Cour
Pénale
Internationale

International
Criminal
Court

Original: English

No. ICC-02/05-01/09 OA2
Date: 21 May 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 the requests for leave to file observations pursuant to rule 103 of the Rules of Procedure and Evidence, the request for leave to reply and further processes in the appeal

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
Ms Helen Brady

States Representatives
Competent authorities of the Hashemite Kingdom of Jordan

State, entities and individuals requesting leave to submit observations
Competent authorities of the United Mexican States

Ms Annalisa Ciampi

Mr Max du Plessis, Ms Sarah Nouwen and Ms Elizabeth Wilmshurst

Ms Paola Gaeta

Ms Yolanda Gamarra

Mr Dov Jacobs

Mr Asad Kiyani

Mr Claus Kreß

Ms Flavia Lattanzi

Mr Konstantinos D. Magliveras

Ms Bonita Meyersfeld and the Southern Africa Litigation Centre (SALC)

Mr Michael A. Newton and Mr Oliver Windridge

Mr Roger O'Keefe

Mr Darryl Robinson, Mr Robert Cryer, Ms Margaret deGuzman, Ms Fannie Lafontaine, Ms Valerie Oosterveld, Mr Carsten Stahn and Mr Sergey Vasiliev

Mr Nicholas Tsagourias and Mr Michail Vagias

Ms Philippa Webb and Mr Ben Juratowitch

Mr Andreas Zimmermann

REGISTRY

Registrar
Mr Peter Lewis

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 o[f] Omar Al-Bashir' of 11 December 2017 (ICC-02/05-01/09-309),

Having before it '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 the arrest and surrender [of] Omar Al-Bashir'"' of 6 April 2018 (ICC-02/05-01/09-332),

Having before it 17 requests from the competent authorities of the United Mexican States and Professors of International Law seeking leave to submit observations pursuant to rule 103 of the Rules of Procedure and Evidence on the merits of the legal questions presented in the appeal of the Hashemite Kingdom of Jordan,

Renders the following

DECISION

1. The competent authorities of the United Mexican States and Professors of International Law, as identified in paragraph 10 of this decision, are granted leave to submit observations pursuant to rule 103 of the Rules of Procedure and Evidence, as *amici curiae*, on the merits of the legal questions presented in the present appeal. The observations shall be no more than ten pages long and shall be submitted no later than 16h00 on Monday, 18 June 2018. The Hashemite Kingdom of Jordan and the Prosecutor may submit consolidated responses, of no more than 20 pages each, to these written observations by 16h00 on Monday, 16 July 2018.

2. A hearing in this appeal shall be convened on Monday, Tuesday, and Wednesday, 10, 11, and 12 September 2018. Further directions on the schedule and the conduct of the hearing will be issued in due course.

3. The Hashemite Kingdom of Jordan's request for leave to reply to the Prosecutor's response to its appeal is granted. The Hashemite Kingdom of Jordan's reply shall be conveyed orally during the scheduled hearing.

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 o[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]

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 its appeal brief[4] (hereinafter: 'Appeal Brief') indicating, *inter alia*, that it stands 'ready to attend an oral hearing should the Appeals Chamber consider such a hearing useful'.[5]

4. On 29 March 2018, the Appeals Chamber issued its 'Order inviting expressions of interest as *amici curiae* in judicial proceedings (pursuant to rule 103 of the Rules of Procedure and Evidence)'[6] (hereinafter: 'Order Inviting Expressions of Interest').

5. On 3 April 2018, the Prosecutor filed her response to Jordan's appeal[7] (hereinafter: 'Response').

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[1] ICC-02/05-01/09-309.
[2] 'Decision on Jordan's request for leave to appeal', ICC-02/05-01/09-319.
[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 itsAppeal [*sic*] 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; '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] '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"', ICC-02/05-01/09-326.
[5] Appeal Brief, para. 116.
[6] ICC-02/05-01/09-330.

6. In accordance with the Order Inviting Expressions of Interest, the competent authorities of the United Mexican States (hereinafter: 'Mexico'),[8] Ms Annalisa Ciampi,[9] Mr Max du Plessis, Ms Sarah Nouwen and Ms Elizabeth Wilmshurst,[10] Ms Paola Gaeta,[11] Ms Yolanda Gamarra,[12] Mr Dov Jacobs,[13] Mr Asad Kiyani,[14] Mr Claus Kreß,[15] Ms Flavia Lattanzi,[16] Mr Konstantinos D. Magliveras,[17] Ms Bonita Meyersfeld and the Southern Africa Litigation Centre (SALC),[18] Mr Michael A.

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[7] '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.

[8] 'Request pursuant to rule 103(1) of the Rules of Procedure and Evidence for leave to submit observations as *amici curiae* in judicial proceedings', dated 27 April 2018 and registered on 30 April 2018, ICC-02/05-01/09-342.

