

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

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

**Date: 14 June 2018**

**THE APPEALS CHAMBER**

**Before:** Judge Chile Eboe-Osuji, Presiding Judge  
 Judge Howard Morrison, Judge  
 Judge Piotr Hofmański, Judge  
 Judge Luz del Carmen Ibáñez Carranza, Judge  
 Judge Solomy Balungi Bossa, Judge

**SITUATION IN DARFUR**

**IN THE CASE OF  
 THE PROSECUTOR *v.* OMAR HASSAN AHMAD AL-BASHIR**

**Public Document**

**AMICUS CURIAE OBSERVATIONS UNDER RULE 103 OF THE RULES OF  
 PROCEDURE AND EVIDENCE ON THE MERITS OF THE LEGAL QUESTIONS  
 IN THE APPEAL OF THE HASHEMITE KINGDOM OF JORDAN LODGED ON  
 12 MARCH 2018 AGAINST THE FINDING OF PRE-TRIAL CHAMBER II THAT  
 IT DID NOT COMPLY WITH THE REQUEST TO ARREST AND SURRENDER  
 PRESIDENT OMAR AL-BASHIR OF SUDAN**

**Source: PROF. KONSTANTINOS D. MAGLIVERAS**

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

**Counsel for the Defence**

**Legal Representatives of the Victims**

**Legal Representatives of the Applicants**

**Unrepresented Victims**

**Unrepresented Applicants  
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**The Office of Public Counsel for the  
Defence**

**States' Representatives**  
Competent Authorities of the Hashimite  
Kingdom of Jordan

**Amicus Curiae**

## **REGISTRY**

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## Introduction

1. This Amicus Curiae has been granted leave by the Appeals Chamber to submit observations in the present proceedings<sup>1</sup> concerning the appeal lodged by the Hashemite Kingdom of Jordan<sup>2</sup> against the finding of Pre-Trial Chamber II that it did not comply with the request to arrest and surrender President Omar Al-Bashir of Sudan.<sup>3</sup> The proceedings are intricately linked to the non-execution of two Arrest Warrants issued against Al-Bashir, respectively, in March 2009 and in July 2010.<sup>4</sup> The consistent refusal of ICC parties and third states to execute them, even though they have had ample opportunity to do so, could be interpreted as a rebellion against the ICC and all it stands for. Given the large number of unexecuted arrest warrants (currently they exceed ten), the Court's ability to fight the ethos of impunity, especially in Africa, the region taking up most of its work, may be seriously compromised. Arguably, the crucial legal issues raised in the present Appeal are tortuously connected to the case's significant political dimension, as evidenced by the consistent refusal of States Parties and non-States Parties to execute the requests for cooperation. Therefore, the observations by this Amicus Curiae cannot not but take fully into account the political element. Moreover, Jordan's legal argumentation that heads of state enjoy absolute immunity from arrest, that UNSC Resolution 1593(2005) did not lift the immunity of the Sudanese officials wanted by the ICC, etc., is effectively the same defense that Al-Bashir would have put forward had he been arrested and surrendered to the ICC and, therefore, the interests of both Jordan and Sudan appear to be aligned. The present Appeal should be regarded as a test case for all future instances of non-cooperation with the Court. Therefore, it offers an excellent opportunity for complex legal issues to be clarified once and for all, and for relevant guidance to be given to Pre-Trial Chambers.

### **The non-execution of the Arrest Warrants against President Al-Bashir: A legally problematic situation mired in politics**

2. The fact that, since March 2009, Al-Bashir has made more than 85 trips to more than 20 states has been regarded as "a matter of concern".<sup>5</sup> He has travelled internationally mainly for participating in summit meetings of intergovernmental organisations in which Sudan is a

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<sup>1</sup> ICC-02/05-01/09-351, 21 May 2018.

<sup>2</sup> ICC-02/05-01/09-326, 12 March 2018.

<sup>3</sup> ICC-02/05-01/09-309, 11 December 2017.

<sup>4</sup> Sudan, all States Parties, and all UNSC members which are not States Parties have been requested to arrest and surrender Al-Bashir, see, respectively, ICC-02/05-01/09-5 (5 March 2009), ICC-02/05-01/09-7 (6 March 2009), and ICC-02/05-01/09-8 (6 March 2009). Supplementary requests were sent on 21 July 2010. Sudan's non-cooperation has been notified to the UNSC, ICC-CPI-20150309-PR1094, 9 March 2015.

