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**International
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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

Confidential

Prosecution's response to the "Transmission of a note verbale from the Embassy of the Hashemite Kingdom of Jordan dated 30 June 2017"

Source: Office of the Prosecutor

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

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**Victims Participation and Reparations
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Introduction

1. The Prosecution requests that Pre-Trial Chamber II (the "Chamber") find the Hashemite Kingdom of Jordan ("Jordan") in non-compliance under article 87(7) of the Rome Statute (the "Statute") for its failure to arrest and surrender Omar Hassan Ahmad Al Bashir ("Mr Al Bashir") to the International Criminal Court (the "Court"), while he was present on Jordan's territory on 29 March 2017, and to refer the matter to the Assembly of States Parties ("ASP") and the United Nations Security Council ("UNSC").
2. Jordan's failure to arrest and surrender Mr Al Bashir prevented the Court from exercising its most fundamental statutory powers. The arguments advanced by Jordan as a justification for its failure to arrest and surrender Mr Al Bashir have been previously made by other States Parties but decisively rejected by the Chamber. Jordan's obligation to cooperate with the Court was clear and it had no discretion to refuse to cooperate on the ground of a disagreement with the Court's interpretation and application of the Statute.
3. The Prosecution submits that should the Chamber find Jordan in non-compliance, it would be appropriate in the circumstances for the Chamber to exercise its discretion to refer the matter to the ASP and the UNSC.

Confidentiality and reclassification request

4. The Prosecution files this response (the "Response") confidentially pursuant to regulation 23*bis*(2) of the Regulations of the Court as it refers to the contents of confidential filings.
5. The Prosecution requests that this Response, together the following filings, be reclassified by the Chamber from "confidential" to "public": ICC-02/05-01/09-291-Conf-Anx1 and Conf-Anx2, ICC-02/05-01/09-292-Conf, ICC-02/05-01/09-293-Conf-Anx1-Corr, ICC-02/05-01/09-294-Conf, ICC-02/05-01/09-298-Conf-Anx and ICC-02/05-01/09-301-Conf-Anx.

6. These confidential classifications are no longer necessary as “there exists no risk to any protected interests”¹ which would result from the reclassification of these filings to “public”. Furthermore, the Prosecution notes that the Chamber has publicly referenced² information contained in a number of these confidential filings.³ To the extent that these filings refer to names of staff members from the Court and Jordan’s Embassy in the Netherlands, the Prosecution accepts that these names could be protected through redactions.⁴

Procedural history

7. On 21 February 2017, acting on media reports of Mr Al Bashir’s anticipated travel to attend the 28th Arab League Summit in Amman, Jordan on 29 March 2017 (the “Summit”), 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 Mr Al Bashir, in the event that he enters Jordanian territory.⁵
8. On 24 March 2017, the Registry received a note verbale from Jordan (“First Note Verbale”) that confirmed Mr Al Bashir’s invitation to the Summit. This First Note Verbale outlined the preparatory steps already taken for the purpose of Mr Al Bashir’s attendance at the Summit, but stated that official confirmation of this attendance had not yet been received. In this First Note Verbale, Jordan also stated that “Jordan adheres to its international obligations, including [...] the applicable rules of customary international law, while taking into account all its rights thereunder.”⁶

¹ ICC-02/05-01/09-268, p. 3.

² ICC-02/05-01/09-297, paras. 3, 4 and 5 and ICC-02/05-01/09-299, paras. 3, 4, 5, 6 and 8.

³ ICC-02/05-01/09-291-Conf-Anx1 and Conf-Anx2 and ICC-02/05-01/09-293-Conf-Anx1-Corr.

⁴ See, e.g. ICC-01/05-01/08-887, para. 4, where the Appeals Chamber ordered the Registrar to designate similar documents as public, with redactions where appropriate “in order to ensure the transparency of the present proceedings.”

⁵ ICC-02/05-01/09-291-Conf-Anx1.

⁶ ICC-02/05-01/09-291-Conf-Anx2.

