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Date: 14 June 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

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"

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I. Introduction

1. Further to the ICC Appeals Chamber’s order inviting expressions of interest as *amici curiae* in judicial proceedings,¹ Professor Michael A. Newton and Mr. Oliver Windridge sought 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: ‘Jordan Referral re Al-Bashir Appeal’).² On 21 May 2018, the ICC Appeals Chamber granted Professor Newton leave to submit full written submissions as *amicus curiae* on the merits of the legal questions presented in Jordan’s appeal.³ This *amicus curiae* brief is respectfully submitted pursuant to Rule 103 of the ICC Rules of Procedure and Evidence by Professor Newton.⁴

2. The Jordan Referral re Al-Bashir Appeal contains three grounds. Ground three concerns Pre-Trial Chamber II’s decision to refer Jordan for its failure to arrest President Al-Bashir to the Assembly of State Parties and Security Council of the United Nations (hereinafter: ‘ASP’ and ‘UNSC’ respectively). Whilst other briefs will focus on legal theory and the existence, or non-existence, of immunity, this brief aims to add a dose of practicality. Focusing on Jordan’s third ground of appeal, it relies on the research undertaken in the Mapping Bashir project to answer the question *does referral ever make a difference?* This question goes to the heart of the reasonableness of Pre-Trial Chamber II’s referral of Jordan. The brief begins with an executive summary, and then discusses the Mapping Bashir project, before

¹ *Prosecutor v. Al Bashir*, 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.

² *Prosecutor v. Al Bashir*, ‘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.

³ *Prosecutor v. Al Bashir*, 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, 21 May 2018, para. 10.

⁴ Professor Newton gratefully acknowledges the assistance of Oliver Windridge, Director of the Mapping Bashir project in compiling this brief and appreciates his significant contributions to the project.

summarizing the conclusions of its research. It is sincerely hoped that this brief will assist the ICC Appeals Chamber in its deliberations on this important issue.

II. Executive Summary of Conclusions

3. This brief makes the following conclusions:

- I. The following test has been consistently applied 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 to obtain cooperation requested taking into account the form and content of the cooperation* (hereinafter: 'Referral Test').⁵
- II. To date, no ICC Pre-Trial Chamber has attempted a comprehensive analysis of President Al-Bashir's travels since arrest warrants have been operative. Accordingly, Chambers have not comprehensively assessed President Al-Bashir's travels when applying the Referral Test.
- III. Mapping Bashir research shows that President Al-Bashir has travelled to numerous States Parties subsequent to the public disclosure of arrest warrants as discussed herein. Pre-Trial Chamber II's decision not to refer South Africa has received significant attention, though Nigeria has been similarly treated.
- IV. Mapping Bashir research demonstrates that referral to the ASP and UNSC has made no appreciable difference to President Al-Bashir's travels to date
- V. As an important element of the Referral Test, Pre-Trial Chambers should consider the ongoing travels of President Al-Bashir because they constitute relevant circumstances within the meaning of the Referral Test.

III. The Bashir Arrest Warrants

4. In order to put the Mapping Bashir research in proper context, it is helpful to briefly recall the dates of the arrest warrants. On March 4, 2009, the ICC issued a warrant of

⁵ 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.

arrest against President Al-Bashir.⁶ Following the decision, the ICC Registrar transmitted a request for cooperation seeking the arrest and surrender of President Al-Bashir to all States Parties.⁷ A second arrest warrant was issued on July 12, 2010.⁸ On July 20, 2010, the ICC Registrar again notified all States Parties and requested their cooperation in the arrest and surrender of President Al-Bashir.⁹

