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Criminal
Court

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

THE APPEALS CHAMBER

Before: **Judge Chile Eboe-Osuji, Presiding Judge**
Judge Howard Morrison
Judge Piotr Hofmański
JudgeLuz 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

Amicus curiae further observations submitted by Prof. Flavia Lattanzi pursuant to the oral order issued on 14 September 2018 by the Presiding Judge of the Appeals Chamber during the hearing on "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

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1. We hereby wish to clarify our understanding of some selected sensitive aspects related to the controversial question of the immunities of State officials before the Court. We particularly believe that, during the intense and deep discussions taking place during the hearings of 10-14 September 2018, the following intertwined claims of those arguing in favour of the immunity of President Al-Bashir remained somewhat in the shadows: (i) a request to execute a warrant of arrest and surrender would not fall under the Court's 'jurisdiction' as per Article 27(2) of the Statute. Therefore, the operation of Article 27(2) would only be triggered when an accused is already present before the Court; (ii) the exception to immunities attached to the official capacity of a person under Article 27(2) would not encompass the person's physical inviolability; (iii) a warrant of arrest issued by the Court would be executed under the jurisdiction of the requested State; thus the Court should satisfy itself of the absence of conflicting obligations in the sense of Article 98 when issuing the requests for arrest and surrender.

2. Supporters of these claims maintained that States parties to the Statute are barred from executing a warrant of arrest issued by the Court against a foreign Head of State, due to the customary law of immunity applicable before foreign domestic jurisdictions. Accordingly, in the present case the Court should have automatically applied Article 98(1) – a provision enshrined in Part 9 of Statute concerning cooperation – and found itself barred from requesting the execution of the warrant of arrest against President Al-Bashir without having first obtained the waiver of immunities by Sudan, a State non-party to the Statute. Taken to the extreme, this perspective led to claim that the same conclusion should be reached even when the person warranted is a national of a State party to the Statute. We respectfully disagree with this position on three main grounds, concerning: (A) the interpretation of the term 'jurisdiction' in Article 27(2); (B) the interpretation of the term 'immunities' of Article 27(2); and (C) the characterization of the enforcement activity of the requested State. Part I below discusses each of these grounds in turn, whereas Part II shortly deals with the third ground of the Hashemite Kingdom of Jordan (Jordan)'s appeal.

I. A. The term 'jurisdiction' in Article 27(2) of the Statute cannot be belittled to 'adjudicatory jurisdiction'

3. The first claim mentioned above rests on the idea that the execution of a warrant of arrest by a State is a matter related only to judicial cooperation, therefore not implying the exercise of the Court's jurisdiction according to Article 27(2). This provision would thus operate vis-à-vis President Al-Bashir only in the event of his presence before the Court. In other terms, this claim reduces the scope of the term 'jurisdiction' of Article 27(2) as mere 'adjudicatory jurisdiction'. Such interpretation, however, does not stand vis-à-vis (i) a literal reading of the term 'jurisdiction' and (ii) a contextual interpretation of the Statute, as further confirmed by (iii) its *travaux préparatoires*.

4. Literally, nothing suggests that the term 'jurisdiction' in Article 27(2) should be belittled to mean 'adjudicatory jurisdiction'. In fact, absent any indication to the contrary, when the Statute employs the term 'jurisdiction', it refers to the investigative, the prosecutorial, the adjudicatory and the enforcement jurisdiction the Court is endowed with. The term 'jurisdiction' under Article 27(2) has indeed a general meaning.

5. A contextual reading of Article 27(2) in light of other provisions, including *inter alia* Articles 19(2)(b), 25(1) and 26, confirms this interpretation. It follows that Article 27(2) also applies to warrants of arrest and the request for their execution. Warrants are indeed decisions adopted by the Court in the exercise of its own jurisdiction, as per Article 58. Significantly, this very Article, at paragraph 5, also deals with the Court's jurisdiction as *iudex in executivis*, where it establishes that on the basis of a warrant, 'the Court may request … the arrest and surrender of the person under Part 9' of the Statute. In turn, Article 59 deals with the procedure aimed to execute warrants of arrest and surrender in the 'custodial' State. Clearly, this procedure remains thus under the control of statutory provisions. The aforesaid contradicts the minority opinion according to which the execution of an arrest warrant is only a matter falling under Part 9 of the Statute. Thus the exception to immunities encapsulated in Article 27 operates not only when the accused is under trial before the Court, but also when the

