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International
Criminal
Court

Original: English **No. ICC-02/05-01/09 OA2**
Date: 6 May 2019

THE APPEALS CHAMBER

Before: **Judge Chile Eboe-Osuji, Presiding**
Judge Howard Morrison
Judge Piotr Hofmański
Judge Luz del Carmen Ibáñez Carranza
Judge Solomy Balungi Bossa

SITUATION IN DARFUR, SUDAN

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

Public document

Judgment in the Jordan Referral re Al-Bashir Appeal

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

The Office of the Prosecutor
Ms Fatou Bensouda, Prosecutor
Ms Helen Brady

States Representatives
Competent authorities of the Hashemite Kingdom of Jordan

Amici Curiae

The African Union

The League of Arab States

Ms Annalisa Ciampi

Ms Paola Gaeta

Ms Yolanda Gamarra

Mr Claus Kreß

Ms Flavia Lattanzi

Mr Konstantinos D. Magliveras

Mr Michael A. Newton

Mr Roger O'Keefe

Mr Darryl Robinson, Mr Robert Cryer, Ms Margaret deGuzman, Ms Fannie Lafontaine, Ms Valerie Oosterveld, and Mr Carsten Stahn

Mr Nicholas Tsagourias

Mr Andreas Zimmermann

REGISTRY

Registrar
Mr Peter Lewis

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The Appeals Chamber of the International Criminal Court,

In the appeal of the Hashemite Kingdom of Jordan against the decision of Pre-Trial Chamber II entitled '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' of 11 December 2017 (ICC-02/05-01/09-309) [the 'Jordan Referral re Al-Bashir Appeal'],

After deliberation,

By majority, Judge Luz del Carmen Ibáñez Carranza and Judge Solomy Balungi Bossa partly dissenting,

Delivers the following

JUDGMENT

1. 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 o[f] Omar Al-Bashir' is unanimously confirmed to the extent that Pre-Trial Chamber II found that the Hashemite Kingdom of Jordan had failed to comply with its obligations under the Statute by not executing the Court's request for the arrest of Mr Omar Hassan Ahmad Al-Bashir and his surrender to the Court while he was on Jordanian territory on 29 March 2017.
2. The Appeals Chamber unanimously finds that Jordan's failure to comply with the Court's request prevented the Court from exercising an important function and power. However, the Appeals Chamber finds (Judge Ibáñez and Judge Bossa dissenting) that in the particular circumstances of this case, the Pre-Trial Chamber II erroneously exercised its discretion to refer Jordan to the Assembly of States Parties and to the Security Council of the United Nations. To that extent, the decision of the Pre-Trial Chamber II is reversed (Judge Ibáñez and Judge Bossa dissenting).

REASONS

I. KEY FINDINGS

1. There is neither State practice nor *opinio juris* that would support the existence of Head of State immunity under customary international law *vis-à-vis* an international court. To the contrary, such immunity has never been recognised in international law as a bar to the jurisdiction of an international court.

2. The absence of a rule of customary international law recognising Head of State immunity *vis-à-vis* international courts is relevant not only to the question of whether an international court may issue a warrant for the arrest of a Head of State and conduct proceedings against him or her, but also for the horizontal relationship between States when a State is requested by an international court to arrest and surrender the Head of State of another State. No immunities under customary international law operate in such a situation to bar an international court in its exercise of its own jurisdiction.

3. While articles 27 and 86 *et seq*. are located in different parts of the Statute, they must be read together and any possible tension between them must be reconciled. This is best achieved by reading article 27(2) of the Statute, both as a matter of conventional law and as reflecting customary international law, as also excluding reliance on immunity in relation to a Head of State's arrest and surrender. Therefore, article 27(2) of the Statute is relevant not only to the adjudicatory jurisdiction of the Court, but also to the Court's 'enforcement jurisdiction' *vis-à-vis* States Parties to the Rome Statute.

4. States Parties to the Rome Statute, have, by virtue of ratifying the Statute, accepted that Head of State immunity cannot prevent the Court from exercising jurisdiction – which is in line with customary international law. There is no reason why article 27(2) should be interpreted in a way that would allow a State Party to invoke Head of State immunity in the horizontal relationship if the Court were to ask for the arrest and surrender of the Head of State by making a request to that effect to another State Party. The law does not readily condone to be done through the back door something it forbids to be done through the front door. In such situations, the requested State Party is not proceeding to arrest the Head of State in

order to prosecute him or her before the courts of the requested State Party: it is only lending assistance to the Court in its exercise of the Court's jurisdiction.

5. Article 98(1) of the Statute does not itself stipulate, recognise or preserve any immunities. It is a *procedural* rule that determines how the Court is to proceed where any immunity exists such that it could stand in the way of a request for cooperation.

6. Article 13(b) of the Statute puts the ICC at the disposal of the UN Security Council as a tool to maintain or restore international peace and security, thus obviating the need for the UN Security Council to create new *ad hoc* tribunals for this purpose.

7. Resolution 1593 gives the Court power to exercise its jurisdiction over the situation in Darfur, Sudan, which it must exercise 'in accordance with [the] Statute'. This includes article 27(2), which provides that immunities are not a bar to the exercise of jurisdiction. As Sudan is obliged to 'cooperate fully' with the Court, the effect of article 27(2) arises also in the horizontal relationship – Sudan cannot invoke Head of State immunity if a State Party is requested to arrest and surrender Mr Al-Bashir. Therefore, there was no Head of State immunity that Sudan could invoke in relation to Jordan, had the latter arrested Mr Al-Bashir on the basis of an arrest warrant issued by the Court. Accordingly, there was also no immunity that Jordan would have been required to 'disregard' by executing the Court's arrest warrant. And there was no need for a waiver by Sudan of Head of State immunity.

8. The first clause of article 87(7) of the Statute consists of two cumulative conditions, namely, (i) that the State concerned failed to comply with a request to cooperate; and (ii) that this non-compliance is grave enough to prevent the Court from exercising its functions and powers under the Statute. It is only when the Chamber has established that *both* conditions are met that it may proceed to consider whether to refer the State to the Assembly of States Parties or the UN Security Council or both, following a finding of non-compliance.

9. Article 58(1) of the Statute empowers the pre-trial chambers to issue a warrant of arrest where there are reasonable grounds to believe that the person has

committed a crime within the jurisdiction of the Court and the arrest of the person 'appears necessary' for the reasons listed therein. The issuance of a warrant of arrest is, alongside the issuance of a summons to appear, one of the means to ensure the presence of the suspect before the Court and is therefore an important power and fundamental function of the Court. Those who bear the obligation to execute an arrest warrant are not free to render it nugatory merely by refusing to execute it.

10. In case a State encounters problems with the execution of a request for cooperation issued by the Court, article 97 of the Statute does not provide for a specific procedure regarding consultations that States have to follow, nor does it set out the manner in which consultations should be carried out.

11. In the absence of a prescribed procedure, the manner in which a State may indicate its intention to seek consultations may vary. What is essential is that the intention to consult is discernible from the circumstances. The intention to consult must be communicated to the Court timeously, so as not to frustrate the object of the request for cooperation or defeat the purpose of the consultation process. Furthermore, States are required to conduct consultations in good faith. While it would be better for a State to approach the consultation process in an unequivocal manner of asking questions, 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.

II. INTRODUCTION

12. On 31 March 2005, the Security Council of the United Nations [the 'UN Security Council'], acting under Chapter VII of the UN Charter, adopted UN Security Council Resolution 1593 (2005) [the 'Resolution 1593'], referring the situation in Darfur, Republic of the Sudan ['Sudan'], to the Prosecutor of the Court.[1] In paragraph 2 of Resolution 1593, the UN Security Council decided, *inter alia*, that the Government of Sudan shall 'cooperate fully with and provide any necessary assistance to the Court and the Prosecutor'. On 4 March 2009, at the

[1] United Nations, Security Council, Resolution 1593, 31 March 2005, S/RES/1593 (2005).

request of the Prosecutor, Pre-Trial Chamber I issued a warrant for the arrest of Mr Omar Hassan Ahmad Al-Bashir ['Mr Al-Bashir'], the President of Sudan.[2] A second warrant of arrest was issued on 12 July 2010, which included the charge of genocide.[3] The warrants of arrests, together with requests for the arrest and surrender of Mr Al-Bashir, were notified, *inter alia*, to all States Parties to the Statute, including Jordan.[4]

13. In March 2017, the Hashemite Kingdom of Jordan ['Jordan'] hosted the 28th Summit of the Arab League in Amman, Jordan. Mr Al-Bashir attended the summit on 29 March 2017.[5] Jordan did not arrest and surrender Mr Al-Bashir while in Jordan.[6]

14. In light of Jordan's failure to arrest and surrender Mr Al-Bashir, on 11 December 2017, Pre-Trial Chamber II [the 'Pre-Trial Chamber'] issued 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 o[f] Omar Al-Bashir' [the 'Impugned Decision'].[7] In particular, the Pre-Trial Chamber found that Jordan had failed to comply with its obligations under the Statute, and decided that Jordan's non-compliance should be referred to the Assembly of States Parties and the UN Security Council.[8] As regards the question of whether Mr Al-Bashir, when attending the Arab League Summit, enjoyed immunity from arrest as Sudan's Head of State, the Pre-Trial Chamber noted that, in view of article 27(2) of the Statute, according to which immunities under international or national law shall not bar the Court's exercise of jurisdiction, there is no Head of State immunity if the Court requests a State Party to arrest and surrender the Head of State of another

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[2] Pre-Trial Chamber I, 'Warrant of Arrest for Omar Hassan Ahmad Al Bashir', 4 March 2009, ICC-02/05-01/09-1. Mr Al-Bashir was President of Sudan at all times relevant to this case.
[3] Pre-Trial Chamber I, 'Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir', 12 July 2010, ICC-02/05-01/09-95.
[4] 'Request to all States Parties to the Rome Statute for the Arrest and Surrender of Omar Al Bashir', 6 March 2009, ICC-02/05-01/09-7, and 'Supplementary Request to all States Parties to the Rome Statute for the Arrest and Surrender of Omar Al Bashir', 21 July 2010, ICC-02/05-01/09-96.
[5] Pre-Trial Chamber II, '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', 11 December 2017, ICC-02/05-01/09-309 [the 'Impugned Decision'], para. 8.
[6] Impugned Decision, para. 8.
[7] Impugned Decision. *See also* 'Minority opinion of Judge Marc Perrin de Brichambaut', ICC-02/05-01/09-309-Anx-tENG.
[8] Impugned Decision, pp. 21-22.

State Party.[9] The Pre-Trial Chamber also found that, in case of a referral by the UN Security Council, the Court shall exercise its jurisdiction 'in accordance with [this] Statute' (article 13 of the Statute), including article 27(2) of the Statute, and that Sudan had the same obligation to cooperate with the Court as a State Party, as a result of Resolution 1593.[10] Hence, in the view of the Pre-Trial Chamber, Mr Al-Bashir could not invoke Head of State immunity and no waiver under article 98(1) of the Statute was required.[11] The Pre-Trial Chamber also found that it had not been established that Sudan was party to the 1953 Convention on the Privileges and Immunities of the Arab League [the '1953 Convention'], which provides for certain immunities in the context of the Arab League, and that, in any event, article 98(2) of the Statute was not applicable to the 1953 Convention.[12] The Pre-Trial Chamber noted further that the decision to refer a State Party to the Assembly of States Parties was discretionary, but that in the circumstances it was appropriate to make such a referral in respect of Jordan's non-compliance.[13]

15. Upon Jordan's request for leave to appeal the Impugned Decision,[14] the Pre-Trial Chamber granted leave to appeal in relation to three issues on 21 February 2018.[15] In its appeal, Jordan raises three grounds of appeal, alleging errors of law and errors in the Pre-Trial Chamber's exercise of its discretion. Under its first ground of appeal, Jordan submits that the Pre-Trial Chamber erred (i) in its findings in relation to 'the effects' of the Statute upon Mr Al-Bashir's immunity, including its conclusions that article 27(2) excludes the application of article 98; (ii) in finding that article 98 established no rights for States Parties; (iii) in finding that article 98(2) does not apply to the 1953 Convention; and (iv) in finding that even if article 98 applied it would provide no basis for Jordan not to comply with

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[9] Impugned Decision, paras 33-34.
[10] Impugned Decision, paras 35-39.
[11] Impugned Decision, para. 39.
[12] Impugned Decision, paras 30-32.
[13] Impugned Decision, paras 51-55.
[14] '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', 18 December 2017, ICC-02/05-01/09-312, para. 4.
[15] 'Decision on Jordan's request for leave to appeal', ICC-02/05-01/09-319 [the 'Decision Granting Leave to Appeal'], para. 2, p. 9; Judge Perrin de Brichambaut stated that while he agreed with the majority to grant leave to appeal the Impugned Decision, such leave should have been granted only for the second and third issues 'as respectively reframed by the Prosecutor'. *See* 'Minority opinion of Judge Marc Perrin de Brichambaut', 21 February 2018, ICC-02/05-01/09-319-Anx, para. 1.

the Court's request.[16] Under the second ground of appeal, Jordan contends that the Pre-Trial Chamber erred in concluding that Resolution 1593 affected Jordan's obligations under customary and conventional international law to accord immunity to Mr Al-Bashir.[17] Finally, under its third ground of appeal, Jordan avers that, even if it were assumed that the Pre-Trial Chamber was correct in finding that Jordan had failed to comply with the Court's request to arrest and surrender Mr Al-Bashir, the Pre-Trial Chamber abused its discretion in deciding to refer such non-compliance to the Assembly of States Parties and to the UN Security Council.[18]

III. PROCEDURAL HISTORY

A. Proceedings before the Pre-Trial Chamber

16. On 11 December 2017, the Pre-Trial Chamber issued the Impugned Decision.

17. On 18 December 2017, Jordan requested leave to appeal the Impugned Decision on four issues.[19] On 21 February 2018, the Pre-Trial Chamber granted Jordan's request on the following three issues:

> i) 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;
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> ii) 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

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[16] 'The Hashemite Kingdom of Jordan's appeal against the "Decision under article 87(7) of the Rome Statute on the non-compliance by Jordan with the request by the Court for the arrest and surrender [of] Omar Al-Bashir"', 12 March 2018, ICC-02/05-01/09-326 [the 'Appeal Brief'], paras 3, 7-39, 115.
[17] Appeal Brief, paras 3, 40-83, 115.
[18] Appeal Brief, paras 3, 84-107, 115.
[19] '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', ICC-02/05-01/09-312, para. 4.

iii) 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.[20]

B. Proceedings before the Appeals Chamber

18. On 28 February 2018, following a decision of the Appeals Chamber to extend the page and time limits for the filing of the appeal brief and the response thereto,[21] Jordan filed its Appeal Brief on 12 March 2018.

19. On 3 April 2018, the Prosecutor filed her response to Jordan's appeal [the 'Response'].[22]

20. On 29 March 2018, the Appeals Chamber issued an order inviting expressions of interest as *amici curiae* pursuant to rule 103 of the Rules of Procedure and Evidence [the 'Rules'],[23] in which it invited the United Nations [the 'UN'], the African Union, the European Union, the League of Arab States and the Organization of American States to submit observations, and States Parties and Professors of international law to request leave to submit observations.[24]

21. In accordance with the Order Inviting Expressions of Interest, the competent authorities of the United Mexican States ['Mexico'],[25] Ms Annalisa Ciampi,[26] Mr Max du Plessis, Ms Sarah Nouwen and Ms Elizabeth Wilmshurst,[27] Ms Paola

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[20] Decision Granting Leave to Appeal, para. 2, p. 9.
[21] 'Decision on applications for extension of the page and time limits', ICC-02/05-01/09-324. *See also* 'The Hashemite Kingdom of Jordan's Application for an Extension of the Page Limit for its [] Appeal against the "Decision under article 87(7) of the Rome Statute on the non-compliance by Jordan with the request by the Court for the arrest and surrender or [*sic*] Omar Al-Bashir"', 27 February 2018, ICC-02/05-01/09-321; 'Prosecution Response to the Kingdom of Jordan's Application for an Extension of the Page Limit', 28 February 2018, ICC-02/05-01/09-323.
[22] 'Prosecution Response to the Hashemite Kingdom of Jordan's Appeal against the "Decision under article 87(7) of the Rome Statute on the non-compliance by Jordan with the request by the Court for [the] arrest and surrender [of] Omar Al-Bashir"', ICC-02/05-01/09-331.
[23] 'Order inviting expressions of interest as *amici curiae* in judicial proceedings (pursuant to rule 103 of the Rules of Procedure and Evidence)', ICC-02/05-01/09-330 [the 'Order Inviting Expressions of Interest'].
[24] Order Inviting Expressions of Interest, paras 2-4.
[25] 'Request pursuant to rule 103(1) of the Rules of Procedure and Evidence for leave to submit observations as *amici curiae* in judicial proceedings', dated 27 April 2018 and registered on 30 April 2018, ICC-02/05-01/09-342.
[26] 'Request for leave to submit amicus curiae observations pursuant to rule 103 of the Rules of Procedure and Evidence', 30 April 2018, ICC-02/05-01/09-343.
[27] 'Request by Max du Plessis, Sarah Nouwen and Elizabeth Wilmshurst for leave to submit observations on the legal questions presented in "The Hashemite Kingdom of Jordan's appeal against the 'Decision under article 87(7) of the Rome Statute on the non-compliance by Jordan with the request

Gaeta,[28] Ms Yolanda Gamarra,[29] Mr Dov Jacobs,[30] Mr Asad Kiyani,[31] Mr Claus Kreß,[32] Ms Flavia Lattanzi,[33] Mr Konstantinos D. Magliveras,[34] Ms Bonita Meyersfeld and the Southern Africa Litigation Centre,[35] Mr Michael A. Newton and Mr Oliver Windridge,[36] Mr Roger O'Keefe,[37] Mr Darryl Robinson, Mr Robert Cryer, Ms Margaret deGuzman, Ms Fannie Lafontaine, Ms Valerie Oosterveld,

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by the Court for the arrest and surrender o[f] Omar Al-Bashir'" of 12 March 2018 (ICC-02/05-01/09-326) in accordance with the Order of the Appeals Chamber dated 29 March 2018 (ICC-02/05-01/09 OA2)', dated 27 April 2018 and registered on 30 April 2018, ICC-02/05-01/09-338.

[28] 'Request by Professor Paola Gaeta for leave to submit observations on the merits of the legal questions presented in the Hashemite Kingdom of Jordan's appeal against the "Decision under Article 87 (7) of the Rome Statute on the non-compliance by Jordan with the request by the Court for the arrest and surrender [of] Omar Al-Bashir" of 12 March 2018', 30 April 2018, ICC-02/05-01/09-349.

[29] 'Request for Leave to Submit Observations on the Legal questions Presented in "The Hashemite Kingdom of Jordan's appeal against the 'Decision under article 87(7) of the Rome Statute on the non-compliance by Jordan with the request by the Court for the arrest and surrender o[f] Omar Al-Bashir'" (ICC-02/05-01/09-326)', 30 April 2018, ICC-02/05-01/09-347.

[30] 'Request for leave to submit an Amicus Curiae brief in the proceedings relating to The Hashemite Kingdom of Jordan's appeal against the "Decision under article 87(7) of the Rome Statute on the non-compliance by Jordan with the request by the Court for the arrest and surrender[] of Omar Al-Bashir ["] issued on the 11 December 2017 (ICC-02/05-01/09-309)', 30 April 2018, ICC-02/05-01/09-340.

[31] 'Request by Dr. Kiyani for Leave to Submit Observations', 30 April 2018, ICC-02/05-01/09-348.

[32] 'Request by Professor Claus Kreß with the assistance of Erin Pobjie for leave to submit observations on the merits of the legal questions presented in "The Hashemite Kingdom of Jordan's appeal against the 'Decision under article 87(7) of the Rome Statute on the non-compliance by Jordan with the request by the Court for the arrest and surrender [of] Omar Al-Bashir'" of 12 March 2018 (ICC-02/05-01/09-326)', 30 April 2018, ICC-02/05-01/09-346.

[33] 'Request by Prof. Flavia Lattanzi for leave to submit observations on the merits of the legal questions presented in "The Hashemite Kingdom of Jordan's appeal against the 'Decision under article 87(7) of the Rome Statute on the non-compliance by Jordan with the request by the Court for the arrest and surrender [of] Omar Al-Bashir'" of 12 March 2018', 30 April 2018, ICC-02/05-01/09-341.

[34] 'Corrected version of the "[]Request by Professor Konstantinos D. Magliveras for leave to submit observations on the merits of the legal questions presented in «The Hashemite Kingdom of Jordan's appeal against the 'Decision under article 87(7) of the Rome Statute on the non-compliance by Jordan with the request by the Court for the arrest and surrender [of] Omar Al-Bashir'» lodged on 12 March 2018 (ICC-02/05-01/09-326)[]", 23 April 2018, ICC-02/05-01/09-335', dated 25 April 2018 and registered on 26 April 2018, ICC-02/05-01/09-335-Corr.

[35] 'Request by Professor Bonita Meyersfeld and the Southern Africa Litigation Centre (SALC) for leave to submit observations on the merits of the legal questions in: The Hashemite Kingdom of Jordan's appeal against the "Decision under article 87(7) of the Rome Statute on the non-compliance by Jordan with the request by the Court for the arrest and Surrender [of] Omar Al-Bashir" lodged on 12 March 2018', dated 28 April 2018 and registered on 30 April 2018, ICC-02/05-01/09-339.

[36] 'Request for Leave by Professor Michael A. Newton and Mr. Oliver Windridge to Submit Observations on the Merits of the Legal Questions Presented in the Appeal of The Hashemite Kingdom of Jordan's appeal against the "Decision under article 87(7) of the Rome Statute on the non-compliance by Jordan with the request by the Court for the arrest and surrender [of] Omar Al-Bashir"', 30 April 2018, ICC-02/05-01/09-350.

[37] 'Request by Professor Roger O'Keefe for leave to submit observations on the merits of the legal questions presented in "The Hashemite Kingdom of Jordan's appeal against the 'Decision under article 87(7) of the Rome Statute on the non-compliance by Jordan with the request by the Court for the arrest and surrender [of] Omar Al-Bashir'" of 12 March 2018 (ICC-02/05-01/09-326)', 19 April 2018, ICC-02/05-01/09-334.

Mr Carsten Stahn and Mr Sergey Vasiliev,[38] Mr Nicholas Tsagourias and Mr Michail Vagias,[39] Ms Philippa Webb and Mr Ben Juratowitch,[40] and Mr Andreas Zimmermann[41] submitted requests for leave to present observations pursuant to rule 103 of the Rules.

22. On 6 April 2018, the Appeals Chamber granted Jordan's request for suspensive effect with respect to the Impugned Decision.[42]

23. On 21 May 2018, the Appeals Chamber granted leave to Mexico and 11 Professors of Law to submit observations under rule 103 of the Rules, scheduled a hearing to be convened on 10 to 12 September 2018, and granted Jordan's request for leave to reply to the Prosecutor's Response[43] to be conveyed orally during the scheduled hearing.[44] It also invited Jordan and the Prosecutor to submit consolidated responses to the *amici curiae*'s observations.[45]

24. In accordance with the Decision on Rule 103 Requests, Ms Ciampi,[46] Ms Gaeta,[47] Ms Gamarra,[48] Mr Kreß,[49] Ms Lattanzi,[50] Mr Magliveras,[51]Mr

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[38] 'Request by Professors Robinson, Cryer, deGuzman, Lafontaine, Oosterveld, Stahn and Vasiliev for Leave to Submit Observations', dated 26 April 2018 and registered on 30 April 2018, ICC-02/05-01/09-337.
[39] 'Request by Professor Nicholas Tsagourias and Dr Michail Vagias for leave to submit observations on the merits of the legal questions presented in the Hashemite Kingdom of Jordan's appeal against the Decision under article 87(7) of the Rome Statute on the non-compliance by Jordan with the request by the Court for the arrest and surrender of Omar Al-Bashir of 12 March 2018', dated 29 April 2018 and registered on 30 April 2018, ICC-02/05-01/09-344.
[40] 'Expression of interest to make submissions as *amicus curiae* in judicial proceedings (pursuant to rule 103 of the Rules of Procedure and Evidence)', 30 April 2018, ICC-02/05-01/09-345.
[41] 'Request by Professor Andreas Zimmermann for leave to submit observations on the merits of the legal questions presented in the Hashemite Kingdom of Jordan's appeal against the Decision under article 87(7) of the Rome Statute on the non-compliance by Jordan with the request by the Court for the arrest and surrender of Omar Al-Bashir of 12 March 2018', 26 April 2018, ICC-02/05-01/09-336.
[42] 'Decision on Jordan's request for suspensive effect of its appeal against the decision on the non-compliance by Jordan with the request for the arrest and surrender of Mr Omar Al-Bashir', ICC-02/05-01/09-333, para. 9.
[43] 'The Hashemite Kingdom of Jordan's request for leave to reply to the Prosecutor's 'Response to the Hashemite Kingdom of Jordan's Appeal against the "Decision under article 87(7) of the Rome Statute on the non-compliance by Jordan with the request by the Court for the arrest and surrender [of] Omar Al-Bashir"', 6 April 2018, ICC-02/05-01/09-332.
[44] 'Decision on the requests for leave to file observations pursuant to rule 103 of the Rules of Procedure and Evidence, the request for leave to reply and further processes in the appeal', ICC-02/05-01/09-351 ['Decision on Rule 103 Requests'], paras 10, 13, 15.
[45] Decision on Rule 103 Requests, para. 11.
[46] 'Amicus curiae observations of Prof. Annalisa Ciampi pursuant to rule 103 of the Rules of Procedure and Evidence', 18 June 2018, ICC-02/05-01/09-363 ['Ms Ciampi's Observations'].
[47] 'Observations by Professor Paola Gaeta as amicus curiae on the merits of the legal questions presented in the Hashemite Kingdom of Jordan's appeal against the "Decision under Article 87 (7) of

Newton,[52] Mr O'Keefe,[53] Mr Robinson, Mr Cryer, Ms deGuzman, Ms Lafontaine, Ms Oosterveld, and Mr Stahn,[54] Mr Tsagourias,[55] and Mr Zimmermann[56] filed their respective observations.

25. On 25 May 2018, the Appeals Chamber invited the competent authorities of Sudan and Mr Al-Bashir to file submissions by 16 July 2018.[57]

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the Rome Statute on the non-compliance by Jordan with the request by the Court for the arrest and surrender [of] Omar Al-Bashir" of 12 March 2018', 18 June 2018, ICC-02/05-01/09-365 ['Ms Gaeta's Observations'].

[48] 'Amicus Curiae Observations Pursuant To Rule 103 Of The Rules Of Procedure And Evidence On The Merits Of The Legal Questions Presented In The Hashemite Kingdom Of Jordan's Appeal Against The Decision Under Article 87(7) Of The Rome Statute On The Non-Compliance By Jordan With The Request By The Court For The Arrest And Surrender Of Omar Al-Bashir Of 12 March 2018', 18 June 2018, ICC-02/05-01/09-364 ['Ms Gamarra's Observations'].

[49] 'Written observations of Professor Claus Kreß as amicus curiae, with the assistance of Ms Erin Pobjie, on the merits of the legal questions presented in "The Hashemite Kingdom of Jordan's appeal against the 'Decision under article 87(7) of the Rome Statute on the non-compliance by Jordan with the request by the Court for the arrest and surrender [of] Omar Al-Bashir'" of 12 March 2018 (ICC-02/05-01/09-326)', 18 June 2018, ICC-02/05-01/09-359 ['Mr Kreß's Observations'].

[50] 'Amicus curiae observations submitted by Prof. Flavia Lattanzi pursuant to rule 103 of the Rules of Procedure and Evidence on the merits of the legal questions presented in "The Hashemite Kingdom of Jordan's appeal against the 'Decision under article 87(7) of the Rome Statute on the non-compliance by Jordan with the request by the Court for the arrest and surrender [of] Omar Al-Bashir'" of 12 March 2018', 18 June 2018, ICC-02/05-01/09-358 ['Ms Lattanzi's Observations'].

