

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 9 June 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

**AMICUS CURIAE OBSERVATIONS
PURSUANT TO RULE 103 OF THE RULES OF PROCEDURE AND
EVIDENCE 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

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

Registrar

M. Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

1. This case presents an opportunity to the Court to clarify the scope and interrelationship of Articles 27 and 98 (1) of the Statute when prosecutions of State officials arise in situations referred to the Court by the Security Council.¹ On 29 April 2018, Professor Tsagourias and Dr Vagias sought leave from the Appeals Chamber, under Rule 103(1) of the Rules of Procedure and Evidence, to submit observations as *amicus curiae*² 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 2018.³ Pursuant to the decision dated 21 May 2018 granting this application,⁴ Professor Tsagourias hereby submits observations on: (i) the relationship between the different sources of law enumerated in Article 21 of the Statute and on whether the Court should apply external sources of law -treaty and customary law on immunities- in the case at hand; (ii) the meaning of ‘third State’ for the purposes of Article 98(1) of the Statute and whether Sudan is a ‘third State’; (iii) the relationship between States Parties’ obligations arising from the Statute and Security Council resolutions and their obligations under other bilateral or multilateral agreements. These observations were written in collaboration with Dr Michail Vagias, Senior Lecturer in Law at The Hague University of Applied Sciences.

Observation 1: The relationship between the different sources of law enumerated in Article 21 of the Statute and the non-applicability of customary and treaty law on immunities in this case.

2. Article 21 of the Statute enumerates the sources of applicable law. According to subparagraph a of paragraph 1, the Court shall apply ‘[i]n the first place, this Statute,

¹ Nicholas Tsagourias and Nigel White, *Collective Security: Theory, Law and Practice* (Cambridge University Press, 2013), 399-403 (hereinafter: Tsagourias and White)

² ‘Request by Professor Nicholas Tsagourias and Dr Michail 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’, dated 29 April 2018 and registered on 30 April 2018, ICC-02/05-01/09-344

³ ICC-02/05-01/09-326

⁴ Decision on the requests for leave to file observations pursuant to rule 103 of the Rules of Procedure and Evidence, the request for leave to reply and further processes in the appeal, No. ICC-02/05-01/09 OA2, 21 May 2018

Elements of Crimes and its Rules of Procedure and Evidence’⁵ and according to sub-paragraph b of paragraph 1 the Court shall apply [i]n the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict’.⁶ It follows that the Court can apply internal as well as external sources of law.

3. Jordan has invoked the 1953 Convention on the Privileges and Immunities of the Arab League (‘1953 Convention’) and the customary law of immunities to justify its failure to arrest the accused. Jordan’s claim alludes to the sources of law mentioned in Article 21(1) (b) of the Statute. It is thus important to clarify which sources are included therein.
4. Regarding the first prong of sub-paragraph b, the term ‘applicable treaties’ includes treaties mentioned in the Statute such as the Geneva Conventions and Human Rights treaties;⁷ treaties to which the Court is a party; and treaties which are linked to the subject-matter jurisdiction of the Court such as the Genocide Convention.⁸ Bilateral or multilateral treaties to which States are parties such as the 1953 Convention are not included therein even if they are related to the matter under adjudication. With regard to the second prong of sub-paragraph b, it is broadly accepted that it also includes customary law within the category of rules and principles of international law.⁹
5. Article 21 however ranks the applicable sources in that it prioritizes the ICC-specific sources of law enumerated in sub-paragraph a. External sources mentioned in sub-paragraphs b and c are utilised only if a matter is not addressed by the sources of law enumerated in sub-paragraph a.¹⁰ Indeed, the ICC has held that ‘those other sources of law ... can only be resorted to when two conditions are met: (i) there is a lacuna in the written law contained in the Statute, the Elements and the RPE; and (ii) the lacuna cannot be filled by the application of the criteria of interpretation provided in the Vienna Convention and Article 21(3) of the Rome Statute.’¹¹ This view is also in sync with the

