



Original: English

No. ICC-02/05-01/09 OA2

Date: 27 August 2018

THE APPEALS CHAMBER

Before:

**President Chile Eboe-Osuji, Presiding Judge
Judge Howard Morrison
Judge Piotr Hofmański
Judge Luz del Carmen Ibáñez Carranza
Judge Solomy Balungi Bossa**

SITUATION IN DARFUR, SUDAN

**IN THE CASE OF
THE PROSECUTOR v. OMAR HASSAN AHMAD AL-BASHIR**

Public document

**Order on the conduct of the hearing before the Appeals Chamber
in the Jordan Referral re Al-Bashir Appeal**

Order to be notified in accordance with regulation 31 of the Regulations of the Court to:

The Office of the Prosecutor
 Ms Fatou Bensouda, Prosecutor
 Ms Helen Brady

States Representatives
 Competent authorities of the Hashemite
 Kingdom of Jordan

Amici curiae

The African Union

The League of Arab States

Ms Annalisa Ciampi

Ms Paola Gaeta

Ms Yolanda Gamarra

Mr Claus Kreß

Ms Flavia Lattanzi

Mr Konstantinos D. Magliveras

Mr Michael A. Newton

Mr Roger O’Keefe

Mr Darryl Robinson, Mr Robert Cryer, Ms Margaret deGuzman, Ms Fannie Lafontaine, Ms Valerie Oosterveld, and Mr Carsten Stahn

Mr Nicholas Tsagourias

Mr Andreas Zimmermann

REGISTRY

Registrar
 Mr Peter Lewis

The Appeals Chamber of the International Criminal Court,

In the appeal of the Hashemite Kingdom of Jordan against the decision of Pre-Trial Chamber II entitled ‘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 o[f] Omar Al-Bashir’ of 11 December 2017 (ICC-02/05-01/09-309),

Noting the ‘Decision on the requests for leave to file observations pursuant to rule 103 of the Rules of Procedure and Evidence, the request for leave to reply and further processes in the appeal’ of 21 May 2018 (ICC-02/05-01/09-351), in which the Appeals Chamber informed the parties and *amici curiae* that a hearing would be held from Monday, 10 September 2018 to Wednesday, 12 September 2018 in order to hear submissions and observations on the above-mentioned appeal,

Issues the following

ORDER

1. The Appeals Chamber hereby revises the schedule of the hearing from three days (10, 11, 12, September 2018) to four days (including Thursday, 13 September 2018).
2. Over the four days scheduled, the Appeals Chamber invites the parties and the *amici curiae*¹ to address the issues as outlined below. The questions are intended to guide the parties and *amici curiae* in their submissions and need not be answered individually. Furthermore, the *amici curiae* may choose to focus on particular issues or topics as preferred.

¹ In the alphabetical order given in the notification page.

i. Group A – Applicable law and its interpretation and Head of State immunity under customary international law and conventional law

- a. According to article 31 of the Vienna Convention on the Law of Treaties² ('Vienna Convention'), the provisions of a treaty must be interpreted in the light of its context, including the preamble, and its object and purpose. What is the significance of such a contextual interpretation of the Statute, in the light of its object and purpose as set out in its preamble, namely 'to put an end to impunity for the perpetrators of [the most serious crimes of concern to the international community as a whole] and thus contribute to the prevention of such crimes', in the determination of the appeal?
- b. In interpreting the relevant provisions of the Statute, at what stage (if at all) should guidance be sought from customary international law, given the terms of article 21(1) of the Statute?
- c. In deciding the issues on appeal, how should the Appeals Chamber ensure that article 21(3) of the Statute is complied with?
- d. Article 2(3)(a) of the International Covenant on Civil and Political Rights³ stipulates that States must ensure that 'any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity'. What is its relevance (if any) *vis-à-vis* the position of the Hashemite Kingdom of Jordan regarding Mr Al-Bashir's alleged immunity?
- e. According to article 64 of the Vienna Convention, *jus cogens* norms are 'peremptory norms of general international law'. Is the prohibition against committing international crimes, such as those allegedly committed by Mr Al-Bashir, including genocide by killing and the crimes against humanity of extermination, torture and rape, a *jus cogens* rule?

² 23 May 1969, 1155 United Nations Treaty Series 18232.

³ 16 December 1966, 999 United Nations Treaty Series 14668.

- f. Can a customary rule or conventional international law provision on immunities be superior to a *jus cogens* rule?
- g. What is the origin and nature of Head of State immunity in international law? Is it a right or a privilege, and what is the relevance of such a distinction (if any) to the case at hand?
- h. Are there any limits or restrictions to Head of State immunity and, if so, on which bases?
- i. Leaving aside the potential impact of the Statute and a referral to the Court from the United Nations Security Council ('Security Council'), does a Head of State enjoy immunity from arrest by another State under customary international law when the arrest is sought by an international criminal court in respect of international crimes?
- j. When has sovereign immunity been pleaded – successfully or otherwise – before, or in relation to, an international criminal court?
- k. The International Court of Justice in the Arrest Warrant case refers to a potential exception to Head of State immunity under customary international law in respect of 'criminal proceedings before certain international criminal courts, where they have jurisdiction'.⁴ How should this be understood and what is its relevance (if any) to the case at hand?
- l. Are consistent State practice and *opinio juris* requirements for the purposes of identifying a rule of customary international law in the area of Head of State immunity, where the arrest is being sought at the instance of an international criminal court? If so, is there sufficient State practice in this area to identify the existence of a rule of customary international law (that a Head of State enjoys immunity from arrest by another State when the arrest is sought by an international criminal court in respect of international crimes)? Has there been any change in State practice or *opinio juris* in this regard since 1998, when the Statute was adopted?
- m. Is article 98(1) of the Statute an indication of the existence of Head of State immunity under customary international law when the arrest is

