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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

The Hashemite Kingdom of Jordan's Notice of Appeal of 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; or, in the Alternative, Leave to Seek Such an Appeal

Source: The Hashemite Kingdom of Jordan

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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Introduction

1. By this pleading, the Hashemite Kingdom of Jordan (“Jordan”) files a notice of appeal, to the Appeals Chamber, of Pre-Trial Chamber II’s “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 or (sic) Omar Al-Bashir” (the “Decision”).¹ In the alternative, if leave from the Chamber is required to file such an appeal, Jordan seeks leave from the Chamber to appeal the Decision.

2. In its Decision, the Chamber found “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 decided “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 Assembly of States Parties of the Rome Statute and the United Nations Security Council”.²

3. Jordan notes that, unlike a similar proceeding with respect to the Republic of South Africa, the Chamber in this instance did not accord to Jordan an opportunity to present its views in a public hearing before the Chamber prior to the issuance of its Decision, nor to provide a written submission in anticipation of such a hearing. Among other things, this resulted in the Chamber moving forward with its Decision without the benefit of Jordan’s full views either with respect to the legal reasoning set forth in the Chamber’s 6 July 2017 decision (upon which the Chamber’s Decision relies heavily) with respect to South Africa’s non-compliance and its non-referral of

¹ *Situation in Darfur, Sudan, 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 or (sic) Omar Al-Bashir”, ICC-02/05-01/09 (11 Dec. 2017) (hereinafter “December 2017 Decision”).

² *Ibid.*, pp. 21-22.

that non-compliance, or with respect to the 13 July 2017 submission by the Prosecutor on Jordan's purported non-compliance and the possibility of a referral (which also relied upon the Chamber's 6 July 2017 decision with respect to South Africa). The purpose of according an "opportunity to fully present" the views of South Africa (and others) at a public hearing before the Chamber was "to obtain all relevant submissions, in fact and in law, with respect to" both the alleged non-compliance with the Rome Statute and "whether circumstances are such that a formal finding of non-compliance by South Africa in this respect and 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 are warranted".³ Yet no such opportunity to fully present the views of Jordan was provided, an outcome that was procedurally unfair and unjustified.

4. By this submission, Jordan provides notice of an appeal of the Decision or, alternatively, if necessary seeks leave to appeal the Decision, on the following four issues ("Issues"):
 - (a) The Chamber erred with respect to a matter of fact in concluding that Sudan was not a party to the 1953 Convention on the Privileges and Immunities of the Arab League ("1953 Convention")⁴ and erred with respect to a matter of law in concluding that Sudan's accession was an essential precondition for Jordan's obligation to give effect to President Al-Bashir's immunity under the 1953 Convention;

³ *Situation in Darfur, Sudan, Prosecutor v. Omar Hassan Ahmad Al Bashir*, "Decision convening a public hearing for the purposes of a determination under article 87(7) of the Statute with respect to the Republic of South Africa", ICC-02/05-01/09 (8 Dec. 2016), paras. 14-15 (hereinafter "South Africa Hearing Decision").

⁴ 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 1955 (hereinafter "1953 Convention").

- (b) The Chamber erred with respect to matters of law in its conclusions regarding the effects of the Rome Statute upon the immunity of President Al-Bashir, including its conclusions that Article 27(2) of the Rome Statute excludes the application of Article 98; that Article 98 establishes no rights for States Parties; that Article 98(2) does not apply to the 1953 Convention; and that even if Article 98 applied it would provide no basis for Jordan not to comply with the Court's request;
 - (c) The Chamber erred with respect to matters of law in concluding that U.N. Security Council resolution 1593 (2005) affected Jordan's obligations under customary and conventional international law to accord immunity to President Omar Hassan Ahmad Al-Bashir; and
 - (d) Even if the Chamber's Decision with respect to non-compliance was correct (*quod non*), the Chamber abused its discretion in deciding to refer such non-compliance to the Assembly of States Parties and the U.N. Security Council.
5. Although these Issues are addressed in greater detail below so as to explain the purpose of the appeal, Jordan intends to provide more detailed factual and legal arguments to the Appeals Chamber, and will seek an opportunity to do so both in writing and at an oral hearing.