<sup>5</sup> As argued by Sweden at the UNSC, see UN Doc. S/PV.8132, 12 December 2017, p. 8.

Member State,<sup>6</sup> and where only heads of state or government may participate.<sup>7</sup> In the case of IGAD, to ensure that Al-Bashir participated in the 2012 Summit, Member States moved the already agreed venue from an ICC State Party (Kenya) to a non-State Party (Ethiopia) in view of (a) ICC demands that he be arrested<sup>8</sup> and (b) a Kenyan High Court ruling that he ought to be arrested if he ever entered Kenya,<sup>9</sup> which was followed by a provisional warrant for his arrest in January 2012. When the Attorney-General appealed, the Court of Appeal sided with the lower court and held that, unless rescinded by the ICC, “the warrants remain outstanding and can still be executed”, it being an international obligation of Kenya.<sup>10</sup>

3. Al-Bashir has also made foreign visits for less significant official business (but nonetheless important for foreign relations purposes)<sup>11</sup> as well as for private (medical and religious) reasons. In the latter visits, arguably he did not enjoy immunity for official acts but only personal immunity, which offers a much lower level of protection. However, his official visits abroad have been curtailed (especially in Western countries, including attending the opening sessions of the UN General Assembly, probably the most prominent gathering of world leaders), while invitations extended to him to attend high-level meetings have been rescinded.<sup>12</sup> Thus, the Arrest Warrants may have resulted in isolating Sudan diplomatically, a situation traditionally associated with the imposition of sanctions. While the purpose of arrest warrants should not be to disrupt a state’s foreign relations, in the present case it has inadvertently led to it, at least partially. However, the Rome Statute does ensure that the arrest of dignitaries neither meddles with official state business nor interrupts basic state functions. Arrested dignitaries

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<sup>6</sup> Namely, African Union (AU), League of Arab States (LAS), Community of Sahel-Saharan States, Organisation of Islamic Cooperation (OIC), Common Market for Eastern and Southern Africa, and Intergovernmental Authority on Development (IGAD). Al-Bashir has also participated in the summits of other international institutions (e.g. Non-Aligned Movement (Tehran Summit, 30-31 August 2012)), and in high-level meetings jointly organized by international organisations (e.g. AU-FAO meeting, Ethiopia, 30 June 2013).

<sup>7</sup> Cf. Article 58(1) of the Constitution of Sudan (2005): “The President of the Republic is the Head of the State and Government”.

<sup>8</sup> See ICC-02/05-01/09-117, 25 October 2010.

<sup>9</sup> See High Court at Nairobi, Misc. Criminal Application No. 685 of 2010, *International Commission of Jurists-Kenya v Attorney General & 2 others*, Judgment, 28 November 2011, [2011] eKLR. The judgment prompted the Sudanese government to ask the Kenyan ambassador in Khartoum to leave the country, see ‘Kenya-Sudan relations veering towards a breakdown after court decision on Bashir’s arrest’, *Sudan Tribune*, 29 November 2011, at: <http://www.sudantribPVune.com/Kenya-Sudan-relations-veering.40851>.

<sup>10</sup> See Court of Appeal at Nairobi, Civil Appeal 105 of 2012 & Criminal Appeal 274 of 2011 (Consolidated), *Attorney General & 2 others v Kenya Section of International Commission of Jurists*, Judgment, 16 February 2018, p. 58, [2018] eKLR.

<sup>11</sup> E.g. on 9 May 2011 he attended the inauguration of President Ismail Omar Guelleh of Djibouti, on 2 September 2012 the funeral of former Ethiopian prime minister Meles Zenawi, on 8 May 2016 the inauguration of President Ismail Omar Guelleh of Djibouti, and a week later (12 May 2016) the inauguration of President Yoweri Museveni of Uganda. All except Ethiopia are State Parties.

