Cour
Pénale
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Court

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No.: **ICC-02/05-01/09**
Date: **3 April 2018**

THE APPEALS CHAMBER

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

SITUATION IN DARFUR, SUDAN

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

Public with Public Annex A

Prosecution Response to the Hashemite Kingdom of Jordan's Appeal against the "Decision under article 87(7) of the Rome Statute on the non-compliance by Jordan with the request by the Court for arrest and surrender [of] Omar Al-Bashir"

Source: **Office of the Prosecutor**

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Introduction

1. When Omar Al-Bashir visited the territory of the Hashemite Kingdom of Jordan, an ICC State Party—in March 2017, at Jordan's invitation—he was wanted for arrest by this Court on allegations of genocide, crimes against humanity and war crimes committed in Darfur, Sudan. This situation had been referred to the Court by the UN Security Council more than a decade ago, on the basis of the threat to international peace and security constituted by the events in Darfur.[1] Jordan knew since 2009 that it was obliged, as a State Party, to arrest Omar Al-Bashir and surrender him to the Court. Yet, despite the Court's position remaining unchanged in the following eight years, Jordan failed to execute the Court's request in 2017. Jordan unilaterally decided not to do so. Pre-Trial Chamber II therefore correctly found that Jordan had failed to comply with its obligations under the Statute, and decided to refer the matter to the Assembly of States Parties ("ASP") and the UN Security Council.[2]

2. Jordan's appeal against this decision should be dismissed.[3] The Appeals Chamber should take this opportunity to confirm the relevant obligations owed to the Court both by ICC States Parties and non-States Parties (who may nonetheless be subject to the obligations in the Statute, including on the basis of a Security Council referral and the UN Charter). In particular, for all these States alike, any immunities which may attach to their officials are rendered inapplicable for the purposes of those officials' arrest and surrender, and the Court's jurisdiction over them. In such circumstances, States Parties, such as Jordan, are required to cooperate promptly with the Court's requests for cooperation. These obligations do not represent any judicial innovation, but instead result from well-established principles of international law by which States have accepted to be bound.

Submissions

3. None of the three grounds of appeal raised by Jordan shows any error in the Decision. The Pre-Trial Chamber (or "Chamber") correctly interpreted article 27 of the Statute relating to the immunities of State officials, and properly concluded that both Jordan and Sudan are subject to the obligations of this provision: the former as a State Party to the Court, and the latter as a UN Member State which is the focus of a referral by the Security Council acting

[1] UN Security Council Resolution 1593, UN Doc. S/RES/1593 (2005), 31 March 2005 ("UNSC Resolution").
[2] ICC-02/05-01/09-309 ("Decision"). Judge Perrin de Brichambaut issued a minority opinion, in which he concurred in the outcome but on the basis of separate reasoning: ICC-02/05-01/09-309-Anx-tENG ("Minority Opinion").
[3] ICC-02/05-01/09-326 ("Appeal").

under Chapter VII of the UN Charter. Having reasonably found that Jordan violated its obligations to cooperate with the Court in arresting and surrendering Omar Al-Bashir when lawfully requested to do so, the Pre-Trial Chamber acted entirely within the bounds of its discretion in concluding that a referral to the ASP and the Security Council was appropriate. Given Jordan's unmistakable position, and choice, *not* to execute the Court's request, referring it to the ASP and the Security Council was the only effective solution, in the circumstances, to foster further cooperation and to preserve the Court's mandate to end impunity.

A. The Pre-Trial Chamber correctly interpreted the obligations of the Rome Statute, to which Jordan has consented (First Ground of Appeal)

4. The Chamber correctly interpreted and applied the law when it concluded that the official capacity of Omar Al-Bashir, as a Head of State, is irrelevant for the purposes of the Statute.[4] As often the case in the practice of this Court, the issues on appeal turn upon the proper interpretation of the Statute, whose provisions must be analysed in light of their ordinary meaning, read in context and in light of their object and purpose.[5]

5. The Prosecution agrees with Jordan that, "together with the context", "[a]ny relevant rules of international law applicable in the relations between the parties" may also be taken into account.[6] Importantly, however, this does *not* mean that the Statute can never diverge from other relevant rules or principles of international law.[7] To the contrary, it is inherent in the very idea of a treaty that its parties may freely elect to accept—and to be bound in their mutual relations by—*greater or different obligations* than may otherwise apply under general customary international law.[8] This is exactly what the drafters of the Statute did when establishing the jurisdiction of the Court, and its framework for judicial cooperation, in the

[4] *Contra* Appeal, paras. 3, 10-14, 39, 115.
[5] *See e.g.* ICC-ACRed-01/16, para. 56; ICC-01/09-01/11-1598 OA7 OA8, para. 105; ICC-01/04-168 OA3, para. 33; ICC-01/04-01/06-3121 A5, para. 277.
[6] Vienna Convention on the Law of Treaties, art. 31(3)(c). *See also* Appeal, para. 6 ("the Rome Statute[] should be interpreted against the background of other rules and principles").
[7] Recourse to customary international law is warranted when the Statute so provides, or when there is a lacuna in the Statute: *see e.g.* ICC-01/04-02/06-1962 OA5 ("*Ntaganda* Decision"), para. 53; *also below* para. 71.
[8] International Law Commission, *Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law*, Report of the Study Group of the International Law Commission Finalized by Martti Koskenniemi, UN Doc. A/CN.4/L.682, 13 April 2006 ("Koskenniemi Report"), para. 79 ("That treaty rules enjoy priority over custom is merely an incident of the fact that most of general international law is *jus dispositivum* so that parties are entitled to derogate from it by establishing specific rights or obligations to govern their behaviour"). *See also* para. 85.

context of the immunity which may ordinarily attach to the official capacity of a person, including Heads of State.[9]

6. This common practice does not itself engage concerns about the fragmentation of law.[10] To the contrary, although the "principle of harmonization" cited by Jordan is one consideration when confronted with an apparent conflict of norms, the International Law Commission's Study Group expressly agreed that "[t]he maxim *lex specialis derogat legi generali* is a generally accepted technique of interpretation and conflict resolution in international law", and that "treaties often act as *lex specialis* by reference to the relevant customary law".[11]

7. For these reasons, nothing in the Rome Statute *necessarily* gives rise to "conflicting obligations".[12] Nor does it come "at the expense of […] peaceful relations among States".[13] Precisely *because* crimes such as those allegedly committed by Omar Al-Bashir "threaten the peace, security and well-being of the world",[14] States acted to create a regime, within the framework of the Rome Statute and in the context of the UN Charter, in which the official capacity of suspects and accused persons was mutually agreed to be, *inter alia*: (a) irrelevant to the Court's exercise of jurisdiction (*i.e.*, not precluding individual responsibility for article 5 crimes); and (b) irrelevant to the issue and execution of requests for the arrest and surrender of officials of States which are bound by the terms of the Statute.

8. This regime therefore applies not only to the relations between the Court and States Parties, but *also*:

- between States Parties themselves; *and*

[9] P. Gaeta, 'Does President Al Bashir enjoy immunity from arrest?', [2009] 7 *Journal of International Criminal Justice* 315 ("Gaeta (2009)"), p. 325.
[10] *Contra* Appeal, paras. 6, 38.
[11] International Law Commission, *Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law*, adopted by the ILC at its Fifth-eighth session, in 2006, pp. 1-2. *See further e.g.* Koskenniemi Report, paras. 17-18, 26, 37-43, 47-48, 56-122.
[12] *Contra* Appeal, para. 6. To the contrary, the Statute foresees the possibility of such eventualities and provides where possible for such conflicts to be resolved: *see e.g.* Statute, arts. 90(6), 97(c), 98. In the context of article 98, for example, this means the Court may not "proceed with a request" for cooperation which would require the requested State to breach a pre-existing treaty obligation to a "third State" (*i.e.*, a State not bound relevantly by the terms of the Statute): *see further below* paras. 46-51.
[13] *Contra* Appeal, para. 5.
[14] Statute, Preamble. *See also* Appeal, para. 5 ("Jordan fully subscribes to the importance of the fight against impunity […] for crimes within the jurisdiction of the Court").

- between the Court and other States which are bound by the terms of the Statute, either by the effect of the Security Council's referral and Chapter VII of the UN Charter (a "UNSC Situation-Referral State") or by having voluntarily lodged a declaration with the Court (an "article 12(3) State");[15] *and*

- between States Parties and other States which are bound by the terms of the Statute, either as a UNSC Situation-Referral State or an "article 12(3) State".

9. This threshold issue—specifically, that non-States Parties to the Statute may nonetheless be bound in some circumstances to adhere to its obligations—is addressed first, because it informs the analysis of the provisions of the Statute. Jordan's specific arguments concerning the referral in this situation are addressed further below.[16]

A.1. Obligations arising from the Rome Statute are legally distinct from obligations arising from the UN Charter

10. It is common ground that a treaty such as the Rome Statute may not itself impose legal obligations upon States which are not party to it.[17] This follows from the "fundamental principle" known as *pacta tertiis nec nocent nec prosunt*, and is reflected for example in article 34 of the Vienna Convention on the Law of Treaties ("Vienna Convention").[18] The Decision was crystal clear about this principle.[19]

11. However, this does not mean that the *content of obligations* within the Rome Statute, as expressed by its terms—may not be imposed upon States which are not a party to it, *if* international law otherwise provides.[20] By allowing for the possibility of Security Council referrals to the Court, acting under Chapter VII of the UN Charter, the Statute expressly foresees such circumstances.[21] In particular, the provision for a Security Council referral

[15] The Security Council is authorised to refer a "situation" to the Court: *see* Statute, art. 13(b). Situations are characterised, among other factors, by their location on the territory of one or more States or the nationality of the suspects: *see* Statute, art. 12(2). Accordingly, to be effective, the referral of a situation to the Court by the Security Council necessarily charges the relevant directly affected State(s) with obligations under the Statute: *see also below* paras. 12, 68-72 (on the extent of such obligations). This is necessary given the particular features of Part 9 of the Statute, which presumes a framework for *State* cooperation, and reflects the basic characteristics of the international legal order: *see* Statute, art. 87; ICC-01/09-159, para. 25.
[16] *See below* paras. 64-95.
[17] *See e.g.* S. Wirth, 'Immunities, related problems, and article 98 of the Rome Statute,' [2001] 12 *Criminal Law Forum* 429 ("Wirth"), p. 453. *See also* Appeal, para. 20.
[18] *See e.g.* M. Fitzmaurice, 'Third parties and the law of treaties,' [2002] 6 *Max Planck Yearbook of United Nations Law* 37, p. 38.
[19] Decision, para. 35. *See also* ICC-02/05-01/09-302 ("South Africa Decision"), para. 82.
[20] This need not only be a rule of customary international law: *c.f.* Gaeta (2009), p. 323.
[21] *See* Statute, art. 13(b). *See also* South Africa Decision, paras. 85-86.

would be entirely defeated if that referral did not impose upon the UNSC Situation-Referral State all the necessary obligations of the Statute, as expressed by its terms.[22]

12. These obligations are not limited merely to a passive tolerance of the Court's jurisdiction, but must also include related provisions including but not limited to those necessary measures of cooperation under Part 9 of the Statute. In referring this situation, the Security Council further emphasised the binding nature of the cooperation obligations imposed upon Sudan, and distinguished them from other States, by its express decision that "the Government of Sudan […] shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor".[23] And while the Court is not required, nor able, to rule on the scope of the Security Council's powers under the UN Charter—except to the extent necessary to determine the scope of its own competence—such an approach is also consistent with the Security Council's express powers to determine the existence of any threat to international peace and security, and to decide on the measures necessary, up to and including the use of armed force.[24]

13. Accordingly, when considering the situation of Darfur referred to the Court by the Security Council under article 13(b) of the Statute, the consent given by all the States concerned to the relevant international obligations is as follows:

- States Parties, including Jordan, have expressly consented to be bound by the Statute in its entirety—which includes an obligation to recognise that *other* States subject to the obligations of the Statute, such as any UNSC Referral-Situation State (like Sudan), are also bound by the terms of the Statute.[25]

[22] Jordan seems to accept this principle, although drawing an artificial distinction between the "referral" and the Security Council resolution constituting that referral, but considers that the only "necessary" obligations are jurisdictional: *see* Appeal, paras. 56, 58-61.
[23] UNSC Resolution, para. 2. *Contra* Appeal, paras. 59-61. *See also* South Africa Decision, para. 87-88 (citing ICC-01/11-01/11-480 OA6, para. 18, which states in the context of the Libya situation: "Libya's obligation to cooperate with the Court arises from the Security Council Resolution referring the situation to the Court and has to be performed in accordance with the principle of good faith, which pervades all obligations arising under international law, including those arising in connection with the UN Charter"); ICC-02/05-01/09-302-Anx ("South Africa Minority Opinion"), para. 41. *See further below* paras. 73-81.
[24] *See e.g.* UN Charter, art. 25; *see further* arts. 39, 41-42, 48-49. *See also* D. Akande, 'The legal nature of Security Council referrals to the ICC and its impact on Al Bashir's immunities,' [2009] 7 *Journal of International Criminal Justice* 333 ("Akande (2009)"), pp. 335, 341-342; W. Schabas and G. Pecorella, 'Article 13,' in O. Triffterer and K. Ambos, *The Rome Statute of the International Criminal Court: a Commentary*, 3rd Ed. (München/Oxford/Baden Baden: C.H.Beck/Hart/Nomos, 2016), p. 701 (mn. 18).
[25] *See below* paras. 22-27 (concerning the "horizontal effect" of article 27).

- Although Sudan has not ratified the Statute,[26] it is a UNSC Situation-Referral State and it *did* ratify the UN Charter and consent to the powers of the Security Council thereunder.[27] Consequently, it consented to the power of the Security Council to require any or all UN Member States—including Sudan—to implement or to comply with such measures to maintain international peace and security as the Council may consider necessary. This includes imposing the obligations of the Statute on a non-State Party, for the purpose of referring a situation to the Court.[28]

14. Accordingly, nothing in the Pre-Trial Chamber's reasoning takes Jordan, or indeed Sudan, beyond the obligations which they have accepted. Nothing requires either State to undertake an internationally wrongful act, much less to fear any reasonable claim that their peaceful relations under international law are endangered. To the contrary, the Pre-Trial Chamber's analysis explains how the international obligations relevant to this appeal exist in harmony.

A.2. Official capacity as a Head of State is irrelevant for the purposes of the Rome Statute

15. By ratifying the Statute, including article 27, the ICC States Parties—including Jordan—have mutually consented to the inapplicability of Head of State immunity for the purposes of the Rome Statute. States could by no means have been unaware or neutral about the significance of this "cardinal principle", which contributes to ensuring that the Court is not "a hopelessly lost cause" by ensuring that no "special immunity or procedure […] impedes" the "effective exercise" of its jurisdiction.[29]

16. Article 27 provides:

> (1) This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility

[26] *See* South Africa Decision, para. 90.
[27] *See* South Africa Decision, paras. 83, 87, 89.
[28] *See* Statute, art. 13(b). *See also* Decision, para. 37; South Africa Decision, paras. 84-91. *Contra* Gaeta (2009), p. 324; *but see* p. 330 (acknowledging the "possibility" that the UN Security Council *could* in principle oblige UN Member States to assume cooperation obligations with the Court). *See also* C. Kreß, 'The International Criminal Court and Immunities under International Law for States Not Party to the Court's Statute,' in M. Bergsmo and Ling Y. (eds.), *State Sovereignty and International Criminal Law* (Brussels: Torkel Opsahl Academic EPublisher, 2012) ("Kreß"), p. 231 (regretting that the Pre-Trial Chamber's earlier decision in 2009 "did not develop […] the 'Security Council avenue'", on which its "persuasiveness" depended), 240-243, 262; Akande (2009), pp. 340-342. *See also below* fn. 149. On the facts of this case, *see below* paras. 64-95.
[29] *See* ICC-01/09-01/11-777 ("*Ruto* Decision"), paras. 69-70. *See also* para. 66.

under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.

