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No.: **ICC-02/05-01/09**
Date: **14 August 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

Prosecution Response to the Observations of the African Union and the League of Arab States

Source: **Office of the Prosecutor**

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Introduction

1. Following the written submissions of the Parties to this appeal concerning the Kingdom of Jordan's non-compliance with its obligation to arrest Omar Al-Bashir,[1] and the interventions of 11 *amici curiae*,[2] the African Union (AU) and the League of Arab States (LAS) filed their own submissions,[3] to which the Parties were invited to respond.[4] The Prosecution does so, although recalling again that this response is no substitute for the opportunity provided to Jordan and the Prosecution at the forthcoming oral hearing to address specific issues arising from their submissions, as well as any questions from the Appeals Chamber.[5]

2. The Prosecution welcomes the submissions of the AU and the LAS, and their constructive engagement with the proceedings of the Court, on the important questions of international law arising from this appeal.[6] While the substance of the relevant obligations is clear in the Prosecution's view, it is undeniable that reasonable minds can at least vary (and even evolve) in their rationales for *why* this might be so; indeed, more than one of these explanations might be correct and even mutually reinforcing. The existence of these proceedings before the Court demonstrates the integrity and flexibility of the system established by the Rome Statute, as the various Parties and participants contribute to finding a just and fair outcome for all concerned—but this does not itself suggest that the law is not (and was not) capable of proper determination.[7]

Submissions

3. In the Prosecution's respectful view, nothing in the observations of the AU or the LAS demonstrates that Jordan should succeed in any of its three grounds of appeal. To the contrary, the Appeals Chamber should still find that: (1) the Pre-Trial Chamber correctly interpreted the obligations under the Rome Statute, to which Jordan has consented; (2) UN Security Council resolution 1593 affected and displaced any international law immunity *arguendo* owed to Sudan; (3) the Pre-Trial Chamber's conclusions would also have been

[1] *See* ICC-02/05-01/09-309 ("Decision"); ICC-02/05-01/09-326 OA2 ("Appeal"); ICC-02/05-01/09-331 OA2 ("Response").
[2] *See generally e.g.* ICC-02/05-01/09-369 OA2 ("Prosecution Response to *Amici Curiae*"), *especially* fn. 4 (citing submissions of *amici curiae*).
[3] *See* ICC-02/05-01/09-370 OA2 ("AU Observations"); ICC-02/05-01/09-367 OA2 ("LAS Observations").
[4] *See* ICC-02/05-01/09-371 OA2.
[5] *See* ICC-02/05-01/09-351 OA2.
[6] *See also* AU Observations, paras. 3 (recognising the nature of this process as a "legal dialogue"), 19-21 (noting the progress in legal discussion of this issue at the Court).
[7] *Cf.* LAS Observations, para. 22.

correct based on alternative arguments, such as *abus de droit* or the application of the Genocide Convention; and (4) the Pre-Trial Chamber properly referred Jordan to the ICC Assembly of States Parties (ASP) and the UN Security Council.

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

4. Nothing in the observations of the AU or the LAS adds any greater weight to Jordan's submissions in support of its appeal, or shows that the Pre-Trial Chamber materially erred in interpreting the Rome Statute. All States subject to the obligations of the Statute are bound under article 27 to respect the non-applicability of immunities in their dealings concerning the Court's exercise of jurisdiction, and to act on the basis that other States similarly bound will likewise perform their obligations. Article 98(1) is not determinative of any relevant international law obligation, but instead imposes a procedural requirement for the Court to consider whether such obligations exist and apply in a given situation—in this case, the Pre-Trial Chamber correctly found that no such obligation applied. Nor was article 98(2) apposite.

5. In discussing these issues, the Prosecution recalls that the ultimate question for the Appeals Chamber is whether the Pre-Trial Chamber's conclusion was legally correct—in that respect, the Pre-Trial Chamber was not obliged to spell out every aspect of its reasoning, nor is there any impediment to the Parties or the Appeals Chamber addressing some of the implications of that reasoning in assessing its correctness.[8]

A.1. States subject to article 27 are bound to respect the non-applicability of immunities in all their dealings concerning the Court (vertical effect of article 27)

6. It is uncontroversial that article 27(2) serves to disapply any immunity which might be claimed by a person within the Court's jurisdiction in the face of the Court.[9] It also *appears* to be accepted by the AU, if not the LAS,[10] that article 27(2) precludes the assertion of immunity by a State (which is subject to that obligation) in responding to a request for assistance with regard to the arrest of its *own* official.[11] In the Prosecution's view, both these

[8] *Cf.* LAS Observations, para. 25.
[9] *See e.g.* AU Observations, para. 30 (acknowledging at least that article 27 "concerns the vertical relationship between the accused and the Court"); LAS Observations, para. 26. *See also* AU Observations, paras. 14, 25, 31.
[10] *See e.g.* LAS Observations, para. 26.
[11] *See e.g.* AU Observations, paras. 15 (accepting that, "[w]here the subject of an arrest warrant involves a head of a State Party, no issue arises"), 16 (asserting that "the duty to cooperate in the arrest and surrender does not apply in relation to a *head of non-State Party*", emphasis added).

situations may be described as the 'vertical' effect of article 27—which was the terminology of the Pre-Trial Chamber, not the Prosecution[12]—since they both engage the relationship between the Court and the State to which the immunity of the official in question attaches. Indeed, there is no legal distinction between these two situations, since it is not the accused person to whom the immunity belongs but the relevant *State* of which they are an official.[13]

7. To the extent that the AU accepts (necessarily and rightly) that article 27(2) precludes the assertion of immunity by a relevant State in failing to arrest its *own* official, it is then somewhat contradictory to imply that article 27(2) has no application at all to matters of State cooperation under Part 9.[14] To the contrary, article 27(2) is the only provision in the Statute which serves to disapply any existing immunity. Accordingly, article 27(2) must be read with Part 9, and *vice versa*, and cannot be interpreted as exclusively relating to matters of jurisdiction.[15] This insight supports the other interpretive considerations previously identified by the Prosecution.[16]

8. It follows from this vertical effect of article 27(2) that Sudan cannot assert immunity in respect of Mr Al-Bashir *vis-à-vis* the Court's request *to Sudan* for his arrest, provided Sudan is subject to obligations under the Statute including article 27(2).[17]

A.2 Requested States, if they are obliged to cooperate with the Court under Part 9, are entitled and required to act on the basis that States subject to article 27 will perform their obligations (horizontal effect of article 27)

9. Both the AU and the LAS argue that article 27(2) can have no effect when a State Party (such as Jordan) is requested by the Court to arrest the official of another State—even if that State, while not a State Party, is subject to the obligation in article 27 (such as Sudan)—

