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**International
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Date: 27 April 2018

**SITUATION IN DARFUR, SUDAN
IN THE CASE OF
*THE PROSECUTOR v. OMAR HASSAN AHMAD AL-BASHIR***

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***

Request by Max du Plessis, Sarah Nouwen and Elizabeth Wilmshurst 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” of 12 March 2018 (ICC-02/05-01/09-326) in accordance with the Order of the Appeals Chamber dated 29 March 2018 (ICC-02/05-01/09 OA2)

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Confidentiality: Public

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

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Unrepresented Victims

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Dr Max du Plessis is an honorary research fellow at the University of KwaZulu-Natal and was associate professor from 2005 to 2017. He is an Associate Fellow at Chatham House (the Royal Institute of International Affairs, London), an associate member of Doughty Street International, Doughty Street Chambers, London, and senior research associate at the Institute for Security Studies, Pretoria. He is a barrister in South Africa and has appeared in a number of leading international law cases, including a successful challenge to South Africa's decision to withdraw from the ICC. He has published widely on immunities and competing obligations for African states.

Dr Sarah Nouwen is a Senior Lecturer in Law at the University of Cambridge, Co-Deputy Director of the Lauterpacht Centre for International Law and Fellow of Pembroke College, Cambridge. She is also a Visiting Professor at the Graduate Institute for International and Development Studies in Geneva. She has published on immunities in the *Leiden Journal of International Law* and the *Netherlands Yearbook of International Law*.

Elizabeth Wilmshurst is a Distinguished Fellow at Chatham House (the Royal Institute of International Affairs, London) and was, from 2003 to 2012, visiting professor in international criminal law at University College, London University. She co-authored three editions of *Introduction to International Criminal Law*, R. Cryer, H. Friman, D. Robinson and E. Wilmshurst (CUP: 2007, 2010 and 2014).

1. This is a request 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 o[f] Omar Al-Bashir"' of 12 March 2018 (ICC-02/05-01/09-326), made pursuant to the Appeals Chamber's 'Order inviting expressions of interest as *amici curiae* in judicial proceedings (pursuant to rule 103 of the Rules of Procedure and Evidence)', 29 March 2018 (ICC-02/05-01/09-330).

A. Outline of arguments

2. The relevant provisions of the Statute are articles 27(2) and 98(1). Under article 27(2), if the Court has jurisdiction over an individual, the exercise of that jurisdiction is not impeded by any immunities the individual may enjoy. That said, pursuant to article 98(1), the Court may not proceed with a request for surrender or assistance if that request requires the requested State to act 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 third state waives the immunity. Article 98(1) is thus of relevance only if a third State is, as a matter of international

law, entitled to immunities. The text of article 98 refers to general international law and it is necessary to turn to that body of law, which is open to the Court to interpret and apply (see also article 21(1)(b)).

3. Under general international law, immunity for incumbent Heads of State is the rule, but there can be exceptions. One is that a State waives immunity. A second can arise if States depart from the general international law on immunities by establishing a *lex specialis* in a treaty regime. A third possible exception lies in the ability of the Security Council to remove immunities.

4. *With respect to States Parties to the Rome Statute:* a) the effect of article 27(2) is that if the Court has jurisdiction over an individual, any immunity that that person may enjoy is no obstacle to that jurisdiction; and b) because the Statute is a treaty and article 27(2) applies in the treaty relations between States Parties, States Parties are also obliged, if so requested, to execute ICC arrest warrants against the officials or representatives of other States Parties. In other words, because States Parties have agreed in the Statute not to apply or rely on international law immunities, immunity does not apply in relation to their officials or representatives.

5. *With respect to States not parties to the Statute:* it cannot be argued that they have agreed not to rely on the international law regime on immunities.¹ So article 98(1) makes provision for the continued respect for immunity, unless the State not party waives immunity. In other words, in the case of States not parties, the possible exception to the general applicability of international law immunities is waiver by the State concerned. Sudan has not waived immunity in this case.

6. The question thus arises whether the Security Council removed President Bashir's immunities. If the Council decided to remove immunities, its decision would have to be express. There is nothing in Security Council resolution 1593 (2005), or the preparatory work, to indicate that the Council took a decision to remove the immunities of President Bashir.

7. The resolution did however include a decision that Sudan was obliged to cooperate with the Court. That obligation must include the obligation to surrender the president if so requested, or to do anything that enables the surrender by another State if the latter is requested by the Court. Sudan has failed in its obligation to surrender the president, or to waive immunity to enable another State to do so. But the result of that failure is a violation of a duty imposed by the Security Council, not the absence of immunity.

