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THE APPEALS CHAMBER

Before: Judge Howard Morrison, Presiding Judge
Judge Sanji Mmasenono Monageng
Judge Christine Van den Wyngaert
Judge Silvia Fernández de Gurmendi
Judge Piotr Hofmański

SITUATION IN DARFUR, SUDAN

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

Public

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"

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Introduction

1. This is an appeal from Pre-Trial Chamber II's 11 December 2017 "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".¹

2. In its December 2017 Decision, the Pre-Trial Chamber found "that Jordan failed to comply with its obligations under the Statute by not executing the Court's request for the arrest of Omar Al-Bashir and his surrender to the Court while he was on Jordanian territory on 29 March 2017". Further, the Chamber decided "that the matter of Jordan's non-compliance with the request for arrest and surrender of Omar Al-Bashir to the Court be referred, through the President of the Court in accordance with regulation 109(4) of the Regulations of the Court, to the Assembly of States Parties of the Rome Statute and the United Nations Security Council".²

3. The December 2017 Decision, which was adopted by a majority, involved the following errors:³
 - a) The Pre-Trial Chamber erred 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 on the Privileges and Immunities of the Arab League⁴; and that even if article 98 applied it would provide no basis for Jordan not to comply with the Court's request ("First Ground of Appeal");

¹*Situation in Darfur, Sudan, Prosecutor v. Omar Hassan Ahmad Al Bashir*, "Decision under article 87(7) of the Rome Statute on the non-compliance by Jordan with the request by the Court for the arrest and surrender [of] Omar Al-Bashir", ICC-02/05-01/09-309 (11 Dec. 2017) (hereinafter "December 2017 Decision").

²*Ibid.*, pp. 21-22.

³ The Chamber granted Jordan's request for leave to appeal these three issues. See *Situation in Darfur, Sudan, Prosecutor v. Omar Hassan Ahmad Al Bashir*, "Decision on Jordan's request for leave to appeal", ICC-02/05-01/09-319 (21 Feb. 2018) (hereinafter "February 2018 Decision").

⁴ Convention on the Privileges and Immunities of the League of Arab States, adopted by the Council of the League of Arab States, 18th Ordinary Sess., 10 May 1953 (hereinafter "1953 Convention").

- b) The Chamber erred in concluding that Security Council resolution 1593 (2005) affected Jordan's obligations under customary and conventional international law to accord immunity to President Al-Bashir ("Second Ground of Appeal"); and
 - c) Even if the Chamber's December 2017 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 Security Council ("Third Ground of Appeal").
4. These grounds of appeal touch upon important questions that are at the core of the functioning of the Court in the context of the arrest and surrender of persons, notably the conflict-avoidance rules set forth in article 98 of the Rome Statute, the effects of referrals by the Security Council under article 13(b), and the proper interpretation of Security Council resolutions. It is important that States Parties have a clear understanding of their obligations under the Rome Statute, and that decisions of the Court are based on sound and consistent legal reasoning. Inconsistencies in previous decisions of Pre-Trial Chambers have engendered considerable controversy among States Parties to the Rome Statute and have tended to undermine the Court's credibility. Calls have been made to solve the problem by, for instance, requesting the Security Council to give an authoritative interpretation or having the Security Council or General Assembly seek an advisory opinion from the International Court of Justice.
5. Jordan fully subscribes to the importance of the fight against impunity and the need to punish those responsible for crimes within the jurisdiction of the Court. However, this cannot be done at the expense of fundamental rules and principles of international law aimed at securing peaceful relations among States. To overlook such rules and principles would do more harm than good in the long-term; the maintenance of peaceful relations among States is one of the essential elements for fostering State cooperation and preventing those crimes. These goals should not be seen as opposing, but rather as complementing each other.

6. Indeed, international law is a complex legal system, and its rules and principles, including the Rome Statute, should be interpreted against the background of other rules and principles. As the International Law Commission's Study Group on the Fragmentation of International Law explained, the principle of harmonization requires that "when several norms bear on a single issue they should, to the extent possible, be interpreted so as to give rise to a single set of compatible obligations".⁵ Not respecting this principle may put States Parties to the Statute in situations of conflicting obligations, whereby they would have to choose which obligation to adhere to.

Submissions

A. First Ground of Appeal: The Chamber erred in its findings regarding the effects of the Rome Statute upon the immunity of President Al-Bashir

(i) President Al-Bashir's immunity under customary and conventional international law

7. Pre-Trial Chamber II rightly found that a sitting Head of State enjoys personal immunity from the exercise of criminal jurisdiction by foreign States, even when suspected of having committed one or more of the crimes that fall within the jurisdiction of the Court. The Chamber stated in its December 2017 Decision that this immunity "indeed exists in customary international law",⁶ citing its recent holding that:

. . . customary international law prevents the exercise of criminal jurisdiction by States against Heads of State of other States. This immunity extends to any act of authority which would hinder the Head of State in the performance of his or her duties. The Chamber is 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

⁵Conclusions of the Work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law, (4) *The principle of harmonization* (in Yearbook of the International Law Commission, 2006, Vol. II, Part Two, p. 178).

⁶ December 2017 Decision, *supra* note 1, at para. 27.

when the arrest is sought on behalf of an international court, including, specifically, this Court.⁷

8. The Pre-Trial Chamber's finding that President Al-Bashir, as a sitting Head of State, enjoys personal immunity from foreign criminal jurisdiction under customary international law is *not* on appeal.⁸
9. Also *not* on appeal is the issue of whether President Al-Bashir enjoyed immunity based on treaty (conventional international law),⁹ such as the 1945 Pact of the League of Arab States¹⁰ and the 1953 Convention. Indeed, the Chamber reached no conclusion as to whether President Al-Bashir, at the time of his visit on 29 March 2017, also enjoyed such immunity in Jordan.¹¹ The Chamber merely said that its analysis with respect to the effects of the Rome Statute and of Security Council resolution 1593 (2005) meant that "no immunity was applicable," whether or not President Al-Bashir enjoyed immunity under conventional international law.¹²

(ii) The Chamber's finding that the Rome Statute itself removed the customary and conventional international law immunities enjoyed by President Al-Bashir

10. What *is* on appeal is whether the Pre-Trial Chamber erred in its conclusions regarding the effects of the Rome Statute upon the immunities enjoyed by President Al-Bashir. In Part 9 of the Rome Statute, which deals with "International cooperation and judicial assistance", Jordan has a general obligation to cooperate fully with the Court under article 86 and a specific obligation to comply with requests for arrest and surrender under article 89.

⁷*Situation in Darfur, Sudan, Prosecutor v. Omar Hassan Ahmad Al Bashir*, "Decision under article 87(7) of the Rome Statute on the non-compliance by South Africa with the request by the Court for the arrest and surrender of Omar Al Bashir", ICC-02/05-01/09-302 (6 July 2017), at para. 68 (hereinafter "South Africa Decision").

⁸ The Prosecutor proposed to "reframe" the issues Jordan sought to appeal "to encapsulate all legal matters presented", but the Chamber declined to do so when granting leave to appeal. See February 2018 Decision, *supra* note 3, at paras. 4, 12.

⁹ Jordan sought to appeal what appeared to be a Chamber finding that conventional immunity did not exist, but the Chamber refused to grant leave to do so, indicating that it had not decided, one way or the other, whether such immunity existed. See *ibid.*, at para. 8.

¹⁰Pact of the League of Arab States, UNTS, Vol. 70, 22 Mar. 1945.

¹¹In its December 2017 Decision, the Chamber was "unable to conclude" that Sudan was a party to the 1953 Convention (see December 2017 Decision, *supra* note 1, at para. 30). The Chamber's "inability to conclude" was based upon a faulty translation (see February 2018 Decision, *supra* note 3, at para. 8).

¹² December 2017 Decision, *supra* note 1, at para. 10.

11. At the same time, article 98, which also falls within Part 9, provides:

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.

12. In its December 2017 Decision, the Chamber found that “article 27(2) of the Statute . . . excludes the application of article 98(1) of the Statute”.¹³ Further, it found that article 98(1) “provides no rights to States Parties to refuse compliance with the Court’s requests for cooperation”.¹⁴ The Chamber also found that article 98(2) “does not apply to the 1953 Convention”, because it “does not refer to a ‘sending State’ and does not establish or refer to a procedure for seeking and providing consent to surrender”.¹⁵

13. More generally, the Chamber found that “the fact that an individual whose arrest and surrender is sought by the Court enjoys diplomatic or State immunities is not as such an exception to the State Parties’ duty to cooperate with the Court”.¹⁶ Even if article 98 applies, the Chamber found that “Jordan – as a result of having chosen not to give effect to the Court’s request for cooperation – would still be found in non-compliance with its obligation to arrest and surrender Omar Al-Bashir to the Court”.¹⁷

14. Each of these findings with respect to the effects of the Rome Statute, and in particular of articles 27 and 98, is incorrect.

¹³ *Ibid.*, at para. 32.

¹⁴ *Ibid.*, at para. 41.

¹⁵ *Ibid.*, at para. 32.

¹⁶ *Ibid.*, at para. 42.

¹⁷ *Ibid.*, at para. 43.

(iii) *Article 27(2) cannot be construed as removing the customary and conventional international law immunities enjoyed by President Al-Bashir*

15. The part of the Rome Statute that expressly addresses the obligation of a State Party to arrest a person found in its territory and surrender him or her to the Court is Part 9. Articles 86 and 89 set forth the obligation of the State Party to arrest and surrender such a person. At the same time, article 98 (also in Part 9) expressly preserves the immunities of officials of third States (that is, States other than the State requested to surrender a person) under customary and conventional international law. Thus, Part 9 of the Rome Statute contains no provision that strips away official immunities in the context of arrest and surrender to the Court; rather, it expressly maintains such immunities.
16. In a different part of the Rome Statute – Part 3 entitled “General principles of criminal law” – there is a provision addressing *the ability of the Court to exercise jurisdiction* not withstanding a person’s immunity. Article 27(2) provides:

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

By its terms, article 27(2) does not address anything other than the Court’s ability to exercise jurisdiction; it does not address the question of a State Party’s arrest and surrender of persons to the Court. Simply put, the provision itself does not create any right or impose any obligation upon a State Party.