[12] *Contra* LAS Observations, para. 25. *See e.g.* Decision, para. 33.
[13] Accordingly, it is incorrect to describe the 'vertical' aspect of article 27 as relating to the "operation of immunities as between an *accused* and international court"—rather, the vertical relationship is between the *State of which the accused is an official* and the Court: *contra* AU Observations, paras. 25, 28, 31. *See also* Decision, para. 33.
[14] *Contra* AU Observations, paras. 30-31. *See also* LAS Observations, paras. 26-27.
[15] *Contra* AU Observations, paras. 29-30. *See also e.g.* R.S. Lee, 'States' responses: issues and solutions,' in R.S. Lee (ed.), *States' Responses to Issues Arising from the ICC Statute: Constitutional, Sovereignty, Judicial Cooperation and Criminal Law* (Ardsley: Transnational, 2005) ("Lee"), p. 16 ("Article 27 has therefore two consequences: no immunity will prevent a person from being investigated or prosecuted […]; and no immunity will prevent a person from being surrendered to the ICC when requested by the Court").
[16] *See* Response, paras. 18-41. The LAS is incorrect to assert that article 27(1) and (2) must be read disjunctively—as demonstrated, for example, by the language of article 27(1) which makes clear that the second sentence (relating to criminal responsibility, beginning "In particular") is just one articulation of the *broader* principle identified in the first sentence. *Contra* LAS Observations, para. 27.
[17] *See further below* paras. 29-32.

because this is precluded by article 98(1).[18] However, this is incorrect because it neglects the effect of article 27(2) in the Court's assessment of whether or not the requested State (Jordan) owes an obligation to the official's State (Sudan) under article 98(1). In particular, as the Prosecution previously explained, if the official's State is precluded from asserting immunity directly before the Court (vertical effect of article 27(2)), then it *must also* be precluded from asserting immunity *vis-à-vis* another State executing an arrest warrant issued by the Court (horizontal effect of article 27(2)).[19] Consequently, there is no relevant "obligation" for the purpose of article 98(1). This is neither complicated nor revolutionary—it merely reflects the ordinary application of article 27.

10. Nor does this entail any detriment to the effective functioning of article 98(1).[20] To the contrary, as further explained below, article 98(1) still serves its *procedural* function which requires the Court to ascertain *whether* the requested State owes any relevant obligation under international law to another State.[21] Identifying that the third State is subject to obligations under article 27(2), thus displacing any obligation which the requested State might owe to that third State, is one possible outcome from that necessary procedure.

11. In this context, the Prosecution also notes that a request to execute an ICC arrest warrant and promptly surrender the person to the ICC does not amount to a request for the requested State to exercise its *own* jurisdiction over that person or the State from which they may originate. This is obviously so with respect to adjudicatory jurisdiction, but on a proper understanding no less so with respect to enforcement jurisdiction. In particular, article 59 of the Statute makes clear that the law of the requested State is relevant only to the extent that it ensures due process is applied in the arrest procedure and that the rights of the arrested person are respected;[22] the *legal justification* for the arrest, however, does not emanate from national law but from the Statute.[23] Depending on the law of the requested State, this procedure may

[18] AU Observations, paras. 30-32; LAS Observations, paras. 26-29.
[19] *See* Response, paras. 22-24.
[20] *Contra* LAS Observations, para. 26.
[21] *See below* paras. 15-16.
[22] *See e.g.* Statute, art. 59(2). *See also* ICC-02/04-01/15-260 ("*Ongwen* Decision"), para. 10 (noting that article 59(2) "states, and thus also limits, the competence of national authorities in the execution of warrants of arrest issued by the Court" and that "this provision does not, in itself, create a duty for the surrendering State to undertake any particular proceeding, upon obtaining custody over a person subject to a warrant of arrest issued by the Court, in order for the competent national authorities to transfer custody to the Court").
[23] *See e.g.* Statute, arts. 59(4) (providing that "It shall not be open to the competent authority of the custodial State to consider whether the warrant of arrest was properly issued in accordance with article 58, paragraph 1(a) and (b)"), 89(2) (in the event an arrested person brings a "challenge before a national court on the basis of the principle of *ne bis in idem* as provided for in article 20" of the Statute, the requested State shall "immediately

be particularly straightforward and expeditious.[24] Likewise, the express distinction drawn in article 102 between "surrender" and "extradition" arguably illustrates the drafters' sensitivity to the distinction between "the delivering up of a person by a State to the Court" (surrender) and "the delivering up a person by one State to another" (extradition).[25]

12. In a very real sense, therefore, the requested State is nothing more than the Court's agent in executing the Court's arrest warrant—and, consequently, the enforcement jurisdiction being exercised is that of the Court, and not that of the requested State. By contrast, the AU and LAS observations consistently tend to confuse this matter by analogising, incorrectly, to the exercise of domestic criminal jurisdiction by Jordan over Mr Al-Bashir.

A.3. Article 98(1) is not determinative of the existence, content, or scope of any "obligation[] under international law"

13. Both the AU and the LAS tend to imply that article 98(1), by its mere existence and/or wording, positively affirms the existence of one or more "obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State".[26] But this mistakes the function of article 98(1), which is procedural in nature, and neither makes nor assumes any substantive guarantee. Furthermore, consistent with its observations responding to the *amici curiae* and as further explained in the following paragraphs, the Prosecution stresses that it does not accept the AU's and the LAS's assumption that customary international law immunity *ratione personae*, opposable to the exercise of national jurisdiction, necessarily precludes the execution of an ICC arrest warrant, which is the instrument of an *international* court.

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consult with the Court to determine if there has been a relevant ruling on admissibility"; if such a ruling has not been made, then matters are stayed "until the Court makes a determination on admissibility").

[24] *See e.g.* *Ongwen* Decision, paras. 5, 11 (the arrest and surrender of Dominic Ongwen to the Court was completed in 58 minutes).

[25] *See also* C. Kreß and K. Prost, 'Article 102,' 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), pp. 2170-2171. Although Kreß and Prost explain that this distinction was drawn primarily to avoid constitutional objections by some States to delivering up their own nationals, this illustrates the understanding of the unique legal regime applicable to "the very specific context of the Court" (mn. 2), and its clear differentiation from other mutual legal assistance regimes. *See further* Lee, p. 19 ("The Statute created an autonomous regime of 'surrender' to replace the traditional inter-state extradition regime and to express the special relationship between the ICC and states parties").

[26] *See e.g.* AU Observations, paras. 9-10, 17-18, 81; LAS Observations, paras. 26, 28-29, 32, 36. The AU also addresses, more generally, the correctness of the Pre-Trial Chamber's previous conclusions that there may be no immunity opposable to the ICC's exercise of jurisdiction: *e.g.* AU Observations, paras. 20-26.

14. Accordingly, while the most straightforward way to resolve this appeal remains the Pre-Trial Chamber's approach in the Decision—that is, that the Statute, the UN Charter, and UN Security Council resolution 1593 combine to disapply *any* relevant immunity *arguendo* for the purpose of the situation in Sudan—the appeal could alternatively be dismissed because no immunity under international law is in any event applicable to this situation. It is purely for reasons of judicial economy that the Prosecution maintains the view that it is unnecessary to decide this broader question of general international law,[27] which may in any event ultimately fall for consideration in another forum.[28]

A.3.a. Article 98(1) requires the Court to undertake its own assessment of the obligations of the requested State

15. As the Prosecution stated in its Response to the *Amici Curiae*, and in Professor Kreβ's words, article 98(1) "provides no basis for a presumption that a certain international law immunity exists."[29] Accordingly, to the extent that Jordan, or the AU or the LAS, claims to benefit from the existence of an applicable immunity, this too is a matter for the Appeals Chamber's determination, and cannot be taken for granted.

