



Original: English

No. ICC-02/05-01/09 OA2

Date: 26 April 2018

**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**

**Request by Professors Robinson, Cryer, deGuzman,  
Lafontaine, Oosterveld, Stahn and Vasiliev  
for Leave to Submit Observations**

**Source:** Professor Darryl Robinson, Queen's University  
Professor Robert Cryer, Birmingham School of Law  
Professor Margaret deGuzman, Temple University  
Professor Fannie Lafontaine, Laval University  
Professor Valerie Oosterveld, Western University  
Professor Carsten Stahn, Leiden University  
Professor Sergey Vasiliev, Leiden University

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  
Ms Helen Brady

**Counsel for the Defence**

**Legal Representatives of the Victims**

**The Office of Public Counsel for Victims**

**States Representatives**

Competent authorities of the Hashemite  
Kingdom of Jordan

**Legal Representatives of the Applicants**

**The Office of Public Counsel for Defence**

**Amicus Curiae**

**REGISTRY**

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**Registrar**

Mr Peter Lewis

**Counsel Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victim Participation and Reparations  
Section**

**Other**

## **Introduction**

1. The Applicants – Professors Darryl Robinson, Robert Cryer, Margaret deGuzman, Fannie Lafontaine, Valerie Oosterveld, Carsten Stahn, and Sergey Vasiliev – request leave to submit *amici curiae* observations, pursuant to the Appeals Chamber’s order of 29 March 2018.<sup>1</sup> The Applicants request leave to submit observations on the merits of the legal questions arising in the appeal of the Hashemite Kingdom of Jordan against the decision of Pre-Trial Chamber II on non-compliance with the Court’s request for arrest and surrender of Omar Al-Bashir.<sup>2</sup>

## **Summary of Initial Observations and Conclusions**

2. The Applicants acknowledge that there are many competing views and counter-arguments on these issues, and that all possible positions on this matter are subject to plausible criticisms. The Applicants consider the interpretation adopted by the Pre-Trial Chamber to be the most convincing reconciliation of the provisions of the Statute (including articles 27, 86 and 98), the customary international law immunity of heads of state, and the powers of the UN Security Council (UNSC).
3. The Applicants do not propose to repeat the arguments of the Pre-Trial Chamber. Instead, the Applicants propose to assist the Appeals Chamber, as *amici curiae*:
  - a) by highlighting the strengths and weaknesses of the major competing theories; and
  - b) by identifying possible legal avenues to acknowledge sincerely-held differences and to accommodate legitimate concerns in this matter.

### **(a) Evaluation of competing theories**

4. The proliferation of firmly-held legal views, which diverge at so many junctures, has created a legal labyrinth on head of state immunity under a Security Council referral. Many arguments are (at least initially) plausible, and reflect legitimate underlying concerns. A careful evaluation of the major criticisms and competing theories will aid the Chamber in assessing these issues. Furthermore, the Applicants’ examination of the main viewpoints will put the Appeals Chamber in the

<sup>1</sup> ‘Order inviting expressions of interest as amici curiae in judicial proceedings (pursuant to rule 103 of the Rules of Procedure and Evidence)’, ICC-02/05-01/09 OA2, 29 March 2018.

<sup>2</sup> ‘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”’, ICC-02/05-01/09-326, 12 March 2018.

best position to address convincingly the major counterpoints in its reasons, whatever it may decide.

5. The Applicants will argue that the Pre-Trial Chamber's analysis is superior to previous approaches adopted in jurisprudence. The Applicants will survey and assess the major criticisms and counter-arguments: (a) that 'cooperate fully' is limited to the cooperation obligations in Part 9 and excludes other cooperation obligations in the Statute; (b) that a UNSC order imposing such obligations violates the *pacta tertiis* principle; (c) that the UNSC cannot override customary law; (d) that the UNSC must specifically and explicitly refer to immunities; and (e) that Article 27 applies only at the Court and not to arrest and surrender requested by the Court. The Applicants will note the merits and deficiencies of each of these arguments, and offer precedents where appropriate.
  
