JOINT DISSENTING OPINION OF JUDGE LUZ DEL CARMEN IBÁÑEZ CARRANZA AND JUDGE SOLOMY BALUNGI BOSSA

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PROLEGOMENA

It is with the greatest respect for our colleagues and under the mandate of our conscience that we issue this dissenting opinion given our disagreement with the outcome of the appeal. At the outset, it must be highlighted that we concur with the reasoning and conclusions reached by the Majority regarding the first and second grounds of appeal. We also agree with the first finding under the third ground of appeal insofar as it confirms that Mr Omar Al-Bashir ('Mr Al-Bashir') did not enjoy Head of State immunity from arrest and, as such, Jordan failed to cooperate with the Court in its execution of the warrants of arrest issued against Mr Al-Bashir. Consequently, Jordan prevented the Court from exercising its functions and powers within the meaning of article 87(7) of the Statute. However, for reasons that will be explained in detail, we disagree with the second finding and determination of the third ground of appeal, as well as with the final outcome of the appeal whereby the Pre-Trial Chamber II ('Pre-Trial Chamber') was found to have abused its discretion when it decided to refer Jordan to the Assembly of States Parties ('ASP') and the United Nations Security Council ('UNSC') under article 87(7) of the Statute. We are convinced that the Pre-Trial Chamber did not err when it referred Jordan to the ASP and the UNSC because of the State's failure to comply with the request to cooperate in the arrest and surrender of Mr Al-Bashir. We would have therefore upheld the outcome of the Impugned Decision for three reasons. First, by failing to arrest Mr Al-Bashir, Jordan effectively frustrated the objectives of the warrants of arrest issued against Mr Al-Bashir and thus prevented the Court from exercising its functions and powers. Second, the Pre-Trial Chamber based its decision on ample, objective factual and legal reasons pursuant to the clear terms of article 87(7) of the Statute which empowers the Pre-Trial Chamber to refer the failure of a State Party to cooperate with the Court to the ASP and/or the UNSC. Third, in addition to those factual and legal objective reasons upon which the Pre-Trial Chamber relied in the Impugned Decision, there are other important factual and legal reasons warranting a referral of Jordan's failure to cooperate with the Court in the arrest and surrender of Mr Al-Bashir to the ASP and UNSC.

Consequently, we are convinced that the Pre-Trial Chamber made a legally sound and reasonably judicious exercise of its discretion under article 87(7) of the Statute. We would have therefore confirmed the Pre-Trial Chamber's determination to refer the matter to the ASP and the UNSC.

It is imperative to note that this referral is not punitive in nature. Nor is it a sanction imposed upon Jordan. Rather, it is a call for action for Jordan, the members of the Assembly of States Parties and for the international community with the aim of fostering cooperation with the Court and enabling the effective realization of the high values and objectives enshrined in the Rome Statute.

I. INTRODUCTION

1. As set out in the Prolegomena, the dissenting judges agree with their colleagues with the conclusions reached under the first and second grounds of appeal and with the first finding under the third ground of appeal, and they dissent with respect to the second finding and the determination of the Majority under the third ground of appeal, as well as with the outcome of the appeal. As it will be fully elaborated in this opinion, it is the firm view of the dissenting judges that the Pre-Trial Chamber did not abuse its discretion, it was reasonable and fair and as a consequence it did not err when it decided to refer Jordan's failure to cooperate to the ASP and the UNSC under article 87(7) of the Statute.

2. To that end, the dissenting opinion shall begin by providing an overview of the case. Next, this opinion shall set out the standard of review that will guide the analysis and the legal issues arising from the third ground of appeal. Subsequently, it shall refer to the legal framework and those juridical considerations relevant to the determination of the legal issues arising from the third ground of appeal.

3. This opinion shall further focus on the analysis, which will be structured as follows: (i) analysis of the objective factual and legal reasons that formed the basis of the Pre-Trial Chamber's determination to refer Jordan's failure to comply with the Court's request to arrest and surrender Mr Al-Bashir to the ASP and the UNSC – it is relevant to evaluate the gravity of Jordan's failure to comply and therefore to provide detailed reasons underpinning this determination; (ii) assessment on whether there are

any additional objective factual and legal reasons further supporting the conclusion reached by the Pre-Trial Chamber about Jordan's failure to comply with the Court's request; and (iii) analysis of whether, on the basis of the objective factual and legal reasons identified in the previous sections, there is any merit in maintaining, as does Jordan and the Majority, that in referring Jordan's non-compliance to the ASP and the UNSC, the Pre-Trial Chamber abused its discretion.

4. Last, but not least, in the final conclusions there will be a recapitulation of the points sustained in the present opinion.

II. OVERVIEW OF THE CASE

A. Background Information

5. On 31 March 2005, the UNSC adopted resolution 1593, which referred the situation in Darfur, Sudan, since 1 July 2002, to the Prosecutor of the Court.[1]

6. On 4 March 2009 and 12 July 2010, upon the application of the Prosecutor, Pre-Trial Chamber I issued two warrants of arrest against Mr Al-Bashir for war crimes, crimes against humanity, and genocide allegedly committed in Darfur from March 2003 to 14 July 2008.[2] Pursuant to Part 9 of the Statute, Jordan was notified of the two arrest warrants on 5 March 2009 and 16 August 2010.[3]

7. Mr Al-Bashir travelled to Jordan and attended the 28th Arab League Summit in Amman on 29 March 2017.[4] While he was on Jordanian territory, Jordan did not arrest and surrender him to the Court.[5]

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[1] United Nations, Security Council, Resolution 1593, 31 March 2005, S/RES/1593, ('Resolution 1593').
[2] Pre-Trial Chamber I, 'Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir', 4 March 2009, ICC-02/05-01/09-3 ('First Decision on Warrant of Arrest'); Pre-Trial Chamber I, 'Second Decision on the Prosecution's Application for a Warrant of Arrest', 12 July 2010, ICC-02/05-01/09-94 ('Second Decision on Warrant of Arrest').
[3] 'Request to all States Parties to the Rome Statute for the Arrest and Surrender of Omar Al Bashir', 6 March 2009, ICC-02/05-01/09-7, and 'Supplementary Request to all States Parties to the Rome Statute for the Arrest and Surrender of Omar Al Bashir', 21 July 2010, ICC-02/05-01/09-96.
[4] Pre-Trial Chamber II, 'Decision under article 87(7) of the Rome Statute on the non-compliance by Jordan with the request by the Court for the arrest and surrender o[f] Omar Al-Bashir', 11 December 2017, ICC-02/05-01/09-309 ('Impugned Decision'), para. 8.
[5] Impugned Decision, para. 8.

8. On 11 December 2017, Pre-Trial Chamber II issued the 'Decision under article 87 (7) of the Rome Statute on the non-compliance by Jordan with the request by the Court for the arrest and surrender o[f] Omar Al-Bashir'[6] ('Impugned Decision').

B. Impugned Decision

9. In the Impugned Decision, the Pre-Trial Chamber found that article 27(2) of the Statute applies with respect to Sudan, rendering inapplicable any Head of State immunity belonging to Sudan.[7] The Pre-Trial Chamber found that Jordan's *note verbale* of 28 March 2017 did not constitute a request for consultation and noted that, in any case, such consultations do not suspend or otherwise affect the validity of a Court's request for cooperation.[8] The Pre-Trial Chamber stated that Jordan's obligations *vis-à-vis* the Court were clear and it was aware that the Chamber had already expressed in unequivocal terms that South Africa, in analogous circumstances, had the obligation to arrest Mr Al-Bashir and that consultations had no suspensive effect on this obligation. While South Africa's requests for consultation militated against a referral of non-compliance, the Pre-Trial Chamber found that similar circumstances did not exist in the case at hand.[9]

10. The Pre-Trial Chamber concluded that Jordan failed to comply with a request to cooperate contrary to the provisions of the Statute and that this non-compliance should be referred to the UNSC.[10]

C. Relevant Findings and Conclusions in the Majority Opinion

11. Under the first and second grounds of appeal, the Appeals Chamber unanimously concludes that Mr Al-Bashir does not enjoy immunity from arrest either in the application of article 27(2) of the Statute or under customary international law and that therefore by not arresting Mr Al-Bashir while he was in Jordanian territory,

[6] Impugned Decision.
[7] Impugned Decision, paras 37-38.
[8] Impugned Decision, paras 47-48.
[9] Impugned Decision, paras 53-54.
[10] Impugned Decision, pp. 21-22.

Jordan failed to cooperate with the Court in the execution of the warrants of arrest issued against him. The dissenting judges are in agreement with these findings.

12. In relation to the issue of Head of State immunity under customary international law, the dissenting judges agree in essence with the ideas developed in detail in the Separate Joint Concurring Opinion. In the view of the dissenting judges, Head of State immunity cannot be invoked before this Court by virtue of article 27(2) of the Statute. Furthermore, Head of State immunity is not opposable under customary international law in relation to the atrocities that are international crimes, at least in regards to the crimes under the jurisdiction of the International Criminal Court. This is because international crimes and those atrocities always amount to grave violations of human rights. These human rights reflect the highest values of humanity; some originate from natural law and others from international conventional law that consecrate the highest values of human beings that the international community as a whole is interested in protecting. Therefore, the practice of international courts has consistently rejected the possibility of invoking Head of State immunity since the beginning of the twentieth century as it is reflected in the envisaged prosecution of the Kaiser.[11] This international practice has been confirmed throughout the twentieth and twenty-first centuries.[12] It is thus clear that the international community as a whole has consistently rejected the invocation of Head of State immunity for the commission of international crimes. This is due to the specific nature of these crimes, which in essence are violations of international human rights. Under customary international law, immunity can never result in impunity for grave violations of the core values consolidated in international human rights law.

13. Under the third ground of appeal, the Appeals Chamber unanimously finds that Jordan's failure to cooperate with the Court in the execution of the warrants of arrest issued against Mr Al-Bashir prevented the Court from exercising its functions and powers within the meaning of article 87(7) of the Statute. The dissenting judges are in agreement with this finding, but consider it necessary to provide the detailed reasons

[11] *See* William Shabas, The Trial of the Kaiser (2018).
[12] *See* SCSL, *Prosecutor v Taylor* (Decision on Immunity from Jurisdiction), 31 May 2004, at para 52; and the initial indictment on Kosovo against Slobodan Milosevic and others, dated 22 May 1999, Case No IT-99-37.

underlying such conclusion, which illustrate the gravity of non-compliance with the Court's requests for cooperation.

14. This notwithstanding, the Majority Opinion thereafter finds that the Pre-Trial Chamber erred in referring Jordan's failure to cooperate with the Court to the ASP and the UNSC. In reaching this conclusion, the Majority Opinion finds that the Pre-Trial Chamber erred in concluding that Jordan's *note verbale* of 28 March 2017 did not constitute a request for consultations, noting in particular that despite the fact that 'the intention to consult must be communicated to the Court timeously', in the case at hand the 'tardiness […] need not result in a presumption of bad faith'.[13] The Majority Opinion further finds that the Pre-Trial Chamber's error concerning consultations led the Pre-Trial Chamber to fail to take into account an important factor arguing against Jordan's referral which, in turn, resulted in unequal treatment of South Africa and Jordan.[14] The conclusion of the Majority Opinion in this regard is that the Pre-Trial Chamber 'abused its discretion by treating Jordan differently from South Africa in similar circumstances and by referring Jordan to the Assembly of States Parties and the UN Security Council, whereas South Africa was not referred'.[15] On the basis of the foregoing considerations, the Majority reverses the Impugned Decision. For reasons explained in this opinion, the dissenting judges do not agree with these last findings and conclusions. The dissenting judges also do not agree with the outcome of the appeal.

D. Relevant Findings and Conclusions of this Dissenting Opinion

15. As a result of the analysis contained in this opinion of the facts as subsumed in the relevant legal framework, the dissenting judges find as follows:

[13] Appeals Chamber II, *The Prosecutor v. Omar Hassan Ahmad Al-Bashir*, Judgment on the appeal of the Hashemite Kingdom of Jordan against the decision of Pre-Trial Chamber II of 11 December 2017 entitled 'Decision under article 87(7) of the Rome Statute on the non-compliance by Jordan with the request by the Court for the arrest and surrender o[f] Omar Al-Bashir', 06 May 2019, ICC-02/05-01/09 (OA2) ('Majority Opinion'), paras 202, 205.
[14] Majority Opinion, paras 207-209.
[15] Majority Opinion, para. 211.

- Regarding the first finding of the third ground of appeal, as held unanimously by the Appeals Chamber, the dissenting judges find that

  a. The Pre-Trial Chamber did not err in concluding that Jordan's failure to arrest and surrender Mr Al-Bashir prevented the Court from exercising its functions and powers under article 87(7) of the Statute, given that the objectives of the warrants of arrest issued against Mr Al-Bashir were frustrated as a result of the failure of Jordan to cooperate with the Court. Such failure prevented the Court from exercising its power to execute the warrants of arrest and its functions to (i) ensure the conduct of trial proceedings in a fair manner; (ii) collect evidence; and (iii) prevent the further commission of crimes.

- Regarding the second finding of the third ground of appeal with which there is disagreement, the dissenting judges find that:

  b. The Pre-Trial Chamber did not err in finding that consultations within the meaning of article 97 of the Statute between Jordan and the Court did not take place in this case: the *notes verbales* sent by Jordan did not comply with the requirement that a State Party 'shall consult with the Court without delay' and merely provided a statement that Jordan would abide by Mr Al-Bashir's alleged immunity from arrest. They neither posed any questions nor requested any further concrete response or action from the Court.

  c. The Pre-Trial Chamber did not err in treating Jordan differently than South Africa when it exercised its discretion under article 87(7) of the Statute; the circumstances surrounding these cases were different, particularly considering that while South Africa held proper consultations and ensured future cooperation with the Court in the arrest and surrender of Mr Al-Bashir thereby making it unnecessary to refer the matter in order to foster cooperation, Jordan has not done so, therefore warranting the impugned referral.

  d. Not referring Jordan's failure to cooperate with the Court to the ASP and the UNSC pursuant to article 87(7) of the Statute would be contrary to the object and purpose of the Rome Statute of putting an end to impunity for

perpetrators of the most serious crimes of concern to the international community as a whole thereby bringing justice to victims, and could in fact amount to perceived inaction by the Court in this regard.

e. By failing to cooperate with the Court, Jordan infringed both its obligations of cooperation under the Rome Statute and potentially the international obligations owed to the UNSC pursuant to the UN Charter. A referral of Jordan's non-compliance to the ASP and the UNSC is required so as to allow the taking of those measures deemed appropriate to ensure future compliance and thereby the fulfilment of the mandates of both the Court and the UNSC.

f. Past examples of referrals of other States Parties' non-compliance with the Court's request to cooperate in the arrest and surrender of Mr Al-Bashir to the ASP demonstrate that a referral of Jordan's non-compliance to that organ has the very real prospect of yielding positive results in terms of future cooperation thereby giving effect to the *raison d'être* of article 87(7) of the Statute.

g. In the case at hand, the Pre-Trial Chamber was correct and did not abuse its discretion. Nor was it arbitrary, unreasonable or unfair when, based on the particular circumstances of the case and within the boundaries of the law, it properly applied article 87(7) of the Statute and referred to the ASP and the UNSC Jordan's failure to comply with the Court in the execution of Mr Al-Bashir's arrest warrant.

16. The dissenting judges would have therefore confirmed the Impugned Decision and upheld the decision of the Pre-Trial Chamber that the failure of Jordan to cooperate with the Court in the arrest and surrender of Mr Al-Bashir ought to be referred to the ASP and the UNSC pursuant to article 87(7) of the Statute.

III. STANDARD OF REVIEW

17. In the case at hand, the Appeals Chamber is called upon to determine whether the Pre-Trial Chamber erred in the exercise of its discretion when determining that

Jordan's non-compliance with the Court's request to arrest and surrender Mr Al-Bashir ought to be referred to the ASP and the UNSC pursuant to article 87(7) of the Statute.

18. Article 81(1) and (2) of the Statute set out the specific grounds of appeal that can be raised by the parties in respect of final appeals. For interlocutory appeals, the Court's legal instruments do not set out the grounds of appeal that may be raised. However, the Appeals Chamber has established that appellants may raise the same errors as in final appeals, notably errors of law, errors of fact, and procedural errors.[16] It is recalled that the legal framework of the Court does not contemplate abusive exercise of discretion by a first instance chamber as a ground of appellate review. However, in the interests of justice, the jurisprudence of the Appeals Chamber has elaborated the concept of abuse of discretion as a ground of appellate review and has developed the appropriate standard of review in this regard.[17]

19. In this sense, it is important to recall that in the case at hand the Appeals Chamber is *not* exercising its own discretion in deciding whether the referral of Jordan's failure to comply with the Court's request for cooperation in the arrest and surrender of Mr Al-Bashir to the ASP and the UNSC was warranted. Rather, the Appeals Chamber is reviewing the exercise of discretion by the Pre-Trial Chamber in this regard. This is indeed an important distinction in light of the standard of review applicable to discretionary decisions, in particular discretionary decisions under article 87(7) of the Statute.

20. In setting out the standard of review for these type of decisions, in the *Kenyatta OA5 Judgment*, addressing the alleged non-compliance of Kenya with a request for cooperation with the Court, the Appeals Chamber built upon already existing jurisprudence to hold that 'determining whether to refer a State's failure to comply

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[16] *See e.g. Situation in the Democratic Republic of Congo*, 'Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled "Decision on the Prosecutor's Application for Warrants of Arrest, Article 58"', 13 July 2006, ICC-01/04-169 (OA), paras 32-34. *See also Prosecutor v. Joseph Kony and others*, 'Judgment on the appeal of the Defence against the "Decision on the admissibility of the case under article 19 (1) of the Statute" of 10 March 2009', 16 September 2009, ICC-02/04-01/05-408 (OA3) ('*Kony et al.* OA3 Decision'), paras 46-47.

[17] *Kony et al.* OA3 Decision, para. 80; *Prosecutor v. Uhuru Muigai Kenyatta*, 'Judgment on the Prosecutor's appeal against Trial Chamber V(B)'s "Decision on Prosecution's application for a finding of non-compliance under Article 87(7) of the Statute"', 19 August 2015, ICC-01/09-02/11-1032 (OA5) ('*Kenyatta* OA5 Judgment'), para. 22.

with a request for cooperation to the ASP or UNSC is at the core of the relevant Chamber's exercise of discretion.'[18] In reaching this conclusion, the Appeals Chamber noted that '[a]s the court of first instance, the Pre-Trial or Trial Chamber is entirely familiar with, *inter alia*, the entirety of the proceedings, including any consultations related to cooperation matters that have taken place, as well as the potential impact of the non-cooperation at issue'.[19] In light of those factors, the Appeals Chamber concluded that for the purpose of making a determination under article 87(7) of the Statute, chambers are 'endowed with a considerable degree of discretion'.[20]

21. Importantly, the Appeals Chamber confirmed that

> it will not interfere with the Chamber's exercise of discretion merely because the Appeals Chamber, if it had the power, might have made a different ruling. The Appeals Chamber will only disturb the exercise of a Chamber's discretion where it is shown that an error of law, fact or procedure was made. In this context, the Appeals Chamber has held that it will interfere with a discretionary decision only under limited conditions and has referred to standards of other courts to further elaborate that it will correct an exercise of discretion in the following broad circumstances, namely where (i) it is based upon an erroneous interpretation of the law; (ii) it is based upon a patently incorrect conclusion of fact; or (iii) the decision amounts to an abuse of discretion. Furthermore, once it is established that the discretion was erroneously exercised, the Appeals Chamber has to be satisfied that the improper exercise of discretion materially affected the impugned decision.[21] [Footnotes omitted.]

22. In relation to an exercise of discretion based upon an alleged erroneous interpretation of the law, 'the Appeals Chamber will not defer to the relevant Chamber's legal interpretation, but will arrive at its own conclusions as to the appropriate law and determine whether or not the first instance Chamber misinterpreted the law'.[22] With respect to an exercise of discretion based upon an incorrect conclusion of fact, 'the Appeals Chamber applies a standard of reasonableness in appeals pursuant to article 82 of the Statute, thereby according a margin of deference to the Chamber's findings' and 'the Appeals Chamber will not disturb a Pre-Trial or Trial Chamber's evaluation of the facts just because the Appeals

[18] *Kenyatta* OA5 Judgment, para. 64.
[19] *Kenyatta* OA5 Judgment, para. 64.
[20] *Kenyatta* OA5 Judgment, para. 64.
[21] *Kenyatta* OA5 Judgment, para. 22.
[22] *Kenyatta* OA5 Judgment, para. 23.

Chamber might have come to a different conclusion'.[23] Finally, the Appeals Chamber may interfere with a discretionary decision if it amounts to an abuse of discretion. In this regard,

> Even if an error of law or of fact has not been identified, an abuse of discretion will occur when the decision is so unfair or unreasonable as to "force the conclusion that the Chamber failed to exercise its discretion judiciously". The Appeals Chamber will also consider whether the first instance Chamber gave weight to extraneous or irrelevant considerations or failed to give weight or sufficient weight to relevant considerations in exercising its discretion. [Footnotes omitted].[24]

23. In light of the foregoing considerations, the analysis and determination of the legal issues under the third ground of appeal must be guided by the standard of review applicable to discretionary decisions, in particular decisions under article 87(7) of the Statute. This, in turn, means that given the considerable degree of discretion enjoyed by the first-instance chamber, strong reasons must be established to overturn the exercise of discretion by the Pre-Trial Chamber in the case at hand.