16. Indeed, it is clear from the drafting history that the States at the Rome Conference recognised the ambiguity surrounding the nature or scope of any rules of international law which might impede the execution of the Court's requests for assistance by its States Parties.[30] This was resolved through a compromise provision—article 98(1)—which established a *procedure* to be followed if a conflict was identified between a request for

[27] *See* Prosecution Response to *Amici Curiae*, paras. 8-9, 22.

[28] *See e.g.* UN General Assembly, *Request for the inclusion of an item in the provisional agenda of the seventy-third session: request for an advisory opinion of the International Court of Justice on the consequences of legal obligations of States under different sources of international law with respect to immunities of Heads of State and Government and other senior officials*, letter dated 9 July 2018 from the Permanent Representative of Kenya to the United Nations addressed to the Secretary-General, UN Doc. No. A/73/144, 18 July 2018.

[29] Prosecution Response to *Amici Curiae*, para. 14 (quoting 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) ("Kreβ (2012")), p. 233).

[30] *See e.g.* C. Kreß and K. Prost, 'Article 98,' in O. Triffterer and K. Ambos (eds.), *The Rome Statute of the International Criminal Court: a Commentary*, 3rd Ed. (München/Oxford/Baden-Baden: C.H. Beck/Hart/Nomos, 2016) pp. 2119-2120, mns. 2-4 (recalling that, in preparing the initial draft of the Statute, "there was no unanimous view" regarding the matters which would come to be addressed in article 98(1), and that "the issue of conflicting immunities was rather reluctantly addressed by some delegations, which were of the view that developments in general international law had substantively reduced, if not eliminated, immunities with respect to crimes under international law as listed in article 5", and that the draft provision was retained "on the insistence of some other delegations and without there being time for a sufficiently thorough discussion in the course of the Rome Conference"; recalling further that "[i]t was recognized to be both impossible in the time available and undesirable to set up a list of those international obligations regarding immunities […] held by sending States that would indeed conflict with the obligation to surrender under article 89 para. 1" and that "[i]t followed that the determination as to whether a real conflict existed had to be taken on a case-by-case basis").

assistance and an applicable rule of international law, but left it to the Court to assess the *substantive* question as to the existence of a competing obligation, and to take the necessary action. It is for this reason, among others, that article 98(1) places the procedural obligation upon *the Court*, and not the requested States, to ensure that article 98(1) does not bar proceeding with a request for assistance in the first place.

17. Consequently, to the extent that Jordan, the AU and the LAS ask the Appeals Chamber to give due effect to article 98(1), this may ultimately require the Appeals Chamber itself to determine whether the Pre-Trial Chamber was correct in assuming that Head of State immunity "extends to any act of authority" by States "which would hinder the Head of State in the performance of his or her duties", including execution of an ICC arrest warrant.[31] For the reasons which follow, the Prosecution submits that this is incorrect.

A.3.b. It is not established that the customary law rule governing Head of State immunity encompasses a bar to the execution of an ICC arrest warrant by an ICC State Party

18. The standard for ascertaining the existence of a rule of customary international law is demanding.[32] Recent domestic practice also underlines the strict nature of the analysis, even within the particular context of immunities. Thus, the Court of Appeal of England and Wales was recently asked to consider the existence of any immunity afforded under international law to "special missions".[33] Emphasising the typical requirements of customary international

[31] S*ee e.g.* Decision, para. 27; ICC-02/05-01/09-302 ("South Africa Decision"), para. 68 (reaching this conclusion because "[t]he Chamber is *unable to identify a rule in customary international law that would exclude* immunity for Heads of State when their arrest is sought for international crimes by another State, even when the arrest is sought on behalf of an international court", emphasis added). In this respect, the Pre-Trial Chamber appears to have made the same error as some *amici curiae*, confusing limits to the scope of a customary law rule (which require no particular showing, since what is not prohibited by a rule of international law must be permitted) with further positive rules constituting *exceptions* to an existing customary law rule (which may require State practice and *opinio juris*): *see* Prosecution Response to *Amici Curiae*, paras. 12-14. Earlier decisions concerning Malawi and Chad were likewise framed in the context of an "exception" to Head of State immunity, rather than the natural limitation of the principle: *see e.g.* ICC-02/05-01/09-139-Corr ("Malawi Decision"), para. 43; ICC-02/05-01/09-140-tENG ("Chad Decision"), para. 13. The AU's criticism of the reasoning in these decisions appears to assume, incorrectly, that such matters are governed by article 27 of the Statute, rather than reflecting an analysis of customary law itself: *see* AU Observations, paras. 22-26.

[32] *See* Prosecution Response to *Amici Curiae*, para. 12, *especially* fn. 29. *See also e.g.* M.H. Mendelson, 'The formation of Customary International Law,' [1998] 272 *Recueil des Cours* 155, pp. 211-214 (quoting, *inter alia*, ICJ, *Asylum Case (Colombia/Peru)*, Judgment of 20 November 1950, ICJ Rep 266, p. 277: "The facts brought to the knowledge of the Court disclose so much uncertainty and contradiction, so much fluctuation and discrepancy in the exercise of diplomatic asylum and in official views expressed on various occasions, there has been so much inconsistency in the rapid succession of conventions on asylum, ratified by some States and rejected by others, and the practice has been so much influenced by considerations of political expediency in the various cases, that it is not possible to discern in all this any constant and uniform usage, accepted as law, with regard to the alleged rule").

[33] In particular, the Court of Appeal was concerned with the question whether customary international law requires a receiving State to grant, for the duration of a special mission (*i.e.*, a temporary visit by a single envoy or delegation on behalf of a State), personal inviolability (freedom from arrest or detention) and immunity from

law,[34] the Court of Appeal found it was right to conclude that such a customary rule existed—but when "there is a very considerable amount of evidence of different types to satisfy these two elements [of consistent State practice and *opinio juris*] and very little against".[35] Likewise, the High Court of South Africa recently stressed the insufficiency of "simply identifying a practice (*usus*)" among States,[36] without *opinio juris*, in rejecting the claim that immunity *ratione personae* is extended to the family members of a foreign Head of State.[37]

19. In responding to the observations of the *amici curiae*, the Prosecution noted the position adopted by Professor Kreβ, who made clear that he found no error in the Pre-Trial Chamber's reasoning in the Decision concerning the interpretation of the Statute and UN Security Council resolution 1593,[38] yet doubted the continued relevance of any immunity under customary international law to the present situation.[39] The Prosecution further noted that the rule of Head of State immunity must be narrowly framed, to extend no further than strictly required by its underlying purpose, which is to preserve the sovereign equality of States.[40]

20. As the ICJ itself has concluded, international law immunities do not bar the procedural exercise of criminal jurisdiction when a person is subject to criminal proceedings before

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criminal proceedings in the same fashion granted to members of permanent diplomatic missions: England and Wales, Court of Appeal, *R (On the Application of the Freedom and Justice Party and Others) v. the Secretary of State for Foreign and Commonwealth Affairs and Another* [2018] EWCA Civ 1719 ("*R (On the Application of the Freedom and Justice Party)*"), paras. 3-5.

