

**Cour
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**International
Criminal
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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 response to the observations submitted by
the African Union and the League of Arab States**

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
 Ms Fatou Bensouda, Prosecutor
 Mr James Stewart
 Ms Helen Brady

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
 African Union
 League of Arab States

REGISTRY

Registrar
 Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

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Victims Participation and Reparations Section

Other

Introduction

1. On 19 July 2018, the Appeals Chamber issued an order inviting Jordan and the Prosecution each to file a response to the observations submitted by the African Union and the League of Arab States.¹ The present response is submitted in accordance with that order.

Submissions

2. In their observations,² both the African Union and the League of Arab States agree with the arguments set out in Jordan's Appeals Brief,³ and conclude that Jordan did not violate any of its obligations under the Rome Statute by not arresting President Al-Bashir and surrendering him to the Court in March 2017. They consider that Jordan's Three Grounds of Appeal should be granted.
3. At the outset, Jordan recalls⁴ that the present appeal concerns a particular decision rendered by Pre-Trial Chamber II,⁵ and that Jordan was granted leave to appeal with respect to specific issues arising out of that decision.⁶ Issues relating to an alleged exception under customary international law to the immunity of Heads of State, or to

¹ *Situation in Darfur, Sudan, The Prosecutor v. Omar Hassan Ahmad Al Bashir*, "Order setting a deadline for responses to the observations of the African Union Commission and the League of Arab States", ICC-02/05-01/09-371 (19 Jul. 2018), at p. 3.

² *Situation in Darfur, Sudan, The Prosecutor v. Omar Hassan Ahmad Al Bashir*, "The African Union's Submission 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'", ICC-02/05-01/09-370 (13 Jul. 2018) (hereinafter "African Union's Observations"); *Situation in Darfur, Sudan, The Prosecutor v. Omar Hassan Ahmad Al Bashir*, "The League of Arab States' Observations on 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-02/05-01/09-367 (16 Jul. 2018) (hereinafter "Arab League's Observations").

³ *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 the arrest and surrender [of] Omar Al-Bashir'", ICC-02/05-01/09-326 (12 Mar. 2018) (hereinafter "Jordan's Appeals Brief").

⁴ *Situation in Darfur, Sudan, The Prosecutor v. Omar Hassan Ahmad Al Bashir*, "The Hashemite Kingdom of Jordan's response to the observations submitted by Professors of International Law pursuant to rule 103 of the Rules of Procedure and Evidence", ICC-02/05-01/09-368 (16 Jul. 2018), at para. 3 (hereinafter "Jordan's Response to Law Professors").

⁵ *Situation in Darfur, Sudan, 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", ICC-02/05-01/09-309 (11 Dec. 2017) (hereinafter "December 2017 Decision").

⁶ *Situation in Darfur, Sudan, The Prosecutor v. Omar Hassan Ahmad Al Bashir*, "Decision on Jordan's request for leave to appeal", ICC-02/05-01/09-319 (21 Feb. 2018), at p. 9.

an implicit removal of the immunity of President Al-Bashir by the operation of Security Council resolution 1593 (2005), do not form part of the present appeal. Those issues played no role in Pre-Trial Chamber II's December 2017 Decision, which is now on appeal.

4. The Prosecution's recent suggestion⁷ that the Appeals Chamber may now re-open those matters is inappropriate. Doing so would put Jordan in the disadvantaged position of having to respond to new arguments at a late stage of the proceedings and only orally. Before the Pre-Trial Chamber, the Prosecution attempted to "re-frame" the issues that would be appealed so as to broaden considerably their scope,⁸ yet the Pre-Trial Chamber refused to grant leave to do so. Instead, the Pre-Trial Chamber granted leave to Jordan to appeal on the basis of three – and only three – grounds, all of which are focused on issues arising from the December 2017 Decision. In their respective pleadings in March and April 2018, both Jordan and the Prosecution focused exclusively on those three grounds of appeal. Notably, the Pre-Trial Chamber did not contest that President Al-Bashir enjoys immunity under customary international law as a sitting Head of State or enjoys immunity under treaties associated with the League of Arab States, and those issues are not on appeal.

5. The following sections address certain points arising out of the observations submitted by the African Union and the League of Arab States. Jordan will present more detailed arguments, in particular in reply to the Prosecution Response⁹, at the hearing in September 2018.

