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PRE-TRIAL CHAMBER II

Before: Judge Cuno Tarfusser, Presiding Judge
Judge Marc Perrin de Brichambaut
Judge Chang-ho Chung

SITUATION IN DARFUR, SUDAN

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

Public

**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**

To be notified, in accordance with Regulation 31 of the Regulations of the Court, to:

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Legal Representatives of the Victims

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Unrepresented Victims

**Unrepresented Applicants for
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States Representatives

Competent authorities of the Hashemite
Kingdom of Jordan

Other

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**Victims Participation and Reparations
Section**

Other

Pre-Trial Chamber II (“Chamber”) of the International Criminal Court (“Court”), acting under article 87(7) of the Rome Statute (“Statute”), issues this decision concerning the non-compliance by the Hashemite Kingdom of Jordan (“Jordan”) with the request by the Court for the arrest and surrender of Omar Hassan Ahmad Al-Bashir (“Omar Al-Bashir”).

I. BACKGROUND AND PROCEDURAL HISTORY

1. On 31 March 2005, the Security Council of the United Nations (“Security Council”), acting under Chapter VII of the Charter of the United Nations, adopted Resolution 1593 (2005), whereby it referred the situation in Darfur, Sudan, since 1 July 2002 to the Prosecutor of the Court and decided that “the Government of Sudan and all other parties to the conflict in Darfur, shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor”.¹
2. Following investigations on the part of the Prosecutor into the situation as referred by the Security Council, and upon application by the Prosecutor,² Pre-Trial Chamber I issued, on 4 March 2009 and 12 July 2010, two warrants of arrest against Omar Al-Bashir for war crimes, crimes against humanity and genocide allegedly committed in Darfur from March 2003 to, at least, 14 July 2008.³
3. Following the issuance of the two warrants of arrest, the Court, pursuant to Part 9 of the Statute, transmitted to the States Parties to the Statute requests for the arrest of Omar Al-Bashir and his surrender to the Court. Jordan was notified of the requests for arrest and surrender of Omar Al-Bashir to the Court pursuant to the two warrants on 5 March 2009 and 16 August 2010 respectively.⁴

¹ S/RES/1593 (2005).

² ICC-02/05-151-US-Exp and annexes.

³ “Warrant of Arrest for Omar Hassan Ahmad Al Bashir”, 4 March 2009, ICC-02/05-01/09-1; “Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir”, 12 July 2010, ICC-02/05-01/09-95.

⁴ See reference at ICC-02/05-01/09-291-Conf-Anx1.

4. To date, the warrants of arrest against Omar Al-Bashir are yet to be executed and, pending his appearance before the Court, proceedings against Omar Al-Bashir remain halted.
5. On 21 February 2017, acting on the basis of media reports of Omar Al-Bashir's expected travel to Jordan in order to participate in the 28th Arab League Summit in Amman on 29 March 2017, the Registry transmitted to Jordan a note verbale inviting it to provide information regarding the visit and renewing the request to cooperate with the Court in the arrest and surrender of Omar Al-Bashir, in the event that he enters Jordanian territory.⁵
6. On 24 March 2017, the Registry received a note verbale from Jordan, wherein Jordan confirmed that its invitation had been delivered to Omar Al-Bashir for participation in the Arab League Summit, that the Sudanese government had registered its delegation for the summit as including Omar Al-Bashir, but that no official confirmation of the latter's attendance had yet been received.⁶ The note verbale also stated that "Jordan adheres to its international obligations, including [the] applicable rules of customary international law, while taking into account all rights thereunder".⁷
7. On 28 March 2017, the Registry received a second note verbale from Jordan, which stated that the Jordanian authorities had received confirmation that Omar Al-Bashir would attend the Arab League Summit on 29 March 2017 and that "Jordan is hereby consulting with the ICC under article 97 of the Rome Statute".⁸ The note verbale further stated that Jordan considers that "President Omar Al Bashir enjoys sovereign immunity as a sitting Head of State under the rules of customary international law" and that that immunity had not been waived by Sudan nor by the Security Council of

⁵ ICC-02/05-01/09-291-Conf-Anx1.

⁶ ICC-02/05-01/09-291-Conf-Anx2.

⁷ *Ibid.*, para. 3.