6. The following summary of conclusions cannot adequately reflect the nuances of other views, but in the broadest outlines the anticipated conclusions are as follows: Under current international law, the Security Council can order cooperation with other bodies and can override customary law. While the term 'cooperate fully' is debated, there is not yet an available plausible alternative interpretation other than cooperating in relation to that situation on the same terms and conditions as would be required of a state party. The obligation to cooperate 'fully' includes the cooperation obligations appearing throughout the Statute, as otherwise, untenable incongruities would follow. Article 27(2) is amenable to different readings, but a careful textual and contextual reading shows its 'horizontal' effect. The Security Council has previously used the very same term, 'cooperate fully', to oblige states to comply with tribunal statutes that remove personal immunities.

**(b) Avenues to acknowledge sincere differences and to accommodate legitimate concerns**

7. The Applicants will recommend that, whatever the Appeals Chamber decides, it should acknowledge the sincerely-held differences and legitimate underlying concerns at stake.
  
8. Acknowledging the sincere and good faith controversy, the Applicants will observe that there are grounds not to refer Jordan to the Security Council and the Assembly

of States Parties. The decision to refer Jordan, which is separate from the immunity issue, is arguably attenuated by errors of fact and law. These include the grounds on which Jordan's situation was distinguished from South Africa's, and a failure to consider other mitigating factors. The Appeals Chamber's contribution on this matter can be clarificatory and forward-looking rather than retrospective.

9. Furthermore, the Applicants would also point out some legal avenues by which the Appeals Chamber might wish to consider accommodating competing legitimate concerns. Even if the ICC has the legal power to insist on the arrest of a current head of state, consideration could be given to mechanisms that balance other shared community interests, such as maintaining high-level meetings of intergovernmental organizations and peace processes.

### **Expertise**

10. All of the Applicants are professors of international law who have taught, researched, and written extensively on international law and international criminal law. Collectively they have valuable expertise on the diverse facets of the issues in this appeal.
11. Darryl Robinson is a professor at Queen's University, Faculty of Law, Canada. He served as a legal officer on international law at Foreign Affairs Canada, as a Canadian delegate at the Rome Conference, and as an advisor in the Office of the Prosecutor of the ICC. He has written on many international criminal law topics, including immunities and Security Council referrals.
12. Robert Cryer is a professor of international and criminal law at Birmingham Law School, UK. He is the author of several books and numerous articles on international criminal justice and international law, including on Resolution 1593 and the interplay of the Security Council and the ICC.
13. Margaret deGuzman is a professor at Temple University's Beasley School of Law, USA. Her research and writings examine, inter alia, the legitimacy of the ICC and the Court's role in the global legal order. She served as legal advisor to the Senegal delegation at the Rome Conference, and worked in the ICTY Office of the Prosecutor.

14. Fannie Lafontaine is a professor at Université Laval, Faculté de Droit, Canada. She is the Canada Research Chair on international criminal justice and human rights, and the Director of the Canadian Partnership on International Justice. She previously worked at the Office of the UN High Commissioner for Human Rights and on the International Commission of Inquiry on Darfur. Her research examines, inter alia, the interaction of domestic and international law in international criminal law.
15. Valerie Oosterveld is a professor at Western University, Faculty of Law, Canada. She previously worked at Foreign Affairs Canada as a legal officer, and served on the Canadian delegation to the Rome Conference, Assembly of States Parties, and the Review Conference in Kampala. Her publications include a textbook on public international law and numerous articles on gender in international criminal law.
16. Carsten Stahn is Professor of International Criminal Law and Global Justice at the Leiden Law School. He previously served as a Legal Officer in the chambers of the ICC. He has published widely on the law and practice of the International Criminal Court and United Nations law and is author of a forthcoming CUP textbook on international criminal law.
17. Sergey Vasiliev is an Assistant Professor at Leiden University, Netherlands. He has published on international and comparative criminal law and procedure, including on the topics of fairness, legitimacy of international tribunals, state cooperation, and cross-judicial communication.



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Darryl Robinson  
Queen's University, Faculty of Law, Canada

Dated this 26<sup>th</sup> day of April 2018  
At Kingston, Canada