

International Criminal Court—United Nations Security Council referral—Sudan—incumbent head of state—personal immunity—Rome Statute of the International Criminal Court—state party—South Africa—state cooperation—arrest and surrender—non-compliance

PROSECUTOR v. AL-BASHIR, ICC-02/05-01/09-302, Decision Under Article 87(7) of the Rome Statute on the Non-compliance by South Africa with the Request by the Court for the Arrest and Surrender of Omar Al-Bashir. At <https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-02/05-01/09-302>.

International Criminal Court, Pre-Trial Chamber II, July 6, 2017.

On July 6, 2017, Pre-Trial Chamber II of the International Criminal Court (the Court or ICC)—composed of Judges Tarfusser, Perrin de Brichambaut, and Chung—held that South Africa violated the Rome Statute of the ICC (Rome Statute) by failing to arrest and surrender to the Court President Omar Al-Bashir of Sudan when he visited the country in June 2015.¹ However, the Court did not refer the matter to the ICC Assembly of States Parties (ASP) or the United Nations Security Council (UNSC) pursuant to Article 87(7) of the Rome Statute. The decision added South Africa to a list of ICC state parties that have failed in their Rome Statute obligations with respect to the incumbent head of state of Sudan. It also marked the first time that the ICC Office of the Prosecutor (OTP), all ICC states parties, and the United Nations (UN) were invited to present their views² and argue fully what is perhaps the most legally contentious and politically sensitive issue that the ICC has faced in its history.

The situation in Darfur, Sudan was referred to the ICC by the UNSC—acting under Chapter VII of the UN Charter and Article 13(b) of the Rome Statute—in March 2005 by Resolution 1593. Two ICC arrest warrants were subsequently issued against President Al-Bashir: one for war crimes and crimes against humanity and another for genocide.³ However, in June 2015, President Al-Bashir attended an African Union (AU) summit in Johannesburg and left without impediment, despite the ICC’s request for South Africa’s cooperation in May 2015 and the holding of urgent Article 97 consultations on the ICC’s premises on the eve of the visit.

The Court first found that President Al-Bashir was not entitled to immunity under the Host Agreement between South Africa and the AU for the purposes of hosting the AU summit (Decision, paras. 66–67). Nevertheless, it held that under customary international law, states may not exercise domestic criminal jurisdiction over foreign incumbent heads of state for alleged international crimes “even when the arrest is sought on behalf of an international court” (Decision, para. 68). But the Court also reasoned that Article 27(2)⁴ of the Rome

¹ Prosecutor v. Al-Bashir, ICC-02/05-01/09-302, Decision Under Article 87(7) of the Rome Statute on the Non-compliance by South Africa with the Request by the Court for the Arrest and Surrender of Omar Al-Bashir (July 6, 2017) [hereinafter Decision].

² See Prosecutor v. Al Bashir, ICC-02/05-01/09-274, Decision Convening a Hearing for the Purposes of a Determination Under Article 87(7) of the Statute with Respect to the Republic of South Africa (Dec. 8, 2016).

³ Prosecutor v. Al Bashir, ICC-02/05-01/09-3, Decision on the Prosecution’s Application for a Warrant of Arrest Against Omar Hassan Ahmad Al Bashir (Mar. 4, 2009); Prosecutor v. Al Bashir, ICC-02/05-01/09-94, Second Decision on the Prosecution’s Application for a Warrant of Arrest (July 12, 2010).

⁴ Rome Statute of the International Criminal Court, Art. 27(2), July 17, 1998, 2187 UNTS 3 (entered into force July 1, 2002) (“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.”).

