

**Cour
Pénale
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**International
Criminal
Court**

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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 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: Professor Yolanda GAMARRA

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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1. On 30 April 2018, Professor Yolanda Gamarra sought leave from the Appeals Chamber of the International Criminal Court (“the Court”), under Rule 103 (1) of the Rules of Procedure and Evidence, to submit observations as *amicus curiae*¹ 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 (ICC-02/05-01/09-326), dated 12 March 2018.*²

2. The case *The Prosecutor v. Omar Hassan Ahmad Al Bashir* (ICC-02/05-01/09, “Al-Bashir case”) presents an excellent opportunity to the Court to clarify the scope and interrelationship of Articles 27 and 98 (1) of the Rome Statute (“the Statute”) when prosecutions of State officials (including the President of the government of the State) are required in situations referred to the Court by the UN Security Council.³

3. Pursuant to the *Decision on the requests for leave to file observations pursuant to rule 103 of the Rules of Procedure and Evidence, the request for leave to reply and further processes in the appeal* (ICC-02/05-01/09-351), dated 21 May 2018 granting this application, Professor Gamarra hereby submits observations on: (i) the clash of sources between the Statute and the treaties and customary law on immunities; ii) the vertical cooperation required by the UN Security Council to all States with respect to the arrest and transfer of Mr. Al-Bashir according to the Article 89 of the Statute; iii) the international obligations arising from the Statute and UN Security Council Resolution 1593 (2005) and their obligations under other bilateral or multilateral conventions.

¹ *Request by Professor Yolanda Gamarra 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-02/05-01/09-347).

² ICC-02/05-01/09-326

³ Y. Gamarra and A. Vicente, “United Nations Member States’ Obligations Towards the ICTY: Arresting and Transferring Lukic, Gotovina and Zelenovic”, *International Criminal Law Review*, 2008/4, pp. 627 – 653.

I. THE PROVISIONS OF THE STATUTE PREVAIL OVER OTHER OBLIGATIONS BASED ON TREATIES AND CUSTOM

4. The Court can apply internal and external sources of law according to Article 21 of the Statute. In particular, Article 21 (1) (a) enumerates the internal sources of applicable law: “(...) Statute, Elements of Crimes and its Rules of Procedure and Evidence”.

5. Jordan has invoked the 1953 Convention on the Privileges and Immunities of the Arab League (‘1953 Convention’) and the customary law of immunities to justify its failure to arrest Al-Bashir. Jordan’s claim alludes to the external sources of law mentioned in Article 21(1) (b) of the Statute, in particular “applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict”.

6. Article 21 1 (a) prioritizes the application of the Statute over external source mentioned in sub-paragraphs (b) and (c). As the ICC has recognized in its jurisprudence the external sources “can only be resorted to when two conditions are met: i) there is a *lacuna* in the written law contained in the Statute (...); and ii) such *lacuna* cannot be filled by the application of the criteria of interpretation provided in the Vienna Convention and Article 21 (3) of the Statute”.⁴ These two conditions do not exist in the present case.

7. On the other side, Jordan invokes Article 98 (1) of the Statute to justify the non-arrest and transfer of Al-Bashir to the Court. Nevertheless, the Article 98 (1) is not applicable to the situation of Al-Bashir. Article 98 (1) is limited to the relations between States parties and third States. The Court should not proceed with a request from a State party to surrender a person with immunity from a third State before obtain the cooperation of the third State for the waiver of the immunity. Article 98 does not apply to this case.

⁴ *Prosecutor v. Al Bashir*, Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 4 March 2009, para. 44, among other cases.

8. Also, questions of immunities are explicitly regulated in Article 27 of the Statute. The Statute is clear on this respect: it “shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State of Government, a member of a Government or parliament”. So, Jordan’s request should be refused having in mind that the 1953 Convention and the clash between customary law of immunities and the provision of Article 27 of the Statute.

9. Moreover, according to the Law of Treaties before two norms of the same rank, one special and another general prevails the special norm. ICC Statute established a self-contained regime with its own substantive and procedural rules. For this reason, the ICC Statute prevails over the 1953 Convention and the customary law on immunities.

10. In the same way that before two general norms or two special norms the principle of temporality must be applied. So the later norm prevails over the previous norm. Consequently, Article 27 of the Statute prevails over the 1953 Convention and the customary law on immunities.

