

**Cour
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**International
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Date: **18 June 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

Observations by Professor Roger O’Keefe, pursuant to rule 103 of the Rules of Procedure and Evidence, 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 (ICC-02/05-01/09-326)

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

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States' Representatives

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Hashemite Kingdom of Jordan

Competent authorities of the
Republic of Sudan

**Person for whom a warrant
of arrest has been issued**

Mr Omar Hassan Ahmad Al-Bashir

Amici curiae

African Union

Competent authorities of the United Mexican States

Ms Annalisa Ciampi

Mr Robert Cryer

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REGISTRY

Registrar

Mr Peter Lewis

Introduction

1. These are observations by Professor Roger O’Keefe, submitted pursuant to rule 103 of the Rules of Procedure and Evidence, 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 (ICC-02/05-01/09-326).

Summary

2. Jordan, although a State Party to the Rome Statute (‘the Statute’), was not obliged to arrest President Al-Bashir or to surrender him to the International Criminal Court (‘the Court’). In accordance with article 98(1) of the Statute, the Court may not proceed with a request for the arrest and surrender of a person which would require a State Party to act inconsistently with its obligations under international law with respect to the inviolability from arrest and immunity from judicial proceedings of a person of a State not party to the Statute, unless the Court first obtains the cooperation of the non-party State for the waiver of the inviolability and immunity. United Nations Security Council resolution 1593 (2005) of 31 March 2005 does nothing to alter the ordinary application of article 98(1). It is not in dispute that a State is obliged under customary international law to accord absolute inviolability and immunity *ratione personae* to the Head of State of another State and that no exception exists in respect of allegations of international crimes, including genocide. At the time of the Court’s request to Jordan, President Al-Bashir was the Head of State of Sudan, a State not party to the Statute. Jordan was consequently obliged under customary international law to accord him absolute inviolability and immunity. The Court had not obtained Sudan’s waiver of the inviolability and immunity from which Sudan was entitled under international law to see President Al-Bashir benefit in other States. In proceeding with a request to Jordan to arrest and surrender President Al-Bashir, the Court acted contrary to article 98(1) and thereby exceeded its powers under the Statute. As a consequence, the Court’s request was invalid and, as such, void *ab initio*. It consequently created no legal obligation for Jordan. The Pre-Trial Chamber erred therefore in finding that Jordan failed to comply with a request to cooperate by the Court ‘contrary to the provisions of [the] Statute’, in the words of article 87(7).

Observations

A. Article 98(1) of the Statute

i. Ordinary application

3. In accordance with article 89(1) of the Statute, the Court may transmit a request for the arrest and surrender of a person to any State on the territory of which that person may be found and shall request the cooperation of that State in the arrest and surrender of the person. In further accordance with article 89(1), States Parties to the Statute are obliged to comply with requests for arrest and surrender. As provided for in article 98(1), however, the Court may not proceed with a request for arrest and surrender¹ which would require a State Party,² such as Jordan, to act inconsistently with its obligations under international law with respect to the inviolability from arrest and immunity from judicial proceedings of a person, such as the Head of State,³ of a State not party to the Statute, such as Sudan, unless the Court first obtains the cooperation of the non-party State for the waiver of the inviolability and immunity (herein, ‘immunity’).⁴

¹ Article 98(1) refers in relevant part only to a request for ‘surrender’. It is accepted, however, that the reference is to be taken to encompass a concomitant request for arrest, since surrender presupposes arrest and since article 89(1), the powers of the Court under which article 98(1) qualifies, speaks of a request for ‘arrest and surrender’.

² Article 98(1) refers to a ‘State’, meaning any State, rather than to a ‘State Party’. This is to accommodate circumstances where the Court, pursuant to its power under article 89(1) to transmit a request for arrest and surrender of a person to any State on the territory of which that person may be found, is minded to transmit a request to a State not party to the Statute, in particular one which is obliged by an ad hoc arrangement or an agreement with the Court, entered into pursuant to article 87(5), to cooperate with a request from the Court for assistance. Since the focus in the present context is on States Parties, the term ‘State Party’ is used herein.

³ Article 98(1) refers only to the ‘State or diplomatic’ immunity of a person. It makes no reference to any other immunity *ratione materiae* or *ratione personae* from which a person may benefit under international law. It is accepted, however, that the reference to ‘State or diplomatic’ immunity is to be taken to encompass all immunities *ratione materiae* and *ratione personae* under international law. In particular, it is not in dispute that the reference in article 98(1) to ‘diplomatic’ immunity is to be read as shorthand for any immunity *ratione personae* and, as such, encompasses the immunity of a foreign Head of State.