Court issues an arrest warrant and requests States to execute it and surrender the person concerned. Throughout all these stages, the Court is exercising its 'jurisdiction' as referred to in Article 27(2). This all-encompassing interpretation of the term 'jurisdiction' in Article 27(2) is also implicitly confirmed by the International Court of Justice (ICJ) in the *Arrest Warrant* case. Therein the ICJ, when dealing with the issue of the immunities of a Minister for Foreign Affairs before a foreign domestic jurisdiction, employed the term *jurisdiction* as referring both to adjudicatory and enforcement jurisdiction. This follows from the fact that it was precisely in this latter respect that the question of the physical inviolability from arrest of Mr. Yerodia specifically arose. *Mutatis mutandis*, the same line of reasoning applies to the ICJ's recognition of an exception to the immunities enjoyed by States' officials before the jurisdiction of international criminal tribunals, including the International Criminal Court: it is indeed self-evident that, in affirming such exception, the ICJ referred to both the adjudicatory and *in executivis* jurisdiction of international criminal tribunals.

6. The above interpretation is also confirmed by the *travaux préparatoires* of the Statute. First, the drafting process demonstrates that the driving force behind the provisions on arrest and surrender is 'the primacy of the jurisdiction of the Court in all cases of requests for transfer';[1] accordingly, the 'role of national authorities, in particular the judiciary, in the execution of the Court's requests for arrest … or surrender' was essentially limited to the application of rules concerning 'rights of individuals'.[2] Second, during the negotiations, issues of arrest and surrender – including the issuance of requests for their execution and execution itself – were always considered inextricably linked to that of jurisdiction: as a matter of fact, until the beginning of 1998, the draft Statute had one single provision – namely draft Article

[1] Report of the Ad Hoc Committee on the Establishment of an International Criminal Court, UN Doc A/50/22 (7 September 1995) para 206. Such primacy is further confirmed by the fact that, if a State faces conflicting requests for arrest and surrender – one coming from the Court and another from a State – the request issued by the Court shall generally take precedent, pursuant to art 90(2) and (4) of the Statute. Moreover, States' implementation acts of the Rome Statute confirm rather a "monistic" approach to the execution of arrest warrants than a "dualistic" one. See on this below, para 16.

[2] 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), A/51/22[VOL-I](SUPP) (14 September 1996) para 323. See also below para C.

28, entitled 'Arrest' – regulating issues currently covered by two groups of provisions: Articles 89-92 and Articles 58-59. Draft Article 28 was part of a chapter headed 'Procedural questions' which covered jurisdictional issues such as investigation (Article 26), prosecution (Article 27), challenges to jurisdiction (Article 34), admissibility (Article 35) and rules applicable to the trial (Articles 37-45).[3] Eventually, the decision to split Article 28 and to move a portion of it to Part 9 of the Statute, i.e. what corresponds to Articles 98-92, was prompted by the mere need to guarantee better 'coordination' of different parts of the Statute.[4]

7. Conclusively, with all respect to the divergent opinion expressed on this issue, we observe that our understanding of the term 'jurisdiction' in Article 27(2) is the only one resulting from the implementation of a correct interpretative technique, namely an interpretation that takes into account the ordinary meaning of a term in its context. Such result, after all, also follows legal logic and is common to the legal science in general. The drafters of the Statute indeed did not invent either the term 'jurisdiction' or the term 'immunities', as discussed below under paragraph B.

8. As examined in more details under paragraph C below, this interpretation is not altered by the fact that the Court, as a *iudex in executivis*, is materially assisted in exercising its jurisdiction by the judicial police of the State requested to arrest and surrender a person according to Article 89(1). It follows that both the two warrants of arrest against President Al-Bashir and the request directed to Jordan to execute such arrest and to transfer Mr. Al-Bashir to the Court were correctly issued. Indeed, Jordan is party to the Rome Statute and, due to the combined application of Article 13(b) of the Statute and Resolution 1593 (2005) of the United Nations Security Council (UNSC), it did not face conflicting obligations on officials' immunities in its relations with Sudan.

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[3] Report of the Preparatory Committee on the Establishment of an International Criminal Court, Volume II, Compilation of proposals, A/51/22[VOL-II](SUPP) (14 September 1996) vii-viii.

[4] See e.g. Article 28, Arrest: Draft revised abbreviated compilation, A/AC-249/1997/WG-4/DP-1 (27 November 1997) 1, ft 2; Tentative guideline questions for discussions of article 54: provisional arrest, UD/A/AC-249/1997/WG-4/IP (2 December 1997) 1.

