

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

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

Amicus curiae observations submitted by Prof. Flavia Lattanzi 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: Prof. Flavia Lattanzi
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Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

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Victims**

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Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

1. On 30 April 2018, Prof. Flavia Lattanzi, assisted by Prof. Mirko Sossai and Dr. Alice Riccardi, with the support of Ms. Flavia Pacella and Ms. Laura Di Gianfrancesco, sought leave to submit observations as *amicus curiae* pursuant to the Appeals Chamber's order of 29 March 2018. The present observations are filed pursuant to the Appeals Chamber's decision of 21 May 2018 granting Prof. Flavia Lattanzi's request.

A. Jordan's submissions regarding President Al-Bashir's immunity are incorrect

2. It is firmly established in international law that the immunity from foreign criminal jurisdiction enjoyed by Heads of State is based on customary law, including when they participate as delegates to meetings of international organizations.¹ The 1953 Convention on the Privileges and Immunities of the Arab League (hereinafter 1953 Convention) is no exception to this: following an approach common to treaties regulating privileges and immunities of States' representatives to international organizations,² the 1953 Convention is silent on the position of Heads of State. It thereby leaves to customary law the identification of their appropriate level of treatment.³

3. It is also steadfastly established that customary rules on Head of States' immunities, far from conferring individual rights, only create inter-State relations.⁴ The legal question regarding the immunity from criminal jurisdiction of President Al-Bashir when he visited the Hashemite Kingdom of Jordan (hereinafter Jordan), thus, was one concerning a right of Sudan *vis-à-vis* other States. Therefore, Jordan erred in

¹ ILC, 'Draft articles on the Representation of States in their Relations with International Organizations with commentaries' in (1971) II (Part One) *Yearbook of the International Law Commission* 284, 315 whereby "Heads of State ... who become delegates retain the facilities, privileges and immunities accorded to them by international law."

² Cf *inter alia*: Convention on the Privileges and Immunities of the United Nations (13 February 1946) 1 UNTS 15; General Agreement on Privileges and Immunities of the Council of Europe (2 September 1949) ETS No. 002; General Convention on the privileges and immunities of the Organization of African Unity (25 October 1965) 1000 UNTS 393; Convention on the privileges and immunities of the Agency for the Prohibition of Nuclear Weapons in Latin America (8 September 1969) 1081 UNTS 195; Agreement on the legal capacity, privileges and immunities of the INTERSPUTNIK International Organization of Space Communications (20 September 1976) 1389 UNTS 83; General Convention on privileges and immunities of the Economic Community of West African States (22 April 1978) 1906 UNTS.

³ Cf ICJ, *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* (Judgment) [2002] ICJ Rep 3 (hereinafter ICJ *Arrest Warrant*) para 52.

⁴ ILC, 'Preliminary report on immunity of State officials from foreign criminal jurisdiction, by Roman Anatolevich Kolodkin, Special Rapporteur' UN Doc. A/CN.4/601 (29 May 2008) 175 para 69.

law when it equated Al-Bashir's immunity to fundamental human rights.⁵ This is confirmed by solid international practice: although essential in protecting the *ius representationis omnimodae* of Heads of State, immunity can be waived, *ad hoc* and unilaterally, by the relevant State⁶ or derogated by treaty, including by treaties creating international jurisdictions.⁷ Furthermore, immunity from jurisdiction with respect to crimes under international law has also been derogated by the United Nations (hereinafter UN) Security Council (hereinafter UNSC) through decisions adopted under Chapter VII of the UN Charter.⁸ This practice shows that States are willing to derogate to their officials' immunity with the aim of ending impunity for egregious crimes of international concern, whoever the perpetrator.⁹

4. Consistent with this framework, Article 27 of the Rome Statute represents a treaty derogation to the immunities enjoyed by Heads of State.¹⁰ Such provision binds, without exceptions, (i) States Parties to the Rome Statute, (ii) non-Parties States that accepted *ad hoc* the Court's jurisdiction as well as – crucially – (iii) non-Parties States on whose territory a situation in which one or more crimes appear to have been committed is referred to the Court by a decision of the UNSC, as follows.