⁴ Article 98(1) refers on its face only to ‘immunity’. Strictly speaking, the immunity of a person imports, in the present context, an obligation under international law to ensure only that the person is not subjected to judicial proceedings, insofar as this may be necessary under the State Party’s national law, for his or her surrender to the Court. It is a person’s inviolability (where international law provides for it), not immunity *stricto sensu*, which imports an obligation to ensure that the person is not subjected to arrest. It is not in dispute, however, that the reference in article 98(1) to ‘immunity’ encompasses inviolability (where international law provides for it), since surrender presupposes arrest and since article 89(1), the powers of the Court under which article 98(1) qualifies, speaks of a request for ‘arrest and surrender’. For the use of ‘immunity’ as shorthand for both immunity *stricto sensu* and inviolability, see eg *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*,

4. Article 98(1) makes no distinction on its face between a person of a State not party to the Statute and a person of a State Party. It speaks only of a person of a third State (meaning, in this context,⁵ a State other than the requested State) with respect to whose immunity the Court may not require a State Party to act inconsistently by proceeding with a request. But analysis clarifies as follows that article 98(1) applies only with respect to a person of a non-party State.
5. Pursuant to article 89(1), States Parties are obliged, in accordance with the provisions of Part 9 of the Statute and the procedure under their national law, to comply with requests from the Court for arrest and surrender. The text of article 89(1) makes no exception with respect to persons who otherwise benefit under international law from immunity. On its own, article 89(1) requires a State Party, on receipt of a request, to arrest and surrender any such person.
6. As among States Parties, the unqualified terms of article 89(1) are legally unobjectionable. In agreeing to these terms, a State Party accepts by the same token that each other State Party may be obliged to arrest and surrender to the Court any person of the first State Party irrespective of any immunity from which the first State Party would otherwise be entitled under international law to see the person benefit. In so accepting, the State Party waives to the same extent any such immunity. Consequently, in the context of arrest and surrender to the Court, a State Party owes no obligations under international law with respect to the immunity of a person of another State Party. A request from the Court to arrest and surrender a person of another State Party cannot, therefore, in the words of article 98(1), require the requested State Party to act inconsistently with its obligations under international law with respect to the immunity of a person of a third State. In short, article 98(1) cannot possibly apply to the arrest and surrender of a person of a State Party.
7. The conclusion that article 98(1) does not apply to the arrest and surrender of a person of a State Party has nothing at all to do with article 27(2) of the Statute. There is no relationship whatsoever between, on the one hand, articles 89(1) and 98(1), both of which are found in Part

ICJ Rep 2002, p. 3 at p. 29, para. 70, at p. 30, para. 71, and at p. 31, para. 75. For the technical distinction, see R. O'Keefe, *International Criminal Law* (Oxford: Oxford University Press, 2015), paras 10.11–10.17.

⁵ Cf *infra* note 10 for the different meaning of 'third State' as defined in the Vienna Convention on the Law of Treaties (Vienna, 23 May 1969), 1155 UNTS 331 ('VCLT'), art. 2(1)(h).

9 (‘International Cooperation and Judicial Assistance’) of the Statute and apply to the arrest and surrender of a person to the Court by a State, and, on the other, article 27(2), which is found in Part 3 of the Statute and applies, like the rest of Part 3, to proceedings against a person before the Court itself, after that person has been arrested and surrendered to the Court.⁶ Article 27(2) provides simply and unambiguously that immunities ‘shall not bar the Court from exercising its jurisdiction over ... a person’. It neither applies to nor has any implications for the arrest and surrender of a person to the Court. It does not affect the availability of immunity ‘where [a] person is ... before the national courts of a State’.⁷

8. When it comes to the arrest and surrender to the Court of a person of a non-party State, the unqualified terms of article 89(1) would pose a legal problem for States Parties were it not for article 98(1). On its own, article 89(1) would oblige a State Party, on receipt of a request from the Court, to arrest and surrender a person of a non-party State even where the non-party State was entitled under international law to see the person benefit from immunity in the State Party. Since, according to a fundamental rule of the law of treaties, the Statute may not diminish the rights under international law of a State not party to it without that State’s consent,⁸ and since, all other things being equal, a State not party to the Statute has not consented to the abrogation of the immunity of its persons from arrest and surrender to the Court by a State Party, article 89(1) would, on its own, require the requested State Party to act inconsistently with its obligations under international law with respect to the immunity of a person of the non-party

⁶ See eg Immunity of State officials from foreign criminal jurisdiction. Memorandum by the Secretariat, A/CN.4/596 (31 March 2008), p. 97, para. 150 (‘generally recognized that article 27 of the Rome Statute is to be interpreted as excluding the defence of immunity before the International Criminal Court alone’). Indeed, in their reactions to the memorandum of the United Nations Secretariat and to the ongoing work of the International Law Commission on the immunity of State officials from foreign criminal jurisdiction, neither of which suggests that article 27(2) of the Rome Statute has implications for States Parties at the national level, no State has ever argued that article 27(2) affects the immunity of a person in the context of his or her arrest and surrender to the Court by a State Party to the Statute.

