Elisions and Omissions: Questioning the ICC’s Latest Bashir Immunity Ruling

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In their seminal article on Third World perspectives on international criminal law, Professors Anghie and Chimni express hope for the International Criminal Court (ICC) partly on the basis that it will constrain the controversial judicial lawmaking of the ad hoc tribunals by establishing clear rules “through an open process which has received the broad approval of the international community as a whole.”

That optimism is surely tempered now by the recent Afghanistan decision and this week’s decision (and curious, voluminous joint concurring opinion of only four judges) on the eight-year legal saga about the immunity of (now former-) President Omar al-Bashir of Sudan. In this confusing and at times apparently contradictory decision, the Appeals Chamber offers arguments that rest on contestable foundations, in part because of its questionable interpretations of or indifference to unfavorable evidence.

Rather than unpack the entirety of the decision, here I analyze the Chamber’s exegesis of the history of international law to raise questions about three conclusions it reaches: (1) that international tribunals are qualitatively different than national ones because of their internationality; (2) that there has always been a rule of customary international law that no immunities apply before international tribunals; and (3) that Security Council Resolution 1593 implicitly removed Bashir’s immunities. In a case that demanded careful reasoning, the Chamber’s arguments unfortunately stretch its credibility by either leaving important questions unanswered, omitting relevant detail, or at times veering into the disingenuous.

On ‘International’ Courts

One of the ‘crucial’ legal positions advanced by the Chamber is that head of state immunity has never applied before international tribunals, as opposed to foreign ones. In other words, there is no need for the Court to prove that there is an exception to the ordinary rule of immunities. Rather, the Chamber says, the ordinary rule of immunities has been incorrectly construed from the start by virtually all concerned, including previous Pre-Trial Chamber decisions and those who argue that Bashir’s immunities did not protect him. This is distinct from arguments such as that of Paola Gaeta, who states that a customary law exception to the ordinary rule of immunities before international courts has evolved over time but that immunities still apply as between nation states regardless.

The Chambers’ reasoning proceeds on two prongs, first it explains the idea that the ‘international’ nature of a court should erase concerns about sovereigns exercising control over one another. International courts are distinguished from national courts, so the reasoning goes, because they are entitled to adjudicate sovereigns in ways that other sovereigns are not. As Cassese argued and the Pre-Trial Chamber accepted in para. 34 of the Malawi Decision, this positivist logic manifests the idea that international courts are not vulnerable to the same concerns about using judicial processes as smokescreens for interference in the domestic affairs of another sovereign state.

In spite of concerns expressed even by favorable and supportive amici, the Appeals Chamber states without much clarification that any court created by two or more states is entitled to exercise authority that national courts cannot (Para. 54, Joint Opinion). There is no explanation of how this occurs legally as opposed to logically, other than to say that in 1919 and 1945, states quite wanted this to be true – of course, those states were willing to put on trial only the nationals and leaders of states they had defeated.

The omission is unfortunate, as the fact that the ICC is a treaty-based court might have obviated some of Cassese’s concerns about the use of courts to exercise political power, although it would have run up against several objections. First, there are numerous examples of organs of the ICC acquiescing to state power (including the recent Afghanistan decision) in decisions about which cases or parties to pursue. Second, as I suggest in Paras. 40 – 45 here, the ICC fails to reckon with critiques of itself as an instrument of partisan power. The vacuum in its current reasoning on this point does not assuage those perceptions. Finally, there is the conceptual point that states cannot, without something additional, combine to do collectively what they could not do singularly. Instead, the reasoning seems to violate basic treaty principles: that by joining together, these states have erased obligations they owed to non-state parties.

Histories of Prosecution

The second prong of the Chamber’s reasoning is that state practice supports its findings about the customary law of immunities. The Chamber points to a number of prosecutions both desired (of Kaiser Wilhelm II) and actual (of Doenitz, Tojo, Milosevic, Taylor, Gaddafi and Gbagbo) as supporting evidence. Yet many of these cases are equally consistent with the mainstream alternative interpretation of immunities: that immunities for sitting heads of state must be waived even if the court is international, unless it is a former head of state (who therefore enjoys no immunities).

Of that list, only Doenitz was actually head of state when indicted and arrested, three weeks after being appointed by Hitler. The Kaiser was never tried and had abdicated by the time he was legally pursued, yet the Chamber suggests that we treat his situation as favorable to its argument because of the “fervour” (Para. 105, Joint Opinion) with which four British and French lawyers argued, and the fact that they went on to senior positions in government (Para. 101, Joint Opinion). Passion and promotions are apparently meaningful tools of legal interpretation.

