

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: 30 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***

Public Document

Request by Professor Paola Gaeta 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

Source: Paola Gaeta, Professor of International Law at the Graduate Institute of International and Development Studies (Geneva)
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Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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Counsel for the Defence

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

States' Representatives
Competent authorities of the Hashemite
Kingdom of Jordan

Amicus Curiae

REGISTRY

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Counsel Support Section

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**

This is a request by Professor Paola Gaeta for leave to submit observations, pursuant to the order of the Appeals Chamber of 29 March 2018 (ICC-02/05-01/09 OA2).

SUMMARY INITIAL OBSERVATIONS

I. Expertise of Professor Paola Gaeta

Paola Gaeta is Professor of International Law at the Graduate Institute of International and Development Studies (Geneva) and Adjunct Professor of International Law at the University L. Bocconi (Milan). She was previously Director of the Geneva Academy of International Humanitarian Law and Human Rights (1 January 2011-31 July 2014). Professor Gaeta has published extensively in the field of international criminal law, including in relation to the legal questions raised in the ‘Jordan Referral re Al-Bashir Appeal’.¹

II. Argument in outline

A. The applicability of Art. 27 (2) to Sudan

1. The enactment by the ICC of an indictment and an arrest warrant against the incumbent President of Sudan, Omar Al Bashir, was not (and is not) barred by the immunities accruing the latter under international law, although Sudan is not a state party to the Rome Statute. This is because Art. 27(2) of the Rome Statute reflects a principle of international law whereby the international immunities accruing to certain state officials do not bar the exercise of jurisdiction by an international criminal court or tribunal. As such, Art. 27 (2) is thus also applicable *qua* general international law vis-à-vis states not parties to the Rome Statute. This interpretation is in line with the *rationale* of the international rules on immunities. In addition, it finds support in the case-law of the International Court of Justice (ICJ, *Arrest*

¹ Her publications include: ‘The Al Bashir and Kenyatta Cases at the ICC: Testing the Rules of the Rome Statute on Personal Immunities’, (with P. Labuda), in A. Abass, I. Bantekas and C. Jalloh (eds), *Africa and the International Criminal Court* (Oxford: Oxford University Press, 2017) pp. 138-162; ‘Head of State Immunity as a Bar to Arrest’, in R.H.Steinberg (ed), *Contemporary issues facing the International Criminal Court* (Leiden: Nijhoff, 2016) 84-98; ‘Chapter 13-Obedience to Superior Orders and Official Capacity’ (revision and update with C. Gosnell), in A. Cassese, P. Gaeta et al., *Cassese’s International Criminal Law* (Oxford: Oxford University Press, 2013), pp. 228-250; ‘Immunity of States and State Officials: A Major Stumbling Block to Judicial Scrutiny?’, in A. Cassese (ed), *Realizing Utopia. The Future of International Law* (Oxford: Oxford University Press, 2012), pp. 28-238; ‘Immunities and Genocide’, in P. Gaeta (ed.), *The UN Genocide Convention. A Commentary*, Oxford, Oxford University Press, 2009, pp. 310-333; ‘Does President Al Bashir Enjoy Immunity from Arrest?’, in *Journal of International Criminal Justice*, 2009, pp. 315-332 ; ‘Official Capacity and Immunities’, in A. Cassese, P. Gaeta, J. R.W.D. Jones (eds), *The Rome Statute of the International Criminal Court. A Commentary*, Oxford, Oxford University Press, 2002, vol. I, pp. 975-1002; ‘L’incidenza dello Statuto di Roma sulle norme costituzionali in materia di immunità’ (*The Impact of the Rome Statute on the Constitutional Rules on Immunities*), in *Rivista di diritto comparato ed europeo*, 2000-II, pp. 594-605.

Warrant case, Judgment of 14 February 2002, para 61) and of the Special Court for Sierra Leone (SCSL, Appeals Chamber, Decision on Immunity from Jurisdiction, *Taylor*, 31 May 2004, para. 51 et ff.). Another precedent is the indictment and arrest warrant issued by the ICTY against the then President of the Federal Republic of Yugoslavia, Mr. Slobodan Milošević.

2. By contrast, the argument whereby Art. 27(2) and the Rome Statute would be applicable to Sudan by virtue of the UN Security Council resolution 1593 (2005) referring to the ICC the situation in Darfur (Sudan) is not convincing, mainly for three reasons. First, because it presupposes that the referral of a situation to the ICC by the Security Council (hereinafter the ‘SC’) *constitutes the source* of the jurisdiction of the Court on that situation. However, a careful reading of the relevant provisions of the Rome Statute does not support this view. Article 1 clearly states that the ICC ‘shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute...’, and that the ‘jurisdiction and functioning of the Court shall be governed by the provisions of this Statute.’ Article 12 sets forth the ‘pre-conditions to the exercise of the jurisdiction of the Court.’ These pre-conditions however are not relevant when the SC refers a situation to the ICC. Therefore, a SC’s referral has the only effect of removing the need for the ICC to assess that the pre-conditions set forth in Art. 12 exist, but *it is not* the source of the jurisdiction of the ICC. The jurisdiction of the ICC stems from the Rome Statute, including with respect to *any* situation referred to it by the SC.

