Cour Pénale Internationale

International Criminal Court

Original: **English**

No.: **ICC-02/05-01/09 OA2**
Date: **28 September 2018**

**APPEALS CHAMBER**

**Before:** **Judge Chile Eboe-Osuji, Presiding**
**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**

**Supplementary African Union Submission 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" with Annex 1, Annex 2, Annex 3, Annex 4 and Annex 5**

**Source:** **African Union Commission**

**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

**Counsel for the Defence**

**Legal Representatives of the Victims**

**Legal Representatives of the Applicants**

**Unrepresented Victims**

**Unrepresented Applicants (Participation/Reparation)**

**Office of Public Counsel for Victims**

**Office of Public Counsel for Defence**

**States' Representatives**
Competent Authorities of the Hashemite Kingdom of Jordan

Competent Authorities of the Other States Parties to the Rome Statute

---

**Registrar**
Mr Peter Lewis

**Counsel Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations Section**

**Other**
*Amici Curiae*

## I. Introduction

1. On 14 September 2018, at the conclusion of the oral hearings in the appeal of Jordan against a finding of non-cooperation, the Appeals Chamber invited the participants to provide further written submissions of no more than ten pages on any issue that "has not been submitted upon either in writing or orally that [is] important enough"[1] to provide submission on. This brief submission is in response to the invitation by the Chamber.

2. The oral hearings seemed to indicate that the outcome of this Appeal will turn on two issues. First, the meaning of Article 27(2) and whether it applies horizontally in the relations between States. Second, the legal effect of UNSC Resolution 1593 by which the Security Council referred the Darfur Situation to the ICC.

3. Before addressing the substantive issues, the AU wishes to re-address a policy issue which seems to lie at the heart of the interpretation of the legal framework by the Office of the Prosecutor (OTP).[2] This is that the Court's jurisdictional reach would be undermined by the AU interpretation.

4. In fact, the opposite is true. The interpretation preferred by the OTP is that advanced by Pre-Trial Chamber (PTC) II in the *South Africa* and *Jordan* decisions.[3] But those decisions, far from enhancing the jurisdictional reach of the Court, constrain it since they limit the application of Article 27 concerning

[1] "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'" Transcript, 14 September 2018, ICC-02/05-01/09-T-8-ENG ET WT 14-09-2018 1/109 SZ PT OA2, p. 2, lines 10-15.

[2] See, e.g. *id.*, Transcript, 11 September 2018, ICC-02/05-01/09-T-8-ENG ET WT 11-09-2018 1/109 SZ PT OA2, p. 137, lines 16-20 and p. 138, lines 1-5.

[3] *Prosecutor v. Omar Hassan Ahmad Al Bashir*, "Decision under Article 87(7) of the Rome Statute on the Compliance with the Request by the Court for the Arrest and Surrender of Omar Al Bashir", 6 July 2017, ICC-02/05-01/09-302 (hereinafter the "*South Africa* decision"); *Prosecutor v. Omar Hassan Ahmed 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 or [sic] Omar Al-Bashir", 11 December 2017, ICC-02/05-01/09-309, p. 21 (hereinafter the "*Jordan* decision").

immunity *before the ICC* to officials of States Parties.[4] Thus, other than in the rare circumstances of UNSC referrals, the Court would be completely barred from exercising its jurisdiction over officials of States that are not Party to the Rome Statute.[5] It is the AU position, which consistent with the object and purpose of the treaty, adopts a broader interpretation of Article 27 excluding immunities for all individuals *before the ICC* irrespective whether the official is from a State that is a party or not to the Rome Statute .[6]

## II. The Meaning of Article 27(2) of the ICC Statute in Relation to Cooperation

5. As we have argued, the ordinary meaning of Article 27(2) does not support the horizontal application advanced by the OTP and PTC II. Article 27(2) provides that immunities "shall not bar *the Court* from exercising its jurisdiction over [a] *person*" (emphasis added). On its terms, it is only about "the Court" and an accused ("the person"). The AU has argued in oral hearings that the words "*under national* or international law", do not affect this ordinary meaning and that they merely confirm that immunities under national law may also not be pleaded before the ICC.

6. The interpretation proffered by the OTP seeks to circumvent the circumscriptive qualifiers in both Article 27 (bar *the Court*) and Article 98

[4] See, e.g. *South Africa* decision (n 4), para. 76. See for a detailed exposition of the position, the *Prosecutor v. Omar Hassan Ahmad Al Bashir*, "Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court", 9 April 2014, ICC-02/05-01/09-195 (hereinafter the "*DRC* decision"), paras. 26-27 ("Given that the Statute is a multilateral treaty … [it] cannot impose obligations on third States without their consent. Thus the exception to the exercise of the Court's provided for in Article 27 should, in principle, be confined to' States Parties ….when the exercise of jurisdiction by the Court entails the prosecution of a Head of State of a non-State Party, the question of personal immunities might validly arise.")

