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N° : ICC-02/05-01/09 OA2

Date : 30 April 2018

**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**

**Request for leave to submit an Amicus Curiae brief in the proceedings relating to 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 issued on the 11 December 2017 (ICC-02/05-01/09-309)**

Source : Dr. Dov Jacobs

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

**The Office of the Prosecutor :**

Ms Fatou Bensouda, Prosecutor

M. James Stewart

**State's representatives :**

Competent authorities of the Hashemite  
Kingdom of Jordan

**REGISTRY :**

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**The Registrar:**

M. Peter Lewis

## **I. Object of the request**

1. This request for leave to submit an Amicus Brief is filed following decision ICC-02/05-01/09-330 of the Appeals Chamber.<sup>1</sup>

## **II. Expertise of the Author**

2. The author is an Assistant Professor of International Law at Leiden University. He has published extensively and has a recognised expertise in the fields of Public International Law and International Criminal Law. He has contributed to key publications in international criminal law, such as the Triffterer commentary to the Rome Statute. More particularly, the author of this request has written extensively on the issue of immunities in international criminal law. His commentaries on the issue have been regularly used and quoted (for example by South Africa in their submissions before the ICC). The author's chapter on immunities in the seminal volume edited by Carsten Stahn on the law and practice of the international criminal court<sup>2</sup> provides a critical understanding of the ICC's case law on the question and puts forward some useful tools to move forward from there. The author has also been practicing at the International Criminal Court as a legal assistant in a Defense team since 2012.

## **III. Summary of arguments**

3. At the outset, the Author wishes to point out that the question of whether Jordan had an obligation to arrest and surrender OMAR AL-BASHIR is not the ultimate question which the Appeals Chamber needs to address in the appeal. Indeed, the language of Article 98 is clear: it creates an **obligation for the Court** not to proceed with a request that would require a State to act inconsistently with one of its international obligations, not a **right for States** to invoke an existing international obligation in order to refuse to comply with a request.

4. As a result, the Author respectfully submits that the main legal question at the heart of the Appeal, which brings into play a number of legal questions raised by Jordan in their

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<sup>1</sup> ICC-02/05-01/09-330, par. 4.

<sup>2</sup> Carsten Stahn (ed.), *The Law and Practice of the International Criminal Court* (Oxford University Press, 2015), chapter 12.

appeal, is the following: “did the Court act in violation of Article 98 by proceeding with a request to arrest and surrender OMAR HASSAN AHMAD AL-BASHIR because it would require the requested State to act inconsistently with its obligations under international law?”

5. The proposed amicus submissions would propose to assist the Appeals Chamber in answering this question by providing elements on the following points.

### **1. The applicability of Article 27 to Sudan**

6. This issue can be solved without complex discussions on the interpretation and the effect of UNSC resolutions. Indeed, given the wording of Article 27, it is to be interpreted as directed at the Court not States and simply allows the Court to exercise its jurisdiction irrespective of whether the person is a national of a State party or not. Whether Article 27 itself is compatible with general international law is another issue entirely. The Judges of the ICC are not tasked with testing the compatibility of the Rome Statute with general international law. As the “domestic judges” of the international criminal court legal system, their role and functions are limited to the scope of that legal system.

### **2. The nature of a UNSC Referral.**

7. In order to decide the questions on appeal, the author believe that the Appeals Chamber will need to explore the nature of Security Council referrals. From the perspective of the internal workings of the ICC, a UNSC referral is merely one of the Article 13 trigger mechanisms, allowing the ICC to exercise jurisdiction.

8. Such a referral does not, from the internal perspective of the ICC legal order, have any other particular impact on the functioning of the Statute. A useful analogy can be drawn with a State referral. Should a State refer a situation to the Court, and in the course of the subsequent investigation the Prosecutor were to issue an arrest warrant against the sitting head of State of a non-State Party (which would be jurisdictionally possible if the crimes were committed on the territory of a State party), the content of the referral itself would be irrelevant in determining whether that person can claim the benefit of immunity from arrest and surrender from the Court.

9. As a consequence, from the internal perspective of the Rome Statute, there is nothing to indicate that a referral (be it from the UNSC) can automatically be deemed to remove any immunity if there is no pre-existing Rome Statute provision to that effect.

10. There is equally no basis in the Rome Statute to consider that a Security Council Referral in itself has the effect of making the Rome Statute as a whole applicable to Sudan. Again, taking the example of a State referral, it would not be argued that such a referral would automatically make the Statute applicable as a whole to all non-State parties that might have some link to the referred situation. There is, from the internal perspective of the Rome Statute, no legal basis to treat UNSC referrals differently.

### **3. The interpretation of paragraph 2 of the UNSC Resolution 1593**

11. Four points relating to paragraph 2 of UNSC Resolution 1593 will be developed in the Amicus submissions:

12. 1) Paragraph 2 of UNSC Resolution 1593 should be analysed separately from the actual referral of the situation under paragraph 1 of the Resolution. Indeed, in paragraph 2, the UNSC is using its powers under Chapter VII to pronounce that Sudan shall cooperate with the Court. This is not a requirement for a referral and the UNSC could very well adopt such a resolution independently of any referral by the UNSC, even one opened following a State referral or a proprio motu procedure under Article 15.

13. 2) The fact that the UNSC adopts an obligation for Sudan to cooperate with the ICC under Chapter VII of the UN Charter does not entail that Sudan has an obligation to cooperate under the Rome Statute. In other words, if Sudan does not cooperate with the Court, it is acting not in violation of the Rome Statute but only possibly in violation of its obligations under the UN Charter, violations which the ICC has no authority to rule upon.

14. 3) There is no indication that the UNSC either intended to make the Rome Statute as a whole applicable to Sudan or intended to implicitly remove OMAR AL-BASHIR's immunity. The language of the Resolution is clear: the UNSC orders that Sudan shall cooperate with the Court. While one could argue that, possibly, in satisfying its obligation to cooperate with the Court, Sudan would have to waive OMAR AL-BASHIR's immunity, this

cannot be interpreted as removing his immunity under customary international law. The Amicus submissions will explain why this also applies to the idea that Sudan would be, through the operation of the UNSC, bound by the Rome Statute as a whole.

15. 4) The UNSC does not have the power to remove immunity under customary international law or make a treaty as a whole binding on a State not a party to it. While the UNSC does have exorbitant powers under the UN Charter, these powers operate within the context of the Charter and cannot displace the ordinary workings of international law.

#### **4. The impact on Jordan's obligations to arrest and surrender BASHIR.**

16. The preceding developments would have a direct impact on determining whether, in arresting OMAR AL-BASHIR, Jordan would be acting inconsistently with its obligations under international law. Indeed, from Jordan's perspective, OMAR AL-BASHIR would still benefit from immunity *ratione personae* under general international law until such time as Sudan waives it (either voluntarily or in execution of UNSC Resolution 1593).

17. Finally, given the fact that the Appeals Chamber might be compelled to consider, if only incidentally, whether Jordan was bound to respect Bashir's immunity under other treaties, the Amicus submissions would also briefly explain why, in the event of possibility conflicting obligations undertaken by a State under international law which would be relevant for the execution of request for cooperation originating from the ICC, the Amicus submissions would explain that it is not incumbent on the Judges to decide which obligation prevails over another. Article 98(1) only requires that there exist at least one obligation under international law that a requesting State would act inconsistently with to prevent the Court from proceeding with a request for cooperation.



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Dr. Dov Jacobs

The Hague, 30 April 2018.