[51] 'Amicus curiae observations under rule 103 of the Rules of Procedure and Evidence on the merits of the legal questions in the appeal of the Hashemite Kingdom of Jordan lodged on 12 March 2018 against the finding of Pre-Trial Chamber II that it did not comply with the request to arrest and surrender President Omar Al-Bashir of Sudan', 14 June 2018, ICC-02/05-01/09-356 ['Mr Magliveras's Observations'].

[52] 'Observations on the Merits of the Legal Questions Presented in the Appeal of The Hashemite Kingdom of Jordan's appeal against the "Decision under article 87(7) of the Rome Statute on the non-compliance by Jordan with the request by the Court for the arrest and surrender [of] Omar Al-Bashir[]"', dated 14 June 2018 and registered on 18 June 2018, ICC-02/05-01/09-361 ['Mr Newton's Observations'].

[53] 'Observations by Professor Roger O'Keefe, pursuant to rule 103 of the Rules of Procedure and Evidence, on the merits of the legal questions presented in "The Hashemite Kingdom of Jordan's appeal against the 'Decision under article 87(7) of the Rome Statute on the non-compliance by Jordan with the request by the Court for the arrest and surrender [of] Omar Al-Bashir'" of 12 March 2018 (ICC-02/05-01/09-326)', 18 June 2018, ICC-02/05-01/09-360 ['Mr O'Keefe's Observations'].

[54] 'Amicus Curiae Observations of Professors Robinson, Cryer, deGuzman, Lafontaine, Oosterveld, and Stahn', dated 17 June 2018 and registered on 18 June 2018, ICC-02/05-01/09-362 ['Mr Robinson's *et al*. Observations'], with an annex (ICC-02/05-01/09-362-Anx).

[55] 'Amicus curiae observations pursuant to rule 103 of the Rules of Procedure and Evidence on the merits of the legal questions presented in the Hashemite Kingdom of Jordan's appeal against the decision under article 87(7) of the Rome Statute on the non-compliance by Jordan with the request by the Court for the arrest and surrender of Omar Al-Bashir of 12 March 2018', dated 9 June 2018 and registered on 11 June 2018, ICC-02/05-01/09-355 ['Mr Tsagourias's Observations'].

[56] 'Observations Pursuant to Rule 103 of the Rules of Procedure and Evidence on the Merits of the Legal Questions presented in the Hashemite Kingdom of Jordan's Appeal against the Decision under Article 87(7) of the Rome Statute on the Non-Compliance by Jordan with the Request by the Court for the Arrest and Surrender of Omar Al-Bashir of 12 March 2018', 18 June 2018, ICC-02/05-01/09-357 ['Mr Zimmermann's Observations'].

26. On 16 July 2018, Jordan and the Prosecutor responded to the *amici curiae*.[58] On the same date, the African Union Commission [the 'African Union'] and the League of Arab States filed their respective observations.[59]

27. Following the Appeals Chamber's order setting a deadline for responses,[60] Jordan and the Prosecutor filed their respective responses to the African Union's and League of Arab States' observations on 14 August 2018.[61]

28. On 27 August 2018, the Appeals Chamber issued an order on the conduct of the hearing in which it revised the schedule of the hearing from three to four days (10-13 September 2018), and invited the parties and *amici curiae* to address during the hearing the issues outlined in the order.[62]

29. On 30 August 2018, the Appeals Chamber granted Jordan's request[63] for an extension of time to present its position during the hearing as well as a

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[57] 'Order inviting submissions', ICC-02/05-01/09-352, p. 3.
[58] 'The Hashemite Kingdom of Jordan's response to the observations submitted by Professors of International Law pursuant to rule 103 of the Rules of Procedure and Evidence', ICC-02/05-01/09-368 ['Jordan's Response to the *Amici*']; 'Prosecution Response to the Observations of Eleven *Amici Curiae*', ICC-02/05-01/09-369 [the 'Prosecutor's Response to the *Amici*'].
[59] 'The African Union's Submission in the "Hashemite Kingdom of Jordan's Appeal Against the 'Decision under Article 87(7) of the Rome Statute on the Non-Compliance by Jordan with the Request by the Court for the Arrest and Surrender [of] Omar Al-Bashir'"', dated 13 July 2018 and registered on 16 July 2018, ICC-02/05-01/09-370 [the 'African Union's Observations'], with an annex (ICC-02/05-01/09-370-Anx1); 'The League of Arab States' Observations on the Hashemite Kingdom of Jordan's appeal against the "Decision under article 87(7) of the Rome Statute on the non-compliance by Jordan with the request by the Court for the arrest and surrender [of] Omar Al-Bashir"', ICC-02/05-01/09-367 [the 'League of Arab States' Observations'].
[60] 'Order setting a deadline for responses to the observations of the African Union Commission and the League of Arab States', 19 July 2018, ICC-02/05-01/09-371, p. 3.
[61] 'The Hashemite Kingdom of Jordan's response to the observations submitted by the African Union and the League of Arab States', ICC-02/05-01/09-376 [the 'Jordan's Response to the African Union and the League of Arab States']; 'Prosecution Response to the Observations of the African Union and the League of Arab States', ICC-02/05-01/09-377 [the 'Prosecutor's Response to the African Union and the League of Arab States'].
[62] 'Order on the conduct of the hearing before the Appeals Chamber in the Jordan Referral re Al-Bashir Appeal', ICC-02/05-01/09-379, p. 3.
[63] *See* 'Transmission of a Note Verbale from the Embassy of the Hashemite Kingdom of Jordan dated 29 August 2018', 29 August 2018, ICC-02/05-01/09-380; 'Prosecution's Response to the *Note Verbale* submitted by the Embassy of the Hashemite Kingdom of Jordan to the Netherlands to the Registry concerning the order on the conduct of the hearing in the Jordan Referral re Al-Bashir Appeal', 30 August 2018, ICC-02/05-01/09-381.

corresponding extension of time for the Prosecutor and revised the schedule of the hearing from four to five days (10-14 September 2018).[64]

30. The Appeals Chamber held a hearing with the parties and *amici curiae* from 10 to 14 September 2018.[65] On 14 September 2018, the Appeals Chamber issued an oral order inviting the parties and *amici curiae* to file, by 28 September 2018, further written submissions on issues that had not been addressed in writing or orally.[66]

31. On 20 September 2018, the Appeals Chamber invited the competent authorities of Sudan and Mr Al-Bashir to file submissions by 5 October 2018 on issues raised in the appeal and during the hearing.[67]

32. Following the Appeals Chamber's oral order of 14 September 2018, Jordan,[68] the Prosecutor,[69] the African Union,[70] the League of Arab States,[71] Ms Lattanzi,[72] Mr Magliveras,[73] Mr O'Keefe,[74] and Mr Robinson, Mr Cryer, Ms

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[64] 'Revised order on the conduct of the hearing before the Appeals Chamber in the Jordan Referral re Al-Bashir Appeal', ICC-02/05-01/09-382, p. 3.
[65] Corrected Transcript of hearing, 10 September 2018, ICC-02/05-01/09-T-4-ENG; Transcript of hearing, 11 September 2018, ICC-02/05-01/09-T-5-ENG; Transcript of hearing, 12 September 2018, ICC-02/05-01/09-T-6-ENG; Transcript of hearing, 13 September 2018, ICC-02/05-01/09-T-7-ENG; Transcript of hearing, 14 September 2018, ICC-02/05-01/09-T-8-ENG.
[66] Transcript of hearing, 14 September 2018, ICC-02/05-01/09-T-8-ENG, p. 2, lines 10-14, p. 57, lines 21-24.
[67] 'Order inviting submissions in the Jordan Referral re Al-Bashir Appeal', ICC-02/05-01/09-386, p. 3.
[68] 'The Hashemite Kingdom of Jordan's submissions following the hearing of 10, 11, 12, 13 and 14 September 2018', 28 September 2018, ICC-02/05-01/09-390 ['Jordan's Final Submissions'].
[69] 'Final Submissions of the Prosecution following the Appeal Hearing', 28 September 2018, ICC-02/05-01/09-392 [the 'Prosecutor's Final Submissions'].
[70] 'Supplementary African Union Submission in the "Hashemite Kingdom of Jordan's Appeal Against the 'Decision under Article 87(7) of the Rome Statute on the Non-Compliance by Jordan with the Request by the Court for the Arrest and Surrender [of] Omar Al-Bashir[']" with Annex 1, Annex 2, Annex 3, Annex 4 and Annex 5', 28 September 2018, ICC-02/05-01/09-389 [the 'African Union's Final Submissions'], with annex 1 (ICC-02/05-01/09-389-Anx1), annex 2 (ICC-02/05-01/09-389-Anx2), annex 3 (ICC-02/05-01/09-389-Anx3), annex 4 (ICC-02/05-01/09-389-Anx4), and annex 5 (ICC-02/05-01/09-389-Anx5).
[71] 'The League of Arab States' post-hearing submissions', 28 September 2018, ICC-02/05-01/09-388 [the 'League of Arab States' Final Submissions'].
[72] 'Amicus curiae further observations submitted by Prof. Flavia Lattanzi pursuant to the oral order issued on 14 September 2018 by the Presiding Judge of the Appeals Chamber during the hearing on "The Hashemite Kingdom of Jordan's appeal against the 'Decision under article 87(7) of the Rome Statute on the non-compliance by Jordan with the request by the Court for the arrest and surrender [of] Omar Al-Bashir'" of 12 March 2018', 28 September 2018, ICC-02/05-01/09-393 ['Ms Lattanzi's Final Submissions'].
[73] 'Amicus curiae further observations pursuant to the oral order issued on 14 September 2018 by the Presiding Judge Eboe-Osuj[i] during the oral hearing on the appeal of the Hashemite Kingdom of Jordan lodged on 12 March 2018 against the finding of Pre-Trial Chamber II that it did not comply

deGuzman, Ms Lafontaine, Ms Oosterveld, and Mr Stahn[75] filed their respective submissions.

IV. MERITS

A. Standard of Review

33. With respect to errors of law, the Appeals Chamber has previously found that it:

> […] will not defer to the Trial Chamber's interpretation of the law. Rather, it will arrive at its own conclusions as to the appropriate law and determine whether or not the Trial Chamber misinterpreted the law. If the Trial Chamber committed such an error, the Appeals Chamber will only intervene if the error materially affected the Impugned Decision.
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> […] A judgment is 'materially affected by an error of law' if the Trial Chamber 'would have rendered a judgment that is substantially different from the decision that was affected by the error, if it had not made the error'. [Footnotes omitted].[76]

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with the request to arrest and surrender Mr. Al-Bashir', dated 25 September 2018 and registered on 26 September 2018, ICC-02/05-01/09-387 ['Mr Magliveras's Final Submissions'].

[74] 'Final observations by Professor Roger O'Keefe, pursuant to rule 103 of the Rules of Procedure and Evidence and the President's oral direction of 14 September 2018, on the merits of the legal questions presented in "The Hashemite Kingdom of Jordan's appeal against the 'Decision under article 87(7) of the Rome Statute on the non-compliance by Jordan with the request by the Court for the arrest and surrender [of] Omar Al-Bashir'" of 12 March 2018 (ICC-02/05-01/09-326)', 28 September 2018, ICC-02/05-01/09-394 ['Mr O'Keefe's Final Submissions'].

[75] 'Supplemental Amicus Curiae Submissions of Professors Robinson, Cryer, deGuzman, Lafontaine, Oosterveld, and Stahn', 28 September 2018, ICC-02/05-01/09-391 ['Mr Robinson's *et al.* Final Submissions'].

[76] *The Prosecutor v. Jean-Pierre Bemba Gombo*, 'Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's 'Judgment pursuant to Article 74 of the Statute'', 8 June 2018, ICC-01/05-01/08-3636-Red (A) ['*Bemba* Appeal Judgment'], para. 36; *The Prosecutor v. Uhuru Muigai Kenyatta*, 'Judgment on the Prosecutor's appeal against Trial Chamber V(B)'s "Decision on Prosecution's application for a finding of non-compliance under Article 87(7) of the Statute"', 19 August 2015, ICC-01/09-02/11-1032 (OA5) ['*Kenyatta* OA5 Judgment'], para. 23. *See also The Prosecutor v. Thomas Lubanga Dyilo*, 'Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction', 1 December 2014, ICC-01/04-01/06-3121-Conf (A5) with a public redacted version, ICC-01/04-01/06-3121-Red (A5) ['*Lubanga* A5 Judgment'], para. 18; *The Prosecutor v. Simone Gbagbo*, 'Judgment on the appeal of Côte d'Ivoire against the decision of Pre-Trial Chamber I of 11 December 2014 entitled "Decision on Côte d'Ivoire's challenge to the admissibility of the case against Simone Gbagbo"', 27 May 2015, ICC-02/11-01/12-75-Conf (OA) with a public redacted version, ICC-02/11-01/12-75-Red (OA) ['*S. Gbagbo* Admissibility OA Judgment'], para. 40. *See also The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, 'Judgment on the appeal of the Prosecutor against the decision of Trial Chamber IV of 12 September 2011 entitled "Reasons for the Order on translation of witness statements (ICC-02/05-03/09-199) and additional instructions on translation"', 17 February 2012, ICC-02/05-03/09-295 (OA2) ['*Banda* OA2 Judgment'], para. 20; *The Prosecutor v. Mathieu Ngudjolo Chui*, 'Judgment on the Prosecutor's appeal against the decision of Trial Chamber II entitled "Judgment pursuant to article 74 of the Statute"', 7 April 2015, ICC-01/04-02/12-271-Corr (A) ['*Ngudjolo* Appeal Judgment'], para. 20.

34. With respect to discretionary decisions, the Appeals Chamber has pronounced the following applicable standard of review:

> The Appeals Chamber recalls that it will not interfere with the Chamber's exercise of discretion merely because the Appeals Chamber, if it had the power, might have made a different ruling.[77] The Appeals Chamber will only disturb the exercise of a Chamber's discretion where it is shown that an error of law, fact or procedure was made.[78] In this context, the Appeals Chamber has held that it will interfere with a discretionary decision only under limited conditions and has referred to standards of other courts to further elaborate that 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.[79] Furthermore, once it is established that the discretion was erroneously exercised, the Appeals Chamber has to be satisfied that the improper exercise of discretion materially affected the impugned decision.[80]
>
> 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.[81]

35. With regard to an exercise of discretion based upon an incorrect conclusion of fact, the Appeals Chamber applies a standard of reasonableness in appeals pursuant to article 82 of the Statute, thereby according a margin of deference to the Chamber's findings.[82] The Appeals Chamber will not interfere with the factual

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[77] *Kenyatta* OA5 Judgment, para. 22. *See also The Prosecutor v. Joseph Kony et al*., 'Judgment on the appeal of the Defence against the "Decision on the admissibility of the case under article 19 (1) of the Statute" on 10 March 2009', 16 September 2009, ICC-02/04-01/05-408 (OA3) ['']', para. 79; *The Prosecutor v. Thomas Lubanga Dyilo*, 'Judgment on the appeals of the Prosecutor and Mr Thomas Lubanga Dyilo against the "Decision on Sentence pursuant to Article 76 of the Statute"', 1 December 2014, ICC-01/04-01/06-3122 (A4 A6) ['*Lubanga* Sentencing Appeal Judgment'], para. 41; *Ngudjolo* Appeal Judgment, para. 21.

[78] *Kenyatta* OA5 Judgment, para. 22. *See also Kony et al.* OA3 Judgment, para. 80; *The Prosecutor v. Abdallah Banda Abakaer Nourain*, 'Judgment on the appeal of Mr Abdallah Banda Abakaer Nourain against Trial Chamber IV's issuance of a warrant of arrest', 3 March 2015, ICC-02/05-03/09-632-Red (OA5) ['*Banda* OA5 Judgment'], para. 30; *The Prosecutor v. Dominic Ongwen*, 'Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber II entitled "Decision Setting the Regime for Evidence Disclosure and Other Related Matters"', 17 June 2015, ICC-02/04-01/15-251 (OA3) ['*Ongwen* OA3 Judgment'], para. 35.

[79] *Kenyatta* OA5 Judgment, para. 22. *See also Kony et al.* OA3 Judgment, paras 80-81; *Banda* OA5 Judgment, para. 30; *Ongwen* OA3 Judgment, para. 35.

[80] *Kenyatta* OA5 Judgment, para. 22. *See also Kony et al.* OA3 Judgment, para. 80; *Banda* OA5 Judgment, para. 30; *Ongwen* OA3 Judgment, para. 35.

[81] *Kenyatta* OA5 Judgment, para. 23. *See also Banda* OA2 Judgment, para. 20; *Lubanga* A5 Judgment, para. 18; *S. Gbagbo* Admissibility OA Judgment, para. 40.

[82] *Kenyatta* OA5 Judgment, para. 24. *See also Lubanga* A5 Judgment, paras 24, 27; *S. Gbagbo* Admissibility OA Judgment, para. 39.

findings of a first instance Chamber 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.[83] Regarding the misappreciation of facts, the Appeals Chamber will not disturb a Pre-Trial or Trial Chamber's evaluation of the facts just because the Appeals Chamber might have come to a different conclusion.[84] It will interfere only where it cannot discern how the Chamber's conclusion could have reasonably been reached from the evidence before it.[85]

B. Applicable legal framework

36. Articles 13, 27 and 87(7), 97 and 98 of the Statute, as well as articles 25 and 103 of the Charter of the United Nations and Resolution 1593 are relevant for the present appeal.

37. Article 13 concerns the exercise of jurisdiction and provides that

> The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if:
>
> (a) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14;
>
> (b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; or
>
> (c) The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15.

38. Article 27 pertains to the irrelevance of official capacity and provides as follows:

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[83] *Kenyatta* OA5 Judgment, para. 24. *See also The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, 'Judgment In the Appeal by Mathieu Ngudjolo Chui of 27 March 2008 against the Decision of Pre-Trial Chamber I on the Application of the Appellant for Interim Release', 9 June 2008, ICC-01/04-01/07 (OA4), para. 25; *Ngudjolo* Appeal Judgment, para. 22; *S. Gbagbo* Admissibility OA Judgment, para. 38.

[84] *Kenyatta* OA5 Judgment, para. 24. *See also The Prosecutor v. Callixte Mbarushimana*, 'Judgment on the appeal of Mr Callixte Mbarushimana against the decision of Pre-Trial Chamber I of 19 May 2011 entitled "Decision on the 'Defence Request for Interim Release"'', 14 July 2011, ICC-01/04-01/10-283 (OA) ['*Mbarushimana* OA Judgment'], para. 17; *Ngudjolo* Appeal Judgment, para. 22; *S. Gbagbo* Admissibility OA Judgment, para. 38.

[85] *Kenyatta* OA5 Judgment, para. 24. *See also Mbarushimana* OA Judgment, para. 17; *Ngudjolo* Appeal Judgment, para. 22; *S. Gbagbo* Admissibility OA Judgment, para. 38.

> 1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.
>
> 2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.

39. Article 87(7) concerns the general provisions for requests for cooperation and provides in relevant part that

> […]
>
> 7. 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.

40. Article 98 deals with the cooperation with respect to waiver of immunity and consent to surrender and stipulates that

> 1. 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.
>
> 2. 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.

41. Article 97 pertains to the consultations and provides as follows:

> Where a State Party receives a request under this Part in relation to which it identifies problems which may impede or prevent the execution of the request, that State shall consult with the Court without delay in order to resolve the matter. Such problems may include, *inter alia*:
>
> (a) Insufficient information to execute the request;
>
> (b) In the case of a request for surrender, the fact that despite best efforts, the person sought cannot be located or that the investigation conducted has

determined that the person in the requested State is clearly not the person named in the warrant; or

(c) The fact that execution of the request in its current form would require the requested State to breach a pre-existing treaty obligation undertaken with respect to another State.

42. Article 25 of the Charter of the United Nations provides:

> The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.

43. Article 103 of the Charter of the United Nations provides:

> In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.

44. Resolution 1593 provides in full:

> The Security Council,
>
> *Taking note* of the report of the International Commission of Inquiry on violations of international humanitarian law and human rights law in Darfur (S/2005/60),
>
> *Recalling* article 16 of the Rome Statute under which no investigation or prosecution may be commenced or proceeded with by the International Criminal Court for a period of 12 months after a Security Council request to that effect,
>
> *Also recalling* articles 75 and 79 of the Rome Statute and encouraging States to contribute to the ICC Trust Fund for Victims,
>
> *Taking note* of the existence of agreements referred to in Article 98-2 of the Rome Statute,
>
> *Determining* that the situation in Sudan continues to constitute a threat to international peace and security,
>
> *Acting* under Chapter VII of the Charter of the United Nations,
>
> 1. *Decides* to refer the situation in Darfur since 1 July 2002 to the Prosecutor of the International Criminal Court;
>
> 2. *Decides* that the Government of Sudan and all other parties to the conflict in Darfur, shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution and, while recognizing that States not party to the Rome Statute have no obligation under

the Statute, urges all States and concerned regional and other international organizations to cooperate fully;

3. *Invites* the Court and the African Union to discuss practical arrangements that will facilitate the work of the Prosecutor and of the Court, including the possibility of conducting proceedings in the region, which would contribute to regional efforts in the fight against impunity;

4. *Also encourages* the Court, as appropriate and in accordance with the Rome Statute, to support international cooperation with domestic efforts to promote the rule of law, protect human rights and combat impunity in Darfur;

5. *Also emphasizes* the need to promote healing and reconciliation and encourages in this respect the creation of institutions, involving all sectors of Sudanese society, such as truth and/or reconciliation commissions, in order to complement judicial processes and thereby reinforce the efforts to restore long lasting peace, with African Union and international support as necessary;

6. *Decides* that nationals, current or former officials or personnel from a contributing State outside Sudan which is not a party to the Rome Statute of the International Criminal Court shall be subject to the exclusive jurisdiction of that contributing State for all alleged acts or omissions arising out of or related to operations in Sudan established or authorized by the Council or the African Union, unless such exclusive jurisdiction has been expressly waived by that contributing State;

7. *Recognizes* that none of the expenses incurred in connection with the referral including expenses related to investigations or prosecutions in connection with that referral, shall be borne by the United Nations and that such costs shall be borne by the parties to the Rome Statute and those States that wish to contribute voluntarily;

8. *Invites* the Prosecutor to address the Council within three months of the date of adoption of this resolution and every six months thereafter on actions taken pursuant to this resolution;

9. *Decides* to remain seized of the matter.

45. Bearing in mind this legal framework, the Appeals Chamber will now turn to address Jordan's submissions under its first and second grounds of appeal.

C. First and second grounds of appeal: whether Jordan complied with its duty to cooperate with the Court

46. The Appeals Chamber notes that the first two grounds of appeal raise several questions with regard to immunity of Head of State and the international obligations of Jordan with respect to the arrest and surrender of Mr Al-Bashir. As

the first two grounds are closely related, the Appeals Chamber will consider them together.

1. Relevant part of the Impugned Decision

47. The Pre-Trial Chamber determined, first, that Jordan had failed to comply with its obligation, under both the Rome Statute and Resolution 1593, by not executing a request by the Court for the arrest and surrender of Mr Al-Bashir; and, second, that Jordan is to be referred to the Assembly of States Parties and to the UN Security Council.[86]

48. The Pre-Trial Chamber determined that Mr Al-Bashir enjoyed Head of State immunity from the exercise of criminal jurisdiction by Jordan under customary international law, reiterating its decision in the case of South Africa in which it held that it was 'unable to identify a rule in customary international law that would exclude immunity for Heads of State when their arrest is sought for international crimes by another state, even when the arrest is sought on behalf of an international court'.[87] However, it found that article 27(2) of the Statute not only prevents immunity from constituting a bar to the exercise of the Court's jurisdiction, but it also excludes immunity from arrest.[88] In particular, in the Pre-Trial Chamber's view, the effect of the provision is twofold; it prevents States Parties from: (i) 'raising any immunity belonging to it under international law as a ground for refusing arrest and surrender of a person sought by the Court (vertical effect)'; and (ii) 'invoking any immunity belonging to them when cooperation in the arrest and surrender of a person to the Court is provided by another State Party (horizontal effect)'.[89] The Pre-Trial Chamber held further that because there was no immunity based on official capacity with respect to proceedings before the Court, article 98(1) (in addressing possible immunity that would prevent the arrest and surrender of an individual) had no object in the context of the application of article 27(2) of the Statute; culminating in the conclusion that no immunity is required to be

[86] Impugned Decision, pp. 21-22.
[87] Impugned Decision, para. 27, referring to Pre-Trial Chamber II, 'Decision under article 87(7) of the Rome Statute on the non-compliance by South Africa with the request by the Court for the arrest and surrender of Omar Al-Bashir', 6 July 2017, ICC-02/05-01/09-302 ['*South Africa* Decision'], para. 68.
[88] Impugned Decision, para. 33, referring to *South Africa* Decision, paras 74-75.
[89] Impugned Decision, para. 33, referring to *South Africa* Decision, paras 76-80.

waived.[90] The Pre-Trial Chamber's reasoning applied equally to customary and conventional immunity.[91]

49. Furthermore, the Pre-Trial Chamber was of the view that while the regime set out in article 27(2) ordinarily applies with respect only to States Parties, the Statute provided for obligations defined therein 'may become incumbent upon a State not as a result of its acceptance, but as a result of, and under, the Charter of the United Nations'.[92] In the present case, the Pre-Trial Chamber found that the Court's jurisdiction under article 13(b) of the Statute was triggered by Resolution 1593, by which the UN Security Council exercised its powers under Chapter VII of the Charter to refer the situation in Darfur to the Prosecutor.[93] The Pre-Trial Chamber considered 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'.[94] Specifically, the Pre-Trial Chamber considered that Resolution 1593 obliged Sudan to cooperate fully with the Court and that 'the terms of such cooperation are set by the Rome Statute'.[95] The Pre-Trial Chamber 'acknowledged that this is an expansion of the applicability of an international treaty to a State which has not voluntarily accepted it as such', but reasoned that this was 'in line' with the UN Charter, which allows the UN Security Council 'to impose obligations on States'.[96] The Pre-Trial Chamber found that, as a consequence of Resolution 1593, 'the interactions between Sudan and the Court, with respect to the Court's exercise of jurisdiction in the situation in Darfur are regulated by the Statute'.[97] The Pre-Trial Chamber therefore held 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'.[98]

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[90] Impugned Decision, para. 34, referring to *South Africa* Decision, para. 81.
[91] Impugned Decision, paras 32-33.
[92] Impugned Decision, paras 35, 37, referring to *South Africa* Decision, para. 89.
[93] Impugned Decision, paras 36-37.
[94] Impugned Decision, para. 37.
[95] Impugned Decision, para. 37, referring to *South Africa* Decision, paras 87-88.
[96] Impugned Decision, para. 37. *See also* para. 35.
[97] Impugned Decision, para. 38.
[98] Impugned Decision, paras 38, 44.