⁸ ICC-02/05-01/09-293-Conf-Anx1-Corr.

the United Nations in its resolution 1593(2005).⁹ Making reference to articles 98(1) and 27(2) of the Statute, Jordan concluded that “[n]othing in the two articles mandates the State Party to the Rome Statute to waive the immunity of a third State and act inconsistently with its obligations under the rules of general international law on the immunity of a third State”.¹⁰

8. Omar Al Bashir eventually travelled to Jordan and attended the 28th Arab League Summit in Amman on 29 March 2017. While he was on Jordanian territory, Jordan did not arrest and surrender him to the Court.
9. On 26 April 2017, the Chamber held that the events recounted above warranted the opening of proceedings pursuant to article 87(7) of the Statute and, in line with regulation 109 of the Regulations of the Court, invited Jordan, “if it wishe[d] to provide further submissions concerning its failure to arrest and surrender Omar Al-Bashir while present on the territory of the Hashemite Kingdom of Jordan, to file any such submissions by Friday, 26 May 2017”.¹¹ This time limit was subsequently extended to 30 June 2017.¹²
10. On 30 June 2017, the Registry transmitted to the Chamber a note verbale from Jordan, which contained Jordan’s submissions pursuant to the Chamber’s decision of 26 April 2017.¹³
11. On 13 July 2017, the Prosecutor responded to Jordan’s submissions.¹⁴

⁹ *Ibid.*, p. 2.

¹⁰ *Ibid.*, p. 3.

¹¹ Decision inviting the Hashemite Kingdom of Jordan to provide any further submissions on its failure to arrest and surrender Omar Al-Bashir to the Court, ICC-02/05-01/09-297.

¹² “Decision on the request of the Hashemite Kingdom of Jordan for an extension of the time limit to provide any further submissions on its failure to arrest and surrender Omar Al-Bashir to the Court”, 2 June 2017, ICC-02/05-01/09-299.

¹³ ICC-02/05-01/09-301-Conf-Anx.

¹⁴ ICC-02/05-01/09-303-Conf.

12. On 18 September 2017, the Chamber issued the “Decision requesting the Hashemite Kingdom of Jordan to provide further information”, whereby, making reference to Jordan’s previous submissions, it requested Jordan to provide the Chamber with an authoritative text of the 1953 Convention on the Privileges and Immunities of the Arab League (“1953 Convention”) as well as the status of its ratification.¹⁵
13. On 18 October 2017, the Registry transmitted to the Chamber a note verbale from Jordan, by way of which Jordan submitted to the Chamber a certified copy of the 1953 Convention and a note verbale from the General Secretariat of the League of Arab States certifying Jordan’s accession to that convention.¹⁶ These documents were provided by Jordan in Arabic, and the Registry prepared an official court translation into English.¹⁷

II. SUBMISSIONS

A. *Submissions of Jordan*

14. In its note verbale of 30 June 2017, Jordan states that Omar Al-Bashir’s presence in Jordan was for the purpose of attending the Arab League Summit that was held in Jordan on 29 March 2017.¹⁸ Jordan further submits that Omar Al-Bashir enjoyed immunity *ratione personae* under international law as a sitting Head of State and that his arrest by Jordan would have violated Jordan’s obligation under customary international law concerning such immunity.¹⁹ In addition, Jordan submits that Omar Al-Bashir enjoyed immunity from the criminal jurisdiction of Jordan during his attendance of the Arab League Summit under the 1953 Convention, which Jordan had acceded to on 12 December 1953.²⁰ Accordingly, in Jordan’s submission, the

¹⁵ ICC-02/05-01/09-305.

¹⁶ ICC-02/05-01/09-306-Conf-AnxI.

¹⁷ ICC-02/05-01/09-306-Conf-AnxII.

¹⁸ ICC-02/05-01/09-301-Conf-Anx, p. 2.

¹⁹ *Ibid.*, p. 3.

