

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: 30 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

Expression of interest to make submissions as *amicus curiae* in judicial proceedings (pursuant to rule 103 of the Rules of Procedure and Evidence)

Source: Dr Philippa Webb and Dr Ben Juratowitch QC

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

Competent authorities of the Hashemite
Kingdom of Jordan

Competent authorities of the other States
Parties to the Rome Statute

Others

United Nations
African Union
European Union
League of Arab States
Organization of American States

REGISTRY

Registrar

Mr Herman von Hebel

SUMMARY INITIAL OBSERVATIONS

1. The jurisdiction of the International Criminal Court (*ICC*) has been triggered in accordance with Art 13(b) of the Rome Statute by the Security Council's referral of the situation in Darfur to the Prosecutor of the ICC in Resolution 1593 (2005) (*SCR 1593*).
2. A Security Council resolution is to be interpreted in light of the terms of the resolution, discussions leading to it, the Charter provisions invoked and taking into account all circumstances that might assist the interpretive exercise.¹ It is necessary to construe two aspects of SCR 1593: (1) the effect of the Security Council's decision in operative paragraph 1 "to refer" the situation in Darfur to the Prosecutor, and (2) the effect of the decision in operative paragraph 2 that the Government of Sudan "shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor".

SCR 1593 displaces the immunity of the Head of State of Sudan in connection with the situation in Darfur

3. The referral of the situation in Darfur to the ICC in operative paragraph 1 does not of itself mean that in respect of States that are not party to the Rome Statute "the legal framework of the Statute applies, in its entirety, with respect to the situation referred."² United Nations Security Council (*UNSC*) referral is one of the jurisdictional triggers for the ICC. Whilst jurisdiction must then be exercised in accordance with the Rome Statute, this does not apply the entire Statute to any State that is not party to it. If it did, there is nothing that would limit this effect to interactions between the Court and the "UNSC Situation-Referral State", as opposed to all UN Member States insofar as matters arising in connection with the "situation in Darfur" were concerned.³ It would also render the first half of operative paragraph 2 redundant (imposing obligations on Sudan) and be inconsistent with the second half, which recognizes that States not party to the Rome Statute have no obligations under it, and "urges" them, rather than legally obliging them, to cooperate fully.
4. It is the obligation of *cooperation*, directed specifically to Sudan in operative paragraph 2, that attracts the application of the content of Art 27 of the Statute to Sudan. The obligation

¹ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971, para. 114 (Namibia AO)*. This is the International Court of Justice's approach for determining whether the Security Council's powers under Art 25 have been exercised. It applies *mutatis mutandis* for other interpretative questions: see *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010, para 117*.

² Pre-Trial Chamber II decision of 11 December 2017, para 37. See Prosecution Response of 3 April 2018, Section B.1.

³ Cf Prosecution Response of 3 April 2018, para 75.

to “cooperate fully” – language that mirrors Art 86 of the Statute – has the same content as the obligations articulated in Part IX of the Rome Statute.⁴ The obligations in Part IX in turn attract the operation of Art 27 which, albeit contained in a different Part of the Rome Statute, is for the purposes of the Statute a “general principle of criminal law” that is closely connected to and cannot be severed from the Part IX cooperation regime.⁵ The obligation to cooperate would be severely undermined if it did not work in conjunction with Art 27.

5. Displacement of Sudan’s Head of State immunity in connection with the situation in Darfur by the joint operation of the second operative paragraph of SCR 1593 and Part IX and Art 27 of the Statute applies as between Sudan (by force of SCR 1593) and Jordan (as a party to the Rome Statute). Indeed, Jordan is bound by Art 25 of the UN Charter to *accept* Sudan’s obligation of cooperation with the Court, including its application of the rule in Art 27 of the Statute to Sudan, since Sudan’s obligation derives from a decision of the Security Council acting under Chapter VII.⁶ This would be so even in the event of conflict between the legal consequences of the Security Council Resolution and any other rule sourced in an international agreement or customary international law.⁷
6. The context and discussions leading to SCR 1593, and the discussions of the resolution itself, support the conclusion that it was intended that Head of State immunity would not prevent action by the ICC. SCR 1564 (2004) requested that an International Commission of Inquiry be established to investigate international crimes in Darfur “by all parties” to ensure that “those responsible are held accountable”.⁸ The Commission’s report, which was the catalyst for SCR 1593, contemplated that action be taken by the ICC against, among others, senior Sudanese Government officials.⁹ An interpretation of SCR 1593 that gives effect to the object and purpose of Resolutions 1593 and 1564 should be preferred: holding accountable all parties responsible for international crimes in Darfur.¹⁰

⁴ Art 86: “States Parties shall...*cooperate fully* with the court in its investigation and prosecution of crimes” (emphasis added). This general obligation is particularised through more specific obligations in Part IX.

⁵ Heading of Part III of the Rome Statute.

⁶ Art 25 of the Charter of the United Nations.

⁷ Art 103 of the Charter of the United Nations. The Charter is silent as to custom but generally decisions of the Security Council will be *lex specialis* to customary rules.

⁸ Operative paragraph 12 of SCR 1564 (2004). The Security Council took note of the report of the International Commission of Inquiry in the preamble to SCR 1593.

⁹ See Report of the International Commission of Inquiry on Darfur to the Secretary-General, 25 January 2005, S/2005/60, paras 531-532, 534, 542, 548, 556, 563 and 572.

¹⁰ See *Namibia AO*, paras 108-109 and 115 where the Court interpreted a Security Council resolution by reference to earlier relevant resolutions.