[5] In D Tladi "Of Heroes and Villains, Angels and Demons: The ICC-AU Tensions Revisited" (2017) *German Yearbook of International Law* (advance pre-publication), at p 21, this approach is described in the following terms: "In its eagerness to 'get Bashir', the ICC decisions in DRC and South Africa both unduly and without any justification restrict the ordinary meaning of Article 27 Rome Statute."

[6] The African Union's Submission 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'", paras. 17-18.

(unless the Court can first obtain […] waiver) by reading into those provisions what is not there.

7. While the ordinary meaning was discussed at length during the oral hearings, the AU seeks to respond to novel arguments about context and object and purpose. First, context is meant to direct the interpreter to a number of factors, other than the ordinary meaning, that can be used to give meaning to the terms of the treaty.[7] These factors include wording of surrounding provisions and headings.[8]

8. The duty on States to cooperate in the arrest and surrender is contained in Part 9 and is qualified by Article 98. It is Part 9 that is concerned with State cooperation and the duties in Part 9 are all qualified by Article 98. Article 27, on the other hand, is contained in Part 3 concerned with the relationship between the accused and the Court. Not only is this consistent with the ordinary language but is confirmed by "wording of surrounding provisions"[9] and the "headings".[10]

9. Context requires reading the Statute as a whole. This does not, however, mean that provisions in one part be read into other parts. Context requires the interpreter to understand where different provisions fit in, in the construction of the treaty. In this case, it requires an understanding that Article 27 must be understood in the context of Part 3, where it finds itself and not Part 9, which is the subject of an exception in Article 98.

10. As described in paragraphs 3 to 4 of these submissions, the object and purpose of the Rome Statute, in the overall scheme, is better served by the AU

[7] R Gardiner *Treaty Interpretation* (OUP, 2015), 197.
[8] *Ibid*.
[9] The language in the provisions in Part 9 all relate to obligations of the State while the language of the provisions in Part 3 all concern rules applicable to the accused before the ICC.
[10] Part 3, in which Article 27(2) is found in the Part is titled "General Principles of Criminal Law".

interpretation of Article 27(2) which does not unduly restrict the vertical application of Article 27(2) to officials of States Parties.

11. Not much attention has been paid to Article 31(3)(c) of the Vienna Convention, which requires that rules of customary international law, including those on immunities, be taken into account in the interpretation of the Rome Statute. Thus, an interpretation that is consistent with customary international law should be preferred. It is trite that customary international law knows no exception to immunity of heads of state.[11] The interpretation advanced by the AU is fully consistent with the rules of customary international law.

12. In relation to the customary international law arguments, Presiding Judge Eboe-Osuji, on various occasions, referred to a dictum from Judge Al-Khasawneh's dissent in the *Arrest Warrant case*.[12] First, the position expressed by Judge Al-Khasawneh was a dissent and thus did not constitute law. Second, the majority view was subsequently reaffirmed by the ICJ. Third, States have consistently accepted the majority decision such that the dissent could not have subsequently become law.

13. In the light of the above, it is the AU's submission that Article 27(2) only removes immunities before international courts to exercise its jurisdiction, thus leaving the application of Article 98 intact in relation to Mr Al Bashir.

## III. Questions concerning the Legal Effect(s) of UNSC Resolution 1593

14. Two sets of Council related questions arose during the oral hearings concerning Jordan's appeal. First, the possible legal effects of Resolution 1593 which, having

[11] This rule is virtually uncontested. See, e.g., Joanne Foakes *The Position of Heads of State and Senior Officials in International Law* (2014), at 81. In these proceedings, only Mr Kreß argued otherwise in relation to persons sought by an international criminal tribunal. Even the OTP did not go as far, suggesting only that there is no law. The authority advanced by Mr Kreß concerned immunity before international criminal tribunals themselves.

[12] See, e.g. Transcript, 10 September 2018, ICC-02/05-01/09-T-8-ENG ET WT 10-09-2018 1/109 SZ PT OA2, p. 87, lines 5-10.

been adopted under Chapter VII of the UN Charter, required the "Government of Sudan" and all other parties to the conflict in Sudan "to cooperate fully" with the ICC while only "urging" all other States to do so.[13]

15. Second, whether in the interpretation of Resolution 1593, by which the Council referred the Situation in Darfur to the ICC, a distinction could be drawn between the coercive effects of Chapter VII vis-à-vis the "culprit State or entity" (presumably in the context of this case Sudan) and the mandatory effects for all other UN Member States (presumably Jordan).[14]

16. All these questions, which were highly contentious during the oral hearings, are germane to the resolution of this appeal. For this reason, the AU considers it prudent to offer additional observations to supplement our prior written and oral submissions. It is hoped that they will be of assistance to the Appeals Chamber deliberations in this case.

