



Original: English

No.: ICC-02/05-01/09
Date: 21 December 2017

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

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)

Source: Office of the Prosecutor

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

The Office of the Prosecutor

Ms Fatou Bensouda
Mr James Stewart
Mr Julian Nicholls

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

The competent authorities of the
Hashemite Kingdom of Jordan

Other

The Presidency
The Appeals Chamber

REGISTRY

Registrar

Mr Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section Other**

Introduction

1. The Hashemite Kingdom of Jordan (“Jordan”)’s notice of appeal¹ against the Pre-Trial Chamber’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 Omar Al-Bashir”² should be rejected. As Jordan acknowledges, decisions under article 87(7) are not directly appealable under articles 81 or 82.³ The Appeals Chamber has repeatedly held that “[t]he decisions that are subject to appeal are enumerated in articles 81 and 82 of the Statute. There is nothing in Part 8 [of the Statute] to suggest that a right to appeal arises except as provided thereunder.”⁴

2. However, the Pre-Trial Chamber may consider Jordan’s alternative request for leave to appeal the Decision on four issues.⁵ As this Pre-Trial Chamber has recently held, decisions under article 87(7) may be appealed pursuant to article 82(1)(d), subject to leave being granted by the Pre-Trial Chamber.⁶ In fact, Trial Chamber V(B) has previously granted leave to appeal against a decision under article 87(7).⁷

3. The Prosecution does not object to granting Jordan leave to appeal the Decision on the legal questions raised in the Application under the Second Issue and

¹ ICC-02/05-01/09-312 (“Application”).

² ICC-02/05-01/09-309 (“Decision”).

³ Application, paras. 9-11.

⁴ ICC-01/04-168 OA3, para. 35; ICC-01/04-01/06-2799 OA19, para. 7; ICC-01/04-01/06-2823 OA20, para. 14; ICC-01/04-01/07-3424 OA14, para. 28; ICC-01/05-01/13-1533 OA12, para. 14.

⁵ Application, 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” (“First Issue”). “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 in 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; 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”).

“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”).

“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”).

⁶ ICC-02/05-01/09-274, footnote 17; see also ICC-02/05-01/09-302, para. 104.

⁷ ICC-01/09-02/11-1004.

the Third Issue. These issues arise from the Decision and meet the criteria for leave to appeal under article 82(1)(d). However, to more accurately reflect the Decision, and to encapsulate all legal matters presented under those issues, the Prosecution proposes to re-frame them 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
- 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.

4. The Pre-Trial Chamber should reject Jordan's Application with respect to the First Issue and the Fourth Issue, as they do not qualify as appealable issues within the meaning of article 82(1)(d) that arise from the Decision. Even if, *arguendo*, the Chamber considers that these two issues are appealable issues arising from the Decision, they should not be certified, as Jordan has not provided any concrete arguments on how they meet the remaining criteria for leave to appeal.

Submissions

(a) The Second Issue and the Third Issue, as re-framed, meet the criteria for leave to appeal

5. Under its Second Issue and Third Issue, Jordan identifies, and seeks leave to appeal, a number of discrete legal findings included in the Decision that inform the Chamber's ultimate conclusion with respect to the effect of article 27(2) on

immunities based on official capacity.⁸ Indeed, to reach that conclusion, the Chamber first held, among other things, that: the rights and obligations under the Statute are applicable to Sudan, as a result of UN Security Council resolution 1593 (2005);⁹ article 27(2) applies to treaty-based immunities and excludes the application of article 98(1);¹⁰ article 98(2) does not apply to the 1953 Convention on Privileges and Immunities of the Arab League (“1953 Convention”);¹¹ article 98(1) establishes no rights to States Parties to refuse compliance with the Court’s requests for cooperation;¹² and article 98 does not have the effect of relieving Jordan of its duties *vis-à-vis* the Court.¹³

6. Since the Chamber entered those findings to reach its ultimate conclusion, it may be more practical, in this case, to focus the appeal on the actual legal conclusions drawn from these intermediate findings. This would facilitate appellate review of the underlying findings in their proper context and allow for a comprehensive resolution of these two issues on appeal. The Prosecution therefore suggests that the Second and Third Issues should be re-framed 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
- 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.

⁸ Decision, para. 44.

⁹ Decision, paras. 36-38, 40, 44.

¹⁰ Decision, para. 32.

¹¹ Decision, para. 32.

¹² Decision, para. 41.

¹³ Decision, para. 43.

7. The legal questions raised under Jordan's Second and Third Issues are central to the Chamber's determination that Jordan failed to comply with its obligations under the Statute by not executing the Court's request for the arrest and surrender of Mr Al Bashir.