8. The Pre-Trial Chamber in the South Africa and Jordan Decisions has stated that the effect of the Council resolution is that 'the legal framework of the Statute applies, in its entirety, with

¹ See also Vienna Convention on the Law of Treaties 1969 (VCLT), article 34.

respect to the situation referred’.² But that alone does not answer the question since if the entire legal framework of the Statute applies, so does article 98(1), with its reference to ‘a third State’, which is, in this case, Sudan. Further, the PTC has stated that ‘it is immaterial whether the Security Council intended—or even anticipated—that, by virtue of article 27(2) of the Statute, Omar Al-Bashir’s immunity as Head of State of Sudan would not operate to prevent his arrest sought by the Court in relation to the proceedings in the situation in Darfur...’.³ However, if this is so, the source of the obligation on States Parties to ignore the immunity of Bashir is not the Security Council resolution but the Statute. If the Court proceeds with a surrender request, States Parties would appear to be put in a position where they are subject to conflicting obligations: that under the Statute to each other and the Court, and that under customary international law to States not parties. Since that is not a result that is consistent with article 98, for the Court to proceed with the surrender request would be outside the powers given to it by the Statute.

9. Finally, the submissions will also address questions pertaining to the procedural element of article 98. On the basis of a textual and contextual reading of articles 97, 98 and Rule 195, it will be submitted that if a State Party makes the Court aware, as part of the consultations foreseen in article 97, of competing obligations for that State because of immunities under international law, ‘the Court may not’, as provided in article 98, ‘proceed’ with that request. Further, a State cannot be regarded as being in non-compliance with the Statute if it does not comply with a request that the Court should not, according to the Statute, have made.

B. Further considerations

10. Arguments on the effect of resolution 1593 have divided scholars, governments and indeed Pre-Trial Chambers. The arguments are finely balanced, as Judge Marc de Brichambaut pointed out in his minority opinions in the South Africa and Jordan Decisions. In taking its own decision on the matter, the Appeals Chamber will want to follow the Court’s consistent practice of relying on article 31 of the VCLT. It will accordingly want to consider the context of articles 27(2) and 98(1), the Statute’s object and purpose and other factors to be taken into account as provided for in article 31 VCLT.

11. The context to articles 27(2) and 98(1) includes the Preamble of the Statute, which notes that States Parties are determined to put an end to impunity for the perpetrators of the most serious crimes of concern to the international community. Following from this, article 1 sets out what

² ‘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 o[f] Omar Al-Bashir’ ICC-02/05-01/09-309 (the Jordan Decision), para. 37 and

‘Decision under article 87(7) of the Rome Statute on the non-compliance by South Africa with the request by the Court for the arrest and surrender of Omar Al-Bashir’ ICC-02/05-01/09-302 (the South Africa Decision), para. 85.

³ The Jordan Decision, para. 40 and the South Africa Decision, para. 95.

must be regarded as the object and purpose of the Statute: To establish a permanent international criminal court, complementary to national jurisdictions, with jurisdiction over persons accused of the most serious international crimes. But that article also provides that the jurisdiction and functioning of the Court are governed by the provisions of the Statute—thus making clear that the aim of ending impunity cannot enlarge the Court’s powers as set out in the Statute.

12. Further context can be found in the provision in the Preamble which recalls that the Court is established ‘in relationship with the United Nations system’. Article 13(b) allows the Security Council to refer situations to the Court, while article 16 allows the Council to defer ICC proceedings. The Statute thus recognises that ICC proceedings can be both an instrument to promote international peace and security, as well as, for a time at least, an obstacle. The Statute incorporates certain limitations on the Court’s potential to end impunity out of respect for other international rules and values. Article 16 contains one such limitation. Article 98(1) another.

13. Relevant rules of international law applicable in the relations between the parties must also be taken into account in the interpretation process.⁴ The interpretation of the Rome Statute to be adopted by the Appeals Chamber must enable the rules of international law, including those on immunity and of the UN Charter, to have their proper place. This would allow States Parties also to respect the rules of international law on immunity and of the UN Charter. While African States (in the forum of the African Union) have been the most expressive in describing the tension created by what they have experienced as ‘competing obligations’, these concerns are not limited to African States.

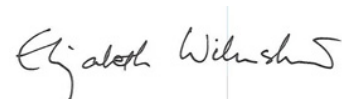
14. As a court applying international law generally, the International Court of Justice has recognised the value of criminal accountability, but has also upheld immunities *ratione personae*. While the ICC is clearly a criminal court, the text, context and object and purpose of the Statute do allow, indeed in some instances require, the ICC to do the same.



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⁴ VCLT, art. 31(3)(c).