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

17. Consistent with the findings of the Pre-Trial Chamber, both in the Decision and in the recent South Africa Decision, article 27 of the Statute imposes two inter-dependent obligations upon States Parties: the "vertical effect" and the "horizontal effect".[30] As such, article 27 governs not only the mutual relations between the Court and States Parties, but also: between States Parties themselves; between the Court and a UNSC Situation-Referral State (such as Sudan); and between States Parties and a UNSC Situation-Referral State (such as Sudan).[31] The majority of the Pre-Trial Chamber correctly reached this conclusion.[32]

18. These vertical and horizontal effects of article 27 are indivisible. One makes no sense without the other. As such, they form the only possible reading of article 27 consistent with the applicable principles of interpretation.

A.2.i. The "vertical effect" of article 27 (Court ↔ State Party or UNSC Situation-Referral State)

19. The vertical effect of article 27 concerns the relations directly between the Court and a State. As a general rule, this will mean the relations between the Court and a State Party. However, exceptionally, this will *also* include the relations between the Court and a non-State Party, for example if the latter is a UNSC Situation-Referral State (such as Sudan) and is therefore indirectly bound by the terms of the Statute for the purpose of a particular situation.[33]

20. The vertical effect of article 27 means that the official capacity of a suspect or accused person, including as Head of State, cannot bar judicial proceedings before the Court.[34] Consequently, the Court may not only exercise criminal jurisdiction over such a person, but

[30] This is in addition to the consequences of article 27 for the status of an accused person before the Court: *see above* para. 7.
[31] *See* C. Kreß and K. Prost, 'Article 98,' in O. Triffterer and K. Ambos, *The Rome Statute of the International Criminal Court: a Commentary*, 3rd Ed. (München/Oxford/Baden Baden: C.H.Beck/Hart/Nomos, 2016) ("Kreß and Prost"), pp. 2140-2141 (mn. 39); Akande (2009), p. 342.
[32] *See* Decision, para. 38; South Africa Decision, para. 91. *Contra* Appeal, paras. 60-61. Judge Perrin de Brichambaut did not decide either way: *see further below* para. 66.
[33] *See above* paras. 8-14.
[34] Decision, para. 33. *See also* South Africa Decision, paras. 76-78.

may also order their arrest and surrender from a State Party or a UNSC Situation-Referral State alike.[35] By operation of article 27, such a State cannot claim immunity *vis-à-vis* the Court's exercise of jurisdiction, nor validly object to any request addressed to it for arrest and surrender of its official.

21. There is nothing controversial in the vertical effect of article 27 *per se*, and to some extent Jordan seems to agree with it.[36] As well established, immunities belong to the State, in order to ensure that their officials are in a position to perform their duties properly. The State may therefore freely waive those immunities on an *ad hoc* basis, or abrogate them entirely for particular purposes or in particular contexts. This is exactly what ICC States Parties have chosen to do when ratifying the Statute (including article 27). Such a position is supremely rational, not only given the nature of article 5 crimes but also because the necessity of the doctrine of immunity itself—to prevent abuses in relations *between* individual States—falls away when the proceedings emanate from an independent and impartial international court whose jurisdiction they have accepted.[37] Similar considerations also apply to a UNSC Situation-Referral State, which may be bound indirectly by the terms of the Statute (including article 27) as a consequence of its consent to the authority of the Security Council in maintaining international peace and security.

A.2.ii. The "horizontal effect" of article 27 (State Party ↔ State Party or UNSC Situation-Referral State)

22. The horizontal effect of article 27 is the necessary corollary of its vertical effect, and concerns the mutual relations between States Parties *for the purpose of bringing a suspect or accused person before the Court*.[38] Exceptionally, again, it also applies to such relations between States Parties and a non-State Party, for example if the latter is a UNSC Situation-

[35] *See e.g.* Kreß and Prost, p. 2125 (mn. 17).
[36] *See* Appeal, paras. 17-18. *But see further below* paras. 30-41.
[37] *See e.g.* Gaeta (2009), pp. 320-321. *See also* South Africa Decision, para. 78; ICC-01/09-02/11-830-Anx3-Corr, para. 32; *Ruto* Decision, para. 92; Kreß, pp. 264-265; O. Triffterer and C. Burchard, 'Article 27,' in O. Triffterer and K. Ambos, *The Rome Statute of the International Criminal Court: a Commentary*, 3rd Ed. (München/Oxford/Baden Baden: C.H.Beck/Hart/Nomos, 2016) ("Triffterer and Burchard"), p. 1049 (mn. 16).
[38] This horizontal effect does not necessarily extend to mutual relations between States Parties for the purpose of bringing their own domestic prosecutions, even for article 5 crimes. It is in this context that some commentators have disagreed with the "horizontal effect" of article 27, but this does not mean that they disagree with the more limited "horizontal effect" as conceived by the Pre-Trial Chamber. *See e.g.* P. Gaeta, 'Official capacity and immunities,' in Cassese et al (eds.), *The Rome Statute of the International Criminal Court: a Commentary* (Oxford: OUP, 2002), Vol. I ("Gaeta (2002)"), pp. 996, 1000; Gaeta (2009), p. 329; Wirth, pp. 452-453.

Referral State and is therefore indirectly bound by the terms of the Statute for a particular situation (such as Sudan).[39]

23. The horizontal effect of article 27 means that States Parties (and other indirectly bound States, such as Sudan) must, in their mutual relations, each respect that the other is likewise bound "vertically" by article 27.[40] This has two direct implications for the present situation:

- The State Party or UNSC Situation-Referral State (such as Sudan) whose *own* official is subject to a warrant of arrest is bound by the vertical effect of article 27. Consequently, that State may not act inconsistently with that obligation in its "horizontal" relations with States Parties (such as Jordan), who may receive a request from the Court for arrest and surrender of that official. This is significant because it means that there is no proper basis for the requested State Party (such as Jordan) to fear that that it would breach an international obligation owed to the official's State (such as Sudan) when complying with the Court's request. There is no conflict of obligations.

- Correspondingly, the State Party (such as Jordan) in receipt of a request for arrest and surrender from the Court is obliged to execute that request promptly in accordance with articles 86 and 89(1), even if it concerns the official of another State Party or UNSC Situation-Referral State (such as Sudan). Thus, in this situation, Jordan was obliged to respect the vertical effect of article 27 on Sudan, as a UNSC Situation-Referral State, and hence was not entitled to rely on article 98(1) as a bar to its cooperation with the Court.[41]

24. These vertical and horizontal effects of article 27 are inevitably intertwined. If each State Party to a multilateral treaty consents to an obligation which they owe to a central body created by that treaty, they must necessarily also mutually contract and accept that each State Party will abide by that obligation. They must execute any other obligations they may have under that multilateral treaty in light of that understanding.[42] Although reasoning separately,

[39] *See above* paras. 8-14.
[40] Decision, para. 33. *See also* South Africa Decision, paras. 76, 79-81.
[41] *See further below* paras. 46-51.
[42] *See also* South Africa Decision, para. 78.

both in the Decision and in the South Africa Decision, Judge Perrin de Brichambaut agreed with the majority on this point.[43]

25. Moreover, further support for the horizontal effect of article 27 lies in the plain terms of article 27(2), which provide for its application to any immunities "whether under national or international law". As Dapo Akande points out, since "[t]he Court does not apply national law," this qualification "would be redundant unless it was directed at authorities who would otherwise be bound by national law—national authorities."[44]

26. State practice also supports this interpretation. Thus, Akande identifies a range of States Parties who have "adopted domestic implementing legislation which implicitly or explicitly take[s] the view that officials of other states may not be entitled to international law immunity from arrest when a request for arrest has been made by the ICC."[45]

27. By contrast, Jordan's primary objection to this natural interpretation of article 27 is based on an unreasonable reading of the Statute, which depends on reading articles 27 and 98 as being in opposition to one another,[46] and the assumption that Sudan cannot be the subject of any obligations under the Rome Statute.[47] As the following paragraphs explain, both premises are incorrect.

A.3. Jordan's interpretation of the Rome Statute is incorrect and untenable

28. Jordan's broad claim that the Pre-Trial Chamber failed to "determine whether there exists immunity under […] international law" constitutes, in fact, a mere disagreement with the Pre-Trial Chamber's legal conclusions.[48] Its disagreement with the Pre-Trial Chamber's analysis depends on advancing an alternative, and fundamentally untenable, interpretation of the Rome Statute, which seeks to read provisions of the Statute in isolation from one another, misunderstands the import of article 98, and assumes a conflict of international obligations where there is none.

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[43] *See e.g.* South Africa Minority Opinion, paras. 44, 46.
[44] Akande (2009), p. 338.
[45] Akande (2009), pp. 338-339 (in footnote 19, referring to implementing legislation from Canada, New Zealand, the United Kingdom, Switzerland, Malta, South Africa, Croatia, Trinidad and Tobago, the Republic of Ireland, Samoa, and Estonia). *See also* D. Akande, 'International law immunities and the International Criminal Court,' [2004] 98 *American Journal of International Law* 407 ("Akande (2004)"), pp. 422, 425-426.
[46] Appeal, paras. 15-19.
[47] Appeal, para. 20.
[48] *Contra* Appeal, para. 26. *See* Decision, paras. 27-45.

29. In short, if the Statute is interpreted properly, as the Pre-Trial Chamber did and in accordance with the Vienna Convention, then Jordan's concerns and objections fall away.

A.3.i. Article 27 applies to the whole Statute

30. Jordan states plainly that "[i]ssues concerning the exercise of the Court's jurisdiction cannot be conflated with issues concerning cooperation of a State Party with the Court".[49] Its appeal thus depends on an interpretation of the Statute which artificially divides Part 3 from Part 9 in approaching the issue of immunities based on official capacity.

31. Jordan asserts that Part 9 of the Statute "expressly addresses the obligation of a State Party to arrest a person found in its territory and surrender him or her to the Court" and that this part "contains no provision that strips away official immunities in the context of arrest and surrender to the Court" but, rather, "expressly maintains such immunities."[50] By contrast, since article 27 is located in "Part 3 entitled 'General principles of criminal law'", Jordan considers that it "does not address the question of a State Party's arrest and surrender of persons to the Court". Rather than "creat[ing] any right or impos[ing] any obligation upon a State Party", in Jordan's view, article 27 simply addresses the Court's *own* "ability to exercise jurisdiction."[51]

32. Yet Jordan's conclusions are unsupported, and inconsistent with the scheme of the Statute, as properly interpreted.

33. First, article 27 itself makes clear that the approach to official capacity in Part 3 is intended to be the same as the approach in Part 9. The first sentence of article 27(1)—omitted by Jordan[52]—expressly requires this, stating:

> *This Statute* shall apply equally to *all persons* without *any distinction* based on official capacity." [Emphasis added]

34. Although article 27(1) and 27(2) continue to detail specific applications of this principle,[53] this first sentence establishes the general premise and object of the provision.[54]

[49] Appeal, para. 17.
[50] Appeal, para. 15.
[51] Appeal, para. 16.
[52] Appeal, para. 16.
[53] This is demonstrated by the phrasing of the second sentence of article 27(1), which reads: "*In particular*, official capacity as a Head of State or Government, a member of a Government or parliament, an elected

By using the term "[t]his *Statute*" (as opposed, for example, to "this Part"),[55] the drafters unequivocally demonstrated their intent for article 27 to govern the approach of the *whole Statute*, requiring coherent effect to be given both to Parts 3 and 9, *inter alia*, rather than construing either one of them in isolation.[56] Academic commentators agree.[57] The principle of equality before the Court reflected in this first sentence of article 27(1) constitutes a fundamental value, as well as being a necessary means to achieve the States Parties' determination "to put an end to impunity for the perpetrators" of "the most serious crimes of concern to the international community as a whole".[58]

35. Second, article 27(2) must be considered in the context of article 27(1). Jordan relies on the stipulation in article 27(2) that the "[i]mmunities or special procedural rules" which may attach to a person's official capacity "shall not bar the Court from exercising its jurisdiction".[59] But it overlooks that article 27(2) is a particular application of the broader principle of equal treatment in article 27(1). Consequently, the reference to the Court's "jurisdiction" does not have a narrow meaning, limiting the irrelevance of official immunity to the Court's own judicial proceedings. Rather, it encompasses the full spectrum of the Court's proceedings, *vis-à-vis* suspects and accused persons but also States Parties and UNSC Situation-Referral States, such as Sudan.

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representative or a government official shall in no case exempt a person from criminal responsibility […]" (emphasis added).

[54] *See further* Statute, art. 27(1) and (2). All express requirements of article 27 fall within the general principle established in the first sentence of article 27(1)).

[55] When the drafters intended to condition the application of a provision to one part of the Statute, they said so expressly: *see e.g.* Statute, arts. 10, 80, 87(4), 87(5), 88, 89(1), 93(1), 95, 97, 99(4), 103(1)(b) (referring to "this Part"). *See further e.g.* rule 1(c) ("'Part' refers to the Parts of the Rome Statute").

[56] When the drafters intended a provision to apply or to refer to the Statute as a whole, again, they said so expressly: *see e.g.* Statute, arts. 1, 3(3), 4(2), 5, 6, 7(1), 7(3), 8(2), 8(2)(b)(xx), 8*bis*(1), 9(3), 10, 11(1), 11(2), 13, 16, 20(1), 21(1)(a), 21(1)(c), 22(1), 22(3), 23, 24(1), 25(1), 25(2), 25(3), 25(4), 28, 31(1), 31(2), 38(3)(b), 39(2)(iii), 41(1), 42(2), 45, 46(1), 46(4), 51(4), 52(1), 53(1), 54(1), 54(3)(d), 55(1), 57(1), 57(2)(b), 57(3), 60(1), 64(1), 64(3), 64(6)(b), 64(8)(b), 65(3), 65(4)(b), 67, 68(5), 69(2), 69(7), 72(7)(a)(ii), 86, 87(7), 101(1), 102, 112(2)(g), 112(6), 113, 119(2), 120 (referring to "this Statute"). *Contra* Appeal, para. 16.

[57] *See e.g.* Akande (2004), p. 424 ("when the parties agreed in the first sentence of Article 27(1) that the Statute applies to their officials, they thereby agreed that all parts of the Statute, including the cooperation regime in Part 9, apply to those officials"); Wirth, p. 452 ("According to the first sentence of article 27, '[t]he *Statute shall apply equally* to all persons without any distinction based on official capacity' (emphasis added). Thus, the States parties to the *Statute* have waived any existing immunities concerning application of the *Statute*, including the Cooperation Regime in part IX", emphasis supplied), 457; Kreß, p. 239 ("the waiver contained in Article 27(2) of the Statute must extend to the triangular relationship between the Court, the requested State Party and the 'third' State Party").