Process for Appealing the Chamber's Decision

- 6. The Rome Statute, the Court's Rules of Procedure, and the Regulations of the Court do not directly address the issue of appeal by a State Party of an adverse decision by a Chamber regarding a State Party's non-compliance with the Rome Statute.
- 7. Jordan respectfully submits that the Issues arising from the Chamber's Decision under Part IX of the Rome Statute are appealable by Jordan without seeking leave of

the Chamber. The Chamber's decision was made not in the context of pre-trial, trial or sentencing procedures concerning the accused but, rather, pursuant to Part IX of the Rome Statute, which concerns "International Cooperation and Judicial Assistance." Specifically, the Chamber's decision is based upon Article 87(7) in Part IX, which provides:

Where a State Party fails to comply with a request to cooperate by the Court contrary to the provisions of this Statute, thereby preventing the Court from exercising its functions and powers under this Statute, the Court may make a finding to that effect and refer the matter to the Assembly of States Parties or, where the Security Council referred the matter to the Court, to the Security Council.

8. Given that the Chamber has decided that Jordan has failed to comply with a request to cooperate with the Court, and has decided to refer the matter to the Assembly of States Parties as well as to the Security Council, there are no further proceedings before the Chamber under Part IX in this regard. To the extent that Jordan seeks to contest the Chamber's Decision, its only recourse is by appeal to the Appeals Chamber. As such, Jordan considers itself entitled to appeal the Decision immediately and does not require leave from the Chamber to do so on an interlocutory basis (in other words, prior to the Chamber's final decision under Article 74).

9. Appeals by a State Party of such decisions are not appeals arising under Articles 81 or 82 in Part VIII of the Rome Statute. Those articles address appeals by the "Prosecutor," by a "convicted person", or by a "party" to the case before a Chamber. Jordan falls into none of those categories and, in particular, cannot be regarded as a "party" in the case of *Prosecutor v. Omar Hassan Ahmad Al Bashir*. Specifically, Article 82(1)(d) in Part VIII is not applicable in that it sets a standard for whether either "party" may file an interlocutory appeal; it is not addressing findings reached against a State Party that are, for all intents and purposes, "final" in nature. Jordan submits that numerous other decisions that might be reached by the Court under Parts

IX and X of the Rome Statute are also not properly viewed as only appealable pursuant to Article 82(1)(d) of Part VIII.

10. Likewise, appeals by a State Party of a decision concerning non-compliance and referral are not appeals arising under Rules 154-55 of Chapter 8 of the Court's Rules of Procedure and Evidence. In particular, Rule 155 on "Appeals that require leave of the Court" refers to "[w]hen a party" wishes to appeal a decision, which, again, refers to the parties to the case before the Court, not to a State Party.
11. As the Appeals Chamber has noted, "non-compliance proceedings and proceedings against an accused before the Court are distinct proceedings that involve different parties (States versus an individual) and have different purposes under the Statute (State cooperation versus individual criminal responsibility)".⁵ The two proceedings should not be conflated. Nevertheless, after seeking guidance from the Registry, and being instructed to file this pleading before the Chamber, Jordan has done so without conceding that leave from the Chamber is needed to file this appeal.
12. Alternatively, if the Court views this appeal as falling within Article 82(1)(d) of Part VIII,⁶ each of the Issues set forth above arise from the Chamber's Decision and are consistent with the criteria for leave to appeal set forth in that provision, as well as Rule 155 of the Court's Rules of Procedure and Evidence and Regulation 65 of the Regulations of the Court. Article 82(1)(d) provides that either party may appeal a "decision that involves an issue that would significantly affect the fair and

⁵ *Situation in the Republic of Kenya, 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 OA 5 (19 Aug. 2015), para. 73 (hereinafter "Kenya Judgment").

⁶ *Situation in Darfur, Sudan, Prosecutor v. Omar Hassan Ahmad Al Bashir*, Transcript, ICC-02/05-01/09 (6 July 2017) (Presiding Judge Tarfusser: "The decision, in any case, may only be appealed with the Chamber's authorisation and, therefore, if South Africa wishes, or it will be determined after having read the whole decision, of course, to appeal the decision itself, it must file an application for leave to appeal within five days from the rendering of the decision. And in this application, it has to identify one or more issues arising from the decision which would meet the requirements of Article 82(1)(d) of the Statute".).

expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings”.