A. First Ground of Appeal

⁷ See, for example, *Situation in Darfur, Sudan, The Prosecutor v. Omar Hassan Ahmad Al Bashir*, "Prosecution Response to the Observations of Eleven *Amici Curiae*", ICC-02/05-01/09-369 (16 Jul. 2018), at paras. 19-22 (hereinafter "Prosecution Response to Law Professors").

⁸ *Situation in Darfur, Sudan, 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)", ICC-02/05-01/09-313 (21 Dec. 2017), at para. 3.

⁹ *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 Apr. 2018) (hereinafter "Prosecution Response").

6. Jordan agrees with the African Union and the League of Arab States that article 27(2) of the Rome Statute relates exclusively to the immunity of State officials vis-à-vis the Court's own jurisdiction. Further, Jordan agrees that article 27(2), read together with article 98, has no effect whatsoever on the immunity of those officials from foreign criminal jurisdiction.¹⁰
7. Both the African Union and the League of Arab States reject the Prosecution's assertion that the "vertical effect" of article 27(2) makes no sense without an "horizontal effect",¹¹ or that "[t]he horizontal effect ... is the necessary corollary of its vertical effect".¹² Rather, for the reasons also explained by Jordan,¹³ they view such assertions as incorrect as a matter of law. If the concern driving the Prosecution's and Pre-Trial Chamber II's expansive interpretation of article 27(2) is that immunity from foreign criminal jurisdiction may constitute a permanent bar to the Court's exercise of its own jurisdiction, both the African Union and the League of Arab States appear to regard such a concern as unfounded. Indeed, any such bar does not arise if a State waives any applicable immunity; and article 98 clearly obliges the Court to obtain such a waiver before making any request for arrest and surrender. Neither the African Union nor the League of Arab States appear to accept the Prosecution's suggestion that States would hardly ever waive the immunity of their officials,¹⁴ which is speculative and appears to question States' commitment to end impunity within the framework of international law.¹⁵
8. Regarding the meaning of the term "third State" in article 98 of the Statute, Jordan agrees with the arguments advanced by the League of Arab States.¹⁶ As Jordan explained in its Response to Law Professors, the language of the Statute is clear, and equating "third State" to "State not party" would amount to modifying the treaty

¹⁰ African Union's Observations, at paras. 14, 18, 25, 29, 30; Arab League's Observations, at para. 26.

¹¹ Prosecution Response, at para. 18.

¹² *Ibid.*, at para. 22.

¹³ Jordan's Response to Law Professors, at paras. 9-10; Jordan's Appeals Brief, at paras. 15-19.

¹⁴ Prosecution Response to Law Professors, at para. 11.

¹⁵ Jordan notes that in a recent application under regulation 46(3), the Prosecution put forward that "article 12 is in express terms concerned with the 'jurisdiction of the Court', and is not concerned with the 'horizontal' allocation of jurisdiction between States" (see "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute", ICC-RoC46(3)-01/18-1 (9 Apr. 2018), at para. 50). It thus appears that, at least in some contexts, the Prosecution is ready to accept that the Court's jurisdiction exclusively concerns the "vertical" relations between the Court and States Parties.

¹⁶ Arab League's Observations, at para. 26.

text.¹⁷ No convincing reasons for departing from the ordinary meaning of article 98 have been provided by Pre-Trial Chamber II or the Prosecution. The latter, for example, clearly stumbles upon the term “third State”, since it suggests that it can be interpreted differently depending on whether a particular case concerns the immunity of officials or the immunity of premises and property.¹⁸ Even more surprising is the Prosecution’s assertion that it does not matter which interpretation of the term “third State” is correct.¹⁹ It appears that the African Union and the League of Arab States both respectfully disagree, viewing the interpretation of that term as central for purposes of determining the effects of article 27(2).

9. Having carefully reviewed the observations submitted by the African Union and the League of Arab States, Jordan reiterates its position that article 98 preserves the immunity of officials of both States Parties and non-party States from foreign criminal jurisdiction, whether under customary international law or conventional international law, and that the Court must obtain a waiver of such immunity before making a request for arrest and surrender. In the alternative, were the Appeals Chamber to find that article 98 does not preserve the immunity of officials of States Parties, that immunity is nonetheless preserved with respect to officials of States not party to the Statute, such as Sudan.