²⁰ *Id.*

arrest of Omar Al-Bashir by Jordan would have also violated Omar Al-Bashir's immunity under said convention.²¹

15. Jordan emphasises that as Sudan is not a party to the Statute, it has not waived immunity of its officials from the criminal jurisdiction of the Court or other States.²² Consequently, in the submission of Jordan, the legal relationship between Sudan and Jordan is governed not by the Statute but by the rules of customary international law and treaty rules governing the immunity of Heads of State and delegates to Arab League meetings.²³
16. As concerns Security Council Resolution 1593 (2005), Jordan submits that "[w]hile it would be open to the Council to exercise its Chapter VII powers to suspend the customary and conventional obligations of States to respect the immunity of a foreign Head of State, it has not done so in the present case".²⁴ Similarly, Jordan argues that "[i]f the Security Council intended to impose an obligation on States, including States Parties to the Rome Statute, to lift the immunity of Sudan's officials, including the absolute immunity of a sitting Head of State, then the Council could have [...] expressly stated so in resolution 1593 (or in subsequent resolutions). It did not."²⁵ Moreover, Jordan submits that this effect cannot be considered implied in Resolution 1593 (2005), because only express provisions in Security Council resolutions can have the effect of requiring States to act in contravention of rules of general international law.²⁶ In the view of Jordan, *travaux préparatoires* and subsequent practice also do not point towards such result.²⁷ Finally in this regard, Jordan submits that the object and purpose of Resolution 1593 (2005) are not defeated

²¹ *Id.*

²² *Ibid.*, p. 3.

²³ *Id.*

²⁴ *Ibid.*, p. 4.

²⁵ *Id.*

²⁶ *Ibid.*, pp. 4-5.

²⁷ *Ibid.*, p. 5.

by interpreting it as silent with respect to the denial of immunity of Omar Al-Bashir from national criminal jurisdiction.²⁸

17. Furthermore, pointing to the 1953 Convention, Jordan refers to article 98(2) of the Statute, and stated that it “is not aware of any consent by the Sudan for the surrender of President Al Bashir to the ICC”.²⁹ Jordan concludes that “[a]s the Court never secured such consent for the surrender, proceeding with the request for arresting and surrendering President Al Bashir in accordance with the arrest warrants is not required given article 98(2) of the Rome Statute”.³⁰ Jordan adds that Resolution 1593 (2005) contains no language “addressing explicitly or implicitly any such consent by the Sudan”.³¹ Jordan also makes the argument that “implementation of the arrest warrants would have been a violation of Jordan’s obligation under the 1953 Convention not only towards Sudan, but also towards all State Parties to that convention (a multilateral treaty)”.³²
18. Finally, Jordan submits that it requested consultations with the Court under article 97 of the Statute, but did not receive an answer by the Court.³³
19. On the basis of its submissions, Jordan requests the Chamber to find: “1. that Jordan did not act inconsistently with its obligations under the Rome Statute, including obligations of cooperation under Part IX; 2. that the Court not refer the matter to the Assembly of State Parties or to the Security Council under article 87(7) of the Statute”.³⁴ Jordan also requests the Court to seek an authoritative interpretation from the Security Council as regards “the meaning of paragraph 2 of its resolution 1593”.³⁵

²⁸ *Ibid.*, pp. 5-6.

²⁹ *Ibid.*, p. 7.

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Ibid.*, pp. 7-8.

³⁴ *Ibid.*, p. 9.

³⁵ *Id.*

B. Submissions of the Prosecutor

20. The Prosecutor submits that previous public decisions of the Chamber made clear that the alleged legal impediments raised by Jordan did not provide a basis under article 98(1) or (2) of the Statute to nullify Jordan's obligation to arrest and surrender Omar Al-Bashir to the Court.³⁶ In the submission of the Prosecutor, Jordan's obligation to arrest and surrender Omar Al-Bashir was therefore clear and unambiguous.³⁷
21. Similarly by reference to previous decisions of the Chamber, the Prosecutor argues that Jordan is not entitled to rely on its own legal interpretation of article 98 of the Statute, and that consultations under article 97 of the Statute have no suspensive effect.³⁸
22. In the submission of the Prosecutor, a referral of non-compliance is appropriate in the present circumstances.³⁹ Factors referred to by the Prosecutor in support of this course of action are the fact that the notes verbales transmitted by Jordan do not contain any arguments that had not previously been considered in public decisions of the Chamber, that to the extent that the note verbale of 28 March 2017 "amounted to a consultation with the Chamber, this took place the day before Mr Al Bashir's arrival in Jordan, and only advanced an argument based on article 98(1) of the Statute", and that "[a] remedy from this Court is [...] likely the only judicial remedy that Jordan will face".⁴⁰
23. The Prosecutor thus requests that the Chamber: "a. find that Jordan failed to comply with its obligations under the Rome Statute by not arresting and surrendering Mr Al Bashir to the Court while he was on Jordan's territory; b. determine that the

³⁶ ICC-02/05-01/09-303-Conf, paras 18-20.