9. On 24 March 2017, the Prosecution filed an urgent, confidential request to the Chamber to, *inter alia*, order the Registrar to seek immediate clarification from Jordan about whether it has identified a problem that would impede or prevent the execution of the Court's requests for arrest and surrender, and if so, to remind Jordan of its obligation under article 97 of the Statute to consult with the Court without delay to resolve the matter.⁷
10. On 28 March 2017, the Registry received a second note verbale ("Second Note Verbale") from Jordan that confirmed Mr Al Bashir's attendance at the Summit. Jordan stated that it was "hereby consulting with the ICC under article 97 of the Rome Statute". Jordan further stated that "President Omar Al Bashir enjoys sovereign immunity as a sitting Head of State under the rules of customary international law" and stated that such immunity had not been waived by Sudan, or the UNSC in its Resolution 1593 ("UNSCR 1593"). Referring to articles 98(1) and 27(2) of the Statute, Jordan also stated 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."⁸
11. On 29 March 2017, the Prosecution filed an urgent and confidential request to the Chamber to, *inter alia*, urgently rule upon the purported legal impediment claimed by Jordan in its Second Note Verbale and instruct Jordan that it is obliged to arrest and surrender Mr Al Bashir ("Second Urgent and Confidential Request").⁹ The Prosecution also referred to the Chamber's previous decisions dealing with the assertion of conflicting international obligations, as set out in its decisions concerning the cooperation of the Democratic Republic of the Congo ("DRC Decision"),¹⁰ the Republic of Uganda¹¹ and the Republic of Djibouti¹². The

⁷ ICC-02/05-01/09-292-Conf, para. 8. This filing also notified to the competent authorities of Jordan.

⁸ ICC-02/05-01/09-293-Conf-Anx1-Corr.

⁹ ICC-02/05-01/09-294-Conf.

¹⁰ ICC-02/05-01/09-195.

¹¹ ICC-02-05-01/09-267.

¹² ICC-02/05-01/09-266.

Prosecution stated that these decisions demonstrate that the alleged legal impediments raised by Jordan in the Second Note Verbale do not exist and that there is no basis under article 98(1) or 98(2) of the Statute to nullify Jordan's obligation to arrest and surrender Mr Al Bashir to the Court.¹³

12. In the Second Urgent and Confidential Request, the Prosecution also requested the Chamber to inform Jordan that the triggering of consultations has no suspensive effect on Jordan's obligation as a State Party to arrest and surrender Mr Al Bashir.¹⁴

13. On 29 March 2017, Mr Al Bashir travelled to Jordan to attend the Summit. Jordan did not arrest and surrender Mr Al Bashir to the Court.

14. On 26 April 2017, the Chamber ruled that before making a determination on whether Jordan's failure to arrest Mr Al Bashir warrants resort to measures under article 87(7) of the Statute, it is appropriate to give Jordan the opportunity to provide further submissions.¹⁵ The original deadline for these submissions was 26 May 2017, but pursuant to a request from Jordan,¹⁶ the Chamber extended this deadline to 30 June 2017.¹⁷

15. On 30 June 2017, the Registry received from Jordan a third note verbale ("Third Note Verbale"). Jordan repeated its argument under article 98(1) of the Statute but also made a new argument, under article 98(2), that "President Al Bashir also 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 on the Privileges and Immunities of the Arab League."¹⁸ Jordan stated that there "is no legal obligation, whether stemming from the UN Charter, the Rome Statute or

¹³ ICC-02/05-01/09-294-Conf, paras.7, 8 and 9. This filing was also notified to the competent authorities of Jordan.

¹⁴ ICC-02/05-01/09-294-Conf, para. 9.

¹⁵ ICC-02/05-01/09-297, para. 8.

¹⁶ ICC-02/05-01/09-298-Conf-Anx.

¹⁷ ICC-02/05-01/09-299.

