

1 International Criminal Court
2 Appeals Chamber
3 Situation: Darfur, Sudan
4 In the case of The Prosecutor v. Omar Hassan Ahmad Al-Bashir - ICC-02/05-01/09
5 Presiding Judge Chile Eboe-Osuji, Judge Howard Morrison, Judge Piotr Hofmański,
6 Judge Luz del Carmen Ibáñez Carranza and Judge Solomy Balungi Bossa
7 Delivery of Judgment - Courtroom 1
8 Monday, 6 May 2019
9 (The hearing starts in open session at 9.32 a.m.)
10 THE COURT USHER: [9:32:46] All rise.
11 The International Criminal Court is now in session.
12 Please be seated.
13 PRESIDING JUDGE EBOE-OSUJI: [9:33:19] Thank you very much.
14 Court officer, please place the case on the record.
15 THE COURT OFFICER: [9:33:29] Good morning, Mr President, your Honours.
16 The situation in Darfur, Sudan, in the case of The Prosecutor versus
17 Omar Hassan Ahmad Al-Bashir, case reference ICC-02/05-01/09.
18 And for the record, we are in open session.
19 PRESIDING JUDGE EBOE-OSUJI: [9:33:46] Thank you.
20 Appearances, please.
21 Beginning with the appellant, Jordan.
22 MR HMOUD: [9:33:55] (Microphone not activated)
23 THE INTERPRETER: [9:34:03] Microphone, please.
24 MR HMOUD: [9:34:11] (Microphone not activated) of The Netherlands and this is
25 my colleague, Mr Amer Hadid, who is diplomat at the embassy of Jordan to

1 The Netherlands.

2 PRESIDING JUDGE EBOE-OSUJI: [9:34:21] Thank you very much.

3 And the Prosecution.

4 MS BRADY: [9:34:24] Good morning, your Honours. Helen Brady, senior appeals
5 counsel, appearing on behalf of the Prosecution. And I'm here today with

6 Mr Reinhold Gallmetzer, appeals counsel; Ms Priya Narayanan, appeals counsel;

7 Mr Matthew Cross, appeals counsel; and Ms Nivedha Thiru, associate appeals
8 counsel. Thank you very much.

9 PRESIDING JUDGE EBOE-OSUJI: [9:34:45] Thank you very much.

10 This is a non-authoritative summary of the Appeals Chamber's judgment in the
11 appeal of the Hashemite Kingdom of Jordan, called "Jordan" from now on, against the
12 decision of Pre-Trial Chamber II, issued on 11 December 2017. That decision is
13 informatively titled, "Decision under Article 87(7) of the Rome Statute on the
14 non-compliance by Jordan with the request by the Court for the arrest and surrender
15 of Omar Al-Bashir."

16 In a familiar parlance of this Court, I will from time to time refer to that decision as
17 the "impugned decision".

18 We begin with the background.

19 At all times material to this appeal, Sudan was not a State Party to the Statute of the
20 International Criminal Court, popularly known as the "Rome Statute". But it was a
21 member State of the United Nations and was bound as such by the UN Charter.

22 For a period of time leading up to 31 March 2005, the UN Security Council had
23 harboured persistent worry that the situation in Sudan, specifically in the Darfur
24 region, amounted to a threat to international peace and security and to stability in the
25 wider region. And they said so in a number of Security Council resolutions.

1 Finally, on 31 March 2005, the UN Security Council adopted yet another resolution,
2 resolution 1593. They adopted it on the basis of their powers under Chapter VII of
3 the UN Charter. In that resolution, the Security Council referred the situation in
4 Darfur to the ICC Prosecutor.

5 It helps to keep in mind that it is under Chapter VII of the UN Charter that the
6 Security Council is empowered to try and contain not only breakdowns in
7 international peace and security, but also threats of such breakdowns. It was
8 precisely with such a threat in mind, in relation to the situation in the Darfur region of
9 Sudan, that the Security Council referred that situation to the ICC. They did so upon
10 the recommendations of an International Commission of Inquiry that the UN had
11 earlier tasked to inquire into the situation in Darfur and to suggest what could be
12 done about it.

