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**International  
Criminal  
Court**

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

Date: 16 July 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**

**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"**

**Source:** The League of Arab States

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

#### **REGISTRY**

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Registrar  
Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations  
Section

Other

## Introduction

1. On 11 December 2017, Pre-Trial Chamber II issued 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” (“Decision”).<sup>1</sup>
2. On 12 March 2018, the Hashemite Kingdom of Jordan (“Jordan”) filed an appeal against that Decision (“Jordan’s Appeal”).<sup>2</sup> The Prosecution responded to Jordan’s Appeal on 3 April 2018 (“Prosecution Response”).<sup>3</sup>
3. On 29 March 2018, the Appeals Chamber issued an “Order inviting expressions of interest as *amici curiae* in judicial proceedings (pursuant to rule 103 of the Rules of Procedure and Evidence)”,<sup>4</sup> in which it decided, *inter alia*, to invite the United Nations, the African Union, the European Union, the League of Arab States and the Organization of American States to submit observations on the merits of the legal questions presented in Jordan’s Appeal.<sup>5</sup> The present observations are submitted in accordance with that Order.
4. The League of Arab States wishes to express at the outset the importance that it attaches to the issues raised in Jordan’s Appeal. The League considers that the fight against impunity is of paramount importance, and that all those responsible for heinous crimes must be brought to justice. These goals, however, cannot be achieved at any cost. The fight against impunity must take place within the framework of international law, including the rules that aim to guarantee orderly relations between States.
5. In particular, as is the case for most international organizations, one of the main ways in which the League carries out its functions is by holding inter-governmental meetings and conferences. Strict respect for the immunities of the members of States’

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<sup>1</sup> ICC-02/05-01/09-309.

<sup>2</sup> ICC-02/05-01/09-326.

<sup>3</sup> ICC-02/05-01/09-331.

<sup>4</sup> ICC-02/05-01/09-330.

<sup>5</sup> *Ibid.*, p. 3.

delegations, including Heads of State, is fundamental in that context. Disregarding such immunities can have serious consequences for the proper functioning of the League and may prevent it from fulfilling the purpose of fostering cooperation among its Member States, as envisaged in article 2 of the Pact of the League of Arab States.<sup>6</sup> Pre-Trial Chamber II's Decision, and its interpretation of the obligations of States Parties to the Rome Statute as regards to immunities of a Head of State under international law, leads to serious negative consequences for the proper functioning of the Arab League, including for the holding of meetings. It also sets obligations of a Member State under the League's legal instruments in direct conflict with obligations under the Rome Statute if such a Member is a party to the Statute.

6. The League has reviewed and fully agrees with the arguments set out in Jordan's Appeal, and is of the opinion that Pre-Trial Chamber II's Decision should be set aside in its entirety. The following observations are intended to develop further some issues which the League finds particularly relevant at this stage of the proceedings, taking into account as well the Prosecution Response. Silence on any particular point raised by the Prosecution should not be understood as agreement.

### **Observations**

#### **A. President Al-Bashir's immunity under the Pact of the League of Arab States and the Convention on the Privileges and Immunities of the League of Arab States**

7. One of the questions of direct concern to the League in the present case is whether Jordan had an obligation to respect the immunity of President Al-Bashir under the 1945 Pact of the League of Arab States and the 1953 Convention on the Privileges and Immunities of the League of Arab States ("1953 Convention")<sup>7</sup> when he visited Jordan on 29 March 2017, in order to attend the 28<sup>th</sup> Arab League Summit. The League considers that Pre-Trial Chamber II erred with respect to matters of fact and law in addressing this question. The following arguments are made by the League in

<sup>6</sup> Pact of the League of Arab States, UNTS, Vol. 70, 22 March 1945.

<sup>7</sup> Convention on the Privileges and Immunities of the League of Arab States, adopted by the Council of the League of Arab States on 10 May 1953.

its capacity as the Depositary of the 1953 Convention and the institution often called upon to interpret and apply both treaties.

