

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

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

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 for leave to submit amicus curiae observations  
pursuant to rule 103 of the Rules of Procedure and Evidence**

**Source:** Professor Annalisa Ciampi

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

**States' Representatives**

Competent authorities of the Hashemite  
Kingdom of Jordan

Competent authorities of the other States  
Parties to the Rome Statute

**REGISTRY**

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**Registrar**

M. Peter Lewis

## I. Introduction

Pursuant to rule 103 of the Rules of Procedure and Evidence ("RPE"), Professor Annalisa Ciampi hereby respectfully applies for leave to submit observations as academic *amicus curiae* in the case of the Prosecutor v. Omar Hassan Ahmad Al-Bashir in the Situation in Darfur, Sudan - on the merits of the legal questions presented in the 'Jordan Referral re Al-Bashir Appeal'.

In the case the honourable Appeals Chamber would grant her request, Professor Ciampi intends to submit her *amicus curiae* brief within the time limit set by the Appeals Chamber. If leave to submit oral comments is granted, she is prepared to appear at a hearing before the Appeals Chamber.

## II. Expertise of the Professor in the legal questions presented

Annalisa Ciampi (JD University of Florence, Fulbright Scholar to Harvard, Harvard LL.M., PhD University of Rome 'La Sapienza') is currently a full professor of International Law at Verona University and a visiting professor of European Human Rights Law at Monash University. She served as member of the European Committee of Social Rights, expert to the Committee of Legal Advisers on Public International Law of the Council of Europe (CAHDI), *ad hoc* judge of the European Court of Human Rights, Visiting Professional at the Office of the Prosecutor, Legal and Advisory Section, of the International Criminal Court and UN Special Rapporteur on the rights to freedom of peaceful assembly and of association.

Professor Ciampi published extensively in the various fields of international law, including international criminal law. Her particular expertise in the legal questions hereby presented is best described by the following publications:

1. "The Obligation To Cooperate", in A. Cassese *et al.* (eds.), *International Criminal Law: A Commentary on the Rome Statute for an International Criminal Court*, Oxford: Oxford University Press, 2001, 1581-1612
2. "Other Forms of Cooperation", in A. Cassese *et al.* (eds.), *International Criminal Law: A Commentary on the Rome Statute for an International Criminal Court*, Oxford: Oxford University Press, 2001, 1679-1721

3. "Procedural Issues in the First Case before the ICC", in M.C. Malaguti (ed.), *ICC and international cooperation in the light of the Rome Statute*, Lecce: Argo, 2007, 13-54
4. "State Cooperation with the ICC and Human Rights", in M. Politi, F. Gioia (eds.), *The International Criminal Court and National Jurisdictions. Proceedings of the Trento Colloquium 4-5 May 2007*, Aldershot: Ashgate Publishing, 2008, 103-111
5. "Extradition", in A. Cassese (ed.), *The Oxford Companion to International Criminal Justice*, Oxford: Oxford University Press, 2009, vol. II, 321-322
6. "Request to the Democratic Republic of the Congo for the Purpose of Obtaining the Identification, Tracing, Freezing and Seizure of Property and Assets Belonging to Mr Thomas Lubanga Dyilo", in A. Klip, G. Sluiter (eds.), *ALCICT*, vol. XXIII, *The ICC, 2005-2007*, Antwerp, Oxford, Portland: Intersentia, 2010, 538-543
7. "La Cour pénale internationale et les Nations Unies", in J. Fernandez, X. Pacreau (eds.), *Statut de Rome de la Cour pénale internationale. Commentaire article par article*, Paris : A. Pedone, 2012, 77-90
8. "Article 87 - Demandes de coopération : dispositions générales", in J. Fernandez, X. Pacreau (eds.), *Statut de Rome de la Cour pénale internationale. Commentaire article par article*, Paris: A. Pedone, 2012, 1805-1821
9. "Legal Rules, Political Realities and Policy Choices in the Functioning of the Cooperation Regime of the International Criminal Court", in O. Bekou, D. Birkett (eds.), *Cooperation and the International Criminal Court Perspectives from Theory and Practice, Nottingham Studies on Human Rights*, Leiden, Boston: Brill Nijhoff, 2016, 7-57
10. "*Public Prosecutor v. Ashby* Italian decision on jurisdiction under NATO Status of Forces Agreement to try U.S. military officers for deaths caused when aircraft severed ski lift cable", 93 *American Journal Int. Law*, 1999, 219-224
11. "Comments on the Security Council Referral of the Situation in Darfur to the ICC" (with Luigi Condorelli), 3 *Journal Int. Criminal Justice*, 2005, 590-599
12. "Current and Future Scenarios for Arrest and Surrender to the ICC", 66 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 2006, 719-736
13. "Il paradosso della Corte penale internazionale: la sospensione garanzia dell'equità del processo?", 91 *Rivista dir. int.*, 2008, 758-775

