Cour
Pénale
Internationale

International
Criminal
Court

Original: **English**

**No. ICC-02/05-01/09 OA2**
Date: **28 September 2018**

**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**

# Supplemental Amicus Curiae Submissions of Professors Robinson, Cryer, deGuzman, Lafontaine, Oosterveld, and Stahn

**Source:** **Professor Darryl Robinson, Queen's University**
**Professor Robert Cryer, Birmingham School of Law**
**Professor Margaret deGuzman, Temple University**
**Professor Fannie Lafontaine, Laval University**
**Professor Valerie Oosterveld, Western University**
**Professor Carsten Stahn, Leiden University**

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

**The Office of the Prosecutor**

Ms Fatou Bensouda, Prosecutor
Mr James Stewart
Ms Helen Brady

**States Representatives**

Competent authorities of the Hashemite
Kingdom of Jordan

**REGISTRY**

**Registrar**
Mr Peter Lewis

## INTRODUCTION

1. On 14 September 2018, by oral order, the Appeals Chamber invited participants in the hearing to provide additional written submissions of up to 10 pages on points not already submitted, by 28 September 2018. Professors Robinson, Cryer, deGuzman, Lafontaine, Oosterveld and Stahn ("Robinson et al") accordingly offer these supplemental submissions, which provide additional citations and references on the following matters:

(a) Dictionary references on the ordinary meaning of "fully"

(b) The ICC's close relationship with the United Nations

(c) Part 3 informs Part 9

(d) Waiver and the *ex injuria* principle

(e) Refining the consultation mechanism ("essential contacts").

## SUBMISSIONS

### A. Dictionary references on the ordinary meaning of "fully"

2. At the hearing, the Robinson et al Amici suggested that the Appeals Chamber should emphasize the ordinary meaning of "fully". The following citations may be of assistance. Three dictionaries that have been cited in Appeals Chamber jurisprudence are the Oxford English Dictionary, the Collins Dictionary, and the Cambridge Dictionary. The Oxford Oxford English Dictionary defines 'fully' as "Completely or entirely; to the fullest extent."[1] Collins Dictionary states that 'fully' means "to the greatest degree or extent possible".[2] The Cambridge Dictionary defines it as "completely" or "as much as possible".[3] The French version of Resolution 1593 uses the term "pleinement", defined in the Larousse dictionary as "de façon complète ou absolue".[4]

3. Thus, the requirement to "cooperate fully" can either be read *literally*, to require the state to comply with every order of the Court, or *contextually* – and more generously

[1] Oxford English Dictionary (Oxford, 2018), accessed at https://en.oxforddictionaries.com/definition/fully.
[2] Collins Dictionary (Glasgow, 2018), accessed at https://www.collinsdictionary.com/dictionary/english/fully.
[3] Cambridge Dictionary (Cambridge, 2018), accessed at https://dictionary.cambridge.org/dictionary/english/fully.
[4] Dictionnaire de français Larousse (Paris, 2018), accessed at https://www.larousse.fr/dictionnaires/francais/pleinement/61599?q=pleinement#150601

and reasonably – to require full cooperation, subject to the same limitations and exceptions accorded to States Parties (which are also obliged to cooperate fully) under the Statute. Any other reading would be "cooperate less than fully", which is incompatible with the plain language of the Resolution. The obligation imposed by the Security Council is less burdensome than what the Security Council has already imposed with the same words in relation to the ICTY and ICTR, because the ICC Statute is more specific and contains more limitations to address state concerns than did the ICTY and ICTR Statutes.

## B. The ICC as a standing facility available to the United Nations

4. As was discussed in the hearing, the Security Council can impose obligations that are also found in treaties.[5] However, an understandable counter-argument was raised during the hearing about the *extent* of the obligations apparently imposed. It was questioned whether the Security Council can impose such extensive obligations, drawn from a treaty, with the simple formula "cooperate fully".