13 Four years later, on 4 March 2009, the Pre-Trial Chamber I, at the request of the
14 Prosecutor, issued a warrant for the arrest of Mr Al-Bashir who was the president of
15 Sudan at that time and at all times relevant to this appeal. That warrant of arrest
16 concerned allegations against Mr Bashir in the nature of crimes against humanity and
17 war crimes.

18 On 12 July 2010, a second warrant of arrest was also issued against him. What was
19 special about that second arrest warrant is that it concerned a new charge of genocide.
20 The warrants of arrest, together with the requests for the arrest and surrender of
21 Mr Al-Bashir to the Court, were notified to all the Rome Statute States Parties,
22 including Jordan.

23 In the meantime, Mr Bashir visited a number of States Parties to the Rome Statute, but
24 they did not arrest him. This resulted in a series of Pre-Trial Chamber decisions on
25 whether or not to refer these States to the Assembly of States Parties and to the

1 UN Security Council. As mentioned in the judgment in the context of certain
2 discussions, those State Parties included Chad, the Democratic Republic of Congo,
3 Djibouti, Malawi, South Africa and Uganda.

4 In March 2017, Jordan hosted the 28th Summit of the League of Arab States in
5 Amman. Mr Al-Bashir attend the summit on 29 March 2017. Jordan did not arrest
6 and surrender Mr Al-Bashir while he was in Jordan. That is why we are here.

7 In declining to arrest and surrender Mr Al-Bashir to the Court, Jordan based itself on
8 an understanding of Article 98 of the Rome Statute.

9 In Article 98(1) this is said:

10 "The Court may not proceed with a request for surrender or assistance which would
11 require the requested State to act inconsistently with its obligations under
12 international law with respect to the State or diplomatic immunity of a person or
13 property of a third State, unless the Court can first obtain the cooperation of that third
14 State for the waiver of the immunity." Unquote.

15 And Article 98(2) says this, quote:

16 "The Court may not proceed with a request for surrender which would require the
17 requested State to act inconsistently with its obligations under international
18 agreements pursuant to which the consent of a sending State is required to surrender
19 a person of that State to the Court, unless the Court can first obtain the cooperation of
20 the sending State for the giving of consent for the surrender." Unquote.

21 Following the Arab League summit in Jordan, Pre-Trial Chamber II issued the
22 decision that is now under appeal. In that decision, the majority of the Pre-Trial
23 Chamber held; one, that Jordan had failed to comply with its obligations under the
24 Statute; and consequently, two, that Jordan's non-compliance should be referred to
25 the Assembly of States Parties and to the UN Security Council in accordance with

1 Article 87(7) of the Rome Statute, which allows such a referral.

2 In arriving at that decision, the Pre-Trial Chamber considered whether Mr Al-Bashir,
3 when attending the Arab League summit, enjoyed immunity from arrest as Sudan's
4 Head of State. The Pre-Trial Chamber found that in view of Article 27(2) of the
5 Rome Statute, there is no Head of State immunity if the Court requests a State Party to
6 the Rome Statute to arrest and surrender the Head of State of another State Party.
7 The Pre-Trial Chamber also found that in the case of a referral by the UN Security
8 Council, such as was done under resolution 1593 (2005), Sudan, although not a
9 State Party to the Rome Statute, had, nevertheless, the same obligation that binds
10 Rome Statute States Parties to cooperate with the Court, for that was precisely the
11 effect of such a referral by the Security Council. In those circumstances, held the
12 Pre-Trial Chamber, Mr Al-Bashir could then not invoke Head of State immunity.
13 And because he could not invoke that immunity, there was no immunity to be
14 waived under Article 98(1) of the Rome Statute. Therefore, that provision did not
15 apply.

16 Concerning Article 98(2) of the Rome Statute, the Pre-Trial Chamber held in the first
17 place that it could not determine whether Sudan was party to the 1953 convention on
18 the privileges and immunities of the Arab League, which provides for certain
19 immunities in certain contexts of the Arab League. In any event, held the Pre-Trial
20 Chamber, the 1953 convention was irrelevant to Article 98(2) of the Rome Statute.
21 Therefore, Article 98(2) also did not apply.

