Cour
Pénale
Internationale

International
Criminal
Court

Original: **English**

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

THE APPEALS CHAMBER

Before: **President 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

Final observations by Professor Roger O'Keefe, pursuant to rule 103 of the Rules of Procedure and Evidence and the President's oral direction of 14 September 2018, 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)

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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
Ms Helen Brady

States' Representatives

Competent authorities of the Hashemite Kingdom of Jordan

Competent authorities of the Republic of Sudan

Person for whom a warrant of arrest has been issued

Mr Omar Hassan Ahmad Al-Bashir

Amici curiae

African Union

Competent authorities of the United Mexican States

Ms Annalisa Ciampi

Mr Robert Cryer

Ms Margaret deGuzman

Ms Paola Gaeta

Ms Yolanda Gamarra

Mr Claus Kreß

Ms Fannie Lafontaine

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Mr Konstantinos D. Magliveras

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REGISTRY

Registrar

Mr Peter Lewis

Introduction

1. These are final observations by Professor Roger O'Keefe, pursuant to rule 103 of the Rules of Procedure and Evidence and the President's oral direction of 14 September 2018, 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).

Observations

A. Arrest and Surrender to the Court as Allegedly Not an Exercise by a State Party of Its Own Criminal Jurisdiction

2. It is argued by the Prosecutor that a requested State Party's arrest and surrender to the International Criminal Court (ICC) of a person the subject of a request to this end by the Court does not constitute an exercise by the requested State Party of its national criminal jurisdiction such as to engage its obligation under international law, whether customary or treaty-based, to accord the officials of other States immunity from criminal proceedings and inviolability from physical constraint. The argument is premised on the extraordinary claim that, when arresting and surrendering to the ICC a person the subject of a binding request by the Court, a State Party is exercising not its own criminal jurisdiction but that of the Court. This fiction has been rebutted at length by Jordan and the African Union (AU) respectively and by the present *amicus curiae* and is considered unsustainable also by the professors of international law represented as *amici curiae* by Professor Robinson. In further rebuttal of the Prosecutor's claim, the following points can be made.

3. The Prosecutor's claim conflates different legal acts by different legal actors. It falsely treats as one and the same, on the one hand, the exercise by the ICC of its power under the first sentence of article 89(1) of the Rome Statute to transmit a request for arrest and surrender to any State on the territory of which a person may be found and, on the other hand, the exercise

by the requested State of its national criminal jurisdiction in the form of the arrest by its police and the surrender by its courts of the person.

4. The speciousness of the Prosecutor's argument is highlighted by the hypothetical case in which the Court, in the permissible exercise of its power under the first sentence of article 89(1), requests the arrest and surrender of a person by a State not party to the Statute. In contrast to a State Party, the requested non-party State would not be obliged by the second sentence of article 89(1) to arrest and surrender the person to the Court. At the same time, it might choose to arrest and surrender the person. According to the logic of the Prosecutor's claim, this purely voluntary arrest and surrender would constitute an exercise by the requested State not of its own criminal jurisdiction but of the jurisdiction of the ICC, despite the fact that the requested State would manifestly be exerting a sovereign discretion in choosing to accede to the Court's request. It would not be acting as the Court's mere 'agent' or 'jurisdictional proxy'.

5. Were the Prosecutor to reply that the difference with a requested State Party is its obligation under article 89(1) to arrest and surrender the person, this would again conflate distinct legal phenomena, this time the requested State Party's obligation under the Statute to arrest and surrender the person to the Court and its actual arrest and surrender of that person.

B. The Alleged Existence of an Exception to Immunity and Inviolability in Cases of Arrest and Surrender to an International Criminal Court

6. In what must be the alternative to the preceding argument, it is argued by the Prosecutor that no specific rule of customary international law obliges a State to accord immunity and inviolability from its criminal jurisdiction to the head of another State in the case of the head of State's arrest and surrender to an international criminal court. In support of this claim, the Prosecutor has referred to statements by a number of States Parties to the effect that they would arrest and surrender President Al-Bashir if he were present on their territory and the Court so requested. Relying on this State practice, the Prosecutor submits that it cannot conclusively be posited that a State is obliged under customary international law to accord the head of another State immunity and inviolability from its criminal jurisdiction in specific relation to arrest and

surrender to an international criminal court. This submission has been rebutted on many grounds by Jordan and the AU respectively and by the present *amicus curiae*, including by showing that the onus lies on the Prosecutor to prove a customary exception to States' generally-applicable obligation to respect the immunity and inviolability from criminal jurisdiction of the head of another State, rather than on Jordan to establish a specific customary obligation in the relevant circumstances. The Prosecutor's argument is considered unsustainable also by the professors of international law represented as *amici curiae* by Professor Robinson. In further rebuttal of the Prosecutor's argument, the following point can be made.

