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**International  
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*Date: 18 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**

**Observations by Professor Paola Gaeta as amicus curiae 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**

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## I. Introduction

Sudan is not a State party to the Rome Statute. Therefore, as a general rule, the provisions contained therein are not applicable to Sudan (see Art. 34 of the Vienna Convention on law of treaties, enshrining the principle expressed with the Latin maxim *pacta tertiis nec nocent nec prosunt*). Art. 27 (2) provides that immunities eventually accruing to persons under international or national law do not bar the jurisdiction of the ICC. Being a State not party, Sudan would be therefore entitled to claim that his incumbent Head of State is protected by international immunities before the ICC, including State parties to the Rome Statute. This would mean that the ICC cannot exercise its jurisdiction against Al Bashir until is serving as Head of State and, *a fortiori*, cannot issue an arrest warrant against him.

As explained in the observations of my learned colleague Claus Kreß, there are two alternative arguments to prove that this claim is flawed. One is to rely on the fact that the case against *Al Bashir* originates from a referral of the Security Council concerning the situation occurring in Darfur. According to this argument, Sudan would be obliged to accept the jurisdiction of the ICC because of a decision of the Security Council: Art. 27 (2) would thus be applicable to Sudan *via* a decision of the Security Council. This view would also have the effect of making Art. 98 (1) of the Rome Statute not relevant in the case. To the extent that the term ‘third State’ in this provisions means ‘State not party’, the ICC would not need to obtain from Sudan a waiver of immunities before requesting a State party to execute the arrest warrant against Al Bashir.

The other alternative argument is to rely on the fact that Art. 27 (2) actually reflects a rule of customary international law, whereby international immunities do not apply before *international* criminal courts as opposed to national criminal jurisdictions. According to this view, Article 27 (2) would thus apply also to States not parties to the Rome Statute, including Sudan, independently of a Security Council referral. However, if one accepts this view, the question arises of whether this customary rule also extends to Art. 98 (1) of the Rome Statute, making it inapplicable (as argued by Professor Kreß in his *amicus curiae*). Otherwise one should argue that the inapplicability of Art. 98 (1) in the *Al Bashir* case stems from the obligation imposed on Sudan by the Security Council to cooperate with the ICC, as suggested in previous decisions of the ICC PTCs.

In the following observations I will mainly focus on the reasons why I think that the first line of argument, based on the effect of the Security Council's resolution on the position of Sudan vis-à-vis the Rome Statute, is not convincing. I will also elaborate on the effect of the Security Council's referral on Art. 98 (1) of the Rome Statute, in particular on the requirement whereby the ICC shall obtain a waiver of the immunities from the relevant third State before issuing a request of arrest and surrender to a State party that would require this State party to act inconsistently with its international obligations on immunities vis-à-vis that third State. Finally, I will clarify that, while I share the view expressed in the written observations of Professor Claus Kieß according to which Article 27 (2) reflects a principle of customary law, I am convinced that this principle does not also extend to Art. 98 (1) of the Rome Statute.

## **II. The (ir)relevance of the Security Council's referral of the situation in Darfur**

### **A. The position of Sudan vis-à-vis the Rome Statute**

In their most recent decisions, and departing from previous decisions, the ICC PTCs have taken the view that since the *Al Bashir* case originates from a situation referred to the ICC by the Security Council, Art. 27 (2) applies to Sudan and to its incumbent Head of State. This view had been also previously elaborated in legal scholarship, particularly by Professor Dapo Akande, who stated that even States that are not parties to the ICC become bound by the Rome Statute by virtue of a Security Council referral. This is because the Security Council referral would be a decision *to confer jurisdiction* on the Court, in circumstances where such jurisdiction may otherwise not exist (ie absent the requirements set forth in Art. 12 of the Rome Statute). Therefore, Sudan would be obliged to accept the Court's exercise of jurisdiction in accordance with the Rome Statute. In line with this argument, article 27(2) of the Rome Statute would also become fully binding on Sudan, which means that Sudanese state officials would not be entitled to any personal immunities before the ICC or any national jurisdiction.