13. As discussed in more detail below, the Chamber did not indicate any reason why, based on the particularities of this situation, a referral of its finding of non-compliance to the Assembly of States Parties and to the Security Council would assist in the expeditious conduct of, or would materially advance, its proceedings. Yet presumably the Chamber sees some value for its proceedings in making such a referral and, if so, there is no reason to conclude that the referral must occur immediately based solely on the decision of the Chamber, with an appeal by Jordan to the Appeals Chamber only years later when a trial before the Chamber is completed or the case is dismissed.
14. Rather, whatever value the Chamber sees in such a referral can only be enhanced by appellate review at this stage in the process as to whether non-compliance occurred and whether the decision to make such a referral is not an abuse of discretion. Indeed, a Chamber has previously determined that issues concerning the correctness of a decision on non-compliance and referral of the matter to the Assembly of States Parties constitute appealable issues by the Prosecutor within the standards set by Article 87(1)(d).⁷ Jordan submits that there can be no basis for any different conclusion in this proceeding, where the State Party concerned seeks appeal.

⁷ *Situation in the Republic of Kenya, Prosecutor v. Uhuru Muigai Kenyatta*, “Decision on the Prosecution’s request for leave to appeal”, ICC-01/09-01/11 (9 Mar. 2015), para. 23.

Issues on Appeal

15. There are four issues upon which Jordan appeals, each of which is discussed in greater depth below.
- (a) **Errors in Failing to Regard Sudan as a Party to the 1953 Convention and in Viewing Sudan’s Accession as Required to Establish Immunity under the Convention**
16. In its diplomatic note to the Registry dated June 30, 2017, Jordan expressly argued that “President Al Bashir . . . enjoyed immunity from the criminal jurisdiction of Jordan during his attendance of the Arab summit as a matter of treaty law, pursuant to the 1953 Convention . . .”.⁸ In its December 2017 Decision, the Chamber asserted that “official confirmation that Sudan is a party has not been provided to the Chamber” and 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 established before it that Sudan is a party to the 1953 Convention”.⁹
17. The Chamber has erred as a matter of fact in reaching this conclusion. After Jordan clearly and explicitly argued that Sudan’s President benefited from immunity under the 1953 Convention, the Chamber requested on 18 September 2017 that Jordan “provide the Chamber with an authoritative text of the 1953 Convention on the Privileges and Immunities of the Arab League as well as the status of its ratification, by 18 October 2017”. In its request, the Chamber conveyed no doubts specifically focused upon Sudan’s accession to the 1953 Convention, nor any request that Jordan “explicitly affirm” that Sudan is a party to that Convention. The request for the

⁸ *Situation in Darfur, Sudan, Prosecutor v. Omar Hassan Ahmad Al Bashir*, “Transmission of a note verbale from the Embassy of the Hashemite Kingdom of Jordan dated 30 June 2017”, ICC-02/05-01/09 (30 June 2017), annex, p. 2.

⁹ December 2017 Decision, *supra* note 1, para. 30; *see also ibid.* para. 44 (“it has not been established before the Chamber that the 1953 Convention is in force between Sudan and Jordan”).

“status of its ratification” was understood by Jordan as being a request with respect to Jordan’s accession to the Convention.

18. By diplomatic note of 6 October 2017, Jordan responded fully to the request of the Chamber.¹⁰ Jordan submitted to the Chamber a complete and certified copy in Arabic of the 1953 Convention which Jordan obtained from the General Secretariat of the Arab League (Department of Legal Affairs: Treaty and International Law Directorate).¹¹ Further, the Note Verbale from the General Secretariat of the League of Arab States confirmed that Jordan acceded to the Convention in 1953, thereby responding directly to what Jordan understood to be the Chamber’s request.¹²
19. To the extent that the Chamber wished to check on the status of Sudan as a party to the 1953 Convention, the materials submitted by Jordan fully enabled it to do so. The first page of the Arabic text of the Convention indicates, in the first footnote, the States that have deposited instruments of accession with the General Secretariat, including Sudan on 30 October 1977.¹³ As such, it was factually incorrect for the Chamber to have concluded that “official confirmation that Sudan is a party has not been provided to the Chamber” and factually incorrect to conclude that Sudan is not a party to the 1953 Convention. For reasons unknown to Jordan, the English translation prepared by the Registry of the materials provided by Jordan contains in the first footnote only a partial list of the parties to the 1953 Convention.¹⁴ Jordan cannot, however, be bound by a mistranslation by the Court.