IV. The Mapping Bashir Research Project

5. The Mapping Bashir research project was conceived by Oliver Windridge. Its implementation is a cooperative venture between Mr. Windridge and the International Law Practice Lab at Vanderbilt University Law School. Working alongside Mr. Windridge, Professor Newton coordinates and leads teams of researchers charged with documenting the travel patterns of President Al-Bashir. This research is publicly available at www.mappingbashir.org. The Mapping Bashir project provides the only known consolidated compilation of President Al-Bashir's travels since arrest warrants were issued. It provides the total number of trips, including detailed analysis regarding the purposes of those trips, and documents the known diplomatic outcomes from trips that were undertaken for official diplomatic exchanges. The research also identifies patterns between the issuance of official ICC warnings and judicial judgements and subsequent travel. The Mapping Bashir team began by compiling all of the primary ICC documents (e.g. Registrar Reports, Motions by the Office of the Prosecutor, and Orders by the Pre-Trial Chamber).¹⁰ This effort was expanded by searching news reports by Sudanese news networks and international news networks in order to find travels that were not reported by the ICC organs. President Al-Bashir's trips were plotted on a timeline before categorizing them according to the reported purposes behind the trip (political, economic, religious, personal, etc.), whether the host state was receptive or not, and whether the host state was a States Party. The research also identified some

⁶ *Prosecutor v. Al Bashir*, Case No. ICC-02/05-01/09, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, ¶ 4.

⁷ *Prosecutor v. Al Bashir*, Case No. ICC-02/05-01/09, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09, at 93.

⁸ *Prosecutor v. Al Bashir*, Case No. ICC-02/05-01/09, Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir (July 12, 2010).

⁹ *Prosecutor v. Al Bashir*, Case No. ICC-02/05-01/09, Supplementary Request to All States Parties to the Rome Statute for the Arrest and Surrender of Omar Hassan Ahmad Al Bashir (July 20, 2010).

¹⁰ Available at <https://www.icc-cpi.int/Pages/crm-refined.aspx?case=ICC-02/05-01/09>.

seventeen trips, representing some 13% of the total number of trips, that were cancelled and the stated reasons for cancellation.

V. The Mapping Bashir Research Project Findings

6. Since the issuance of the first ICC arrest warrant on March 4, 2009, President Al-Bashir has made at least 115 reported trips. He has visited at least thirty-two countries, including fourteen States Parties, eleven non-States Parties, and eight Signatory States. Available data shows that in the two years proceedings ICC arrest warrants, only six trips were taken during 2007 and two trips in 2008. President Al-Bashir has made at least ten trips each year since 2009 (with the exception of 2010, during which he only made four successful trips due to various cancellations), averaging 12.7 trips per year. The four-year window from 2013 to 2016 represents the highest average travel in any four-year window, with an average of 17.25 trips per annum. More than half of President Al-Bashir's trips were to non-States Parties.

7. The data collected demonstrates that in most, but not all instances, States Parties have afforded privileges and immunities consistent with those customarily accorded to heads of state conducting official business. Malawi was the first state to argue that full diplomatic protocol remained applicable after the issuance of arrest warrants, when it did not arrest President Al-Bashir during his 2011 visit to attend the summit of the Common Market for Eastern and Southern Africa (COMESA).¹¹ Subsequently, similar arguments have been raised by the Congo,¹² Djibouti,¹³ and South Africa.¹⁴

¹¹ See *Prosecutor v. Al Bashir*, Case No. ICC-02/05-01/09, Corrigendum to the Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir, ¶ 5-7 (Dec. 13, 2011) [hereinafter Malawi Decision], https://www.icc-cpi.int/CourtRecords/CR2011_21722.PDF.

¹² *Prosecutor v. Al Bashir*, Case No. ICC-02/05-01/09, Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court, ¶ 18-19 (April 9, 2014) [hereinafter Congo Decision], https://www.icc-cpi.int/CourtRecords/CR2014_03452.PDF.

¹³ *Prosecutor v. Bashir*, Case No. ICC-02/05-01/09, Decision on the Non-Compliance by the Republic of Djibouti with the Request to Arrest and Surrender Omar Al-Bashir to the Court and Referring the Matter to the United Nations Security Council and the Assembly of the State Parties to the Rome Statute, ¶ 6 (July 11, 2016) [hereinafter Djibouti Decision], https://www.icc-cpi.int/CourtRecords/CR2016_04946.PDF.

¹⁴ *Prosecutor v. Al Bashir*, Case No. ICC-02/05-01/09, 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, ¶ 32-38 (July 6, 2017) [hereinafter South Africa Decision], https://www.icc-cpi.int/CourtRecords/CR2017_04402.PDF.