17. Issues concerning the exercise of the Court’s jurisdiction cannot be conflated with issues concerning cooperation of a State Party with the Court. As the Prosecution itself has acknowledged, article 98 “serves to qualify the cooperation obligations of States Parties concerning the surrender of persons sought by the Court, not the exercise of jurisdiction by the Court”; instead, “the very purpose of article 98 is to regulate how the Court’s exercise of jurisdiction should be enforced”.¹⁸

¹⁸*Situation in the Islamic Republic of Afghanistan*, “Public redacted version of ‘Request for authorisation of an investigation pursuant to article 15’”, ICC-02/17-7-Conf-Exp (20 Nov. 2017), at para. 46.

18. Even if, *arguendo*, article 27(2) is viewed as relevant in the context of the arrest and surrender of a person to the Court, that relevance could only exist with respect to the arrest and surrender by a State Party of its own officials. On this view, the State of the official, by virtue of joining the Rome Statute (and thereby accepting article 27(2)), may not itself refuse to cooperate with the Court under articles 86 and 89 based on a claim that such an official is immune from the Court's jurisdiction.
19. By contrast, when the arrest and surrender of a person to the Court involves a State Party potentially surrendering an official of *another* State, then article 27(2) is irrelevant. Rather, article 98 – which, again, is a provision to be found within the part of the Rome Statute addressing cooperation with the Court – expressly addresses the situation and does so by preserving immunities arising under customary or conventional international law in the absence of waiver.
20. Even assuming, *arguendo*, that article 27(2) may be construed as an implicit waiver by a *State Party* to the Rome Statute of the conventional and customary international law immunities that its officials would otherwise enjoy from being arrested and surrendered to the Court by another State Party under Part 9, article 27(2) cannot be construed in that way with respect to an official of a *State that is not a party* to the Rome Statute, such as Sudan in March 2017. The Rome Statute is a multilateral treaty governed by the rules set out in the Vienna Convention on the Law of Treaties.¹⁹ As such, the Statute cannot impose obligations on or deny rights to States that are not parties to the Statute, at least not without their consent.²⁰ As Pre-Trial Chamber II has concluded, “the exception to the exercise of the Court's jurisdiction provided in article 27(2) of the Statute should, in principle, be confined to those States Parties who have accepted it”.²¹ Consequently, it “follows that when

¹⁹See *Situation in the Democratic Republic of the Congo*, “Judgment on Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal”, ICC-01/04-168 (13 July 2006), at para. 33 (noting that the “interpretation of treaties, and the Rome Statute is no exception, is governed by the Vienna Convention on the Law of Treaties”).

²⁰ Vienna Convention on the Law of Treaties, UNTS, Vol. 1155, article 34 (“A treaty does not create either obligations or rights for a third State without its consent”).

²¹*Situation in Darfur, Sudan, The 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”, ICC-02/05-01/09-195 (9 Apr. 2014) (hereinafter “DRC Decision”), at para. 26.

the exercise of jurisdiction by the Court entails the prosecution of a Head of State of a non-State Party, the question of personal immunities might validly arise”.²²

21. For the reasons indicated above, the Pre-Trial Chamber erred in finding that article 27(2) “excludes the application of article 98(1) of the Statute”.²³

(iv) Jordan was not obligated under articles 86 and 89(1) to arrest and surrender President Al-Bashir in the absence of a waiver by Sudan of his immunities, as contemplated by article 98

22. As indicated in section (iii), the relevant provisions governing the arrest and surrender of President Al-Bashir are to be found in Part 9 of the Rome Statute. There, article 98 provides that the Court may not proceed with a request for surrender if doing so requires the requested State Party to act inconsistently with: (1) obligations under international law with respect to immunity of a third State or its officials or property, unless the Court first obtains a waiver from that third State (article 98(1)); or (2) obligations under international agreements pursuant to which consent of a sending State is required to surrender a person of that State to the Court, unless the Court first obtains the consent of that third State (article 98(2)).

23. Jordan’s obligations to Sudan under both customary and conventional international law with respect to the immunities of President Al-Bashir fell within both paragraphs of article 98.

24. Article 98 mediates between, on the one hand, a requested State Party’s obligation under articles 86 and 89(1) to arrest a foreign State official and surrender him or her to the Court and, on the other hand, the requested State Party’s obligations under international law not to do so. Pre-Trial Chamber II correctly indicated how article 98 resolves the matter when the arrest and surrender concern the Head of a State that is not a party to the Rome Statute:

²² *Ibid.*, at para. 27.

²³ December 2017 Decision, *supra* note 1, at para. 32.

The solution provided for in the Statute to resolve such a conflict is found in article 98(1) of the Statute. This provision directs the Court to secure the cooperation of the third State for the waiver or lifting the immunity of its Head of State. This course of action envisaged by article 98(1) of the Statute aims at preventing the requested State from acting inconsistently with its international obligations towards the non-State Party with respect to the immunities attached to the latter's Head of State.²⁴

25. In its December 2017 Decision, however, the Chamber found that article 98(1) “provides no rights to States Parties to refuse compliance with the Court’s requests for cooperation”.²⁵ Read in conjunction with the Chamber’s earlier decision with respect to South Africa,²⁶ this finding is clearly incorrect as a matter of law.
26. First, the Chamber’s analysis emphasizes that the language of article 98 refers to the “Court” not proceeding with a request, rather than referring to a “right of a State Party” not to comply with a request. According to the Chamber, this means that any State Party must surrender an individual immediately whenever requested by the Court (apparently 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). Yet construing such language as implying no right with respect to the requested State is highly problematic.
27. Such an arrow interpretation could have significant repercussions for many provisions of the Rome Statute. Indeed, by the Chamber’s logic, the Court itself would have no right to demand cooperation from States Parties since article 86 and 89(1) refer to obligations of “States Parties” and not to rights of the Court.
28. Second, article 86 expressly provides that “States Parties shall, *in accordance with the provisions of this Statute*, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court” (emphasis added). Article 89(1) expressly provides that “States Parties shall, *in accordance with the provisions of [Part 9]* and the procedure under their national law, comply with the requests for arrest and surrender” (emphasis added). Article 98 of the Statute, which is within Part 9, does not authorize the Court to proceed with a request for

²⁴DRC Decision, *supra* note 21, at para. 27.

²⁵December 2017 Decision, *supra* note 1, at para. 41.

²⁶South Africa Decision, *supra* note 7, at para. 100.

cooperation or surrender in certain circumstances. A State Party's obligations under articles 86 and 89(1) are clearly conditioned upon the Court acting in a manner consistent with article 98; the State Party has no obligation to cooperate in circumstances where the Court is proceeding with a request contrary to the terms of article 98. Likewise, 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. The Chamber's focus on a very non-contextual reading of the language of article 98, rather than a holistic reading of that article as an element of Part 9, should not be countenanced by the Appeals Chamber.

29. Third, when properly scrutinized, the procedure envisaged in the language of articles 89(1) and 98 inescapably leads to a conclusion opposite to that reached by the Chamber. These provisions contemplate that: (1) the Court "transmits" a request to a State Party for arrest and surrender; (2) the State Party complies with the request but only "in accordance with the provisions of this Part"; (3) when relevant, the State Party notifies the Court that compliance would require the State Party to act inconsistently with its obligations under international law with respect to the immunity owed to another State or its officials; (4) the Court reviews whether compliance by the State Party would have such an effect; (5) if the Court concludes that compliance would have such an effect, then the Court may only "proceed" with its request if it "can first obtain" from the other State a waiver; and (6) if the Court concludes that compliance would not have such an effect, then the Court informs the State Party that article 98 does not apply. This procedure makes quite clear that the transmittal of the request from the Court in step (1) does *not* result in an immediate and uncontestable obligation on the State Party to comply with the request. Rather, it initiates a process whereby it is expected that the State Party might invoke article 98 as a reason why the Court may not proceed with its request.
30. Finally, the crux of the Chamber's position is conflated with the issue of whether, ultimately, it is for the Court to decide under article 87(7) whether a State Party has failed "to comply with a request to cooperate by the Court contrary to the provisions of this Statute". Yet that is not the issue here. Even if it were for the Court, and for the Court alone, to make such a finding under article 87(7), that finding must take into account whether the Court "proceeded" with its request in

accordance with “the provisions of this Statute”, which include article 98. A State Party may take the position that the Court’s request for cooperation is inconsistent with the Rome Statute, for a number of reasons (whether it relates to the jurisdiction of the Court or some other matter, such as article 98). The State Party must then be given an opportunity to explain fully to the Court why it believes that the request is inconsistent with the Rome Statute. It is simply unsustainable to say that the State Party has no right to decline to comply with the Court’s initial request based on the State Party’s view that it is inconsistent with the requirements of article 98.

