



Original: English

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

Date: 6 April 2018

THE APPEALS CHAMBER

Before: **President 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

**Decision on Jordan's request for suspensive effect of its appeal against the
decision on the non-compliance by Jordan with the request for the arrest and
surrender of Mr Omar Al-Bashir**

Decision 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

States Representatives
Competent authorities of the Hashemite
Kingdom of Jordan

REGISTRY

Registrar
Mr Herman von Hebel

The Appeals Chamber of the International Criminal Court,

In the appeal of the Hashemite Kingdom of Jordan against the decision of Pre-Trial Chamber II entitled ‘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 [f] Omar Al-Bashir’ of 11 December 2017 (ICC-02/05-01/09-309),

Having before it ‘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 [f] Omar Al-Bashir”’ of 12 March 2018 (ICC-02/05-01/09-326),

Renders unanimously, the following

DECISION

The request of the Hashemite Kingdom of Jordan for suspensive effect is granted with respect to Pre-Trial Chamber II’s ‘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 [f] Omar Al-Bashir’.

REASONS

I. PROCEDURAL HISTORY

1. On 11 December 2017, Pre-Trial Chamber II (hereinafter: “Pre-Trial 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 [f] Omar Al-Bashir’¹ (hereinafter: ‘Impugned Decision’).
2. On 21 February 2018, the Pre-Trial Chamber granted the Hashemite Kingdom of Jordan (hereinafter: ‘Jordan’) leave to appeal the Impugned Decision.²

¹ [ICC-02/05-01/09-309](#).

² ‘Decision on Jordan’s request for leave to appeal’, [ICC-02/05-01/09-319](#).

3. On 12 March 2018, following a decision of the Appeals Chamber to extend the page limit of and the time limit for the filing of the appeal brief and the response thereto,³ Jordan filed ‘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 o[f] Omar Al-Bashir”’⁴ (hereinafter: ‘Appeal Brief’). In the Appeal Brief, Jordan requests, *inter alia*, that the Pre-Trial Chamber’s decision to refer it to the Assembly of States Parties and the United Nations Security Council through the President of the Court according to regulation 109 (4) of the Regulations of the Court be suspended, pursuant to article 82 (3) of the Statute and rule 156 (5) of the Rules of Procedure and Evidence (hereinafter: ‘Rules’), pending resolution of the appeal.⁵

4. On 3 April 2018, the Prosecutor filed the ‘Prosecution Response to 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 o[f] Omar Al-Bashir”’⁶ (hereinafter: ‘Prosecutor’s Response’), which includes the Prosecutor’s response to the request for suspensive effect.

II. MERITS

5. In support of its request for suspensive effect, Jordan submits that a referral of ‘non-compliance to the Assembly of States Parties and the Security Council prior to resolution of this appeal would result in consequences that are difficult to correct and irreversible, and would defeat the purpose of this appeal’.⁷ In Jordan’s view, the purpose of the appeal - to avoid any ‘such referral and its consequences’ - would most certainly be defeated should the Security Council ‘take action or adopt measures

³ ‘Decision on applications for extension of the page and time limits’, 28 February 2018, [ICC-02/05-01/09-324](#). See also ‘The Hashemite Kingdom of Jordan’s Application for an Extension of the Page Limit for its 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 or [sic] Omar Al-Bashir”’, 27 February 2018, [ICC-02/05-01/09-321](#) and ‘Prosecution Response to the Kingdom of Jordan’s Application for an Extension of the Page Limit’, 28 February 2018, [ICC-02/05-01/09-323](#).

⁴ [ICC-02/05-01/09-326](#).

⁵ [Appeal Brief](#), paras 108-114.

⁶ [ICC-02/05-01/09-331](#).

⁷ [Appeal Brief](#), para. 111.

against Jordan’.⁸ Moreover, Jordan argues that a referral to the Assembly of States Parties may trigger procedures relating to non-cooperation which it submits ‘should not take place when a decision relating to non-cooperation is under appeal’.⁹

6. The Prosecutor agrees ‘in principle’ to suspensive effect being granted and defers to the Appeals Chamber’s discretion in this matter.¹⁰

7. The Appeals Chamber notes that article 82 (3) of the Statute provides that ‘[a]n appeal shall not of itself have suspensive effect unless the Appeals Chamber so orders, upon request, in accordance with the Rules of Procedure and Evidence’. Rule 156 of the Rules provides that ‘[w]hen filing the appeal, the party appealing may request that the appeal have suspensive effect in accordance with article 82, paragraph 3’.

8. The Appeals Chamber recalls that it has consistently held that its decision to order that an appeal has suspensive effect is discretionary and that, when examining a request for suspensive effect, it ‘will consider the specific circumstances of the case and the factors it considers relevant for the exercise of its discretion under these circumstances’.¹¹ The Appeals Chamber has summarised the circumstances in which it has previously exercised its discretion to grant suspensive effect as follows:

In past decisions, the Appeals Chamber, when deciding on requests for suspensive effect, has considered whether the implementation of the decision under appeal (i) ‘would create an irreversible situation that could not be corrected, even if the Appeals Chamber eventually were to find in favour of the appellant’, (ii) would lead to consequences that ‘would be very difficult to correct and may be irreversible’, or (iii) ‘could potentially defeat the purpose of the appeal’.¹² [Footnotes omitted.]

⁸ [Appeal Brief](#), paras 111-112.

⁹ [Appeal Brief](#), para. 113.

¹⁰ [Prosecutor’s Response](#), para. 125.

¹¹ *Situation on registered vessels of the Union of the Comoros, The Hellenic Republic and the Kingdom of Cambodia*, ‘Decision on suspensive effect’, 6 August 2015, [ICC-01/13-43 \(OA\)](#), para. 7, referring to *Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, ‘Decision on the Prosecutor’s urgent request for suspensive effect of the “Decision ordering the release of Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido” of 21 October 2014’, 22 October 2014, [ICC-01/05-01/13-718 \(OA9\)](#), para. 5.

¹² *Ibid.*

9. Without prejudice to the Appeals Chamber's eventual determination on the merits of the appeal, the Appeals Chamber finds Jordan's arguments on suspensive effect to be persuasive. In particular, the Appeals Chamber finds that the purpose of the present appeal would be defeated if Jordan were referred to the Assembly of States Parties and the Security Council prior to a determination by the Appeals Chamber on whether the basis for the referral was correct. Accordingly, the request for suspensive effect is granted.

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



President Chile Eboe-Osuji
Presiding Judge

Dated this 6th day of April 2018

At The Hague, The Netherlands