



THE APPEALS CHAMBER

Before: **Judge Chile Eboe-Osuji, Presiding**
 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

[...]

96. [At issue] is primarily the question of whether Head of State immunity finds application in a situation where the Court requests a State Party of the Rome Statute to arrest and surrender the Head of State of another State (in this instance, Sudan), which, while not being party to the Rome Statute, is the subject of a referral to the Court by the UN Security Council and, in terms of Resolution 1593, obliged to fully cooperate with the Court.

97. The central issue in this appeal is whether Mr Bashir, in his capacity as Head of State of Sudan, enjoyed immunity before this Court which Jordan was obligated to respect in the absence of a waiver from Sudan. [...]

100. Article 27(2) of the Statute provides as follows:

Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.

101. The Appeals Chamber notes that Head of State immunity, which has been asserted in the case at hand, is a manner of immunity that is, as such, accepted under customary international law. That immunity prevents one State from exercising its criminal jurisdiction over the Head of State of another State. It is important to stress that immunity of that kind operates in the context of relations between States.

102. The most direct effect of article 27(2) of the Statute is that a Head of State cannot claim Head of State immunity when he or she appears before the ICC for prosecution in accordance with the provisions on the exercise of jurisdiction under articles 12 et seq. of the Statute. Nor does Head of State immunity present a bar to the Court opening an investigation in relation to or issuing a warrant of arrest against a Head of State. This was specifically recognised by the ICJ in the *Arrest Warrant Case*.

103. It is of note that article 27(2) of the Statute is a clear provision in conventional law; but it also reflects the status of customary international law. In this regard, the Appeals Chamber notes, first, article 7 of the Nuremberg Charter of the International Military Tribunal at Nuremberg, which provides as follows:

The official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment.

104. On 11 December 1946, the UN General Assembly expressly affirmed the ‘principles of international law recognized by the Charter of the Nürnberg Tribunal and the judgment of the Tribunal’ and directed the newly established International Law Commission to ‘treat as a matter of primary importance plans for the formulation [...] of the principles recognized’ therein.³⁰⁹ The International Law Commission subsequently formulated the Nuremberg Principles, Principle III of which reads as follows:

The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible Government official does not relieve him from responsibility under international law.

[...]

106. There is no suggestion in any of these instruments that immunity of Heads of State could stand in the way of their prosecution before an international court for international crimes.

107. Further milestones in this regard were the Statutes of the international criminal tribunals – the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda [the ‘ICTY’ and the ‘ICTR’] – which the UN Security Council adopted in 1993 and 1994, respectively. Both Statutes include provisions similar to Principle III of the Nuremberg Principles. In his reports on the draft Statutes of the ICTY and ICTR, the UN Secretary-General indicated that they should contain provisions ‘which specify that a plea of head of State immunity [...] will not constitute a defence, nor will it mitigate punishment’. It is of note that the ICTY issued an indictment against President Slobodan Milošević on 22 May 1999, while he was still President of Serbia. [...]

113. The Appeals Chamber fully agrees with Pre-Trial Chamber I’s conclusions in the *Malawi Decision* [...] and notes that there is neither State practice nor *opinio juris* that would support the existence of Head of State immunity under customary international law vis-à-vis an international court. To the contrary, as shown in more detail in the Joint Concurring Opinion of

Judges Eboe-Osuji, Morrison, Hofmański and Bossa, such immunity has never been recognised in international law as a bar to the jurisdiction of an international court. [...]

114. The absence of a rule of customary international law recognising Head of State immunity *vis-à-vis* international courts is relevant not only to the question of whether an international court may issue a warrant for the arrest of a Head of State and conduct proceedings against him or her, but also for the horizontal relationship between States when a State is requested by an international court to arrest and surrender the Head of State of another State. As further explained in the Joint Concurring Opinion of Judges Eboe-Osuji, Morrison, Hofmański and Bossa and correctly found by the Pre-Trial Chamber in the *Malawi* Decision, no immunities under customary international law operate in such a situation to bar an international court in its exercise of its own jurisdiction.

115. The Appeals Chamber considers that the absence of a rule of customary international law recognising Head of State immunity *vis-à-vis* an international court is also explained by the different character of international courts when compared with domestic jurisdictions. While the latter are essentially an expression of a State's sovereign power, which is necessarily limited by the sovereign power of the other States, the former, when adjudicating international crimes, do not act on behalf of a particular State or States. Rather, international courts act on behalf of the international community as a whole. Accordingly, the principle of *par in parem non habet imperium*, which is based on the sovereign equality of States, finds no application in relation to an international court such as the International Criminal Court.