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

any other source of international law that overrides such obligations by Jordan to the Sudan and President Al Bashir.”¹⁹

Submissions

I. Jordan failed to comply with its obligations under the Statute by not arresting and surrendering Mr Al Bashir

As a State Party, Jordan is obliged to cooperate fully with the Court

16. As a State Party, Jordan is obliged to “cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court”, under article 86 of the Statute. This obligation to cooperate includes executing requests for arrest and surrender to the Court issued in relation to persons under article 58 of the Statute,²⁰ which Jordan failed to do.

17. Jordan appears to accept the existence of this obligation, as demonstrated by its Second Note Verbale, sent a day before Mr Al Bashir’s arrival in Jordan for the Summit, in which Jordan stated it is “hereby consulting with the ICC under article 97 of the Rome Statute.”²¹

Mr Al Bashir does not have immunity before the ICC

18. Previous public decisions by the Chamber made clear that the alleged legal impediments raised by Jordan in its Second and Third Notes Verbales did not provide a basis under article 98(1) or 98(2) of the Statute to nullify Jordan’s obligation to arrest and surrender Mr Al Bashir to the Court.

19. In respect of article 98(1), the Chamber made it clear in the DRC Decision that the effect of UNSCR 1593 was that the immunities granted to Mr Al Bashir under international law and attached to his position as Head of State were implicitly

¹⁹ ICC-02/05-01/09-301-Conf-Anx, p. 3.

²⁰ See, e.g. ICC-02/05-01/09-266, para. 8.

²¹ ICC-02/05-01/09-293-Conf-Anx1-Corr.

waived.²² The Chamber re-affirmed this position in the June 2015 South Africa Decision.²³ Most recently, in its July 2017 South Africa 87(7) Decision,²⁴ the Chamber stated that the issue of waiver does not even arise since “all immunities based on official capacity which would bar the Court from exercising its jurisdiction have been made inapplicable as a result of the effects of article 27(2) of the Statute and Security Council Resolution 1593 (2005).”²⁵

20. In respect of article 98(2), the Chamber also previously made clear that the effect of UNSCR 1593 rendered inapplicable any immunity which might arise as a consequence of an international agreement. In particular, in its response to the Republic of South Africa’s (“South Africa”) initial reliance on an international agreement within the terms of article 98(2), the Chamber held that there exists “no impediment at the horizontal level”²⁶ regarding the arrest and surrender to the Court of Mr Al Bashir.²⁷ Thus, with respect to any immunities purportedly conferred by the 1953 Convention on the Privileges and Immunities of the Arab League, the same logic applies: as a result of the effects of article 27(2) of the Statute and UNSCR 1593, all immunities based on official capacity which would bar the Court from exercising its jurisdiction have been made inapplicable.

21. Jordan’s obligations to arrest and surrender Mr Al Bashir were therefore clear and unambiguous.

Jordan is not entitled to rely on its own legal interpretation of article 98 of the Statute

22. Moreover, and constituting an independent basis to find Jordan in non-compliance, article 98:

does not provide that the requested State may refuse cooperation with the Court, or postpone execution of the request for arrest and surrender. Even

²² ICC-02/05-01/09-195, para. 29. *See also* ICC-02/05-01/09-266, para. 12 and ICC-02/05-01/09-267, para. 12.

²³ ICC-02/05-01/09-242 (“June 2015 South Africa Decision”), para. 9.

²⁴ ICC-02/05-01/09-302 (“July 2017 South Africa 87(7) Decision”).

²⁵ ICC-02/05-01/09-302, para. 96.

²⁶ *See* ICC-02/05-01/09-242, para. 7.

²⁷ *See* ICC-02/05-01/09-242, paras. 5-8, recalling the Presiding Judge’s oral ruling of 12 June 2015.

less does this provision grant discretion to States Parties to choose whether to cooperate with the Court or refuse such cooperation on the ground of a disagreement with the Court's interpretation and application of the Statute.²⁸

23. Jordan was therefore not entitled to rely on its own interpretation of article 98 of the Statute and take the unilateral decision not to comply with the Court's request and surrender of Mr Al Bashir to the Court.²⁹ As the Chamber observed in its July 2017 South Africa 87(7) Decision, "it is not in the nature of legal obligations that they can simply be put aside on the grounds of a disagreement with a determination of a competent court of law [...]".³⁰

