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Date: **13 July 2018**

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

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'"

Source: **African Union Commission**

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I. Background

1. On 11 December 2017, Pre-Trial Chamber ("PTC") II found, by majority, that the Hashemite Kingdom of Jordan ("Jordan") had failed to comply with its obligations to cooperate under Article 87(7) of the Rome Statute of the International Criminal Court ("Rome Statute") by not arresting and surrendering Sudanese President Omar Al Bashir during his March 2017 visit.[1] Jordan appealed this decision.[2]

2. On 29 March 2018, the Appeals Chamber issued an order noting that the decision on Jordan's non-compliance and referral regarding the Al Bashir appeal "raises legal issues that may have implications beyond the present case."[3] Thus, it considered "it desirable to invite observations from", *inter alia*, international organisations including the African Union ("AU").[4]

3. The AU welcomed this refreshing invitation to engage in a legal dialogue with the International Criminal Court ("ICC" or "Court").[5] The present brief constitutes the AU's submissions. We look forward to further opportunities to engage with the ICC, including during oral hearings that may be convened concerning this particular matter.

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[1] *Prosecutor v Omar Hassan Ahmad Al Bashir*, "Decision under article 87(7) of the Rome Statute on the non-compliance by Jordan with the request by the Court for the arrest and surrender or [sic] Omar Al-Bashir", 11 December 2017, ICC-02/05-01/09-309, p. 21 (hereinafter the "*Jordan* decision"); "Minority Opinion of Judge Marc Perrin de Brichambaut," 14 December 2017, ICC-02/05-01/09-309-Anx-tENG.

[2] "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, (hereinafter the "*Jordan* Appeal");.

[3] "Order inviting expressions of interest as *amici curiae* in judicial proceedings (pursuant to rule 103 of the Rules of Procedure and Evidence)," 29 March 2018, ICC-02/05-01/09-330, para. 1.

[4] *Id.*, para. 2.

[5] African Union Notification of Acceptance of the Appeals Chamber Invitation to Submit *Amicus Curiae* Observations in the Appeal of the Hashemite Kingdom of Jordan, 18 May 2018, ICC-02/05-01/09 OA2.

II. Immunities and Customary International Law within the African Union

4. The AU has a long-standing position regarding the respect of immunities of heads of States and other senior officials as well as the fight against impunity. The latter as a fundamental principle was enshrined in Article 4 of the Constitutive Act which stipulates, *inter alia,* as follows:

> (h) the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: *war crimes, genocide and crimes against humanity*;
> ...
> (m) respect for democratic principles, human rights, the rule of law and good governance;
> ...
> (o) respect for the sanctity of human life, condemnation and *rejection of impunity* and political assassination, acts of terrorism and subversive activities... [*Emphasis added*].

5. Since its establishment, the AU has focused its efforts to implement such principles. This reflects Africa's unflinching commitment to fight impunity. This includes providing for the right of intervention in Member States, in "grave circumstances", namely those where genocide, war crimes, crimes against humanity and aggression are being committed.

6. The commitment by African States against impunity led to the adoption of further legal instruments. This included the adoption of the African Charter on Human and Peoples' Rights and the Protocol establishing the African Court on Human and Peoples' Rights. Moreover, although not yet in force, the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights was adopted to expand the jurisdiction of the African Court of Justice and Human Rights to include international and transnational crimes, amongst which are aggression, crimes against humanity, genocide and war crimes.

7. The AU decisions at the highest levels have repeatedly emphasized such commitment. This included during its extraordinary session of heads of State and governments, in October 2013, when the Assembly "reiterated, in

accordance with the Constitutive Act of the African Union, the AU's unflinching commitment to fight impunity, promote human rights and democracy, and the rule of law and good governance in the continent."[6]

8. The AU is the first regional body to successfully establish, through a bilateral agreement with one of its Member States (Senegal) in August 2012, a special chamber to investigate and try persons most responsible for atrocity crimes in one of its Member States (Chad). This followed a Committee of Eminent African Jurists' recommendation for the trial of Mr. Hissène Habré for alleged crimes against humanity committed by his regime between June 1982 and December 1990. Former president Habré was convicted in May 2016, a decision upheld in April 2017.

9. Yet, the AU — since 2009 — has raised concerns regarding the application and interpretation of the Rome Statute particularly as concerns immunities. In this context, the case of President Al Bashir, as a Head of State, has raised many complexities for the AU. Similar concerns arose regarding the Kenya Situation, before the ICC's charges were dropped, in respect of President Uhuru Kenyatta and Deputy President William Ruto. We consider that justice and peace are not mutually exclusive, but rather, that they go hand in hand; however, a delicate balance must be struck to avoid destabilising African States and violating their sovereignty under international law.

10. Against this background, the AU wishes to make the following submissions:

(i) United Nations Security Council ("UNSC") Resolution 1593 did not have the effect of removing, whether directly or indirectly, the immunities of President Al Bashir;

[6] Ext./Assembly/AU/Dec.1 (Oct. 2013), para. 2.

(ii) States Parties and States not parties alike continue to be obligated to respect the immunities of President Al Bashir under customary international law;

(iii) immunities remain especially relevant in the context of an intergovernmental organisation.

III. The Relationship between Article 27 and Article 98

11. The rule that, under international law, heads of State enjoy immunity *ratione personae* from foreign criminal jurisdiction is virtually uncontested.[7] It is a fundamental rule of international law. It has been affirmed by State practice, including domestic court judgments,[8] and States in international forums.[9] It has also been confirmed as customary international law by both the International Court of Justice ("ICJ") and the International Law Commission ("ILC").[10] Indeed, Pre-Trial Chamber II in the *Jordan* decision, as well as in both the *South Africa* and *DRC* decisions, has not questioned this principle. Instead, they have explicitly recognised it.[11]

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[7] See, e.g., Joanne Foakes *The Position of Heads of State and Senior Officials in International Law* (2014), at 81.

