA2, 06 May 2019. Pre-Trial Chamber II has followed *Bashir* in its recent decision holding that Mongolia should have arrested President Putin.
2. *Arrest Warrant Case (Democratic Republic of the Congo v. Belgium)* Judgment, ICJ reports 2002, para. 53.
3. Id. para. 51.

to incumbent Ministers for Foreign Affairs, where they are suspected of having committed war crimes or crimes against humanity."[4] It reached that conclusion after having examined, inter alia, the Rome Statute and the practice of earlier international criminal tribunals.

The ICC Appeal Chamber rejected Jordan's case and decided that Article 27(2) of the ICC Statute was part of customary international law. Article 27(2) provides:

> *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 fact that Article 27(2) was only ever intended to apply as between parties to the ICC Statute is confirmed by Article 98(1) which reads:

> *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 waiver of the immunity.*

The terms of Article 98(1) are clear. The ICC Statute does not – and could not – give a State party a reason for acting in disregard of its obligations in respect of state or diplomatic immunity vis-à-vis a non-State party.

The ICC Appeals Chamber reached a decision that has attracted almost universal criticism by scholars. Dapo Akande, now Chichele Professor of Public International Law at the University of Oxford and the United Kingdom's candidate for the International Court of Justice, wrote at the time that the decision was "stunning and appears to be deeply misguided" and "a very dangerous and unwise move for the Court to make".[5] Akande criticised the judgement's reasoning as deeply flawed, and pointed out that the reasoning, which took away legal rights belonging to non-State parties, "is likely to stiffen opposition to the Court by non-parties."

Meanwhile, Ben Batros, a former counsel at the ICC, criticised the judgment as "confusing" and "frustrating" on a number of levels. Again, he pointed out the many internal inconsistencies of the reasoning of the judgment, criticises the Appeals Chamber for confusing the immunity of defendants vis-à-vis the Court with the immunity of persons vis-à-vis ICC State parties, and eviscerates Article 98(1). He concludes by saying that "The confusing nature of the decision is a bit of an own-goal for the Court", adding ominously that "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."[6]

Dov Jacobs, Assistant Professor of International Law, wrote that the Appeals Chamber "adopt[ed] the worst possible solution on immunities in the Bashir case". He concluded "This is again a case of the ICC Judges trying to be more (and to make the Court be more) than it actually is. In the fable, the frog actually exploded at the end… it's of course just a metaphor, but given recent developments at the Court, it's increasingly

4. Id. para. 58.
5. Dapo Akande, "ICC Appeals Chamber Holds that Heads of State Have No Immunity Under Customary International Law Before International Tribunals", *EJIL:Talk!*, 6 May 2019, https://www.ejiltalk.org/icc-appeals-chamber-holds-that-heads-of-state-have-no-immunity-under-customary-international-law-before-international-tribunals/
6. https://www.justsecurity.org/64896/why-the-iccs-judgment-in-the-al-bashir-case-wasnt-so-surprising/

becoming a concrete risk for the institution."[7]

The ICC Appeals Chamber's decision is wrong in law. The immunity of serving Heads of Governments under international law is firmly established as a matter of customary international law, and nothing justifies the Appeals Chamber's radical holding that it falls away in relation to the Rome Statute. Indeed, if the Appeals Chamber's contention were true, then there would be absolutely no reason to include Article 98(1) in the Rome Statute in the first place, something which the Appeals Chamber does not begin to attempt to explain.

Even the Appeals Chamber appeared to recognise the weakness of its position for, after claiming to settle the issue in *Bashir*, it immediately pivots to considering the question of whether UNSC Resolution 1593 meant that Sudan could not invoke immunity for Bashir, a point which is completely irrelevant if one accepts the Appeals Chamber's bald assertion that Bashir had no immunity against ICC proceedings.

To complicate matters, four of the five judges who sat on the ICC Appeals Chamber produced a joint concurring opinion in order to "recommend a certain view of the further analysis that underscores the correctness of the Appeals Chamber's judgment on that subject".[8] The stated aim of the joint concurrent opinion was "to reveal that further analysis in a connected way."[9] The four judges purport to deal with the difficulty of reconciling Articles 27 and 98(1) in an opaquely reasoned section entitled "A Juristic Algebra".[10] The concurrent opinion discusses two conflicting first instance decisions on the issue of immunity that had also arisen in connection with the decision of State parties to the ICC not to arrest President Al-Bashir: the Malawi Referral Decision and the South Africa Referral decision.[11]

The pre-trial chambers in the South Africa Referral Decision had found:

> *[T]he Chamber notes that customary international law prevents the exercise of criminal jurisdiction by States against Heads of State of other States. This immunity extends to any act of authority which would hinder the Head of State in the performance of his or her duties. The Chamber is unable to identify a rule in customary international law that would exclude immunity for Heads of State when their arrest is sought for international crimes by another State, even when the arrest is sought on behalf of an international court, including, specifically, this Court.*[12]

The concurrent opinion says that "[a]t face value, the pronouncement in the South Africa Referral Decision may appear logically attractive to some observers" before adding, mystifyingly, "that the matter goes deeper than face value and a view of logic."[13] The pre-trial chamber in the South Africa Referral Decision had however concluded that customary international law immunities were no bar to the arrest of President Al-Bashir because of the effect of UNSC Resolution 1593.

It is a fundamental principle of international law that "A treaty does not create either obligations or rights for a third State without its consent."[14] States who are parties to the Rome Statute cannot purport to modify the rights of a state that is not party to the Rome Statute, namely Israel.

