

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: ICC-02/05-01/09 OA2

Date: 23 April 2018

THE APPEALS CHAMBER

Before: Judge Chile Eboe-Osuji, Presiding Judge
 Judge Howard Morrison Title
 Judge Piotr Hofmański Title
 Judge Luz del Carmen Ibáñez Carranza Title
 Judge Solomy Balungi Bossa Title

SITUATION IN DARFUR, SUDAN

**IN THE CASE OF
 THE PROSECUTOR *v.* OMAR HASSAN AHMAD AL-BASHIR**

Public Document

Request by Professor Konstantinos D. Magliveras for 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'» lodged on 12 March 2018 (ICC-02/05-01/09-326)

Source: Professor Konstantinos D. Magliveras, Professor of International Law, University of the Aegean, Demokratias 1, 85100 Rhodes, Greece

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

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 competent authorities of the
Hashemite Kingdom of Jordan

Amicus Curiae

REGISTRY

Registrar
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Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

REQUEST FOR LEAVE TO SUBMIT OBSERVATIONS ON THE MERITS OF THE LEGAL QUESTIONS PRESENTED IN JORDAN REFERRAL RE AL BASHIR APPEAL

I. INTRODUCTION

1. In accordance with the Order inviting expressions of interest as *amici curiae* in judicial proceedings, which the Appeals Chamber issued on 29 March 2018 (ICC-02/05-01/09/330) in the Case of *The Prosecutor v. Omar Hassan Ahmad Al-Bashir*, and pursuant to rule 103 of the Rules of Procedure and Evidence ("RPE"), Professor Konstantinos D. Magliveras hereby respectfully applies for leave to submit observations on the merits of the legal questions presented in the appeal lodged on 12 March 2018 by the Hashemite Kingdom of Jordan 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" (ICC-02/05-01/09-326).
2. Should the honourable Appeals Chamber grant this request for leave to submit observations, the applicant has the intention to submit the *amicus curiae* brief within any time limit set by the Appeals Chamber. Moreover, should leave to submit oral comments be granted, the applicant and author of the brief is prepared to appear at a hearing before the Appeals Chamber.

II. THE APPLICANT, HIS SUITABILITY AND MOTIVATION

3. Professor Magliveras is a professor of Public International Law and the Law of International Organisations at the University of the Aegean. He is also a practicing lawyer, member of the Athens Bar Association. He has researched and written on the ICC,¹ on the ICC-African relationship² and specifically on the Arrest Warrant against The President of Sudan Al-Bashir³ and on the ensuing confrontation between the African Union (AU) and the ICC,⁴ including the AU efforts to endow its Court of Justice with international criminal law jurisdiction and make it a viable alternative to the ICC.⁵ His research and analysis, which has been cited by other authors and commentators, has been presented in international conferences.⁶ He has proposed to transform the unitary ICC and form regional circuit ICC chambers, with one of them operating exclusively in and for Africa.⁷ Finally, he has a teaching and research interest in the League of Arab States.

¹ See K. Magliveras, "Some Thoughts on a Possible Involvement of the ICC Prosecutor in the Recent Armed Conflict in the Gaza Strip" [2008] 61 *Revue Hellénique de Droit International* 435-454; K. Magliveras, "The Position of the ICC Prosecutor in the Recent Hostilities in the Gaza Strip" [2009] 25 *International Enforcement Law Reporter* 209-213.

² See K. Magliveras & G. Naldi, "The International Criminal Court's Involvement with Africa: Evaluation of a Fractious Relationship" [2013] 82 *Nordic Journal of International Law* 417-446.

³ See K. Magliveras & G. Naldi, "The ICC Addresses Non-Cooperation by State Parties in Arresting President Al-Bashir: The *Malawi* Decision" [2013] 6 *African Journal of Legal Studies* 1-15.

⁴ See G. Naldi & K. Magliveras, "The Ever Difficult Symbiosis of Africa with the International Criminal Court" [2013] 66 *Revue Hellénique de Droit International* 59-125; K. Magliveras, "International Organisations and Denialism: The Case of the African Union" in R. Moerland, H. Nelen & J.C.M. Willems (editors), *Denialism and Human Rights*, Intersentia, Cambridge, 2016, pp. 267-284; K. Magliveras & G. Naldi, "The International Criminal Court and the African Union: A Problematical Relationship" in C. Jelloh & I. Bantekas (editors), *The International Criminal Court and Africa*, Oxford University Press, Oxford, 2017, pp. 111-137.