⁵ *Prosecutor v Al Bashir*, 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) (hereinafter Jordan's appeal) para 70.

⁶ See: ILC, 'Third report on immunity of State officials from foreign criminal jurisdiction' UN Doc. A/CN.4/646 (24 May 2011) paras 32 ff; Institute of International Law, 'Resolution on Immunities from Jurisdiction and Execution of Heads of State and of Government in International Law' (Session of Vancouver, 2001) (26 August 2001) (hereinafter IIL Resolution) art 7.

⁷ Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and the Charter of the International Military Tribunal (8 August 1945) arts 1, 7; Convention on the Prevention and Punishment of the Crime of Genocide (9 December 1948) 78 UNTS 277 arts IV, VI; International Convention on the Suppression and Punishment of the Crime of Apartheid (30 November 1973) 1015 UNTS 243 arts III, V; crucially, Rome Statute art 27. Cf ICJ *Arrest Warrant* paras 58, 60-61.

⁸ UNSC, Resolution S/RES/827 (25 May 1993); UNSC, Resolution S/RES/955 (8 November 1994); UNSC, S/RES/1966 (22 December 2010).

⁹ ICJ *Arrest Warrant* para 61; *Prosecutor v Charles Taylor*, Decision on Immunity from Jurisdiction (31 May 2004) SCSL-2003-01-1 para 53; Supreme Court of Sierra Leone, Case No. S.C. No. 1/2003 (14 October 2005); United Kingdom House of Lords, *Regina v Bartle and the Commissioner of Police for the Metropolis and others Ex parte Pinochet* [25 November 1998] in (1998) 37 International Legal Materials 6, 1302. See also: ILC, 'Fifth report on immunity of State officials from foreign criminal jurisdiction, by Concepción Escobar Hernández, Special Rapporteur' UN Doc. A/CN.4/701 (14 June 2016) (hereinafter ILC, Fifth report) paras 215-216; IIL Resolution art 8.

¹⁰ The present observations do not dwell on the question whether a customary exception to immunities with respect to crimes under international law has emerged. Cf ILC, Fifth report paras 181 ff.

B. Jordan erred in its submissions regarding the effects of UNSC Res. 1593 (2005)

5. The normative effect of UNSC Res. 1593 (2005) is to create – by virtue of Article 25 UN Charter – new obligations binding upon Sudan, a UN member State, with respect to the investigation and prosecution by the Court of crimes of international concern committed in Darfur. Such conclusion is a direct – and inevitable – consequence of the mechanism used by States to confer jurisdiction to the Court. Indeed, the Court’s jurisdiction is founded on the delegation of powers by States. Such delegation is direct when States ratify the Rome Statute; whereas it is indirect when the UNSC refers a situation occurring in the territory of a non-Party State, in exercising its powers conferred to it by the UN member States under Chapter VII.¹¹ The Rome Statute did not add to such powers; rather, it merely recognized that the UNSC could take all the necessary measures to maintain international peace and security. The *travaux préparatoires* of the Statute unequivocally show that, since the very beginning of the work of the International Law Commission, UNSC referrals were understood as a substitute for States’ conferred jurisdiction,¹² being an alternative judicial instrument at the UNSC disposal to the setting up of *ad hoc* tribunals.¹³ It goes without saying that the UNSC refers a situation to the Prosecutor and not a single case: the UNSC is not concerned with “the destiny of the individuals”,¹⁴ as the procedure under Article 53 of the Rome Statute makes clear.