B. Second Ground of Appeal

10. The African Union and the League of Arab States agree that Security Council resolution 1593 (2005) does not have any effect on Jordan’s obligations under customary and conventional international law to accord immunity to President Al-Bashir, as a sitting Head of State, while he was present in its territory.²⁰
11. Like the African Union and the League of Arab States, Jordan finds unfounded the proposition that Sudan is in a position analogous to that of State Party by virtue of resolution 1593 (2005).²¹ As the African Union rightly points out, “[t]his proposition

¹⁷ Jordan’s Response to Law Professors, at paras. 9-10.

¹⁸ Prosecution Response, at para. 50.

¹⁹ *Ibid.*, at para. 51.

²⁰ African Union’s Observations, at paras. 17, 27; Arab League’s Observations, at paras. 33-36.

²¹ African Union’s Observations, at para. 27; Arab League’s Observations, at para. 33.

is based on a fiction and has no basis whatsoever in either international law or the Statute”.²² Both organizations appear to view the question of which provisions of the Statute are applicable to Sudan following the referral by the Security Council as one that must be addressed with care. Jordan already explained its straight-forward understanding of this matter in its Appeals Brief.²³ By contrast, the approach of the Pre-Trial Chamber II and the Prosecution is entirely ambiguous. The latter asserts that the Statute applies in its entirety to Sudan or, alternatively, to the situation in Darfur, while at the same time speculating that only some provisions of the Statute may apply, or that Sudan is “bound to the necessary extent”.²⁴ What any of this means is not only ambiguous but also arbitrary and subjective.

12. In any event, both the African Union and the League of Arab States appear to agree that, since the *chapeau* of article 13 provides that the Court may exercise its jurisdiction “in accordance with the provisions of [the] Statute” when a situation is referred by the Security Council, it is wholly unclear why article 98 would not apply. Moreover, if it were to be held that the Statute applies in its entirety with respect to Sudan or the situation in Darfur, it must equally be accepted that “the application of the entire legal framework does not have the effect of removing the immunities of Mr. Al Bashir from the jurisdiction of other States (...) the *whole Statute* includes limitations and exceptions, most notably, Article 98”.²⁵

13. For the African Union and the League of Arab States, it is indisputable that Sudan is not a party to the Statute. Likewise, the Prosecution does not contest this, but it has invented a completely new category of States (“UNSC Situation-Referral States”), nowhere to be found in the Statute, in an attempt to paper over that fact. Both the African Union and the League of Arab States appear to regard such an approach as without merit: if a provision of the Statute deals with non-party States (as does article 98), the Court must apply it to Sudan if the Court is to act within the law.

14. Jordan agrees with the League of Arab States’ observation that the Prosecution, in explaining the effects of Security Council resolution 1593 (2005), confusingly shifts

²² African Union’s Observations, at para. 27.

²³ Jordan’s Appeals Brief, at paras. 55-61.

²⁴ Prosecution Response to Law Professors, at para. 1.

²⁵ African Union’s Observations, at para. 38.

between a State-centric approach and a situation-centric approach.²⁶ Indeed, it should be borne in mind that all a Security Council resolution does is refer a *situation* to the Court, not a State, so that the Court may exercise its jurisdiction over crimes set out in article 5 of the Statute with respect to that situation (not with respect to that State). The Prosecution, as well as Pre-Trial Chamber II, has failed to explain how the referral of a situation inescapably places a non-party State into the status vis-à-vis the Court now claimed.

15. Having carefully reviewed the observations submitted by the African Union and the League of Arab States, Jordan reiterates its position that Security Council resolution 1593 (2005) does not affect Jordan's obligations under customary and conventional international law to accord immunity to President Al-Bashir.

C. Third Ground of Appeal

16. Jordan views the observations presented by the League of Arab States with respect to the Third Ground of Appeal²⁷ as legally sound and consistent with the position taken by Jordan in its Appeals Brief, as well as in its Response to Law Professors. The African Union did not address this aspect of the appeal, having determined that Jordan could not possibly be found in non-compliance with its obligations.
17. In this regard, Jordan highlights that when one combines all the *amicus curiae* observations together (those of both the two international organizations and the many law professors), only two *amici* (both law professors) have called upon the Appeals Chamber to reject the Third Ground of Appeal.
18. In essence, the League of Arab States agrees with Jordan that, in the event that it is determined by the Appeals Chamber that Jordan failed to comply with its obligations under the Rome Statute in not arresting and surrendering President Al-Bashir to the Court, the Appeals Chamber should nevertheless conclude that the Pre-Trial Chamber II's referral of Jordan to the Assembly of States Parties and to the Security

²⁶ Arab League's Observations, at paras. 33-36.

