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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 Hashemite Kingdom of Jordan's response to the observations submitted by Professors of International Law pursuant to rule 103 of the Rules of Procedure and Evidence

Source: **The Hashemite Kingdom of Jordan**

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

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Peter Lewis

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Introduction

1. On 29 March 2018, the Appeals Chamber issued an order, in which it invited 'Professors of International Law' to request leave to submit observations on the merits of the legal questions presented in Jordan's appeal.[1] On 21 May 2018, the Appeals Chamber, "[n]oting the number of responses received and having regard to the antecedents of the responding scholars", invited twelve of those who had sought leave "to submit written observations, as *amici curiae*, on the merits of the legal questions presented in Jordan's appeal",[2] and invited Jordan and the Prosecution each to submit consolidated responses by 16 July 2018.[3]

Submissions

2. As the Appeals Chamber stated in the May 2018 Decision, Jordan's appeal raises "novel and complex issues".[4] The legal uncertainties are apparent from the inconsistent decisions by various Pre-Trial Chambers with respect to the asserted non-compliance of other States Parties,[5] as well as the Prosecution Response to Jordan's appeal,[6] and are reinforced by the great variety of theories now put forward both in the requests for leave and in the observations submitted by professors. Some professors correctly argue that Jordan acted fully in accordance with its obligations under the Rome Statute. Others consider that Jordan failed to comply with its obligations, but for differing reasons. The inconsistencies and contradictions of the

[1] *Situation in Darfur, Sudan, The Prosecutor v. Omar Hassan Ahmad Al Bashir*, "Order inviting expressions of interest as *amici curiae* in judicial proceedings (pursuant to rule 103 of the Rules of Procedure and Evidence)", ICC-02/05-01/09-330 (29 Mar. 2018) (hereinafter "March 2018 Order"), at p. 3.
[2] *Situation in Darfur, Sudan, The Prosecutor v. Omar Hassan Ahmad 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", ICC-022/05-01/09-351 (21 May 2018) (hereinafter "May 2018 Decision"), at para. 10.
[3] *Ibid.*, at p. 3.
[4] *Ibid.*, at para. 12.
[5] *Situation in Darfur, Sudan, The Prosecutor v. Omar Hassan Ahmad Al Bashir*, "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", ICC-02/05-01/09-326 (12 Mar. 2018) (hereinafter "Appeals Brief"), at para. 43.
[6] *Situation in Darfur, Sudan, The Prosecutor v. Omar Hassan Ahmad Al Bashir*, "Prosecution Response to 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 arrest and surrender [of] Omar Al-Bashir'", ICC-02/05-01/09-331 (3 Apr. 2018) (hereinafter "Prosecution Response").

latter attest to the weakness of such arguments and to the impropriety of any referral of Jordan to the Assembly of States Parties or to the Security Council.

3. Jordan recalls that the present appeal concerns a particular decision rendered by Pre-Trial Chamber II,[7] and that Jordan was granted leave to appeal with respect to specific issues arising out of that decision.[8] Some of the observations submitted by the professors, however, go beyond those specific issues.[9] Issues that do not arise from the December 2017 Decision are outside the scope of this appeal.

4. Jordan's appeal has two principal objects. First, in its First and Second Grounds of Appeal, Jordan seeks to reverse the finding of the Pre-Trial Chamber that Jordan failed to comply with its obligations under the Rome Statute by not arresting and surrendering a sitting Head of State who enjoys immunity *ratione personae* under international law (**sections A and B** below).

5. Second, Jordan seeks through its Third Ground of Appeal to reverse the Pre-Trial Chamber's decision to refer such non-compliance to the Assembly of States Parties and to the Security Council. This second object of the appeal is of the utmost importance to Jordan, not least given its record, over the years, of strong support for and cooperation with the Court and for the principles of international justice, rule of law and the fight against impunity (**section C** below).

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[7] *Situation in Darfur, Sudan, The Prosecutor v. Omar Hassan Ahmad Al Bashir*, "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", ICC-02/05-01/09-309 (11 Dec. 2017) (hereinafter "December 2017 Decision").

[8] *Situation in Darfur, Sudan, The Prosecutor v. Omar Hassan Ahmad Al Bashir*, "Decision on Jordan's request for leave to appeal", ICC-02/05-01/09-319 (21 Feb. 2018), at p. 9.

[9] For example, one professor argues that there is an exception under customary international law to the immunity *ratione personae* of Heads of State before international criminal courts, and that such an exception would somehow also apply to the immunity of Heads of States from the criminal jurisdiction of other States (Observations by Kress, at paras. 3, 5-19). Yet this issue is not on appeal. Pre-Trial Chamber II correctly decided that it "is unable to identify a rule in customary international law that would exclude immunity for Heads of State when their arrest is sought for international crimes by another State, even when the arrest is sought on behalf of an international court, including, specifically, this Court" (December 2017 Decision, at para. 27). Though the issue is not before the Appeals Chamber, it is noted that Professor Kress has not demonstrated the existence of such an exception through an analysis of whether there is a general practice that is accepted as law (*opinio juris*). Indeed, he acknowledges that he is departing from the generally accepted method for demonstrating the existence of rules of customary international law (Observations by Kress, at para. 9) and that his position "is admittedly not (yet) firmly entrenched and fortified" (*ibid.*, at para. 8).