8. Pre-Trial Chamber II addressed the question of treaty-based immunity only with respect to the 1953 Convention, and its reasoning was brief.<sup>8</sup>
9. At the outset, it is important to state that Jordan and Sudan are parties to the Pact of the League of Arab States and therefore members of the organization. Jordan became a Member State on 22 March 1945, and Sudan on 19 January 1956. Both States are equally parties to the 1953 Convention. Jordan deposited its instrument of accession on 12 December 1953, while Sudan did so on 30 October 1977. The Pact of the League of Arab States and the 1953 Convention were therefore in force as between Jordan and Sudan at the time of the visit of President Al-Bashir to Jordan.
10. The League notes that, on 18 September 2017, Pre-Trial Chamber II requested Jordan “to complement its submissions by providing to the Chamber an authoritative text of the 1953 Convention on the Privileges and Immunities of the Arab League as well as the status of its ratification”.<sup>9</sup> Jordan responded to that request on 6 October 2017.<sup>10</sup> It submitted to the Chamber a certified copy of the authoritative text of the 1953 Convention (which is in Arabic), which the General Secretariat of the League made available. A list of the States that deposited instruments of accession with the General Secretariat, including Sudan, appears on the first page of the text of the Convention.<sup>11</sup>
11. The Chamber was “unable to conclude” that Sudan was a party to the 1953 Convention because of a faulty translation by the Registry of the Court, which did not include Sudan among the Member States of the League that had deposited instruments of accession.<sup>12</sup> This was indeed later acknowledged by the Chamber in its decision granting Jordan leave to appeal.<sup>13</sup> But this does not change the fact that

<sup>8</sup> Decision, paras. 29-32, 44.

<sup>9</sup> ICC-02/05-01/09-305, para. 6.

<sup>10</sup> ICC-02/05-01/09-306.

<sup>11</sup> *Ibid.*, annex I, p. 44.

<sup>12</sup> *Ibid.*, annex II, p. 44.

<sup>13</sup> ICC-02/05-01/09-319, para. 8 (“It has since become apparent that the Chamber did not have before it at the time of the issuance of the Decision an accurate translation of the information provided by Jordan in Arabic on 6 October 2017. Indeed, the corrected translation filed by the Registry on 20 December 2017 includes information that Sudan deposited its instrument of accession to the 1953 Convention on 30 October 1977”) (footnotes omitted).

the Chamber had at its disposal all the materials to come to the right conclusion, and in the League's view Jordan should not have been prejudiced by an error for which it bore no responsibility. The Chamber's failure to determine that Sudan was a party to the 1953 Convention constituted a serious error of fact.

12. While President Al-Bashir was on Jordanian territory in order to attend the 28<sup>th</sup> Arab League Summit, Jordan had an obligation to fully respect his immunities, both under the Pact of the League of Arab States and the 1953 Convention. The Pact of the League of Arab States creates certain organs for the exercise of the League's functions. Article 3 provides, in part, that "[t]he League shall have a Council composed of the representatives of the member States. Each State shall have one vote, regardless of the number of its representatives". When a Head of State leads a delegation to the Council, he or she is a member of the Council of the League. Article 11 of the Pact further provides that "[t]he Council of the League shall meet in ordinary session twice a year, during the months of March and October".

13. The first paragraph of article 14 of the Pact, concerning immunities, reads as follows:

"The members of the Council of the League, the members of its Committees and such of its officials as shall be designated in the internal organization, shall enjoy, in the exercise of their duties, diplomatic privileges and immunities".

14. In order to specify in greater detail the "kinds of privileges and immunities referred to in the Pact and to define clearly the manner of their application",<sup>14</sup> the Council of the League adopted in 1953 a resolution proposing the 1953 Convention for accession by each of the League's Member States. The overall purpose of the 1953 Convention is to facilitate the exercise of the League's functions in the territories of Member States,<sup>15</sup> while the purpose in according privileges and immunities under Chapter IV of the Convention to "representatives of Member States" of the League is "to safeguard the independent exercise of their functions in connection with the League".<sup>16</sup>

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<sup>14</sup> 1953 Convention, preamble.

<sup>15</sup> *Ibid.*

<sup>16</sup> *Ibid.*, article 14.