As for the rest: Tojo resigned a year before the end of the war in the Pacific; Milosevic was indicted while in office, but at the time of arrest had lost an election, been arrested on domestic corruption charges, and seen the International Criminal Tribunal for the former Yugoslavia (ICTY) reissue a warrant for his arrest; and, Taylor was indicted while in office, but had resigned and been in exile for nearly three years when arrested. Using Gaddafi’s case as precedent is disingenuous, given that Bashir was indicted first and Gaddafi’s case would have presented the exact same legal issues had he lived. The reference to Gbagbo is bizarre: Gbabgo’s own government had acceded to ICC jurisdiction (and therefore waived immunity) seven years before his arrest, which also took place after Gbagbo had lost an election. The elision of these distinctions complicates the veracity of the ICC’s claims that it has uncovered the correct history of personal immunities, and gives credence to charges of teleological reasoning.

Interpreting Security Council Action and State Practice

Less for its elisions than for its omissions, the Chamber’s history of the Security Council’s views is also troubled. While Resolution 1593 could have been interpreted in the manner suggested by the Court (which was a key point of debate between amici curiae last summer) – that is, the Resolution implicitly removed the immunity of Bashir – there is obvious contrary evidence that is ignored. The Chamber trumpets, for example, the apparent American evolution on immunities from the First to the Second World Wars, without asking whether the same country would agree with that position now (or indeed at any point since the military tribunals).

Much is made of the Security Council’s views on immunities at both the ad hoc tribunals and the ICC, but no mention is made of its unwillingness to act on persistent non-cooperation or the Prosecutor’s requests for assistance in respect of Bashir. Furthermore, just as the Chamber overlooks the modern day American position, it also ignores that two other permanent members – Russia and China – clearly do not agree with the Chamber’s interpretation of that resolution.

Similarly, in referencing widespread adoption of the Rome Statute as favorable evidence, the Chamber ignores that it raises this point in a case in which a party to that same treaty has yet again refused to arrest Bashir. Bashir made dozens of overseas trips after the arrest warrant was first issued in 2009, “including [to] fourteen States Parties, eleven non-States Parties, and eight Signatory States.” The majority of his trips were made to African and Middle Eastern states, suggesting that the state practice the ICC claims is neither as comprehensive nor as uniform as it claims.

Finally, to the extent that the statutes of the ad hoc tribunals are claimed as evidence in its favour, the Chamber ignores the Malabo Protocol to the African Court of Justice and Human Rights, in which an international tribunal will (if ratified) specifically affirm head of state immunity. Had the Chamber earlier laid out some criteria for legitimate international tribunals, it might have been able to offer a principled response; instead it invites then ignores the obvious comparison.

Enduring Significance?

None of this is to say that the result the Chamber arrives at is necessarily wrong. There is enough ambiguity and contradiction on all the main arguments for and against Bashir such that a range of outcomes could have been justified through robust and nuanced reasons. Yet key aspects of the decision are clouded by questions of completeness. This suggests yet another failure of the Chamber: to appreciate the context of its decision as one in which a great number of states and observers perceive neo-imperial impulses emanating from the Court. Perhaps little could be done to ultimately rebut those views, but the unstable reasoning of the Chamber gives greater credence to such critiques.

The Chamber’s decision does little to repair the damage done to the Court’s reputation through its previous inconsistent decision-making in the other Bashir non-cooperation cases. The Chamber says “nothing turns” (Para. 97) on the complaint that so many different iterations of the Pre-Trial Chamber have issued decisions arriving at the same result – that immunity does not preclude the arrest of Bashir by a particular state – through different reasons. In its charitable description of this as merely “different structures of judicial reasoning,” the Chamber overlooks that not only were different rationales put forth in different judgments, but that some of those judgments clearly rejected the reasoning adopted in other decisions. Perhaps nothing of immediate import turns on this because the latest decision is binding, but the degrees of incompatibility of prior decisions with each other and the present one’s failure to address them challenge the reliability of the Court’s decision-making.

It is nonetheless unsurprising that the Chamber minimizes the significance of this disagreement, given that its own method of resolving the inconsistencies is not to choose between them, but rather to choose all of them and stitch them together. In this respect, the Chamber seems less to be deciding an issue than preparing to have it challenged yet again. The comprehensive set of rationales offered in the decision and joint opinion seem addressed as much to future decision-makers as to the parties, providing them with a set of options (and reasons favoring all of them). In this light, the decision is only another stop on an uncertain and unending journey rather than the endpoint it was promised to be, undermining yet again the optimism that ushered in the Court.