8. In terms of States Parties, President Al-Bashir has travelled to Chad seven times, the highest number of any States Party. President Al-Bashir rarely travels to a States Party more than once, the notable exceptions being Chad and Uganda. In contrast, Ethiopia is the most frequently visited non-State Party (twenty-five times), followed by Saudi Arabia (eighteen), Egypt (eleven) and Qatar (nine).
9. Whilst the lack of return visits to States Parties may be due to concerns over future arrest, the presence of domestic proceedings is another identifiable factor demonstrated by the data. Domestic legal proceedings in South Africa and Kenya followed President Al-Bashir's travel and exit. Whilst South Africa's proceedings are well known, it should also be noted that in January 2012, a court in Kenya issued a warrant for Bashir's arrest should he return.¹⁵ This incited political tension between Sudan and Kenya,¹⁶ and with IGAD.¹⁷ Such tensions could have contributed to President Al-Bashir's decision to only travel to non-State Parties in 2012.
10. As to patterns in travel, the overwhelming majority of President Al-Bashir's completed trips have been to Africa and the Middle East. The ICC States Parties that President Al-Bashir has visited since issuance of the first arrest warrant are: South Africa, Botswana, Uganda, Chad, Kenya, Central African Republic, Senegal, Djibouti, Malawi, Nigeria, Democratic Republic Congo, Equatorial Guinea and Jordan. President Al-Bashir has made seven successful visits to Chad since 2009, with no reports of cancelled visits. Most of the visits were made for economic and political purposes. For example, he attended the summit of the Sahel-Saharan States in 2010,¹⁸ the community of Sahel-Saharan (CEN-SAD) summit in February 2013,¹⁹ and

¹⁵ Provisional Warrant for Arrest, High Court of Kenya (Jan 23, 2012).

http://www.sudantribune.com/IMG/pdf/Kenya_arrest_warrant_01232011.pdf

¹⁶ Kenyan judge formally issues provisional arrest warrant for Sudanese president, Sudan TRIB. (Jan. 26, 2012), <http://www.sudantribune.com/Kenyan-judge-formally-issues,41413>

¹⁷ *Al Bashir Arrest Warrant Judgement Bad in Law and for the Region*, INTERGOVERNMENTAL AUTHORITY ON GOV'T. (last visited Oct. 18, 2017) <https://igad.int/executive-secretary/398-al-bashir-arrest-warrant-judgement-bad-in-law-and-for-the-region>

¹⁸ *Prosecutor v. Al Bashir*, Case No. ICC-02/05-01/09, Decision informing the United Nations Security Council and the Assembly of the States Parties to the Rome Statute about Omar Al-Bashir's recent visit to the Republic of Chad (Aug. 27, 2010) https://www.icc-cpi.int/CourtRecords/CR2010_05769.PDF

¹⁹ *Sudanese president arrives in Chad as ICC asks for his arrest*, Sudan TRIB. (Feb 16, 2013), http://www.sudantribune.com/spip.php?iframe&page=imprimable&id_article=45541

CEN-SAD's extraordinary meeting in March 2013.²⁰ President Al-Bashir was on the guest list for Chad's official Independence Day ceremony in January 2011²¹ and attended the Head of State inauguration ceremony in August 2011.²² He also attended a regional summit in 2013²³ and addressed the second forum of tribes living in the border area between Sudan and Chad in 2014.²⁴

11. Since the first arrest warrant was issued, President Al-Bashir has visited eleven non-States Parties: Qatar, Libya, Ethiopia, Saudi Arabia, South Sudan, China, Iraq, Mauritania, India, Indonesia and Rwanda. Of those, President Al-Bashir has most frequently visited Ethiopia and Saudi Arabia. President Al-Bashir has made twenty-five successful visits to Ethiopia since 2009 with no reported cancellations. Indeed, he has visited Ethiopia every year from 2012 to 2017. Specifically, President Al-Bashir has travelled to Ethiopia to attend the African Union Summit every year,²⁵ and attended the Intergovernmental Authority on Development Summit (IGAD) in 2012,²⁶ 2014,²⁷ and 2017.²⁸ Other official forums include: TANA High-level Forum

²⁰ *Prosecutor v. Al Bashir*, Case No. ICC-02/05-01/09, Prosecution notification of possible travel in the case of The Prosecutor v Omar Al Bashir pursuant to Article 97 of the Rome Statute (Mar. 15, 2013) https://www.icc-cpi.int/CourtRecords/CR2013_02025.PDF