Statute foreclosed immunity before the ICC itself, and that it “concerns both, vertically, the relationship between a State Party and the Court and, horizontally, the inter-State relationships between States Parties to the Statute” (Decision, paras. 74–76). Accordingly, under Article 27(2), ICC states parties may not invoke their “own” immunity and refuse to arrest and surrender their own head of state to the ICC, nor may immunity be invoked to prevent the arrest and surrender of the head of state of an ICC state party by another ICC state party (Decision, paras. 77–80). Consequently, a waiver under Article 98(1)⁵ was not required since there was “no immunity to be waived” (Decision, para. 81). However, the reasoning thus far only applied to ICC states parties—states that had consented to the Rome Statute (Decision, para. 82)—and Sudan was not a party to the ICC.

Nonetheless, the ICC’s jurisdiction over the Darfur situation was triggered by UNSC Resolution 1593, with the effect that “the legal framework of the [Rome] Statute applies in its entirety, with respect to the situation” and that Sudan had an obligation to cooperate fully and provide any necessary assistance to the ICC (Decision, paras. 85–87). Accordingly, “for the limited purpose of the situation in Darfur, Sudan has rights and duties analogous to those of States Parties to the [Rome] Statute” (Decision, para. 88). Although Sudan had not consented to the Rome Statute, the Court held that the UNSC could impose obligations on UN member states—like Sudan—pursuant to the UN Charter (Decision, para. 89). Sudan was thus bound by Article 27(2) of the Rome Statute which “render[ed] inapplicable any immunity on the ground of official capacity . . . that would otherwise exist under international law” (Decision, para. 91). Thus, Sudan could not claim President Al-Bashir’s immunity before the ICC, nor did immunity apply when ICC states parties, like South Africa, executed an ICC arrest warrant (Decision, paras. 92–94). The Court also found, as *obiter dicta*, that UNSC Resolution 1593’s text contained no immunity waiver and did not need to, as Article 98(1) did not apply because Sudan had no immunity to waive, and that the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention)—to which South Africa and Sudan are parties—did not abrogate President Al-Bashir’s immunity (Decision, paras. 96, 109).

South Africa had therefore been obligated to arrest President Al-Bashir and surrender him to the ICC while he was on its territory (Decision, para. 97). Moreover, South Africa was not entitled to rely on its own understanding of Article 98 to unilaterally decide not to cooperate with the ICC (Decision, paras. 99, 102). Article 98 does not give ICC states parties the discretion to refuse or delay cooperation because of disagreement with the ICC’s interpretation and application of the Rome Statute or to question the validity of the Court’s cooperation request (Decision, paras. 104–05). Similarly, South Africa’s Article 97 consultations with the ICC on the eve of the visit did not affect or suspend its arrest and surrender obligations (Decision, paras. 119–22).

Finally, the Court considered, in light of South Africa’s Article 97 consultations and its seeking of a decision on the issue of President Al-Bashir’s immunity (Decision, paras. 127–30), whether to refer the matter to the ICC ASP and/or the UNSC pursuant to Article 87(7). The Court found that a referral “would be of no consequence as a mechanism for the Court

⁵ *Id.* Art. 98(1) (“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.”).

to obtain cooperation” since any legal ambiguity had now been resolved (Decision, para. 137). Additionally, it noted that Malawi, Chad, the Democratic Republic of the Congo (DRC), Djibouti, and Uganda had been previously referred to the UNSC and the ICC ASP for failing to arrest and surrender President Al-Bashir, which resulted in no action being taken. The Court opined that “these considerations further strengthen[ed] its belief that a referral of South Africa [wa]s not warranted as a way to obtain cooperation” (Decision, para. 138).