7. 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/
8. Joint Concurring Opinion of Judges Eboe-Osuji, Morrison, Hofmański and Bossa, para. 1.
9. Ibid.
10. Id. paras. 405-412.
11. Pre-Trial Chamber I, 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, ICC-02/05-01/09-139, 12 December 2011 (Malawi Referral Decision"; Pre-Trial Chamber II, 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-02/05-01/09-302, 06 July 2017 (South Africa Referral Decision).
12. Joint Concurring Opinion of Judges Eboe-Osuji, Morrison, Hofmański and Bossa, para. 417.
13. Vienna Convention on the Law of Treaties, Article 34.

This interpretation was accepted by an earlier ICC Pre-Trial Chamber arising from the decision of the Democratic Republic of Congo not to arrest President Al-Bashir, which held that "[g]iven that the Statute is a multilateral treaty governed by the rules set out in the Vienna Convention on the Law of Treaties, the Statute cannot impose obligations on third States without their consent. Thus, the exception to the exercise of the Court's jurisdiction provided in article 27(2) of the Statute should, in principle, be confined to those States Parties who have accepted it."[15]

The Appeals Chamber attempts to sidestep this fundamental objection by claiming that "when adjudicating international crimes… international courts act on behalf of the international community as a whole". This is an untenable position. There is absolutely nothing, either in the text of the Rome Statute, or of its *travaux préparatoires*, to support such an astonishing proposition.

Indeed, the Appeals Chamber does not even attempt to define an "international court" in this context, so that, on its own logic, nothing stops two states from obliterating the law of immunity by establishing between themselves an international court which purports to "act on behalf of the international community as a whole". This is clearly an absurd position.

In any event, for the purposes of the position under UK law, the ICC Act 2001 is clear and unambiguous. No British court is free to disapply, read down or otherwise disregard clear and unambiguous terms even if the court reasoned that this would ensure consistency with international law (which is not the case here anyway as customary international law requires the UK not to breach state or diplomatic immunity). There is no way of 'reading down' section 23 (even if such an approach to statutory interpretation were permissible, which it is not) without frustrating the fundamental distinction that Parliament drew in that enactment between State parties and non-State parties. This distinction was central to this provision and thus to the way in which Parliament decided to implement the UK's obligations under the Rome Statute, including mirroring and incorporating Article 98 into UK law.

It is also worth noting that the Rome Statute in fact acknowledges the importance of national law, especially in relation to the procedure for enforcing arrest warrants. Crucially, Article 59 says that a state which has received a request for arrest "shall immediately take steps to arrest the person in question in accordance **with its laws and the provisions of Part 9.**" [Emphasis added.] "Its laws" clearly encompass the International Criminal Court Act 2001, while "the provisions of Part 9" include Article 98(1) concerning the effect of immunity. Hence, by following the statute enacted by Parliament and the explicit provisions of the Rome Statute, the United Kingdom would be upholding the rule of law by not giving effect to the arrest warrant against Prime Minister Netanyahu.

14. Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court, ICC-02/05-01/09-195, 09 April 2014.

The Government's current position

The Government has chosen to equivocate about whether it would give effect to the arrest warrant if Prime Minister Netanyahu was to be on British soil. Such equivocation is unjustifiable and irresponsible.

As noted above, Parliament legislated on the basis that the UK had to continue to respect its obligations under customary international law in respect of the immunities of representatives of non-State parties. Customary international law has not changed since the ICC Act 2001. Interestingly, the ICC Appeal Chamber in *Prosecutor v Bashir* did even contend to the contrary. Its (wrong) conclusion appeared instead to be that customary international law had changed at some unspecified time before the ICC Statute was even adopted, and that Article 27(2) must be interpreted as reflecting such a pre-existing customary rule. That has never been the UK position, and the ICC Act 2001 (as indeed the ICC Statute itself) clearly reflect that.

Customary international law is a source of law unique to international law. It comprises two elements: the practice *of States* and the views *of States* ("opinio juris") as to the binding nature of the rule. States – not NGOs or campaigners, or indeed even courts – are the creators of customary international law. This is an entirely state-centric source of law. Its correct application requires States to be clear on where they stand in relation to particular rules. Equivocation by the Government on such an important issue – and one where our domestic law reflects a clear understanding of what customary international law was and is – does no service to either UK law or international law. It also undermines the core rule of law value of legal certainty and clarity.

Indeed, whenever customary international law is contended to be different from what the UK considers it to be, it is *imperative* that the Government should respond by re-stating its position. Successive UK Governments have often acted in this way, and indeed British law officers' statements have historically made an important contribution to shaping the course of customary international law, as well as providing clarity as regards the official view of the UK on the law. Equivocation about the rules of customary international law is not a form of progress in the history of this country's relationship with international law: it is the opposite.

The Government must therefore make a clear and unequivocal statement that sets out the UK's understanding of the position under customary international law. That statement would have to provide that,

in accordance with its domestic law, the UK maintains the view that customary international law – in 2001 as well as now – does not permit the arrest or delivery of the serving Prime Minister of a non-State party to the ICC.

On Friday 22 November, a statement by a No 10 Spokesman was widely reported as indicating that the Government would seek to arrest Prime Minister Netanyahu were he to travel to the UK or otherwise enter our jurisdiction. The Government should urgently correct this statement. For the reasons given above, such a course of action would clearly be unlawful in UK law – and would also breach the UK's international obligations to respect state or diplomatic immunity.

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