Art 98 does not invalidate the ICC's request for surrender, with which Jordan was obliged to comply

7. If, contrary to the argument above, the rule in Art 27 does not apply to Sudan, or if it does, applies only between the Court and Sudan but not between Sudan and Jordan, the Court's request for surrender was nonetheless not precluded by Art 98 and Jordan was obliged to comply with it pursuant to Arts 86 to 89.
8. An arrest warrant has been issued against President Omar Al-Bashir for crimes including genocide. Jordan and Sudan are both parties to the Genocide Convention which, by Art IV, requires punishment of persons committing genocide irrespective of "whether they are constitutionally responsible rulers".¹¹ The Genocide Convention is *lex specialis* to the 1953 Convention on the Privileges and Immunities of the League of Arab States (**1953 Convention**) and to any customary international law immunity.¹² Art IV displaces, for the charge of genocide before an international court, any Head of State immunity that would otherwise have applied vis-à-vis Jordan. The Court's request for cooperation in relation to this charge would not, in Art 98 terms, require Jordan to "act inconsistently" with its obligations to Sudan in respect of Head of State immunity.
9. Even if Sudan otherwise possessed immunity opposable to Jordan, the preconditions for the Court's request for surrender in Art 98(1) were met. The Court did not as a matter of *fact* "obtain the cooperation" of Sudan under Art 98(1), but as a matter of *law* it did "obtain the cooperation" of Sudan through the legal obligation imposed on Sudan by the second operative paragraph of SCR 1593 "to cooperate fully". Full cooperation includes "[c]ooperation with respect to waiver of immunity and consent to surrender".¹³
10. Nor can Jordan avoid its obligation to surrender the Head of State of Sudan on the basis of Art 98(2). Art 98(2) applies where a person is "sent" by a State to another State, as provided for and subject to an "international agreement", for example a Status of Forces Agreement. The 1953 Convention is not such an agreement.
11. In any case, Jordan was not entitled to act on its own subjective assessment of whether the Court's request contravened Art 98. It is the Court's responsibility to determine whether it may or may not proceed with a request. If it does, a State party is obliged by Arts 86 to 89 to comply with it.

¹¹ The Genocide Convention entered into force for Sudan on 11 January 2004 and for Jordan on 2 July 1950. Note the present tense of Art IV.

¹² See also Art 30(4)(b) of the *Vienna Convention on the Law of Treaties 1969* which provides: "When the parties to the later treaty do not include all the parties to the earlier one: ... the treaty to which both States are parties governs their mutual rights and obligations." There is no evidence that Sudan is a party to the 1953 Convention. Accordingly, it is the Genocide Convention to which both Sudan and Jordan are parties that governs their mutual rights and obligations.

¹³ Heading of Art 98 of the Rome Statute, which has received little attention.

EXPERTISE IN THE LEGAL QUESTIONS PRESENTED

12. Dr Philippa Webb is Associate Professor of Public International Law at King's College London and a barrister at 20 Essex Street Chambers. She is a leading expert in the law of State immunity and the co-author of the preeminent treatise on the topic, *The Law of State Immunity* with Lady Hazel Fox QC. She has also written on immunities in her monograph, *International Judicial Integration and Fragmentation* and in leading journals on international law and criminal justice. She has contributed to the forthcoming *Cambridge Handbook of Immunities and International Law* and is co-author of *The Genocide Convention: The Travaux Préparatoires* (with Hiram Abtahi). With Dame Rosalyn Higgins QC and others she is an author of *Oppenheim's International Law: United Nations*, published in 2017.
13. Dr Webb's academic work on immunities has been cited by the Supreme Court of the United Kingdom,¹⁴ the Supreme Court of Canada,¹⁵ and the Supreme Court of Appeal of South Africa.¹⁶ Her work on the law of genocide has been cited by the ICTY,¹⁷ ICTR¹⁸ and President Tomka of the ICJ.¹⁹ She advises States, individuals and organizations on the law of immunity in cases before the ICJ, *ad hoc* arbitral tribunals, and courts in the United Kingdom, including the Supreme Court and the Privy Council.
14. Dr Ben Juratowitch QC is the head of the public international law practice of Freshfields Bruckhaus Deringer. He is a lecturer in international dispute settlement at the University of Paris V and has been a visiting fellow in international law at the London School of Economics, where he undertook a research project on the harmonious interpretation of different rules of international law. He appears before a wide range of international courts and tribunals on issues of public international law, including in cases dealing with the interpretation of resolutions of organs of the United Nations, the interpretation of various treaties, and issues of State immunity. He was counsel for REDRESS for the amicus curiae submission requested from it by the ICC in the *Bemba* case concerning the approach to reparations to victims to be adopted following convictions for international crimes committed in the Central African Republic.

¹⁴ *United States of America v Nolan* [2015] UKSC 63; *Belhaj v Jack Straw & Ors* [2016] UKSC 3; *Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs* [2017] UKSC 62.

¹⁵ *Kazemi Estate v. Islamic Republic of Iran* 2014 SCC 62.

¹⁶ *The Minister of Justice and Constitutional Development v The Southern African Litigation Centre* (867/15) [2016] ZASCA 17.

¹⁷ *Prosecutor v Popovic*, Appeals Chamber, Case No.: IT-05-88-A, 30 January 2015.

¹⁸ *Bizimungu, Mugenzi, Bicomumpaka and Mugiraneza* Trial Judgment, Case No.: ICTR-99-50-T, 20 September 2011; *Kalimanzira* Appeal Judgment, Case No.: ICTR-05-88-A, 20 October 2010.

¹⁹ *Croatia v Serbia*, ICJ Rep 2015.



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At London, England, and Paris, France