14. "L'immunité de l'État responsable de crimes internationaux devant les juridictions italiennes", 54 *Annuaire français de droit international*, 2008, 45-76.

15. "The Proceedings against President Al Bashir and the Prospects of their Suspension under Article 16 ICC Statute", 6 *Journal Int. Criminal Justice*, 2008, 885-897

### **III. Legal questions presented, main lines of arguments as well as summary conclusions as to those questions**

On the merits of the legal questions presented in the 'Jordan Referral re Al-Bashir Appeal', Professor Ciampi wishes to submit before the Appeals Chamber the following summary initial observations.

#### **1. Re First Ground of Appeal: Art. 27(2) is applicable to Sudan and therefore Art. 98 on conflicting obligations does not apply to Jordan**

The effects of the Rome Statute combined with paragraph 2 of resolution 1593 (2005) is that Sudan cannot claim the immunity of Al-Bashir (for the reasons sub 2)). It follows that Art. 98 does not come into play vis-à-vis Jordan, as there is no conflict between Jordan's duty of cooperation with the International Criminal Court ("ICC") and Jordan's alleged obligation to respect Al-Bashir immunity.

#### **2. Re Second Ground of Appeal: The effect of Security Council resolution 1593 (2005) is to remove the immunity of Sudan's Head of State, elected representatives and governmental officials. Hence, Jordan does not have any obligation under customary or conventional international law to accord immunity to Al-Bashir**

The effect of Security Council Resolution 1593 (2005) is not that the Rome Statute applies, in its entirety, with respect to the situation in Darfur. Paragraph 2 of Security Council resolution 1593 (2005), which imposes upon Sudan and the other parties to the conflict the obligation to cooperate with the Court, does, however, necessarily imply that Sudan cannot claim immunity for its Head of State or other State officials. This conclusion finds support in the text, context, object and purpose of paragraph 2 of resolution 1593 as well as in the general principle of interpretation of *effet utile* of international law, including Security Council resolutions. The ICC, entrusted with the power to settle any dispute concerning its judicial functions (Art. 119 Statute), has

the inherent power to authoritatively interpret Security Council resolutions of which it is the principal addressee.

**3. Re Third Ground of Appeal: The Court's discretion to decide whether to refer Jordan's non-compliance to the Assembly of States Parties ("ASP")**

The Court's decision whether to refer a State's non-compliance under Art. 87, paragraph 7, is not automatic but a discretionary one, that ought to be based on correct conclusions of fact and right interpretations of law and not to appear manifestly unfair or unreasonable. Only failure "to comply [...] preventing the Court from exercising its functions and powers" may be referred. Moreover, relevant considerations must include a reasonable prospect that the referral will sort some positive effects on the "functioning of the Court": i) Such prospect is not excluded because the person whose arrest and surrender is sought by the Court (Al Bashir) is not present any more in the territory of the requested State (Jordan). The presence of Al Bashir on Jordan's territory, that at one moment may seem improbable, remains always possible. ii) The prospective effects of a referral on the possibility of consequential action by the ASP or the Security Council are not a decisive criterion. The decision-making processes and procedures of political organs do not fall within the exercise of the judicial functions of the Court and could only be the subject of speculation by the latter. iii) A finding of non-compliance and referral by the Court may have an important "blaming and shaming" effect with implications beyond the present case *vis-à-vis* Jordan as well as the other States parties to the Statute. The damage to the image of the State concerned and the general deterrent effect arising therefrom are at the origin of 'Jordan Referral re Al-Bashir Appeal' and the States parties' expressions of interest to submit observations in the present case. may overwrite this text to maintain existing formatting.



Professor Annalisa Ciampi

Dated this 30th of April 2018 At Florence, Italy