B. The term 'immunities' in Article 27(2) of the Statute also encompasses physical inviolability

9. The second claim – i.e. that concerning the interpretation of the term 'immunities' used in Article 27(2) – was scarcely discussed both in the submissions of the parties and during the hearings of 10-14 September 2018. Still, we believe that it is fundamental to clarify that any interpretation of Article 27(2) aimed at excluding from its scope the notion of inviolability would be incorrect. In ascertaining the ordinary meaning to be given to term 'immunities', the interpreter should take into account the applicable rules of general international law, in the first place. Codification treaties are based on the assumption that customary law on immunities developed to provide both inviolability for the person and immunities from the exercise of jurisdiction.[5] Moreover, when the ICJ referred to the term 'immunities' in the *Arrest Warrant* case, it meant it as covering 'immunity from criminal jurisdiction and the inviolability then enjoyed by [the incumbent Minister for Foreign Affairs of the Democratic Republic of Congo] under international law'.[6] Finally, the teachings of the most highly qualified publicists treat the inviolability of serving Heads of State as part of the special treatment to which they are entitled, together with 'immunity from jurisdiction and immunity from measures of execution'.[7]

10. A perusal of the drafting process of Article 27 suggests that the specific choice of referring to 'immunities or special procedural rules' in paragraph 2 is aimed at removing all the rules affording special protection to a State official, which would bar the exercise by the Court of its own jurisdiction. In particular, the fact that this expression covers personal inviolability finds further confirmation in the scope of the category of "special procedural rules", which include also those 'against the exercise of domestic jurisdiction like arrest and prosecution before national courts'.[8]

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[5] Convention on Special Missions, 1400 UNTS 231, art 21.

[6] *Arrest Warrant of 11 April 2000*, [2002] ICJ Rep, 3, 29, para 70.

[7] Resolution on 'Immunities from Jurisdiction and Execution of Heads of State and of Government in International Law' (Rapporteur J Verhoeven), *Annuaire de l'Institut de droit international*, vol 69 (2000–2001) 680–692.

[8] Otto Triffterer, Christoph Burchard, 'Article 27' in Otto Triffterer and Kai Ambos (eds), *The Rome Statute of the International Criminal Court* (3 ed, 2015) 1037, 1054.

C. In executing warrants of arrest issued by the Court, local authorities act on behalf of the Court

11. As to the third claim, we wish to clarify at the outset that it is impossible not to agree that the material enforcement activity of arresting and surrendering stands in the hands of States, since the Court is 'a giant without limbs'.[9] It is very significant that the same States, in creating the Court, conceived themselves as its arms.[10]

12. It follows that the execution of a warrant of arrest and surrender issued by the Court cannot be equated to a pure national and independent activity carried out by local authorities on behalf of the State. Indeed, the local judicial police rather operates on behalf of the Court. In fact, by consenting to the Court, States accept a limitation to their national sovereignty in criminal matters by transferring to it the investigative, prosecutorial, adjudicatory and enforcement powers inherent to the administration of criminal justice with respect to crimes under international law, subject to the principle of complementarity.[11] When negotiating the Statute, States agreed not to endow the Court with its own judicial police;[12] rather, they decided that the State requested to assist the Court would loan *ad hoc* to it its own judicial police, when necessary.[13] For States party to the Statute, as well as for any State otherwise bound by it or available

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[9] Antonio Cassese, 'On the Current Trends towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law' in EJIL 9 (1998) 2, 13.

[10] See *inter alia*: Preparatory Committee, Proposal by the Delegation of the Netherlands on Articles 51 and 52 (8 April 1996), where the Netherlands referred to the State materially arresting a suspect as an 'administering party'; Preparatory Committee, Draft report of the Preparatory Committee, 12-30 August 1996, A/AC-249/L-15 (24 August 1996) at 7, where States are considered as 'execut[ing] the warrant on behalf of the Court'.

[11] The same effect of limiting and transferring some of States' sovereign powers to the Court follows a UNSC referral of a situation involving a State non-party to the Rome Statute.

[12] States negotiating the Statute could have created a judicial police as a coercive organ of the Court. However, they decided not to (see 1996 Report of the Preparatory Committee, cit, paras 240-241). States are indeed still very jealous of their coercive-armed powers and prefer to exercise them directly. This does not mean that they cannot use their coercive-armed powers on behalf of an international organization: after all, this happens in the context of United Nations (UN) peace-keeping or enforcement missions, whose contingents are furnished to the UN by the States and remain under a collective multinational command. Cfr. arts 43 and 45 UN Charter, which provide for the establishment of a 'combined international enforcement action', notoriously never instituted.

