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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

Reply to the 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: The Hashemite Kingdom of Jordan

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

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Introduction

1. In its Decision on Jordan's request for leave to reply, Pre-Trial Chamber II stated:

In light of the arguments made by the Prosecutor in the Response, including the proposed reformulation of some of the issues for the prospective appeal, the Chamber considers that a reply to the response by Jordan is warranted. The request is therefore granted¹

In accordance with that Decision, the Hashemite Kingdom of Jordan ("Jordan") hereby replies to the Prosecution's Response to 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).²

2. Jordan wishes to stress that it regards its ability to appeal all four of the Issues it has identified, including the Fourth Issue (referral to the Assembly of States Parties and to the Security Council), as extremely important for fully addressing matters of the utmost concern to Jordan.
3. The Prosecution asserts that Jordan may not directly appeal the Chamber's decision that Jordan has failed to comply with the Rome Statute and that such non-compliance shall be referred to the Assembly of States Parties and to the Security Council.³ Yet the Prosecution fails to respond to the point that a decision rendered adverse to a State Party under Article 87(7) prior to a defendant being taken into custody simply does not fit the language or intent of the appeals envisaged in Articles 81 and 82. Jordan is not a "party" to the case currently before the Chamber, it is seeking appeal of a decision that is for all intents and purposes "final" in nature, and therefore this appeal

¹*Situation in Darfur, Sudan, Prosecutor v. Omar Hassan Ahmad Al Bashir*, "Decision on Jordan's request for leave to reply", ICC-02/05-01/09 (15 Jan. 2018), para. 6.

²*Situation in Darfur, Sudan, 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 (21 Dec. 2017) (hereinafter "Prosecution's Response").

³*Ibid.*, para. 1.

does not appear to fall within the scope of article 82(1)(d).⁴Further, the Prosecution mischaracterizes Jordan's position as being that "decisions under article 87(7) are not directly appealable under articles 81 and 82";⁵ in fact, as clearly stated in its 18 December Notice of Appeal, Jordan's position is that appeals of decisions under article 87(7) are best construed as not being "appeals arising under Articles 81 or 82 in Part VIII of the Rome Statute".⁶The prior decisions of the Appeals Chamber referred to by the Prosecution⁷ do not involve an appeal by a State Party of a Chamber's decision issued under article 87(7) of the Statute and therefore are not controlling for the present case.

4. Alternatively, if the appeal of a decision under article 87(7) *is* an appeal arising under Article 82 (1)(d) of the Rome Statute, all four of the Issues that Jordan seeks to appeal meet the standards set forth in Article 82(1)(d), as discussed below. Indeed, the Prosecution previously has argued that a trial chamber's decision not to refer a situation of purported non-compliance "compromises the fairness and expedition of" proceedings before the trial chamber, and that "the immediate resolution of" issues central to that referral, including the exercise of the chamber's discretion, "is essential to verify the correctness of the legal basis relied upon by the Trial Chamber...".⁸ If that is the case, then likewise a trial chamber's decision on non-compliance and in favor of referral also significantly affects the fair and expeditious conduct of the proceedings before the trial chamber, for which an immediate resolution of any challenge to that decision would materially advance the proceedings.

⁴*Situation in Darfur, Sudan, Prosecutor v. Omar Hassan Ahmad Al Bashir*, "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", ICC-02/05-01/09 (18 Dec. 2017), para. 9 (hereinafter "Jordan's Notice of Appeal").

⁵ Prosecution's Response, *supra* note 0, para. 1.

⁶ Jordan's Notice of Appeal, *supra* note 4, paras. 9-11.

⁷ Prosecution's Response, *supra* note 2, para. 1, n. 4.

⁸*Situation in the Republic of Kenya, Prosecutor v. Uhuru Muigai Kenyatta*, "Prosecution's application for leave to appeal the 'Decision on Prosecution's application for a finding of non-compliance under Article 87(7) of the Statute'", ICC-01/09-02/11 OA 5 (9 Dec. 2014), paras. 21-32.

Submissions

(a) The First Issue is an appealable issue arising from the Decision

5. The Prosecution asserts⁹ that Jordan should not be permitted to appeal the First Issue on whether 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”), or as a matter of law when it concluded that Sudan’s accession to the 1953 Convention is not in fact an essential precondition for the existence of Jordan’s obligation to accord President Al-Bashir immunity under the Convention.

6. In support of its position, the Prosecution says that “the Chamber did not conclusively find whether Sudan is a party to the 1953 Convention”.¹⁰ That position is incorrect. The Chamber said it “is unable to conclude that it is established before it that Sudan is a party to the 1953 Convention” and, “[a]ccordingly, the Chamber cannot further consider Jordan’s argument that Omar Al-Bashir, when on Jordanian territory in March 2017, benefited from immunity from arrest under article 11 of the 1953 Convention”.¹¹ Further, the Chamber found it unproven that “the 1953 Convention is in force between Sudan and Jordan”.¹² In light of this, to say that the Chamber did not conclude that Sudan was not a party to the 1953 Convention is extraordinary. Moreover, even if one follows the Prosecution’s implausible view of the Chamber’s decision, the Chamber still erred as a matter of fact in concluding that it had not been established that Sudan was a party to the 1953 Convention.

⁹*Ibid.*, paras. 14-22.

