Cour
Pénale
Internationale

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Court

Original: ***English***

No.: ***ICC-02/05-01/09***
Date: **25 September 2018**

THE APPEALS CHAMBER

Before: **Judge Chile Eboe-Osuji, Presiding Judge**
Judge Howard Morrison, Judge
Judge Piotr Hofmański, Judge
JudgeLuz del Carmen Ibáñez Carranza, Judge
Judge Solomy Balungi Bossa, Judge

SITUATION IN DARFUR

IN THE CASE OF
THE PROSECUTOR v.OMAR HASSAN AHMAD AL-BASHIR

Public Document

AMICUS CURIAE FURTHER OBSERVATIONS PURSUANT TO THE ORAL ORDER ISSUED ON 14 SEPTEMBER 2018 BY THE PRESIDING JUDGE EBOE - OSUJL DURING THE ORAL HEARING ON THE APPEAL OF THE HASHEMITE KINGDOM OF JORDAN LODGED ON 12 MARCH 2018 AGAINST THE FINDING OF PRE-TRIAL CHAMBER II THAT IT DID NOT COMPLY WITH THE REQUEST TO ARREST AND SURRENDER MR. AL-BASHIR

Source: **PROFESSOR KONSTANTINOS D. MAGLIVERAS**

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Ms Fatou Bensouda, Prosecutor

Counsel for the Defence

Legal Representatives of the Victims

Legal Representatives of the Applicants

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States' Representatives
Competent Authorities of the Hashimite Kingdom of Jordan

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Presiding Judge Eboe-Osujl issued on 14 September 2018 an Oral Order during the Oral Hearing on the appeal of the Hashemite Kingdom of Jordan lodged on 12 March 2018 against the Finding of Pre-Trial Chamber II that Jordan did not comply with the request to arrest and surrender Mr. Al-Bashir. Pursuant to the said Oral Order, "everyone will be given 10 pages maximum … to make any more written submissions they wish to make on something that has not been submitted upon either in writing or orally …". Based on this Oral Order, the following submissions are respectfully made to the Appeals Chamber as amicus curiae.

1. *On the types of 'international agreements' covered by article 98(2) of the Rome Statute and on whether the 1953 Convention on the Privileges and Immunities of the Arab League fall into the scope of the Statute*

Article 98(2) of the Statute is primarily concerned with the so-called 'status of forces agreements', namely agreements, principally bilateral, setting out the respective rights and obligations when one state stations its armed forces in the territory of another state. These agreements may create specific immunity regimes applying only in the inter-state relations of contracting parties. It follows that a requested state may be faced with conflicting obligations, since to satisfy the ICC request for arresting and surrendering one or more individuals present in its territory could violate the promises given not to arrest and surrender under a 'status of forces agreement'. Clearly, this is not the case with the 1953 Convention.

Moreover, Article 98(2) does not appear to cover any agreements, which have been concluded exclusively within the confines of an international organisation and aim at regulating issues and matters concerning solely the international organisation in question and its membership. It is submitted that the 1953 Convention falls into this category because its sole purpose is to regulate the specific question of privileges and immunities within the Arab League, necessary to facilitate its operation. Thus, the 1953 Convention creates a self-contained regime, which extends solely to the

relationship between the Arab League and its Member States as well as to relations among its membership.

As a self-contained regime, its provisions do not produce any effects outside the operation of the Arab League. It follows that any privileges and immunities established under and pursuant to the 1953 Convention have limited application which is confined to the Arab League and to those Member States which have chosen to ratify it. Indeed, the latter assume obligations to whom effect must be given but only when they act as participants in the Arab League. Thus, these obligations do not attach to these states (including Jordan) when they act as contracting parties to another legal regime or treaty, *in casu* the Rome Statute.

To put the above observations in context, any obligations that Jordan might have as the Member hosting a meeting of the Arab League Council *vis-à-vis* the immunity of Heads of State of the Members present in its territory for the meeting would be confined to the Council's proper operation and to facilitate its work (there is no extraterritoriality) and may not be invoked as binding duties to justify behaviour towards another international institution.

2. *On the obligation contained in article 86 of the Rome Statute for States Parties to cooperate fully with the Court*

Article 86 of the Statute is titled 'General obligation to cooperate' and, as explicitly stated therein, this cooperation shall be effected pursuant to the Statute provisions. Therefore, while the wording of article 86 might suggest that cooperation is only restricted to the investigation and prosecution of crimes coming under the Court's purview, the proper interpretation should be that it covers the cooperation envisaged in Part 9 in its entirety and not in a piecemeal fashion. This would, by necessary implication, include arrest and surrender requests under article 89. This is the only rational interpretation to be given because it would be irrational if cooperation by States Parties were to end at the stage of prosecution. It is also consistent with the fact that the Court does not have its own force to execute arrest warrants in the territory

of States Parties. Having said that, it is only advisable that a future Statute amendment revises the wording of Article 86 to reflect the precise scope of cooperation and assistance laid down in Part 9.

3. *On the desirability for the Court to refer a State to the ASP and/or to the UN Security Council in respect of non-compliance with article 87(7) of the Rome Statute*

It is regrettable that the Court has not been endowed with the power to impose measures of a punitive nature when it has determined that a State Party has not complied with its Statute obligations, including failure to comply with express and repeated requests for cooperation. Other international courts (e.g. the Court of Justice of the European Union) have been granted a sanctioning power to deal with recalcitrant states. That article 87(7) empowers the Court to refer a State Party to the ASP and/or to the Security Council for non-compliance could not and should not be construed as a punitive measure, a sanction. On the contrary, it is a way to inform in an official manner the ASP and/or the Security Council of a specific State Party's problematic behaviour.