6. Jordan maintains in full the positions set forth in its Appeals Brief of 12 March 2018. The present response does not seek to address all the errors and distortions in the observations submitted by certain professors.

A. First Ground of Appeal

7. Having carefully reviewed the observations submitted by professors, Jordan reaffirms its position, set out at paragraphs 7 to 39 of the Appeals Brief, that the Rome Statute does not affect the immunity of a State official from the criminal jurisdiction of a second State; that article 98 of the Statute establishes a procedure for seeking a waiver of such immunity prior to requesting the second State to arrest and surrender such an official; and that the Court did not obtain such a waiver with respect to the events at issue in this appeal. But even if (*arguendo*) the Appeals Chamber considered that article 27(2) lifts the immunity of an official of a State Party to the Rome Statute from the criminal jurisdiction of a second State, article 27(2) cannot have such an effect with respect to the officials of a non-party State, such as Sudan. This position is grounded in the well-settled rules on interpretation set out in the Vienna Convention on the Law of Treaties.[10]

8. The different arguments advanced by certain professors disagreeing with Jordan in this regard are not persuasive. One argues, for example, that "the distinction between jurisdiction to adjudicate and jurisdiction to enforce has no place in proceedings before the Court or international criminal law".[11] She argues that "[i]nternational criminal courts do not have the power to issue directly enforceable orders and lack enforcement agencies" and "must rely heavily on the cooperation of states".[12]

[10] Jordan notes that these conclusions reached by Jordan were supported by certain professors who were not granted leave to submit observations by the Appeals Chamber. Professor Jacobs, for example, intended to argue that "given the wording of Article 27, it is to be interpreted as directed to the Court not States and simply allows the Court to exercise its jurisdiction…" (Request for leave to submit observations by Jacobs, at para. 6). Profesor Kiyani opined that "Article 27(2) does not concern cooperation but clarifies that individuals who are before the Court may not claim immunity as a procedural bar to prosecution" and that "the Court's jurisdiction is not frustrated simply because, in accordance with its own Statute, it must satisfy certain preconditions before requesting state parties to arrest and/or surrender nationals of non-party states who benefit from immunities…" (Request for leave to submit observations by Kiyani, at para. 6). See also Request for leave to submit observations by Wilmshurst *et al.*, at para. 5.
[11] Observations by Ciampi, at p. 4.
[12] *Ibid.*, at p. 5.

9. Jordan reiterates that matters related to the Court's jurisdiction are distinct from matters related to cooperation,[13] being dealt with in different parts of the Rome Statute (Part 3 and Part 9 respectively). Article 27(2) of the Statute only concerns immunities with respect to the *Court's own jurisdiction*, and has nothing to do with the immunities of State officials from the *jurisdiction of other States* (a matter regulated by article 98 of the Statute). To hold otherwise would require: (1) an extraordinarily expansive interpretation of article 27(2);[14] and (2) an interpretation of the term "third State" in article 98 that would not be consistent with the way "third State" and the term "State not party" are employed throughout the rest of the Statute.[15] Jordan considers that no convincing arguments have been given to depart from the ordinary meaning of the terms of articles 27 and 98.

10. The main argument put forward to depart from such ordinary meaning is, in essence, that the Court depends on the cooperation by States in order to exercise its jurisdiction.[16] But that is highly problematic because, if upheld by the Appeals Chamber, it would render the carefully-negotiated terms of Part 9 meaningless, would invite all kinds of expansive interpretations (not only of the articles in question, but of the Statute in general), and would deny fundamental rules of the law of treaties, notably the inability to bind to a treaty a non-party. While article 31 of the Vienna Convention permits the purposive interpretation of treaty provisions, such interpretation must not be done in a way that actually modifies or amends the text of the treaty (contrary to articles 39 to 41 of the Convention), or creates rights or obligations for a non-party State without its consent (article 34). Yet this is precisely the outcome when one adopts the position of certain professors, the Prosecution or the Pre-Trial Chambers. Another problem with that argument is that it is based on a

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[13] Appeals Brief, at para. 17. See also Observations by Gaeta, at pp. 10-11; O'Keefe, at para. 7.

[14] Various expansive interpretations have been suggested. Some argue that article 27(2) contains an implicit waiver of immunity from the jurisdiction of other States (see, for example, the December 2017 Decision, at paras. 33-34). The Prosecution, on the other hand, argued that States Parties "must, in their mutual relations, each respect that the other is likewise bound 'vertically' by article 27" (Prosecution Response, at para. 23).

[15] For a proper interpretation of the term "third State" in the Statute, see Observations by Lattanzi, at para. 10; Robinson *et al.*, at para. 16. See also the Prosecution Response, at para. 48. Only one professor argues that "third State" means "State not party", but her arguments are far from convincing (see Observations by Gamarra, at para. 14).