50. The Pre-Trial Chamber concluded that Sudan cannot claim, v*is-à-vis* the Court, Head of State immunity in respect of Mr Al-Bashir, and Sudan has the obligation to arrest and surrender him to the Court.[99] Equally, it was of the view that such immunity does not apply v*is-à-vis* States Parties to the Statute in the execution of a request for arrest and surrender issued by the Court in the exercise of its jurisdiction in respect of the situation in Darfur.[100] The Pre-Trial Chamber also found that as 'no waiver is required as there is no immunity to be waived', article 98(1) is inapplicable to the situation of Mr Al-Bashir,[101] hence States Parties, including Jordan, are obliged to execute the Court's request to arrest Mr Al-Bashir and surrender him to the Court and as such this would not be 'violating Sudan's rights under international law'.[102] According to the Pre-Trial Chamber, this is the 'necessary un-severable effect' of the informed choice by the UN Security Council to trigger the jurisdiction of the Court and impose on Sudan the obligation to cooperate with it.[103]

51. The Pre-Trial Chamber found further that article 98(1) of the Statute 'provides no rights to States Parties to refuse compliance with the Court's requests for cooperation' as 'article 98 of the Statute addresses the Court, and is not a source of substantive rights (or additional duties) to States Parties'.[104]

52. Finally, the Pre-Trial Chamber found that under this provision and rule 195 of the Rules, it is the Court's responsibility, and not of the State Party, to address any conflict that may exist between a State Party's duty to cooperate with the Court and that State's obligations to respect immunities under international law.[105] The Pre-Trial Chamber found that Jordan was not entitled to rely on article 98 in order to decide unilaterally not to comply with the Court's request for arrest and surrender of Mr Al-Bashir.[106] The Pre-Trial Chamber found that, even in a situation where article 98(1) of the Statute is applicable, Jordan 'would still be

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[99] Impugned Decision, para. 39. *See also* para. 44.
[100] Impugned Decision, para. 39. *See also* para. 44.
[101] Impugned Decision, paras 34, 40, 44. *See also* para. 39.
[102] Impugned Decision, para. 39, referring to *South Africa* Decision, paras 92-93.
[103] Impugned Decision, para. 40.
[104] Impugned Decision, para. 41, referring to *South Africa* Decision, para. 100.
[105] Impugned Decision, para. 41, referring to *South Africa* Decision, para. 100.
[106] Impugned Decision, para. 42, referring to *South Africa* Decision, paras 102-105. *See also* Impugned Decision, para. 44.

found to be in non-compliance with its obligations' because it failed to execute the Court's cooperation request since the effect of article 98 regarding conflict of obligations does not relieve Jordan of its duties *vis-à-vis* the Court.[107]

2. Submissions of the parties and amici curiae

(a) Jordan

53. Jordan submits that the Pre-Trial Chamber erred (i) in its findings in relation to 'article 27(2) of the Rome Statute excludes the application of article 98';[108] (ii) in finding that 'article 98 establishes no rights for States Parties';[109] (iii) in finding that 'article 98(2) does not apply to the 1953 Convention';[110] and (iv) in finding that 'even if article 98 applied it would provide no basis for Jordan not to comply with the Court's request'.[111] Jordan clarifies that the issues of Mr Al-Bashir enjoying 'personal immunity from foreign criminal jurisdiction under customary international law' or whether Mr Al-Bashir enjoyed immunity based on 'conventional international law' such as the 1953 Convention are not being appealed.[112] Jordan submits further that it does not share Judge Perrin de Brichambaut's interpretation of the Convention for the Prevention and Punishment of the Crime of Genocide [the 'Convention against Genocide'],[113] and agrees with the majority's finding at paragraph 109 of the Pre-Trial Chamber's decision with respect to South Africa[114] [the '*South Africa* Decision'].[115] However, Jordan stresses that this issue is not under appeal and therefore it will not make any submission on the matter 'but stands ready to do so should the Appeals Chamber

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[107] Impugned Decision, para. 43, referring to *South Africa* Decision, para. 106.
[108] Appeal Brief, paras 3 (a), 12, 14-21; Transcript of hearing, 10 September 2018, ICC-02/05-01/09-T-4-ENG, p. 24, lines 14-21.
[109] Appeal Brief, paras 3 (a), 22-30; Transcript of hearing, 10 September 2018, ICC-02/05-01/09-T-4-ENG, p. 24, lines 14-21.
[110] Appeal Brief, paras 3 (a), 31-33; Transcript of hearing, 10 September 2018, ICC-02/05-01/09-T-4-ENG, p. 24, lines 14-21.
[111] Appeal Brief, paras 3 (a), 34-38; Transcript of hearing, 10 September 2018, ICC-02/05-01/09-T-4-ENG, p. 24, lines 14-21.
[112] Appeal Brief, paras 8-9; Jordan's Response to African Union and League of Arab States, para. 3; Transcript of hearing, 10 September 2018, ICC-02/05-01/09-T-4-ENG, p. 25, lines 16-23; Jordan's Final Submissions, para. 7.
[113] *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, 78 United Nations Treaty Series 1021.
[114] Appeal Brief, fn. 37.
[115] 'Decision under article 87(7) of the Rome Statute on the non-compliance by South Africa with the request by the Court for the arrest and surrender of Omar Al-Bashir', 6 July 2017, ICC-02/05-01/09-302.

so wish'.[116] Jordan adds that '[u]nder customary international law, Head of State immunity from foreign criminal jurisdiction is not subject to any exceptions' and the International Court of Justice [the 'ICJ'] in the 'Case concerning the arrest warrant of 11 April 2000' [the '*Arrest Warrant Case*'],[117] did not suggest otherwise.[118]

54. Jordan argues that the issues concerning the exercise of the Court's jurisdiction and the cooperation of a State Party cannot be conflated.[119] Jordan submits that articles 86 and 89, which appear in Part 9 of the Statute, address a State Party's obligations to arrest and surrender a person found in its territory and article 98 preserves the immunities of officials of "third States" under customary and conventional international law.[120] Jordan argues that article 27, which is contained in Part 3 of the Statute, addresses only the Court's ability to exercise its jurisdiction notwithstanding a person's immunity.[121] Jordan argues that article 27 'does not address the question of a State Party's arrest and surrender of persons to the Court', as this provision 'does not create any right or impose any obligation upon a State Party'.[122]

55. Jordan submits that, even if article 27 were considered 'relevant in the context of the arrest and surrender of a person to the Court's own jurisdiction, it could be relevant only in relation to a State Party *vis-à-vis* its own officials and not when a State Party was potentially surrendering an official of another State Party.[123] In Jordan's view, article 98 expressly addresses the latter situation by 'preserving immunities arising under customary and conventional international law

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[116] Appeal Brief, fn. 37.
[117] (Judgment) 14 February 2002, ICJ Reports 2002.
[118] Appeal Brief, paras 7-8; Transcript of hearing, 10 September 2018, ICC-02/05-01/09-T-4-ENG, p. 42, lines 14-16.
[119] Appeal Brief, para. 17.
[120] Appeal Brief, paras 15, 28; Transcript of hearing, 10 September 2018, ICC-02/05-01/09-T-4-ENG, p. 31, lines 1-3, 10-20; Transcript of hearing, 11 September 2018, ICC-02/05-01/09-T-5-ENG, p. 106, line 24 to p. 107, line 10; Jordan's Final Submissions, paras 4-5.
[121] Appeal Brief, para. 16; Transcript of hearing, 10 September 2018, ICC-02/05-01/09-T-4-ENG, p. 34, lines 16-19; Jordan's Response to the *Amici*, para. 7.
[122] Appeal Brief, para. 16; Jordan's Response to the *Amici*, para. 7.
[123] Appeal Brief, para. 18 (emphasis in original omitted); Transcript of hearing, 11 September 2018, ICC-02/05-01/09-T-5-ENG, p.105, line 10 to p.106, line 5; Jordan's Response to the *Amici*, para. 9.

in the absence of waiver'.[124] Jordan further argues that, even if article 27(2) was construed as an 'implicit waiver by a *State Party*' of international law immunities it would otherwise enjoy under Part 9 of the Statute, article 27(2) cannot be construed that way in relation to officials of a non-State Party such a Sudan.[125] Jordan avers that the exception provided in article 27(2), in principle, should be confined to the State Parties that have 'accepted' the Court's jurisdiction.[126]

56. According to Jordan, its obligations *vis-à-vis* Sudan under both customary and international law with respect to the immunities of Mr Al-Bashir fell within article 98(1) and (2).[127] Jordan asserts that according to the Pre-Trial Chamber's narrow reading of article 98 any State Party must surrender an individual whenever requested by the Court, 'even in circumstances where the Court has not seen fit to determine whether there exists immunity under conventional international law, as is the case here'.[128] Jordan avers that the meaning of 'third State' under article 98(1) should not be equated with 'State not party'.[129] It contends that it is incorrect to conclude that 'any international agreement that does not include the words 'sending State' does not fall within the ambit of article 98(2).[130] According to Jordan, article 11 of the 1953 Convention addresses the issue of immunity of member state representatives from arrest and detention when travelling to and from conferences, and article 14 of the 1953 Convention addresses circumstances where a member state might consent to the arrest and detention of its representatives.[131]

57. Jordan argues that when the Court makes a finding under article 87(7) of the Statute, such a finding must take into account whether the Court 'proceeded' with its request in accordance with the Statute, including article 98 of the Statute.[132]

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[124] Appeal Brief, para. 19; Transcript of hearing, 10 September 2018, ICC-02/05-01/09-T-4-ENG, p. 31, lines 1-4; Jordan's Response to African Union and League of Arab States, paras 6-7, 9. *See also* Jordan's Final Submissions, para. 14.
[125] Appeal Brief, para. 20.
[126] Appeal Brief, para. 20, quoting Pre-Trial Chamber II, 'Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court', 9 April 2014 ICC-02/05-01/09-195 [the '*Democratic Republic of the Congo* Decision'], para. 26.
[127] Appeal Brief, para. 23. *See also* Jordan's Final Submissions, paras 5-6.
[128] Appeal Brief, paras 26-27.
[129] Jordan's Response to African Union and League of Arab States, para. 8; Jordan's Final Submissions, paras 5-6.
[130] Appeal Brief, paras 31-32. *See also* Jordan's Final Submissions, paras 5-6, 13.
[131] Appeal Brief, paras 32-33. *See also* Jordan's Final Submissions, para. 13.
[132] Appeal Brief, para. 30.

Jordan submits that a State Party must be given an opportunity to fully explain why it believes that a request for cooperation is inconsistent with the Statute, in particular with the requirements of article 98 of the Statute.[133] Jordan argues that the Pre-Trial Chamber has negated 'an important conflict avoidance rule' provided for under article 98 of the Statute by asserting that Jordan has a 'duty to cooperate with the Court no matter what legal obligations [it] may have vis-à-vis other States'.[134] According to Jordan, the Court first 'needs to obtain a waiver [pursuant to article 98] from Sudan before requesting State Parties […] to arrest and surrender him'.[135]

58. According to Jordan, its obligations *vis-à-vis* Sudan under both customary and international law with respect to the immunities of Mr Al-Bashir fell within article 98(1) and (2).[136] Jordan argues that the Pre-Trial Chamber's narrow reading of this provision as referring solely to the 'Court' rather than 'to a 'right of a State Party'' is highly problematic.[137] Jordan asserts that according to this reading any State Party must surrender an individual whenever requested by the Court, 'even in circumstances where the Court has not seen fit to determine whether there exists immunity under conventional international law, as is the case here'.[138]

59. Jordan argues that as articles 86 and 89(1) expressly state that a State Party's obligations must be carried out in accordance with the provisions of the Statute, including Part 9; then such obligations are conditioned on the Court acting in accordance with article 98.[139] According to Jordan, the 'Court has no right or power to request a State Party to arrest and surrender a person in complete disregard for the provisions of the Rome Statute'.[140] Jordan argues that when the Court makes a finding under article 87(7) of the Statute, such a finding must take into account whether the Court 'proceeded' with its request in accordance with the

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[133] Appeal Brief, para. 30.
[134] Appeal Brief, paras 35, 37-38; Transcript of hearing, 10 September 2018, ICC-02/05-01/09-T-4-ENG, p. 32, line 21.
[135] Appeal Brief, paras 64, 77; Transcript of hearing, 10 September 2018, ICC-02/05-01/09-T-4-ENG, p. 32, line 25 to p. 33, line 2, p. 33, lines 14-16.
[136] Appeal Brief, para. 23.
[137] Appeal Brief, paras 26-27.
[138] Appeal Brief, para. 26.
[139] Appeal Brief, para. 28.
[140] Appeal Brief, para. 28.

Statute, including article 98 of the Statute and gave the State an opportunity to explain why it believes that a request for cooperation is inconsistent with the Statute.[141]

60. With respect to Resolution 1593, Jordan argues that the Pre-Trial Chamber erred in finding that the resolution triggered the application of the entire legal framework of the Statute to the situation in Darfur and that Sudan has analogous rights and obligations as to a State Party, for the purposes of the Darfur situation.[142] Jordan argues that the legal relationship between Jordan and Sudan continues to be governed by customary and conventional international law and, since the resolution did not implicitly waive Mr Al-Bashir's immunity, Jordan was under no obligation to arrest and surrender him while he was on Jordanian territory.[143] Jordan avers that paragraph 1 of the resolution merely triggered the Court's jurisdiction over the situation in Darfur (not a State) in accordance with article 13(b) of the Statute, whilst paragraph 2 of the resolution, binding under article 25 of the UN Charter, pertains to Sudan's cooperation with the Prosecutor and with the Court; however, these two 'specific decisions' cannot be 'transformed into much broader decisions regarding the relations of other States vis-à-vis the Court, as the Chamber has sought to do'.[144]

61. Jordan submits that the Impugned Decision's reasoning and conclusions regarding the effect of Resolution 1593 and the triggering of the Court's jurisdiction, which are drawn from the *South Africa* Decision, are 'unconvincing'.[145] Jordan argues that a UN Security Council referral 'does not, and cannot' have the effect of going further than the application of article 13(b) of the Statute which concerns only the Court's jurisdiction and that extending the

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[141] Appeal Brief, para. 30.
[142] Appeal Brief, para. 50. *See also* paras 40, 55.
[143] Appeal Brief, paras 50, 82; Transcript of hearing, 11 September 2018, ICC-02/05-01/09-T-5-ENG, p. 101, lines 16-18, p. 105, lines 10-21, p. 107, lines 11-14.
[144] Appeal Brief, para. 52; Transcript of hearing, 11 September 2018, ICC-02/05-01/09-T-5-ENG, p. 100, line 8 to p. 101, line 7. *See also* Jordan's Final Submissions, paras 22-24.
[145] Appeal Brief, paras 53-55. *See also* Transcript of hearing, 11 September 2018, ICC-02/05-01/09-T-5-ENG, p. 98, line 22 to p. 99, line 1.

application of the Statute in its entirety by virtue of the resolution does not find support either in the language of the resolution nor in article 13(b).[146]

62. Jordan alleges further that the Impugned Decision is unclear as to which specific provisions 'if any' of the Statute apply automatically to Sudan 'by virtue of the referral' pursuant to article 13(b) and which ones would apply by virtue of 'any obligation imposed upon Sudan' by the resolution.[147] Jordan submits that article 13(b) provides that only the provisions concerning the exercise of the Court's jurisdiction become operative when a situation is referred by the UN Security Council rather than all the provisions of the Statute.[148] Jordan argues further that the obligations to cooperate under Part 9 of the Statute do not relate to the Court's jurisdiction and do not apply to a non-State Party 'simply' by virtue of a referral.[149] Jordan avers that if the entire Statute applied by virtue of a referral under article 13(b), paragraph 2 of Resolution 1593 would be unnecessary.[150] In Jordan's view, the Pre-Trial Chamber acknowledged this point in the *South Africa* Decision but contradicted itself in the Impugned Decision when finding that 'the Statute applies in its entirety with respect to the situation of Darfur, on one hand, and that Part 9 does not automatically apply, on the other'.[151]

63. Moreover, Jordan alleges that a UN Security Council referral does not 'automatically' trigger the application of article 27(2) to a non-State Party.[152] In Jordan's view, this provision does not establish or limit the Court's jurisdiction because 'immunities are simply a procedural bar' that may prevent the Court's exercise of its jurisdiction or a State Party from arresting and surrendering a person upon the Court's request; the Court's jurisdiction 'continues to exist even if immunities apply and it may be exercised whenever those immunities cease to apply, for example when they are waived'.[153]

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[146] Appeal Brief, paras 55, 58; Jordan's Response to African Union and League of Arab States, paras 12, 14.
[147] Appeal Brief, paras 56-57.
[148] Appeal Brief, para. 58.
[149] Appeal Brief, para. 59.
[150] Appeal Brief, para. 59, citing *South Africa* Decision, para. 87.
[151] Appeal Brief, para. 59, citing *South Africa* Decision, para. 87.
[152] Appeal Brief, para. 60.
[153] Appeal Brief, para. 60.

64. Jordan avers that even if the Statute does apply in its entirety with respect to the situation in Darfur or even if, for the limited purpose of that situation, Sudan has rights and duties analogous to that of a State Party, Sudan must continue to be regarded as a non-State Party.[154] Jordan argues further that even if article 27(2) were to apply to Sudan, its effects would be limited by article 98 of the Statute because Sudan is a non-State Party; hence while the resolution may prevent Sudan from claiming immunity of Mr Al-Bashir *vis-à-vis* the Court, the resolution 'does not reach the issue of the obligations of other States vis-à-vis the Court' which are governed by article 98 of the Statute nor 'supersede the rules of customary and conventional international law applicable between Jordan and Sudan'.[155]

65. Jordan contends that paragraph 2 of Resolution 1593 does not refer to the removal of immunity, and according to the European Court of Human Rights, a 'derogation in a UN Security Council resolution from the rules on State immunity […] cannot be presumed'.[156] Jordan maintains that the resolution focuses on the relationship between Sudan, a non-State Party, and the Court; 'it does not address the national criminal jurisdiction of other States'.[157] Jordan adds that neither the *travaux préparatoires* of the resolution nor the UN Security Council's deliberations leading to its adoption provide any evidence of the intent to 'suspend or remove' Mr Al-Bashir's immunity from 'national' or 'foreign' criminal jurisdiction and the subsequent practice of UN organs and States demonstrates that Mr Al-Bashir's immunity under international law 'remains fully applicable'.[158] In Jordan's view, the *South Africa* Decision, upon which the Impugned Decision relies heavily, rejected the reasoning of earlier pre-trial chambers in ruling that there had been no waiver, implicit or explicit, of Mr Al-Bashir's immunity in Resolution 1593.[159]

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[154] Appeal Brief, para. 62. *See also* Jordan's Final Submissions, para. 19.
[155] Appeal Brief, paras 63, 67; Transcript of hearing, 11 September 2018, ICC-02/05-01/09-T-5-ENG, p. 105, line 25 to p. 106, line 5.
[156] Appeal Brief, para. 70, referring to article 2 (1) of the UN Charter. *See also* Transcript of hearing, 11 September 2018, ICC-02/05-01/09-T-5-ENG, p. 106, lines 13-20.
[157] Appeal Brief, para. 72.
[158] Appeal Brief, paras 73-75.
[159] Appeal Brief, para. 46, referring to; 'Decision on the non-compliance by the Republic of Djibouti with the request to arrest and surrender Omar Al-Bashir to the Court and referring the matter to the United Nations Security Council and the Assembly of the State Parties to the Rome Statute', 11 July

66. Jordan argues further that, pursuant to article 98 of the Statute, Sudan has the 'sovereign prerogative' to waive such immunity and paragraph 2 of Resolution 1593 does not modify 'the terms of article 98 in that sense'.[160] Jordan contends that the resolution does not impose on States the obligation to 'disregard' Mr Al-Bashir's immunity as 'the resolution imposes no obligations on States other than Sudan'.[161]

67. With respect to *jus cogens* norms, Jordan submits that based on the *Arrest Warrant Case* and the ICJ case of *Germany v. Italy*, the prohibitions of genocide and crimes against humanity may be considered as such norms; however the status of these prohibitions 'does not affect the immunities that operate to protect State officials from foreign criminal jurisdiction'.[162] Jordan adds that the 'question of hierarchy of norms doesn't arise in this situation because the rules in question address quite different issues and are not in conflict'.[163] In that regard, it avers that when Jordan 'recognized the immunity of Mr Al-Bashir, it is not committing an act of genocide [,…] crimes against humanity [or…] transgressing a peremptory norm of international law'.[164] Finally, Jordan argues that neither articles 4(2) nor 59 of the Statute would have a bearing on the issues raised in the present appeal.[165]

(b) The Prosecutor

68. The Prosecutor submits that the Pre-Trial Chamber correctly interpreted and applied the law when it concluded that Mr Al-Bashir's official capacity, as a Head of State, is irrelevant for the purposes of the Statute.[166] The Prosecutor contends that '[t]o the extent that the Statute disapplies under article 27(2) all immunities which might be opposable to the request to arrest and surrender Mr Al-Bashir, it is unnecessary to entertain more general questions of the contours of those

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2016, ICC-02/05-01/09-266; 'Decision on the non-compliance by the Republic of Uganda with the request to arrest and surrender Omar Al-Bashir to the Court and referring the matter to the United Nations Security Council and the Assembly of State Parties to the Rome Statute', 11 July 2016, ICC-02/05-01/09-267.

[160] Appeal Brief, para. 80.

[161] Appeal Brief, para. 81.

[162] Transcript of hearing, 10 September 2018, ICC-02/05-01/09-T-4-ENG, p. 44, line 23 to p. 45, line 2.

[163] Transcript of hearing, 10 September 2018, ICC-02/05-01/09-T-4-ENG, p. 45, lines 5-6.

[164] Transcript of hearing, 11 September 2018, ICC-02/05-01/09-T-5-ENG, p. 84, lines 21-24.

[165] Transcript of hearing, 10 September 2018, ICC-02/05-01/09-T-4-ENG, p. 43, line 23 to p. 44, line 8; Jordan's Final Submissions, para. 10.

[166] Prosecutor's Response, paras 4, 45; Transcript of hearing, 10 September 2018, ICC-02/05-01/09-T-4-ENG, p. 47, line 14 to p. 48, line 5.

immunities in international law beyond the Statute'.[167] Nothing in the Statute, the Prosecutor avers, 'necessarily gives rise to 'conflicting obligations' because the Statute, being a treaty, acts 'as *lex specialis* by reference to relevant customary law'.[168] The Prosecutor maintains that 'crimes such as those allegedly committed by Omar Al-Bashir 'threaten the peace, security […] of the world''.[169] She adds that the regime created by States on the official capacity of suspects and accused was mutually agreed upon when ratifying the Statute to be irrelevant to the Court's exercise of jurisdiction and to 'the issue and execution of requests of arrest and surrender of officials of States […] bound by the […] Statute'.[170]

69. The Prosecutor argues that the 'two inter-dependent obligations', *i.e.* the 'vertical effect' and the 'horizontal effect', are indivisible and constitute the 'only possible reading' of article 27 that is consistent with the applicable principles of interpretation under the Vienna Convention.[171] With respect to the vertical effect, the Prosecutor avers that while article 27 concerns the relations between the Court and a State Party, it also 'exceptionally' governs relations between the Court and a non-State Party 'if the latter is a [UN Security Council] Situation-Referral State'.[172] The Prosecutor argues that, by virtue of article 27, the official capacity of a suspect or an accused 'cannot bar judicial proceedings before the Court'; a State Party or a UN Security Council Situation-Referral State can neither 'claim immunity *vis-à-vis* the Court's exercise of jurisdiction, nor validly object to any request addressed to it for arrest and surrender of its official'.[173]

70. The Prosecutor further submits that the horizontal effect is the 'necessary corollary' of its vertical effect[174] in that States Parties must mutually respect that 'the other is likewise bound 'vertically' by article 27.[175] Referring to the plain terms of article 27 and State practice, the Prosecutor avers that the 'direct

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[167] Prosecutor's Final Submissions, para. 5.
[168] Prosecutor's Response, paras 6-7.
[169] Prosecutor's Response, para. 7.
[170] Prosecutor's Response, paras 7, 15.
[171] Prosecutor's Response, paras 17-18. *See also* paras 24, 41; Transcript of hearing, 10 September 2018, ICC-02/05-01/09-T-4-ENG, p. 49, line 5 to p. 50, line 6; Prosecutor's Response to the *Amici*, para. 11; Prosecutor's Final Submissions, paras 5-7.
[172] Prosecutor's Response, para. 19.
[173] Prosecutor's Response, para. 20.
[174] Prosecutor's Response, para. 22.
[175] Prosecutor's Response, para. 23.

implications' of these effects are two-fold: (i) there is no conflicting obligation and therefore 'Jordan was obliged to respect the vertical effect of article 27'; and (ii) Jordan could not rely on article 98(1) as a basis to not cooperate with the Court.[176] According to the Prosecutor, Jordan's interpretation of article 27 in opposition to article 98 and the assumption that Sudan cannot be the subject of any obligations under the Statute are incorrect 'premises'.[177]

71. The Prosecutor argues further that the Pre-Trial Chamber 'properly' found that article 27 applies to the whole Statute and article 98 does not apply to the present case;[178] therefore there is no 'material conflict' between Jordan's international obligations.[179] The Prosecutor asserts that the general structure of the Statute including the particular scheme of Part 9 'must [...] be considered as relevant context in interpreting article 27'.[180] She argues that the language of this provision makes it clear that 'the approach to official capacity in Part 3 is intended to be the same as the approach in Part 9'.[181] In this respect she avers that article 27(2) not only bars a State from raising immunity when their officials appear before the Court as suspects, but also from raising immunity to avoid arresting and surrendering their own officials.[182]

72. The Prosecutor contends further that Jordan overlooks that article 27(2) is a particular application of the principle of equality before the Court, and therefore the reference to the Court's 'jurisdiction' has a broader meaning that 'encompasses the full spectrum of the Court's proceedings, *vis-à-vis* suspects and accused persons but also State Parties and UN Security Council Situation-Referral States, such as Sudan'.[183] She adds that 'even if Parts 3 and 9 were intended *arguendo* to reflect different issues related to the question of immunity, the Appeals Chamber

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[176] Prosecutor's Response, paras 23, 25-26, referring to D. Akande, 'The legal nature of Security Council referrals to the ICC and its impact on Al Bashir's immunities' 7 *Journal of International Criminal Justice* (2009), pp. 338-339, fn. 19. *See also* Prosecutor's Final Submissions, paras 8-9.
[177] Prosecutor's Response, para. 27; Prosecutor's Final Submissions, paras 8-9.
[178] Prosecutor's Response, paras 30-60.
[179] Prosecutor's Response, paras 61-63.
[180] Prosecutor's Response, paras 30-32, 36; Transcript of hearing, 10 September 2018, ICC-02/05-01/09-T-4-ENG, p. 46, lines 12-20, p. 47, lines 4-5.
[181] Prosecutor's Response, paras 33-34 (emphasis in original omitted); Transcript of hearing, 10 September 2018, ICC-02/05-01/09-T-4-ENG, p. 53, lines 1-4.
[182] Transcript of hearing, 10 September 2018, ICC-02/05-01/09-T-4-ENG, p. 53, lines 2-4.
[183] Prosecutor's Response, paras 34-35.

must still examine both parts and be satisfied that they do indeed serve different interests, such that they need not be reconciled' given the presumption that 'a treaty reflects a mutually coherent set of principles, displaced only by plain evidence of the drafters' intentions'.[184] The Prosecutor submits that the general obligation to cooperate is provided under article 86 and, mirroring the approach of article 27, this provision 'recognises that the rights and obligations of State Parties are not exhaustively set out under Part 9'.[185]

73. The Prosecutor argues that contrary to Jordan's contention, articles 27 and 98(1) 'can and must be read consistently'.[186] The Prosecutor submits that while 'article 98(1) is directed generally to "third States"', it is 'inapplicable to requests for the surrender of persons who are officials of States subject to the operation of article 27' and in the present case to a UN Security Council Situation-Referral State such as Sudan.[187] She argues that while Jordan 'assumes' that 'Sudan is a "third State" whose immunity must be respected by the Court',[188] the term '"third State" is broad and does not itself appear to limit the States to which article 98(1) might apply', as such term is used in the Statute 'generally to describe "another" State, but without particular specification of its status'.[189] She argues further that '[w]hen considering the particular question of the immunity of persons, however, […] the term "third State" in article 98(1) is better interpreted as referring only to States which have not "accepted the provision embodied in Article 27(2)"'.[190] She reiterates that all States subject to the obligations of the Statute are bound, under article 27, to respect the non-applicability of immunities in all their dealings concerning the Court's exercise of jurisdiction (vertical effect).[191]

