



SUMMARY

Judgment of the Appeals Chamber

in

The Prosecutor v Al-Bashir

read by

Judge Eboe-Osuji

Presiding

The Hague, 6 May 2019

1. This is a non-authoritative summary of the Appeals Chamber’s judgment in the appeal of the Hashemite Kingdom of Jordan [called ‘Jordan’ from now on] against the decision of Pre-Trial Chamber II, issued on 11 December 2017. That decision is informatively titled ‘**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 o[f] Omar Al-Bashir**’.

2. In a familiar parlance of this Court, I will – from time to time – refer to that decision as the ‘Impugned Decision’.

A. Background of the Appeal Proceedings

3. We begin with the background.

4. At all times material to this appeal, Sudan was not a State Party to the Statute of the International Criminal Court, popularly known as the ‘Rome Statute’. But, it was a Member State of the United Nations, and was bound as such by the UN Charter.

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

6. **Finally**, on 31 March 2005, the UN Security Council adopted yet another resolution: resolution 1593 (2005). They adopted it on the basis of their powers under

Chapter VII of the UN Charter. In that resolution, the Security Council referred the situation in Darfur to the Prosecutor of the ICC.

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

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

9. On 12 July 2010, a second warrant of arrest was also issued against him. What was special about that second arrest warrant was that it concerned the new charge of genocide.

10. The warrants of arrest, together with requests for the arrest and surrender of Mr Al-Bashir to the Court, were notified to all the Rome Statute States Parties — including Jordan.

11. In the meantime, Mr Bashir visited a number of States Parties to the Rome Statute, but they did not arrest him. This resulted in a series of Pre-Trial Chamber decisions on whether or not to refer these States to the Assembly of States Parties and the UN Security Council. As mentioned in the judgment in the context of certain discussions, those States Parties include Chad, the Democratic Republic of the Congo, Djibouti, Malawi, South Africa and Uganda.

12. In March 2017, Jordan hosted the twenty-eighth (28th) Summit of the League of Arab States in Amman. Mr Al-Bashir attended the summit on 29 March 2017. Jordan did not arrest and surrender Mr Al-Bashir while he was in Jordan. That is why we are here.

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

14. Article 98(1) says this: *'The Court may not proceed with a request for surrender or assistance which 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, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.'*

15. And, article 98(2) says this: *'The Court may not proceed with a request for surrender which 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, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.'*

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16. Following the Arab League Summit in Jordan, Pre-Trial Chamber II issued the Decision that is now under appeal. In that decision, the majority of the Pre-Trial Chamber held: (1) that Jordan had failed to comply with its obligations under the Statute; and, consequently, (2) that Jordan's non-compliance should be referred to the Assembly of States Parties and to the UN Security Council, in accordance with article 87(7) of the Rome Statute, which allows such a referral.

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

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

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19. On 21 February 2018, the Pre-Trial Chamber granted Jordan's request for leave to appeal the Decision. In granting leave, the Pre-Trial Chamber certified three questions for consideration of the Appeals Chamber. The issues boil down to these:

- i. Whether the Pre-Trial Chamber was wrong to find that the Rome Statute precluded immunity for Mr Al-Bashir as Sudan's Head of State, in any way that excuses Jordan's failure to comply with the Court's request to arrest and surrender him;
- ii. Whether the Pre-Trial Chamber was wrong to find that Security Council resolution 1593 (2005) negated any obligation that Jordan may have under international law to accord immunity to Mr Al-Bashir as Sudan's Head of State; and
- iii. Whether the Pre-Trial Chamber's decision to refer Jordan to the Assembly of States Parties and to the Security Council for non-compliance with the Court's request was, in any event, an erroneous exercise of the discretion to do so.

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20. Appeal briefs were duly filed by Jordan, the Prosecutor, and the Counsel for Victims; as well as by the Arab League, the African Union and a number of legal scholars who had been invited to participate in the proceedings, in the capacity known as 'friends of the court'. States and the UN had also been invited to participate in the discussion, but none of them took up the invitation.

21. The Appeals Chamber received oral arguments in hearings that took place from 10 to 14 September 2018.
22. Following the hearings, the Appeals Chamber invited the parties and participants to file further written submissions on salient issues that might not have been addressed – or addressed fully – in writing or in oral submissions.
23. The Appeals Chamber had also invited the competent authorities of Sudan and Mr Al-Bashir to participate in the proceedings, and express their views. But they did not take up the invitation.
24. This is the background.
25. Now, to the Judgment.