[8] *Gaddafi*, France, Court of Cassation, Criminal Chamber, 13 March 2001, (2001) 125 *International Law Reports* 490; Decision *In Re Mugabe*, Judgment of UK Bow Street Magistrates Court of 14 January 2004, *International Law in Domestic Courts* (UK 2004); *Marcos v Federal Department of Police*, Judgment of Swiss Supreme Court, (1989) *International Law Reports* 365. Although the South African Supreme Court of Appeal found that the South African authorities were compelled to arrest Mr. Al Bashir, this conclusion was reached on the basis of domestic law. With respect to customary international law, the Court found that there were no exceptions. See *Minister of Justice and Constitutional Development Others v Southern African Litigation Centre and Others*, Judgment of the South African Supreme Court of Appeal, 2016 (4) *BCLR* 487 (SCA), para. 84.

[9] See, for example, Fifth Report of Special Rapporteur (Concepción Escobar Hernández) on Immunity of State Officials from Foreign Criminal Jurisdiction (A/CN.4/701), para. 20 (footnote 65).

[10] See *Case Concerning the Arrest Warrant of 11 April 2000* ("*Arrest Warrant Case*"), Judgment of 14 February 2002, *ICJ Reports* 2002 p 3, paras. 53, 58, 59. See draft article 3 and 4 of the Draft Articles on the Immunities of State Officials from Foreign Criminal Jurisdiction provisionally adopted by the International Law Commission, *Report of the International Law Commission, 69th Session*, GAOR (A/72/10).

[11] *Jordan* decision (n 1), para. 27; *Prosecutor v Omar Hassan Ahmad Al Bashir*, "Decision under Article 87(7) of the Rome Statute on the Compliance with the Request by the Court for the Arrest and Surrender of Omar Al Bashir", 6 July 2017, ICC-02/05-01/09-302 (hereinafter the "*South Africa* decision"), para. 68; *Prosecutor v Omar Hassan Ahmad Al Bashir*, "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 (hereinafter the "*DRC* decision"), para. 25.

12. All these authorities, including ICC chambers, also affirm that there are no exceptions from this basic rule of general international law. This is the case even in instances of crimes falling within the jurisdiction of the Court or *jus cogens* crimes.[12]

13. The legal question before the Appeals Chamber is thus whether the cooperation regime set up under the Rome Statute has, in any manner, affected this basic rule.

14. Article 27(2) of the Rome Statute provides, in part, that "immunities or special procedural rules which may attach to the official capacity of a person … *shall not bar the Court from exercising its jurisdiction* over such a person." [*Emphasis added*]. This provision, on its own terms, concerns the exercise of jurisdiction by the Court over a person and relates to the relationship between the Court and an accused person. Put differently, it excludes the operation of immunity *before the International Criminal Court* but does not affect immunity from *foreign* domestic jurisdiction, including when "arrest is sought on behalf of … this Court."[13]

15. Part 9 of the Rome Statute sets forth a system for cooperation and judicial assistance with the Court which includes, in Article 89, the duty to arrest and surrender an indicted person sought by the ICC.[14] Where the subject of an arrest warrant involves a head of a State Party, no issue arises. However, where the person under an arrest warrant is a head of non-State Party, there is potential for

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[12] *Cf.* Regarding the South African Supreme Court of Appeal judgment in respect of the arrest and surrender of President Al Bashir (*Minister v SALC*), see discussion in footnote 8. See also draft article 7 of the Drafts Articles on Immunity of State Officials from Foreign Criminal Jurisdiction (n 10), which provides exceptions in respect of immunity of *ratione materiae,* but not for immunity *ratione personae.* The commentary states, "draft article 7 refers solely to immunity from jurisdiction *ratione materiae,* it is included in Part III and does not apply in respect of immunity *ratione personae."*

[13] *Jordan* decision (n 1), para. 27. *Cf.* W Schabas *The International Criminal Court: A Commentary on the Rome Statute* (2010, first edition), 450; D Akande "International Law Immunities and the International Criminal Court" (2004) 98 *American Journal of International Law* 407, 420.

[14] On the importance of cooperation framework for the Rome Statute system, see A Ciampi "The Obligation to Cooperate" in A Cassese, P Gaeta and JRWD Jones (eds.), *The Rome Statute of the International Criminal Tribunal: A Commentary (Volume II)* (OUP, 2002); B Swart "Arrest and Surrender" in Cassese, Gaeta and Jones (id).

conflict between the duty to arrest and surrender and the fundamental rule of international law described in paragraph 11. The drafters of the Rome Statute, aware of this potential conflict, included Article 98(1) of the Statute which provides as follows:

> 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 the 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.
> ...

16. In a sense, Article 98(1) serves as a without prejudice clause, leaving intact the customary international law rules pertaining to immunity as between States Parties and non-Parties *inter se*. Thus, while the Court may have jurisdiction over a head of a State not party to the Rome Statute in terms of Article 27, the duty to cooperate in the arrest and surrender does not apply in relation to a head of non-State Party.

17. Applied to the allegations concerning Mr. Al Bashir, while the Court may have jurisdiction, and while Article 27 may remove immunity before the ICC, he remains covered by immunity *ratione personae* from the *jurisdiction of other States*, including of States Parties, by virtue of Article 98 of the Rome Statute which preserves the rules of customary international law on immunities for third States.

18. The various decisions of the AU addressing the issue of cooperation with the Court,[15] are all based on the fact that Article 27, which removes immunity in proceedings before the ICC, does not affect the horizontal application of immunities between States which remain intact under Article 98 of the Rome Statute.[16] This distinction between immunity before international criminal

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[15] See, e.g., AU Assembly/AU/Dec.245(XIII), July 2009, para. 10 ; AU Assembly/AU/Dec.270(XIX), February 2010; AU Assembly/AU/Dec.296(XV), July 2010, paras. 5-6; AU Assembly/AU/Dec. 397(XVIII), January 2012, paras. 7-10.