¹⁰*Ibid.*, para. 15.

¹¹*Situation in Darfur, Sudan, 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 or (sic) Omar Al-Bashir”, ICC-02/05-01/09 (11 Dec. 2017), paras. 30-31 (hereinafter “December 2017 Decision”).

¹²*Ibid.*, para. 44.

7. Contrary to the Prosecution's position,¹³ the Chamber's errors of fact and law are material to Chamber's decision. If Jordan successfully establishes that the Chamber's views with respect to the effects of the Security Council's referral are erroneous, then the existence of immunity of President Al-Bashir under conventional international law is of central importance. Further, to the extent that the standards set forth in article 82(1)(d) are relevant, and to the extent that the Prosecution itself agrees that the Second and Third Issues satisfy the requirements of article 82(1)(d),¹⁴ there is no basis for finding, as the Prosecution suggests,¹⁵ that the First Issue does not satisfy such requirements. If it promotes "fair and expeditious conduct of the proceedings" for the Appeals Chamber to resolve points of law related to immunity that arise with respect to Issues 2 and 3, then it inescapably also promotes "fair and expeditious conduct of the proceedings" to resolve points of fact and law that concern such immunity under conventional international law.

8. The Prosecution alternatively submits that:

[i]n 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.¹⁶

That is no doubt the case, but it would have no practical consequences for the present proceedings unless the Appeals Chamber also reviews what Jordan claims are the errors made by the Chamber.

¹³ Prosecution's Response, *supra* note 2, para. 20.

¹⁴ *Ibid.*, paras. 7-13.

¹⁵ *Ibid.*, para. 21.

¹⁶ *Ibid.*, para. 22.

(b) The Second and Third Issues are appealable issues arising from the Decision, and they should not be reframed

9. Jordan notes that the Prosecution does not object to granting Jordan leave to appeal the Decision on the legal questions raised under the Second and Third Issues, since they meet the criteria for leave to appeal under article 82(1)(d) of the Statute.¹⁷
10. Jordan, however, does not accept the Prosecution's reframing of the Second and Third Issues¹⁸ and wishes to maintain the much-clearer two Issues as originally formulated. Jordan is not seeking to develop the Court's case law in the abstract; rather, Jordan seeks to appeal issues that directly concern the Chamber's decision with respect to Jordan.¹⁹ Those issues relate to the Chamber's interpretation of the effects of the specific provisions of the Rome Statute and of Security Council resolution 1593 (2005) upon the immunity of President Al-Bashir.

(c) The Fourth Issue is an appealable issue arising from the Decision

11. The appeal of the Fourth Issue is of particular importance. The Prosecution asserts that Jordan has not indicated how appeal of the Fourth Issue satisfies the standards of Article 82(1)(d) and therefore argues that leave to appeal that issue should be denied.²⁰ As indicated above, Jordan maintains that such standards do not need to be met for this appeal by a State Party of a Chamber's decision under Article 87(7). In any event, to the extent that the Prosecution itself agrees that the Second and Third Issues satisfy the requirements of article 82(1)(d),²¹ there is no basis for finding that the Fourth Issue does not satisfy such requirements. The Prosecution cannot credibly maintain, on the one hand, that resolution of the legal issues concerning President Al-

¹⁷*Ibid.*, paras. 3, 5-13.

¹⁸*Ibid.*, paras. 3, 6.

¹⁹ Jordan's Notice of Appeal, *supra* note 4, para. 4(b) and (c).

²⁰ Prosecution's Response, *supra* note 2, paras. 23-25.

²¹*Ibid.*, paras. 7-13.

Bashir’s immunity “significantly affect the Prosecution’s ability to prosecute Mr. Al Bashir before the Court”, “concern Jordan’s obligation to arrest and surrender Mr. Al Bashir”,²² and “would also materially advance the cooperation proceedings with Jordan”,²³ and then maintain, on the other hand, that the Chamber’s decision to refer Jordan’s purported non-compliance to the Assembly of States Parties and to the Security Council has no comparable significance.

12. As a practical matter, if the Prosecution accepts the utility of an appeal of the Second and Third Issues, then it must also accept that referral of Jordan’s purported non-compliance cannot occur until after the Appeals Chamber’s decision, since the Appeals Chamber ultimately may conclude that Jordan has fully complied with its obligations under the Rome Statute and therefore that a referral cannot be made. As such, it cannot be argued that it is consistent with a “fair and expeditious conduct of the proceedings” for the Appeals Chamber not to address the Fourth Issue as a part of the present appeal. If the Appeals Chamber upholds the Pre-Trial Chamber’s findings of fact and law with respect to the First, Second and Third Issues, then it does not advance the fair and expeditious conduct of the proceedings for Jordan to be required to return to the Pre-Trial Chamber immediately thereafter to seek leave to appeal the Fourth Issue. Presumably, it is not the Prosecution’s position that Jordan must await until the end of a trial before appealing the Fourth Issue, unless it is also the Prosecution’s position that the referral will await until then as well.

Conclusion

13. For the foregoing reasons, Jordan requests that the Chamber grant Jordan’s Application with respect to all four Issues in the Application, each as originally framed by Jordan.

²²*Ibid.*, para. 9.

²³*Ibid.*, para 11.



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

Dated 23 January 2018
The Hague, The Netherlands