[34] *R. (On the Application of the Freedom and Justice Party and Others)*, paras. 15-18. *See also* para. 117 (referring to the "very demanding nature of the test to establish whether a rule of customary international law exists").

[35] *R. (On the Application of the Freedom and Justice Party and Others)*, para. 78. *See also* paras. 79 ("Special missions cannot be expected to perform their role without the functional protection afforded by the core immunities. No state has taken action or adopted a practice inconsistent with the recognition of such immunities. We do not, therefore, doubt but that an international court would find that there is a rule of customary international law to that effect"), 83 ("a particular feature of the rule of customary international law in this case is that it only applies to a receiving state which agrees to receive a special mission as such").

[36] Republic of South Africa, High Court, *Democratic Alliance v. the Minister of International Relations and Cooperation et al.*, Case No. 58755/17, 30 July 2018 ("*Democratic Alliance*"), para. 21 ("Absent judicial pronouncements, evidence of what states have done on the ground may sometimes only demonstrate the existence of an *usus* but not necessarily that of an *opinio juris*. The latter understandably is much more difficult to establish. However, the Minister cannot escape the duty to demonstrate the co-existence of both […] Expressed differently, proof of the existence of an *usus* is a necessary but insufficient condition for the establishment of a custom").

[37] *Democratic Alliance*, paras. 35-36 (finding that "[w]here such immunity was granted it was on the basis of international comity rather than on the basis of a finding that it is a principle of customary international law"). The Government of South Africa has stated that it will not appeal this decision: *see e.g.* 'Govt will not appeal high court ruling on Grace Mugabe,' *The Citizen*, 2 August 2018.

[38] Prosecution Response to *Amici Curiae*, para. 20. *See also above* para. 13 (recalling that resolving this appeal on the basis of the Pre-Trial Chamber's own reasoning may remain the most economical approach).

[39] Prosecution Response to *Amici Curiae*, paras. 20-21.

[40] Prosecution Response to *Amici Curiae*, para. 13.

certain international courts, including this Court.[41] In this context, it would be anomalous to consider that those same immunities barred the *enforcement* of a warrant emanating from such a court[42]—especially since State cooperation (and in particular with regard to the essential matter of apprehending fugitives) is integral to all such courts, without exception. For the same reason that the *adjudicatory* jurisdiction of an international court is not procedurally barred by Head of State immunity (because such jurisdiction does not violate the principle of sovereign equality),[43] neither may the *enforcement* jurisdiction of an international court, even if implemented by or through a requested State,[44] be procedurally barred by Head of State immunity (because such jurisdiction does not violate the principle of sovereign equality).[45] Consequently, to the extent any immunity may avail a Head of State in such circumstances, then it must be on the basis *either* of evidence of the *extension* of the existing rule or a *separate* customary rule, both of which must be established on the basis of consistent State practice and *opinio juris*.[46]

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[41] Prosecution Response to *Amici Curiae*, para. 13, *especially* fns. 31-32 (citing ICJ, *Case concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment of 14 February 2002, ICJ Rep 3, para. 61). The AU seems not to take issue with this principle: *see e.g.* AU Observations, paras. 11-12 (referring only generally to "immunity *ratione personae* from foreign criminal jurisdiction", and asserting that this immunity is not disapplied on the basis of alleged "crimes falling within the jurisdiction of the Court", rather than the exercise of jurisdiction *by* the Court), 18-19 (apparently agreeing with Judge Eboe-Osuji in *Ruto* that the customary law immunity preventing the "trial" of a Head of State "does not operate when it comes to trying officials before *international* courts").

[42] *See above* para. 11. *Contra* AU Observations, paras. 24-26.

[43] Dapo Akande seems to distinguish in this respect between international courts created by the UN Security Council, such as the *ad hoc* tribunals, and international courts created by treaty: *see e.g.* D. Akande, 'International law immunities and the International Criminal Court,' [2004] 98 *American Journal of International Law* 407 ("Akande"), pp. 417-418. However, this derives from his view that immunity is ineffective before such bodies only to the extent their constituent acts *disapplied* such immunity: Akande, p. 418 ("the statement by the ICJ that international immunities may not be pleaded before certain international tribunals must be read subject to the condition (1) that the instruments creating those tribunals expressly or implicitly remove the relevant immunity"). This is distinct from the view that certain international courts may fall *outside* the rule of immunity *ratione personae*, founded as it is on the notion of sovereign equality, because they do not reflect the exercise of jurisdiction over one State by another, but the exercise of jurisdiction by the international community as a whole. To qualify as such, necessarily, such a Court would need to be sufficiently independent and more than the instrumentality of a small number of States seeking to impose their will over others, and thus constituting a covert effort to conduct foreign relations by unconventional means. On the other hand, if Akande's view is correct, *arguendo*, then it remains the case that the Statute in article 27 *did* disapply any relevant immunity, and that Sudan is subject to this regime by virtue of UN Security Council resolution 1593 and its obligations under the UN Charter, as otherwise argued.

[44] This is distinct from jurisdiction to enforce an international arrest warrant issued pursuant to a mutual legal assistance regime, even if issued by an international organisation such as INTERPOL, which is ultimately based on the adjudicatory jurisdiction of *national* authorities. *See* ILC, *Immunity of State Officials from Foreign Criminal Jurisdiction: Sixth Report by Ms Hernández, Special Rapporteur*, UN Doc. A/CN.4/722, 12 June 2018 ("Special Rapporteur Sixth Report"), paras. 75-79.

[45] *See also* Response, para. 21.

[46] *Contra* AU Observations, para. 14 (suggesting that Head of State immunity from the exercise of jurisdiction by another States encompasses inviolability from arrest on behalf of the Court).

21. The danger in simply assuming that the enforcement jurisdiction of this Court, even though exercised through States, is subject to Head of State immunity is underlined by recent developments at the ILC. Recent developments in this forum demonstrate that such questions remain no less controversial among States now than they did in 1998, when the compromise in article 98(1) was first struck.

- In 2016, the Special Rapporteur on this issue confirmed her view that the commission of international crimes is a limitation or exception to State immunity from foreign (national) criminal jurisdiction, at least in respect of immunity *ratione materiae* (functional immunity).[47] Furthermore, and significantly for these proceedings, she concluded that even such immunities do not prejudice any treaty provision binding on the relevant States which might disapply such immunities, or the obligation to cooperate with an international court or tribunal which requires compliance by the forum (requested) State.[48] These conclusions formed the basis for her proposed Draft Article 7(3) by qualifying the domestic execution of an ICC warrant as "proceedings in which [...] immunity cannot be invoked". In other words, in the Special Rapporteur's view, the position in general international law is perfectly consistent with the approach of the Decision and its interpretation of the Statute, including article 27, and UN Security Council resolution 1593.