31. The Chamber also erred with respect to its interpretation of article 98(2). According to the Chamber, article 98(2) “does not apply to the 1953 Convention” because:

Article 98(2) of the Statute is applicable to “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”. Conversely, the 1953 Convention, including its article 11, does not refer to a “sending State” and does not establish or refer to a procedure for seeking and providing consent to surrender. The Chamber is therefore unable to subsume the Convention on the privileges and immunities of the League of Arab States under article 98(2) of the Statute.²⁷

32. It is incorrect to conclude that article 98(2) is inapplicable to any international agreement that does not include the words “sending State”. Chapter IV of the 1953 Convention, and in particular its article 11, 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 personal arrest or detention in “the place of meeting”. To say that such provisions are irrelevant to article 98(2) because they do not contain the words “sending State” is an unsustainably restrictive reading, resulting from a failure to apply properly the rules set forth in articles 31 and 32 of the Vienna Convention on the Law of Treaties.
33. Likewise, it is incorrect to conclude that article 98(2) is inapplicable to any international agreement that “does not establish or refer to a procedure for seeking and providing consent to surrender”. Aside from again being an unsustainably restrictive reading, article 14 of the 1953 Convention expressly addresses the

²⁷ December 2017 Decision, *supra* note 1, at para. 32.

circumstances under which the Member State might consent to the arrest or detention of its representative.²⁸

(v) The Chamber erred in elevating a “duty of cooperation” with the Court so as to displace the Rome Statute rules addressing conflict of international obligations

34. Even if article 98 applies, the Chamber found that “Jordan – as a result of having chosen not to give effect to the Court’s request for cooperation – would still be found in non-compliance with its obligation to arrest and surrender Omar Al-Bashir to the Court”.²⁹ The Chamber found that “the fact that an individual whose arrest and surrender is sought by the Court enjoys diplomatic or State immunities is not as such an exception to the State Parties’ duty to cooperate with the Court”.³⁰
35. With respect, by asserting that Jordan has a duty to cooperate with the Court no matter what legal obligations Jordan may have vis-à-vis other States, the Chamber is writing out of the Rome Statute an important conflict-avoidance rule (article 98), and is placing Jordan in the untenable position of having two irreconcilable legal obligations. The Chamber’s error in this regard rests upon an apparent assumption that, by becoming a party to the Rome Statute, Jordan assumed obligations that supersede all its other legal obligations, even vis-à-vis States that are not parties to the Rome Statute.
36. Yet the rights and obligations that exist between Jordan and Sudan under customary and conventional international law cannot be modified by the Rome Statute unless Sudan becomes a State Party to the Rome Statute. With respect to conflicting treaties, Article 30 of the Vienna Convention on the Law of Treaties addresses the issue of successive treaties relating to the same subject-matter, and expressly provides that when the parties to the later treaty (i.e., the Rome Statute) do not

²⁸Article 14 reads: “Privileges and immunities are accorded to the representatives of Member States, not for their personal benefit, but in order to safeguard the independent exercise of their functions in connection with the League. Consequently, Member States are under a duty to waive the immunity of its representatives in any case where the immunity would impede the course of justice and if it can be waived without prejudice to the purpose for which the immunity is accorded.”

²⁹*Ibid.*, at para. 43.

³⁰*Ibid.*, at para. 42.

include all the parties to the earlier treaty (i.e., the 1945 Pact of the League of Arab States or the 1953 Convention), then as between a State Party to both treaties (Jordan) and a State Party to only one of the treaties (Sudan), the treaty to which both States are parties governs their mutual rights and obligations.³¹ That treaty is not the Rome Statute, but the 1945 Pact of the League of Arab States and the 1953 Convention.

37. The same applies to Jordan's obligations under customary international law vis-à-vis Sudan. While Jordan and other States Parties to the Rome Statute might, by means of the Statute, contract out of a customary international law obligation as among themselves, they cannot do so with respect to States that are not parties to the Statute. Indeed, the whole point of article 98 was to take account of conflicts with respect to a State Party's customary and conventional obligations, a conflict-avoidance rule that cannot be set aside based on a view that a State Party's "duty to cooperate" with the Court is paramount.
38. Thus, the Pre-Trial Chamber's December 2017 Decision erred by approaching the issue of cooperation with the Court in a manner that inevitably leads to a State Party to the Rome Statute facing irreconcilable obligations under international law, an outcome that the drafters of the Rome Statute without question sought to avoid. Moreover, such an interpretive approach not only undermines the carefully balanced system established in the Statute; it also contravenes the principle of harmonization in international law.³²

(vi) Conclusion on the First Ground of Appeal

39. As shown above, the Chamber erred with respect to several matters of law in concluding that the Rome Statute precludes the immunity that President Al-Bashir enjoys under customary and conventional international law. As a result, the Appeals Chamber should grant the First Ground of Appeal.

³¹ Vienna Convention on the Law of Treaties, *supra* note 20, article 30(4)(b).

³² See para. 6 above.

B. Second Ground of Appeal: The Chamber erred in concluding that Security Council resolution 1593 (2005) affected Jordan's obligations under customary and conventional international law to accord immunity to President Al-Bashir

40. The Chamber also erred in concluding that Security Council resolution 1593 (2005) affected Jordan's obligations under customary and conventional international law to accord immunity to President Al-Bashir. In essence, the Chamber found that resolution 1593 (2005) had the effect of making Sudan bound by article 27(2) of the Rome Statute as if it were a party to the Statute, with the consequence that article 98 of the Statute was not applicable and that the President of Sudan's immunity *ratione personae* did not apply in the case of his arrest and surrender to the Court.³³ As will be shown, the Chamber's majority finding in the December 2017 Decision—which relied heavily upon the same majority's South Africa Decision³⁴—that resolution 1593 (2005) made article 27(2) binding on Sudan was based upon an incorrect interpretation of the resolution. In each case, the majority of the Chamber failed to apply the correct rules for the interpretation for Security Council resolutions, as set out by the International Court of Justice in the *Kosovo* advisory opinion.³⁵ The reasons given for the majority interpretation were brief and unconvincing. Judge Marc Perrin de Brichambaut, by contrast, applied the correct rules (and did so thoroughly) in his minority opinion in the South Africa Decision,³⁶ which he recalled in the Decision under appeal.³⁷

41. Properly interpreted, resolution 1593 (2005) does not affect Jordan's obligations under international law to accord immunity to President Al-Bashir. First, while the resolution has the effect of triggering the Court's jurisdiction (pursuant to article

³³ December 2017 Decision, *supra* note 1, at paras. 35-40.

³⁴ South Africa Decision, *supra* note 7, at paras. 84-97.

³⁵ *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010*, p. 403, at p. 442, para. 94.

³⁶ South Africa Decision, *supra* note 7, Minority Opinion of Judge Marc Perrin de Brichambaut, at paras. 64-91.

³⁷ December 2017 Decision, *supra* note 1, Minority Opinion of Judge Marc Perrin de Brichambaut, at para. 3. For the avoidance of doubt, Jordan hereby places on record that it does not share Judge Marc Perrin de Brichambaut's interpretation of the Genocide Convention (see South Africa Decision, Minority Opinion of Judge Marc Perrin de Brichambaut, at paras. 4-38; December 2017 Decision, Minority Opinion of Judge Marc Perrin de Brichambaut, at paras. 4-10). In this regard, it respectfully agrees with the majority (South Africa Decision, at para. 109). Since the interpretation of the Genocide Convention is not under appeal, Jordan will refrain from entering into the matter but stands ready to do so should the Appeals Chamber so wish.

13(b) of the Rome Statute), the resolution does not have the effect of applying the legal framework of the Statute in its entirety with respect to the situation in Darfur, nor have the effect, for the limited purpose of that situation, of imposing upon Sudan rights and duties analogous to those of a State Party. Second, by requiring Sudan to cooperate fully with the Court, the resolution does not implicitly waive the immunity of President Al-Bashir, nor suspend Jordan's obligations under international law to accord such immunity.

(i) Pre-Trial Chambers and individual judges have relied on a variety of inconsistent legal bases for determining the effects of resolution 1593 (2005)

42. Earlier decisions of Pre-Trial Chambers concerning the effects of Security Council resolution 1593 (2005) were based on varying, mutually inconsistent and unconvincing reasoning. While such inconsistencies need not be addressed in detail in this appeal brief, which is limited to Pre-Trial Chamber II's December 2017 Decision, they attest to the great uncertainty in the legal bases relied upon to deny the immunity of President Al-Bashir, and to the impropriety of maintaining that States Parties are aware of clear obligations regarding his arrest and surrender.

43. In particular, Pre-Trial Chambers have relied on a number of contradictory and questionable interpretations of Security Council resolution 1593 (2005) when deciding that States Parties to the Rome Statute have failed to comply with their obligation to cooperate with the Court.³⁸ Indeed, prior to the December 2017 Decision, which is the subject of this appeal, Pre-Trial Chambers had adopted three completely different approaches towards Security Council resolution 1593 (2005)

³⁸*Situation in Darfur, Sudan, Prosecutor v. Omar Hassan Ahmad Al Bashir*, "Decision pursuant to article 87(7) of the Rome Statute on the failure by the Republic of Malawi to comply with the cooperation request issued by the Court with respect to the arrest and surrender of Omar Hassan Ahmad Al Bashir", ICC-02/05-01/09-139 (12 Dec. 2011) (hereinafter "Malawi Decision"), at para. 43; *Situation in Darfur, Sudan, Prosecutor v. Omar Hassan Ahmad Al Bashir*, "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", ICC-02/05-01/09-140 (13 Dec. 2011) (hereinafter "Chad Decision"), at para. 13; DRC Decision, *supra* note 21, at para. 29; *Situation in Darfur, Sudan, Prosecutor v. Omar Hassan Ahmad Al Bashir*, "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", ICC-02/05-01/09-266 (11 July 2016) (hereinafter "Djibouti Decision"), at paras. 11-13; *Situation in Darfur, Sudan, Prosecutor v. Omar Hassan Ahmad Al Bashir*, "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", ICC-02/05-01/09-267 (11 July 2016) (hereinafter "Uganda Decision"), at paras. 11-13.

and how it affects States' obligations under international law to respect President Al-Bashir's immunity. They are: (1) the resolution is not relied upon at all; (2) the resolution implicitly waived the immunity of President Al-Bashir; and (3) the resolution placed Sudan in a position analogous to that of a State Party.

44. In the Decision now under appeal, Pre-Trial Chamber II relied heavily on its own 2017 South Africa Decision. The present brief therefore focuses on that Decision as well as the Decision under appeal.

45. In the South Africa Decision, Pre-Trial Chamber II determined, *inter alia*, 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. ...³⁹

Moreover, by deciding that Sudan shall cooperate fully with the Court, the Security Council, in addition to triggering the jurisdiction of the Court, has also imposed on Sudan – acting under Chapter VII of the Charter of the United Nations – an obligation vis-à-vis the Court (to cooperate fully and provide any necessary assistance) which Sudan would not otherwise have as it has not ratified the Statute ...⁴⁰

... The Chamber finds, by majority, that the necessary effect of the Security Council resolution triggering the Court's jurisdiction in the situation in Darfur and imposing on Sudan the obligation to cooperate fully with the Court, is that, for the limited purpose of the Situation in Darfur, Sudan has rights and duties analogous to those of States Parties to the Statute.⁴¹

It is acknowledged that this is an expansion of the applicability of an international treaty to a State which has not voluntarily accepted it as such. Nonetheless, the finding of the majority of the Chamber in this respect is in line with the Charter of the United Nations, which permits the Security Council to impose obligations on States.⁴²

It may be emphasized that Sudan's rights and obligations are only those related to the situation referred to by the Security Council and strictly within those parameters. It is for this reason that Sudan does not have rights and obligations with respect to other Statute-based activities of the Court, and ... does not have the right to vote in the Assembly of States Parties and does

³⁹ South Africa Decision, *supra* note 7, at para. 85.