[16] See most explicitly AU, Press Release No. 002/2012 on the Decision of Pre-Trial Chamber I of the International Criminal Court (ICC) Pursuant to Article 87(7) of the Rome Statute on the Alleged Failure

tribunals, such as the ICC, and domestic authorities was also recognized by Judge Eboe-Osuji in the *Ruto Case*.[17] In that opinion, Judge Eboe-Osuji notes that while "official position immunity" continues to exist under international law, it has no application at the ICC.[18] More to the point, he made the following observations:

> I now turn to the argument that customary international law does not permit the trial of a sitting Head of State or of senior State officials. That proposition lacks strong support. The legal developments that make it so will now be considered. First, the ICJ has rightly said that customary international law prevents the trial of officials of a State in the *national* courts of another State. But that rule does not operate when it comes to trying officials of States before *international* courts.[19]

19. Judge Eboe-Osuji's finding is rooted in *lex lata* rather than *lex ferenda*. Proof of this may be found in the fact that it is entirely consistent with that of the ICJ in the *Arrest Warrant Case*.[20] In the light of the legal position described above, those seeking to impose a duty to arrest contrary to the clear rules of international law, have advanced various theories designed to explain why, notwithstanding Article 98, there is a duty on States Parties to arrest Mr. Al Bashir. These theories have been advanced in Pre-Trial Chamber decisions and they are:

(i) Article 27 also removes the immunity from foreign national criminal jurisdiction;[21]

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by the Republic of Chad and the Republic of Malawi to Comply with the Non-Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Mr. Omar Hassan Al-Bashir of the Republic of Sudan, 9 January 2012, pp. 2.

[17] *The Prosecutor v William Samoei Ruto and Joshua Arap Sang*, "Decision on Defence Application for Judgments for Acquittal", 5 April 2016, ICC-01/09-01-11 (Separate Reasons of Judge Eboe-Osuji).

[18] *Id.*, para. 215. See also para. 223.

[19] *Id.* para. 226. See also D Tladi "The Immunity Provision in the AU Amendment Protocol: Separating the (Doctrinal) Wheat from the (Normative) Chaff" (2015) 13 *Journal of International Criminal Justice* 3, at 12 *et seq.*

[20] *Arrest Warrant Case* (n 10), para. 58.

[21] This theory was advanced in two identical decisions of Pre-Trial Chamber I: Pre-Trial Chamber I, *Prosecutor v Omar Hassan Ahmad Al Bashir*, "Decision Pursuant to the Article 87(7) on the Failure of the Republic of Malawi to Comply with the Cooperation Request Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmed Al Bashir", 12 December 2011, ICC-02/05-01/09; "Decision Pursuant to the Article 87(7) on the Failure of the Republic of Chad to Comply with the Cooperation Request Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmed Al Bashir", 12 December 2011, ICC-02/05-01/09 (hereinafter "*Malawi* and *Chad* decisions").

(ii) UNSC Resolution 1593 implicitly waived the immunity of President Al Bashir;[22]

(iii) UNSC Resolution 1593 turns Sudan into a State Party;[23] and

(iv) the Convention on the Prevention and Punishment of the Crime of Genocide ("Genocide Convention") waives the immunity of President Al Bashir.[24]

20. In over six decisions handed down by ICC pre-trial chambers, there has been no consistency in the theory underlying the conclusion that there is a duty to arrest Mr. Al Bashir. Each time a theory has been shown to be flawed, the ICC PTCs have, like shifting sands, simply shifted to another theory.[25] After the severe criticism of PTC I *Malawi* and *Chad* decisions, the PTC II, in the *DRC* decision, adopted the theory that UNSC Resolution 1593 implicitly waived the immunities of Mr. Al Bashir. When, in the South Africa non-cooperation proceedings, South Africa illustrated how a proper interpretation following the established rules of interpretation did not support the implicit waiver theory, PTC II moved to the theory that a UNSC referral placed Sudan into a position analogous to that of a State Party — a theory that was subsequently adopted in the *Jordan* decision.

21. It is the submission of the AU Commission that none of the theories are legally sound. The remainder of this submission will address each theory in turn. We will not, for obvious reasons, address subsidiary legal arguments that have not

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[22] This theory was advanced by Pre-Trial Chamber II in the *DRC* decision (n 11).
[23] This theory was advanced by Pre-Trial Chamber II in *South Africa* decision (n 11). The theory also formed the basis of the Court's conclusion in the *Jordan* decision (n 1).
[24] This theory is advanced in the Minority Opinion of Judge de Brichambaut (n 1).
[25] D Tladi "Of Heroes and Villains, Angels and Demons: The ICC-AU Tensions Revisited" (2017) *German Yearbook of International Law* (advance pre-publication) ("The ICC has essentially adopted an *á la carte* approach to the applicability of immunities in the Rome Statute, in which any approach in a wide selection of options is acceptable, as long as it leads to the conclusion that Al Bashir must be arrested and surrendered.").

been raised by the Chamber's decision or the novel legal theories advanced by some academic *amici*, save where these are relevant for the submission of the AU.

IV. Article 27 of the Rome Statute Does Not Remove the Immunity of Heads of non-State Parties from Foreign Criminal Jurisdiction

22. The first theory to justify a departure from the fundamental rule that a head of State has immunity *ratione personae* from foreign criminal jurisdiction was advanced in the *Malawi* and *Chad* decisions. Although this theory has been discredited and has since abandoned by PTC, it is necessary to address, albeit briefly.[26]

23. PTC I, in *Malawi* and *Chad*, held that the "current position of Omar Al Bashir as a Head of a State which is not party to the Statute has *no effect on the Court's jurisdiction over the present case.*"[27] [*Emphasis added*]. It states, as a consequence and citing the Nuremberg and Tokyo Tribunals, the UN *ad hoc* tribunals for Rwanda and former Yugoslavia and the *Arrest Warrant Case*, that international law does not "afford[s] immunity to heads of State in respect of proceedings before international courts".[28]

24. Flowing from the conclusion that international law does not recognise immunities before international courts, the PTC states that Chad, Malawi and

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[26] In addition to having been abandoned by the ICC Pre-Trial Chambers, it has also been widely criticized in academic circles. For cogent criticism of the *Malawi* and *Chad* decisions, see W Schabas "Introductory Remarks: Annual Ben Ferencz Session" (2012) 106 *American Society of International Law Proceedings* 305; AKA Greenawalt "Introductory Note to the International Criminal Court: Decisions Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi and 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 and the African Union Response" (2012) 51 *International Legal Materials* 393; D Akande "The African Union's Response to the ICC's Decision on Bashir's Immunity: Will the ICJ get Another Immunity Case" *EJIL Talk*, 8 February 2012; D Tladi "The ICC Decisions on Chad and Malawi: On Cooperation, Immunities and Article 98" (2013) 11 *Journal of International Criminal Justice* 199; A Kiyani "Al Bashir and the ICC: The Problem of Head of State Immunity" (2013) 12 *Chinese Journal of International Law* 467.