Judge Perrin de Brichambaut penned a minority concurring opinion⁶ disagreeing with the majority that the Genocide Convention did not abrogate President Al-Bashir’s head of state immunity. In his view, the facts satisfied Article VI⁷ because the UNSC triggered the ICC’s jurisdiction via Article 25 of the UN Charter and as a UN member state, “Sudan can be regarded as having accepted the jurisdiction of the Court as a result of having accepted the powers of the UN Security Council under . . . the UN Charter” (Minority Opinion, paras. 12–13, 15, 17–18). Consequently, South Africa and Sudan are obliged to cooperate with the ICC on the basis of the Genocide Convention (Minority Opinion, para. 16). Judge Perrin de Brichambaut also found that Articles IV⁸ and VI of the Genocide Convention impose an obligation on states to prosecute and punish all persons committing genocide on their territory including “constitutionally responsible rulers” while they are still in office; that states parties to the Genocide Convention had thus “implicitly waived their personal immunities”; and that, in light of the obligations to prevent and punish genocide under Article I, personal immunity for “constitutionally responsible rulers” charged with genocide would be incompatible with the Genocide Convention (Minority Opinion, paras. 23–24, 27, 30, 35, 37). He concluded that by acceding to the Genocide Convention, Sudan had waived its head of state immunity, thereby satisfying the Rome Statute’s Article 98(1) waiver provision. Since President Al-Bashir’s immunity had thus been waived by Sudan, it did not prevent South Africa from arresting and surrendering him to the ICC (Minority Opinion, para. 38).

While Judge Perrin de Brichambaut agreed that UNSC Resolution 1593 resulted in the Rome Statute applying in its entirety to the Darfur referral and had thus activated Article 27(2) (which applies to all ICC state parties), he reasoned that Article 98(1), which addresses the immunity of states that are not ICC state parties, was also activated and could therefore apply (Minority Opinion, paras. 41, 54). Because the exercise of the ICC’s jurisdiction did not automatically imply the absence of immunity—since jurisdiction and immunity are separate and distinct—“the mere fact that the Court may exercise jurisdiction on the basis of a referral” need not “render[] article 27 of the [Rome] Statute applicable as if Sudan were analogous to a State Party” (Minority Opinion, paras. 55–56).

Similarly, Judge Perrin de Brichambaut reasoned that the text of UNSC Resolution 1593, in light of its ordinary meaning, context, object, and purpose, considered with UNSC

⁶ Prosecutor v. Al-Bashir, ICC-02/05-01/09-302, Decision Under Article 87(7) of the Rome Statute on the Non-compliance by South Africa with the Request by the Court for the Arrest and Surrender of Omar Al-Bashir – Minority Opinion of Judge Marc Perrin de Brichambaut (July 6, 2017) [hereinafter *Minority Opinion*].

⁷ Convention on the Prevention and Punishment of the Crime of Genocide, Art. VI, Dec. 9, 1948, 78 UNTS 277 (entered into force Jan. 12, 1951) (“Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.”).

⁸ *Id.* Art. IV (“Persons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.”).

member statements, other UNSC resolutions, and the subsequent practice of UN organs and affected states, “yields contradictory outcomes or indistinct results” on the issue of whether it had removed President Al-Bashir’s immunity (Minority Opinion, para. 83). Finally, Judge Perrin de Brichambaut found that conflicting state practice and the nature of international courts “reveal[s] that it remains undecided whether the existing rule of customary international law regarding immunities enjoyed by incumbent heads of state functions in the same manner if one of the states involved is acting pursuant to its obligations towards the Court” (Minority Opinion, para. 91).

* * * *

This Decision marks the next step in the ICC’s evolving views on the issue of President Al-Bashir’s immunity. While ICC Pre-Trial Chambers I and II have on numerous occasions addressed the issue and always held that President Al-Bashir was not entitled to immunity, the legal reasoning has not been consistent. Initially, Pre-Trial Chamber I held—in decisions relating to Malawi and Chad—that under customary international law, heads of state were not entitled to immunity before international courts.⁹ Pre-Trial Chamber II then found—in decisions relating to the DRC, Djibouti, Uganda, and a preliminary request relating to South Africa—that President Al-Bashir’s immunity had been implicitly waived by paragraph 2 of UNSC Resolution 1593.¹⁰ With this latest Decision, Pre-Trial Chamber II added two more legal theories for the removal of President Al-Bashir’s immunity: Sudan is analogous to an ICC state party and the Genocide Convention.