[16] See, for example, *Situation in Darfur, Sudan, The Prosecutor v. Omar Hassan Ahmad Al Bashir*, "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", ICC-02/05-01/09-302 (6 July 2017), at paras. 74-75 (hereinafter "South Africa Decision"); Prosecution Response, at para. 17; Observations by Kress, at para. 17; Lattanzi, at para. 11; Robinson *et al.*, at para. 14.

view that the immunity of Heads of State under international law is a permanent bar to the Court's jurisdiction. That is not the case, as the possibility of waiver demonstrates.[17]

11. Other professors suggest a novel theory concerning the rules that may be applied by the Court. They argue, for instance, that Jordan cannot invoke the 1953 Convention on the Privileges and Immunities of the League of Arab States[18] or the rules of customary international law on the immunities of Heads of State because article 21 of the Rome Statute prioritizes the application of the Statute over "external sources";[19] that issues of immunity are fully regulated in article 27 of the Statute;[20] that the Statute is a "special norm" and a "self-contained regime";[21] and that the Statute is a "later norm".[22] It has also been suggested that article 21(1)(b) of the Statute only applies to certain types of treaties, which do not include the 1953 Convention.[23] It has further been suggested that the Appeals Chamber should apply the "solidarity principle", and that, since the Statute is a "living instrument", the Chamber may adjust it as it sees fit to this particular case.[24]

12. Such theories are untenable. In particular, there is nothing in the Statute or in the practice thereunder to suggest that it is a "self-contained regime"; the fact that article 21 refers to a variety of sources attests to this, as does the repeated reference by the Court in its decisions to other applicable rules of international law. Furthermore, article 98 expressly seeks to preserve the obligations of States Parties arising *outside* the context of the Rome Statute; as such, it demonstratively is not establishing a self-contained regime. Finally, to assert that the Statute prioritizes its own application over other rules of international law makes no sense. Rules of international law addressing the rights and obligations of a State that is not a party to the Rome Statute must be applied by the Court if it is to act within the law.[25]

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[17] Appeals Brief, at paras. 60-61.
[18] Convention on the Privileges and Immunities of the League of Arab States, adopted by the Council of the League of Arab States, 18th Ordinary Sess., 10 May 1953 (hereinafter "1953 Convention").
[19] Observations by Gamarra, at para. 6; Tsagourias, at para. 5.
[20] Observations by Gamarra, at para. 8; Tsagourias, at para. 6.
[21] Observations by Gamarra, at para. 9; Tsagourias, at paras. 5, 9.
[22] Observations by Gamarra, at para. 10.
[23] Observations by Tsagourias, at para. 4.
[24] Observations by Magliveras, at para. 9.
[25] As regards the argument that article 21(1)(b) of the Statute does not apply to the 1953 Convention, Jordan refers the Appeals Chamber to the judgment cited by the *amicus curiae*, which, when read properly, simply does not

B. Second Ground of Appeal

13. Jordan agrees with the conclusion of certain professors that, as Jordan explained in its Appeals Brief,[26] Security Council resolution 1593 (2005) does not have the effect of applying the legal framework of the Statute in its entirety with respect to the situation in Darfur, or that, for the limited purpose of that situation, Sudan has rights and duties analogous to those of a State Party.[27]

14. Only a few professors seem to agree with the conclusion of the majority of Pre-Trial Chamber II in the December 2017 Decision in this regard.[28] One, for instance, suggests that the effect of resolution 1593 (2005) is that "Jordan and Sudan are bound in their relations by those provisions of the Rome Statute that are necessary for the Court to fulfill its mandate, including Article 27, pursuant to the *renvoi* to the Statute" in the resolution.[29] Others maintain, without explanation, that "Sudan is to be treated *as if* it was a State Party",[30] or that Sudan is a "*quasi* State Party".[31]

15. These arguments, like the Prosecution Response (which refers to "UNSC Referral-Situation States"),[32] fail to explain which specific provisions of the Statute become operative following a referral by the Security Council. Just to state that all those provisions which are "necessary" apply to Sudan provides no legal certainty, which is an untenable position for a court applying criminal law. Critically, and even assuming (*arguendo*) that article 27 of the Statute did apply to Sudan, these arguments fail to explain why article 98 would be displaced. Be it a "*quasi* State

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support the argument (see *Situation in the Central African Republic, The Prosecutor v. Jean-Pierre Bemba Gombo*, "Judgment pursuant Article 74 of the Statute", ICC-01/05-01/08-3343 (21 Mar. 2016), at para. 70).

[26] Appeals Brief, at paras. 40-83.

[27] See Observations by Ciampi, at p. 7; Gaeta, at pp 6-7; O'Keefe, at paras. 10-14; Robinson *et al.*, at para. 5. Most of the requests to submit observations that were not granted leave by the Appeals Chamber also took this position. See Request for leave to submit observations by Jacobs, at para. 10; Kiyani, at para. 9; Webb and Juratowich, at para. 3; Wilmshurst *et al.*, at para. 8.

[28] Some professors attempt to revive the argument according to which resolution 1593 (2005) implicitly removed the immunity of President Al-Bashir (see Observations by Ciampi, at pp. 7-10; Tsagourias, at para. 19; Kress, at paras. 20, 24). Yet this issue is not on appeal. Pre-Trial Chamber II explicitly rejected the possibility of an implicit removal of immunity (see South Africa Decision, at para. 96), and Jordan agrees with that rejection (see Appeals Brief, at paras. 65-81). The Prosecution has not argued otherwise.

