

Cour
Pénale
Internationale



International
Criminal
Court

Original: English

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

Date: 6 April 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

The Hashemite Kingdom of Jordan's request for leave to reply to the Prosecutor's "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 arrest and surrender [of] Omar Al-Bashir'"

Source: The Hashemite Kingdom of Jordan

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

The Office of the Prosecutor

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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

Other

REGISTRY

Registrar

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Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

Introduction

1. On 12 March 2018, the Hashemite Kingdom of Jordan (“Jordan”) filed its Appeal against Pre-Trial Chamber II’s December 2017 “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”.¹
2. On 3 April 2018, the Prosecution filed its “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 [of] Omar Al-Bashir’”.²
3. Pursuant to regulation 24(5) of the Regulations of the Court, Jordan hereby requests leave from the Appeals Chamber to file a reply to the Prosecution’s response.

Submissions

4. Regulation 24(5) of the Regulations of the Court provides that “[p]articipants may only reply to a response with the leave of the Chamber, unless otherwise provided in these Regulations”. As the Appeals Chamber has indicated, “[u]nless otherwise permitted by the Chamber, a reply must be limited to new issues raised in the response which the replying participant could not have anticipated”.³ The Appeals Chamber has also determined that “the question of whether leave to reply should be granted lies within its discretionary powers and must be determined on a case-by-

¹*Situation in Darfur, Sudan, The Prosecutor v. Omar Hassan Ahmad Al Bashir*, “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 arrest and surrender [of] Omar Al-Bashir’”, ICC-02/05-01/09-326, 12 March 2018.

²*Situation in Darfur, Sudan, The Prosecutor v. Omar Hassan Ahmad Al Bashir*, “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 arrest and surrender [of] Omar Al-Bashir’”, ICC-02/05-01/09-331, 3 April 2018 (hereinafter the “Prosecution’s response”).

³*Situation in the Democratic Republic of the Congo, The Prosecutor v. Bosco Ntaganda*, “Decision on MrNtaganda’s request for leave to reply”, ICC-01/04-02/06-1994, 17 July 2017, at para. 9.

case basis”. Furthermore, a reply should “be in the best interests of justice and assist the Appeals Chamber in its determination of the matter”.⁴

5. The purpose of the reply requested by Jordan is to assist the Appeals Chamber in determining the present appeal. If allowed, it will challenge a number of important and new legal issues raised in the Prosecution’s response. In light of the unique circumstances of the present case⁵, Jordan’s reply appears to be warranted.
6. Jordan’s reply will address, *inter alia*, the following issues:
 - (i) The Prosecution’s proposed new category of “UNSC Situation-Referral States”⁶, and the possibility of equating such a category to States Parties to the Rome Statute;
 - (ii) The Prosecution’s new theory that there is an “obligation to recognise that *other* States subject to the obligations of the Statute, such as any UNSC Referral-Situation State (like Sudan), are also bound by the terms of the Statute”⁷, and its consequences;
 - (iii) The Prosecution’s new theory that “the vertical and horizontal effects of article 27 [of the Rome Statute] are indivisible”⁸, and that “[t]he horizontal effect of article 27 means that States Parties (and other indirectly bound States, such as Sudan) must, in their mutual relations, each respect that the other is likewise bound “vertically” by article 27”⁹, and its consequences;
 - (iv) The Prosecution’s new theory consisting of artificially separating immunity of State officials from other types of State immunity for purposes of article 98(1) of the Rome Statute;¹⁰
 - (v) The Prosecution’s new argument that article 98(2) of the Rome Statute applies “only to certain kinds of international agreements”;¹¹

⁴*Situation in the Central African Republic, The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, ICC-01/05-01/13-2197, 18 August 2017, at para. 17.

⁵See *Situation in Darfur, Sudan, The Prosecutor v. Omar Hassan Ahmad Al-Bashir*, “Order inviting expressions of interest as *amici curiae* in judicial proceedings (pursuant to rule 103 of the Rules of Procedure and Evidence)”, ICC-02/05-01/09-330, 29 March 2018.

⁶Prosecution’s response, at para. 8.

⁷*Ibid.*, at para. 13.

⁸*Ibid.*, at para. 17.

⁹*Ibid.*, at para. 23.

¹⁰*Ibid.*, at paras. 49-50.

¹¹*Ibid.*, p. 20.

- (vi) The Prosecution’s misleading argument that “the entirety” of the Rome Statute applies to situations referred by the Security Council¹², while at the same time admitting that certain provisions of the Statute do not apply;¹³
- (vii) The Prosecution’s serious misrepresentations suggesting that Jordan “expressed unambiguously its position ... not to execute Court’s request before Omar Al-Bashir’s visit”; that Jordan “already had proper and unequivocal notice of both its obligations to arrest and surrender Omar Al-Bashir”; and that “the manner in which Jordan approached the Court for consultations ... warranted referral to the ASP and Security Council for appropriate measures”.¹⁴

7. A reply by Jordan will assist the Appeals Chamber in its determination. Should the Chamber grant leave, Jordan will set out its substantive submission in the reply.

Request

8. Based on the foregoing, Jordan requests that the Appeals Chamber grant it leave to reply.

¹²*Ibid.*, at para. 69.

¹³*Ibid.*, at paras. 80-81.

¹⁴*Ibid.*, at para. 96.



Ambassador Ahmad Jalal Said Al-Mufleh
on behalf of
The Hashemite Kingdom of Jordan



Dated 6 April 2018

At The Hague, The Netherlands