IV. LEGAL ISSUES ARISING FROM THE THIRD GROUND OF APPEAL

24. Under the third ground of appeal, Jordan submits that the Pre-Trial Chamber (i) erred in fact in concluding that (a) Jordan had taken a very clear legal position regarding its ability to arrest and surrender Mr Al-Bashir and did not expect anything further from the Court;[25] and (b) that at the time of Mr Al-Bashir's visit to Jordan the Pre-Trial Chamber had already expressed in unequivocal terms that South Africa had the obligation to arrest Mr Al-Bashir;[26] and (ii) that the Pre-Trial Chamber's decision to refer it to the ASP and the UNSC 'constituted an abuse of discretion' given (a) the alleged Pre-Trial Chamber's differential treatment between South Africa and Jordan

[23] *Kenyatta* OA5 Judgment, para. 24.
[24] *Kenyatta* OA5 Judgment, para. 25.
[25] 'The Hashemite Kingdom of Jordan's appeal against the "Decision under article 87(7) of the Rome Statute on the non-compliance by Jordan with the request by the Court for the arrest and surrender [of] Omar Al-Bashir"', 12 March 2018, ICC-02/05-01/09-326, ('Appeal Brief'), paras 89-90; 'The Hashemite Kingdom of Jordan's submissions following the hearing of 10, 11, 12, 13 and 14 September 2018', 28 September 2018, ICC-02/05-01/09-390 ('Jordan's Final Submissions'), para. 28.
[26] Appeal Brief, paras 93-95; Jordan's Final Submissions, para. 29.

in similar circumstances;[27] and (b) the Pre-Trial Chamber's failure to give weight to relevant considerations in reaching its decision on referral.[28] Moreover, Jordan submits that the failure to comply is not a sufficient basis for referral and in the present case this amounted to an automatic referral.[29]

25. In response, the Prosecutor submits that 'having reasonably found that Jordan violated its obligations to cooperate with the Court […] the Pre-Trial Chamber acted entirely within the bounds of its discretion' in determining that a referral of Jordan's failure to cooperate with the Court to the ASP and the UNSC was warranted.[30] The Prosecutor avers that in light of 'Jordan's unmistakable position, and choice, not to execute the Court's request', a referral to the ASP and the UNSC is 'the only effective solution […] to foster further cooperation and to preserve the Court's mandate to end impunity'.[31]

26. In light of the arguments advanced by the parties, the following legal issues and questions must be tackled:

- **Did the Pre-Trial Chamber err in referring Jordan's failure to comply with the Court's request to arrest and surrender Mr Al-Bashir to the ASP and the UNSC pursuant to article 87(7) of the Statute?**

27. This issue can be resolved by answering the following questions:

a. *Did the Pre-Trial Chamber rely on objective factual and legal reasons in deciding to refer the matter to the ASP and the UNSC?*
b. *Are there any additional relevant objective factual and legal reasons warranting the referral of Jordan's failure to comply*

[27] Appeal Brief, paras 96-102; Jordan's Final Submissions, para. 30.
[28] Appeal Brief, paras 103-106; Jordan's Final Submissions, para. 31.
[29] Appeal Brief, para. 90; Transcript of hearing, 13 September 2018, ICC-02/05-01/09-T-7-ENG, p. 42, line 24 to p. 43, line 2, p. 45, lines 8-14, 23-25, p. 46, lines 5-6; Transcript of hearing, 14 September 2018, ICC-02/05-01/09-T-8-ENG, p. 96, lines 8-15.
[30] 'Prosecution Response to the Hashemite Kingdom of Jordan's Appeal against the "Decision under article 87(7) of the Rome Statute on the non-compliance by Jordan with the request by the Court for [the] arrest and surrender [of] Omar Al-Bashir"', ICC-02/05-01/09-331 ('Prosecutor's Response'), para. 3.
[31] Prosecutor's Response, para. 3.

with the Court's request in the arrest and surrender of Mr Al-Bashir to the ASP and the UNSC?

c. *Did the Pre-Trial Chamber abuse its discretion in referring the matter to the ASP and the UNSC?*

V. LEGAL FRAMEWORK AND RELEVANT JURIDICAL CONSIDERATIONS

28. Before analysing the legal issues arising out of the third ground of appeal, it is appropriate to first elaborate on the relevant legal framework and appropriate juridical considerations.

A. The Sources of Law and Their Order of Application – Article 21 of the Statute

29. It is important to recall that when determining any matter before this Court, it is mandatory to apply the sources of law as stipulated in article 21 of the Statute, observing the order of precedence as set out therein. In light of the foregoing, the determination of the legal issues arising under the third ground of appeal and the outcome of the appeal must be carried out in observance of the mandate imposed in article 21 of the Statute and taking into account that the relevant provisions must be interpreted in light of the object and purpose of the Rome Statute to put an end to impunity for the most serious crimes of concern to the international community as a whole. Article 21 of the Statute provides as follows

> 1. The Court shall apply:
>
> (a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;
>
> (b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;
>
> (c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.
>
> 2. The Court may apply principles and rules of law as interpreted in its previous decisions.
>
> 3. The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.

30. Article 21 is crystal clear in stating that the Court must *first* apply the Rome Statute, the Elements of Crimes and its Rules and Procedure and Evidence and only in the *second* place 'where appropriate' applicable treaties and the principles and rules of international law. Only when these primary sources are insufficient to resolve the legal issues at stake and therefore a lacuna is identified, can the Court resort to general principles of law derived from national laws of legal systems of the world as long as those principles are consistent with the Statute and with international law and internationally recognised norms and standard. Furthermore, while it is possible for the Court to apply principles and rules of law as interpreted in its previous decisions, article 21 of the Statute does not provide for the possibility of relying upon the jurisprudence of other courts. Notwithstanding the foregoing, it could be possible that the judge at the time of resolving a legal uncertainty could exceptionally resort to these sources as a way of enlightening him- or herself on the issues at stake, to elucidate legal concepts or in the application of general principles of law.

31. The interpretation and application of the sources of law set out in article 21(1) and (2) of the Statute must be consistent with internationally recognised human rights and be without any adverse distinction founded, *inter alia*, on those grounds stipulated in article 21(3) of the Statute. This mandate imposed in article 21(3) of the Statute is particularly relevant and apposite given the specific nature of the crimes under the jurisdiction of the Court. The crimes subject to the jurisdiction of this Court not only constitute international crimes under the Rome Statute, but also amount to grave violations of internationally recognised human rights.

32. Finally, it must be stressed that according to article 31(1) of the Vienna Convention on the Law of Treaties, the legal provisions must be interpreted in light of the object and purpose of the treaty.[32] In this case, the object and purpose of the Rome Statute to put an end to impunity for the most serious crimes of concern to the international community is set out in the preamble. The interpretation of the relevant provisions must give effect to this object and purpose.

[32] 'A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.'

B. Specific Relevant Legal Provisions

33. Having regard to the sources and order of precedence set out in article 21 of the Statute, we have identified various legal provisions that are relevant in resolving the legal issues arising under the third ground of appeal and the outcome of the appeal, namely the preamble of the Rome Statute, articles 13(b), 22, 58(1), 61(2), 63, 67(1)(d), 86, 87(7), 89(1), 97 of the Statute, rules 123(3), 124, 134 *bis*, *ter* and *quater* of the Rules; article 14(3)(d) of the International Covenant on Civil and Political Rights;[33] and articles 25, 41, 42, 48, and 103 of the UN Charter.

34. We shall briefly set out their relevancy before applying them. In the overall determination of whether the Pre-Trial Chamber erred in deciding to refer Jordan's failure to cooperate with the Court in the arrest and surrender of Mr Al-Bashir, it is important to bear in mind the objectives set out in the **preamble of the Rome Statute**[34] as the *raison d'être* of this Court. In addressing the impact that Jordan's failure had on the achievement of the object and purpose of the Rome Statute, it is important to recall, the object and purpose, which is 'to put an end to impunity' for the perpetrators of 'the most serious crimes of concern to the international community

[33] Regional human rights instruments have adopted similar provisions, including: article 6(3)(c) of the European Convention on Human Rights stating that 'Everyone charged with a criminal offence has the following minimum rights: (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require'; article 8(2)(d) of the American Convention on Human Rights stating that 'Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law. During the proceedings, every person is entitled, with full equality, to the following minimum guarantees: (d) the right of the accused to defend himself personally or to be assisted by legal counsel of his own choosing, and to communicate freely and privately with his counsel;'; and article 7(1) of the African Charter on Human and People's Rights stating that 'Every individual shall have the right to have his cause heard. This comprises: (a) The right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force; (b) The right to be presumed innocent until proved guilty by a competent court or tribunal; (c) The right to defence, including the right to be defended by counsel of his choice; (d) The right to be tried within a reasonable time by an impartial court or tribunal'.

[34] '[…] **Mindful** that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity, **Recognizing** that such grave crimes threaten the peace, security and well-being of the world, **Affirming** that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation, **Determined** to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes, […] **Reaffirming** the Purposes and Principles of the Charter of the United Nations, [...] **Determined** to these ends and for the sake of present and future generations, to establish an independent permanent International Criminal Court in relationship with the United Nations system, with jurisdiction over the most serious crimes of concern to the international community as a whole, […] **Resolved** to guarantee lasting respect for and the enforcement of international justice'.

as a whole', in this case those crimes allegedly committed in Darfur, and 'thus to contribute to the prevention of such crimes'. Jordan's non-compliance frustrated the said objective and purpose.

35. The impact of Jordan's failure to cooperate with the Court in the arrest and surrender of Mr Al-Bashir, requires us also to analyse **article 13(b) of the Statute** which triggers the jurisdiction of the Court when '[a] situation in which one or more [crimes referred to in article 5] 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'. This is because article 13(b) of the Statute requires the Court to consider the mandate of the UNSC and the consequences that the non-compliance of a State Party that is also a UN member with obligations owed to the Court and the UNSC entail.

36. In relation to the question whether the Pre-Trial Chamber erred in finding that the failure of Jordan to cooperate with the Court prevented the Court from exercising its functions and powers, **article 58(1) of the Statute** is crucial given that it sets out those reasons upon which a pre-trial chamber may rely to issue a warrant of arrest, namely when '[t]here are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court' and the arrest appears necessary '[t]o ensure the person's appearance at trial', 'ensure that the person does not obstruct or endanger the investigation or the court proceedings', or 'to prevent the person from continuing with the commission of that crime or a related crime which is within the jurisdiction of the Court and which arises out of the same circumstances'. As it is clear from the use of the word 'or' in this provision and as confirmed by the Appeals Chamber, 'the reasons for detention pursuant to article 58 (1) (b) (i) to (iii) of the Statute are in the alternative' and therefore once one of the reasons is established, it is immaterial to the issuance of a warrant of arrest whether any of the other reasons are also present.[35]

[35] Appeals Chamber, *The Prosecutor v. Thomas Lubanga Dyilo*, 'Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled "Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo"', 13 February 2007, ICC-01/04-01/06-824 ('*Lubanga* OA7 Judgment'), para. 139 ('However, as the reasons for detention pursuant to article 58 (1) (b) (i) to (iii) of the Statute are in the alternative, the question of whether or not the continued detention of the Appellant appears necessary under article 58 (1) (b) (ii) is ultimately not decisive for

37. One of the legal questions raised during the oral hearing in relation to the third ground of appeal is the extent to which the possibility of holding confirmation of charges proceedings *in absentia* under **article 61(2) of the Statute**[36] mitigates or annuls the Court's ability to exercise its functions and powers within the meaning of article 87(7) of the Statute. In order to properly examine the merit of this proposition, it is necessary to interpret article 61(2) of the Statute and its potential applicability to the case at hand. **Rule 123(3)**[37] and **rule 124 of the Rules**[38] are relevant to the interpretation of article 61(2) of the Statute.

38. This analysis will be carried out in section VI.A.1.(d)(ii)(c) below. However, at this juncture it is important to note that article 61(2) is a provision that essentially allows for exceptions to the fundamental human right to be tried in the presence of the defendant. Therefore, in interpreting the scope and potential applicability of this legal norm, it is fundamental to consider the concrete human rights concerned, the guarantee of proper administration of justice and the *Principle of Legality* provided in article 22 of the Statute[39] that must be borne in mind when interpreting any legal provision restrictive of the rights of a defendant. The Principle of Legality is a

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the present appeal because in any event and for the reasons explained above the Pre-Trial Chamber's finding as to the necessity of continued detention to ensure the presence of the appellant at trial justified the decision to deny release under article 60 (2) of the Statute').

[36] 'The Pre-Trial Chamber may, upon request of the Prosecutor or on its own motion, hold a hearing in the absence of the person charged to confirm the charges on which the Prosecutor intends to seek trial when the person has: (a) Waived his or her right to be present; or (b) Fled or cannot be found and all reasonable steps have been taken to secure his or her appearance before the Court and to inform the person of the charges and that a hearing to confirm those charges will be held. In that case, the person shall be represented by counsel where the Pre-Trial Chamber determines that it is in the interests of justice'.

[37] 'The Pre-Trial Chamber shall ensure that a warrant of arrest for the person concerned has been issued and, if the warrant of arrest has not been executed within a reasonable period of time after the issuance of the warrant, that all reasonable measures have been taken to locate and arrest the person.'

[38] '1. If the person concerned is available to the Court but wishes to waive the right to be present at the hearing on confirmation of charges, he or she shall submit a written request to the Pre-Trial Chamber, which may then hold consultations with the Prosecutor and the person concerned, assisted or represented by his or her counsel. 2. A confirmation hearing pursuant to article 61, paragraph 2 (a), shall only be held when the Pre-Trial Chamber is satisfied that the person concerned understands the right to be present at the hearing and the consequences of waiving this right. 3. The Pre-Trial Chamber may authorize and make provision for the person to observe the hearing from outside the courtroom through the use of communications technology, if required. 4. The waiving of the right to be present at the hearing does not prevent the Pre-Trial Chamber from receiving written observations on issues before the Chamber from the person concerned.'

[39] *Lex certa, lex scripta* and *lex stricta.*

principle in criminal law that has substantive, procedural and execution aspects and the Principle of Legality applies to criminal law in its entirety.[40]

39. When analysing the reasons that formed the basis of the warrants of arrest, particularly the need to ensure the presence of the accused at trial, one must remember that due process of law is an objective condition of criminal accountability, a fundamental human right and a guarantee for the proper administration of justice. Due process of law is a *conditio sine qua non* of a fair trial and all decisions of this Court must be in line with this fundamental right and guarantee.

40. In discussing the reasons relied upon in the decision of the Pre-Trial Chamber to issue two warrants of arrest in this case, it is important to recall that the requirement set out in article 58(1)(b)(i) of the Statute of ensuring the presence of the person at trial requires consideration of the fundamental right of the person to be present in his or her trial and the duty of the Court to afford the guarantee of proper administration of justice as stipulated in **article 63(1) of the Statute**: '[t]he accused shall be present during the trial' and **article 67(1)(d) of the Statute**: in the determination of any charge, the accused shall be entitled to minimum guarantees as set out in this provision, including in particular the right to be present at trial.[41]

41. In analysing any possible exceptions to this fundamental internationally recognised human right of the defendant and duty of the Court, the following relevant

[40] *See e.g.* Trial Chamber II, *Prosecutor v. Katanga*, 'Judgment pursuant to Article 74 of the Statute', 7 March 2014, ICC-01/04-01/07-3436-t ENG, para. 51 (stating that article 22 of the Statute 'constitutes a clear and explicit restriction on *all interpretative activity'* and therefore '[t]he bench must […] respect the two corollaries of the principle of legality, namely the principle of strict construction and the principle of *in dubio pro reo'*); Trial Chamber II, *Prosecutor v. Matheiu Ngudjolo Chui*, 'Concurring Opinion of Judge Christine Van Den Wijngaert', 18 December 2012, ICC-01/04-02/12-4 (stating that 'by including this principle in Part III of the Statute, the drafters wanted to make sure that the Court could not engage in the kind of "judicial creativity" of which other jurisdictions may at times have been suspected').

[41] 'In the determination of any charge, the accused shall be entitled to the following minimum guarantees, in full equality: […] (d) Subject to article 63, paragraph 2, to be present at the trial, to conduct the defence in person or through legal assistance of the accused's choosing, to be informed, if the accused does not have legal assistance, of this right and to have legal assistance assigned by the Court in any case where the interests of justice so require, and without payment if the accused lacks sufficient means to pay for it'.

provisions will be considered: **article 63(2) of the Statute**,[42] and **rules 134 *bis***,[43] ***ter***,[44] and ***quater*** of the Rules.[45]

42. Given that under the third ground of appeal the main issue to be determined is whether the Pre-Trial Chamber erred in referring Jordan's non-compliance with the Court's request to cooperate in the arrest and surrender of Mr Al-Bashir to the ASP and the UNSC, the legal basis of this obligation to cooperate with the Court is fundamentally relevant. This legal basis is found in **article 86 of the Statute** that provides that 'States Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court'. Furthermore, the specific legal basis for the obligation of States Parties to cooperate with requests of the Court for the arrest and surrender of persons to the Court is set out in **article 89(1) of the Statute** as follows: 'The Court may transmit a request for the arrest and surrender of a person […], to any State on the territory of which that person may be found and shall request the cooperation of that State in the arrest and surrender of such a person. *States Parties shall, in accordance with the provisions of this Part and the procedure under their national law, comply with requests for arrest and surrender*' (emphasis added).

[42] 'If the accused, being present before the Court, continues to disrupt the trial, the Trial Chamber may remove the accused and shall make provision for him or her to observe the trial and instruct counsel from outside the courtroom, through the use of communications technology, if required. Such measures shall be taken only in exceptional circumstances after other reasonable alternatives have proved inadequate, and only for such duration as is strictly required.'

[43] 'Presence through the use of video technology: 1. An accused subject to a summons to appear may submit a written request to the Trial Chamber to be allowed to be present through the use of video technology during part or parts of his or her trial. 2. The Trial Chamber shall rule on the request on a case-by-case basis, with due regard to the subject matter of the specific hearings in question.'

[44] 'Excusal from presence at trial: 1. An accused subject to a summons to appear may submit a written request to the Trial Chamber to be excused and to be represented by counsel only during part or parts of his or her trial. 2. The Trial Chamber shall only grant the request if it is satisfied that: (a) exceptional circumstances exist to justify such an absence; (b) alternative measures, including changes to the trial schedule or a short adjournment of the trial, would be inadequate; (c) the accused has explicitly waived his or her right to be present at the trial; and (d) the rights of the accused will be fully ensured in his or her absence. 3. The Trial Chamber shall rule on the request on a case-by-case basis, with due regard to the subject matter of the specific hearings in question. Any absence must be limited to what is strictly necessary and must not become the rule.'

[45] 'Excusal from presence at trial due to extraordinary public duties: 1. An accused subject to a summons to appear who is mandated to fulfil extraordinary public duties at the highest national level may submit a written request to the Trial Chamber to be excused and to be represented by counsel only; the request must specify that the accused explicitly waives the right to be present at the trial. 2. The Trial Chamber shall consider the request expeditiously and, if alternative measures are inadequate, shall grant the request where it determines that it is in the interests of justice and provided that the rights of the accused are fully ensured. The decision shall be taken with due regard to the subject matter of the specific hearings in question and is subject to review at any time'.

43. Furthermore, given that the legal basis upon which the Pre-Trial Chamber referred Jordan's failure to cooperate with the Court is **article 87(7) of the Statute**, each of the elements of this provision must be examined. In relation to the first and second grounds of appeal, the Appeals Chamber has unanimously determined that a State Party (Jordan) has failed 'to comply with a request to cooperate by the Court contrary to the provisions of this Statute'. In the analysis section of this dissenting opinion, the basis upon which the second prerequisite of this provision is established will be explained, namely that the failure prevented 'the Court from exercising its functions and powers under this Statute'. If both prerequisites are established, it is then within the legal boundaries and the discretion of the relevant chamber to 'make a finding to that effect and refer the matter to the Assembly of States Parties or, where the Security Council referred the matter to the Court, to the Security Council'. The analysis section will focus on whether the prerequisite of a failure that prevented the Court from exercising its functions and powers was established and, if so, whether the Pre-Trial Chamber made an erroneous exercise of its discretion when referring the matter to the ASP and the UNSC.

44. One of the arguments raised by Jordan under the third ground of appeal is that the Pre-Trial Chamber erred in its conclusions on consultations.[46] **Article 97 of the Statute** specifically addresses this issue stating that '[w]here a State Party receives a request [to cooperate] in relation to which it identifies problems which may impede or prevent the execution of the request, that State shall consult with the Court without delay in order to resolve the matter.' Article 97 of the Statute sets out some of the problems that may be identified such as '[i]nsufficient information to execute the request'. In cases of a request for surrender, such problems may include 'the fact that despite best efforts, the person sought cannot be located or that the investigation conducted has determined that the person in the requested State is clearly not the person named in the warrant', or '[t]he fact that execution of the request in its current form would require the requested State to breach a pre-existing treaty obligation undertaken with respect to another State'.

