

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 30 April 2018

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**

Public Document

Request by Prof. Flavia Lattanzi 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'" of 12 March 2018

Source: Prof. Flavia Lattanzi

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

Mr James Stewart

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

Competent authorities of the Hashemite
Kingdom of Jordan

Amicus Curiae

REGISTRY

Registrar

Mr Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

A. Prof. Flavia Lattanzi and the team of scholars requesting leave to submit observations are experts of the legal questions presented in the appeal

1. Prof. Flavia Lattanzi: currently Professor of International Law, LUISS Guido Carli University, Rome, Italy; Member of the Steering Committee of CEILS at the University of Trento, Italy. She was: Director of the School of International Criminal Law in Arusha, Tanzania and Gaborone, Botswana (1996-1997-1999); member expert of the Italian Delegation to the Committee (1994-1998), the Rome Conference for the establishment of an International Criminal Court (1998) and the ICC Preparatory Commission (1999-2002); member of the Italian Commission on the Implementation of International Rules in Criminal Judiciary Cooperation (2000-2002); member of the International Fact Finding Commission on International Humanitarian Law *ex* Article 90 of the Additional Protocol I to the Geneva Conventions of 1949 (2002-2015); Judge *ad litem* of the International Criminal Tribunal for Rwanda (2003-2006) and of the International Criminal Tribunal for the former Yugoslavia (2007-2016). Prof. Lattanzi is author and editor of numerous publications, *inter alia* on: the powers of the UN Security Council and its power to refer a situation to ICC; the distinction between war crimes and crimes against humanity; the diversification and fragmentation of International Criminal Law; law interpretation by International Criminal Tribunals; the ICC jurisdiction; primacy and complementarity of international criminal jurisdictions; the implementation of the Rome Statute by national legislators.
2. Prof. Lattanzi is assisted by: Prof. Mirko Sossai, Associate Professor of International Law at Roma Tre University, Italy and dr. Alice Riccardi, Research Fellow in International Law at the same University. Prof. Sossai has extensively written on the UN collective security system, while Dr. Riccardi on international criminal justice, including on UNSC referrals; on Article 87(7) of the Rome Statute; and on sentencing at the International Criminal Court. Prof. Lattanzi is further assisted by Ms. Flavia Pacella and Ms. Laura Di Gianfrancesco.

B. Summary initial conclusions and lines of arguments on the first and second grounds of appeal

3. Under customary international law, Heads of State enjoy immunity from foreign criminal jurisdiction. Immunity rules, far from conferring individual rights, only create inter-State relations. Although fundamental in protecting the *ius representationis omnimodae* of Heads of State, these rules can be conventionally derogated, including by treaties creating international jurisdictions (see the ICJ in *Congo v. Belgium*), as envisaged as far back as 1948 by the Genocide Convention. The *ius representationis omnimodae* of Heads of States – just like their immunities – may also be used for allowing them to participate as delegates to meetings of international organizations, as provided, *inter alia*, by the 1953 Convention on the Privileges and Immunities of the Arab League (1953 Convention). Against this framework, Article 27 of the Rome Statute represents a derogation to the immunities enjoyed by Heads of State whichever their legal source, be it customary or conventional. Such provision binds, without exceptions, (i) States Parties to the Rome Statute, (ii) States that accepted *ad hoc* the Court's jurisdiction as well as (iii) States implicated in a situation referred to the Court by a decision of the United Nations (UN) Security Council (UNSC).
4. Regarding this last scenario, a UNSC decision to refer a situation occurring in the territory of a non-Party State to the Prosecutor is rendered pursuant to both the UN Charter (Article 25 and Chapter VII) and the Rome Statute (Article 13(b)); accordingly, it creates new obligations on that non-Party State. It is held that such a UNSC decision implies the exercise by the Court of all the powers necessary for the effective prosecution of the crimes under its jurisdiction. Consequently, such new obligations are confined to those that permit the Court to exercise the said powers. In other words, a UNSC referring resolution must be interpreted as operating a *renvoi* to all the statutory provisions whose application is essential for the exercise of said powers. Hence, also Part 9 of the Statute is applicable in its entirety. After all, the Statute cannot be parceled: Articles 86 and 89 are unquestionably functional to the exercise by the Court of its jurisdictional functions, particularly so as trials *in absentia* are not allowed. This interpretation is consistent with the very wording of para. 2 of UNSC res. 1533 (2004), which

