

**Cour
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**International
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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 of Prof. Annalisa Ciampi
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:

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Ms Fatou Bensouda, Prosecutor

Mr James Stewart

States' Representatives

Competent authorities of the Hashemite
Kingdom of Jordan

Competent authorities of the other States
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I. Introduction

Pursuant to rule 103 of the Rules of Procedure and Evidence ("RPE"), Professor Annalisa Ciampi thanks the honourable Appeals Chamber for granting her request and respectfully hereby submits 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'.

If invited to make oral submissions, she is prepared to appear at the hearing convened by the Appeals Chamber on 10, 11 and 12 September 2018.

II. Outline of the brief

In line with the summary initial observations presented 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 that:

Re the First Ground of Appeal:

- **Art 27, paragraph 2**, does not only remove the immunity of sitting Heads of State or other persons with an official capacity *vis-à-vis* the Court's ability to exercise jurisdiction. It also **allows the arrest and surrender by a State party of officials of a State under an international obligation to cooperate with the Court.**

Re the Second Ground of Appeal:

- **The effect of Security Council resolution 1593 (2005), paragraph 2**, which imposes upon Sudan and the other parties to the conflict the obligation to cooperate fully with the Court, **is that Sudan cannot claim immunity for its Head of State, elected representatives or governmental officials sought for surrender by the Court.**

Re the Third Ground of Appeal:

- **The Court's decision to refer a case of non-compliance to the Assembly of States Parties ("ASP") and the Security Council requires a judicial finding that a characterized infringement of the obligation to cooperate has occurred and a consideration of its prospective effects.**

III. Art 27, paragraph 2, does not only remove the immunity of sitting Heads of State or other persons with an official capacity vis-à-vis the Court's ability to exercise jurisdiction. It also allows the arrest and surrender by a State party of officials of a State under an international obligation to cooperate with the Court.

The distinction between jurisdiction to adjudicate and jurisdiction to enforce has no place in proceedings before the Court or international criminal law.

The distinction is a valuable one for the purposes of the jurisdictional immunities of the *State*, not of State officials. As it is well known, the rule of State immunity – which derives from the principle of sovereign equality of States – applies in principle in respect of *acta jure imperii* and bars the exercise of *civil jurisdiction by foreign courts*. For *acta jure gestionis*, where an exception applies or in case of a waiver of its jurisdictional immunity, a State may be subject to the jurisdiction of a foreign court for the purpose of *adjudication* on its (civil) responsibility. The legitimate exercise of a foreign State's jurisdiction, however, is without prejudice to the respondent State's immunity from the jurisdiction *to enforce*. The State against which judgment has been given can be the subject of measures of constraint on the territory of the forum State or on that of a third State, with a view to enforcing the judgment in question, only if at least one of the following conditions is met: the property in question must be in use for an activity not pursuing government non-commercial purposes, the State which owns the property has expressly consented to the taking of a measure of constraint, or that State has allocated the property in question for the satisfaction of a judicial claim.

With respect to States, “[t]he rules of customary international law governing immunity from enforcement and those governing jurisdictional immunity (understood *stricto sensu* as the right of a State not to be the subject of judicial proceedings in the courts of another State) are distinct, and must be applied separately.” (ICJ, *Jurisdictional immunities of the State* (Judgment), 3 February 2012, para. 113).

The distinction between jurisdiction to adjudicate and jurisdiction to enforce is inapplicable in relation to the exercise of criminal jurisdiction by an international court for the purposes of ascertaining individual criminal responsibility. It would be equally inapplicable with respect to individual immunities before national courts.

International criminal courts do not have the power to issue directly enforceable orders and lack enforcement agencies directly available for the purpose of collecting evidence, searching premises, seizing documents, or executing arrest warrants and other judicial orders. They must rely heavily on the cooperation of states and are totally dependent on “international diplomacy and states’ good will”.¹

Before an international court, such as the International Criminal Court, which requires that the accused be present at trial, therefore, “the power to exercise its jurisdiction over persons for the most serious crimes of international concern” (Article 1) entails the power to issue binding requests for cooperation to all States parties to the Statute. Binding requests may also be addressed to other States under an international obligation to cooperate with the Court, pursuant to any other appropriate basis. The Court may also request, in a non-binding fashion, cooperation from other States.