- In 2018, the Special Rapporteur recorded the initial response to her conclusions, which was in general "very heated and reflected the differences between members of the Commission and between States on this question."[49] Although there was largely "a broad consensus that there should be no limitations or exceptions on immunity *ratione personae*"[50] in the exercise of *national* jurisdiction, States disagreed whether or not there was evidence for a custom or even a trend concerning limitations or exceptions to immunity.[51] On the other hand, some States also stressed the need to preserve the progress achieved by the international community in combating impunity for the most

[47] ILC, *Immunity of State Officials from Foreign Criminal Jurisdiction: Fifth Report by Ms Hernández, Special Rapporteur*, UN Doc. A/CN.4/701, 14 June 2016 ("Special Rapporteur Fifth Report"), paras. 189, 240-241. The Special Rapporteur noted that there is little practice, as yet, to support such an exception to immunity *ratione personae* in national proceedings.
[48] Special Rapporteur Fifth Report, para. 246; *see also* p. 95 (draft article 7(3)(i) and (ii)).
[49] Special Rapporteur Sixth Report, para. 8. *See also* para. 32.
[50] Special Rapporteur Sixth Report, para. 12. *See also* para. 14.
[51] Special Rapporteur Sixth Report, paras. 14-15.

serious crimes under international law, "particularly" in the Statute of this Court,[52] and States generally agreed that there must be a balance between "preservation of immunity as a guarantee of the principle of sovereign equality and maintenance of the instruments existing to combat impunity for the most serious crimes under international law."[53] Discussions resulted in the acceptance of the proposed Draft Article 7, by a vote, but *omitting* reference to Draft Article 7(3),[54] which was deferred for further consideration in the Special Rapporteur's next report in recognition of the continuing need to study its implications further.[55] If the matter had been as straightforward and settled as the AU and LAS suggest, no such further study would have been warranted.

22. In looking at the practice particularly of States Parties to this Court, bearing in mind the limited number of States Parties that have adopted specific implementing legislation, the Prosecution has already referred to 11 States whose domestic legislation implementing the Rome Statute implies their view that immunities under customary international law do not avail officials of third States wanted for arrest by the Court, for whatever reason.[56] Professor Kreβ has also identified other States (including States Parties from Africa) whose recent practice seems to suggest a similar concern,[57] as has the Prosecution.[58] Contrary views taken of this matter by the AU as such or a number of other States are not dispositive,[59] given the high threshold for the identification of customary international law.[60] Moreover, a number of AU Member States have notably expressed a distinction between expressions of political

[52] Special Rapporteur Sixth Report, para. 14.
[53] Special Rapporteur Sixth Report, para. 17.
[54] *See* Special Rapporteur Sixth Report, p. 42. *See further above* fn. 48.
[55] *See* Special Rapporteur Sixth Report, para. 109.
[56] Response, para. 25 (citing Akande).
[57] Kreβ (2012), pp. 259-261 (referring to Kenya, Malawi, and Botswana). *See further* Republic of Kenya, Court of Appeal, *Attorney General and Others v. Kenya Section of the International Commission of Jurists* [2018] eKLR, 16 February 2018, p. 24 (emphasising that "Kenya was and is bound by its international obligations to cooperate with the ICC to execute the original warrant issued by the ICC for the arrest of President Al Bashir").
[58] *See e.g.* EU, *Statement by the spokesperson of HR Catherine Ashton on President Al-Bashir's visit to Kenya*, 27 August 2010 (recalling "the importance of all Member States of the United Nations abiding by and implementing" UN Security Council resolution 1593, and urging Kenya "to respect its obligations under international law to arrest and surrender those indicted by the ICC"); D. Akande, 'Denmark invites Sudanese President Bashir to Climate Change Conference,' *EJIL: Talk!*, 19 November 2009 (quoting a Danish source that "Denmark would be obliged to honour the ICC arrest warrant should al-Bashir arrive in the country").
[59] *See e.g.* AU Observations, paras. 9, 18.
[60] *See above* para. 18.

solidarity in voting on AU resolutions and their own appreciation of their continuing legal obligations under the Statute and international law more generally.[61]

A.3.c. Any immunity established by treaty law in this case can be no greater in its scope than any immunity applicable under customary international law

23. In its observations, the LAS places considerable emphasis upon the significance of the Pact of the LAS, and the 1953 Convention, as a further source of Jordan's obligation to respect any immunity to which Mr Al-Bashir may be entitled, on the basis that "[w]hen a Head of State leads a delegation to the Council, he or she is a member of the Council of the League."[62] Members of the Council of the League, according to article 14(1) of the Pact of the LAS, enjoy "diplomatic privileges and immunities".[63]

24. Yet any difficulty encountered by the Pre-Trial Chamber in determining whether Mr Al-Bashir was the beneficiary of such an immunity under the 1953 Convention (due to its uncertainty whether Sudan was a party to it) is irrelevant, and did not materially affect its ultimate conclusions.[64] This is because any "diplomatic privileges and immunities" enjoyed by Mr Al-Bashir "in the exercise of [his] duties" under article 14 of the Pact of the LAS and/or the 1953 Convention cannot be greater in their scope or more comprehensive than the immunity *ratione personae* that he already enjoys under customary international law as a Head of State.[65] Such Head of State immunity—even though not universal in its scope, as previously explained—is undoubtedly the most comprehensive type of immunity recognised by international law.[66] As such, the operation of the Pact of the LAS and/or the 1953 Convention conferred nothing upon Mr Al-Bashir that was not already conferred by

[61] *See e.g.* K. Mills, '"Bashir is dividing us": Africa and the International Criminal Court,' [2012] 34 *Human Rights Quarterly* 404, pp. 425-426 (disagreeing in 2012 with "the impression of a unified, monolithic" position shared by all African States and suggesting that "the situation is much more complex"; in particular, although "Chad was the only country to express an official reservation" on an AU decision stating that AU Member States shall not cooperate in arresting and surrendering Mr Al-Bashir pursuant to article 98, "Botswana has indicated a number of times, including after the Assembly, that it did not agree and would live up to its obligations under the Rome Statute", "Benin was also reportedly unhappy with the decision", "South Africa […] stated that it would arrest Bashir according to its obligations as did Uganda", and "[o]thers […] also expressed discontent").
[62] LAS Observations, para. 12.
[63] LAS Observations, para. 13.
[64] *Contra* LAS Observations, para. 20.
[65] From the language of article 14 of the Pact of the LAS, and article 11 of the 1953 Convention, it appears that the content of the immunity applied by the Pact of the LAS and/or the 1953 Convention adheres in essence to the immunity granted to diplomats under customary international law: *see* LAS Observations, paras. 13-15. *Cf.* para. 28 (observing that "treaty-based immunities", such as under the Pact and the 1953 Convention, "often have a distinct and more limited object and purpose, and operate in a different manner").
[66] *See e.g.* Special Rapporteur Fifth Report, paras. 121, 237-240; M.N. Shaw, *International Law*, 8th Ed. (Cambridge: CUP, 2017), pp. 557-559.