74. The Prosecutor argues that article 98(1) does not preclude requests to States Parties to arrest and surrender officials of a Referral State, like Sudan, regardless of

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[184] Prosecutor's Response, para. 36.
[185] Prosecutor's Response, para. 37. *See also* Transcript of hearing, 10 September 2018, ICC-02/05-01/09-T-4-ENG, p. 53, lines 17-24.
[186] Prosecutor's Response, paras 38-39; Prosecutor's Final Submissions, para. 8.
[187] Prosecutor's Response, para. 44.
[188] Prosecutor's Response, para. 46.
[189] Prosecutor's Response, para. 48.
[190] Prosecutor's Response, para. 49 (emphasis in original omitted) referring to Impugned Decision, para. 34; *South Africa* Decision, paras 81-83.
[191] Prosecutor's Response to African Union and League of Arab States, paras 4, 6-8.

which interpretation of the term 'third State' is adopted and whether or not 'this means the provision applies but factually there is no applicable immunity – or that the provision simply does not apply'.[192] The Prosecutor adds that article 98(1) established a procedural obligation for the Court to consider before proceeding with any request for arrest and surrender when any relevant immunities are owed by the requested State to the third State.[193] She further contends that 'the requested State is nothing more than the Court's agent in executing the Court's arrest warrant, and consequently, the enforcement jurisdiction being exercised is that of the Court and not that of the requested State'.[194] She maintains that when the Court makes this assessment it must always first consider whether the relevant third State bears any duty to comply with article 27 of the Statute.[195] The Prosecutor avers further that article 98(2) addresses agreements on matters 'where a person is specifically 'sent' to the territory of a State Party under certain conditions' and does not apply to the 1953 Convention.[196]

75. Referring to ICJ case-law, the Prosecutor maintains further that while '*jus cogens* norms are superior to ordinary rules of customary law, it's a question of scope of the *jus cogens* norm as to whether it necessarily conflicts with […] a rule of immunity'.[197] The Prosecutor argues that her position regarding the immunity spectrum under customary international law – either to surrender or to prohibit the surrender – she is unsure that there is at this stage sufficiently settled State practice and *opinio juris* to support it.[198] The Prosecutor adds that a 'customary rule restricting States from enforcing requests for arrest and surrender by a competent

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[192] Prosecutor's Response, para. 51.
[193] Prosecutor's Response to African Union and League of Arab States, paras 4, 13-17; Transcript of hearing, 10 September 2018, ICC-02/05-01/09-T-4-ENG, p. 51, line 25 to p. 52, line 2.
[194] Prosecutor's Response to African Union and League of Arab States, paras 11-12. *See also* Transcript of hearing, 13 September 2018, ICC-02/05-01/09-T-7-ENG, p. 23, line 13 to p. 24, line 5.
[195] Transcript of hearing, 10 September 2018, ICC-02/05-01/09-T-4-ENG, p. 52, lines 15-17.
[196] Prosecutor's Response, para. 44.
[197] Transcript of hearing, 10 September 2018, ICC-02/05-01/09-T-4-ENG, p. 57, lines 7-11.
[198] Transcript of hearing, 10 September 2018, ICC-02/05-01/09-T-4-ENG, p. 60, line 5 to p. 61, line 22, p. 63, line 18 to p. 64, line 18, p. 65, line 16 to p. 67, line 18, p. 68, line 13 to p. 71, line 2, p. 75, line 15 to p. 76, line 18; Transcript of hearing, 11 September 2018, ICC-02/05-01/09-T-5-ENG, p. 23, line 25 to p. 26, line 9.

international court' does not serve the purpose underlying Head of State immunity.[199]

76. With respect to Resolution 1593, the Prosecutor submits that it was unnecessary for the UN Security Council to expressly state that the Statute applies as a whole or that Sudan's obligation to cooperate with the Court is regulated by the Statute because the resolution referred the situation in Darfur to the Court pursuant to article 13(b) which stipulates that the Court may exercise its jurisdiction 'in accordance with the provisions of [the] Statute', including article 27 and Part 9 of the Statute.[200] It follows, the Prosecutor avers, that the resolution 'did not need to expressly set out the effect that it would have on Omar Al-Bashir's immunities that he otherwise enjoys under international law'.[201] The Prosecutor avers that contrary to the *ad hoc* tribunals, where the UN Security Council created a 'new *sui generis* body', the Court 'already exists and applies an established Statute',[202] and Resolution 1593, by empowering the Court to exercise its jurisdiction, determined, at the same time, that it would exercise that jurisdiction as per the Statute.[203] She avers that the Court's jurisdiction 'once triggered pursuant to any of the three methods' set out in article 13 can only be exercised pursuant to the legal regime of the Statute, as supported *inter alia* by the wording of the chapeau of article 13, and therefore, 'no question arises as to which provisions are applicable and which are not'.[204]

77. The Prosecutor submits that whilst paragraph 2 of Resolution 1593 is the 'source' of Sudan's obligations to cooperate with the Court, the 'content of such duty to cooperate with the Court' is regulated by the Statute and not by the resolution.[205] The Prosecutor submits that it is paragraph 1 of the resolution that triggers the Court's jurisdiction and ensures that the Statute applies in its entirety to the interactions between Sudan and the Court with respect to the situation in

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[199] Prosecutor's Response to the *Amici*, para. 14.
[200] Prosecutor's Response, paras 82, 84; Prosecutor's Final Submissions, paras 10-11.
[201] Prosecutor's Response, para. 87; Transcript of hearing, 11 September 2018, ICC-02/05-01/09-T-5-ENG, p. 131, line 4 to p. 135, line 10.
[202] Prosecutor's Response, para. 83.
[203] Prosecutor's Response, paras 69-71, 82; Transcript of hearing, 11 September 2018, ICC-02/05-01/09-T-5-ENG, p. 124, line 8 to p. 130, line 21.
[204] Prosecutor's Response, para. 72. *See also* para. 70.
[205] Prosecutor's Response, paras 73-74 (emphasis in original omitted).

Darfur, whilst paragraph 2 'clarifies the cooperation obligations of different actors', the content of those cooperation duties contained in Part 9.[206] The Prosecutor argues that the effect of Resolution 1593 and Sudan's resulting obligation to cooperate fully is that 'Sudan is placed in a situation comparable to that of a State Party'; this 'accords with the UN Charter, which permits the Security Council to impose obligations on States'.[207] While Sudan 'is [not] fully equated to a State Party' as its obligations are limited to the Court's exercise of jurisdiction in the situation in Darfur, the Prosecutor argues that the interactions between Sudan and the Court are regulated by the Statute.[208] The Prosecutor contends that obliging Sudan - a refereed State - to cooperate with the Court 'is consistent with the object and purpose of the Statute' because referrals become 'effective' 'by placing a [UN Security Council] Situation-Referral State in a position comparable to other States that are within the jurisdictional scope of the Court'.[209] She adds that because they are already bound by the Statute to comply with the obligations contained therein. States Parties are not specifically named in the resolution.[210]

78. The Prosecutor contends that if the UN Security Council 'had intended to provide for an exception' to the entire application of the Statute, it would have done so expressly, as it did for instance in paragraph 6 of Resolution 1593.[211] The Prosecutor adds that this paragraph shows that the UN Security Council 'was aware of the immunity issues for 'nationals, current or former officials or personnel from a contributing State'' and placed them 'outside the Court's jurisdiction without affecting the general application of the Statute, including article 27(2), to nationals of Sudan'.[212]

79. The Prosecutor contends that the Inquiry Report from the International Commission of Inquiry on violations of international humanitarian law and human

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[206] Prosecutor's Response, paras 75, 77.
[207] Prosecutor's Response, para. 79; Transcript of hearing, 13 September 2018, ICC-02/05-01/09-T-7-ENG, p. 20, lines 8-17.
[208] Prosecutor's Response, para. 80.
[209] Prosecutor's Response, para. 81.
[210] Transcript of hearing, 13 September 2018, ICC-02/05-01/09-T-7-ENG, p. 20, line 19 to p. 21, line 10.
[211] Prosecutor's Response, para. 88.
[212] Prosecutor's Response, para. 88.

rights law in Darfur [the 'Cassese Commission Report']213 – which mentions the possibility of prosecuting government officials – shows that the UN Security Council was aware that public officials might be implicated in the commission of crimes in Darfur and could be the subject of investigation by the Prosecutor.214 She argues that had the UN Security Council intended to 'exempt' any Sudanese public officials from criminal prosecution on account of their immunities under international law, 'it would have done so expressly', as it did for example in paragraph 6 of the same resolution.215 On this point the Prosecutor also submits that 'the non-applicability of immunities also accords with the object and purpose of the resolution' as the 'main purpose is to refer the situation in Darfur to the Court, but without the removal of immunities for Sudanese State officials, the referral would be largely, if not wholly, ineffective'.216

(c) The *amici curiae*

80. The African Union submits that there is a general rule under international law that Heads of State enjoy immunity as there are no exceptions to this basic rule 'even with regard to crimes falling within the jurisdiction of the Court or *jus cogens* crimes'; therefore Mr Al-Bashir, as Head of State of Sudan, a State not party to the Statute, enjoys immunity from arrest and surrender.217 With respect to article 27(2) of the Statute, the African Union argues that this provision excludes the operation of immunity when a suspect or accused is before the Court, 'but does not affect immunity from *foreign* domestic jurisdiction, including when "arrest is sought"' by the Court and the duty to cooperate in the arrest and surrender 'does not apply in relation' to a Head of State of a non-State Party by virtue of article 98.218 The African Union asserts that article 27 of the Statute, while removing immunity in proceedings before the Court (vertical application of immunities),

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213 United Nations, Security Council, 'Report of the International Commission of Inquiry on Darfur to the Secretary-General: pursuant to Security Council resolution 1564 (2004) of 18 September 2004 [Annexed to Letter dated 31 January 2005 from the Secretary-General addressed to the President of the Security Council] Doc No S/2005/60.
214 Prosecutor's Response, para. 91, referring to Cassese Commission Report, paras 641, 644-645.
215 Prosecutor's Response, para. 91; Transcript of hearing, 11 September 2018, ICC-02/05-01/09-T-5-ENG, p. 136, line 23 to p. 137, line 13.
216 Transcript of hearing, 11 September 2018, ICC-02/05-01/09-T-5-ENG, p. 137, lines 14-17.
217 African Union Observations, paras 11-12; Transcript of hearing, 10 September 2018, ICC-02/05-01/09-T-4-ENG, p. 79, lines 21-22, p. 91, lines 2-14, p. 99, lines 11-12.
218 African Union Observations, paras 14, 16; Transcript of hearing, 10 September 2018, ICC-02/05-01/09-T-4-ENG, p. 89, lines 16 to 19.

'does not affect the horizontal application of immunities between States which remains intact under article 98 of the Rome Statute'.[219] It argues that the duty to cooperate on States to arrest and surrender contained in Part 9 is qualified by that later provision.[220]

81. The African Union contends further that when interpreting the Statute, the Court must take into account customary international law[221] and article 98 of the Statute which incorporates the rules of customary international law regarding Head of State immunity from the exercise of foreign jurisdiction and provides for instances where there is no duty to cooperate with the Court.[222] It further contends that while article 27 clearly addresses a procedural matter, article 98 addresses the international obligations of States Parties.[223] The African Union argues further that article 4 of the Convention against Genocide does not deal with immunity; rather it addresses matter of responsibility and not immunity.[224] With respect to the ICJ *Barcelona Traction Case*, the African Union recalls that years after that case, the ICJ did not read into paragraphs 33 and 34 of that case the complete removal of immunity *ratione personae* in the warrant of arrest and jurisdictional immunities cases.[225]

82. The African Union also submits that Resolution 1593 does not waive the immunity of Mr Al-Bashir and a referral under article 13(b) of the Statute does not place a State that is not a party to it in a situation analogous to that of a State Party.[226] The African Union submits that notwithstanding the delegation of responsibilities by Member States to the UN Security Council,[227] any waiver of

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[219] African Union Observations, paras 18-19, 25; African Union's Final Submissions, para. 4.
[220] African Union's Final Submissions, para. 8. *See also* paras 5-10.
[221] Transcript of hearing, 10 September 2018, ICC-02/05-01/09-T-4-ENG, p. 83, lines 12-14.
[222] African Union Observations, para. 17; Transcript of hearing, 10 September 2018, ICC-02/05-01/09-T-4-ENG, p. 83, lines 15-17, p. 92, lines 9-13; Transcript of hearing, 14 September 2018, ICC-02/05-01/09-T-8-ENG, p. 26, lines 12 -14; African Union's Final Submissions, para. 11.
[223] Transcript of hearing, 14 September 2018, ICC-02/05-01/09-T-8-ENG, p. 28, lines 5-7.
[224] Transcript of hearing, 10 September 2018, ICC-02/05-01/09-T-4-ENG, p. 94, lines 21-25.
[225] Transcript of hearing, 11 September 2018, ICC-02/05-01/09-T-5-ENG, p. 76, lines 7-13, referring to 'Case concerning the Barcelona Traction, Light and Power Company, Limited' (Judgment) 5 February 1970, ICJ Reports, paras 33-34.
[226] African Union Observations, paras 27-39; Transcript of hearing, 14 September 2018, ICC-02/05-01/09-T-8-ENG, p. 30, line 22 to p. 31, line 18; African Union's Final Submissions, paras 17-19.
[227] African Union Observations, para. 44, referring to UN Charter, article 24.

immunity by virtue of Resolution 1593 needs to be explicit.[228] The African Union maintains that the contents of the Cassese Commission Report cannot be read into the resolution[229] as the main purpose of the resolution is to provide the legal basis for the UN Security Council to refer the situation to the Court, and thereby confer jurisdiction on the Court.[230] The African Union avers that the resolution 'does not purport to modify the legal framework of the Rome Statute nor to carve out an exception in respect of immunities otherwise available under international law'.[231] According to the African Union, since Sudan did not waived the immunity *ratione personae* of its Head of State, the horizontal effect of this immunity still applies *vis-à-vis* other states.[232]

83. The League of Arab States agrees with Jordan's arguments that the Pre-Trial Chamber erred in its interpretation of the obligations of the States Parties regarding immunity of Heads of State, that article 27(2) does not take away the immunity of Heads of States on the horizontal level as it refers to immunity with respect to the Court only and that article 98(2) applies.[233] The League of Arab States adds that the Pre-Trial Chamber erred in fact and in law in finding that Sudan was not party to the 1953 Convention and that Jordan had an obligation to respect the immunity of Mr Al-Bashir under, *inter alia*, the 1953 Convention and under customary international law.[234] The League of Arab States avers that the equation of 'Situation-Referral States' with 'States Parties' leads to 'manifestly absurd results', and that 'Situation-Referral States' cannot be 'fully equated' with States Parties, due to the lack of voting rights in the Assembly of States Parties and the limitation of obligations to the Court's exercise of jurisdiction, excluding the obligation to pay contributions.[235] Consequently, the League of Arab States avers that Sudan is a

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[228] African Union Observations, para. 44, referring to Vienna Convention, article 31(3)(c).
[229] Transcript of hearing, 10 September 2018, ICC-02/05-01/09-T-4-ENG, p. 81, lines 21-24.
[230] African Union Observations, para. 58.
[231] African Union Observations, para. 50.
[232] African Union Observations, para. 51.
[233] League of Arab States Observations, paras 6, 26, 45; Transcript of hearing, 10 September 2018, ICC-02/05-01/09-T-4-ENG, p. 100, lines 10-12, p. 101, lines 5-6, p. 103, line 25 to p. 105, line 5, p. 106, lines 9-25; League of Arab States' Final Submissions, para. 16.
[234] League of Arab States Observations, paras 18-20; Transcript of hearing, 10 September 2018, ICC-02/05-01/09-T-4-ENG, p. 101, line 5 to p. 103, line 18; League of Arab States' Final Submissions, paras 3-6.
[235] League of Arab States Observations, paras 29, 33. *See also* Transcript of hearing, 12 September 2018, ICC-02/05-01/09-T-6-ENG, p. 20, line 24 to p. 21, line 1.

non-State Party and must be treated as such for the purposes of the Statute and, in particular, article 98 thereof.[236]

84. Mr O'Keefe contends that, given that the Court had not obtained Sudan's waiver of the inviolability and immunity to which Mr Al-Bashir was entitled under international law, when proceeding with a request to Jordan to arrest and surrender Mr Al-Bashir, the Court acted contrary to article 98(1) and thereby exceeded its powers under the Statute.[237] Mr O'Keefe submits that no customary exception to immunity *ratione personae* from foreign criminal jurisdiction, or inviolability from foreign arrest, exists in respect of international crimes.[238] Moreover, he avers there is insufficient state practice and *opinio juris* to establish an exception specifically in respect of surrender to an international court.[239] He adds that there is no such thing legally as the *ius puniendi* of the international community, other than the community of UN Member States *inter se* acting through an explicit decision of the UN Security Council under Chapter VII of the UN Charter.[240] Mr O'Keefe asserts that the distinct concepts of *jus cogens* and obligations *erga omnes* are irrelevant to the present proceedings.[241] He contends that the immunity *ratio personae* of Heads of State is absolute, even in the case of genocide, on the basis that any arrest or prosecution will inevitably interfere with the performance of their functions on behalf of the State, for so long as they remain in office.[242] Mr O'Keefe submits that article 98(1) applies with respect to any person of a State, whether it is a State Party or non-State Party: that is the meaning of 'third State' in the present context.[243] Mr O'Keefe submits that there is no relationship between article 86 and the second sentence of article 89 of the Statute, which apply to the

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[236] League of Arab States Observations, paras 29, 33. *See also* Transcript of hearing, 12 September 2018, ICC-02/05-01/09-T-6-ENG, p. 20, line 24 to p. 21, line 1; League of Arab States' Final Submissions, para. 12.
[237] Mr O'Keefe's Observations, para. 2.
[238] Mr O'Keefe's Observations, para. 2; Transcript of hearing, 11 September 2018, ICC-02/05-01/09-T-5-ENG, p. 7, lines 6-12; Transcript of hearing, 14 September 2018, ICC-02/05-01/09-T-8-ENG, p. 56, lines 4-13.
[239] Transcript of hearing, 11 September 2018, ICC-02/05-01/09-T-5-ENG, p. 10, lines 18-23, p. 75, lines 13-20; Transcript of hearing, 14 September 2018, ICC-02/05-01/09-T-8-ENG, p. 55, lines 8-24.
[240] Transcript of hearing, 14 September 2018, ICC-02/05-01/09-T-8-ENG, p. 56, lines 14-22.
[241] Transcript of hearing, 11 September 2018, ICC-02/05-01/09-T-5-ENG, p. 10, lines 7-17.
[242] Transcript of hearing, 11 September 2018, ICC-02/05-01/09-T-5-ENG, p. 33, line 25 to p. 35, line 8, p. 36, lines 8-12, p. 36, line 22 to p. 37, line 7.
[243] Transcript of hearing, 14 September 2018, ICC-02/05-01/09-T-8-ENG, p. 48, line 16 to p. 49, line 4; Mr O'Keefe's Observations, paras 3-9; Mr O'Keefe's Final Submissions, paras 8-9.

arrest and surrender of a person to the Court by a State Party, on the one hand, and article 27(2) of the Statute, which applies to proceedings against a person before the Court following arrest and surrender, on the other hand.[244] Moreover, he avers that article 98(1) excludes the obligations of arrest and surrender of officials of a third States 'in relation to whom immunity is owed'.[245] Mr O'Keefe submits that if, however, article 89(1) is not to be construed in conjunction with article 98(1), then the solution is not to look to article 27(2) but to rely on an explicit waiver, as may be requested by the Court, albeit that it may be refused by States Parties.[246] He maintains that such an approach derives from the overall structure of the Statute, where Part 3 concerns the Court and Part 9 concerns cooperation and assistance, and in the context of which it would be anomalous for article 27(2) to have any broader application.[247]

85. In Mr O'Keefe view, Resolution 1593 does not alter the ordinary application of article 98(1).[248] He argues that the contrary would offend against the *pacta tertiis* rule, which stipulates that a treaty creates neither rights nor obligations in respect of a State not party to it without that State's consent, as a cardinal tenet of customary international law.[249] Mr O'Keefe submits that paragraph 2 of the resolution 'does no more' than oblige Sudan to comply with any specific request made by the Court or the Prosecutor – '[i]t does not of itself render binding on Sudan, a State not party to the Statute, the full range of obligations of cooperation, including the obligation of arrest and surrender in article 89(1), undertaken in accordance with Part 9 of the Statute by States Parties'.[250] He adds that 'it does not mean that the Court has obtained the cooperation of Sudan for the waiver of immunity of President Al-Bashir' in terms of article 98(1); as demonstrated by the

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[244] Mr O'Keefe's Observations, para. 7; Transcript of hearing, 13 September 2018, ICC-02/05-01/09-T-7-ENG, p. 79, lines 18-22.
[245] Transcript of hearing, 13 September 2018, ICC-02/05-01/09-T-7-ENG, p. 107, line 13 to p. 109, line 15, p. 110, lines 7-13; Mr O'Keefe's Final Submissions, paras 4-5.
[246] Transcript of hearing, 13 September 2018, ICC-02/05-01/09-T-7-ENG, p. 126, lines 8-14; Mr O'Keefe's Final Submissions, paras 8-9.
[247] Transcript of hearing, 13 September 2018, ICC-02/05-01/09-T-7-ENG, p. 126, line 16 to p. 128, line 18. *See also* Transcript of hearing, 14 September 2018, ICC-02/05-01/09-T-8-ENG, p. 52, lines 4-6; Mr O'Keefe's Final Submissions, paras 10-11.
[248] Mr O'Keefe's Observations, paras 10-14; Mr O'Keefe's Final Submissions, paras 12-14.
[249] Transcript of hearing, 12 September 2018, ICC-02/05-01/09-T-6-ENG, p. 67, line 23 to p. 68, line 1; Transcript of hearing, 14 September 2018, ICC-02/05-01/09-T-8-ENG, p. 53, line 10 to p. 55, line 7.
[250] Mr O'Keefe's Observations, para. 12; Mr O'Keefe's Final Submissions, para. 12.

'manifest and persistent inaction' of the UN Security Council in response to repeated findings of non-cooperation and referrals.[251]

86. Mr Tsagourias submits that article 27 renders the immunities attached to state officials inapplicable between and among States Parties and as this provision is clear there is no lacuna; therefore neither treaty law nor customary law can be used to reinterpret article 27.[252] Mr Tsagourias avers that by referring the situation in Darfur to the Court and imposing an obligation upon Sudan to cooperate with the Court, 'Resolution 1593 rendered Sudan a *quasi* State party to the Statute for the referred situation',[253] consequently article 98 is inapplicable as Sudan does not fall within the category of a third State for the purposes of that article.[254]

87. Mr Zimmermann suggests that the Appeals Chamber consider a different approach based on the *abus de droit* doctrine.[255] He argues that since Sudan is not complying with its obligations to 'cooperate fully' under Resolution 1593, including arresting and surrendering its Head of State, Sudan is legally barred from invoking immunities and any attempt to invoke such immunity would be an *abus de droit*.[256] Consequently, Mr Zimmermann argues that Jordan was not under an obligation to respect Head of State immunity of Mr Al-Bashir and Jordan was not in a situation foreseen by article 98.[257] Furthermore, Mr Zimmermann submits that Head of State immunity does not have an *erga omnes* character as only Sudan could invoke it if Jordan was to arrest Mr Al-Bashir.[258] Mr Zimmermann submits that pursuant to paragraph 2 of Resolution 1593, Sudan is under an obligation under article 25 of the UN Charter to arrest and surrender Mr Al-Bashir to the Court because the term 'cooperate' in the resolution implicitly refers back to Part 9 of the Statute.[259] He contends that the UN Security Council intentionally placed this obligation upon Sudan as evinced by its express exemption of officials from

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[251] Mr O'Keefe's Observations, para. 12.
[252] Mr Tsagourias'Observations, paras 2-10.
[253] Mr Tsagourias'Observations, para. 13. *See also* paras 15, 23.
[254] Mr Tsagourias'Observations, paras 12-13, 18.
[255] Mr Zimmermann's Observations, paras 43-44.
[256] Mr Zimmermann's Observations, para. 13.
[257] Mr Zimmermann's Observations, paras 7-40.
[258] Mr Zimmermann's Observations, para. 41.
[259] Mr Zimmermann's Observations, paras 7-8.

certain States in paragraph 6,[260] and by the fact that the resolution used the same language as that used in relation to the ICTY and ICTR, in resolutions 827 and 955 respectively, which was read as applying to persons equally regardless of official capacity.[261]

88. Ms Lattanzi submits that article 27 represents a treaty derogation to the immunities enjoyed by Heads of State which binds (i) States Parties; (ii) States that accepted *ad hoc* the Court's jurisdiction; and (iii) non-party States referred by the UN Security Council.[262] She submits that article 27 applies to the horizontal relationship between Jordan and Sudan and that article 98(1) is simply irrelevant in the present situation.[263] She avers that the notion of jurisdiction under article 27(2) 'should be belittled to mean "adjudicatory jurisdiction"'.[264] Ms Lattanzi further submits that the 1953 Convention does not fall within the scope of article 98(2), which concerns those specific agreements affirming the exclusive jurisdiction of States 'sending' personnel abroad bilaterally or through contribution to multilateral operations (paragraph 6 of Resolution 1593 confirms this by referring to the same agreements).[265] Ms Lattanzi argues that the effect of Resolution 1593 is to create new obligations and that the *travaux préparatoires* show that UN Security Council referrals were understood as a substitute for States conferred jurisdiction.[266] She avers that, pursuant to the *chapeau* of article 13 of the Statute, when situations are referred to the Court by the UN Security Council, the Court exercises jurisdiction in accordance with the Statute in the same way as in situations referred by States Parties or opened *proprio motu* by the Prosecutor; article 53 of the Statute does not provide for a different procedure.[267] Ms Lattanzi submits that if the UN Security Council had explicitly raised the exception to immunities raised in article 27, this would have constituted undue interference in the exclusive jurisdiction of the Court, that is to decide even in the interests of justice under article 53(2), which

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[260] Mr Zimmermann's Observations, paras 20-21.
[261] Mr Zimmermann's Observations, para. 22.
[262] Ms Lattanzi's Observations, para. 4.
[263] Ms Lattanzi's Observations, para. 10.
[264] Ms Lattanzi's Final Submissions, para. 4. *See also* paras 3, 5-7.
[265] Ms Lattanzi's Observations, paras 13-16; Transcript of hearing, 13 September 2018, ICC-02/05-01/09-T-7-ENG, p. 71, line 15 to p. 74, line 10, referring, *inter alia*, to the drafting history of article 98(2) of the Statute.
[266] Ms Lattanzi's Observations, para. 5.
[267] Ms Lattanzi's Observations, para. 6.

suspects should be prosecuted in the Darfur situation.[268] Referring, *inter alia*, to articles 4(2) and 59 of the Statute, Ms Lattanzi contends that local authorities act on behalf of the Court when they execute warrants of arrest issued by the Court.[269]

89. Mr Kreß submits that there are two main legal avenues justifying the conclusion that article 98(1) does not prevent the Court from proceeding with a request for the arrest and surrender of Mr Al-Bashir on the territory of a State Party: the customary law avenue,[270] and the UN Security Council avenue.[271] Mr Kreß argues that the first legal avenue is based on the view that there exists an exception to immunity *ratione personae* of States for the purpose of proceedings before the Court, and that it extends to the triangular legal relationship of vertical cooperation between the Court, a requested State Party and the non-State Party of which the person sought is the incumbent Head of State.[272] According to Mr Kreß such an exception includes the arrest and surrender of a sitting Head of State by a State Party at the Court's request – not as a customary obligation to arrest and surrender, but as a customary right to 'non-existence of immunity'.[273] Mr Kreß avers that article 27 of the Statute does not innovate on the existing content of customary international law;[274] rather, the international criminal court exception has been authoritatively confirmed and applied subsequently as a cardinal principle of international criminal law codified in article 27(2) of the Statute.[275] Mr Kreβ submits further that there exists an international community to which states owe customary international law obligations. As a consequence, the Court's jurisdiction does not derive from the delegation of national criminal jurisdiction. Rather, the evolution of international criminal law arises from the notion that war crimes are so horrendous that they affect the international community as a whole. Therefore, there is a *ius puniendi* that transcends state sovereignty and resides in the