45. Because the interpretation of the relevant provisions of the Rome Statute must be consistent with internationally recognised human rights as per **article 21(3) of the**

[46] *See* para. 23 *et seq.*

Statute, relevant provisions of international human rights treaties will be examined when analysing the requirement under the Rome Statute that a defendant be present at trial, in particular **article 14(3)(d) of the International Covenant on Civil and Political Rights**.[47]

46. Given that in the determination of the legal issues arising under the third ground of appeal, the mandate, functions and powers of the UN, in particular those of the UN Security Council are relevant, the analysis section will examine the relevance and import of the following provisions: **articles 25,**[48] **41,**[49] **42,**[50] **48**,[51] and **103 of the UN Charter**.[52]

47. The legal issues and questions arising under the third ground of appeal will be determined having regard to and applying the legal framework and relevant juridical considerations set out above.

[47] 'In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it.'

[48] '[t]he Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.'

[49] 'The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.'

[50] 'Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.'

[51] '1. The action required to carry out the decisions of the Security Council for the maintenance of international peace and security shall be taken by all the Members of the United Nations or by some of them, as the Security Council may determine. 2. Such decisions shall be carried out by the Members of the United Nations directly and through their action in the appropriate international agencies of which they are members.'

[52] '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.'

VI. ANALYSIS

A. Did the Pre-Trial Chamber rely on objective factual and legal reasons in deciding to refer Jordan's failure to comply to the ASP and the UNSC?

48. In order to determine whether the Pre-Trial Chamber relied on objective factual and legal elements in deciding to refer Jordan's failure to comply to the ASP and the UNSC, the following questions must be answered:

a. *Was the Pre-Trial Chamber correct in determining that Jordan's failure to comply prevented the Court from exercising its functions and powers?*

b. *Was the Pre-Trial Chamber correct in its conclusions on consultations?*

c. *Was the Pre-Trial Chamber correct in its conclusions on the differential treatment with South Africa?*

49. In analysing and answering these questions, the dissenting judges are convinced that the Pre-Trial Chamber relied on ample and objective factual and legal reasons when it decided to refer Jordan's failure to cooperate with the Court in the arrest and surrender of Mr Al-Bashir to the ASP and the UNSC pursuant to article 87(7) of the Statute.

1. Was the Pre-Trial Chamber correct in determining that Jordan's failure to comply prevented the Court from exercising its functions and powers?

50. In answering this question, it is crucial to explain further the legal and factual reasons on the basis of which this dissent finds that the Court has been effectively prevented from exercising its functions and powers. Although there is unanimous agreement on this conclusion, it is important to explain the facts and scope of the legal framework that support this fundamental finding, and to examine in detail the negative impact that Jordan's failure to comply had on the exercise of the Court's powers and functions. This is relevant to the assessment of the gravity of Jordan's non-compliance, particularly in light of the jurisprudence of this Appeals Chamber stating that the exercise of discretion under article 87(7) of the Statute is subject to 'a

factual prerequisite that needs to be met for a finding of non-compliance to be made, namely that there is a failure to comply with the cooperation request *of a certain gravity*' (emphasis added).[53] The extent of the obstruction that Jordan's non-compliance caused on the exercise of the Court's functions and powers is therefore an important consideration to decide the gravity of such conduct and the potential need of a referral under article 87(7) of the Statute as a result.

(a) Relevant Part of the Impugned Decision

51. In the Impugned Decision, after determining that Jordan had failed to comply with the Court's request to arrest and surrender Mr Al-Bashir, the Pre-Trial Chamber stated at paragraph 50 that

> by not arresting Omar Al-Bashir while he was on its territory on 29 March 2017, Jordan failed to comply with the Court's request for the arrest and surrender of Omar Al-Bashir contrary to the provisions of the Statute, thereby preventing the Court from exercising its functions and powers under the Statute in connection with the criminal proceedings instituted against Omar Al- Bashir.

(b) Submissions of the Parties

52. We note that in the case at hand neither of the parties has raised on appeal the issue of whether the Pre-Trial Chamber correctly established the factual prerequisite under the first clause of article 87(7) of the Statute. However, further to a question put by the bench during the oral hearing,[54] the Prosecutor presented submissions in this regard.

53. In her final submissions, the Prosecutor submits that the issuance and execution of 'the arrest warrant is an essential part of the Court's process'; explaining that article 58 of the Statute 'outlines the Court's powers to issue arrest warrants and protects the Court's function'.[55] She further submits that one of the reasons to issue a warrant of arrest is to ensure the presence of the accused at trial, affirming that 'a trial

[53] *Kenyatta* OA5 Judgment, para. 39.
[54] Transcript of hearing, 13 September 2018, ICC-02/05-01/09-T-7-ENG, p. 95, lines 18-25 ('[i]'ll begin with a question to the OTP and this question is asked against a back-drop of Mr Newton's data of travels, and the question is this: Here we have all these travels going on in what appears to, to put it very diplomatically, cat-and-mouse game happening whenever travels happen. It engages the question, at least for purposes of whether a State Party who has not complied with a request to arrest and surrender, therefore, needing referral to the Security Council or the ASP. Is exercise of the Court's jurisdiction conditional on arrest and surrender, such that when that doesn't happen from a State Party, that State Party must be referred?').
[55] 'Final Submissions of the Prosecution following the Appeal Hearing', 28 September 2018, ICC-02/05-01/09-392 (OA 2) ('Prosecutor's Final Submissions'), para. 18.

cannot be held without the accused'.[56] With respect to the possibility of conducting confirmation of charges proceedings *in absentia*, the Prosecutor contends that notwithstanding this 'limited possibility […], the execution of the arrest warrant—as the plain terms of article 58 show—is intrinsically connected with the trial itself', arguing that 'one does not exist without the other.'[57]

54. The Prosecutor submits that 'several practical reasons militate against holding *in absentia* proceedings in this case'.[58] Furthermore, she affirms that Jordan's obligation to arrest and surrender Mr Al-Bashir 'is triggered by the duty that's incumbent upon them as it stands at the day on which the warrant is issued, and certainly that hypothetical scenario cannot be pleaded in excuse of not meeting their obligations'.[59]

(c) Unanimous Findings and Conclusions of the Appeals Chamber

55. The Appeals Chamber has found unanimously that '[a] warrant of arrest, alongside its alternative of summons to appear, serves the function of securing the presence of the suspect before the Court. It thus engages an important power that serves a fundamental function of the Court.'[60] It has then found that in the case at hand 'by failing to arrest and surrender Mr Al-Bashir, in circumstances in which Mr Al-Bashir was entitled to no immunity, Jordan prevented the Court from exercising an important power and a fundamental function'.[61]

(d) Analysis

56. In the Impugned Decision, the Pre-Trial Chamber found that Jordan's failure to arrest Mr Al-Bashir resulted in the non-compliance with a request of the Court which prevented the Court from exercising its functions and powers within the meaning of article 87(7) of the Statute. While it would have been preferable for the Pre-Trial Chamber to have elaborated on why it considered Jordan's non-compliance to have impeded the Court in this way, it is possible to nevertheless discern the justification and the basis for this finding, particularly by reference to the decisions on the Prosecutor's application for a warrant of arrest rendered on 4 March 2009 and 12 July

[56] Prosecutor's Final Submissions, paras. 18-19.
[57] Prosecutor's Final Submissions, para. 18.
[58] Prosecutor's Final Submissions, para. 19.
[59] Transcript of hearing, 13 September 2018, ICC-02/05-01/09-T-7-ENG, p. 99, lines 6-8.
[60] Majority Opinion, para. 190.
[61] Majority Opinion, para. 191.

2010 and the reasons underpinning them.[62] Before entering into a more detailed analysis of the reasons given by the Pre-Trial Chamber in those decisions as to the need to arrest Mr Al-Bashir, it is important to recall that these decisions and the underlying reasons are not under appeal and are as such final. This consideration in itself would suffice to conclude that by virtue of Jordan's failure to comply with the Court's request to cooperate in the arrest and surrender of Mr Al-Bashir the Court has been prevented from exercising its functions and powers as found unanimously by the Appeals Chamber. Nevertheless, the dissenting judges consider it important to elaborate on this aspect in order to further strengthen the unanimous determination.

(i) Relevant Factual Background

57. In order to determine the correctness or otherwise of the Pre-Trial Chamber's determination that Jordan's failure to comply prevented the Court from exercising its powers and functions, it is imperative to first recall the reasons on the basis of which the two warrants of arrest in relation to Mr Al-Bashir were issued. In order to conclude that the arrest of Mr Al-Bashir appeared necessary, the Pre-Trial Chamber analysed the different requirements provided in article 58(1) of the Statute as set out below.

(a) Whether there are reasonable grounds to believe that at least one of the crimes within the jurisdiction of the Court referred to in the Prosecution Application has been committed and that Mr Al-Bashir is responsible for those crimes

58. In the case at hand, the two warrants of arrest with respect to Mr Al-Bashir were issued at the request of the Prosecutor and on the basis that 'the evidence shows reasonable grounds to believe that Al Bashir intended to destroy in substantial part the Fur, Masalit and Zaghawa ethnic groups as such'.[63] The Prosecutor supported her assertion that the attack was widespread and systematic by reference to the fact that 'Al Bashir used the apparatus of the State, the Armed Forces and Militia/Janjaweed, to carry out hundreds of attacks against civilian towns and villages in Darfur, resulting

[62] First Decision on Warrant of Arrest; Second Decision on Warrant of Arrest.
[63] 'ANNEX A: Public Redacted Version of the Prosecutor's Application under Article 58', 14 July 2008, ICC-02/05-157-AnxA, ('Prosecutor's Application under Article 58'), para. 10.

in mass killings, rapes and torture, forcible transfer of hundreds of thousands civilians and destruction of their means of survival'.[64] In support of her contention that Mr Al-Bashir should be charged as an indirect perpetrator pursuant to article 25(3)(a), the Prosecutor referred, *inter alia*, to Mr Al-Bashir holding 'supreme authority in the hierarchically organised structure of the GoS', having *de jure* and *de facto* authority over the State apparatus.[65]

59. On the basis of the allegations presented by the Prosecutor and after analysing the evidence submitted in support thereof, the Pre-Trial Chamber determined that there were reasonable grounds to believe that Mr Al-Bashir was criminally responsible under article 25(3)(a) of the Statute for multiple counts of war crimes, crimes against humanity and genocide, including murder, extermination, torture and rape.[66]

(b) Whether the specific requirements under article 58 of the Statute for the issuance of a warrant of arrest have been met

60. In its analysis, the Pre-Trial Chamber first addressed whether the arrest of Mr Al-Bashir appeared necessary *to ensure his appearance at trial*. In this regard, it noted that the Government of Sudan, while presided over by Mr Al-Bashir, had 'systematically refused any cooperation with the Court since the issuance of an arrest warrant for Ahmad Harun and Ali Kushayb'[67] and that following the filing of the public summary of the Prosecutor's request for the issuance of a warrant of arrest against Mr Al-Bashir, 'it appears that Omar Al Bashir himself has been particularly defiant of the jurisdiction of the Court in several of his public statements'.[68] On the basis of the foregoing, the Pre-Trial Chamber concluded that the arrest of Mr Al-

[64] Prosecutor's Application under Article 58, para. 237.
[65] Prosecutor's Application under Article 58, paras 250-268, 280, 397 (the Prosecutor refers, *inter alia*, to Mr Al-Bashir 'repeatedly us[ing] his control to eliminate internal dissent and ensure uniform enforcement of his plan by his subordinates'and 'concealing his crimes under the guise of a "counterinsurgency strategy", or "inter-tribal clashes"').
[66] First Decision on Warrant of Arrest, para. 223; Second Decision on Warrant of Arrest, para. 43.
[67] First Decision on Warrant of Arrest, para. 228.
[68] First Decision on Warrant of Arrest, para. 231.

Bashir appeared necessary to ensure his appearance at trial in accordance with article 58(1)(b)(i) of the Statute.[69]

61. Secondly, the Pre-Trial Chamber discussed whether the arrest of Mr Al-Bashir appeared necessary *to ensure that he does not obstruct or endanger the proceedings*. In this respect, it recalled the existence of reasonable grounds to believe that Mr Al-Bashir 'is in control of the "apparatus" of the State of Sudan, or at least shares such control with a few high-ranking Sudanese political and military leaders'.[70] In light of the foregoing, the Pre-Trial Chamber considered that '[a]s a result, he is in a position to attempt to obstruct proceedings and to possibly threaten witnesses'.[71] In support of this conclusion, the Pre-Trial Chamber observed 'with grave concern that it appears that at least one individual has been recently convicted for the crime of treason as a result of his alleged cooperation with the Court'.[72] The Pre-Trial Chamber was thus satisfied that the arrest of Mr Al-Bashir appeared necessary in order to ensure that he does not obstruct or endanger the proceedings pursuant to article 58(1)(b)(ii) of the Statute.

62. Finally, the Pre-Trial Chamber analysed whether the arrest of Mr Al-Bashir appeared necessary *to prevent Mr Al-Bashir from continuing to commit the above-mentioned crimes*. To this effect, it noted that the latest report issued on 23 January 2009 by the UN High Commissioner for Human Rights concluded that the Government of Sudan appeared to continue to commit some of the crimes within the jurisdiction of the Court for which an arrest warrant for Mr Al-Bashir was issued.[73] On the basis of the foregoing and 'given that there are reasonable grounds to believe that Omar Al Bashir is the *de jure* and *de facto* President of the State of Sudan and Commander-in-Chief of the Sudanese Armed Forces', the Pre-Trial Chamber concluded that the arrest of Mr Al-Bashir appeared necessary to prevent him from continuing to commit the above-mentioned crimes under article 58(1)(b)(iii) of the Statute.[74]

[69] First Decision on Warrant of Arrest, para. 232.
[70] First Decision on Warrant of Arrest, para. 233.
[71] First Decision on Warrant of Arrest, para. 233.
[72] First Decision on Warrant of Arrest, para. 233.
[73] First Decision on Warrant of Arrest, para. 235.
[74] First Decision on Warrant of Arrest, para. 236.

63. Thus, the Pre-Trial Chamber clearly set out the objective factual and legal reasons justifying the issuance of a warrant of arrest against Mr Al-Bashir: to ensure his appearance at trial, to prevent the obstruction or endangerment of the proceedings and to prevent the further commission of crimes in Darfur, Sudan.

(ii) Presence of a defendant in criminal proceedings as a general rule

64. As recalled above, the Pre-Trial Chamber was satisfied that the arrest of Mr Al-Bashir appeared necessary to ensure his presence at trial. In this regard, it is important to emphasise the significance of the presence of a defendant during the entirety of the criminal proceedings instituted against him or her. This is particularly so given the questions posed by the bench during the oral hearing and the submissions presented by the Prosecutor concerning the possibility of holding some or all stages of the proceedings in this case in the absence of Mr Al-Bashir.

(a) The rule of presence in criminal proceedings and the restrictive approach to exceptions in international human rights law

65. The presence of a defendant in criminal proceedings instituted against him or her has a double dimension: it is an internationally recognised human right, inherently linked with the right to defence[75] that at the same time forms part of the due process of law, and is also a guarantee for the proper administration of justice through which not only the interests of the accused are protected but also those of the victims. By virtue of article 21(3) of the Statute, this Court must take into account the minimum standards for the protection of the right to due process of law developed in International Human Rights Law. In this regard, it is noted that the presence of a defendant in criminal proceedings has been internationally recognised as a human

[75] Both the ECHR and the IACHR have affirmed that the rights of the accused to defend herself or himself in person and to examine witnesses cannot be exercised without the accused person being present. *See* IACtHR, *Suarez-Rosero v Ecuador*, 'Judgment', 12 November 1997, Series C, no. 35, paras. 82-83; ACtHPR, *Thomas v Tanzania*, 'Judgement', 20 November 2015, application no. 005/2013, para. 91; ECHR, *Colozza v. Italy*, 'Judgement', 12 February 1985, application no. 9024/80, para. 27. *See also* African Commission on Human and People's Rights, *Avocats Sans Frontières (on behalf of Bwampamye) v Burundi*, application no. 231/99, 06 November 2000, paras 27-29.

right. Article 14(3)(d) of the International Covenant on Civil and Political Rights explicitly provides for the right of the accused to be present at trial.[76]

66. As previously noted by the Appeals Chamber, 'the accused person is not merely a passive observer of the trial, but the subject of the criminal proceedings and, as such, an active participant therein'. In this regard, the Appeals Chamber noted the 'central role of the accused person in proceedings and the wider significance of the presence of the accused for the administration of justice'.[77] The absence of the defendant during his or her criminal proceedings would also result in (i) a detrimental impact on the morale and participation of victims and witnesses';[78] (ii) a negative impact on the 'promoti[on of] public confidence in the administration of justice';[79] (iii) the Court not having the opportunity to verify the accuracy of the statements of the defendant and compare them with those of the victim and of the witnesses;[80] (iv) the defendant not being able to monitor the accuracy of the statements received by the Court and the arguments of the counterpart;[81] (v) a negative impact on the obtainment of a comprehensive record of the relevant facts that can only be achieved through the process of confronting the accused with the evidence against him;[82] (vi) in cases like the one at hand, vulnerable witnesses are unlikely to cooperate knowing that they could be subject to retaliation given that the defendant has a position of power that

[76] Article 14(3) of the ICCPR ('In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:... (d) to be tried in his **presence** and to defend himself in person or through legal assistance of his own choosing') (emphasis added).
[77] Appeals Chamber, *Prosecutor v. William Ruto and Samoei Sang*, 'Judgment on the appeal of the Prosecutor against the decision of Trial Chamber V(a) of 18 June 2013 entitled "Decision on Mr Ruto's Request for Excusal from Continuous Presence at Trial"', 25 October 2013, ICC-01/09-01/11-1066, ('*Ruto and Sang* OA5 Judgment'), para. 49 (stating that the accused 'is not merely a passive observer of the trial, but the subject of the criminal proceedings and, as such, an active participant therein'). *See also* IACHR, *Barreto Leiva v. Venezuela*, 'Judgment' 17 November 2009, Series C, no. 206, para. 29.
[78] *Ruto and Sang* OA5 Judgment, para. 49.
[79] *Ruto and Sang* OA5 Judgment, para. 49.
[80] ECHR, *Medenica v. Switzerland*, 'Judgment', 12 December 2001, application no. 20491/92, para. 54; ECHR, *Poitrimol v. France*, 'Judgment', 23 November 1993, application no. 14032/88, para. 35; ECHR, *Krombach v. France*, 'Judgment', 13 May 2001, application no. 29731/96, para. 84.
[81] ECHR, *Eliazer v. the Netherlands*, 'Judgment', 16 October 2001, application no. 38055/97, para. 32.
[82] *Ruto and Sang* OA5 Judgment, para. 49 citing jurisprudence of the ECHR (noting that Judge Rozakis has further developed this idea through his vote in *Medenica v. Switzerland*, and that 'the relevant paragraph may also serve the more general interests of justice by making it easier for criminal courts to acquire a better and more complete picture of the reality of the facts of a case and of the personality of the accused through constant interaction between the accused and the other protagonists at the trial (judges, witnesses and exhibits)'. *See also* ECHR, *Medenica v. Switzerland*, 'Judgment', 12 December 2001, application no. 20491/92, Dissenting Opinion of Judge Rozakis, para. 1.

would allow him to interfere with witnesses and obstruct justice;[83] (vii) ineffectiveness of any punishment imposed at the conclusion of criminal proceedings *in absentia*.[84] Furthermore, the absence of the defendant in criminal proceedings would prevent the Court from carrying out its duty to establish the truth which, in turn, negatively impacts the human right of the victims and the international community as a whole to know the truth.

67. Because of the importance of observing this fundamental human right which forms part of the due process of law and at the same time is a guarantee for the proper administration of justice, trials *in absentia* are generally impermissible under International Human Rights Law and the presence of the defendant is considered the general rule as confirmed by the Human Rights Committee,[85] the European Court of Human Rights,[86] the Inter-American Court of Human Rights,[87] and the African Court of Human and Peoples' Rights.[88]

68. From a review of the cases before the Inter-American Court of Human Rights and the African Court of Human and Peoples' Rights, it appears that in those two continents in general the rule is that the defendant must be present in criminal proceedings against him- or herself, without exceptions that would have required the attention of these regional human rights courts.[89] On their part, both the Human Rights Committee and the European Court of Human Rights have been seized of cases in which they have examined whether any exceptions to this norm is in

[83] First Decision on Warrant of Arrest, para. 233.
[84] IACHR, *Valle Jaramillo et al. v. Colombia*, 'Judgment', 27 November 2008, Series C, no. 192, para.165; IACHR, *Case of the Mapiripán Massacre v. Colombia*, 'Judgment', 15 September 2005, Series C, no. 134, para. 296 ('the impunity in th(e) case is reflected by the trial and conviction *in absentia* of members of paramilitary groups, who have benefited from the ineffectiveness of the punishment, because the warrants for their arrest have not been executed').
[85] Human Rights Committee, *Mbenge v Zaire*, 25 March 1983, no. 16/1977, para. 14.1; Human Rights Committee, *Maleki v. Italy*, 27 July 1999, no. 699/2996, para. 9.3.
[86] ECHR, *Colozza v. Italy*, 'Judgement', 12 February 1985, application no. 9024/80, para. 27; ECHR, *Medenica v. Switzerland*, 'Judgement', 12 December 2001, application no. 20491/92, para. 54; ECHR, *Sanader v. Croatia*, 'Judgement', 06 July 2015, application no. 66408/12, para. 18. *See also* ECHR *Stoichkov v. Bulgaria*, 'Judgement', 24 March 2005, application no. 9808/02, para. 56.
[87] IACHR, *Suarez-Rosero v Ecuador*, 'Judgment', 12 November 1997, Series C, no. 35, paras 82-83.
[88] African Commission on Human and People's Rights, *Avocats Sans Frontières (on behalf of Bwampamye) v. Burundi*, application no. 231/99, 06 November 2000, paras 27-29; ACHPR, *Thomas v Tanzania*, 'Judgement', 20 November 2015, application no. 005/2013, para. 91.
[89] *See e.g.* IACHR, *Suarez-Rosero v Ecuador*, 'Judgment', 12 November 1997, Series C, no. 35, paras 82-83; IACHR, *Valle Jaramillo et al. v. Colombia*, 'Judgment', 27 November 2008, Series C, no. 192, para.165; IACHR, *Case of the Mapiripán Massacre v. Colombia*, 'Judgment', 15 September 2005, Series C, no. 134, para. 296.

accordance with internationally recognised human rights. It seems that with the exception of one case,[90] in the remaining jurisprudence, the Committee and the European Court of Human Rights applied the general rule that trials *in absentia* were not compatible with internationally recognised human rights law and such violations could only be remedied if the accused person was entitled to an absolute right to a retrial.[91]

69. In light of the foregoing, it is thus clear that under international human rights law the presence of a defendant in criminal proceedings is the general rule and exceptions to this rule are to be interpreted restrictively, with the limitations imposed by the principle of legality and with strict observance of all minimum guarantees.

