

## MINORITY OPINION OF JUDGE MARC PERRIN DE BRICHAMBAUT

### I. Introduction

1. I agree with the decision of the Chamber to grant leave to appeal the Impugned Decision.<sup>1</sup> However, I am of the view that leave to appeal should be granted solely with respect to the Second and Third Issues as respectively reframed by the Prosecutor:

Whether the immunities of Omar Hassan Ahmad Al Bashir [“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

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.<sup>2</sup>

2. With respect to the First Issue,<sup>3</sup> I would make the point, as has the Prosecutor,<sup>4</sup> that the effects of pre-existing treaty obligations on Jordan’s duty to execute a request by the Court for arrest and surrender, including obligations arising from the 1953 Convention on the Privileges and Immunities of the League of Arab States,<sup>5</sup> could indeed be addressed under the Second Issue as reframed. Regarding

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<sup>1</sup> *The Prosecutor v. Omar Hassan Ahmad 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 Omar Al-Bashir”, 11 December 2017, ICC-02/05-01/09-309.

<sup>2</sup> *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, “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)” (“Prosecution’s Response”), 21 December 2017, ICC-02/05-01/09-313, para. 3.

<sup>3</sup> *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, “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” (“Jordan’s Notice of Appeal”), 18 December 2017, ICC-02/05-01/09-312, para. 4: “[...] 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 (“1953 Convention”) 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.” [footnote omitted].

<sup>4</sup> Prosecution’s Response, para. 22.

<sup>5</sup> *Convention on the Privileges and Immunities of the League of Arab States*, adopted by the Council of the League of Arab States, 18th Ordinary Sess., 10 May 1953.

the Fourth Issue,<sup>6</sup> I agree with the Prosecutor's contention that Jordan has not identified an appealable issue, as defined by article 82 (1) (d) of the Statute.<sup>7</sup> Thus, I consider that leave to appeal should not be granted concerning the First and Fourth Issues.

3. The Second and Third Issues, as reframed by the Prosecutor, accurately encapsulate the legal and factual issues whose consideration by the Pre-Trial Chamber led to the Impugned Decision. Accordingly, certification by the Pre-Trial Chamber of the reframed Second and Third Issues, would put the Appeals Chamber in a position to address the Impugned Decision in the most comprehensive manner. This is especially important in the light of the Court's divergent decisions on the question of immunities.

4. Furthermore, for the exhaustive resolution of all the legal issues bearing on the obligation of States Parties to the Rome Statute to cooperate with the Court in the arrest and surrender of Omar Al-Bashir, it is my opinion that, in addition to the above issues, the following related issue, set out in detail in my minority opinion of 14 December 2017 on the non-cooperation of Jordan ("Minority Opinion of 14 December 2017"),<sup>8</sup> should also be addressed by the Appeals Chamber, *viz.*, the issue as to whether:

the full participation of Sudan and Jordan in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide<sup>9</sup> ("Genocide Convention" or "Convention") has the effect of lifting the immunity of Omar Al Bashir, [and if so, whether it] compel[s] Contracting Parties to the Convention to arrest him when he is present on their territory pursuant to their obligation to cooperate with the Court.

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<sup>6</sup> Jordan's Notice of Appeal, para. 4: "[...] 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."

<sup>7</sup> Prosecution's Response, paras. 23-24.

<sup>8</sup> *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, "Minority Opinion of Judge Marc Perrin de Brichambaut", dated 11 December 2017 and registered on 14 December 2017, ICC-02/05-01/09-309-Anx-tENG.

<sup>9</sup> *Convention on the Prevention and Punishment of the Crime of Genocide*, United Nations Treaty Series, vol. 78, p. 277.

## II. The Chamber's power to reframe an issue, as defined by article 82 (1) (d) of the Statute

5. The Appeals Chamber has previously held with respect to article 82 (1) (d) of the Statute that "the Pre-Trial or Trial Chamber is vested with power to state, or more accurately still, to certify the existence of an appealable issue".<sup>10</sup> The Appeals Chamber has further noted that "[t]his indicates that it is for the Pre-Trial or Trial Chamber to determine not only whether a decision may be appealed, but also to what extent".<sup>11</sup>

6. On this basis Pre-Trial and Trial Chambers have, on a number of occasions, reframed an "issue" in relation to which leave to appeal was sought, by narrowing or changing the focus of the question raised by the appellants.<sup>12</sup> Hence, it is well established that Pre-Trial and Trial Chambers have the power to reframe issues in relation to which leave to appeal is sought and, as a consequence, to expand upon them. I am fully aware that Pre-Trial and Trial Chambers must exercise the discretion conferred upon them by article 82 (1) (d) of the Statute judiciously, as, in at least one instance, a party that had sought and was granted leave to appeal subsequently withdrew its appeal in the light of a reframed "issue".<sup>13</sup> In that

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<sup>10</sup> 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. 20.