Consequently, the ICC has now presented four independent legal avenues by which President Al-Bashir is not entitled to immunity—and none of the decisions explicitly acknowledge the competing decisions, much less state that their respective reasoning was erroneous. To be fair, the Decision did state that it (now) saw no implicit or explicit waiver of President Al-Bashir’s immunity in UNSC Resolution 1593, but it did so in passing while also noting that such a waiver was, in any event, not necessary (Decision, para. 96). However, the fact that this had been precisely the basis under which Pre-Trial Chamber II previously held that President Al-Bashir did not enjoy immunity was not acknowledged, referenced, or explained.

Even more surprising is that Judge Tarfusser sat on each of the decisions cited above, including the present one, and never discussed the changes in his opinion. Similarly, Judge

⁹ Prosecutor v. Al Bashir, ICC-02/05-01/09-139-Corr, Corrigendum to the 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 (Dec. 13, 2011); Prosecutor v. Al Bashir, ICC-02/05-01/09-140-t-ENG, Decision Pursuant to Article 87(7) of the Rome Statute on the Refusal of the Republic of Chad to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir (Dec. 13, 2011).

¹⁰ See Prosecutor v. Al Bashir, ICC-02/05-01/09-195, Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir’s Arrest and Surrender to the Court (Apr. 9, 2014); Prosecutor v. Al Bashir, ICC-02/05-01/09/242, Decision Following the Prosecutor’s Request for an Order Further Clarifying that the Republic of South Africa is Under the Obligation to Immediately Arrest and Surrender Omar Al Bashir (June 13, 2015); Prosecutor v. Al Bashir, ICC-02/05-01/09-266, Decision on the Non-compliance by the Republic of Djibouti with the Request to Arrest and Surrender Omar Al-Bashir to the Court and Referring the Matter to the United Nations Security Council and the Assembly of the State Parties to the Rome Statute (July 11, 2016); Prosecutor v. Al Bashir, ICC-02/05-01/09-267, Decision on the Non-compliance by the Republic of Uganda with the Request to Arrest and Surrender Omar Al-Bashir to the Court and Referring the Matter to the United Nations Security Council and the Assembly of State Parties to the Rome Statute (July 11, 2016).

Chung sat on the Djibouti and Uganda decisions and did not explain his change of view in the present Decision either. Only Judge Perrin de Brichambaut—who had also sat on the Djibouti and Uganda decisions—“acknowledged that [his] views have evolved” (Minority Opinion, n. 3). Therefore, while the present Decision remained faithful to the position that President Al-Bashir did not enjoy immunity, it only adds to the legal confusion as to why. Considering the political sensitivity surrounding President Al-Bashir and the ICC, this issue deserves a definitive ruling from the ICC Appeal Chamber. Unfortunately, no request for authorization to appeal the Decision was filed.

The Decision is, however, the most sophisticated and prolonged judicial analysis by the ICC of President Al-Bashir’s immunity, even if the reasoning was not groundbreaking—the argument that the Genocide Convention removes head of state immunity or that Sudan is analogous to an ICC state party had already been articulated by academics, commentators, and a single judge of the (then) United Kingdom House of Lords.¹¹ There is no doubt that the Decision was facilitated by a South Africa that was fully engaged with the litigation, as well as an ICC OTP that was permitted to file written submissions on the matter for the first time; both parties also presented oral argument. Unfortunately, Belgium was the only country that accepted the Court’s open invitation to ICC state parties to file submissions. For its part, the UN refused to participate at all in the proceedings, despite the fact that a UNSC decision was the very reason why the matter was before the ICC and that the interpretation and effect of a UN document—UNSC Resolution 1593—was center stage.

