

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

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

Date: 29 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 PROFESSOR NICHOLAS TSAGOURIAS AND DR MICHAEL VAGIAS 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: PROFESSOR NICHOLAS TSAGOURIAS AND DR M VAGIAS**

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 Steward

**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 Hashimite  
Kingdom of Jordan

**Amicus Curiae**

**REGISTRY**

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**Registrar**

M. Peter Lewis

**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**

This is a request by Professor Nicholas Tsagourias and Senior Lecturer Michail Vagias, pursuant to the order of the Appeals Chamber entitled ‘Order inviting expressions of interest as amici curiae in judicial proceedings (pursuant to rule 103 of the Rules of Procedure and Evidence)’ of 29 March 2018 (ICC-02/05-01/09/330), 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 (ICC-02/05-01/09-326).

**Particular Expertise of Professor Tsagourias and Dr Vagias in the Legal Questions Presented**

Professor Tsagourias is Professor of International Law at the University of Sheffield. Prior to that he held the Chair of International Law and Security at the University of Glasgow. In 2016 he was Senior Research Fellow at the US Naval War College. Professor Tsagourias is an expert on collective security and on U.N Law and is well published in these areas. He is the co-author of the monograph *Collective Security: Theory, Law and Practice* (CUP, 2013) which examines the relationship between the Security Council and the ICC including the issue of immunities in chapter 17. He is on the editorial board of the *Journal of Conflict and Security Law* (OUP).

Michail Vagias is Senior Lecturer in Law at The Hague University of Applied Sciences. He is the author of *The Territorial Jurisdiction of the International Criminal Court* (Cambridge, 2014) and a number of peer-reviewed academic articles on the jurisdiction of the International Criminal Court, such as ‘The Territorial Jurisdiction of the ICC for core crimes committed through the internet’, (2016) 21 *Journal of Conflict and Security Law*, pp. 523-540, ‘Burden and Standard of Proof in Defence Challenges to the Jurisdiction of the International Criminal Court’, (2014) 28 *Leiden Journal of International Law*, pp. 133-155 (together with Janos Ferencz), ‘The Territorial Jurisdiction of the International Criminal Court: A Jurisdictional Rule of Reason for the ICC?’, in (2012) 59 *Netherlands International Law Review*, pp. 43-64. His work has been cited by the Office of the Public Counsel for the Victims in the Situation on the Registered Vessels (ICC-01/13-27-Red, 23 June 2015) and recently by the Prosecutor of the Court in her Request for a Ruling on Jurisdiction under Article 19(3) of the Statute (ICC-RoC46(3)-01/18-1, 9 April 2018).

### **Summary Conclusion and Initial Observations**

Jordan is a State Party to the Rome Statute of the International Criminal Court ('the Statute'). It has an obligation to arrest and surrender Al-Bashir to the International Criminal Court ('the Court'). The Pre-Trial Chamber did not err in finding that Jordan had failed to comply with a request to co-operate contrary to the provisions of the Statute.

#### **Argument 1: The appeal is inadmissible**

Jordan's request is a disguised challenge to jurisdiction *ratione personae* raised directly and for the first time before the Appeals Chamber in lieu of the suspect or Sudan, more than 8 years after the arrest warrant was issued. Deciding on this appeal would make ineffective Articles 19(2) and 19(6) of the Statute. It would render meaningless the duty of the Pre-Trial and Trial Chambers to decide on the scope of the Court's jurisdiction in specific procedural moments according to article 19(6), as well as the right of the suspect and of Sudan to challenge the exercise of the Court's jurisdiction due to his official capacity. This course of action would run contrary to the *Ruto Jurisdictional Appeal Decision* and the principle of effective interpretation. For these reasons, the Court should reject the appeal as inadmissible.