8. These issues significantly affect the fair and expeditious conduct of the proceedings and the outcome of the cooperation proceedings and a future trial. In this context, the term "proceedings" should not be narrowly construed and should include both the cooperation proceedings between the Prosecution and Jordan, as well as the criminal proceedings in the case of *the Prosecutor v. Al Bashir*.¹⁴ In addition, in interpreting article 82(1)(d), the Appeals Chamber has held that the term "proceedings" is not "confined to the proceedings in hand but extends to proceedings prior and subsequent thereto".¹⁵ Further, in analysing the term "fair" as used in article 82(1)(d), the Appeals Chamber noted that "[t]he principles of a fair trial are not confined to trial proceedings but extend to pre-trial proceedings as well as the investigation of crime".¹⁶

9. Accordingly, the legal matters raised under the Second and Third Issues not only significantly affect the Prosecution's ability to prosecute Mr Al Bashir before the Court, but they also concern Jordan's obligation to arrest and surrender Mr Al Bashir. Only once the Prosecution has obtained such cooperation and Mr Al Bashir has been arrested and surrendered to the Court will the Prosecution be able to continue the criminal proceedings against him. The Second and Third Issues therefore significantly affect the fair and expeditious conduct of both proceedings.

10. For the same reasons, the Second and Third Issues also have an impact on the outcome of the cooperation proceedings and the potential trial against Mr Al Bashir. This is particularly so in light of the Chamber's finding that Jordan's failure to

¹⁴ ICC-01/09-02/11-1004, para. 26.

¹⁵ ICC-01/04-168 OA3, para. 12.

¹⁶ ICC-01/04-168 OA3, para. 11.

comply with the Court's request for the arrest and surrender of Mr Al Bashir prevented the Court from exercising its statutory functions and powers in connection with the criminal proceedings instituted against him.¹⁷

11. Immediate resolution by the Appeals Chamber of the Second and Third Issues would also materially advance the cooperation proceedings with Jordan and the criminal proceedings against Mr Al Bashir. Article 87(7) provides a specific mechanism for the referral of instances of non-cooperation *inter alia*, in order to facilitate political and diplomatic efforts to promote cooperation with the Court.¹⁸ While the law on the above issues has repeatedly and clearly been stated by the Pre-Trial Chamber, Jordan reasonably argues that appellate review at this stage in the process may enhance the value of Jordan's referral to the Assembly of States Parties and the UN Security Council.¹⁹

12. In addition, the Appeals Chamber's authoritative resolution of the legal questions raised under the Second and Third Issues will facilitate the Prosecution's capacity to secure the ongoing and future cooperation of States Parties, including but not limited to Jordan, to arrest and surrender Mr Al Bashir and other suspects who are at large. To assess whether immediate appellate resolution of an issue is justified, a Chamber should consider not only the direct impact on the present proceedings, but also assess how the prompt resolution of an issue will assist to advance all other proceedings before this Court.²⁰

¹⁷ Decision, para. 50.

¹⁸ ICC-01/09-02/11-982, para. 81; ICC-01/09-02/11-1004, para. 28.

¹⁹ Application, para. 14.

²⁰ While the impact of immediate resolution of the issue on other proceedings may not itself be sufficient to sustain a grant of leave under article 82(1)(d), it is a factor to be weighed in deciding whether to grant leave. Pre-Trial Chamber II has previously recognised that in certain circumstances, the potential impact on other proceedings may be "invoked as an additional argument in support of the alleged significant impact on the current proceedings", see ICC-01/05-20-US-Exp, para. 54 (unsealed pursuant to ICC-02/04-01/05-52). See also *Prosecutor v Bizimungu et al*, ICTR-99-50-T, Decision on the Prosecutor's Motion for Certification to Appeal the Trial Chamber's Decisions on Protection of Defence Witnesses, 28 September 2005, para. 5; *Prosecutor v Mrksic*, IT-95-13/1-PT, Decision Granting Certification to Appeal, 29 May 2003.

13. For these reasons, the Chamber should grant Jordan's request for leave to appeal the Decision on the Second Issue and Third Issue, as re-framed under paragraph 3 above.

(b) The First Issue is not an appealable issue arising from the Decision

14. As its First Issue, Jordan argues that the Chamber erred in fact when concluding that Sudan was not a party to the 1953 Convention; and that the Chamber further erred in law in determining that Sudan's accession to the 1953 Convention was a precondition for Jordan to give effect to President Al-Bashir's immunity under that convention.²¹ The Chamber should reject Jordan's application for leave to appeal on both aspects of the First Issue.

15. The factual aspect of this issue does not arise from the Decision because the Chamber did not conclusively find whether Sudan is a party to the 1953 Convention. Instead, the Chamber merely held that Jordan has not provided any proof that Sudan is a party to the 1953 Convention and refrained from making a determination on this fact.²² It is irrelevant whether Jordan initially understood the Chamber's request as referring to its membership of the 1953 Convention.²³ The Chamber can draw factual conclusions only on the basis of reliable information before it. It cannot be faulted for not speculating on a fact in the abstract.

16. Jordan further claims that its submissions reveal that Sudan is a member to the 1953 Convention. Jordan stresses that its original filing in Arabic was incompletely translated by the Registry omitting a passage referring to Sudan's membership of the 1953 Convention.²⁴ While this argument has merit,²⁵ it does not demonstrate that the First Issue arises from the Decision. Regulation 39 of the

²¹ Application, para. 4.