5. In response, it should be emphasized that imposing obligations corresponding to those in the ICC Statute is not the same as imposing obligations from other treaties. The ICC was created under UN auspices, and was intended, in part, to serve as a standing facility available to the United Nations. The idea was to obviate the need for new ad hoc tribunals each time a new situation requiring accountability arises. The following citations may be of assistance. The International Law Commission, in its draft Statute, explained the inclusion of Security Council referrals "to enable the Council to make use of the court, as an alternative to establishing ad hoc tribunals".[6] The ILC debated whether the ICC needed to be a subsidiary organ of the UN, and concluded that it was sufficient to create the ICC by treaty and bring the ICC into a close relationship with the UN through a relationship agreement.[7] This approach was adopted in the Rome Statute negotiations. The Ad Hoc Committee discussed referrals "to obviate the need for the

[5] See also Amicus Curiae Observations of Professors Robinson, Cryer, deGuzman, Lafontaine, Oosterveld, and Stahn, 17 June 2018, ICC-02/05-01/09-362 OA2 ("Robinson et al Amicus Observations") para 6; and see Res. 1172 (1998) (non-proliferation and nuclear test ban); Res. 1373 (2001) (terrorism); Res. 1540 (2004) (weapons of mass destruction); Res. 2310 (2016) (nuclear test ban).
[6] International Law Commission, *Draft Statute for an International Criminal Court with Commentaries* (1994), Y*earbook of the International Law Commission, 1994*, vol. II, Part Two, at Article 23, commentary (1).
[7] ILC draft Statute, ibid, commentary to Article 2.

creation of additional ad hoc tribunals".[8] The report of the Preparatory Committee affirmed the need for a "close relationship" with the United Nations.[9] Article 2 of the Rome Statute thus addresses the Court's relationship with the United Nations. A Relationship Agreement with the UN was duly brought into force, with approval of the General Assembly, which includes provisions concerning referral by the Security Council.[10]

6. Accordingly, it is neither unexpected nor inappropriate for the UN Security Council to make referrals to the ICC and to impose obligations corresponding to the cooperation obligations in the Statute. The ICC Statute is different from other treaties in that such referrals, and the imposition of obligations of cooperation, were foreseen in its design. Referrals from the Security Council to the ICC were contemplated by the UN General Assembly when it approved the Relationship Agreement.

7. If referrals to the ICC were found to be less effective than referrals to ad hoc Tribunals, it would undermine the purpose of creating a standing facility and could precipitate a return to the inefficiencies, delays and redundancies of special ad hoc tribunals for each situation. In referring the Darfur situation, the Security Council used the same term and the same technique as when it created the ICTY and ICTR: it ordered states to cooperate fully with an instrument that removes immunities.

## C. Part 3 informs Part 9

8. At the hearing, some participants argued that Part 3 and Article 27(2) only become relevant once a person is before the Court, and that Part 3 has no bearing on Part 9 and surrender proceedings. We offer two supplementary observations in response.

9. First, as with any treaty, the Parts of the Rome Statute inform each other. If one reads Part 9 carefully, one can see that the other Parts of the Statute inform Part 9 in several ways. The following specific illustrations may be helpful. The provisions on

[8] Report of the Ad Hoc Committee on the Establishment of an International Criminal Court, GAOR, 50th Sess Supp. No. 22 (A/50/22) (1995) at para 120.
[9] Report of the Preparatory Committee on the Establishment of an International Criminal Court, Volume I, (Proceedings of the Preparatory Committee during March-April and August 1996) GAOR 51st Sess Supp No.22 (A/51/22) at para 29.
[10] UN-ICC Relationship Agreement, Article 17.

admissibility and ne bis in idem, which are in Part 2, affect Part 9 (see eg Articles 89(2), 90(2), 95). The provisions on national security information, which are in Part 6, affect Part 9 (see Article 93(4), 99(5)). Similarly, the general principle denying any statute of limitations, in Part 3 (Article 29), is relevant to procedures under Part 9. Indeed, as noted by William Schabas, the provision is not really needed for trials in ICC courtrooms, because there would be no statute of limitations even if the Statute were silent. The main value of Article 29 is precisely that also informs the interpretation of the grounds of refusal under Part 9. If a state sought to decline surrender because of a statute of limitations, the general principle would guide the interpretation of the grounds for refusal in Part 9.[11] Likewise, the removal of immunity in Article 27 is relevant to Article 98, which respects immunities that are still opposeable to the exercise of jurisdiction by the Court.

10. Second, it may be useful to emphasize the *textual* question posed by Article 27. Jordan and the AU rightly noted that arrest proceedings are carried out by agents of the requested state. Jordan and the AU are also correct that personal immunity generally precludes arrest by foreign national authorities. However, the issue before the Court is whether the obligation to cooperate fully, including the obligation under Article 27(2), removes that immunity. It would be desirable for the Court to emphasize a *textual* analysis. The text of Article 27(2) does not state that it applies only in ICC courtrooms. The textual question is whether the immunity would "bar the exercise of jurisdiction by the Court". To preclude surrender would indeed pose a barrier to the exercise of jurisdiction by the Court. Thus, for those states subject to the cooperation obligations, Article 27(2) removes immunities against ICC proceedings.