customary international law.[67] Consequently, the purpose of the immunity provisions in the Pact of the LAS and/or the 1953 Convention must primarily be to ensure that *persons who are not otherwise the subject of privileges and immunities* by virtue of their person or function receive such immunities. The States Parties to these treaties cannot have intended to create instead an immunity which is universal and absolute, and more far-reaching even than Head of State immunity—nor indeed is it clear that this would even be legally possible.[68]

25. Nor does any immunity emanating from the Pact of the LAS and/or the 1953 Convention otherwise preclude the effectiveness of the Statute and UN Security Council resolution 1593 in ensuring that Jordan would not breach any obligation under international law, for the purpose of article 98(1),[69] by arresting Mr Al-Bashir. This is because, under the 1953 Convention, to which the LAS reiterates Sudan is a State Party,[70] Sudan remained obliged to waive any immunity under the Pact of the LAS and/or the 1953 Convention "where it appears that the immunity would impede the course of justice and if it can be waived without prejudice to the purpose for which the immunity is accorded."[71] Not only were these conditions met in and of themselves—and thus Sudan was bound under the 1953 Convention itself to waive any immunity accorded to Mr Al-Bashir—but it was under a further obligation to do so by virtue of its duty to cooperate with the Court under UN Security Council resolution 1593 and chapter VII of the UN Charter.

A.4 Article 98(1) did not bar the request to Jordan because the request did not entail Jordan breaching any obligation under international law

26. In requesting the assistance of Jordan in arresting Mr Al-Bashir, and then in issuing the Decision, the Pre-Trial Chamber was correct to determine that Jordan would not breach any obligation under international law—whether this was by operation of the Statute, UN

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[67] Nor indeed would any customary rule, *arguendo*, relating to special missions (*see above* fn. 35) or persons attending conferences of international organisations (*see* Prosecution Response to *Amici Curiae*, para. 24).
[68] For example, treaty obligations are void if they conflict with a peremptory norm of general international law (*jus cogens*), which is "a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted": *Vienna Convention on the Law of Treaties*, art. 53. To the extent that the prohibition of core international crimes—including crimes under article 5 of the Statute—may constitute one or more *jus cogens* norms, then this may exclude the possibility of States mutually obliging one another to grant immunity to persons responsible for such crimes, at least in the face of jurisdiction by a competent international court and/or if such immunity is likely to result in impunity. *See further* Special Rapporteur Fifth Report, paras. 73-86, *especially* paras. 85-86 (noting that the principles discussed in the ICJ's *Jurisdictional Immunities of the State* judgment, which addresses the question of *jus cogens* but in the context of State immunity more generally, do not automatically apply to the immunity of State officials), 143; *see also* paras. 90-92, 95, 115-116, 121, 134, 140, 184, 199-205. *Cf.* AU Observations, para. 12.
[69] *See further above* paras. 9, 15-17; *below* paras. 26-27, 29-32.
[70] LAS Observations, paras. 9, 11.
[71] LAS Observations, para. 16 (quoting article 14 of the 1953 Convention).

Security Council resolution 1593, and the UN Charter,[72] or in any event more broadly due to the narrower scope of any immunities under international law,[73] or other doctrines.[74]

27. In reaching this conclusion, the Pre-Trial Chamber was correct to focus primarily on analysing the *substance* of any such obligations, and any circumstances which would preclude their application, such as whether the relevant State was subject to article 27 of the Statute. The formal question—whether or not the reference to "third States" in article 98(1) applies to all States other than the requested State, or only to non-States Parties—was ultimately beside the point.[75] The Prosecution notes that the AU and the LAS would seem to disagree on this definitional question, with the AU understanding this provision to apply narrowly to "non-States Parties"[76] and the LAS understanding it more broadly.[77] For its own part, the Prosecution had observed that a core aspect of article 98(1), referring to "premises and property", suggests that the broad interpretation is correct,[78] even though the effect of article 27 otherwise largely makes the article 98(1) analysis redundant (with regard to "persons") for all States Parties.[79]

A.5. Article 98(2) does not apply to all kinds of international agreement

28. The LAS argues that article 98(2) applies to all kinds of "international agreements", and not any particular "class".[80] However, this not only disregards the terms of the provision—which plainly qualify the scope of application ("agreements *pursuant to which* […]")—but also its context and object and purpose, as well as drafting history.[81] Reading article 98(2) so broadly is also inconsistent with article 98(1), which already addresses international obligations of all kinds insofar as they may relate to applicable immunities.[82] For all these reasons, article 98(2) is inapposite, and does not assist Jordan in this appeal.

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[72] *See above* paras. 4-9, 14; *below* paras. 29-32.
[73] *See above* paras. 13-25 (concerning the scope of relevant customary and treaty law immunities).
[74] *See below* paras. 33-34 (concerning the *abus de droit* principle, and the Genocide Convention).
[75] *See* Response, para. 51.
[76] AU Observations, para. 30.
[77] LAS Observations, para. 26.
[78] Response, para. 50.
[79] Response, para. 49.
[80] LAS Observations, para. 31.
[81] *See* Response, paras. 52-58.
[82] *See* Response, paras. 59-60.

B. The Pre-Trial Chamber correctly found that UN Security Council resolution 1593 affected any obligation Jordan had under international law to accord immunity to Omar Al-Bashir (Second Ground of Appeal)

29. The Pre-Trial Chamber was correct to find that UN Security Council resolution 1593 can only be properly interpreted to impose upon Sudan the obligations of the Statute with regard to the situation in Darfur, including under article 27(2), and thus rendering inapplicable any immunity that might otherwise exist under international law.[83]

30. The AU and the LAS merely disagree with the Pre-Trial Chamber's interpretation of resolution 1593, but do not show that it was legally erroneous. Thus, the AU argues that article 13(b) of the Statute does not expressly provide for the UN Security Council to have such a power. However, it overlooks that the Court may not simply interpret article 13(b) in isolation but in the context of the plenary powers of the UN Security Council under chapter VII of the UN Charter (which the AU seems to recognise),[84] by virtue of article 21(1)(b) of the Statute.[85] Other sources, such as the UN-ICC Relationship Agreement, are also instructive.[86] To say that the UN Security Council intended equally to apply article 98(1) to Sudan is no answer to the current situation, since article 98(1) is a merely procedural provision which does not itself address the substantive existence of any immunities.[87]

31. Nor is there any significance in the distinction observed by the UN Security Council in resolution 1593 between Sudan and States Parties to the Statute, since while Sudan is subject to the obligations of the Statute insofar as they are necessary to give effect to the referral of the situation in Darfur,[88] it remains distinct from States Parties in other respects (for example, it incurs no financial obligations).[89] It is for this same reason that the Prosecution sought to describe Sudan by the term "UNSC Situation-Referral State" as a mere shorthand for those non-States Parties nonetheless made subject to certain obligations of the Statute, due to the operation of resolution 1593 (in this case), the UN Charter, and the Statute.[90]

