

MINORITY OPINION OF JUDGE MARC PERRIN DE BRICHAMBAUT

I. Introduction

1. I agree with the decision of the Chamber that: (1) Jordan has failed in its obligation to comply with the request by the International Criminal Court (“the Court”) to arrest Omar Hassan Ahmad Al Bashir (“Omar Al Bashir”) and surrender him to the Court; and (2) the matter should be referred to the Assembly of States Parties (“ASP”) and the United Nations Security Council (“UN Security Council”).
2. However, I am not persuaded by the analysis underpinning the Majority’s decision with regard to the legal basis for the removal of Omar Al Bashir’s immunity. It is my belief that it is the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (“Genocide Convention” or “Convention”)¹ – which applies to the present case since Jordan has invoked article 98 of the Statute in these proceedings – that renders inapplicable Omar Al Bashir’s immunity as Head of State of a Contracting Party to the Convention. As explained fully in my minority opinion on the non-cooperation of South Africa,² I find this legal basis to be more persuasive, in the circumstances of the present case, than that relied upon by the Majority.
3. In the absence of any clarification from the UN Security Council or a change in State practice regarding the immunity of sitting Heads of State charged with international crimes since my minority opinion of 6 July 2017, my uncertainty abides as to:

(1) the status of Sudan following the referral by the UN Security Council, i.e. whether or not the referral of the Darfur situation to the Court by the UN Security Council rendered Sudan analogous to a State Party, with the consequence that article 98(1) of the Statute is not applicable to the case at hand;

¹ *Convention on the Prevention and Punishment of the Crime of Genocide*, United Nations Treaty Series, vol. 78, p. 277.

² ICC-02/05-01/09-302-Anx.

- (2) whether UN Security Council resolution 1593 (2005) can be interpreted as removing the immunities enjoyed by Omar Al Bashir as a sitting Head of State; and
- (3) whether the involvement of an international court affects the application of the rule of customary international law regarding the personal immunity of Heads of State in the relationship between States.

Given the current state of the law, I maintain that no firm conclusions can be drawn on any of these questions. Again, however, I find firmer ground with respect to the consequences of Jordan's accession to the Genocide Convention.

II. Reasoning in terms of the impact of the Genocide Convention is applicable to Jordan's obligations under international law with respect to the personal immunity of Omar Al Bashir

4. In the context of the current proceedings, and pursuant to Pre-Trial Chamber II's decision of 26 April 2017,³ Jordan provided written submissions on its failure to arrest and surrender Omar Al Bashir. According to Jordan, it would have acted inconsistently with its obligations under international agreements and under customary international law to respect Omar Al Bashir's immunities as the incumbent Head of State of Sudan if it had complied with the Court's request to arrest and surrender him.⁴ Jordan based its position on article 98 of the Statute and primarily on article 98(1).⁵

³ *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, "Decision inviting the Hashemite Kingdom of Jordan to provide any further submissions on its failure to arrest and surrender Omar Hassan Ahmad Al-Bashir to the Court", 26 April 2017, ICC-02/05-01/09-297.

⁴ ICC-02/05-01/09-293-Conf-Anx1.

⁵ Article 98(1) of the Statute is worded as follows: "The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity."

5. As noted in my minority opinion on the non-cooperation of South Africa, rule 195 of the Rules of Procedure and Evidence contemplates the possibility that a requested State may raise a problem of execution under article 98 of the Statute before the Court. It specifically indicates that:

[w]hen a requested State notifies the Court that a request for surrender or assistance raises a problem of execution in respect of article 98, the requested State shall provide any information relevant to assist the Court in the application of article 98.

Read together with article 119(1) of the Statute, this procedure vests in the Court the sole authority to decide whether Jordan is obliged to respect the immunities of Omar Al Bashir.⁶

6. Accordingly, Jordan's request requires the Court to determine under article 98(1) of the Statute whether the arrest and surrender of Omar Al Bashir to the Court would be inconsistent with Jordan's "obligations under international law with respect to the [...] immunity" enjoyed by Omar Al Bashir as the sitting Head of State of Sudan. The reference to "obligations under international law" indicates that, where relevant, a State Party's obligations under both conventional and customary international law must be assessed "with respect to the [...] immunity of a person [...] of a third State".
7. Both Sudan and Jordan are parties to the Genocide Convention and have been since 11 January 2004 and 3 April 1950, respectively.⁷ On 12 July 2010, Pre-Trial Chamber I issued a warrant of arrest against Omar Al Bashir for his alleged criminal

⁶ Pre-Trial Chamber I, *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, "Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir", 12 December 2011, ICC-02/05-01/09-139, para. 11; Pre-Trial Chamber II, *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, "Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court", 9 April 2014, ICC-02/05-01/09-195, para. 16.