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[268] Transcript of hearing, 12 September 2018, ICC-02/05-01/09-T-6-ENG, p. 39, lines 6-24.
[269] Ms Lattanzi's Observations, para. 11.
[270] Mr Kreß's Observations, paras 5-19.
[271] Mr Kreß's Observations, para. 20.
[272] Mr Kreß's Observations, para. 3.
[273] Transcript of hearing, 10 September 2018, ICC-02/05-01/09-T-4-ENG, p. 108, lines 8-10.
[274] Transcript of hearing, 10 September 2018, ICC-02/05-01/09-T-4-ENG, p. 109, lines 8-10.
[275] Transcript of hearing, 10 September 2018, ICC-02/05-01/09-T-4-ENG, p. 109, lines 17-22, referring to the *Arrest Warrant Case*, para. 61; Transcript of hearing, 10 September 2018, ICC-02/05-01/09-T-4-ENG, p. 109, line 23 to p. 110, line 7.

international community itself.[276] Mr Kreβ adds that article 98(1) of the Statute merely acknowledges the possibility of an inconsistency arising between a cooperation request by the Court and an immunity obligation of a State Party towards a third State, and entrusts that the Court may not proceed with any such request in the event of any inconsistency arising.[277] Mr Kreβ submits that the ordinary wording of article 98(2) of the Statute does not support the inclusion of the 1953 Convention within the scope of relevant agreements.[278]

90. Ms Gaeta submits that, while she agrees with Mr Kreß that article 27(2) is reflective of customary international law, this general rule removing immunities does not extend to the matter of judicial cooperation; as a consequence, article 98(1) is applicable to the case at hand and Jordan was not obliged to execute the request to arrest and surrender Mr Al-Bashir.[279] In any case, she argues that reliance upon the UN Security Council referral to bring Sudan within the jurisdiction of the Court is unconvincing for the following reasons:[280] (i) it is prejudicial to the integrity of the Court as a court of law which is bound to apply the Statute independently of the political intervention of the UN Security Council;[281] (ii) it implies that, in triggering the jurisdiction of the Court, the UN Security Council could modify the legal framework of the Statute at its discretion;[282] and (iii) 'it does not conform to the legal nature' of the Court as a treaty-based international organisation 'governed by the principle of specialty', which can only be endowed with powers and competencies delegated to it by States Parties on the basis of the Statute.[283] She adds that the interpretation given in the *Democratic Republic of the Congo* Decision, that the resolution had the effect of implicitly waiving the immunities of Mr Al-Bashir, contradicts the text of article 98(1) which only allows the relevant third state and not other entities to waive immunities; moreover, the resolution 'says nothing whatsoever about the

[276] Transcript of hearing, 14 September 2018, ICC-02/05-01/09-T-8-ENG, p. 35, line 19 to p. 36, line 9; Transcript of hearing, 11 September 2018, ICC-02/05-01/09-T-5-ENG, p. 89, line 24 to p. 92, line 11.
[277] Transcript of hearing, 10 September 2018, ICC-02/05-01/09-T-4-ENG, p. 112, lines 5-9.
[278] Transcript of hearing, 13 September 2018, ICC-02/05-01/09-T-7-ENG, p. 69, lines 8-19.
[279] Ms Gaeta's Observations, pp. 3-4.
[280] Ms Gaeta's Observations, pp. 3-4.
[281] Ms Gaeta's Observations, p. 5.
[282] Ms Gaeta's Observations, p. 5.
[283] Ms Gaeta's Observations, pp. 5-6.

immunities eventually accruing to [Sudan's] high ranking state officials and its Head of State'.[284]

91. Mr Magliveras argues that the Appeals Chamber should interpret the applicable legal provisions in the light of the object and purpose of the Statute.[285] He contends that the 1996 Code of Crimes Against Peace, Security of Mankind sufficiently proves that genocide, extermination, torture and rape are prohibited as *jus cogens* and therefore, these prohibitions are opposable to Sudan and Mr Al-Bashir should not be granted impunity as a matter of domestic Sudanese law.[286] He adds that article 86 of the Statute should be interpreted as covering 'the cooperation envisaged in Part 9 in its entirety and not in a piecemeal fashion'.[287]

92. Mr Robinson *et al.* contend that the interpretation of the Pre-Trial Chamber is the most convincing reconciliation of the relevant provisions of the Statute namely, articles 27, 86 and 98, with customary international law, and Resolution 1593.[288] In that regard, they argue that contrary to what was suggested during the hearing before the Appeals Chamber, Part 3 of the Statute 'informs Part 9' of the Statute.[289] They contend that 'a state obliged to cooperate fully with the ICC has not immunity vis-à-vis the ICC to waive, by virtue of Article 27(2)'.[290] Furthermore, they urge the Court 'not to adopt the international court exception at this time'.[291] They also argue that the international court agreement, that emerged with the decision of the Sierra Leone Special Court in the *Charles Taylor Case*, does not 'fit well' with some basic legal principles and has received severe criticism even from strong supporters of the Court.[292] They submit further that: (i) the practice of the UN Security Council shows the opposite as it actually uses explicit language to preserve immunities; (ii) the UN Security Council 'routinely issues 'sensitive' orders in a brief and terse manner'; (iii) the UN Security Council is not required to specifically single out article 27(2) from the Statute which

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[284] Ms Gaeta's Observations, p. 7.
[285] Mr Magliveras's Observations, para. 9.
[286] Transcript of hearing, 10 September 2018, ICC-02/05-01/09-T-4-ENG, p. 125, lines 4-10.
[287] Mr Magliveras's Final Submissions, pp. 4-5.
[288] Mr Robinson's *et al.* Observations, paras 13-16.
[289] Mr Robinson's *et al.* Final Submissions, paras 8-11.
[290] Mr Robinson's *et al.* Final Submissions, para. 12.
[291] Transcript of hearing, 11 September 2018, ICC-02/05-01/09-T-5-ENG, p. 15 lines 8-9.
[292] Transcript of hearing, 11 September 2018, ICC-02/05-01/09-T-5-ENG, p. 15 lines 13-17.

contains other sensitive provisions; and, (iv) Resolution 1593 did expressly remove immunities (the 'cooperate fully language' imposed on Sudan is the identical 'formula and technique' that was used by the UN Security Council to remove immunity before the ICTY and ICTR).[293]

93. Mr Newton submits that, on the basis of the data collected in the 'Mapping Bashir Research Project', which aims at providing a consolidated compilation of Mr Al-Bashir's travels since arrest warrants were issued against him,[294] consistent State practice and *opinio juris* is lacking as to whether States consider themselves under any international obligation to arrest Mr Al-Bashir.[295]

94. Ms Ciampi and Ms Gamarra submit that article 27(2) (i) removes the immunity of sitting Heads of State *vis-à-vis* the Court and prevails over other obligations stemming from treaty or customary international law relating to immunity; and (ii) allows the arrest and surrender by a State Party of officials of a State under an international obligation to cooperate with the Court.[296] They argue that article 27(2) is applicable to Sudan and article 98 is not applicable to Jordan.[297] Ms Ciampi and Ms Gamarra submit that the UN Security Council referral results in the applicability of the Statute to the situation referred - including article 27 on the derogation to the immunities enjoyed by Heads of State which binds States Parties, States that accepted *ad hoc* the Court's jurisdiction, and non-party States referred by the UN Security Council and therefore article 98(1) is irrelevant.[298]

3. Determination by the Appeals Chamber

95. Jordan submits that the Pre-Trial Chamber made erroneous findings regarding the effects of the Statute on Mr Al-Bashir's Head of State immunity.[299] Notably, Jordan alleges that the Pre-Trial Chamber erred in finding that (i) 'article

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[293] Mr Robinson's *et al.* Observations, paras 7-8; Transcript of hearing, 12 September 2018, ICC-02/05-01/09-T-6-ENG, p. 79, lines 21-23.
[294] Mr Newton's Observations, para. 5.
[295] Transcript of hearing, 10 September 2018, ICC-02/05-01/09-T-4- ENG, p. 135, lines 5-9, 20-23.
[296] Ms Ciampi's Observations, pp. 4-6; Ms Gamarra's Observations, paras 4-12, 29.
[297] Ms Ciampi's Observations, pp. 4-6; Ms Gamarra's Observations, para. 7.
[298] Ms Ciampi's Observations, pp. 4-10; Ms Gamarra's Observations, paras 7, 14, 20-29.
[299] Appeal Brief, paras 7-39.

27(2) of the Rome Statute excludes the application of article 98';[300] (ii) 'article 98 establishes no rights for States Parties';[301] (iii) 'article 98(2) does not apply to the 1953 Convention';[302] and (iv) 'even if article 98 applied it would provide no basis for Jordan not to comply with the Court's request'.[303] Jordan argues further that the Pre-Trial Chamber erred in finding that Resolution 1593 triggered the application of the entire legal framework of the Statute to the situation in Darfur and that Sudan has analogous rights and obligations to a State Party.[304]

96. Thus, at issue under the first two grounds of appeal is primarily the question of whether Head of State immunity finds application in a situation where the Court requests a State Party of the Rome Statute to arrest and surrender the Head of State of another State (in this instance, Sudan), which, while not being party to the Rome Statute, is the subject of a referral to the Court by the UN Security Council and, in terms of Resolution 1593, obliged to fully cooperate with the Court.

97. The central issue in this appeal is whether Mr Bashir, in his capacity as Head of State of Sudan, enjoyed immunity before this Court which Jordan was obligated to respect in the absence of a waiver from Sudan. In the circumstances of this Court, it is possible to follow different structures of judicial reasoning that may yield reasonable answers to that question. Nothing thus turns ultimately on the complaint that different compositions of the Pre-Trial Chamber may have used varied paths of judicial reasoning to answer that question. For present purposes, the issues in the appeal are adequately resolved along the same general framework of reasoning that the Pre-Trial Chamber had adopted in this case, with the exception of a strain of reasoning concerning customary international law. Following that approach, in keeping with article 21(1) (a) of the Statute, which stipulates that the Court shall apply '[i]n the first place, [the] Statute', the Appeals Chamber is satisfied that the issues in this appeal ultimately rest on a proper construction of the

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[300] Appeal Brief, paras 3(a), 12, 15-21; Transcript of hearing, 10 September 2018, ICC-02/05-01/09-T-4-ENG, p. 24, lines 14-21.
[301] Appeal Brief, paras 3(a), 22-30; Transcript of hearing, 10 September 2018, ICC-02/05-01/09-T-4-ENG, p. 24, lines 14-21.
[302] Appeal Brief, paras 3(a), 31-33; Transcript of hearing, 10 September 2018, ICC-02/05-01/09-T-4-ENG, p. 24, lines 14-21.
[303] Appeal Brief, paras 3(a), 34-38; Transcript of hearing, 10 September 2018, ICC-02/05-01/09-T-4-ENG, p. 24, lines 14-21.
[304] Appeal Brief, para. 50. *See also* paras 40, 55.

provisions of the Rome Statute, in particular articles 27(2), 86, 89 and 98 of the Statute. It will address the impact of article 27(2) of the Statute on requests for cooperation relating to Heads of State of States Parties [below, section (b)]. It will then address the legal situation of Sudan in light of the UN Security Council referral of the Darfur situation [below, section (c)].

98. In the context of construing the provisions of the Statute, the Appeals Chamber considers it convenient to address whether customary international law actually provides for immunity of a Head of State if arrest and surrender are sought by the Court [below, section (a)], especially given the importance generated by that question in the context of this appeal. While the Appeals Chamber notes that Jordan submits that the question of whether Head of State immunity *vis-à-vis* the Court exists is not on appeal,[305] this is a question that is intrinsically linked to the issues in relation to which leave to appeal was granted and the Appeals Chamber cannot disregard it.

99. In determining these issues, the Appeals Chamber has carefully considered the submissions it received from all parties and participants, including the *amici curiae*, even though it will not address all arguments made.

(a) Article 27(2) of the Statute and customary international law

100. Article 27(2) of the Statute provides as follows:

> Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.

101. The Appeals Chamber notes that Head of State immunity, which has been asserted in the case at hand, is a manner of immunity that is, as such, accepted under customary international law.[306] That immunity prevents one State from

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[305] Appeal Brief, paras 7-9.

[306] *See also* Appeal Brief, paras 7-8; Transcript of hearing, 10 September 2018, ICC-02/05-01/09-T-4-ENG, p. 42, lines 14-16; African Union Observations, paras 11-12; Transcript of hearing, 10 September 2018, ICC-02/05-01/09-T-4-ENG, p. 79, lines 21-22, p. 91, lines 2-14, p. 99, lines 11-12; Mr O'Keefe's Observations, para. 2; Transcript of hearing, 11 September 2018, ICC-02/05-01/09-T-5-ENG, p. 7, lines 6-12; Transcript of hearing, 14 September 2018, ICC-02/05-01/09-T-8-ENG, p. 56, lines 4-13.

exercising its criminal jurisdiction over the Head of State of another State. It is important to stress that immunity of that kind operates in the context of relations between States.

102. The most direct effect of article 27(2) of the Statute is that a Head of State cannot claim Head of State immunity when he or she appears before the ICC for prosecution in accordance with the provisions on the exercise of jurisdiction under articles 12 *et seq*. of the Statute. Nor does Head of State immunity present a bar to the Court opening an investigation in relation to or issuing a warrant of arrest against a Head of State. This was specifically recognised by the ICJ in the *Arrest Warrant Case*.[307]

103. It is of note that article 27(2) of the Statute is a clear provision in conventional law; but it also reflects the status of customary international law. In this regard, the Appeals Chamber notes, first, article 7 of the Nuremberg Charter of the International Military Tribunal at Nuremberg, which provides as follows:

> The official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment.[308]

104. On 11 December 1946, the UN General Assembly expressly affirmed the 'principles of international law recognized by the Charter of the Nürnberg Tribunal and the judgment of the Tribunal' and directed the newly established International Law Commission to 'treat as a matter of primary importance plans for the formulation […] of the principles recognized' therein.[309] The International Law Commission subsequently formulated the Nuremberg Principles, Principle III of which reads as follows:

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[307] *Arrest Warrant Case*, para. 61.
[308] *Charter of the International Military Tribunal*, annexed to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, 8 August 1945, 82 United Nations Treaty Series 251.
[309] United Nations General Assembly, 56th plenary meeting, 11 December 1946, A/RES/95(1), Resolution 95(1).

> The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible Government official does not relieve him from responsibility under international law.[310]

105. The same principle was included in article 3 of the International Law Commission's draft Code of Offences against the Peace and Security of Mankind.[311] The Convention against Genocide contains a similar provision, providing in its article IV:

> Persons committing genocide or any of the other acts enumerated in article III shall be punished, *whether they are constitutionally responsible rulers, public officials or private individuals*. [Emphasis added]

106. There is no suggestion in any of these instruments that immunity of Heads of State could stand in the way of their prosecution before an international court for international crimes.

107. Further milestones in this regard were the Statutes of the international criminal tribunals – the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda [the 'ICTY' and the 'ICTR'] – which the UN Security Council adopted in 1993 and 1994, respectively. Both Statutes include provisions similar to Principle III of the Nuremberg Principles.[312] In his reports on the draft Statutes of the ICTY and ICTR, the UN Secretary-General indicated that they should contain provisions 'which specify that a plea of head of State immunity […] will not constitute a defence, nor will it mitigate punishment'.[313] It is of note that the ICTY issued an indictment against President Slobodan Milošević on 22 May 1999, while he was still President of Serbia.[314]

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[310] *See* Yearbook of the International Law Commission, 1950, vol. II, at p. 375.
[311] *See* Yearbook of the International Law Commission, 1951, vol. II, at p. 137.
[312] ICTY, *Statute of the International Criminal Tribunal for the former Yugoslavia*, 25 May 1993, Security Council Resolution 827 (1993), last amended by Security Council Resolution 1877 (2009), 7 July 2009, article 7(2); *Statute of the International Criminal Tribunal for Rwanda*, 8 November 1994, Security Council Resolution 955 (1994), last amended by Security Council Resolution 1878 (2009), 7 July 2009, article 6(2).
[313] United Nations Security Council, 'Report of the Secretary-General, pursuant to paragraph 2 of Security Council Resolution 808 (1993)', S/25704, 3 May 1993, p. 14; UN Security Council, 'Final report of the Independent Commission of Experts established in accordance with Security Council resolution 935 (1994),' Annex to Letter dated 9 December 1994 from the Secretary-General Addressed to the President of the Security Council, Doc No S/1994/1405, paras 171, 173.
[314] *The Prosecutor v. Slobodan Milošević et al*. 'Indictment', 22 May 1999, Case No. IT-99-37.

108. The Statute of the Special Court for Sierra Leone [the 'SCSL'], a court established pursuant to a UN Security Council resolution by an agreement between the Government of Sierra Leone and the UN Secretary-General, also contains a provision rejecting the suggestion that Head of State immunity could be invoked against the SCSL's exercise of jurisdiction. Article 6(2) of the SCSL Statute[315] stipulates:

> The official position of any accused persons, *whether as Head of State or Government* or as a responsible government official, shall not relieve such person of criminal responsibility nor mitigate punishment.[316]

109. The SCSL confirmed an indictment against Mr Charles Taylor on 7 March 2003[317] and issued a warrant for his arrest, while he was still President of Liberia.[318] Mr Taylor filed an application before the SCSL, requesting that the court quash the indictment and set aside the arrest warrant on the ground that he was immune from the SCSL's jurisdiction.[319] A panel of the SCSL's Appeals Chamber heard this application, noting that it was called upon to decide 'whether it was lawful for the Special Court to issue an indictment and to circulate an arrest warrant in respect of a serving Head of State'.[320] It answered this question in the affirmative, noting, first, that the SCSL was an international court,[321] and, second, relying, *inter alia*, on the ICJ's finding in the *Arrest Warrant Case*, that Head of

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[315] *Statute of the Special Court for Sierra Leone*, annexed to the Agreement between the United Nations and the Government of Sierra Leone pursuant to Security Council Resolution 1315 (2000) of 14 August 2000, 2178 United Nations Treaty Series 38342.
[316] Emphasis added.
[317] *The Prosecutor against Charles Ghankay Taylor also known as Charles Ghankay MaCarthur Dapkpana Taylor*, 'Decision approving the Indictment and Order for non-disclosure', 7 March 2003, SCSL-2003-01-I; *The Prosecutor against Charles Ghankay Taylor also known as Charles Ghankay MaCarthur Dapkpana Taylor*, 'Indictment', 7 March 2003, SCSL-2003-01-I.
[318] *The Prosecutor against Charles Ghankay Taylor also known as Charles Ghankay MaCarthur Dapkpana Taylor*, 'Warrant of arrest and order for transfer and detention', 7 March 2003, SCSL-2003-01-I.
[319] *The Prosecutor against Charles Ghankay Taylor*, 'Applicant motion made under protest and without waiving of Immunity accorded to a Head of State President Charles Ghankay Taylor requesting that the Trial Chamber do quash the said approved indictment of 7th March 2003 of Judge Bankole Thompson and that the aforesaid purpoted Warrant of Arrest and Order for transfer and detention of the same date issued by Judge Bankole Thompson of the Special Court for Sierra Leaone, and all other consequential and related order(s) granted thereafter by either the said Judge Bankole Thompson or Judge Pierre Boutet on 12th June 2003 against the person of the said President Charles Ghankay Taylor be declared null and void, invalid at their inception and that they be accordingly cancelled and/or set aside as a matter of law', 23 July 2003, SCSL-2003-01-I-015.
[320] *The Prosecutor against Charles Ghankay Taylor*, 'Decision on immunity from jurisdiction', 31 May 2004, SCSL-2003-01-I [the 'Immunity Decision'], para. 20.
[321] Immunity Decision, paras 37 *et seq*.

State immunity did not find application before international courts.[322] It found that 'the principle seems now established that the sovereign equality of states does not prevent a Head of State from being prosecuted before an international criminal tribunal or state'.[323]

110. Turning to the jurisprudence of the ICC, the Appeals Chamber recalls that Pre-Trial Chamber I, in the 'Corrigendum to the Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir' [the '*Malawi* Decision'],[324] reached the same conclusion in a situation that was identical to the case at hand: a State Party to the Rome Statute having failed to execute a request for the arrest and surrender of Mr Al- Bashir.[325] Pre-Trial Chamber I, having recalled the irrelevance of Head of State immunity in respect of international courts since the end of the First World War, distinguished the case before it from that decided by the ICJ in the *Arrest Warrant Case*, noting that the latter was 'concerned solely with immunity across national jurisdictions' and therefore 'distinct from the present circumstances, as here an *international court* is seeking arrest for international crimes'.[326] Pre-Trial Chamber I also recalled the passage of the judgment in the *Arrest Warrant Case* that recognises that Head of State immunity does not find application before international courts.[327]

111. Pre-Trial Chamber I found that:

> [T]he principle in international law is that immunity of either former or sitting Heads of State can not be invoked to oppose a prosecution by an international court. This is equally applicable to former or sitting Heads of States not Parties to the Statute whenever the Court may exercise jurisdiction. In this particular case, the Chamber notes that it is exercising jurisdiction following a referral by the United Nations Security Council made under Chapter VII of the United Nations Charter, in accordance with article 13(b) of the Statute.[328]

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[322] Immunity Decision, paras 43 *et seq*.
[323] Immunity Decision, para. 52.
[324] 13 December 2011, ICC-02/05-01/09-139-Corr.
[325] *Malawi* Decision, paras 22 *et seq*.
[326] *Malawi* Decision, para. 34.
[327] *Malawi* Decision, para. 33.
[328] *Malawi* Decision, para. 36.

112. Pre-Trial Chamber I considered that 'Malawi, and by extension the African Union, are not entitled to rely on article 98(1) of the Statute to justify refusing to comply with the Cooperation Requests',[329] noting, *inter alia*, 'an increase in Head of State prosecutions by international courts in the last decade', which shows 'that initiating international prosecutions against Heads of State have gained widespread recognition as accepted practice'.[330] It also noted the number of States Parties to the Rome Statute and the fact that States not parties to the Statute allowed twice for situations to be referred to the Court by the UN Security Council.[331] Pre-Trial Chamber I concluded that the 'international community's commitment to rejecting immunity in circumstances where international courts seek arrest for international crimes has reached a critical mass' and that '[t]here is no conflict between Malawi's obligations towards the Court and its obligations under customary international law; therefore, article 98(1) of the Statute does not apply'.[332]

113. The Appeals Chamber fully agrees with Pre-Trial Chamber I's conclusions in the *Malawi* Decision[333] as well as that of the SCSL's Appeals Chamber in the *Taylor* case and notes that there is neither State practice nor *opinio juris* that would support the existence of Head of State immunity under customary international law *vis-à-vis* an international court. To the contrary, as shown in more detail in the Joint Concurring Opinion of Judges Eboe-Osuji, Morrison, Hofmański and Bossa, such immunity has never been recognised in international law as a bar to the jurisdiction of an international court.[334] To be noted in that regard is the role of judicial pronouncements in confirming whether or not a rule of customary international law has as such 'crystallized'.[335] The Appeals Chamber is satisfied

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[329] *Malawi* Decision, para 37.
[330] *Malawi* Decision, para. 39.
[331] *Malawi* Decision, para. 40.
[332] *Malawi* Decision, paras 42, 43.
[333] The Appeals Chamber notes that Pre-Trial Chamber I adopted the same approach set out in the *Malawi* Decision in its 'Decision pursuant to article 87(7) of the Rome Statute on the refusal of the Republic of Chad to comply with the cooperation requests issued by the Court with respect to the arrest and surrender of Omar Hassan Ahmad Al Bashir', 13 December 2011, ICC-02/05-01/09-140-tENG.
[334] *See* the 'Joint Concurring Opinion of Judges Eboe-Osuji, Morrison, Hofmański and Bossa', 6 May 2019 [the 'Joint Concurring Opinion of Judges Eboe-Osuji, Morrison, Hofmański and Bossa'], ICC-02/05-01/09-397-Anx1, paras 52-174. *See also* paras 175-252.
[335] See *New Jersey v Delaware*, where, writing for the US Supreme Court, Mr Justice Cardozo (on the authority of eminent commentators such as Lauterpacht, *The Function of Law in the International Community* and Hall, *International Law*, 7th edn), observed as follows: 'International law … like the common law within states, a twilight existence during which it is hardly distinguishable from morality

that the pronouncements of both the Pre-Trial Chamber in the *Malawi* Decision and of the Appeals Chamber of the Special Court for Sierra Leone 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 jurisdiction. The Appeals Chamber accordingly rejects any contrary suggestion of the Pre-Trial Chamber in that regard, in both this case and in the case concerning South Africa.

114. The absence of a rule of customary international law recognising Head of State immunity *vis-à-vis* international courts is relevant not only to the question of whether an international court may issue a warrant for the arrest of a Head of State and conduct proceedings against him or her, but also for the horizontal relationship between States when a State is requested by an international court to arrest and surrender the Head of State of another State. As further explained in the Joint Concurring Opinion of Judges Eboe-Osuji, Morrison, Hofmański and Bossa[336] and correctly found by the Pre-Trial Chamber in the *Malawi* Decision,[337] no immunities under customary international law operate in such a situation to bar an international court in its exercise of its own jurisdiction.

115. The Appeals Chamber considers that the absence of a rule of customary international law recognising Head of State immunity *vis-à-vis* an international court is also explained by the different character of international courts when compared with domestic jurisdictions. While the latter are essentially an expression of a State's sovereign power, which is necessarily limited by the sovereign power of the other States, the former, when adjudicating international crimes, do not act on behalf of a particular State or States. Rather, international courts act on behalf of the international community as a whole.[338] Accordingly, the principle of *par in parem non habet imperium*, which is based on the sovereign equality of States,

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or justice, till at length the imprimatur of a court attests its jural quality:' United States, Supreme Court, *New Jersey v Delaware*, February 5 1934, 291 U.S. 361, at p 383. *See also* Antonio Cassese, *International Law*, 2nd edn (2005) at p 160, citing Anzilotti.

[336] *See* further the Joint Concurring Opinion of Judges Eboe-Osuji, Morrison, Hofmański and Bossa, paras 76-174, 414-418. *See also* paras 175-252, 431-445.

[337] *Malawi* Decision, paras 37 *et seq*.

[338] *See* in this regard the Joint Concurring Opinion of Judges Eboe-Osuji, Morrison, Hofmański and Bossa, paras 52-174. *See also* paras 431-445.

finds no application in relation to an international court such as the International Criminal Court.

116. The Appeals Chamber notes further that, given the fundamentally different nature of an international court as opposed to a domestic court exercising jurisdiction over a Head of State, it would be wrong to assume that an exception to the customary international law rule on Head of State immunity applicable in the relationship between States has to be established; rather, the *onus* is on those who claim that there is such immunity in relation to international courts to establish sufficient State practice and *opinio juris*. As further explained in the Joint Concurring Opinion of Judges Eboe-Osuji, Morrison, Hofmański and Bossa, there is no such practice or *opinio juris*.[339]

117. In sum, the Appeals Chamber finds that there was no rule of customary international law that would have given Mr Al-Bashir immunity from arrest and surrender by Jordan on the basis of the request for arrest and surrender issued by the Court. It follows that there was no ground for Jordan not to execute the request for arrest and surrender and that therefore it did not comply with its obligation to cooperate with the Court pursuant to articles 86 *et seq*. of the Statute.