11. External sources of law can be used by the Court as an interpretation aid. Article 31 of the Vienna Convention on the Law of Treaties is clear on this respect. However, this kind of sources cannot be used to counter-interpret provisions of the ICC Statute as is recognized in Article 32 of the Vienna Convention on the Law of Treaties. Also, this observation is supported by Articles 10, 121, 122 and 123 of the ICC Statute.

12. Neither customary law nor treaty law can be used to not apply Article 27 of the Statute. Further, the crimes prosecuted by the Court are the most serious crimes of concern for the international community. In conclusion, Article 27 prevails over the rest of treaties and customary laws on immunities. So, Jordan’s claim should be rejected.

II. COOPERATION WITH A THIRD STATE IN RELATION TO WAIVER OF IMMUNITY AND CONSENT TO SURRENDER

13. Jordan has invoked the Article 98 (1) of the Statute pursuant to which “(t)he Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligation under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity”. As a starting point we need to know what does means “third State”.

14. The Vienna Convention on the Law of Treaties defines third State as States not party to a particular treaty (Article 2 par. 1 h). For this reason, Article 98 (1) does not apply to the relations between States parties who have consented in Article 27 abolish the immunities of the Heads of States. Now, the question is if Sudan can be considered as such in accordance with Article 98 (1). The UN Security Council Resolution 1593 (2005) has decided to refer the situation in Darfur to the Prosecutor of the Court with the aim to deter the commission of further abuses and to restore international peace and security, and has established an obligation to “cooperate fully with and provide any necessary assistance to the Court and the Prosecutor”. In this case, Sudan is in a ‘particular’ situation. It is a non-party State to the Statute but a member of the United Nations and, furthermore, the UN Security Council has referred the situation in Sudan to the Prosecutor of the ICC acting in the framework of his primary responsibility for the maintenance of international peace and security under Chapter VII of the Charter of the United Nations. Sudan as a member of the United Nations must comply with the obligations adopted under Chapter VII of the Charter of the United Nations. UN Security Council Resolution 1523 (2005) is mandatory for Sudan

15. The jurisdiction of the Court (according to Article 13 b) of the Statute), together with its need of State assistance to be effective, has created a new way of cooperation. The rules governing the traditional inter-State cooperation on criminal and judicial matters are based on the sovereign equality of States and, therefore, the jurisdiction of a State does not have primacy over the jurisdiction of another one.⁵ Consequently, inter-state cooperation is known as 'horizontal' cooperation.⁶ However, the Court has been provided by the UN Security Council with primacy over UN member States and, therefore, it is entitled to request the cooperation of States on a variety of judicial matters. Insofar as the relationship between the Court and UN member States is not based on equal sovereignty but on the primacy of the Court, such cooperation is known as 'vertical'.

16. Article 27 of the Statute includes horizontal and vertical cooperation.⁷ Vertical cooperation exists as well on the arrest and transfer to the Court of persons against whom the Court has issued a warrant of arrest. Thus, extradition rules that would usually apply between States when transferring criminals are not necessarily applicable when transferring accused to the Court. Otherwise, States could easily invoke immunities or the non-extradition of nationals to prevent arrests and transfers. Fortunately, this is not the case of the Court (and the rest of International Tribunals), as the Statute incorporates norms excluding certain immunities and noting that the surrender of accused persons is not to be dealt with as extraditions.⁸ The distinction is logical if one considers that the Court is not a foreign jurisdiction;

⁵ See G. Sluiter, "Cooperation with International Criminal Tribunals for the former Yugoslavia and Rwanda", Fischer/Kress/Luder: *International Prosecution of Crimes under International Law*, 2001, p. 688.

⁶ See G. Sluiter, "Using the Genocide Convention to Strengthen Cooperation with the ICC in the Al Basahir Case", *Journal of International Criminal Justice*, 2010, 365-382.

⁷ *Prosecutor v. Al-Bashir*, 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 Al-Bashir, 11 December 2017, paras 33, 38. *Prosecutor v. Al-Bashir*, Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir, 12 December 2011, para. 18.

⁸ On the distinction between transfer and extradition, see Article 102 of the ICC Statute.

thus, the extradition rules that would usually apply between States do not make sense in the context of the Court.