⁷ See the status of the Convention on the Prevention and Punishment of the Crime of Genocide, available at:

https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-1&chapter=4&lang=fr (last visited 12 June 2017) and article XIII of the Genocide Convention.

responsibility under article 25(3)(a) of the Statute for the crime of genocide within the meaning of article 6(a), (b) and (c) of the Statute.⁸ Pre-Trial Chamber I found that there were reasonable grounds to believe that acts of genocide had been committed between the month of April 2003 and 14 July 2008 throughout the Darfur region.⁹

8. The analysis of the Genocide Convention presented in my minority opinion of 6 July 2017 – and which is transferable *mutatis mutandis* to the present case – points to the conclusion that the Convention applies to the case at hand and that it removes the personal immunities enjoyed by the “constitutionally responsible rulers”¹⁰ of Contracting Parties. In essence,¹¹ the combined effect of a literal and contextual interpretation of article IV of the Genocide Convention, in conjunction with an assessment of the object and purpose of the treaty, leads to the conclusion that personal immunities cannot attach to “constitutionally responsible rulers”, within the meaning of article IV of the Convention, who are charged with the crime of genocide. Pursuant to article VI of the Convention, such immunities are removed for the purposes of prosecution, *inter alia*, before an “international penal tribunal”. This Court constitutes exactly such an international penal tribunal. Jordan is a State Party and recognized the Court’s jurisdiction when it ratified the Rome Statute on 11 April 2002.¹² As such, Jordan has an obligation to cooperate with the Court arising from article VI of the Convention in addition to its obligations under the Rome Statute.

⁸ Pre-Trial Chamber I, *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, “Second Decision on the Prosecution’s Application for a Warrant of Arrest”, 12 July 2010, ICC-02/05-01/09-94, p. 28.

⁹ *Ibid.*, paras. 22-24, 29-31 and 36-40.

¹⁰ The term “constitutionally responsible ruler” is understood within the meaning of article IV of the Genocide Convention.

¹¹ For the full analysis of the Genocide Convention, see section II of my minority opinion on the non-cooperation of South Africa, ICC-2/05-01/09-302-Anx.

¹² See the status of the Rome Statute, available at:

https://asp.icc.cpi.int/fr_menus/asp/states%20parties/pages/the%20states%20parties%20to%20the%20rome%20statute.aspx (last visited 26 July 2017).

9. As shown exhaustively in section II of my minority opinion on the non-cooperation of South Africa, personal immunities are incompatible with the obligations that the Contracting Parties have undertaken under the Genocide Convention, and Sudan must be regarded to have relinquished the immunities of its “constitutionally responsible rulers” when acceding to the Convention. Since Omar Al Bashir is alleged to have committed the crime of genocide, he no longer enjoys immunity from arrest and surrender. It follows that the requirements of article 98(1) of the Statute have been fulfilled owing to the prior accession of Sudan to the Genocide Convention. As no impediment to cooperation exists at the horizontal level between South Africa and Sudan regarding the execution of the request for arrest and surrender issued by the Court, South Africa would not have acted inconsistently with its “obligations under international law with respect to the [...] immunity of a person [...] of a third State” within the meaning of article 98(1) had it arrested Omar Al Bashir and surrendered him to the Court.¹³
10. Applied *mutatis mutandis* to the present case, the analysis of the Genocide Convention in my minority opinion of 6 July 2017 leads me to conclude that the full participation of Sudan and Jordan in the Genocide Convention has the effect of lifting the immunity of Omar Al Bashir, allowing and in fact compelling Contracting Parties to the Convention to arrest him when he is present on their territory. No impediment existed at the horizontal level between Jordan and Sudan with regard to the execution of the request for arrest and surrender of Omar Al Bashir issued by the Court. It follows that Jordan would not have acted inconsistently with its “obligations under international law with respect to the [...] immunity of a person [...] of a third State” within the meaning of article 98(1) of the Statute had it arrested Omar Al Bashir and surrendered him to the Court. However, it failed to do

¹³ Furthermore, as highlighted above, both South Africa and Sudan have an obligation to cooperate with the Court arising from article VI of the Genocide Convention.

so and it is, therefore, in non-compliance with its obligations under the Statute to execute the Court's request to arrest and surrender Omar Al Bashir.

Done simultaneously in English and French, with both the English and French versions being authoritative.

[signed]

Judge Marc Perrin de Brichambaut

Dated this 11 December 2017

At The Hague, Netherlands