

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: ICC-02/05-01/09
Date: **21 February 2018**

PRE-TRIAL CHAMBER II

Before: Judge Cuno Tarfusser, Presiding Judge
Judge Marc Perrin de Brichambaut
Judge Chang-ho Chung

SITUATION IN DARFUR, SUDAN

IN THE CASE OF *THE PROSECUTOR v. OMAR HASSAN AHMAD AL BASHIR*

Public

Decision on Jordan's request for leave to appeal

To be notified, in accordance with Regulation 31 of the Regulations of the Court, to:

The Office of the Prosecutor

Fatou Bensouda

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Counsel for the Defence

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants for
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

Other

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Counsel Support Section

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Detention Section

**Victims Participation and Reparations
Section**

Other

Pre-Trial Chamber II (“Chamber”) of the International Criminal Court issues this decision on the request for leave to appeal 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” (“Decision”), made by the Hashemite Kingdom of Jordan (“Jordan”) in “The Hashemite Kingdom of Jordan’s Notice of Appeal of 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; or, in the Alternative, Leave to Seek Such an Appeal”, filed on 18 December 2017.¹

1. On 11 December, the Chamber issued 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”,² whereby it found that Jordan had failed to comply with its obligations under the Rome Statute by not executing the Court’s request for the arrest of Omar Hassan Ahmad Al-Bashir (“Omar Al-Bashir”) and his surrender to the Court while he was on Jordanian territory on 29 March 2017, and decided that the matter of Jordan’s non-compliance with the request for arrest and surrender of Omar Al-Bashir to the Court be referred to the Assembly of States Parties of the Rome Statute and the United Nations Security Council.
2. On 18 December 2017, Jordan requested leave to appeal the Decision with respect to the following four issues:
 - i) The Chamber erred with respect to a matter of fact in concluding that Sudan was not a party to the 1953 Convention on the Privileges and Immunities of the Arab League (...) and erred with respect to a matter of law in concluding that Sudan’s accession was an essential precondition for Jordan’s obligation to give effect to President Al-Bashir’s immunity under the 1953 Convention [“First Issue”];
 - ii) The Chamber erred with respect to matters of law in its conclusions regarding the effects of the Rome Statute upon the immunity of President Al-Bashir, including its conclusions that Article 27(2) of the Rome Statute excludes the application of Article 98; that Article 98 establishes no rights for States Parties;

¹ ICC-02/05-01/09-312.

² ICC-02/05-01/09-309.

that Article 98(2) does not apply to the 1953 Convention; and that even if Article 98 applied it would provide no basis for Jordan not to comply with the Court's request ["Second Issue"];

- iii) The Chamber erred with respect to matters of law in concluding that U.N. Security council resolution 1593 (2005) affected Jordan's obligations under customary and conventional international law to accord immunity to President Omar Hassan Ahmad Al-Bashir ["Third Issue"]; and
- iv) Even if the Chamber's Decision with respect to non-compliance was correct (*quod non*), the Chamber abused its discretion in deciding to refer such non-compliance to the Assembly of States Parties and the U.N. Security Council ["Fourth Issue"].

3. The Chamber notes that in the same submission, Jordan also argued that "the Issues arising from the Chamber's Decision under Part IX of the Rome Statute are appealable by Jordan without seeking leave of the Chamber".³ However, considering that a Pre-Trial Chamber does not have the power under the Statute or the Rules of Procedure and Evidence ("Rules") to determine the admissibility of a direct appeal, the Chamber does not address this argument and the present decision is issued under article 82(1)(d) of the Statute.

4. On 21 December 2017, the Prosecutor filed the "Prosecution's response to the Hashemite Kingdom of Jordan's notice of appeal against the article 87(7) decision, or in the alternative, application for leave to appeal the decision under article 82(1)(d)",⁴ submitting, *inter alia*, that it "does not object to granting Jordan leave to appeal the Decision under the Second Issue and the Third Issue".⁵ Nevertheless, the Prosecutor, "to more accurately reflect the Decision, and to encapsulate all legal matters presented under those issues", proposes to "re-frame" the Second and Third Issues as follows:

- Whether the immunities of Omar Al-Bashir as Head of State, under customary international law or a pre-existing treaty obligation, bar States Parties to the Rome Statute from executing the Court's request for his arrest and surrender for crimes under the Court's jurisdiction allegedly committed in Darfur within the parameters of the Security Council referral; and

³ *Ibid.*, para. 7, see also paras 8-11.

