

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: **English**

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

Date: **19 April 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

Request by Professor Roger O’Keefe for leave to submit observations 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 (ICC-02/05-01/09-326)

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Confidentiality: **Public**

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****Legal Representatives of the Applicants****Unrepresented Victims****Unrepresented Applicants****The Office of Public Counsel for Victims****The Office of Public Counsel for the Defence****States' Representatives****Amicus Curiae**

Competent authorities of the

Hashemite Kingdom of Jordan

REGISTRY**Registrar****Counsel Support Section**

Mr Peter Lewis

Victims and Witnesses Unit**Detention Section****Victims Participation and Reparations
Section****Other**

Request for Leave to Submit Observations on the Merits of the Legal Questions Presented in Jordan Referral re Al Bashir Appeal

1. This is a request by Professor Roger O’Keefe, pursuant to the order of the Appeals Chamber entitled ‘Order inviting expressions of interest as *amici curiae* in judicial proceedings (pursuant to rule 103 of the Rules of Procedure and Evidence)’ of 29 March 2018 (ICC-02/05-01/09/330), for leave to submit observations 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 (ICC-02/05-01/09-326).

Particular Expertise of Professor O’Keefe in the Legal Questions Presented

2. Professor O’Keefe is Professor of Public International Law at University College London. From 1 September 2018, he will be Professor of International Law at Bocconi University, Milan. He is the author of *International Criminal Law* (Oxford University Press, 2015), the co-editor of *The United Nations Convention on Jurisdictional Immunities of States and Their Property: A Commentary* (Oxford University Press, 2013), and joint General Editor of the Oxford University Press series *Oxford Monographs in International Law*. In 2004 he was awarded the *Journal of International Criminal Justice* Prize. He has spoken on the immunity of state officials from foreign criminal jurisdiction to, among others, the Committee of Legal Advisers on Public International Law of the Council of Europe. His article ‘An “International Crime” Exception to the Immunity of State Officials from Foreign Criminal Jurisdiction: Not Currently, Not Likely’ (2015) 109 *AJIL Unbound* 167–172 was cited with approval by the Supreme Court of Appeal of South Africa in *Minister of Justice and Constitutional Development v Southern African Litigation Centre* [2016] ZASCA 17 (‘*Al-Bashir*’).

Summary Conclusion and Initial Observations

3. Jordan, although a state party to the Rome Statute (‘the Statute’), was not obliged to arrest President Al-Bashir or to surrender him to the International Criminal Court (‘the Court’). The

Pre-Trial Chamber therefore erred in finding that Jordan had failed to comply, contrary to the provisions of the Statute, with a request by the Court to cooperate.

A. Argument in Outline

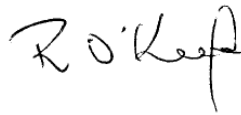
4. In accordance with article 98(1) of the Statute, the Court may not proceed with a request for surrender which would require a state party to act inconsistently with its obligations under international law with respect to the inviolability from arrest and immunity from judicial proceedings of officials of a state not party to the Statute, unless the Court first obtains the cooperation of the non-party state for the waiver of the inviolability or immunity. A state is obliged under customary international law to accord absolute inviolability and immunity *ratione personae* to the head of another state. No exception exists in respect of allegations of international crimes, including genocide. President Al-Bashir was and is the head of state of Sudan, a state not party to the Statute. Jordan was consequently obliged under customary international law to accord him inviolability and immunity. The Court had not and has not obtained Sudan's waiver of the inviolability and immunity from which Sudan is entitled under international law to see President Al-Bashir benefit in other states. In proceeding with a request to Jordan to arrest and surrender President Al-Bashir, the Court therefore acted contrary to article 98(1) and thereby exceeded its powers under the Statute.
5. There is no relationship whatsoever between articles 98(1) and 27(2) of the Statute. Article 27(2), which provides that immunities 'shall not bar the Court from exercising its jurisdiction over ... a person', applies solely to proceedings against that person before the Court itself, after the person has been arrested and surrendered to the Court. It neither applies to nor has any implications for the arrest and surrender of a person to the Court by a state party.
6. Security Council resolution 1593 (2005) does not alter the ordinary application of article 98(1) of the Statute. The referral of a situation to the Prosecutor by the Security Council, in accordance with article 13(b) of the Statute, is simply one of the three procedural means by which the Court may be seised of jurisdiction with respect to a crime referred to in article 5 of the Statute. Subject to the terms of the resolution by which the Council refers the situation, the