118. As recalled above, the Pre-Trial Chamber in the decision under review took a different approach to the one it adopted in the *Malawi* Decision. Contrary to that decision and the Appeals Chamber's above finding, it found that it was unable to identify 'a rule in customary international law that would exclude immunity for Heads of State when their arrest is sought for international crimes by another State, even when the arrest is sought on behalf of an international court, including, specifically, this Court'.[340] Nevertheless, it concluded that Head of State immunity did not stand in the way of Mr Al-Bashir's arrest by Jordan, based on the interplay between the relevant provisions of the Statute and Sudan's obligation to 'cooperate fully' with the Court pursuant to paragraph 2 of Resolution 1593.

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[339] *See* in this regard the Joint Concurring Opinion of Judges Eboe-Osuji, Morrison, Hofmański and Bossa, paras 76-174, 414-418. *See also* paras 175-252, 431-445.
[340] Impugned Decision, para. 27, referring to *South Africa* Decision, para. 68.

119. While the Appeals Chamber, for the reasons set out above, rejects the Pre-Trial Chamber's finding that there is immunity under customary international law for Heads of State when their arrest is sought for international crimes by this Court, the Appeals Chamber notes that the Pre-Trial Chamber nevertheless reached the same conclusion as the Appeals Chamber, namely that Jordan should have arrested and surrendered Mr Al-Bashir. The Pre-Trial Chamber did so based on its interpretation of the Statute and bearing in mind Sudan's position under Resolution 1593. The Appeals Chamber considers that this interpretation of the Statute was, as such, correct, as will be demonstrated in the subsequent sections.

(b) Articles 27(2) and 98 of the Statute and their impact on obligations between State Parties

120. The Pre-Trial Chamber found that the effect of article 27(2) of the Statute on States Parties of the Rome Statute is two-fold: it prevents them from invoking any immunity belonging to them under international law (i) 'as a ground for refusing arrest and surrender of a person sought by the Court (vertical effect)'; and (ii) 'when cooperation in the arrest and surrender of a person to the Court is provided by another State Party (horizontal effect)'.[341] While the Appeals Chamber, for the reasons set out above, disagrees with the Pre-Trial Chamber's finding as to the existence of immunity *vis-à-vis* this Court, it confirms the correctness of the Pre-Trial Chamber's interpretation of article 27(2) of the Statute.

(i) Article 27(2) of the Statute and its 'vertical effect' in relation to cooperation by States Parties

121. The Appeals Chamber recalls that, pursuant to article 86 of the Statute, States Parties to the Rome Statute are under an obligation to cooperate fully with the Court, in accordance with the Statute; pursuant to article 89 of the Statute, the Court may request the arrest and surrender of a person against whom a warrant of arrest has been issued. The extent of the obligation of States Parties to cooperate fully must be understood in the context of the Statute as a whole and bearing in mind its object and purpose. The Court was set up to exercise jurisdiction 'over persons for the most serious crimes of international concern' and its States Parties

[341] Impugned Decision, para. 33, referring to *South Africa* Decision, paras 76-80.

expressed their determination to 'put an end to impunity for the perpetrators of these crimes'.[342] On that basis, the Appeals Chamber considers it to be clear, that, if a warrant of arrest were to be issued against the Head of State of a State Party to the Rome Statute and the Court requests that State Party to arrest and surrender the person who is the subject of the warrant, the requested State Party could not refuse to comply with the request on the ground that its Head of State enjoys immunity, be it under international or domestic law. This is a direct consequence of article 27(2) of the Statute, to which all States Parties to the Rome Statute have consented by virtue of their ratification of, or accession to, the Statute.[343]

122. The Appeals Chamber is unpersuaded by Jordan's argument that article 27(2), which is situated in Part 3 of the Statute, only addresses the Court's ability to exercise jurisdiction, and not the arrest and surrender of persons to the Court, which is regulated in Part 9.[344] While articles 27 and 86 *et seq*. are located in different parts of the Statute, they must be read together and any possible tension between them must be reconciled.[345] In the view of the Appeals Chamber, this is best achieved by reading article 27(2), both as a matter of conventional law and as reflecting customary international law, as also excluding reliance on immunity in relation to a Head of State's arrest and surrender. This follows from a number of considerations. First, it is clear that the purpose of article 27(2) is to ensure that immunities do not stand in the way of the exercise of the Court's jurisdiction; the Court's jurisdiction must be effective. This purpose would be all but defeated if a State Party, which is obliged to cooperate fully with the Court, were allowed to invoke immunity as a ground to refuse the arrest and surrender of its Head of State to the Court, given that the Court depends on State cooperation to execute warrants

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[342] *See* article 1 of the Statute and the fifth preambular paragraph.
[343] *See* Impugned Decision, para. 33; *South Africa* Decision, paras 77-78.
[344] Appeal Brief, para. 16; Transcript of hearing, 10 September 2018, ICC-34, lines 16-19; Jordan's Response to the *Amici*, para. 9.
[345] *See* in this sense, Prosecutor's Response, paras 36, 38-39, referring, *inter alia*, to D. Akande, 'The legal nature of Security Council referrals to the ICC and its impact on Al Bashir's immunities' 7 *Journal of International Criminal Justice* (2009), pp. 339, 342; W. Schabas, *The International Criminal Court: a Commentary on the Rome Statute* (Oxford: OUP, 2nd Ed. 2016), p. 1346 *cf.* 1348.; R. Rastan, 'Jurisdiction,' in C. Stahn (ed.), *The Law and Practice of the International Criminal Court* (Oxford: OUP, 2015), p. 161; Mr Robinson's *et al*. Observations, paras 13-16; Mr Robinson's *et al*. Final Submissions, paras 8-11.

of arrest.[346] The result would be that, in effect, the Court would be barred from exercising its jurisdiction because of the existence of immunities, which would be contrary to the letter and spirit of article 27(2). If such an interpretation of article 27(2) were to be adopted, an important provision of the Statute would become potentially meaningless.

123. The Appeals Chamber notes in this regard that the obligation of States Parties to cooperate with the Court when exercising its jurisdiction over crimes listed in article 5 of the Statute (the crime of genocide, crimes against humanity, war crimes and the crime of aggression) relates to breaches of fundamental norms of international law that have, such as the prohibition of genocide, the character and force of *jus cogens*.[347] The obligation to cooperate with the Court reinforces the obligation *erga omnes* to prevent, investigate and punish crimes that shock the conscience of humanity, including in particular those under the jurisdiction of the Court and it is this *erga omnes* character that makes the obligation of States Parties to cooperate with the Court so fundamental. These considerations are reflected in the possibility, pursuant to article 87(7) of the Statute, of referring non-compliance with these obligations to the Assembly of States Parties and, in case the situation to which the cooperation request relates was referred to the Court by the UN Security Council, to the UN Security Council.[348] The resulting importance of the duty to cooperate lends further weight to the argument that the duty to cooperate under articles 86 *et seq*. of the Statute must be interpreted in light of article 27(2) of the Statute.

124. As stated by Pre-Trial Chamber II in the *South Africa* Decision, if States Parties to the Statute were allowed to rely on immunities or special procedural rules to deny cooperation with the Court, this would create a situation which would 'clearly be incompatible with the object and purpose of article 27(2) of the Statute'.[349] Indeed, as noted by Pre-Trial Chamber II 'the Court's jurisdiction with

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[346] *See* Prosecutor's Response, paras 15-41, Prosecutor's Response to the *Amici*, para. 11; Mr Robinson's *et al*. Final Submissions, para. 10.
[347] *See* further Joint Concurring Opinion of Judges Eboe-Osuji, Morrison, Hofmański and Bossa, paras 198-218.
[348] *See* further Joint Concurring Opinion of Judges Eboe-Osuji, Morrison, Hofmański and Bossa, paras 198-218.
[349] *South Africa* Decision, para. 75.

respect to persons enjoying official capacity would be reduced to a purely theoretical concept if States Parties could refuse cooperation with the Court by invoking immunities based on official capacity'.[350] If article 27(2) were to be read narrowly only to encompass proceedings before the Court (i.e. the Court's adjudicatory jurisdiction), it would be unclear, as noted by the Prosecutor, whether any Head of State – even of a State Party – could ever be effectively arrested and surrendered, absent an express waiver by the State concerned.[351] To read the Statute in this way would be contrary to the principle of effectiveness.

125. Furthermore, the reference in article 27(2) to immunities 'under national law' suggests that the provision also applies to the relationship between the Court and States Parties because national law could in any event not be invoked before the Court; the reference to 'national law' would be meaningless if article 27(2) were considered to be unrelated to Part 9 of the Statute.[352] Therefore, contrary to the submissions of Jordan and some of the *amici curiae*, article 27(2) is relevant not only to the adjudicatory jurisdiction of the Court, but also to the Court's 'enforcement jurisdiction' *vis-à-vis* States Parties to the Rome Statute.[353]

126. In light of the above, the term 'cooperate fully' in article 86 must be understood and interpreted in the context of article 27(2). A State Party would not be cooperating fully with the Court if, when faced with a request for the arrest and surrender of its Head of State, it refused to comply with this request, relying on Head of State immunity. The Pre-Trial Chamber's finding in this regard was therefore correct in law.

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[350] *South Africa* Decision, para. 75.
[351] Prosecutor's Response to the *Amici*, para. 11.
[352] Prosecution's Response, para. 25; Mr Robinson's *et al*. Final Submissions, para. 10.
[353] Jordan: Appeal Brief, paras 15-17, 28; Jordan's Response to the *Amici*, para. 9; Transcript of hearing, 10 September 2018, ICC-02/05-01/09-T-4-ENG, p. 31, lines 1-4, 10-20, p. 34, lines 16-19; Transcript of hearing, 11 September 2018, ICC-02/05-01/09-T-5-ENG, p. 106, line 24 to p. 107, line 10; Jordan's Final Submissions, paras 4-5.Prosecutor: Prosecutor's Response, paras 33-34 (emphasis in original omitted); Transcript of 10 September 2018, ICC-02/05-01/09-T-4-ENG, p. 53, lines 1-4; Mr O'Keefe: Mr O'Keefe's Observations, para. 7; Transcript of hearing, 13 September 2018, ICC-02/05-01/09-T-7-ENG, p. 79, lines 18-22; Mr Robinson *et al*.: Mr Robinson's *et al*. Observations, paras 13-16; Mr Robinson's *et al.* Final Submissions, paras 8-11; The African Union: Transcript of hearing, 13 September 2018, ICC-02/05-01/09-T-7-ENG, p. 112, line 23 to p. 113, line 25.

(ii) Article 27(2) of the Statute and its 'horizontal effect'

127. Jordan argues that, if at all, article 27(2) is relevant only in respect of the relationship between the Court and States Parties *vis-à-vis* their own Heads of State.[354] According to this argument, article 27(2) has no impact on the continuing existence of Head of State immunity in the horizontal relationship between States Parties. The Appeals Chamber is unpersuaded by this argument. States Parties to the Rome Statute, have, by virtue of ratifying the Statute, accepted that Head of State immunity cannot prevent the Court from exercising jurisdiction – which is in line with customary international law. There is no reason why article 27(2) should be interpreted in a way that would allow a State Party to invoke Head of State immunity in the horizontal relationship if the Court were to ask for the arrest and surrender of the Head of State by making a request to that effect to another State Party. The law does not readily condone to be done through the back door something it forbids to be done through the front door. It must be noted that, in such situations, the requested State Party is not proceeding to arrest the Head of State in order to prosecute him of her before the courts of the requested State Party: it is only lending assistance to the Court in its exercise of proper jurisdiction.[355]

128. The Appeals Chamber recognises the relevance of article 98 of the Statute in this context and the apparent tension with article 27(2). In this regard, it is recalled that Jordan, the African Union and the League of Arab States argue that article 98 preserves the immunity of officials of both States Parties and States not parties to the Statute from foreign criminal jurisdiction, whether under customary international law or conventional international law, and that the Court must obtain a waiver of such immunity before making a request for arrest and surrender.[356]

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[354] Appeal Brief, para. 18.
[355] *See* in this regard the Joint Concurring Opinion of Judges Eboe-Osuji, Morrison, Hofmański and Bossa, paras 387-413.
[356] Appeal Brief, paras 18-19; Transcript of hearing, 10 September 2018, ICC-02/05-01/09-T-4-ENG, p. 31, lines 1-4; Transcript of hearing, 11 September 2018, ICC-02/05-01/09-T-5-ENG, p.105, line 10 to p.106, line 5; Jordan's Response to African Union and League of Arab States, paras 6-7, 9; Jordan's Final Submissions, para. 14; African Union Observations, paras 18-19, 25; African Union's Final Submissions, para. 4; League of Arab States Observations, paras 6, 26, 45; Transcript of hearing, 10 September 2018, ICC-02/05-01/09-T-4-ENG, p. 100, lines 10-12, p. 101, lines 5-6, p. 103, line 25 to p. 105, line 5, p. 106, lines 9-25; League of Arab States' Final Submissions, para. 16.

129. The Appeals Chamber recalls that, pursuant to article 98(1) of the Statute, the Court shall not make a request for surrender or assistance to a State Party which would require the State Party 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 other words, the Court may not, without first obtaining a waiver of immunity, request a State Party to arrest and surrender the Head of State of another State if that would require the requested State Party to act inconsistently with its obligations under international law.

130. It must be underlined, however, that article 98(1) of the Statute does not itself stipulate, recognise or preserve any immunities. It is a *procedural* rule that determines how the Court is to proceed where any immunity exists such that it could stand in the way of a request for cooperation. Accordingly, the existence of immunities must be established on the basis of the Court's sources of law, pursuant to article 21(1) of the Statute. As noted above, article 27(2) of the Statute prevents any reliance on Head of State immunity both vertically in the State Parties' relationship with the Court and horizontally in the relationship between States Parties when cooperation is sought by the Court. As a result, in the absence of Head of State immunity, article 98(1) of the Statute is not in its own right a fountain of immunity. In those circumstances, no waiver is required as there is no immunity to be waived.

131. The above reading does not deprive article 98(1) of meaning. Article 98(1) of the Statute is indeed, as stated by Jordan, a 'conflict-avoidance rule',[357] ensuring that States Parties are not placed in a situation where their cooperation obligations require them to breach an obligation owed to a third State. Article 98(1) remains an important procedural safeguard as it requires the Court to consider whether a requested State owes an obligation to a 'third State' before proceeding with a request for arrest and surrender (or any other request for cooperation). Nevertheless, article 98(1) provides no basis for the presumption that immunity exists; it merely imposes a procedural requirement for the Court to consider whether any international law obligation exists and applies with regard to the

[357] Appeal Brief, paras 35, 37-38; Transcript of hearing, 10 September 2018, ICC-02/05-01/09-T-4-ENG, p. 32, line 21; Jordan's Final Submissions, para. 5.

requested State in a particular situation.[358] In this case, the Pre-Trial Chamber correctly found that no such obligation applied.

(iii) Conclusion

132. In sum, the Appeals Chamber finds that, by ratifying or acceding to the Statute, States Parties have consented to the inapplicability of Head of State immunity for the purpose of proceedings before the Court. As a result, both in the State Parties' vertical relationship with the Court and in the horizontal relationship between States Parties there is no Head of State immunity if the Court is asking for the arrest and surrender of a person. Therefore, the Pre-Trial Chamber correctly found that a State Party cannot refuse to arrest and surrender the Head of State of another State Party on the ground of Head of State immunity.

(c) Resolution 1593 and the applicability of article 27(2) of the Statute to Sudan

133. The Appeals Chamber will now turn to the next question, namely the effect of Resolution 1593 on the issue of whether Sudan can invoke Head of State immunity in relation to warrants of arrest issued by the Court for alleged crimes arising from the situation in Darfur, Sudan. In this regard, the Pre-Trial Chamber found that, as a result of Resolution 1593 triggering the jurisdiction of the Court under article 13(b) of the Statute, 'the legal framework of the Statute applies, in its entirety, with respect to the situation referred',[359] 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'.[360] Accordingly, in the Pre-Trial Chamber's view, Sudan cannot invoke Head of State immunity *vis-à-vis* the Court, or *vis-à-vis* States Parties that are executing requests by the Court for Mr Al-Bashir's arrest and surrender.[361]

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[358] *See also* Transcript of hearing, 10 September 2018, ICC-02/05-01/09-T-4-ENG, p. 111, line 20 to p. 113, line 1; Prosecutor's Response to African Union and League of Arab States, para. 15.
[359] Impugned Decision, para. 37.
[360] Impugned Decision, para. 38.
[361] Impugned Decision, para. 39.

134. On appeal, Jordan argues that Sudan cannot be regarded to be a State Party of the Statute, even after the referral,[362] and that the referral only affects the vertical relationship between Sudan and the Court, and does not remove immunity *vis-à-vis* other States.[363] The Appeals Chamber finds these arguments unpersuasive, for the following reasons.

135. As mentioned above, in accordance with article 13(b) of the Statute, the exercise of the Court's jurisdiction can be triggered by a referral by the UN Security Council, acting under Chapter VII of the UN Charter. Article 13(b) puts the ICC at the disposal of the UN Security Council as a tool to maintain or restore international peace and security, thus obviating the need for the UN Security Council to create new *ad hoc* tribunals for this purpose.[364] This is what occurred in relation to the situation in Darfur, Sudan, which was referred to the Prosecutor of the Court by virtue of Resolution 1593. The *chapeau* of article 13 stipulates that, regardless of how the Court's jurisdiction is triggered, it must be exercised 'in accordance with [the] Statute'. This means that, also in case of a referral by the UN Security Council, the Court is bound by the provisions of the Statute. This includes the cooperation regime, which is regulated by Part 9 of the Statute.

136. The Appeals Chamber notes that, leaving aside any cooperation obligations that States may have as a result of resolutions of the UN Security Council, the cooperation regime, as set out in Part 9 of the Statute, makes a distinction between the obligations of States Parties to the Rome Statute on one hand, and cooperation by States not parties to the Statute on the other hand. As concerns the former, article 86 of the Statute stipulates the general obligation of States Parties to cooperate fully with the Court; the more specific obligations are set out in the subsequent articles. Cooperation of States not parties to the Statute is addressed in article 87(5), which provides, in its sub-paragraph (a), that the Court may 'invite any State not party to [the] Statute to provide assistance under [Part 9 of the Statute] on the basis of an ad hoc arrangement, an agreement with such State or any other appropriate basis'. Sub-paragraph (b) provides for the possibility of

[362] Appeal Brief, para. 62.
[363] Appeal Brief, paras 63-64.
[364] *See* Joint Concurring Opinion of Judges Eboe-Osuji, Morrison, Hofmański and Bossa, paras 339-387.

bringing cases of non-compliance under certain conditions before the Assembly of States Parties or the UN Security Council.

137. While the UN Security Council may obligate States not parties to the Statute to cooperate with the Court, it is of note that the Statute does not provide for a third regime of cooperation specific to UN Security Council referrals. Thus, given that the Court must exercise its jurisdiction 'in accordance with [the] Statute', cooperation by a State following a referral by the UN Security Council must either follow the rules provided for States Parties (articles 86 *et seq.* of the Statute) or the more limited regime for States not parties to the Statute (article 87(5) of the Statute). That is to say, in the absence of a comprehensive regime of cooperation spelt out in a Security Council resolution, with the clear intention of replacing the two cooperation regimes provided for in the Rome Statute, cooperation must be governed by either of the two regimes provided for under the Rome Statute. The question that then arises is under which of the two regimes cooperation by Sudan in respect of the situation in Darfur falls, given that Resolution 1593 does not provide any comprehensive regime of cooperation that would guide the Darfur referral.

138. On its face, it would appear that the answer is straight-forward: Sudan is not party to the Statute and any cooperation would therefore seem to fall under article 87(5) of the Statute. This would mean that it is open to Sudan to enter into *ad hoc* arrangements or agreements with the Court regarding cooperation, but that it is not required to do so, and that, in the absence of such an arrangement or agreement, there is simply no obligation for Sudan to cooperate with the Court. In the view of the Appeals Chamber, however, such an approach would be overly simplistic and disregard Sudan's legally binding obligations under Resolution 1593.

139. In this regard, it is important to stress that Resolution 1593 is a specific jurisdictional trigger contemplated by article 13(b) of the Rome Statute. As fully explained in the Joint Concurring Opinion of Judges Eboe-Osuji, Morrison, Hofmański and Bossa, article 13(b) was intended as the means through which the Court could facilitate the mandate of the UN Security Council in the maintenance of international peace and security or to contain threats in that regard, without resorting to the need to create new *ad hoc* international criminal tribunals, such as

the ICTY and the ICTR.[365] As such, Resolution 1593 is a decision of the UN Security Council which has a binding force upon all UN Members States according to the applicable provisions of the UN Charter.

140. Resolution 1593 stipulates that 'the Government of Sudan […] shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor […]'.[366] The formulation of the resolution suggests that the obligation imposed on Sudan is stronger than the one addressed to States not parties to the Statute, which are 'urge[d]' to cooperate fully. Under article 25 of the UN Charter, Sudan – a Member State of the United Nations – is obliged to accept and carry out decisions of the UN Security Council. Resolution 1593 therefore creates an obligation to 'fully cooperate' that is legally binding on Sudan. It is of significance for the question at hand that the language used with respect to Sudan's obligation to cooperate reflects that of article 86 of the Statute, which provides that 'States Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court'.

141. In the view of the Appeals Chamber, the fact that Sudan is obliged to fully cooperate with the Court, as per Resolution 1593, means that the cooperation regime for States Parties to the Rome Statute is applicable to Sudan's cooperation with the Court, and not article 87(5) of the Statute. This is because the latter regime is clearly inappropriate for a State that actually has a legally binding duty to cooperate with the Court. Therefore, exercise of jurisdiction by the Court 'in accordance with [the] Statute' means, in relation to cooperation by Sudan, cooperation on the basis of the regime established for States Parties to the Statute.

142. In this regard, the Appeals Chamber notes Jordan's argument that '[i]f the Statute applied in its entirety simply by virtue of a referral under article 13(b), paragraph 2 of resolution 1593 (2005) would not have been needed'.[367] This argument is unpersuasive. Had the UN Security Council not included an obligation on Sudan to cooperate fully with the Court, the cooperation regime under article

[365] *See* Joint Concurring Opinion of Judges Eboe-Osuji, Morrison, Hofmański and Bossa, paras 53-54, 339-387.
[366] Resolution 1593, para. 2.
[367] Appeal Brief, para. 59.

87(5) of the Statute would have been applicable, while the effect of paragraph 2 of Resolution 1593 is to bring Sudan into the cooperation regime applicable to States Parties. The Appeals Chamber underlines that this does not make Sudan a State Party to the Rome Statute, with all the attendant obligations and powers.[368] It simply means that the applicable cooperation regime is that for States Parties, as the one for States not parties to the Rome Statute is clearly inappropriate and a 'third regime' does not exist.

143. As noted above, the cooperation regime for States Parties – including article 98(1) of the Statute – must be understood and interpreted in light of article 27(2) of the Statute. A State Party cannot invoke Head of State immunity if another State Party proceeds to arrest and surrender the former State's Head of State on the basis of a request for cooperation by the Court. There is no reason to assume that article 27(2) would not be applicable to cooperation by Sudan. In the view of the Appeals Chamber, 'full cooperation' in accordance with the Statute encompasses all those obligations that States Parties owe to the Court and that are necessary for the effective exercise of jurisdiction by the Court.[369] Article 27(2) applies in the sense that immunities that Sudan may otherwise enjoy under international law, as a matter of its relations with another State, cannot bar the Court's exercise of jurisdiction. There would simply be no 'full cooperation' if Sudan could invoke immunities *vis-à-vis* the Court that may otherwise exist under national or international law, as a matter of its relations with another State.[370] If that were the case, the Court's ability to punish crimes that may have been committed in the Darfur situation would be limited from the start, and the Court's exercise of jurisdiction would not be effective.

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[368] The Appeals Chamber notes that Jordan argues that the Pre-Trial Chamber considered that the Statute in its entirety applied to Sudan (Appeal Brief, para. 55, referring to *South Africa* Decision, para. 88). The Appeals Chamber considers that this submission is based on a misreading of the South Africa Decision, which refers to Statute applying in its entirety *only in respect of the cooperation obligations. See also* regarding the limitations of the duty to fully cooperate, Mr Robinson's *et al.* Observations, paras 12-13; Transcript of hearing, 12 September 2018, ICC-02/05-01/09-T-6-ENG, p. 81, lines 14-21; Transcript of hearing, 12 September 2018, ICC-02/05-01/09-T-6-ENG, p. 85, lines 5-19.

[369] *See also* in this sense Prosecutor's Final Submissions, para 10; Ms Lattanzi's Observations, para. 6; Transcript of hearing, 12 September 2018, ICC-02/05-01/09-T-6-ENG, p. 38, lines 11-19.

[370] The Appeals Chamber recalls that, for the reasons set out above, there is no immunity under customary international law before international courts.

144. Given that Sudan was therefore not in a position to rely on Head of State immunity of Mr Al-Bashir, the Appeals Chamber considers that there was no need for the Court to obtain a waiver 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. As noted above,[371] article 98(1) does not itself generate or preserve any immunity. As Sudan could not invoke Head of State immunity *vis-à-vis* a request by the Court for the arrest and surrender of Mr Al-Bashir, there was nothing that could have been waived. The legal obligation under Resolution 1593, which imposed upon Sudan the same obligation of cooperation that the Rome Statute imposes upon States Parties, including with regard to the applicability of article 27(2) of the Statute, prevailed as *lex specialis* over any immunity that would otherwise exist between Sudan and Jordan.

145. For that reason, there were also no 'irreconcilable legal obligations' that Jordan was facing[372] when being asked to arrest and surrender Mr Al-Bashir to the Court. Nor was this a situation where customary or conventional international law existing in the relationship between Sudan and Jordan was modified by the Statute without Sudan becoming a party to the Statute[373] – the modification was effected by Resolution 1593, which imposed legally binding obligations on Sudan.

146. The Appeals Chamber notes Jordan's arguments regarding the question of whether Resolution 1593 constituted an 'implicit waiver' of Sudan's Head of State immunity by the UN Security Council.[374] As noted by Jordan, this question is actually not on appeal, given the approach of the Pre-Trial Chamber.[375] Nevertheless, the Appeals Chamber considers it appropriate to address some of Jordan's arguments in this regard, to the extent that they are relevant to the assessment of the approach adopted by the Pre-Trial Chamber in the case at hand. At the outset, the Appeals Chamber underlines that, under the Pre-Trial Chamber's approach, the effect of Resolution 1593 is not that of an implicit waiver of Mr Al-Bashir's immunity. Rather, as explained above, the effect of paragraph 2 of

[371] *See* above, para. 130.
[372] *See* Appeal Brief, para. 35.
[373] Appeal Brief, para. 36.
[374] Appeal Brief, paras 65 *et seq*.
[375] Appeal Brief, para. 66.

Resolution 1593 is to bring Sudan under the cooperation regime applicable to States Parties to the Rome Statute, which does not recognise immunities for the reasons stated above. Since there was no 'waiver of immunity', the question of whether a waiver would have to be express rather than implicit[376] simply does not arise.

147. Jordan's argument based on case law of the European Court of Human Rights (notably, that there is a presumption that the UN Security Council does not intend to impose obligation on Member States that would breach fundamental human rights)[377] is equally unconvincing: this statement was made to protect fundamental human rights – in the case at hand, the situation is entirely different. If Jordan's position were to be followed, it might result in potential impunity for violations of fundamental human rights.

148. Also noteworthy in this regard is the reference in the inquiry report of the Cassese Commission to senior Government official and military commanders as those identified as possibly responsible for the mentioned violations.[378] Therefore, when the UN Security Council decided to refer the situation in Darfur, Sudan, to the Court, it was foreseeable that people who might be in high official positions and could enjoyed immunities could come under the jurisdiction of the Court.