(b) Presence of a defendant in criminal proceedings in the Rome Statute

70. Within the legal framework of the Rome Statute, the presence of the defendant in criminal proceedings is the general rule. Article 63(1) of the Statute determines that the accused shall be present during the trial. In addition, the presence of the accused person is also stipulated as a fundamental *right* in article 67(1)(d) of the Statute.[92] Furthermore, the Statute requires the presence of the defendant in the provisions regarding the initial proceedings before the Court.[93] The requirement of the presence

[90] ECHR, *Medenica v. Switzerland*, 'Judgment', 14 June 2001, application no. 20491/92.
[91] Human Rights Committee, *Mbenge v Zaire*, 25 March 1983, no. 16/1977, para. 14.1; Human Rights Committee, *Maleki v. Italy*, 27 July 1999, no. 699/2996, para. 10; ECHR, *Pelladoah v Netherlands*, application no. 16737/90, 22 September 1994, paras 34-36; ECHR, *Colozza v Italy*, 'Judgment', 12 March 1985, application no. 9024/80; ECHR, *F.C.B. v. Italy*, 'Judgment', 28 August 1991, application no. 12151/86; ECHR, *T. v. Italy*, 'Judgment', 12 October 1992, application no. 14104/88; ECHR, *Poitrimol v France*, 'Judgment', 12 November 1993, application no. 14032/88; ECHR, *Lala v. the Netherlands*, 'Judgment', 22 September 1994, application no. 14861/89; ECHR, Grand Chamber, *Van Geyseghem v Belgium*, 'Judgment', 21 January 1999, application no. 26103/95; ECHR, *Krombach v. France*, 'Judgment', 13 January 2001, application no. 29731/96; ECHR, *Somogyi v. Italy*, 'Judgment', 10 November 2004, application no. 67972/01; ECHR, *Mariani v. France*, 31 March 2005, application no. 43640/98; ECHR, *Stoichkov v. Bulgaria*, 'Judgment', 24 June 2005, application no. 9808/02; ECHR, Grand Chamber, *Sejdovic v. Italy*, 'Judgment', 1 March 2006, application no. 56581/00.
[92] Article 67(1)(d) of the Statute ('The accused shall be entitled … to the following minimum guarantees, in full equality (d) … to be present at the trial'); *Prosecutor v Ruto and another* Judgment on the Appeal of the Prosecutor against the decision of Trial Chamber V(a) 25 October 2013, ICC-01/09-01/11-1066 Para 40.
[93] Articles 58-60 of the Statute. *See also* C. Safferling, *International Criminal Procedure* (2012), p. 323.

of the defendant was already present in the ILC Draft, which indicated that 'as a general rule, the accused should be present during the trial'.[94]

71. The Appeals Chamber has elaborated on article 63(1) of the Statute stating that it 'establishes that the accused shall be present during the trial, reflecting the central role of the accused person in proceedings and the wider significance of the presence of the accused for the administration of justice'.[95] By reference to the drafting history, the Appeals Chamber found that 'concerns in relation to the rights of the accused, as well as the practical utility of trials *in absentia* and their potential to discredit the Court prevailed and article 63 (1) of the Statute was incorporated in order to preclude this possibility'.[96] In relation to any possibility of 'implicit waiver', the Appeals Chamber found that 'the rationale for including article 63 (1) of the Statute was to reinforce the right of the accused to be present at his or her trial and, in particular, *to preclude any interpretation of article 67 (1) (d) of the Statute that would allow for a finding that the accused had implicitly waived his or her right to be present by absconding or failing to appear for trial*' (emphasis added).[97]

72. In relation to any possibility of allowing exceptions to the rule of presence at trial, the Appeals Chamber stated that '[t]he discretion that the Trial Chamber enjoys under article 63 (1) of the Statute is limited and must be exercised with caution'.[98] After noting that 'the presence of the accused must remain the general rule', it found that

> the following limitations on the discretion of the Trial Chamber to excuse an accused person from presence during trial may be derived: (i) *the absence of the accused can only take place in exceptional circumstances and must not become the rule*; (ii) the possibility of alternative measures must have been considered,

[94] O. Triffterer, *Commentary on the Rome Statute of the International Criminal Court* (2008), p. 1192.
[95] *Ruto and Sang* OA5 Judgment, para. 49 (the Appeals Chamber confirmed that '[t]he accused person is not merely a passive observer of the trial, but the subject of the criminal proceedings and, as such, an active participant therein. It is important for the accused person to have the opportunity to follow the testimony of witnesses testifying against him or her so that he or she is in a position to react to any contradictions between his or her recollection of events and the account of the witness. It is also through the process of confronting the accused with the evidence against him or her that the fullest and most comprehensive record of the relevant events may be formed. Furthermore, the continuous absence of an accused from his or her own trial would have a detrimental impact on the morale and participation of victims and witnesses. More broadly, the presence of the accused during the trial plays an important role in promoting public confidence in the administration of justice').
[96] *Ruto and Sang* OA5 Judgment, para. 53.
[97] *Ruto and Sang* OA5 Judgment, para. 54 (emphasis added).
[98] *Ruto and Sang* OA5 Judgment, para. 61.

> including, but not limited to, changes to the trial schedule or a short adjournment of the trial; (iii) *any absence must be limited to that which is strictly necessary*; (iv) *the accused must have explicitly waived his or her right to be present at trial*; (v) the rights of the accused must be fully ensured in his or her absence, in particular through representation by counsel; and (vi) the decision as to whether the accused may be excused from attending part of his or her trial must be taken on a case-by-case basis, with due regard to the subject matter of the specific hearings that the accused would not attend during the period for which excusal has been requested.[99]

73. From the foregoing considerations, it becomes clear that trials *in absentia* are not foreseen in the legal framework of the Court with the exception of the specific factual scenarios provided for in (i) article 63(2) ('[i]f the accused, being present before the Court, continues to disrupt the trial'); rule 134 *bis* (presence through the use of video technology); rule 134 *ter* (excusal from presence at trial, which can be allowed only in exceptional circumstances and with the explicit waiver by the accused); and 134 *quater* (excusal from presence at trial due to extraordinary public duties).[100]

(c) The exception of article 61(2)

74. During the oral hearing, a question was put by the bench to the Prosecutor as to whether the possibility of holding confirmation of charges proceedings *in absentia* in the case at hand could somehow reduce the negative impact of Jordan's failure to comply with the Court's request to arrest and surrender Mr Al-Bashir on the Court's ability to exercise its powers and functions.[101] While Jordan did not make submissions on this point, the Prosecutor submitted that there is no trial *in absentia* at the Court as there was no agreement to include such possibility in the Statute, and that at the end, article 61 was included to allow an *in absentia* proceeding regarding confirmation of charges.[1] That is why, the Prosecutor argued, a State Party that fails to cooperate must

[99] *Ruto and Sang* OA5 Judgment, paras 61-62.
[100] *Ruto and Sang* OA5 Judgment, para. 62 ('the absence of [an] accused can only take place in exceptional circumstance and must not become the rule'); rule 134 of the Rules ('[a]ny absence must be limited to what is strictly necessary and must not become the rule').
[101] Transcript of hearing, 13 September 2018, ICC-02/05-01/09-T-7-ENG, p. 98, line 23 to p. 99, line 3 ('[t]he distinction was made between proceeding to trial without the person versus doing confirmation hearing without a person. Again we come back to Jordan's scenario here. As I understand it, there has not been a confirmation hearing. Would we say that Jordan's non-compliance has frustrated even the confirmation hearing to the extent that the Statute allows a confirmation hearing to take place without').

be referred because the Court cannot exercise its jurisdiction.[1] The Prosecutor asserted that because the proceedings could not progress beyond the confirmation process, an arrest and surrender is essential for allowing the proceedings to advance, and in the absence of such arrest, the Court's functions and powers are frustrated.[1]

75. For the reasons that follow the possibility of holding confirmation of charges proceedings *in absentia* is inapposite in the case at hand. Article 61(2) of the Statute provides as follows:

> 1. The Pre-Trial Chamber may, upon request of the Prosecutor or on its own motion, hold a hearing in the absence of the person charged to confirm the charges on which the Prosecutor intends to seek trial when the person has:
>
> (a) Waived his or her right to be present; or
>
> (b) Fled or cannot be found and all reasonable steps have been taken to secure his or her appearance before the Court and to inform the person of the charges and that a hearing to confirm those charges will be held. In that case, the person shall be represented by counsel where the Pre-Trial Chamber determines that it is in the interests of justice'.

76. The exceptions set out in article 61(2) of the Statute must be interpreted restrictively primarily because they constitute exceptions to the general rule set out in article 61(1) that the confirmation of charges hearing shall be held in the presence of the person charged, and because they are restrictions to the internationally recognised human right of a defendant to be present in criminal proceedings.[102] Furthermore, by virtue of the Principle of Legality that applies in international criminal law, it is not possible to extend by analogy the effects of this provision to cases or scenarios not specifically set out in the legal norm.

77. Turning to the possibility of applying the exception envisaged in article 61(2) to the present case, in relation to article 61(2)(a),[103] it is rather an obvious statement to affirm that for all purposes, Mr Al-Bashir is not available to the Court[104] and has not

[102] The mandate imposed in article 21(3) of the Statute to interpret and apply the sources of the law in a manner consistent with internationally recognised human rights is a relevant consideration when interpreting article 61(2) of the Statute.
[103] This provision refers to the case where a person has waived his or her right to be present.
[104] Rule 124 makes clear that article 61(2)(a) can only proceed 'if the person concerned is available to the Court'.

explicitly and unequivocally waived his right to be present within the meaning of article 61(2)(a) of the Statute.[105]

78. As to the possibility of invoking article 61(2)(b) of the Statute, it is likely undisputed that Mr Al-Bashir has not 'fled' as he has never been available to the Court.[106] Furthermore, it is rather undisputable that the whereabouts of Mr Al-Bashir were known at all material times and locating him[107] is not the real obstacle to the holding of confirmation proceedings. In the matter *sub judice*, the true obstacle to the possibility of holding criminal proceedings against Mr Al-Bashir has been the lack of cooperation of Jordan in the arrest and surrender of Mr Al-Bashir. The only necessary step in this case to ensure the surrender of Mr Al-Bashir to the Court is the execution of the warrants of arrest issued by the Pre-Trial Chamber through the cooperation of States. In terms of the requirements set out in article 61(2)(b) of the Statute, the question must also be posed as to whether this Court has indeed taken all reasonable steps to ensure Mr Al-Bashir's presence before this Court. If the answer is in the negative, article 61(2)(b) cannot be applied. In answering this question, one may consider the steps so far taken by the Court, namely issuing a warrant of arrest and making a number of findings of non-compliance of States Parties in the request for cooperation to arrest and surrender Mr Al-Bashir. Some of these instances were referred to the ASP and the UNSC and others were not. It seems therefore that the Court has not taken all reasonable steps at its disposal to ensure the presence of Mr Al-Bashir in the criminal proceedings instituted against him.

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[105] ECHR, *Zana v Turkey*, 'Judgment', 25 November 1997, application no. 60/1996/688/880, para. 70: '[w]aiver of the exercise of a right guaranteed by the Convention must be established in an unequivocal manner'. *See also* ECHR, *Poitrimol v. France*, 'Judgment', 23 November 1993, application no. 14032/88, para. 31; ECHR, *Sejdovic v. Italy*, 'Judgment', 1 March 2006, application no. 56581/00, paras 86-87. *See also* ICTY, *Prosecutor v. Delalic*, case no/ IT-96-21 transcript, 4 November 1997, paras 8967-8976; *Ruto and Sang* OA5 Judgment, para. 54 ('[t]he Appeals Chamber finds that part of the rationale for including article 63 (1) of the Statute was to reinforce the right of the accused to be present at his or her trial and, in particular, to preclude any interpretation of article 67 (1) (d) of the Statute that would allow for a finding that the accused had implicitly waived his or her right to be present by absconding or failing to appear for trial').

[106] The first scenario referring to a situation where a defendant has fled presupposes that the person was previously available to the Court and subsequently absconded (contumacy).

[107] It is persuasive and the most consistent interpretation with internationally recognised human rights to view article 61(2)(b) as referring to the 'impossibility to trace the person', notwithstanding reasonable steps and efforts in that direction. (*See e.g.* G. Pikis, *The Rome Statute for the International Criminal Court* (2010), p. 136). The text of rule 123(3) of the Rules confirms this interpretation as it refers to the possibility of holding confirmation proceedings in the absence of the suspect only after 'all reasonable measures have been taken to ***locate*** and arrest the person'. The word 'locate' in this provision clearly indicates that the person cannot be located because his or her whereabouts are unknown.

79. It is clear from the foregoing considerations that the presence of a defendant in the criminal proceedings instituted against him or her is both an internationally recognised human right of the person and part of the judicial guarantee of due process of law, fair trial and proper administration of justice established in articles 61(1), 63(1) and 67(1)(d) of the Statute and in accordance with article 14(3)(d) of the International Covenant on Civil and Political Rights. In this regard, it is pertinent to recall that the Rome Statute has established the presence of an indicted person in proceedings before the Court as the general rule. As such, and in light of the Principle of Legality applicable to any legislation affecting fundamental rights, article 61(2) must be interpreted in a restrictive manner.

80. Although there are specific exceptions to the general rule of presence in criminal proceedings established in the Rome Statute, such as those set out in article 61(2) of the Statute, none of the scenarios provided in that provision seem to have been established in the present case. In any event, the Appeals Chamber cannot interfere with the autonomy of the Prosecutor and with the autonomy and discretion of the Judges of the Pre-Trial Chamber – article 61(2) of the Statute is sufficiently clear on this point. Furthermore, neither the parties nor the participants have requested the application of this provision and have not been heard on this issue.

(d) Conclusion on Presence at trial

81. It is clear from the foregoing analysis that Jordan's failure to execute the warrant of arrest issued against Mr Al-Bashir has prevented the Court from exercising its power afforded in article 58(1)(b) to execute the warrant of arrest against Mr Al-Bashir and its functions to secure the presence of the defendant at trial and of carrying out fair trial proceedings under article 64(2) of the Statute. Therefore, the Court was prevented from exercising its concrete functions and powers, thereby fulfilling the requirement provided in article 87(7) of the Statute.

(iii) Prevent the obstruction or endangerment of investigations

82. In relation to the second requirement of article 58(1)(b) – to ensure that the person does not obstruct or endanger the investigation or the court proceedings – given, as noted by the Pre-Trial Chamber in the First Decision on Warrant of Arrest, the existence of reasonable grounds to believe that Mr Al-Bashir 'is in control of the "apparatus" of the State of Sudan, or at least shares such control with a few high-ranking Sudanese political and military leaders',[108] it seems very difficult to conceive how the Prosecutor and his or her team will be able to enter the territory of Sudan in order to carry out her investigation. Investigative measures typically include, *inter alia*, the identification and interviewing of witnesses and victims; visiting the locations in which crimes were allegedly committed; the search of locations of mass graves; collecting relevant documentary evidence; and conducting financial investigations. It is only logical to conclude that without the possibility of conducting the relevant and appropriate investigative measures, it will be very difficult for the Prosecutor to collect evidence, let alone submit credible and reliable evidence to the relevant chamber for the purpose of the confirmation of charges hearing and subsequently the trial.

83. These difficulties were already illustrated in the request by the Prosecutor to issue a warrant of arrest against Mr Al-Bashir. The Prosecutor explained that '[s]itting at the apex of the state structure in the Sudan, [Mr Al-Bashir] is in a position to obstruct the proceedings and possibly attempt to secure information about witnesses and threaten them'.[109]

84. In support of her contention, the Prosecutor provided concrete examples. She observed that Mr Al-Bashir's agents 'have intimidated, threatened or carried out reprisals aimed at those complaining or suspected of providing information about, or reporting crimes committed in Darfur. *A number of witnesses have suffered intimidation, threats, bribery, arrest, torture and disappearance after having met with commissioners from the UNCOI, UN officials or international NGOs*' (emphasis added).[110] In her application, the Prosecutor referred in particular to an IDP that during his interview with the United Nations Commission of Inquiry, 'described his

[108] First Decision on Warrant of Arrest, para. 233.
[109] Prosecution's Article 58 Application, para. 412.
[110] Prosecution's Article 58 Application, para. 344.

arrest and torture by security forces as retaliation for his complaints while in the camp about the attacks on villages'.[111] She further noted the testimony of several witnesses interviewed by the United Nations Commission of Inquiry who explained that 'shortly before the visit of the UNCOI to the camp, a [Sudanese] official from Khartoum arrived at the camp and at a meeting […] he stated that "he was coming from the head of the Sudan Government to let the [IDPs] know that there was a committee coming in", that there are "rumours about crime, execution and rapes to get rid of specific tribes" and concluded by stating, "if you [IDPs] say everything is okay, we will help you"'.[112]

85. In the application under article 58 of the Statute, the Prosecutor further noted that after an attack in one locality of Darfur, 'the local security committee […] issued a decree preventing people from filing complaints with the Police and instructing the Police not to report incidents'.[113] The Prosecutor referred as well to the testimony of personnel from Prosecution Offices in Darfur reporting a 'verbal directive from Khartoum not to prosecute incidents which occurred in the context of counterinsurgency, including the killing of civilians, rape, looting of property and destruction of homes'.[114]

86. As noted in the background section, in the decision on the warrant of arrest, the Pre-Trial Chamber found reasonable grounds to believe that Mr Al-Bashir **'**is in control of the "apparatus" of the State of Sudan, or at least shares such control with a few high-ranking Sudanese political and military leaders'.[115] The Pre-Trial Chamber therefore found reasonable grounds to believe that 'he is in a position to attempt to obstruct proceedings and to possibly threaten witnesses', observing in particular 'with grave concern that it appears that at least one individual has been recently convicted for the crime of treason as a result of his alleged cooperation with the Court'.[116]

87. Without access to evidence, it will be impossible to meaningfully hold a confirmation hearing, let alone commence trial proceedings and give effect to any

[111] Prosecution's Article 58 Application, para. 347.
[112] Prosecution's Article 58 Application, para. 346.
[113] Prosecution's Article 58 Application, para. 348.
[114] Prosecution's Article 58 Application, para. 345.
[115] First Decision on Warrant of Arrest, para. 234.
[116] First Decision on Warrant of Arrest, para. 234.

potential sentence imposed and award of reparations to victims. This has the necessary consequence of preventing the Court from exercising its functions and powers, delivering justice to the victims of the crimes allegedly committed by Mr Al-Bashir and impeding the Court from fulfilling its mandate to put an end to impunity.

88. In conclusion, by failing to arrest and surrender Mr Al-Bashir, Jordan has prevented the Court from exercising its power to execute the warrants of arrest against Mr Al-Bashir and the powers and functions of the Office of the Prosecutor, which is an organ of the Court, with respect to investigations under article 54 of the Statute. This, in turn, prevented the Court from exercising its functions and powers thereby fulfilling the second requirement provided for in article 87(7) of the Statute.

