

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

*Original: English*

No.: ICC-02/05-01/09  
Date: 28 September 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**

**The League of Arab States' post-hearing submissions**

**Source:** The League of Arab States

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

*Court to:*

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**Legal Representatives of the Applicants**

**Unrepresented Victims**

**Unrepresented  
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Victims**

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

**States' Representatives**

**Other**

The Hashemite Kingdom of Jordan

African Union

**REGISTRY**

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**Detention Section**

**Victims Participation and Reparations  
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**Other**

## Introduction

1. On the last day of the hearing concerning the ‘Jordan Referral re Al-Bashir Appeal’ (14 September 2018), the Presiding Judge of the Appeals Chamber invited the participants in the hearing to make additional written submissions on what they may consider relevant at the present stage of the proceedings.<sup>1</sup> The League of Arab States makes the following submissions in accordance with that oral order.

## Submissions

2. The League of Arab States maintains its written and oral submissions in full, and it does not aim to repeat them here. Having participated in and having reviewed the transcripts of the hearing, the League wishes to make the following points:

**(1) The Pact of the League of Arab States and the Convention on the Privileges and Immunities of the League of Arab States obliged Jordan to accord immunity to President Al-Bashir**

3. As the League has explained, when President Al-Bashir visited Jordan on 29 March 2017 for purposes of the 28<sup>th</sup> Arab League Summit, Jordan was obliged under the 1945 Pact of the League of Arab States and the 1953 Convention on the Privileges and Immunities of the League of Arab States (“1953 Convention”) to accord President Al-Bashir inviolability and immunity from criminal proceedings in Jordan. These are treaty obligations incumbent upon Jordan, in addition to Jordan’s obligation to respect the immunity of President Al-Bashir as a Head of State under customary international law.
4. Ensuring respect for the immunities from national criminal jurisdiction that have been developed for the operation of the League, including the immunity from arrest or detention of Member States’ representatives attending League meetings, is of utmost importance to the organization. If the League is to properly carry out its

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<sup>1</sup> ICC-02/05-01/09-T-8-ENG ET WT 14-09-2018 2/109 SZ PT OA2, p. 2.

functions and fulfill its objectives, such immunities must be respected, without exception.

5. The League notes that none of the participants in the hearing appears to have challenged the League's interpretation of the Pact of the League and of the 1953 Convention, and how these treaties operate in practice. Crucially, no one questioned the League's long-standing position that the obligations under the article 14 of the Pact and article 11 of the 1953 Convention to respect the immunity of representatives of Member States are owed not only to a particular State Party to the treaties (for example, Sudan), but also to the League itself. The League has a right to have that obligation owed to the League fully respected by Member States.
  
6. The Prosecution argued in its response to the League's observations that "[a]ny immunity established by treaty law in this case can be no greater in its scope than any immunity applicable under customary international law".<sup>2</sup> This point was not repeated in the course of the hearing. Nonetheless, the League wishes to clarify that the Prosecution's argument is wrong. There are two key aspects where the immunities under the League's treaties differ from the immunity of Heads of State under customary international law. First, as mentioned above, the obligations to respect those immunities are owed not just to the sending State Party but also to the League itself, and prevail as between the parties to the treaties and the League in terms of the scope of immunity. Second, those immunities serve a different purpose: to allow Member States' representatives to exercise their functions in connection to the League. Therefore, in the League's view, the immunities under the League's treaties are distinct. This is a fact that should not be overlooked by the Appeals Chamber.

**(2) None of the many theories advanced against the appellant party has the effect of suppressing the immunities under the League's treaties**

7. A great variety of (contradictory) theories were advanced during the hearing as to why President Al-Bashir's immunity from Jordan's criminal jurisdiction should not be recognized. These included an exception under customary international law to

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<sup>2</sup> ICC-02/05-01/09-377, section A.3.c.