⁴⁰ *Ibid.*, at para. 87.

⁴¹ *Ibid.*, at para. 88.

⁴² *Ibid.*, at para. 89.

not pay contributions towards the expenses of the Court in line with article 115 of the Statute.⁴³

Accordingly, as a result of Security Council Resolution 1593 (2005), the interactions between Sudan and the Court with respect to the Court's exercise of jurisdiction in the situation of Darfur are regulated by the Statute. One consequence of this is 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.⁴⁴

46. In reaching this decision, the Chamber cast doubt upon some of the interpretations made by prior Pre-Trial Chambers. Most notably, it ruled that there had been no waiver of the immunity to which President Al-Bashir is entitled, whether implicit or explicit, in Security Council resolution 1593 (2005), thus rejecting the reasoning in earlier decisions regarding the Democratic Republic of the Congo, Djibouti and Uganda.⁴⁵

47. The inconsistencies in the case law of the Pre-Trial Chambers were noted by Judge Marc Perrin de Brichambaut in his minority opinion to the South Africa Decision.⁴⁶ In relation to the approach adopted by Pre-Trial Chamber II in that Decision, he stated that:

... the conclusion that a referral of a situation to the Court by the UN Security Council triggers the applicability of the entire Statute necessarily entails not only the applicability of article 27(2) of the Statute, but also, *inter alia*, article 98(1) of the Statute ... It follows that the referral of a situation to the Court by the UN Security Council also activates provisions relevant to non-States Parties. This indicates, in turn, that such a referral need not necessarily render a non-State Party analogous to a State Party to the Statute.⁴⁷

48. The contradictions in the case law of the Pre-Trial Chambers – including in the South Africa Decision – attest to the uncertainty in the legal bases relied upon to deny the immunity to which President Al-Bashir is entitled under international law as the Head of State of Sudan, and to the impropriety of maintaining that States

⁴³ *Ibid.*, at para. 90.

⁴⁴ *Ibid.*, at para. 91.

⁴⁵ *Ibid.*, at para. 96.

⁴⁶ *Ibid.*, Minority Opinion of Judge Marc Perrin de Brichambaut, at para. 2.

⁴⁷ *Ibid.*, at para. 54.

Parties are aware of clear obligations regarding the arrest and surrender of him to the Court.

(ii) The effect of Security Council resolution 1593 (2005) is not that the Rome Statute applies, in its entirety, with respect to the situation in Darfur, nor that, for the limited purpose of that situation, Sudan has rights and duties analogous to those of a State Party to the Rome Statute

49. In order to determine the effects of Security Council resolution 1593 (2005), it is necessary to interpret and apply both the Rome Statute (in particular articles 13(b), 27(2) and 98(1)) and the resolution itself. The Statute falls to be interpreted in accordance with the rules of interpretation set forth in the Vienna Convention on the Law of Treaties; the resolution falls to be interpreted in accordance with the rules applicable to the interpretation of Security Council resolutions.⁴⁸
50. Jordan submits that, by triggering the Court's jurisdiction under article 13(b) of the Rome Statute, the effect of Security Council resolution 1593 (2005) is not that the legal framework of the Statute applies, in its entirety, with respect to the situation in Darfur, nor that, for the limited purposes of that situation, Sudan has rights and duties analogous to a State Party. In particular, Jordan was under no obligation to arrest and surrender President Al-Bashir while he was on Jordanian territory, since the Court had not obtained a waiver of his immunity.
51. Security Council resolution 1593 (2005) needs to be read as a whole. It reads:

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,

⁴⁸ *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J Reports 2010, p. 403, at p. 442, para. 94.*

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,

52. In this resolution, the Security Council adopted two specific decisions under Chapter VII of the Charter of the United Nations that are relevant to the present appeal. First, by paragraph 1 the Council referred ‘the situation in Darfur since 1 July 2002’ to the Prosecutor. In so doing, the Council triggered the Court’s jurisdiction, in accordance with article 13(b) of the Rome Statute. Second, by paragraph 2 the Council decided “that the Government of Sudan ... shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution”. This decision is binding on Sudan under the Charter of the United Nations (Article 25). These two specific decisions are important, but they 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.

53. The Chamber’s reasoning in its December 2017 Decision on the meaning and effect of resolution 1593 (2005) is concise. It draws heavily on its earlier South Africa Decision. The Chamber, by a majority, drew the following conclusions as regards the effects of triggering the Court’s jurisdiction under article 13(b) of the Statute:

... the Statute provides for a particular situation where obligations defined in the Statute may become incumbent upon a State not as a result of its acceptance of the Statute, but as a result of, and under, the Charter of the United Nations;⁴⁹

... 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,⁵⁰

... the terms of [the obligation of cooperation imposed by the Security Council on Sudan] are set by the Rome Statute. It is acknowledged that this

⁴⁹ December 2017 Decision, *supra* note 1, at para. 35.

⁵⁰ *Ibid.*, at para. 37.

is an expansion of the applicability of an international treaty to a State which has not voluntarily accepted it as such;⁵¹

Accordingly, as a result of Security Council Resolution 1593 (2005), 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;⁵²

... this means, in the first instance, that Sudan cannot claim, vis-à-vis the Court, Omar Al-Bashir's immunity as Head of State: Sudan has the obligation to arrest him and surrender him to the Court. Second, the immunities of Omar Al-Bashir as Head of State do not apply vis-à-vis States Parties to the Statute when they execute a request for arrest and surrender issued by the Court in the exercise of its jurisdiction in the situation in Darfur. Accordingly, article 98(1) of the Statute is not applicable ...;⁵³

... it is immaterial whether the Security Council intended – or even anticipated – that, by virtue of article 27(2) of the Statute, Omar Al-Bashir's immunity as Head of State of Sudan would not operate to prevent his arrest sought by the Court (...) this is a necessary, un-severable, effect of the informed choice by the Security Council to trigger the jurisdiction of the Court and impose on Sudan the obligation to cooperate with it.⁵⁴

54. The reasoning and conclusions of the Pre-Trial Chamber are unconvincing. Article 13(b) of the Statute reads:

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:

...

- (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

55. Article 13 concerns the exercise of jurisdiction by the Court. It provides for three cases where “[t]he Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute”. Under the Statute, the effect of a referral is that the Court may exercise its jurisdiction. To go further and maintain that, by virtue of resolution 1593 (2005), the Statute applies “in its entirety” with respect to the situation in Darfur, or that Sudan “has rights and

⁵¹*Ibid.*

⁵²*Ibid.*, at para. 38.

⁵³*Ibid.*, at para. 39.

⁵⁴*Ibid.*, at para. 40.

duties analogous to those of States Parties to the Statute”,⁵⁵ finds no support in the text of paragraph 1 of the resolution or article 13(b) of the Statute. A referral by the Security Council does not, and cannot, have such an effect.

56. A referral under article 13(b) necessarily has the effect that certain provisions of the Statute apply with respect to the situation referred by the Security Council. As article 1 of the Statute provides, “[t]he jurisdiction and functioning of the Court shall be governed by the provisions of this Statute”. Similarly, the *chapeau* of article 13 states that the jurisdiction of the Court is to be exercised “in accordance with the provisions of this Statute”. The questions at issue in this appeal are which specific provisions, if any, apply automatically to Sudan (a State which is not a party to the Statute) by virtue of the referral; and which specific provisions, if any, apply by virtue of any obligation imposed upon Sudan by resolution 1593 (2005). In other words, which provisions precisely become operative, and what is the position of a non-party State vis-à-vis the Statute, the Court and States Parties following a referral.
57. In its December 2017 Decision, the Chamber did not answer these questions clearly. It simply asserted that “the legal framework of the Statute applies, in its entirety, with respect to the situation referred”.⁵⁶ The Chamber further asserted that “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”, and that “one consequence of this is that article 27(2) of the Statute applies equally with respect to Sudan”.⁵⁷ No convincing reason was given for these assertions.
58. Article 13(b) of the Statute refers only to the exercise of jurisdiction by the Court in accordance with the provisions of the Statute. Not all the provisions of the Statute, but only those concerning the Court’s jurisdiction, are triggered (or become operative) in respect of a situation referred by the Security Council.

⁵⁵South Africa Decision, *supra* note 7, at para. 88.

⁵⁶ December 2017 Decision, *supra* note 1, at para. 37.

⁵⁷*Ibid.*, at para. 38. At the same time, in the South Africa Decision, the Chamber noted that certain provisions of the Rome Statute, such as those concerning representation and decision-making rights in the Assembly of the States Parties, as well as those concerning financial obligations, would not apply to Sudan (see *supra* note 7, at para. 90).

59. The obligations of cooperation with the Court under Part 9 of the Statute, for example, do not apply to a non-party State simply by virtue of a referral by the Security Council, as those obligations do not relate to the Court's jurisdiction. That this is so is confirmed by paragraph 2 of resolution 1593 (2005), which imposes an obligation upon Sudan to "cooperate fully with and provide any necessary assistance to the Court and the Prosecutor".⁵⁸ If the Statute applied in its entirety simply by virtue of a referral under article 13(b), paragraph 2 of resolution 1593 (2005) would have not been needed. This point was acknowledged by Pre-Trial Chamber II in the South Africa Decision⁵⁹, as well as by the Appeals Chamber in a previous decision.⁶⁰ The Pre-Trial Chamber seems thus to contradict itself when it says that the Statute applies in its entirety with respect to the situation in Darfur, on the one hand, and that Part 9 does not automatically apply, on the other.