[13] See e.g. 1996 Report of the Preparatory Committee, cit, paras 240-241, according to which 'since many countries would not accept the direct execution of an arrest warrant on their territories, the statute should provide that States should execute the warrant on behalf of the Court.'

to cooperate with the Court on a voluntary basis, their police forces operate therefore as an organ of the Court.[14]

13. In this respect, it can be reasonably affirmed that, when it comes to the execution of a decision of the Court – including warrants of arrests and surrender – the requested State's jurisdiction cannot be deemed **foreign** in the relations between that State and all other States bound by the Statute. Indeed, through the transfer to the Court of the administration of justice with respect to crimes under international law, the jurisdictions of the States bound by the Statute are integrated in the international jurisdiction and thus are **not foreign** *inter se*. This clearly emerges from the Statute's *travaux préparatoires*, as the drafters refused to embrace a model given by extradition treaties; indeed the statutory provisions on the execution of requests for arrest and surrender are based upon the premise that the Court is 'common to all States Parties to the Statute'.[15]

14. In other words, the execution of a warrant of arrest and surrender of a suspect or an accused before the Court is still to be understood against the background of the limitation of sovereignty and the transfer of some powers from the State concerned to the Court, either through the ratification of the Statute or through a UNSC referral of a situation involving a State non-party. The scope of both these procedures is not limited to transferring to the Court the exercise of investigative, prosecutorial and enforcement jurisdiction with respect to crimes under international law, but it also covers the duty to fully cooperate with the Court's decisions, including warrants of arrest and surrender, through States own domestic organs and in accordance with the conditions established by the Rome Statute itself (in particular by Article 59). This finds support in the letter of Article 4(2) of the Statute, according to which '[t]he Court may exercise its functions and powers, as provided in this Statute, on the territory of any State Party', either directly by carrying out hearings on that territory or, indirectly, by

[14] The notion of 'loaned organs' is very well known in international law. See *inter alia* Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries in *Yearbook of the International Law Commission*, vol II, Part II (2001) art 6, 44-46, para (5).

[15] Tenth report of the draft Code of crimes against the peace and security of mankind, by Mr. Doudou Thiam, Special Rapporteur, in *Yearbook of the International Law Commission*, Vol II(1) (1992) 57.

having recourse to local authorities for the execution of the decisions of the Courts, in particular a warrant of arrest and surrender.

15. Further confirmation is to be found in a textual reading of Article 59 of the Statute, which at paragraph 2 exhaustively establishes that the national judicial oversight over the activities of the national judicial police is limited to determine that: '(a) [t]he warrant applies to that person; (b) [t]he person has been arrested in accordance with the proper process; and (c) [t]he person's rights have been respected.' As to this last requirement, we wish to underline that it is unanimously accepted that the immunities enjoyed by States' officials, far from conferring individual rights, only create rights and duties for States. More generally, it is fundamental that Article 59(2) does not confer to the local judge the competence to verify whether conflicting obligations exist for the requested State: the issue of immunity is thus considered as already solved by the Court when requesting the arrest and surrender to the State where the suspect/accused is present.

16. Moreover, an analysis of both the preparatory works of the Rome Statute and the practice of its domestic implementation supports the above interpretation. First, since 1996 it has been clear that the determinations of national judicial authorities are confined to what is exhaustively established in Article 59(2).[16] In particular, Article 59(2) responds to the limited necessity of ensuring that the rights of suspects/accused are respected when their arrest is performed. Notably, in the entire drafting history of Article 59(2), a reference to immunity appeared only once, in 1993, and was immediately deleted with no discussion.[17] Furthermore, when Article 59(1) establishes that the arrest shall be conducted 'in accordance with [the requested State] laws', it merely refers to national procedural rules regulating the actual arrest and transfer.[18] Second, domestic implementation practice validates our interpretation. The law of

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[16] Cfr Proceedings of the Preparatory Committee during March-April and August 1996), A/51/22[VOL-I](SUPP) (14 September 1996) para 315.

[17] Eleventh Report on the draft Code of rimes against the peace and security of mankind, by Mr. Doudou Thiam, Special Rapporteur, in *Yearbook of the International Law Commission*, Vol II(1) (1993) 122.

[18] See *inter alia*: Report of the Ad Hoc Committee on the Establishment of an International Criminal Court, UN Doc A/50/22 (7 September 1995) para 212; 1996 Report of the Preparatory Committee, cit, para 323; Preparatory Committee on the Establishment of an International Criminal Court, Proposals by States on Articles 53 and 53 bis (4 December 1997), Proposal of Japan.