In so far as the Court has the power to adjudicate upon the criminal responsibility of Al Bashir – it definitely does because of the Security Council’s decision “to refer the situation in Darfur since 1 July 2002 to the Prosecutor of the International Criminal Court” pursuant to resolution 1593 (2005), paragraph 1 – it also has the power to request his arrest and surrender. Whatever the nature and scope of personal immunities under international law, the exercise of the Court’s jurisdiction is not barred in this respect. To hold that the Court is entitled to exercise jurisdiction in relation to Al Bashir, but that the Court’s request for his arrest and surrender was issued *ultra vires* is a non-sense and would make a mockery of international law.

A different question relates to whether the requested state is or is not under an obligation to comply with such a request.

Because the obligation to cooperate finds its basis in the Statute, *qua* an international treaty, a Court’s request in accordance with the Statute is binding in principle for the States parties. It is also binding for other States (and entities) “on the basis of an *ad hoc* arrangement, an agreement with such State or any other appropriate basis” (Article 87, paragraph 5).

¹ Cassese, *International Criminal Law*², Oxford, 2008, 442

The latter is precisely the case of Sudan, which was brought under a *qualified* international obligation to “cooperate fully with and provide any necessary assistance to the Court and the Prosecutor” by resolution 1593, paragraph 2. For the reasons detailed below (*sub IV*), the effects of the Rome Statute combined with paragraph 2 of resolution 1593 (2005) is that Sudan cannot claim the immunity of Al-Bashir.

Article 98 does not come into play *vis-à-vis* Jordan, as there is no conflict between Jordan’s duty of cooperation with the Court and Jordan’s alleged obligation to respect Al-Bashir’s immunity. The consultation mechanism is provided for under the Statute as a means to defuse blanket refusals – not a tool to indefinitely delay cooperation duly requested by the Court.

To conclude:

In the case the Appeals Chamber finds no legal basis for the removal of Al Bashir’s immunity in an international customary law exception to personal immunities for alleged international crimes before an international court,² or a treaty such as the 1948 Convention on the Prevention and Punishment of the Crime of Genocide,³ it should hold that:

Article 27, paragraph 2, is applicable to Sudan and Article 98 on conflicting obligations does not apply to Jordan.

IV. The effect of Security Council resolution 1593 (2005), paragraph 2, which imposes upon Sudan and the other parties to the conflict the obligation to cooperate fully with the Court, is that Sudan cannot claim immunity for its Head of State, elected representatives or governmental officials sought for surrender by the Court.

The Court is entrusted by the Statute with the power to settle any dispute concerning its judicial functions (Article 119). It has therefore the inherent power to authoritatively interpret Security Council resolutions of which it is the principal addressee.

² The question of whether a Head of State, a prime minister, a foreign minister or a diplomat, charged by an international criminal court with an international crime, is precluded from claiming personal immunity is answered in the affirmative, by Cassese, *International Criminal Law*², Oxford, 2008, 311-313.

³ This is the view expressed in the Minority Opinion of Judge Marc Perrin de Brichambaut, 14 December 2017 (ICC-02/05-01/09-309-Anx-tENG).

Resolution 1593 (2006) does not blur the distinction between States parties and non-parties to the Statute. Arguably, the Security Council could have imposed the obligation to cooperate with the Court on all member States of the UN. It did not do so but *recognized* “that States not party to the Rome Statute have no obligation under the Statute” and *urged* “all States and concerned regional and other international organizations to cooperate fully”. The only exception to this clear cut distinction is the obligation imposed upon “the Government of Sudan and all other parties to the conflict in Darfur, [to] cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution” (paragraph 2).

The effect of Security Council Resolution 1593 (2005) is not that the Rome Statute applies, in its entirety, to Sudan in relation to the situation in Darfur. Paragraph 2 of resolution 1593 (2005) does, however, entail that Sudan cannot claim immunity for its Head of State or other officials.

The effect of paragraph 2 is twofold.

First of all, it imposes on Sudan (and certain non-State actors) alone a qualified international obligation to comply with requests by the Court. This obligation is binding upon Sudan under Article 25 and prevails over *any* conflicting obligation *ex* Article 103 of the UN Charter. Sudan is one of the addressees of the Court’s requests for the arrest and surrender of Al Bashir and could be found in failure of compliance therewith.

Paragraph 2 also has the effect of removing the possibility for Sudan to invoke the immunity of its Head of State and officials. Although it does not have the effect of extending the application of the provisions of the whole Statute to Sudan, it does place Sudan in a legal position analogous to that of a State party with respect to the Court’s requests for cooperation (Wood, 2011), including the unavailability of personal immunities pursuant to Art. 27, paragraph 2 (*qua* a Statutory provision).

