**Session 5**

**Head of state immunity**

**SABC NEWS (YOUTUBE) – THERE IS NO DIPLOMATIC IMMUNITY IN THE CASE OF BASHIR: ICC**

The International Criminal Court says there is no provision for diplomatic immunity when a Head of State attends an African Union summit.

* Not cooperating violation of obligations under Rome Statute

South Africa claimed that the fact that the Sudanese President, Omar Al-Bashir, visited on an African Union invitation, granted him diplomatic immunity

* ICC: no immunity for Bashir even as head of state
* because the Statute clearly indicates that there are no immunities because of the official capacities of the suspect
* and because the Rome Statute is applicable with regards to Sudan

If the Court deems non-cooperation, the ICC is likely to refer the matter to the UNSC

The ICC insists it is obligated to investigate South Africa on this matter

Voices of dissent from the African continent are only likely to become louder as a result

**ICC PRESS RELEASE – CASE INFORMATION SHEET: SITUATION IN DARFUR, SUDAN: THE PROSECUTOR V. OMAR HASSAN AHMAD AL BASHIR**

Omar Hassan Ahmad Al Bashir Suspected of five counts of crimes against humanity, two counts of war, and three counts of genocide allegedly committed in Darfur, Sudan.

Not in ICC custody

Current status: President of the Republic of Sudan since 16 October 1993

First Warrant of arrest: 4 March 2009

Second Warrant of arrest: 12 July 2010

Status of proceedings: The execution of the arrest warrant is pending

**Charges**

The warrants of arrest for Omar Al Bashir list ten counts on the basis of his individual criminal responsibility under article 25(3)(a) of the Rome Statute as an indirect (co)perpetrator including:

* Five counts of crimes against humanity:
* murder (article 7(1)(a))
* extermination (article 7(1)(b))
* forcible transfer (article 7(1)(d))
* torture (article 7(1)(f))
* rape (article 7(1)(g));
* Two counts of war crimes:
* intentionally directing attacks against a civilian population as such or against individual civilians not taking part in hostilities (article 8(2)(e)(i))
* pillaging (article 8(2)(e)(v))
* Three counts of genocide:
* genocide by killing (article 6-a)
* genocide by causing serious bodily or mental harm (article 6-b)
* genocide by deliberately inflicting on each target group conditions of life calculated to bring about the group’s physical destruction (article 6-c).

**Alleged crimes (non-exhaustive list)**

Pre-Trial Chamber I considered that there are reasonable grounds to believe that:

* From March, 2003 to at least 14 July 2008, a protracted armed conflict not of an international character existed in Darfur between the Government of Sudan (GoS) and several organised armed groups, in particular the Sudanese Liberation Movement/Army (SLM/A) and the Justice and Equality Movement (JEM).
* Soon after the April, 2003 attack on the El Fasher airport, Omar Al Bashir and other high-ranking Sudanese political and military leaders of the GoS agreed upon a common plan to carry out a counter-insurgency campaign against the SLM/A, the JEM and other armed groups opposing the Government of Sudan in Darfur.
* A core component of that campaign was the unlawful attack on part of the civilian population of Darfur – belonging largely to the Fur, Masalit and Zaghawa groups – who were perceived to be close to the organised armed groups opposing the Government of Sudan in Darfur. The campaign was conducted through GoS forces, including the Sudanese Armed Forces and their allied Janjaweed militia, the Sudanese Police Forces, the National Intelligence and Security Service (NISS) and the Humanitarian Aid Commission (HAC). It lasted at least until the date of the filing of the Prosecution Application on 14 July 2008.
* During the campaign, GoS forces allegedly committed crimes against humanity, war crimes, and crimes of genocide, and in particular:

1. carried out numerous unlawful attacks, followed by systematic acts of pillage, on towns and villages, mainly inhabited by civilians belonging to the Fur, Masalit and Zaghawa groups;
2. subjected thousands of civilians – belonging primarily to the Fur, Masalit and Zaghawa groups – to acts of murder, as well as to acts of extermination;
3. subjected thousands of civilian women – belonging primarily to the said groups – to acts of rape;
4. subjected hundreds of thousands of civilians – belonging primarily to the said groups – to acts of forcible transfer;
5. subjected civilians – belonging primarily to the said groups – to acts of torture; and
6. contamined the wells and water pumps of the towns and villages primarily inhabited by members of the Fur, Masalit and Zaghawa groups that they attacked; and encouraged members of other tribes, which were allied with the GoS, to resettle in the villages and lands previously mainly inhabited by members of the Fur, Masalit and Zaghawa groups.