149. In sum, Resolution 1593 gives the Court power to exercise its jurisdiction over the situation in Darfur, Sudan, which it must exercise 'in accordance with [the] Statute'. This includes article 27(2), which provides that immunities are not a bar to the exercise of jurisdiction. As Sudan is obliged to 'cooperate fully' with the Court, the effect of article 27(2) arises also in the horizontal relationship – Sudan cannot invoke Head of State immunity if a State Party is requested to arrest and surrender Mr Al-Bashir. Therefore, there was no Head of State immunity that Sudan could invoke in relation to Jordan, had the latter arrested Mr Al-Bashir on the basis of an arrest warrant issued by the Court. Accordingly, there was also no immunity that Jordan would have been required to 'disregard' by executing the

[376] *See* Appeal Brief, paras 69-70.
[377] Appeal Brief, para. 70.
[378] Cassese Commission Report, pp. 4-5.

Court's arrest warrant. And there was no need for a waiver by Sudan of Head of State immunity. The Appeals Chamber therefore concludes that the Pre-Trial Chamber did not err when it found that, as a result of Resolution 1593, Sudan could not invoke Head of State immunity.

(d) Jordan's obligation to arrest and surrender

150. Jordan raises several arguments that concern its obligation to execute the warrant for the arrest and surrender of Mr Al-Bashir. Some of these arguments are based on Jordan's interpretation of the relevant law, notably that, before Mr Al-Bashir could be arrested, a waiver from Sudan would have been required. In preceding sections, these arguments were rejected. Some remaining arguments, however, cover aspects that have not been addressed yet; they will be addressed in turn.

151. The Pre-Trial Chamber found that article 98(1) of the Statute did not provide Jordan with the right not to comply with the Court's requests, but is addressed to the Court itself.[379] Jordan argues that this amounted to an error of law because cooperation has to be provided in accordance with the Statute – if the cooperation sought is inconsistent with the Statute, there is no obligation of States Parties to cooperate.[380]

152. The Appeals Chamber finds that Jordan's argument is unpersuasive. Article 98(1) is indeed directed at the Court itself – it prescribes that the Court may not proceed with requests for cooperation under certain circumstances. However, this does not mean that the requested State may unilaterally decide not to execute a request for arrest and surrender, if it considers that the Court erroneously asked for cooperation, contrary to article 98(1). In such a situation, the requested State has to seek consultations with the Court pursuant to article 97 of the Statute. Whether Jordan appropriately sought such consultations in the case at hand will be discussed under the third ground of appeal.

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[379] Impugned Decision, para. 42.
[380] Appeal Brief, paras 25-30.

153. For the same reasons, Jordan's argument that the Pre-Trial Chamber erred because it purportedly asserted that 'Jordan has a duty to cooperate with the Court no matter what legal obligations Jordan may have vis-à-vis other States'[381] is unpersuasive. It disregards that the Statute provides for a consultation procedure in case a requested State Party identifies problems with a request for cooperation. This means that the requested State cannot unilaterally decide not to comply with a request for cooperation – as correctly found by the Pre-Trial Chamber.[382] Rather, the requested State must engage in consultations.

154. Jordan argues further that the Pre-Trial Chamber erred when it found that article 98(2) of the Statute did not apply to the 1953 Convention because it did not refer to 'sending states' and because it 'does not establish or refer to a procedure for seeking and providing consent to surrender'.[383] Jordan argues that the Pre-Trial Chamber's understanding of article 98(2) was too restrictive and disregarded that article 11 of the 1953 Convention 'squarely addresses the situation of the representatives of a Member State "journeying" to and from conferences convened by the Arab League, and their immunity from person arrest or detention in "the place of the meeting"'.[384] Jordan also notes that article 14 of the 1953 Convention 'expressly addresses the circumstances under which the Member State might consent to the arrest or surrender of its representative'.[385] For the reasons that follow, the Appeals Chamber is unpersuaded by these arguments.

155. Article 98(2) of the Statute provides as follows:

> 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.

156. Article 11 of the 1953 Convention provides:

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[381] Appeal Brief, para. 35.
[382] Impugned Decision, para. 42.
[383] Appeal Brief, paras 31-33, referring to Impugned Decision, para. 32.
[384] Appeal Brief, para. 32.
[385] Appeal Brief, para. 33.

> Representatives of Member States to the principal and subsidiary organs of the League of Arab States and to conferences convened by the League, shall, while exercising their functions and during their journey to and from the place of meeting, enjoy the following privileges and immunities:
>
> a) Immunity from personal arrest or detention and from seizure of their personal effects;
>
> b) Judicial immunity in respect of words spoken or written and acts done by them in their capacity as representatives of their States;
>
> c) Inviolability for papers and documents;
>
> d) The right to use codes in their communications and to receive their correspondence by courier or in sealed bags;
>
> e) The right of exemption in respect of themselves and their spouses from all residence restrictions, procedures relating to the registration of aliens, as well as from all national service obligations in the country they enter or through which they pass in the exercise of their functions;
>
> f) The facilities accorded to the representatives of foreign States delegated on temporary official missions in respect of regulations relating to currency and exchange;
>
> g) The immunities and facilities accorded to diplomatic representatives in respect of their personal effects;
>
> h) The privileges, exemptions and facilities, not inconsistent with those mentioned above, accorded to diplomatic representatives, except for exemption from excise tax and from customs duties on articles imported other than their personal effects.

157. Article 14 of the 1953 Convention provides:

> Privileges and immunities shall not be accorded to the representatives of Member States for their personal benefit, but in order to safeguard the independent exercise of their functions in connection with the League.
>
> Consequently, Member States should waive the immunity of their representative in all cases where it appears that immunity would impede the course of justice and where its waiver in respect of (these representatives) would not prejudice the purpose for which the immunity is accorded.

158. The Appeals Chamber notes that articles 11 and 14 of the 1953 Convention address the question of immunities that members of delegations to meetings of the Arab League are entitled to and under which circumstances such immunities should be waived. As such, these provisions are relevant to article 98(1) of the Statute – though the effect of Sudan's duty under Resolution 1593 to cooperate

fully with the Court is that Sudan cannot invoke such immunities if the Court seeks the arrest of a person otherwise entitled to such immunity.[386]

159. In contrast, article 98(2) of the Statute does not concern immunities – be they customary or conventional in nature – but agreements according to which a receiving State undertakes not to surrender a person of the sending State to the Court without prior consent.[387] Typical examples of such agreements are so-called status of forces agreements, which regulate the status of armed forces of a sending State on the territory of a receiving State.[388] Indeed, depending on the particular circumstances of a given situation – such as in this case where either the Rome Statute or a UN Security Council referral resolution creates cooperation obligations for a State or the States concerned – article 98(2) may not afford an escape route from the duty to cooperate with the ICC. Thus, the Appeals Chamber finds that the Pre-Trial Chamber did not err when it found that article 98(2) of the Statute did not apply to the 1953 Convention.

160. In any event, the Appeals Chamber notes that the Pre-Trial Chamber found that it could not consider whether Mr Al-Bashir benefitted from immunity under the 1953 Convention because of doubts as to whether Sudan was party to that Convention.[389] The Pre-Trial Chamber clarified this matter in its decision granting leave to appeal by stating that, based on the corrected translation submitted by the Registry, Sudan is a party to the Convention since 30 October 1977 but found that this aspect was not dispositive nor had any impact on the Pre-Trial Chamber's

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[386] *See* Prosecutor's Response, para. 44.
[387] *See* C. Tan, 'The Proliferation of Bilateral Non-Surrender Agreements Among Non-Ratifiers of the Rome Statute of the International Criminal Court' in *19 Am. U. Int'l L. Rev. 1115* (2004), p. 1138-39 (noting that it is the circumstances leading to a person's presence on the territory of the requested state party, and not the status of the person or the activity he or she performs in said state, which is determinative of whether or not said person falls within the exception provided in Article 98(2). In their ordinary meaning, these terms suggest a person who is specifically despatched by the 'sending State' to the 'Requested State', and whose status therein requires specific regulation by the international agreement in question). *See also*, C. Keitner, 'Crafting the International Criminal Court: Trials and tribulations in Article 98(2)'in *6 UCLA J. Int'l L. & For. Aff. 215* (2001), p. 236 (stating that article 98(2) is not meant, and cannot legally be read, to hinder the surrender by a State Party of a person to the ICC because of any obligations other than those existing between the sending State and the requested State that are themselves consistent with customary and conventional international law. Any other interpretation of article 98(2) would contradict the spirit and purpose of the Rome Statute, and would defy common sense).
[388] *See* W.A. Schabas, 'Article 98' in *The International Criminal Court: A Commentary on the Rome Statute* (2010), p. 1042-1043.
[389] Impugned Decision, paras 30-31.

determination of the main issue before it.[390] In these circumstances, the Pre-Trial Chamber made statements about the applicability of article 98(2) only 'in any event'. Jordan on appeal specifically states that whether Mr Al-Bashir enjoys immunity under this instrument is not on appeal because the Pre-Trial Chamber did not reach a conclusion on that matter.[391]

161. Finally, the Appeals Chamber notes that both Jordan and Sudan are parties to the Convention against Genocide.[392] Article I of the Convention against Genocide provides that the contracting parties 'undertake to prevent and punish' the crime of genocide. The Appeals Chamber notes that Mr Al-Bashir is alleged to be responsible for the crime of genocide. Thus, Jordan was under an obligation to cooperate in the arrest and surrender of Mr Al-Bashir at the request of the Court not only as a State Party to the Rome Statute, but also by virtue of its being party to the Convention against Genocide.

(e) Overall conclusion on first and second grounds

162. In sum, the Appeals Chamber is unpersuaded by Jordan's arguments that the Pre-Trial Chamber erred when it found that there was no Head of State immunity that would have prevented Jordan from executing the warrant for the arrest and surrender of Mr Al-Bashir issued by the Court or that Jordan was otherwise not obliged to execute the Court's request for arrest and surrender. The first and second grounds of appeal are therefore rejected.

D. Third ground of appeal: whether the Pre-Trial Chamber abused its discretion in referring Jordan's non-compliance to the Assembly of States Parties and the UN Security Council

163. The Appeals Chamber's enquiry under Jordan's third ground of appeal concerns the exercise of the Pre-Trial Chamber's discretion to refer Jordan's non-compliance with a request from the Court for cooperation to the Assembly of States Parties and the UN Security Council.

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[390] Decision Granting Leave to Appeal, paras 8-10.
[391] Appeal Brief, para. 9.
[392] Jordan acceded to the Convention against Genocide on 3 April 1950 and Sudan acceded to the Convention against Genocide on 13 October 2003.

1. Relevant part of the Impugned Decision

164. Having found that Jordan had failed to comply with the Court's request for cooperation to arrest and surrender Mr Al-Bashir, thereby preventing the Court from exercising its functions and powers under the Statute, the Pre-Trial Chamber examined the appropriateness of referring Jordan to the Assembly of States Parties and the UN Security Council.[393] The Pre-Trial Chamber found that a referral of Jordan's non-compliance was appropriate given: (i) Jordan's 'very clear position' in choosing not to execute the Court's request for cooperation and in not requiring or expecting anything further from the Court that 'could assist it in ensuring the proper exercise of its duty to cooperate'; and (ii) that the obligation to arrest Mr Al-Bashir was already expressed in unequivocal terms and that consultations did not suspend this obligation.[394] It held further that for the case of South Africa, as it 'was the first State Party to approach the Court with a request for consultations', this fact 'militated against a referral for non-compliance'.[395]

165. In relation to the issue of consultations, the Pre-Trial Chamber found that exchanges between Jordan and the Court aiming at removing obstacles to Jordan's cooperation 'did not take place'.[396] The Pre-Trial Chamber considered that the *note verbale* of 28 March 2017 [the '*Note Verbale* of 28 March 2017'][397] was not a request for consultations as this *note verbale* did not 'contain any question or call to action addressed to the Court that could enable [it] being interpreted as a request of any kind'.[398] In the Pre-Trial Chamber's view, the timing of the *note verbale* sent one day before the arrival of Mr Al-Bashir in Jordan was an additional factor that

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[393] Impugned Decision, paras 50-51.
[394] Impugned Decision, paras 53-54, referring, *inter alia*, to 'Decision following the Prosecutor's request for an order further clarifying that the Republic of South Africa is under the obligation to immediately arrest and surrender Omar Al Bashir', 13 June 2015, ICC-02/05-01/09-242 [the 'Decision of 13 June 2015'].
[395] Impugned Decision, para. 54.
[396] Impugned Decision, para. 47.
[397] Annex 1 to 'Report of the Registry on additional information received regarding Omar Al Bashir's potential travel to the Hashemite Kingdom of Jordan', ICC-02/05-01/09-293-Conf-Anx1-Corr; pursuant to the Pre-Trial Chamber's instruction, annex 1 was reclassified as public on 28 August 2018 (ICC-02/05-01/09-293-Anx1-Corr).
[398] Impugned Decision, para. 47.

reinforced the Chamber's belief that the *note verbale* was not a request for consultations.[399]

2. Submissions of the parties and amici curiae

(a) Jordan

166. Jordan submits that the Pre-Trial Chamber erred as a matter of fact in concluding: (i) that Jordan had taken a very clear legal position regarding its ability to arrest and surrender Mr Al-Bashir and did not expect anything further from the Court;[400] and (ii) that at the time of Mr Al-Bashir's visit to Jordan the Pre-Trial Chamber had already expressed in unequivocal terms that South Africa had the obligation to arrest Mr Al-Bashir.[401] Jordan argues that the Pre-Trial Chamber had directly communicated its legal views to South Africa on 12 and 13 June 2015 prior to Mr Al-Bashir's visit to that country, whereas these legal views were not 'expressed directly to Jordan'.[402] Jordan avers that the Pre-Trial Chamber only established South Africa's obligation to arrest and surrender Mr Al-Bashir in July 2017.[403] In Jordan's view, it was unreasonable to maintain that it was on notice of its obligations under the Statute given the divergent jurisprudence of the pre-trial chambers on the issue of arrest and surrender of Mr Al-Bashir on States Parties' territories.[404] Jordan adds that the Pre-Trial Chamber failed to discuss these 'multiple legal interpretations' and 'whether that should be a factor to take into account' regarding Jordan's referral.[405]

167. Jordan alleges further that the Pre-Trial Chamber's decision to refer it to the Assembly of States Parties and the UN Security Council 'constituted an abuse of discretion' given (i) the alleged Pre-Trial Chamber's differential treatment between South Africa and Jordan in similar circumstances;[406] and (ii) the Pre-Trial

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[399] Impugned Decision, para. 47.
[400] Appeal Brief, paras 89-90; Jordan's Final Submissions, paras 27-28.
[401] Appeal Brief, paras 93-95; Jordan's Final Submissions, para. 29.
[402] Appeal Brief, paras 98, 101.
[403] Transcript of hearing, 13 September 2018, ICC-02/05-01/09-T-7-ENG, p. 46, lines 16-18; Transcript of hearing, 14 September 2018, ICC-02/05-01/09-T-8-ENG, p. 97, lines 9-20.
[404] Appeal Brief, paras 43, 46, 48, 95; Transcript of hearing, 10 September 2018, ICC-02/05-01/09-T-4-ENG, p. 29, lines 1-10; Transcript of hearing, 14 September 2018, ICC-02/05-01/09-T-8-ENG, p. 97, lines 21-24.
[405] Transcript of hearing, 13 September 2018, ICC-02/05-01/09-T-7-ENG, p. 47, lines 22-24.
[406] Appeal Brief, paras 96-102; Jordan's Final Submissions, para. 30.

Chamber's failure to give weight to relevant considerations in reaching its decision on referral.[407] In that regards, Jordan submits that while the Pre-Trial Chamber considered favourably South Africa's consultations with the Court as it was the first State Party to do so, it failed to consider Jordan's good faith and to discuss Jordan's efforts at consultations prior to Mr Al-Bashir's visit.[408]

168. Moreover, Jordan submits that the failure to comply is not a sufficient basis for referral and in the present case this amounted to an automatic referral.[409] Jordan maintains that the Pre-Trial Chamber failed to discuss what would be 'the concrete circumstances' in the present case that would require a referral in order to foster cooperation from Jordan.[410]

(b) The Prosecutor

169. The Prosecutor submits that the Pre-Trial Chamber reasonably found that Jordan's 'clear position and choice not to execute the Court's request was a factor supporting referral'.[411] The Prosecutor asserts that the Pre-Trial Chamber's decision to refer Jordan to the Assembly of States Parties and the UN Security Council was not punitive and was the 'most effective' way to obtain Jordan's cooperation and 'preserve the object and purpose of article 87(7)' of the Statute.[412] The Prosecutor maintains that the Pre-Trial Chamber correctly expressed in unequivocal terms its position that South Africa had an obligation to arrest and surrender Mr Al-Bashir and Jordan knew that it was obliged to arrest him and that engaging in consultations with the Court did not suspend its obligations when it decided unilaterally not to comply with these obligations.[413] The Prosecutor argues that Jordan's argument as to the inconsistency of the jurisprudence of the Court on

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[407] Appeal Brief, paras 103-106; Jordan's Final Submissions, para. 31.
[408] Appeal Brief, paras 103-104; Transcript of hearing, 13 September 2018, ICC-02/05-01/09-T-7-ENG, p. 47, lines 14-20; Transcript of hearing, 14 September 2018, ICC-02/05-01/09-T-8-ENG, p. 95, line 23 to p. 96, line 7.
[409] Appeal Brief, para. 90; Transcript of hearing, 13 September 2018, ICC-02/05-01/09-T-7-ENG, p. 42, line 24 to p. 43, lines 1-2, p. 45, lines 8-14, 23-25, p. 46, lines 5-6; Transcript of hearing, 14 September 2018, ICC-02/05-01/09-T-8-ENG, p. 96, lines 8-15.
[410] Transcript of hearing, 13 September 2018, ICC-02/05-01/09-T-7-ENG, p. 45, lines 15-25; Transcript of hearing, 14 September 2018, ICC-02/05-01/09-T-8-ENG, p. 96, lines 8-15, p. 100, lines 12-17; Jordan's Final Submissions, para. 32.
[411] Prosecutor's Response, paras 3, 100, 102, 104.
[412] Prosecutor's Response, paras 3, 107.
[413] Prosecutor's Response, paras 100, 109-114. *See also* Transcript of hearing, 14 September 2018, ICC-02/05-01/09-T-8-ENG, p. 81, lines 9-16.

immunities is inaccurate because while the legal reasoning may have varied across the Court's decisions, they 'unanimously' concluded that Mr Al-Bashir does not benefit from any immunity before this Court and States Parties are obliged to arrest and surrender him.[414]

170. The Prosecutor submits further that, contrary to Jordan's submissions regarding the Pre-Trial Chamber's alleged indiscriminate comparison between Jordan and South Africa, the Pre-Trial Chamber's analysis appropriately focused on Jordan's failure to consult and only referred to the proceedings with respect to South Africa in order to distinguish its findings on referral in that case.[415] The Prosecutor asserts that the Pre-Trial Chamber 'was justified in arriving at different conclusions in the two cases' on the issue of referral, as 'Jordan has not accepted its obligation to cooperate with the Court' and, unlike South Africa, Mr Al-Bashir's visit did not trigger 'any effort domestically to resolve perceived inconsistencies with Jordan's statutory obligations'.[416]

171. Furthermore, the Prosecutor avers that Jordan's contention that it made good-faith efforts to consult with the Court is unsupported.[417] The Prosecutor asserts that Jordan only approached the Court after it was asked about Mr Al-Bashir's visit by the Registry on 24 March 2017, five days before Mr Al-Bashir's visit to Jordan.[418] The Prosecutor argues that, in the *Note Verbale* of 28 March 2017, apart from referring to article 97 of the Statute, Jordan 'did not seek anything further from the Court, or even express an interest in meeting with Court officials' and 'identified no difficulty, no impediment to executing the request'; instead, 'Jordan only expressed a *principled position* not to arrest Omar Al-Bashir.'[419] The Prosecutor argues that 'Jordan had many opportunities to communicate with the Court about the arrest warrant'; it could have done so in 2009 when notified of the first arrest

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[414] Prosecutor's Response, paras 67, 113 (emphasis in original omitted); Transcript of hearing, 13 September 2018, ICC-02/05-01/09-T-7-ENG, p. 54, lines 1-4.
[415] Prosecutor's Response, paras 115-116.
[416] Prosecutor's Response, paras 117-118; Transcript of hearing, 13 September 2018, ICC-02/05-01/09-T-7-ENG, p. 58, lines 10-17; Transcript of hearing, 14 September 2018, ICC-02/05-01/09-T-8-ENG, p. 81, lines 20-25.
[417] Prosecutor's Response, para. 119.
[418] Transcript of hearing, 13 September 2018, ICC-02/05-01/09-T-7-ENG, p. 52, lines 3-7. *See also* Prosecutor's Response, para. 120.
[419] Prosecutor's Response, paras 119-120 (emphasis added in original); Transcript of hearing, 13 September 2018, ICC-02/05-01/09-T-7-ENG, p. 52, lines 8-10, 18-25, p. 53, lines 4-9.

warrant or in 2010 when notified of the second arrest warrant and Jordan could have communicated at any time in the intervening eight years but did not do so.[420]

172. Finally, with respect to the Presiding Judge's question about trial *in absentia* asked during the oral hearings, the Prosecutor submits that there is no trial *in absentia* at the Court as there was no agreement to include such possibility in the Statute, and that at the end, article 61 was included to allow an *in absentia* proceeding regarding confirmation of charges.[421] That is why, the Prosecutor argues, a State Party that fails to cooperate must be referred because the Court cannot exercise its jurisdiction.[422] The Prosecutor asserts that because the proceedings could not progress beyond the confirmation process, an arrest and surrender is essential for allowing the proceedings to advance, and in the absence of such arrest, the Court's functions and powers are frustrated.[423]

(c) The *amici curiae*

173. On the matter of potential improvements to the consultation process envisioned under article 97 of the Statute, the African Union asserts that articles 97 and 98 are 'essentially twin provisions […] in the sense that 97 places a burden on the State and 98 places a burden on the Court.'[424] The African Union further argues that article 97 provides that it is the State's obligation to identify the problems and to communicate them to the Court.[425] According to the African Union, this process assumes the good faith on the part of the State raising the problems.[426] This, in the African Union's opinion, could leave the State with the problem of lack of resources to even respond to the Court's request, and it suggest that perhaps this could be addressed in the rules of procedure or at a policy level by the Assembly of States Parties.[427]

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[420] Transcript of hearing, 13 September 2018, ICC-02/05-01/09-T-7-ENG, p. 55, lines 1-4; Transcript of hearing, 14 September 2018, ICC-02/05-01/09-T-8-ENG, p. 79, line 19 to p. 80, line 16.
[421] Transcript of hearing, 13 September 2018, ICC-02/05-01/09-T-7-ENG, p. 96, lines 15-23.
[422] Transcript of hearing, 13 September 2018, ICC-02/05-01/09-T-7-ENG, p. 96, lines 1-3. *See also* Transcript of hearing, 13 September 2018, ICC-02/05-01/09-T-7-ENG, p. 95, lines 16-25.
[423] Transcript of hearing, 13 September 2018, ICC-02/05-01/09-T-7-ENG, p. 98, lines 4-8, 19-21.
[424] Transcript of hearing, 14 September 2018, ICC-02/05-01/09-T-8-ENG, p. 17, lines 5-7.
[425] Transcript of hearing, 14 September 2018, ICC-02/05-01/09-T-8-ENG, p. 17, lines 8-9.
[426] Transcript of hearing, 14 September 2018, ICC-02/05-01/09-T-8-ENG, p. 17, lines 12-13.
[427] Transcript of hearing, 14 September 2018, ICC-02/05-01/09-T-8-ENG, p. 19, lines 10-12; p. 20, line 25 to p. 21, line 5.

174. The League of Arab States submits that the Pre-Trial Chamber erred in law by relying on its unequivocal expression of its position to a different State Party.[428] It argues that the Pre-Trial Chamber failed to decide the referral of Jordan in reference to its own facts rather than to the situation of a different State Party.[429] Furthermore, the League of Arab States argues that the Pre-Trial Chamber's decision 'constituted an abuse of discretion'.[430]

175. Ms Ciampi submits that a finding of non-compliance and a referral by the Court may have an important 'blaming and shaming effect' which could result in a general deterrent effect.[431]

176. Whilst Jordan deserves credit for its cooperation with the Appeals Chamber in the present proceedings, Mr Kreβ argues that the Court is entitled to expect Jordan's further cooperation 'unreservedly' in accordance with its authoritative clarification of the law in due course.[432] Without such 'basic loyalty' of States Parties, Mr Kreβ argues, the enforcement of the *ius puniendi* by a permanent international court could not succeed.[433]

177. Ms Lattanzi submits that she is amending her previous position on the issue of Jordan's referral[434] and argues now that Jordan should not be referred to the Assembly of States Parties and the UN Security Council.[435] She 'aknowledge[s] that Jordan might have felt the need to consult with the Court with the aim to clarify the arguments upon which the request to arrest and surrender President Al-Bashir were founded, notwithstanding his alleged immunity under the international law applicable by foreign domestic jurisdiction'.[436] Ms Lattanzi argues that the Pre-

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[428] The League of Arab States' Observations, para. 44. *See also* Jordan's Response to African Union and League of Arab States, para. 24.
[429] League of Arab States' Observations, paras 11-12. *See also* Transcript of hearing, 12 September 2018, ICC-02/05-01/09-T-6-ENG, p. 23, lines 20-22. On this matter, the League of Arab States emphasised that the Pre-Trial Chamber omitted to attend to the issue of whether further cooperation by Jordan was possible or a referral was necessary to ensure compliance. *See also* Transcript of hearing, 12 September 2018, ICC-02/05-01/09-T-6-ENG, p. 24, lines 1-3.
[430] Transcript of hearing, 12 September 2018, ICC-02/05-01/09-T-6-ENG, p. 23, lines 8-12.
[431] Ms Ciampi's Observations, p. 12 (emphasis in original omitted).
[432] Transcript of hearing, 14 September 2018, ICC-02/05-01/09-T-8-ENG, p. 40, lines 8-17.
[433] Transcript of hearing, 14 September 2018, ICC-02/05-01/09-T-8-ENG, p. 40, lines 21-24.
[434] *See* Ms Lattanzi's Observations, paras 17-21.
[435] Ms Lattanzi's Final Submissions, para. 20.
[436] Ms Lattanzi's Final Submissions, para. 19.