⁵ See G. Naldi & K. Magliveras, "The African Union's International Criminal Court: An Appraisal" [2015] 21 *African Yearbook of International Law* 299-343.

⁶ See K. Magliveras, "Substituting International Criminal Justice for an African Criminal Justice?" presented at the *Fifth European Conference on African Studies (ECAS 2015)*, Paris, France, 8-10 July 2015; K. Magliveras, "The Purported Withdrawal of African States from the ICC: Good, Bad or Irrelevant?" presented at "The Crisis of International Law in Africa", a Conference organised by the Law Schools of the University of Johannesburg & the University of Leicester, Leicester, Great Britain, 7 November 2017.

⁷ See K. Magliveras, "Substituting the International Criminal Justice for an African Criminal Justice?" [2017] 14 *International Organizations Law Review* 291-320.

4. The issues for which the Appeals Chamber has granted Jordan's request for leave to appeal raise several legal considerations, which Professor Magliveras has analysed in the past. Therefore, he has particular expertise in the legal questions presented in Jordan's appeal and is in the position to prepare and submit an *amicus curiae* brief on their merits.

III. SUMMARY CONCLUSION AND INITIAL OBSERVATIONS

5. The Appeal Chamber has granted Jordan's request for leave to appeal in three issues.⁸ The arguments advanced by Jordan in these issues do not take into consideration the current state of the evolution towards a globalized international criminal justice, as pursued specifically by the ICC. Moreover, they are not persuasive as to why Jordan chose to refuse to honour its obligations under the Rome Statute and arrest Al-Bashir but chose to honour its obligations under the 1953 Arab League Immunities Convention, which, it will be argued, was not devised to protect Heads of State per se but rather the members of the delegations sent by Member States to attend its meetings and who lack the immunities attached specifically to Heads of State.

ON THE FIRST GROUND OF APPEAL

6. Jordan has argued that the contested Decision placed it in the untenable position of having two irreconcilable legal obligations, namely to arrest and surrender Al-Bashir as mandated by the Rome Statute and to respect his immunity from arrest under the 1953 Arab League Immunities Convention. Assuming that neither obligation takes precedence over the other (a matter which Jordan has not addressed), Jordan failed to explain why it chose to observe the latter obligation and disregard its strict obligation to cooperate with the ICC. Assuming further that Jordan had complied with articles 86 and 89(1) of the Rome Statute and had arrested Al-Bashir, the latter would have been able to challenge the legality of his arrest before the courts of Jordan, in accordance with article 59 of the Rome Statute and pursuant to the domestic legislation of Jordan. Thus, Jordan would have fulfilled its obligations towards the ICC and it would have been a matter for its courts to rule on possible illegalities in executing the Arrest Warrant.
7. As regards the problems associated with the application of article 27(2), in view of article 98, and their proper interpretation, it will be suggested that the principle of *effet utile* be employed. This should ensure that the Rome Statute's object, purpose and context, namely "to guarantee lasting respect for and the enforcement of international justice" by exercising jurisdiction over nationals of even non-State Parties accused for the most serious crimes would materialize. The application of *effet utile* is justifiable in the present case, because more than nine years after the first Arrest Warrant against Al-Bashir was issued, he has still not been arrested and, therefore, the ICC's primary aim to avoid impunity is clearly in jeopardy.

ON THE SECOND GROUND OF APPEAL

8. Principally, this concerns the proper determination of the legal consequences of Security Council resolution 1593(2005). Jordan objects to the finding that Sudan has rights and duties analogous to those of a State Party as regards the situation in Darfur. It will be submitted that resolution 1593(2005) should be understood as a decision that the Security Council took as an UN organ and specifically within the legal framework of Chapter VII of its Charter. It follows that its legal effects cover all Member States and has the authority accorded under articles 24(1) and 25 of the UN Charter. While it is true that Sudan, as a non-State Party, has not consented to the expansive Security Council powers envisaged in article 13(b) of the Rome Statute, in its capacity as UN Member State, it is under a strict obligation to execute the operative part of said resolution. It should also be recalled that the domestic judicial proceedings undertaken by the Sudanese government to deal with the alleged

⁸ See *Situation in Darfur, Sudan, Prosecutor v. Omar Hassan Ahmad Al Bashir*, "Decision on Jordan's request for leave of appeal", ICC-02/05-01/09-319 (21 February 2018).

crimes perpetrated in Darfur have universally been regarded as inadequate, inappropriate and faulty. Equally, there has been no African-led criminal tribunal to ensure that justice is done, for example a tribunal akin to that which finally tried Hissène Habré.⁹ Finally, article 103 of the UN Charter comes into play and, therefore, Jordan ought to have given precedence to its obligations pursuant to the aforementioned provisions of the Charter.