[29] Observations by Lattanzi, at para. 9. See also paras. 6-7.

[30] Observations by Zimmermann, at para. 19.

[31] Observations by Tsagourias, at para. 13.

[32] Prosecution Response, at paras. 13, 68-72.

Party", a "UNSC Referral-Situation State", or whatever other term one may put forward, Sudan is *not* a State Party.

16. Some professors maintain that Sudan's obligation to "cooperate fully" under paragraph 2 of resolution 1593 (2005), besides imposing cooperation obligations analogous to those of a State Party under Part 9 of the Statute, also obliges Sudan to waive the immunity of its officials.[33] This is said to be because "the relinquishment of immunity … relates to the exercise of jurisdiction by the Court in a case".[34]

17. Jordan accepts that the obligation to "cooperate fully" under resolution 1593 (2005), which was imposed on *Sudan*, might be interpreted in accordance with Part 9 of the Statute, and that Sudan might accordingly have obligations pursuant to the resolution that are comparable to the obligations of a State Party to cooperate with the Court.[35] But the Statute contains no obligation of cooperation that would require Sudan to waive the immunity of its Head of State from the jurisdiction *of other States*; nor is there an obligation for Jordan to disregard such immunity if it is not waived by Sudan.[36] If one could add obligations to those already established in Part 9 of the Statute simply because certain action (like the waiver of immunity) may be regarded as "relat[ing] to the exercise of the jurisdiction of the Court", the list of such potential additional obligations would be endless. Furthermore, as Jordan explained in its Appeals Brief, even if Sudan had violated resolution 1593 (2005), it is not open to Jordan (nor is Jordan under an obligation) to remedy such a situation. That is a matter between Sudan and the Security Council.[37]

18. Another argument advanced is that Sudan cannot claim the immunity of President Al-Bashir from the jurisdiction of States Parties to the Statute, for such an invocation would constitute an "abuse of rights".[38] According to this argument, Sudan "has lost the right to have its head of State immunity respected by third States", and that all

[33] Observations by Robinson *et al.*, at paras. 8, 14.
[34] *Ibid.*, at para. 14.
[35] Appeals Brief, at para. 79; Observations by Robinson *et al.*, at para. 11; Zimmermann, at para. 8.
[36] See also Observations by Gaeta, at p.7.
[37] Appeals Brief, at para. 81.
[38] Observations by Zimmermann, at para. 12.

States are "free to ignore" such immunity.[39] Nothing, therefore, bars Jordan from arresting President Al-Bashir and surrendering him to the Court.

19. Yet this argument does no more than restate the assertion that Sudan is violating resolution 1593 (2005) by not arresting its own Head of State and surrendering him to the Court.[40] Assuming (*arguendo*) that Sudan has such an obligation, nothing about the "abuse of rights" doctrine as it may operate with respect to Sudan-ICC relations leads to a loss of immunity for Sudan's Head of State from the exercise of criminal jurisdiction by Jordan, and even more so nothing that could possibly impose an obligation upon Jordan. Moreover, the doctrine is a very thin reed for building a legal argument, as it has found very little application in practice. Indeed, the professor does not provide any example that would be relevant to the circumstances of the present appeal. Jordan also notes that, in advancing these arguments, the professor agrees with Jordan that resolution 1593 (2005) does not have any effect on the immunity of President Al-Bashir from foreign criminal jurisdiction. Indeed, by putting forward that Sudan "abuses" the right to have such immunity respected, he presupposes the existence of that right.

20. Having carefully reviewed the observations filed by the professors, Jordan remains of the view that, while it may be open to the Security Council when making a referral to include additional requirements, 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. As such, the Chamber erred with respect to matters of law in concluding that Security Council resolution 1593 (2005) had the effect of overriding Jordan's obligations under customary and conventional international law to accord immunity to President Al-Bashir. Therefore, the Appeals Chamber should grant the Second Ground of Appeal.

[39] *Ibid.*, at paras. 14-15.
[40] See also *ibid.*, at para. 37.

C. Third Ground of Appeal

21. In the event that it is determined by the Appeals Chamber that Jordan failed to comply with its obligations under the Rome Statute by not arresting and surrendering President Al-Bashir to the Court, the Appeals Chamber should nevertheless conclude that the Pre-Trial Chamber II's referral of Jordan to the Assembly of States Parties and to the Security Council is not sustainable since it constituted an abuse of discretion.

22. Relatively few of the *amicus curiae* observations squarely addressed the Third Ground of Appeal. Some observations concluded that Jordan did not violate its obligations under the Rome Statute and therefore, apparently, saw no need to consider the Third Ground of Appeal.[41] Other observations concluded the Jordan did violate its obligations under the Rome Statute, but did not address the Third Ground of Appeal.[42] Professor Ciampi advanced a series of legal propositions concerning the Third Ground of Appeal but did not apply them to the circumstances of this referral.[43] In fact, of the eleven *amicus curiae* observations, only two appear to call upon the Appeals Chamber to uphold the Third Ground of Appeal.[44]

23. Yet some of the *amici curiae* did address the Third Ground of Appeal, although they did not consider the points made by Jordan in its Appeals Brief. The points raised in those observations are addressed below. In doing so, Jordan organizes its response around the two factors that, according to certain professors, the Pre-Trial Chamber advanced for why a referral was appropriate.