<sup>12</sup> E.g. in December 2009 Turkey cancelled an invitation extended to him to attend an OIC meeting because “no Muslim could commit genocide”. But Turkey invited him to attend emergency OIC Summits in Istanbul on 13 December 2017 and again on 18 May 2018 both times to discuss Israel.

may apply for interim release both in the state where in custody<sup>13</sup> and while awaiting trial at the ICC.<sup>14</sup> Therefore, any suggestion that the arrest of Al-Bashir by Jordan (or indeed by any other state) and his eventual transfer to the ICC would have devastating effects on Sudan's proper running cannot be seriously entertained.<sup>15</sup>

4. At least two State Parties' courts have confirmed the obligation to arrest Al-Bashir.<sup>16</sup> And it is the ICC's view that this obligation attaches to non-State Parties as well,<sup>17</sup> because the Arrest Warrants were issued in the context on an Article 13(b) referral, where the UNSC acted within and exercised its Chapter VII powers *vis-à-vis* the situation in Darfur. However, politics have seemingly overshadowed legal considerations, a fact which should weight in the Appeals Chamber's judgment. This being the situation, King Abdullah II extended an invitation to Al-Bashir to attend the LAS Council 28<sup>th</sup> Ordinary Session (Summit Level) in March 2017 in Amman.<sup>18</sup> It is not the purpose of these observations to speculate what political or other considerations prompted this invitation. Presumably Al-Bashir has always travelled internationally believing that he would not be arrested but whether he took assurances to that effect by Jordan would probably never become known. However, (a) Jordan was fully aware of its Rome Statute obligations and the consequences of not executing the Arrest Warrants (it did receive reminders, including an urgent *démarche* by the European Union Delegation to Jordan<sup>19</sup>), and (b) the Summit's agenda did not include any items directly bearing on Sudan necessitating its President's presence at all costs.<sup>20</sup> Moreover, the fact that the two countries' animosity over the ICC has recently been reversed should not go unnoticed: in December 2014, Sudan protested to the Jordanian ambassador in Khartoum because of his country's pronouncement at the UNSC earlier that month that it was deeply concerned about continued

<sup>13</sup> See Article 59(3) Rome Statute: "The person arrested shall have the right to apply to the competent authority in the custodial State for interim release pending surrender". In the present Appeal, whether 'custodial State' means any arresting state or only ICC State Parties does not come into play, since Jordan is a contracting party.

<sup>14</sup> See *ibid* Article 60(2): "A person subject to a warrant of arrest may apply for interim release pending trial". For practice, see Trial Chamber VII, ICC-01/05-01/13-1151, 17 August 2015; Appeals Chamber, ICC-01/05-01/13-969, 29 May 2015.

<sup>15</sup> Cf. the agreements concluded with Belgium (entered into force 10 April 2014) and with Argentina (signed 28 February 2018) on the interim release of detainees on their territory pursuant to Chamber decisions.

<sup>16</sup> Namely, Kenya, see *supra* notes 9 and 10, and the Republic of South Africa, see Supreme Court of Appeal of South Africa, *Minister of Justice and Constitutional Development v. Southern African Litigation Centre* (867/15), Judgment, 15 March 2016, [2016] ZASCA 17.

<sup>17</sup> E.g. ICC-02/05-01/09-236, 16 April 2015 (Indonesia) and ICC-02/05-01/09-252, 26 October 2015 (India). See further, ICC-02/05-01/09-3, 4 March 2009, p. 93; ICC-02/05-01/09-94, 12 July 2010, p. 29.

<sup>18</sup> For more information, see <https://www.arabsummit2017.jo/en/>

<sup>19</sup> See European Parliament, Parliamentary Questions, E-002224-17, Answer given by Vice-President Mogherini on behalf of the Commission, 26 June 2017, at: <http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2017-002224&language=EN>.