³⁷ *Ibid.*, para. 21.

³⁸ *Ibid.*, paras 24-25.

³⁹ *Ibid.*, para. 26.

⁴⁰ *Ibid.*, paras 27-29.

circumstances require a formal finding of non-compliance and referral of the matter to the ASP and the UNSC pursuant to article 87(7) of the Statute".⁴¹

III. ANALYSIS

24. Article 87(7) of the Statute enables the Chamber to make a formal finding of non-compliance and refer the matter to the Assembly of States Parties or the Security Council in cases where non-compliance, contrary to the provisions of the Statute, prevents the Court from exercising its functions and powers under the Statute.⁴² This is a discretionary power and not a mandatory course of action. Indeed, as the Appeals Chamber has also emphasized, the Chamber must assess the particularities of each situation to determine the most favourable course of action.⁴³
25. Accordingly, the Chamber addresses separately and in turn the two salient questions: (i) whether Jordan failed to comply with the request for arrest and surrender of Omar Al-Bashir contrary to the provisions of the Statute; and (ii) whether a referral of the matter to the Assembly of States Parties and/or the Security Council is warranted.

A. Whether Jordan failed to comply with the request for arrest and surrender of Omar Al-Bashir contrary to the provisions of the Statute

26. On the basis of the submissions received, and in order to determine whether Jordan failed to comply with the request for arrest and surrender of Omar Al-Bashir contrary to the provisions of the Statute, the Chamber is called upon to analyse whether Jordan was entitled not to execute the Court's request for arrest and

⁴¹ *Ibid*, para. 30.

⁴² Appeals Chamber, *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'", 19 August 2015, ICC-01/09-02/11-1032, paras 41 and 49 ("Appeals Chamber Judgment of 19 August 2015"); see also "Decision under article 87(7) of the Rome Statute on the non-compliance by South Africa with the request by the Court for the arrest and surrender of Omar Al-Bashir", 6 July 2017, ICC-02/05-01/09-302, para. 61 ("South Africa Decision").

⁴³ Appeals Chamber Judgment of 19 August 2015, paras 51-53; see also South Africa Decision, para. 61.

surrender on two independent grounds, namely: (i) on account of Omar Al-Bashir's immunity; and/or (ii) as a result of Jordan's "consultations" with the Court on 28 March 2017.

1. *Whether Jordan was entitled not to execute the Court's request for arrest and surrender on the ground of Omar Al-Bashir's immunity*

(a) *The legal basis for Omar Al-Bashir's immunity at the relevant time*

27. Jordan asserts, first, that Omar Al-Bashir enjoys immunity from the exercise of criminal jurisdiction by Jordan on account of his being the Head of State of Sudan. The Chamber agrees that this immunity indeed exists in customary international law. In this respect, the Chamber has recently held

[C]ustomary international law prevents the exercise of criminal jurisdiction by States against Heads of State of other States. This immunity extends to any act of authority which would hinder the Head of State in the performance of his or her duties. The Chamber 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.⁴⁴

28. In addition, Jordan argues that Omar Al-Bashir, when present on Jordanian territory for the purposes of the Arab League Summit of 29 March 2017, benefitted from immunity from arrest also on the basis of article 11 of the 1953 Convention.⁴⁵

29. The Chamber notes that the bearer of any immunity of a representative of a State, as a right of international law, is the State which the individual concerned represents. This is an uncontroversial component of the law of immunities in international law, and is also confirmed by article 14, second paragraph, of the 1953 Convention. It

⁴⁴ South Africa Decision, para. 68.

⁴⁵ Article 11 of the Convention [...] states, in relevant part: "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; [...]", see ICC-02/05-01/09-306-Conf-AnxII, p. 6.

should be clarified that the bearer of the immunity under article 11 of the 1953 Convention, by its terms, are not all parties to the Convention, as apparently argued by Jordan,⁴⁶ and also not the League of Arab States itself. Accordingly, representatives of any Member States of the League of Arab States which are not parties to the 1953 Convention do not enjoy immunities under article 11 of said convention even vis-à-vis those States which are parties to it.

