

**Cour
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**International
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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

Observations 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

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

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I. INTRODUCTION

1. In line with the ‘Decision on the requests for leave to file observations pursuant to rule 103 of the Rules of Procedure and Evidence, the request for leave to reply and further processes in the appeal’ of the Appeals Chamber dated 21 May 2018, we hereby 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-02/05-01/09-351).

II. BACKGROUND: HEAD OF STATE IMMUNITIES UNDER CURRENT PUBLIC INTERNATIONAL LAW

2. The jurisprudence of both, international and domestic courts on the scope of, and possible exceptions to, head of State immunity under public international law is, to say the least, inconsistent.

3. Besides, the current work of the International Law Commission (‘ILC’) also reflects this controversial and divisive debate, which is likewise present in the submission of commentaries of States to the ILC.¹

4. The Appeals Chamber is therefore confronted with a sensitive issue, the implications of which extend far beyond the case at hand.

5. At the same time, the Office of the Prosecutor has repeatedly brought to the attention of the Security Council the matter of Omar Al-Bashir, and the lack of cooperation with the Court, by a significant number of States, be they contracting parties of the Rome Statute or not. The Security Council, for its part, has – apart from its original referral contained in Security Council Resolution 1593 (2005) – however not taken any further steps against either Sudan, or non-cooperating States. This, once again, confirms the divergence of views among the international community.

6. It is therefore respectfully submitted that the Appeals Chamber should approach the matter against this very background.

III. SECURITY COUNCIL RESOLUTION 1593 (2005) AND SUDAN’S LACK OF COOPERATION WITH THE COURT

¹ Fifth report of the International Law Commission, Sixty-ninth session, Chapter VII on Immunity of State officials from foreign criminal jurisdiction, A/72/10, pp. 163-191. See also the Fifth report on immunity of State officials from foreign criminal jurisdiction, Concepción Escobar Hernández, Special Rapporteur, A/CN.4/701, 14 June 2016, pp. 73-88.

See furthermore the manifold comments submitted to the ILC by governments pertaining to the scope of and possible exceptions to immunity under domestic legislation and practice at http://legal.un.org/ilc/guide/4_2.shtml#govcoms.

7. Security Council Resolution 1593 (2005), adopted under Chapter VII of the UN Charter, contains the unequivocal obligation of Sudan to ‘cooperate *fully* with and provide *any* necessary assistance to the Court and the Prosecutor’². Sudan is bound to fulfill this obligation by virtue of Article 25 UN Charter.

8. This unambiguous obligation, by using the term ‘cooperate’, implicitly refers back to Chapter IX of the Rome Statute. It thus also refers to Article 89(1) of the Rome Statute, containing the obligation to surrender individuals who are subject to an arrest warrant to the Court. Hence, once an arrest warrant was issued by the Court, Sudan was subject to a Chapter VII-based legal obligation to arrest and surrender Omar Al-Bashir, which legal obligation Sudan has however not (yet) fulfilled.

9. It ought to be noted at the outset that vis-à-vis Sudan (as being the State of nationality of Omar Al-Bashir) the issue of head of State immunity does *not* arise.

10. It ought to be further noted at this juncture that any head of State immunity Omar Al-Bashir might enjoy, does not constitute an individual right of the person concerned. Rather, it is a right of the State the person is representing, i.e. in the case at hand, a right of Sudan. This is confirmed by the very fact that such immunity might be waived by the State concerned, *i.e.* Sudan.

11. Sudan invokes the head of State immunity of Omar Al-Bashir for the sole purpose of enabling him to return to Sudan, in which case he is then however not surrendered to the Court in disregard of Sudan’s above-mentioned Chapter VII-obligation arising under Security Council Resolution 1593 (2005).

12. This violation, by Sudan, of its Charter-based obligations has the further effect that any head of State immunity, which otherwise *might* protect Omar Al-Bashir against his arrest and surrender by third States – on which issue, as will be shown, the Appeals Chamber does *not* need to take a position – cannot be invoked by Sudan for its benefit, for such invocation would constitute an *abuse of rights / abus de droit* to the extent, and as long as, Sudan does not itself comply with its own Chapter VII-based obligation.