9. Article 13(b) should be interpreted as permitting the Security Council, solely in cases where a threat or breach to peace and security has been established, to call upon the ICC, as the only permanent international court of criminal jurisdiction, to investigate very serious alleged crimes and to prosecute alleged perpetrators, irrespective of nationality and of the state where the crimes were committed. If the International Court of Justice, as the principal UN judicial organ, had jurisdiction over persons (as the International Criminal Law Section of the African Court of Justice and Human Rights will have when it becomes operative), the Security Council might have been able to ask it to prosecute and try the alleged perpetrators. But in the foreseeable future this is not going to happen. At the same time, article 13(b) seeks to institutionalize the Security Council's practice of establishing, in cases comparable to the situation in Darfur, ad hoc international criminal tribunals (former Yugoslavia, Rwanda). Therefore, there is nothing extraordinary about article 13(b): it is a further step in the evolutionary process of achieving a globalized criminal justice transcending continents and states and having at its center place the protection of the life and the rights of the individual.

ON THE THIRD GROUND OF APPEAL

10. Jordan complained that the Chamber abused its discretion when it decided to refer Jordan's non-compliance to the Assembly of States Parties and to the Security Council. Clearly, when exercising discretion, there are upper limits which should not be exceeded. For this reason, a test must be devised which will determine which are these upper limits and whether the Chamber's referral breached them. The Chamber's prior actions or lack of action is not the important determinant but only one of several. On too many occasions, the conclusion has been reached that ICC States Parties have failed to execute their obligation to arrest and surrender Al-Bashir. This has led to an unprecedented and unacceptable situation questioning the ICC's efficacy to carry out its mandate. Therefore, by referring Jordan's non-compliance, the Chamber sought to protect and to defend the institutions on which the ICC is founded. Taking advantage of this possibility should be regarded as neither unfair nor unreasonable. But there is also an important policy consideration in the referral, namely that the Chamber has officially asked the Assembly of States Parties and the Security Council to deliberate the ethos of non-compliance with legitimate requests of cooperation and to take the requisite measures to, respectively, protect the ICC and induce UN Member States to execute legally binding Security Council resolutions. The referral offers to the Assembly and to the Security Council an excellent opportunity to pronounce, within their respective spheres of competence, on the very important issues raised in the present case. Indeed, Jordan should have welcomed the referral as it offers the opportunity to put forward its argumentation before these two organs and convince them of its merits. Jordan has nothing to fear from the referral, which does not compromise, threaten or diminish its sovereign rights.

IV. CONCLUDING OBSERVATION

11. That so many ICC States Parties have refused to execute the Arrest Warrant against Al-Bashir is unacceptable. If it continues, it should be regarded as a rebellion. The Appeals Chamber should take advantage of the present case and, on the basis of a sound legal reasoning, send out a clear and unambiguous message to all actors concerned (States Parties, Non-States Parties whose nationals are wanted by the ICC, Assembly of States Parties, UN Security Council) that undermining the ICC's role and mandate is an affront to humanity. At the same time, the Appeals Chamber ought to disperse

⁹ See K. Magliveras, "Fighting Impunity Unsuccessfully in Africa: A Critique of the African Union's Handling of the Hissène Habré Affair" [2014] 22:3 *African Journal of International and Comparative Law* 420-447.

any legal ambiguities regarding the interpretation and validity of Articles 13(b), 27(2) and 98(1). And it should confirm the obvious: no one, who is allegedly responsible for the (direct or indirect) perpetration of the worst imaginable crimes against people, should be allowed to escape prosecution. And if he/she is innocent, he/she has nothing to fear: the independence, fairness and impartiality of the ICC bench is undisputed.



Professor Konstantinos D. Magliveras
on behalf of
himself

Dated this 23rd day of April 2018

At Athens, the Hellenic Republic

At [place, country]