[27] *Malawi* and *Chad* decisions (n 11), para. 14.

[28] *Id.*, paras. 22-37.

the African Union are "not entitled to rely on Article 98(1) of the Statute to justify" non-cooperation with the Court.[29]

25. With respect, this reasoning is flawed and incorrectly conflates the question of the (vertical) operation of immunities as between an accused and international court with the (horizontal) application of immunities between States. The former is regulated by Article 27 while the latter is regulated by the rules of customary international law and is confirmed in the Rome Statute by Article 98. This distinction is recognised in the reasons of Judge Eboe-Osuji in the *Ruto Case*.

26. PTC I supported its conflation of Articles 27 and 98 by suggesting that the AU's interpretation would disable the Court and international criminal justice. This charge, however, is neither accurate nor is it borne out by the facts. To date, the ICC has indicted more than forty accused and yet, only in the case concerning Mr. Al Bashir, has Article 98 played any role whatsoever, an illustration that the fear that a good faith interpretation of Article 98 would lead to the erosion of the Rome Statute system is a red-herring.

V. UNSC Resolution 1593 Does Not Turn Sudan into a State Party

27. PTC II, in both the *South Africa* and *Jordan* decisions, put forward a different theory, based on UNSC Resolution 1593. According to the PTC, UNSC Resolution 1593 has the effect of placing Sudan in the position analogous to that of a State Party. This proposition is based on a fiction and has no basis whatsoever in either international law or the Statute.

28. The PTC arrives at this proposition based on a number of steps. First, Article 27(2) applies to both immunity of an accused before the ICC (vertical) and immunity from national jurisdiction (horizontal).[30] Second, ordinarily not only would States Parties be barred from arresting a head of a non-State Party but the

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[29] *Id.*, para. 37.
[30] *Jordan* decision, para. 33 and *South Africa* decision, paras. 74-83.

Court itself would not have jurisdiction over a head of a non-State Party.[31] Third, by virtue of Article 13(b) of the Statute, the referral of the Situation in Darfur to the ICC by the UNSC has the effect of essentially placing Sudan in a position similar to that of a State Party. This, according to the PTC, is because a referral by the UNSC means that the "legal framework of the Statute applies, in its entirety, with respect to the situation referred."[32] On this basis, Article 27(2) applies to Mr. Al Bashir, Article 98(1) does not apply and, therefore, his immunities cannot be invoked.[33]

29. With respect, none of the propositions of PTC I have any basis in either general international law or the Rome Statute and, in fact, are deeply problematic. The first flaw is that the PTC I's interpretation treats Articles 27 and 98 as addressing the same issues. As the submission of Jordan observes, "[i]ssues concerning the exercise of jurisdiction cannot be conflated with issues concerning cooperation of a State Party with the Court."[34]

30. Article 31 of the 1969 Vienna Convention on the Law of Treaties ("VCLT") requires that a treaty be interpreted in good faith, in accordance with the ordinary meaning of the terms of the treaty, in their context and in light of its object and purpose. The ordinary meaning of the terms of Article 27 and Article 98 make it plain that these two provisions address immunities in different contexts. Article 27 concerns the Court's exercise of jurisdiction over an accused. In other words, it concerns the vertical relationship between the accused and the Court. There is nothing in Article 27 that implicates the immunities owed by one State to another State, i.e. the horizontal relationship between States. The latter relationship is captured in Article 98 which clearly concerns the relationship

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[31] *Jordan* decision, para. 35 and *South Africa* decision, especially at para. 74.
[32] *South Africa* decision, para. 85 and *Jordan* decision, para. 36.
[33] *Jordan* decision, para. 35.
[34] 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, para. 17.

between the Court, "the requested State" and third States, i.e. non-States Parties.[35]

31. The context similarly indicates that Articles 27 and Article 98 entail different application.[36] Article 27 is found in Part 3 on General Principles of Criminal Law. *All* the provisions in Part 3 concern rules that the ICC applies in determining the guilt or innocence of an accused. They *all* concern the relationship of the Court to the accused. Article 98, on the other hand, is contained in Part 9 on International Cooperation and Judicial Assistance. It is not concerned, at all, with the relationship between the accused and the Court. Part 9, in general, concerns the obligations of States Parties to the ICC and to other States.

32. The fact that the ICC has jurisdiction and that, by virtue of Article 27, it is not barred from exercising that jurisdiction does not affect the customary international law of immunity preserved by Article 98 of the Rome Statute.[37] That the rules of immunity before the Court cannot be conflated with the rules of immunity applicable between States is also clear from the dictum of Judge Eboe-Osuji in the *Ruto Case* quoted above.

33. The second, and more problematic flaw, concerns the proposition that a referral by the UNSC has the effect of placing Sudan in the position analogous to that of a State Party. This quite extraordinary claim, which as a matter of legal argumentation appears to have again shifted even if ever so slightly, has no basis whatsoever in international law or in the text of the Rome Statute. A proper application of the rules of interpretation of treaties to Article 13(b) reveals the flaw in this theory.

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[35] See, in this regard, *Amicus Curiae Observations of Professor Tsagourias*, 9 June 2018, at para. 12, correctly observing that "third States" refers to States that are not Party to the Rome Statute. Although Professor Tsagourias concludes that Sudan is not a third State, this conclusion is based on the erroneous assumption that UNSC turns Sudan into a "*quasi* State", an assertion that is addressed in detail below.
[36] *Id.*, paras. 15-17.
[37] Minority Opinion of Judge de Brichambaut, *South Africa* decision (n 11), para. 55.