⁵ Article 21(1) (a) of the Rome Statute of the International Criminal Court (hereinafter referred to as ‘RS’, ‘ICC St.’, ‘the Statute’)

⁶ Article 21(1) (b) ICC St

⁷ Article 21(1)(b) and (c) and Article 8 ICC St

⁸ *Prosecutor v. Bemba*, Judgment pursuant to Article 74 of the Statute, 21 March 2016, para. 70

⁹ Otto Triffterer and Kai Ambos (Eds.), *Commentary The Rome Statute of the International Criminal Court - A Commentary*, Third Edition, C.H.Beck/Hart/Nomos, München/Oxford/Baden-Baden, 2016, pp. 940-942 (hereinafter: Triffterer Commentary)

¹⁰ *Ibid*

¹¹ *Prosecutor v. Al Bashir*, Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 4 March 2009, para. 44, *Prosecutor v. Ruto et al.*, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, para. 289 (hereinafter Ruto Decision);

fact that the Rome Statute established a self-contained regime with its own substantive and procedural rules, expressing a ‘unified object and purpose’.¹²

6. The question of immunities which constitutes the subject-matter of contention in the case at hand has been dealt with explicitly and exhaustively in Article 27 of the Statute. Article 27 renders the immunities attached to state officials inapplicable in the relations between and among States Parties and the Court. There is thus no lacuna in the law to require recourse to external sources such as those invoked by Jordan.¹³ For this reason, 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 in relation to a matter that has been explicitly and exhaustively dealt with in Article 27 of the Statute.
7. Moreover, customary and treaty law cannot be used indirectly to interpret *contra legem* the Rome Statute under 31(3)(c) VCLT.¹⁴ Article 31(3)(c) VCLT requires the interpreter of a treaty to take into account ‘any relevant rules of international law applicable in the relations between the parties’.
8. External sources of law such as treaties and customary law can be used by the Court as interpretation aid when interpreting provisions of the Statute as the jurisprudence of the Court also shows.¹⁵ However, external sources of law cannot be used to counter-interpret clear and explicit provisions of the Statute such as Article 27.¹⁶
9. This view is also supported by Articles 10, 121 and 122 of the Statute. Article 10 reinforces the view that the Rome Statute established a self-contained regime vis-à-vis general international law and thus shields Article 27, as an ICC-specific rule, from any other international law developments concerning immunities. Moreover, amendments to particular provisions of the Statute should be effectuated according to the procedure provided in Articles 121 and 122 of the Statute and not through judicial fiat or by the parties by introducing external sources of law.

Prosecutor v. Lubanga, Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial, 30 November 2007, para. 44

¹² Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law, para 251 (c) (11) and (13).

¹³ *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, para 22; *Prosecutor v. Germain Katanga*, Decision on the Confirmation of Charges, 30 September 2008, para. 508; *Ruto Decision*, para. 289

¹⁴ Vienna Convention on the Law of Treaties, 1155 UNTS 331, (hereinafter referred to as ‘VCLT’)

¹⁵ *Prosecutor v. Lubanga*, Judgment pursuant to Article 74 of the Statute, 14 March 2012, paras. 600-607

¹⁶ *Prosecutor v. Lubanga*, Decision on the “Registrar’s Submissions under Regulation 24bis of the Regulations of the Court in Relation to Trial Chamber I’s Decision ICC-01/04-01/06-2800” of 5 October 2011, 21 November 2011, para. 16.

10. In conclusion, neither treaty law nor customary law can be used to disapply or re-interpret Article 27 of the Statute. Consequently, Jordan's claim should be rejected.