⁴ ICC-02/05-01/09-313.

⁵ *Ibid.*, para. 3.

- Whether the rights and obligations as provided for in the Statute, including article 27(2), are applicable to Sudan, by imposition of the Security Council acting under Chapter VII of the UN Charter.⁶

As concerns the First and Fourth Issues, the Prosecutor submits that they are not appealable.⁷

5. On 23 January 2018, after having sought⁸ and obtained leave of the Chamber,⁹ Jordan filed the “Reply to the prosecution’s response to the Hashemite Kingdom of Jordan’s notice of appeal against the article 87(7) decision, or in the alternative, application for leave to appeal the decision under article 82(1)(d)”.¹⁰
6. The Chamber notes article 82(1)(d) of the Statute, which provides that “[e]ither party may appeal [...] [a] decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, and immediate resolution by the Appeals Chamber may materially advance the proceedings”.
7. The Chamber will first assess whether the issues presented by Jordan are issues arising out of the Decision.
8. The First Issue relates to the validity of the Chamber’s assessment of whether the 1953 Convention on the Privileges and Immunities of the Arab League (“1953 Convention”) gave immunity from arrest to Omar Al-Bashir during his presence on Jordanian territory. As a preliminary point, it is proper to clarify that, as pointed out by the Prosecutor, the Chamber did not conclude that Sudan was not a party to the 1953 Convention, but stated that it was “unable to conclude that it has been

⁶ *Id.*

⁷ *Ibid.*, paras 14-25.

⁸ ICC-02/05-01/09-314.

⁹ “Decision on Jordan’s request for leave to reply”, 15 January 2018, ICC-02/05-01/09-315.

¹⁰ ICC-02/05-01/09-316.

established before it that Sudan is a party to the 1953 Convention”.¹¹ It has since become apparent that the Chamber did not have before it at the time of the issuance of the Decision an accurate translation of the information provided by Jordan in Arabic on 6 October 2017. Indeed, the corrected translation filed by the Registry on 20 December 2017 includes information that Sudan deposited its instrument of accession to the 1953 Convention on 30 October 1977.¹²

9. In any case, for an issue to qualify for certification under article 82(1)(d) of the Statute, it must be “constituted by a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination”.¹³ For this determination, paragraph 44 of the Decision is crucial:

The Chamber finds, by majority, that because the rights and obligations as provided for in the Statute, including article 27(2), are applicable to Sudan (by imposition of the Security Council acting under Chapter VII of the UN Charter), the immunities of Omar Al-Bashir as Head of State, under customary international law, do not bar States Parties to the Rome Statute from executing the Court’s request of his arrest and surrender for crimes under the jurisdiction of the Court allegedly committed in Darfur within the parameters of the Security Council referral. *While it has not been established before the Chamber that the 1953 Convention is in force between Sudan and Jordan, the same conclusion would hold also with respect to any immunity of Omar Al-Bashir under article 11 of said convention.* Article 98(1) of the Statute is not applicable to the situation of Omar Al Bashir, and States Parties to the Rome Statute, including Jordan, are under the duty to execute the warrants of arrest issued by the Court, and to implement the Court’s request for the arrest of Omar Al-Bashir and his surrender to the Court.¹⁴

10. It is clear from the above that even if the Chamber had adjudicated the First Issue differently in the Decision and found, as argued by Jordan, that Sudan was indeed a party of the 1953 Convention and/or that, as a matter of law, this aspect was in any case not dispositive, this would not have had any impact on – let alone be “essential” for – the Chamber’s determination of the matter before it and its conclusion that no

¹¹ Decision, para. 30.

¹² ICC-02/05-01/09-306-Conf-AnxII-Corr, p. 3; cf. ICC-02/05-01/09-306-Conf-AnxII.

¹³ Appeals Chamber, *Situation in the Democratic Republic of the Congo*, “Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal”, 13 July 2006, ICC-01/04-168, para. 9.

¹⁴ Emphasis added.

immunity was applicable and that Jordan was under the obligation, under the Statute, to arrest Omar Al-Bashir while he was present on Jordanian territory and surrender him to the Court. Accordingly, the First Issue does not constitute an appealable issue within the meaning of article 82(1)(d) of the Statute, and leave to appeal the Decision with respect to this issue is therefore rejected.