6. The *chapeau* of Article 13 of the Rome Statute makes it apparent that, when situations are referred by the UNSC, the Court exercises its jurisdiction on all

¹¹ Flavia Lattanzi, ‘The Rome Statute and State Sovereignty. ICC Competence, Jurisdictional Links, Trigger Mechanism’ in Flavia Lattanzi, William Schabas (eds) *Essays on the Rome Statute of the International Criminal Court* (vol 1, 1999) 51, 60 ff. See also: Madeline Morris, ‘High Crimes and Misconceptions: The ICC and Non-party States’ (2001) 64 *Law and Contemporary Problems* 13; Shlomit Wallerstein, ‘Delegation of Powers and Authority in International Criminal Law’ (2015) 9 *Criminal Law and Philosophy* 123.

¹² See ILC, ‘Summary Records of the 2330th Meeting’ in (1994) I *Yearbook of the International Law Commission* 9.

¹³ Cf ILC, ‘Commentary to the Draft Statute for an International Criminal Court’ in (1994) II (Part Two) *Yearbook of the International Law Commission* 44; moreover, see the opinions expressed by Francisco Villagran Kramer, Christian Tomuschat and James Crawford in ILC, ‘Summary Records of the 2360th Meeting’ in (1994) I *Yearbook of the International Law Commission* 214-221.

¹⁴ Luigi Condorelli, Santiago Villalpando, ‘Referral and Deferral by the Security Council’ in Antonio Cassese, Paola Gaeta, John Jones (eds) *The Rome Statute of the International Criminal Court: A Commentary* (vol 1, 2002) 627, 632.

individual cases “in accordance with the Statute” in the same way as for situations referred by States Parties as well as for investigations opened *proprio motu* by the Prosecutor. A confirmation of this can be found in Article 53, which does not provide for any specific procedure in relation to the different mechanisms triggering the Court’s jurisdiction. The very wording of Res. 1593 (2005) validates this conclusion. Already the Preamble itself situates Res. 1593 (2005) within the framework of the Statute.¹⁵ In particular, the ordinary meaning to be given to the expression “cooperate fully” at para. 2 – when read in the context of the decision as a whole and in the light of its object and purpose – leads to conclude that Res. 1593 (2005) incorporates and extends to Sudan all the obligations under the Rome Statute that are necessary for the effective investigation and prosecution of the crimes under the Court’s jurisdiction, including the provision in Article 27, as well as the cooperation framework established by the Statute under Part IX, where the same expression is resorted to.¹⁶ This cooperation framework cannot be parcelled: Articles 86 and 89 are unquestionably functional to the exercise by the Court of its jurisdictional functions, particularly so as trials *in absentia* are not allowed.¹⁷ The strict link between the Court’s investigation and prosecution functions on one side, and the functions exercised by the Court under Part IX on the other, is also apparent from the wording of Article 86¹⁸ as well as from the content of Article 87, notably its para. 7.¹⁹

7. The incorporation of the relevant provisions of the Rome Statute in a UNSC referral decision is the result of the well-known legal technique of *renvoi* used in the relations between different *corpora iuris* within the same legal system or between

¹⁵ UNSC, S/RES/1593 (2005) Preamble, paras 2-4.

¹⁶ Dapo Akande, ‘The Effect of Security Council Resolutions and Domestic Proceedings on State Obligations to Cooperate with the ICC’ (2012) 10 *JICJ* 299, 309.

¹⁷ The argument that res 1593 (2005) operated a *renvoi* to art 27 of the Rome Statute is reinforced by a purposive interpretation of the decision which takes into account “the collective intent of the UNSC to demand justice from the ICC”. Cf Nerina Boschiero, ‘The ICC Judicial Finding on Non-cooperation Against the DRC and No Immunity for Al-Bashir Based on UNSC Resolution 1593’ (2015) 13 *JICJ* 625, 641.

¹⁸ Whereby “States Parties shall ... *cooperate fully with the Court in its investigation and prosecution* of crimes within the jurisdiction of the Court” (emphasis added).