34. **The ordinary meaning of Article 13(b)**: There is nothing in the language of Article 13(b) that suggests that its effect is to turn a non-State Party into a State Party. Article 13 concerns situations in which the Court may exercise jurisdiction with respect to Rome Statute crimes. There are at least two reasons why the establishment of jurisdiction does not amount to the removal of immunity of officials from foreign criminal jurisdiction. First, while immunity presupposes jurisdiction, the presence of jurisdiction does not imply lack of immunity.[38] Second, and more important, even if jurisdiction *of the Court* removed immunity, it would only remove it before *the Court itself* since Article 13 concerns the exercise of jurisdiction *by the Court*. This removal would not apply to other States, including States Parties, which would remain bound to the immunity requirements of customary international law.

35. **Context of Article 13(b)**: That Article 13 is simply a trigger for the Court's jurisdiction, in the same way as Article 13(a) and (c) provide for trigger of the Court's jurisdiction through State referral or Prosecutor's *proprio motu* powers.[39] The mere triggering of jurisdiction cannot, in and of itself, negate other provisions of the Statute such as Article 98.

36. Finally, as part of context, it is clear that the UNSC itself did not consider that its referral turned Sudan into a State Party. UNSC Resolution 1593 identifies three categories of States. State Parties, which are bound to cooperate with the Court under the Statute, non-State Parties which are not bound to cooperate, and finally, Sudan, which is bound to cooperate with the Court on the basis of the

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[38] See *Arrest Warrant Case* (n 10), para. 46 ("it is only where a State has jurisdiction under international law in relation to a particular matter that there can be any question of immunities in regard to the exercise of jurisdiction").

[39] 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 Request by the Court for the Arrest and Surrender" of Omar Al-Bashir Issued on the 11 December 2017" by Prof Dov Jacobs, ICC-02/05-01/09 OA2.

resolution. If the UNSC considered that the resolution made Sudan a State Party, it would have included Sudan in the first category.

37. The customary rules of interpretation contained in Article 31 of the VCLT[40] also provide that, in the interpretation of a treaty "any relevant rules of international law applicable" shall be taken into account.[41] Applied to the current matter, this rule requires that, to the extent possible, meaning be given to Article 13(b) that respects existing rules of international law, including the rules relating to immunities. It is possible to give *full* effect to Article 13(b) while giving *full* effect to the rules on immunities, i.e. granting the ICC jurisdiction over the situation in Darfur, while accepting that States Parties are duty-bound not to arrest persons with immunity. This, in fact, is what Article 98 seeks to accomplish. Similarly, this is what the ICC Statute contemplated when States accepted a limited role for the UNSC to trigger the jurisdiction in situations where Chapter VII is engaged.

38. The PTC II's decision is based on the reasoning that a referral by the UNSC has the effect that "the legal framework of the Statute applies in its entirety, with respect to the situation referred."[42] Although this proposition is correct, the application of the entire legal framework does not have the effect of removing the immunities of Mr. Al Bashir from the jurisdiction of other States. This is

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[40] Draft Conclusion 2 para. 1 of the ILC Draft Conclusions on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties, *Report of the International Law Commission, 68th Session*, GAOR (A/71/10). (Articles 31 and 32 of the Vienna Convention on the Law of Treaties set forth, respectively, the general rule of interpretation and the rule on supplementary means of interpretation. These rules also apply as customary international law.)

[41] Article 31(3)(c) of the VCLT. In his *amicus curiae* submission, Tsagourias asserts that "external sources of law", such as Article 31(1)(c), "cannot be used to counter-interpret clear and explicit provisions of the Statute…". This is correct. However, there is nothing in the Statute "clear and explicit" that Mr. Al Bashir's immunity does not apply. If anything, all good faith interpretations of the Statute suggests that Mr. Al Bashir's immunity continues to apply, and interpretations to the contrary *all* rely on fictions and concepts that cannot be found in the Statute such as "*quasi* State Party".

[42] *South Africa* decision, para. 85.

because the *whole Statute* includes limitations and exceptions, most notably, Article 98.[43]

39. On the basis of the above, it is submitted that the referral does not have the effect of transforming Sudan into a State Party.

VI. UNSC Resolution 1593 Does Not Waive the Immunity of President Al Bashir

40. Various ICC PTC have flirted with the waiver theory in several decisions concerning the alleged non-compliance of DRC, Djibouti and Uganda. The waiver theory suggests that, by virtue of the adoption of Resolution 1593 and a joint reading of the Charter of the United Nations ("Charter"), in particular Articles 25 and 103, and the Rome Statute, the UNSC can waive the immunities of President Al Bashir by *implication*.

41. This theory departs from the premise that Resolution 1593 not only triggered the jurisdiction of the ICC under Article 13(b) of the Rome Statute, but that it also obligated Sudan to "cooperate fully with and provide any necessary assistance" to the Court and the Prosecutor. The latter language is then taken to be a *waiver* lifting the immunities of President Al Bashir.

42. Although PTC II in its decisions concerning South Africa[44] and Jordan[45] have abandoned the waiver theory, and the issue is not *per se* on appeal,[46] we consider it prudent to address it for two reasons.

43. First, in their perennial search for a legal basis that would stick, it is possible that the Prosecution or another Pre-Trial or Trial Chamber will resuscitate the waiver

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[43] *Prosecutor v Omar Hassan Ahmad Al Bashir*, "Transcript, Status Conference – South Africa Oral Hearing", ICC-O2/05-01/09-T-2-ENG, p 36-37. See Minority Opinion of Judge de Brichambaut, *South Africa* decision, para. 54.

[44] *South Africa* decision, para. 96 (explaining that, the majority of the Chamber, "sees no such 'waiver' in the Security Council resolution, and that, in any case, no such waiver – whether 'explicit' or 'implicit' would be necessary").

[45] *Jordan* decision, para. 34 ("[n]o waiver is required as there is no immunity to be waived").

[46] Jordan Appeal, para. 67.

theory. Second, this is the Appeals Chamber's first opportunity to resolve the contradictory interpretations of State Party obligations to cooperate with the ICC. This carries legal implications for other UNSC referrals under Article 13(b) of the Rome Statute, including Libya.[47]

a) UNSC Resolution 1593 does not mention the word "immunity", let alone expressly waive Sudan's immunity

44. Notwithstanding the important responsibility that Member States have delegated to the UNSC for the maintenance of international peace and security under Article 24 of the Charter,[48] UNSC Resolution 1593 would have to *explicitly* waive immunity for it to take away the fundamental right of immunity of a State under international law. That right, which belongs to the State, redounds to the benefit of the State (Sudan) and does not belong to a particular person for his personal benefit (Al Bashir).[49] This is particularly the case where the resolution requires a State to act in contravention of international law.