24. The first factor, identified by the Pre-Trial Chamber at paragraph 53 of its Decision, was that Jordan "took a clear position" not to comply with the Court's request, which therefore justified the referral.[45] As discussed below, the facts do not support the Pre-Trial Chamber's position. Moreover, a central problem with this factor is that the

[41] See Observations by Gaeta and O'Keefe.
[42] See Observations by Gamarra; Kress; Tsagourias; and Zimmermann.
[43] See Observations by Ciampi, at pp. 10-12.
[44] See Observations by Lattanzi, at pp. 10-11; Magliveras, at p. 10.
[45] December 2017 Decision, at para. 53 ("Jordan took a very clear position, chose not to execute the Court's request for arrest and surrender of Omar Al-Bashir and did not require or expect anything further that Court assist it in ensuring the proper exercise of its duty to cooperate").

Appeals Chamber has stated, unequivocally, that a decision of non-compliance standing alone does not result in an automatic referral.[46] The second factor, identified by the Pre-Trial Chamber at paragraph 54 of its Decision, was that it had "already expressed in unequivocal terms that another State Party, the Republic of South Africa, had in analogous circumstances the obligation to arrest Omar Al-Bashir, and that consultations had no suspensive effect on this obligation".[47] Here too, as discussed below, the facts do not support the Pre-Trial Chamber's position. Further, a central problem with this factor is that "an indiscriminate comparison of two States Parties [is] inappropriate. A State Party's referral must be decided, primarily with reference to its own facts, not to the situation of a different State Party".[48] These problems of fact and law are why the Appeals Chamber should, if this point is reached, uphold the Third Ground of Appeal.

(i) Assertions regarding Jordan's position just prior to President Al-Bashir's visit are erroneous and misleading

25. As indicated above, the first factor for the Pre-Trial Chamber referral decision was that Jordan took a "clear position" not to execute the Court's request and did not "require or expect from the Court anything further…". In this regard, one professor opined that Jordan acted in "bad faith" and "without consulting with the Court ... with the aim to resolve the matter".[49] Such opinions are remarkable given that the professor acknowledged that she did not have access to the relevant exchanges between Jordan and the Court.[50]

26. In fact, Jordan's 28 March 2017 *note verbale* to the Court was an effort to explain its understanding of the legal situation, which involved a complicated scenario involving potentially conflicting rules of international law arising under treaty, custom and a Security Council resolution. The record before the Appeals Chamber shows that Jordan conveyed to the Court what it "consider[ed]" to be the law, while at the same time indicating clearly that it was doing so in the context of "consulting

[46] *Situation in the Republic of Kenya, The Prosecutor v. Uhuru Muigai Kenyatta*, "Judgment on the Prosecutor's appeal against Trial Chamber V(B)'s 'Decision on Prosecution's application for a finding of non-compliance under Article 87(7) of the Statute'", ICC-01/09-02/11-1032 (19 Aug. 2015), at para. 49 (hereinafter "Kenya Judgment").
[47] December 2017 Decision, at para. 54.
[48] Prosecution Response, at para. 116.
[49] Observations by Lattanzi, at pp. 10-11 (emphasis omitted).
[50] *Ibid.*, at p. 10, n. 38.

with the ICC".[51] Without doubt, Jordan explained to the Court what it viewed to be impediments, in the form of the immunity of President Al-Bashir and the lack of any waiver of that immunity.

27. At the time of the events in question, the Prosecution unequivocally stated that Jordan's "*note verbale* formally *identifies an alleged legal problem*, which it communicates to the Court by way of *article 97 consultations*".[52] Indeed, at the time of the events in question, the Prosecution acknowledged that Jordan had "trigger[ed] … consultations".[53] Moreover, rather than regarding Jordan's position as demonstrating inevitable non-compliance, the Prosecution requested that the Pre-Trial Chamber "proceed urgently to *resolve any misunderstanding that Jordan may perceive* with respect to its obligations under the statute…".[54] Such action would have been welcome to Jordan; instead, Jordan received no response whatsoever from the Chamber.

28. Curiously, in agreeing with the Chamber, Professor Lattanzi appears to think that it would have been better for Jordan to be less "clear" in conveying to the Court its understanding as to the law or that Jordan failed to follow some established procedures for engaging in consultation. In fact, if there was some defect in the manner that the consultations unfolded, it was not of Jordan's making. Article 97 of the Rome Statute contains none of the requirements that the professor apparently now finds lacking in Jordan's conduct; it simply provides that a State Party shall consult the Court without delay when the State Party identifies problems which may impede or prevent the execution of a request under Part 9. Indeed, the deficiencies in identifiable or transparent procedures at the Court with respect to consultations was only corrected (and even then only partially) in December 2017, long after the March 2017 visit to Jordan, with the adoption at the Assembly of States Parties of a *Resolution on consultations pursuant to article 97(c) of the Rome Statute of the International Criminal Court*.[55]

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[51] Jordan's two *note verbales* to the Court prior to the visit, dated 24 and 28 March 2017, may be found as annexes to ICC-02/05-01/09-291 and ICC-02/05-01/09-293.
[52] ICC-02/05-01/09-294-Conf (29 Mar. 2017), at para. 4 (emphasis added).
[53] *Ibid.*, at para. 9.
[54] *Ibid.*, at para. 4 (emphasis added). See also ICC-02/05-01/09-292-Conf ("This statement by Jordan does not make clear whether it intends to comply with its obligations under the Rome Statute…).
[55] Resolution on consultations pursuant to article 97(c) of the Rome Statute of the International Criminal Court, ICC-ASP/16/Res.3 (14 Dec. 2017).