This conclusion is mandated by a plain reading of the text of paragraph 2 and finds support in the context, object and purpose of resolution 1593 as well as the circumstances surrounding its adoption and the general principle of *effet utile*, that applies to international norms, including Security Council resolutions.

The text of the provision is quite simple but unequivocally clear that Sudan is under an international obligation to “cooperate fully with and provide any necessary assistance to the Court and the Prosecutor”, i.e. to comply with the Court’s requests.

This obligation applies to all Court’s requests for cooperation, including requests for arrest and surrender. The request to arrest and surrender Al Bashir therefore binds Sudan at least as much as it binds the States parties to the Statute.

This obligation is immediate and unconditional and not subject to any condition or exception whatsoever. In particular, no waiver express or implied on the part of Sudan is required for the obligation to apply. That Sudan is under an obligation to cooperate to the effective exercise of the Court’s jurisdiction means that *Sudan* is not entitled to claim the immunity – of whatever kind – for its officials.

The obligation to “cooperate fully” includes the obligation to surrender any person sought by the Court and therefore is incompatible – both logically and legally – with (and hence removes) the right of Sudan to the personal immunities of its Head of State or other officials both “vertically” in its relationship with the Court and “horizontally”, where it is another State to execute the Court’s request.

A State under an obligation to execute a request for cooperation can claim no right *vis-à-vis* another State executing the request, which it could no claim *vis-à-vis* the Court. It follows that Jordan has no obligation towards Sudan with respect to its Head of State’s or other governmental officials’ immunity.

This plain reading in accordance with the ordinary meaning of the terms of paragraph 2 is in accordance with the object and purpose of the provision, which is to ensure the cooperation of Sudan with the Court for the effective exercise of its functions and powers in relation to the situation in Darfur (Sudan).

As the territorial State where the crimes have been committed and the State of nationality of those allegedly responsible, Sudan is the State where the evidence and the suspects are to be found and therefore the State the cooperation of which would be most needed. In this respect, the imposition upon Sudan of the obligation to cooperate is instrumental and key to effectiveness of the Council’s decision to refer the situation in Darfur to the Court.

The context of the whole resolution further confirms this reading. Paragraph 6 expressly provides for the immunities of officials of non-party States contributing to operations in Sudan established or authorized by the Council or the African Union. Had the Security Council intended to safeguard the immunities of other non-party States, it would have done so explicitly. There was no need therefore for resolution 1593 expressly *to exclude* the immunities of Sudanese officials.

The circumstances surrounding the adoption of the resolution also confirm and reinforce the plain reading of resolution 1593 in accordance with its ordinary meaning. That the Court would be seeking the arrest and surrender of high governmental officials (nobody excluded) of Sudan and that Sudan as well the States parties would be under an obligation to arrest and surrender its own officials., was all but unexpected or unforeseeable.

First of all, the Court is established to prosecute the most serious crimes of concern of the international society as a whole. These crimes, by definition, are generally, if not necessarily, committed by state organs. As the Nuremberg Tribunal famously stated: “International crimes are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.”

Moreover, resolution 1593 was adopted in response to the finding and recommendations of the International Commission of Inquiry on Darfur, chaired by Professor Antonio Cassese. In its Report, the Commission “identified as possibly responsible for” a number of violations of international human rights and humanitarian law, *inter alia*, “a number of senior Government officials” (para. 644). Exactly on this basis, the Report “strongly” recommended that the Security Council refer the situation in Darfur to the then newly established International Criminal Court, pursuant to Article 13(b) of the Statute of the Court (para. 647).

Lastly, this is the only interpretation which makes resolution 1593, paragraph 2, meaningful and therefore purports with the general principle of interpretation of *effet utile*. If Sudan – as one of the addressees of the Court’s request to arrest and surrender Al Bashir that it failed to execute – was allowed to plead Al Bashir’s immunity *vis-à-*

vis a State party wishing to comply with the request – this would make the obligation meaningless and make a mockery of it.