13. Given this situation of *abuse of rights / abus de droit* in which Sudan found itself, it would have been barred from *invoking* any alleged violation of the head of State immunity of Omar Al-Bashir, had Jordan arrested and surrendered him.

14. As a matter of fact, Sudan has lost the right to have its head of State immunity respected by third States (assuming it would have otherwise existed) to the extent, and

² Security Council Resolution 1593 (2005) operative paragraph 2; emphasis added.

as long as, it fails to comply with its own obligation arising under Chapter VII of the Charter of the United Nations.

15. Therefore, all third States are free to ignore any otherwise possibly existing head of State immunity of Omar Al-Bashir *in order to arrest and surrender him to the Court*.

16. Accordingly, any alleged conflict between the obligation of third States to arrest and surrender Omar Al-Bashir on the one hand, and their obligation to respect his head of State immunity (assuming it did exist as a matter of principle even where a situation has been referred to the Court under Chapter VII UN Charter) on the other, simply does *not* arise.

17. The above reading of Security Council Resolution 1593 (2005) as to the scope of obligations imposed on Sudan to cooperate with the Court constitutes the only possible interpretation of said resolution.

18. Already by virtue of its very wording, paragraph 2 of Security Council Resolution 1593 (2005) ('shall cooperate *fully* and provide *any necessary* assistance') imposes an all-encompassing obligation on Sudan, the fulfillment of which is required for the Court to be able to *de facto* exercise its jurisdiction. It thereby supplements paragraph 1 of the resolution activating the jurisdiction of the Court in its entirety.

19. Consequently, (at least) for purposes of cooperation, Sudan is to be treated *as if* it was a State party to the Rome Statute as long as the Security Council does not make use of its deferral competence under Article 16 of the Rome Statute. In particular, the wording of Security Council Resolution 1593 (2005) does not allow another interpretation than one comprising the duty of Sudan to arrest and surrender its head of State.

20. While paragraph 2 of the resolution thus imposes far-reaching obligations to cooperate *on Sudan*, its paragraph 6 addresses nationals, officials and personnel of *contributing third States not being party to the Rome Statute* and exempts them from the jurisdiction of the Court. This proves that the Security Council, when adopting Security Council Resolution 1593 (2005), was indeed fully aware of the contentious nature of the treatment of government officials and their immunities.

21. While expressly exempting officials from certain States in paragraph 6, the Security Council *nevertheless* chose to pass the resolution with the all-encompassing language in paragraph 2, hence *not* taking up such exemptions and *not* restricting the scope of obligations *imposed on Sudan*. Thus, the Security Council in paragraph 2 of its resolution *e contrario* did indeed intend to provide for the obligation of Sudan to

eventually arrest and surrender high-ranking State officials, including should the case arise, its own head of State.

22. The 'shall cooperate fully'-language contained in paragraph 2 of Security Council Resolution 1593 (2005) had already been used by the Security Council in its Resolutions 827 (1993) and 955 (1994) creating the ICTY and the ICTR respectively. In both instances, the resolutions were read as applying equally to all persons regardless of their official status in their respective home country. The very same wording was then used in Resolution 1593 (2005).

23. What is more is that despite the arrest warrants then already issued against Omar Al-Bashir, the Security Council in its Resolution 1970 (2011) once again used that very same language. The Security Council thereby implicitly confirmed that under the 'shall cooperate-fully'-formula the State concerned (*i.e.* in the case at hand Sudan respectively Libya) has to do just this, namely to fully cooperate regardless of the status of the person indicted by the Court.

24. Therefore, the Security Council in its Resolution 1593 (2005) obliged Sudan to cooperate fully including to arrest and surrender its sitting head of State.

25. Sudan however continues to not comply with this duty, and thus continuously violates its obligations under Security Council Resolution 1593 (2005).