¹⁹ Whereby “[w]here a State Party *fails to comply with a request to cooperate ... thereby preventing the Court from exercising its functions and powers*” (emphasis added).

different systems of law. The resort to such technique is not uncommon in the practice of the UNSC.²⁰ Indeed, resolutions are not to be understood as self-contained: given the way they are drafted, one should not expect much legal detail in them.²¹ In the specific scenario of a UNSC referral, making a *renvoi* to the Statute is the natural and coherent consequence of the mutual link between the Statute and the UN Charter. Notably, whilst Article 13(b) operates a *renvoi* to the UN collective security system, UNSC resolutions adopted under Chapter VII UN Charter referring a situation to the Court operate a *renvoi* to the relevant provisions of the Statute.

8. Provided that Res. 1593 (2005) is the source of obligations which Sudan, as a non-Party State, would not otherwise have, the application of Article 27(2) of the Rome Statute removes the immunity with respect to Sudanese officials that would otherwise exist under international law. The fact that Res. 1593 (2005) contains the verb “urges” instead of “decides” with respect to UN member States not Party to the Statute other than Sudan is entirely coherent with the discretion conferred to the UNSC in taking recommendations rather than decisions when it determines the existence of any threat to the peace, breach of the peace, or act of aggression under Article 39 UN Charter. Therefore, it comes as no surprise that the UNSC made the political choice of addressing non-Parties States other than Sudan by simply “urging” them to cooperate fully.²²

9. Conclusively, Jordan and Sudan are bound in their relations by those provisions of the Rome Statute that are necessary for the Court to fulfill its mandate, including Article 27, pursuant to the *renvoi* to the Statute operated by UNSC Res. 1593 (2005).

C. Jordan’s reliance on Article 98 of the Rome Statute is inapposite

a. Jordan’s reliance on Article 98(1) of the Rome Statute is incorrect

10. Article 27(1) of the Rome Statute applies to the horizontal relationship between States Parties *inter se* as well as between States Parties and non-Parties States once a

²⁰ Cf Michael Wood, ‘The Interpretation of Security Council Resolutions, Revisited’ (2017) 20 *Max Planck Yearbook of United Nations Law Online* 1.

²¹ This explains why the lack of explicit wording on immunities in res 1593 (2005) is not decisive.

²² The possibility for the Court to call upon non-Parties States to cooperate is also envisaged for example in arts 87(5)(a) and 89(1) of the Rome Statute.

situation occurring in the territory of the latter is referred to the Court by the UNSC. Therefore, the request by the Court for the arrest and surrender of Al-Bashir did not require Jordan “to act inconsistently with its obligations under international law”, as Pre-Trial Chamber II correctly found. In the present situation, Article 98(1) is simply irrelevant. In any case, we take the chance to stress that the *travaux préparatoires* of the Statute support the view that the expression “third State” in Article 98(1) must be understood as “a State other than the requested State”: during the negotiations, the driving force behind the inclusion of that provision was the customary rule on the inviolability of diplomatic premises, which could interfere with the execution of a request for surrender, “both *vis-à-vis* a State Party or a non-State Party”.²³

11. Moreover, Article 27(2) of the Rome Statute vertically inhibits Jordan and Sudan from claiming immunity for State officials, including Heads of State, when accused before the Court. Any other interpretation would make such provision meaningless, considering that the Court is entirely reliant on national authorities to arrest and surrender suspects.²⁴

12. Conclusively, Jordan was never faced with conflicting obligations *vis-à-vis* Sudan, as both States are bound by Article 27 and none of them is entitled to claim immunities pursuant to Article 98(1).

b. The 1953 Convention is not relevant under Article 98(2) of the Rome Statute

13. In its appeal, Jordan claims that the 1953 Convention is relevant under Article 98(2) of the Rome Statute, hence the Court was supposed to obtain Sudan’s consent for the surrender of Al-Bashir.²⁵ This position is untenable, on two grounds.