15. Among other things, the 1953 Convention provides in article 11 that:

“Representatives of Member States to the principal and subsidiary organs of the League of Arab States and to conferences convened by the League shall, while exercising their functions and during the journey to and from the place of meeting, enjoy the following privileges and immunities:

(a) Immunity from personal arrest or detention and from seizure of their personal effects (...)”

16. Further, Article 14 of the 1953 Convention provides that:

“Privileges and immunities are accorded to the representatives of Member States, not for their personal benefit, but in order to safeguard the independent exercise of their functions in connection with the League.

Consequently, Member States must waive the immunity of their representatives in all cases where it appears that the immunity would impede the course of justice and if it can be waived without prejudice to the purpose for which the immunity is accorded.”

17. The above-mentioned provisions are clear. While on Jordanian territory for purposes of the 28<sup>th</sup> Arab League Summit, President Al-Bashir acted on behalf of a member of the Council of the League. As a representative of Sudan to the League, he enjoyed immunity from arrest or detention by Jordan, both under article 14 of the Pact of the League and article 11 of the 1953 Convention.

18. Even starting from the position wrongly taken by the Pre-Trial Chamber (that it could not conclude that Sudan was a party to the 1953 Convention), Jordan would still have a treaty obligation to respect the immunity of President Al-Bashir. First, Jordan and Sudan are parties to the Pact of the League of Arab States, and Jordan is obliged to respect the immunity of members of the Council of the League by virtue of article 14 of the Pact alone. Article 14 is a self-standing provision and its application does not depend on Member States’ accession to the 1953 Convention.

19. Second, Sudan’s accession to the 1953 Convention is in fact not a precondition for Jordan to respect the immunity of President Al-Bashir under article 11 thereof. The privileges and immunities under Chapter IV of the Convention are accorded to

“representatives of Members States” of the League with the purpose of allowing them to carry out their functions “in connection to the League”. It is indisputable that Sudan is a Member State of the League, and that President Al-Bashir was a “representative” of Sudan (as well as member of the Council) when he visited Jordan in March 2017. Jordan’s obligations to accord such privileges and immunities thus exist regardless of whether Sudan is a party to the 1953 Convention. Furthermore, in light of the overall purpose and the multilateral nature of the Convention, those obligations are not owed just to any particular Member State that has acceded the Convention, but also to the League itself and to all States parties generally. It should also be noted that the 1953 Convention uses the term “Member States”, not “States Parties”, in article 11 (and 14) to refer to the immunity and inviolability of representatives, thus including in its regime of immunity such representatives of any Member State of the Arab League.

20. The Chamber’s errors are material, given that a central argument of Jordan is that it was under a treaty obligation to accord immunity to President Al-Bashir during his visit to Jordan in March 2017. Having decided that Sudan’s accession to the 1953 Convention was required, and that it was “unable to conclude” that Sudan was not a party to said Convention, the Chamber stated that it “cannot further consider Jordan’s argument that Omar Al-Bashir, when on Jordanian territory in March 2017, benefitted from immunity from arrest under article 11 of the 1953 Convention”.<sup>17</sup> As such, based on errors of fact and law, the Chamber failed to properly consider Jordan’s argument.

#### **B. The First and Second Grounds of Appeal**

21. Jordan’s First and Second Grounds of Appeal seek to correct legal errors of the Pre-Trial Chamber concerning whether a State Party to the Rome Statute is obligated to arrest and surrender the Head of State of a State which is not a party to the Statute, whose immunity has not been waived. Claims as to the denial of such immunity have given rise to much concern among States and within regional organizations, including the League of Arab States.

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<sup>17</sup> Decision, para. 31.