¹⁰ *Situation in Darfur, Sudan, Prosecutor v. Omar Hassan Ahmad Al Bashir*, “Transmission of a note verbale from the Embassy of the Hashemite Kingdom of Jordan dated 6 October 2017”, ICC-02/05-01/09 (18 Oct. 2017).

¹¹ *Ibid.*, annex I.

¹² *Ibid.*

¹³ *Ibid.*, p. 44.

¹⁴ *Ibid.*, annex II, p. 44.

20. If the Chamber had any doubt concerning Sudan's accession to the 1953 Convention, which is a matter of public record, it could – and should – have made further enquiries of Jordan or of the Depositary.
21. The Chamber also erred as a matter of law in addressing this issue, in that Sudan's accession to the 1953 Convention is not in fact an essential precondition for the existence of Jordan's obligation to accord President Al-Bashir immunity under that convention. The overall purpose of the 1953 Convention is to facilitate for the League of Arab States the exercise of its functions in the territories of Member States,¹⁵ while the purpose in according privileges and immunities under Chapter IV of the Convention to "representatives of Member States" of the League (of which Sudan is indisputably one) is "to safeguard the independent exercise of their functions in connection with the League".¹⁶ Consequently, Jordan's obligations to accord such privileges and immunities exist whether or not Sudan is a party to the 1953 Convention, as those obligations are owed to the League by virtue of Jordan's accession regardless of Sudan's accession.
22. The Chamber's errors are material, given that a central argument of Jordan is that it was under a treaty obligation to accord immunity to President Al Bashir during his visit to Jordan in March 2017. Having decided that Sudan's accession was required and that Sudan was not a party to the 1953 Convention, the Chamber stated that it "cannot further consider Jordan's argument that Omar Al-Bashir, when on Jordanian territory in March 2017, benefitted from immunity from arrest under article 11 of the 1953 Convention."¹⁷ As such, based on errors of fact and law, the Chamber failed to properly consider Jordan's argument.

¹⁵ See 1953 Convention, *supra* note 4, at pmb1.

¹⁶ *Ibid.* art. 14.

¹⁷ December 2017 Decision, *supra* note 1, para. 31.

(b) **Errors in the Interpretation of the Effects of the Rome Statute, Including Articles 27(2) and 98, on the Immunity of President Al-Bashir**

23. The Chamber found that “article 27(2) of the Statute . . . excludes the application of article 98(1) of the Statute”.¹⁸ Further, it found that Article 98(1) “provides no rights to States Parties to refuse compliance with the Court’s requests for cooperation”.¹⁹ Article 98(1) of the Rome Statute precludes the Court from proceeding with a request for surrender if doing so “would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State”, in the absence of waiver of the immunity by the third State.
24. The Chamber also found that Article 98(2) “does not apply to the 1953 Convention”.²⁰ Article 98(2) also precludes the Court from proceeding with a request for surrender if doing so “would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court”, in the absence of consent of the sending State. According to the Chamber, Article 98(2) does not apply to the 1953 Convention because it “does not refer to a ‘sending State’ and does not establish or refer to a procedure for seeking and providing consent to surrender”.²¹
25. More generally, the Chamber found that “the fact that an individual whose arrest and surrender is sought by the Court enjoys diplomatic or State immunities is not as such an exception to the State Parties’ duty to cooperate with the Court”.²² Even if Article 98 applies, the Chamber found that “Jordan – as a result of having chosen not to give

¹⁸ *Ibid.*, para. 32.

¹⁹ *Ibid.*, para. 41.

²⁰ *Ibid.*, para. 32.

²¹ *Ibid.*

²² *Ibid.*, para. 42.