17. Since the obligation of UN member States to transfer persons against whom the Court has issued a warrant of arrest is not based on an extradition treaty, but on their international obligations according to UN Security Resolution 1593 (2005), their discretion to consider the surrender of persons against whom the Court has issued a warrant of arrest is greatly limited. There is a pivotal obligation to comply with requests made by the Court. Even if a State fails to comply with its international obligation to arrest and transfer persons against whom the Court has issued a warrant of arrest, its international obligation still subsists. In that case, it will most likely be for the State that failed to comply with its international obligation to justify the actions taken and/or the reasons for its non-compliance. If the State fails to justify the non-compliance in a satisfactory manner it will incur in international responsibility. The Court has certain mechanisms to report the non-compliance of UN member States with their international obligations to the UN Security Council, which can then take measures against the State that incurred in international responsibility.⁹

18. Articles 40 and 41 of the UN Charter empower the Security Council to adopt measures not involving the use of armed force to give effect to its decisions in order to discharge its obligation under Article 39 to maintain or restore international peace and security. In addition, Article 25 of the Charter emphasizes that “[t]he Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter”. Thus, UN member States have an obligation to implement decisions of the UN Security Council.

19. Having said that, the importance of UN member States’ obligations towards the Court and other international tribunals cannot be overestimated. The particular obligation of States to cooperate in the arrest and transfer of persons against whom

⁹ Of course, this mechanism is limited and insufficient.

the Court has issued a warrant of arrest constitutes a key factor in addressing the crimes concerned and providing redress to the victims. Therefore, full and expedient cooperation in the transfer of persons against whom the Court has issued a warrant of arrest is a necessary element of the cooperation regime. In sum, Jordan willingness to completely fulfill its obligation to cooperate with the Court is questioned.

III. INTERNATIONAL OBLIGATIONS ARISING FROM THE STATUTE AND UN SECURITY COUNCIL RESOLUTION 1593 (2005)

20. The reference to the verticality between the Court and UN member States is included in the UNSC Resolution 1593 (2005). UN Security Council Resolution 1593 (2005) emphasizes the international obligations of UN member States vis-à-vis the Court. By Resolution 1593 (2005) par. 2 the UN Security Council determined the following:

*“Acting under Chapter VII of the Charter of the United Nations,
...
2. Decides that 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 recognizing that States not party to the Rome Statute have no obligation under the Statute, urges all States and concerned regional and other international organizations to cooperate fully”*

21. In practical terms, this means that all States and International organizations are under an obligation to cooperate with the Court and to assist it in all stages of the proceedings to ensure compliance with requests for assistance in the gathering of evidence, hearing of witnesses, suspects and experts, identification and location of persons and the service of documents. Effects shall also be given to orders issued by the Pre-Trial Chamber, such as warrants of arrest, search warrants, warrants for surrender or transfer of persons, and any other orders necessary for the conduct of the trial.

22. Vertical cooperation applies as well to the arrest and surrender of persons against whom the Court has issued a warrant of arrest (Article 89 of the Statute). Extradition rules, which would usually apply between States when transferring

persons against whom the Court has issued a warrant of arrest, are not necessarily applicable when transferring accused to the Court. The obligation of UN member States, in particular Jordan, to arrest and transfer Mr. Al-Bashir to the Court is not based on an extradition treaty but on their international obligations, their discretion to decide on the transfers is greatly limited. There is an essential obligation to comply with requests made by the Court (Article 27(2) of the Statute). If a State fails to comply with its international obligation to arrest and surrender (or transfer) war crimes suspects, it will most likely have to justify the actions taken and/or the reasons for its non-compliance.

23. Moreover, in the vertical relationship between the Court and UN member States there is a mechanism by which failure to cooperate with the Court has negative consequences for the State. While the Court does not have enforcement powers, it is competent to make a judicial finding concerning a State's failure to comply with the Statute and other legal documents of the Court, and to report that judicial finding to the UN Security Council. Such reporting powers constitute the only tool the Court has to ensure cooperation and to fulfill the mandate entrusted to it by the UN Security Council -to prosecute the most responsible for serious violations of international humanitarian law committed in the territory of Sudan.¹⁰

24. Thus, the mechanism available to the Court is a reporting one by which the UN Security Council is put on notice if a State fails to cooperate with the Court. The UN Security Council will then consider taking those measures that are appropriate against the State that failed to comply.¹¹ This mechanism has been applied on numerous occasions in the framework of The International Criminal Tribunal for the Former Yugoslavia (ICTY).¹² However, its scope is limited insofar as any of the

¹⁰ See Y. Gamarra and A. Vicente, "Securing Protection to Civilian Population: The Doubtful United Nations Response in Sudan", *The Global Community Yearbook of International Law and Jurisprudence*, 2004/1, pp. 195 – 226.