## IV. A proper interpretation of UNSC Resolution 1593 indicates that only Sudan is legally obligated to cooperate with the ICC

17. In our earlier written submission, the AU explained the proper interpretation of Council Resolution 1593. First, the AU demonstrated that the ordinary language, context, object and purpose as well as drafting history of Resolution 1593, all make clear that the resolution does not expressly or implicitly waive the immunities of Sudan.[15] This thereby continues to redound to the benefit of President Al Bashir, unless the ICC can first secure a waiver in accordance with the plain text of Article 98(1) of the Rome Statute.[16] The AU continues to stand by that submission. This is because of our view, also reiterated during the oral

[13] See, for example, Transcript, 12 September 2018, ICC-02/05-01/09-T-8-ENG ET WT 12-09-2018 1/109 SZ PT OA2, p. 72, lines 18-22 and p. 145, lines 19-45.
[14] *Id*., p. 19, lines 1-11.
[15] The African Union's Submission 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'", paras. 44-55.
[16] *Id*. at para. 44.

hearings, that Article 27 only applies in respect of individuals who are subject to the proceedings before the ICC itself. Indeed, as we clarified, any person before the Court is not entitled to invoke, or even if they do invoke, would not benefit from any immunities because of the obvious language contained in Article 27 which renders both immunities and official capacity irrelevant for the purposes of jurisdiction of the Court.

18. Second, the AU demonstrated that Resolution 1593 does not turn Sudan into a State Party or something analogous to one since the effect of Article 13(b) is to merely trigger the exercise of the ICC's jurisdiction in a situation where it would not otherwise exist. The duty to cooperate, in that referral decision of the Council which is binding on Sudan as per Article 25 of the United Nations Charter, extends only to the Government of Sudan and all other parties to the conflict in Darfur. It does not, by the ordinary terms of the resolution itself, extend to States not party to the Rome Statute which "have no obligation under the Statute".

19. Though the idea of referred States bearing analogous obligations, under the Rome Statute, has been advanced by the ICC Pre-Trial Chamber and endorsed by the OTP, this concept finds no basis in established treaty law. Indeed, rather than invent a whole new third category of analogous State Parties to treaties, it was common place among the parties during the oral hearings, that under both treaty and customary international law, a treaty does not create either obligations or rights for third states without their consent. This fundamental rule reflecting the consensual nature of international law, also codified in the VCLT, continues to remain relevant. It should not, in line with ICJ case law, be brushed under the carpet.

20. Returning now to the specific question mentioned at paragraph 15. It is true that the Council, after having determined that the situation in Darfur fell within the parameters of Chapter VII, decided that the Government of Sudan and all other parties to the conflict "shall cooperate fully with and provide any necessary

assistance to the Court and the Prosecutor" pursuant to Resolution 1593. That duty, to cooperate fully, means that Sudan is, by the terms of that resolution, to cooperate with the ICC in accordance with Article 86 of the Rome Statute. That decision is binding on Sudan under Article 25 of the UN Charter. And, to the extent that there are conflicting obligations under any other international agreements to which Sudan is a party or with a binding decision of the Council, Article 103 would resolve that in favour of primacy of the obligations under the UN Charter.

21. The situation differs markedly from the use of the Chapter VII power to establish the ICTY and the ICTR. Those were subsidiary bodies created pursuant to resolutions constituting binding decisions to which were annexed statutes that contained Articles (7)2 and 6(2), which rendered any official capacity of the leaders of the former Yugoslavia and Rwanda irrelevant to the prosecution by those courts. This is because, in those contexts, the duty to cooperate fully in relation to those two situations included the possible arrest and surrender of persons by other states was obligatory for all UN Member States under Articles 29 and 28. That is not the case in relation to Jordan vis-à-vis Sudan.