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[83] *See* Response, paras. 64-95.
[84] *See e.g.* AU Observations, paras. 44, 53.
[85] *Contra* AU Observations, paras. 33-37. *See further* Response, paras. 7-8, 10-13, 71, 78.
[86] *See* Response, para. 84. *See also* P. Ambach, 'Article 2,' in O. Triffterer and K. Ambos (eds.), *The Rome Statute of the International Criminal Court: a Commentary*, 3rd Ed. (München/Oxford/Baden-Baden: C.H. Beck/Hart/Nomos, 2016), *especially* p. 33, mn. 33 (the Relationship Agreement is a "fundamental tool").
[87] *Contra* AU Observations, paras. 37-38; LAS Observations, para. 36. *See above* paras. 15-16.
[88] *See* Response, paras. 68-81. *Cf.* LAS Observations, para. 34.
[89] *Contra* AU Observations, para. 36.
[90] *Contra* LAS Observations, para. 33; *see also* para. 35. In this respect, the LAS' suggestion that the Prosecution articulated a difference between a "State-centric" and "situation-centric" approach is mistaken—Sudan is a "UNSC Situation-Referral State" *for the purpose of the referred situation in Darfur, Sudan*: *see* Response, para.

32. Both the AU and the LAS are also incorrect to the extent they imply that the legal effect of a UN Security Council resolution is confined only to matters which are expressly stated in that resolution.[91] To the contrary, such resolutions require interpretation.[92] When applying the correct method, it is clear that the effect of resolution 1593 can only have been to make Sudan subject to all the necessary obligations of the Statute in order to make the Court's jurisdiction over the referred situation effective.[93] In pointing out that the resolution only imposes an obligation upon Sudan to cooperate with the Court, the AU overlooks both that resolution 1593 also requires Sudan to recognise the Court's exercise of jurisdiction with respect to the situation in Darfur[94] and that for States Parties, including Jordan, it is the Statute itself which imposes relevant obligations to cooperate with the Court.[95]

C. The Pre-Trial Chamber's legal conclusion may also be upheld on additional grounds

33. The Prosecution further recalls that, as observed in its response to the *amici curiae*, the correctness of the Pre-Trial Chamber's conclusion concerning Jordan's non-compliance with its obligations under the Statute could also be upheld on other grounds, such as the principle of *abus de droit*.[96]

34. Likewise, although in the Prosecution's view it is not necessary to consider the effect of instruments such as the Genocide Convention,[97] this too could potentially avail the Court in this case.[98] In particular, the AU fails to explain its apparent suggestion in this context that the UN Security Council, in resolution 1593, could not and did not require Sudan to accept the Court's jurisdiction in a way satisfactory for the purpose of the Genocide Convention.[99] Nor does it acknowledge the extent to which the maxim 'immunity does not mean impunity' is

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8, fn. 15. It does not have obligations under the Statute, by virtue of UN Security Council resolution 1593, for any situation at the ICC other than that situation.

[91] *Contra* AU Observations, para. 44; LAS Observations, para. 36. *See also* AU Observations, paras. 45-51. *See* Response, paras. 82-84.

[92] *See* Response, para. 75, fn. 143 (citing ICJ, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion of 22 July 2010, ICJ Rep 403, paras. 94-100, 113-119).

[93] *Contra* AU Observations, paras. 54, 56-62; LAS Observations, para. 35.

[94] UNSC resolution 1593, para. 1.

[95] *Contra* AU Observations, para. 56.

[96] Prosecution Response to *Amici Curiae*, paras. 5-8.

[97] Response, para. 66.

[98] Since this case does not concern a dispute between Jordan and Sudan as to their interpretation of the Genocide Convention, but rather a proceeding between Jordan and the Court concerning Jordan's obligations under the Statute (to which the meaning of the Genocide Convention is merely 'evidence'), the AU is incorrect to suggest that article IX of the Genocide Convention is applicable: *contra* AU Observations, para. 82.

[99] *Contra* AU Observations, paras. 70, 73, 75.

highly contested and potentially doubtful[100]—including in this particular case—and with all that implies for its interpretation of article IV of the Genocide Convention. The argument that article 98(1) of the Statute is in some way *lex specialis* to article IV of the Genocide Convention again overlooks the inherently procedural nature of article 98(1).[101]

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

35. The AU does not specifically address Jordan's third ground of appeal.[102] The LAS addresses the third ground of appeal.[103] Although the LAS claims that the Pre-Trial Chamber erred in exercising its discretion to refer Jordan to the ASP and Security Council,[104] its submissions largely duplicate the general themes that Jordan had itself identified in its appeal and for its potential reply.[105] Yet, on certain discrete issues, the LAS's arguments depart from Jordan's original submissions.[106] Notwithstanding—similar to Jordan—the LAS misinterprets the Court's law, the Decision itself and even the Prosecution's substantive submissions.

36. The LAS's submissions are flawed in two key aspects: they misread the standard of review applicable to discretionary decisions; and they misapprehend the Decision and its basis for referring Jordan to the ASP and Security Council.[107]

D.1. The LAS Observations misread the standard of review for discretionary decisions

37. As the Appeals Chamber has held, and as the Prosecution previously stated, 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".[108] Whether or not such a

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[100] *Contra* AU Observations, para. 79. *See e.g.* Special Rapporteur Sixth Report, para. 17.
[101] *Contra* AU Observations, para. 81. *See above* paras. 15-16.
[102] *See generally* AU Observations.
[103] LAS Observations, paras. 37-44.
[104] LAS Observations, para. 37.
[105] *Compare* LAS Observations, paras. 37, 40-44 with Appeal, paras. 89-97, 103-107 and ICC-02/05-01/09-332 OA2 ("Jordan's Reply Request"), p. 5.
[106] *Compare* LAS Observations, para. 44 (endorsing the Prosecution's submission that "an indiscriminate comparison 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") *with* Appeal, paras. 98-102 (conducting a wholesale comparison of the facts pertaining to the non-referral of South Africa with the referral of Jordan). *See also* Response, paras. 115-123.
[107] LAS Observations, paras. 38-44.
[108] ICC-01/09-02/11-1032 OA5 ("*Kenyatta* AD"), paras. 25, 64. *See* Response, para. 98 ("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. 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'. Such a decision should not be disturbed lightly on appeal. The Appeals Chamber's review is therefore deferential.")

Chamber has properly exercised its discretion is assessed against certain *limited* conditions specified in law.[109] In seeking to re-interpret this standard, the LAS misinterprets it.

38. First, regarding the standard of review for article 87(7) decisions, the LAS conflates the statement of law or "the standard" as such with its application in individual cases.[110] That the Appeals Chamber had previously found that the *Kenyatta* Trial Chamber had erred in exercising its discretion under article 87(7) does not imply that, *as a matter of law*, the Trial Chamber had "significantly limited" discretion.[111] Rather, the Chamber had a "considerable degree of discretion" *in law*, which it failed to exercise properly *in fact*.[112] Moreover, although the LAS appears to suggest that imparting a "considerable degree of discretion" to Chambers would imply that their decisions cannot be reviewed,[113] this is incorrect. Such discretionary decisions are reviewable: they can, however, only be disturbed on appeal under limited conditions.