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”.²³

26. These findings with respect to the effects of the Rome Statute, and in particular of Articles 27 and 98, are incorrect as a matter of law. For example, it is incorrect as a matter of law to conclude that Article 98(2) is inapplicable to any international agreement that lacks the term “sending State”. Chapter IV of the 1953 Convention, and in particular Article 11, squarely addresses the situation of the representatives of a Member State “journeying” to and from conferences convened by the League, and their immunity from personal arrest or detention in “the place of meeting”. To say that such provisions are irrelevant to Article 98(2) because they lack the express term “sending State” is an unsustainably restrictive reading, resulting from a failure to apply properly the rules set forth in articles 31 and 32 of the Vienna Convention on the Law of Treaties.
27. Likewise, it is incorrect as a matter of law to conclude that Article 98(2) is inapplicable to any international agreement that “does not establish or refer to a procedure for seeking and providing consent to surrender”. Aside from also being an unsustainably restrictive reading, Article 14 of the 1953 Convention expressly addresses the circumstances under which the Member State of the representative must waive immunity.
28. In support of its findings, the Chamber relied heavily²⁴ upon its own decision with respect to non-compliance by South Africa.²⁵ Since that decision was rendered on 6 July 2017, Jordan’s submissions to the Chamber on June 30, 2017 do not address the

²³ *Ibid.*, para. 43.

²⁴ *Ibid.*, paras. 27, 33-35.

²⁵ See *Situation in Darfur, Sudan, 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 (6 July 2017), paras. 74-83, 98-106 (hereinafter “South Africa Final Decision”).

legal analysis contained therein. On appeal, Jordan will explain why the Chamber erred in regarding Article 27(2) as opposable to a non-State Party, why Article 27(2) in any event does not exclude the application of Article 98, why Article 98(2) does apply to the 1953 Convention, why the involvement of an international court does not affect the application of the rule of customary international law regarding the personal immunity of a Head of State in the relationship between States, and other related matters.

(c) Errors in Concluding that U.N. Security Council Resolution 1593 Altered Jordan’s Obligations to Accord Immunity

29. In its Decision, the Chamber noted that 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”.²⁶ As a consequence, the Chamber concluded that “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”.²⁷
30. Further, the Chamber concluded that the Security Council “expanded” the application of cooperation provisions of the Rome Statute to a non-State Party,²⁸ and 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”.²⁹ Among other things, this means that “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”.³⁰ By contrast, one

²⁶ December 2017 Decision, *supra* note 1, para. 36.

²⁷ *Ibid.*, para. 37.

²⁸ *Ibid.*

²⁹ *Ibid.*, para. 38.

³⁰ *Ibid.*, para. 39.

member of the Chamber was “not persuaded by the analysis underpinning the Majority’s decision with regard to the legal basis for the removal of Omar Al Bashir’s immunity”.³¹

31. The Chamber’s findings are incorrect as a matter of law. In support of its findings, the Chamber again relied heavily upon its own decision with respect to non-compliance by South Africa.³² Since that decision was rendered on 6 July 2017, Jordan’s submissions to the Chamber on June 30, 2017, do not address the legal analysis contained therein. On appeal, Jordan will explain, among other things, why the Chamber erred in concluding that the Security Council’s intent with respect to its referral “is immaterial”³³; why the triggering of the Court’s jurisdiction does not inescapably result in the application of Article 27(2) to a non-State Party nor the inapplicability of Article 98; and why the Council’s action did not impose upon Jordan an obligation to execute the Court’s request that President Al-Bashir be arrested and surrendered to the Court.

(d) Chamber’s Abuse of Discretion in Deciding to Refer this Matter

32. In addition to finding that Jordan failed to comply with its obligations under the Statute, the Chamber decided that “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 Assembly of States Parties of the Rome Statute and the United Nations Security Council”.³⁴

³¹ December 2017 Decision, *supra* note 1, Minority Opinion of Judge Marc Perrin de Brichambaut, para. 2.

³² See South Africa Final Decision, *supra* note 25, paras. 84-97.

³³ December 2017 Decision, *supra* note 1, para. 40.

³⁴ *Ibid.* pp. 21-22.