Kenya, Uganda and South Africa,[19] *inter alia*[20] confirm that national authorities directly endorse warrants for arrest and surrender issued by the Court, provided that requests for arrest and surrender sent by the Court respect the criteria set forth in Article 59 of the Statute. Furthermore, none of the said laws mandate national authorities to verify whether the concerned person is entitled to whatsoever immunity under international law. Rather, some of the laws that we reviewed explicitly provide that the official *status* of the person concerned is not a bar to the execution of warrants of arrest and surrender.

17. Conclusively, the international immunities enjoyed by States' officials of a State party to the Statute or of a State otherwise bound by the exception of Article 27(2) do not apply when such a State enforces a warrant of arrest and surrender issued by the Court, nor the question of conflicting obligations as envisaged by Article 98(1) arises before the Court, nor this question may be posed by the State bound by the Statute and requested to arrest and surrender a national of another State also bound by the Statute.

II. On the referral of Jordan to the Assembly of States Parties (ASP) and the UNSC

18. As to the finding of a failure to cooperate by Jordan pursuant to Article 87(7) of the Statute, we must concede that our reading of the characterization of the enforcement activity requested to States bound to execute a warrant of arrest and surrender issued by the Court might not have been so self-evident.[21]

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[19] Kenya, International Crimes Act, No 16 of 2008, in Laws of Kenya (2012) arts 29-30, 39; Uganda, International Criminal Court Act, 2010, Part IV, 26-27, 29; South Africa, Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002, Chapter 4, Part 1, 8-10. See also Supreme Court of Appeal of South Africa, *The Minister of Justice and Constitutional Development v The Southern African Litigation Centre* (867/15) [2016] ZASCA 17 (15 March 2016), Judgment, para 109, where the Court established that 'the power to arrest [Al-Bashir] existed under the Implementation Act. Furthermore [Al-Bashir] was not to be arrested without a warrant, but in terms of warrants endorsed by a magistrate', pursuant to the said Implementation Act, Chapter 4, Part 1, 8 'Endorsement of warrants of arrest'.

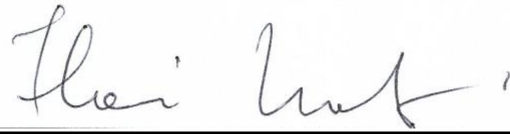
[20] Oher implementing legislations confirm this same approach (see e.g. the law of Australia, Germany, Italy, Spain and Uruguay). Space constraints do not allow us to refer here to all of them. We also wish to highlight that some States provide for the direct application of the Rome Statute by national courts. See *inter alia*: Avocats sans frontières, *Case study: The application of the Rome Statute of the International Criminal Court by the Courts of the Democratic Republic of Congo* (2009); Colombia, Ley 742 de 2002, Diario Oficial. Ano CXXXVIII. N. 44826, June 2002.

[21] We maintain that this was also caused by the fact that both States and scholars do not give sufficient attention to the drafting history of international treaties, which is very relevant when the interpretation of a rule cannot be unanimously reached through general criteria of interpretation.

19. Consequently, we must also acknowledge that Jordan might have felt the need to consult with the Court with the aim to clarify the arguments upon which the request to arrest and surrender President Al-Bashir were founded, notwithstanding his alleged immunities under the international law applicable by foreign domestic jurisdictions. We are also convinced that, pending a request for consultations, Jordan had in any case to arrest Al-Bashir although suspending his transfer to the Court.

20. Notwithstanding the abovementioned, we reaffirm that the generic references contained in Jordan's *note verbale* did not represent a real and concrete request for consultations. However, upon the discussions held during the hearings of 10-14 September 2018, we concede that the Court might have followed-up to that *note verbale* by inviting Jordan to consultations, in particular on the controversial issue of the applicability of the immunities in the enforcement process of arrest and surrender. Accordingly, in light of the discussions held during the mentioned hearing on the third ground of appeal, we accept that Pre-Trial Chamber (PTC) II's determination of the facts surrounding the lack of consultations was not completely correct.[22] Notably, such determination did not fully reflect Jordan's reference – although ambiguous – to consultations and the lack of a follow-up by the Court. We are aware that the Appeals Chamber may reverse or amend PTC II's decision only if it finds a manifest error of fact or law; and we are also aware that only the Appeals Chamber has all the means for determining whether PTC II erred in referring Jordan to the ASP and the UNSC. However, we feel it appropriate to suggest to the Appeals Chamber to take up the suggestion of the Presiding Judge to have recourse to commonsense.[23] Thus, changing our previous approach on this issue, we respectfully suggest not to refer Jordan to the ASP or to the UNSC.

[22] ICC-02/05-01/09-309.
[23] ICC-02/05-01/09-T-8-ENG, 3.



Prof. Flavia Lattanzi

Dated this 30 April 2018

At Rome, Italy