The majority’s opinion does have its flaws. Its lynchpin is that UNSC Resolution 1593 converted Sudan into a state that is analogous to an ICC state party so that Article 27(2) of the Rome Statute applied to Sudan and removed President Al-Bashir’s immunity. This looks like an elegant solution. After all, it is difficult to argue the UNSC did not intend for the Rome Statute system to apply to the cases that would emerge from its Darfur referral. Indeed, one saw this in action from the UNSC’s referral of the Libya situation to the ICC. Libya—also not party to the Rome Statute—challenged the admissibility of the *S. Gaddafi* and *Al-Senussi* cases and, in that context, relied on provisions of the Rome Statute that apply only to an ICC state party.

The problem is that the Rome Statute imposes other obligations and confers specific rights on ICC state parties. For example, Part XI of the Rome Statute established the ICC ASP to which each ICC state party is entitled representation (Article 112(1)) and a vote (Article 112(7)), while Part XII relates to the ICC’s financing, including obligatory contributions by ICC states parties (Article 115(a)). Yet, no one has ever suggested that Sudan or Libya should take their places at the ICC ASP and vote or demanded an ICC budget contribution from them in relation to the situations in Darfur and Libya respectively. Thus, the Decision needs a legal theory that explains why and under what circumstances some of the Rome Statute’s provisions apply while others, apparently, do not.

Along this vein, Judge Perrin de Brichambaut’s minority opinion points out that some provisions of the Rome Statute are specifically addressed to states that are not ICC state parties, including Article 98(1) which protects the immunity of such states. In his view, Article 98(1) must retain its applicability, even if Sudan is analogous to an ICC state party, because it does not

¹¹ See *R v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet* (No. 3), 1 A.C. 147, at 289 (per Lord Phillips) (finding that Article IV of the Genocide Convention constituted a waiver by states of personal immunity—such as that enjoyed by incumbent heads of state).

make sense for the Rome Statute to apply in its entirety, but then not apply Article 98(1) which benefits non-parties like Sudan. Thus, he simply disagreed with the proposition that being “analogous” to an ICC state party means that Article 27(2) applies and displaces Article 98(1).

But rather than concentrating on one theory—as the majority did—Judge Perrin de Brichambaut instead addressed all grounds upon which the ICC had previously held that President Al-Bashir was not entitled to immunity, even if he did not cite the prior decisions and categorically refute them. He discussed the nature of international courts (the Malawi and Chad decisions), the wording of UNSC Resolution 1593 (the DRC, Djibouti, Uganda, and preliminary South Africa decisions), and Sudan being analogous to an ICC state party (the present majority decision). Each was rejected for the same underlying reason: they did “not allow a firm conclusion to be reached,” did “not allow a definite answer,” and it was “not possible to make a firm finding” (Minority Opinion, paras. 58, 83, 95). But most legal arguments on controversial issues will inevitably have counterarguments or points of contention. Indeed, Judge Perrin de Brichambaut’s theory concerning the Genocide Convention is not flawless. While he insisted that UNSC Resolution 1593 did not have any clear and explicit wording that removed President Al-Bashir’s immunity, neither does the Genocide Convention. Rather, an implicit waiver was read into Articles IV and VI, which is not that dissimilar to prior ICC case law finding an implicit waiver in paragraph 2 of UNSC Resolution 1593. To his credit, Judge Perrin de Brichambaut acknowledged the apparent contradiction and conceded that his interpretation was not “entirely free from doubt,” but that it was a matter of the different degrees to which immunity was addressed in the two documents (Minority Opinion, para. 101). However, by accepting a theory that he admitted was not free of doubt and rejecting others for essentially the same reason, he undermines the very rationale for their rejection.