[9] 'Request for leave to submit amicus curiae observations pursuant to rule 103 of the Rules of Procedure and Evidence', 30 April 2018, ICC-02/05-01/09-343.

[10] 'Request by Max du Plessis, Sarah Nouwen and Elizabeth Wilmshurst for leave to submit observations on the legal questions presented in "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'" of 12 March 2018 (ICC-02/05-01/09-326) in accordance with the Order of the Appeals Chamber dated 29 March 2018 (ICC-02/05-01/09 OA2)', dated 27 April 2018 and registered on 30 April 2018, ICC-02/05-01/09-338.

[11] 'Request by Professor Paola Gaeta for leave to submit observations on the merits of the legal questions presented in 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" of 12 March 2018', 30 April 2018, ICC-02/05-01/09-349.

[12] 'Request for Leave to Submit Observations on the Legal questions Presented in "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'" (ICC-02/05-01/09-326)', 30 April 2018, ICC-02/05-01/09-347.

[13] 'Request for leave to submit an Amicus Curiae brief in the proceedings relating 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 issued on the 11 December 2017 (ICC-02/05-01/09-309)', 30 April 2018, ICC-02/05-01/09-340.

[14] 'Request by Dr. Kiyani for Leave to Submit Observations', 30 April 2018, ICC-02/05-01/09-348.

[15] 'Request by Professor Claus Kreß with the assistance of Erin Pobjie for leave to submit observations on the merits of the legal questions presented in "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'" of 12 March 2018 (ICC-02/05-01/09-326)', 30 April 2018, ICC-02/05-01/09-346.

[16] 'Request by Prof. Flavia Lattanzi for leave to submit observations on the merits of the legal questions presented in "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'" of 12 March 2018', 30 April 2018, ICC-02/05-01/09-341.

[17] 'Corrected version of the "[]Request by Professor Konstantinos D. Magliveras for leave to submit observations on the merits of the legal questions presented in «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'» lodged on 12 March 2018 (ICC-02/05-01/09-326)[]", 23 April 2018, ICC-02/05-01/09-335', dated 25 April 2018 and registered on 26 April 2018, ICC-02/05-01/09-335-Corr.

[18] 'Request by Professor Bonita Meyersfeld and the Southern Africa Litigation Centre (SALC) for leave to submit observations on the merits of the legal questions in: The Hashemite Kingdom of Jordan's appeal against the "Decision under article 87(7) of the Rome Statute on the non-compliance

Newton and Mr Oliver Windridge,[19] Mr Roger O'Keefe,[20] Mr Darryl Robinson, Mr Robert Cryer, Ms Margaret deGuzman, Ms Fannie Lafontaine, Ms Valerie Oosterveld, Mr Carsten Stahn and Mr Sergey Vasiliev,[21] Mr Nicholas Tsagourias and Mr Michail Vagias,[22] Ms Philippa Webb and Mr Ben Juratowitch,[23] and Mr Andreas Zimmermann[24] submitted requests for leave to present observations pursuant to rule 103 of the Rules of Procedure and Evidence (hereinafter: 'Rules').

7. On 6 April 2018, Jordan requested leave to reply to the Response[25] (hereinafter: 'Request for Leave to Reply'). The Prosecutor did not respond to this request.

II. MERITS

A. Requests for leave to present observations pursuant to rule 103 of the Rules

8. Rule 103 of the Rules provides, in relevant part, as follows:

> 1. At any stage of the proceedings, a Chamber may, if it considers it desirable for the proper determination of the case, invite or grant leave to a State,

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by Jordan with the request by the Court for the arrest and Surrender [of] Omar Al-Bashir" lodged on 12 March 2018', dated 28 April 2018 and registered on 30 April 2018, ICC-02/05-01/09-339.

[19] 'Request for Leave by Professor Michael A. Newton and Mr. Oliver Windridge to Submit Observations on the Merits of the Legal Questions Presented in the Appeal of 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"', 30 April 2018, ICC-02/05-01/09-350.

[20] 'Request by Professor Roger O'Keefe for leave to submit observations on the merits of the legal questions presented in "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"' of 12 March 2018 (ICC-02/05-01/09-326)', 19 April 2018, ICC-02/05-01/09-334.

[21] 'Request by Professors Robinson, Cryer, deGuzman, Lafontaine, Oosterveld, Stahn and Vasiliev for Leave to Submit Observations', dated 26 April 2018 and registered on 30 April 2018, ICC-02/05-01/09-337.

[22] 'Request by Professor Nicholas Tsagourias and Dr Michail Vagias for leave to submit observations on the merits of the legal questions presented in 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 of 12 March 2018', dated 29 April 2018 and registered on 30 April 2018, ICC-02/05-01/09-344.