60. Likewise, article 27(2) of the Statute does not automatically apply to a non-party State merely because of a Security Council referral. This provision neither establishes nor limits the Court's jurisdiction: immunities are simply a procedural bar that may, at times, prevent the Court from exercising whatever jurisdiction it possesses, or prevent States Parties from arresting and surrendering a person to the Court upon the latter'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.

61. It cannot seriously be maintained that the immunity *ratione personae* of a Head of State from foreign criminal jurisdiction would constitute an "insurmountable obstacle to the Court's ability to exercise its jurisdiction", or that such immunity would render the Court's jurisdiction "a purely theoretical concept".⁶¹ The immunity

⁵⁸A similar obligation is found in Security Council resolution 1970 (2011), referring the situation in the Libyan Arab Jamahiriya to the Prosecutor (para. 5).

⁵⁹South Africa Decision, *supra* note 7, at para. 87.

⁶⁰*Situation in Libya, The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, "Decision on the request for suspensive effect and the request to file a consolidated reply", ICC-01/11-01/11-480 (22 Nov. 2013), at para. 18. See also *Situation in Libya, The Prosecutor v. Saif Al-Islam Gaddafi*, "Decision on the non-compliance by Libya with requests for cooperation by the Court and referring the matter to the United Nations Security Council", ICC-01/11-01/11-577 (10 Dec. 2014), at para. 21 (and the decisions referred to in note 31); *Situation in Darfur, Sudan, Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, "Decision on 'Defence Application pursuant to articles 57(3)(b) & 64(6)(a) of the Statute for an order for the preparation and transmission of a cooperation request to the Government of the Republic of Sudan'", ICC-02/05-03/09-169 (1 July 2011), at para. 14.

⁶¹South Africa Decision, *supra* note 7, at para. 75.

ratione personae enjoyed by a Head of State from foreign criminal jurisdiction ends when he or she ceases to hold that office, and therefore may no longer be invoked as against the exercise of jurisdiction.

62. In the alternative, should the Appeals Chamber consider that the Rome Statute applies, in its entirety, with respect to the situation in Darfur, or that, for the limited purpose of that situation, Sudan has rights and duties analogous to those of a State Party, Jordan further submits that Sudan must continue to be regarded as a non-State Party to the Statute. The fact that Security Council resolution 1593 (2005) has authorized the Court to exercise jurisdiction over the situation in Darfur, and that the Court must act within the framework of its Statute, does not transform Sudan into a State Party (or into a State having analogous rights and obligations). Nothing in the terms of resolution 1593 (2005), its object and purpose, its *travaux préparatoires* or the subsequent practice related to it, may be interpreted as, or points to an intention to place Sudan in such a position.⁶² In fact, the Pre-Trial Chambers themselves have referred to Sudan as a non-party State on many occasions.⁶³
63. Therefore, even if the Appeals Chamber were to consider that article 27(2) applies to Sudan, the effects of that provision would be limited by article 98 (which also forms part of the legal framework within which the Court must act). Sudan may not be able to claim the immunity of President Al-Bashir vis-à-vis the Court by force of the Security Council's resolution, but that resolution does not reach the issue of the obligations of other States vis-à-vis the Court, which remain governed by the provisions of article 98 of the Rome Statute.
64. It follows that, since President Al-Bashir continues to enjoy immunity from the criminal jurisdiction of other States, the Court needs to obtain a waiver from Sudan before requesting States Parties to the Statute to arrest and surrender him to the Court.

⁶²As was explained in detail by Judge Marc Perrin de Brichambaut in his minority opinion in the South Africa Decision (*supra* note 7, at paras. 64-91).

⁶³See, for example, *Situation in Darfur, Sudan, Prosecutor v. Omar Hassan Ahmad Al Bashir*, "Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir", ICC-02/05-01/09-3(4 Mar. 2009), at paras. 40-41.

(iii) Security Council resolution 1593 (2005) did not implicitly remove the immunity from foreign criminal jurisdiction to which President Al-Bashir is entitled under international law as a Head of State, nor suspend Jordan's obligations to accord such immunity

65. In earlier cases, Pre-Trial Chambers took the position that Security Council resolution 1593 (2005), by requiring Sudan to “cooperate fully with and provide any necessary assistance to the Court and the Prosecutor”, implicitly lifted the immunity of President Al-Bashir, thus making article 98 of the Statute inapplicable.⁶⁴
66. In the South Africa Decision (as well as in the December 2017 Decision), that case law seems to have been set aside, as Pre-Trial Chamber II acknowledged that “it sees no such ‘waiver’ in the Security Council resolution”.⁶⁵ This issue is therefore *not* on appeal. Nevertheless, for the sake of completeness, and in light of the Prosecution’s ambiguous position,⁶⁶ Jordan finds it necessary to state its position briefly on this issue.⁶⁷
67. The findings of the Pre-Trial Chambers in the DRC, Djibouti and Uganda Decisions were based on a misinterpretation of Security Council resolution 1593 (2005). The ordinary meaning of the resolution, its object and purpose, its *travaux préparatoires* and the subsequent practice of United Nations organs and of States do not support the conclusion of the Chambers. While resolution 1593 (2005) imposed an obligation on Sudan to cooperate fully with the Court, it did not supersede the rules of customary and conventional international law applicable between Jordan and Sudan concerning the immunity of President Al-Bashir.

⁶⁴See para. 43 above.

⁶⁵South Africa Decision, *supra* note 7, at para. 96.

⁶⁶In the Prosecution’s response to the “Transmission of note verbale from the Embassy of the Hashemite Kingdom of Jordan 30 June 2017” of 13 July 2017, the Prosecution relied on both the DRC Decision and the South Africa Decision (see para. 19). The Prosecution’s ambiguous position is also apparent from the arguments it put forward in the course of the proceedings against South Africa.

⁶⁷Jordan recalls that it addressed this issue at some length in its submission dated 30 June 2017. See Embassy of the Hashemite Kingdom of Jordan in The Hague, Noteverbale of 30 June 2017 (hereinafter “Note verbale of 30 June 2017”).

a) *Security Council resolution 1593 (2005) does not remove the immunity of President Al-Bashir*

68. In paragraph 2 of resolution 1593 (2005), the Security Council decided “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 ...”. The plain text of this decision, when given its ordinary meaning, does not refer to any removal of the immunity of President Al-Bashir. The resolution imposes on Sudan a general obligation to cooperate, and in that context certain actions may be expected from it. However, an automatic removal of the immunities of the officials of that State cannot be read into the resolution.
69. To remove the immunity *ratione personae* of a serving Head of State under customary and conventional international law would be a very significant decision. As the International Court of Justice, the International Law Commission and indeed the Pre-Trial Chamber itself have all recognized, there are no exceptions to the immunity of certain holders of high-ranking office in the State.⁶⁸ Furthermore, as the Special Rapporteur of the International Law Commission on the topic *Immunity of State officials from foreign criminal jurisdiction* rightly pointed out, waiver of this type of immunity should be explicit.⁶⁹ Had the Security Council intended to remove the immunity of President Al-Bashir, it would have to have done so explicitly.⁷⁰
70. Express language is needed for such a fundamental rule of international law to be set aside by a Security Council resolution. In a recent case, the European Court of Human Rights took into consideration the Purposes and Principles of the Charter of the United Nations, as well as the principle of harmonization, in concluding that “there must be a presumption that the Security Council does not intend to impose any obligation on member States to breach fundamental principles of human rights . . . where a Security Council does not contain any clear or explicit wording

⁶⁸ *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, *I.C.J. Reports 2002*, p. 3, at p. 24, para. 58; Report of the International Law Commission, 2017, p. 178. See also para. 7 above.

⁶⁹ A/CN.4/646: Third Report on immunity of State officials from foreign criminal jurisdiction (2011), at para. 55. See also A/CN.4/596: Memorandum by the Secretariat on Immunity of State officials from foreign criminal jurisdiction (2008), at para. 256; Vienna Convention on Diplomatic Relations, UNTS, Vol. 500, article 32(2).

⁷⁰ Note verbale of 30 June 2017, *supra* note 67, p. 3.

excluding or limiting respect for human rights in the context of the implementation of sanctions against individuals or entities at national level, the Court must always presume that those measures are compatible with the Convention”.⁷¹ In Jordan’s view, the same reasoning applies with respect to derogation in a Security Council resolution from the rules on State immunity, which derive from the fundamental principle of sovereign equality (enshrined in Article 2(1) of the Charter of the United Nations). Such derogation cannot be presumed.⁷²

71. The object and purpose of resolution 1593 (2005) is not defeated by interpreting it as silent with respect to the denial of the immunity of President Al-Bashir from foreign criminal jurisdiction. Nothing in the resolution indicates that its object and purpose requires the lifting of such immunity, given its central focus on the relationship of Sudan, and other (non-State) parties to the Sudan conflict, with the Court. In fact, the language of the resolution indicates otherwise by acknowledging certain limits to the exercise of national criminal jurisdiction, including with respect to States that are not parties to the Rome Statute, as may be seen in the fourth preambular paragraph.⁷³

72. Indeed, if the object and purpose of the resolution were to require States to disregard the immunity of President Al-Bashir from foreign criminal jurisdiction, then this would have been done with respect to all States, not just States Parties to the Rome Statute. Yet the resolution expressly avoids addressing obligations of States that are not party to the Rome Statute, such as in paragraph 6, where the Security Council 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 ...”. In short, the resolution at its heart addresses the relationship of Sudan (and other parties to the Sudan conflict) with the Court; it does not address the national criminal jurisdiction of other States.⁷⁴

⁷¹ *Case of Al-Dulimi and Montana Management Inc. v. Switzerland* (Application no. 5809/08), Judgment of 21 June 2016, at para. 140.

⁷² Note verbale of 30 June 2017, *supra* note 67, p. 4.

⁷³ *Ibid.*, pp. 4-5.

⁷⁴ *Ibid.*, p. 5.