33. For the reasons indicated above, Jordan did not fail to comply with its obligations under the Statute. Even assuming *arguendo* that Jordan did fail to comply, the Appeals Chamber should set aside the Chamber's decision on referral.
34. The decision of whether to refer a finding of non-compliance is a discretionary, not mandatory, decision. The Appeals Chamber has stated that it will disturb the exercise of a Chamber's discretion "where it is shown that an error of law, fact or procedure was made".³⁵ Specifically, "it will correct an exercise of discretion in the following broad circumstances, namely where (i) it is based upon an erroneous interpretation of the law; (ii) it is based upon a patently incorrect conclusion of fact; or (iii) the decision amounts to an abuse of discretion".³⁶
35. Jordan will argue to the Appeals Chamber that the Chamber decided upon the referral based on errors of both fact or law. With respect to an incorrect conclusion of fact, the Appeals Chamber will not interfere "unless it is shown that the Chamber committed a clear error, namely, misappreciated the facts, took into account irrelevant facts or failed to take into account relevant facts".³⁷ With respect to "an exercise of discretion based upon an alleged erroneous interpretation of the law, the Appeals Chamber will not defer to the relevant Chamber's legal interpretation, but will arrive at its own conclusions as to the appropriate law and determine whether or not the first instance Chamber misinterpreted the law".³⁸
36. Further, Jordan will argue to the Appeals Chamber that the Chamber's referral amounts to an abuse of discretion. The Appeals Chamber has stated that:

Even if an error of law or of fact has not been identified, an abuse of discretion will occur when the decision is so unfair or unreasonable as to "force the conclusion that the Chamber failed to exercise its discretion judiciously". The

³⁵ See Kenya Judgment, *supra* note 5, para. 22.

³⁶ *Ibid.*

³⁷ *Ibid.*, para. 24.

³⁸ *Ibid.*, para. 23.

Appeals Chamber will also consider whether the first instance Chamber gave weight to extraneous or irrelevant considerations or failed to give weight or sufficient weight to relevant considerations in exercising its discretion.³⁹

37. Jordan's arguments with respect the Chamber's abuse of discretion will be that the referral decision is unfair, unreasonable, and failed to give weight to relevant considerations in exercising its discretion. In its brief discussion of whether to refer the matter,⁴⁰ the Chamber identified just two factors: (1) that Jordan did not comply with the Court's request;⁴¹ and (2) 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".⁴²
38. The first factor alone cannot support a decision of referral. The Appeals Chamber has stated that a decision of non-compliance does *not* result in an automatic referral,⁴³ and for the Chamber to proceed on that basis – especially when such an approach is not taken by any other Chamber – is unfair, unreasonable, and a failure to take into account relevant considerations when exercising its discretion. Rather, 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

³⁹ *Ibid.*, para. 25 (citations omitted).

⁴⁰ December 2017 Decision, *supra* note 1, paras. 51-55.

⁴¹ *Ibid.*, para. 53.

⁴² *Ibid.*, para. 54.

⁴³ Kenya Judgment, *supra* note 5, para. 49 ("the Appeals Chamber considers that, it is clear that Pre-Trial Chambers consistently consider the appropriateness of a referral to the ASP or UNSC when deciding upon an application for a finding of non-compliance and referral pursuant to article 87 (7) of the Statute, even when it had already confirmed a failure to comply with a cooperation request. As indicated above, the Appeals Chamber is of the view that these interpretations are supported by the wording of article 87 of the Statute and holds therefore that an automatic referral to external actors is not required as a matter of law. Furthermore, the Appeals Chamber is not persuaded that such automatic referral would be beneficial as a matter of policy as contended by the Prosecutor").

concludes that it is the most effective way of obtaining cooperation in the concrete circumstances at hand”.⁴⁴ The Chamber itself has acknowledged this in the context of proceedings with respect to South Africa, stating that it “should therefore consider whether engaging external actors would, in the circumstances of the case, be an effective way to obtain cooperation”.⁴⁵

39. Yet that is exactly what the Chamber has not done with respect to Jordan. For example, the 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 at this time will make any difference whatsoever with respect to the proceedings before the Chamber, given that President Al-Bashir is no longer in Jordan. In other words, having concluded that Jordan was in non-compliance, exactly what is gained by the Chamber now seeking further action from either the Assembly of States Parties or the Security Council? If the objective is to impose some sort of punishment of Jordan, then such motivation by the Chamber is blatantly unfair, unreasonable and, indeed, unlawful.
40. The second factor also cannot support a decision of referral. The Chamber does not explain why a finding of non-compliance of South Africa has any relevance with respect to a referral of non-compliance by Jordan. Even if one were to assume that Jordan was “on notice” that the Chamber had expressed that South Africa was obligated to arrest President Al-Bashir, there is no obvious reason why that fact alone would support a need to refer Jordan’s non-compliance to the Assembly of States Parties or to the Security Council.

⁴⁴ *Ibid.*, para. 51.

