

INTERNATIONAL CRIMINAL COURT*Original: English***No: ICC-02/05-01/09 OA2****Date: 28 April 2018****THE APPEALS CHAMBER**

Before: Judge Chile Eboe-Osuji, Presiding Judge
Judge Howard Morrison
Judge Piotr Hofmanski
Judge Luz del Carmen Ibanez Carranza
Judge Solomy Balungi Bossa

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

Request by Professor Bonita Meyersfeld and the Southern Africa Litigation Centre (SALC) for leave to submit observations on the merits of the legal questions 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

Sources: Professor Bonita Meyersfeld and Ms Kaajal Ramjathan-Keogh, Johannesburg South Africa

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

The Office of the Prosecutor:

Fatou Bensouda, Prosecutor

Counsel for the Defendants

Legal Representatives of Victim

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of the Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

States' Representatives

Amicus Curiae

Competent Authorities of the Hashemite
Kingdom of Jordan

REGISTRY

Registrar

Mr Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

I. INTRODUCTION

1. Professor Bonita Meyersfeld and the Southern Africa Litigation Centre ("**SALC**") ("**the applicants**") hereby respectfully seek leave to submit written and oral observations on the merits of two legal questions presented in the appeal by the Hashemite Kingdom of Jordan ("**Jordan**") against the "Decision under article 87(7) of the Rome Statute on the non-compliance by Jordan with the request by the Court to arrest and surrender President Omar Al-Bashir ("**Al-Bashir**") in the case of *The Prosecutor v Omar Hassan Ahmad Al Bashir*" ("**the appeal**").

II. THE APPLICANTS, THEIR SUITABILITY AND MOTIVATION

2. Bonita Meyersfeld makes this submission in her capacity as an Associate Professor of Law at the School of Law, University of Witwatersrand, South Africa ("**Wits**"). This submission is made in conjunction with the Southern African Litigation Centre ("**SALC**"), a non-governmental organisation. Professor Meyersfeld has worked extensively with SALC to develop a specialised approach to international criminal law from an African perspective. It is this specialisation which we propose will be an important and unique contribution to the Appeal Chamber's determination of the legal questions before it.
3. Professor Meyersfeld publishes, teaches and researches in international law, business and human rights and international criminal law, with twin focuses of gender and the African perspective. She is the former Director of the Centre for Applied Legal Studies at Wits and has worked in the fields of international criminal justice, transitional justice, and corporate accountability in Africa and internationally, including consultancies on these issues for the United Nations. She worked on legislative reform regarding international criminal law in the House of Lords, UK.
4. SALC's international criminal justice programme aims at ensuring that Southern African states are aware of, and act in compliance with, their international legal obligations including, crucially, those under the Statute. SALC's key contribution lies in its central role in the matter relating to South Africa's failure to arrest Al-Bashir when

he was in South Africa for an African Union Summit in 2015. SALC brought urgent court proceedings to compel the South African government to arrest and surrender Al-Bashir. Although SALC successfully obtained an urgent interdict, the government failed to comply therewith, leading to the PTC II's case regarding South Africa's failure to arrest and surrender Al-Bashir.¹ SALC was admitted as *amicus curiae* by the PTC II in that matter.² SALC therefore has unique insight into the legal questions before the Appeal Chamber.

III. SUMMARY OF CONCLUSIONS AND INITIAL OBSERVATIONS

5. Whether or not Al-Bashir enjoys immunity, rests on the joint interpretation of (i) the symbiosis between articles 27(2) and 98 of the Rome Statute ("**the Statute**"); and (ii) the context of Security Council Resolution 1593 (2005) ("**the Resolution**").
6. Our submission is that Al-Bashir's immunity, as provided by customary international law and treaty law, has been removed by the Statute and by the Resolution. Our submissions will address the claim by Jordan that it had conflicting obligations in terms of the 1953 Arab League Immunities Convention and the Court's request for arrest and surrender.

IV. SUMMARY OF ARGUMENTS

a. Head of State Immunity

7. The first submission addresses the question of whether customary international law or a pre-existing treaty obligation bars Jordan from executing the Court's request for Al-Bashir's arrest and surrender within the parameters of the Security Council

¹ *The case of the Prosecutor v Omar Hassan Ahmad Al Bashir (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)*.