It should be accepted that the Court acts legitimately when it acts by responding to circumstances where States Parties are unwilling to fulfill their fundamental obligations and duties. No state sovereignty is breached. The Court does what is imperative to protect the institution of a supranational criminal justice entity. While not expressly mentioned in article 87(7), the Court should be able to additionally request that appropriate action is taken against the State Party, because it has prevented it from exercising its powers and functions. Whether the State concerned did so deliberately or not is a matter for the ASP and/or the Security Council to consider (or not) when ordering such measures. Article 112(2)(f) of the Statute and the relevant provisions of the UN Chapter come into play.

4. *On the specific action taken by the African Union and other intergovernmental organisations to address alleged human rights violations committed in Darfur*

It is regrettable that the African Union has not undertaken any concrete action in addressing the alleged gross violations of human rights in Darfur, which have resulted in unacceptable loss of life. While the African Union has repeatedly said that impunity will not be tolerated in the continent, on the one hand, it has been antagonizing the Court and, on the other hand, it has failed to give effect to its Constitutive Act, thus perpetuating an ethos of impunity. It should be emphasized that article 4(h) of the Constitutive Act endows the African Union with the right to intervene in a Member State when grave circumstances are present in its territory, including acts of genocide and crimes against humanity.

Whether by design or not, the AU Member States have so far avoided operationalizing the Court of Justice, the judicial organ envisaged in article 18 of the Constitutive Act and whose Protocol entered into force on 11 February 2009 (Sudan ratified it in January 2006, see the ratification table at: https://au.int/en/treaties). There is no doubt that the Court of Justice might have played an important role in ensuring that the Organisation implements its duties under article 4(2). On the other hand, the successful criminal trial against Mr Hissène Habré, the former ruler of Chad, is evidence that, despite many problems, the African Union is capable to instigate prosecution for gross violations of human rights. That Mr Habré was a former Head of State when he was tried before the Extraordinary African Chambers (created by an AU-Senegal Agreement) while Mr Al-Bashir is a serving Head of State should not be considered a vital consideration, because, as explained during the Oral Hearing in the present appeal, the Constitution of the Sudan stipulates that there is no absolute immunity when the President is accused of grossly violating the Bill Of Rights contained in the Constitution.

But perhaps one should not only address the action (or inaction for that matter) by the African Union but should ask what action has been taken by other intergovernmental organisations in which the Sudan is a Member State, including of course the Arab League but also the Organisation of Islamic Cooperation. Such an examination would have revealed a general unwillingness to address genocide and

crimes against humanity allegedly perpetrated in Darfur. This lack of reaction is rather puzzling given that, as argued in the Oral Hearing when answering a question put by Judge Ibañez Carranza, the Arab League has seemingly abandoned the rule of not interfering in Member States in relation to alleged serious crimes committed during the popular uprisings in Syria and in Libya. The latter are under investigation by the Prosecutor pursuant to the referral under UN Security Resolution 1970(2011).

5. *Concluding remarks*

It would appear that the main argument advanced by Jordan, and supported by the African Union and the Arab League, is that, no matter how regrettable, the rules of public international law dictate that serving Heads of State enjoy absolute immunity and no derogations are allowed. It might not, however, be very clear which kind immunity Jordan invoked: was it immunity from prosecution? (and in this case should the two Arrest Warrants not have been issued for as long as Mr Al-Bashir serves his second consecutive (and final) term of office?); Was it immunity from arrest? Was it immunity from being surrender to the Court (again for as long as he is a serving Head of State according to the stipulations of the Sudanese Constitution)? Or all of the above?

Even if such a rule of public international exists, it was portrayed principally as a combination of applying by analogy the case-law of international courts and tribunals as well as an interpretation of a collective reading of Article 27(2) and several provisions of Part 9 of the Statute. The Court does not necessarily have to follow the former (if it does it, it will have to convincingly show why they are directly applicable to the specific facts and circumstances of the present case), while the latter is arguably only one of possible interpretations. However, as also argued in the written submissions as amicus curiae (ICC-02/05-01/09-356, 14-06-2018), the Appeals Chamber ought to interpret the Rome Statute in a manner fitting to the Court's paramount aim, namely to end impunity, especially when the State where

the alleged crimes were perpetrated is incapable and/or unwilling to do so and no other alternative means appear to be available. And even the more so in the case of Darfur, where the victims and the families of the victims have a right to justice finally be served.

It is not unknown for international courts to face severe difficulties in exercising their mandate. Their constitutive instruments and statutes may not been drafted in very clear language, provisions many have been intentionally blurred. Often this is the result of compromise, one searches for the lowest possible denominator that will secure their establishment. But international courts have an inherent power to resolve any ambiguities regarding their judicial powers. So does the ICC under Article 119(1) of the Statute. At the same time, there is an expectation that international courts shall uphold the 'general principles of law recognized by civilized nations' (article 38(1)(d) of the ICJ Statute). Arguably, these general principles also emanate from the theory of natural law dictating that justice must be served at all times.-

PROF. KONSTANTINOS D. MAGLIVERAS

Dated this 25th day of September 2018

At Athens, The Hellenic Republic

At [place, country]