14. First, the 1953 Convention does not fall within the scope of Article 98(2).²⁶ The latter provision in fact does not deal with the surrender of States’ officials enjoying

²³ Hans-Peter Kaul, Claus Kreß, ‘Jurisdiction and Cooperation in the Statute of the International Criminal Court: Principles and Compromises’ (1999) 2 *Yearbook of International Humanitarian Law* 143, 164.

²⁴ Cf Erika de Wet, ‘The Implications of President Al-Bashir’s Visit to South Africa for International and Domestic Law’ (2015) 13 *JICJ* 1049, 1055.

²⁵ Jordan’s appeal paras 22 ff.

²⁶ Cf also Rule 195(2) RPE.

immunities, even less of Heads of State. This stems from a literal interpretation of the clear wording of the provision at hand: Article 98(2) concerns those specific agreements affirming the exclusive jurisdiction of States “sending” personnel abroad bilaterally or through their contribution to multilateral operations²⁷ – a matter which is completely unrelated to the issue of immunity. The practice subsequent to the entry into force of the Rome Statute supports this interpretation.²⁸ As to the UNSC, various resolutions have echoed Article 98(2) in upholding the exclusive jurisdiction of non-Parties States “contributing”²⁹ to multilateral operations over their nationals, current or former officials and personnel dispatched to the territory of third States.³⁰ The same holds true for UNSC Res. 1593 (2005) which – after explicitly recalling Article 98(2) in its Preamble at para. 4 – at operative para. 6 specifically deals with such agreements by recognizing the exclusive jurisdiction of “contributing” non-Parties States *outside Sudan* over their “nationals, current or former officials or personnel”. Furthermore, controversial as they may be, bilateral agreements concluded by the United States of America (US) invariably refer to the exclusive jurisdiction of the US over its current or former officials, military personnel or nationals dispatched on the territory of the other contracting State.³¹ This interpretation is confirmed by the particular meaning³² of the term “sending” (or “contributing”) States, which is a technical one commonly used within the context of Status of Forces Agreements and Status of Missions

²⁷ Claus Kreß, Kimberly Prost, ‘Article 98’ in Otto Triffterer, Kai Ambos (eds) *The Rome Statute of the International Criminal Court: A Commentary* (3rd edn, Beck-Hart-Nomos 2016) 2143.

²⁸ Vienna Convention on the Law of the Treaties (hereinafter VCLT) art 31(3)(b).

²⁹ In the UN context, reference is made to “participating” or “contributing” States rather than to “sending” States, in light of UNGA, ‘Draft model status-of-forces agreement between the United Nations and host countries’ annexed to ‘Model status-of-forces agreement for peace-keeping operations. Report of the Secretary-General’ UN Doc. A/45/549 (9 October 1990) para 47(b).

³⁰ UNSC, Resolution S/RES/1422 (2002) para 1; UNSC, Resolution S/RES/1497 (2003) para 7; UNSC, Resolution S/RES/1970 (2011) para 6. This practice raised some perplexities among doctrine. See Alice Riccardi, ‘Sul referral della situazione libica alla Corte penale internazionale’ in (2011) 2 *Diritti umani e diritto internazionale* 377 ff.

³¹ Cf *inter alia*: Agreement between the Government of the Transitional Islamic State of Afghanistan and the Government of the United States of America regarding the surrender of persons to the International Criminal Court (20 September 2002) I-51233 UNTS 4; Agreement between the Government of the United States of America and the Government of the Republic of Uganda regarding the surrender of persons to the International Criminal Court (12 June 2003) I-51547 UNTS 2.

³² VCLT art 31(4).

Agreements.³³ The drafting history of Article 98(2) corroborates this understanding.³⁴ In conclusion, nowhere the 1953 Convention employs a language similar to that of Article 98(2); nor does it provide for any procedure for seeking and providing consent.