²¹ *Prosecutor v. Al Bashir*, Case No. ICC-02/05-01/09, Prosecution notification of possible travel in the case of The Prosecutor v Omar Al Bashir, pursuant to Article 97 of the Rome Statute (Jan. 10, 2011) https://www.icc-cpi.int/CourtRecords/CR2011_00067.PDF

²² *Prosecutor v. Al Bashir*, Case No. ICC-02/05-01/09, Decision requesting observations about Omar Al-Bashir's recent visit to the Republic of Chad (Aug. 18, 2011) https://www.icc-cpi.int/CourtRecords/CR2011_12351.PDF

²³ *Prosecutor v. Al Bashir*, Case No. ICC-02/05-01/09, Prosecution Notification of Possible Travel in the Case of The Prosecutor v Omar Al Bashir, pursuant to Article 97 of the Rome Statute (May 10, 2013) https://www.icc-cpi.int/CourtRecords/CR2013_03488.PDF.

²⁴ *Prosecutor v. Al Bashir*, Case No. ICC-02/05-01/09, https://www.icc-cpi.int/CourtRecords/CR2014_02978.PDF

²⁵ *Ethiopia to host Africa Union summit after Omar al-Bashir Malawi row*, BBC News (June 12, 2012), <http://www.bbc.com/news/world-africa-18407396>; 2013:

<http://www.sudantribune.com/spip.php?article46684> *Prosecutor v. Al Bashir*, Case No. ICC-02/05-01/09, Prosecution's Urgent Notification of Travel in the Case of The Prosecutor v Omar Al Bashir (Jan. 30 2014) https://www.icc-cpi.int/CourtRecords/CR2014_01297.PDF; *Prosecutor v. Bashir*, Case No. ICC-02/05-01/09, Prosecution's Notification of Travel in the Case of The Prosecutor v Omar Al Bashir (Jan 25, 2015) https://www.icc-cpi.int/CourtRecords/CR2015_00496.PDF; Carien du Plessis, *Al-Bashir, Zuma hug, happily shake hands at AU meeting*, News24 (Feb. 1 2016),

<http://www.news24.com/SouthAfrica/News/al-bashir-zuma-hug-happily-shake-hands-at-au-meeting-20160201>; *Prosecutor v. Al Bashir*, Case No. ICC-02/05-01/09, Report of the Registry on information received regarding Omar Al Bashir's travels to States Parties and Non-States Parties from 5 October 2016 to 6 April 2017 and other efforts conducted by the Registry regarding purported visit, 11 April 2017) https://www.icc-cpi.int/CourtRecords/CR2017_02216.PDF

²⁶ NUBA REPORTS, <https://nubareports.org/bashir-travels/> (last visited Oct 18, 2017).

²⁷ *Prosecutor v. Bashir*, Case No. ICC-02/05-01/09, Prosecution's Urgent Notification of Travel in the Case of The Prosecutor v Omar Al Bashir (Nov. 4 2014) https://www.icc-cpi.int/CourtRecords/CR2014_09319.PDF

on Security in Africa in both 2013²⁹ and 2014³⁰ and the East African Regional Heads of States and Governments Summit in 2014.³¹ President Al-Bashir attended meetings on ending hunger in Africa,³² talks regarding South Sudan in 2015,³³ a summit on the Libyan crisis in 2016,³⁴ and private meetings in 2014³⁵ and 2017.³⁶

12. President Al-Bashir has made sixteen successful trips to Saudi Arabia since 2009, with one recorded cancellation in 2017. He has visited Saudi Arabia every year from 2012 to 2017. Reasons for visiting have included: medical (minor surgery in 2012,³⁷ and a medical check-up in 2013),³⁸ religious (visit to Mecca for Hajj in 2013,³⁹ the annual Hajj pilgrimage in 2014,⁴⁰ and the Umrah pilgrimage in 2015),⁴¹ and political

²⁸ Prosecutor v. Bashir, Case No. ICC-02/05-01/09, Report of the Registry on information received regarding Omar Al Bashir's travels to States Parties and Non-States Parties from 5 October 2016 to 6 April 2017 and other efforts conducted by the Registry regarding purported visits (Apr. 11 2017) https://www.icc-cpi.int/CourtRecords/CR2017_02216.PDF