⁴ International Court of Justice, *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, 14 February 2002, [I.C.J. Reports 2002](#), p. 3, para. 61.

sought by the Court? Or does it concern such immunity that remains *opposable* in the circumstances, taking into account possible unavailability of immunity otherwise applicable according to customary rules or treaty provisions in international law?

- n. If it were to be found that customary international law recognises an exception to Head of State immunity if arrest is sought by the Court, what effect (if any) would this have on conventional international law immunities?
 - o. How (if at all) should one balance Head of State immunity against responsibility for the international crimes allegedly committed by Mr Al-Bashir which amount to core violations of human rights?
 - p. What is the impact (if any) of the Convention on the Prevention and Punishment of the Crime of Genocide⁵ on Head of State immunity?
 - q. What is the relevance (if any) of, and the applicable basis for, the abuse of rights principle and the maxim that no one may profit from his own wrongdoing to the case at hand?
- ii. Group B – Security Council referrals under article 13(b) of the Statute and Resolution 1593⁶
- a. For the purposes of Chapter VII of the United Nations (‘UN’) Charter, does the Security Council have the power to waive, displace or override the immunity of a Head of State under customary international law or conventional international law? If so, must this be done expressly or can it be by necessary implication?
 - b. For the purposes of Chapter VII of the UN Charter, does the Security Council have the power to make conventional provisions of the Statute applicable to States that are not party to it? If so, must this be done expressly or can it be by necessary implication?

⁵ 9 December 1948, 78 United Nations Treaty Series 1021.

⁶ 31 March 2005, [S/RES/1593](#).

- c. In this respect, what is the intendment of article 13(b) of the Statute when it provides that the Court must exercise its jurisdiction ‘in accordance with the provisions of [the] Statute’?
- d. Does article 13(b) of the Statute entail the application of the Statute to a non-State Party on the same basis as a State Party, or does it only serve to instrumentalise the Court through the Chapter VII powers of the Security Council?
- e. What is the significance (if any) of the fact that Security Council referrals of situations to the Court under article 13(b) of the Statute can only be accomplished by the Security Council under Chapter VII, not under any other chapter of the UN Charter, nor by the UN General Assembly?⁷
- f. Is a proper understanding of the effect of article 13(b) of the Statute assisted by the hypotheses that the Court: (a) is the ‘brainchild’ of the UN; and/or (b) was established as a separate entity rather than as part of the UN?
- g. What is the legal significance and effect of the distinction, in paragraph 2 of Resolution 1593, between imposing an obligation on the Republic of the Sudan to cooperate fully, while only urging all other States to cooperate fully?⁸ Does the former obligation have the same effect on States not party to the Statute (whether UN Member States or otherwise) as it does on the Republic of the Sudan, from the perspective of any immunities cognisable under article 98 of the Statute?
- h. Does the ‘urge’ in paragraph 2 of Resolution 1593 on all other States to cooperate fully amount to a licence, excuse or defence permitting States to derogate from any immunities that the Republic of the Sudan might otherwise enjoy under international law?

⁷ See esp [Commentary](#) of the International Law Commission to draft article 23(1) of the 1994 Draft Statute for an International Criminal Court 1994, paras 1, 5. See also United National General Assembly, Report of Ad Hoc Committee on the Establishment of an International Criminal Court, doc no [A/50/22](#), 6 September 1995, para. 120.

⁸ Paragraph 2 provides: ‘*The Security Council, [...] Decides that the Government of Sudan and all other parties to the conflict in Darfur, shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution and, while recognizing that States not party to the Rome Statute have no obligation under the Statute, urges all States and concerned regional and other international organizations to cooperate fully*’ (emphasis in original).