7. Even leaving aside the fact that the state practice proffered is insufficient and insufficiently representative to ground a customary exception, the fatal flaw in the Prosecutor's argument, even on its own terms, is the complete lack of evidence as to the *opinio juris* accompanying the practice presented. For the alleged customary exception to immunity and inviolability to stand a chance of emerging, the States Parties in question would need not only to state that they would arrest and surrender President Al-Bashir at the Court's request but to state this in the belief that arrest and surrender would not be prohibited thanks specifically to a customary exception to immunity and inviolability in cases of arrest and surrender to an international criminal court.[1] It is trite law that 'acting, or agreeing to act in a certain way, does not of itself demonstrate anything of a juridical nature'.[2] This is especially so when other motivations suggest themselves,[3] and an alternative motivation for the statements by States Parties is that the Pre-Trial Chamber has repeatedly held, rightly or wrongly, that States Parties are obliged on receipt of a request from the Court to arrest and surrender President Al-Bashir.

[1] See, among many others, *The SS 'Lotus'*, PCIJ Rep Ser A Nº 10 (1927) at p. 28; *Asylum Case (Colombia v. Peru)*, ICJ Rep 1950, p. 266 at pp. 276–277; *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment*, ICJ Rep 1969, p.3 at pp. 44–45, paras 77–78; *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment*, ICJ Rep 2012, p. 99 at pp. 122–123, para. 55 and p. 135, para. 77.
[2] *North Sea Continental Shelf* at p. 44, para. 76. See also *Lotus* at p. 28.
[3] See eg *Lotus* at p.28; *North Sea Continental Shelf* at p. 44, para. 76 and p. 45, para. 78.

C. The Alleged Effect of Article 27(2) on Arrest and Surrender to the Court

8. It is plain, and agreed on by the parties and *amici curiae*, that Article 27(2) of the Statute bars a plea of jurisdictional immunity in proceedings before the ICC itself, after a person has been arrested and surrender to it. It is further alleged, however, by the Prosecutor and several *amici curiae* that the import of Article 27(2) extends beyond proceedings before the Court itself to proceedings before the courts of a State Party for the surrender of a person of another State Party to the Court and to the prior arrest of the person for this purpose. The effect, according to the argument, is to bar a plea of jurisdictional immunity in surrender proceedings before the courts of the first State Party and a prior plea of inviolability from arrest preparatory to them. As a result, so the argument goes, article 98(1) has no application to any immunity or inviolability otherwise owed by a requested State Party to another State Party in respect of an official of that other State Party. The claim that article 27(2) has effects on the exercise by a State Party of its national criminal jurisdiction in cases of arrest and surrender to the Court has been rebutted at length, on grounds both logical and textual, by counsel for Jordan and the African Union (AU) respectively and by the present *amicus curiae*. To these rebuttals can be added another.

9. By way of parenthetical preface, however, it pays first to reiterate a point that emerged during the oral proceedings, namely that the present *amicus curiae*—while maintaining, as he always has, that article 27(2) has no application or effect whatsoever beyond proceedings before the Court itself[4]—concedes the unpersuasiveness of his previous argument, advanced in paragraph 6 of his original written submissions on the merits of the present case,[5] that the unqualified terms of the obligation of arrest and surrender in the second sentence of article 89(1) of the Statute has the effect of a mutual waiver of what would otherwise be the immunity and inviolability from arrest and surrender to the Court by one State Party of an official of another

[4] See 'Observations by Professor Roger O'Keefe, pursuant to rule 103 of the Rules of Procedure and Evidence, 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)', 18 June 2018 (ICC-02/05-01/09-360), para. 7.
[5] See ibid., para. 6.

State Party. As a consequence of this concession, the present *amicus curiae* now accepts that article 98(1) of the Statute applies as much to the arrest and surrender by one State Party of an official of another State Party as it does to the arrest and surrender by a State Party of an official of a non-party State. In other words, since in reality article 27(2) has no effect at the national level, the Court, as stipulated in article 98(1), may not proceed with a request to a State Party for the arrest and surrender of an official even of another State Party unless it can first obtain the cooperation of that other State Party for the waiver of the immunity.[6] This being so, even were Security Council resolution 1593 (2005) to have the effect—contrary to the view of Jordan, the AU, and the present *amicus curiae*—of rendering binding on Sudan, by virtue of article 25 of the UN Charter, obligations equivalent to the full range of obligations binding under the Rome Statute on States Parties, this would not have the effect of abrogating the immunity and inviolability that a State Party owes Sudan in respect of the arrest and surrender to the Court of President Al-Bashir.