IV. SUDAN'S ABUSE OF RIGHTS WHEN INVOKING THE ALLEGED HEAD OF STATE IMMUNITY OF OMAR AL-BASHIR

26. Any invocation, by Sudan, of an alleged violation of the head of State immunity of Omar Al-Bashir amounts to claiming the re-establishment of an unlawful situation contrary to Security Council Resolution 1593 (2005), the Rome Statute and the arrest warrant issued against Omar Al-Bashir; it accordingly constitutes an *abuse of rights / abus de droit*.

27. Consequently, Jordan was *not* under an obligation to respect the head of State immunity of Omar Al-Bashir (if it existed at all on which issue the Appeals Chamber accordingly does *not* need to take a position) in order to arrest and surrender him to the Court. Thus, Jordan had no obligation vis-à-vis Sudan to not arrest Omar Al-Bashir which could have conflicted with the obligation to arrest and surrender him to the Court. Jordan did not, therefore, find itself in a situation foreseen in Article 98 of the Rome Statute.

28. Based on the concept of *good faith / bonne foi / bona fide*, the well-established notion of *abuse of rights / abus de droit* 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. Thus, not only the fulfillment of an obligation of international law, but also the invocation of any right must be done in *good faith / bonne foi / bona fide*. Under the notion of *abuse of rights / abus de droit* or, more precisely, the maxim *nemo commodum capere potest de sua propria iniuria*,³ a State may in particular not invoke a right in order to sustain or re-establish an otherwise unlawful situation *caused by itself* or, as *Bin Cheng* put it:

*“No one should be allowed to reap advantages from its own wrong.”*⁴

29. The maxim of *nemo commodum capere potest de sua propria iniuria* underlies, *inter alia*, Articles 61(2) and 62(2)(b) of the Vienna Convention of the Law of Treaties as reflecting international customary law. More generally, the notions of *good faith / bonne foi / bona fide* and *abuse of rights / abus de droit* are codified in various treaties, such as *inter alia* Article 300 of the UN Convention on the Law of the Sea, Article 17 of the European Convention of Human Rights, or Article 3 of the Optional Protocol to the International Covenant on Civil and Political Rights.

30. Furthermore, this long-standing maxim of international law has been recognized and applied by international courts and tribunals, including the PCIJ,⁵ the ICJ,⁶ as well as the Iran-U.S. Claims Tribunal;⁷ and confirmed by scholars.⁸

31. Most prominently, the PCIJ in its judgment in *Factory at Chorzow* stated that:

“It is, moreover, a principle generally accepted in the jurisprudence of international arbitration, as well as by municipal courts, that one Party cannot avail himself of the fact that the other has not fulfilled some obligation or has not had recourse to some means of redress, if the former Party has, by

³ The maxim *nemo commodum capere potest de sua propria iniuria* translates into French as “Nul ne peut profiter de son propre tort” or in English as “No one should be allowed to reap advantages from its own wrong.”

⁴ *B Cheng*, *General Principles of Law as applied by International Courts and Tribunals*, 1953, p. 150.

⁵ PCIJ, *Factory at Chorzow* (1927), Judgment, Series A, No. 9, pp. 3, 31; PCIJ, *Jurisdiction in the Courts of Danzig* (1928), Advisory Opinion, Series B, No. 15, pp. 3, 26-27.

⁶ ICJ, *Gabčíkovo Nagymaros Project (Hungary / Slovakia)*, Judgment, ICJ Reports 1997, p. 7, 67, para. 110. For the latest recognition of the concept of abuse of rights by the ICJ see: ICJ, *Immunities and Criminal Proceedings (Equatorial Guinea / France)*, Judgment on Preliminary Objections, 2018, pp. 41-42, paras 146, 151.

⁷ Iran-U.S. Claims Tribunal, *Tippetts, Abbett, McCarthy, Stratton c. Iran et al.* (1984), Award, Iran-U.S. Claims Tribunal Reports, Vol. 6, pp. 227-228.