22 On 21 February 2018, the Pre-Trial Chamber granted Jordan's request for leave to
23 appeal the decision. In granting leave, the Pre-Trial Chamber certified three
24 questions for consideration of the Appeals Chamber. The issues boil down to these:
25 One, whether the Pre-Trial Chamber was wrong to find that the Rome Statute

1 precluded immunity for Mr Al-Bashir as Sudan's Head of State in any way that
2 excuses Jordan's failure to comply with the Court's request to arrest and surrender
3 him;

4 Two, whether the Pre-Trial Chamber was wrong to find that Security Council
5 Resolution 1593 (2005) negated any obligation that Jordan may have under
6 international law to accord immunity to Mr Al-Bashir as Sudan's Head of State; and

7 Three, whether the Pre-Trial Chamber's decision to refer Jordan to the Assembly of
8 States Parties and to the Security Council for non-compliance with the Court's request
9 was, in any event, an erroneous exercise of the discretion to do so.

10 Appeal briefs were duly filed by Jordan, the Prosecutor and the counsel for victims; as
11 well as by the Arab League, the African Union and a number of legal scholars who
12 had been invited to participate in the proceedings in the capacity known as "friends of
13 the Court". States and the UN had also been invited to participate in the proceedings,
14 but none of them took up the invitation.

15 The Appeals Chamber received oral arguments in hearings that took place from
16 10 to 14 September 2018.

17 Following the hearings, the Appeals Chamber invited the parties and participants to
18 file further written submissions on salient issues that might not have been
19 addressed - or addressed fully - in writing or in oral submissions.

20 The Appeals Chamber also invited the competent authorities of Sudan and
21 Mr Al-Bashir to participate in the proceedings and express their views. But they did
22 not take up the invitation.

23 This is the background.

24 Now the judgment.

25 The judgment of the Appeals Chamber is unanimous on the first two grounds

1 of the appeal. This is notwithstanding that four out of the five judges of the
2 Appeals Chamber, Judge Morrison, Judge Hofmański, Judge Bossa and I, also append
3 a joint concurring opinion to amplify the reasons for judgment on those two grounds.
4 It is recalled that these are the grounds concerning the essential question whether
5 Mr Al-Bashir enjoyed immunity in international law; notwithstanding or in view of
6 (a) the Rome Statute; or (b) Security Council Resolution 1593 (2005), such as would
7 require the Court to obtain a waiver of that immunity before requesting Jordan to
8 arrest Mr Al-Bashir.

9 The judgment of the Appeals Chamber is by majority on ground three; Judge Ibáñez
10 and Judge Bossa dissenting as to that ground. It is recalled that this ground of
11 appeal, the third ground, concerns the question whether the Pre-Trial Chamber had
12 exercised its discretion erroneously in deciding to refer Jordan to the Assembly of
13 States Parties and to the UN Security Council, notwithstanding that Jordan may have
14 indeed not complied with the obligation to arrest and surrender Mr Al-Bashir.

15 I now turn to the Appeals Chamber's findings on the issues raised by Jordan under
16 the first two grounds of appeal. As these two grounds are closely related, they have
17 been considered together.

18 On the first and second grounds of appeal, Jordan argued that the Pre-Trial Chamber
19 erred in finding that Article 27(2) of the Rome Statute, which precludes immunity
20 even for Heads of State, had the effect of excluding, the effect of excluding the
21 application of Article 98. It is recalled that Article 98(1) requires the Court to obtain
22 waiver of any applicable immunity from one State whose official is entitled to that
23 immunity before presenting to another State that is a party to the Statute a request
24 that may put that State in a position of violating the immunity in question.

25 With respect to UN Security Council Resolution 1593 (2005), Jordan first argued that

1 the Pre-Trial Chamber erred in finding that the resolution imported the application of
2 the entirety of the Rome Statute to the situation in Darfur. Jordan's complaint is that
3 the Pre-Trial Chamber's finding means that Article 27 of the Rome Statute would
4 apply to trouble the availability of immunity. In that regard, Jordan argued that the
5 Pre-Trial Chamber erred in finding that Sudan, although not a State Party to the Rome
6 Statute, labours nonetheless under the same obligations that the Rome Statute
7 imposes upon its States Parties. Meaning that Article 27(2), which binds States
8 Parties to that Statute by removing the immunity of their Heads of State, would also
9 bind Sudan which is not a State Party to the Rome Statute.