30. On 18 October 2017, Jordan, following a request by the Chamber to be provided with the status of ratification of the 1953 Convention,⁴⁷ presented to the Chamber an official confirmation by the General Secretariat of the Arab League that Jordan is a party to the convention. However, official confirmation that Sudan is a party has not been provided to the Chamber and it is also noted that Jordan's submissions do not include an explicit affirmation that Sudan is a party to the 1953 Convention. Therefore, the Chamber is unable to conclude that it has been established before it that Sudan is a party to the 1953 Convention.
31. Accordingly, the Chamber 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.
32. In any case, the Chamber considers it of benefit to clarify that the considerations laid out below are not applicable only to immunity under customary international law, but also to immunity established by a treaty. Indeed, article 27(2) of the Statute equally applies to treaty-based immunity and excludes the application of article 98(1) of the Statute. As to article 98(2) of the Statute, invoked by Jordan,⁴⁸ the Chamber clarifies that it does not apply to the 1953 Convention. Article 98(2) of the Statute is applicable to "obligations under international agreements pursuant to which the

⁴⁶ ICC-02/05-01/09-301-Conf-Anx, p. 7.

⁴⁷ See above, para. 12.

⁴⁸ See above, para. 17.

consent of a sending State is required to surrender a person of that State to the Court". Conversely, the 1953 Convention, including its article 11, does not refer to a "sending State" and does not establish or refer to a procedure for seeking and providing consent to surrender. The Chamber is therefore unable to subsume the Convention on the privileges and immunities of the League of Arab States under article 98(2) of the Statute.

(b) Effect of article 27(2) of the Statute on immunities based on official capacity

33. As concerns the scope of article 27(2) of the Statute, the Chamber has recently found that it excludes also immunity from arrest.⁴⁹ In its recent decision, the Chamber examined specifically only immunity of Heads of State under customary international law, but, as stated above, the conclusions reached apply equally to any treaty-based immunity from arrest attaching to the official capacity of a person. As also recently found by the Chamber, the effect of article 27(2) of the Statute is two-fold: (i) it prevents States Parties from raising any immunity belonging to it under international law as a ground for refusing arrest and surrender of a person sought by the Court (vertical effect); and (ii) it prevents States Parties from invoking any immunity belonging to them when cooperation in the arrest and surrender of a person to the Court is provided by another State Party (horizontal effect).⁵⁰
34. As there exists no immunity from arrest and surrender based on official capacity with respect to proceedings before the Court where any such immunity would otherwise belong to a State Party to the Rome Statute, article 98(1) of the Statute – in the part in which it addresses situations of possible State or diplomatic immunity preventing the arrest and surrender of an individual – is without object in the scope

⁴⁹ South Africa Decision, paras 74-75.

⁵⁰ *Ibid.*, paras 76-80.

of application of article 27(2) of the Statute.⁵¹ No waiver is required as there is no immunity to be waived.⁵²

35. This regime ordinarily applies only with respect to States Parties to the Statute. Nevertheless, the Statute provides for a particular situation where obligations defined in the Statute may become incumbent upon a State not as a result of its acceptance of the Statute, but as a result of, and under, the Charter of the United Nations.
36. The Court's jurisdiction in the instant case was triggered by Security Council Resolution 1593 (2005), whereby the Security Council, acting under Chapter VII of the Charter of the United Nations, referred the situation in Darfur to the Prosecutor.
37. As recently explained by the Chamber, the effect of a Security Council resolution triggering the Court's jurisdiction under article 13(b) of the Statute is that the legal framework of the Statute applies, in its entirety, with respect to the situation referred.⁵³ Moreover, the Chamber, by majority, has also found previously, in relation to the imposition on Sudan by the Security Council of the obligation to cooperate fully with the Court and provide to it any necessary assistance, that the terms of such cooperation are set by the Rome Statute.⁵⁴ It is acknowledged that this is an expansion of the applicability of an international treaty to a State which has not voluntarily accepted it as such. Nonetheless, this finding is in line with the Charter of

⁵¹ See *ibid.*, para. 81.