Head of State immunity when arrest and surrender is sought by an international criminal court; the absence of a rule on Head of State immunity when arrest and surrender is sought by an international criminal court; the “implicit waiver” of immunity by virtue of U.N. Security Council resolution 1593 (2005); the transformation of Sudan into essentially a “State Party” by virtue of resolution 1593 (2005) and the removal of immunity through article 27(2) of the Rome Statute; an alleged abuse of rights by Sudan, Jordan or even the League; the removal of immunity by virtue of the Genocide Convention; and so on. The inconsistency between these different theories (surprisingly advanced simultaneously by certain participants, including the Prosecution) is, in the League’s view, a clear sign of a policy-driven approach that President Al-Bashir must be arrested at all costs.

8. The League notes that when those theories were advanced, focus seems to have been on the immunity of President Al-Bashir as a Head of State under customary international law. References in the hearing to treaty law, and in particular the Pact of the League and the 1953 Convention, were scant. It is therefore unclear for the League to what extent any of the theories would affect, according to their proponents, the treaty-based immunity of a Head of State when he or she attends a summit of the League, and where such immunity is protective not just of State representatives but of the League and its functions.
9. In any event, the League fails to see how any of those theories could suppress the immunities under the League’s treaties, also taking into account that those immunities are owed to the League itself. The theories based on customary international law (exception or absence) are aimed precisely at that: customary law. They do not touch upon treaty law, which remains intact regardless of what the customary rule of Head of State immunity may say. The “implicit waiver” theory presupposes that *Sudan’s* right to invoke immunities has been removed by resolution 1593 (2005), not that the League’s right to invoke immunities under the Pact and the 1953 Convention, or Jordan’s obligations towards the League, have been suspended or otherwise disapplied. The theory of Sudan being analogous to a “State Party” to the Rome Statute would only affect *Sudan’s* immunities under international law, not the League’s right to invoke immunities so as to fulfill its functions or the obligations owed to the League under the said instruments. The abuse of rights theory is simply

inapplicable to the League's exercise of its right to have the immunity of Member States' representatives respected. And, since the League is not a party to the Genocide Convention, it cannot be said that it has waived any immunities under that treaty, assuming that a waiver exists.

10. It follows that, no matter which theory one may choose, Jordan always remains bound to respect the immunities of representatives of the League's Member States given that this is an obligation not only vis-à-vis Sudan, but also vis-à-vis the League itself.
11. During the hearing of 10 September 2018, the President of the Appeals Chamber asked whether it would be "something of a recommendation, as a matter of policy that where President Al-Bashir attends a conference of an international regional organisation, perhaps it may be as a matter of policy for arrest not be sought".<sup>3</sup> Certainly, if the Court were to abstain from requesting the arrest and surrender of officials attending summits of the League of Arab States, many problems could be avoided. But the League wishes to recall that this is not a matter of policy; States have treaty-based obligations to respect immunities in that context regardless of whether the Court proceeds with a request for arrest and surrender.<sup>4</sup>

**(3) The League's treaties fall within both article 98(1) and 98(2) of the Statute**

12. There was some discussion during the hearing as to whether the Pact of the League and the 1953 Convention fall under article 98(1), article 98(2), or both. As the League explained, it considers these treaties to fall within the scope of both provisions. More particularly, nothing in article 98(2) points to an interpretation of that provision as applying only to status-of-forces agreements, a position that appears to have been abandoned during the hearing. Further, the League wishes to confirm that, when a Member State sends a representative to a meeting of the League, it is clearly acting as a "sending State" within the meaning of article 98(2), even if that representative is a Head of State. The League would find completely unacceptable any interpretation that Heads of State are not protected under the Pact of the League and the 1953 Convention.

<sup>3</sup> ICC-02/05-01/09-T-4-ENG CT WT 10-09-2018 107/141 SZ PT OA2, p. 107; repeated at *ibid.*, pp. 114-115.

<sup>4</sup> See also ICC-02/05-01/09-T-6-ENG ET WT 12-09-2018 98/134 NB PT OA2, p. 98.

