

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

**Original: English**

**No. ICC-02/05-01/09 OA2**

**Date: 30 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 DOCUMENT**

**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"**

**SOURCE: Professor Michael A. Newton and Mr. Oliver Windridge**

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

**The Office of the Prosecutor**

Ms. Fatou Bensouda, Prosecutor  
Mr James Stewart

**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' Representative**

**Amicus Curiae**

Competent authorities of the Hashemite  
Kingdom of Jordan

**REGISTRY**

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**Registrar**

Mr. Peter Lewis

**Counsel Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations Section**

**Other**

## **I. Introduction**

1. Further to the ICC Appeals Chamber's order inviting expressions of interest as *amici curiae* in judicial proceedings,<sup>1</sup> Professor Michael A. Newton and Mr. Oliver Windridge hereby seek leave 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"' of 12 March 2018 (ICC-02/05-01/09-326) (hereinafter the 'Jordan Referral re Al-Bashir Appeal').

2. The Jordan Referral re Al-Bashir Appeal contains three grounds. Ground one and ground two can be broadly described as relating to the interpretation of international law on immunities and how this coexists with provisions within the Rome Statute, particularly in relation to Jordan's failure to arrest President Al-Bashir on his travels to Jordan in March 2017. Ground three concerns Pre-Trial Chamber II's decision to refer Jordan to the Assembly of State Parties and Security Council of the United Nations. For the reasons set out below, Professor Newton and Mr. Windridge consider their observations on Jordan's third ground of appeal can assist the Appeals Chamber, arising in particular from their work on the [Mapping Bashir](#) research project.

## **II. Expertise of Applicants**

3. Professor Michael A. Newton is a faculty member of Vanderbilt Law School's International Law Practice Lab. He is a Professor of the Practice of Law, Professor of the Practice of Political Science and Director, Vanderbilt-in-Venice Program at Vanderbilt Law School. Previously, Professor Newton was Associate Professor, Department of Law, at the U.S. Military Academy, West Point, N.Y. Professor Newton is a former Senior Advisor to the United States Ambassador-at-Large for War Crimes, and was one of the two U.S. delegates who successfully negotiated the Elements of Crimes Document for the ICC. He currently serves as co-counsel for Mr. Bemba in appellate proceedings at the ICC, and has previously provided *amicus curiae* briefs on issues of international law to several national courts and the ICC. He is a member of the Board of Advisors for the ABA

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<sup>1</sup> Order inviting expressions of interest as *amici curiae* in judicial proceedings (pursuant to rule 103 of the Rules of Procedure and Evidence), 29 March 2018 hereinafter "Appeals Chamber Order".

International Criminal Court Project, and advised judges in the creation of the Special Court for Sierra Leone, International Criminal Tribunal for the former Yugoslavia and International Criminal Tribunal for Rwanda. He is widely published in international criminal law with over ninety publications to his name.

4. Oliver Windridge is founder and director of the Mapping Bashir research project. He is a British lawyer with over ten years' experience in international criminal law. His practice includes working on fourteen cases at trial or appeal level in chambers at the International Criminal Tribunal for Rwanda and International Criminal Tribunal for the former Yugoslavia. He has previously provided *amicus curiae* briefs to the ECCC Office of the Co-Investigating Judges, and together with Professor Newton, to the African Commission on Human and Peoples' Rights. Mr. Windridge is a Solicitor of the Senior Courts of England and Wales (non-practicing) and currently serves on the List of Assistants to Counsel at the ICC, List of Consultants (Defence Section) at the ECCC, List of Counsel (pro bono) at the African Court on Human and Peoples' Rights and on the Pro Bono Panel, UK Foreign and Commonwealth Office.

5. The Mapping Bashir project is a research venture supported by Vanderbilt Law School's International Law Practice Lab under the supervision of Mr. Windridge and Professor Newton.<sup>2</sup> Since its inception in August 2017, the Mapping Bashir project has researched and reviewed President Al-Bashir's movements since the issuance of ICC arrest warrants. Through this research, the Mapping Bashir team has produced a detailed record of President Al-Bashir's movements since 2009, identifying over one hundred and fifty trips, sorted by state or non-state party, reason for trip (political, personal, religious, medical etc) and the result of trip. To the best of the authors knowledge, this detailed data set is not available anywhere else in the world.