<sup>20</sup> According to the then Sudanese Foreign Minister, Al-Bashir's participation would be "in spite of his hectic schedule", see 'Sudan's Bashir to attend Arab summit: minister', *ENCA*, 27 March 2017, at: <https://www.enca.com/africa/sudans-bashir-to-attend-arab-summit-minister>.

serious crimes, aerial bombardments, attacks against civilians and sexual crimes taking place in Darfur,<sup>21</sup> as testified by the Prosecutor.<sup>22</sup>

6. Reference should also be made to Jordan's obligations as a contracting party to the Convention on the Prevention and Punishment of the Crime of Genocide.<sup>23</sup> Pursuant to Article IV thereof, echoing Article 7 of the Charter of the International Military Tribunal (1945), those committing genocide or directly or indirectly implicated in acts of genocide shall be punished notwithstanding their status as "constitutionally responsible rulers". Moreover, pursuant to Article VI, a provision of intertemporal application, those charged with genocide or acts of genocide must be tried by "such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction". While the ICC falls squarely into the meaning of 'international penal tribunal',<sup>24</sup> whether Sudan should be considered as having accepted its jurisdiction is a more difficult question.<sup>25</sup> However, the following considerations could weight in giving an affirmative answer. First, Sudan has inadvertently accepted it when the UNSC referred the situation in Darfur, thus creating a triangular relationship (this is true with all Article 13(b) referrals). Second, Sudan does not appear to have challenged the Arrest Warrants' legality issued against its nationals, even though it could have exercised diplomatic protection and/or invoked Article 35(1) of the UN Charter (executing the Arrest Warrants is bound to lead to a dispute between Sudan and the state where execution took place). Third, the Appeals Chamber has ordered that Sudan and/or Al-Bashir may file submissions on the merits of Jordan's appeal.<sup>26</sup> And there is precedence: in the *Application of Genocide Convention Case* (2007), the ICJ held that Serbia's non-cooperation with the ICTY in arresting Ratko Mladic, who was located in its territory, was a failure to comply with its obligation to punish genocide deriving from the said Convention and engaged its international responsibility.<sup>27</sup> The factual, political and legal similarities between the two cases are obvious.

### **Observations on Jordan's three grounds of appeal**

7. The Appeal Chamber has granted Jordan's request for leave to appeal on three grounds. The gist of Jordan's arguments fails to accept that the ever-evolutionary process towards a

<sup>21</sup> See 'Sudan calls on Jordan to apologise for ICC statements to UNSC', *Sudan Tribune*, 23 December 2014, at: <http://sudantribune.com/spip.php?article53421>.

<sup>22</sup> UN Doc. S/PV.7337, 12 December 2014, pp. 2-3.

<sup>23</sup> 78 UNTS 277. Jordan acceded on 3 April 1950, while Sudan relatively recently on 13 October 2003.

<sup>24</sup> Cf. Decision on Jordan's request for leave to appeal, Minority Opinion of Judge Marc Perrin De Brichambaut, ICC-02/05-01/09-319-Anx, 21 February 2018, p. 6, arguing that the Appeals Chamber should determine whether the ICC constitutes an 'international penal tribunal' for the purpose of Article VI.

<sup>25</sup> Ibid.

<sup>26</sup> ICC-02/05-01/09-352, 25 May 2018.

<sup>27</sup> ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007, [2007] I.C.J. Reports 43, 190 at para. 450.

globalized international criminal justice, where the ICC has been entrusted with playing the pivotal role, has resulted in abandoning certain norms prevalent in previous eras. These norms (a) disregard the rights of victims of unspeakable crimes in favour of perpetuating the protection of heads of state from suit, a relic no doubt of the epoch of absolute state sovereignty crushing the personality of individuals and (b) are inconsistent with contemporary international law characterized by its deep anthropocentric nature. Moreover, Jordan has not persuasively argued why it deliberately failed to comply with its ICC obligations and arrest Al-Bashir but chose to honour its obligations under the LAS Immunities Convention (1953). The purpose of the latter, which was considerably influenced by the Convention on the Privileges and Immunities of the United Nations,<sup>28</sup> is to afford only to national delegations, in connection to LAS operation, the protection necessary for exercising their functions independently, an application of the maxim *ne impediatur legatio*. On the contrary, it does not offer any (additional) protection to heads of state of Member States,<sup>29</sup> who are endowed by international law with *jus representationis omnimodae* and which they may delegate to prime ministers and foreign ministers.