22. The League notes that the Prosecution Response in this regard is largely based on the repetition of general and unfounded assertions. The Response urges a policy-driven approach, with little attention being paid to the treaty texts or to the applicable rules of customary international law. Instead, it relies heavily on certain writings, while ignoring or dismissing others. The contradictory legal bases and reasoning in the decisions of various Pre-Trial Chambers, compounded by the arguments of the Prosecution in the present case, have left the law in this field in a state of extreme confusion, such that States Parties have been uncertain as to their obligations and the source of such obligations. The uncertainty with respect to the state of the law on these issues is readily apparent from the Appeals Chamber's highly unusual call for expressions of interest as *amici curiae* from States, international organizations, and professors.<sup>18</sup> To say, as the Prosecution now does<sup>19</sup>, that this uncertainty does not matter since the various Pre-Trial Chamber decisions ultimately arrived at the same outcome, is not serious. States and international organizations will hardly feel bound by a case-law predicated on various legal theories that contradict each other, which was the position Jordan found itself during March 2017.

23. In fact, behind all the confusion, two issues stand out, which the League addresses in turn below. First, what is the relationship between articles 27(2) and 98 of the Rome Statute? Specifically, does article 27(2), notwithstanding article 98, have the effect of removing the immunity *ratione personae* under customary or conventional international law of a foreign Head of State of a State Party for the purpose of arrest and surrender to the Court? Second, if article 27(2) does have that effect, what is the effect, if any, of Security Council resolution 1593 (2005) on the immunity from such arrest and surrender of the Head of State of Sudan, a State not party to the Statute?

(i) *The relationship between articles 27(2) and 98 of the Rome Statute*

24. The Prosecution contends that article 27 of the Rome Statute imposes on States Parties obligations that diverge from rules of customary international law concerning

<sup>18</sup> ICC-02/05-01/09-330.

<sup>19</sup> Prosecution Response, para. 113.

the immunity of Heads of State.<sup>20</sup> This leads the Prosecution to the conclusion that there is no conflict between the obligation to arrest and surrender a foreign Head of State of a State Party to the Court (even in circumstances where waiver has not been obtained) and the obligation to respect the immunity from foreign criminal jurisdiction of that Head of State.<sup>21</sup>

25. Underlying the Prosecution's arguments is an erroneous and misguided approach to the interpretation of article 27, based on a complicated and hypothetical series of so-called "vertical" and "horizontal" relationships.<sup>22</sup> The League notes that, while the Prosecution makes reference to Pre-Trial Chamber II's July 2017 decision on non-compliance by South Africa<sup>23</sup> and to the Decision under appeal to support the Prosecution's assertions, those decisions do not spell out the effects of article 27 in the convoluted manner suggested by the Prosecution. The Pre-Trial Chamber's reasoning was, in essence, based on an idea that there is no immunity to be waived for purposes of article 98 since those immunities have already been waived by virtue of article 27(2).<sup>24</sup> At no time did the Chamber refer to an "obligation to respect the vertical effect of article 27 (...)", as the Prosecution now suggests.<sup>25</sup> The new reading<sup>26</sup> of article 27(2) by the Prosecution is unclear, and creates yet more confusion concerning the meaning of that provision.

26. The League is of the opinion that article 27(2) of the Statute does not strip away the immunity of State officials from foreign criminal jurisdiction at the so-called "horizontal level", be it officials of States Parties or non-party States.<sup>27</sup> This is clear when the provision is read together with article 98, which refers to "third States",<sup>28</sup>

<sup>20</sup> *Ibid.*, para. 5.

<sup>21</sup> *Ibid.*, paras. 6-7.

<sup>22</sup> The weakness of this approach is shown by such abstract assertions as: "the vertical and horizontal effects of article 27 are indivisible" (*ibid.*, para. 19); "[t]he horizontal effect of article 27 means that States Parties (and other indirectly bound States, such as Sudan) must, in their mutual relations, each respect that the other is likewise bound 'vertically' by article 27" (para. 23); "[t]he horizontal effect of article 27 is the necessary corollary of its vertical effect" (at para. 22); and "[t]hese vertical and horizontal effects of article 27 are inevitably intertwined" (para. 24, reiterated at para. 41).

<sup>23</sup> ICC-02/05-01/09-302.

<sup>24</sup> *Ibid.*, para. 81; Decision, para. 34.

<sup>25</sup> Prosecution Response, para. 23.

<sup>26</sup> On a previous occasion, the Prosecution has also considered that "the waiver has already been provided by acceptance of Article 27(2)". See ICC-02/05-01/09-T-2-ENG, p. 70.