29. Among other things, that Resolution contains no requirement that a State Party pose a question or ask the Court to resolve an ambiguity; it simply says that the State Party should make a request for consultations in writing,[56] something that Jordan did through its *note verbale*.[57] Further, the Resolution provides that, upon receipt of such a request, "the Office of the Prosecutor, Registrar, or Presidency, as appropriate, should, without delay, inform the State Party and any other relevant organ or official in writing about the proposed date, location and/or other modalities of the consultation process".[58] If comparable procedures for article 97 consultations had been in place in March 2017, Jordan would have fully met them; the Pre-Trial Chamber would have not, given the failure to respond without delay.

30. If Professor Lattanzi's position is that Jordan knew, as far back as 2009, that it was obliged, as a State Party, to arrest and surrender Omar Al-Bashir if he were present on its territory, such that Jordan's "clear position" in March 2017 was wrongful, then this line of argument is also misleading. Aside from the fact that such "notice" was deemed irrelevant to the Pre-Trial Chamber when deciding on its non-referral regarding South Africa, it is wholly incorrect to say that Pre-Trial Chamber I's March 2009 decision to confirm the arrest warrant[59] resolved issues regarding the immunity of President Al-Bashir from the criminal jurisdiction of States Parties to the Statute, including the interaction of the Rome Statute with Security Council resolution 1593 (2005). Indeed, the word "immunity" does not even appear in the Pre-Trial Chamber's March 2009 decision (or in its 2010 decision).

31. Likewise, as is evident, the law on this matter was far from settled as of March 2017, not least given the disparate and conflicting legal opinions that had been issued, with no reconciliation by the Appeals Chamber. Indeed, even today that law is unclear. The Appeals Chamber itself has stated that the present appeal raises "novel and complex issues".[60] This is presumably why the Appeals Chamber issued its call for

[56] *Ibid.*, Annex on Understanding with respect to article 97(c) consultations, at para. 2 (hereinafter the "Understanding").
[57] Prosecution Response, at p. 41 ("…Jordan—in a single sentence—declared an intention to 'consult' with the Court under article 97…").
[58] Understanding, at para. 4.
[59] *Situation in Darfur, Sudan, The Prosecutor v. Omar Hassan Ahmad Al Bashir*, "Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir", ICC-02/05-01/09-3 (4 Mar. 2009).
[60] May 2018 Decision, at para. 12.

expressions of interest as *amici curiae*. The disparate legal interpretations apparent in both the various requests filed with the Appeals Chamber for leave to submit *amicus curiae* observations and in the observations that were actually filed readily demonstrate that the law in this area is not obvious. Ultimately, it must be kept in mind that the basic position expressed in Jordan's *note verbale* to the Court – that immunity exists for a sitting Head of State and such immunity is not waived by Security Council resolution 1593 (2005) – is a position *that the Pre-Trial Chamber itself accepts today*. Thus, there was no "bad faith" with respect to the legal position advanced by Jordan to the Court in March 2017.

32. In sum, Jordan's *note verbale* was a good faith effort to engage with the Court on the salient legal issues in advance of the visit to attend the League's summit, to which the Pre-Trial Chamber never responded either orally or in writing. Viewing Jordan's effort to engage with the Court in March 2017 as wrongful conduct that merits a referral is a "patently incorrect conclusion of fact" by the Chamber. Jordan did not take an approach that ignored the Court, such as by treating the Court's inquiry dismissively or by failing to respond to it at all. Rather, Jordan took the matter seriously, made a good faith effort to explain its obligations in relation to the League and the 28th League Summit as Jordan understood them, and indicated to the Court that it was doing so for the purpose of consultations. In mis-appreciating the facts of Jordan's posture vis-à-vis the Court, the Pre-Trial Chamber committed an error meriting intervention and correction by the Appeals Chamber.

(ii) Assertions that Jordan "had proper and unequivocal notice" of its obligation to arrest and surrender President Al-Bashir are misleading

33. With respect to the second factor, one professor's approach[61] appears to regard the Pre-Trial Chamber's prior expression "in unequivocal terms" to South Africa as functionally equivalent to a much broader proposition: an expression that *any* State Party's obligation with respect to the arrest and surrender President Al-Bahir was settled as of 29 March 2017.

[61] Observations by Lattanzi, at p. 11 (Jordan "sent an advance notification of its intention not to comply with the Court's decisions").

34. Taking first what the Pre-Trial Chamber actually said, the central question is whether the Chamber, as of March 2017, in fact "had already expressed in unequivocal terms" that South Africa was obligated to arrest and surrender President Al-Bashir. The answer is clearly no.