8. As regards the *first ground of appeal*, Jordan has argued that it finds itself in the untenable position of having two irreconcilable legal obligations: (a) arrest and surrender Al-Bashir under the Rome Statute and (b) uphold his (presumed) immunity from arrest under the LAS Immunities Convention. Assuming that neither obligation takes precedence over the other (the provisions of the VCLT (1969) giving primacy on the later in time treaty in case of incompatibility should probably have been applied), Jordan did not adduce any compelling reasoning why it observed the latter obligation and disregarded the former. For had Al-Bashir been arrested he would have been able to challenge it before Jordanian courts, which would then have to rule on possible illegalities or irregularities. In its 30 June 2017 submissions to Pre-Trial Chamber II, Jordan maintained that it complied with the LAS Immunities Convention (and not with the Rome Statute) as a matter of treaty law.<sup>30</sup> But this should have been determined by domestic courts in view of Article 102 of its Constitution.<sup>31</sup> In the present case, the cooperation requests (including execution of Arrest Warrants) are orders given by an international court acting pursuant to a UNSC mandate under Chapter VII, and are addressed to a State Party, which has voluntarily accepted its jurisdiction. Moreover, if *in casu* the ICC acted as an UNSC agent,<sup>32</sup> its orders have the same binding effect as UNSC resolutions and

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<sup>28</sup> 1 UNTS 15.

<sup>29</sup> Argument inferred from Article 16 LAS Immunities Convention equating the term ‘representative of Member State’ to delegates, their deputies, etc. and from Articles 15 and 18 which clearly do not apply to heads of states.

<sup>30</sup> ICC-02/05-01/09-309, 11 December 2017, pp. 6-7.

<sup>31</sup> It reads: “Civil Courts ... shall have the right to exercise jurisdiction over all persons in all ... criminal matters, including cases filed by the Government or filed against it.”

<sup>32</sup> Had the situation in Darfur not been referred, the UNSC could have created an international criminal tribunal for Darfur following the established pattern of the Yugoslav and Rwanda tribunals. The possibility of a hybrid

addressees must execute promptly and in full.<sup>33</sup> Notwithstanding the consequences of the UNSC involvement, the Appeals Chamber may wish to discuss whether the obligation to execute the requests is a manifestation of Article 4(2) of the Rome Statute.

9. As regards the problems associated with applying and interpreting Article 27(2), in view of Article 98, arguably the principle of *effet utile* (effectiveness) should be employed. Regarded as one of the fundamental principles of treaty interpretation,<sup>34</sup> it should not *in casu* be counter-balanced by the *in dubio mitius* principle.<sup>35</sup> And this because the Rome Statute's obligations are meant to ensure that the most heinous international crimes committed by a person against another person are always prosecuted, even if jurisdiction must be exercised over nationals of non-State Parties. Considering that the non-execution of Arrest Warrants threatens the ICC's efficacy, which has not been endowed with its own force to enforce decisions, to invoke the *effet utile* principle is more than justifiable. The Appeals Chamber could also employ the solidarity principle, which, as applied in international law, aims at "promot[ing] greater heed for the long-term interests of the globe".<sup>36</sup> Solidarity towards an international institution is a principle which participating states should always observe and not abandon in favour of pursuing ephemeral alliances with other states. Moreover, it is a fact that treaties are living instruments having a life of their own and, depending on the applicable circumstances, they may require adjustments. Therefore, the Appeals Chamber should interpret the Rome Statute as it sees it fittingly under the currently prevailing conditions.

10. The *second ground of appeal* principally concerns the proper determination of the legal consequences of Resolution 1593(2005). Jordan claims that, as regards the situation in Darfur, no rights and duties analogous to those of a State Party have been attached to Sudan.<sup>37</sup> A few introductory remarks. Arguably, the UNSC could have decided to create a separate category of resolutions solely for the purposes of Article 13(b) referrals, because its proper interpretation is that Chapter VII shall be the legal basis for the UNSC to adopt the referral decision (otherwise it might have been regarded as *ultra vires*) but not that the procedure laid down in Chapter VII

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criminal tribunal, like those in Sierra Leone and in Cambodia, was also advocated, see 'A middle way for justice in Sudan', *The Economist*, 11 December 2008, at: <https://www.economist.com/node/12777952>.

<sup>33</sup> Even though the Jordanian Constitution (1952) neither prescribes the primacy of the international law's peremptory rules over domestic law nor provides for the consequences arising from the country's participation in international institutions, the stipulations in the LAS Immunities Convention, even if of direct relevance here, cannot stand higher than ICC acts founded on UNSC powers under Chapter VII.