⁵² See *id.*

⁵³ *Ibid.*, paras 85-86. See also Pre-Trial Chamber I, The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi, "Decision on the postponement of the execution of the request for surrender of Saif Al-Islam Gaddafi pursuant to article 95 of the Rome Statute", 1 June 2012, ICC-01/11-01/11-163, paras 28-29; Trial Chamber IV, The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus, "Decision on 'Defence Application pursuant to articles 57(3)(b) & 64(6)(a) of the Statute for an order for the preparation and transmission of a cooperation request to the Government of the Republic of the Sudan'", 1 July 2011, ICC-02/05-03/09-169, para. 15; Pre-Trial Chamber I, Situation in Darfur, Sudan, "Decision on Application under Rule 103", 4 February 2009, ICC-02/05-189, para. 31.

⁵⁴ *Ibid.*, paras 87-88.

the United Nations, which permits the Security Council to impose obligations on States.⁵⁵

38. Accordingly, as a result of Security Council Resolution 1593 (2005), the interactions between Sudan and the Court with respect to the Court's exercise of jurisdiction in the situation in Darfur are regulated by the Statute. As recently held by the Chamber, by majority, one consequence of this is that article 27(2) of the Statute applies equally with respect to Sudan, rendering inapplicable any immunity on the ground of official capacity belonging to Sudan that would otherwise exist under international law.⁵⁶
39. The majority of the Chamber therefore considers that this means, in the first instance, that Sudan cannot claim, vis-à-vis the Court, Omar Al-Bashir's immunity as Head of State: Sudan has the obligation to arrest him and surrender him to the Court.⁵⁷ Second, the immunities of Omar Al-Bashir as Head of State do not apply vis-à-vis States Parties to the Statute when they execute a request for arrest and surrender issued by the Court in the exercise of its jurisdiction in the situation in Darfur.⁵⁸ Accordingly, article 98(1) of the Statute is not applicable to the arrest of Omar Al-Bashir and his surrender to the Court: no immunity needs to be waived and States Parties can execute the Court's request for arrest and surrender of Omar Al-Bashir without violating Sudan's rights under international law.⁵⁹ Therefore, States Parties, including Jordan, have the obligation to execute the Court's request for cooperation and arrest Omar Al-Bashir and surrender him to the Court.⁶⁰
40. Following certain submissions by Jordan,⁶¹ the Chamber clarifies, as stated before,⁶² that for this conclusion it is immaterial whether the Security Council intended – or

⁵⁵ See *ibid.*, para. 89.

⁵⁶ *Ibid.*, para. 91

⁵⁷ See *ibid.*, para. 92.

⁵⁸ See *ibid.*, para. 93.

⁵⁹ See *id.*

⁶⁰ See *id.*

⁶¹ ICC-02/05-01/09-301-Conf-Anx, pp. 4-5.

even anticipated – that, by virtue of article 27(2) of the Statute, Omar Al-Bashir’s immunity as Head of State of Sudan would not operate to prevent his arrest sought by the Court in relation to the proceedings in the situation in Darfur referred to the Prosecutor of the Court in Resolution 1593 (2005). As explained, this is a necessary, un-severable, effect of the informed choice by the Security Council to trigger the jurisdiction of this Court and impose on Sudan the obligation to cooperate with it.

41. Finally, while the majority of the Chamber finds, as explained above, that article 98(1) of the Statute does not apply to the situation of Omar Al-Bashir, the Chamber, in any case, emphasises that, contrary to the submission of Jordan,⁶³ this provision provides no rights to States Parties to refuse compliance with the Court’s requests for cooperation. Indeed, as previously found by the Chamber,⁶⁴ article 98 of the Statute addresses the Court, and is not a source of substantive rights (or additional duties) to States Parties. While it does indicate that a tension may exist between the duty of a State Party to cooperate with the Court and that State’s obligation to respect immunities under international law, it leaves to the Court, and not to the State Party, the responsibility to address the matter. The text of rule 195 of the Rules confirms this understanding.

42. Accordingly, the Chamber considers that, in the case at hand, Jordan was not entitled to rely on its own understanding of article 98 of the Statute (whether on its own or in relationship with article 27) to decide unilaterally not to comply with the Court’s request for the arrest of Omar Al-Bashir and his surrender to the Court.⁶⁵ Irrespective of all considerations made above as to the inapplicability under the Statute of immunities on the ground of official capacity, the Chamber notes that the fact that an individual whose arrest and surrender is sought by the Court enjoys diplomatic or

⁶² South Africa Decision, para. 95.

⁶³ ICC-02/05-01/09-301-Conf-Anx, p. 7.

⁶⁴ South Africa Decision, para. 100.