[58] *See* Statute, Preamble. *See also* Triffterer and Burchard, p. 1049 (mn. 17); W. Schabas, *The International Criminal Court: a Commentary on the Rome Statute*, 2nd Ed. (Oxford: OUP, 2016) ("Schabas"), pp. 598-599. The Prosecution respectfully submits that acknowledging that the first sentence of article 27(1) informs and guides the meaning of article 27—its "textual neighbourhood"—is not the same as suggesting that it abolishes any appropriate "differentiated treatment of accused persons" within the framework of a criminal trial: *see* ICC-01/09-01/11-1186-Anx, paras. 41, 56-60.

[59] Appeal, para. 16.

36. The general structure of the Statute must also be considered as relevant context in interpreting article 27, including the particular scheme of Part 9. It is axiomatic in assessing the context of a treaty provision—integral to treaty interpretation[60]—that "[o]ne must look at the treaty *as a whole*".[61] Thus, even if Parts 3 and Part 9 were intended *arguendo* to reflect different issues related to the question of immunity, the Appeals Chamber must still examine both these parts, and be satisfied that they do indeed serve different interests, such that they need not be reconciled. Indeed, the presumption must be that a treaty reflects a mutually coherent set of principles, displaced only by plain evidence of the drafters' intentions.

37. Article 86 of the Statute sets out the general obligation to cooperate—which is the founding premise of Part 9—and, significantly, requires States Parties to "cooperate fully" with the Court "in accordance with the provisions of this *Statute*" (emphasis added), and not merely "this Part". Mirroring the approach of article 27,[62] article 86 thus recognises that the rights and obligations of States Parties are not exhaustively set out under Part 9. The same implication is contained in article 87(7), which provides for referrals back to the ASP or the Security Council for failure "to comply with a request to cooperate by the Court contrary to the provisions of this Statute". This again supports the conclusion that Parts 3 and 9 may not be read in isolation.

38. Nor does anything in article 98 compel the conclusion that article 27 was not intended to affect the application of provisions of Part 9 of the Statute. Article 98(1) merely provides that the Court must respect any applicable immunities or obtain a waiver—it says nothing about the *circumstances* in which such immunities or waivers might exist. Jordan fails to articulate any reason why article 27 must necessarily become "irrelevant" in determining this question, beyond reiterating that article 98 is located in a different part of the Statute.[63]

39. Indeed, contradicting Jordan's unsupported view, numerous commentators agree that article 27 and article 98(1) can and must be read consistently, with article 27 serving to remove all immunities related to official capacity for States subject to that obligation, and article 98(1) retaining a distinct function for:

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[60] *See above* para. 4.
[61] A. Aust, *Modern Treaty Law and Practice*, 3rd Ed. (Oxford: OUP, 2013), p. 210 (emphasis added). *See also* R. Gardiner, *Treaty Interpretation*, 2nd Ed. (Oxford: OUP, 2015), pp. 197 ("Context is defined by […] attention to the whole text of the treaty, its preamble, and any annexes"), 209.
[62] *See above* para. 34.
[63] *Contra* Appeal, para. 19.

- any immunities relating to the premises and property of all States, whether or not they are Parties to the Statute, since these do not fall within article 27;[64] and

- dealings with States which are subject to no obligations under the Statute.[65]

40. Third, and finally, if it is accepted that the object and purpose of article 27 includes, at least, the principle of equality before the Court in its own judicial proceedings, then this must *necessarily* imply the application of article 27 to the whole Statute, including Part 9. If article 27 does not apply to Part 9 matters, then article 27 becomes entirely illusory—by definition, except in certain rare cases, immunity will *already* have been waived in order for the person to have appeared before the Court at all.[66]

41. For all these reasons, the vertical and horizontal effects of article 27 are indivisible, and inescapably follow from the general scope of article 27 within the Statute as a whole.

A.3.ii. Jordan is not assisted by reference to article 98 of the Statute

42. Article 98 of the Statute provides that:

> (1) The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.
>
> (2) The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.

43. This provision was intended to serve "narrow purposes", and in particular to ensure that a State Party would not become subject to competing obligations under international law.[67] Article 98(1) addresses the scenario in which the Court seeks State cooperation which affects

[64] *See further below* para. 50.
[65] Kreß and Prost, p. 2125 (mn. 17); Akande (2009), pp. 339, 342; Gaeta (2002), pp. 978, 1000. Schabas' position in this respect appears to be contradictory: *compare* Schabas, p. 1346, *with* p. 1348.
[66] *See further* Gaeta (2002), pp. 993-994; Akande (2009), pp. 336-338; Akande (2004), pp. 424-425.
[67] K. Prost, 'The surprises of Part 9 of the Rome Statute on international cooperation and judicial assistance,' *Journal of International Criminal Justice*, Advance Access ("Prost"), p. 3; R. Rastan, 'Jurisdiction,' in C. Stahn (ed.), *The Law and Practice of the International Criminal Court* (Oxford: OUP, 2015) ("Rastan"), p. 161; Kreß, p. 233; Gaeta (2009), pp. 327-328; D. Akande, 'The jurisdiction of the International Criminal Court over nationals of non-parties: legal basis and limits,' [2003] 1 *Journal of International Criminal Justice* 618 ("Akande (2003)"), p. 643.

the State or diplomatic immunity of a "third State", and thus must be read with article 27.[68] Article 98(2) addresses other scenarios in which the Court seeks the arrest and surrender of personnel specifically "sent" to the territory of a State Party pursuant to an agreement concerning their status on that territory, such as a Status of Forces Agreement.[69]

44. Jordan's reliance on article 98 is thus inapposite for two reasons.[70]

- First, although article 98(1) is directed generally to "third States", in practice it is inapplicable to requests for the surrender of persons who are officials of States subject to the operation of article 27 of the Statute. As such, it does not apply to Sudan in this situation (as a UNSC Situation-Referral State).

- Second, article 98(2) does not duplicate article 98(1) and therefore addresses agreements on matters other than State or diplomatic immunity, where a person is specifically "sent" to the territory of a State Party under certain conditions. As such, it does not apply to the 1953 Convention on the Privileges and Immunities of the Arab League.[71]

45. The conclusions of the Pre-Trial Chamber were correct in both these respects.

A.3.ii.a. Article 98(1) is inapposite for requests to arrest and surrender officials of States Parties and UNSC Situation-Referral States

46. Jordan generally asserts that the approach of the Decision to article 98(1) was "clearly incorrect as a matter of law",[72] yet it fails to engage substantively either with the correct interpretation of this provision or the Pre-Trial Chamber's reasoning. Indeed, it simply assumes that Sudan is a "third State" whose immunity must be respected by the Court under article 98(1),[73] and focuses its arguments on disputing the *procedure* adopted by the Pre-Trial Chamber (in particular, whether it is the Court or the requested State Party which has the primary responsibility to decide whether article 98(1) might be engaged).[74] This is an entirely separate issue from the substantive question whether article 98(1) *actually was* applicable to

[68] *See* Prost, p. 3.
[69] *See* Prost, pp. 3-4.
[70] *Contra* Appeal, para. 23.
[71] *See* ICC-02/05-01/09-306-Conf-AnxII ("1953 Convention").
[72] Appeal, para. 25. *See also* paras. 19-21.
[73] *See e.g.* Appeal, paras. 23-24.
[74] *See* Appeal, paras. 26-30.

the Court's request for Jordan to surrender Omar Al-Bashir. If inapplicable, as the majority of the Pre-Trial Chamber correctly found,[75] then it is immaterial for the purposes of Jordan's challenge to the legal correctness of the interpretation of article 98(1) who was competent to decide the matter. Accordingly, the Prosecution will first address this question.[76]

47. The terms of article 98(1) state that the Court may not request a State's cooperation if so doing 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 a waiver can be obtained.

48. On its face, the term "third State" is broad and does not itself appear to limit the States to which article 98(1) might apply. Indeed, in the Statute, the term "third State" is used generally to describe 'another' State, but without particular specification of its status.[77] This was also the approach previously taken by the Pre-Trial Chamber.[78]

49. When considering the particular question of the immunity of *persons*, however, a number of commentators suggest that the term "third State" in article 98(1) is better interpreted as referring only to States which have *not* "accepted the provision embodied in Article 27(2)",[79] whether directly as a State Party (such as Jordan) or indirectly as a UNSC Situation-Referral State (such as Sudan). Likewise, this view is also found in the Pre-Trial Chamber's reasoning, illustrated by its finding that, due to the effect of article 27, States bound by that provision do not fall within the scope of article 98(1) because "there is no immunity to be waived".[80] In the South Africa Decision, the same Pre-Trial Chamber stated even more plainly that only "with respect to States that are not parties to the Statute, the

[75] Decision, para. 41 (recalling that "the majority of the Chamber finds, as explained above, that article 98(1) does not apply to the situation of Omar Al-Bashir"). *See further* paras. 38-39.
[76] On the question of procedure, *see further below* para. 62.
[77] *See e.g.* Statute, arts. 8*bis*(2)(f) (it is an act of aggression for a State to allow its territory to be used by "another State" to perpetrate an act of aggression against a "third State"), 93(9)(b) (requests for cooperation which concern information or other material subject to the control of a "third State" shall be directed to that State), 108(1) (a sentenced person may not be extradited to a "third State" from the "State of enforcement" without the Court's approval).
[78] ICC-02/05-01/09-139-Corr ("Malawi Decision"), para. 18 (referring to "a third State which has ratified the Statute"). *See also* Kreß and Prost, pp. 2123-2124 (mn. 11); Kreß, p. 238.
[79] Gaeta (2009), p. 328. *See also* Gaeta (2002), pp. 993-995; Schabas, p. 1345; Akande (2009), p. 339; Akande (2004), pp. 409, 423-424; Akande (2003), pp. 640-641, 643.
[80] Decision, para. 34 (also stating "article 98(1) of the Statute […] is without object in the scope of application of article 27(2)"). *See also* South Africa Decision, para. 81.

applicable regime is that of article 98(1) of the Statute."[81] This view accords with the horizontal effect of article 27.

50. Just one aspect of article 98(1)—which is entirely unrelated to the immunities of *official persons*—suggests that the provision has a distinct but limited function even for States Parties and other States subject to the obligations of the Statute. This pertains to immunities concerning *premises and property* which might be subject to State or diplomatic immunity, which are not covered by article 27, and which accordingly are not addressed by its horizontal effect.[82]

51. Yet in any event, no matter which interpretation of the term "third State" is correct, the end result in this situation remains the same—article 98(1) does not preclude requests to States Parties to arrest and surrender the officials of a UNSC Situation-Referral State, like Sudan. This is due to the operation of article 27 which, in Claus Kreß's words, renders article 98(1) "redundant, non-operational and meaningless" in these circumstances.[83] Whether or not this means the provision applies but factually there is no applicable immunity—or that the provision simply does not apply—is in this case a distinction without a difference. Accordingly, the Decision was entirely correct in its approach to article 98(1).

A.3.ii.b. Article 98(2) applies only to certain kinds of international agreements, distinct from those addressed in article 98(1)

52. Article 98(2), again, must be interpreted on the basis of its terms, read in context and in light of its object and purpose.[84] Jordan does not substantiate its claim that the Pre-Trial Chamber failed to apply this process properly.[85] To the contrary, the Pre-Trial Chamber's conclusion is entirely consistent with an analysis according to the Vienna Convention.

53. In express terms, article 98(2) limits its application to "international agreements pursuant to which the consent of a sending State is required to surrender a person of that State

[81] South Africa Decision, para. 82. *See also* para. 83 (describing the distinction between States Parties and other States as "fundamental" when "considering issues of cooperation with the Court"). *See also* South Africa Minority Opinion, paras. 44-45.
[82] Kreß and Prost, p. 2124 (mn. 14: "it was this type of immunity protection that was the main driving force behind the paragraph 1"; *see also* mn. 11); Kreß, p. 239; Wirth, p. 454 (fn. 102).
[83] Kreß, p. 238.
[84] *See above* para. 4. *See also* D. Scheffer, 'Article 98(2) of the Rome Statute: America's original intent,' [2005] 3 *Journal of International Criminal Justice* 333 ("Scheffer"), p. 334.
[85] *Contra* Appeal, paras. 32-33 (characterising the Decision as adopting "an unsustainably restrictive reading").

to the Court". It is obvious, therefore, that it does not apply to *all* kinds of international agreements, but only to some—the interpretive question is simply *to which ones*?[86]

54. As the Pre-Trial Chamber explained, this means article 98(2) agreements are defined by reference to a "sending State" and "a procedure for seeking and providing consent to surrender".[87] Particular care is required in analysing the meaning of these terms given the recognition by an informed commentator that, "with the benefit of hindsight," article 98(2) "could have been more clearly articulated to reflect the narrow purposes envisaged at the time of its drafting."[88] This reinforces the importance of adhering to the correct interpretive approach under the Vienna Convention.

55. In their ordinary meaning,[89] these terms suggest a person who is *specifically despatched* by the "sending State" to the "Requested State",[90] and whose status therein requires specific regulation by the international agreement in question. It is thus almost impossible to reconcile these terms with the concepts in the 1953 Convention. For example, article 11 of the 1953 Convention does not contemplate a person being "sent" *specifically to* another State, but instead applies only to a "[r]epresentative […] to the principal and subsidiary organs of the *League of Arab States*", or to conferences of the League, "journey[ing] to and from *the place of meeting*" (emphasis added).[91] Likewise, article 14 does not address consent to "surrender" such a representative at all, but instead discusses the "waiver" of such person's "privileges and immunities" as otherwise provided in international law.[92] Nothing supports the view that Sudan can be regarded as a "sending State" in the meaning of article 98(2), on the basis of the 1953 Convention.

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[86] *See e.g.* Scheffer, p. 352 ("the ICC judges will examine such agreement to determine whether it qualifies").
[87] Decision, para. 32.
[88] Prost, p. 4. *See also* Kreß and Prost, pp. 2119 (mn. 2: noting that article 98(2) referred, "without spelling this out explicitly", to "Status of Forces Agreements"), 2120 (mn. 4: noting that "article 98 did not absorb too much negotiation time in Rome").
[89] *See* Gardiner, pp. 186-187 (noting that the "ordinary meaning" of a term in the sense of article 31(1) of the Vienna Convention includes not only "the basic discovery of ordinary meanings of a term" but also "the identification of a 'functional' meaning, in the sense of a meaning appropriate to the subject matter be it international law, hydrology, or whatever", without "the degree of specialism in the term being interpreted […] such as to warrant an argument that the parties intended it to have a special meaning of the kind to which article 31(4) of the Vienna Convention refers"). *But see also below* paras. 56-58.
[90] *See e.g.* Scheffer, pp. 339 (suggesting that the term "sending State" includes "persons sent officially by a state into a foreign jurisdiction under the authority of the sending State"), 342 ("official personnel deployed into a foreign jurisdiction"), 346 ("persons acting at the *direction* of the 'sending State'", emphasis supplied), 349 ("a State that either has sent official personnel to or established an official presence in another State, or has extradited someone requested by the receiving State"). *See further* pp. 347-350 (considering other instruments using the term "sending State"). *See also* Akande (2003), pp. 643-644.
[91] *Contra* Appeal, para. 32.
[92] *Contra* Appeal, para. 33.