3. Second, accepting the argument above would mean that, when the SC triggers the jurisdiction of the ICC, the SC becomes the ‘master’ of the jurisdiction of the ICC. The ICC would be thus a ‘measure’ of the SC to maintain peace and security under Chapter VII of the UN Charter and would be put in a position similar to an *ad hoc* international criminal tribunal of the SC. In turn, this would imply, for instance, that the SC could modify at its own discretion the legal framework set forth in the Rome Statute in any matter whatsoever, including the scope of the temporal, personal or material jurisdiction of the ICC or even the selection of the judges. This interpretation is patently contrary to the letter and the spirit of the Rome Statute, that expressly clarifies the powers of the SC vis-à-vis the Court and the legal consequences of a referral of a situation by the SC (see eg Art. 53(2)(c) and 53(3)(a); Art. 87(5)(b); Art. 87(7)). The Rome Statute does not confer to the SC the authority to impose the criminal jurisdiction of ICC to non-member states. The Rome Statute simply provides that the exercise by the ICC of its criminal jurisdiction over persons allegedly responsible for crimes

listed in Art. 5 the Rome Statute is not subject to the pre-conditions listed in Art. 12 if a situation has been referred to the ICC by the SC.

4. Third, accepting the argument above would risk having a serious negative impact on the credibility of the ICC as a court of law, which is bound by the Rome Statute independently from the intervention of the SC. The ICC has been created as the first permanent international criminal court also to overcome the flaws inherent in the establishment of ad hoc international criminal tribunals by the SC, which include the perception that international criminal justice can be used as a political tool in the hands of few powerful states. Should the ICC recognize that the referrals by the SC have legal effects other than those expressly envisaged in the Rome Statute, the risk would be to make the ICC appearing ready to serve the political goals of the SC or of some of its permanent members, with long-term prejudicial effects on its universal reach.

B. The relationship between Art. 27 (2) and Art. 98 (1) of the Rome Statute

5. The above mentioned general principle enshrined in Art. 27 (2) only refers to the irrelevance of immunities from the *adjudicatory jurisdiction* of the ICC. This provision does not have *per se* an impact on the adjudicatory or enforcement jurisdiction of states parties to the Rome Statute, which will be bound to respect the international rules on immunities accruing to certain foreign state officials unless otherwise provided by the Rome Statute. Therefore Article 98(1) aims to prevent the ICC from obliging states parties to violate their international obligations vis-à-vis *states not parties* to the Rome Statute. This is a significant limitation of the ICC's authority, but importantly it applies only with respect to states not parties to the Rome Statute. An immunity waiver is not necessary when the international obligations to respect immunities concern the relationship between the requested state party and other ICC states parties. There is therefore no contradiction between Art. 27 (2) and Art. 98 (1). Art. 27 (2) pertains to the exercise by the ICC of its adjudicatory jurisdiction, while Art. 98 (1) regulates the power of the ICC in requesting states parties to exercise their *enforcement jurisdiction*, including in the matter of execution of the arrests warrants of the ICC.

C. The (ir)relevance of SC's resolution 1593 (2005)

6. The fact that Sudan is obliged to cooperate to the ICC by virtue of SC resolution 1593 (2005) does not have an impact on the applicability of Art. 98(1). This provision is not concerned with whether a state that is not party to the Rome Statute is obliged to cooperate

with the Court. It is concerned with the *actual* cooperation that the ICC *must obtain from the relevant third State to waive the immunity*.

7. The obligation of cooperation imposed on Sudan by the SC does not modify the powers of the ICC, including the power of the latter vis-à-vis states parties to the Rome Statute in the matter of judicial cooperation. The ICC is an international organization, created by a treaty and exercising the powers and competences attributed to it by its member states. The obligations set forth by the SC upon Sudan cannot affect the rights and powers of another international organization, in this case the ICC, as they are regulated in the respective constitutive instrument of such other international organization. The decision of the SC on the obligation of Sudan to cooperate with the ICC does not relieve the latter from implementing a requirement for the exercise of its power to request judicial cooperation under Art. 98 (1) of the Rome Statute.

III. Summary Conclusions

8. Under a general principle of international law immunities accruing to certain state officials under international law do not apply before international criminal courts and tribunals. Art. 27 (2) enshrines this general principle and therefore applies also to Sudan, although the latter is not a state-party to the Rome Statute. However, Art. 98 (1) limits the power of the ICC in obliging states parties to cooperate in matters that would put the requested state in a situation of conflicting international obligations on immunities vis-a-vis non-party states. SC's resolution 1593 (2005) has not modified this legal framework. The request to state parties to execute the arrest warrant against President Al- Bashir is not in conformity with Art. 98(1). States parties to the Rome Statute are therefore not obliged to execute the ICC request. Nonetheless the ICC could *invite* states parties to execute the arrest warrant: states parties would then be free to decide whether to comply with this invitation and not to respect the international immunities accruing to President Al –Bashir.



Professor Paola Gaeta

Dated this 30 April 2018

At Milan, Italy