⁶⁵ See *ibid*, para. 102.

State immunities is not as such an exception to the State Parties' duty to cooperate with the Court.⁶⁶

43. Even assuming, for the sake of argument, its existence, such a conflict of obligations would not have relieved Jordan of its duties vis-à-vis the Court, or given it discretion to dispense with such duties.⁶⁷ Article 98 of the Statute simply does not have this effect.⁶⁸ Accordingly, even in this scenario of the applicability of article 98(1) to the situation at hand, Jordan – as a result of having chosen not to give effect to the Court's request for cooperation – would still be found in non-compliance with its obligation to arrest and surrender Omar Al-Bashir to the Court.⁶⁹

(c) Conclusion

44. The Chamber finds, by majority, that because the rights and obligations as provided for in the Statute, including article 27(2), are applicable to Sudan (by imposition of the Security Council acting under Chapter VII of the UN Charter), the immunities of Omar Al-Bashir as Head of State, under customary international law, do not bar States Parties to the Rome Statute from executing the Court's request of his arrest and surrender for crimes under the jurisdiction of the Court allegedly committed in Darfur within the parameters of the Security Council referral. While it has not been established before the Chamber that the 1953 Convention is in force between Sudan and Jordan, the same conclusion would hold also with respect to any immunity of Omar Al-Bashir under article 11 of said convention. Article 98(1) of the Statute is not applicable to the situation of Omar Al-Bashir, and States Parties to the Rome Statute, including Jordan, are under the duty to execute the warrants of arrest issued by the Court, and to implement the Court's request for the arrest of Omar Al-Bashir and his surrender to the Court.

⁶⁶ See *id.*, see also paras 103-105.

⁶⁷ See *ibid.*, para. 106.

⁶⁸ See *id.*

⁶⁹ See *id.*

45. In addition, irrespective of whether Jordan considered itself obliged to respect the immunity of Omar Al-Bashir, it nevertheless had the duty under the Statute to arrest him and surrender him to the Court, as article 98 of the Statute – even if applicable to the present situation – does not foresee the possibility for a requested State Party to unilaterally refuse compliance with a Court’s request for arrest and surrender.

2. Whether Jordan was entitled not to execute the request for arrest and surrender because it had requested consultations with the Court

46. Jordan made the argument that it had “requested consultations with the Court in accordance with article 97 in its note verbale on 28 March 2017, once Jordan received confirmation of President Al Bashir’s attendance of the Summit”, but that, “[u]nfortunately, the request by Jordan under article 97 was never answered by the Court”.⁷⁰ Jordan did not explain how these submissions relate to considerations of the Chamber under article 87(7) of the Statute.

47. In the present case, consultations – *i.e.* exchanges between Jordan and the Court with a view to removing the obstacle to Jordan’s cooperation – did not take place. Moreover, the Chamber does not find merit in Jordan’s argument that the note verbale of 28 March 2017 constituted a request for consultations. The text of the note verbale only refers to consultations when it states that “Jordan is hereby consulting with the ICC under article 97 of the Rome Statute”.⁷¹ The note verbale does not contain any question or call to action addressed to the Court that could enable its being interpreted as a request of any kind. On the contrary, the note verbale is an affirmative statement of Jordan’s arguments and effectively an advance notification of non-compliance. The Chamber also considers that the date when the note verbale was sent to the Court, which is one day before the expected arrival of Omar Al-

⁷⁰ ICC-02/05-01/09-301-Conf-Anx, pp. 7-8.

⁷¹ ICC-02/05-01/09-293-Conf-Anx1-Corr, p. 2.

Bashir to Jordan, is an additional factor militating against the interpretation of the note verbale as a “request for consultations”.

48. In any case, the Chamber underscores that consultations (whether requested or ongoing) between a State and the Court do not, as such, suspend or otherwise affect the validity of the Court’s request for cooperation.⁷² Even more, the availability of a channel for dialogue between the Court and a State Party – irrespective of the form that such dialogue may take – cannot be understood as resulting in a (unilateral) suspension of the execution of a request for cooperation.⁷³ This is particularly important in cases such as the one at hand, where execution of the request for cooperation could succeed only in a narrow window of time.⁷⁴
49. In these circumstances, the Chamber does not consider that Jordan’s submissions under article 97 affect the Chamber’s finding above that Jordan was under the duty to arrest Omar Al-Bashir and surrender him to the Court while he was on Jordanian territory.

