

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: 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 Document

Request for Leave to Submit Observations on the Legal questions Presented in '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 [f] Omar Al-Bashir"' (ICC-02/05-01/09-326)

Source: Prof^a Dra Yolanda Gamarra

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

The Office of the Prosecutor
Fatou Bensouda, Prosecutor
James Stewart, Deputy Prosecutor

Counsel for the Defence

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

States' Representatives
The Hashemite Kingdom of Jordan

Amicus Curiae

REGISTRY

Registrar
M. Peter Lewis

Counsel Support Section
Prof. Dr. Esteban Peralta Losilla

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

1. Professor Yolanda Gamarra hereby requests leave to submit observations on the merits of the legal questions presented in “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” of 12 March 2018 (ICC-02/05-01/09-326)’ pursuant to the order of the Appeals Chamber entitled “Order inviting expressions of interest as amici curiae in judicial proceedings (pursuant to rule 103 of the Rules of Procedure and Evidence”) of 29 March 2018 (ICC-02/05-01/09 0 A2).

Expertise of Professor Gamarra on the Legal Questions Presented

2. Dr. Yolanda Gamarra is Professor of Public International Law and International Relations at the Faculty of Law of the University of Zaragoza (Spain). She has been Visiting Fellow at The Lauterpacht Centre for International Law (University of Cambridge) between February to June 2009 and the Royal Complutense College at Harvard (March 2011). She was Visiting Researcher (as “Salvador de Madariaga” Fellow, supported by the Spanish Ministry of Education and the Government of Aragón) at the Institute for Global Law and Policy (Harvard Law School) and Fellow at the Royal Complutense College at Harvard (March-August 2012). In 2014, she was Visiting Researcher at the Max Planck Institute for Comparative Public Law and International Law (Heidelberg). She is the editor of the book *Lecciones sobre justicia internacional* (Zaragoza, IFC/DPZ/ Fundación ‘Manuel Jiménez Abad’, 2009) and the author of “La política hostil de Estados Unidos de Norteamérica contra la Corte Penal Internacional: los acuerdos bilaterales del artículo 98 (2) o la búsqueda de la impunidad” (*Revista Española de Derecho internacional*, 2005/1, pp. 145 – 169); “Mujeres, guerra y violencia: los modos de compensación en el Derecho internacional contemporáneo” (*Aequalitas. Revista jurídica de Igualdad de Oportunidades entre Hombres y Mujeres*, 2005, pp. 6 – 18) and “The Politics of the Legal Framework governing Spanish Foreign Policy on International Administration in Crisis Areas”, in Korhonen, O. (ed.), *International Administration of Crisis Areas. Nine National Approaches* (Helsinki, KDG Research and Publications, 2007, pp. 83 – 127), among others. She is co-author of “Securing Protection to Civilian Population: The Doubtful United Nations Response in Sudan” (*The Global Community Yearbook of International Law and Jurisprudence*, 2004/1, pp. 195 – 226); “Towards the Rule of Law in Kosovo: The Judicial System Under International Administration” (*The Global*

Community Yearbook of International Law and Jurisprudence, 2006, pp. 165 – 189) and “United Nations Member States’ Obligations Towards the ICTY: Arresting and Transferring Lukic, Gotovina and Zelenovic” (*International Criminal Law Review*, 2008/4, pp. 627 – 653).

Key Question and Initial Observation

3. Jordan was obliged to arrest and to surrender Al-Bashir to the ICC in accordance with UN Security Council Resolution 1593 (2005) par. 2. The Pre-Trial Chamber was correct in finding that Jordan had failed to comply with her obligations under the Rome Statute by not implementing the request by the Court. Our argument is to defend the position of the Pre-Trial Chambers.