I respectfully disagree with this view, for the reasons that I have already elaborated in a recent contribution together with my co-author Patryk Labuda and that I will present below.

First, this view presupposes that the referral of a situation to the ICC by the Security Council *constitutes the source* of the jurisdiction of the Court on that situation absent the

requirements set forth in Article 12 of the Rome Statute. If one takes this view, there would be actually ‘two’ Courts in one: the Court of the State parties of the Rome Statute, that have negotiated and ratified the text of the Rome Statute in accordance with the applicable rules on the stipulation of treaties, and the Court of the Security Council, that would need a resolution of this political body to acquire jurisdiction in situations where crimes appear to be committed in the territory and by nationals of a non-state Party.

I submit therefore that this view is prejudicial to the integrity of the Court as a court of law, which is and shall be bound to apply the Rome Statute equally in any situation and independently of the intervention of the Security Council. The more is so if one considers that ICC has been created as the first permanent international criminal court also to overcome the flaws inherent in the establishment of ad hoc international criminal tribunals by the Security Council, which include the perception that international criminal justice can be used as a political tool in the hands of few powerful states. Should the ICC recognize that the referrals by the Security Council have legal effects other than those expressly envisaged in the Rome Statute, the risk would be to make the ICC appearing ready to serve the political goals of the Security Council or of some of its permanent members, with long-term prejudicial effects on its universal reach.

Second, accepting the view presented above would mean that, when the Security Council triggers the jurisdiction of the ICC, the former becomes the ‘master’ of the jurisdiction of the latter. The ICC would be thus a ‘measure’ of the Security Council to maintain peace and security under Chapter VII of the UN Charter and would be put in a position similar to an *ad hoc* international criminal tribunal of the Security Council. In turn, this would imply, for instance, that the Security Council could modify at its own discretion the legal framework set forth in the Rome Statute in any matter whatsoever, including the scope of the temporal, personal or material jurisdiction of the ICC or even the selection of the judges. This interpretation is patently contrary to the letter and the spirit of the Rome Statute, that expressly clarifies the powers of the Security Council vis-à-vis the Court and the legal consequences of a referral of a situation by the Security Council (see eg Art. 53(2)(c) and 53(3)(a); Art. 87(5)(b); Art. 87(7)).

Third, the aforementioned view does not conform to the legal nature of the ICC as a treaty-based international organization governed by the principle of specialty, which means that the

ICC can only be endowed with the powers and competences delegated to it by states parties on the basis of its constitutive instrument – the Rome Statute. In the Rome Statute, the Security Council referral of a situation to the Court constitutes one of the mechanisms to trigger the exercise of the ICC’s criminal jurisdiction, but it does not constitute the source of the jurisdiction including when the territoriality or active nationality link are absent.

A careful reading of the relevant provisions of the Rome Statute supports this approach. Article 1 clearly states that the ICC ‘shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute’, and that the ‘jurisdiction and functioning of the Court shall be governed by the provisions of this Statute’. Articles 6 to 8 define the crimes over which the Court ‘shall have jurisdiction’, while article 12 sets forth the ‘*preconditions* to the *exercise* of the jurisdiction of the Court’ (emphasis added). The latter provision thus establishes that the ICC ‘may exercise its jurisdiction’— in the case of a referral by a state party or by virtue of a proprio motu investigation by the OTP— if crimes are committed in the territory, by a national of a state party, or over a state that has accepted the ad hoc jurisdiction of the Court. Thus, article 12 sets out only *requirements* for the Court to exercise its jurisdiction, although this provision is often read (in my view, incorrectly) as providing the legal basis for the ICC to *acquire jurisdiction*.