3. Conclusion

50. The Chamber concludes that, by not arresting Omar Al-Bashir while he was on its territory on 29 March 2017, Jordan failed to comply with the Court’s request for the arrest and surrender of Omar Al-Bashir contrary to the provisions of the Statute, thereby preventing the Court from exercising its functions and powers under the Statute in connection with the criminal proceedings instituted against Omar Al-Bashir.

⁷² See South Africa Decision, para. 119.

⁷³ See *id.*

⁷⁴ See *id.*

B. Whether a referral of the matter to the Assembly of States Parties and/or the Security Council is warranted

51. The Chamber now turns to the second question before it, namely whether circumstances are such that a formal finding of non-compliance by Jordan and a referral of the matter to the Assembly of States Parties to the Rome Statute and/or the Security Council of the United Nations within the meaning of article 87(7) of the Statute is warranted. Having found that Jordan failed to comply with a request to cooperate issued by the Court contrary to the provisions of the Statute, thereby preventing the Court from exercising its functions and powers under this Statute, the substantive question to be addressed at this juncture is whether it is appropriate to refer this matter to the Assembly of States Parties and/or the Security Council.⁷⁵ This is a separate question from that of whether there has been non-compliance on the part of the requested State. Indeed, as confirmed by the Appeals Chamber, “an automatic referral to external actors is not required as a matter of law”.⁷⁶
52. In addition, the Appeals Chamber has held that, when deciding whether to refer a matter of non-cooperation to the Assembly of States Parties and/or the Security Council of the United Nations, a Chamber “has discretion to consider all factors that may be relevant in the circumstances of the case, including whether external actors could indeed provide concrete assistance to obtain cooperation requested taking into account the form and content of the cooperation”.⁷⁷
53. In the case at hand, the Chamber takes into account the fact that Jordan’s submissions indicate that it did not consider there to be any kind of unclarity as to its

⁷⁵ See, in this regard, Appeals Chamber, *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’”, 19 August 2015, ICC-01/09-02/11-1032, para. 43; see also South Africa Decision, para. 124.

⁷⁶ Appeals Chamber, *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’”, 19 August 2015, ICC-01/09-02/11-1032, para. 49.

⁷⁷ *Ibid.*, para. 53.

obligations vis-à-vis the Court. 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 from the Court anything further that could assist it in ensuring the proper exercise of its duty to cooperate.

54. The Chamber also notes in this regard that at the time of Omar Al-Bashir's presence in Jordan in March 2017, the Chamber 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.⁷⁸ While the Chamber has previously held that the fact that South Africa was the first State Party to approach the Court with a request for consultations militated against a referral of non-compliance, this circumstance does not exist in the case at hand.
55. Accordingly, the Chamber does not consider that there remains anything to be undertaken by the Court and that the case of Jordan's non-compliance should be referred to the Assembly of States Parties and the Security Council.

FOR THESE REASONS, THE CHAMBER HEREBY

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; and

DECIDES that the matter of Jordan's non-compliance with the request for arrest and surrender of Omar Al-Bashir to the Court be referred, through the President of the Court in accordance with regulation 109(4) of the Regulations of the Court, to the

⁷⁸ See ICC-02/05-01/09-243-Anx2; see also "Decision following the Prosecutor's request for an order further clarifying that the Republic of South Africa is under the obligation to immediately arrest and surrender Omar Al Bashir", ICC-02/05-01/09-242.

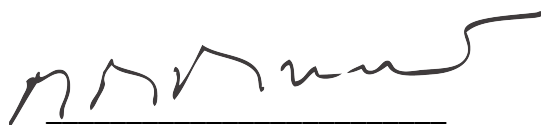
Assembly of States Parties of the Rome Statute and the United Nations Security Council.

Judge Marc Perrin de Brichambaut appends a minority opinion.

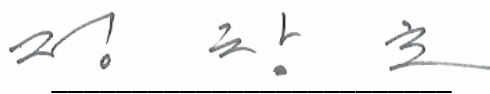
Done in both English and French, the English version being authoritative.



Judge Cuno Tarfusser
Presiding Judge



Judge Marc Perrin de Brichambaut



Judge Chang-ho Chung

Dated 11 December 2017

At The Hague, The Netherlands