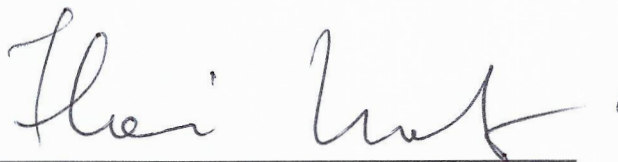
utilizes the same language as that contained in Part 9 of the Rome Statute: Sudan, just like States Parties, has to “cooperate fully” with the Court and the Prosecutor. Para. 6 of res. 1953 further confirms this approach, by referring to “nationals, current or former officials or personnel from a contributing non Party-State, *outside Sudan*” (emphasis added). Conclusively, Sudan and Jordan are bound in their relations by the provisions of Rome Statute that are necessary for the Court to fulfill its mandate, including Article 27, pursuant to the implicit *renvoi* to the Statute operated by UNSC Res. 1593 (2005).

5. Article 27 of the Rome Statute applies to the horizontal relationship between Jordan and Sudan and it vertically inhibits them from claiming immunity for State officials, including Heads of State, when accused before the Court. Indeed, the portion of Article 98(1) concerning the immunities of State officials is not applicable in the relations between States parties *inter se* as well as between States parties and States implicated in a situation referred to the Court by the UNSC. Conclusively, Jordan was never faced with conflicting obligations *vis-à-vis* Sudan, as both States are bound by Article 27(2) and none of them is entitled to claim immunities pursuant to Article 98(1).
6. In any case, the assessment of the existence of conflicting obligations within the meaning of Article 98(1) is under the Court’s exclusive interpretative power. Accordingly, Jordan was under a duty to consult without delay with the Court pursuant to Article 97, as further elaborated below at para. 8.
7. Lastly, contrary to Jordan’s claim that the 1953 Convention is relevant under Article 98(2), it is held that this Convention does not fall within the scope of such provision, as it does not deal with the surrender of States’ officials enjoying immunities, even less of Heads of State. As confirmed by the Statute’s *travaux préparatoires*, Article 98(2) only deals with specific agreements aimed to grant sending States exclusive jurisdiction over “person[s]” accused of criminal offenses. All the more so, UNSC res. 1953, after echoing Article 98(2), in para. 6 specifically deals with such agreements by upholding the exclusive jurisdiction of non-Parties States *outside Sudan* in respect of “nationals, current or former officials or

personnel" from those contributing States. Conclusively, Jordan also incorrectly invoked Article 98(2) of the Rome Statute.

C. Summary initial conclusions and lines of arguments on the third ground of appeal

8. Concerning the claim of Jordan that the Pre-Trial Chamber abused its discretion in referring it to the UNSC and the Assembly of States Parties (ASP), different factors are to be taken into account.¹ Jordan not only committed a serious violation of international law by failing to comply with the Court's decisions, but it also unilaterally interpreted Articles 27 and 98 in the context of its relations with Sudan. Notably, it did not trigger meaningful consultations with the Court as mandated by Article 97; instead, it sent an advance notification of its intention not to comply with the arrest and surrender of President Al-Bashir. All the more, no internal procedure on the question of whether President Al-Bashir had to be at least arrested was activated. Finally, it is important to stress that the referral of Jordan to the ASP and the UNSC may also generally prevent future instances of non-compliance, thereby significantly promoting the fight against impunity for egregious crimes of international concern. In light of all these circumstances, the Pre-Trial Chamber did not abuse its discretion in referring Jordan to the UNSC and the ASP.



Prof. Flavia Lattanzi

Dated this 30 April 2018

At Rome, Italy

¹ The Applicants do not have access to the notes verbales exchanged between Jordan and the Registry, classified as confidential, thus rely on the reconstruction of such exchange in ICC-02/05-01/09-309.