⁴⁵ South Africa Final Decision, *supra* note 25, para. 135.

41. Moreover, the Chamber had *not*, as of March 2017, “expressed in unequivocal terms that” South Africa had failed to comply with its obligations under the Rome Statute. Quite to the contrary, the 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 . . .”.⁴⁶ The hearing was scheduled for April 2017. If the Chamber was still conducting a proceeding in March 2017 (when President Al-Bashir visited Jordan) to “determine” based on submissions “in fact and in law” whether “South Africa failed to comply with its obligations”, then it is demonstrably clear that the Chamber had *not* as of that time “expressed in unequivocal terms that” South Africa had failed to comply with its obligations under the Rome Statute.⁴⁷ For the Chamber to find otherwise in its Decision is manifestly unfair and unreasonable.
42. Finally, with respect to the second factor, the Chamber’s distinction as between the position of South Africa and the position of Jordan is also manifestly unfair and unreasonable. Prior to President Al-Bashir’s visit to South Africa, the Presiding Judge of the Chamber apparently informed South African representatives, at a meeting on 12 June 2015, “that: (i) all of the issues tabled by South Africa had already been decided upon by the Court; and (ii) the consultations had no suspensive effect on South Africa’s outstanding obligations under the Statute to cooperate with the

⁴⁶ South Africa Hearing Decision, *supra* note 2, para. 15.

⁴⁷ Even after that hearing, one judge of the Trial Chamber itself concluded that “these submissions do not allow for a firm conclusion to be reached with regard to the question of whether or not Sudan is analogous to a State Party to the Statute pursuant to the referral of the situation in Darfur to the Court by the UN Security Council” and that “the current state of the law does not allow a definitive answer to be reached in relation to the question of whether [Security Council resolution 1593] removes the immunities of Omar Al Bashir, contrary to the Majority’s position in relation to this matter”. *See* South Africa Final Decision, *supra* note 25, Minority Opinion of Judge Marc Perrin de Brichambaut, paras. 58, 83.

Court”.⁴⁸ Further, on 13 June 2015, the Presiding Judge issued a decision “stating that there was no need for any additional reminder to South Africa or further clarification as regards the existence of its obligation to immediately arrest and surrender Omar Al Bashir to the Court”.⁴⁹ As such, South Africa was fully “on notice” in advance of President Al-Bashir’s visit as to the Chamber’s legal views with respect to South Africa’s cooperation with the Court.

43. Despite this, President Al-Bashir visited South Africa on 13-15 June 2015 and was neither arrested nor surrendered to the Court by South Africa. Even so, the Chamber, after finding in July 2017 that South Africa had failed to comply with its obligations under the Statute, decided not to refer the matter to the Assembly of States Parties or to the Security Council.
44. By contrast, the Chamber decided that Jordan’s non-compliance in March 2017 should be referred because “the Chamber had already expressed in unequivocal terms that” South Africa had an obligation to arrest and surrender President Al-Bashir. By what means had the Chamber made such views known? *By a transcript of the meeting with South Africa on 12 June 2015 and by the Chamber’s decision regarding South Africa on 13 June 2015.*⁵⁰
45. In other words, the Chamber’s legal views of 12-13 June 2015 had been “unequivocally expressed” directly to South Africa prior to President Al-Bashir’s visit to South Africa, but that fact did not merit referral of South Africa’s non-compliance. Yet those *very same legal views*, which were not expressed directly to

⁴⁸ South Africa Hearing Decision, *supra* note 3, para. 5.

⁴⁹ *Ibid.* (referring to *Situation in Darfur, Sudan, Prosecutor v. Omar Hassan Ahmad Al Bashir*, “Decision following the prosecutor’s request for an order further clarifying that the Republic of South Africa is under an obligation to immediately arrest and surrender Omar Al Bashir”, ICC-02/05-01/09 (13 June 2015)).

⁵⁰ See December 2017 Decision, *supra* note 1, para. 54, n. 78.

Jordan,⁵¹ were viewed by the Chamber as meriting referral of Jordan's non-compliance. Such differential treatment of like circumstances is, almost by definition, unfair and unreasonable.