Observation 2: The meaning of 'third State' for the purposes of Article 98 paragraph 1 of the Statute and the non-applicability of Article 98 (1) in this case

11. According to paragraph 1 of Article 98, the Court should not request from a State Party to surrender a person enjoying immunity of a third State before securing a waiver of the immunity from the third State. The role of Article 98(1) is to prevent violations of international law by States Parties in cases of conflicting obligations. Article 98 of the Statute is clearly limited to the relations between States Parties and third States.
12. It is thus important to clarify what is meant by 'third State' and whether Sudan is a 'third State' whose cooperation is required prior to any request for surrender. The Rome Statute, being a treaty, is subject to the Vienna Convention on the Law of Treaties which defines third States as States not party to a particular treaty.¹⁷ Consequently, Article 98 does not apply to the relations between States Parties who have consented in Article 27 to abrogate the immunities attached to Heads of States or other state officials.¹⁸
13. The immediate question is whether Sudan is a 'third State' for the purposes of Article 98(1) of the Statute. By referring the situation in Darfur to the Court¹⁹ and, thus, by conferring jurisdiction on the Court, and by imposing an obligation on Sudan to 'cooperate fully with and provide any necessary assistance to the Court and the Prosecutor', Resolution 1593 rendered Sudan a *quasi* State party to the Statute for the referred situation.²⁰ Consequently Sudan is not a 'third State' for the purposes of Article 98 and thus Article 98 is inapplicable.²¹
14. The wording of paragraph 2 of Resolution 1593 mirrors Article 86 of the Statute which requires States Parties to cooperate fully with the Court in accordance with the provisions of the Statute. Consequently, the terms of the Statute including Article 27

¹⁷ Art 2 para. 1 (h) VCLT, above note 14

¹⁸ *Prosecutor v Ruto and Sang*, Decision on Mr Ruto's request for excusal from continuous presence at trial, 18 June 2013, paras. 69-70

¹⁹ Article 13(b) of the Statute

²⁰ UN Security Council Resolution 1593, UN Doc. S/RES/1593 (2005), 31 March 2005 [hereinafter SC Res 1593], para 2; Tsgourias and White, above note 1, 399-403.

²¹ 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 ICC-02/05-01/09, 11 December 2017, Pre-Trial Chamber II, para. 4; *Prosecutor v. 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, 6 July 2017, para. 82 (hereinafter: South Africa Decision),

apply to the relations between Sudan and the Court and to the relations between Sudan and other States Parties.²²

15. Article 27 has vertical as well as horizontal scope²³ in that it applies to the relations between the Court and States Parties as well as to the relations between and among State Parties.²⁴ This includes situation-referred States which, as was said, become *quasi* State Parties for the limited purpose of the referred situation. Otherwise, Article 27 of the Statute would be rendered meaningless.
16. Furthermore, nothing in Resolution 1593 evinces an attempt to exclude the application of Article 27. 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.²⁵ Resolution 1593 also deals explicitly with the immunities of officials of non-party States in a separate paragraph (para 6).
17. Finally, it should be recalled that the Security Council does not have competence to suspend or amend provisions of the Statute when referring a situation to the Court. The UN and the Court are independent of one another with their respective powers and possible interactions regulated by their respective Charters.²⁶ Also, the Court is not party to the UN Charter, therefore its Statute cannot be amended by the Security Council.
18. In conclusion, Sudan is not a ‘third State’ for the purposes of Article 98 (1) of the Statute and its relations with the Court and with State Parties are regulated by the Statute including Article 27.

Observation 3: Obligations under Resolution 1593 prevail over other obligations under treaty law (1953 Convention) or customary law

²² South Africa Decision para. 85-87 Triffterer Commentary, above note 9, at 2139-2141; D. Akande, ‘The legal nature of Security Council referrals to the ICC and its impact on Al Bashir’s immunities,’ [2009] 7 *Journal of International Criminal Justice*, 345–348

²³ *Prosecutor v. Al-Bashir*, 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 Al-Bashir, 11 December 2017, paras 33, 38. *Prosecutor v. Al-Bashir*, Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir, 12 December 2011, para. 18.