73. Moreover, there is no evidence in the *travaux préparatoires* of resolution 1593 (2005) pointing to an intent of the members of the Security Council to suspend or remove the immunity of President Al-Bashir from the national criminal jurisdiction of any State, including States Parties to the Rome Statute. The deliberations of the Council when the resolution was adopted provide no indication or reference to any such intent.⁷⁵
74. The Inquiry Report on the situation in Darfur, which is referred to in the resolution, mentions the possibility of prosecuting government officials.⁷⁶ However, it does not follow that the Security Council intended to remove the immunity of President Al-Bashir from foreign criminal jurisdiction. In a meeting of the Security Council in 2005, the Prosecutor at the time, Luis Moreno Ocampo, stated himself that his assessment would be independent from the Inquiry Report, and that he did not know who precisely would be prosecuted.⁷⁷
75. The subsequent practice of United Nations organs and States shows that the immunity to which President Al-Bashir is entitled under international law remains fully applicable. There is, first of all, the practice of those States Parties to the Rome Statute that have given effect to President Al-Bashir's immunity, including those that have defended this position before the Court. Second, the Prosecutor has brought cases of 'non-compliance' to the attention of the Security Council many times. However, the Council has not taken action: no response has been made by the Council to the Prosecutor; no further resolution was adopted; no Presidential statement; no press statement. The Security Council, in spite of referrals by the Court for non-compliance with requests to arrest and surrender President Al-Bashir, has not adopted any measure against Sudan or the States Parties to the Statute concerned.⁷⁸

⁷⁵ *Ibid.*, p.4.

⁷⁶ Report of the International Commission of Inquiry on Darfur to the United Nations Secretary General (S/2005/60), 25 January 2005, at paras. 641, 644-645.

⁷⁷ S/PV.5321, p. 2.

⁷⁸ Jordan further notes that, in subsequent meetings of the Security Council, some States expressed the view that President Al-Bashir continues to enjoy immunities under international law. See, for example, S/PV.8132, p. 11 ("... we reiterate that resolution 1593 (2005) does not render invalid norms of international law on immunity for senior officials of States that are not party to the Rome Statute. They still apply, and no decisions by the ICC can change that"); S/PV. 7963, p. 7 ("The ICC must respect the provisions of international law relating to the immunity accorded to Heads of State and other senior officials during their tenure") and p. 12 ("... the obligation to cooperate, as set forth in resolution 1593 (2005), does not mean that the norms of international law governing

76. Jordan further maintains that interpreting Security Council resolution 1593 (2005) as removing the immunity of President Al-Bashir from foreign criminal jurisdiction would not be in conformity with the Rome Statute. As explained above, the effect of article 13(b) is to trigger the Court's jurisdiction, which must then be exercised in accordance with the provisions of the Statute. If the Security Council, for example, were to purport to add new crimes, to modify the temporal limits on the jurisdiction of the Court or to lower the age of criminal responsibility of alleged offenders, this would likely not be accepted by the Court, which must exercise its jurisdiction in accordance with the Statute. The position would be the same if the Security Council were to purport to remove the immunities that would otherwise be applicable under the Statute. In any event, even if the Security Council had the power to modify the Statute, it would have to do so explicitly, as appears, for example, from paragraph 6 of resolution 1593 (2005).

77. In conclusion, Security Council resolution 1593 (2005) cannot be read as implicitly removing the immunity *ratione personae* to which President Al-Bashir is entitled during his term of office as the Head of State of Sudan. It follows that, for Jordan to arrest President Al-Bashir and surrender him to the Court, the Court should have first obtained a waiver of that immunity in accordance with article 98 of the Rome Statute.

b) Effects of paragraph 2 of Security Council resolution 1593(2005)

78. Paragraph 2 of the resolution imposes on Sudan (and certain non-State actors) alone an obligation in the following terms: "the Government of Sudan ... shall cooperate

the immunity of the Government officials of those States not party to the Rome Statute can be repealed"); S/PV.7833, p. 12 ("The arrest warrant issued by the International Criminal Court against President Al-Bashir undermines the right to jurisdictional immunity for Heads of State of those States that are not party to the Rome Statute"); S/PV.7478, p. 11 ("...we recall that, in addition to the obligation to cooperate with the ICC, the Statute states that parties to the Statute are bound by obligations arising from international legal norms governing the immunity of high-level officials, particularly Heads of States, of States that, like the Sudan, are not party to the Rome Statute"), p. 14 ("The issuance of the warrant of arrest by the International Criminal Court against President Omar Al-Bashir violates customary international law, which guarantees jurisdictional immunity to [serving] Heads of State"); S/PV.7080, p. 8 ("...we note the importance of States discharging their corresponding obligations to cooperate with the Court under the norms of immunities for senior Government officials").

fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution.”

79. It is a two-fold obligation, expressed in general terms: to ‘cooperate fully’ with the Court and the Prosecutor, and to provide ‘any necessary assistance’ to them. The precise requirements are not spelled out in the resolution, and to determine their content recourse may be had to various means, including the terms of the Rome Statute, Part 9 of which concerns international cooperation. Article 86 provides that States Parties “shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court”, and it may be considered that under resolution 1593 (2005) Sudan has a similar obligation.
80. At the same time, Jordan submits that nothing in such an obligation to cooperate would require Sudan to waive the immunity of its Head of State. It is recalled that article 98 of the Statute imposes an obligation on the Court to obtain the cooperation of third States for the waiver of immunity before making a request for surrender or assistance. That third State may waive the immunity of the official concerned or not – this is a sovereign prerogative. Nothing in paragraph 2 of the Security Council resolution modifies the terms of article 98 in that sense.⁷⁹ Consequently, it does not necessarily deprive Sudan of the option not to waive the immunity of its Head of State if it does not find it appropriate.
81. Furthermore, resolution 1593 (2005) in no way obliges States (whether Parties to the Rome Statute or not) to disregard the immunity of President Al-Bashir if Sudan decides not to waive it. Even if Sudan had an obligation to waive the immunity of its Head of State under the resolution (*quod non*), and it failed to do so, that would

⁷⁹ It is recalled that a Pre-Trial Chamber once stated that “...Sudan is under an obligation to cooperate with the Court pursuant to Resolution 1593. However, the Chamber considers that this obligation, as formulated in the Security Council resolution, only expands the boundaries of cooperation in relation to the Court with respect to “who” is obliged to cooperate. It does not provide for an autonomous legal regime for cooperation that would replace the ICC regime or represent an alternative to it. Therefore, the power of the Chamber to request the cooperation of Sudan remains confined to the provisions of the Statute...” (see *Situation in Darfur, Sudan, Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, “Decision on ‘Defence Application pursuant to articles 57(3)(b) & 64(6)(a) of the Statute for an order for the preparation and transmission of a cooperation request to the Government of the Republic of Sudan””, ICC-02/05-03/09-169 (1 July 2011), at para. 15).

be a matter between Sudan and the Security Council. It would not be for Jordan to correct a violation by Sudan of the resolution in question. It remains bound to respect that immunity under customary and conventional international law. This is confirmed by the fact that the resolution imposes no obligations on States other than Sudan.

(iv) Conclusion on the Second Ground of Appeal

82. The legal relationship between Jordan and Sudan concerning the immunity of President Al-Bashir from foreign criminal jurisdiction continues to be governed by customary and conventional international law. Since the Court has not obtained a waiver of immunity by Sudan pursuant to article 98 of the Rome Statute, Jordan had no obligation to arrest and surrender President Al-Bashir while he was on Jordanian territory. Proceeding with the Court's cooperation request under these circumstances would have put Jordan in breach of its customary and conventional obligations to accord immunity.
83. Consequently, the Chamber erred with respect to matters of law in concluding that Security Council resolution 1593 (2005) had the effect of overriding Jordan's obligations under customary and conventional international law to accord immunity to President Al-Bashir. As a result, the Appeals Chamber should grant the Second Ground of Appeal.

C. Third Ground of Appeal: Even if the Chamber's December 2017 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 to the Security Council

84. In addition to finding that Jordan failed to comply with its obligations under the Statute, Pre-Trial Chamber II decided that "Jordan's non-compliance with the request for arrest and surrender of Omar Al-Bashir to the Court be referred, through the President of the Court in accordance with regulation 109(4) of the Regulations

of the Court, to the Assembly of States Parties of the Rome Statute and the United Nations Security Council”.⁸⁰

85. For the reasons indicated above, Jordan did not fail to comply with its obligations under the Statute. But even assuming *arguendo* that Jordan did fail to comply, the Appeals Chamber should set aside the Chamber’s decision on referral.
86. The decision whether to refer a finding of non-compliance is discretionary, not mandatory. The Appeals Chamber has stated that it will disturb the exercise of a Chamber’s discretion “where it is shown that an error of law, fact or procedure was made”.⁸¹ Specifically, “it will correct an exercise of discretion in the following broad circumstances, namely where (i) it is based upon an erroneous interpretation of the law; (ii) it is based upon a patently incorrect conclusion of fact; or (iii) the decision amounts to an abuse of discretion”.⁸²
87. With respect to an incorrect conclusion of fact, the Appeals Chamber will not interfere “unless it is shown that the Chamber committed a clear error, namely, misappreciated the facts, took into account irrelevant facts or failed to take into account relevant facts”.⁸³
88. 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”.⁸⁴

⁸⁰December 2017 Decision, *supra* note 1, pp. 21-22.

⁸¹See *Situation in the Republic of Kenya, Prosecutor v. Uhuru Muigai Kenyatta*, “Judgment on the Prosecutor’s appeal against Trial Chamber V(B)’s ‘Decision on Prosecution’s application for a finding of non-compliance under Article 87(7) of the Statute’”, ICC-01/09-02/11-1032, (19 Aug. 2015) (hereinafter “Kenya Judgment”), at para. 22.

⁸²*Ibid.*

⁸³*Ibid.*, at para. 24.

⁸⁴*Ibid.*, at para. 23.