⁸ *B Cheng*, *General Principles of Law as applied by International Courts and Tribunals*, 1953, pp. 121-158; *G Schwarzenberger*, *International Law, as applied by International Courts and Tribunals*, 1957, pp. 523-542; *R Kolb*, *La Bonne Foi en Droit International Public*, 1st Ed., 2000, pp. 487-499; *R Kolb*, *La Maxime “Nemo Ex Propria Turpitudine Commodum Capere Potest” (Nul Ne Peut Profiter de son Propre Tort) en Droit International Public*, 33 *Revue Belge de Droit International* 2000, pp. 84-136.

some illegal act, prevented the latter from fulfilling the obligation in question, or from having recourse to the tribunal which would have been open to him.”⁹

32. In the same vein, the PCIJ held in the case *Jurisdiction in the Courts of Danzig* that:

“[T]he Court would have to observe that at any rate Poland could not avail herself of an objection which, according to the construction placed upon the Beamtenabkommen by the Court would amount to relying upon the non-fulfilment of an obligation imposed upon her by an international agreement.”¹⁰

33. The ICJ applied that same principle in its judgment in *Gabčíkovo Nagymaros Project* reiterating the above-cited *dictum* of the PCIJ in *Factory at Chorzow* and concluded that:

“Hungary, by its own [prior wrongful] conduct, had prejudiced its right to terminate the Treaty”¹¹

34. The abuse of immunities for the sole purpose of evading criminal prosecution is currently also the subject of a case pending before the ICJ on *Immunities and Criminal Proceedings (Equatorial Guinea / France)*. There, the ICJ has explicitly made reference to, and acknowledged, the notion of *abuse of rights / abus de droit* as such, even if it did not have yet to make a more detailed pronouncement at the current stage of the proceedings.¹²

35. On that same matter, the Swiss *Bundesgericht* in the *Vitianu* case held that the rejection of a diplomat’s appointment by Switzerland as the receiving State was lawful, as it had been the only purpose of that appointment to confer immunity on the person concerned in order to exempt him from criminal prosecution in violation of the notion of *abuse of rights / abus de droit*.¹³

36. International courts and tribunals have repeatedly confirmed the maxim *nemo commodum capere potest de sua propria iniuria*. For instance, in the cases *Brown*,¹⁴ *El Oro*¹⁵ and *Velásquez-Rodríguez*¹⁶, the arbitral tribunals, as well as the Inter-American Court of Human Rights respectively found that a State cannot invoke in its defence the non-exhaustion of local remedies, where that State itself is responsible for the non-existence

⁹ PCIJ, *Factory at Chorzow* (1927), Judgment, Series A, No. 9, p. 31.

¹⁰ PCIJ, *Jurisdiction in the Courts of Danzig* (1928), Advisory Opinion, Series B, No. 15, pp. 26-27.

¹¹ ICJ, *Gabčíkovo Nagymaros Project (Hungary / Slovakia)*, Judgment, ICJ Reports 1997, pp. 7, 67, para. 110.

¹² ICJ, *Immunities and Criminal Proceedings (Equatorial Guinea / France)*, Preliminary Objections, Judgment, 2018, pp. 41-42, paras 146, 151.

¹³ Tribunal Fédéral, *Vitianu* (1948), cf. H Lauterpacht, *International Law – Collected Papers*, Vol. 3, 1977, pp. 451-457; H Reimann, *Encyclopedia of Public International Law*, Vol. 9, pp. 399-400.

¹⁴ *Robert E. Brown (United States) v. Great Britain* (1923), Award, 6 UNRIAA, pp. 120, 128-129.

¹⁵ *El Oro Mining and Railway Company (Ltd.) (Great Britain) v. United Mexican States* (1931), Award, 5 UNRIAA, pp. 191, 197-198.