effect of such a referral on the application of the Statute is no different from that of the referral of a situation by a state party in accordance with article 13(a) or, leaving aside the procedural requirements of article 15, the initiation of an investigation by the Prosecutor *proprio motu* in accordance with article 13(c). The consequence is merely that the Court may exercise its jurisdiction ‘in accordance with the provisions of [the] Statute’. Nowhere is it stated or implied in the Statute or suggested in its *travaux préparatoires* that referral by the Security Council, without more, renders binding on a state not party to the Statute the obligations binding on states parties or otherwise modifies the application of article 98(1). Nor does the Council’s decision in resolution 1593 (2005) that Sudan ‘shall cooperate fully and provide any necessary assistance to the Court and the Prosecutor’, binding on Sudan as a UN member state in accordance with article 25 of the UN Charter, render binding on Sudan, a state not party to the Statute, all the obligations of cooperation undertaken in accordance with Part 9 of the Statute by states parties. Even less does it abrogate the inviolability and immunity *ratione personae* from which Sudan is entitled under international law to see President Al-Bashir benefit at the hands of the criminal justice authorities of states parties or otherwise modify the application of article 98(1). The Council’s decision does no more than oblige Sudan to comply with any request to it by the Court or Prosecutor for cooperation or assistance. While it may be open to the Council, by a decision taken under chapter VII of the Charter, expressly to abrogate the inviolability and immunity from which President Al-Bashir benefits under international law in states parties, the Council has not sought to do this.

7. It is a general principle of the law of international organizations and of the law of the different national legal traditions that an act of an organ, including an order or judgment of a court, in excess of the powers granted to that organ is a legal nullity. The Court’s request to arrest and surrender President Al-Bashir created no legal obligation for Jordan. The Pre-Trial Chamber therefore erred in finding that Jordan had failed to comply with a request to cooperate by the Court ‘contrary to the provisions of [the] Statute’, in the words of article 87(7).

B. Subsidiary Initial Observation

8. By virtue of the term ‘third State’, article 98(1) applies explicitly only in respect of officials of states not party to the Statute. As defined in article 2(1)(b) of the Vienna Convention on the Law of Treaties, ‘third State’ means ‘a State not a party to the treaty’. Although ‘State not party to [the] Statute’, rather than ‘third State’, is the term used elsewhere in the Statute to refer to a non-party state, there is no reason why a treaty may not use different terms in different contexts to refer to the same thing. Nor is this interpretation undermined by the fact that the use of ‘third State’ in article 98(1) derives from the term’s use in treaties of extradition and mutual legal assistance. In bilateral treaties of this sort, ‘third State’ is capable of meaning either any other state or a non-party state, while in the European Convention on Extradition, the only extradition treaty of a multilateral character, like the Statute, it in fact means a state not party to the Convention. As it is, the term used elsewhere in the Statute to refer to any other state, states parties included, is not ‘third State’, as the alternative reading of the term in article 98(1) would suggest, but ‘another State’. Nor as a matter of logic can the reference in article 98(1) to a ‘third State’ be merely to any state other than the requested state, since, given that it is the Court, not a state, making the request, any other state would logically constitute not a third but a second state or, more simply, ‘another State’. The posited interpretation is also supported by the equally authoritative French text of article 98(1), which uses ‘État tiers’, or ‘third-party State’, rather than ‘troisième État’.



Professor Roger O’Keefe

Dated 19 March 2018

At Budapest, Hungary