According to this reading of the Rome Statute, the ICC’s jurisdiction exists independently of where or by whom crimes are committed, but this jurisdiction can only be exercised over crimes committed in the territory or by nationals of states that are parties to the Rome Statute or have lodged a declaration under Art. 12 (3). However these ‘requirements’ disappears when the Security Council refers a situation to the ICC: in other words, the Security Council referral operates to ‘remove’ the pre-condition on the exercise of the ICC jurisdiction but is not the basis that jurisdiction (as confirmed by article 13(b) on the referrals by the Security Council: ‘exercise of jurisdiction’).

The practical consequence of this legal distinction is that Sudan’s position vis-à-vis the Rome Statute is not actually altered by the Security Council referral that triggered the Court’s jurisdiction over Darfur. The ICC’s jurisdiction over Darfur is grounded in the Rome Statute; it is not ‘imposed’ by the Security Council on non- states parties to the Rome Statute, such as Sudan. Therefore Sudan’s relationship vis-à-vis the Rome Statute is a relationship governed

by the principle enshrined in Art. 34 of the 1969 Vienna Convention on the laws of treaty, subject to the applicability of some of the provisions of the Rome Statute to Sudan *qua* customary international law (as is the case with Art. 27 (2)).

### **B. Art. 98 (1) and the obligation of Sudan to cooperate with the ICC**

As for the effect of the Security Council's resolution triggering the ICC's jurisdiction in Darfur on the applicability of Art. 98 (1) of the Rome Statute, the ICC PTCs held in some decisions that this resolution 'implicitly waived the immunities granted to Omar Al- Bashir under international law and attached to his position as a head of state' (eg PTC II decision of 9 April 2014). I respectfully submit that this interpretation is not convincing, since it clearly contradicts the text of article 98(1) of the Rome Statute, which allows only the relevant 'third state'— not other entities— to waive immunities. Moreover, Resolution 1593 of the Security Council refers only to cooperation of Sudan but says nothing whatsoever about the immunities eventually accruing to its high ranking state officials and its Head of State.

Equally, I do not find convincing the view put forward in another decision of the PTC that, since the Security Council imposed an obligation to cooperate on Sudan, this obligation aimed to 'eliminate any impediment to the proceedings before the Court, including the lifting of immunities', and that '[a] ny other interpretation would render the S[ecurity] C[ouncil] decision . . . senseless'. The fact that Sudan is obliged to cooperate with the ICC by virtue of SC resolution 1593 (2005) does not have an impact on the applicability of Art. 98(1). This provision is not concerned with whether a State that is not party to the Rome Statute is obliged to cooperate with the Court. It is concerned with the actual cooperation that the ICC must obtain from the relevant third State to waive the immunity.

In addition, the obligation of cooperation imposed on Sudan by the Security Council does not modify the powers of the ICC, including the power of the latter vis-à-vis States parties to the Rome Statute in the matter of judicial cooperation. As mentioned above, the ICC is an international organization, created by a treaty and exercising the powers and competences attributed to it by its member States. The obligations set forth by the Security Council upon Sudan cannot affect the rights and powers of another international organization, in this case the ICC, as they are regulated in the respective constitutive instrument of such other international organization. The decision of the Security Council on the obligation of Sudan to

cooperate with the ICC does not relieve the latter from implementing a requirement for the exercise of its power to request judicial cooperation under Art. 98 (1) of the Rome Statute.

Finally, it is perfectly possible for the ICC to prosecute serious crimes committed in Darfur irrespective of whether a very narrow group of people entitled to personal immunities remains shielded from arrest when travelling abroad. Acknowledging the immunities of the Sudanese president, his head of government, and his foreign minister hardly makes the referral 'senseless'.

### **C. Art. 98 (1) and the obligation of State parties to cooperate with the ICC**

The last point concerning the effects of the Security Council's referral of the situation in Darfur concerns the obligation of State parties to the Rome Statute to cooperate with the ICC.