(iv) Prevent the further commission of crimes

89. With respect to the last requirement set out in article 58(1)(b) – to prevent the person from continuing with the commission of crimes within the jurisdiction of the Court - it is important to recall that in its decision to issue a warrant of arrest, the Pre-Trial Chamber noted that the report issued on 23 January 2009 by the UN High Commissioner for Human Rights concluded that the Government of Sudan appeared to continue to commit some of the crimes within the jurisdiction of the Court for which an arrest warrant for Mr Al-Bashir was issued.[117] The Pre-Trial Chamber observed the existence of reasonable grounds to believe that Mr Al-Bashir 'is the *de jure* and *de facto* President of the State of Sudan and Commander-in-Chief of the Sudanese Armed Forces' thereby concluding that the arrest of Mr Al-Bashir appeared necessary to prevent him from continuing to commit the above-mentioned crimes under article 58(1)(b)(iii) of the Statute.[118]

90. More recently, the last report presented by the Prosecutor to the Security Council on 20 June 2018 with respect to the situation in Darfur indicates that the Government of the Sudan, whose Head of State remained Mr Al-Bashir, appears to have continued to be involved in the commission of crimes within the jurisdiction of

[117] First Decision on Warrant of Arrest, para. 235.
[118] First Decision on Warrant of Arrest, para. 236.

the Court.[119] In particular, the report notes that 'during reported attacks by the Rapid Support Forces ("RSF") [the Sudanese paramilitary forces] and allied militiamen at the end of March 2018, between 11 and 16 civilians were allegedly killed, houses were burnt and hundreds of livestock were looted in the surroundings of Sawani and Rakoona villages located in East Jebel Marra'.[120] In relation to the targeting by the Government of students, journalists and political opponents, the report states that 'hundreds of people reportedly continue to be arbitrarily detained in Sudan for prolonged periods of time, without being charged or given proper access to their families, lawyers or essential medical treatment.'[121]

91. Furthermore, the Office of the UN High Commissioner for Human Rights has recently noted '[c]redible reports of the use of excessive force, including live ammunition, by State security forces against protestors across Sudan'.[122] This organ also reported that '[t]he Government has confirmed that 24 people have died in the course of the protests, but other credible reports suggest the death toll may be nearly twice as high'.[123]

92. In light of the foregoing, the determination of the Pre-Trial Chamber that Jordan's failure to surrender and arrest Mr Al-Bashir prevented the Court from exercising its functions and powers was not unreasonable. By failing to arrest and surrender Mr Al-Bashir, Jordan has prevented the Court from exercising its power derived from article 58 to execute the warrants of arrest against Mr Al-Bashir and its function of investigating, trying and prosecuting crimes under its jurisdiction thereby preventing the further commission of crimes as per article 58(1)(b)(iii) of the Statute. This prevented the Court from exercising its functions and powers thereby fulfilling the requirement provided for in article 87(7) of the Statute.

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[119] The Office of the Prosecutor, 'Twenty-seventh report of the Prosecutor of the International Criminal Court to the United Nations Security Council pursuant to UNSCR 1593 (2005)', 20 June 2018, ('OTP Twenty-Seventh Report') paras 25-33.
[120] OTP Twenty-Seventh Report, para. 27.
[121] OTP Twenty-Seventh Report, para. 33.
[122] Office of the High Commissioner for Human Rights, 'Reports of excessive force against Sudan protests deeply worrying – Bachelet', 17 January 2019, ('OHCHR Report on Sudan').
[123] OHCHR Report on Sudan ('[a]ccording to information received, security forces have also followed some protestors into the Omdurman Hospital and fired tear gas and live ammunition inside the premises of the hospital [and inside Bahri Teaching Hospital and Haj Al-Safi Hospital]' and '[a]uthorities have also confirmed that up to 6 January, at least 816 people were arrested in connection with the demonstrations. Reports indicate that these include journalists, opposition leaders, protestors and representatives of civil society').

(e) Conclusion on the question of whether the Court was prevented from exercising its functions and powers

93. The above analysis of those relevant considerations that should inform the determination as to whether the Pre-Trial Chamber erred in concluding that Jordan's failure to arrest and surrender Mr Al-Bashir prevented the Court from exercising its functions and powers within the meaning of article 87(7) of the Statute leads to the following conclusions:

a. Jordan's failure to comply with the Court in the arrest and surrender of Mr Al-Bashir frustrated the fulfilment of the objectives of article 58(1)(b) of the Statute, namely (1) ensure Mr Al-Bashir's appearance at trial; (2) ensure that Mr Al-Bashir does not obstruct or endanger the investigation or the court proceedings; and (3) prevent the continuation of the commission of crimes in Darfur.

b. In relation to article 58(1)(b)(i) of the Statute, Jordan's failure prevented the Court from exercising its functions of carrying out fair trials under article 64(2) of the Statute because:

(i) None of the prerequisites for the application of article 61(2) of the Statute are established;

(ii) the remote possibility of holding confirmation of charges *in absentia* would deprive of effect the final and uncontested decision rendered by the Pre-Trial Chamber on the warrants of arrest issued against Mr Al-Bashir;

(iii) the remote possibility of holding confirmation of charges *in absentia* would send the wrong message to States Parties with respect to their obligation to cooperate: regardless of whether a suspect is arrested and surrendered to the Court, the Court can nevertheless fulfil its mandate; and

(iv) even if confirmation of charges *in absentia* were to be considered possible under certain conditions (conditions that are not met in this case), nevertheless

trials *in absentia* are not possible within the legal framework of the Court and holding the contrary would be inconsistent with internationally recognised human rights.

c. In relation to article 58(1)(b)(ii) of the Statute, Jordan's failure prevented the Prosecutor as an organ of the Court from exercising its functions and powers with respect to investigations under article 54 of the Statute.

d. In relation to article 58(1)(b)(iii) of the Statute, Jordan's failure prevented the Court from exercising its function of investigating, trying and prosecuting crimes under its jurisdiction thereby preventing the further commission of crimes.

94. In sum, the dissenting judges are satisfied that the Pre-Trial Chamber did not err in determining that Jordan's failure to cooperate in the arrest and surrender of Mr Al-Bashir prevented the Court from exercising its powers under article 58(1)(b) of the Statute. Jordan's failure to cooperate also frustrated the objectives of the warrants of arrest issued against Mr Al-Bashir thereby preventing the Court from exercising its functions to carry out fair trials, conduct investigations and prevent the further commission of crimes. Therefore, the factual prerequisite of article 87(7) of the Statute was fulfilled. Accordingly, the Appeals Chamber unanimously upholds the Pre-Trial Chamber's determination in this regard.

95. The reasons explained in detail above illustrate the gravity of Jordan's non-compliance as a relevant consideration in the assessment of whether a referral under article 87(7) of the Statute was warranted.

2. Was the Pre-Trial Chamber correct in its conclusions on consultations?

(a) Relevant Part of the Impugned Decision

96. In the Impugned Decision, the Pre-Trial Chamber ascertained that consultations between Jordan and the Court with the view of removing the conflicting obstacles to

Jordan's cooperation, did not take place.[124] The Pre-Trial Chamber considered that the *note verbale* of 28 March 2017 did not qualify as a request for consultations since: (i) the text of the *note verbale* of 28 March 2017 only refers to consultations when it states that 'Jordan is hereby consulting with the ICC under article 97 of the Rome Statute';[125] and (ii) that it did not contain any questions or call to action to the Court that could 'enable [it] being interpreted as a request for any kind'.[126] It held further that the timing of the *note verbale* of 28 March 2017, having been sent one day prior to the expected arrival of Mr Al-Bashir to Jordan, acted as an additional factor 'militating against the interpretation of the *note verbale* as a request for consultations'.[127]

97. In deciding that Jordan's failure to comply with the Court's request to cooperate in the arrest and surrender of Mr Al-Bashir should be referred to the ASP and the UNSC, the Pre-Trial Chamber considered, *inter alia*, that at the time of Mr Al-Bashir's visit the Court had already expressed in unequivocal terms that States Parties are under an obligation to arrest Mr Al-Bashir and that consultations did not have suspensive effect on this obligation.[128]

(b) Submissions of Parties

98. Jordan submits that two *note verbales* were sent to the Court seeking consultations and that they had urged the Pre-Trial Chamber to initiate those proceedings.[129] Jordan argues that following official confirmation of Mr Al-Bashir's attendance to the summit in March 2017, it had requested consultations with the Court in its *note verbale* of 28 March 2017.[130] In Jordan's view, the *note verbale* of 28 March 2017 was 'an effort pursuant to Article 97 to consult with the Court'[131] but

[124] Impugned Decision, para. 47.
[125] Annex 1 of 'Report of the Registry on additional information received regarding Omar Al Bashir's potential travel to the Hashemite Kingdom of Jordan', 28 March 2017, ICC-02/05-01/09-293-Conf-Anx1-Corr, p. 2.
[126] Impugned Decision, para. 47.
[127] Impugned Decision, para. 47.
[128] Impugned Decision, para. 54.
[129] Transcript of hearing, 13 September 2018, ICC-02/05-01/09-T-7-ENG, p. 39, line 9 to p. 40, line 6.
[130] Transcript of hearing, 13 September 2018, ICC-02/05-01/09-T-7-ENG, p. 40, lines 18-19.
[131] Transcript of hearing, 13 September 2018, ICC-02/05-01/09-T-7-ENG, p. 40, lines 18-24.

asserts that 'Jordan received no response whatsoever from the Pre-Trial Chamber'.[132] Jordan alleges that (i) following the *note verbale* of 24 March 2017, the Prosecutor filed her observations on the same date on the *note verbale* and 'urged the Pre-Trial Chamber to seek immediate clarification from Jordan so as to resolve any questions or misunderstandings that may have arisen on the part of Jordan with respect to its obligations';[133] and (ii) the Prosecutor filed further observations on 29 March 2017 acknowledging that Jordan had 'triggered consultations' and had requested for the Pre-Trial Chamber to 'procced urgently to resolve any misunderstandings'.[134] Jordan maintains that despite the Prosecutor's efforts, the Pre-Trial Chamber 'took no action'.[135] Jordan maintains that it was 'genuinely seeking consultations and it was doing so in good faith'.[136]

99. Jordan asserts that at the time Mr Al-Bashir had travelled to Jordan in March 2017, the proceedings concerning South Africa were still on-going and therefore the Pre-Trial Chamber had not expressed in unequivocal terms that South Africa had failed to comply with its obligations under the Statute.[137] Jordan argues that the Pre-Trial Chamber had directly communicated its legal views to South Africa on12 and 13 June 2015 prior to Mr Al-Bashir's visit to that country, whereas these legal views were not 'expressed directly to Jordan'.[138] Jordan adds that it was unreasonable to maintain that it was on notice of its obligations under the Statute given the divergent jurisprudence of the pre-trial chambers on the issue of arrest and surrender of Mr Al-Bashir on the territory of States Parties.[139]

100. In her response, the Prosecutor submits that the contention made by Jordan that it made good faith efforts to consult with the Court is unsupported by the record.[140] The Prosecutor asserts that Jordan approached the Court only a day before Mr Al-Bashir's visit.[141] She contends as well that Jordan only approached the Court following the Registry's inquiry regarding Mr Al-Bashir's travel to Jordan to attend

[132] Transcript of hearing, 13 September 2018, ICC-02/05-01/09-T-7-ENG, p. 41, lines 15-16.
[133] Transcript of hearing, 13 September 2018, ICC-02/05-01/09-T-7-ENG, p. 39, line 18 to p. 40, line 1.
[134] Transcript of hearing, 13 September 2018, ICC-02/05-01/09-T-7-ENG, p. 41, lines 1-14.
[135] Transcript of hearing, 13 September 2018, ICC-02/05-01/09-T-7-ENG, p. 40, lines 2-4.
[136] Transcript of hearing, 13 September 2018, ICC-02/05-01/09-T-7-ENG, p. 41, lines 15-20.
[137] Appeal Brief, paras 94-95, 102.
[138] Appeal Brief, paras 98, 101.
[139] Appeal Brief, para. 95.
[140] Prosecutor's Response, para. 119.
[141] Prosecutor's Response, para. 120.

the Summit in March 2017; and besides making reference to article 97 of the Statute in the *note verbale* of 28 March 2017, Jordan 'did not seek anything further form the Court, did not request a meeting with Court Officials or identify difficulties or impediments to executing the request'.[142] Instead, the Prosecutor argues that 'Jordan only expressed a principled position not to arrest Omar Al-Bashir'.[143] She argues that article 97 of the Statute only gives States Parties an avenue to express '*practical reasons* why cooperation may be impeded'; it does not provide an outlet for a State to express a differing opinion from that of the Court or explore whether it 'should or should not arrest' Mr Al-Bashir.[144]

101. The Prosecutor submits that the Pre-Trial Chamber correctly considered, and unequivocally expressed its position regarding a State Party's obligation to arrest and surrender Mr Al-Bashir and Jordan knew that it was obliged to arrest him and that engaging in consultations with the Court did not suspend its obligations in this regard.[145] The Prosecutor argues that the Court has directly reminded Jordan of its obligations in three instances since 2009 and the Court's publicly available decisions between 2011 and 2017 'have consistently underscored States Parties' obligations to arrest Omar Al-Bashir and surrender him to the Court'.[146] The Prosecutor argues further that, while the legal reasoning may have varied across the Court's decisions, they 'unanimously' concluded that Mr Al-Bashir does not benefit from any immunity before this Court and States Parties are obliged to arrest and surrender him.[147]

(c) Findings and Conclusions in the Majority Opinion

102. The Majority finds that the Pre-Trial Chamber erred in concluding that Jordan's *note verbale* of 28 March 2017 did not constitute a request for consultations.[148] In reaching this conclusion, the Majority considers that 'the manner in which a State may indicate its intention to seek consultations may vary' and 'some approaches may be more awkward than others' but it states that the intention to consult must be

[142] Prosecutor's Response, paras 119-120.
[143] Prosecutor's Response, paras 119-120.
[144] Prosecutor's Response, para. 119.
[145] Prosecutor's Response, paras 100, 109-114.
[146] Prosecutor's Response, para. 112. *See also* paras 105, 109.
[147] Prosecutor's Response, para. 113 (emphasis in original omitted).
[148] Majority Opinion, para. 206.

'discernible in the circumstances'.[149] In terms of the timing, the Majority holds that 'the intention to consult must be communicated to the Court timeously, so as not to frustrate the object of the request for cooperation or defeat the purpose of the consultation process' and that States must 'conduct consultations in good faith'.[150]

103. Nevertheless, in applying these considerations to the present case, the Majority finds that it was discernible that Jordan 'sought to engage with the Court in relation to the requested cooperation' and that the Pre-Trial Chamber should have reacted to Jordan's request.[151] The Majority further considers that '[w]hile it would be better for a State to approach the consultation process in an unequivocal manner of asking questions in need of resolution, the failure to follow that approach is not necessarily inconsistent with an intention to engage in consultation'.[152] The Majority finds that in the case at hand 'Jordan's failure to put questions to the Pre-Trial Chamber, choosing rather to set out its own legal position for the *Note Verbale* of 28 March 2017 was not inconsistent with an attempt to engage in consultations'.[153]

104. In terms of the timing of Jordan's alleged attempt to engage in consultations, the Majority finds that 'while Jordan was required to seek consultation without delay, tardiness in that regard need not result in a presumption of bad faith'.[154] In this sense, the Majority highlights that '[e]ngaging in consultations earlier would have made it possible for these questions to be clarified in advance of Mr Al-Bashir's arrival in Jordan, which, in turn, could have avoided Jordan's non-compliance with its obligations under the Statute' but nonetheless finds that in any event 'Jordan made a request to consult before Mr Al-Bashir was on Jordan's territory'.[155]

[149] Majority Opinion, para. 202.
[150] Majority Opinion, para. 202.
[151] Majority Opinion, para. 203.
[152] Majority Opinion, para. 204.
[153] Majority Opinion, para. 204.
[154] Majority Opinion, para. 205.
[155] Majority Opinion, para. 205.

(d) Analysis

105. As provided in article 97 of the Statute and as accepted by the Majority,[156] when upon receipt of a request for cooperation, a State Party encounters difficulties in its execution, the State concerned must consult with the Court 'without delay' with a view to resolving the matter. The first question that arises in interpreting article 97 of the Statute concerns the meaning of consultations in the context of the fulfillment of international obligations arising from international conventional law.

106. The ordinary meaning of the verb 'consult' shows that the act of consulting involves either seeking information or advice from someone, having discussions with someone typically before undertaking a course of actions or refer for information to a book, diary, etc.[157] In the field of international public law, it is contended that '[c]onsultation encompasses not only invitations, rights and obligations to inform, but also to consider, to discuss' and that '[j]ust as parties to negotiations normally accept an obligation so to conduct themselves that the negotiations are meaningful, so parties undertake to consult one another or an organization with at least a good faith commitment to consider the information provided by the consulting partner.'[158]

107. In terms of the purpose of consultations in international law, '[t]he role of consultation has expanded beyond a non-legal tool of diplomacy to a quasi-legal procedure not only for resolution and prevention of disputes *but also for promotion of cooperation and consensus*' and they include 'a moral or legal duty to inform other parties, a corresponding duty to listen, and often an obligation to discuss'.[159] Furthermore, '[c]onsultations usually involve discussions specifically intended to impart or exchange information about the matter in question, or to seek or impart views about that matter'.[160]

108. In the context of consultations under article 97 of the Statute, it must first be observed that this provision appears in Part 9 of the Statute concerning cooperation

[156] Majority Opinion, para. 203.
[157] Oxford English Dictionary (OED Online), 'consult' ('[t]o take counsel together, deliberate, confer; also said of a person deliberating with himself'; '[t]o take counsel *with*; to seek advice from'; '[t]o take counsel *with*…for information'; '[t]o confer about, deliberate upon, debate, discuss, consider'; '[t]o take counsel to bring about; to meditate, plan, devise, contrive'; '[t]o ask advice of, seek counsel from; to have recourse to for instruction, guidance, or professional advice').
[158] 'Part 9' in *Encyclopedia of Public International Law* (1986), p. 48.
[159] 'Part 9' in *Encyclopedia of Public International Law* (1986), p. 48.
[160] R. Jennings and A. Watts (ed.), *Oppenheim's International Law* (1996), p. 1181.

with the Court. The object of this provision is to give States Parties the opportunity to comply with their obligations of cooperation by way of removing any potential obstacle and in the spirit of giving effect to the Rome Statute. The goal therefore is to ensure cooperation with the Court. Thus, all the acts of the State concerned should be directed to this end and carried out in good faith.

109. It is further stated that 'the State cannot arbitrarily invoke article 97 in order to justify its non-cooperation'.[161] Indeed, article 97 of the Statute does not provide the State concerned with *carte blanche* to act in whatever manner it deems most appropriate in the sense that it 'does not leave the Member State with the ultimate decision regarding the request'.[162]

110. In relation to the procedure that must be followed under article 97 of the Statute, as established in the ASP resolution on the understanding with respect to article 97(c), consultations under this provision consist of a process of consultations which encompasses a number of steps. Logically, the fulfilment of these steps to ensure a proper process of consultation involves a certain amount of time.[163] Upon receipt of a request for consultations by the relevant State, the Prosecutor, Registrar or the Presidency 'as appropriate, should, without delay, inform the State Party and any other relevant organ or official in writing about the proposed date, location and/or other modalities of the consultation process'.[164] When consultations have been exhausted, the ASP resolution stipulates that a written notification to the other participants in the consultations should be given, and following that 'the matter may be addressed in accordance with article 87 and other applicable provisions of the Rome Statute as required'.[165]

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[161] S. Babaian (ed.), *The International Criminal Court, An International World Court?*, (2017), p 118.
[162] S. Babaian (ed.), *The International Criminal Court, An International World Court?*, (2017), p 118.
[163] Assembly of State Parties, 'ASP 16th Session Resolution 3', 14 December 2017, ICC-ASP/16/Res.3.
[164] Assembly of State Parties, 'ASP 16th Session Resolution 3', 14 December 2017, ICC-ASP/16/Res.3, para. 4.
[165] Assembly of State Parties, 'ASP 16th Session Resolution 3', 14 December 2017, ICC-ASP/16/Res.3, para. 6 (noting that (a) if the organ issuing the request, the Presidency or the requested State Party considers that the consultations have been exhausted, it should give written notification to the other participants in the consultations, and (b) following receipt of such notice, the matter may be addressed in accordance with article 87 and other applicable provisions of the Rome Statute as required).

111. Although it is correct that the ASP resolution on the understanding with respect to article 97(c) consultations was adopted after Mr Al-Bashir's visit to Jordan, this resolution merely solidified the practice of consultation in the international arena. The commitment of South Africa with the Court and spirit of cooperation was so that it triggered before the ASP the process that finalised with the adoption of resolution ASP/16/Res.3 mentioned above.[166] Furthermore, article 97 of the Statute is sufficiently clear in itself in stating that the duty is on the State that identifies problems which may impede or prevent the execution of the request to consult ('that State ***shall consult***') *without delay* in order to resolve the matter.