35. In fact, as of March 2017, the Pre-Trial Chamber had decided to convene a hearing "for the purposes of a determination under article 87(7) of the Statute with respect to the Republic of South Africa", one purpose of which was "to obtain all relevant submissions, in fact and in law, with respect to . . . whether South Africa failed to comply with its obligations under the Statute by not arresting and surrendering Omar Al Bashir to the Court while he was on South Africa's territory despite having received a request by the Court…".[62] There would have been no purpose in any such hearing if the question of South Africa's obligations were already "unequivocally" resolved by the Pre-Trial Chamber. Moreover, writing in July 2017 (four months after the visit to Jordan), the Chamber said that "should there have existed any doubt in this regard, *it has now been unequivocally established*, both domestically and by this Court, that South Africa must arrest Omar Al-Bashir and surrender him to the Court".[63] Moreover, the Pre-Trial Chamber never indicated exactly when and in what form the Chamber "expressed in unequivocal terms" *to Jordan* as of March 2017 that South Africa was so obliged, let alone why the same should apply automatically to the case of Jordan.

36. The professor may be of the view that, while there were conflicting legal arguments by Pre-Trial Chambers in various decisions, nevertheless a commonality existed among them, on one theory or another, in finding a lack of immunity for President Al-Bashir.

37. Yet any such commonality is not a plausible basis for saying that there was "unequivocal" notice to Jordan (or to any other State Party to the Rome Statute) as to the state of the law. The reality is that, as of March 2017, there were serious doubts both within and outside the Court as to the principal legal theories that had been advanced by the Court (such as finding no customary international law immunity at

[62] ICC-02/05-01/09-274, at para. 15.
[63] South Africa Decision, at para. 137 (emphasis added).

all or finding an automatic waiver of that immunity by force of resolution 1593). If those arguments were wrong, then it was entirely plausible to conclude that President Al-Bashir *had* immunity. And, in fact, the Pre-Trial Chamber ultimately did conclude, four months later, in July 2017, by a majority, that such arguments were wrong, but then proceeded to identify an entirely new legal theory for denying immunity (one positing that the Security Council's referral made the Rome Statute applicable in its entirety to Sudan). As argued above, that theory is misguided as well; and taking into account the conflicting legal basis advanced by Pre-Trial Chamber II, such a theory clearly was not "unequivocally" established as of March 2017.

38. In sum, the Pre-Trial Chamber's finding that, as of March 2017, it had "already expressed in unequivocal terms" that South Africa was obligated to arrest and surrender President Al-Bashir, that Jordan was somehow on notice as to such an expression, and that such an expression inescapably answered the circumstances of an entirely different factual situation, was an error of both fact and law meriting intervention by the Appeals Chamber.

(iii) Assertions that the Trial Chamber did not abuse its discretion are unsustainable

39. Equally unsustainable are arguments as to why the Pre-Trial Chamber's decision on referral should not be deemed an abuse of discretion. Remarkably, one professor is apparently of the view that the Chamber's extremely cursory discussion (of the two factors supposedly warranting a referral) somehow demonstrates that the Chamber properly considered all relevant factors and disregarded irrelevant ones.[64] How one can regard a total of four sentences[65] as properly considering all relevant factors in a matter of considerable gravity is a mystery, as is any claim that the Chamber disregarded irrelevant ones, given the Chamber provided no discussion of any other factors. Another professor unabashedly speculates that the Pre-Trial Chamber's referral had nothing to do with Jordan's particular conduct, but instead was because of the conduct of States Parties generally with respect to the visits of President Al-

[64] Observations by Lattanzi, at p. 10.
[65] December 2017 Decision, at paras. 53-54.

Bashir "and the presumed Pre-Trial Chamber's frustration witnessing the Court's efficacy being diminished".[66]

40. In any event, Professor Magliveras' efforts to explain away the differential treatment between the non-referral of South Africa (July 2017) and the referral of Jordan (December 2017) completely miss the mark. There was no serious analysis in the Pre-Trial Chamber's decision as to why *Jordan's* conduct merited a referral, in stark contrast to the analysis undertaken with respect to South Africa. For example, the Chamber made no effort to analyze the situation under Jordanian national law if that was instrumental in justifying the differential treatment.

41. Moreover, it is flatly erroneous to say that Jordan has not accepted its obligation to cooperate with the Court. Jordan -- which has been a State Party to the Rome Statute since 2002 – clearly has such an obligation and has never denied it. And as demonstrated by its participation in this proceeding, Jordan is willing to resolve any outstanding matters relating to Jordan's relationship with the Court. To the extent that the likelihood of cooperation with the Court is central to such differential treatment, the Pre-Trial Chamber paid no attention to the fact that Jordan has never adopted a national law or policy precluding cooperation with the Court.

42. Ultimately, none of these issues animate the Pre-Trial Chamber's reason for referral. Rather, the central claim is that, in March 2017, Jordan was "on notice" as to its obligations whereas South Africa was not. As explained in Jordan's Appeals Brief,[67] that claim is simply not sustainable, such that the Pre-Trial Chamber's differential treatment can only be viewed as unfair and unreasonable. As such, the decision on referral of Jordan was an abuse of discretion that must be addressed by the Appeals Chamber.