39. Second, in arguing *against* Jordan's referral, the LAS's reliance on the facts of the *Kenyatta* case is inapposite.[114] Indeed, the LAS fails to note that the Appeals Chamber found that the *Kenyatta* Trial Chamber had initially erred in exercising its discretion *not* to refer Kenya to the ASP.[115] Following the Appeal Judgment, the *Kenyatta* Trial Chamber corrected its errors, and subsequently referred Kenya to the ASP.[116]

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[109] *See* *Kenyatta* AD, paras. 22, 24, 25; *see also* Response, para. 99 ("[Jordan] fails to show an erroneous interpretation of the law or a patently incorrect conclusion of fact. 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'").
[110] LAS Observations, paras. 38-39.
[111] *Contra* LAS Observations, para. 38 ("[T]he Prosecution fails to acknowledge various circumstances where such discretion has been regarded as significantly limited, including circumstances directly relevant to this appeal. Indeed, in the *Kenyatta* case itself, after indicating that the Pre-Trial Chamber had a 'considerable degree of discretion', the Appeals Chamber then found that the Trial Chamber erred in the exercise of its discretion due to several errors […]").
[112] *Kenyatta* AD, paras. 21-25, 64, 82, 90-91.
[113] LAS Observations, para. 38.
[114] LAS Observations, para. 38 (relying on the *Kenyatta* case for "circumstances directly relevant to this appeal").
[115] *Kenyatta* AD, paras. 7-8, 90-91. *See also* para. 96 ("If the Trial Chamber concludes that there has been such a failure to comply with a cooperation request, the Trial Chamber should make an assessment of whether a referral of Kenya to the ASP would be an appropriate measure to seek assistance to obtain the requested cooperation or otherwise address the lack of compliance by Kenya, taking into account, *inter alia*, considerations and factors referred to in paragraph 53 above").
[116] ICC-01/09-02/11-1037 ("*Kenya* Referral Decision"), para. 38, p. 18.

D.2. The LAS Observations misapprehend the Decision

40. The LAS misreads the Decision and the Chamber's legal and factual bases for referring Jordan to the ASP and Security Council.[117] After finding that Jordan had failed to comply with the Court's cooperation request thus preventing the Court from exercising its powers and functions under the Statute, the Chamber properly relied on *three*, not two, factors to justify Jordan's referral.[118] A reasonable and contextual reading of the Decision supports this interpretation. To the contrary, the LAS's analysis commingles several discrete concepts, without acknowledging relevant aspects of the Pre-Trial Chamber's reasoning.

41. First, in (mis)interpreting the "first factor" justifying the referral, the LAS fails to distinguish between *the Chamber's finding* of non-compliance and *Jordan's own decision and choice* not to comply with the Court's request.[119] While the bar against "automatic referrals" applies to the former (*i.e.*, the Chamber's findings of non-compliance), it is wholly irrelevant to the latter (*i.e.*, a State Party's choice not to comply with a cooperation request, also the "first factor"). Rather, this first factor reflects Jordan's conduct in executing cooperation requests and is appropriately germane to the referral question.

42. Moreover, as the distinct analysis in the Decision and the Response make clear,[120] the referral did not automatically follow the finding of non-compliance.

43. Second, regarding the "second factor", the LAS does not read the Decision and the Prosecution's Response in context.[121] The Decision and the Response are consistent: both recognise the self-evident principle that following the notification of the arrest warrants, all States Parties know that they are obliged to arrest Omar Al-Bashir. Jordan itself was notified of this obligation in 2009-2010, and was subsequently reminded in February 2017 well in

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[117] LAS Observations, paras. 40-44.
[118] *Contra* LAS Observations, fn. 59. *See* Response, para. 96 (addressing the three factors relied on, namely, (i) that Jordan had expressed unambiguously its position, and choice, not to execute the Court's request before Omar Al-Bashir's visit; (ii) that, at the time when it chose not to arrest Omar Al-Bashir, Jordan already had proper and unequivocal notice of its obligations to arrest and surrender Omar Al-Bashir; and (iii) that the manner in which Jordan had approached the Court for consultations warranted referral to the ASP and Security Council"); paras. 100-124 (addressing all three factors in a suitably responsive manner to Jordan's appeal).
[119] *See e.g.* LAS Observations, para. 42 ("In short, the first factor identified by the Pre-Trial Chamber is, in essence, simply a recitation of the fact that Jordan decided not to comply with the Court's request, and thus constitutes a decision to refer the finding of non-compliance based simply on the fact of non-compliance. The Appeals Chamber, however, has stated that a decision of non-compliance standing alone does *not* result in an automatic referral.") (relying exclusively on Decision, para. 53, omitting reference to the Chamber's statements in paras. 51-52).
[120] Decision, paras. 51-55; Response, paras. 100, 102-103.
[121] LAS Observations, paras. 43-44.

advance of Omar Al-Bashir's visit.[122] Jordan was also aware that seeking consultations with the Court would not suspend its obligation to arrest Omar Al-Bashir.[123] Moreover, apart from stating that the second factor had "everything to do [with a different State Party (South Africa)] [involving a different set of facts]", the LAS's view remains unsupported.[124]

44. Third, contrary to the LAS's observations, the "third factor" (the manner in which Jordan approached consultations with the Court) does not simply repeat or "repackage" the first factor (Jordan's decision and choice not to execute the arrest warrant).[125] The former relates specifically to the discrete issue of consultations possible under article 97—which the LAS does not acknowledge.

Conclusion

45. For all these reasons, and those contained in the Prosecution's previous submissions, as well as those which may further be elaborated in the forthcoming oral hearing, the Appeal should be dismissed.

Fatou Bensouda, Prosecutor

Dated this 14th day of August 2018[126]

At The Hague, The Netherlands

[122] Decision, paras. 2-5, 54; Response, paras. 105, 109-114. *Contra* LAS Observations, fn. 64 (contradicting Decision, para. 54, without further support). *See also* Response, para. 113 (arguing that while the Court's decisions may have varied in their legal reasoning on why Omar Al-Bashir does not enjoy immunity at this Court, they were *unanimous* in their conclusions that he had no such immunity and that States Parties were obliged to arrest Omar Al-Bashir and surrender him to the Court). *Contra* LAS Observations, para. 22; AU Observations, para. 20.

[123] Decision, para. 54; Response, para. 110 ("The Chamber did not rely on 'a finding of non-compliance by South Africa'. 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. 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. The Chamber had emphatically rejected this view at that time.")

[124] LAS Observations, para. 44.

[125] LAS Observations, fn. 59 (incorrectly arguing that "the manner in which Jordan approached the Court" is "simply a repackaging of the first factor and should be treated as such.")

[126] This submission complies with regulation 36, as amended on 6 December 2016: ICC-01/11-01/11-565 OA6, para. 32.