15. Second, and in any case, should this Honourable Appeals Chamber believe that Article 98(2) may apply even to treaties granting immunities to State officials, still the 1953 Convention was not the source of Al-Bashir's immunity from criminal jurisdiction when he travelled to Jordan. As already maintained, indeed, Al-Bashir's immunity stems solely from customary law.³⁵

16. Therefore, Jordan failed to demonstrate that an "agreement" as required under Article 98(2) of the Rome Statute exists at all in its relation with Sudan. Conclusively, Jordan also incorrectly invoked Article 98(2).

D. Pre-Trial Chamber II did not abuse its discretion in referring Jordan to the UNSC and to the Assembly of States Parties

17. An abuse of discretion occurs when a decision is so unreasonable to force the conclusion that a Chamber failed to exercise its discretion judiciously, *i.e.* by taking into account irrelevant considerations or by not weighing relevant ones.³⁶ In the context of Article 87(7) of the Rome Statute, relevant considerations decisively include the nature of the committed violations and the conduct of the parties throughout the cooperation process.³⁷ Against this background, Jordan not only failed to comply with the Court's decisions to arrest and surrender Al-Bashir, but it also discharged its obligations stemming from Article 97(c) of the Rome Statute in bad faith.³⁸ Although the assessment of the existence of conflicting obligations within the meaning of Article

³³ Among many see Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces (4 April 1949) art VII(2)(a).

³⁴ See: Ad Hoc Committee, 'General Issues Relating to States' Cooperation with ICC; Proposal by the Coordinator' UD/A/AC-244/IP (16 August 1995) 4; PrepCom, 'Cooperation between States and the ICC, Remarks of the U.S. Delegation' (8 April 1996). Cf David Scheffer, 'Article 98(2) of the Rome Statute: America's Original Intent' (2005) 3 *JICJ* 333, 337.

³⁵ See *supra* para 2.

³⁶ *Prosecutor v Kenyatta*, Judgment on the Prosecutor's appeal against Trial Chamber V(B)'s "Decision on Prosecution's application for a finding of non-compliance under Article 87(7) of the Statute", ICC-01/09-02/11 OA 5 (19 August 2015) para 25.

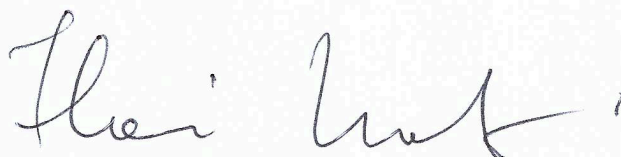
³⁷ *Ibid* paras 82, 87, 89.

³⁸ The Applicants do not have access to the *notes verbales* exchanged between Jordan and the Registry, classified as confidential, thus rely on the reconstruction of such exchange in ICC-02/05-01/09-309.

98 is firmly under the Court's exclusive interpretative power,³⁹ Jordan unilaterally interpreted Articles 27 and 98 in the context of its relations with Sudan without consulting with the Court as soon as it identified the existence of a problem preventing it from arresting and surrendering Al-Bashir *with the aim to resolve the matter*: instead, it sent an advance notification of its intention not to comply with the Court's decisions. Furthermore, no internal procedure on the question of whether Al-Bashir had to be at least arrested was activated. Conclusively, Jordan committed serious violations of international law and acted in bad faith throughout the cooperation process.

18. Finally, it shall be stressed that a referral of Jordan to the UNSC and the Assembly of States Parties (ASP) may "enhance the work of the Court by, for example, promoting future cooperation",⁴⁰ thereby preventing future instances of non-compliance and fostering the fight against impunity for egregious crimes of international concern.

19. In light of the above mentioned, Pre-Trial Chamber II did not abuse its discretion in referring Jordan to the UNSC and the ASP.



Prof. Flavia Lattanzi

Dated this 18 June 2018

At Rome, Italy

³⁹ Cf art 97(c) of the Rome Statute and Rule 195 RPE.

⁴⁰ *Prosecutor v Kenyatta*, Decision on Prosecution's application for a finding of non-compliance under Article 87(7) of the Statute, ICC-01/09-02/11 (3 December 2014) para 84.