10 Looking at the matter from another angle, the essential question of law engaged in the
11 first two grounds of appeal on the facts of this case still remains this: Whether the
12 concerned Head of State of another State, in this instance, Sudan, would enjoy
13 immunity where the Court requested a State Party to the Rome Statute to arrest and
14 surrender that Head of State?

15 Now, the factual oddities to keep in mind are as follows: (a) the State whose Head of
16 State is being sought for arrest is not a party to the Rome Statute; but (b) that State is a
17 member of the United Nations; and (c) is the subject of a Security Council referral to
18 the Court in the terms of a Chapter VII resolution that obligated that State, Sudan, in
19 this case, to cooperate fully with the Court.

20 All that is to say, putting it more plainly, that the central issue before the Appeals
21 Chamber is whether Mr Al-Bashir in his capacity as Head of State of Sudan enjoyed
22 immunity before this Court, with the result that the Court was required to obtain a
23 waiver of that immunity from Sudan, before presenting a request to Jordan to arrest
24 and surrender Mr Al-Bashir.

25 One central question that dominated the discussion in this case is this: Even as a

1 matter of interpretation of the Rome Statute, does customary practice, accepted as law,
2 in relations amongst nations, otherwise known as customary international law,
3 recognise immunity for Heads of State, which immunity may be asserted to bar this
4 Court from the exercise of its proper jurisdiction?

5 The Appeals Chamber has duly noted Jordan's complaint registered during the
6 hearing that no question on customary international law was certified as such by the
7 Pre-Trial Chamber as an issue on appeal. But the Appeals Chamber considers that
8 question as inevitably linked to issues on which leave to appeal was granted, since the
9 immunity being asserted is described nowhere in the Rome Statute or in
10 resolution 1593 (2005). And whether that immunity exists in customary
11 international law is an important question that has troubled this series of litigation in
12 the jurisprudence generated by various decisions of the Pre-Trial Chambers on the
13 question of immunity of heads of state. It is for those reasons that the Appeals
14 Chamber invited the parties and participants ahead of the hearing to make
15 submissions on the issue and gave them ample opportunity to do so. The
16 Appeals Chamber will consider that question.

17 The Appeals Chamber notes that the Head of State immunity, which Jordan asserts at
18 the instance of Sudan, is based on a manner of immunity that is clearly accepted in
19 customary international law in certain circumstances. That immunity prevents one
20 State from exercising its criminal jurisdiction over the Head of State of another State.
21 It is based on the principle of sovereign equality of States. And States being equal,
22 no sovereign may assert jurisdiction over an equal. The principle is usually captured
23 in the Latin maxim, *par in parem non habet imperium*; meaning, amongst equals, none
24 may exercise dominion.

25 But there is a clear provision in the Rome Statute that precludes immunity before this

1 Court. As indicated earlier, it is Article 27(2). It is certainly correct to see that
2 provision in its own form as a provision in a treaty that binds the parties to it.
3 The Appeals Chamber finds, however, that the provision represents more than a
4 stipulation in treaty law. The provision also reflects the status of customary
5 international law as it concerns the jurisdiction that an international criminal court is
6 properly entitled to exercise. In that regard, the Appeals Chamber finds that there is
7 neither State practice nor an impelled sense of such as law, which would support the
8 existence of Head of State immunity under customary international law in relation to
9 an international criminal court in the exercise of its proper jurisdiction. No
10 submission was orally made or in writing such as would truly contradict the
11 Appeals Chamber's own findings as indicated, although the Appeals Chamber had
12 invited submissions on the point.

13 Accordingly, the Appeals Chamber has not found that customary international law
14 preserves any immunity that afforded Jordan an excuse to decline the request of the
15 Court for the arrest and surrender of Mr Al-Bashir.

16 In this regard, the Appeals Chamber is fully satisfied that the pronouncements made
17 by the Pre-Trial Chamber I in the Malawi referral decision and those made by the
18 Appeals Chamber of the Special Court for Sierra Leone in the case of Charles Taylor,
19 who was indicted before that international court when he was the sitting president of
20 Liberia, have adequately and correctly confirmed the absence of a rule of customary
21 international law recognising Head of State immunity before an international court in
22 the exercise of its proper jurisdiction.