56. Furthermore, even if such conclusions cannot be said to be drawn from the "ordinary meaning" of the terms used, those terms may be said to have a "special meaning", in the sense of article 31(4) of the Vienna Convention.[93] This is supported by their context, and the relevant object and purpose. This again leads to the conclusion that the 1953 Convention does not fall within the scope of article 98(2).

57. As Schabas recalls, "[c]ertainly, the terminology that is employed in article 98(2) is rooted in practice concerning status of forces agreements."[94] For example, the US delegation's comments to the Ad Hoc Committee in 1995, state that it is "critical that the rights and responsibilities of states parties to applicable Status of Forces Agreements (SOFAs) be fully preserved", and defined such agreements in the following terms:

> SOFAs are international agreements, which provide for a number of reciprocal rights and responsibilities of the signatory states in respect to armed forces stationed or temporarily present in the territories of the respective signatory states. Under such agreements, the state dispatching or posting its forces in the territory of another state is identified as the 'sending state'. […] Most SOFAs contain provisions governing the exercise of criminal jurisdiction over the armed forces stationed or posted abroad.[95]

58. Kreß and Prost, and Akande, allow that the language of article 98(2) might, to a limited extent, also include some types of agreements beyond SOFAs—provided that such agreements conform to the same "technical concept".[96] As the Pre-Trial Chamber noted,[97] it is essential that the person in question is "present on the territory of a receiving State *because they have been sent by a sending State*".[98] Other commentators agree.[99] There is nothing "unsustainably restrictive" in giving weight to this consideration.[100]

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[93] *See* Gardiner, pp. 337-338 (concluding that it is "of no great consequence whether an interpreter finds the route to the appropriate meaning through an understanding of what is an 'ordinary' meaning or whether such meaning is viewed as 'special'" because "[p]rovided the interpreter uses all appropriate evidence to evaluate the probable meaning the correct result should be ascertainable").
[94] Schabas, p. 1349.
[95] Schabas, pp. 1349-1350 (quoting 'US Government informal comments on extradition/surrender approach of ILC draft of a statute for an international criminal court,' 14 July 1995). *See also* Scheffer, p. 336; Prost, p. 3; Akande (2003), p. 644.
[96] Kreß and Prost, p. 2143 (mn 47: identifying as other possible types of agreements that might fall within article 98(2) "treaty provisions on re-extradition" and "an agreement on a special mission"). *See also* Akande (2009), p. 337; Akande (2004), pp. 426-427; Akande (2003), p. 645. *See also below* fn. 99 (referring to Status of Mission Agreements, which are closely related to SOFAs).
[97] Decision, para. 32.
[98] Kreß and Prost, p. 2143 (mn. 49, emphasis added).
[99] *See* Scheffer, pp. 337-338 ("The text of Article 98(2) does not seek to limit the type of international agreement that would prohibit surrender of particular types of persons to the Court. *Yet, the scope of non-surrender is, and was intended to be, limited by explicit use of the term 'sending State'*" […] *The key limitation on the scope of the international agreement reference in Article 98(2) is the term 'sending State'*" which "derives from the original American effort, very early in the ICC negotiations, to preserve the rights […] covered by status of forces

59. Analysis of the statutory context, and its object and purpose, also supports this view. If article 98(2) was intended to cover international agreements providing for wider varieties of privileges and immunities, such as the 1953 Convention, it would duplicate and/or interfere with the careful balance between articles 27 and 98(1). This absurdity is avoided, however, if article 98(2) is understood to address *different* types of international agreements, such as those concerning jurisdiction over persons "sent" by a State but *not* protected under the "State or diplomatic immunity" mentioned in article 98(1).[101]

60. Scheffer confirms this understanding, noting that article 98(2) was intended to apply "in circumstances normally unrelated to the protection afforded by sovereign or diplomatic immunity."[102] Indeed, typical article 98(2) agreements, such as SOFAs, actively contemplate the exercise of criminal investigation and prosecution of such forces, even though the receiving State's sovereign jurisdiction is conditionally allocated back to the sending State.[103] Such agreements thus differ significantly in nature from agreements concerning immunity, like the 1953 Convention, which do not necessarily presume any exercise of jurisdiction by the sending State at all.

A.3.iii. There is no material conflict between Jordan's international obligations

61. For all the reasons above, Jordan is incorrect to say that the effect of the Decision is to "inevitably lead[] to a State Party to the Rome Statute facing irreconcilable obligations under international law".[104] Any such fears are unfounded. Rather, Jordan had just one material obligation to discharge, which was to arrest and surrender Omar Al-Bashir to the Court, consistent with articles 27, 86 and 89 of the Statute. It owed no enforceable obligation at all to Sudan, because Sudan was itself already bound under article 27, pursuant to the UNSC Resolution and Sudan's own consent to the regime of the UN Charter.[105]

62. Furthermore, it was precisely due to the possibility of such concerns by States that the drafters of the Rome Statute primarily addressed article 98 to the Court, as the Decision

agreements […] and Status of Mission Agreements", emphasis added), 349 ("we used the term 'sending State' because our entire negotiating history behind the provision that became Article 98(2) referenced the officials and military personnel deployed by the 'sending State' into a foreign jurisdiction").
[100] *Contra* Appeal, para. 32.
[101] *See also* Schabas, p. 1345 ("Article 98 covers two distinct concepts that are developed in separate paragraphs").
[102] Scheffer, p. 337.
[103] *See* Scheffer, pp. 338-339, 352-353; Rastan, p. 161.
[104] *Contra* Appeal, para. 38. *See also* para. 35.
[105] Decision, paras. 38-39.

correctly noted (albeit in an *obiter dictum*).[106] This did not mean that "an important conflict-avoidance rule" was written out of the Statute, nor did it mean that the Decision was based on the view that Jordan's obligations under the Statute were assumed, *per se*, to "supersede all its other legal obligations".[107] It only meant that the Statute requires *the Court* to take measures, when necessary, to avoid subjecting States Parties to conflicting legal obligations when seeking their cooperation[108]—but, correspondingly, that the Court is then entitled to obtain the requested cooperation on the basis that it has done so.[109]

63. For all the reasons set out above, the Appeals Chamber should dismiss Jordan's First Ground of Appeal.

B. The Pre-Trial Chamber correctly found that the UNSC Resolution affected Jordan's obligation under international law to accord immunity to Omar Al-Bashir (Second Ground of Appeal)

64. In concluding that the UNSC Resolution 1593 (2005) imposed upon Sudan relevant obligations contained in the Statute, including article 27, the Pre-Trial Chamber correctly held that:

- the UNSC Resolution has the effect that the Rome Statute applies, in its entirety, with respect to the Situation in Darfur;[110]
- Sudan's duty under the UNSC Resolution to cooperate fully with the Court entails that the Rome Statute governs the terms of Sudan's cooperation with the Court;[111] and its interactions with the Court;[112] and
- one consequence of this is that article 27(2) of the Statute applies equally to Sudan, rendering inapplicable any immunity on the ground of official capacity belonging to Sudan that would otherwise exist under international law.[113]

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[106] Decision, paras. 41-43. *See also* South Africa Decision, paras. 100-106.
[107] *Contra* Appeal, para. 35. *See also* paras. 26-27, 36-37 (discussing Jordan's other obligations under conventional and customary law, but taking no account of the legal effect of Sudan itself being made subject, *inter alia*, to article 27 of the Statute, pursuant to the UN Security Council's Chapter VII powers).
[108] *See* Kreß and Prost, pp. 2119-2120 (mn. 3); Kreß, pp. 234-235.
[109] *Contra* Appeal, para. 28. *See also* paras. 29-30. Jordan does not address rule 195(1), which provides a framework for its concerns to be addressed, but is separate from article 97 consultations: South Africa Decision, paras. 115, 120.
[110] Decision, para. 37.
[111] Decision, para. 37.
[112] Decision, para. 38.
[113] Decision, para. 38.

65. Jordan's arguments in relation to its Second Ground of Appeal are unsupported and should be dismissed.[114]

66. Jordan refers to Judge Perrin de Brichambaut's Minority Opinion in the South Africa Decision,[115] which he recalled in the Decision under appeal.[116] Judge Perrin de Brichambaut did not find that the Majority of the Chamber committed any clear errors, but that in his view there was no "definite answer"[117] as to the effect of the UNSC Resolution on existing Head of State immunity and therefore he was unable to draw any "firm conclusion" on the matter.[118] Instead, he recognised "a degree of validity" to the various arguments of both parties.[119] His minority opinions therefore seem to be premised on his view that it was not possible to discern either the correct interpretation of the Statute[120] or the UNSC Resolution.[121] He therefore relied on an alternative legal basis, which he found "more persuasive",[122] namely the Genocide Convention, to conclude Omar Al-Bashir had no immunity that would prevent his arrest and surrender to the Court. However, since Judge Perrin de Brichambaut did not express definite views on the correctness of the Majority's Decision, his minority opinions should not determine the issues before the Appeals Chamber.

67. As a preliminary argument, Jordan argues that since the Decision is inconsistent with earlier Pre-Trial Chamber decisions—that were themselves based on "contradictory and questionable interpretations" of the UNSC Resolution—this shows that the legal basis for denying Omar Al-Bashir's immunity as a Head of State under international law is uncertain.[123] However, this does not show a legal error in *this* Decision. That previous chambers have reached the same outcome through different—even inconsistent—reasoning does not detract from the soundness of the legal reasoning in this Decision, nor does it relieve Jordan from its burden to establish an appealable error. Insofar as the different reasoning adopted in the various decisions may have affected States' awareness of their obligations to

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[114] Appeal, paras. 40-83.
[115] *See* South Africa Minority Opinion.
[116] Appeal, para. 40. Jordan specifically points out that it does not share Judge Perrin de Brichambaut's interpretation of the Genocide Convention: *see* Appeal, fn. 37.
[117] South Africa Minority Opinion, paras. 83, 91.
[118] Minority Opinion, para. 3.
[119] *See e.g.* South Africa Minority Opinion, para. 58.
[120] *See e.g.* South Africa Minority Opinion, para. 58. This may be akin to finding a *non liquet*: *see* Oxford Bibliographies, definition of "*non liquet*" by Ulrich Fastenrath and Franziska Knur.
[121] *See* South Africa Minority Opinion, para. 83. On the interpretive approach for Security Council resolutions: *see further below* fn. 143.
[122] Minority Opinion, para. 2.
[123] Appeal, paras. 42-48, 65-67.

arrest and surrender Omar Al-Bashir, the Prosecution will address this argument in response to Jordan's Third Ground of Appeal.[124]

B.1. The Pre-Trial Chamber was correct that a Security Council resolution triggering the Court's jurisdiction under article 13(b) invokes the entire legal framework of the Statute for the referred situation[125]

68. Article 13, in relevant part, provides:

> The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if:
>
> (a) […]
>
> (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; […]
>
> (c) […]

69. Article 13 must be interpreted according to the ordinary meaning of its terms, its context, and its object and purpose. These confirm that the legal consequence of a Security Council referral under article 13(b) is to empower the Court to act in the referred situation—any other interpretation would render article 13 futile.[126] The only legal framework within which the Court may exercise its jurisdiction—once triggered—is that which generally applies, namely the legal regime under the Rome Statute.[127] Accordingly, the Court has previously consistently ruled that the entirety of the Statute must apply to situations referred by the Security Council.[128]

70. Article 13 provides that "[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* […]".[129] This is so irrespective of how the Court's jurisdiction is triggered in a particular situation.[130] In fact, the *chapeau* of article 13 applies equally to all three triggering mechanisms listed in that

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[124] *See below* para. 113.
[125] Decision, para. 37; *contra* Appeal, paras. 49-58.
[126] South Africa Decision, para. 86.
[127] South Africa Decision, paras. 86, 88; Akande (2009), p. 340.
[128] South Africa Decision, para. 85; ICC-01/11-01/11-163 ("*Gaddafi* Decision"), paras. 28-29; ICC-02/05-03/09-169 ("*Banda* Decision"), para. 15; ICC-02/05-185, para. 31. In this context it is noteworthy that in both the Darfur and the Libya situations, Pre-Trial Chambers have entered non-cooperation findings under article 87(7), rather than article 87(5), based on the finding that the referral of a situation by the Security Council triggers the application of the entire legal framework of the ICC *vis-à-vis* the State concerned, including by implication any rules attendant on States Parties: Rastan, pp. 1810-1811 (mn. 42). *See e.g.* ICC-02/05-01/09-3, para. 248; ICC-01/11-01/11-577 ("Article 87(7) Libya Decision"), paras. 20-22).
[129] Emphasis added.
[130] South Africa Decision, para. 85.

provision, as shown by its wording: the term "if" in the *chapeau* is connected, among others, to paragraph (b), concerning a UN Security Council referral of a situation to the Prosecutor acting under Chapter VII of the UN Charter.

71. Other provisions of the Statute support this interpretation of article 13 as requiring that the entire legal framework of the Statute applies, irrespective of the mechanism by which the Court's jurisdiction is triggered. Article 1 provides that "[t]he jurisdiction and functioning of the Court shall be governed by *the provisions of the Statute*".[131] Moreover, article 21(1)(a) mandates the Court to apply, "in the first place", *the Statute*, Elements of Crimes and the Rules of Procedure and Evidence.[132] Recourse to other sources of law is possible only if there is a *lacuna* in these constituent instruments.[133] Accordingly—under article 21(1)(b)—"applicable treaties and the principles and rules of international law" are to be applied "in the second place" and only "where appropriate".[134]

72. Jordan's argument that article 13 merely triggers the Court's jurisdiction, but does not go beyond that,[135] ignores that the article specifically stipulates that the Court's jurisdiction—once triggered pursuant to any of the three methods set out in that provision—is to be exercised "in accordance with the provisions of [the] Statute".[136] In addition, since the Court can only exercise its jurisdiction according to the applicable legal regime of the Statute,[137] no question arises as to which provisions are applicable and which are not.[138]

B.2. The Pre-Trial Chamber was correct that Sudan's cooperation duty under the UNSC Resolution invokes the cooperation procedures of the Statute[139]

73. The UNSC Resolution is the *source* of Sudan's obligation to cooperate with the Court. In the *Gaddafi et al*. case, the Appeals Chamber held that the referring Security Council Resolution had the effect of imposing an obligation on the addressed non-State Party—in that case Libya—to cooperate with the Court.[140] Similarly, at paragraph 2, the UNSC Resolution

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[131] South Africa Decision, para. 85 (emphasis added).
[132] South Africa Decision, para. 85.
[133] *Ntaganda* Decision, para. 53.
[134] ICC-01/09-02/11-421 OA4, para. 11.
[135] Appeal, paras. 55, 57-58.
[136] As noted below (*see* para. 81), the entire legal framework of the Statute also applies in case a State lodges an *ad hoc* declaration under article 12(3) of the Statute.
[137] South Africa Decision, para. 86.
[138] *Contra* Appeal, para. 56.
[139] Decision, para. 37; *contra* Appeal, para. 59.
[140] ICC-01/11-01/11-480 OA6, para. 18. *See also* South Africa Decision, para. 87. *See further* *Banda* Decision, paras. 14-15; *Gaddafi* Decision, paras. 28-30 (recalling that "the Court has consistently held that the legal

provides that "the Government of Sudan […] shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution […]."