Judge Perrin de Brichambaut also ignored the practical consequences of his opinion. President Al-Bashir has two ICC arrest warrants against him, one for genocide and another for war crimes and crimes against humanity. If President Al-Bashir is arrested and surrendered by a state to the ICC on the basis that the Genocide Convention abrogated his immunity, according to the rule of speciality under Article 101(1) of the Rome Statute, he can only be tried for genocide. While the Court can, pursuant to Article 101(2), request the surrendering state to waive Article 101(1), Judge Perrin de Brichambaut’s opinion means that President Al-Bashir retains his immunity vis-à-vis the war crimes and crimes against humanity arrest warrant. Despite Article 101(2) also stating that ICC state parties have “the authority” to provide a waiver and “should endeavour to do so,” it would simply be unsound for a surrendering state to provide a waiver for crimes over which it could not have arrested President Al-Bashir in the first place. Hence, Judge Perrin de Brichambaut’s opinion suggests that as long as President Al-Bashir remains in office, he can only stand trial for genocide at the ICC (unless Sudan waives his immunity). In this respect, the strength of the ICC OTP’s evidence in relation to the genocide charge may be questioned, as Pre-Trial Chamber I initially refused to issue an arrest warrant for genocide. It was only issued after the ICC Appeals Chamber held that Pre-Trial Chamber I had erred by applying a standard of proof that was higher than necessary for the arrest warrant stage.¹²

¹² See *Prosecutor v. Al Bashir*, ICC-02/05-01/09-73, Judgment on the Appeal of the Prosecutor Against the “Decision on the Prosecution’s Application for a Warrant of Arrest Against Omar Hassan Ahmad Al Bashir” (Feb. 3, 2008).

We have not heard the last word on this matter. Indeed, President Al-Bashir's visit was also the subject of a South African judgment which found that the country's ICC implementing legislation (rather than international law) removed his immunity.¹³ But none of this has prevented President Al-Bashir from (re)visiting select ICC state parties, most recently Jordan (in March 2017),¹⁴ Uganda (in November 2017), and Chad (in December 2017). Thus, more ICC decisions concerning his immunity appear likely. Regrettably, the ICC seems to have little confidence that the ICC ASP or the UNSC will act; their lack of prior action was a reason why South Africa was not referred to them. This situation may lead President Al-Bashir to believe that (some) ICC state parties will not arrest and surrender him to the ICC. But that mentality may also mean that one day he might try his luck one too many times.

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¹³ *Minister of Justice and Constitutional Development and Others v. Southern Africa Litigation Centre* 2016 (3) SA 317 (SCA) (S. Afr.).

¹⁴ Since the writing of this case note, Pre-Trial Chamber II issued a decision finding that Jordan violated the Rome Statute by failing to arrest and surrender President Al-Bashir to the ICC during his March 2017 visit to Amman and referred Jordan to the ICC ASP and the UNSC. The reasoning concerning President Al-Bashir's immunity mirrored that of the present Decision: Judges Tarfusser and Chung found that Sudan is analogous to an ICC state party and Judge Perrin de Brichambaut, in a minority opinion, reiterated his Genocide Convention position. See *Prosecutor v. Al Bashir*, ICC-02/05-01/09-309, 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 (Dec. 11, 2017); *Prosecutor v. Al Bashir*, ICC-02/05-01/09-309-Anx-t-ENG, 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 – Minority Opinion of Judge Marc Perrin de Brichambaut (Dec. 11, 2017). Jordan subsequently communicated its intention to appeal the decision to the ICC Appeals Chamber, to which the ICC OTP only partially objects: *Prosecutor v. Al Bashir*, ICC-02/05-01/09-312, The Hashemite Kingdom of Jordan's Notice of Appeal of 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; or, in the Alternative, Leave to Seek Such an Appeal (Dec. 18, 2017); *Prosecutor v. Al Bashir*, ICC-02/05-01/09-313, Prosecution's Response to the Hashemite Kingdom of Jordan's Notice of Appeal Against the Article 87(7) Decision, or in the Alternative, Application for Leave to Appeal the Decision Under Article 82(1)(d) (Dec. 21, 2017). Therefore, the ICC Appeals Chamber appears to be on the brink of being seized with the issue of President Al-Bashir's immunity.

* The views expressed herein are those of the author and do not necessarily reflect the views of the Special Tribunal for Lebanon.