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B. Overview of the Appeals Chamber's Judgment

26. The Judgment of the Appeals Chamber is unanimous on the first two grounds of the appeal. This is notwithstanding that 4 out of the 5 Judges of the Appeals Chamber (Judge Morrison, Judge Hofmański, Judge Bossa and I) also append a JOINT OCCURRING OPINION, to amplify the reasons for judgment on those two grounds. It is recalled that these are the grounds concerning the essential question whether Mr Al-Bashir enjoyed immunity in international law – notwithstanding or in view of (a) the Rome Statute, or (b) Security Council resolution 1593 (2005) – such as would require the Court to obtain a waiver of that immunity before requesting Jordan to arrest Mr Al-Bashir.

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

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C. First and Second Grounds of Appeal

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

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

30. With respect to UN Security Council resolution 1593 (2005), Jordan first argued that the Pre-Trial Chamber erred in finding that the resolution imported the application of the entirety of the Rome Statute to the situation in Darfur. Jordan's complaint is that the Pre-Trial Chamber's finding means that article 27 of the Rome Statute would apply to trouble the availability of immunity. In that regard, Jordan argued that the Pre-Trial Chamber erred in finding that Sudan, although not a State Party to the Rome Statute, labours nonetheless under the same obligations that the Rome Statute imposes upon its States Parties. Meaning that article 27(2) which binds States Parties to that Statute, by

removing the immunity of their Heads of State, would also bind Sudan which is not a State Party to the Rome Statute.

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

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

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

CUSTOMARY INTERNATIONAL LAW

34. One central question that dominated the discussion in this appeal is this. Even as a matter of interpretation of the Rome Statute, does customary practice – accepted as law – in relations amongst nations – otherwise known as customary international law – recognise immunity for Heads of State, which immunity may be asserted to bar this Court from the exercise of its proper jurisdiction?

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

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36. The Appeals Chamber notes that the Head of State immunity, which Jordan asserts at the instance of Sudan, is based on a manner of immunity that is clearly

accepted under customary international law in certain circumstances. That immunity prevents one State from exercising its criminal jurisdiction over the Head of State of another State. It is based on the principle of sovereign equality of States. And States being equal, no sovereign may assert jurisdiction over an equal. The principle is usually captured in the Latin maxim – par in parem non habet imperium [amongst equals, none may exercise dominion].

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37. But, there is a clear provision in the Rome Statute that precludes immunity before the Court. As indicated earlier, it is article 27(2). It is certainly correct to see that provision in its own form, as a provision in a treaty that binds the parties to it.

38. The Appeals Chamber finds, however, that the provision represents more than a stipulation in treaty law. The provision also reflects the status of customary international law, as it concerns the jurisdiction that an international criminal court is properly entitled to exercise. In that regard, the Appeals Chamber finds that there is neither State practice nor an impelled sense of such a practice as law, which would support the existence of Head of State immunity under customary international law, in relation to an international criminal court in the exercise of its proper jurisdiction. No submission was made orally or in writing such as would contradict the Appeals Chamber's own findings as indicated — although the Appeals Chamber had invited submissions on the point. Accordingly, the Appeals Chamber has not found that customary international law preserves any immunity that afforded Jordan an excuse to decline the request of the Court for the arrest and surrender of Mr Al-Bashir.

39. In this regard, the Appeals Chamber is fully satisfied that the pronouncements made by the Pre-Trial Chamber I in the Malawi Referral Decision — and those made by the Appeals Chamber of the Special Court for Sierra Leone in the case of Charles Taylor (who was indicted before that international court when he was the sitting President of Liberia) — have adequately and correctly confirmed the absence of a rule of customary international law recognising Head of State immunity before international courts in the exercise of proper jurisdiction.

40. The effect of absence of a rule of customary law recognising Head of State immunity, in relation to international courts, is not readily avoided through the backdoor: by asserting immunity that operates in the horizontal relationship between States, in a manner that would effectively bar an international court from exercising its jurisdiction over the person whose arrest and surrender it has requested. The law does not readily condone to be done through the back door something it forbids to be done through the front door.

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SECURITY COUNCIL AND THE ICC

41. I now turn especially to the effect of UN Security Council resolution 1593 (2005), concerning whether Sudan could invoke Head of State immunity in relation to the warrants of arrest that the Court issued against Mr Al-Bashir for alleged international crimes in the situation in the Darfur region of Sudan.