74. However, the *content* of such duty to cooperate with the Court is not regulated by the UNSC Resolution, but by the Rome Statute.[141] As above, article 13 provides that "[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 […]".

75. Jordan's argument that paragraph 2 of the UNSC Resolution would have been redundant if the Statute applied in its entirety by virtue of a referral under article 13(b),[142] ignores the distinct scope of the first and second paragraphs of the UNSC Resolution.[143] Paragraph 1 triggers the Court's jurisdiction in accordance with the Rome Statute, thereby ensuring that for the purposes of the interactions between Sudan and the Court with respect to the situation in Darfur, the Statute applies in its *entirety*. Paragraph 2 clarifies the cooperation obligations of different actors. Sudan and the parties to the conflict in Sudan *shall* cooperate fully and provide any necessary assistance to the Court and the Prosecutor—which, in Sudan's case, as a UNSC Situation-Referral State, means assuming the obligations under the Statute. States not Party to the Rome Statute and concerned regional and other international organisations, on the other hand, are merely *urged* to cooperate fully with the Court but, given their status, are not *obliged* to do so.

framework of the Statute applies in the situations referred by the Security Council in Libya and Darfur, Sudan, including its complementarity and cooperation regimes").

[141] South Africa Decision, para. 88.

[142] Appeal, para. 59.

[143] *Contra* Appeal, para. 40 (arguing that the Chamber did not properly interpret the UNSC Resolution, by reference to the practice of the ICJ in interpreting a Security Council resolution in the *Kosovo* Advisory Opinion). This mistakes the ICJ's interpretive practice, which only dictates resort to certain additional techniques when *required*: *see e.g.* ICJ, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion of 22 July 2010, paras. 94 (noting "differences" in the elaboration of UN Security Council resolutions and treaties, emphasising that "the final text of such resolutions represents the view of the Security Council as a body", and that consequently this "*may*" (emphasis added) require the consideration of other factors in addition to the interpretive process set out in the Vienna Convention), 95-100 (initially interpreting a Security Council resolution by reference to its principal characteristics, context, and object and purpose, and not proceeding to consider the additional factors which the ICJ identified as being potentially relevant), 113-119 (addressing a point requiring "careful reading" of a resolution by reference to "contemporaneous practice" of the Security Council, but on this basis again emphasising the importance of the text and object and purpose). Likewise, Judge Perrin de Brichambaut only resorted to such considerations based on his view—with which the Prosecution respectfully disagrees—that the terms, context, and object and purpose of the UNSC Resolution are ambiguous: *see e.g.* South Africa Minority Opinion, paras. 66-75. *See also above* fn. 120.

76. Jordan further misreads the South Africa Decision when suggesting that the Chamber had acknowledged this point in its earlier decision.[144] To the contrary, in the relevant portion of the South Africa Decision, the Chamber held that Sudan's duty as a non-State Party to cooperate fully with the Court is based *both* in the Security Council's decision to trigger the jurisdiction of the Court (paragraph 1) *and* in the express reference in the UNSC Resolution to Sudan's obligation *vis-à-vis* the Court to cooperate fully and to provide it with any necessary assistance (paragraph 2).[145] Nor did the Chamber in its Decision state that Part 9 of the Statute does not automatically apply as a result of the referral of the Situation in Darfur to the Court. The Chamber expressly held that the effect of the UNSC Resolution triggering the Court's jurisdiction under article 13(b) is that the legal framework of the Statute applies in its entirety,[146] and that the Statute regulates "the interactions between Sudan and the Court with respect to the Court's exercise of jurisdiction in the situation in Darfur".[147]

77. That there is some overlap between paragraph 1 of the UNSC Resolution (referral of the situation to the Court) and paragraph 2 (Sudan's obligation to cooperate fully), does not mean that the effect of the referral is limited to triggering jurisdiction.[148] Under paragraph 1, the UNSC Resolution provides the Court with the jurisdictional precondition to exercise its jurisdiction. In other words, the Court's jurisdiction is triggered over the referred situation, and, as explained earlier, this occurs "in accordance with the provisions of the Statute". Paragraph 2 is directed to the Government of Sudan; it requires Sudan to cooperate fully and to provide any necessary assistance to the Court and the Prosecutor. The content of these cooperation duties are those contained in Part 9 of the Rome Statute.

78. Jordan accepts that the UNSC Resolution imposes binding obligations on Sudan to cooperate fully with the Court, as a result of articles 25 and 103 of the UN Charter.[149] One

[144] Appeal, para. 59.
[145] South Africa Decision, para. 87.
[146] Decision, para. 37.
[147] Decision, para. 38.
[148] *Contra* Appeal, para. 59. Jordan's argument is based on a misinterpretation of the South Africa Decision (para. 87), which does not show that the effect of the referral under article 13 is limited to triggering the Court's jurisdiction.
[149] Appeal, para. 52. *See* UN Charter, arts. 25 ("The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter"), 103 ("In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail"). *See also* South Africa Decision, para. 89 and the authority at footnote 100. *See further* Koskenniemi Report, para. 345 ("the practice of the Security Council has continuously been grounded on an understanding that Security Council resolutions override conflicting customary law […] it seems sound to join the prevailing opinion that Article 103 should be read extensively"); E. de Wet, *The Chapter VII Powers of the United Nations Security Council* (Oxford: Hart, 2004), pp. 182 ("the Security Council has a wide discretion to deviate from

legal effect of the UNSC Resolution is that Sudan (as a UN Member State) must accept the Court's exercise of jurisdiction over alleged ICC crimes occurring on the territory of Darfur since 1 July 2002. Another legal effect is that Sudan must comply with the obligations set out in the Statute and the decisions issued by the Court.[150]

79. The effect of the UNSC referral and Sudan's obligation to cooperate fully with the Court, is that for the limited purpose of this situation, Sudan is placed in a situation comparable to that of a State Party.[151] This accords with the UN Charter, which permits the Security Council to impose obligations on States.[152]

80. This does not mean that Sudan, as a result of the UNSC Resolution, is fully equated to a State Party. Its obligations are limited to the Court's exercise of jurisdiction in the situation in Darfur.[153] In addition, Sudan does not have the right to vote in the ASP and does not pay contributions towards the expenses of the Court pursuant to article 115.[154] However, as correctly held by the Chamber, "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".[155]

81. Obliging a UNSC Situation-Referral State to cooperate fully with the Court is consistent with the object and purpose of the Statute. First, it makes referrals effective. Second, it promotes internal coherence in the application of the Rome Statute by placing a UNSC Situation-Referral State in a position comparable to other States that are within the jurisdictional scope of the Court. For example, in addition to States Parties, a non-State Party which lodges an *ad hoc* declaration under article 12(3) is obliged to "cooperate with the Court

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customary international law or treaty law"), 187 ("Although the Security Council may impinge on customary international law or treaty law when maintaining international peace and security, most authors agree that these impingements find their limits in […] *ius cogens*"). *Contra* A. Kiyani, 'Al-Bashir and the ICC: the problem of Head of State immunity,' [2013] 12 *Chinese Journal of International Law* 467, pp. 469, 472, 474-475, 478-480 (arguing, avowedly in contrast to "most commentaries", *inter alia* that the UN Security Council is not competent to issue Chapter VII resolutions inconsistent *arguendo* with customary international law, but not arguing *jus cogens*).

[150] Akande (2009), p. 341.

[151] South Africa Decision, para. 88. The Chamber implicitly endorsed this finding: Decision, para. 38. *Contra* Appeal, paras. 41, 43, 47, 50, 55, 62.

[152] South Africa Decision, para. 89. *See also above* paras. 10-14.

[153] Decision, paras. 37-38; South Africa Decision, para. 91.

[154] South Africa Decision, para. 90.

[155] Decision, para. 38; *see also* South Africa Decision, para. 91.

without any delay or exception in accordance with Part 9",[156] and the entire legal framework of the Statute applies to such situations.[157]

B.3. The UNSC Resolution need not state expressly that the whole of the Rome Statute applies or that Sudan's obligation to cooperate is regulated by the Statute

82. The UNSC Resolution referred the situation in Darfur to the Court pursuant to article 13(b), which provides that the Court may exercise its jurisdiction "in accordance with the provisions of [the] Statute". Accordingly, it was unnecessary for the Security Council to expressly state that the Rome Statute applies as a whole, including with respect to Sudan's obligation to cooperate with the Court.[158] By empowering the Court to exercise *its* jurisdiction, the UNSC determined that the Court would exercise that jurisdiction according to the terms of its Statute.[159]

83. Unlike the Security Council resolutions establishing the ICTY and ICTR, the UNSC Resolution did not create a new *sui generis* body, requiring it to set out the applicable law. Rather, the point of the Security Council referral mechanism is that the Court already exists and applies an established Statute, an instrument that was negotiated under the auspices of the United Nations, even if the institution was ultimately set up as an independent body.

84. Finally, the absence of an express reference to article 13 in the UNSC Resolution is not determinative because the matter has already been settled. Under article 17(1) of the Relationship Agreement between the Court and the United Nations—which pre-dates the UNSC Resolution and was approved by both the General Assembly of the United Nations and the ASP—a referral of a situation by the Security Council to the Prosecutor will occur pursuant to article 13(b) of the Rome Statute.[160] As noted above, article 13 specifies that a Security Council referral will trigger the exercise of jurisdiction by the Court "in accordance with the provisions of this Statute". This includes article 27 and Part 9 of the Rome Statute.

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[156] Statute, art. 12(3).
[157] According to article 12(3) of the Statute, a non-State Party may "accept the exercise of jurisdiction by the Court". Article 13 provides that the Court exercises its jurisdiction "in accordance with the provisions of [the] Statute".
[158] *Contra* Appeal, para. 70.
[159] Akande (2009), pp. 340-341; Kreβ and Prost, p. 2140 (mn. 37).
[160] Negotiated Relationship Agreement between the International Criminal Court and the United Nations, 4 October 2004; *see also* CICC, Questions & Answers on the Relationship Agreement between the International Criminal Court and the United Nations, 12 November 2004.

B.4. The Pre-Trial Chamber was correct that article 27(2) applies to Sudan and renders inapplicable any immunity based on official capacity[161]

85. Having found that the effect of the UNSC Resolution triggering the Court's jurisdiction under article 13(b) is that the legal framework of the Statute applies in its entirety,[162] and 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,[163] the Chamber correctly concluded that "one consequence of this is that article 27(2) of the Statute applies equally with respect to Sudan".[164] The Chamber further found that this "render[s] inapplicable any immunity on the ground of official capacity belonging to Sudan that would otherwise exist under international law".[165]

86. Consistent with its findings in the South Africa Decision,[166] and as discussed above,[167] the Chamber correctly held that the application of article 27(2) with respect to Sudan has two effects: Firstly, it has a vertical effect, meaning that Sudan cannot claim, *vis-à-vis* the Court, Omar Al-Bashir's immunity as a Head of State.[168] Second, it has a horizontal effect, meaning that 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 from the Court in the exercise of its jurisdiction in the situation in Darfur. Accordingly, article 98(1) of the Statute is not applicable to the arrest of Omar Al-Bashir and his surrender to the Court.[169]

87. The UNSC Resolution did not need to expressly set out the effect that it would have on Omar Al-Bashir's immunities that he otherwise enjoys under international law.[170] Since the UNSC Resolution referred the situation in Darfur to the Court pursuant to article 13(b), which provides that the Court may exercise its jurisdiction "in accordance with the provisions of [the] Statute", the Security Council must have regarded it as obvious that the Rome Statute

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[161] Decision, para. 38; *contra* Appeal, paras. 65-81.
[162] Decision, para. 37.
[163] Decision, para. 38.
[164] Decision, para. 38. Article 27(2) of the Statute provides as follows: "Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such person."
[165] Decision, para. 38.
[166] South Africa Decision, paras. 92-94.
[167] *See above* paras. 15-27.
[168] Decision, para. 39; South Africa Decision, paras. 76-78, 92.
[169] Decision, para. 39; South Africa Decision, paras. 79-80, 93. Because no immunities are applicable to the situation in Darfur, the UNSC Resolution cannot be seen as implicit "waiver" of Omar Al-Bashir's immunities within the meaning of article 98(1): Decision, paras. 32, 41; South Africa Decision, para. 96; *contra* Appeal, paras. 65-67.
[170] *Contra* Appeal, paras. 68-69.

applies as a whole, including article 27(2). The Chamber correctly held that this provision renders inapplicable any immunity on the ground of official capacity belonging to Sudan that would otherwise exist under international law.[171]

88. If the Security Council had intended to provide for an exception to the principle that the Rome Statute applies in its entirety, it would have had to mention that expressly,[172] as it did, for instance in paragraph 6 of the UNSC Resolution, which provides that nationals, current or former officials or personnel from a contributing State *outside Sudan* which is not a party to the Rome Statute, shall be subject to the exclusive jurisdiction of that contributing State.[173] Jordan misinterprets this paragraph of the UNSC Resolution.[174] If anything, paragraph 6 shows that the Security Council was aware of immunity issues for "nationals, current or former officials or personnel from a contributing State". It appears to place such persons outside the Court's jurisdiction without affecting the general application of the Statute, including article 27(2), to nationals of Sudan.[175]

89. Jordan's reliance on a recent case of the European Court of Human Rights (*Al-Dulimi and Montana Management Inc. v. Switzerland*)[176] is misplaced. The immunity that may attach to a person based on his or her official capacity is not a fundamental human right. Indeed, immunity does not belong to an individual but rather to a State.[177] In any event, the Security Council's decision to refer Sudan to the Court clearly sets aside any official immunity.

90. There is no need for any evidence in the *travaux préparatoires* of the UNSC Resolution pointing to the intent of the members of the Security Council for specific provisions of the Rome Statute, including article 27(2), to apply.[178] The Chamber correctly held that it is immaterial whether the Security Council intended—or even anticipated—that, by virtue of article 27(2), Omar Al-Bashir's immunity would not operate to prevent his arrest sought by the Court. The application of article 27(2)—providing that no immunities which may attach

[171] Decision, para. 38.
[172] *Contra* Appeal, para. 71.
[173] South Africa Minority Opinion, para. 71.
[174] Appeal, para. 72. Contrary to Jordan's submission, paragraph 6 of the UNSC Resolution does not generally avoid addressing obligations of non-States Parties. It specifies that nationals of non-States Parties are subject to the exclusive jurisdiction of the relevant national jurisdictions. It also emphasises that this does not apply to nationals of Sudan.
[175] As previously argued, the Prosecution does not accept that, as a matter of law, these persons are exempted from the jurisdiction of the Court for crimes committed in Darfur: *see* ICC-02/05-01/09-T-2, 68:4-6.
[176] Appeal, para. 70.
[177] Decision, para. 38; *see also* South Africa Decision, para. 77, 79, 81-82.
[178] *Contra* Appeal, para. 73.

to the official capacity of a person under national or international law shall bar the Court from exercising its jurisdiction over such a person—is "a *necessary, un-severable, effect of the informed choice* by the Security Council to trigger the jurisdiction of this Court and impose on Sudan the obligation to cooperate with it".[179]

91. As correctly noted by Jordan,[180] the Inquiry Report on the Situation in Darfur, which is referred to in the UNSC Resolution,[181] mentions the possibility of prosecuting government officials.[182] Although this did not necessarily anticipate that Omar Al-Bashir would be prosecuted as a result of the UNSC Resolution, it shows that the Security Council was aware of the possibility that public officials might be implicated in crimes committed in Darfur and that they could be the subject of an investigation by the Prosecution.[183] If the Security Council intended to exempt any public officials from Sudan from criminal prosecution based on immunities that would otherwise exist under international law, then it would have done so expressly.