¹⁶ IACHR, *Velásquez-Rodríguez v. Honduras*, Judgment, 1988, pp. 91, 156-157, paras 171, 178-180.

or ineffectiveness of such local remedies. *Georg Schwarzenberger* in the context of the first two cases therefore concluded that:

“If a State lacks effective local remedies, this accounts to a breach of the minimum standard. This omission itself constitutes an international tort and, in good faith, precludes the tortfeasor from invoking the local remedies rule.”¹⁷

37. In the case at hand, Sudan consistently fails to comply with its obligation to arrest and surrender its sitting head of State, and is thus in breach of international law. Any arrest and surrender to the Court of Omar Al-Bashir by a third State would constitute an act, which Sudan is obliged to perform *itself* under Security Council Resolution 1593 (2005), the Rome Statute and the arrest warrant issued against Omar Al-Bashir. If Sudan then were allowed to invoke a violation of its alleged head of State immunity by the third State performing that same act, Sudan would only do so in order to perpetuate its own prior breach of international law. As a matter of fact, absent such breach by Sudan, Omar Al-Bashir would long have been arrested and surrendered to the Court, and the question of a third State potentially violating Sudan’s head of State immunity by arresting and surrendering him simply could have not arisen.

38. What is more, any invocation of this allegedly persisting right, by Sudan, would have the only purpose of returning Omar Al-Bashir to Sudan and thus of re-establishing the unlawful situation of him evading criminal prosecution. In the guise of the exercise of its right to head of State immunity, Sudan would essentially claim to be accorded assistance in consolidating its consistent breach of international law.

39. Such claims by Sudan would therefore fall squarely within the scope of what the long-standing concept of *good faith / bonne foi / bona fide* proscribes: the abuse of a legal norm as a pretext to break the law or to consolidate an existing breach of the law. In the same vein, *Bin Cheng* stated that:

“Any fictitious exercise of a right for the purpose of evading a rule of law or a contractual obligation will not be tolerated. Such an exercise constitutes an abuse of the right, prohibited by law.”¹⁸

40. Therefore, Sudan is barred from invoking this otherwise (possibly) existing right to the extent, and as long as, it is obliged to perform that same act. Insofar, Jordan did

¹⁷ *G Schwarzenberger*, *A Manual of International Law*, 5th Ed., 1967, p. 177.

¹⁸ *B Cheng*, *General Principles of Law as applied by International Courts and Tribunals*, 1953, p. 123. Quite similarly, the memorandum submitted by Great Britain to the PCIJ in the *Oscar Chinn* case argued that “*International law has regard to substance rather than form, and will not countenance the evasion of an international obligation by the adoption of indirect means to effect an unlawful purpose.*” See PCIJ, *Oscar Chinn* (1934), Memorandum submitted by Great Britain, Series C, No. 75, p. 40.

not owe Sudan the obligation to respect its head of State immunity, which would otherwise conflict with the obligation of Article 89(1) of the Rome Statute.

41. Moreover, Jordan did not owe such obligation to another State. Since the head of State immunity constitutes a purely subjective right enjoyed by the home State of the person concerned only, and does *not* possess an *erga omnes* character, no other State but the one potentially injured (*i.e.* Sudan) is entitled to invoke it. Accordingly, the question of whether this right might have been violated merely governs the relation between Sudan and Jordan. Hence, for Sudan being barred from invoking its head of State immunity, this right is entirely deprived of its substance and ceases to have any legal effect whatsoever to the extent, and as long as, Sudan fails to comply with its obligations under Security Council Resolution 1593 (2005). Consequently, no other obligation of Jordan vis-à-vis third States conflicting with the obligation of Article 89(1) of the Rome Statute exists.

42. It follows that Jordan had no conflicting obligations when required to arrest and surrender Omar Al-Bashir by the Court. Consequently, Jordan was *not* in a situation of Article 98 of the Rome Statute, and accordingly violated its own obligations under the Rome Statute by not arresting and surrendering Omar Al-Bashir to the Court.

V. CONCLUSIONS

43. 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 therefore violate its obligations under Security Council Resolution 1593 (2005), and under the Rome Statute generally.

44. For that reason, the Court does not need to decide the question whether a rule of international law exists, permitting a State to arrest and then surrender a sitting head of State who is not a contracting party of the Rome Statute, to the Court, be it by virtue of a Security Council referral or otherwise.



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At Potsdam, Germany