112. In interpreting article 97 of the Statute, the foregoing considerations must be borne in mind and, as noted by the Majority, 'without delay' in article 97 of the Statute 'signifies that the intention to consult must be communicated to the Court timeously, so as not to frustrate the object of the request for cooperation or defeat the purpose of the consultation process'.[167] Furthermore, the consultations must be held, as correctly noted by the Majority and understood in international law, 'in good faith'.[168]

113. As held by the ICJ, the principle of good faith requires that every right be exercised honestly and loyally, and any fictitious exercise of a right *for the purpose of evading either a rule of law or a contractual obligation* will not be tolerated.[169] Indeed, the principle of good faith is extremely relevant in the public international law domain as the fulfilment of treaties depends on the observance thereof. It is maintained that the 'good faith principle concerns the way in which disputes are approached and which claims the parties may raise' and that 'two concretizations of the good faith principle merit particular attention', namely 'the principle of estoppel, which bars a party to a dispute from contesting its own previous "clear and

[166] Assembly of State Parties, 'ASP 16th Session - Report of the Chair of the working group of the Bureau on the implementation of article 97 of the Rome Statute of the International Criminal Court', 22 November 2017, ICC-ASP/16/29, para. 4.
[167] Majority Opinion, para. 203.
[168] Majority Opinion, para. 203; 'Part 9' in *Encyclopedia of Public International Law* (1986), p. 48.
[169] ICJ, *Anglo-Norwegian Fisheries, U.K. v. Norway*, 1951 I.C.J. 117, p. 142.

unequivocal representation"' and 'the prohibition of the abuse of rights, a proposition that enjoys overwhelming acceptance in international law.'[170]

114. It has been correctly sustained that good faith 'forbids contracting parties to behave in any way that is intended to frustrate the meaning and purpose of a treaty' and that it 'demands fulfillment of the treaty in a way that the other party to the treaty may reasonably expect on the basis of the text agreed upon, or, in other words, in such a way as is required by the sense and purpose of the treaty, as understood by the contracting parties in good faith'.[171]

115. The Principle of Estoppel as a concretization of the principle of good faith in public international law is relevant to the question of consultations given that Jordan has voluntarily acceded to the Rome Statute thereby binding itself to the obligation to cooperate and consult in the terms established in this treaty. As held by the ICJ, 'it is well recognized that declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations'.[172] It has been further maintained that '[u]nderlying most formulations of the doctrine of estoppel in international law is the requirement that a State ought to be consistent in its attitude to a given factual or legal situation'.[173] The foregoing requires that in assessing whether Jordan sought consultations in good faith, regard is given to the question of whether it acted in good faith and 'in such a way as is required by the sense and purpose of'[174] the Rome Statute.

116. As it will be shown below, in the case at hand Jordan did not seek information, guidance, advice or put any questions to the Court prior to undertaking the course of action it took, namely failing to abide by its obligations under the Statute. The belated reactions of Jordan are a manifestation of its intention not to engage in any meaningful consultations with the Court with a view to removing any perceived

[170] M. Goldmann, 'Putting Your Faith in Good Faith' in *41 Yale Journal of International Law 117* (2016), p. 125; I. McGibbon, 'Estoppel in International Law' in *7 International and Comparative Law Quarterly 468* (1958), pp. 468-513.
[171] R. Kolb, 'Ch. I: Purposes and Principles, Article 2(2)' in (ed) *The Charter of the United Nations: A Commentary*, para. 34.
[172] 1974, Nuclear Test cases.
[173] I. MacGibbon, 'Estoppel in International Law' in *The International and Comparative Law Quarterly* Vol. 7, No. 3 (Jul., 1958), pp. 468, 469.
[174] R. Kolb, 'Ch. I: Purposes and Principles, Article 2(2)' in (ed) *The Charter of the United Nations: A Commentary*, para. 34.

obstacle to fulfil its obligation to cooperate. In light of the manner and timing of Jordan's approach to the Court, it seems clear that Jordan was not attempting to trigger a consultation process in 'good faith'. To the contrary, one could argue that Jordan's *notes verbales* seem to have been transmitted for the purpose of evading its contractual obligation and therefore not with the intention of removing any perceived obstacles to the fulfilment of its obligation under the Rome Statute.

117. Given that Jordan was at all times under an obligation to cooperate with the Court in the arrest and surrender of Mr Al-Bashir in order to give effect to the object and purpose of the Rome Statute, the timing and manner of approaching the Court display a deliberate intention to refuse cooperation, contrary to the object and purpose of this treaty to which it voluntarily acceded. It cannot therefore be maintained that Jordan acted in good faith.

118. Jordan seems to have acted in a manner contrary to the 'sense and purpose of the' Rome Statute. In this regard, it is important to bear in mind the relevance of the expression of a State's intention for the validity of an international State act.[175] It cannot therefore be argued, as the Majority seems to do that Jordan's actions were somehow awkward. It cannot be presumed that the deliberate act of a State is not the result of a thoroughly considered decision-making process. The presumption must be that the acts of a State are a clear expression of their intent and the result of a conscious and deliberate decision making process.

119. In the case at hand, Jordan's conduct was limited to sending two *notes verbales* to the Court, and only after the Registry reminded Jordan on 21 February 2017, in light of the available public information as to the upcoming summit in Amman, of the requests to cooperate in the execution of the warrants of arrest issued in relation to Mr Al-Bashir.[176] It is therefore clear that Jordan did not take any proactive measures to engage in consultations with the Court under article 97 of the Statute – rather it reacted to the Registry's reminder of 21 February 2017. Furthermore, Jordan reacted

[175] *See e.g.* C. Goodman, 'Acta Sunt Servanda? A Regime for Regulating the Unilateral Acts of States at International Law' in *25 Australian Year Book of International Law 43* (2006); United Nations, Office of Legal Affairs, 'Fourth report on unilateral acts of States, by Mr. Víctor Rodríguez Cedeño, Special Rapporteur', 30 May 2001, UN Doc A/CN.4/519, para. 31.
[176] Annex 1 of 'Report of the Registry on additional information received regarding Omar Al Bashir's potential travel to the Hashemite Kingdom of Jordan', 28 March 2017, ICC-02/05-01/09-293-Conf-Anx1-Corr.

with a considerable delay as more than a month had elapsed after receipt of the Registry's reminder. This extreme delay was despite the facts that Jordan had extended an invitation to Mr Al-Bashir to attend the summit in Jordanian territory and that Jordan was well aware of its obligation to arrest and surrender Mr Al-Bashir in light of the numerous decisions rendered by the Court in which it was unanimously determined that States Parties are under such obligation. As submitted by the Prosecutor during the oral hearing,[177] Jordan received the requests for cooperation in the arrest and surrender of Mr Al-Bashir in 2009 and 2010 and had therefore ample time to consult with the Court on any perceived difficulties for the execution of the requests upon receipt.

120. It is misleading to maintain, as Jordan does, that it was not aware of its obligation because of the divergent jurisprudence on the issue. The pre-trial chambers' decisions rendered between 2011 and 2017 on the States Parties' obligations to arrest and surrender Mr Al-Bashir were publicly available and 'have consistently underscored States Parties' obligations to arrest Omar Al-Bashir and surrender him to the Court'.[178] Thus, as argued by the Prosecutor, while the legal reasoning may have varied across the Court's decisions, they 'unanimously' concluded that Mr Al-Bashir does not benefit from any immunity before this Court and States Parties are obliged to arrest and surrender him and this was known to Jordan when it decided not to consult with the Court and to subsequently fail to cooperate in the arrest and surrender of Mr Al-Bashir.[179]

121. The Majority accepts that the phrase 'without delay' in article 97 of the Statute 'signifies that the intention to consult must be communicated to the Court timeously, so as not to frustrate the object of the request for cooperation or defeat the purpose of the consultation process'.[180] However, after noting that 'Jordan could indeed have sought consultations' earlier 'in particular given Jordan's position that it could not arrest Mr Al-Bashir' and that 'engaging in consultations earlier […] could have avoided Jordan's non-compliance with its obligations under the Statute', the Majority

[177] Transcript of hearing, 13 September 2018, ICC-02/05-01/09-T-7-ENG, p. 55, lines 1-4; Transcript of hearing, 14 September 2018, ICC-02/05-01/09-T-8-ENG, p. 79, line 19 to p. 80, line 16.
[178] Prosecutor's Response, para. 112. *See also* para. 109.
[179] Prosecutor's Response, para. 113 (emphasis in original omitted).
[180] Majority Opinion, para. 203.

concludes without any further explanation that 'tardiness in [engaging in consultations] need not result in a presumption of bad faith. There may well be other reasons peculiar to the circumstances of a particular State that may explain the tardiness besides bad faith' and '[i]n any event […] Jordan made a request to consult before Mr Al-Bashir was on Jordan's territory'.[181]

122. With all due respect, the reasoning of the Majority seems to be dissociated from the conclusions reached. If consulting without delay is a duty that rests on the State Party and the timing of consultations is fundamental so as not to frustrate the object of the request for cooperation or defeat the purpose of the consultation process, then clearly the fact that Jordan approached the Court only hours before Mr Al-Bashir's visit must be determinative. Furthermore, it seems that the Majority speculates as to other possible reasons for the tardiness of Jordan in approaching the Court without explaining the basis for this assertion in the concrete circumstances of this case. Contrary to the suggestion of the Majority, the objective circumstances denote no other explanation for the tardiness other than the possible lack of good faith. In light of the foregoing considerations, the reasoning of the Majority is unpersuasive and insufficient to conclude that the Pre-Trial Chamber was unreasonable in reaching the conclusion that Jordan did not engage in consultations with the Court within the meaning of article 97 of the Statute. Jordan's belated reaction is clearly at odds with the requirement of consulting 'without delay' stipulated in article 97 of the Statute.

123. The Majority further finds that the intention to consult must be 'discernible in the circumstances' and that '[w]hile it would be better for a State to approach the consultation process in an unequivocal manner of asking questions in need of resolution, the failure to follow that approach is not necessarily inconsistent with an intention to engage in consultation'.[182] The Majority further notes, clearly suggesting that Jordan's manner of approaching the Court in this case was awkward, that 'some approaches may be more awkward than others'.[183] In light of these considerations of the Majority, it is unclear from which concrete and specific circumstances the Majority is persuaded that in the present case it was discernible that Jordan genuinely

[181] Majority Opinion, paras 206-207.
[182] Majority Opinion, paras 11, 205.
[183] Majority Opinion, para 203.

intended to engage in meaningful consultations with the Court. The basis for this finding of the Majority is therefore unclear and insufficient to fault the Pre-Trial Chamber's conclusion. The Majority goes even further in finding that 'the Pre-Trial Chamber misconstrued Jordan's attempt to engage in consultations as a refusal to comply with the Court's request'.[184] On the basis of the objective factual and legal reasons set out below, the dissenting judges are unable to agree with such conclusion.

124. With respect to the content of the two *notes verbales*, it should be observed that the first one transmitted on 24 March 2017 over a month after the Registry had reminded Jordan of its obligation to arrest and surrender Mr Al-Bashir and only four days prior to the summit merely contains information as to the invitation extended to Mr Al-Bashir and the application for his visa.[185] This communication shows that Jordan had extended the invitation to Mr Al-Bashir on 9 January 2017 and received the application for a visa for Mr Al-Bashir on 19 March 2017.[186] In the same *note verbale*, Jordan puts the Court on notice that it 'adheres to its international obligations, including those [sic] the applicable rules of customary international law, while taking into account all its rights thereunder'.[187]

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[184] Majority Opinion, para 206.

[185] Annex 2 of 'Report of the Registry on information received regarding Omar Al Bashir's potential travel to the Hashemite Kingdom of Jordan', 24 March 2017, ICC-02/05-01/09-291-Conf-Anx2 ('The Embassy of the Hashemite Kingdom of Jordan to the Netherlands presents its compliments to the Registry of the International Criminal Court (ICC), and with reference to the latter's Note Verbale NV/2017/EOSS/049/JCA/ms dated 21 February 2017 concerning the request for cooperation in the case The Prosecutor v. Omar Hassan Ahmad A1 Bashir (ICC-02/05-01/09) has the honor to convey the following: • The 28th Arab League summit will be held in Jordan on 29 March 2017 pursuant to the decision of the Arab League. • Invitations to attend the Summit were delivered to the Heads of State of the members of the Arab League by the respective Jordanian ministers. • The former Deputy Prime Minister for Economic Affairs, Dr. Jawad Anani, delivered the invitation for participation in the Summit to the President Omar Hassan A1 Bashir, of the Sudan on 9 January 2017. • On 19 March 2017, the Embassy of the Hashemite Kingdom of Jordan in Khartoum received a Note Verbale from the Foreign Ministry of the Sudan applying for visas for President A1 Bashir and the accompanying delegation to attend the Summit. • The Sudanese government has registered its delegation for the Summit on the website of the Arab League Summit. The registration includes President A1 Bashir. • No official confirmation from the Sudan concerning the attendance of President A1 Bashir has yet been received by the Jordanian government. The Jordanian authorities have yet to be informed about the itinerary for the arrival and departure of President A1 Bashir to Jordan. Furthermore, Jordan adheres to its international obligations, including those the applicable rules of customary international law, while taking into account all its rights thereunder. The Embassy of The Hashemite Kingdom of Jordan avails itself of this opportunity to renew to the Registry of the International Criminal Court the assurances of its highest consideration').

[186] Annex 2 of 'Report of the Registry on information received regarding Omar Al Bashir's potential travel to the Hashemite Kingdom of Jordan', 24 March 2017, ICC-02/05-01/09-291-Conf-Anx2.

[187] Annex 2 of 'Report of the Registry on information received regarding Omar Al Bashir's potential travel to the Hashemite Kingdom of Jordan', 24 March 2017, ICC-02/05-01/09-291-Conf-Anx2.

125. In the first *note verbale*, Jordan did not include the word 'consultation' or mention article 97 of the Statute. Furthermore, it is clear that even after extending the invitation to Mr Al-Bashir in January 2017 and receiving a visa application for him on 19 March 2017, Jordan did not consider it necessary to consult with the Court as to any potential conflict or difficulty in the execution of the Court's request for cooperation in the execution of the arrest and surrender of Mr Al-Bashir. The Majority seems to imply that the manner in which Jordan approached the Court with the two *notes verbales* was 'awkward'.[188] With respect to the first *note verbale*, Jordan's communication simply put the Court on advance notice that Jordan would not carry out its obligations under the Rome Statute. Therefore, it is clear that through this first *note verbale* Jordan did not initiate any consultation process.

126. In relation to the second *note verbale*, it is observed that it was transmitted on 28 March 2017, only hours prior to Mr Al-Bashir's visit to Jordan in clear breach of its obligation to consult 'without delay'. It should be noted that in spite of mentioning article 97 of the Statute, Jordan only confirms Mr Al-Bashir's attendance to the summit ('[t]he Jordanian authorities received confirmation that President Omar Al Bashir of the Sudan will be attending the Arab League Summit on 29 March 2017 and heading the Sudanese delegation for the Summit').[189] However, the most important

[188] Majority Opinion, para 202.

[189] Annex 1 of 'Report of the Registry on additional information received regarding Omar Al Bashir's potential travel to the Hashemite Kingdom of Jordan', 28 March 2017, ICC-02/05-01/09-293-Conf-Anx1-Corr ('The Embassy of the Hashemite Kingdom of Jordan to the Netherlands presents its compliments to the Registry of the International Criminal Court (ICC) and reference to its Note Verbale NV/2017/EOSS/085/JCA/nv concerning the case of The Prosecutor v. Omar Hassan Ahmad Al Bashir (ICC-02/05-01/09) dated 27 March 2017, has the honor to transmit the following: • The Jordanian authorities received confirmation that President Omar Al Bashir of the Sudan will be attending the Arab League Summit on 29 March 2017 and heading the Sudanese delegation for the Summit. • Jordan is hereby consulting with the ICC under article 97 of the Rome Statute of the International Criminal Court (Rome Statute) as regards to the content of the arrest and surrender warrants transmitted in the Registry's two note verbales (NV/DCS/2009/82/ab) and NV/DCS/2010/202/MD/ab) dated 5 March 2009 and 16 August 2010 respectively. • Jordan considers that President Omar Al Bashir enjoys sovereign immunity as a sitting Head of State under the rules of customary international law. • Jordan considers that sovereign immunity of President Al Bashir has not been waived by the Sudan. As such, Jordan respects and adhers to this immunity of the State of the Sudan and will act consistently with such immunity. • Jordan further considers that Security Council resolution 1593 (2005) as containing nothing which may be interpreted as a waiver of the sovereign immunity of a sitting Head of State, in general, or President Al Bashir in particular. Furthermore, nothing in the subsequent practice of the Security Council, including its subsequent resolutions, may be interpreted to conclude that the language in resolution 1593 on the cooperation of the Sudan to be a waiver of immunity of President A1 Bashir. Nor is there anything in resolution 1593 that mandates States, including State Parties to the Rome Statute, to bypass such immunity. • As such, Jordan considers that its execution of the requests for surrender and arrest contained in note verbales

aspect of this communication is that Jordan did not pose any question or request information, guidance, concrete actions or further instructions from the Court with respect to any potential difficulties in the execution of the Court's request. This second *note verbale* does not reveal awkwardness as suggested by the Majority but rather the intention of Jordan to avoid compliance with its obligations under the Rome Statute.

127. In this second *note verbale*, Jordan willingly sets out its legal viewpoint with respect to the question of immunity of Heads of State before the Court; Jordan does not express any difficulty to comply with the request to cooperate and does not offer any willingness to comply with the Court's order. Jordan only informs the Court that in light of its own understanding of the law, it will not execute the Court's request to cooperate in the arrest and surrender of Mr Al-Bashir:

> Jordan considers that President Omar Al Bashir enjoys sovereign immunity as a sitting Head of State under the rules of customary international law.
>
> Jordan considers that sovereign immunity of President Al Bashir has not been waived by the Sudan. As such, Jordan respects and adheres to this immunity of the State of the Sudan and will act consistently with such immunity.
>
> […]
>
> As such, Jordan considers that its execution of the requests for surrender and arrest contained in note verbales (NV/DCS/2009/82/ab) and NV/DCS/2010/202/MD/ab) to be inconsistent with its obligations under the rules of customary international law as regards to sovereign immunity of a sitting Head of State.[190]

128. The specific wording and terms employed in this second *note verbale* reveal Jordan's clear intention not to comply with its international obligations under the

(NV/DCS/2009/82/ab) and NV/DCS/2010/202/MD/ab) to be inconsistent with its obligations under the rules of customary international law as regards to sovereign immunity of a sitting Head of State. • Article 98 (1) of the Rome Statute concerns an obligation on the ICC regarding how to proceed with a request of surrender or assistance which would require the requested State to act inconsistently with the latter's obligation under international law with respect to the immunity of the State of a person of a third State. Furthermore, article 27 (2) of the Statute as regards to immunity not barring the ICC from exercising its jurisdiction concerns the courts exercise of jurisdiction. Nothing in the two articles mandates the State Party to the Rome statute to waive the immunity of a third State and act inconsistently with its obligations under the rules of general international law on the immunity of a third State. The Embassy of The Hashemite Kingdom of Jordan avails itself of this opportunity to renew to the Registry of the International Criminal Court the assurances of its highest consideration').

[190] Annex 1 of 'Report of the Registry on additional information received regarding Omar Al Bashir's potential travel to the Hashemite Kingdom of Jordan', 28 March 2017, ICC-02/05-01/09-293-Conf-Anx1-Corr.

Rome Statute because Jordan 'considers' that these obligations are inconsistent with its international obligations under customary international law. This *note verbale* does not denote awkwardness but rather the clear position adopted by Jordan and the presentation of thoroughly considered legal arguments by virtue of which Jordan prefers an interpretation more favourable to Mr Al-Bashir and against the spirit of the Rome Statute.

129. Given its form and clear message of non-cooperation, the second *note verbale* cannot be considered a proper consultation or even the initiation of any proper consultation process, particularly in light of the fact that it was transmitted with extreme delay, only hours prior to Mr Al-Bashir's visit to Jordan. The dissenting judges find that given the extreme delay in transmitting the *note verbale*, the purpose of any potential consultation process was indeed defeated and therefore the timing of the late actions undertaken by Jordan was determinative to the question of whether it engaged in any proper consultation process. Indeed, the consultation process involves a number of steps and therefore the transmission of the *note verbale* only hours prior to the arrival of Mr Al-Bashir to Jordanian territory despite Jordan's longstanding obligation to arrest and surrender him to the Court was not sufficient to enter into any meaningful consultation process. Furthermore, article 97 of the Statute is explicit in requesting the transmission of any consultation 'without delay'. The unjustified belated actions of Jordan were clearly determinative to the matter of alleged consultations. The second *note verbale* confirms the conclusion that the objective actions by Jordan are clear indicators of its intention not to engage in any meaningful or good faith consultations and rather defeat the purpose of consultations under article 97 of the Statute and invoke this provision as a way of evading the fulfilment of its obligation to cooperate with the Court.

130. As a preliminary conclusion on the timing and content of the two *notes verbales*, the dissenting judges find that the belated reaction of Jordan denotes a clear intention not to engage in consultations and therefore, contrary to the insinuation by the Majority Opinion, Jordan's late approach to the Court was not 'awkward'.[191] Rather, it was an obvious expression of Jordan's intention not to engage in any meaningful consultation process. Given the importance of the expression of a State's

[191] Majority Opinion, para 203.

intention for the validity of an international State act, it cannot be assumed that the act of a State is 'awkward'.[192] On the contrary, the presumption must be that the acts of a State express their intent and are the result of a conscious, serious and deliberate decision-making process. In this sense, the lateness and manner in approaching the Court are a manifestation of Jordan's intent not to engage in any meaningful and good faith consultation process with the Court. The objective actions undertaken by Jordan denote the contrary intention, namely defeating the object and purpose of article 97 to remove any perceived obstacle and resorting to this provision in order to evade the fulfilment of its obligations under the Rome Statute. Thus, Jordan's actions were not awkward in any sense.