10. To return, then, to further rebutting the claim that—leaving aside any supposed effect of Security Council resolution 1593 (2005)—article 27(2) of the Statute renders article 98(1) of the Statute inapplicable as among States Parties, the weakness of the claim is underlined by comparing the alleged effect of article 27(2) on article 98(1) with the unaffected operation, as uncontested by the Prosecutor and *amici curiae*, of article 98(2), which not only sits alongside article 98(1) but also matches in significant measure its formulation.[7] It is logical, and accords with the requirement to read a treaty provision in the light of its textual context, to presume that the twin paragraphs of article 98, worded significantly similarly, operate to significantly similar effect. On the Prosecutor's understanding, however, of the effect of article 27(2) on the availability of immunity and inviolability as procedural bars to arrest and surrender to the

[6] In practice, the Court could always more simply request the other State Party to arrest and surrender its official itself, which that other State Party would be bound by the second sentence of article 89(1) to do.

[7] Article 98(1) reads: 'The Court may not proceed with a request for surrender or assistance which would require the requested State to inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.' Article 98(2) reads: 'The Court may not proceed with a request for surrender which would require the requested State to inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent to the surrender.'

Court, the two paragraphs of article 98 would operate significantly differently. Article 98(2) would apply, as is not contested, in respect of the arrest and surrender to the Court of persons of States not party to the Statute and of States Parties alike. Article 98(1), in contrast, would apply in respect of persons of States not party alone. Although the presumption against such an antinomy is in principle rebuttable, the Prosecutor has offered no persuasive argument to rebut it.

11. The alleged effect of article 27(2) on article 98(1) all the less plausible when one considers a further contrast with article 98(2) to which the alleged effect would give rise. Like the jurisdictional immunities encompassed by article 98(1), the international agreements encompassed by article 98(2) pose no bar to the exercise by the Court of its own jurisdiction once a person has been arrested and surrendered to it. The only difference is that no provision in Part III of the Statute spells this out in the way that article 27(2) spells it out in relation to immunities, for the simple reason that, since the Court itself is not party to any such agreements, it manifestly cannot be bound by them. On the Prosecutor's view, however, the ineffectiveness of jurisdictional immunities as a bar to the exercise by the Court of its own jurisdiction, as specified in article 27(2), renders the same immunities inapplicable at the national level among States Parties and consequently renders inapplicable among them article 98(1), while the ineffectiveness of status-of-forces agreements, status-of-mission agreements, and cognate international agreements as bars to the exercise by the Court of its own jurisdiction has no consequences at the national level and consequently leaves unaffected among States Parties the application of article 98(2). The contrast undermines further the argument that article 27(2) has effects at the national level.

D. The Alleged Effect of Paragraph 2 of Security Council Resolution 1593 (2005)

12. It is argued by the Prosecutor and by several *amici curiae* that the effect of the Security Council's decision in paragraph 2 of resolution 1593 (2005) that Sudan, a UN Member, shall 'cooperate fully' with the Court is to render binding on Sudan, by virtue of article 25 of the UN Charter, obligations of cooperation with respect to arrest and surrender and other forms of assistance to the Court of the same content as those undertaken by virtue of the Rome Statute

by States Parties to it. In support of this claim, it has been said by Professor Robinson that previous decisions of the Security Council, notably in relation to the financing of terrorism and the proliferation of weapons of mass destruction, have similarly rendered binding on UN Members, by virtue of article 25 of the Charter, obligations paralleling those found in treaties to which these States are not party. But while the latter statement is not untrue, the implication is misleading, insofar as the means by which the relevant decisions imposed such obligations bear no comparison with the unspecific direction in paragraph 2 of resolution 1593—taken from article 86 of the Statute but unaccompanied by any reference to it or to the Statute generally beyond the immediately succeeding recognition 'that States not party to the Rome Statute have no obligations under the Statute'—that Sudan shall 'cooperate fully' with the Court and the Prosecutor.

13. In paragraphs 1 and 2 of resolution 1373 (2001) of 28 September 2001, the Security Council imposed on UN Members obligations to the same substantive effect as the core obligations undertaken by States Parties to the International Convention for the Suppression of the Financing of Terrorism. But it did so by specifying in precise detail in the texts of paragraphs 1 and 2 of the resolution the relevant obligations for UN Members, which consequently have no need to consult the text of the Convention to understand what is obliged of them. Indeed, the fact that the obligations decided on in paragraphs 1 and 2 of resolution 1593 were drawn from the Convention is merely of historical interest. It is irrelevant to the implementation of paragraphs 1 and 2 of the resolution.

14. The same goes, *mutatis mutandis*, for the obligations regarding the non-proliferation of weapons of mass destruction and the storage and transport of nuclear, chemical, and biological materials specified in explicit detail in paragraphs 1 to 5 of Security Council resolution 1540 (2004) of 28 April 2004 and certain of the obligations undertaken by States Parties to the Nuclear Non-Proliferation Treaty, the Chemical Weapons Convention, the Biological and Toxin Weapons Convention, and the Convention on the Physical Protection of Nuclear Materials.

Professor Roger O'Keefe

Dated 28 September 2018

At Milan, Italy