⁷ Re *Sharon and Yaron* (2003) 127 ILR 110 at 124 (Court of Cassation, Belgium). See also *Minister of Justice and Constitutional Development v. Southern African Litigation Centre* [2016] ZASCA 17 at paras 69 and 77 (Supreme Court of Appeal, South Africa).

⁸ See eg para. 2 of the commentary to draft article 30 (the eventual article 34) of the International Law Commission’s Draft Articles on the Law of Treaties, in *Yearbook of the International Law Commission 1966*, Vol. II, p. 226 (‘nor modify in any way their legal rights without their consent’); *Island of Palmas (Netherlands/United States of America)* (1928) 2 RIAA 829 at 842; A. McNair, *The Law of Treaties* (Oxford: Clarendon Press, 1961), p. 321.

State. It is precisely for this reason that article 98(1) was included in the Statute. In barring the Court from proceeding with a request for arrest and surrender which would require a requested State Party to act inconsistently with its obligations under international law with respect to the immunity of a person of a third State, article 98(1) is designed to obviate the possibility that a State Party, on receipt of a request from the Court, might be required to arrest and surrender to the Court a person of a non-party State in violation of the immunity from which the non-party State is entitled under international law to see the person benefit in the State Party.

9. In sum, article 98(1) bars the Court from proceeding with a request for arrest and surrender which would require a State Party to act inconsistently with its obligations under international law with respect to the immunity of a person of a non-party State, unless the Court first obtains the cooperation of the non-party State for the waiver of the immunity.

ii. Security Council resolution 1593 (2005)

10. Security Council resolution 1593 (2005) does nothing to alter the ordinary application of article 98(1) of the Statute. Referral of a situation by the Security Council does not of itself render binding on a State not party to the Statute, such as Sudan, the obligations binding on States Parties or otherwise modify the application of article 98(1). Nor do the specific terms of resolution 1593 (2005) render binding on Sudan all the obligations of cooperation in Part 9 of the Statute or otherwise modify in relation to Sudan the application of article 98(1).
11. The referral of a situation to the Prosecutor by the United Nations Security Council is simply one of the three procedural means by which the Court may be seised of its jurisdiction. Subject to the terms of the resolution by which the Council refers the situation, the consequence of the referral of a situation by the Security Council in accordance with article 13(b) of the Statute, just like that of the referral of a situation by a State Party in accordance with article 13(a) and the initiation of an investigation by the Prosecutor *proprio motu* in accordance with article 13(c), is merely that the Court may exercise its jurisdiction ‘in accordance with the provisions of [the] Statute’.⁹ To the limited extent that referral by the Security Council differs in

⁹ Rome Statute, art. 13, chapeau.

substantive effect from referral by a State Party or initiation of an investigation *proprio motu*, namely in relation to the preconditions to the exercise by the Court of its jurisdiction, this is specified explicitly in the Statute, in articles 12(2) and 15*bis* and *ter*. Were referral of a situation by the Security Council, without more, to render binding on a State not party to the Statute, contrary to a fundamental rule of the law of treaties,¹⁰ the obligations binding on States Parties or otherwise to modify the application of article 98(1), the Statute would provide for this explicitly and would need to provide for this explicitly.¹¹ Nowhere, however, is the purported radical departure from the law of treaties or any other modification of the ordinary application of article 98(1) provided for explicitly, or even necessarily implied, in the Statute. In short, referral of a situation by the Security Council does not of itself modify the application of article 98(1). In referring a situation, the Security Council, unless it states otherwise, can be taken to intend no more than that the Statute, including article 98(1), apply ‘in accordance with [its] provisions’, in the words of article 13.