(i) *The Chamber's decision to refer was based upon patently incorrect conclusions of fact and erroneous interpretations of law*

89. The Chamber decided upon the referral based on errors of both fact and law. In its brief discussion of whether to refer Jordan,⁸⁵ the Chamber identified just two factors that it viewed as justifying the referral: (1) that Jordan did not comply with the Court's request;⁸⁶ and (2) that "at the time of Omar Al-Bashir's presence in Jordan in March 2017, the Chamber had already expressed in unequivocal terms that another State Party, the Republic of South Africa, had, in analogous circumstances, the obligation to arrest Omar Al-Bashir, and that consultations had no suspensive effect on this obligation".⁸⁷

a) *The mere fact that the Court found that Jordan failed to comply with the Court's request is not a sufficient basis for a referral*

90. As a matter of law, the first factor alone cannot support a decision of referral. The Appeals Chamber has stated that a decision of non-compliance does *not* result in an automatic referral,⁸⁸ and for Pre-Trial Chambers to proceed on that basis – especially when such an approach is not taken by any other Chamber – is unfair, unreasonable, and a failure to take into account relevant considerations when exercising its discretion.

91. Rather, as the Appeals Chamber has stated, since "the object and purpose of article 87(7) of the Statute is to foster cooperation", a referral to the Assembly of States Parties and/or the Security Council of the United Nations "was not intended to be the standard response to each instance of non-compliance, but only one that *may* be sought when the Chamber concludes that it is the most effective way of obtaining

⁸⁵ December 2017 Decision, *supra* note 1, at paras. 51-55.

⁸⁶ *Ibid.*, at para. 53.

⁸⁷ *Ibid.*, at para. 54.

⁸⁸ Kenya Judgment, *supra* note 81, at para. 49 ("the Appeals Chamber considers that, it is clear that Pre-Trial Chambers consistently consider the appropriateness of a referral to the ASP or UNSC when deciding upon an application for a finding of non-compliance and referral pursuant to article 87 (7) of the Statute, even when it had already confirmed a failure to comply with a cooperation request. As indicated above, the Appeals Chamber is of the view that these interpretations are supported by the wording of article 87 of the Statute and holds therefore that an automatic referral to external actors is not required as a matter of law. Furthermore, the Appeals Chamber is not persuaded that such automatic referral would be beneficial as a matter of policy as contended by the Prosecutor").

cooperation in the concrete circumstances at hand”.⁸⁹Pre-Trial Chamber II itself acknowledged this in the proceedings with respect to South Africa, stating that it “should therefore consider whether engaging external actors would, in the circumstances of the case, be an effective way to obtain cooperation”.⁹⁰

92. Yet that is exactly what the Chamber did not do with respect to Jordan. The Chamber made no effort to consider whether a referral of Jordan’s non-compliance to the Assembly of States Parties or to the Security Council would make any difference whatsoever with respect to the proceedings before the Chamber, given that President Al-Bashir was no longer in Jordan. In other words, having concluded that Jordan was in non-compliance, exactly what is gained by the Chamber now seeking further action from either the Assembly of States Parties or the Security Council? If the objective is to impose some sort of punishment of Jordan, then such motivation by the Chamber is blatantly unfair, unreasonable and without basis in law. There is nothing in the Rome Statute that may be interpreted as providing the Chamber with a right to impose punitive measures on a State which is not a Party to the criminal proceeding. Article 87(7) is not intended for this purpose.

b) At the time of President Al-Bashir’s visit to Jordan in March 2017, the Chamber had not expressed in unequivocal terms that South Africa had the obligation to arrest President Al-Bashir

93. As a matter of both law and fact, the second factor also cannot support a decision of referral. The Chamber does not explain why a finding of non-compliance by South Africa has any relevance with respect to a referral of non-compliance by Jordan. Even if one were to assume that Jordan was “on notice” that the Chamber had expressed that *South Africa* was obligated to arrest President Al-Bashir, as a matter of law there is no reason why that fact alone would support a referral of *Jordan’s* non-compliance to the Assembly of States Parties or to the Security Council.

94. Moreover, as a matter of fact, the Chamber had *not*, as of March 2017, “expressed in unequivocal terms” that South Africa had failed to comply with its obligations

⁸⁹ *Ibid.*, at para. 51.

⁹⁰ South Africa Decision, *supra* note 7, at para. 135.

under the Rome Statute. Quite to the contrary, as of that month the Chamber had decided to convene a hearing “for the purposes of a determination under article 87(7) of the Statute with respect to the Republic of South Africa”, one purpose of which was “to obtain all relevant submissions, in fact and in law, with respect to . . . whether South Africa failed to comply with its obligations under the Statute by not arresting and surrendering Omar Al Bashir to the Court while he was on South Africa’s territory despite having received a request by the Court . . .”.⁹¹

95. That hearing was held in April 2017. Yet if the Chamber was still conducting a proceeding in March 2017 (when President Al-Bashir visited Jordan) to “determine” based on submissions “in fact and in law” whether “South Africa failed to comply with its obligations”, then it is demonstrably clear that the Chamber had *not* as of that time “expressed in unequivocal terms” that South Africa had failed to comply with its obligations under the Rome Statute.⁹² More generally, the contradictions in the case law of the Pre-Trial Chambers, as explained previously, also make it unreasonable to maintain that Jordan was “on notice” as regards its obligations under the Statute.

(ii) The Chamber’s decision to refer was an abuse of discretion

96. Another basis for the Appeals Chamber to disturb the exercise of the Chamber’s discretion is that the Chamber’s referral amounts to an abuse of discretion. The Appeals Chamber has stated that:

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

⁹¹*Situation in Darfur, Sudan, The Prosecutor v. Omar Hassan Ahmad Al Bashir*, “Decision convening a public hearing for the purposes of a determination under article 87(7) of the Statute with respect to the Republic of South Africa”, ICC-02/05-01/09-274 (8 Dec. 2016) (hereinafter “South Africa Hearing Decision”), at para. 15.

⁹² Even after that hearing, one judge of the Pre-Trial Chamber concluded that “these submissions do not allow for a firm conclusion to be reached with regard to the question of whether or not Sudan is analogous to a State Party to the Statute pursuant to the referral of the situation in Darfur to the Court by the UN Security Council” and that “the current state of the law does not allow a definitive answer to be reached in relation to the question of whether [Security Council resolution 1593] removes the immunities of Omar Al Bashir, contrary to the Majority’s position in relation to this matter”. See South Africa Decision, *supra* note 7, Minority Opinion of Judge Marc Perrin de Brichambaut, at paras. 58, 83.

instance Chamber gave weight to extraneous or irrelevant considerations or failed to give weight or sufficient weight to relevant considerations in exercising its discretion.⁹³

97. The Chamber's referral decision was unfair, unreasonable, and failed to give weight to relevant considerations in exercising its discretion, for the following reasons.

a) *The Chamber's differential treatment as between South Africa and Jordan with respect to the decision to refer was manifestly unfair and unreasonable*

98. The Chamber's distinction as between the position of South Africa and the position of Jordan was manifestly unfair and unreasonable. Prior to President Al-Bashir's visit to South Africa, the Presiding Judge of the Chamber apparently informed South African representatives, at a meeting on 12 June 2015, "that: (i) all of the issues tabled by South Africa had already been decided upon by the Court; and (ii) the consultations had no suspensive effect on South Africa's outstanding obligations under the Statute to cooperate with the Court".⁹⁴ Further, on 13 June 2015, the Presiding Judge issued a decision "stating that there was no need for any additional reminder to South Africa or further clarification as regards the existence of its obligation to immediately arrest and surrender Omar Al Bashir to the Court".⁹⁵ As such, South Africa was fully "on notice" in advance of President Al-Bashir's visit as to the Chamber's legal views with respect to South Africa's cooperation with the Court. No such views were communicated by the Chamber to Jordan prior to President Al-Bashir's visit to Jordan.

99. Despite the communication of the Chamber's views directly to South Africa, President Al-Bashir visited South Africa on 13-15 June 2015 and was neither arrested nor surrendered to the Court by South Africa. Even so, the Chamber, after finding in July 2017 that South Africa had failed to comply with its obligations under the Statute, decided not to refer the matter to the Assembly of States Parties or to the Security Council.

⁹³ Kenya Judgment, *supra* note 81, at para. 25 (citations omitted).

⁹⁴ South Africa Hearing Decision, *supra* note 91, at para. 5.

⁹⁵ *Ibid.* (referring to *Situation in Darfur, Sudan, Prosecutor v. Omar Hassan Ahmad Al Bashir*, "Decision following the Prosecutor's request for an order further clarifying that the Republic of South Africa is under the obligation to immediately arrest and surrender Omar Al Bashir", ICC-02/05-01/09-242 (13 June 2015)).

100. By contrast, the Chamber decided that Jordan's alleged non-compliance in March 2017 should be referred because "the Chamber had already expressed in unequivocal terms" that South Africa had an obligation to arrest and surrender President Al-Bashir. By what means had the Chamber made such views known? Not by any direct communication to Jordan. Rather, such views were purportedly known to Jordan *by a transcript of the meeting with South Africa held on 12 June 2015 and by the Chamber's decision regarding South Africa on 13 June 2015*.⁹⁶

101. In other words, the Chamber's legal views of 12-13 June 2015 had been "unequivocally expressed" directly to South Africa prior to President Al-Bashir's visit to South Africa, but that fact did not merit referral of South Africa's non-compliance. Yet those *very same legal views*, which were not expressed directly to Jordan,⁹⁷ were viewed by the Chamber as meriting referral of Jordan's non-compliance. Such differential treatment of like circumstances is, almost by definition, unfair and unreasonable.

102. The Chamber also suggested that differential treatment was warranted because "South Africa was the first State Party to approach the Court with a request for consultations".⁹⁸ Yet that fact alone is no reason to refrain from referring South Africa's non-compliance while referring that of Jordan; indeed, having a referral decision turn on which State (South Africa or Jordan) first sought consultations is completely arbitrary. If anything, the salient issue might be the date that the first challenge with respect to alleged non-compliance concerning President Al-Bashir was definitively addressed by the Chamber. That challenge was indeed brought by South Africa, but it was only definitively addressed by the Chamber in July 2017,

⁹⁶See December 2017 Decision, *supra* note 1, at para. 54, n. 78.

