

ANNEX TO

**Amicus Curiae Observations of Professors Robinson, Cryer, deGuzman,
Lafontaine, Oosterveld, and Stahn**

LIST OF AUTHORITIES

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**IN THE COURT OF APPEAL
AT NAIROBI**

(CORAM: MUSINGA, OUKO & MURGOR, J.J.A)

CIVIL APPEAL NO. 105 OF 2012

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 274 OF 2011

BETWEEN

**THE ATTORNEY GENERAL1ST APPELLANT
MINISTER OF STATE FOR PROVINCIAL
ADMINISTRATION AND INTERNAL SECURITY.....2ND APPELLANT
THE KENYANS FOR JUSTICE AND
DEVELOPMENT TRUST (KEJUDE).....3RD APPELLANT**

AND

**THE KENYA SECTION OF INTERNATIONAL
COMMISSION OF JURISTS.....RESPONDENT**

*(Being an Appeal from the Ruling of the High Court of Kenya at Nairobi by
(Ombija, J) dated 28th November 2011*

in

H.C. Misc. Crim. Appl. No. 685 of 2010)

JUDGMENT OF THE COURT

We cannot begin the consideration of this appeal without first setting out the historical perspective of the idea of establishing an international criminal court. That history, though important for the background of the matter before us, is long and often contentious. But for the space and opportunity we have in this

Rwanda based their jurisdiction on Security Council powers under Chapter VII. The Tokyo Tribunal after World War II, on the other hand based its jurisdiction on Japan's consent, while the Nuremberg Tribunal drew its jurisdiction on the consent of the Allies.

Article 13(b) of the Rome Statute vests in the ICC the jurisdiction with respect to crimes of genocide; crimes against humanity; war crimes; and crime of aggression if, among other things;

“(a)

(b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations.”

In March 2005 the UN Security Council by Resolution 1593 (2005) determined that the situation in Darfur, Sudan constituted a threat to international peace and security and referred it to the ICC. In doing so it decided that;

“2..... the Government of Sudan and all other parties to the conflict in Darfur, shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution and, while recognising that States not party to the Rome Statute have no obligation under the Statute, urges all States and concerned regional and other international organisations to cooperate fully.” (Our emphasis).

The plain and unambiguous mandatory language of the resolution- **“shall cooperate fully”**- compels Sudan, though not a State Party to the Statute, to cooperate fully with the ICC. On the other hand, and while stressing that non-

State parties, (other than Sudan), have no obligation under the Statute, the Security Council-“urges all”- of them to cooperate fully with the Court.

The obligation imposed on Sudan by the Security Council must be traced to Sudan’s membership of the United Nations and the fact that it has ratified a number of UN Human Rights Conventions by which it has made binding international commitments to adhere to the standards and values laid down in these universal human rights documents. As a signatory to the UN Charter on 12th November 1956, Sudan undertook to uphold, promote and to act in accordance with the principles espoused in **Article 2** of the Charter. Among those principles are; to settle international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered; and to give the United Nations every assistance in any action it takes. It consented to the obligation to comply with the provisions of the Charter, including decisions and resolutions of the Security Council made pursuant to Chapter VII.

Article 103 of the Charter reaffirms the primacy of the Charter in situations of conflict of obligations as follows;

“In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail”.

Where the Security Council refers a situation to the ICC the territoriality and nationality regimes that would ordinarily restrict the Court do not apply. The reference enables the ICC to exercise jurisdiction over States that have not ratified the Rome Statute.

We agree, in this regard, with the holding by both the Pre-Trial Chamber of the ICC in **The Prosecutor v. Omar Hassan Ahmad Al Bashir**, ICC-02/05-01/09-302 made on 06 July 2017 and the South African Supreme Court of Appeal in the **Minister of Justice and Constitutional Development and Others v Southern African Litigation Centre and Others** [2016] ZASCA 17; 2016 (3) SA 317 (SCA), both of which confirmed that, one, sitting heads of States would ordinarily enjoy immunity under customary international law and, two, that, in principle, the ICC may not request a State party to arrest and surrender a country's head of a State not party to the Rome Statute without first obtaining a waiver of immunity. But the two courts reached the conclusion that, in the case of President Al Bashir, the "special regime" under the provisions of the U.N. Charter, to which both Sudan and South Africa (and even Kenya) are signatories were invoked to clothe ICC with jurisdiction.

Under **Article 25** of the Charter the members agreed "... to accept and carry out the decisions of the Security Council in accordance with the present Charter". Thus, it can be argued that the Security Council, acting under Chapter VII of the Charter, effectively removed immunity with respect to

President Al Bashir. This is an exception to the general rule that treaties may only create obligations for States that are party to that treaty and a third State cannot be bound by the provisions of a treaty without its express consent.

Under President Al-Bashir, Sudan signed the Rome Statute on 8 September 2000 but has not ratified it to this date. In a communication received on 27th August 2008, the Government of Sudan informed the UN Secretary General, as the depository of the Rome Statute, of the following:

“....., Sudan does not intend to become a party to the Rome Statute. Accordingly, Sudan has no legal obligation arising from its signature on 8 September 2000.” (See Declarations and Reservations to the Rome Statute, United Nations Treaty Collection)”.

Technically, therefore Sudan is not a State member to the Rome Statute because a mere signature without ratification, acceptance or approval does not establish the consent of a State to be bound. But under **Articles 10 and 18** of the Vienna Convention on the Law of Treaties 1969 the signature is significant as it creates an obligation on the signing State to refrain, in good faith, from acts that would defeat the object and the purpose of the treaty.

The Security Council having itself referred the Darfur situation to the ICC, it follows that the provisions of the Rome Statute, including the waiver of immunity set out in **Article 27 (2)** effectively applied to Sudan. With the referral Sudan would be treated as if it were a State party.