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

43. As such, resolution 1593 is a decision of the UN Security Council that is binding upon all UN Members States according to the applicable provisions of the UN Charter — whether or not those UN Member States are also Parties to the Rome Statute.

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

45. Moreover, the Appeals Chamber considers that the obligation of full cooperation in accordance with the Statute encompasses all those obligations that States Parties owe to the Court, which are necessary for the Court's effective exercise of jurisdiction. Those obligations include those that merge into article 27(2); ensuring that immunities that Sudan may otherwise enjoy under international law, as a matter of its relations with another State, cannot bar the Court's effective exercise of jurisdiction.

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46. Since Sudan could not legally rely on the Head of State immunity of Mr Al-Bashir, the Appeals Chamber considers that there was no need for the Court to obtain the waiver of immunity from Sudan before it could proceed with a request to Jordan for Mr Al-Bashir's arrest and surrender, in accordance with article 98(1) of the Statute. That is to say, there was no immunity that needed to be waived. The Pre-Trial Chamber committed no error in that regard.

47. Similarly, the Appeals Chamber is not persuaded by Jordan's arguments alleging error on the part of the Pre-Trial Chamber in finding that article 98(2) of the Statute holds no accommodation for the 1953 Arab League Convention on Privileges and Immunities.

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

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49. Finally, the Appeals Chamber notes that both Jordan and Sudan are parties to the Convention against Genocide. Article I of that Convention provides that the parties to it *'undertake to prevent and punish'* the crime of genocide. Thus, in view of the allegation of genocide engaged in the second warrant of arrest, Jordan was under an obligation to cooperate in the arrest and surrender of Mr Al-Bashir at the request of the Court; not only because Jordan is a State Party to the Rome Statute, but also by virtue of its being party to the Convention against Genocide.

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50. All the findings of the Appeals Chamber that I have laid out so far, dealing with the first two grounds of the appeal, are the unanimous findings of all the judges.

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D. Third Ground of Appeal

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

52. In previous jurisprudence, the Appeals Chamber has examined that provision. In that regard, the Appeals Chamber noted that the exercise of discretion under the provision is subject to 'a factual prerequisite that needs to be met'. This requires that the

cooperation request that was not complied with must concern a matter 'of a certain gravity'.

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

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

55. And here we recall the two arrest warrants that were respectively issued on 4 March 2009 and 12 July 2010. They were issued by the Pre-Trial Chamber on the basis of the power to do so under article 58 of the Rome Statute. A warrant of arrest, alongside its alternative of summons to appear, serves the function of securing the presence of the suspect before the Court. It thus engages an important power that serves a fundamental function of the Court. This is particularly so when the Pre-Trial Chamber has decided that an arrest warrant is the more appropriate means of securing presence before the Court.

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

57. It is the finding of the Appeals Chamber that by failing to arrest and surrender Mr Al-Bashir, in circumstances in which Mr Al-Bashir was entitled to no immunity, Jordan prevented the Court from exercising an important power and a fundamental function. As a result, Pre-Trial Chamber II was correct in concluding that Jordan's non-compliance prevented the Court from exercising its functions and powers under the Statute.

58. The Appeals Chamber is unanimous in that finding.

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

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

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

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

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

64. In this case, the majority of the Appeals Chamber is persuaded by Jordan's argument that their Note Verbale of 28 March 2017 constituted a request for consultations with the Court in terms of article 97 of the Statute. Judge Ibáñez and Judge Bossa dissent.

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

66. In addition, the Appeals Chamber finds (Judge Ibáñez and Judge Bossa dissenting) that Jordan's Note Verbale of 28 March 2017 need not be seen as an 'advance notification of non-compliance'. It is enough to see it as Jordan's way of identifying Head of State immunity, and the lack of its waiver by Sudan, as perceived impediments to the request for Mr Al-Bashir's arrest and surrender, in relation to which consultations should take place. While it would be better for a State to approach the consultation process in an unequivocal manner of asking questions in need of resolution, the failure to follow that approach is not necessarily inconsistent with an

intention to engage in consultation. A State may indeed approach the consultation process in the manner of stating a preliminary position that it sees as posing an obstacle to cooperation, thus engaging the question to be resolved. The Appeals Chamber therefore finds, Judge Ibáñez and Judge Bossa dissenting, that Jordan's failure to put questions to the Pre-Trial Chamber, choosing rather to set out its own legal position in the Note Verbale of 28 March 2017, did not preclude a view of the encounter as an attempt to engage in consultations.