23 The effect of absence of a rule of customary international law recognising Head of
24 State immunity in relation to international courts is not readily avoided through the
25 backdoor by asserting immunity that operates in the horizontal relationship between

1 States, asserted in a manner that would effectively bar an international court from
2 exercising its jurisdiction over the person whose arrest and surrender is requested.

3 The law does not readily condone to be done through the backdoor what it forbids to
4 be done through the front door. And indeed this maxim serves a value in this
5 appeal in more ways than one.

6 I now turn especially to the effect of UN Security Council Resolution 1593 (2005)
7 concerning whether Sudan could invoke Head of State immunity in relation to the
8 warrants of arrest that the Court issued against Mr Al-Bashir for allegedly committing
9 international crimes in the context of the situation in Darfur.

10 Resolution 1593 is a special jurisdictional trigger for the Court. It is contemplated by
11 Article 13(b) of the Rome Statute. That provision was intended as the means through
12 which the ICC could facilitate the mandate that the UN Security Council has under
13 Chapter VII of the charter to maintain international peace and security or to contain
14 threats to international peace and security. The direct benefit of this facility afforded
15 by Article 13(b) is that the Security Council no longer needs to create new ad hoc
16 international tribunals, as it did in relation to the former Yugoslavia and Rwanda in
17 1993 and 1994 respectively. The ICC is now an international judicial mechanism at
18 the disposal of the UN Security Council in the council's effort to maintain
19 international peace and security.

20 As such, resolution 1593 is a decision of the UN Security Council that is binding upon
21 all UN member States according to the applicable provisions of the UN Charter,
22 whether or not those UN member States are also parties to the Rome Statute.

23 In that connection, the Appeals Chamber notes that resolution 1593 (2005) imposes
24 upon Sudan a specific obligation to cooperate fully with the Court. This means in
25 effect that the cooperation regime for States Parties to the Rome Statute is applicable

1 also to Sudan.

2 Moreover, the Appeals Chamber considers that the obligation to cooperate fully in
3 accordance with the Statute embraces all those obligations that States Parties owe to
4 the Court, which are necessary for the Court's effective exercise of jurisdiction.

5 Those obligations include those that merge into Article 27(2), ensuring that
6 immunities that Sudan may otherwise enjoy under international law as a matter of its
7 relations with another State cannot bar the Court's effective exercise of jurisdiction.

8 Since Sudan could not legally rely on the Head of State immunity of Mr Al-Bashir, the
9 Appeals Chamber considers that there was no need for the Court to obtain the waiver
10 of immunity from Sudan before the Court could proceed with a request to Jordan for
11 Mr Al-Bashir's arrest and surrender in accordance with Article 98(1) of the Statute.

12 That is to say, there was no immunity that needed to be waived. The Pre-Trial
13 Chamber committed no error in that regard.

14 Similarly, the Appeals Chamber is not persuaded by Jordan's arguments alleging
15 error on the part of the Pre-Trial Chamber in finding that Article 98(2) of the Statute
16 holds no accommodation for the 1953 Arab League convention on privileges and
17 immunities.

18 The sum of the foregoing analysis is that Jordan did not comply with its obligations to
19 cooperate with the Court as it was bound to do under the Rome Statute.

20 Finally, the Appeals Chamber notes that both Jordan and Sudan are parties to the
21 convention against genocide. Article 1 of that convention provides that the parties to
22 it undertake to prevent and punish the crime of genocide. Thus, in view of the
23 allegation of genocide engaged in the second warrant of arrest, Jordan was under an
24 obligation to cooperate in the arrest and surrender of Mr Al-Bashir at the request of
25 the Court, not only because Jordan is a State Party to the Rome Statute, but also by

1 virtue of its being party to the convention against genocide.

2 All the findings of the Appeals Chamber that I have summarised so far dealing with
3 the first two grounds of appeal are the unanimous findings of all the judges.

4 Now I turn to Jordan's arguments under the third ground of appeal. This concerns
5 the Pre-Trial Chamber's exercise of discretion to refer Jordan to the Assembly of States
6 Parties and to the UN Security Council for non-compliance with the Court's request
7 for cooperation. As indicated earlier, it is Article 87(7) of the Rome Statute that
8 contemplates such referrals.

