

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 26 April 2018

THE APPEALS CHAMBER

Before: Judge 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

**REQUEST BY PROFESSOR ANDREAS ZIMMERMANN FOR LEAVE TO
SUBMIT OBSERVATIONS ON THE MERITS OF THE LEGAL QUESTIONS
PRESENTED IN THE HASHEMITE KINGDOM OF JORDAN'S APPEAL
AGAINST THE 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 OF
12 MARCH 2018**

Source: PROFESSOR ANDREAS ZIMMERMANN

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

The Office of the Prosecutor
Ms Fatou Bensouda, Prosecutor
Mr James Stewart

Counsel for the Defence

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

States' Representatives
Competent authorities of the Hashemite
Kingdom of Jordan

Amicus Curiae

REGISTRY

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Detention Section

**Victims Participation and Reparations
Section**

Other

I. INTRODUCTION

1. In line with the ‘Order inviting expressions of interest as *amici curiae* in judicial proceedings’ of the Appeals Chamber dated 29 March 2018, I hereby request leave to submit observations on the merits of the legal questions presented in the appeal in the case of THE PROSECUTOR v. OMAR HASSAN AHMAD AL-BASHIR (ICC-02/05-01/09 OA2).

II. SUMMARY INITIAL OBSERVATIONS

A. Expertise of Prof. Zimmermann in the Field of International Criminal Law

2. Prof. Dr. Andreas Zimmermann, LL.M. (Harvard), holds the Chair of International Law at the University of Potsdam and is Director of the Potsdam Centre of Human Rights. He is also member of the Permanent Court of Arbitration and has frequently acted as counsel before the ICJ, as well as before other international courts and tribunals; he has also served as judge *ad hoc* at the ECHR.

3. Prof. Zimmermann has in the past appeared as *amicus curiae* before the ICTY in the *Blaškić* case, and has been a member and legal adviser of the German Delegation to the Preparatory Committee and the Diplomatic Conference for the creation of the ICC. Besides, he has also been a member of the working group of the ICC’s Office of the Prosecutor on ‘Complementary in Practice’.

4. Apart from his manifold publications in international law generally (including the Commentary on the Statute of the ICJ¹), he has in particular published in the field of international criminal law. *Inter alia* one might refer to his articles on the 2017 amendment of the Kampala amendment;² on Articles 8, 8bis, 15bis, 15ter and 124 of the Rome Statute;³ on the ICC’s jurisdiction over cases concerning the use of chemical weapons;⁴ on the relationship between Palestine and the ICC;⁵ on Security Council

¹ The Statute of the ICJ - A Commentary (OUP, 2nd ed., 2012; 3rd ed. forthcoming 2018).

² “A Victory for the International Rule of Law? Or: All’s Well that Ends Well?: The 2017 ASP Decision to Amend the Kampala Amendment on the Crime of Aggression”, JICJ 2018, p. 19 *et seq.*

³ “Finally...Or Would Rather Less Have Been More?”, JICJ 2016, p. 505 *et seq.*; as well as Articles 5; 8(2)(b)(x), (xiii), (xvi), 8(2)(c), (d); 8 (2)(e)(i)-(xii); 8(2)(f); 8(3); 8bis; 15bis; 15ter; 124, in Triffterer / Ambos (eds.), Commentary on the Rome Statute of the ICC (Beck/Hart/Nomos, 3rd ed., 2016), pp. 97 *et seq.*, 409 *et seq.*, 424 *et seq.*, 509 *et seq.*, 568 *et seq.*, 730 *et seq.*, 2312 *et seq.*

⁴ “Chemical weapons and the International Criminal Court”, AJIL 2014, p. 436 *et seq.*

⁵ “Palestine and the International Criminal Court Quo Vadis: the Reach and Possible Limits of Article 12 (3) of the Rome Statute, JICJ 2013, p. 303 *et seq.*

Resolution 1593 in particular, as well as on the relation between the Security Council and the ICC as such;⁶ or on the process leading to the creation of the ICC.⁷

5. His observations will be prepared with the support of Konrad Neugebauer, assistant at the chair of Prof. Zimmermann, who is currently in the process of writing his Ph. D. on the accountability of domestic judges under international criminal law and who has, *inter alia*, clerked with the United Nations Assistance to the Khmer Rouge Trials at the Extraordinary Chambers in the Courts of Cambodia.

B. Outline of the Observations to be Presented

6. The observations will demonstrate that in order to resolve the case at hand there is *no* need for the Appeals Chamber to decide as to whether Omar Al-Bashir did enjoy head of State immunity *vis-à-vis* Jordan. This is due to the fact that Sudan was legally *barred from invoking* such immunity (even assuming it had been otherwise applicable) *vis-à-vis* Jordan, while Jordan was at the same time under an obligation to arrest and surrender Omar Al-Bashir in fulfillment of its obligations under both, the Rome Statute as well as under Article 25 of the UN Charter. This is due to the fact that any invocation by Sudan of his head of State immunity would constitute an *abuse of rights / abus de droit* which would render such invocation legally irrelevant.