(iv) Assertions about the value of a referral are highly speculative and overlook the main point: The Pre-Trial Chamber failed to consider whether a referral is the most effective way of obtaining Jordanian cooperation in the concrete circumstances at hand

[66] Observations by Magliveras, at p. 10.
[67] Appeals Brief, at paras. 96-102.

43. Some assertions are made in the *amicus curiae* observations as to the value of a referral. One professor opined, without any supporting evidence, that a referral will enhance the work of the Court.[68] By contrast, another professor concluded, based on empirical research, that referrals have made "no appreciable difference" in affecting the travel of President Al-Bashir".[69]

44. More importantly, Professor Lattanzi's speculations miss the main point, which is that the *Pre-Trial Chamber* never considered whether a referral would be the most effective way of obtaining cooperation from Jordan for the case before the Chamber. There is nothing in the December 2017 Decision that says why a referral is needed in order to obtain cooperation from Jordan. This failure is a critical error with respect to the referral process. As the Appeals Chamber has stated, since "the object and purpose of article 87(7) of the Statute is to foster cooperation", a referral to the Assembly of States Parties and/or the Security Council of the United Nations "was not intended to be the standard response to each instance of non-compliance, but only one that *may be sought when the Chamber concludes that it is the most effective way of obtaining cooperation in the concrete circumstances at hand*".[70]

45. Indeed, the Pre-Trial Chamber itself acknowledged this in the South Africa Decision, stating that it "should therefore consider whether engaging external actors would, in the circumstances of the case, be an effective way to obtain cooperation".[71] In that instance, the Pre-Trial Chamber devoted several paragraphs to considering whether a referral of South Africa would be an effective way to foster cooperation.

46. Yet the Pre-Trial Chamber made no effort to consider whether a referral of Jordan's non-compliance to the Assembly of States Parties or to the Security Council would be the most effective way of obtaining Jordanian cooperation or would make any difference whatsoever with respect to the proceedings before the Chamber.[72] In fact, securing cooperation is inevitably forward-looking. In that regard, rather than pursue a referral, the most effective way to promote cooperation from States Parties in this

[68] Observations by Lattanzi, at p. 11.
[69] Observations by Newton, at p. 11.
[70] Kenya Judgment, at para. 51 (emphasis added).
[71] South Africa Decision, at para. 135.
[72] Appeals Brief, at paras. 103-106.

proceeding would not be for a referral but, rather, for the Appeals Chamber simply to reach a soundly-based decision on the unresolved legal issues before it.

47. This point was aptly made by one of the *amicus curiae* observations. Professors Robinson, Cryer, deGuzman, Lafontaine, Oosterveld, and Stahn concluded that Jordan did not violate its obligations and therefore concluded that "there is no violation to refer".[73] Yet they went on to note that even if Jordan violated its obligations:

> "24. There is no benefit in referral in this instance. Jordan is not currently withholding any assistance. The sufficient and much-needed remedy in this instance is the clarification that the Appeals Chamber will provide. The [Pre-Trial Chamber] was correct that a request had been issued and the obligation of states parties is simply to comply. Nonetheless, the Court should show some understanding of the legal stakes for states parties. An arrest of a foreign head of state is a momentous action, which would trigger state responsibility if it were not justified, and hence states understandably want great legal clarity. This issue has been clouded by intensely-held and well-argued opinions, which diverge on numerous points. The ICC is the authoritative interpreter of its Statute, and states parties are obliged to comply, but the ICC can still show restraint and understanding, given the stakes, the widespread uncertainty and well-argued controversy.
>
> 25. The PTC correctly showed restraint in its response to South Africa. The Appeals Chamber should carefully consider the grounds on which South Africa's situation was distinguished from Jordan's. If the clarified reasoning was not yet available to Jordan, then the same restraint would be appropriate here.
>
> 26. These considerations against referral are warranted in and confined to the present case. The Appeals Chamber's contribution on this matter can be forward-looking and clarify the obligations of states parties in similar situations in the future."

48. What further cooperation by Jordan is envisaged by certain professors now that the visit by President Al-Bashir has concluded? None is identified by them nor by the Pre-Trial Chamber. And how could the Pre-Trial Chamber have believed in December 2017 that such a referral will lead to any such cooperation, having decided[74] just five months earlier that numerous prior referrals had not led to any of the measures now apparently envisaged? The conclusion must be that the motivation

[73] Observations by Robinson *et al.*, at p. 11.
[74] South Africa Decision, at para. 138 (citations omitted).

for the Pre-Trial Chamber's referral lies elsewhere, as means of punishing Jordan. In sum, the decision on referral of Jordan was an abuse of discretion.

49. Having reviewed carefully the observations by the professors, Jordan remains of the view that the Pre-Trial Chamber erred in deciding to refer this matter. Consequently, the Appeals Chamber should uphold the Third Ground of Appeal.

Request

50. Based on the foregoing, Jordan confirms its requests at paragraph 115 of the Appeal's Brief.

Ambassador Ahmad Jalal Said Al-Mufleh
on behalf of
The Hashemite Kingdom of Jordan

Dated 16 July 2018

At The Hague, Netherlands