45. But UNSC Resolution 1593 does not explicitly waive Sudan's immunity. Indeed, the relevant operative paragraph does not relate to immunities. It reads as follows:

> *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[.][50] [*Emphasis added*].

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[47] S/RES/1970, 26 February 2011.
[48] Article 24 provides that "its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf."
[49] Although privileges and immunities are accorded to the holders of certain offices, such as the head of state or government and foreign minister, the immunities are for the interest and benefit of the State and not for personal benefit.
[50] S/RES/1593, 31 March 2005.

46. It is obvious that there is no explicit reference to the word "immunity" concerning any official, let alone the Head of State. It only requires the "Government of Sudan" to "cooperate fully with and provide any necessary assistance to the Court and the Prosecutor".

47. The remaining paragraphs of UNSC Resolution 1593 similarly do not support the argument that the immunities of Sudan's officials have been expressly or implicitly waived. As with operative paragraph 2, the term immunity is again absent from the rest of the resolution, including paragraph 1. The latter simply supplies the legal basis for the UNSC to refer the situation, thereby permitting the Court to exercise its jurisdiction where it would not otherwise exist. The effect of the paragraph 1 is to merely confer jurisdiction. Nothing more. Nothing less.

48. Operative paragraph 6 of UNSC Resolution 1593 "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 … unless such exclusive jurisdiction has been expressly waived by that contributing State."[51] This paragraph also does not expressly waive Sudan's immunities. Rather, it compels to at least two opposite conclusions that serve to demonstrate the implausibility of the express waiver theory.

49. Firstly, it confirms the UNSC's express recognition that States not party to the ICC bear no obligations under the Rome Statute. This should not be surprising since it only brings the Rome Statute regime into harmony with established principles of international law, including the *pacta tertiis* rule.[52]

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[51] *Id.*

[52] It is trite that, under both treaty and customary law, a treaty does not create either obligations or rights for a third state without its consent. Two exceptions, which are not relevant here, are where 1)

50. None of the remaining five of the nine paragraphs, which invited, encouraged, emphasized or recognized certain actions, explicitly mention the word immunity. Moreover, the language of Resolution 1593 does not purport to modify the legal framework of the Rome Statute nor does it carve out an exception in respect of immunities otherwise available under international law.

51. In the circumstances the correct legal conclusion is that Resolution 1593 does not explicitly waive the immunity of Sudan's officials. Sudan has not waived the immunities *ratione personae* of its Head of State. It follows that immunity, including inviolability, would continue to remain opposable *vis-à-vis* other States at the horizontal level.[53]

b) The Security Council's "cooperate fully with" language is not an implicit waiver of immunity

52. PTC II erroneously determined that the duty on Sudan to "cooperate fully with and provide any necessary assistance" to the Court implicitly waived the immunities of President Al Bashir. This proposition is legally untenable and is unsupported by reasonable interpretation. It suggests that the UNSC has, by merely invoking Chapter VII, performed legal magic and wished away Sudan's immunities under customary international law. This is too far a stretch.

53. Of course, it is true that, in accordance with Article 25 of the UN Charter, the UNSC may impose binding obligations on Member States. It is equally true that it has, in UNSC Resolution 1593, imposed such binding obligations to cooperate on the Government of Sudan. That said, it would be incorrect to suggest, as did the majority of PTC II, that "any discussion of the rules and principles of

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the obligation arises for a third state from a provision of a treaty if the parties to the treaty intend the provision to be the means of establishing the obligation and the third state expressly accepts that obligation in writing and 2) where a rule would become binding upon a third state as a function of a customary rule of international law recognized as such. See Articles 34, 35 and 38, VCLT (1969).

[53] See discussion at paras. 18-26 of this submission.

international law applicable to the act of waiver of immunity"[54] can have no bearing in the circumstances of the Al Bashir debacle. The correct position is that without a waiver, the immunities available to him continue to apply. Those obligations have not evaporated, based on the duty of Sudan to cooperate with the Court.

54. The ordinary meaning of Resolution 1593, its object and purpose, the context of its adoption and the drafting history serve as affirmation that the UNSC did not implicitly waive the immunities of Mr. Al Bashir any more than it can be said to have done so when it failed to explicitly mandate the waiver of his immunity.

55. The problematic nature of the majority's reasoning was recognized by Judge de Brichambaut in his separate opinions concerning Jordan and South Africa. In both instances, he found as unpersuasive the views of the majority of the PTC.[55] He also pointed out the potential for a careful review of the available evidence to yield different or even contradictory outcomes.

56. As noted above, and as South Africa has previously argued, a consideration of the ordinary meaning in paragraph 2 of Resolution 1593 indicates that it is not at all concerned with immunities.[56] Resolution 1593 *requires* Sudan to "cooperate fully with and to provide any necessary assistance," while only *urging* all other States and concerned regional and other international organizations to also "cooperate fully."[57] Aside from Sudan, paragraph 2 imposes no obligation on any other State.[58]

57. **Context of Resolution 1593**: As Judge de Brichambaut highlights, a contextual interpretation of Resolution 1593 may lead to "diverging results," in relation to

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[54] *Jordan* decision, para. 96.
[55] Minority Opinion of Judge de Brichambaut, *South Africa* decision; Minority Opinion of Judge de Brichambaut, *Jordan* decision.
[56] Transcript (n 43), pp. 28, line 18 *et seq.*
[57] See S/RES/1593, 31 March 2005.
[58] See *Id.*; Jordan Appeal, para. 81.

immunity.[59] He rightly points out that the preamble to the resolution references the International Commission of Inquiry, which had in its report recommending the referral of the matter to the ICC alluded to the involvement of "senior government officials in the crimes in Darfur."[60] The preamble of the resolution also references Article 98(2) of the Rome Statute, and in operative paragraph 6, carves out an exception in respect of such agreements.[61] That the Resolution omitted any reference to Article 98(1), in the context of the "cooperate fully language" might suggest that the UNSC did not believe the provision bore any effect on the obligation imposed on Sudan.[62]