12. The Security Council’s decision in paragraph 2 of resolution 1593 (2005) that Sudan ‘shall cooperate fully and provide any necessary assistance to the Court and the Prosecutor’, which in accordance with article 25 of the United Nations Charter is binding on Sudan in its capacity as a Member of the United Nations,¹² does no more than oblige Sudan to comply with any specific request to it by the Court or Prosecutor for its cooperation or assistance. It does not of itself render binding on Sudan, a State not party to the Statute, the full range of obligations of cooperation, including the obligation of arrest and surrender in article 89(1), undertaken in accordance with Part 9 of the Statute by States Parties. Even less does it mean that Sudan has agreed to the terms of article 89(1) and can thereby be taken to have waived the immunity of

¹⁰ See VCLT, art. 34 (‘A treaty does not create either obligations or rights for a third State without its consent.’), as consonant with customary international law. In this context, a ‘third State’, as defined in art. 2(1)(h) of the VCLT, means a State not party to the relevant treaty.

¹¹ See *Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy)*, Judgment, ICJ Rep 1989, p.15 at p. 42, para. 50, holding that ‘an important principle of customary international law’ is not to be ‘held to have been tacitly dispensed with, in the absence of any words making clear an intention to do so’; *Immunities and Criminal Proceedings (Equatorial Guinea v. France)*, Preliminary Objections, 6 June 2018 (ICJ), joint diss. op. Xue, Sebutinde, Robinson, and Kateka, para. 14, applying *Elettronica Sicula* to ‘the important customary rules on foreign State immunity’.

¹² In accordance with United Nations Charter, art. 25, the Members of the United Nations ‘agree to accept and carry out the decisions of the Security Council’.

its persons from arrest and surrender to the Court by a requested State Party.¹³ Still less does it mean that the Court has actually obtained, as per article 98(1), the cooperation of Sudan for the waiver of the immunity of President Al-Bashir.¹⁴ In short, paragraph 2 of Security Council resolution 1593 (2005) does not modify in relation to Sudan, a non-party State, the application of article 98(1) of the Statute. Indeed, were it to do so, one might have expected other than the manifest and persistent inaction of the Security Council to date in the present case in response to the Pre-Trial Chamber's repeated findings of non-cooperation by States Parties and referrals of the matter to the Council.

13. It would be open to the Security Council, acting under Chapter VII of the United Nations Charter,¹⁵ to decide in relation to a situation or case before the Court that States Parties, as Members of the United Nations, shall owe no obligations under international law with respect to the immunity from arrest and surrender to the Court of persons of a State not party to the Statute, as a Member of the United Nations. Any decision to this effect would need to be explicit.¹⁶ Such a decision, which in accordance with article 25 of the United Nations Charter

¹³ See *supra* para. 6, in relation to States Parties to the Statute.

¹⁴ The Security Council's decision in paragraph 2 of Security Council resolution 1593 (2005) that Sudan shall cooperate fully with the Court cannot be equated, logically or legally, with Sudan's actual cooperation. Refusal by Sudan of any request to it by the Court to cooperate by waiving President Al-Bashir's immunity in another State, while a breach of article 25 of the United Nations Charter, would remain a refusal to cooperate, meaning that the Court would still not have obtained Sudan's cooperation for the waiver of the immunity.

¹⁵ The Security Council's authority under the United Nations Charter to decide on 'collective measures for the prevention and removal of threats to the peace' pursuant to its powers under Chapter VII of the Charter is unfettered by at least non-peremptory rules of international law applicable among States, as indicated *a contrario* by the wording of article 1(1) of the Charter. Although the Security Council is bound by article 24(2) of the Charter to act 'in accordance with the Purposes and Principles of the United Nations' as set out in articles 1 and 2 respectively of the Charter, and although article 1(1) of the Charter requires the United Nations to act 'in conformity with the principles of ... international law' when seeking to 'bring about by peaceful means ... adjustment or settlement of international disputes or situations which might lead to a breach of the peace', article 1(1) also makes clear from the positioning of the parenthetical phrase 'in conformity with the principles of ... international law' that this limitation does not apply when the Organization takes 'collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace'—that is, when it exercises, via the Security Council, the powers for the maintenance of international peace and security embodied in Chapter VII of the Charter. See eg H. Kelsen, *The Law of the United Nations: A Critical Analysis of its Fundamental Problems* (London: Stevens & Sons, 1950), pp. 294–295; L. Goodrich, E. Hambro, and A. Simons, *Charter of the United Nations. Commentary and Documents* (3rd edn, New York: Columbia University Press, 1969), pp 27–28; R. Wolfrum, 'Chapter I. Purposes and Principles' in B. Simma *et al.* (ed.), *The Charter of the United Nations. A Commentary* (3rd edn, Oxford: Oxford University Press, 2012), Vol. I, p. 107 at p. 114, para. 22.