To sum up:

- The jurisdiction of the Court in relation to those responsible for crimes committed in Darfur (Sudan), including its top governmental officials and Head of State, is definitely established by the Security Council decision to refer in paragraph 1 of resolution 1593.
- The obligation to execute a Court's request for arrest and surrender derives for the States parties from the Statute and for Sudan from paragraph 2 of the same resolution.
- Whatever the interpretative method selected by the Court, the meaning of resolution 1593 (2005), paragraph 2, does not change.
- The obligation to cooperate, directed specifically to Sudan under paragraph 2, attracts the application of Article 27 of the Statute to Sudan. Therefore, **Jordan does not have any obligation under customary or conventional international law to accord immunity to Al-Bashir.**

V. The Court's decision to refer a case of non-compliance to the ASP and the Security Council requires a judicial finding that a characterized infringement of the obligation to cooperate has occurred and a consideration of its prospective effects.

The Court's decision whether to refer Jordan's non-compliance under Article 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. Art. 87, paragraph 7, provides that failure on the part of a State Party "to comply with a request to cooperate by the Court contrary to the provisions of th[e] Statute, thereby preventing the Court from exercising its functions and powers under th[e] Statute", empowers the Court to "make a finding to that effect and refer the matter to the Assembly of the States parties or, where the Security Council referred the matter to the Court, to the Security Council" ..

- First of all, the Statute addresses a *characterized* infringement of the obligation to cooperate by a State Party. Only failure "to comply [...] preventing the Court from exercising its functions and powers" may be referred.

It is arguable whether there exist cases where the non-cooperation would not prevent the Court from exercising its functions and powers.⁴ No doubt, however, failure to execute a request for the arrest and surrender of a person sought by the Court for the purpose of prosecution does prevent the Court from exercising its functions.⁵ The first condition is thus fulfilled in the present case.

While the power to make a finding as to a State's failure to cooperate is inherent to the Court's judicial functions, the power to refer the matter to the ASP or, where the Security Council referred the matter to the Court, to the Security Council needs to be based in the Statute. Because Article 87, paragraph 7, requires a judicial finding that a characterized infringement has occurred, the referral also implies a reasonable prospect that it will sort some positive effects on the "functioning of the Court". This assessment should include not only Jordan as the State subject to the referral but more widely the international society as a whole, and be based on a number of considerations, including the following:

- The effectiveness of the referral is not necessarily excluded *vis-à-vis* the referred State because the person whose arrest and surrender is sought by the Court (Al Bashir) is not present any more in the territory of that State (Jordan). The presence of Al Bashir on Jordan's territory, that at one moment may seem improbable, remains always possible.
- The possibility of consequential action by the ASP or the Security Council is 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. Moreover, the ASP (or the Security Council) do not appear to enjoy exclusive powers on the matter under the Statute.⁶

⁴ C. Kress, K. Prost, "Art. 87", in O. Triffter (ed.), *Commentary on the Rome Statute of the International Criminal Court. Observers' Notes. Article by Article*, 1999, 1055, at 1067.

⁵ A. Ciampi, "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, 1607-1638, at 1635 s.

⁶ Because the questions of State responsibility are not really answered, it appears impossible to qualify the Statute as a self-contained regime. C. Kress, Penalties, Enforcement and Cooperation in the

- Failing any action either taken or recommended by the ASP or the Security Council, States Parties to the Statute (or any Member State of the UN, as the case may be,) may resort to remedies generally available to them under international law, with a view to ensuring compliance with requests for cooperation by the Court. The *erga omnes* character of the obligation to cooperate with the Court entails, however, that any reaction not challenged through the ASP (or the Security Council) should be taken by States in cooperation. This would not exclude the adoption, as last resort, of individual countermeasures.

- Finally, a finding of non-compliance and consequent 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 and beyond. The damage to the image of the State concerned is obviously at the origin of ‘Jordan Referral re Al-Bashir Appeal’. The pervasive general deterrent effect arising therefrom is evident from high amount of attention received by the present case.

VI. Conclusions

This *amicus curiae* respectfully submits that conclusions contrary to those outlined above *sub* III and IV *re* the effects of Security Council resolution 1593 (2005), paragraph 2, and the applicability of Art. 27, paragraph 2, to the execution of the Court’s request for the arrest and surrender by a State party (Jordan) of the Head of a State under a qualified obligation to cooperate with the Court (Sudan), would make a mockery of both the Statute and the UN resolution, the Court and the Security Council, and ultimately of international law.

Prof. Annalisa Ciampi



Dated this 18th of June 2018 At Florence, Italy

International Criminal Court Statute, 6 European Journal of Crime, Criminal Law and Criminal Justice (1998) 442, at 450.