11. The foregoing supplementary arguments are in addition to the interpretive arguments already advanced about Article 27(2), based on the text,[12] the context[13] and purpose[14].

---

[11] William Schabas, "Article 29" in Trifterrer and Ambos, *The Rome Statute of the International Criminal Court: A Commentary, Third Edition* (2016) at 1109-1110.

[12] Text: The reference to immunities in 'national' law contemplates removal of immunity as a barrier in national systems, since national law cannot be invoked at the ICC.

[13] Context: The harmonious reading of Article 27 and 98 is that Article 98 respects immunities that are still opposeable to ICC proceedings.

[14] Purpose: Article 27(2) would have negligible effect if the immunities of states obliged to cooperate precluded surrender to the Court, since appearance in Court would be highly unlikely.

## D. Waiver and the *ex injuria* principle

12. One argument that has been advanced is that a state subject to a Chapter VII obligation to cooperate fully might be obliged to give waiver, but if they fail to do so, the requested State Party must still respect the recalcitrant state's immunity. The Appeals Chamber may wish to address this argument. The main response is that a state obliged to cooperate fully with the ICC has no immunity vis-à-vis the ICC to waive, by virtue of Article 27(2). As the 'horizontal effect' of Article 27(2) between States Parties is already widely accepted, the same effect applies between states obliged to cooperate fully (as otherwise it would be cooperating 'less than fully'). As a secondary response, one might note the impracticality of an interpretation that acknowledges that a state is obliged to waive and yet respects that state's failure to waive. One could refer to the principle *ex injuria jus non oritur* (illegal acts or omissions do not create rights). It is not a sound interpretation to let surrender be frustrated by a failure to give a waiver that the state is obliged to give in any event.

## E. Refining the consultation mechanism ("essential contacts")

13. If the Appeals Chamber decides to clarify or refine the consultation mechanism to address legitimate concerns, it may wish to consider that many stakeholders have shown concern about preserving some narrow possibility for "essential contacts". Relevant citations include documents from the Assembly of States Parties,[15] the United Nations,[16] the Secretary General,[17] and the European Union.[18] Preserving some

[15] ASP, 2014 Resolution on Cooperation, ICC-ASP/13/Res.3, para 6: "Urges States Parties to avoid contact with persons subject to a warrant of arrest issued by the Court, unless such contact is deemed essential by the State Party, welcomes the efforts of States and international and regional organizations in this regard and acknowledges that States Parties may, on a voluntary basis, advise the ICC of their own contacts with persons subject to a warrant of arrest made as the result of such an assessment". See also 2016 Resolution on Cooperation, ICC-ASP/15/Res.3, para 5; 2017 Resolution on Cooperation, ICC-ASP/16/Res.2, para 6.

[16] United Nations, Best Practices Manual for United Nations – International Criminal Court Cooperation, 26 October 2016, page 9, ""There may still be a need, in exceptional circumstances, to interact directly with a person who is the subject of an International Criminal Court arrest warrant. Where this is an imperative for the performance of essential United Nations activities, direct interaction with such a person may take place to the extent necessary only".

[17] Identical letters dated 3 April 2013 from the Secretary-General addressed to the President of the General Assembly and the President of the Security Council, A/67/828-S/2013/210. "It may be important for the Secretary-General and Deputy Secretary-General, from time to time, to have direct contact with such a person, in order to address fundamental issues affecting the ability of the United Nations and its various offices, programmes and funds to carry out their mandates in the country concerned, including vital matters of security".

[18] EU, Action Plan to follow-up on the Decision on the International Criminal Court, 12080/11, 12 July 2011. "The EU and its Member States will undertake consistent action to encourage full cooperation of States with the

possibility for essential contacts could allow the Court to recognize other important shared values. If the consultation mechanism is interpreted to allow for advance approval of essential contacts in exceptional circumstances, it would be important to require that any such requests for consultation be made in a timely manner.

Darryl Robinson
Queen's University, Faculty of Law, Canada

Dated this 28th day of September 2018

At Kingston, Canada

ICC, including the prompt execution of arrest warrants. The EU and its Member States should avoid non-essential contacts with individuals subject to an arrest warrant issued by the ICC. They will monitor and address developments that may hamper the ICC's work".