9 In previous jurisprudence, the Appeals Chamber has examined that provision. In
10 that regard, the Appeals Chamber noted that the exercise of discretion under the
11 provision is subject to a factual prerequisite that needs to be met. This requires that
12 the cooperation request that was not complied with must concern a matter of a certain
13 gravity.

14 Neither party has raised on appeal the issue of whether the Pre-Trial Chamber
15 correctly established that factual prerequisite. But the Appeals Chamber addresses
16 this issue on its own motion because of its importance in the inquiry, since the
17 absence of that prerequisite would make a referral improper.

18 The prerequisite engages the question whether failure to comply with the Court's
19 request for cooperation was a conduct that prevented the Court from exercising its
20 powers and functions under the Rome Statute. The issue then is whether that was
21 the case here.

22 And here we recall the two arrest warrants that were respectively issued on
23 4 March 2009 and 12 July 2010. They were issued by the Pre-Trial Chamber on the
24 basis of the power to do so under Article 58 of the Rome Statute. A warrant of arrest
25 alongside its alternative of summons to appear serves the function of securing the

1 presence of the suspect before the Court. It thus engages an important power that
2 serves a fundamental function of the Court. That is particularly so when the
3 Pre-Trial Chamber has decided that an arrest warrant is the more appropriate means
4 of securing presence before the Court.

5 Given the importance of the indicated power and function, those who bear the
6 obligation to execute an arrest warrant are not then free to render it nugatory merely
7 by refusing to execute it.

8 It is the finding of the Appeals Chamber that by failing to arrest and surrender
9 Mr Al-Bashir in circumstances in which Mr Al-Bashir was entitled to know immunity,
10 Jordan prevented the Court from exercising an important power and a fundamental
11 function. As a result, Pre-Trial Chamber II was correct in concluding that Jordan's
12 non-compliance prevented the Court from exercising its functions and powers under
13 the Statute.

14 The Appeals Chamber is also unanimous as to that finding.

15 Yet, the question remains whether the Pre-Trial Chamber's referral of Jordan to the
16 Assembly of States Parties and Security Council was, in the particular circumstances
17 of the case, an error in the exercise of discretion.

18 It is noted that Jordan's main contention revolves around the Pre-Trial Chamber's
19 finding that Jordan did not truly pursue consultation with the Court in order to seek
20 to resolve any difficulties that Jordan saw as attending the request made by the Court
21 to arrest and surrender Mr Al-Bashir.

22 Jordan further argued that the Pre-Trial Chamber treated South Africa and Jordan
23 differently by having declined similarly to refer South Africa to the Assembly of
24 States Parties and the Security Council when South Africa had also failed to arrest
25 Mr Al-Bashir on an earlier occasion of his visit to South Africa to attend a conference

1 of the African Union.

2 The Appeals Chamber notes that Article 97 of the Statute does not provide or compel
3 a specific procedure regarding consultations between States and the Court. Nor
4 does it set out the manner in which consultations should be done.

5 The Appeals Chamber considers that, in the absence of a prescribed procedure, the
6 manner in which a State may indicate its intention to engage in consultations may
7 vary. Some approaches may be more awkward than others. But what is essential is
8 that the intention to consult is discernible in the circumstances.

9 In this case the majority of the Appeals Chamber is persuaded by Jordan's argument
10 that their note verbale on 28 March 2017 amounted to a request for consultations with
11 the Court in terms of Article 97 of the Statute. Judge Ibáñez and Judge Bossa
12 disagree.

13 Contrary to the Pre-Trial Chamber's finding, the Appeals Chamber considers that a
14 State Party's discernible indication of intent to consult is in itself a spur to the Court to
15 engage which should not be ignored.

16 In addition, the Appeals Chamber finds, Judge Ibáñez and Judge Bossa dissenting,
17 that Jordan's note verbale of 28 March 2017 need not be seen as an "advance
18 notification of non-compliance". It is enough to see it as Jordan's way of identifying
19 Head of State immunity and the lack of its waiver by Sudan as perceived
20 impediments to the request for Mr Al-Bashir's arrest and surrender in relation to
21 which consultations should take place. While it would be better for a State to
22 approach the consultation process in an unequivocal manner of asking questions in
23 need of resolution, the failure to follow that approach is not necessarily inconsistent
24 with an intention to engage in consultation. A State may indeed approach the
25 consultation process in the manner of stating a preliminary position that it sees as

1 posing an obstacle to cooperation, thus engaging the question to be resolved. The
2 Appeals Chamber therefore finds, Judge Ibáñez and Judge Bossa dissenting, that
3 Jordan's failure to put questions to the Pre-Trial Chamber, choosing rather to set out
4 its own legal position in a note verbale, did not preclude a view of the encounter as an
5 attempt to engage in consultations.