- i. Given the express recognition, in paragraph 6 of Resolution 1593,⁹ of specific exceptions to the Court's jurisdiction, can the resolution reasonably be construed as recognising any other exceptions by implication, notwithstanding the requirements of cooperation placed upon UN Member States by virtue of various provisions of the UN Charter including articles 2(2), 2(5), 2(7), 24(1), 25, 49 and 103?
- j. Is it right to say that immunity derives essentially from sovereignty? If so, can a UN Member State plead its own sovereign immunity in order to avoid the effects of a Chapter VII measure, particularly having regard to articles 1(1), 1(3) and 1(4) of the UN Charter, and its preamble.
- k. Can a rule of customary international law be pleaded by a State as a bar against the implementation of a decision of the Security Council taken under Chapter VII, particularly having regard to articles 2(2), 2(5), 2(7), 24(1), 25, 48, 49, and 103 of the UN Charter?
- l. Is there a difference between the legal effects in the following scenarios where the Security Council uses Chapter VII powers to: (a) refer a case to the Court and (b) create a new *ad hoc* tribunal like the International Criminal Tribunal for the former Yugoslavia ('ICTY') or the International Criminal Tribunal for Rwanda ('ICTR')? If the Security Council had created a new *ad hoc* tribunal for Darfur modelled on the template of the resolutions used in the creation of the ICTY and ICTR, would Mr Al-Bashir have enjoyed immunity before that tribunal?
- m. Since the adoption of Resolution 1593, to what extent (if any) has the Republic of the Sudan complied with its obligation to 'cooperate fully', other than in the matter of the arrest and surrender of Mr Al-Bashir? How many citizens of the Republic of the Sudan are currently subject to an arrest warrant issued by the Court, and what is the extent of the Republic of the Sudan's cooperation in the arrest and surrender of such persons to the Court?

⁹ Paragraph 6 provides: '*The Security Council, [...] Decides that nationals, current or former officials or personnel from a contributing State outside Sudan which is not a party to the Rome Statute of the International Criminal Court shall be subject to the exclusive jurisdiction of that contributing State for all alleged acts or omissions arising out of or related to operations in Sudan established or authorized by the Council or the African Union, unless such exclusive jurisdiction has been expressly waived by that contributing State*' (emphasis in original).

- n. Would the recognition of immunity in respect of Mr Al-Bashir render Resolution 1593 wholly or substantially ineffective?
- o. In the context of a request for arrest and surrender issued by the Court following a Security Council referral, could the State be said to be acting as the Court's jurisdictional proxy, or otherwise, in the execution of such a request? What is the relevance (if any) of article 59 of the Statute in this regard?

iii. Group C – Articles 86, 87(7), 97 and 98(2) of the Statute

- a. What types of 'international agreements' are covered by article 98(2) of the Statute, and does the 1953 Convention on the Privileges and Immunities of the Arab League fall within its scope?
- b. Article 86 of the Statute enjoins States Parties to 'cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court'. Does this obligation include the duty to arrest and surrender persons in respect of whom the Court has issued arrest warrants, leaving aside any question of immunity?
- c. How should the general obligation to cooperate fully with the Court in article 86 of the Statute be understood in light of article 27(2) of the Statute, and paragraph 2 of Resolution 1593?
- d. In what circumstances (if any) would it be desirable for the Court to refer a State to the Assembly of States Parties and/or the Security Council in respect of non-compliance pursuant to article 87(7) of the Statute, when it is no longer immediately possible to obtain the specific cooperation requested (such as in the present case when Mr Al-Bashir was no longer present on Jordanian territory at the time of the referral)?
- e. What specific actions (if any) were taken by the Hashemite Kingdom of Jordan to communicate to the Court the difficulties encountered in its execution of the arrest warrant in respect of Mr Al-Bashir in accordance with article 97 of the Statute?
- f. What specific action (if any) has been taken by the African Union and/or the Republic of the Sudan to address the alleged gross violations of human rights committed in Darfur?

3. The parties and *amici curiae* will be invited to address the Appeals Chamber on the issues set out above as follows:

In relation to Group A and Group B, respectively:

- i. The Hashemite Kingdom of Jordan (30 minutes)
- ii. The Prosecutor (30 minutes)
- iii. The *amici curiae*
 - a. The African Union (25 minutes)
 - b. The League of Arab States (25 minutes)
 - c. The Professors of International Law (20 minutes each)
- iv. The Prosecutor (5 minutes)
- v. The Hashemite Kingdom of Jordan (5 minutes)

In relation to Group C:

- i. The Hashemite Kingdom of Jordan (20 minutes)
- ii. The Prosecutor (20 minutes)
- iii. The *amici curiae*
 - a. The African Union (15 minutes)
 - b. The League of Arab States (15 minutes)
 - c. The Professors of International Law (10 minutes each)
- iv. The Prosecutor (5 minutes)
- v. The Hashemite Kingdom of Jordan (5 minutes)

4. Additional questions may be put to the parties and *amici curiae* from the bench in respect of the above issues or any other relevant issues.

5. At the end of the hearing, the *amici curiae* will be invited to make final observations of 10 minutes each. Thereafter, the Hashemite Kingdom of Jordan and the Prosecutor will also be invited, to make final submissions of 25 minutes each.¹⁰

Done in both English and French, the English version being authoritative.



President Chile Eboe-Osuji
Presiding Judge

Dated this 27th day of August 2018

At The Hague, The Netherlands

¹⁰ Within this framework, the Hashemite Kingdom of Jordan will also be permitted to reply to the Prosecutor's response to the appeal and the Prosecutor may reply accordingly, as indicated in the 'Decision on the requests for leave to file observations pursuant to rule 103 of the Rules of Procedure and Evidence, the request for leave to reply and further processes in the appeal', 21 May 2018, [ICC-02/05-01/09-351](#), para. 3