116. The Appeals Chamber notes further that, given the fundamentally different nature of an international court as opposed to a domestic court exercising jurisdiction over a Head of State, it would be wrong to assume that an exception to the customary international law rule on Head of State immunity applicable in the relationship between States has to be established; rather, the *onus* is on those who claim that there is such immunity in relation to international courts to establish sufficient State practice and *opinio juris*. As further explained in the Joint Concurring Opinion of Judges Eboe-Osuji, Morrison, Hofmański and Bossa, there is no such practice or *opinio juris*.

117. In sum, the Appeals Chamber finds that there was no rule of customary international law that would have given Mr Al-Bashir immunity from arrest and surrender by Jordan on the basis of the request for arrest and surrender issued by the Court. It follows that there was no ground for Jordan not to execute the request for arrest and surrender and that therefore it did not comply with its obligation to cooperate with the Court pursuant to articles 86 *et seq.* of the Statute.

118. As recalled above, the Pre-Trial Chamber in the decision under review took a different approach to the one it adopted in the *Malawi* Decision. Contrary to that decision and the Appeals Chamber's above finding, it found that it was unable to identify 'a rule in customary international law that would exclude immunity for Heads of State when their arrest is sought for international crimes by another State, even when the arrest is sought on behalf of an international court, including, specifically, this Court'. Nevertheless, it concluded that Head of State immunity did not stand in the way of Mr Al-Bashir's arrest by Jordan, based on the interplay between the relevant provisions of the Statute and Sudan's obligation to 'cooperate fully' with the Court pursuant to paragraph 2 of Resolution 1593.

[...]

127. Jordan argues that, if at all, article 27(2) is relevant only in respect of the relationship between the Court and States Parties *vis-à-vis* their own Heads of State. According to this argument, article 27(2) has no impact on the continuing existence of Head of State immunity in the horizontal relationship between States Parties. The Appeals Chamber is unpersuaded by this argument. States Parties to the Rome Statute, have, by virtue of ratifying the Statute, accepted that Head of State immunity cannot prevent the Court from exercising jurisdiction – which is in line with customary international law. There is no reason why article 27(2) should be interpreted in a way that would allow a State Party to invoke Head of State immunity in the horizontal relationship if the Court were to ask for the arrest and surrender of the Head of State by making a request to that effect to another State Party. The law does not readily condone to be done through the back door something it forbids to be done through the front door. It must be noted that, in such situations, the requested State Party is not proceeding to arrest the Head of State in order to prosecute him or her before the courts of the requested State Party: it is only lending assistance to the Court in its exercise of proper jurisdiction.

Zadání: Pokuste se rekonstruovat argumentaci odůvodňující závěr, že Jordánsko bylo povinno vydat Omara Al-Bashira k trestnímu stíhání před MTS a nemohlo se v tomto ohledu dovolávat jeho imunity jakožto úřadující hlavy státu.

Omar Al-Bashir je bývalý súdánský prezident a diktátor, který vládl Súdánu od roku 1989 až do svého svržení v roce 2019. Ačkoliv Súdán nikdy nebyl smluvní stranou Římského statutu (ŘS), vydal na něj Mezinárodní trestní soud (MTS) v roce 2009 zatykač. Učinil tak poté, co mu byla situace oznámena Radou bezpečnosti (rez. č. 1593) na základě čl. 13 písm. b) ŘS. Al-Bashir byl obviněn z válečných zločinů, zločinů proti lidskosti a genocidy v souvislosti s konfliktem v západním Súdánu, v provincii Dárfúr. Podle údajů OSN během konfliktu zahynulo přibližně 400 000 osob (převážně šlo o příslušníky tamějších afrických kmenů, které byly za podpory súdánské vlády masakrovány arabskými polovojenskými skupinami) a další 2 miliony byly nuceny opustit své domovy. V roce 2017 cestoval Al-Bashir do Jordánska, kde se zúčastnil setkání Ligy arabských států. Jako smluvní strana ŘS Jordánsko mělo povinnost Al-Bashira zadržet a vydat. Podle Jordánska však takový postup nebyl možný, neboť coby úřadující hlava státu disponoval Al-Bashir personální imunitou.