92. For the resolution of this appeal, it is entirely irrelevant that a number of States have failed to arrest and surrender Omar Al-Bashir in the past and that the Security Council and the ASP have not yet taken action upon referrals by the Court of States under article 87(7).[184] Each and every such referral was based on a finding by the competent chamber that the State in question failed to comply with a request to cooperate by the Court contrary to their duties under the Statute. The erroneous and unlawful actions of other States do not derogate from Jordan's duties as a State Party to the Rome Statute or from the binding effect of the UNSC Resolution.[185] To the contrary, they illustrate the importance of a clear ruling from the Appeals Chamber on this issue.

93. Similarly, the fact that some individual member States of the Security Council have expressed contrary views on the applicability of Head of State immunity[186] does not impact

[179] Decision, para. 40 (emphasis added); *see also* South Africa Decision, para. 95.
[180] Appeal, para. 74.
[181] UNSC Resolution, first paragraph of the preamble.
[182] Report of the International Commission of Inquiry on violations of international humanitarian law and human rights law in Darfur, S/2005/60, 25 January 2005, paras. 641, 644-645.
[183] *Contra* South Africa Minority Opinion, para. 72.
[184] *Contra* Appeal, para. 75; *see also* South Africa Minority Opinion, para. 90.
[185] Judge Perrin de Brichambaut points out that the Security Council has not adopted any measures against Sudan that would suggest that it expected Sudan to lift the immunities against Omar Al-Bashir: South Africa Minority Opinion, para. 81. As argued above, article 27(2) of the Statute renders any immunity inapplicable by operation of law, which makes it unnecessary for Sudan to take any steps to lift his immunities.
[186] Appeal, para. 75, fn. 78; *see also* South Africa Minority Opinion, para. 89.

on the legal effects of the UNSC Resolution.[187] Had the Security Council intended to comment further on its prior resolution, it could have done so in the context of the biannual reports that the Prosecutor provides to the Security Council according to the UNSC Resolution itself.[188] The Security Council has not done so. Similarly, the Security Council refused to accede to the repeated requests from the African Union to invoke article 16 of the Rome Statute to defer the investigation and prosecution of Omar Al-Bashir, among others, on the basis of his Head of State immunity under international law.[189] This further shows that the Security Council sees no reason to interfere with the Court's discharge of its mandate in the prosecution of the case against a sitting Head of State.[190]

94. Interpreting the UNSC Resolution to render inapplicable any immunity that Omar Al-Bashir would otherwise enjoy under international law does not modify the Statute.[191] To the contrary, as discussed above, this is the direct effect of the Security Council's decision to refer the situation to the Court under article 13(b), which triggers the Court's exercise of jurisdiction in accordance with the provisions of the Statute, including article 27(2).

95. For all the reasons set out above, the Appeals Chamber should dismiss Jordan's Second Ground of Appeal.

C. The Pre-Trial Chamber properly referred Jordan to the ASP and the Security Council (Third Ground of Appeal)

96. Having first correctly found that Jordan had failed to comply with its obligations, as a State Party, to arrest and surrender Omar Al-Bashir to the Court, the Pre-Trial Chamber then properly referred Jordan to the ASP and the Security Council.[192] The Chamber engaged in a distinct analysis to assess if Jordan's referral was warranted. It found, on the facts before it, that Jordan's unilateral refusal to comply with the Court's request for cooperation justified

[187] In this context, *see* South Africa Minority Opinion, para. 78 (noting that, in meetings subsequent to the passing of the UNSC Resolution, certain States explicitly pointing out that the aim of the UNSC Resolution was to ensure that "(all) perpetrators of serious crimes should be punished"). According to Judge Perrin de Brichambaut, such statements may be seen as a possible endorsement of the position that immunities were removed by the UNSC Resolution.
[188] UNSC Resolution, para. 8.
[189] *EJIL Talk!*, D. Akande, Addressing the African Union's Proposal to Allow the UN General Assembly to Defer ICC Prosecutions, 30 October 2010.
[190] South Africa Minority Opinion, para. 82.
[191] *Contra* Appeal, para. 76.
[192] Decision, paras. 51-55.

referral.[193] The Chamber correctly exercised its broad discretion to refer Jordan. Three separate factors justified Jordan's referral:[194]

- *First*, Jordan had expressed unambiguously its position, and choice, not to execute the Court's request before Omar Al-Bashir's visit, and essentially provided "advance notice of [its] non-compliance";[195]

- *Second*, at the time when it chose not to arrest Omar Al-Bashir, Jordan already had proper and unequivocal notice of both its obligation to arrest and surrender Omar Al-Bashir, *and* that, in principle, invoking consultations with the Court did not suspend Jordan's obligations;[196] and

- *Third*, the manner in which Jordan approached the Court for consultations (unlike South Africa) warranted referral to the ASP and Security Council for appropriate measures.[197]

97. Jordan fails to show that the Chamber erred in exercising its discretion. Rather, the Appeal mistakes the Chamber's reasoning, and in particular the factors instrumental to the Chamber's decision.[198] In these circumstances, the Pre-Trial Chamber's proper exercise of discretion should not be second-guessed or revised, and Jordan's submissions should be dismissed.

[193] Decision, paras. 42, 45-49, 51-55.
[194] *Contra* Appeal, para. 89.
[195] Decision, para. 53 ("In the case at hand, the Chamber takes into account the fact that Jordan's submissions indicate that it did not consider there to be any kind of unclarity as to its obligations *vis-à-vis* the Court. Jordan took a very clear position, chose not to execute the Court's request for arrest and surrender of Omar Al-Bashir and did not require or expect from the Court anything further that could assist it in ensuring the proper exercise of its duty to cooperate"). *See also* para. 47.
[196] Decision, para. 54 ("The Chamber also notes in this regard 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"). *See also* paras. 45, 48.
[197] Decision, paras. 54-55 ("While the Chamber has previously held that the fact that South Africa was the first State Party to approach the Court with a request for consultations militated against a referral of non-compliance, this circumstance does not exist in the case at hand. Accordingly, the Chamber does not consider that there remains anything to be undertaken by the Court and that the case of Jordan's non-compliance should be referred to the [ASP] and the Security Council"). *See also* paras. 47-48.
[198] Appeal, paras. 84-107.

C.1. The Pre-Trial Chamber properly exercised its discretion

C.1.i. The Pre-Trial Chamber has a "considerable degree of discretion"

98. The Pre-Trial Chamber's decision to refer Jordan was a discretionary one. The degree of discretion afforded to a Chamber depends on the nature of the decision in question.[199] At this Court, a chamber of first instance, in deciding to refer a State to the ASP or Security Council under article 87(7), "is endowed with a considerable degree of discretion".[200] As the Appeals Chamber has underscored, the chamber of first instance is "intimately familiar" with the entirety of the proceedings, including any consultations relating to cooperation with a State Party that may or may not have taken place, and the potential impact of the non-cooperation at issue.[201] In these circumstances, determining whether to refer a State's non-compliance to the ASP or Security Council is "at the core of the relevant Chamber's exercise of discretion".[202] Such a decision should not be disturbed lightly on appeal. The Appeals Chamber's review is therefore deferential.

99. Jordan's appeal against the referral fails to demonstrate any of the *limited conditions* which could prompt the Appeals Chamber to disturb the Pre-Trial Chamber's exercise of discretion.[203] It fails to show an erroneous interpretation of the law or a patently incorrect conclusion of fact.[204] It also fails to show an abuse of discretion "so unfair or unreasonable" so as to "force the conclusion that the Chamber failed to exercise its discretion judiciously".[205] And even if *arguendo* the Chamber had improperly exercised its discretion, Jordan fails to argue—let alone show—that such error materially affected the Decision.[206] Jordan's Third Ground of Appeal should be dismissed.

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[199] ICC-01/09-02/11-1032 OA5 ("*Kenyatta* AD"), paras. 25, 64.
[200] *Kenyatta* AD, para. 64.
[201] *Kenyatta* AD, para. 64.
[202] *Kenyatta* AD, para. 64.
[203] *See* ICC-01/05-01/13-2275-Red A A2 A3 A4 A5 ("*Bemba et al.* AJ"), para. 101; ICC-01/05-01/13-2276-Red A6 A7 A8 A9 ("*Bemba et al.* SAJ"), para. 22; *Kenyatta* AD, paras. 21-25. *See also* ICC-01/04-02/12-271-Corr A ("*Ngudjolo* AJ"), para. 21 ("[p]rocedural errors often relate to alleged errors in a Trial Chamber's exercise of discretion").
[204] *See Kenyatta* AD, para. 24 ("With respect to an exercise of discretion based upon an incorrect conclusion of fact, the Appeals Chamber applies a standard of reasonableness in appeals […]. The Appeals Chamber will not interfere with the factual findings of a first instance Chamber unless it is shown that the Chamber committed a clear error, namely, misappreciated the facts, took into account irrelevant facts or failed to take into account relevant facts. Regarding the misappreciation of facts, the Appeals Chamber will not disturb a Pre-Trial or Trial Chamber's evaluation of the facts just because the Appeals Chamber might have come to a different conclusion. It will interfere only where it cannot discern how the Chamber's conclusion could have reasonably been reached from the evidence before it").
[205] *Bemba et al.* AJ, para. 101; *Bemba et al.* SAJ, para. 22; *Kenyatta* AD, para. 25.
[206] *Bemba et al.* AJ, para. 100; *Bemba et al.* SAJ, para. 22; *Kenyatta* AD, para. 22. *Contra* Appeal, para. 107.

C.1.ii. Jordan fails to show that the Pre-Trial Chamber erred in exercising its discretion

C.1.ii.a. The Pre-Trial Chamber correctly interpreted the law and reasonably assessed the facts

100. Jordan's analysis of the "two factors" that the Chamber relied on is incorrect.[207] The Appeal misstates both factors. As the first factor, the Chamber found that Jordan's "very clear" position and choice not to execute the Court's request for cooperation—and not its non-compliance *per se*—justified the referral.[208] Since the referral did not automatically follow the non-compliance finding, the Chamber did not err in law.[209] Further, as the record shows, Jordan's unilateral decision not to comply with the Court's request warranted the referral.[210] As the second factor, the Chamber found that, at the time of Omar Al-Bashir's visit to Jordan, it had already unequivocally expressed the Court's position that States Parties were obliged to arrest and surrender Omar Al-Bashir and had determined that consultations with the Court did not suspend this obligation.[211] Contrary to Jordan's argument, the Chamber's statement of the law from the South Africa proceedings was highly relevant.[212] Moreover, irrespective of the South Africa proceedings, Jordan, as a State Party, knew that it was obliged to arrest and surrender Omar Al-Bashir since 2009.[213] What was expected of Jordan, in the circumstances, was well known. And yet, it failed to comply with its obligations, but rather presented the Court with a *fait accompli*. The Chamber did not, therefore, err in fact or law. Jordan's submissions should be dismissed.

101. At the outset, Jordan incorrectly suggests, as a matter of law, that a single factor cannot support a decision to refer.[214] The Appeals Chamber has previously clarified that a chamber has *discretion to consider all factors that may be relevant* in the circumstances of the case.[215] This discretion necessarily includes reliance on a single factor, if appropriate in the case. Setting a numerical threshold, as Jordan seeks to, unduly curtails the Chamber's discretion.

[207] Appeal, paras. 89-95.
[208] Decision, para. 53. *Contra* Appeal, para. 89 ((mis)stating, as the first factor, that Jordan did not comply with the Court's request).
[209] *Contra* Appeal, paras. 90-92.
[210] Decision, paras. 45-49, 53.
[211] Decision, para. 54.
[212] Appeal, para. 93.
[213] Decision, para. 3 ("Jordan was notified of the requests for arrest and surrender of Omar Al-Bashir to the Court pursuant to the two warrants on 5 March 2009 and 16 August 2010 respectively.").
[214] Appeal, paras. 90, 93.
[215] *Kenyatta* AD, para. 53.

Notwithstanding, the Pre-Trial Chamber's analysis involved several factors—all of which emphatically support the referral, individually or cumulatively.

- *The first factor: Jordan's clear position and choice not to execute the Court's request*

102. In finding that Jordan's clear position and choice not to execute the Court's request was a factor to support the referral, the Chamber correctly considered the law and the facts.[216] Jordan fails to show error.

103. *First,* in claiming that the Chamber relied on Jordan's non-compliance *per se* to justify the referral, Jordan misstates the Decision.[217] Rather, the Chamber found that Jordan's unambiguous decision not to execute the Court's request was a reason to refer.[218] Moreover, as the Decision's plain text shows, the Chamber's decision to refer Jordan was not based on the non-compliance finding alone, and was therefore not "automatic".[219] It conducted a proper analysis, involving three distinct factors.[220] Therefore, the Chamber properly interpreted the law.

104. *Second*, on the facts, the Chamber reasonably decided that Jordan "did not consider there to be any kind of unclarity as to its obligations *vis-à-vis* the Court".[221] Yet, it "chose not to execute the Court's request […]".[222] And it "did not require or expect [anything further from the Court] that could assist it in ensuring the proper exercise of its duty to cooperate."[223]

105. As the sequence of events regarding Jordan's interaction with the Court preceding Omar Al-Bashir's visit shows, Jordan's position was clear. At no point did it identify impediments to executing the Court's request such that consultations were necessary.

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[216] *Contra* Appeal, paras. 90-92.
[217] Decision, para. 89 (stating "(1) that Jordan did not comply with the Court's request").
[218] Decision, para. 53.
[219] Decision, paras. 24-25, 51 ("[t]he substantive question to be addressed at this juncture is whether it is appropriate to refer this matter to the [ASP] and/or the Security Council. This is a separate question from that of whether there has been non-compliance on the part of the requested State. Indeed, as confirmed by the Appeals Chamber, 'an automatic referral to external actors is not required as a matter of law'"). *See also Kenyatta* AD, para. 53 ("[a] referral is not an automatic consequence of a finding of a failure to comply with a request for cooperation, but rather this determination falls within the discretion of the Chamber seized of the article 87(7) application.").
[220] Decision, paras. 53-55.
[221] Decision, para. 53 (italics added).
[222] Decision, para. 53.
[223] Decision, para. 53.

- Jordan knew, as far back as 2009, that it was obliged, as a State Party, to arrest and surrender Omar Al-Bashir if he were present on its territory. Jordan was specifically notified of the two arrest warrants against Omar Al-Bashir on 5 March 2009 and 16 August 2010.[224] Despite being asked at the time to identify any impediments to the execution of the request, [225] Jordan did not do so.