46. The Chamber also suggested that differential treatment was warranted because "South Africa was the first State Party to approach the Court with a request for consultations".⁵² Yet that fact alone is no reason to refrain from referring South Africa's non-compliance while referring that of Jordan; indeed, having a referral decision turn on which State (South Africa or Jordan) first sought consultations is completely arbitrary. If anything, the salient issue might be the date that the first challenge with respect to alleged non-compliance concerning President Al-Bashir was definitively addressed by the Chamber. That challenge was indeed brought by South Africa, but it was only definitively addressed by the Chamber in July 2017, months after the visit of President Al-Bashir to Jordan. As such, it is not a basis for distinguishing between South Africa and Jordan with respect to the referral of a decision of non-compliance.
47. The Chamber's abuse of discretion is also apparent in its failure to give any weight to relevant considerations. For example, with respect to its decision regarding a possible referral of South Africa's non-compliance, the Chamber considered favorably "South Africa's request to consult with the Court under article 97 of the Statute", finding that it "distinguishes the conduct of South Africa from that of other States that, in the past,

⁵¹ It is striking that the Trial Chamber's principal citation for where it had "expressed in unequivocal terms" South Africa's obligation is to a "confidential annex" containing the transcript of the meeting between the Trial Chamber and representatives of South Africa on 12 June 2015. See *ibid.* (citing to ICC-02/05-01/09-243-Anx2). This confidential annex apparently was then declassified more than a year later by the Court. The Trial Chamber does not explain why Jordan should be presumed to be aware of such information prior to the visit of President Al-Bashir.

The Trial Chamber's secondary citation, *ibid.* (citing to ICC-02/05-01/09-242), refers to the brief decision it issued on 15 June 2015, the minimalist legal reasoning of which (focused on an implicit waiver of immunity by the Security Council) is completely different from the legal reasoning set forth in its final decision of July 2017 concerning South Africa's compliance.

⁵² *Ibid.*, para. 54.

have been involved in proceedings under article 87(7) of the Statute”.⁵³ Yet in its Decision, the Chamber failed to take any account of Jordan’s good faith consultations with the Court prior to the visit of President Al-Bashir, whereby Jordan explained the factual and legal situation it was facing, and stated that it was “hereby consulting with the ICC under article 97 of the Rome Statute . . .”.⁵⁴

48. In its Decision, the Chamber also failed to give any consideration to the likelihood of any action by the Assembly of States Parties or the Security Council in the event that a referral was made. With respect to its decision concerning South Africa in July 2017, the Chamber noted the following:

[T]he Chamber observes that States Parties have been referred to both the Assembly of States Parties and the United Nations Security Council in six instances in relation to failures to arrest and surrender Omar Al-Bashir. However, the past 24 meetings of the Security Council of the United Nations following the adoption of Resolution 1593 (2005), including meetings held on the occasion of the biannual reports made by the Prosecutor to the Security Council of the United Nations, have not resulted in measures against States Parties that have failed to comply with their obligations to cooperate with the Court, despite proposals from different States to develop a follow-up mechanism concerning the referral of States to the Security Council by the Court. The Chamber considers that these considerations further strengthen its belief that a referral of South Africa is not warranted as a way to obtain cooperation.⁵⁵

49. Yet in its decision just five months later to refer Jordan’s non-compliance, the Chamber is silent with respect to any such consideration. Failure to give any weight to relevant considerations of this type, as well as the differential treatment in like circumstances, is a manifest abuse of the Chamber’s discretion.

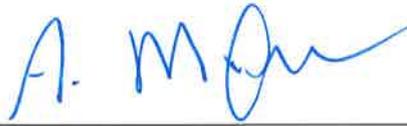
⁵³ South Africa Final Decision, *supra* note 25, para. 127.

⁵⁴ *Situation in Darfur, Sudan, Prosecutor v. Omar Hassan Ahmad Al Bashir*, “Report of the Registry on additional information received regarding Omar Al Bashir’s potential travel to the Hashemite Kingdom of Jordan”, ICC-02/05-01/09 (28 Mar. 2017), annex, p. 1.

⁵⁵ South Africa Final Decision, *supra* note 25, at para. 138 (citations omitted).

Relief Sought

50. For the reasons indicated above, Jordan hereby gives notice of an appeal of the Chamber's Decision of 11 December 2017 or, if leave is required, requests the Chamber to grant it leave to appeal the Decision on the above four Issues.



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

Dated 18 December 2017

At The Hague, The Netherlands