Pre-Trial Chamber I also found that there are reasonable grounds to believe that:

* Omar Al Bashir, as the de jure and de facto President of the State of Sudan and Commander-in-Chief of the Sudanese Armed Forces at all times relevant to the Prosecution Application, played an essential role in coordinating the design and implementation of the common plan;
* and, in the alternative, that Omar Al Bashir also:

1. played a role that went beyond coordinating the implementation of the said GoS counter-insurgency campaign;
2. was in full control of all branches of the "apparatus" of the State of Sudan, including the Sudanese Armed Forces and their allied Janjaweed militia, the Sudanese Police Forces, the NISS and the HAC; and
3. used such control to secure the implementation of the said GoS counter-insurgency campaign.

Pre-Trial Chamber I found that there are reasonable grounds to believe that Omar Al Bashir acted with specific intent to destroy in part the Fur, Masalit and Zaghawa ethnic groups.

**Key judicial developments**

Using its authority under the Rome Statute, the UNSC referred the situation in Darfur since 1 July 2002 to the Prosecutor of the International Criminal Court in resolution 1593 on 31 March 2005.

**Non-cooperation**

The suspect remains at large in spite of the arrest warrants issued against him.

ICC judges have made a number of decisions regarding the non- compliance of certain States with the requests to arrest and surrender Mr Al Bashir and have referred the matter to the United Nations Security Council (UNSC) and the Assembly of the States Parties (ASP) to take the necessary measures they deem appropriate

**UNITED NATIONS SECURITY COUNCIL – RESOLUTION 1593 (2005)**

Taking note of the report of the International Commission of Inquiry on violations of international humanitarian law and human rights law in Darfur (S/2005/60),

Recalling article 16 of the Rome Statute under which no investigation or prosecution may be commenced or proceeded with by the International Criminal Court for a period of 12 months after a Security Council request to that effect,

Also recalling articles 75 and 79 of the Rome Statute and encouraging States to contribute to the ICC Trust Fund for Victims,

Taking note of the existence of agreements referred to in Article 98-2 of the Rome Statute,

Determining that the situation in Sudan continues to constitute a threat to international peace and security,

Acting under Chapter VII of the Charter of the United Nations,

1. Decides to refer the situation in Darfur since 1 July 2002 to the Prosecutor of the International Criminal Court;
2. Decides that the Government of Sudan and all other parties to the conflict in Darfur, shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution and, while recognizing that States not party to the Rome Statute have no obligation under the Statute, urges all States and concerned regional and other international organizations to cooperate fully;

**ICC THE APPEALS CHAMBER, SITUATION IN DARFUR, SUDAN – IN THE CASE OF: THE PROSECUTOR V. OMAR HASSAN AHMAD AL-BASHIR**

**JUDGEMENT: IN THE JORAN REFERRAL RE AL-BASHIR APPEAL**

*Decided to print the case (see attached)*

*Chat GPT*

The ICC Appeals Chamber Judgment in the Jordan Referral re Al Bashir Appeal is significant for its interpretation of immunity under the ICC. Here's a detailed overview of what the case tells us about immunity:

1. Horizontal Immunity:
   * The judgment clarifies that under customary international law, heads of state enjoy immunity from arrest and prosecution in foreign jurisdictions. This principle, known as horizontal or state immunity, protects sitting heads of state from legal proceedings initiated by other states.
   * However, the Appeals Chamber emphasizes that this principle of immunity does not extend to international criminal courts, such as the ICC. According to the Court, the ICC's jurisdiction is not subject to the same limitations as domestic courts and is not bound by principles of state immunity.
   * Therefore, the ICC can exercise its jurisdiction over sitting heads of state, including allegations of genocide, war crimes, crimes against humanity, and the crime of aggression, without being constrained by horizontal immunity.
2. Vertical Immunity:
   * The judgment also addresses vertical or individual immunity, which refers to immunity from prosecution granted to certain individuals holding official positions. Vertical immunity is typically based on domestic laws or international agreements.
   * The Appeals Chamber underscores that while vertical immunity may exist under domestic legal systems, it does not provide a shield against the jurisdiction of the ICC. The Court's jurisdiction over individuals is not affected by their official capacity or immunity granted under domestic law.
   * Therefore, even if a person holds a high-ranking position or official capacity, such as a head of state or government official, they can still be subject to the ICC's jurisdiction for alleged international crimes committed while in office.