6 Accordingly, the Chamber finds, Judge Ibáñez and Judge Bossa dissenting, that the
7 Pre-Trial Chamber erred when it found that Jordan had not sought consultations with
8 the Court. In the view of the majority, this error of appreciation of Jordan's position
9 materially tainted the exercise of the Pre-Trial Chamber's discretion to refer. The
10 error was notably implicated in the further error, which the Appeals Chamber found,
11 Judge Ibáñez and Judge Bossa dissenting, that the Pre-Trial Chamber had treated
12 Jordan differently from South Africa in respect of the referral to the Assembly of
13 States Parties and to the UN Security Council.

14 The Appeals Chamber therefore finds, Judge Ibáñez and Judge Bossa dissenting,
15 that the Pre-Trial Chamber's exercise of the discretion to refer was accordingly tainted
16 by error.

17 In the outcome, the Appeals Chamber confirms the impugned decision to the extent
18 that the Pre-Trial Chamber found that Jordan had failed to comply with its
19 obligations under the Statute by failing to execute the Court's request for the arrest of
20 Mr Al-Bashir and his surrender to the Court while he was in Amman on
21 29 March 2017.

22 The Appeals Chamber reverses the impugned decision to the extent that the
23 Pre-Trial Chamber referred Jordan to both the Assembly of States Parties and the
24 UN Security Council on the ground that the Pre-Trial Chamber's exercise of discretion
25 was erroneous, Judge Ibáñez and Judge Bossa dissenting.

1 I shall now summarise the joint dissenting opinion of Judge Ibáñez and Judge Bossa
2 on the third ground of appeal and the eventual outcome of the appeal.

3 While Judge Ibáñez and Judge Bossa agree with the determination of the first and
4 second grounds of appeal, and Judge Bossa also joined in the joint concurring opinion
5 of the four judges in support of the Appeals Chamber's judgment on those two
6 grounds, Judge Ibáñez and Judge Bossa disagree, nevertheless, with the
7 determination of the third ground of appeal and with the outcome of the Appeals
8 Chamber's judgment reversing the Pre-Trial Chamber's decision to refer Jordan to the
9 Assembly of States Parties and the UN Security Council.

10 Judge Ibáñez and Judge Bossa are convinced that the Pre-Trial Chamber did not err in
11 that regard and that the decision to refer ought to be upheld. A summary of their
12 reasons is as follows.

13 First, the reasons fully explained in the dissenting opinion, given that the objectives of
14 the warrants of arrest issued against Mr Al-Bashir were frustrated as a result of the
15 failure of Jordan to cooperate with the Court, the failure prevented the Court from
16 exercising its functions and powers.

17 As noted earlier, on that all five judges are agreed.

18 Second, Judge Ibáñez and Judge Bossa found that the Pre-Trial Chamber did not err
19 in concluding that consultations did not take place in this case. The belated
20 notes verbales sent by Jordan indicated only a statement of Jordan's position that it
21 would respect Mr Al-Bashir's alleged immunity from arrest. Jordan did not request
22 any further concrete response or action from the Court.

23 Third, for the reasons set out in detail in the dissenting opinion, the Pre-Trial
24 Chamber did not err in affording a different treatment to Jordan as compared to
25 South Africa. The circumstances surrounding these two cases were different, thus

1 justifying the different treatments. This is particularly so considering, as the
2 dissenting judges found, that while South Africa ensured future cooperation with the
3 Court in the arrest and surrender of Mr Al-Bashir, thereby making it unnecessary to
4 refer the matter in order to foster cooperation, Jordan has not done so, thus
5 warranting the impugned referral.