<sup>11</sup> Appeals Chamber, *The Prosecutor v. Laurent Koudou Gbagbo*, "Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 3 June 2013 entitled 'Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute'", 16 December 2013, ICC-02/11-01/11-572 (OA 5) ("Judgment of 16 December 2013"), para. 63.

<sup>12</sup> See, for example, Trial Chamber V(a), *The Prosecutor v. Ruto and Sang*, "Decision on the Defence's Applications for Leave to Appeal the 'Decision on Prosecution Request for Admission of Prior Recorded Testimony'", dated 10 September 2015 and registered on 11 September 2015, ICC-01/09-01/11-1953-Red, para. 20; Trial Chamber VI, *The Prosecutor v. Bemba et al.*, "Decision on Defence request seeking leave to appeal the 'Decision on request for compensation for unlawful detention'", 13 May 2016, ICC-01/05-01/13-1893, paras. 21 *et seq.*

<sup>13</sup> See, *The Prosecutor v. Banda and Jerbo*, "Defence Notice to the Registrar of the Discontinuance of the Defence appeal against the Decision on the defence request for a temporary stay of proceedings (ICC-02/05-03/09-410)", 21 December 2012, ICC-02/05-03/09-435 (OA 3).

connection, I also note that the Appeals Chamber has held that it will not render “advisory opinions on issues that are not properly before it”.<sup>14</sup>

7. However, in view of the importance of the issues arising from the Impugned Decision<sup>15</sup> and the fact that the question of the applicability and effect of the Genocide Convention form part of the relevant issues, I believe that it is appropriate to exercise such discretion and that the inclusion of this related issue would not amount to seeking an advisory opinion. The fact of the matter is that despite his numerous official visits to States Parties, Omar Al-Bashir has yet to be arrested and surrendered to the Court.<sup>16</sup> Moreover, I noted in my minority opinion on the non-cooperation of South Africa of 6 July 2017 (“Minority Opinion of 6 July 2017”)<sup>17</sup> that the issue of Omar Al-Bashir’s immunity, as mentioned above,<sup>18</sup> has given rise to different legal positions in the decisions of this Court. It is therefore of the utmost importance and urgency that the Court take a clear stance on the legal issues bearing on the obligation of States Parties to cooperate with the Court in the arrest and surrender of Omar Al-Bashir, in particular in the light of the obligations arising under the Genocide Convention.

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<sup>14</sup> Appeals Chamber, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, “Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case”, 25 September 2009, ICC-01/04-01/07-1497 (OA 8), para. 38 and *The Prosecutor v. Callixte Mbarushimana*, “Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 16 December 2011 entitled ‘Decision on the confirmation of charges’”, 30 May 2012, ICC-01/04-01/10-514 (OA 4), para. 68. See also *The Prosecutor v. Laurent Koudou Gbagbo*, Judgment of 16 December 2013, para. 54.

<sup>15</sup> *The Prosecutor v. Omar Hassan Ahmad 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 Omar Al-Bashir”, 11 December 2017, ICC-02/05-01/09-309.

<sup>16</sup> See, for instance, *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, “Decision inviting the Republic of Uganda to provide submissions concerning its failure to arrest Omar Al-Bashir and surrender him to the Court”, 13 December 2017, ICC-02/05-01/09-310 and “Decision inviting the Republic of Chad to provide submissions concerning its failure to arrest Omar Al-Bashir and surrender him to the Court”, 13 December 2017, ICC-02/05-01/09-311.

<sup>17</sup> Minority Opinion of Judge Marc Perrin de Brichambaut, 6 July 2017, ICC-02/05-01/09-302-Anx, para. 2.

<sup>18</sup> *Supra*, para. 3.

### III. Legal obligations arising from the Genocide Convention

8. As set out in both my Minority Opinion of 6 July 2017 and my Minority Opinion of 14 December 2017,<sup>19</sup> I firmly believe that the Genocide Convention is the relevant instrument to be considered regarding the question of the lifting of the personal immunity of a Head of State charged with the crime of genocide.