#### **Argument 2: The only limits to the Court's jurisdiction are those available in the sources listed under Article 21(1)(a); there is no lacuna and customary and treaty law are thus inapplicable**

Jordan's request should be rejected, insofar as it seeks to interject rules of customary and treaty law as obstacles to the exercise of jurisdiction by the Court. Article 21 allows recourse to customary or treaty law only if a matter is not addressed by the sources of law enumerated in Article 21(1)(a). Article 21 ranks the applicable sources by prioritizing the ICC-specific sources of law. In the present case, it is clear that the Statute has addressed the issue of immunities and rejected them in Article 27. There is no lacuna, according to the *Extraordinary Review Appeal*. Therefore, customary and external treaty law cannot be used directly as a source of law to impose limits on the Court's jurisdiction, other than those specifically provided for in the Statute. Furthermore, customary and treaty law cannot be used indirectly to interpret *contra legem* the Rome Statute under 31(3)(c) VCLT, as such approach would be inconsistent with Articles 10, 121 and 122 of the Statute.

#### **Argument 3: Neither Jordan nor Sudan constitute a 'third party' for the purposes of Article 98**

Article 98 of the Statute is clearly limited to relationships between States Parties and third States. The Security Council referral of the Darfur situation to the Court rendered Sudan a *quasi* State party to the Statute within the limits stipulated therein. Consequently, the relations between Sudan and the Court and between Sudan and State parties are regulated by the Statute, including Article 27. Therefore, Sudan is not a ‘third state’ for the purposes of Article 98. Article 98 is thus inapplicable.

**Argument 4: Articles 13 and 16 determine the nature and scope of the normative relationship between the Court and the Security Council and referral with exclusion of Article 27 is not provided for**

The normative relationship between the Court and the Security Council is laid down in Articles 13 and 16 of the Statute. The drafters did not provide explicitly for the possibility to suspend parts of the Statute when a situation is referred to the Court by the Security Council. Where limitations were agreed upon, the Statute explicitly included them, for example in Article 16. A Security Council referral purporting to exclude parts of the Statute would be incompatible with the Statute and should be disregarded. Otherwise, the Security Council would be able to introduce amendments to the Statute in violation of Articles 121-122. In any event, in the present case, nothing in the relevant Security Council Resolution evinces an attempt to exclude Article 27. Resolution 1593 obligates Sudan to cooperate fully with the Court (para 2). It thus renders Sudan a *quasi* State party for the purposes of the situation in Darfur and brings into play the Statute including Article 27. This is also evinced by the fact that Resolution 1593 deals explicitly with the immunities of officials of non-party States in a separate paragraph (para 6). Moreover, Resolution 1593 was adopted in response to the Report of the International Commission of Inquiry which concluded that among individual perpetrators are officials of the Government of Sudan.

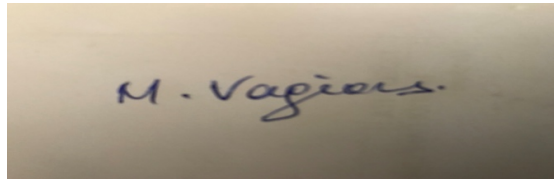
**Argument 5: Even if the 1953 Convention is applicable – *quod non* – obligations under SC Res 1593 prevail**

The 1953 Convention is irrelevant to the present proceedings, as it generates rights and obligations only among states parties. The Court has its own legal personality and is a ‘third party’ to the Convention. Moreover, under Article 21 of the Statute, the Convention is not applicable law for the purposes of the present proceedings as the matter is regulated exhaustively by the Statute. Finally, even if the 1953 Convention were applicable – *quod non* – the removal of the immunities of Sudanese officials by Resolution 1593 which imposed on Sudan an obligation to co-operate fully with the Court has *erga omnes* effect in that all U.N

member States should accept the removal of immunities in relation to the situation in Darfur. It thus overrides other treaty obligations, in accordance with Articles 25 and 103 UN Charter and the Lockerbie decision.



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Dated this 29<sup>th</sup> April 2018

At Sheffield, UK

**Appendix of Sources per Regulation 36(2)(b) of the Regulations of the Court**

*Ruto Jurisdictional Appeal Decision:* Decision on the Appeals of Mr William Samoei Ruto and Mr Joshua Arap Sang against the Decision of Pre-Trial Chamber II of 23 January 2012 Entitled "Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute", ICC-01/09-01/11-414, 24 May 2012

*Extraordinary Review Appeal:* Situation in the Democratic Republic of the Congo, Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, ICC-01/04-0168 OA 3, 13 July 2006

*Lockerbie Decision:* Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom), Preliminary Objections, Judgment, I. C.J. Reports 1998