22. Moreover, in relation to the language of "urging", which was also raised several times during the oral hearings, the AU submits that operative paragraph 2 was clear that all States and concerned regional and other international organizations were encouraged – not obligated – to also "cooperate fully."[17] Besides Sudan, this means that paragraph 2 imposes no obligation on any other State in relation to the Darfur referral. It follows that States, such as Jordan, must - in line with Article 98(1) of the Rome Statute - respect its customary international law obligations owed to other states such as Sudan.[18] The hortatory language of urging as opposed to the binding language of deciding makes clear that this is a

[17] See S/RES/1593, 31 March 2005.
[18] See *Id*.; Jordan Appeal, para. 81.

recommendation which has no binding effect on other States not parties to the Rome Statute, even if that language is included in a Chapter VII resolution. Consequently, the decision cannot be said to possess the same legal effects on other UN Member States as it does on Sudan. This is because the latter, not the former, were legally required to cooperate with the ICC under the plain terms of Resolution 1593.

23. As to the second question, regarding the mandatory versus coercive effects of Chapter VII decisions, the AU agrees with the response of Jordan and Professor O'Keefe in this respect.[19] An additional point worth raising relates to the *Tadic*[20] Appeals Chamber decision which analyzed that issue in considerable depth. That decision noted that once the Council determines that a particular situation poses a threat to the peace, as it did in relation to Sudan, it necessarily enjoys a wide margin of discretion in choosing a corrective course of action. It could either continue, in spite of its determination, to act via recommendations, i.e., as if it were still within Chapter VI ("Pacific Settlement of Disputes") or it can exercise its exceptional powers under Chapter VII. In the words of Article 39, it would then "decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security." (United Nations Charter, Article 39.)

24. The question that would then arise is whether the choice of the Council is limited to the measures provided for in Articles 41 and 42 of the Charter (as the language of Article 39 implies), or whether it has even wider discretion in the form of general powers to maintain and restore international peace and security under Chapter VII at large.

[19] See, for example, Transcript, 12 September 2018, ICC-02/05-01/09-T-8-ENG ET WT 12-09-2018 1/109 SZ PT OA2, p. 74, lines 12-25 and p. 75, lines 1-5; p. 76 lines 1-25.
[20] Prosecutor v. Tadic, *Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*, 2 October 1995, paras. 28-31.

25. In our respectful submission, in the context of the Darfur referral, the Council would have been limited to the specific measures listed in Articles 41 and 42 of the UN Charter. This is because, under Article 41, it could decide the measures not involving the use of armed force that are to be employed to give effect to its decision to refer the Darfur situation to the ICC. It could have also called upon UN Member States to apply such a measure. Again, based on a plain reading of the text of Resolution 1593, the Council did not choose to impose any legally binding decisions on all UN Member States in relation to the Darfur referral. It only imposed a decision to fully cooperate on Sudan, in paragraph 2, while excluding similar effects on all other States. Further, in relation to Article 42, since the Darfur referral in March 2005, it remains the case that additional measures could have been taken by the Council to maintain or restore peace and security to the extent that it considered that the measures it initially provided for would be inadequate or had proved to be so. Still, it simply has not done so whether generally or in relation to the duty to arrest despite immunities specifically.

26. Overall then, as the ICTY Appeals Chamber has explained, the exercise of the Council's Chapter VII powers can be said to be coercive *vis-à-vis* the Sudan as a consequence of the referral decision taken under the UN Charter. That said, the exercise of the Council's powers in those circumstances could, where this is so specified, also be mandatory *vis-à-vis* the other Member States. The latter would be under an obligation to cooperate with the UN as per Article 2(5), Articles 25 and 48 of the UN Charter and with one another (Articles 49), in the implementation of the action or measures decided by the Council. Again, this is clearly not the case under Resolution 1593 in relation to which all other states were merely addressees of "recommendations" rather than binding "decisions" of the Council that would then attract Article 25 and 103 consequences. That the ICJ found, in the *Namibia Advisory Opinion*, decisions of the Council need not be

taken under Chapter VII to be binding does not undermine this conclusion.[21] This is because, as the ICJ clarified, the language of the resolution being interpreted must be carefully analysed, along with the discussions leading to it, the Charter provisions invoked and, in general, all circumstances that might assist in determining its legal consequences.[22] All those factors point to the opposite conclusion here: i.e. the intent to only bind Sudan in Resolution 1593 rather than all UN Member States.

## V. Conclusion

27. For all the above reasons, and the observations submitted during the oral hearings and in its previous written submission, the AU considers that the PTC erred in its interpretation of the applicable law and urges the Appeals Chamber to grant Jordan's appeal.

*Respectfully Submitted,*

Ambassador Dr. Namira Negm
Legal Counsel
African Union Commission

Prof. Dr. Charles Jalloh
External Counsel
African Union Commission

Prof. Dr. Dire Tladi
External Counsel
African Union Commission

Dated this 28th day of September 2018
At Addis Ababa, Ethiopia

[21] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, I.C.J. Reports 1971, p. 16 at para. 113.
[22] Id. at para. 114.