¹¹ See Article 87 para. 7 of the ICC Statute.

¹² Among the early cases before the ICTY, see the preambular para. 7 of Security Council Resolution 9 November 1995 (S/1995/940) referring to the President's Report (S/1995/910) in the case *Prosecutor v. Dragan Nikolić*, Case No. IT-94-2-R61; the statement of the President of the Security Council on 8

permanent members of the UN Security Council can veto measures against the State that failed to arrest and/or transfer. Therefore, the effectiveness of this mechanism can be hindered by political considerations within the members of the UN Security Council.

25. It is worth noting that, in addition to the legal remedy available to the Court, UN member States may also act upon other member State's failure to cooperate with the Court as long as there is a previous judicial finding that the State concerned has indeed fail to cooperate.¹³

26. The UN member State's obligations towards the Court have been implemented by States through national laws on cooperation with the Court. It is important to note that before the Court such internal legislation is required by the Statute.¹⁴ Such laws regulate how and which organs within the State's national jurisdiction will deal with the Court requests for assistance, including arrest warrants and requests for the transfer of persons against whom the Court has issued a warrant of arrest to the Court. Of course, the existence of national legislations facilitates and makes more efficient the process of arresting and transferring war criminals to international tribunals.

27. The arrest and transfer of persons against whom the Court has issued a warrant of arrest is more likely to take place when States have a true intention to

May 1996 concerning non-cooperation by the Federal Republic of Yugoslavia described in the Report of the President of the International Tribunal (S/1996/319); the statement of the President of the Security Council on 8 August 1996 (S/PRST/1996/34-SC/6253) in reply to the Report of the President of the International Tribunal of 11 July 1996 (S/1996/556); the statement of the President of the Security Council on 20 September 1996 (S/PRST/1996/39) in reply to the Report of the President of the International Tribunal of 16 September 1996 (S/196/763). See also the Letter dated 16 March 1999 from the President of the ICTY addressed to the President of the Security Council: about the Refusal of the FRY to Cooperate with the ICTY as required by UN Resolutions and the ICTY Statute. See wider information in Y. Gamarra and A. Vicente, "United Nations Member States' Obligations Towards the ICTY: Arresting and Transferring Lukic, Gotovina and Zelenovic", *International Criminal Law Review*, 2008/4, pp. 627 – 653.

¹³ See D. Cortright and A. Lopez, "Smart Sanctions. Targeting Economic Statecraft", Rowman and Littlefield, 2002; and Z. Selden, *Economic Sanctions as Instruments of American Foreign Policy*, Praeger, 1999.

¹⁴ See Article 88 of the ICC Statute.

cooperate, which is explicit when they adopt internal legislation to make the process of arresting and transferring smooth and transparent. Such internal legislation incorporating the obligation to arrest and transfer should clearly distinguish transfers from extraditions to avoid misinterpretations of the State's international obligations. They should also provide a procedure that is fair to the accused but that is efficient and does not create delays or procedural difficulties to the arrest and transfer of war crimes accused.

28. The obligations imposed by the UN Security Council Resolution 1593 (2005) has *erga omnes* effect. In this respect, the crimes prosecuted by the Court are the most serious crimes of concern for the international community, and the legal and procedural standards applied by the ICC are of the highest level.

29. At the end, the obligations under the UN Security Council Resolution 1593 (2005) in relation to the Statute overrides its the general international law and treaties relating to immunities. That is why Jordan has no legal arguments to refuse the surrender Al-Bashir to the Court.

A handwritten signature in black ink, consisting of several fluid, overlapping loops and a long horizontal stroke at the end, identifying the author as Profª Dra Yolanda Gamarra.

Profª Dra Yolanda Gamarra

Dated this 18 June 2018

In Zaragoza, Spain