¹⁶ See *supra* note 11. Consider also *Al-Jedda v. United Kingdom* (2011) 147 ILR 107 at 172, para. 102 (ECtHR (GC)); *Al-Dulimi v. Switzerland* (2016) 42 BHRC at 163 at 227–228, para. 140 (ECtHR (GC)).

the States Parties and non-party State alike would be bound to accept,¹⁷ would have the effect of rendering article 98(1) inapplicable on the facts, with the consequence that the Court would be permitted to proceed with a request to a State for any such person's surrender, a request with which a State Party would be bound by article 89(1) to comply. Indeed, the Security Council, acting under Chapter VII of the Charter, could simply decide that States Parties to the Statute or even all States, as Members of the United Nations, shall, absent a request from the Court, arrest and surrender to the Court persons of a State not party to the Statute, as a Member of the United Nations, irrespective of any immunity from which such persons may otherwise benefit under international law. The Security Council, however, has taken neither course of action in the present case.

14. In sum, United Nations Security Council resolution 1593 (2005) does nothing to alter the ordinary application of article 98(1) of the Statute.

B. Application of Article 98(1) of the Statute to the Court's Request to Jordan

15. It is not in dispute that a State is obliged under customary international law to accord absolute inviolability and immunity *ratione personae* to the Head of State of another State and that no exception exists in respect of allegations of international crimes, including the crime of genocide. At the time of the Court's request to Jordan, President Al-Bashir was the Head of State of Sudan, a State not party to the Statute. Jordan was consequently obliged under customary international law to accord him absolute inviolability and immunity. The Court had not obtained Sudan's waiver of the inviolability and immunity from which Sudan was entitled under international law to see President Al-Bashir benefit in other States. In proceeding with a request to Jordan to arrest and surrender President Al-Bashir, the Court acted contrary to article 98(1) and thereby exceeded its powers under the Statute.

¹⁷ Recall *supra* note 12. This treaty-based obligation would apply over any relevant immunity under customary international law, in accordance with the principle *lex specialis derogat legi generali*. It would trump any relevant treaty-based immunity by virtue of article 103 of the United Nations Charter ('In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.').

C. Consequence of the *Ultra Vires* Character of the Court's Request to Jordan

16. It is a general principle of law applicable by the Court¹⁸ that an act of an organ, including a decision of a court, in excess of the powers granted to that organ ('*ultra vires*') is invalid and, as such, void *ab initio*. It has no legal force and is therefore incapable of itself¹⁹ of giving rise to legal obligations. The procedure, if any, by which an act is determined to be *ultra vires* is a separate question. It does not affect the legal nullity of the act in principle, of which any determination can be merely declaratory.
17. The Court's request to Jordan for the arrest and surrender of President Al-Bashir, being in excess of the powers of the Court as limited by article 98(1), was invalid and, as such, void *ab initio*. It had no legal force and therefore created no legal obligation for Jordan. Whether the Court alone is competent to determine the conformity of the request with its powers under the Statute is a separate question. It does not affect the legal nullity of the request in principle, as a consequence of which Jordan was not obliged to cooperate with the Court by arresting and surrendering President Al-Bashir.

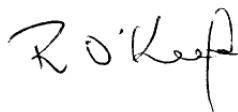
Conclusion

18. The Pre-Trial Chamber erred in finding that Jordan failed to comply, contrary to the provisions of the Statute, with a request to cooperate by the Court. In proceeding with a request to Jordan for the arrest and surrender of President Al-Bashir, the Head of State of Sudan, a State not party to the Statute, without having first obtained the cooperation of Sudan for the waiver of his inviolability and immunity under international law, the Court acted contrary to article 98(1) of the Statute and thereby exceeded its powers. United Nations Security Council resolution 1593 (2005) of 31 March 2005 does nothing to alter this. As a consequence of its *ultra vires*

¹⁸ See Rome Statute, art. 21(1)(c), in accordance with which the Court shall apply 'general principles of law derived by the Court from national laws of legal systems of the world ... provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards'. The general principle of the invalidity and consequent nullity of *ultra vires* acts is not inconsistent with the Statute or with international law or internationally recognized norms or standards.

¹⁹ Detrimental reliance on an invalid act, as distinct from the invalid act itself, may give rise to legal obligations. This is not the case in the present case.

character, the Court's request to Jordan was invalid and, as such, void *ab initio*. It created no legal obligation for Jordan. Jordan was therefore not obliged, on receipt of the Court's request, to cooperate by arresting and surrendering President Al-Bashir.



Professor Roger O'Keefe

Dated 18 June 2018

At London, United Kingdom