131. The Majority maintains that 'the Pre-Trial Chamber should have reacted to Jordan's request to consult'.[193] With all due respect, the Majority seems to focus on the wrong aspects. In this regard, it is important to emphasise that the pertinent question is whether Jordan fulfilled its duty to consult with the Court within the meaning of article 97 of the Statute and in conformity with its obligations under the Rome Statute, not whether the Pre-Trial Chamber reacted diligently to any such request for consultations (without any actual request of that type) as the Majority seems to suggest. In any event, given that in the two *notes verbales* Jordan did not pose any concrete question to resolve the matter nor request any urgent action, guidance or instructions from the Court, there was nothing that the Court could have done just hours prior to Mr Al-Bashir's visit to Jordan. Therefore it is not possible to transfer any kind of responsibility of non-compliance to the Pre-Trial Chamber given that it was not consulted in due form and in a timely fashion. These considerations mean that it was materially impossible for the Pre-Trial Chamber to act at a time when the process of non-compliance was already underway.

132. This Court is a court of law that can only make pronouncements when required by the parties to resolve concrete legal questions or juridical uncertainties and is not called upon to give opinions on matters that are not specifically presented to it. On the

[192] *See e.g.* C. Goodman, 'Acta Sunt Servanda? A Regime for Regulating the Unilateral Acts of States at International Law' in *25 Australian Year Book of International Law 43* (2006); United Nations, Office of Legal Affairs, 'Fourth report on unilateral acts of States, by Mr. Víctor Rodríguez Cedeño, Special Rapporteur', 30 May 2001, UN Doc A/CN.4/519, para. 31.
[193] Majority Opinion, para. 204.

basis of the foregoing considerations, one can conclude that Jordan failed to observe the obligation in article 97 of the Statute to consult without delay, in good faith and with the intention of removing any perceived obstacles to the fulfilment of its obligation. On the contrary, it may be argued that the acts of Jordan denote an intention to evade the obligation that rested upon it by virtue of being a State Party to the Rome Statute.

(e) Conclusion on the matter of alleged consultations

133. On the basis of the foregoing considerations, it must be concluded that the Pre-Trial Chamber did not err in determining that consultations between Jordan and the Court within the meaning of article 97 of the Statute did not take place: despite being well aware of its obligation to cooperate in the arrest and surrender of Mr Al-Bashir to the Court, Jordan's actions were limited to sending two *notes verbales*. In neither of the *notes verbales* did Jordan pose any questions to the Court. The contents of the two *notes verbales* show that Jordan was not consulting with the Court in the sense of requesting information, guidance or further instructions on concrete actions by the Court with the aim of achieving compliance with its obligations to cooperate.[194]

In these extremely delayed communications, Jordan simply informed the Court of the fact that Mr Al-Bashir was going to attend the summit and that it was not going to arrest and surrender him in accordance with its alleged obligations under customary international law.[195] Jordan's communication was in fact a very clear affirmation of its position of non-compliance and not a consultation. Given the timing and content of these communications, it is possible to conclude that Jordan was not genuinely consulting with the Court with a view to observing its obligations under the Rome Statute and it was certainly not acting in an awkward manner.

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[194] Oxford English Dictionary (OED Online), 'consult' ('[t]o take counsel together, deliberate, confer; also said of a person deliberating with himself'; '[t]o take counsel *with*; to seek advice from'; '[t]o take counsel *with*…for information'; '[t]o confer about, deliberate upon, debate, discuss, consider'; '[t]o take counsel to bring about; to meditate, plan, devise, contrive'; '[t]o ask advice of, seek counsel from; to have recourse to for instruction, guidance, or professional advice').

[195] Annex 2 of 'Report of the Registry on information received regarding Omar Al Bashir's potential travel to the Hashemite Kingdom of Jordan', 24 March 2017, ICC-02/05-01/09-291-Conf-Anx2; Annex 1 of 'Report of the Registry on additional information received regarding Omar Al Bashir's potential travel to the Hashemite Kingdom of Jordan', 28 March 2017, ICC-02/05-01/09-293-Conf-Anx1-Corr.

The objective circumstances demonstrate that the actions intentionally taken by Jordan were not aimed at removing any perceived obstacle to the fulfillment of its obligation to cooperate with the Court under the Rome Statute and therefore there was no attempt to engage in good faith consultations. Thus, the actions undertaken by Jordan cannot be considered consultations under article 97 of the Statute and it was not unreasonable for the Pre-Trial Chamber to conclude that consultations between Jordan and the Court did not take place. The dissenting judges therefore conclude that the Pre-Trial Chamber was correct in its conclusions on consultations by Jordan in asserting that Jordan failed to consult with the Court.

3. Was the Pre-Trial Chamber correct in its conclusions on the differential treatment with South Africa?

(a) Relevant Part of the Impugned Decision

134. In assessing whether a referral of Jordan's failure to comply with the Court's request to arrest and surrender Mr Al-Bashir was warranted, the Pre Trial Chamber considered that: (i) Jordan had taken a very clear position that it was not under an obligation to arrest Mr Al-Bashir; (ii) Jordan chose not to execute the Court's request; (iii) Jordan did not require anything further that would assist in ensuring the proper exercise of its duty to cooperate; (iv) at the time of Mr Al-Bashir's visit the Court had already expressed in unequivocal terms that States Parties are under an obligation to arrest Mr Al-Bashir and that consultations did not have suspensive effect on this obligation.[196] In its analysis, the Pre-Trial Chamber further noted, as a reference and not as a determinative factor in its assessment, that as South Africa was the first State Party to request and initiate consultations with the Court, this had acted as a factor that 'militated against a referral for non-compliance', whereas such circumstances 'did not exist in the case at hand'.[197]

[196] Impugned Decision, paras 53-54.
[197] Impugned Decision, para. 54.

(b) Submissions of parties and *amici curiae*

135. Jordan submits that the differential treatment between South Africa and Jordan was unfair and unreasonable.[198] Jordan argues that the fact that South Africa was the first State Party to seek consultations with the Court is a completely arbitrary factor that does not warrant differing treatment of the two States.[199] Jordan submits that while the Pre-Trial Chamber considered favourably South Africa's consultations with the Court, it failed to consider Jordan's good faith consultations.[200]

136. Jordan argues that, although the Pre-Trial Chamber had unequivocally expressed its legal views directly to South Africa prior to Mr Al-Bashir's travel to that country, and after finding that South Africa had failed to cooperate with the Court, the Pre-Trial Chamber nevertheless decided that South Africa's non-compliance did not merit a referral to the ASP and UNSC, whereas those exact legal views which were not expressed directly to Jordan were considered by the Pre-Trial Chamber as 'meriting referral of Jordan's non-compliance'.[201]

137. The Prosecutor submits that, contrary to Jordan's submissions, the Pre-Trial Chamber did not abuse its discretion because it did not make 'an indiscriminate comparison of the situations of two States Parties'; rather, the Pre-Trial Chamber's analysis appropriately focussed on Jordan's failure to consult and only referred to the proceedings with respect to South Africa in order to distinguish its findings on referral in that case.[202] The Prosecutor asserts that the Pre-Trial Chamber was justified in arriving at two different conclusions with respect to Jordan and South Africa on the issue of referral, as 'Jordan has not accepted its obligation to cooperate with Court' and, unlike South Africa, Mr Al-Bashir's visit did not trigger 'any effort domestically to resolve perceived inconsistencies with Jordan's statutory obligations'.[203]

138. Ms Lattanzi submits that the 'fundamental difference' between the decision of the Pre-Trial Chamber to refer Jordan and the decision not to refer South Africa is that in the latter case the Supreme Court had already stated that South Africa had a duty to

[198] Appeal Brief, para. 98.
[199] Appeal Brief, para. 102.
[200] Appeal Brief, paras 103-104.
[201] Appeal Brief, para. 101.
[202] Prosecutor's Response, paras 115-116.
[203] Prosecutor's Response, paras 117-118.

arrest Mr Al-Bashir, which should be complied with in the event of Mr Al-Bashir's return to the country and therefore, she argues 'the deterrent effect was already provided for in this decision'.[204]

139. Mr Robinson *et al.* submit that it was correct for the Pre-Trial Chamber not to refer South Africa and asserts that the Appeals Chamber should 'consider the grounds on which South Africa's situation was distinguished from Jordan's'.[205]

(c) Findings and Conclusions in the Majority Opinion

140. The Majority finds that 'the Pre-Trial Chamber abused its discretion by treating Jordan differently from South Africa in similar circumstances'.[206] To reach this conclusion, the Majority maintains that as a result of the alleged error on consultations, the Pre-Trial Chamber 'failed to take into account an important factor arguing against Jordan's referral', which in its view resulted in 'unequal treatment of South Africa and Jordan'.[207] The Majority further recalls the Pre-Trial Chamber's findings in the South Africa Decision that 'South Africa's domestic courts have found that the Government of South Africa acted in breach of its obligations under its domestic legal framework by not arresting Omar Al-Bashir and surrendering him to the Court',[208] and that the Supreme Court of Appeal of South Africa concluded that South Africa had acted inconsistently with its obligations under the Statute and its legislation implementing the Statute.[209] In this regard, the Majority relies upon a comment made by a counsel of the African Union (not a party to these proceedings) during the oral hearing.[210]

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[204] Transcript of hearing, 14 September 2018, ICC-02/05-01/09-T-8-ENG, p. 46, lines 18-21.
[205] 'Amicus Curiae Observations of Professors Robinson, Cryer, deGuzman, Lafontaine, Oosterveld, and Stahn', 18 June 2018, ICC-02/05-01/09-362.
[206] Majority Opinion, paras 211.
[207] Majority Opinion, para. 208.
[208] Majority Opinion, para. 210, referring to *South Africa* Decision, para. 136.
[209] Majority Opinion, para. 210, referring to *South Africa* Decision, para. 136.
[210] Majority Opinion, para. 210.

(d) Analysis

141. With respect to the alleged differential treatment with South Africa, the main point to be made is that the case of the State of South Africa is considerably different from that of Jordanian State and therefore the finding of the Majority that these States were treated differently 'in similar circumstances' is incorrect. On the contrary, the dissenting judges find that the circumstances surrounding the cases of Jordan and South Africa were not similar for the following reasons. In the first place, it must be noted that the decision rendered in the case of South Africa was not appealed and is therefore final having acquired the status of *res judicata*. As such, this Appeals Chamber lacks competence to determine the correctness or otherwise of the determination made at the time by the Pre-Trial Chamber in that case. The only reason on the basis of which this opinion addresses aspects of the case of South Africa is because it seems to be an important point in the analysis of the Majority Opinion.

142. In terms of the differences surrounding the cases of Jordan and South Africa, it is first noted that although the executive branch of South Africa failed to comply with the Court's request to cooperate, the judicial organ of the same State subsequently rendered a final decision that confirmed the obligation of South Africa to execute the Court's request to arrest and surrender Mr Al-Bashir to the Court. This is a positive factor that imports the affirmative action taken by the judicial branch of the State of South Africa in favour of complying with the obligations owed to the Court. This is a circumstance that, contrary to the treatment afforded by the Majority, ought to be considered as militating in favour of a differential treatment between Jordan and South Africa in the sense that at the time of the decision in the South Africa case, future cooperation by South Africa had already been ensured. Such cooperation has not been secured in the present case and the Majority fails to address this fundamental difference.

143. This approach by the Majority does not account for the differences between the concept of the 'executive power' as embodied by the government and the concept of 'State', which are not synonymous. A State is composed of three branches, executive, legislative and judiciary. Indeed, the executive power generally embodied by the government is only one of the branches of the State. As it will be explained below, in the particular circumstances surrounding the South Africa case, although there was a

discrepancy between the executive and the judicial branches of that State, the judicial decision rendered by the judiciary became final thereby securing future cooperation by South Africa and rendering a referral to the ASP and the UNSC unnecessary. This factor has a positive, rather than a negative connotation in assessing the reasons why the failure to cooperate of South Africa, different from that of Jordan, was not referred to the ASP and the UNSC.

144. In the proceedings concerning South Africa, the Pre-Trial Chamber observed that 'South Africa's domestic courts have found that the Government of South Africa acted in breach of its obligations under its domestic legal framework by not arresting Omar Al-Bashir and surrendering him to the Court'.[211] The Pre-Trial Chamber noted in particular the findings in the judgment rendered by the Supreme Court of Appeal of South Africa. The judgment reads in relevant part as follows:

> The conduct of the Respondents in failing to take steps to arrest and detain, for surrender to the International Criminal Court, the President of Sudan, Omar Hassan Ahmad Al Bashir, after his arrival in South Africa on 13 June 2015 to attend the 25th Assembly of the African Union, was inconsistent with South Africa's obligations in terms of the Rome Statute and section 10 of the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002, and unlawful.[212]

145. Judge J. D. Wallis of the Supreme Court of Appeal of South Africa further held that

> ***when South Africa decided to implement its obligations under the Rome Statute*** by passing the Implementation Act ***it did so on the basis that all forms of immunity, including head of state immunity, would not constitute a bar*** to the prosecution of international crimes in this country or ***to South Africa cooperating with the ICC by way of the arrest and surrender of persons charged with such crimes before the ICC***, where an arrest warrant had been issued and a request for cooperation made.[213] [Emphasis added.]

146. By reference to the obligation to cooperate with the Court assumed by South Africa, Judge J. D. Wallis held that if such commitment 'puts [South Africa] in the

[211] Pre-Trial Chamber II, 'Decision under article 87(7) of the Rome Statute on the non-compliance by South Africa with the request by the Court for the arrest and surrender of Omar Al-Bashir', 6 July 2017, ICC-02/05-01/09-302 ('South Africa Decision'), para. 136.
[212] 'Annex to [Decision on the request of the Republic of South Africa for an extension of the time limit for submitting their views for the purposes of proceedings under article 87(7) of the Rome Statute of 15 October 2015 (ICC-02/05-01/09)]', 04 May 2016, ICC-02/05-01/09-258-Anx, ('Judgment of the Supreme Court of Appeal of South Africa') para. 4.
[213] Judgment of the Supreme Court of Appeal of South Africa, para. 103.

vanguard of attempts to prevent international crimes and, when they occur, cause the perpetrators to be prosecuted, that seems to me a matter for national pride rather than concern'.[214] He concluded by stating that such obligation 'is wholly consistent with our commitment to human rights both at a national and an international level'.[215]

147. In its decision concerning non-compliance by South Africa, the Pre-Trial Chamber noted that the judgment rendered by the Supreme Court of Appeal of South Africa was final as the Government of South Africa had withdrawn its previously lodged appeal against it.[216] In light of the foregoing, the Pre-Trial Chamber concluded that it appeared that 'the Government of South Africa has accepted its obligation to cooperate with the Court under its domestic legal framework'.[217] It is clear that the patent differences surrounding the case of Jordan and South Africa prevent arriving at a conclusion that the circumstances in these cases were similar.

148. In light of the foregoing considerations, it becomes clear that South Africa's failure to comply with the Court in the arrest and surrender of Mr Al-Bashir did not need to be referred to the ASP and the UNSC pursuant to article 87(7) of the Statute as future cooperation had already been ensured. Indeed, fostering cooperation is the *raison d'être* of article 87 (7) of the Statute as confirmed by the Appeals Chamber in the *Kenyatta* OA5 Judgment.[218] The jurisprudence of the Appeals Chamber is clear in that article 87(7) of the Statute provides for the unique opportunity of engaging external actors with a view to fostering cooperation with the Court. The drafting history further demonstrates that article 87(7) was inserted with a view to 'provid[ing]

[214] Judgment of the Supreme Court of Appeal of South Africa, para. 103.
[215] Judgment of the Supreme Court of Appeal of South Africa, para. 103.
[216] South Africa Decision, para. 136.
[217] South Africa Decision, para. 136.
[218] *Kenyatta* OA5 Judgment, para. 51 ('***it is important to take into account the object and purpose of paragraph 7 of article 87 of the Statute***. […] ***this final provision aims at enhancing the effectiveness of the cooperation regime under Part IX of the Statute, by providing the Court with the possibility of engaging certain external actors to remedy cases of non-cooperation***. Since ***the object and purpose of the provision is to foster cooperation***, the Appeals Chamber believes that a referral to those particular actors was not intended to be the standard response to each instance of non-compliance, but only one that may be sought when the Chamber concludes that ***it is the most effective way of obtaining cooperation in the concrete circumstances at hand***') (emphasis added).

some kind of safeguard […] to enable the Court to take further action should the State fail to comply with the Court's request'.[219]

149. Despite the fact that the executive branch of the State of South Africa did not initially comply with the Court's request for cooperation in the execution of the order of arrest and surrender, the judicial branch of that State determined in a final decision that South Africa is under an obligation to arrest and surrender Mr Al-Bashir to the Court.[220] As the judiciary is a branch of the State, a final judicial determination must be considered as an act of the State.

150. Contrary to the Majority's assertion that the circumstances are 'similar', in the case of Jordan, one can objectively find that this was not the case given that no branch of that State has determined that Jordan is under an obligation to comply with the Court in the arrest and surrender of Mr Al-Bashir to the Court. Jordan's state actions have been limited to presenting arguments to defend its position that it is under no obligation to cooperate in the execution of the arrest and surrender of Mr Al-Bashir. Thus, on the basis of the facts before us, the Jordanian State, unlike the South African State, has not secured future cooperation with the Court in the arrest and surrender of Mr Al-Bashir and therefore there are palpable differences in the actions taken by the two States in securing cooperation with the Court. It is therefore objectively incorrect to assert that Jordan and South Africa were in a similar position or circumstances as maintained by the Majority.

151. A further distinction regarding the conduct of South Africa *vis-à-vis* Jordan concerns the consultation proceedings held in relation to the first State. This is indeed another big difference between these cases. In its request dated 11 June 2015, South Africa requested an urgent meeting with the Court with a view to entering into consultations pursuant to article 97 of the Statute.[221] The request was clear and specific, and it triggered a proper process of consultations. The meeting between the Single Judge appointed by the Pre-Trial Chamber and the diplomats representing

[219] UN, General Assembly, Report of the Preparatory Committee on the Establishment of the International Criminal Court: Volume I, 13 September 1996, A/51/22, p. 65, para. 315.
[220] Judgment of the Supreme Court of Appeal of South Africa, para. 4.
[221] 'Prosecution's Urgent Response to the Registry's submission titled "Urgent request from the Authorities of South Africa"', 12 June 2015, ICC-02/05-01/09-239-Conf.

South Africa was held on 12 June 2015 in which they discussed the obligations of South Africa under the Rome Statute.[222]

152. In this case, the consultations materialised at the initiative of South Africa. South Africa's commitment and spirit of cooperation with the Court are further illustrated by the fact that it was South Africa that triggered the ASP process that culminated in the adoption of the ASP resolution on consultations under article 97 of the Statute.[223] The foregoing considerations further demonstrate that South Africa had a commitment to cooperate with the Court contrary to the suggestion made by the counsel cited in the Majority Opinion that '*in response to the Prosecution in terms of the difference between the treatment of Jordan and South Africa, I would point out that, as someone who had been involved in the South Africa case, in fact, South Africa did not make a commitment to further cooperate. The reaction was actually […] quite a negative reaction but to start processes to withdrew. I just think that that ought to be on the table and sort of thinking about the difference in treatment*'.[224] This suggestion by counsel does not seem to be based on any concrete facts and amounts therefore to speculation with no juridical value that cannot be invoked as an argument in a judicial decision. In the view of the dissenting judges, reliance on this simple comment is inapposite to determine that the Pre-Trial Chamber afforded a differential treatment between South Africa and Jordan.

153. On the contrary, as it is clear from the section addressing the matter of alleged consultations, in the *notes verbales* sent by Jordan, apart from presenting its statement as to why it considered itself under an obligation to afford Mr Al-Bashir immunity from arrest, Jordan did not seek any action from the Court nor did it request a meeting with Court officials or ask for advice, clarification or alike. Therefore, while South Africa displayed a clear, objective and genuine intention to engage in consultation proceedings with the Court within the meaning of article 97 of the Statute (consultations that indeed took place), Jordan failed to do so. Indeed, it cannot be sustained that Jordan acted in 'good faith' when approaching the Court in its two

[222] South Africa Decision, para. 9.
[223] Assembly of State Parties, 'ASP 16th Session Resolution 3', 14 December 2017, ICC-ASP/16/Res.3; Assembly of State Parties, 'ASP 16th Session - Report of the Chair of the working group of the Bureau on the implementation of article 97 of the Rome Statute of the International Criminal Court', 22 November 2017, ICC-ASP/16/29, para. 4.
[224] Majority Opinion, para. 211.

belated *notes verbales*. As explained above, the principle of good faith requires that every right be exercised honestly and loyally, and any fictitious exercise of a right *for the purpose of evading either a rule of law or a contractual obligation* will not be tolerated.[225] This distinction further demonstrates that the circumstances surrounding the case of South Africa have to be distinguished from that of Jordan when examining whether a referral under article 87(7) of the Statute is warranted and are therefore very far from being 'similar'.

154. Moreover, the position adopted in the Majority Opinion seems to suggest that the fact that South Africa was not referred to the ASP and the UNSC despite having failed to cooperate with the Court should have been considered as a relevant factor. If the Majority considered that a comparison between instances of non-cooperation by States in the arrest and surrender of Mr Al-Bashir was relevant, it should have also carried out a comprehensive analysis of all instances in which such failures were referred to the ASP and the UNSC. Such an examination would have allowed the Majority to note that the majority of States that failed to cooperate with the Court in the arrest and surrender of Mr Al-Bashir, including, Djibouti, Malawi, Chad, DRC, Uganda have been referred to the ASP and/or the UNSC,[226] except Nigeria[227] and South Africa.[228]

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[225] ICJ, *Anglo-Norwegian Fisheries, U.K. v. Norway*, 1951 I.C.J. 117, p. 142.