²² Decision, para. 30.

²³ Request, para. 17.

²⁴ Application, para. 19.

²⁵ See corrected version of the Registry's translation filed on 20 December 2017: ICC-02/05-01/09-306-Conf-AnxII-Corr.

Regulations of the Court provides that all materials filed with the Registry shall be in English or French. It is the duty of a participant—in this case Jordan—to ensure that the translation of a document drafted in a language other than French or English, is accurate and complete. The Chamber correctly based its Decision on information submitted to it in a working language of the Court.

17. The factual aspect of the First Issue should therefore be rejected.

18. The legal aspect of the First Issue, namely whether the Chamber correctly concluded that Sudan's accession to the 1953 Convention was an essential precondition for Jordan to give effect to President Al-Bashir's immunity under that convention, is not an appealable issue within the meaning of article 82(1)(d). Leave to appeal should therefore be rejected.

19. The Appeals Chamber has held that an issue constitutes "an identifiable subject or topic requiring a decision for its resolution",²⁶ and that its resolution is "essential for the determination of matters arising under the judicial cause under examination".²⁷ The legal question raised under the First Issue was not essential for the determination of the Chamber's Decision.

20. While the Chamber held that "the bearer of any immunity of a representative of a State, as a right of international law, is the State which the individual concerned represents",²⁸ this finding was immaterial to the conclusion that Jordan failed to comply with the request for arrest and surrender of Mr Al Bashir. The legal findings that informed the Decision are those identified under the Second and Third Issues. The Chamber held that those considerations are applicable both to immunity under customary international law, as well as to immunity established under a treaty.²⁹

²⁶ ICC-01/04-168 OA3, para. 9.

²⁷ ICC-01/04-168 OA3, para. 9.

²⁸ Decision, para. 29.

²⁹ Decision, para. 32.

21. In addition, leave to appeal on the First Issue should also be rejected because Jordan has not substantiated how this particular issue affects the fair and expeditious conduct of the proceedings or the outcome of the trial and why immediate resolution of this issue would materially advance the proceedings.

22. In any event, if and when Jordan is granted leave to appeal the Decision on the Second and Third Issues, Jordan could raise arguments before the Appeals Chamber that address the effects of pre-existing treaty obligations on its duty to execute a Court's request for arrest and surrender. Such arguments would squarely fall within the scope of the Second Issue and Third Issue.

(c) The Fourth Issue is not an appealable issue arising from the Decision

23. Under its Fourth Issue, Jordan argues that 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 UN Security Council.³⁰ This argument falls short of identifying an appealable issue within the meaning of article 82(1)(d) and leave to appeal should therefore be rejected.

24. Instead of setting out a "subject or topic requiring a decision for its resolution",³¹ and showing how resolution is "essential for the determination of matters arising under the judicial cause under examination",³² the Fourth Issue merely disagrees with the Chamber's exercise of discretion and questions its correctness in the most general terms. A question over which there is disagreement or a conflicting opinion does not constitute an appealable issue.³³ In addition, the correctness of a decision is irrelevant to an application for leave to appeal under article 82(1)(d). The sole questions are whether an appealable issue arises from the

³⁰ Application, para. 4.

³¹ ICC-01/04-168 OA3, para. 9.

³² ICC-01/04-168 OA3, para. 9.

³³ ICC-01/04-168 OA3, paras. 9. ICC-02/04-01/05-367, para.22; ICC-02/05-02/09-267, p. 6; ICC-01/04-01/06-2463, para. 8; ICC-01/09-02/11-27, para. 7.

Decision and whether that issue meets the criteria for leave to appeal.³⁴ Accordingly, it also does not assist that Jordan provides extensive arguments on the merits of a potential future appeal,³⁵ challenging discrete findings of the Chamber that informed the exercise of its discretion.³⁶ These arguments merely show that Jordan disagrees with the Decision, but fall short of identifying an appealable issue.

25. In any event, even if, *arguendo*, the Chamber considers that the Fourth Issue is an appealable issue arising from the Decision, it should nonetheless reject Jordan's request for leave to appeal. Jordan has failed to show how this particular issue affects the fair and expeditious conduct of the proceedings or the outcome of the trial, and why immediate resolution of this issue would materially advance the proceedings.

Conclusion

26. For the foregoing reasons, the Prosecution requests that the Chamber grant the Application with respect to the Second Issue and the Third Issue, as reframed under paragraph 3 above, and reject the Application with respect to the First Issue and the Fourth Issue.



Fatou Bensouda, Prosecutor

Dated this 21st December 2017

At The Hague, The Netherlands

³⁴ ICC-02/04-01/05-20-US-Exp, para. 22, unsealed pursuant to Decision ICC-02/04-01/05-52.

³⁵ Application, paras. 39-47.

³⁶ Decision, paras. 53-54.