<sup>27</sup> Jordan's Appeal, paras. 15-21.

<sup>28</sup> See also articles 93(9)(b) and 108(1) of the Statute.

as opposed to “States not party” (a term found in other provisions of the Statute).<sup>29</sup> The Prosecution avoided dealing clearly with this issue in its Response.<sup>30</sup> When read in the context of the Statute as a whole, the term “third State” must refer to any State other than the requested State, and that includes both States Parties and non-party States. Reading article 27(2) as an implicit waiver of immunity from foreign criminal jurisdiction by States Parties would render article 98 largely meaningless, which goes against the *effet utile* principle.

27. The Prosecution challenges this interpretation of the Statute. First, it is said that this interpretation reads “articles 27 and 98 as being in opposition to one another”.<sup>31</sup> The League considers that these two provisions are distinct, and serve different purposes, just as Part 3 and Part 9 of the Statute address different matters, but at the same time views them as operating in harmony and not in conflict. Relying heavily on the opening sentence of article 27(1),<sup>32</sup> the Prosecution then reads article 27(2) as doing away with immunities altogether. The Prosecution, however, overlooks the fact that the two paragraphs deal with quite different matters.<sup>33</sup> Paragraph 1 addresses substantive criminal responsibility, and it is in this regard that no distinction is to be based on “official capacity”, while paragraph 2 concerns immunity, a procedural matter, and does not replicate the opening sentence of paragraph 1.<sup>34</sup>
28. As regards Pre-Trial Chamber II’s argument that its interpretation of article 27(2) of the Statute applies not only with respect to immunities under customary international law, but also to all treaty-based immunities that may be covered by article 98(1),<sup>35</sup> the League considers that it raises a number of questions. This view seems to overlook the fact that treaty-based immunities (such as those provided for under article 14 of the Pact of the League of Arab States and article 11 of the 1953 Convention) often have a distinct and more limited object and purpose, and operate in a different manner. Furthermore, the Pre-Trial Chamber’s position purports to

<sup>29</sup> See articles 87(5) and 90(4) of the Statute.

<sup>30</sup> Prosecution Response, paras. 48-49, 51.

<sup>31</sup> *Ibid.*, para. 28.

<sup>32</sup> *Ibid.*, paras. 33-34.

<sup>33</sup> Contrary to the Prosecution’s assertion at para. 35 of the Response.

<sup>34</sup> The Prosecution’s argument (at paras. 25-26 of the Response), based on the reference in article 27(2) to “national law” has no merit. Procedural immunity may arise under national law as well as international law, hence the reference in paragraph 2 to both.

<sup>35</sup> Decision, paras. 32 and 44.

undermine the object and purpose of such provisions in the Pact and the 1953 Convention and raises serious issues of conflict of treaty obligations.

29. The Pre-Trial Chamber's and Prosecution's interpretation of articles 98(1) and 98(2) is also incorrect. The Prosecution's main argument as regards article 98(1) is that "in practice it is inapplicable to requests for the surrender of persons who are officials of States subject to the operation of article 27 of the Statute. As such, it does not apply to Sudan in this situation (as a UNSC Situation-Referral State)".<sup>36</sup> This argument is conclusory and question-begging; it adds nothing to the Prosecution's argument on article 27,<sup>37</sup> which has been addressed at paragraphs 24 to 28 above.
30. As regards article 98(2) of the Rome Statute, Pre-Trial Chamber II found that it "does not apply to the 1953 Convention" because the latter "does not refer to a "sending State" and does not establish or refer to a procedure for seeking and providing consent to surrender".<sup>38</sup> The Prosecution further argued in its Response to Jordan's Appeal that article 98(2) only applies to certain kinds of international agreements, which would not include the 1953 Convention.<sup>39</sup>
31. The League agrees with Jordan's arguments in this regard.<sup>40</sup> In the League's view, there is no reason to regard the ordinary meaning of the term "international agreements" in article 98(2) as limited to "status of forces agreements" or to any other class of agreements. Another important category of international agreements clearly covered by the provision, for example, are those conferring privileges and immunities on persons connected with international organizations, including State representatives. Meetings of international organizations frequently take place on the territory of the host States and elsewhere. Such meetings require according temporary immunity to State representatives, if they are not to be disrupted in their work. Such persons are in fact sent by a "sending State", even if that terminology is not always used. To adopt the Pre-Trial Chamber's and the Prosecution's excessively narrow interpretation of article 98(2)<sup>41</sup> is inconsistent with its text, object and purpose. The

<sup>36</sup> Prosecution Response, para. 44.