Circumstances of the case

4. Much of the current debates amongst scholars and international practitioners is focused on formalizing the so called *jus post bellum*, that is the rules and principles governing peace-making after Darfur’s conflict (Sudan), among others. Part of that peace building effort is the rule of law process, which consists of putting in place a set of international human rights norms and international humanitarian norms that establish the minimum standards necessary to achieve a stable society. Only by holding accountable those responsible for mass war crimes can there be a basis for post-conflict societies to establish the rule of law and move towards peace.
5. In general terms, domestic justice systems should be the first resort in pursuing accountability. Under international customary law, States have an obligation to try (or extradite) persons who have allegedly committed grave breaches of international humanitarian law. Such duty to try or extradite is inherent to the principle *aut dedere aut judicare* that is the basis of international criminal law enforcement. Only when domestic authorities are unwilling or unable to prosecute violators at home does the role of the international community become crucial.

The request of UN Security Council to the Prosecutor of the ICC in relation to Sudan war crimes

6. UN Security Council Resolution 1593 (2005) stated 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 State, urges all States and

concerned regional and other international organizations to cooperate fully". On 4 March 2009 and 12 July 2010, Pre-Trial Chamber I of the ICC issued two warrants of arrest against Al-Bashir for war crimes, crimes against humanity and genocide allegedly committed in Darfur.

Non-compliance by Jordan with the request by the ICC for arrest of Al-Bashir

7. On 29 March 2017, Al-Bashir traveled to Jordan to attend the Arab League Summit on 29 March 2017. Jordan transmitted a note verbale to the Register of the ICC considering that Al-Bashir is provided the immunity *ratione personae* under the 1953 Convention on the Privileges and Immunities of the Arab League. Jordan said that Al-Bashir arrest would have violated Jordan's obligation under customary international law and 1953 Convention. For this reason, Jordan did not arrest Al-Bashir. Jordan invokes the Article 98(1) of the ICC Statute. Nevertheless, the Article 98(1) is not applicable to the situation of Al-Bashir.

Effect on State Obligations

8. One relevant question is the legal basis of the vertical cooperation required of UN member States with respect to the ICC and, in particular, in relation to the arrest and transfer of accused persons (Article 86 of the ICC Statute). UNSC Resolution 1593 (2005) is clear about this obligation. The arrest of war crimes accused constitutes an obvious key step in conducting prosecutions. However, the lack of cooperation in this area by States where war crimes are committed or where accused persons take refuge or in transit (Al-Bashir case) continues being a difficulty not only in cases before the ICC, but also before other international jurisdictions. Thus, it is a crucial point to explore the legal and political difficulties that some UN member States face in implementing the obligation to arrest and transfer accused persons to the ICC. The case of Al-Bashir illustrates such difficulties.

International obligation to arrests and surrenders before the ICC

9. Vertical cooperation applies as well to the arrest and surrender of war crimes accused to the ICC (Article 89 of the ICC Statute). As such, extradition rules which would usually apply between States when transferring war criminals are not necessarily applicable when transferring accused to the ICC. The obligation of UN member States, in particular Jordan, to arrest and transfer Al-Bashir to the ICC is not based on an extradition treaty but on their international obligations, their discretion to decide on the transfers is greatly

limited. There is an essential obligation to comply with requests made by the ICC (Article 27(2) of the ICC Statute). As such, if a State fails to comply with its international obligation to arrest and surrender (or transfer) war crimes suspects, it will most likely have to justify the actions taken and/or the reasons for its non-compliance.

Domestic Implementation of the International Obligation to Arrest and Transfer

10. The international obligations of member States towards the ICC have been implemented by States by passing national laws on cooperation (Article 88 of the ICC Statute). For those countries that have passed internal legislation, such laws regulate how and which organs within the State's domestic jurisdiction will deal with ICC requests for assistance, including arrest warrants and requests for the transfer of war crimes accused to the ICC.

Prof^a Dra Yolanda Gamarra

A handwritten signature in black ink, consisting of several fluid, overlapping loops and curves, positioned below the printed name.

Dated this 30 April 2018
At Zaragoza, Spain