²⁹ *Sudan's Bashir to attend TANA Forum in Ethiopia*, Sudan TRIB. (Apr. 20, 2013), <http://www.sudantribune.com/spip.php?article46296>

³⁰ Prosecutor v. Bashir, Case No. ICC-02/05-01/09, Prosecution's Urgent Notification of Travel in the Case of The Prosecutor v. Omar Al Bashir (Apr. 29, 2011) https://www.icc-cpi.int/CourtRecords/CR2014_03805.PDF

³¹ IGAD leaders authorise quick deployment of regional forces in South Sudan, Sudan TRIB. (Mar. 14, 2014), <http://www.sudantribune.com/spip.php?article50283>

³² *Sudan's Bashir Arrives in Addis Ababa for meeting on Hunger in Africa*, Sudan TRIB. (June 30, 2013), <http://dev.sudantribune.com/Sudan/Article/Index/7-1-2013-Sudan-s-Bashir-arrives-in-Addis-Ababa-for-meeting-on-hunger-in-Africa/47136>

³³ AFP, *South Sudanese President Salva Kiir to join peace talks in Ethiopia*, Times of Oman (Aug 16, 2015), <http://timesofoman.com/article/65666/World/Africa/South-Sudanese-President-Salva-Kiir-to-join-Ethiopia-peace-talks-to-end-civil-war>

³⁴ *Mini African summit in Addis Ababa on Libyan crisis*, Libya Herald (Nov. 8, 2016), <https://www.libyaherald.com/2016/11/08/mini-african-summit-in-addis-ababa-on-libyan-crisis/>

³⁵ Prosecutor v. Bashir, Case No. ICC-02/05-01/09, Prosecution's Urgent Notification of Travel in the Case of The Prosecutor v. Omar Al Bashir (Apr. 29 2014) https://www.icc-cpi.int/CourtRecords/CR2014_03805.PDF

³⁶ *President Al-Bashir Concludes Official Visit to Ethiopia*, Ethiopian News Agency (Apr. 6, 2017), <http://www.ena.gov.et/en/index.php/politics/item/3012-president-al-bashir-concludes-official-visit-to-ethiopia>

³⁷ *Bashir had throat surgery in Qatar, in good health: official*, Reuters (Oct. 21, 2012), <http://www.reuters.com/article/us-sudan-bashir/bashir-had-throat-surgery-in-qatar-in-good-health-official-idUSBRE89K08320121021>

³⁸ *Sudan president in Saudi Arabia for medical checkup: source*, Sudan TRIB. (Mar. 10, 2013), <http://sudantribune.com/spip.php?article45771>

³⁹ Prosecutor v. Bashir, Case No. ICC-02/05-01/09, Prosecution's urgent notification of travel in the case of The Prosecutor v Omar Al Bashir (Oct. 9, 2013) https://www.icc-cpi.int/CourtRecords/CR2013_07315.PDF

⁴⁰ Mohammed Amin, *ICC asks Saudi Arabia to arrest Sudan President Bashir during pilgrimage*, The EastAfrican (Oct. 6, 2014), <http://www.theeastafrican.co.ke/news/ICC-asks-Saudi-Arabia-to-arrest-Bashir-/2558-2476908-rwpyd9z/index.html>

⁴¹ Prosecutor v. Bashir, Case No. ICC-02/05-01/09, Report of the Registry on Omar Al Bashir's travels to the Kingdom of Saudi Arabia, the State of Qatar and the Arab Republic of Egypt (Aug. 12, 2015) https://www.icc-cpi.int/CourtRecords/CR2015_13687.PDF

(attending the Arab-Latin America Summit in 2015,⁴² a bilateral meeting in 2015,⁴³ and a meeting for the end of military drills in Saudi Arabia in 2016).⁴⁴