<sup>37</sup> As is clear from paras. 45-51 of the Prosecution Response.

<sup>38</sup> Decision, para. 32.

<sup>39</sup> Prosecution Response, heading A.3.ii.b.

<sup>40</sup> Jordan's Appeal, paras. 32-33.

<sup>41</sup> *Ibid.*, para. 55.

League wishes to confirm that when a State sends a representative to a meeting of the League it is clearly acting as a 'sending State' within the meaning of article 98(2).

32. In sum, the League is of the opinion that article 98 of the Statute preserves the treaty-based and customary international law immunity from foreign criminal jurisdiction of officials of both States Parties to the Statute and non-party States, and that the Court is obliged to obtain a waiver of immunity (or consent to surrender) from the foreign State concerned before making a request for arrest and surrender. But even if the Appeals Chamber considered that article 98 does not preserve the immunities of officials of States Parties to the Statute by virtue of article 27(2), those immunities are without doubt preserved with respect to non-party States, such as Sudan, including immunity from the foreign criminal jurisdiction of a State Party to the Rome Statute.

*(ii) The effects of Security Council resolution 1593 (2005)*

33. The League now turns to the Prosecution's arguments concerning the effect of Security Council resolution 1593 (2005). These arguments consist of convoluted and inconsistent assertions that are based upon a wholly unrecognizable approach to interpreting Security Council resolutions.<sup>42</sup> First, the Prosecution takes a *State-centric approach* by inventing a novel category of non-party States, which it labels "UNSC Situation-Referral States".<sup>43</sup> Such an approach fails to recognize that a State's position pursuant to a resolution may vary depending on the particular terms of that resolution. Similarly, it fails to recognize that, whatever label one may use, simply equating such a State with a State Party to the Rome Statute leads to manifestly absurd results.<sup>44</sup> The League is of the opinion that Sudan is, without doubt, a *non-party State*, and must be treated as such for purposes of the Statute, and in particular article 98.<sup>45</sup>

<sup>42</sup> For the proper approach, see Jordan's Appeal, para. 49.

<sup>43</sup> Prosecution Response, para. 8. The term "indirectly bound State" was also used to refer to Sudan. See, e.g., *ibid.*, para. 22.

<sup>44</sup> Indeed, the Prosecution itself stumbles over this approach, making statements such as: "[t]his does not mean that Sudan ... is fully equated to a State Party. Its obligations are limited to the Court's exercise of jurisdiction ..." (*ibid.*, para. 80); and "Sudan does not have the right to vote in the ASP and does not pay contributions ..." (*ibid.*, para. 80).

<sup>45</sup> Jordan's Appeal, paras. 62-63.

34. Second, the Prosecution asserts that, simply as a consequence of the referral, non-party States are bound by “some” unspecified Rome Statute obligations.<sup>46</sup> That argument has no basis in the text or negotiating history of the resolution; it boils down to a bald assertion that “the provision for a Security Council referral would be entirely defeated if that referral did not impose upon the UNSC Situation-Referral State all the necessary obligations of the Statute, as expressed by its terms”, and goes on to claim that “[t]hese obligations are not limited merely to a passive tolerance of the Court’s jurisdiction, but must also include related provisions including but not limited to those necessary measures of cooperation under Part 9 of the Statute”.<sup>47</sup> In a considerable leap (*non-sequitur*) reminiscent of the now-discarded “waiver” theory, the Prosecution concludes that Sudan has consented (by becoming a party to the UN Charter) to having “the obligations of the Statute” (unspecified) imposed upon it by the Security Council.<sup>48</sup>