11. The Second and Third Issues, instead, do arise out of the Decision, as the Prosecutor also acknowledges. Indeed, these two issues are each a composite of several issues that relate to the core of the Decision and concern precisely the subject-matter the resolution of which underpinned the Chamber's finding that Jordan failed to comply with its obligations under the Statute. It may be additionally observed, as a corollary to what is stated above with respect to the First Issue, that the Second and Third Issue as proposed encompass the possibility to make also arguments related to any immunity under the 1953 Convention.
12. The matter remaining to be resolved at this juncture is the Prosecutor's proposal to "re-frame" the issues "to more accurately reflect the Decision, and to encapsulate all legal matters presented under those issues".¹⁵ Jordan objects to the re-framing of the issues and "wishes to maintain the much-clearer two Issues as originally formulated".¹⁶ In the view of the majority of the Chamber, there is no reason to "re-frame" the Second and Third Issues as presented by Jordan. On the one hand, it is for the prospective appellant to specify the issues intended to form the subject-matter of the prospective appeal. On the other hand, the Appeals Chamber has adequate powers to ensure that the issue on appeal is wholly and properly considered in substance.¹⁷

¹⁵ ICC-02/05-01/09-313, para. 3.

¹⁶ ICC-02/05-01/09-316, para. 10.

¹⁷ See *e.g.* Appeals Chamber, *The Prosecutor v. Thomas Lubanga Dyilo*, "Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled 'Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54 (3) (e) agreements and the application to stay

13. Finally, the Chamber turns to the Fourth Issue identified for appeal by Jordan. The Chamber, by majority, is of the view that this issue plainly arises from the Decision as it concerns the validity of the Chamber's considerations that underlie its ultimate determination that a referral to the Assembly of States Parties to the Rome Statute and the Security Council of Jordan's non-compliance with its obligations under the Statute was appropriate. The Chamber therefore finds, by majority, that the Fourth Issue can therefore be said to constitute an appealable issue.

14. Having determined that the Second, Third and Fourth Issues proposed for appeal by Jordan constitute issues within the meaning of article 82(1)(d) of the Statute, the majority of the Chamber must now assess whether these issues "would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial" and whether "an immediate resolution by the Appeals Chamber may materially advance the proceedings". As the issues are related, this assessment is undertaken jointly.

15. The Second, Third and Fourth Issues identified by Jordan relate to the Court's ability to obtain cooperation from States in execution of the arrest warrant issued for Omar Al-Bashir. While the plain meaning of the requirement that the issues affect the fair and expeditious conduct of the proceedings or the outcome of the trial does not appear to encompass the matter at hand, the Chamber considers it appropriate in the present circumstances to give that requirement an extensive interpretation based on

the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008", 21 October 2008, ICC-01/04-01/06-1486, paras 14, 17; *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, "Judgment on the appeal of Mr Mathieu Ngudjolo against the decision of Pre-Trial Chamber I entitled 'Decision on the Prosecution Request for Authorisation to Redact Statements of Witnesses 4 and 9'", 27 May 2008, ICC-01/0401/07-521, para. 37; *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, "Judgment on the appeal of Mr Laurent Gbagbo against the decision of Trial Chamber I entitled "Decision giving notice pursuant to Regulation 55(2) of the Regulations of the Court", 18 December 2015, ICC-02/11-01/15-369, paras 25-26; *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, "Judgment on the appeals of Mr Laurent Gbagbo and Mr Charles Blé Goudé against the decision of Trial Chamber I of 9 June 2016 entitled "Decision on the Prosecutor's application to introduce prior recorded testimony under Rules 68(2)(b) and 68(3)", 1 November 2016, para. 19.

its object and purpose, and to allow for the conclusion that the requirement is also met presently, where the issues significantly affect the Court's ability to obtain custody of a person and commence criminal proceedings *stricto sensu*. Finally, the Chamber considers, by majority, that the authoritative resolution by the Appeals Chamber with respect to the Second, Third and Fourth Issues would provide clarity and finality on these matters. In these circumstances, the majority of the Chamber is satisfied that leave to appeal the Decision must therefore be granted with respect to the Second, Third and Fourth Issues.

FOR THESE REASONS, THE CHAMBER HEREBY

GRANTS Jordan leave to appeal the Decision with respect to the Second, Third and Fourth Issues; and

REJECTS the request for leave to appeal the Decision with respect to the First Issue.

Judge Marc Perrin de Brichambaut appends a minority opinion.

Done in both English and French, the English version being authoritative.



Judge Cuno Tarfusser
Presiding Judge



Judge Marc Perrin de Brichambaut



Judge Chang-ho Chung

Dated 21 February 2018

At The Hague, The Netherlands