<sup>34</sup> See ICJ, *Territorial Dispute (Libyan Arab Jamahiriya v. Chad)*, Judgment of 3 February 1994, [1994] ICJ Reports 1994, 6, para. 51 at p. 23 with references to other jurisprudence.

<sup>35</sup> See R. Jennings & A. Watts, *Oppenheim's International Law*, 9th ed., Vol. I, Parts 2-4, Longman, 1992, p. 1278. For these two principles, see also [1950] 43:1 *Annuaire de l'Institut de Droit International* 402 et seq.

<sup>36</sup> See M. Bedjaoui, 'General Introduction' in M. Bedjaoui (ed.), *International Law: Achievements and Prospects*, UNESCO/Martinus Nijhoff, 1991, pp. 1, 14.

<sup>37</sup> Jordan's arguments have a direct bearing upon the UNSC as it is the author of Resolution 1593(2005). France's proposal that the UNSC invite states deemed by the ICC to have violated their duty to cooperate to address it, see UN Doc. S/PV.8132, op. cit., p. 8, has obvious advantages and there is no reason why it should not be implemented.



must be followed. Thus, Chapter VII is the relevant substantive law but not necessarily the applicable procedural law as well.<sup>38</sup> There is nothing extraordinary about Article 13(b): it is a further step in the evolutionary process towards a globalized criminal justice transcending continents and states and focusing on protecting the life and the personality of the individual. It seeks to institutionalize the aforementioned UNSC practice creating *ad hoc* international criminal tribunals in cases comparable to the situation in Darfur.

11. Regarding Jordan's contention, as Chapter VII is the juridical basis of Resolution 1593(2005), it (a) produces legal effects covering the entire UN membership without exceptions, (b) has the authority accorded under Articles 24(1) and 25 of the UN Charter, and (c) all Member States must comply with its terms as specifically demanded by Article 48 thereof, in conjunction with Article 103 thereof. While it is true that Sudan, as a non-State Party, has not consented to the expansive UNSC powers under Article 13(b), in its capacity as UN Member State, it is under an obligation to comply. Moreover, as a signatory to the Rome Statute since 8 September 2000, Sudan is bound by Article 18 VCLT and, judging by its actions, its behaviour may be wanting. Given that practice on Article 18 VCLT is rare, the Appeals Chamber is presented with an excellent opportunity to shed some light and make pronouncements which will develop international law on the nature and content of the obligations to be met by signatory parties. Furthermore, Sudan's domestic judicial and quasi-judicial efforts to investigate and prosecute crimes in Darfur<sup>39</sup> have universally been regarded as inadequate, inappropriate and faulty.<sup>40</sup> As regards the AU, despite its continuing antiparathesis with the ICC, it has failed to create the Hybrid Court for Darfur, as proposed by eminent African personalities in 2009,<sup>41</sup> even though it has gained valuable experience from the Extraordinary African Chambers within the courts of Senegal, and it would have given credence to its "African solutions to African problems" initiative. Presently, rather unexplainably, no AU Member State has ratified the Malabo Protocol (2014),<sup>42</sup> which creates the International Criminal Law Section of the African Court of Justice and Human Rights (ACJHR) as an alternative to the ICC to try individuals for war crimes, crimes against humanity,

<sup>38</sup> Thus, for example, the UNSC may not have to "determine the existence of any threat to the peace, breach of the peace ..." as required by Article 39 UN Charter.

<sup>39</sup> They include a National Inquiry Commission, the Special Court for Events in Darfur, the Special Attorney for Crimes against Humanity, and the Prosecutor General for Darfur Crimes.

<sup>40</sup> See, *inter alia*, Report of the United Nations High Commissioner for Human Rights on Impunity and Accountability in Darfur for 2014, August 2015; Human Rights Council, Report of the Working Group on the Universal Periodic Review – Sudan, A/HRC/18/16, 11 July 2011 & A/HRC/33/8, 11 July 2016; and Australia in S/PV.7337, op. cit., p. 3.