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

68. The Appeals Chamber therefore finds, Judge Ibáñez and Judge Bossa dissenting, that the Pre-Trial Chamber's exercise of the discretion to refer Jordan to the Assembly of States Parties and to the Security Council was, accordingly, tainted by error.

E. Appropriate Relief

69. In the outcome, the Appeals Chamber confirms the Impugned Decision to the extent that the Pre-Trial Chamber found that Jordan had failed to comply with its

obligations under the Statute by failing to execute the Court's request for the arrest of Mr Al-Bashir and his surrender to the Court, while he was in Amman on 29 March 2017.

70. The Appeals Chamber reverses the Impugned Decision, to the extent that the Pre-Trial Chamber referred Jordan to both the Assembly of States Parties and the UN Security Council on the ground that the Pre-Trial Chamber's exercise of discretion was erroneous; Judge Ibáñez and Judge Bossa dissenting.

F. Summary of the Dissenting Opinion of Judge Ibáñez and Judge Bossa

71. I shall now summarise the Joint Dissenting Opinion of Judge Ibáñez and Judge Bossa, on the third ground of appeal and the eventual outcome of the appeal.

72. While Judge Ibáñez and Judge Bossa agree with the determination of the first and second grounds of appeal (and Judge Bossa joined in the Joint Concurring Opinion in support of the Appeals Chamber's judgment as to those two grounds), they disagree, nevertheless, with the determination of the third ground of appeal and with the outcome of the Appeals Chamber's judgment reversing the Pre-Trial Chamber's decision to refer Jordan to the Assembly of States Parties and the UN Security Council.

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

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

75. Second, the Pre-Trial Chamber did not err in concluding that consultations did not take place in this case. The belated notes verbale sent by Jordan indicated only a statement of Jordan's position that it would respect Mr Al-Bashir's alleged immunity

from arrest. Jordan did not request any further concrete response or action from the Court.

76. Third, for the reasons set out in detail in the dissenting opinion, the Pre-Trial Chamber did not err in affording a different treatment to Jordan as compared to South Africa. The circumstances surrounding these two cases were different, thus justifying the different treatments. This is particularly so considering, as the dissenting judges found, that while South Africa ensured future cooperation with the Court in the arrest and surrender of Mr Al-Bashir – thereby making it unnecessary to refer the matter in order to foster cooperation – Jordan has not done so. Thus warranting the impugned referral.

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

78. Fifth, as further explained in the dissenting opinion, past examples of referrals to the Assembly of States Parties of the failure of other States Parties to comply with the Court's request to cooperate in the arrest and surrender of Mr Al-Bashir demonstrate that a referral of Jordan's non-cooperation to that body has the very real prospect of

yielding positive results, in terms of future cooperation; thereby giving effect to the raison d'être of article 87(7) of the Statute.

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

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

81. Finally, for reasons explained in detail in the dissenting opinion, the dissenting judges find that in the case at hand the Pre-Trial Chamber was correct. It did not err or act arbitrarily and did not abuse its discretion. On the contrary, the Pre-Trial Chamber was reasonable and fair when, based on the particular circumstances of the case and after properly weighing all relevant elements and facts, and within the boundaries of the law, it properly applied article 87(7) of the Statute, to refer to the Assembly of States

Parties and the UN Security Council Jordan's failure to comply with the Court in the execution of Mr Al-Bashir's arrest warrant.

82. The dissenting judges would uphold the Impugned Decision and confirm Jordan's referral to the Assembly of States Parties and the UN Security Council, for failure to cooperate with the Court.

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

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

85. The authoritative pronouncements of the judges will be found in the JUDGMENT OF THE CHAMBER: read together with both the JOINT CONCURRING OPINION (of Judge Morrison, Judge Hofmański, Judge Bossa and me on the first two grounds), and the JOINT DISSENTING OPINION (of Judge Ibáñez and Judge Bossa on the third ground of appeal).

86. The Judgment of the Appeals Chamber and the Joint Concurring Opinion of Judges Eboe-Osuji, Morrison, Hofmański and Bossa will be published immediately after this sitting.

87. The Joint Dissenting Opinion of Judge Ibáñez and Judge Bossa will be published in due course.

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