58. **Object and Purpose of Resolution 1593**: It appears self-evident that the main purpose of the resolution was to refer Darfur to the Court. This can be confirmed by the contemporaneous statements of permanent and non-permanent members of the UNSC.[63]

59. **Drafting History of Resolution 1593**: As Judge de Brichambaut highlights, the contemporaneous statements by UNSC members do not provide any confirmation regarding an intention to remove immunities via Resolution 1593.[64] In this regard, it is notable that the record of 5158th meeting of the UNSC is rather thin and in fact does not reveal any substantive discussion of official immunity even if a handful of references were made to "jurisdictional immunity" in the context of the discussion of operative paragraph 6.[65] This suggests that the waiver of substantive immunities, whether implicitly or explicitly, was not

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[59] Minority Opinion of Judge de Brichambaut, *South Africa* decision, para. 69.
[60] *Id.*, para. 70 (citing Report of the International Commission of Inquiry on Darfur to the Secretary-General Pursuant to Security Council Resolution 1564 (2004) of 18 September 2004, 25 January 2005, S/2005/60, paras. 644-645.)
[61] See S/RES/1593, 31 March 2005, preamble.
[62] Minority Opinion of Judge de Brichambaut, *South Africa* decision, para. 71.
[63] UNSC 5158th meeting, 31 March 2005, S/PV. 5158 (United States, p. 3; United Kingdom, p. 7; France, p. 8; Benin, p. 10).
[64] *Id.* para. 76.
[65] *Id.* para. 77.

necessarily contemplated. And, even countries like France, which voted in favour of the Darfur referral, noted that the jurisdictional immunity that had been provided cannot run counter to the other international obligations of States.[66]

60. Finally, it cannot be insignificant that although the UNSC has been aware of the controversy since at least 2008 concerning whether the "cooperate fully" language entails a removal of immunities of Sudanese officials through, *inter alia*, the periodic bi-annual reports of the Prosecutor, it has not provoked a single move to cure this presumed deficiency. It has in fact been completely silent on the question. Yet, if the intention of the UNSC to implicitly waive immunities had been misunderstood, it could have clarified its intention. Rather, in an identical referral of the Libya Situation on *26 February 2011*, the UNSC has continued to use the same "cooperate fully with" phrasing without providing any further specificity or addressing the issue of immunities.

61. **Systemic Integration (Article 31(3)(c) of the VCLT)**: The resolution should also be interpreted in a manner that is consistent with other principles of international law, save where such an interpretation is not possible. One of these principles is immunity. Thus, where is it is possible to interpret the UNSC Resolution in a manner that is consistent with the fundamental rules of immunities, such an interpretation should be adopted over an interpretation that is inconsistent with the rules on immunities.

62. Consequently, as Jordan correctly emphasized, "by requiring Sudan to cooperate fully with the Court, the resolution does not implicitly waive the immunities of Mr. Al-Bashir, nor suspend Jordan's obligations under international law to accord such immunity."[67]

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[66] *Id.* p. 8.
[67] Jordan Appeal, para. 41.

VII. The Genocide Convention Does Apply to the Present Proceedings

63. We turn now to our last substantive submission. This argument, advanced by Judge de Brichambaut, stems from his finding in relation first to South Africa and subsequently Jordan that "no firm conclusions can be drawn" at present on the 1) status of Sudan following the referral of Sudan as being analogous to that of a State Party; 2) his rejection of the idea that UNSC Resolution 1593 can be interpreted as implicitly removing the immunities of President Al Bashir; and 3) his uncertainty whether the involvement of the ICC affects the applicability of customary international law immunities in the context of the *inter se* relationship between States.

64. As argued in previous sections, the AU disagrees with the erroneous legal interpretation proffered by the majority of PTC II regarding the obligations of States Parties (Jordan, South Africa) under the Rome Statute in relation to the arrest and surrender of the head of a non-State Party (Sudan). To that extent, the AU would agree with Judge de Brichambaut's position that the legal reasoning in support of the majority ruling is unpersuasive.

65. However, the AU cannot accept as "more persuasive" Judge de Brichambaut's alternative legal theory that the 1948 Genocide Convention applies in the circumstances of the present case, and in particular, that it removes the immunities *ratione personae* enjoyed by the leaders of contracting States to that treaty such as Sudan in proceedings relating to the ICC.

a) The question of applicability of the Genocide Convention

66. Article VI of the Genocide Convention, on which Judge de Brichambaut bases his admittedly interesting legal theory, provides as follows:

> Persons charged with genocide or any of the other acts enumerated in Article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.

67. Several important observations can be made about this clause. To begin with, as PTC II has rightly observed, this provision is broadly concerned with the allocation of legal competencies between the national and international penal tribunals over punishable acts under the Genocide Convention. It does not directly concern itself with the issue of immunities.

68. Turning now to its specific elements, even if we assume for the sake of argument that Genocide Convention is applicable to this matter, the question would arise whether Mr. Al Bashir has been charged by "a competent tribunal of the State in the territory of which the act was committed" such as to fall within the scope of Article VI of the Convention.

69. To our knowledge, a competent Sudanese court has not charged him with any of the crimes contemplated by the Genocide Convention. That then leaves the alternative of such charges being brought "by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction".

70. The next question then is whether the ICC, which has charged Mr. Al Bashir for genocide, constitutes an "international penal tribunal"[68] under Article VI of the Genocide Convention. At first blush, the answer would be in the affirmative. However, a deeper analysis reveals that the Court is a treaty-based international penal tribunal that applies in relation to its *States parties*. This is confirmed by Article VI, which contemplates "jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction."

71. Sudan, like Jordan, is a party to the Genocide Convention. However, although there was a proposal for the establishment of such a penal court in 1948, the said convention did not create such a court. The compromise forged was to leave the

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[68] ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro) (Merits)*, Judgment of 26 February 2007, para. 445.

creation of a permanent international criminal tribunal for whenever States would be ready to reach agreement on its establishment. This only occurred in July 1998 when the Rome Statute was adopted.