<sup>41</sup> See AU Peace and Security Council, *Report of the African Union High-Level Panel on Darfur (AUPD)*, PSC/AHG/2(CC VII), 29 October 2009, paras 246 et seq.

<sup>42</sup> Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, signed in Malabo, Equatorial Guinea, on 27 June 2014, not yet in force.

genocide, etc.<sup>43</sup> Thus, the ICC is the only international actor with criminal jurisdiction able and willing to serve justice in Darfur. Surely, this is what States Parties and non-States Parties alike aspire to.

12. As regards the *third ground of appeal*, Jordan complained that the Pre-Trial Chamber abused its discretion when it referred its non-compliance to the ASP and to the UNSC. It also sought to compare it with other instances where no such reference was made, thus suggesting that it was the victim of double standards. Whenever a legal entity holding censure power exercises discretion, there are legal principles to be observed (e.g. legitimate expectations, reasonable confidence, proportionality, fairness), there are upper limits which should not be exceeded, while allegations of arbitrariness or capriciousness must be proven by the complainant. Usually courts have discretion and make choices because there is no pre-determined (fixed) rule available. Thus, the Appeals Chamber ought to lay down the upper limits of discretion and devise a test to determine whether such referrals comply with or breach these limits. As regards Jordan's contention, what the Pre-Trial Chamber has done in the past or has failed to do is not the important determinant but only one of several. But, it is submitted, there may be specific circumstances explaining Jordan's referral. These have to do with the States Parties' persistent failure to arrest and surrender Al-Bashir for almost a decade and the presumed Pre-Trial Chamber's frustration witnessing the Court's efficacy being diminished. By referring Jordan's non-compliance, the Pre-Trial Chamber may have tried to protect and defend the Court as an institution as well as its values and principles. This behaviour is neither unfair nor unreasonable and certainly within the limits of the Bench's discretion. It could further be justified if regarded as (yet another) attempt to persuade the ASP<sup>44</sup> and the UNSC to finally address in earnest those states refusing to comply with legitimate cooperation requests by taking appropriate (even punitive) measures.<sup>45</sup> Instead of filing a complaint about its referral, Jordan should have welcomed it as it would allow it to convince the ASP and the UNSC that the ICC has erred. Jordan has nothing to fear and, at any rate, the referral does not compromise, threaten or diminish its sovereign rights.

### **Concluding observations**

13. The present proceedings present a unique opportunity for the Appeals Chamber to send out a clear and unambiguous message to States Parties, to non-States Parties (particularly to those whose nationals are wanted by the ICC), to the ASP and to the UNSC that undermining

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<sup>43</sup> See *ibid*, Article 28A ('International Criminal Jurisdiction of the Court') Revised Statute of the ACJHR.

<sup>44</sup> As the ASP is the competent organ to settle disputes between States Parties regarding the Rome Statute's interpretation or application (Article 119(2)), it has a special duty to formulate an appropriate response.

<sup>45</sup> Cf. European Parliament Resolution of 6 October 2016 on Sudan, calling on the EU to impose "targeted punitive sanctions" against those responsible for non-cooperation with the ICC, T8-0379/2016, para. 12.

the Court persistently and deliberately is an affront to humanity but especially to the victims. The Appeals Chamber must employ a sound legal reasoning to disperse any legal ambiguities on Rome Statute's proper interpretation (with emphasis on Articles 13(b), 27(2) and 98(1)) and insist that international criminal justice is an evolutionary process which will not stop until impunity has been eradicated. It should interpret the Rome Statute according to its purpose and the determination of the original signatory states. Its drafters might not have envisaged the troubling circumstances that the Appeals Chamber faces today. They would have reasonably expected that States Parties would comply with requests for cooperation and not antagonize the Court. But it has not turned out that way. Disturbing as this might be, the Appeals Chamber should not be disheartened and should confirm that all those allegedly responsible for the (direct or indirect) perpetration of the worst imaginable crimes and regardless of official status or capacity will not be allowed to escape prosecution, which is not equated to conviction. If President Al-Bashir is innocent of the crimes accused of, he is offered the chance to be exonerated by the independent and impartial ICC.




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PROF. KONSTANTINOS D. MAGLIVERAS

Dated this 14 June 2018

At Athens, The Hellenic Republic

At [place, country]