9. The Genocide Convention is brought into play in these proceedings by article 98 of the Statute and, more specifically, article 98 (1), to which Jordan has referred.<sup>20</sup> Article 98 (1) of the Statute states that the Court “may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with *its obligations under international law* with respect to the [...] immunity of a person [...] of a third State” (emphasis added). However, the reference to “obligations under international law” does not, in my view, allow for a pick-and-choose approach. Rather, it requires the Court to conduct an exhaustive analysis of *all* the relevant and potentially competing obligations under international law, including those in the case at bar which arise from the Genocide Convention, to which both Sudan and Jordan acceded in 2004 and 1950, respectively.

10. In my Minority Opinion of 14 December 2017, I argued that personal immunities cannot attach to the “constitutionally responsible rulers” of the Contracting Parties, within the meaning of article IV of the Convention, who are charged with the crime of genocide. I further argued that article VI of the Convention, in fact lifts such immunities for the purposes of prosecution, *inter alia*, before an “international penal tribunal” such as this Court. Thus, I concluded that Jordan has an obligation to cooperate with the Court arising from article VI of the

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<sup>19</sup> Minority Opinion of 6 July 2017. *See also*, Minority Opinion of 14 December 2017, paras. 4-10.

<sup>20</sup> Minority Opinion of 14 December 2017, paras. 2, 4-6. As underscored in my Minority Opinion of 6 July 2017, pursuant to rule 195 of the Rules of Procedure and Evidence, a requested State may raise a problem of execution under article 98 of the Statute before the Court. Read together with article 119 (1) of the Statute, I concluded that by virtue of this procedure the authority to decide whether Jordan is obliged to respect Omar Al Bashir’s immunities vests solely in the Court (Minority Opinion of 14 December 2017, para. 5. *See also*, Minority Opinion of 6 July 2017, para. 4).

Convention in addition to its obligations under the Rome Statute and, as a result, Jordan would not have acted inconsistently with its “obligations under international law with respect to the [...] immunity of a person [...] of a third State”, had it arrested and surrendered Omar Al Bashir to the Court.<sup>21</sup>

11. Certification of this Third Issue, as reframed above,<sup>22</sup> would require the Appeals Chamber to address a number of important questions in relation to the Genocide Convention. First, it would have to determine whether the Genocide Convention is, in fact, applicable to the case *sub judice* and, as a consequence, whether any waiver of immunity based on the Convention affects the proceedings before the Court. In order to do so, the Appeals Chamber would have to examine in turn: (i) whether the Court constitutes an “international penal tribunal” for the purpose of article VI of the Convention; (ii) whether Sudan can be considered to have accepted the jurisdiction of the Court; and (iii) whether Omar Al-Bashir can be regarded as a “perso[n] charged with genocide” within the meaning of article VI of the Convention.

12. Were it to conclude that the Genocide Convention is applicable to the case, the Appeals Chamber would then have to examine whether personal immunities can attach to the official capacity of an incumbent Head of State who has been “charged” with the crime of genocide before an “international penal tribunal” as envisaged by article VI of the Convention or whether Sudan must be regarded as having relinquished the immunities of its “constitutionally responsible rulers” upon acceding to the Convention.

13. I am also of the opinion that those issues would significantly affect the fair and expeditious conduct of the proceedings and that an immediate resolution of these matters by the Appeals Chamber would materially advance the proceedings,

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<sup>21</sup> Minority Opinion of 14 December 2017, para. 10. In this connection, I also note that Jordan did not submit a request under article 97 of the Statute to consult with the Court regarding “problems which may impede or prevent the execution of the request” for the arrest and surrender of Omar Al-Bashir.

<sup>22</sup> *Supra*, para. 4.

as the intervention of the Appeals Chamber at this stage would provide guidance on the critical issue of whether Jordan, or any other State Party for that matter, may be absolved from executing requests of the Court for arrest and surrender on the ground of immunities based on official capacity.

#### **IV. Conclusion**

14. For these reasons, I consider that, in addition to the Second Issue, as reframed by the Prosecutor, the Pre-Trial Chamber should also certify for determination by the Appeals Chamber the Third Issue, as reframed and in relation to the Genocide Convention.

Done simultaneously in English and French, with both the English and French versions being authoritative.

A handwritten signature in black ink, consisting of several loops and a long horizontal stroke at the end, positioned above a solid horizontal line.

**Judge Marc Perrin de Brichambaut**

Dated this Wednesday, 21 February 2018

At The Hague, The Netherlands