I have already explained above the reasons why I am convinced that a Security Council's referral does not transform the ICC into a 'Court of the Security Council'. This is also true concerning the obligations of State parties in the field of judicial cooperation with the ICC. The Security Council's referrals do not automatically vest the ICC requests in matters of judicial cooperation with the authority of a Security Council decision under Chapter VII of the UN Charter. As I previously noticed, there is little doubt that a Security Council referral produces important legal effects, but all of them are expressly set out in the Rome Statute. For instance, on the issue of judicial cooperation, if a State party fails to comply with a request to cooperate, the Court may make a finding to that effect and refer the matter to the Security Council (Article 87(7) of the Rome Statute).

However, nothing in the Rome Statute supports the view that a Security Council referral in and of itself endows the ICC's requests of judicial cooperation with the binding force of a Security Council decision under Chapter VII, as was the case at the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda. The Rome Statute provides expressly that the Security Council can trigger the jurisdiction of the ICC under Chapter VII of the UN Charter, but once this happens the Court can act only within the framework of the Rome Statute, including in matters of judicial cooperation. In other words, the obligation of States parties to cooperate with the Court, including the obligation to execute its requests, continues to be grounded in the Rome Statute. It does not stem from the

Security Council referral itself, unless the Security Council resolution provides otherwise.

By referring the situation of Darfur to the ICC, however, the Security Council did not make such a determination. The resolution only provides that Sudan and all other parties to the conflict ‘shall cooperate fully’ with the Court. As for other states, the resolution recognizes ‘that States not party to the Rome Statute have no obligation under the Statute to cooperate...’ but it nonetheless ‘urges all States and concerned regional and other international organizations to cooperate fully’ with the ICC. The language of the resolution could not be clearer: Sudan and the parties to the Rome Statute are obliged to cooperate with the ICC by virtue of a Security Council decision, while other states are simply ‘urged’ to do so.

Therefore it cannot be claimed that, because of the Security Council’s referral, States can lawfully enforce the request by the ICC of arresting a person protected by international immunities absent a waiver from the relevant third State, because they would be required to do so by a decision of the Security Council vested with Chapter VII powers.

### **III. The applicable rules on immunities to the Al Bashir under the Rome Statute**

Having clarified that the Security Council’s referral of Darfur to the ICC does not alter the position of Sudan vis-à-vis the Rome Statute, nor that of State parties in the field of judicial cooperation with the ICC, one has to turn to the Rome Statute as the relevant primary body of law that the ICC is bound to apply under its Art. 21.

In this respect, it is true that Art. 27 (2) of the Rome Statute cannot be applied *qua* treaty law to Sudan since the latter is a State not party to the Rome Statute. However, it is well known that a treaty rule can be applied to a State not party to a treaty if it reflects a rule of customary international law. This is the case with Art. 27 (2) of the Rome Statute, as Professor Kreß has clarified in his *amicus brief*: I totally share his view in this respect, as also reflected in my academic writings. I am therefore fully convinced that the ICC can exercise its jurisdiction over the incumbent President of Sudan, Omar Al Bashir, and that his immunities under international law do not constitute a bar to the jurisdiction of the ICC and the issuance of an arrest warrant against him.

However, I do not agree with my learned colleague where he argues that the general rule

removing immunities reflected in Article 27 (2) would equally extend in the matter of judicial cooperation. In other words, I am convinced that Article 98 (1) applies in the *Al Bashir* case and prevents the ICC from obliging a State party to execute its arrest warrant against him without a waiver of his immunities from Sudan and until he is serving as a Head of State.