Trial Chamber could have followed-up on the *Note Verbale* of 28 March 2017 'by inviting Jordan to consultations, in particular on the controversial issue of the applicability of the immunities in the enforcement process of arrest and surrender'.[437] Ms Lattanzi therefore accepts that the Pre-Trial Chamber's factual finding on the lack of consultations was not entirely correct as it 'did not fully reflect Jordan's reference […] to consultations'.[438]

178. Mr Magliveras argues that the Pre-Trial Chamber was 'neither unfair nor unreasonable' and Jordan should not fear such referral as it does not affect its sovereign rights; rather this referral should be viewed as an opportunity for Jordan to present its arguments to the Assembly of States Parties and to the UN Security Council.[439] Mr Magliveras avers further that article 87(7) should not be interpreted as a punitive measure, or sanction, but as a means to officially inform the '[Assembly of States Parties] and/or [UN Security Council] of a specific State Party's problematic behaviour'.[440]

179. Mr Newton submits that the Mapping Bashir Research Project shows that the Court's referrals to the Assembly of States Parties and the UN Security Council 'have made no appreciable difference' and therefore did not 'substantially affect' Mr Al-Bashir's subsequent travels to States Parties territories.[441] Nonetheless, Mr Newton submits that the patterns of travel show that referral, of itself, can have some political impact, albeit that the precise impact may be unpredictable.[442]

180. Mr Robinson *et al*. submit that even in the event of the Appeals Chamber confirming the Pre-Trial Chamber's approach, Jordan need not be referred to the Assembly of States Parties or the UN Security Council.[443] They argue that '[t]here is no benefit' for such referral as Jordan does not 'withhol[d] any assistance'[444] and that the Pre-Trial Chamber erred in law and fact on the main reasons for referring Jordan and that 'Jordan was not defiant […but] was just stating what it perceived

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[437] Ms Lattanzi's Final Submissions, para. 20.
[438] Ms Lattanzi's Final Submissions, para. 20.
[439] Mr Magliveras's Observations, para. 12; Mr Magliveras's Final Observations, p. 5.
[440] Mr Magliveras's Final Observations, p. 5.
[441] Mr Newton's *et al*. Observations, para. 17. *See also* paras 3, 6, 10.
[442] Transcript of hearing, 13 September 2018, ICC-02/05-01/09-T-7-ENG, p. 75, line 22 to p. 76, line 1.
[443] Mr Robinson's *et al.* Observations, para. 23.
[444] Mr Robinson's *et al*. Observations, para. 24.

as obstacles'.[445] Mr Robinson *et al*. aver that the Pre-Trial Chamber erred in fact when it held that the law had be settled unequivocally whereas the *South Africa* Decision had not yet been available in March 2017 and the 'theory that Jordan objected to has been significantly refined'.[446] They maintain that the 'Court should show some understanding of the legal stakes for states parties […], the widespread uncertainty and well-argued controversy' that the issue of the arrest of a Head of State has generated so far.[447] In their view, it was correct for the Pre-Trial Chamber not to refer South Africa and argue that the Appeals Chamber should 'consider the grounds on which South Africa's situation was distinguished from Jordan's'.[448] Furthermore, they argue that the remedy 'might just be to clarify the law for States Parties for the future'.[449]

181. Furthermore, Mr Robinson *et al*. submit that there are legal avenues to respect competing legitimate concerns of states regarding Head of State immunities and the difficulties to arrest such an official.[450] First, they argue that the Court can issue warrants of arrest against Head of State but could allow an exception for Heads of States participating in a conference of an intergovernmental organization.[451] Alternatively, they aver, a chamber could 'consider creating a space for a legislative-judicial "dialogue" to allow some shared responsibilities'.[452] In that sense, they argue, the Appeals Chamber could confirm the approach adopted by the Pre-Trial Chamber but could find that the 'Statute framework leaves space for the [Assembly of States Parties] to adopt a rule of procedure specifying appropriate exceptions as a matter of legislative policy'.[453] Regarding improvements on the consultation process, Mr Robinson *et al*. assert that the Appeals Chamber could declare that States could consult the Court if they do so 'in a timely manner' about what they see as an 'essential contact' and that such

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[445] Transcript of hearing, 14 September 2018, ICC-02/05-01/09-T-8-ENG, p. 62, lines 4-8.
[446] Transcript of hearing, 14 September 2018, ICC-02/05-01/09-T-8-ENG, p. 62, lines 9-11.
[447] Mr Robinson's *et al*. Observations, para. 24.
[448] Mr Robinson's *et al*. Observations, para. 25.
[449] Transcript of hearing, 13 September 2018, ICC-02/05-01/09-T-7-ENG, p. 86, lines 19-20.
[450] Mr Robinson's *et al*. Observations, paras 18, 20.
[451] Mr Robinson's *et al*. Observations, paras 20-21. *See also* Transcript of hearing, 12 September 2018, ICC-02/05-01/09-T-6-ENG, p. 86, lines 5-16.
[452] Mr Robinson's *et al*. Observations, para. 22.
[453] Mr Robinson's *et al*. Observations, para. 22. *See also* Transcript of hearing, 12 September 2018, ICC-02/05-01/09-T-6-ENG, p. 86, lines 19-22.

contact - in 'exceptional circumstances' - 'could allow the Court to recognize other important shared values'.[454]

3. Determination by the Appeals Chamber

182. The Appeals Chamber recalls that the power of the Court to refer a State Party to the Assembly of States Parties and/or the UN Security Council for non-compliance is derived from article 87(7) of the Statute, which provides as follows:

> 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.

183. The Appeals Chamber has previously examined article 87(7) in the *Kenyatta* OA5 Judgment. There, the Appeals Chamber found, *inter alia*, that the object and purpose of the provision was to 'foster cooperation' between the Court and States Parties to the Statute by 'providing the Court with the possibility of engaging certain external actors to remedy cases of non-compliance'.[455] Importantly, the Appeals Chamber stated that the decision to refer a State is not an 'automatic consequence' of failure to avail cooperation to the Court, but rather a 'determination [that] falls within the discretion of the Chamber seized of the article 87(7) application'[456] and a response 'that *may* be sought when the Chamber concludes that it is the most effective way of obtaining cooperation in the concrete circumstances at hand'.[457]

184. In addition, the Appeals Chamber noted that the exercise of discretion under the first clause of article 87(7) of the Statute is subject to 'a factual prerequisite that needs to be met for a finding of non-compliance to be made, namely that there is a failure to comply with the cooperation request of a certain gravity'.[458] If that is the case, the Appeals Chamber held that the second clause of article 87(7) comes into

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[454] Mr Robinson's *et al*. Final Submissions, para. 13.
[455] *Kenyatta* OA5 Judgment, para. 51.
[456] *Kenyatta* OA5 Judgment, para. 53.
[457] *Kenyatta* OA5 Judgment, para. 51.
[458] *Kenyatta* OA5 Judgment, para. 39.

play.[459] In that regard, the Appeals Chamber considers it important to clarify that this 'factual prerequisite' under the first clause of article 87(7) consists of two cumulative conditions, namely, (i) that the State concerned failed to comply with a request to cooperate; and, (ii) that this non-compliance is grave enough to prevent the Court from exercising its functions and powers under the Statute. It is only when the Chamber has established that *both* conditions are met that it may proceed to consider whether to refer the State to the Assembly of States Parties or the UN Security Council or both, following a finding of non-compliance.

(i) Whether the factual prerequisite under article 87(7) of the Statute was established

185. The Appeals Chamber notes that, in the case at hand, neither of the parties has raised on appeal the issue of whether the Pre-Trial Chamber correctly established the factual prerequisite for referral under article 87(7) of the Statute. That prerequisite is stated in terms which require, as a condition for a referral, a failure to comply with a request to cooperate, thereby 'preventing the Court from exercising its functions and powers under this Statute'. The Appeals Chamber will address this issue on its own motion, because unless the Pre-Trial Chamber has established the factual prerequisite of article 87(7) of the Statute, it cannot exercise its discretion to refer a State to the Assembly of States Parties or the UN Security Council, following a finding of non-compliance.

186. As determined under the previous grounds of appeal, the Pre-Trial Chamber correctly found that Jordan had failed to comply with a request to cooperate. Thus, the first condition relating to the factual prerequisite was established.

187. With respect to the second condition, namely, whether Jordan's non-compliance prevented the Court from exercising its functions and powers under the Statute, the Appeals Chamber observes that, at paragraph 50 of the Impugned Decision, the Pre-Trial Chamber stated that:

> by not arresting Omar Al-Bashir while he was on its territory on 29 March 2017, Jordan failed to comply with the Court's request for the arrest and surrender of Omar Al-Bashir contrary to the provisions of the Statute, *thereby*

[459] *Kenyatta* OA5 Judgment, para. 39.

> *preventing the Court from exercising its functions and powers under the Statute in connection with the criminal proceedings instituted against Omar Al- Bashir*. [Emphasis added.]

188. The Pre-Trial Chamber did not further explain how it understood the terms of article 87(7) of the Statute or why it considered that the Court, in the case at hand, was prevented from exercising its functions and powers as a result of Jordan's failure to cooperate. It is important to do so. Nevertheless, for the reasons that follow, the Appeals Chamber considers that the Pre-Trial Chamber's conclusion was correct.

189. The Appeals Chamber recalls, first, the wording of article 87(7) of the Statute, which requires, as a condition for a referral, a failure to cooperate with a request to that effect, thereby 'preventing the Court from exercising its functions and powers under this Statute'. How then was the Court prevented from exercising its functions and powers in this case?

190. Article 58(1) of the Statute empowers the pre-trial chambers to issue a warrant of arrest where there are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court and the arrest of the person 'appears necessary' for the reasons listed therein. 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. Those who bear the obligation to execute an arrest warrant are not then free to render it nugatory merely by refusing to execute it.

191. The warrants of arrest of 4 March 2009 and 12 July 2010 respectively were issued by the Pre-Trial Chamber on the basis of this power, and, by failing to arrest and surrender Mr Al-Bashir, Jordan indeed prevented the Court from exercising this power. 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, the Pre-Trial Chamber was correct in concluding

that Jordan's non-compliance prevented the Court from exercising its functions and powers under the Statute.

(ii) Whether the referral of Jordan to the Assembly of States Parties and the UN Security Council was an abuse of discretion

192. As noted above, the decision to refer a State Party to the Assembly of States Parties and or the UN Security Council following a finding of non-compliance is discretionary in nature.[460] Jordan challenges the Pre-Trial Chamber's exercise of discretion to refer Jordan to the Assembly of States Parties and the UN Security Council, submitting that it is tainted by errors of fact and law and arguing that a referral in the circumstances of this case constituted an abuse of discretion.[461] Regardless of Jordan's characterisation of the alleged errors, the Appeals Chamber will assess whether the Pre-Trial Chamber's decision amounted to an abuse of its discretion.

193. The Appeals Chamber observes that Jordan's main contention revolves around the Pre-Trial Chamber's finding that 'consultations – i.e. exchanges between Jordan and the Court with a view to removing the obstacle to Jordan's cooperation – did not take place'[462] and that the Pre-Trial Chamber treated South Africa and Jordan differently, even though the two States had found themselves in a similar situation,[463] in particular as regards their attempts to consult with the Court.

194. On the matter of whether Jordan actually sought to consult with the Court, the Pre-Trial Chamber found, *inter alia*, that 'Jordan took a very clear position, chose not to execute the Court's request for arrest and surrender of Omar Al-Bashir and did not require or expect from the Court anything further that could assist it in ensuring the proper exercise of its duty to cooperate'.[464] Jordan disputes these

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[460] *See* *Kenyatta* OA5 Judgment, paras 49, 64.
[461] Appeal Brief, paras 96-106; Jordan's Final Submissions, para. 31.
[462] Impugned Decision, para. 47.
[463] Appeal Brief, paras 98-106; Transcript of hearing, 14 September 2018, ICC-02/05-01/09-T-8-ENG, p. 94, line 13 to p. 95, line 16, p. 96, lines 1-7, p. 96, line 16 to p. 97, line 8; p. 99, lines 9-16, p. 99, line 22 to p. 100, line 1; Jordan's Final Submissions, paras 26, 28, 30-31.
[464] Impugned Decision, para. 53.

findings and asserts that consultations with the Court were in fact sought, in good faith, as evidenced by its *Note Verbale* of 28 March 2017.[465]

195. The Appeals Chamber recalls that, on 24 March 2017, following receipt of a report from the Registry on information received regarding Mr Al-Bashir's potential visit to Jordan's territory,[466] Jordan addressed a *note verbale* to the Registry in which it indicated, *inter alia*, that an invitation had been sent to Heads of State of the members of the Arab League, including Sudan, for the upcoming Arab League summit, to be held on 29 March 2017, but that at that time there was no official confirmation concerning the attendance of Mr Al-Bashir.[467] Jordan added that it 'adhere[d] to its international obligations, including the applicable rules of customary international law, while taking into account all its rights thereunder'.[468]

196. On 24 March 2017, the Prosecutor responded, requesting that the Pre-Trial Chamber 'order the Registrar to seek immediate clarification from Jordan regarding 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 to consult with the Court without delay in order to resolve the matter'.[469]

197. On 28 March 2017, Jordan filed the *Note Verbale* of 28 March 2017, in which it confirmed that Mr Al-Bashir would attend the summit and stipulated that Jordan was 'hereby consulting with the ICC under Article 97 of the Rome Statute'.[470] Jordan indicated that it considered that Mr Al-Bashir enjoyed 'sovereign immunity as a sitting Head of State', that this immunity has not been

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[465] Transcript of hearing, 13 September 2018, ICC-02/05-01/09-T-7-ENG, p. 43, lines 10-22; p. 44, lines 19-23.
[466] Registry Report of February 2017.
[467] Annex 2 of 'Report of the Registry on information received regarding Omar Al Bashir's potential travel to the Hashemite Kingdom of Jordan', ICC-02/05-01/09-291-Conf-Anx2. A public redacted version was registered on 17 August 2018 (ICC-02/05-01/09-291-Anx2-Red) [the '*Note verbale* of 24 March 2017'], Registry pagination p. 2. *See also* Transcript of 13 September 2018, ICC-02/05-01/09-T-7-ENG, p. 39, lines 13-17.
[468] *Note verbale* of 24 March 2017, Registry pagination p. 2.
[469] Request of 24 March 2017, paras 1, 8. *See also* Transcript of hearing, 13 September 2018, ICC-02/05-01/09-T-7-ENG, p. 39, line 18 to p. 40, line 1.
[470] *Note verbale* of 28 March 2017, Registry pagination p. 2.

waived by Sudan and that Resolution 1593 could not be interpreted as containing a waiver of immunity or mandating States to 'bypass' such immunity.[471] Jordan stated that executing the Court's request for surrender and arrest would be 'inconsistent with its obligations under the rules of customary international law' regarding Head of State immunity and that nothing in the relevant provisions of the Statute 'mandates a State Party 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'.[472]

198. On 29 March 2017 the Prosecutor filed her observations, withdrawing her previous request of 24 March 2017 and urging the Pre-Trial Chamber 'to proceed to urgently resolve any misunderstanding that Jordan may perceive with respect to its obligations under the Statute'.[473] The Prosecutor noted further that Jordan, in the *Note Verbale* of 28 March 2017, 'formally identifies an alleged legal problem, which it communicate[d] to the Court by way of article 97 consultations' and that 'the triggering of consultations has no suspensive effect on Jordan's obligation as a State Party to arrest and surrender Mr Al-Bashir'.[474]

199. The Pre-Trial Chamber did not respond to Jordan's *Note Verbale* of 28 March 2017, nor did it react to the Prosecutor's abovementioned requests. Rather, in the Impugned Decision, the Pre-Trial Chamber stated that it:

> […] does not find merit in Jordan's argument that the note verbale of 28 March 2017 constituted a request for consultations. The text of the note verbale only refers to consultations when it states that "Jordan is hereby consulting with the ICC under article 97 of the Rome Statute". The note verbale does not contain any question or call to action addressed to the Court that could enable its being interpreted as a request of any kind. On the contrary, the note verbale is an affirmative statement of Jordan's arguments and effectively an advance notification of non-compliance. The Chamber also considers the date when the note verbale was sent to the Court, which is one day before the expected arrival of Omar Al-Bashir, is an additional factor militating against the interpretation of the note verbale as a "request for consultations".[475] [Footnotes omitted].

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[471] *Note verbale* of 28 March 2017, Registry pagination pp. 2-3.
[472] *Note verbale* of 28 March 2017, Registry pagination p. 3.
[473] Request of 29 March 2017, paras 4, 8-9.
[474] Request of 29 March 2017, paras 4, 9.
[475] Impugned Decision, para. 47.

200. The Appeals Chamber recalls that the issue of consultations is addressed in article 97 of the Statute, which provides, in relevant part, as follows:

> Where a State Party receives a request under [Part 9 of the Statute] in relation to which it identifies problems which may impede or prevent the execution of the request, that State shall consult with the Court without delay in order to resolve the matter. Such problems may include, *inter alia*:
>
> (c) The fact that execution of the request in its current form would require the requested State to breach a pre-existing treaty obligation undertaken with respect to another State.

201. The Appeals Chamber notes that article 97 of the Statute does not provide for a specific procedure regarding consultations that States have to follow, nor does it set out the manner in which consultations should be carried out. The drafting history of this provision reveals that the provision was deliberately designed to allow States flexibility in this regard, in order to address problems with execution of requests and to provide a general mechanism which could deal with the full range of scenarios that might arise.[476] For the same reason, no provision with regard to article 97 was included in the Rules,[477] as 'there was consensus that it should be left unconstrained to make it as effective as possible in resolving issues'.[478]

202. The Appeals Chamber considers that, in the absence of a prescribed procedure, the manner in which a State may indicate its intention to seek consultations may vary. And some approaches may be more awkward than others. What is essential, however, is that the intention to consult is discernible in the circumstances. In addition, the phrase 'without delay' in article 97 signifies that the intention to consult must be communicated to the Court timeously, so as not to frustrate the object of the request for cooperation or defeat the purpose of the

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[476] *See e.g.* 'Report of the Chair of the working group of the Bureau on the implementation of article 97 of the Rome Statute of the International Criminal Court', 24 November 2016, ICC-ASP/15/35 [the 'Article 97 Report'], para. 4; K. Prost, 'The Surprises of Part 9 of the Rome Statute on International Cooperation and Judicial Assistance', 16 *Journal of International Criminal Justice* (2018) ['K. Prost, The Surprises of Part 9 of the Rome Statute'], p. 363, at p. 369.
[477] Article 97 Report, para. 5. The intention of not having such a rule was 'to provide the necessary flexibility for consultations, since it was not foreseeable to elaborate rules and procedures to govern every possible scenario that could arise. Consultations were case-specific, might be resolved inter-parties or could require resolution by a Chamber'. *See* Article 97 Report, para. 6.
[478] K. Prost, The Surprises of Part 9 of the Rome Statute, p. 363, at p. 374.

consultation process. Indeed, it is in the interest of the requested State to engage in consultations as soon as possible, to ensure that any potential obstacles to cooperation can be resolved. Furthermore, the Appeals Chamber emphasises that States are required to conduct consultations in good faith.

203. Turning to the case at hand, the majority of the Appeals Chamber (Judge Ibáñez and Judge Bossa dissenting) is persuaded by Jordan's argument that the *Note Verbale* of 28 March 2017 constituted a request for consultations with the Court in terms of article 97 of the Statute. The phrase 'Jordan is hereby consulting with the ICC' is, in the Appeals Chamber's view, a discernible indication of Jordan's intent to engage with the Court in relation to the requested cooperation. Contrary to the Pre-Trial Chamber's finding,[479] 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. Consequently, the Appeals Chamber considers that the Pre-Trial Chamber should have reacted to Jordan's request to consult, by giving the necessary direction to that effect.

204. 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.[480] 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 preliminary position that it sees as posing an obstacle to cooperation, thus engaging the question to be resolved. The Appeals Chamber therefore finds that Jordan's failure to put questions to the Pre-Trial Chamber, choosing rather to set out its own legal position for the *Note Verbale* of 28 March 2017 was not inconsistent with an

[479] *See* Impugned Decision, para. 47.
[480] *See* Impugned Decision, para. 47.

attempt to engage in consultations.[481] As noted above, article 97 of the Statute does not prescribe the manner in which a request for consultations is made and, as long as it is clear that a State wishes to engage in consultations, it may do so by putting forward its own position.

205. With respect to the Pre-Trial Chamber's consideration that the timing of the *Note Verbale* of 28 March 2017 (one day before Mr Al-Bashir's scheduled arrival in Jordan) was another indication that Jordan had not actually requested consultations, the Appeals Chamber considers that, while Jordan was required to seek consultation without delay,[482] tardiness in that regard need not result in a presumption of bad faith. There may well be other reasons peculiar to the circumstances of a particular State that may explain the tardiness besides bad faith. The Appeals Chamber notes that Jordan could indeed have sought consultations as soon as the invitations for the Arab League Summit had been sent out and Mr Al-Bashir's presence on Jordan's territory in the near future therefore had become a real possibility,[483] in particular given Jordan's position that it could not arrest Mr Al-Bashir during the summit because of his purported Head of State immunity and its awareness of the ongoing proceedings against South Africa at the time.[484] Engaging in consultations earlier would have made it possible for these questions to be clarified in advance of Mr Al-Bashir's arrival in Jordan, which, in turn, could have avoided Jordan's non-compliance with its obligations under the Statute – either by rescinding Mr Al-Bashir's invitation or by arresting him upon his arrival in Jordan. In any event, the Appeals Chamber notes that Jordan made a request to consult before Mr Al-Bashir was on Jordan's territory.

206. In light of the above, the Appeals Chamber finds (Judge Ibáñez and Judge Bossa dissenting) that the Pre-Trial Chamber erred in concluding that Jordan's *Note Verbale* of 28 March 2017 did not constitute a request for consultations.

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[481] *See* Impugned Decision, para. 47.
[482] *See* Transcript of hearing, 13 September 2018, ICC-02/05-01/09-T-7-ENG, p. 44, lines 2-7. Jordan submitted that article 97 'simply provides that a State Party shall consult without delay, and we believe that that's what we did once the problem presented itself'.
[483] *See* *Note verbale* of 24 March 2017, Registry pagination p. 2. *See also* Transcript of 13 September 2018, ICC-02/05-01/09-T-7-ENG, p. 39, lines 13-17.
[484] Appeal Brief, para. 95.

207. In the same vein, the Appeals Chamber considers that, since the *Note Verbale* of 28 March 2017 was in fact an indication of Jordan's intention to consult with the Court and identified what it perceived to be problems with the execution of the request to arrest and surrender Mr Al-Bashir,[485] the Pre-Trial Chamber erred in finding that Jordan's referral to the Assembly of States Parties and the UN Security Council, was justified, *inter alia*, because Jordan took 'a very clear position, chose not to execute the Court's request and did not require or expect anything further that could assist it in ensuring the proper exercise of its duty to cooperate'. In the Appeals Chamber's view (Judge Ibáñez and Judge Bossa dissenting) the Pre-Trial Chamber misconstrued Jordan's attempt to engage in consultations as a refusal to comply with the Court's request, even though it was a request to consult, with which the Pre-Trial Chamber should have engaged. It follows that the Pre-Trial Chamber's error impacted on the reasons it gave for referring Jordan to the Assembly of States Parties and UN Security Council.

208. Turning more fully to the differential treatment, it is noteworthy that in an attempt to distinguish South Africa's consultation efforts from those of Jordan, the Pre-Trial Chamber found that 'the fact that South Africa was the first State Party to approach the Court with a request for consultations militated against a referral of non-compliance'.[486] Jordan recalls that the Pre-Trial Chamber in the *South Africa* Decision noted South Africa's request to consult with the Court and found that this 'distinguishe[d] the conduct of South Africa from that of other States that, in the past have been involved in proceedings under article 87(7) of the Statute'.[487] Indeed, on 11 June 2015 South Africa had engaged in a consultation process by requesting two days before Mr Al-Bashir's visit to its territory on 13 June 2015 an urgent meeting between the Registrar and the Chief State Law advisor which took place the next day with the Single Judge and representatives of South Africa.[488] Thus, the fact that South Africa consulted with the Court was a significant factor

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[485] *See* Transcript of hearing, 13 September 2018, ICC-02/05-01/09-T-7-ENG, p. 43, lines 8-14.
[486] Impugned Decision, para. 54. *See also* Appeal Brief, para. 102.
[487] Appeal Brief, para. 104, referring to *South Africa* Decision, para. 127.
[488] *South Africa* Decision, paras 6, 9; 'Urgent request from the authorities of South Africa', ICC-02/05-01/09-239-Conf, 12 June 2015; Annex 2 to 'Registry Report on the consultations undertaken under Article 97 of the Rome Statute by the Republic of South Africa and the departure of Omar Al Bashir from South Africa on 15 June 2015, ICC-02/05-01/09-243-Conf-Anx2, 18 June 2015; this annex was reclassified as public on 12 July 2016 (ICC-02/05-01/09-243-Anx2).

for the Pre-Trial Chamber's decision not to refer South Africa to the Assembly of States Parties and/or the UN Security Council. In contrast, in the case at hand, as set out above, the Pre-Trial Chamber erroneously found that Jordan had not consulted the Court, and therefore failed to take into account an important factor arguing against Jordan's referral. This resulted in unequal treatment of South Africa and Jordan.

209. For the reasons explained earlier, the Appeals Chamber does not accept (Judge Ibáñez and Judge Bossa dissenting) that Jordan did not seek to engage in consultations. The details of the circumstances of South Africa's consultations did not justify the finding that South Africa engaged in consultations and Jordan did not. Both had engaged in consultations. Therefore the difference in treatment accorded to Jordan was an error.

210. But there is more that compounds the error of the differential treatment accorded to Jordan as compared to that accorded to South Africa. This is especially so given that 'South Africa's domestic courts have found that the Government of South Africa acted in breach of its obligations under its domestic legal framework by not attesting Omar A-Bashir and surrendering him to the Court'.[489] The Supreme Court of Appeal of South Africa concluded that South Africa had acted inconsistently with its obligations under the Statute and its legislation implementing the Statute.[490] In addition, the Appeals Chamber notes that counsel for the African Union, who also appeared as Counsel for South Africa during the proceedings before this Court, the Appeals Chamber notes that African Union, submitted as follows before the Appeals Chamber:

> in response to the Prosecution in terms of the difference between the treatment of Jordan and South Africa, I would point out that, as someone who had been involved in the South Africa case, in fact, South Africa did not make a commitment to further cooperate. The reaction was actually […] quite a negative reaction but to start processes to withdrew. I just think that that ought to be on the table and sort of thinking about the difference in treatment.[491]

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[489] *South Africa* Decision, para. 136.
[490] *South Africa* Decision, para. 136.
[491] Transcript of hearing, 13 September 2018, ICC-02/05-01/09-T-7-ENG, p. 61, lines 20-25.

211. In that sense, Jordan's behaviour diverged from that displayed by South Africa in its endeavour to engage with the Court. It even reaffirmed its commitment to cooperate with the Court and its continuing support to the Court since its inception.[492] In these circumstances, the Appeals Chamber (Judge Ibáñez and Judge Bossa dissenting) finds merit in Jordan's arguments and considers that the Pre-Trial Chamber abused its discretion by treating Jordan differently from South Africa in similar circumstances and by referring Jordan to the Assembly of States Parties and the UN Security Council, whereas South Africa was not referred.

(iii) Conclusion.

212. In sum, 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. This error led to an erroneous exercise of the Pre-Trial Chamber's discretion in its appreciation of Jordan's position, notably by treating Jordan differently than South Africa in respect of the referral to the Assembly of States Parties and the UN Security Council.

213. In light of the above, the Appeals Chamber finds (Judge Ibáñez and Judge Bossa dissenting) that the Pre-Trial Chamber failed to exercise its discretion judiciously when it decided to refer the matter of Jordan's non-compliance to the Assembly of States Parties and the UN Security Council.

214. Given this conclusion, the Appeals Chamber finds it unnecessary to consider the remaining arguments of Jordan under the third ground of appeal.

V. APPROPRIATE RELIEF

215. In an appeal pursuant to article 82(1)(d) of the Statute, the Appeals Chamber may confirm, reverse or amend the decision appealed (rule 158(1) of the Rules of Procedure and Evidence). In the present case it is appropriate to confirm 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 not executing the Court's request for the arrest of Mr Al-Bashir and his surrender to the Court while he was

[492] *See* Corrected Transcript of hearing, 10 September 2018, ICC-02/05-01/09-T-4-ENG, p. 28, lines 3-4.

on Jordanian territory on 29 March 2017. This decision of the Appeals Chamber is unanimous.

216. The Appeals Chamber finds by majority, Judge Ibáñez and Judge Bossa dissenting, that it is appropriate to reverse the Impugned Decision to the extent that the Pre-Trial Chamber referred Jordan to the Assembly of States Parties and the UN Security Council because, for the reasons explained above, the Pre-Trial Chamber's exercise of discretion was, in the Appeals Chamber's view, erroneous.

Judge Eboe-Osuji, Judge Morrison, Judge Hofmański and Judge Bossa append a joint concurring opinion to this judgment. Judge Ibáñez and Judge Bossa append a partly dissenting opinion to this judgment.

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

Judge Chile Eboe-Osuji

Presiding

Dated this 6th day of May 2019

At The Hague, The Netherlands