²⁴ *Prosecutor v. Al-Bashir*, Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir, 12 December 2011, para. 18

²⁵ Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General S/2005/60, 25 January 2005, para 644

²⁶ See Article 2 Negotiated Relationship Agreement Between the International Criminal Court and the United Nations, (2004) <https://www.icc-cpi.int/pages/item.aspx?name=icc-un-rel-agr>

19. Even if the 1953 Convention were applicable – *quod non* – the removal of the immunities of the Sudanese President or of other Sudanese officials by Resolution 1593 overrides other treaty obligations, in accordance with Articles 25 and 103 UN Charter and relevant jurisprudence.²⁷
20. According to Article 25 of the UN Charter, member states ‘agree to accept and carry out the decisions of the Security Council’ whereas according to Article 103 of the U.N Charter ‘in the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.’ Article 103 does not invalidate contrary obligations but displaces them in order to give effect to UN obligations.²⁸
21. The Charter obligations mentioned in Article 103 include primary as well as secondary obligations such as obligations imposed by Security Council resolutions. It is broadly accepted that Article 103 also includes customary law obligations in view of the overlaps between customary and conventional obligations and in view of the purpose of Article 103 which is to give effect to the UN obligations in the pursuit of peace and security.²⁹
22. Resolution 1593 urged ‘all States and concerned regional and other international organizations to cooperate fully’ with the Court.³⁰ It is evident from this wording that no obligation of cooperation is imposed on States (other than Sudan as I will explain in the next paragraph) but, conversely and regarding States Parties, Resolution 1593 did not impose any contrary obligation either for example, an obligation to seize cooperation with the Court. There is no conflict of obligations; consequently, States Parties such as Jordan continue to have an obligation to cooperate with the Court as provided for by the Statute whereas their failure to comply with such an obligation will constitute a breach of the Statute.

²⁷ *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v UK, Libya v US) (Provisional Measures)* [1992] ICJ Reps 3, paras 39-42; *Behrami, Agim, and Bekir Behrami v. France*, Application No. 71412/01 and *Ruzhdi Saramati v. France, Germany and Norway*, Application No. 78166/01, Grand Chamber Decision, 2 May 2007 45 EHRR (2007) para. 147; *R (Al-Jedda) v Secretary of State for Defence* [2007] UKHL 58, paras 33–34 (Lord Bingham); Article 30 VCLT, above note 14. Tsagourias and White, above note 1, 334-338

²⁸ H. Kelsen, *Law of the United Nations*, (1950) 113; B. Simma. et als (eds.), *The Charter of the United Nations: A Commentary* (Oxford University Press, 2002) at 1122; R. Kolb, L'article 103 de la Charte des Nations Unies, 367 *Collected Courses of the Hague Academy of International Law* (2013).

²⁹ Simma, *Charter*, above note 28, 1298-1299; Tsagourias and White, above note 1, 335

³⁰ SC Res 1593, above note 20, para 2

23. Resolution 1593 imposed an obligation on Sudan to ‘cooperate fully with and provide any necessary assistance to the Court and the Prosecutor’.³¹ As was said, in doing so, it rendered Sudan a *quasi* State party to the Statute binding it to the terms of the Statute including Article 27 which disapplies immunities.
24. The obligation imposed on Sudan by the Security Council has *erga omnes* effect. It means that Sudan is barred from raising the issue of immunities in proceedings before the Court or in proceedings before the courts of States Parties or the courts of third States. Doing so would constitute a breach of its obligation to co-operate under Resolution 1593. By virtue of Resolution 1593 and Article 25 of the UN Charter, States Parties also accepted that the terms of the Statute including Article 27 apply in their relations with Sudan and the Court. Consequently, any contrary obligations of States Parties such as those contained in the 1953 Convention or in customary law disapply on the basis of Article 103 of the UN Charter and relevant jurisprudence as mentioned above.
25. In conclusion, Jordan’s obligation under Resolution 1593 to accept that Sudan is bound by the terms of the Statute - including Article 27 which disapplies the immunities attached to Omar Al-Bashir – overrides its other conventional or customary obligations concerning immunities.



Professor Nicholas Tsagourias
School of Law, University of Sheffield, Sheffield S3 7ND, UK

³¹ Ibid.

Dated this 9th June 2018
At Sheffield, UK