There are three main reasons that I can mention in support of this interpretation. First of all, the letter itself of Article 98 (1) of the Rome Statute: this provision can only be disregarded if it is proven that has been derogated by the subsequent practice of State parties or has fallen into desuetude. This is certainly not the case, as the practice of some State parties to the Rome Statute in the *Al Bashir* case clearly shows. Second, arguing that the customary rule reflected in Art. 27 (2) also applies in the field of requests of judicial cooperation, runs counter the clear letter of Article 98 (1) and makes this provision redundant, which is contrary to the general rule of treaty interpretation requiring that an *effet utile* is to be given to any treaty provision. Finally, it is not contradictory to state that the above mentioned general principle enshrined in Art. 27 (2) only refers to the irrelevance of immunities from the *adjudicatory jurisdiction* of the ICC and does not apply in the field of requests of judicial cooperation to States parties. The crucial distinction here is between, on the one hand, the ICC's jurisdiction over Al Bashir, and on the other, the jurisdiction of states parties that are requested to arrest Al Bashir. While the former concerns a facet of jurisdiction that is commonly described as 'adjudicatory', the latter is an iteration of the 'jurisdiction to enforce'. The inapplicability of the international rules on immunities in relation to the ICC's adjudicatory jurisdiction, which is regulated by article 27(2) of the Rome Statute, does not imply that the rules on immunity are equally inapplicable before national jurisdictions with respect to their enforcement powers in matters of an arrest warrant.

These technical legal distinctions become clearer when the rationale of article 98(1) is explained. This provision aims to prevent the ICC from obliging states parties to violate their international obligations vis- à- vis States not parties to the Rome Statute. Under article 98(1), the Court may not issue a request for judicial cooperation, such as a request to execute an arrest warrant, to States parties without a prior waiver of immunities from the relevant non-party State, so long as executing the warrant would require violating the international immunities of the non- member state. This is a significant limitation of the ICC's jurisdictional powers, but it must be highlighted that the regime established by article 98(1)

applies only with respect to States not parties to the Rome Statute: an immunity waiver is a condition for executing a request for surrender only when the requested State party is internationally obliged to respect the immunities of states *not parties* to the Rome Statute. By contrast, a waiver is not necessary between the requested State party and other ICC States parties.

I acknowledge that one counter-argument is to claim that it would be illogical for the ICC to be able to exercise jurisdiction over individuals entitled to personal immunities if domestic authorities then remain bound by the rules of customary international law on personal immunities (in respect of States not parties) when trying to surrender the same individuals to the Court. But this argument misses the point. Once issued, an arrest warrant produces autonomous legal effects and constitutes the legal basis upon which a State may deprive a person of his/her own liberty. This is different from an ICC's request to a State party to execute the arrest warrant. Under the Rome Statute, a State party cannot be compelled to execute an arrest warrant which would bring it to violate the international immunities a State not party. Arguably, however, the ICC could *invite* a State party to execute the arrest warrant and that State could decide to comply with such invitation (or can even do so on its own initiative), disregarding the personal immunities of the foreign state official in order to surrender him or her to the ICC. However, in doing so, the State would commit an internationally wrongful act vis-à-vis the State not party and this act may engage its responsibility under international law. It bears emphasizing, however, that such a wrongful act under international law does not restrict the ICC's adjudicatory jurisdiction over that person. The ICC may lawfully exercise jurisdiction over an individual so long as he or she was transferred to the Court, irrespective of whether the person's surrender was in accordance with or in violation of the international law on personal immunities. The last point illustrates the difference between adjudicatory and enforcement jurisdiction, two autonomous concepts that are often conflated by scholars who argue that, because the ICC may try Al Bashir, he may also be arrested pursuant to the ICC's arrest warrants against him.

#### **IV. Conclusion**

In light of the above, I respectfully submit that the ICC should accept the appeal by Jordan. President Al Bashir, as the incumbent Sudanese Head of State, enjoys personal immunities from arrest (i.e. inviolability) under international law vis- à- vis all States, including States

parties to the Rome Statute. The Security Council's resolution 1593 (2005) has not modified this legal framework. The request to State parties to execute the arrest warrant against President Al- Bashir is thus not in conformity with Art. 98(1). States parties to the Rome Statute are therefore not obliged to execute the ICC request. Nonetheless the ICC could *invite* States parties to execute the arrest warrant: States parties would then be free to decide whether to comply with this invitation and not to respect the international immunities accruing to President Al –Bashir.



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Professor Paola Gaeta

Dated this 18 June 2018

At Geneva, Switzerland