7. Sudan has a continuous duty to arrest and surrender Omar Al-Bashir. Security Council Resolution 1593 (adopted under Chapter VII UN Charter) imposed on Sudan the legal duty to ‘cooperate fully with and provide any necessary assistance to the Court and the Prosecutor’. The arrest and surrender of a person, subject to an arrest warrant issued by the Court, falls squarely within the said provision of Security Council Resolution 1593. The resolution does *not* provide for an exception as to the extent of duties and obligations of *Sudan* contained therein. Besides, *vis-à-vis Sudan* the issue of his immunity does not arise. Security Council Resolution 1593 therefore encompasses the obligation of Sudan to arrest and surrender Omar Al-Bashir, despite the fact of him being the sitting head of Sudan itself.

8. The immunity of a head of State *vis-à-vis other* States constitutes a right of the respective State, rather than one of the individual concerned. It does not possess an *erga omnes* character. It is therefore only the injured State, *i.e.* the State whose own right

⁶ “Two steps forward, one step backwards? – SC Resolution 1593 (2005) and the Council’s Power to Refer Situations to the International Criminal Court”, in: Festschrift für C. Tomuschat, p. 681 *et seq.*; „Acting under Chapter VII (...) - Resolution 1422 and possible limits of the powers of the Security Council”, in: J. A. Frowein *et al.* (Eds.), *Negotiating for Peace – Liber Amicorum Tono Eitel*, 2003, p. 253 *et seq.*

⁷ “The Creation of a Permanent International Criminal Court”, Max-Planck-Yb. UN Law 1998, p. 169 *et seq.*

has allegedly been violated by withholding such immunity and thus in the case at hand Sudan, that is entitled to invoke such violation. If Jordan had arrested and surrendered Omar Al-Bashir, it is thus exclusively Sudan (but no other State) that would eventually have been entitled to invoke an alleged violation of his head of State immunity.

9. However, as Sudan was (and continues to be) obliged to *itself* arrest Omar Al-Bashir and surrender him to the Court, any invocation of his head of State immunity when it comes to his arrest and surrender to the Court by Jordan would amount to an *abuse of rights / abus de droit*.

10. The notion of *abuse of rights / abus de droit* is based on the concept of good faith. It constitutes a general principle of law (*cf.* Article 38(1)(c) of the ICJ Statute). It establishes limits to the exercise of an otherwise existing right. Under the concept of *abuse of rights / abus de droit* a State may in particular not invoke a right in order to sustain an otherwise unlawful situation. Thus, the right in its entirety forfeits its substance otherwise allowing to demand another subject to act in a specific way.

11. Sudan has consistently failed to comply with its duty under Security Council Resolution 1593 to arrest and surrender Omar Al-Bashir. If Jordan had arrested and surrendered him, as ordered by the Court, Jordan would have substituted Sudan's compliance with its own duty to do so. An invocation, by Sudan, of a violation of the head of State immunity of Omar Al-Bashir would therefore amount to claim a re-establishment of an illegal situation contrary to Security Council Resolution 1593, and hence constitute an *abuse of rights / abus de droit*.

12. Accordingly, Sudan (which eventually would be the injured State under applicable rules of State responsibility if head of State immunity did apply in the case at hand at all) is therefore *not* in a position to claim such immunity (regardless of whether it would otherwise exist or not, which issue the Appeals Chamber therefore does not have to decide). Thus, the fulfillment, by Jordan, of its own obligation to arrest and surrender Omar Al-Bashir could not conflict with any obligation it *might* otherwise have had vis-à-vis Sudan.

III. SUMMARY CONCLUSIONS

13. As an invocation of head of State immunity of Omar Al-Bashir would have amounted to an *abuse of rights / abus de droit* by Sudan, Jordan was *not* confronted with two conflicting legal obligations when faced with the Court's request to arrest and surrender Omar Al-Bashir. By not arresting Omar Al-Bashir and not surrendering him

to the Court Jordan did however violate its obligations under Security Council Resolution 1593 and under the Rome Statute generally.

14. For that reason, the Court does not need to decide the question whether a rule of customary international law exists permitting a third State to arrest and then surrender a sitting head of State to the Court, be it by virtue of a Security Council referral or otherwise.

15. It is these issues, as laid out above, that will be addressed in an *amicus curiae* brief, if the Court grants leave to submit full observations.



Prof. Dr. Andreas Zimmermann, LL.M. (Harvard)
Chair of International Law
University of Potsdam
Director of the Potsdam Centre of Human Rights

Dated this 26 April 2018

At Potsdam, Germany