**(4) The work of the International Law Commission on the topic “Immunity of State officials from foreign criminal jurisdiction”**

13. During the hearing, a question was raised as to the International Law Commission’s current topic on “Immunity of State officials from foreign criminal jurisdiction”. The League, which follows closely the work of the Commission, understands the situation as follows. In 2013, the Commission adopted draft articles 3 and 4, which essentially provide that a Head of State (as well as Head of Government and Foreign Minister) enjoys absolute immunity while in office.<sup>5</sup> In 2016-17, the Commission considered a proposal from the Special Rapporteur for exceptions to immunity, which would have included a “without prejudice clause” concerning the “obligation to cooperate with an international court or tribunal which, in each case, requires compliance by the forum State”.<sup>6</sup> In 2017, the Commission rejected that proposal, and limited draft article 7 on “exceptions” solely to immunity *ratione materiae*,<sup>7</sup> thereby leaving fully intact the absolute immunity of a sitting Head of State. In 2018, the Special Rapporteur submitted a report indicating her intention to examine the issue in a future report “in the context of procedural aspects of immunity”,<sup>8</sup> but no such report has been filed nor has the Commission taken any decision in that regard. As such, the League understands that the current Commission position maintains the absolute immunity of a Head of State from foreign criminal jurisdiction. This position has been welcomed by U.N. Member States during the annual debates of the Commission’s work in the General Assembly’s Sixth Committee.

**(5) The negotiation of article 98 of the Statute**

14. In its final submissions, the Prosecution put emphasis on a 2016 commentary on the Rome Statute,<sup>9</sup> where an account of the negotiation process of article 98 of the Statute is provided. In essence, the Prosecution seems to suggest that, since article 98 was

<sup>5</sup> A/68/10 (2013), p. 52.

<sup>6</sup> A/CN.4/701 (2016), p. 95.

<sup>7</sup> A/72/10 (2017), p. 176.

<sup>8</sup> A/CN.4.722 (2018), p. 44, para. 43.

<sup>9</sup> C. Kress/K. Prost, “Article 98” in O. Triffterer, K. Ambos (eds.) *The Rome Statute of the International Criminal Court: A Commentary* (3<sup>rd</sup> ed., 2016); ICC-02/05-01/09-T-8-ENG ET WT 14-09-2018 2/109 SZ PT OA2, pp. 69-70.


not thoroughly discussed by States, it is the Court which must decide, on a case-by-case basis, whether particular rules of immunity are opposable to requests for arrest and surrender, and that article 98(1) cannot be read as saying that the Court cannot proceed with such requests without a waiver.

15. The League considers this argument irrelevant. It matters little whether issues were discussed thoroughly during a negotiation (or if there is simply no record of that discussion); what matters is what the treaty actually says. Furthermore, it has never been suggested that the Court cannot decide on issues of immunity in cases falling within its jurisdiction; indeed, this is precisely what the present appeal is about. The League, Jordan, the African Union and some of the professors of international law have fully explained why the Head of State immunity of President Al-Bashir is applicable in the present case, and why, therefore, the Court was obliged to obtain a waiver before making the request for arrest and surrender.
  
16. Furthermore, to the extent that the Prosecution finds the Triffterer/Ambos commentary authoritative, the League notes that, with respect to article 27(2), it says that “[i]t has to be noted that this [international court exception] does not pre-determine article 98; it is thus very well possible to believe that the irrelevance of personal immunity before the Court *does not extend to the horizontal relationship between a State requested for cooperation and the Non-Party State granting personal immunity (e.g. to its head of state)*”.<sup>10</sup> This is in accordance with the League’s overall approach to article 27(2), which is shared by Jordan, the African Union and some professors of international law.



<sup>10</sup> *Ibid.*, O. Triffterer, C. Burchard, “Article 27”, p. 1053 (emphasis added).





**Ambassador Mr. Maged Abdelfattah Abdelaziz  
Permanent Observer for the  
League of Arab States to the United Nations**

**On behalf of  
The League of Arab States**

Dated 28 September 2018

At Cairo, Egypt