6 Fourth, the dissenting judges are of the view that the failure to refer Jordan's
7 non-compliance to the Assembly of States Parties and to the UN Security Council
8 would be contrary to the object and purpose of the Rome Statute. That object and
9 purpose being to put an end to impunity for the perpetrators of the most serious
10 crimes of concern to the international community as a whole, thereby preventing the
11 further commission of crimes and bringing justice to victims, in this case to the
12 numerous victims of international crimes allegedly committed in Darfur.

13 Fifth, as further explained in the dissenting opinion, the dissenting judges consider
14 that past examples of referrals to the Assembly of States Parties of the failure of other
15 States Parties to comply with the Court's request to cooperate in the arrest and
16 surrender of Mr Al-Bashir demonstrate that a referral of Jordan's non-cooperation to
17 that body has a very real prospect of yielding positive results in terms of future
18 cooperation, thereby giving effect to the *raison d'être* of Article 87(7) of the Statute.

19 Sixth, the dissenting judges consider that by refusing to cooperate with the Court,
20 Jordan infringed both its obligations of cooperation under the Rome Statute and
21 potentially international obligations owed to the Security Council pursuant to the
22 UN Charter. In the view of the dissenting judges, a referral of Jordan's
23 non-compliance to the Assembly of States Parties and to the UN Security Council is
24 required so as to allow the taking of those measures deemed appropriate to ensure
25 future compliance, cooperation with the Court and thereby the fulfilment of the

1 mandates of both the Court and the UN Security Council.

2 The dissenting judges consider that this referral is not punitive in nature or a sanction
3 imposed upon Jordan. Rather, it is a call for action, not only for Jordan, but also for
4 the members of the Assembly of States Parties and for the international community as
5 a whole, with the aim of fostering cooperation with the Court, thereby enabling the
6 effective realisation of the high values and objectives enshrined in the Rome Statute.

7 Finally, for reasons explained in detail in the dissenting opinion, the dissenting judges
8 find that in the case at hand the Pre-Trial Chamber was correct. It did not err or act
9 arbitrarily and did not abuse its discretion. On the contrary, the Pre-Trial Chamber
10 was reasonable and fair when, based on the particular circumstances of the case and
11 after properly weighing all relevant elements and facts and within the boundaries of
12 the law, it properly applied Article 87(7) of the Rome Statute to refer to the Assembly
13 of States Parties and the UN Security Council Jordan's failure to comply with the
14 Court's request to arrest and surrender Mr Al-Bashir.

15 The dissenting judges would uphold the impugned decision and confirm Jordan's
16 referral to the Assembly of States Parties and the UN Security Council for failure to
17 cooperate with the Court.

18 This brings us to the end of the summaries of the Appeals Chamber's judgment and
19 dissenting opinions.

20 As always, it must be stressed that these summaries are not authoritative. They are
21 intended only to convey the essence of the Appeals Chamber's judgment in an
22 accessible language. It is important to caution, in particular, that in many instances,
23 different words and phrases have been used in this summary to convey the sense of
24 what is said in the judgment.

25 The authoritative pronouncements of the judges will be found in the judgment of

1 the Appeals Chamber, read together with both the joint concurring opinion of
2 Judge Morrison, Judge Hofmański, Judge Bossa and me on the first two grounds and
3 the joint dissenting opinion of Judge Ibáñez and Judge Bossa on the third ground.
4 The judgment of the Appeals Chamber and the joint concurring opinion will be
5 published immediately after this sitting.
6 The joint dissenting opinion will be published in due course.
7 It is our tradition at this juncture to express our appreciation to all counsel who
8 appeared in the proceedings. Your participation particularly were very, very helpful,
9 given the high quality of written and oral submissions that we received.
10 We also thank all the staff of the Court who work so hard to make these proceedings
11 possible, not only those that we see in the courtroom, but also those who work behind
12 the scenes, both closer to the courtroom and the more physically removed. They
13 include, but are not limited to, the interpreters, the court reporters, the security staff
14 and all the other staff of the Court. On behalf of the Appeals Chamber I thank all
15 of you.
16 But before we adjourn, I received a note that the representative of the Arab League
17 would like to put his appearance on record. It's enough to note that the Arab League
18 representative was in court today. Thank you very much.
19 The Court is adjourned.
20 THE COURT USHER: [10:24:20] All rise.
21 (The hearing ends in open session at 10.24 a.m.)