

Chapter 9, Problem IV

State Refusals to Hand Over Suspects

South Africa's unwillingness to hand over then-Sudanese president al-Bashir to the ICC in 2015, discussed in the casebook on p. 495, was one of many instances where states parties failed to hand him over to the Court despite the issuance of an arrest warrant. Chad, Kenya, Djibouti, Uganda, Malawi, and Democratic Republic of the Congo also refrained from doing so. When Jordan, another ICC party, failed to arrest him in 2017, the ICC's pre-trial chamber, relying on prior rulings, found that al-Bashir lacked immunity. The Appeals Chamber, in its first ruling on this issue, unanimously agreed, [ruling](#) in May 2019 that "there is no Head of State immunity under customary international law vis-a-vis an international court." A number of [commentators](#) praised the ruling, while others [criticized](#) it for limiting the rights of non-parties to the ICC Statute (like Sudan) and endorsing a rule applying to any "international court." Detractors said that the ICC should have relied on Jordan's status as a party to the ICC Statute or the original Security Council Chapter VII resolution referring the case to the ICC.

What would be the likely reaction in the capitals of non-state parties to the ICC Statute to the Court's 2019 ruling? Do you think that, by creating an international court like the ICC, the parties are able to remove the immunity under customary international law of heads of states of non-parties? If those heads of state still have immunity from arrest, then how can the Court gain custody of them? If you were the head of police in a state party in this situation, would you hand over a defendant?

Russia's Invasion of Ukraine and the ICC

The Russian invasion of Ukraine in February 2022 placed renewed attention on national and international mechanisms to bring to justice those accused of war crimes, whether individual soldiers, military commanders, or civilian leaders. Numerous reports from the UN, the Organization for Security and Cooperation in Europe, NGOs, journalists, and eyewitnesses pointed to the commission of numerous violations of international humanitarian law by invading Russian forces, including large-scale killings of civilians, deliberate targeting of civilian objects, arbitrary detention, forced deportations, and torture. As discussed in Problem I, many of these actions constitute war crimes and, under certain circumstances, crimes against humanity.

At the national level, efforts at accountability for Russian soldiers began in May 2022, when a Russian soldier captured in Ukraine pleaded guilty before a Ukrainian court of killing an unarmed civilian, and two other Russian soldiers pleaded guilty to shelling civilian targets. Governments praised the proceedings, though scholars expressed [concern](#) about the use of civilian courts to try war crimes during hostilities, as well as the [due process](#) provided to the soldiers. (See [here](#) as well.) Some observers urged Ukraine to investigate actions by its own soldiers. In July 2022, Russia announced that it was prosecuting 92 Ukrainian soldiers for crimes against humanity, following an earlier statement that it was investigating over 1000 Ukrainian soldiers. [Amnesty International](#) condemned the action, noting that soldiers cannot be

prosecuted merely for participating in hostilities and that the prosecutors had offered no evidence of the commission of international crimes.

In addition, six EU states – Poland, Lithuania, Ukraine, Estonia, Latvia, and Slovakia -- set up a “Joint Investigation Team” (JIT) under EU auspices to facilitate investigations and prosecutions in their own states under national or universal jurisdiction. The ICC Prosecutor (see below) agreed to join the JIT as a participant. France and Germany commenced investigations as well.

At the international level, almost immediately after the first reports emerged, the UN Human Rights Council created a [three-person commission of inquiry](#) to investigate the atrocities. The UN has created such commissions in other areas of large-scale violations of international human rights law and international humanitarian law, including North Korea, Myanmar, and Syria. Virtually simultaneously, Ukraine invoked the Organization for Security and Cooperation in Europe’s Moscow Mechanism, triggering an independent investigation that resulted in a detailed [report](#) in April. The General Assembly removed Russia from the Human Rights Council in April, the first such action taken against a Council member.

With respect to the ICC, although Ukraine is not a party to the ICC Statute (neither is Russia), it filed a notification in 2015 pursuant to Article 12(3) of the ICC Statute (p. 487 of the casebook) accepting the jurisdiction of the Court for any crimes committed on its territory since February 2014. (This acceptance does not cover the crime of aggression, for which the Court lacks jurisdiction because neither Russia nor Ukraine are parties.) In early March 2022, 38 states parties to the ICC Statute referred the situation in Ukraine to the ICC, thereby triggering an investigation by the Prosecutor. Despite deep reservations in the U.S. Congress about the ICC, the U.S. Senate overwhelmingly passed a resolution in March 2022 that, among other things, encouraged states to refer the situation in Ukraine to the ICC. The Prosecutor’s investigation has included visits to Ukraine and deployment of numerous investigators. His investigation is geographically delimited and thus not limited to actions by Russian forces.