### **III. Summary of Initial Observations**

6. As stated by Pre-Trial Chamber II, in determining whether to refer non-compliance, a Chamber has discretion to consider all factors that may be relevant in the circumstances of the case, including whether external actors could indeed provide concrete assistance

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<sup>2</sup> See [Mapping Bashir website](http://www.mappingbashir.org). The Mapping Bashir website will emigrate to [www.mappingbashir.org](http://www.mappingbashir.org) shortly.

to obtain cooperation requested taking into account the form and content of the cooperation.<sup>3</sup> These “external actors” can properly be understood as the Assembly of States Parties and/or the Security Council of the United Nations. Plugging these parties in, the test can be reformulated as “will referral to the Assembly of States Parties and/or Security Council provide concrete assistance in obtaining the cooperation requested?” As an initial observation, the follow up question on the reasonableness of referral is “what is meant by ‘cooperation’”? One view is that cooperation relates to the state subject to the referral, in this case Jordan. Another, is that cooperation can be read more holistically to mean cooperation from the wider international community to affect the arrest of President Al-Bashir. The former interpretation is restrictive, as it assesses whether a state that has already failed to comply is likely to comply in the future. The latter expansive interpretation engages with the idea of referral as a more widely applicable mechanism that uses referral to encourage the international community more widely to cooperate with the ICC.

7. How can one assess whether referral will actually result in cooperation on either the restrictive or expansive interpretation? As discussed above, the Mapping Bashir research project has produced a detailed record of President Al-Bashir’s travels unavailable elsewhere. This record includes particulars of over one hundred and fifty trips taken, whether the trip was to a state or non-state party, the reason for the trip and outcome. Mapping Bashir research also includes records of cancelled trips and reasons given for cancellation. Working with this data set, the project can begin to make assessments, including patterns in travel to state and non-state parties. The data can be sorted by reason for travel, outcomes of travel and reasons for cancelled trips. The data can also be examined by country, identifying member states that continue to welcome President Al-Bashir despite the existence of ICC arrest warrants. Taking this detailed data set, the Mapping Bashir project has overlaid instances when Pre-Trial Chamber II has referred non-compliance to the Assembly of State Parties and the Security Council, or in the case of South Africa elected not to refer. By aligning previous dates of referral

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<sup>3</sup> 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, 11 December 2017, ICC-02/05-01/09-309, para. 52. See also Decision under article 87(7) of the Rome Statute on the non-compliance by South Africa with the request by the Court for the arrest and surrender of Omar Al-Bashir, 6 July 2017, ICC-02/05-01/09-302, para. 125.

with subsequent journeys, the project can begin to assess whether President Al-Bashir's travels have been affected either in the immediate aftermath of referral, or in the longer term. Put simply, Mapping Bashir's unique research can be used to determine whether referrals have had any effect on President Al-Bashir's travels. This can assist the Appeals Chamber in determining whether referral has either restricted President Al-Bashir's travel because of perceived future cooperation either from the state subject to the referral (restrictive interpretation of cooperation) or from the international community more widely (wider interpretation of cooperation). This is of importance to the Appeals Chamber as it seeks to consider the impact of referral and whether referral is reasonable.

#### **IV. Summary of Conclusions**

8. The Mapping Bashir project is uniquely placed to assist the Appeals Chamber in its assessment of Jordan's appeal, and in particular its third ground of appeal concerning the reasonableness of referral. As the Appeals Chamber has rightly stated, the Jordan Referral re Al-Bashir Appeal raises legal issues that may have implications beyond the present case.<sup>4</sup> Mapping Bashir research demonstrate what changes, if any, have occurred to President Al-Bashir's travels as a result of ongoing attempts by the ICC via referral to obtain cooperation from the international community. Mapping Bashir research can be used to accurately and objectively determine whether referral fails either the restrictive interpretation of cooperation or the more wider interpretation of cooperation amongst the international community.

9. We submit that expanding on the issues raised herein would assist the Appeals Chamber in determining whether referral does indeed have any impact on future compliance. Professor Newton and Mr. Windridge would therefore be honoured to receive leave to expand on these submissions more fully.



Professor Michael A. Newton



Oliver Windridge

Dated this 30 day of April 2018. At Nashville, Tennessee, United States of America and The Hague, Netherlands respectively.

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<sup>4</sup> Appeals Chamber Order, para. 1.