Consultations have no suspensive effect

24. Lastly, the June 2015 South Africa Decision, also referred to in the Prosecution's Second Urgent and Confidential Request,³¹ made it clear that the triggering of consultations does not suspend a State Party's obligation to arrest and surrender Mr Al Bashir should he arrive on its territory.³² This position was reaffirmed by the July 2017 South Africa July 87(7) Decision, in which the Chamber observed "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 a request for cooperation."³³ Moreover, as the Chamber found in that instance, which is equally applicable here, this is particularly important in cases where execution of the request for cooperation could succeed only in a narrow window of time.³⁴

25. As the Prosecution stated in its Second Urgent and Confidential Request, rule 195 of the Rules of Procedure and Evidence confirms that when a requested State raises a problem in respect of article 98, while it must provide relevant

²⁸ ICC-02/05-01/09-302, para. 104. *See also*, ICC-02/05-01/09-195, para. 22.

²⁹ ICC-02/05-01/09-302, para. 102.

³⁰ ICC-02/05-01/09-302, para.121.

³¹ ICC-02/05-01/09-294, para. 9.

³² ICC-02/05-01/09-242, para. 8.

³³ ICC-02/05-01/09-302, para. 119.

³⁴ ICC-02/05-01/09-302, para. 119.

information to the Court, this is “to assist the Court in the application of article 98”, and as such, rule 195 emphasises that it is for the Court to determine whether the conditions in article 98(1) or (2) are met.³⁵ According to rule 195, once the State “notifies” the Court and provides any such relevant information, it is for the Chamber to decide whether it should withdraw the request.³⁶ Having received the information provided by Jordan, the Chamber did not withdraw the request, which therefore remained valid.

II. A formal finding of Jordan’s non-compliance and referral of the matter to the ASP and the UNSC is warranted

26. As a State Party, Jordan’s failure to comply with a request for the arrest and surrender of Mr Al Bashir prevented the Court from exercising its most fundamental powers and functions under the Statute. As such, the Chamber should make a formal finding of non-compliance in respect of Jordan and in the circumstances, it is appropriate to refer the matter to the ASP and the UNSC.
27. On 21 February 2017, the Registry provided Jordan with a reminder of its obligations to arrest and surrender Mr Al Bashir should he enter its territory. Neither the First or the Second Note Verbale, sent before the Summit, nor the Third Note Verbale, sent after the Summit, contain any arguments that had not previously been considered in public decisions by the Chamber and ultimately rejected as potential legal impediments to a State Party’s obligation to arrest and surrender Mr Al Bashir to the Court.
28. It is appropriate for the Chamber to exercise its discretion to refer Jordan to the ASP and the UNSC.³⁷ To the extent that the Second Note Verbale 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.

³⁵ ICC-02/05-01/09-294-Conf, para. 6.

³⁶ ICC-02/05-01/09-302, para. 120.

³⁷ ICC-01/09-02/11-1032, para. 39.

29. A referral is the only judicial remedy available to the Court when faced with a State Party that fails to comply with the Court's arrest warrants. In contrast to the recent article 87(7) proceedings in relation to South Africa, there do not appear to be any domestic legal proceedings in Jordan in relation to this issue. A remedy from this Court is therefore likely the only judicial remedy that Jordan will face. For these reasons, a referral to the ASP and the UNSC is appropriate.

Relief requested

30. For the foregoing reasons, the Prosecution 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 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; and
- c. reclassify the following filings from "confidential" to "public": this Response, ICC-02/05-01/09-291-Conf-Anx1 and Conf-Anx2, ICC-02/05-01/09-292-Conf, ICC-02/05-01/09-293-Conf-Anx1-Corr, ICC-02/05-01/09-294-Conf, ICC-02/05-01/09-298-Conf-Anx and ICC-02/05-01/09-301-Conf-Anx.



Fatou Bensouda, Prosecutor

Dated this 13th July 2017

At The Hague, The Netherlands