² *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*, 6 July 2017, ICC-02/05-01/09-302.

referral.³ The answer lies in an analysis of articles 27 and 98 of the Statute.

8. Article 98 addresses situations where an international obligation of a state party is in conflict with the obligation to cooperate with the Court. Where all states are parties to the Statute, it is arguable that the signatories have renounced immunity, including Head of State immunity in respect of international crimes, allowing article 27(2) to function. The requested state, therefore, will not be in breach of its international obligations to the third state because the latter, by signing the Statute, has abrogated its leaders' rights to immunity. However, where the third state is *not* a party to the Statute, as is the case with Sudan, conflicting obligations arise for the requested state.
9. In the ordinary course, immunity *ratione materiae* will shield a head of state from criminal prosecution in the domestic courts of another state. However, a request from the Court to arrest and surrender a head of state is *not* a request that the state uses its own jurisdiction to prosecute the head of state. It is asking the state to *arrest* and not *to prosecute*. A distinction may be drawn between a state being prohibited from using its courts to prosecute a foreign head of state for international crimes versus a state being prevented from using its powers to arrest an individual and remove that person to another entity, such as the Court.

b. The Impact of SC Resolution 1593 on articles 27(2) and 98 of the Statute

10. Article 13(b) of the Statute empowers the Security Council ("SC") to refer cases to the Court, including in respect of persons from states which are not party to the Statute. The application of head of state immunity in respect of the situation of Darfur would render the SC referral vacant. The referral would be an empty imprimatur if it did not also empower the Court to request its States Parties to arrest and surrender Al-Bashir notwithstanding his office and the immunity that otherwise would apply.
11. Moreover, as a member of the United Nations, Sudan is subject to the authority of the SC. The Resolution was made pursuant to the SC's Chapter VII powers, which are

³ Prosecution's response to the Hashemite Kingdom of Jordan's notice of appeal against the article 87(7) decision, or in the alternative, application for leave to appeal the decision under article 82(1)(d) ICC-02/05-01/09-313 21-12-2017 6/11 RH Presentation titled, para. 6, page 5.


binding on all member states.⁴ The Resolution imposes an obligation on the Government of Sudan to “cooperate fully and provide any necessary assistance to the Court.” Jordan claims that it would be in violation of its obligations to Sudan if it did not adhere to the principle of head of state immunity; however, Sudan has been enjoined by the SC to cooperate with the Court. If Sudan insists on immunity for Al-Bashir, it would not be cooperating as the Resolution requires. In principle, therefore, Jordan cannot rely on its obligations to Sudan when Sudan itself is required to abrogate its leader’s right to immunity.

12. The Resolution does not *expressly* stipulate that Al-Bashir’s immunities must be lifted but such express provision is not required. It is respectfully submitted that the SC cannot, in every resolution, *explicitly identify* all possible legal consequences required for the implementation of the resolution in question. It is enough for the SC to order Sudan to cooperate, and, since such cooperation will compel it to abandon its President’s immunities, Jordan cannot claim to be bound by an obligation in respect of a right that Sudan no longer has by virtue of the Resolution.

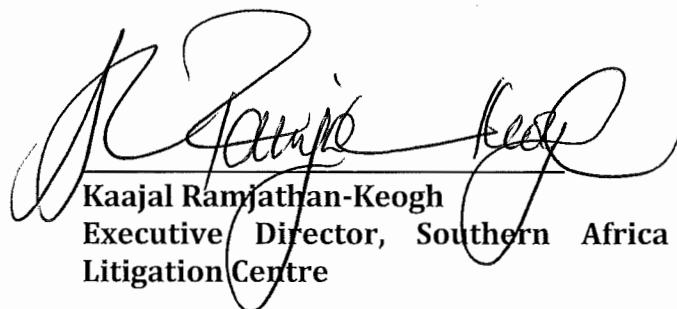
V. CONCLUSION

13. For the foregoing reasons, the applicants request that the Chamber grant leave to submit *amicus curiae* observations on these matters pursuant to Rule 103, within a time limit determined by the Chamber, including the right for *the amicus* to appear at the hearing with a view to assisting the Chamber by way of oral submissions, including by answering any questions that arise.

Respectfully submitted



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Kaajal Ramjathan-Keogh
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 Litigation Centre

⁴ Article 25 of the UN Charter.