Overall, the case reaffirms the principle that the ICC's jurisdiction is not subordinate to principles of state or individual immunity. The Court's mandate to prosecute individuals for the most serious international crimes prevails over any immunity claims based on customary international law or domestic legislation.

1. Article 27 of the Rome Statute:
   * The Appeals Chamber emphasizes the principle enshrined in Article 27, which states that official capacity, whether as a head of state or government, or as a government official, shall not relieve an individual of criminal responsibility under the Rome Statute.
   * It underscores that immunity cannot be invoked to shield individuals from prosecution before the ICC for international crimes falling within its jurisdiction.
2. Article 98 of the Rome Statute:
   * The judgment acknowledges the provisions of Article 98, which address cooperation with respect to the waiver of immunity and consent to surrender.
   * It underscores that Article 98 does not provide an absolute bar to the prosecution of individuals before the ICC, particularly for crimes under its jurisdiction, and that states have an obligation to cooperate with the Court in such matters.

**DAPO AKANDE (EJIL: TALK!) – ICC APPEALS CHAMBER HOLDS THAT HEADS OF STATE HAVE NO IMMUNITY UNDER CUSTOMARY INTERNATIONAL LAW BEFORE INTERNATIONAL TRIBUNALS**

In the oral and written summary of the Appeals Judgment of the ICC in the Al-Bashir case, the Appeals Chambers holds that under customary international law, heads of state have no immunity from criminal prosecution by international criminal courts.

The provision in Article 27(2) of the ICC Statute that ‘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’, according to the summary of the judgment: “represents more than a stipulation in treaty law. The provision also reflects the status of customary international law, as it concerns the jurisdiction that an international criminal court is properly entitled to exercise’.

In so holding, the Appeals Chamber, once again changes the basis on which the ICC has held that the Sudanese (now former) President was not immune from the arrest in ICC states parties that he visited.

ndeed the Appeals Chamber appears to explicitly endorse the much criticised decision of Pre-Trial chamber I in the Malawi Decision*.*The Summary states that:

“39. In this regard, the Appeals Chamber is fully satisfied that the pronouncements made by the Pre-Trial Chamber I in the Malawi Referral Decision — and those made by the Appeals Chamber of the Special Court for Sierra Leone in the case of Charles Taylor (who was indicted before that international court when he was the sitting President of Liberia) — have adequately and correctly confirmed the absence of a rule of customary international law recognising Head of State immunity before international courts in the exercise of proper jurisdiction.   
40. The effect of absence of a rule of customary law recognising Head of State immunity, in relation to international courts, is not readily avoided through the backdoor: by asserting immunity that operates in the horizontal relationship between States, in a manner that would effectively bar an international court from exercising its jurisdiction over the person whose arrest and surrender it has requested. The law does not readily condone something to be done through the backdoor, if the law has forbidden the thing to be done through the front door.”

The author finds it misguided and dangerous.

* This reasoning appears to assert that parties to the Rome Statute, have, by creating the Court, taken away the rights of non-party states under international law.
* Dangerous because this reasoning is likely to stiffen opposition to the Court by non-parties.
* The issue of immunity of heads of state before the international criminal courts is not what is at issue in these cases
* That’s why the Malawi decision was a terrible one and it is disappointing to see it resurrected
* What was is at issue is the immunity of heads of states from arrest byother states acting at the request of an international criminal court.
* That the head of state may not have immunity before the international criminal court does not, without more, say anything about whether he or she may have immunity before a foreign state.

Although the Chamber was unanimous in holding that Jordan violated its obligation not to arrest Bashir, the majority decided not to refer Jordan to the UN Security Council and reversed the Pre-Trial Chamber on this point.