⁹⁷It is striking that the Pre-Trial Chamber's principal citation for where it had "expressed in unequivocal terms" South Africa's obligation is to a "confidential annex" containing the transcript of the meeting between the Chamber and representatives of South Africa on 12 June 2015. See *ibid.* (citing to ICC-02/05-01/09-243-Anx2). This confidential annex apparently was then declassified more than a year later by the Court. The Pre-Trial Chamber does not explain why Jordan should be presumed to be aware of such information prior to the visit of President Al-Bashir.

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

⁹⁸December 2017 Decision, *supra* note 1, at para. 54.

months after the visit of President Al-Bashir to Jordan. As such, it is not a basis for distinguishing between South Africa and Jordan with respect to the referral of a decision of non-compliance.

b) *The Chamber failed to give weight to relevant considerations in exercising its discretion*

103. The Chamber also failed to give any weight to relevant considerations in reaching its decision on referral.

104. With respect to its decision regarding a possible referral of South Africa's non-compliance, the Chamber considered favorably "South Africa's request to consult with the Court under article 97 of the Statute", finding that it "distinguishes the conduct of South Africa from that of other States that, in the past, have been involved in proceedings under article 87(7) of the Statute".⁹⁹ Yet in its December 2017 Decision, the Chamber failed to take any account of Jordan's good faith consultations with the Court prior to the visit of President Al-Bashir, whereby Jordan explained the factual and legal situation it was facing, and stated that it was "hereby consulting with the ICC under article 97 of the Rome Statute . . .".¹⁰⁰ For reasons unknown to Jordan, the Chamber did not take any action on the basis of those consultations.

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

[T]he Chamber observes that States Parties have been referred to both the Assembly of States Parties and the United Nations Security Council in six instances in relation to failures to arrest and surrender Omar Al-Bashir. However, the past 24 meetings of the Security Council of the United Nations following the adoption of Resolution 1593 (2005), including

⁹⁹ South Africa Decision, *supra* note 7, at para. 127.

¹⁰⁰ *Situation in Darfur, Sudan, Prosecutor v. Omar Hassan Ahmad Al Bashir*, "Report of the Registry on additional information received regarding Omar Al Bashir's potential travel to the Hashemite Kingdom of Jordan", ICC-02/05-01/09-293 (28 Mar. 2017), annex, p. 1.

meetings held on the occasion of the biannual reports made by the Prosecutor to the Security Council of the United Nations, have not resulted in measures against States Parties that have failed to comply with their obligations to cooperate with the Court, despite proposals from different States to develop a follow-up mechanism concerning the referral of States to the Security Council by the Court. The Chamber considers that these considerations further strengthen its belief that a referral of South Africa is not warranted as a way to obtain cooperation.¹⁰¹

106. Yet in its December 2017 Decision, just five months later, in which the Chamber decided to refer Jordan's non-compliance, the Chamber is silent with respect to any such consideration. Failure to give any weight to relevant considerations of this type, as well as the differential treatment in like circumstances, is a manifest abuse of the Chamber's discretion.

(iii) Conclusion on the Third Ground of Appeal

107. As shown above, even if the Chamber's December 2017 Decision with respect to non-compliance were correct (*quod non*), the Chamber abused its discretion in deciding to refer such non-compliance to the Assembly of States Parties and the Security Council. As a result, the Appeals Chamber should grant the Third Ground of Appeal.

D. Request for Suspensive Effect

108. In addition to finding that Jordan failed to comply with its obligations under the Statute, the Pre-Trial Chamber decided that "Jordan's non-compliance with the request for arrest and surrender of Omar Al-Bashir to the Court be referred, through the President of the Court in accordance with regulation 109(4) of the Regulations of the Court, to the Assembly of States Parties of the Rome Statute and the United Nations Security Council".¹⁰² Jordan, as a strong supporter of the Court, takes particular exception to this decision, which it finds discriminatory, for the reasons given in the previous section.

¹⁰¹ South Africa Decision, *supra* note 7, at para. 138 (citations omitted).

¹⁰² December 2017 Decision, *supra* note 1, pp. 21-22.

109. Article 82(3) of the Statute provides that “[a]n appeal shall not itself have suspensive effect unless the Appeals Chamber so orders, upon request, in accordance with the Rules and Procedure and Evidence.” Rule 156 of the Rules of Procedure and Evidence provides that “[w]hen filing the appeal, the party appealing may request that the appeal have suspensive effect in accordance with article 82, paragraph 3”. The Appeals Chamber has indicated that “the effect of a judicial decision may be suspended pending the outcome of an appeal only if the Appeals Chamber so orders upon request. Until such time, the effect of any judicial decision remains valid and binding upon the parties”.¹⁰³ The Appeals Chamber has also explained that the decision on suspensive effect is discretionary and that, when addressing a request for suspensive effect, it “will consider the specific circumstances of the case and the factors it considers relevant for the exercise of its discretion under these circumstances”.¹⁰⁴ An order for suspensive effect is, according to the Chamber, “aimed at preserving the situation existing prior to the issuance of the impugned decision”.¹⁰⁵

110. It is also well-established that:

In past decisions, the Appeals Chamber, when deciding on requests for suspensive effect, has considered whether the implementation of the decision under appeal (i) “would create an irreversible situation that could not be corrected, even if the Appeals Chamber eventually were to find in favour of the appellant”, (ii) would lead to consequences that “would be very difficult to correct and may be irreversible”, or (iii) “could potentially defeat the purpose of the appeal”.¹⁰⁶

¹⁰³*Situation on registered vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia*, “Decision on suspensive effect”, ICC-01/13-43 (6 Aug. 2015), at para. 6.

¹⁰⁴*Situation in the Central African Republic, Prosecutor v. Jean Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean Jacques Magenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, “Decision on the Prosecutor’s urgent request for suspensive effect of the ‘Decision ordering the release of Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido’ of 21 October 2014”, ICC-01/05-01/13-718(22 Oct. 2014), at paras. 5-6; *Situation in the Democratic Republic of the Congo, Prosecutor v. Thomas Lubanga Dyilo*, “Decision on the requests of the Prosecutor and the Defence for suspensive effect of the appeals against Trial Chamber I’s Decision on Victim’s Participation on 18 January 2008”, ICC-01/04-01/06-1347 (22 May 2008), at para. 10.

¹⁰⁵*Situation in Libya, Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, “Decision on the request for suspensive effect and the request to file a consolidated reply”, ICC-01/11-01/11-480 (22 Nov. 2013), at para. 16.

¹⁰⁶*Situation in the Central African Republic, Prosecutor v. Jean Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean Jacques Magenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, “Decision on the Prosecutor’s urgent request for suspensive effect of the ‘Decision ordering the release of Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido’ of 21 October 2014”, ICC-01/05-01/13-718(22 Oct. 2014), at para. 5; *Situation in the Central African Republic, Prosecutor v. Jean-Pierre Bemba Gombo*, “Decision on the Request of Mr. Bemba to Give Suspensive Effect to the Appeal Against the ‘Decision on the Admissibility and Abuse of Process Challenges’”, ICC-01/05/08-817 (9 July 2010), at para. 11.

111. Jordan submits that it is self-evident that a referral of non-compliance to the Assembly of States Parties and the Security Council prior to resolution of this appeal would result in consequences that are difficult to correct and irreversible, and would defeat the purpose of this appeal. That purpose is precisely to avoid such referral and its consequences. If the Appeals Chamber overturns the December 2017 Decision, the basis for the referral would no longer be present.

112. The referral of Jordan's alleged non-compliance to the Security Council would result in serious and irreversible consequences. Quite apart from the possible reputational damage to Jordan, which has traditionally been among the Court's strongest supporters, the Security Council may take action or adopt measures against Jordan. While the Council has not yet done so with respect to other States Parties in similar cases, it is nevertheless within its powers to do so. It is moreover evident from the Prosecutor's reports to the Council that important action is expected from the latter.¹⁰⁷ If the Security Council adopts any measure against Jordan based on the referral by the Pre-Trial Chamber, the purpose of this appeal would certainly be defeated.

113. The referral of Jordan to the Assembly of States Parties would also lead to irreversible situations, and would defeat the purpose of the appeal. The "Assembly procedures relating to non-cooperation", for example, may be triggered.¹⁰⁸ Those procedures include Bureau meetings; public meetings between States Parties to the Rome Statute, observers and civil society; the preparation of a report based on those meetings and its consideration by the Assembly; and the good offices of the President of the Assembly.¹⁰⁹ In Jordan's submission, such procedures should not take place when a decision relating to non-cooperation is under appeal.

114. Consequently, Jordan requests that the Pre-Trial Chamber's decision on referral be suspended pending resolution of this appeal.

¹⁰⁷ See, for example, S/PV.8132, pp. 2-3; S/PV. 7963, p. 4; S/PV.7833, p. 3; S/PV.7710, p. 2.

¹⁰⁸ ICC-ASP/10/Res.5, annex.

¹⁰⁹ *Ibid.*, at paras. 12-20.

Conclusions

115. For the reasons set out above, Jordan requests the Appeals Chamber:

- (1) to suspend the Pre-Trial Chamber's decision on referral pending the resolution of this appeal;
- (2) to grant the First Ground of Appeal, in so far as Pre-Trial Chamber II erred 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;
- (3) to grant the Second Ground of Appeal, in so far as Pre-Trial Chamber II erred in concluding that Security Council resolution 1593 (2005) affected Jordan's obligations under customary and conventional international law to accord immunity to President Al-Bashir; and
- (4) to grant the Third Ground of Appeal, in so far as, even if the December 2017 Decision with respect to non-compliance was correct (*quod non*), Pre-Trial Chamber II abused its discretion in deciding to refer such non-compliance to the Assembly of States Parties and the Security Council.

116. Jordan remains at the disposal of the Appeals Chamber for any further assistance that it may be able to give, and is of course ready to attend an oral hearing should the Appeals Chamber consider such a hearing useful.

117. Jordan would also wish to have the possibility to respond further in writing and/or at an oral hearing to any further pleadings in this appeal, whether from the Prosecutor or any other participant.



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

Dated 12 March 2018

At The Hague, The Netherlands