13. From the issue of the first arrest warrant, President Al-Bashir has visited eight signatory states, which are Eritrea, Egypt, Iran, Kuwait, UAE, Algeria, Morocco and Bahrain. President Al-Bashir's reasons for repeated trips to Egypt have varied. He has repeatedly travelled for high level discussions related to international peace and security, regional economic and political issues, and economic cooperation.
14. President Al-Bashir has maintained a consistent pattern of pre-trip communication with states that he intends to visit. The data shows clear correlation to the decision whether to cancel, adjust, or proceed with his trip. Sometimes a state will cancel or postpone a forum that President Al-Bashir plans to attend (e.g. the cancelled Kenya trip of October 27, 2010 where under pressure from the ICC, Kenya decided not to host the Intergovernmental Authority of Development Summit because Bashir would be attending).⁴⁵ Sometimes a state will use political tactics (e.g. the cancelled Uganda trip of July 1, 2009 where President Al-Bashir cancelled his trip to Uganda to avoid a "diplomatic incident" over whether he would be arrested under warrants issued by ICC).⁴⁶ Uganda subsequently facilitated an official trip to Kampala by Bashir during which he met with senior officials. There have also been instances of states refusing permission to transit such as the cancelled Iran trip of August 4, 2013 due to the refusal of Saudi Arabia to permit transit of sovereign air space.⁴⁷
15. While some states have tried to avoid taking a clear stance on the arrest warrant, other states have made their positions known by both words and action. After the issuing of first arrest warrant on March 4, 2009, President Al-Bashir visited Eritrea

⁴²Prosecutor v. Bashir, Case No. ICC-02/05-01/09, Report of the Registry on Omar Al Bashir's travels to the People's Democratic Republic of Algeria, the Republic of India and the Kingdom of Saudi Arabia (Nov. 27 2015) https://www.icc-cpi.int/CourtRecords/CR2015_23074.PDF

⁴³ *Id.*

⁴⁴'Thunder' in Saudi desert as huge military drill ends, Times of Israel (Mar. 20 2016) <https://www.timesofisrael.com/thunder-in-saudi-desert-as-huge-military-drill-ends/>

⁴⁵BASHIR WATCH, <http://bashirwatch.org/#kenya> (last visited Oct. 18, 2017).

⁴⁶Andy Checkley, *Sudanese president cancels trip to Uganda*, the guardian (July 20, 2009), <https://www.theguardian.com/katine/2009/jul/20/omar-bashir-ugandan-trip>

⁴⁷*Saudi Arabia maintains silence over its decision to block Bashir's plane*, Sudan TRIB. (Aug. 4, 2013), <http://sudantribune.com/spip.php?article47539>

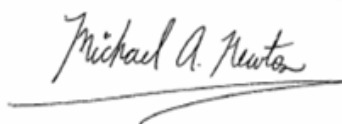
on March 23, 2009. The Sudanese Foreign Minister Deng Alor said the visit was “important” and reflected Eritrean “solidarity ... with Sudan *against* the ICC.”⁴⁸

16. Mapping Bashir research shows that during the nine years of travel since the issuance of arrest warrants, President Al-Bashir has cancelled numerous trips, including seven directly related to pressure from the ICC.
17. Mapping Bashir research also demonstrates that when comparing the dates on which the ICC Pre-Trial Chamber has referred to the UNSC and ASP with President Al-Bashir’s travels, referrals have made no appreciable difference. Research therefore suggests that referral does not substantially affect President Al-Bashir’s subsequent travels. This conclusion is demonstrable by the compiled data.

VI. Conclusions

18. As the Appeals Chamber has rightly stated, the Jordan Referral re Al-Bashir Appeal raises legal issues with implications beyond the present case.⁴⁹ President Al-Bashir’s travel patterns are relevant factors under the Referral Test.
19. Referral may be considered a “least best option.” However, it remains the only mechanism available to sanction Member States for failure to arrest President Al-Bashir. The Appeals Chamber would ideally consider all relevant factors in this important case. At the very least, Pre-Trial Chambers should consider the data available on President Al-Bashir’s travels as a factor in determining the efficacy of referral. The Mapping Bashir research project stands ready to assist this analysis as directed.

The whole respectfully submitted,



Professor Michael A. Newton

Dated this 14 day of June 2018. At Nashville, Tennessee, United States of America

⁴⁸*Sudan President al-Bashir defies arrest warrant with trip to Eritrea*, The Telegraph (Mar. 24, 2009), <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/sudan/5040418/Sudan-President-al-Bashir-defies-arrest-warrant-with-trip-to-Eritrea.html>

⁴⁹ Appeals Chamber Order, para. 1.