- Following media reports that Omar Al-Bashir may visit Jordan to participate in the 28th Arab League Summit in Amman on 29 March 2017, the Court, on 21 February 2017, reminded Jordan of its obligations, sought information on the intended visit, and renewed its request to Jordan to cooperate.[226]

- Jordan replied a month later. In its 24 March 2017 *note-verbale*, five days before the Summit, Jordan stated that its representatives had invited Omar Al-Bashir to the Summit on 9 January 2017. Although Omar Al-Bashir had been included in the Sudanese delegation, Jordan had not received "official confirmation" of the visit.[227] Jordan noted that it "adher[ed] to its international obligations, including those (*sic*) the applicable rules of customary international law, while taking into account all its rights thereunder."[228] Again, Jordan did not identify any concrete impediment to executing the Court's request.

- A day before the Summit, in a second *note-verbale* on 28 March 2017, Jordan confirmed that Omar Al-Bashir was attending the Summit.[229] For the first time, it noted the content of the arrest warrants and stated that Omar Al-Bashir "enjoys sovereign immunity as a sitting Head of State under the rules of customary international law".[230] It further stated that Sudan had not waived Omar Al-Bashir's immunity. Jordan confirmed that it would act consistently with such immunity. [231] In

[224] *See* Decision, paras. 3-6 (noting ICC-02/05-01/09-291 ("24 March 2017 Registry Report"); ICC-02/05-01/09-291-Conf-Anx1 ("21 February 2017 Registry Note-Verbale") and ICC-02/05-01/09-291-Conf-Anx2 ("24 March 2017 Jordan Note-Verbale")). *See also* ICC-02/05-01/09-7 ("6 March 2009 Request to States Parties"), pp. 5-6 (requesting all States Parties to arrest and surrender Omar Al-Bashir and *inter alia* to inform the Court, pursuant to article 97, of any problem which may impede or prevent the execution of the request); ICC-02/05-01/09-96 ("21 July 2010 Supplementary Request to States Parties"), p. 5.
[225] *See* 6 March 2009 Request to States Parties, pp. 5-6; 21 July 2010 Supplementary Request to States Parties, p. 5.
[226] Decision, para. 5 (noting 21 February 2017 Registry Note-Verbale).
[227] Decision, para. 6 (noting 24 March 2017 Jordan Note-Verbale).
[228] Decision, para. 6 (noting 24 March 2017 Jordan Note-Verbale).
[229] Decision, para. 7 (noting ICC-02/05-01/09-293-Conf-Anx1-Corr ("28 March 2017 Jordan Note-Verbale")).
[230] Decision, para. 7 (noting 28 March 2017 Jordan Note-Verbale).
[231] Decision, para. 7 (noting 28 March 2017 Jordan Note-Verbale).

doing so, Jordan also declared that UNSC Resolution 1593, UNSC practice and articles 27(2) and 98(1) did not require it to act inconsistently with rules of general international law on immunity.[232] Although Jordan—in a single sentence—declared an intention to "consult" with the Court under article 97,[233] it posed no question regarding the scope of its obligations, nor asked the Court to resolve any ambiguity in its understanding.

- Omar Al-Bashir attended the Summit on 29 March 2017. Jordan failed to arrest and surrender him to the Court.[234]

- Although Jordan had already expressed its reasons for why it had not intended to arrest Omar Al-Bashir, the Chamber gave it a second opportunity to address it.[235] Jordan sought and was granted additional time to do so.[236] Notwithstanding, Jordan presented a further detailed set of arguments seeking to justify its non-compliance.[237]

106. In these circumstances, the Pre-Trial Chamber correctly and reasonably described Jordan's conduct prior to Omar Al-Bashir's visit as only providing "advance notification of non-compliance".[238] Rather than drawing the Court's attention to an impediment to executing the request or raising a genuine ambiguity, Jordan announced its resolve to adhere to Omar Al-Bashir's "immunity".[239] Although it claimed that its article 97 request for consultations was "never answered" by the Court,[240] Jordan never asked a question of the Court. Rather, it presented the Court with a *fait-accompli* on the eve of Omar Al-Bashir's visit.

107. *Third*, Jordan incorrectly suggests that the Pre-Trial Chamber's decision to refer it to the ASP and the Security Council pursuant to article 87(7) was punitive in nature.[241] It was not. Rather, in view of Jordan's unmistakable position that it would not arrest Omar Al-Bashir and

[232] Decision, para. 7 (noting 28 March 2017 Jordan Note-Verbale).
[233] Decision, para. 7 (noting 28 March 2017 Jordan Note-Verbale ("Jordan is hereby consulting with the ICC under article 97 of the Rome Statute […] as regards the content of the arrest and surrender warrants […]")).
[234] Decision, para. 8.
[235] ICC-02/05-01/09-297 ("26 April 2017 Decision"), para. 8 ("[Jordan] already provided certain submissions as to the reasons for its (at that time only intended) non-compliance with the Court's request […]. Nonetheless, the Chamber is of the view that […] it is appropriate to give Jordan the opportunity to provide additional submissions if it wishes to do so").
[236] Decision, para. 9 (noting ICC-02/05-01/09-298-Conf-Anx ("24 May 2017 Jordan Note-Verbale") and ICC-02/05-01/09-299 ("2 June 2017 Decision")).
[237] Decision, paras. 10, 14-19 (noting ICC-02/05-01/09-301-Conf-Anx ("30 June 2017 Jordan Note-Verbale"), pp. 1-8).
[238] Decision, para. 47.
[239] Decision, para. 15.
[240] Decision, para. 18 (noting 30 June 2017 Jordan Note-Verbale).
[241] Appeal, paras. 91-92.

the subsequent futility of any further consultations with the Court, the Chamber correctly considered that the Court could do no more. In these circumstances, referring Jordan to the ASP and the Security Council would make available further measures that are not at the Court's disposal, and thus obtain Jordan's cooperation.[242] Since the ultimate goal is to obtain cooperation, such measures could include providing concrete assistance to obtain cooperation, providing incentives for cooperation, and engaging in further consultations.[243] The Chamber's referral therefore was appropriately "value-neutral".[244] And, contrary to Jordan's submissions, there is much to gain by its referral.[245] The ASP has several measures at its disposal.[246] Critically, since the Court lacks a direct enforcement mechanism and cannot fulfil its mandate without the States' cooperation, the Security Council, when it has referred the situation to the Court, is equally well placed to take appropriate measures to ensure cooperation.[247] The referral was the "most effective"—and perhaps only—way of obtaining further cooperation by Jordan in the circumstances, so as to preserve the object and purpose of article 87(7).[248]

108. For these reasons, the Chamber correctly considered Jordan's clear position and choice not to execute the Court's request as a basis for referral.

[242] Decision, paras. 54-55.
[243] *Kenyatta* AD, para. 53.
[244] *Kenyatta* AD, para. 53. *See also* Article 87(7) Libya Decision, para. 33 ("[A]rticle 87(7) is value-neutral, and not designed to sanction or criticise the requested State. [This] provision makes available to the Court an additional tool so that it may seek assistance to eliminate impediments to cooperation").
[245] Appeal, para. 92 (querying "exactly what is gained by the Chamber now seeking further action from either the [ASP] or the Security Council").
[246] *See e.g.* Statute, art. 112(2)(f) ("The Assembly shall consider pursuant to article 87, paragraphs 5 and 7, any question relating to non-cooperation"); ICC-ASP/10/Res.5 (21 December 2011), Annex, paras. 6 (recognising non-judicial measures to support the effectiveness of the Rome Statute by deploying political and diplomatic effort to promote cooperation and respond to non-cooperation), 12-20 (recognising both formal response procedures (Emergency Bureau meetings, open letters from the President of the ASP, Bureau meetings at the ambassadorial level, public meetings with the Working Groups, further discussion in plenary sessions) and informal response procedures (using the President's good offices)); C. Kreβ and K. Prost, "Article 87", in O. Triffterer and K. Ambos, *The Rome Statute of the International Criminal Court: a Commentary*, 3rd Ed. (München/Oxford/Baden Baden: C.H.Beck/Hart/Nomos, 2016), p. 2041 (mn. 69: "As a consequence the [ASP] is entitled to ask for immediate compliance with the Court's request and may condemn the State Party's failure. It may go beyond this and consider the appropriateness of collective countermeasures, such as economic sanctions, against the non-cooperating State"); J. O'Donohue, "The ICC and the ASP", in C. Stahn (ed.), *The Law and Practice of the International Criminal Court* (Oxford: OUP, 2015), pp. 131-133 (referring to the ASP's diplomatic initiatives to address non-cooperation).
[247] ICC-02/05-01/09-195 ("DRC Decision"), para. 33.
[248] *Kenyatta* AD, para. 51.

- *Second factor: Jordan knew that it was obliged to arrest Omar Al-Bashir and that consultations did not suspend its obligation*

109. At the time of Omar Al-Bashir's March 2017 visit to Jordan, the Court had unequivocally expressed its position that a State Party was obliged to arrest him and that consultations did not preclude this obligation. Jordan was aware of these facts, not just through the South Africa proceedings, but also through the extensive public record of this case. It was thus on "notice".[249] In exercising its discretion, the Chamber correctly assessed the law and the facts.[250] The Chamber also sufficiently explained its decision.[251] Jordan fails to show error.

110. *First,* Jordan misstates the Chamber's finding. The Chamber did not rely on "a finding of non-compliance by South Africa".[252] Rather, what it relied on was that the Court had, at the time of Omar Al-Bashir's visit to Jordan, already expressed the *general principle* and *statement of law* that all States Parties were obliged to arrest Omar Al-Bashir, and that consultations did not suspend this obligation.[253] In this sense, the Chamber drew a factual parallel with the situation that South Africa had found itself in 2015, where South Africa had similarly asserted that consultations, or the request to engage in them, may suspend its obligations to arrest Omar Al-Bashir.[254] The Chamber had emphatically rejected this view at that time.[255]

111. Jordan knew this.[256] That Jordan was familiar with the general principles governing the "immunity" litigation at this Court may be assumed from the complex legal argument it put forward to justify its non-compliance, which often mirrored arguments raised in the South

[249] Decision, para. 54.
[250] *Contra* Appeal, paras. 93-95.
[251] *Contra* Appeal, para. 93. *See* Decision, paras. 24-55. *See also Bemba et al.* AJ, paras. 102-106 ("The Appeals Chamber notes that a trial chamber thus has a degree of discretion as to what to address or what not to address in its reasoning. Not every actual or perceived shortcoming in the reasoning will amount to a breach […]").
[252] *Contra* Appeal, para. 93.
[253] Decision, para. 54.
[254] Decision, para. 54 (referring to the "analogous circumstances" for South Africa). *See generally* ICC-02/05-01/09-243-Anx2 ("12 June 2015 Transcript"). *See also* ICC-02/05-01/09-242 ("13 June 2015 Decision"), para. 4 (noting that South Africa argued that there was lack of clarity in the law and that it was subject to competing obligations).
[255] *See* 12 June 2015 Transcript, p. 17, ln. 16-p. 23 ln. 22; 13 June 2015 Decision, para. 8 ("[Consultations] do not trigger any suspension or stay of this standing obligation. As there exists no issue which remains unclear or has not already been explicitly discussed and settled by the Court, the consultations under [article 97] have therefore ended."). *See also* Decision, fn. 78 (referring to the 12 June 2015 Transcript and 13 June 2015 Decision).
[256] *Contra* Appeal, paras. 94 (stating that the Chamber had not expressed in unequivocal terms, as of March 2017, that States were obliged to arrest Omar Al-Bashir), 100 (querying the means by which the Chamber made its views in the South Africa litigation known to Jordan).

Africa litigation at this Court.[257] In any event, the Prosecution's observations on Jordan's *notes-verbales* directly addressing the general principles governing consultations put Jordan on notice.[258] That the Chamber later heard South Africa in April 2017 on whether South Africa had failed to comply with its obligations in the specific circumstances did not alter the fact that the Court had already firmly established the law on the subject.[259] Thus, the Chamber did not err in fact.

112. *Second*, and significantly, Jordan knew that it was obliged to arrest and surrender Omar Al-Bashir to the Court since 2009.[260] This is uncontroversial. Jordan had been directly reminded of this obligation on no less than three instances since 2009—most recently, a month before Omar Al-Bashir's visit.[261] In addition, a series of decisions in the Court's public record (2011, 2013, 2014, 2016, 2017) have consistently underscored States Parties' obligations to arrest Omar Al-Bashir and surrender him to the Court.[262] That Jordan acknowledges these decisions frequently in the course of its appeal further emphasises that it was aware of its obligations.[263]

113. Moreover, Jordan's effort to characterise the Court's prior decisions as "inconsistent" or "contradictory" on the subject of its statutory obligations is inaccurate.[264] The decisions may have varied in their legal reasoning on why Omar Al-Bashir does not enjoy immunity at this

[257] Decision, paras. 7, 10, 14-19 (noting 28 March 2017 Jordan Note-Verbale and 30 June 2017 Jordan Note-Verbale). *See also* Appeal, paras. 98-102 (relying on the South Africa litigation).
[258] ICC-02/05-01/09-292-Conf ("24 March 2017 Prosecution Submission"), para. 6; ICC-02/05-01/09-294-Conf ("29 March 2017 Prosecution Submission"), para. 9. *See also* Decision, paras. 20-24.
[259] *Contra* Appeal, para. 95. *See* ICC-ASP/16/29 (Appendix) (22 November 2017), p. 5; ICC-ASP/16/Res.3 (Annex) (14 December 2017) (reiterating that "[n]either the request for consultations, the consultations, nor any outcome of consultations has suspensive effect, unless a competent Chamber so orders").
[260] *See above* para. 105.
[261] *See* Decision, paras. 3, 5.
[262] *See* Malawi Decision, p. 21 (finding that Malawi, as a State Party, failed to arrest and surrender Omar Al-Bashir to the Court, thus preventing the Court from exercising its functions and powers under the Statute); ICC-02/05-01/09-140-tENG ("Chad Decision"), p. 8 (finding that Chad, as a State Party, failed to arrest and surrender Omar Al-Bashir to the Court, thus preventing the Court from exercising its functions and powers under the Statute); ICC-02/05-01/09-151 ("26 March 2013 Chad Decision"), p. 11 (finding that Chad, as a State Party, failed to arrest and surrender Omar Al-Bashir, thus preventing the Court from exercising its functions and powers under the Statute); DRC Decision, p. 17 (finding that DRC, as a State Party, failed to arrest and surrender Omar Al-Bashir to the Court, thus preventing the Court from exercising its functions and powers under the Statute); ICC-02/05-01/09-266 ("Djibouti Decision"), p. 10 (finding that Djibouti, as a State Party, failed to arrest and surrender Omar Al-Bashir to the Court, thus preventing the Court from exercising its functions and powers under the Statute); ICC-02/05-01/09-267 ("Uganda Decision"), p. 9 (finding that Uganda, as a State Party, failed to arrest and surrender Omar Al-Bashir to the Court, thus preventing the Court from exercising its functions and powers under the Statute); South Africa Decision, para. 123 (finding that South Africa, as a State Party, failed to arrest and surrender Omar Al-Bashir to the Court, thus preventing the Court from exercising its functions and powers under the Statute).
[263] *See* Appeal, paras. 42-48, 65-67.
[264] Appeal, paras. 42-43, 46-48, 65, 67.