[23] 'Expression of interest to make submissions as *amicus curiae* in judicial proceedings (pursuant to rule 103 of the Rules of Procedure and Evidence)', 30 April 2018, ICC-02/05-01/09-345.

[24] 'Request by Professor Andreas Zimmermann for leave to submit observations on the merits of the legal questions presented in 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 of 12 March 2018', 26 April 2018, ICC-02/05-01/09-336.

[25] '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 the arrest and surrender [of] Omar Al-Bashir"', ICC-02/05-01/09-332.

> organization or person to submit, in writing or orally, any observation on any issue that the Chamber deems appropriate.
>
> 2. The Prosecutor and the defence shall have the opportunity to respond to the observations submitted under sub-rule 1.

9. The Appeals Chamber's decision pursuant to rule 103 (1) of the Rules is discretionary and premised on whether it considers it 'desirable for the proper determination of the case' to grant leave to the applicants to submit observations on the merits of the legal questions presented in the appeal.

10. As noted above, the Appeals Chamber is seized with 17 requests for leave to submit observations pursuant to rule 103 of the Rules as *amici curiae*.[26] The Appeals Chamber recalls that the Order Inviting Expressions of Interest limited the invitation to present such requests to States Parties and Professors of International Law. Noting the number of responses received and having reviewed the antecedents of the responding scholars, the Appeals Chamber considers it desirable for the proper determination of the case to invite Mexico, Ms Annalisa Ciampi, Ms Paola Gaeta, Ms Yolanda Gamarra, Mr Claus Kreß, Ms Flavia Lattanzi, Mr Konstantinos D. Magliveras, Mr Michael A. Newton, Mr Roger O'Keefe, Mr Darryl Robinson, Mr Robert Cryer, Ms Margaret deGuzman, Ms Fannie Lafontaine, Ms Valerie Oosterveld and Mr Carsten Stahn, Mr Nicholas Tsagourias, and Mr Andreas Zimmermann, to submit written observations, as *amici curiae*, on the merits of the legal questions presented in Jordan's appeal, of no more than ten pages by 16h00 on Monday, 18 June 2018. The Appeals Chamber emphasises that the written observations must adhere, in particular, to the formatting requirements stipulated in regulation 36 of the Regulations of the Court (hereinafter: 'Regulations').

11. In accordance with rule 103 (2) of the Rules, the Appeals Chamber invites Jordan and the Prosecutor to submit consolidated responses, of no more than 20 pages, to the written observations of the above-mentioned *amici curiae*, by 16h00 on Monday, 16 July 2018.

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[26] *See supra* para. 6.

B. Hearing pursuant to rule 156 (3) of the Rules

12. The Appeals Chamber considers that, in addition to receiving written submissions in the proceedings at hand, it is appropriate to also convene a hearing in accordance with rule 156 (3) of the Rules in order to fully address the novel and complex issues that arise in this appeal. At this hearing, the Appeals Chamber will give the parties to this appeal an opportunity to address specific issues arising from their submissions and to respond to questions that may be posed by the Appeals Chamber. Furthermore, pursuant to rules 103 (1) and 156 of the Rules, the Appeals Chamber may invite all or some of the *amici curiae* to make oral submissions at the hearing as it deems appropriate.

13. Accordingly, the Appeals Chamber schedules a hearing in this appeal on Monday, Tuesday and Wednesday, 10, 11, and 12 September 2018. Further directions on the conduct of the hearing will be issued in due course.

C. Request for Leave to Reply

14. Jordan seeks leave to reply to the Response pursuant to regulation 24 (5) of the Regulations.[27] Jordan submits that submissions in reply will assist the Appeals Chamber in its determination of the present appeal as the Prosecutor has raised 'important and new legal issues' in her Response.[28] Jordan argues further that a reply is warranted given certain misrepresentations that the Prosecutor has made in her Response regarding, *inter alia*, whether 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"'.[29]

15. Regulation 24 (5) of the Regulations provides in relevant part that '[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 reasonably have anticipated'. The Appeals Chamber considers that Jordan has sufficiently demonstrated that the issues to which it seeks to reply are new and could not reasonably have been anticipated. Accordingly, the Request for Leave to Reply is granted. In the interest of

[27] Request for Leave to Reply, paras 3-4.
[28] Request for Leave to Reply, paras 5, 7.
[29] Request for Leave to Reply, para. 6.

expeditious proceedings, the Appeals Chamber directs Jordan to convey its submissions in reply orally at the above-mentioned scheduled hearing.

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

President Chile Eboe-Osuji
Presiding Judge

Dated this 21st day of May 2018

At The Hague, The Netherlands