35. Third, and perhaps sensing the difficulties of its approach, the Prosecution shifts to a *situation-centric approach*, asserting that the resolution “has the effect that the Rome Statute applies, in its entirety, with respect to the Situation in Darfur”.<sup>49</sup> Yet such an assertion also has no basis in the terms of the Statute or resolution 1593 (2005). It is clearly untenable for reasons previously explained by Jordan,<sup>50</sup> as well as entirely inconsistent with the Prosecution’s assertions indicated above. The Prosecution, like the Pre-Trial Chamber, fails to recognize that all the referral of a *situation* (not of a State) under article 13(b) does is to establish the jurisdiction of the Court with respect to crimes under the Statute, which has to be exercised in accordance with the provisions of the Statute. As such, the consequences of a referral by the Security Council are limited to establishing the Court’s power to exercise jurisdiction.<sup>51</sup> A referral does not have the far-reaching consequences suggested by the Prosecution for the State in which a situation occurs.

<sup>46</sup> Prosecution Response, para. 9, and paras. 10-14.

<sup>47</sup> *Ibid.*, paras. 11-12.

<sup>48</sup> *Ibid.*, para. 13.

<sup>49</sup> See, e.g. *ibid.*, paras. 64, 69, 75.

<sup>50</sup> Jordan’s Appeal, paras. 55-60.

<sup>51</sup> *Ibid.*

36. It may be open to the Security Council when making a referral to include additional requirements, but it must do so in clear terms and the requirements must be consistent with the Statute. The simple referral of a situation and the imposition of an obligation on a non-party State to cooperate fully with the Court, however, cannot be regarded as removing the immunity of a Head of State from the criminal jurisdiction of another State, which would be contrary to article 98.<sup>52</sup>

### C. The Third Ground of Appeal

37. Assuming, *arguendo*, that Jordan did fail to comply with its obligations under the Rome Statute in not arresting and surrendering President Al-Bashir to the Court, the League considers that Pre-Trial Chamber II's referral of Jordan to the Assembly of States Parties and to the Security Council constituted an abuse of discretion.<sup>53</sup> The Prosecution has made several misleading or erroneous arguments in this regard.

(i) *The Pre-Trial Chamber has discretion, but the Appeals Chamber has found that such discretion is significantly limited*

38. Citing to the Appeals Chamber's judgment in the *Kenyatta* case, the Prosecution emphasizes that the Pre-Trial Chamber has a "considerable degree of discretion" when deciding whether to refer a finding of non-compliance.<sup>54</sup> In doing so, however, the 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".<sup>55</sup>

<sup>52</sup> *Ibid.*, paras. 65-81.

<sup>53</sup> Decision, pp. 21-22.

<sup>54</sup> Prosecution Response, para. 98.

<sup>55</sup> ICC-01/09-02/11-1032, para. 82.

39. The fact is that the Appeals Chamber's functions extend "to reviewing the exercise of discretion by the [Trial Chamber] to ensure that the Chamber properly exercised its discretion".<sup>56</sup> The Appeals Chamber "will correct an exercise of discretion in the following *broad circumstances*, namely where (i) it is based upon an erroneous interpretation of the law; (ii) it is based upon a patently incorrect conclusion of fact; or (iii) the decision amounts to an abuse of discretion".<sup>57</sup> With respect to the latter, the Appeals Chamber has repeatedly said that it would intervene, *inter alia*, when a Trial Chamber's decision is so unfair and unreasonable as to constitute an abuse of discretion.<sup>58</sup>

(ii) *The Prosecution's characterizations of the two factors considered by the Pre-Trial Chamber are misleading and untenable*

40. The Prosecution's characterizations of the two factors considered by the Pre-Trial Chamber when deciding to refer its finding of non-compliance are both untenable. Indeed, the Prosecution neglects to accept both what is and what is not in the Pre-Trial Chamber's discussion of these two factors.<sup>59</sup>

41. The Prosecution seeks to argue that the first factor (at paragraph 53 of the Decision) was not simply Jordan's non-compliance.<sup>60</sup> But when one considers the elements of paragraph 53, that was exactly the Pre-Trial Chamber's approach. 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.<sup>61</sup> 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

<sup>56</sup> ICC-01/04-01/06-3122, para. 41.