²⁷ *Ibid.*, at paras. 37-44.

Council constituted an abuse of discretion. The League does so for reasons that Jordan regards as highly relevant to this proceeding.

19. First, the League of Arab States correctly notes that – contrary to the position taken by the Prosecution – the discretion possessed by the Pre-Trial Chamber with respect to referrals is significantly limited. Indeed, as the League observed:

“[T]he Prosecution fails to acknowledge various circumstances where such discretion has been regarded as significantly limited, including circumstances directly relevant to this appeal. Indeed, in the *Kenyatta* case itself, after indicating that the Pre-Trial Chamber had a ‘considerable degree of discretion’, the Appeals Chamber then found that the Trial Chamber erred in the exercise of its discretion due to several errors, including in its assessment of ‘whether securing compliance with the cooperation request at issue would further the proceedings’ and ‘whether further cooperation by Kenya was possible’”.²⁸

20. The League’s observation is especially pertinent to this case, given that the Pre-Trial Chamber failed to provide any indication of how a referral of Jordan would further the proceedings in this case, and failed to analyze whether there was any problem with respect to future cooperation by Jordan with the Court.

21. Second, the League of Arab States correctly regarded as deficient the two factors identified by the Prosecutor as to why the Pre-Trial Chamber decided in favor of referral. Although the Prosecution seeks to argue that the referral was not based simply upon the fact of Jordan’s non-compliance, the League found such an argument unsustainable. As the League indicated:

“According to the Pre-Trial Chamber, Jordan's non-compliance arose from a request to Jordan from the Court and from Jordan's decision in March 2017 not to comply with that request. The Pre-Trial Chamber's assertion that Jordan ‘took a very clear position’ when making that decision cannot be regarded as some special factor that extends beyond Jordan's decision not to comply with the request; it is just an assertion that Jordan's decision not to comply was clear. Likewise, the Pre-Trial Chamber's assertion that Jordan ‘chose not to execute the Court's request for arrest and surrender of Omar Al- Bashir’ also is not some special factor; indeed, it is precisely the act that gave rise to the finding of non-compliance”.²⁹

²⁸ *Ibid.*, at para. 38.

²⁹ *Ibid.*, at para. 41.

22. Jordan agrees with this assessment and with the League's argument that, based on prior precedent of the Appeals Chamber, a decision of non-compliance alone cannot result in an automatic referral.³⁰ As such, the Pre-Trial Chamber erred.
23. The League of Arab States also properly found unsustainable the Prosecution's argument that a second factor was in play for the Pre-Trial Chamber. According to the Prosecution, the Pre-Trial Chamber's referral decision was based upon a "*general principle and statement of law* that all States Parties were obliged to arrest Omar Al-Bashir".³¹ Yet the League of Arab States correctly dismisses any such argument, noting that the Prosecution's "assertion is misleading and rather clearly rebutted by the text of paragraph 54 [of the Pre-Trial Chamber's decision], which says nothing about a 'general principle' or about a 'statement of law' or about 'all States Parties'".³²
24. Rather, the League identifies the true basis for the Pre-Trial Chamber's decision, which was that Jordan's conduct was apparently unacceptable because of the Chamber's "unequivocal expression" of its legal position *in an entirely different context and to an entirely different State Party* (South Africa).³³ Yet, as the League indicates, such an approach constitutes an indiscriminate comparison of two States Parties, which the Appeals Chamber has found to be a wholly inappropriate basis for a referral decision.³⁴ As such, again, the Pre-Trial Chamber erred.
25. Having reviewed carefully the observations by the League of Arab States and by the African Union, Jordan remains convinced that the Pre-Trial Chamber erred in deciding to refer this matter. Consequently, the Appeals Chamber should uphold the Third Ground of Appeal.

³⁰ *Ibid.*, at para. 42.

³¹ Prosecution Response, at para. 110.

³² Arab League's Observations, at para. 43.

³³ *Ibid.*, at para. 43.

³⁴ *Ibid.*, at para. 44.

Conclusion

26. Based on the foregoing, Jordan confirms its requests at paragraph 115 of the Appeals Brief.



Dana Souber
Chargé d'affaires
on behalf of
The Hashemite Kingdom of Jordan

Dated 14 August 2018

At The Hague, Netherlands