72. The July 2010 warrant of arrest means that Mr. Al Bashir can thus be considered a "person charged with genocide"[69] for the purposes of Article VI of the Convention.

73. The next relevant question therefore is whether Sudan may be regarded as having "accepted [the] jurisdiction" of the ICC, which is the second element required for the applicability of Article VI of the Genocide Convention. Sudan has, in principle, accepted the potential availability of an international penal tribunal under the Genocide Convention to prevent and repress genocidal crimes. However, such acceptance is subject to a further condition, since by the plain terms of Article VI, the jurisdiction is only available "with respect to those Contracting Parties which *shall have accepted its jurisdiction*". Sudan has not accepted the jurisdiction of the ICC, making Article VI inapplicable to the present case.

74. As per Article 12 of the Rome Statute, a State can accept such jurisdiction either expressly by choosing to become a party (as 122 States have done to date), or by entering a special declaration, such as that of Ivory Coast, accepting such jurisdiction under Article 12(3) of the Statute. Neither is the case here. In addition to not being a party, in fact, Sudan has contested the Court's assertion of jurisdiction.[70]

75. Judge de Brichambaut suggests that Sudan can be deemed to have accepted the jurisdiction of the Court if we read Resolution 1593 as *obligating* or *requiring* the

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[69] Pre-Trial Chamber I, *Prosecutor v Omar Hassan Ahmad Al Bashir*, Second Decision on the Prosecution's Application for a Warrant of Arrest, 12 July 2010, ICC-02/05-01/09-94, pp. 28; Pre-Trial Chamber I, *Prosecutor v Omar Hassan Ahmad Al Bashir*, Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir, 12 July 2010, ICC-02/05-01/09-95.

[70] UNSC 5158th meeting, 31 March 2005, S/PV. 5158, pp. 12 (Sudan).

State of Sudan to "accept the jurisdiction of the Court." Under this view, Sudan can be said to have accepted the Court's jurisdiction by fiat of the binding Chapter VII decision of the Council. Nonetheless, it is hard to see how the mandatory imposition of the ICC as part of a measure aimed at the restoration or maintenance of international peace and security could be seen as capable of compelling the acceptance of that jurisdiction by a non-State Party. It is highly implausible that, during the drafting of the Genocide Convention, States contemplated this type of judicial grant of enforcement jurisdiction. The very essence of acceptance of a treaty-based criminal jurisdiction must reflect the consent-based nature of international law through ratification or accession.

76. As a third reason, Article 13(a) addresses a situation referred to in Article 12(2), wherein the Court "may exercise its jurisdiction". It does not provide that a given State "accepts" the jurisdiction of the Court with respect to a crime referred to in Article 5. This construction suggests that it may be possible for the ICC to "exercise" its jurisdiction in circumstances where that jurisdiction is based, *exceptionally*, on the indirect consent of the State such as is possible by fiat of UNSC decision.

77. In the circumstances, States Parties, though they have separate duties to cooperate with the Court under the Rome Statute, need not succumb to the *ultra vires* acts of the ICC that places them in the position to act inconsistently with their obligations under international law contrary to Article 98(1) of the Rome Statute.

b) Article IV of the Genocide Convention does not implicitly remove immunities or serve as a waiver for the purposes of Article 98(1)

78. Even assuming the applicability of the Genocide Convention to the present case, Judge de Brichambaut's argument is problematic for other reasons. It is based on the erroneous assumption that Article IV of the Genocide Convention removes

the application of immunities between Sudan and other parties to the Genocide Convention. Article IV provides as follows:

> 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.

79. This important clause of the Genocide Convention is directed to the contracting parties, and not the ICC as such, and addresses the question of individual criminal responsibility of "persons committing genocide". As the majority of the PTC has explained, this clause should not be conflated with the issue of immunity from criminal jurisdiction.[71] Indeed, like the ICJ, the Court made clear that immunity and responsibility are two separate concepts:

> The Court emphasizes, however, that the *immunity* from jurisdiction ... does not mean ...impunity...Immunity from criminal jurisdiction and individual criminal responsibility are quite separate concepts. While jurisdiction immunity is procedural in nature, criminal responsibility is a question of substantive law.[72]

80. Moreover, as compared to Article 27 of the Rome Statute which by its simple title affirms its core object "irrelevance of official capacity", it is hard to "see a convincing basis for a constructive interpretation of the provisions in the Convention such that would give rise to an implicit exclusion of immunities".[73]

81. Furthermore, the Rome Statute was adopted 54 years later than the Genocide Convention. The Rome Statute provides a specific rule concerning irrelevance of official capacity (Article 27), but also contains Article 98(1) providing for respect of the immunities available to third states under customary international law. In such circumstances, when a later treaty (Rome Statute) furnishes a *lex specialis* rule, the effect is that the earlier treaty (Genocide Convention) with a more general rule cannot be read as displacing the applicability of the specific regime

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[71] For a general discussion of this issue, see Tladi (n 25), pp. 20-21.
[72] *Arrest Warrant*, para. 60.
[73] *South Africa* decision, para. 109.

contemplated for the ICC. More so where that regime indicates the clear intention of States to safeguard immunities under customary international law.

82. By the plain language of Article IX of the Genocide Convention, if there are differences of view on their obligations between Jordan and Sudan, these would constitute disputes between contracting parties regarding the interpretation, application or fulfilment of that convention. The ICC would not be privy to such a dispute. Any such disputes, including those relating to responsibility of a State for genocide or for any of the other acts enumerated in Article III, are to be submitted to the ICJ at the request of any of the parties to the dispute. It is not, by the plain terms of that treaty, a matter for ICC decision.

VIII. Conclusion

83. In the light of all of the above, the AU submits that, on account of Article 98 of the Statute and the rules of customary international law, there is no duty on Jordan or any other State to cooperate in the arrest and surrender of Mr. Al Bashir. Moreover, neither UNSC resolution 1593 nor the Genocide Convention disturbs this legal position. The PTC majority, in holding otherwise, erred in its interpretation of the applicable law. The Appeals Chamber should therefore uphold Jordan's Appeal.

Respectfully Submitted,

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Dated this 13th day of July 2018
At Addis Ababa, Ethiopia and Geneva, Switzerland