<sup>57</sup> ICC-01/09-02/11-1032, para. 22 (emphasis added).

<sup>58</sup> ICC-01/04-01/06-3122, para. 41; ICC-02/04-01/05-408 OA3, paras. 79-80; ICC-01/09-01/11-307 OA, paras. 89-90. See also ICC-01/04-02/12-271 A, paras. 18-21.

<sup>59</sup> Decision, paras. 53-54. The Prosecution initially seeks to characterize the "manner in which Jordan approached the Court for consultations (unlike South Africa)" as a third factor: Prosecution Response, para. 96 (indicating "three separate factors"). The Prosecution, however, then adopts an analysis that focuses just on two factors. In any event, the "manner in which Jordan approached the Court" is simply a repackaging of the first factor and should be treated as such.

<sup>60</sup> Prosecution Response, paras. 100, 103.

<sup>61</sup> Decision, p. 21 ("FINDS that Jordan failed to comply with its obligations under the Statute by not executing the Court's request for the arrest of Omar Al-Bashir and his surrender to the Court while he was on Jordanian territory on 29 March 2017").



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. The Pre-Trial Chamber’s assertion that Jordan “did not require or expect from the Court anything further that could assist it in ensuring the proper exercise of its duty to cooperate” is opaque but, in any event, is simply a variation of the “took a very clear position” assertion.

42. In short, the first factor identified by the Pre-Trial Chamber is, in essence, simply a recitation of the fact that Jordan decided not to comply with the Court’s request, and thus constitutes a decision to refer the finding of non-compliance based simply on the fact of non-compliance. The Appeals Chamber, however, has stated that a decision of non-compliance standing alone does *not* result in an automatic referral.<sup>62</sup>
43. The Prosecution seeks to argue that the second factor (at paragraph 54 of the Decision) for the Pre-Trial Chamber concerned a “*general principle and statement of law* that all States Parties were obliged to arrest Omar Al-Bashir”, rather than a reference to the Pre-Trial Chamber’s decision on non-compliance with respect to a completely different State Party (South Africa).<sup>63</sup> That assertion is misleading and rather clearly rebutted by the text of paragraph 54, which says nothing about a “general principle” or about a “statement of law” or about “all States Parties”.<sup>64</sup> Instead, paragraph 54 expressly refers to the Pre-Trial Chamber’s “unequivocal” position expressed with respect to South Africa.
44. Thus, the second factor for the Pre-Trial Chamber has everything to do with the Chamber’s “unequivocal expression” to a different State Party, involving a different set of facts, and nothing to do with a “*general principle and statement of law*”. The reliance by the Pre-Trial Chamber on such a factor is manifestly an error of law. As the Prosecution itself concedes, “an indiscriminate comparison of two States Parties would be inappropriate. A State Party’s referral must be decided, primarily with

<sup>62</sup> ICC-01/09-02/11-1032, para. 49.

<sup>63</sup> Prosecution Response, para. 110.

<sup>64</sup> The Prosecution also misleads the Court in saying that, at paragraph 54 of the December 2017 Decision, “the Chamber found that ... it had already unequivocally expressed the Court’s position that State Parties were obliged to arrest and surrender Omar Al-Bashir and had determined that consultations with the Court did not suspend this obligation” (Prosecution Response, para. 100). The Chamber said no such thing.

reference to its own facts, not to the situation of a different State Party”.<sup>65</sup> This is precisely what the Pre-Trial Chamber did not do in its reliance on the second factor.

### **Conclusions**

45. For the reasons set out above, the League of Arab States considers that all three Grounds of Appeal in Jordan’s Appeal should be granted.

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<sup>65</sup> Prosecution Response, para. 116.

On behalf of Ehab Makram

**Ambassador Dr. Fadel Mohamed Jawad  
Assistant of the General Secretary  
Head of the Legal Affairs Sector  
League of Arab States**

**On behalf of  
The League of Arab States**

Dated this 16/ July 2018

At Cairo, Egypt

**16/ July 2018**