Court, but they were *unanimous* in their conclusions that he had no such immunity and that States Parties were obliged to arrest Omar Al-Bashir and to surrender him to the Court.[265] Jordan acknowledges that this is so, when it states that the "uncertainty" is only "in the legal bases relied upon to *deny* the immunity".[266] Likewise, chambers are entitled to reason differently, based on the unique facts and circumstances before them. It is immaterial, for the purposes of making the referral, that different chambers arrived at the same conclusion differently. Moreover, apart from stating that this "uncertainty" may have affected States' awareness of their obligations to arrest Omar Al-Bashir, Jordan fails to provide a tangible link.[267] Nor is there any such link: the legal reasoning expressed in the various decisions does not affect their ultimate findings. Likewise, Jordan's claim that Judge Perrin de Brichambaut's Minority Opinion and the Prosecution's submissions were "ambiguous" is unconvincing.[268] Neither Judge Perrin de Brichambaut (in his Minority Opinion) nor the Prosecution (in its submissions) disagreed with the States' obligations, including Jordan's, to arrest Omar Al-Bashir.[269] Quite the opposite.

114. For these reasons, the Chamber correctly considered, as a basis for the referral, that the Court had unequivocally stated, and Jordan knew, that it was obliged to arrest Omar Al-Bashir and that consultations did not suspend its obligation.

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[265] *See above* fn. 264. *See also* Malawi Decision, para. 43 ("customary international law creates an exception to Head of State immunity when international courts seek a Head of State's arrest for the commission of international crimes"); Chad Decision, para. 13 ("customary international law creates an exception to Head of State immunity when international courts seek a Head of State's arrest for the commission of international crimes"); DRC Decision, para. 29 ("Since immunities attached to Omar Al Bashir are a procedural bar from prosecution before the Court, the cooperation envisaged in [UNSC Resolution 1593] was meant to eliminate any impediment to the proceedings before the Court, including the lifting of immunities. […] By virtue of [paragraph 2], the SC implicitly waived the immunities granted to Omar Al Bashir under international law and attached to his position as a Head of State"); Djibouti Decision, para. 12 ("[T]he Security Council, acting under Chapter VII of the United Nations Charter, had effectively lifted the immunities of Omar Al-Bashir in Resolution 1593 (2005) […]"); Uganda Decision, para. 12 ("[T]he Security Council, acting under Chapter VII of the United Nations Charter, had effectively lifted the immunities of Omar Al-Bashir in Resolution 1593 (2005) […]"); South Africa Decision, para. 96 ("[All] immunities based on official capacity which could bar the Court from exercising its jurisdiction have been made inapplicable as a result of the effects of article 27(2) of the Statute and Security Council Resolution 1593 (2005)").

[266] Appeal, paras. 42, 48 (emphasis added).

[267] Appeal, para. 42. *See* DRC Decision, para. 22 ("[Nowhere] in any decision issued by the Court is there the slightest ambiguity about the Chamber's legal position regarding Omar Al-Bashir's arrest and surrender to the Court, despite the arguments invoked relating to his immunity under international law"). *See also* *Statement of ICC Prosecutor, Fatou Bensouda, before the United Nations Security Council on the Situation in Darfur, pursuant to UNSCR 1593 (2005)*, 13 December 2016 , para. 15; *Twenty-Fourth report of the Prosecutor of the International Criminal Court to the United Nations Security Council Pursuant to UNSCR 1593 (2005)*, 13 December 2016, para. 15.

[268] Appeal, fns. 66, 92.

[269] Minority Opinion, para. 1 (agreeing with the Majority that Jordan had failed to comply with its obligations and that the matter should be referred to the ASP and Security Council); Decision, paras. 20-23 (noting ICC-02/05-01/09-303-Conf ("13 July 2017 Prosecution Submissions"))

C.1.ii.b. The Pre-Trial Chamber did not abuse its discretion

115. Contrary to Jordan's submissions, the Chamber's exercise of discretion was manifestly fair and reasonable.[270] It properly considered all relevant factors, and disregarded irrelevant ones. In claiming that the Chamber "unfairly and unreasonably" distinguished between South Africa and Jordan, Jordan misreads both relevant decisions.[271] Similarly, Jordan's claim that it purportedly consulted with the Court in "good faith" is unsupported by the record.[272] Likewise, its claim that the ASP and the Security Council were unlikely to act on the referral, based on a specific statement in the South Africa Decision, is premature and speculative.[273]

116. *First,* Jordan incorrectly claims that the Chamber distinguished the "like circumstances" of South Africa and Jordan.[274] However, it misunderstands the Decision. The Chamber did not conduct a "wholesale comparison" between the circumstances surrounding South Africa's and Jordan's non-compliance.[275] Indeed, an indiscriminate comparison of the situations of two States Parties would be inappropriate. A State Party's referral must be decided, primarily, with reference to its own facts, not to the situation of a different State Party. And the Pre-Trial Chamber properly did this. Its analysis was centred on Jordan's own conduct, but it referred to the South Africa proceedings, in a limited way, to note its process of consulting with the Court. In doing so, it distinguished its findings on referral in the South Africa Decision from the case at hand.[276] Specifically, although the Chamber had found that the manner in which South Africa approached its obligation to cooperate with the Court was a "significant factor" militating against the referral,[277] it determined that Jordan's "consultations" were non-existent.[278] Jordan merely mentioned that it was "hereby consulting" with the Court "under article 97" in a brief sentence on the eve of Omar Al-Bashir's visit, with no follow-up.[279]

[270] Appeal, paras. 96-106.
[271] Appeal, paras. 98-102.
[272] Appeal, para. 104.
[273] Appeal, paras. 105-106.
[274] Appeal, paras. 98 ("The Chamber's distinction as between the position of South Africa and the position of Jordan was manifestly unfair and unreasonable"), 101 ("Such differential treatment of like circumstances is, almost by definition, unfair and unreasonable").
[275] Decision, para. 54.
[276] *See* South Africa Decision, paras. 124-138.
[277] South Africa Decision, paras. 127, 130.
[278] Decision, para. 47.
[279] Decision, para. 7 (noting 28 March 2017 Jordan Note-Verbale).

117. *Second,* and more importantly, the Chamber was justified in arriving at different conclusions in the two cases. The two cases were manifestly different in several important aspects.[280] In particular, South Africa's domestic judicial processes were instrumental in conclusively establishing its obligation to cooperate with the Court under the domestic legal framework.[281] It was established with finality that when the Government of South Africa failed to arrest Omar Al-Bashir, its conduct was "unlawful" and "inconsistent" with South Africa's obligations under the Rome Statute.[282] Critically, the Government of South Africa has accepted its obligation to cooperate with the Court under its domestic legal framework.[283] In light of this, and since the law was now clear, the Chamber found that South Africa's referral to engage external actors was not necessary to foster further cooperation.[284]

118. In sharp contrast, Jordan has not accepted its obligation to cooperate with the Court. Nor does it appear that Omar Al-Bashir's visit to Jordan—unlike his visit to South Africa—triggered any effort domestically to resolve perceived inconsistencies with Jordan's statutory obligations. Rather, Jordan continues to express a unilateral and contrary position to that of the Court. Engaging external actors is both appropriate and necessary to foster further cooperation.

119. *Third,* Jordan's assertion that it had consulted with the Court "in good faith" prior to Omar Al-Bashir's visit is unsupported by the record.[285] The Chamber was correct not to consider it. The 28 March 2017 *note-verbale*—expressing Jordan's unambiguous position that it would not arrest Omar Al-Bashir—was not a "consultation" under article 97.[286] Although article 97 gives States Parties the opportunity to advance *practical reasons* why cooperation may be impeded,[287] Jordan only expressed a *principled position* not to arrest

[280] *Contra* Appeal, paras. 98-102.
[281] South Africa Decision, paras. 136-137.
[282] South Africa Decision, para. 136.
[283] South Africa Decision, para. 136.
[284] South Africa Decision, paras. 135-138.
[285] Appeal, para. 104.
[286] Decision, para. 47. *See also* South Africa Decision, para. 112.
[287] *See e.g.* South Africa Decision, para. 112 ("[Article 97] is built on the implicit and realistic expectation that, due to practical reasons, straightforward cooperation may occasionally not be possible. […] This provision mentions as possible examples: (i) insufficient information to execute the request; (ii) in cases of requests for surrender, the fact that, despite best efforts, the person sought cannot be located or that the investigation conducted has determined that the person in the requested State is clearly not the person named in the warrant; and (iii) the fact that execution of the request in the form in which it is made would require the requested State to breach a pre-existing treaty obligation undertaken with respect to another State"). *See also* C. Kreβ and K. Prost, "Article 97", in O. Triffterer and K. Ambos, *The Rome Statute of the International Criminal Court: a Commentary*, 3rd Ed. (München/Oxford/Baden Baden: C.H.Beck/Hart/Nomos, 2016), p. 2115 (mns. 1-2) ("Article 97 is of practical importance in that it creates a consultative mechanism which should be used to

Omar Al-Bashir. The Court's law is clear: Jordan was obliged to arrest Omar Al-Bashir. And the Court is the sole authority to decide if immunities applied or not.[288] Any article 97 consultation was not an avenue for Jordan to express a different opinion, or to explore a binary choice of whether it should or should not arrest Omar Al-Bashir.[289] As the Chamber has said, "it is not in the nature of legal obligations that they can simply be put aside on the grounds of a disagreement with a determination of a competent court of law, or perceived unfairness of the process and/or the result."[290]

120. The 28 March 2017 *note-verbale* also did not constitute a proper request to consult with the Court under article 97. In that *note-verbale*, apart from referring to "article 97", Jordan did not seek anything further from the Court, or even express an interest in meeting with Court officials. Moreover, despite being given ample opportunity to "consult" with the Court "without delay" on possible obstacles to cooperation, Jordan approached the Court belatedly, the day before Omar Al-Bashir's visit.[291]

121. *Fourth,* Jordan incorrectly asserts that the Chamber was obliged to consider the "likelihood of any action by the ASP and Security Council" as a factor militating against referral, as it had for South Africa.[292] In its South Africa Decision, the Chamber considered that referrals had "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 […]". In this context, it found that this "further strengthened its belief" that South Africa's referral was not warranted.[293] This factor was not standalone or

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resolve any problems which may arise in relation to a request under this Part. […] It obliges the States Parties to consult with the Court without delay when any execution problems arise. […] Article 97 signals a cooperative approach to the resolution of problems and presumes good faith efforts on the part of the Court and the State. In a case where such a cooperative approach does not yield a result, the Court will have to rely on its power under article 87(7) and article 119(1) of the Statute to authoritatively settle the dispute"). *See also* Prost, p. 8 ("The idea was to have a specific statutory provision available to states should there be practical problems with the execution of a request. At the same time, it should be a flexible mechanism which could be used to encourage successful execution of the Court's requests for assistance by providing a forum for addressing issues for discussion, as opposed to providing for refusal or adversarial challenge. In essence, it was intended as an Article that would allow for the Court and a state to work together to solve practical problems").

[288] *See e.g.* Chad Decision, para. 10; DRC Decision, para. 16.

[289] South Africa Decision, paras. 117, 120, 121.

[290] South Africa Decision, para. 121.

[291] *See above* para. 105. *See also* Decision, paras. 46-49.

[292] Appeal, paras. 105-106. *See* South Africa Decision, para. 138.

[293] South Africa Decision, para. 138.

even determinative, but rather assessed in the totality of the circumstances specific to South Africa.[294]

122. Jordan's attempt to present this factor as a question of "principle" relevant to all referrals made at this Court is unsustainable.[295] Doing so would effectively deprive article 87(7) of its meaning: engaging with external actors, such as the ASP and the Security Council, as a remedy for non-cooperation is an essential feature of the Statute. Moreover, although the Chamber was entitled to consider that further engagement with the ASP and Security Council was not necessary in the South Africa situation, Jordan's statement that the Chamber must likewise do so here unduly curtails its legitimate discretion. The Chamber was not obliged to consider exactly the same factors as a basis of both referrals. And to claim that Jordan's referral to the ASP and the Security Council would not result in any positive action by them—merely three months after the Decision and before the Presidency has even officially notified them of it—is premature and speculative.[296]

123. For these reasons, the Chamber properly considered all relevant factors, disregarded irrelevant factors, and correctly exercised its discretion.

124. Therefore, the Appeals Chamber should dismiss Jordan's Third Ground of Appeal.

C.2. In principle, granting suspensive effect is appropriate

125. Jordan requests the Appeals Chamber to suspend the Pre-Trial Chamber's decision to refer it to the ASP and Security Council through the President of the Court according to regulation 109(4) of the Regulations of the Court, pending the final resolution of the appeal.[297] The Prosecution agrees in principle, but defers to the Appeals Chamber's discretion to do so. If the Appeals Chamber were to reverse the Decision and the findings on non-compliance, the referral would have no basis. If suspensive effect were granted, the Presidency would not act, under regulation 109(4), to refer the matter to the ASP and the Security Council pending the appeal. That said, given the spectrum of measures that are

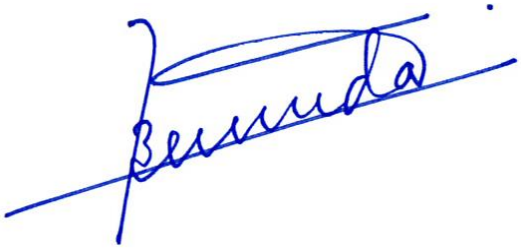
[294] South Africa Decision, paras. 135-138.
[295] Appeal, paras. 105-106.
[296] *See* Appeal, paras. 112-113 (where Jordan foreshadows the "irreversible situation" following the referral, including that the Security Council may take action or adopt measures against Jordan, and the ASP may trigger procedures relating to non-cooperation).
[297] Appeal, para. 114. Decision, disposition. *See also* Statute, art. 82(3); rule 156. *See also* ICC-01/13-43 OA ("*Comoros* Suspensive Effect Decision"), para. 7 (noting that the decision is discretionary and setting out factors); ICC-01/05-01/13-718 OA9 ("*Bemba et al.* Suspensive Effect Decision"), paras. 6-7 (rejecting the suspensive effect request).

possible upon referral, Jordan's claim that it may face "possible reputational damage" is premature at this stage.[298]

126. Finally, Jordan's attempt to pre-empt its reply to the Prosecution's response is inappropriate.[299] Regulation 24(5) of the Regulations of the Court governs replies in interlocutory appeal proceedings. Such replies are discretionary: Jordan may reply only with the Chamber's leave, and only if the Prosecution's response raises "new issues" which it could not have reasonably anticipated.[300] Therefore, should Jordan wish to reply once it is notified of the Prosecution's response, it should seek leave to reply appropriately.

Conclusion

127. For all the reasons above, the Appeal should be dismissed, and Jordan should be referred to the ASP and UN Security Council, as ordered by the Pre-Trial Chamber.



Fatou Bensouda, Prosecutor

Dated this 3rd day of April 2018[301]
At The Hague, The Netherlands

[298] Appeal, para. 112.
[299] Appeal, para. 117.
[300] *See* regulation 24(5); ICC-01/04-02/06-1994 OA6 ("*Ntaganda* Reply Decision"), para. 9.
[301] This submission complies with regulation 36, as amended on 6 December 2016: ICC-01/11-01/11-565 OA6, para. 32.