[226] Pre-Trial Chamber I, 'Decision informing the United Nations Security Council and the Assembly of the States Parties to the Rome Statute about Omar Al-Bashir's recent visit to Djibouti', 12 May 2011, ICC-02/05-01/09-129, p. 3; Malawi Decision, para. 47; Chad Decision, para. 14, p. 8; Pre-Trial Chamber II, 'Decision on the Non-compliance of the Republic of Chad with the Cooperation Requests Issued by the Court Regarding the Arrest and Surrender of Omar Hassan Ahmad Al-Bashir', 27 March 2013, ICC-02/05-01/09-151, para. 23; DRC Decision, paras 32-34, p. 17; Pre-Trial Chamber II, 'Decision on the Prosecutor's Request for a Finding of Non-Compliance Against the Republic of the Sudan', 9 March 2015, ICC-02/05-01/09-227, para. 19, p. 10; Pre-Trial Chamber II, 'Decision on the non-compliance by the Republic of Djibouti with the request to arrest and surrender Omar Al-Bashir to the Court and referring the matter to the United Nations Security Council and the Assembly of the State Parties to the Rome Statute', 11 July 2016, ICC-02/05-01/09-266, paras 16-18, p. 10; Pre-Trial Chamber II, 'Decision on the non-compliance by the Republic of Uganda with the request to arrest and surrender Omar Al-Bashir to the Court and referring the matter to the United Nations Security Council and the Assembly of State Parties to the Rome Statute', 11 July 2016, ICC-02/05-01/09-267, paras 15-17, p. 10; Pre-Trial Chamber II, 'Decision under article 87 (7) of the Rome Statute on the non-compliance by Jordan with the request by the Court for the arrest and surrender o[f] Omar Al-Bashir', 11 December 2017, ICC-02/05-01/09-309, paras 53-54, pp. 21-22.

[227] Nigeria Decision, para. 13. It should be noted that for Nigeria there was no explicit finding of non-compliance. *See* p. 6.

[228] South Africa Decision, paras 135-140.

155. With respect to Nigeria, Pre-Trial Chamber II took note of the explanations provided by the Nigerian authorities, including their commitment to cooperate with the Court and the sudden departure of Mr Al-Bashir from their territory, and concluded that it was not warranted in the circumstances to refer the matter to the ASP and/or to the UNSC.[229] With respect to South Africa, Pre- Trial Chamber II took into consideration the fact that South Africa was the first State Party to seek from the Court a final legal determination on the extent of its obligations to execute a request to arrest and surrender Mr Al-Bashir and that South Africa's domestic courts had already found South Africa to be in breach of its obligations under its domestic legal framework to conclude that a referral to the ASP and/or the UNSC would not be required in order to achieve cooperation from South Africa.[230] In light of the foregoing considerations, the jurisprudence of the Court has been generally consistent in referring cases of non-compliance to the ASP and/or the UNSC. Therefore, it becomes apparent that not referring Jordan to the ASP and the UNSC would have been a sudden, unexpected and unjustified departure from the relevant jurisprudence in this regard. In the present case, it is clear that the circumstances surrounding the case of Jordan and South Africa are objectively different and therefore an 'equal' treatment is not warranted and would in effect result in unfairness. In any event, it must be recalled that every case is different and therefore determinations as to whether instances of non-compliance should be referred are case-specific.

156. Furthermore, the specifics of South Africa and other cases fall outside the concrete circumstances of *these* proceedings against Jordan. In this case, the objective facts amply justify and in fact require the Court to exercise its discretion under article 87(7) of the Statute to refer Jordan's failure to cooperate to the ASP and the UNSC.

157. In addition, the determination by the Pre-Trial Chamber was not solely based on this aspect that is somewhat secondary to its analysis. The focus of the Pre-Trial Chamber was on the specific acts undertaken by Jordan and the different conduct adopted by South Africa was noted as a point of reference in assessing the specific circumstances of *this* case.

[229] Nigeria Decision, para. 13.
[230] South Africa Decision, para. 139.

158. Finally, as a result of the fact that in this case, and particularly in the course of the oral hearing, political arguments were presented to the Appeals Chamber, it must be stressed as a general consideration that the International Criminal Court, as a Court of law, is obliged to apply the law as set out in article 21 of the Statute to the specific facts and circumstances of a given case and is precluded from considering any political argument in the determination of matters before it.

(e) Conclusion on the matter of alleged differential treatment with South Africa

159. It is clear that the circumstances surrounding the case of South Africa are different from those of Jordan and therefore the Pre-Trial Chamber did not err in differentiating the two when determining whether a referral to the ASP and the UNSC was warranted. This is particularly so because first South Africa engaged in meaningful consultations in due form and in a timely manner. Second, at the time of the rendering of the South Africa decision, the State of South Africa had secured future cooperation with the Court in the arrest and surrender of Mr Al-Bashir. The State of Jordan has not engaged in any meaningful consultation nor secured any such cooperation. Accordingly, there is no merit or basis to sustain that the Pre-Trial Chamber erred when deciding to refer Jordan's failure to cooperate with the Court to the ASP and the UNSC under article 87(7) of the Statute. Therefore the Pre-Trial Chamber was correct.

4. General Conclusion on whether the Pre-Trial Chamber relied on objective factual and legal reasons in deciding to refer Jordan's failure to comply to the ASP and the UNSC

160. On the basis of the foregoing, it is clear that Jordan's failure to cooperate with the Court frustrated the three objectives considered by the Pre-Trial Chamber when issuing the warrants of arrest against Mr Al-Bashir under article 58(1)(b) of the Statute: (a) ensure Mr Al-Bashir's appearance at trial; (b) prevent the obstruction or endangerment of the investigations; and (c) prevent the further commission of crimes in Darfur. Given that Jordan's failure to cooperate with the Court prevented the fulfilment of the objectives of the warrants of arrest issued by the Pre-Trial Chamber,

the condition in article 87(7) of the Statute that the failure of the State Party must have prevented the Court from exercising its functions and powers is fulfilled. Therefore the Pre-Trial Chamber did not err in this regard.

161. It is also clear that the Pre-Trial Chamber did not err in concluding that consultations within the meaning of article 97 of the Statute did not happen in this case: the *notes verbales* sent by Jordan were transmitted with extreme delay and only provided a statement that Jordan would respect Mr Al-Bashir's alleged immunity from arrest and did not request any further action from the Court. Therefore, Jordan did not trigger any proper consultation proceedings – Jordan's actions were directed from the beginning to state that it would not abide by its obligations under the Rome Statute to arrest and surrender Mr Al-Bashir. In conclusion, the Pre-Trial Chamber did not err in this case and therefore the dissenting judges cannot agree with the reasoning and conclusion of the Majority Opinion in this regard.

162. There can be no discussion of any differential treatment between Jordan and South Africa by the Pre-Trial Chamber when examining whether a referral under article 87(7) of the Statute was warranted. The Pre-Trial Chamber considered the actions undertaken by South Africa only as a point of reference in its assessment of the specific actions taken by Jordan and not as a fundamental of its decision. For reasons fully explained above, the circumstances surrounding these cases were different, particularly considering that while South Africa held proper consultations and further ensured future cooperation with the Court in the arrest and surrender of Mr Al-Bashir thereby making it unnecessary to refer the matter in order to foster cooperation, Jordan has not done so warranting therefore the impugned referral as per article 87(7) of the Statute. In sum, the Pre-Trial Chamber decided to refer Jordan's failure on the basis of the specific acts and circumstances surrounding that case and not other cases. Thus, the dissenting judges disagree with the reasoning and determination by the Majority Opinion in this regard.

163. In conclusion, it is clear that the Pre-Trial Chamber relied on ample objective factual and legal elements in deciding to refer Jordan's failure to comply to the ASP and the UNSC. On the basis of these objective reasons, the conclusions reached by the Pre-Trial Chamber were not unreasonable and therefore it did not err. Thus the dissenting judges are unable to join the Majority and must dissent.

B. Are there any additional objective factual and legal reasons warranting the referral of Jordan's failure to comply with the Court's request in the arrest and surrender of Mr Al-Bashir to the ASP and the UNSC?

164. As it has been explained in the previous section, in the Impugned Decision the Pre-Trial Chamber relied on ample objective factual and legal reasons to conclude that Jordan's failure to comply with the Court's request to arrest and surrender Mr Al-Bashir ought to be referred to the ASP and the UNSC. Thus, it was not unreasonable for the Pre-Trial Chamber to refer Jordan's non-compliance to the ASP and the UNSC. Notwithstanding the foregoing, in light of the relevance of the matter to the exercise of the Court's functions and powers in relation to its mandate to put an end to impunity for the most serious crimes of international concern and to the mandate of the UNSC to maintain international peace and security, it is deemed appropriate to set out those additional objective factual and legal reasons that warrant the referral of Jordan's non-compliance to the ASP and the UNSC.

1. Necessary Factual and Legal Background

(a) Cassese Report and the gravity of the crimes allegedly committed in Darfur

165. In relation to the alleged grave crimes committed in Darfur, the UNSC acting under Chapter VII of the UN Charter and in the understanding that the situation in Darfur was negatively affecting international peace and security, adopted resolution 1593 on 31 March 2005. In that resolution, the Security Council, *inter alia*, noted the report of the International Commission of Inquiry on violations of international humanitarian law and human rights law in Darfur ('Cassese Report').[231]

[231] On 18 September 2004, by virtue of UNSC resolution 1564(2004), the International Commission of Inquiry on violations of international humanitarian law and human rights law in Darfur was established, chaired by Antonio Cassese. The terms of reference of the Cassese Commission indicated the following mandates: (1) to investigate reports of violations of international humanitarian law and human rights law in Darfur by all parties; (2) to determine whether or not acts of genocide have occurred; (3) to identify the perpetrators of such violations; and, (4) to suggest means of ensuring that those responsible for such violations are held accountable. On 25 January 2005, the Cassesse

166. The Cassese Report concluded, *inter alia*, that '[i]t is undeniable that mass killing occurred in Darfur and that the killings were perpetrated by the Government forces and the Janjaweed in a climate of total impunity and even encouragement to commit serious crimes against a selected part of the civilian population' and that these 'mass killing of civilians in Darfur is therefore likely to amount to a crime against humanity'.[232] The Cassese Report further concludes, *inter alia*, that 'Sudanese Governmental forces and militias under their control were responsible for violations of international human rights and humanitarian law which are very likely to amount to war crimes [and] crimes against humanity'[233] and observes that 'many of the alleged crimes documented in Darfur have been widespread and systematic'.[234]

167. In its report, the Cassese Commission noted the 'irrefutable fact' that 'according to United Nations estimates there are 1,65 million internally displaced persons in Darfur'.[235] It further observed that '[a]ccording to some estimates, over 700 villages in all the three states of Darfur ha[d] been completely or partially destroyed'.[236] The Commission also noted that 'several incidents involved aerial bombardment of areas surrounding the villages and/or bombing of civilians and civilian structures within villages themselves' observing in particular that '[t]he fact that some of the attacks received aerial support presents a clear indication of the link between the Janjaweed and the Government of Sudan'.[237] In one of the case studies presented by the Commission, '[t]he following facts were established': on 17 or 18 February 2004, the village of Barey 'was attacked by a combined force of Government soldiers and Janjaweed', first by aerial bombardment lasting 'for about two hours'.[238] During the bombardment, a hospital was hit.[239] Thereafter, the attackers looted the village and

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Commission rendered its report to the UN Secretary-General, who subsequently submitted it to the Security Council.

[232] Cassese Report, para. 233.

[233] UNSC Resolution 1593, p. 1; International Commission of Inquiry on Darfur, 'Report of the International Commission of Inquiry on Darfur', 25 January 2005 ('Cassese Report'), para. 630.

[234] Cassese Report, para. 647.

[235] Cassese Report, p. 3.

[236] Cassese Report, para. 236.

[237] Cassese Report, para. 243.

[238] Cassese Report, para. 251.

[239] Cassese Report, para. 251.

destroyed the remaining buildings by burning them resulting in 15 civilians killed and another 8 wounded.[240]

168. Moreover, the Cassese Report identified 'senior Government official and military commanders' as possibly responsible for the above violations.[241]

169. On the basis of the foregoing, it becomes clear that the Cassese Report identified the commission of alleged crimes that would fall under the subject-matter jurisdiction of the Court and the possible involvement of high ranking Government officials.

170. As noted earlier in this opinion, the crimes subject to the jurisdiction of the Court not only constitute international crimes under the Rome Statute, but also amount to grave violations of internationally recognised human rights. That is the case of crimes such as murder, extermination, forcible transfer, torture, rape, intentionally directing attacks against a civilian population as such or against individual civilians not taking part in hostilities, pillaging, genocide by killing, genocide by causing serious bodily or mental harm, and genocide by deliberately inflicting on each target group conditions of life calculated to bring about the group's physical destruction. In particular, they constitute attacks to the core human rights as established in article 4 of the International Covenant on Civil and Political Rights[242] ("ICCPR"). Indeed, article 4 of the ICCPR sets out those rights that can never be derogated – even in times of public emergency that threatens the life of the nation.[243] Furthermore, the crime of genocide is stipulated in the Convention on the Prevention of Genocide as a grave human rights violation ("Genocide Convention").[244]

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[240] Cassese Report, para. 251.
[241] Cassese Report, pp. 4-5.
[242] United Nations, General Assembly, Resolution 2200A, 16 December 1966, A/6316 (XXI) ('ICCPR').
[243] The core human rights to which article 4 of the ICCPR refers are: the right to life (article 6 of the ICCPR); the prohibition of torture, cruel, inhuman and degrading treatment (article 7 of the ICCPR); the prohibition on being held in slavery or in servitude (article 8 of the ICCPR); being imprisoned merely on the ground of inability to fulfil a contractual obligation (article 11 of the ICCPR); the right not to be held guilty for a criminal offence that did not constitute a criminal offence at the time of its commission (article 15 of the ICCPR); the right to be recognised as a person before the law (Article 16 of the ICCPR); and the right to freedom of thought, conscience and religion (article 18 of the ICCPR).
[244] ICCPR, article 6. *See also* United Nations General Assembly, article II of the Convention on the Prevention and Punishment of the Crime of Genocide, Resolution 260 A, 12 January 1951, 78 U.N.T.S. 277;Genocide Convention, Article 1 ('The Contracting Parties confirm that genocide, whether

171. The core human right to life is enshrined in numerous human rights instruments, such as the Universal Declaration of Human Rights[245] ("UDHR"), and in binding treaties such as article 4 (1) of the American Convention on Human Rights[246] ("ACHR"), article 2 (1) of the European Convention on Human Rights[247] ("ECHR") and article 6 of the ICCPR, which in paragraph 1 provides that 'every human being has the inherent right to life', and in both paragraphs 2 and 3 precludes any violation to or derogation from the Genocide Convention.[248] These treaties likewise incorporate the human right to liberty of movement and freedom to choose a person's own residence;[249] the human right to humane treatment, including the prohibition of being subject to torture and having one's personal integrity respected;[250] the human right to have honour respected and dignity recognised;[251] and the human right to property.[252] Some of the core human rights that these treaties protect, especially the right to life, are by nature peremptory norms that the international community recognises as *ius*

committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish').

[245] United Nations, General Assembly, Resolution 217 A, 10 December 1948, A/810 (III), ('UDHR').

[246] Organization of American States, article 4 (1) of the American Convention on Human Rights, 18 July 1978, 1144 U.N.T.S. 123, ('ACHR').

[247] European Court of Human Rights, article 2 (1) of the Convention for the Protection of Human Rights and Fundamental Freedoms, 21 September 1970, 213 U.N.T.S. 222, ('ECHR').

[248] ICCPR, article 6. *See also* United Nations General Assembly, article II of the Convention on the Prevention and Punishment of the Crime of Genocide, Resolution 260 A, 12 January 1951, 78 U.N.T.S. 277, Genocide Convention ('2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court. 3. When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide').

[249] UDHR, article 13; ACHR, article 22; ICCPR, article 12.

[250] UDHR, article 5; ACHR, article 5; ECHR, article 3; ICCPR, article 6; Genocide Convention, article II; United Nations, General Assembly, Resolution 39/46, 10 December 1984, ('Convention against Torture').

[251] UDHR, article 12; ACHR, article 11; ECHR, article 8; ICCPR, article 17; Genocide Convention, article II.

[252] UDHR, article 17; ACHR, article 21; ECHR, article 1.

cogens.[253] The prohibition to commit international crimes is also regarded as a *ius cogens* norm.[254]

172. *Ius cogens* or peremptory norms of general international law are characterized in article 53 of the Vienna Convention on the Law of Treaties, as norms accepted and recognized by the international community of States as a whole. They can originate from international conventional law,[255] international customary law[256] and general principles of law recognized by civilized nations,[257] which include norms from international humanitarian law and international human rights law.[258] *Ius cogens* norms have been widely recognised in international treaties and conventions such as the prohibition to commit genocide in the Genocide Convention,[259] the prohibition to commit torture as recognised in the Convention against Torture[260] and the obligation

[253] IACHR, *Gomes-Lund et al. (Guerrilha do Araguaia) v. Brazil*, 24 November 2010, Series C No. 219, para. 19, (see the separate opinion of Judge Figueiredo-Caldas noting that '[t]he Court can, and beyond this, has the obligation to attribute jus cogens nature to those rights most dear to the person, the core components of protection …so as to protect and comply with the objective of protecting human rights covered by the American Convention').

[254] M. Tushnet, *et al*., *International Human Rights and Humanitarian Law* (Cambridge University Press, 2006), pp. 34-35. *See also* ICTY, Trial Chamber II, *Prosecutor v. Zoran Kupregki& et al.*, Case No. IT-95-16, 14 January 2000, para. 520 ('most norms of international humanitarian law, in particular those prohibiting war crimes, crimes against humanity and genocide, are also peremptory norms of international law or jus cogens, i.e. of a non-derogable and overriding character').

[255] *See e.g.* Genocide Convention (Prohibition to commit genocide).

[256] For example, for the prohibition of torture, *see* ICJ, *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)*, Judgment of 20 July 2012, ICJ Reports 2012, para. 99 ('the prohibition of torture is part of customary international law and it has become a peremptory norm *(jus cogens')*.

[257] Elementary considerations of humanity. *See* ICJ, 'Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion', 8 July 1996, para. 79 ('It is undoubtedly because a great many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and "elementary considerations of humanity" as the Court put it in its Judgment of 9 April 1949 in the Corfu Channel case (I.C.J. Reports 1949, p. 22), that the Hague and Geneva Conventions have enjoyed a broad accession. Further these fundamental rules are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary laws').

[258] R. Nieto-Nave, *International Peremptory Norms (Jus Cogens) and International Humanitarian Law*, pp. 11-12.

[259] Genocide Convention, Article 1 ('The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish').

[260] *See* ICJ, *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)*, Judgment of 20 July 2012, ICJ Reports 2012, para. 99 ('the prohibition of torture is part of customary international law and it has become a peremptory norm *(jus cogens)*. That prohibition is grounded in a widespread international practice and on the *opinio juris* of States. It appears in numerous international instruments of universal application (in particular the Universal Declaration of Human Rights of 1948, the 1949 Geneva Conventions for the protection of war victims; the International Covenant on Civil and Political Rights of 1966; General Assembly resolution 3452/30 of 9 December 1975 On the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading

to observe certain important rules of humanitarian law applicable in armed conflict contained in the four Geneva Conventions,[261] such as the rules set out in article 3 common to the four Geneva Conventions.[262] It is the duty of States to respect the peremptory character of these norms. They are universal and non-derogable. The effect of characterizing a norm as *jus cogens* is that derogation of this norm is not permitted and according to the Vienna Convention they can only be modified by a norm of the same character.[263] This reflects the extreme gravity of the human rights violations allegedly committed as a result of the crimes attributed to the indicted person in this case.

173. Because of their distinctive character as *ius cogens* norms, the prohibition to commit international crimes is legally binding without exception to all States,

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Treatment or Punishment), and it has been introduced into the domestic law of almost all States; finally, acts of torture are regularly denounced within national and international fora').

[261] International Committee of the Red Cross (ICRC), Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention), 12 August 1949, 75 UNTS 31; International Committee of the Red Cross (ICRC), Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Second Geneva Convention), 12 August 1949, 75 UNTS 85; International Committee of the Red Cross (ICRC), Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention), 12 August 1949, 75 UNTS 135; International Committee of the Red Cross (ICRC), Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), 12 August 1949, 75 UNTS 287. .

[262] 'In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions: 1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons: a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; b) taking of hostages; c) outrages upon personal dignity, in particular, humiliating and degrading treatment; d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples. 2) The wounded and sick shall be collected and cared for. An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict. The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention. The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.'

[263] United Nations, General Assembly, article 53 of the Vienna Convention on the Law of Treaties, 23 May 1969, ('VCLT'), ('[t]reaties conflicting with a peremptory norm of general international law ("jus cogens"): A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character').

independently of whether the State has accepted or not the norm.[264] Furthermore, non-compliance with these norms cannot be legally justified.[265] When a State breaches peremptory norms, according to the International Law Commission's articles on state responsibility, every other State is obliged to cooperate to bring to an end such conduct through lawful means and not recognize as lawful a situation created by a serious breach, nor render aid or assistance in maintaining that situation.[266] *Ius cogens* norms create obligations *erga omnes* that must always prevail over any other international obligation.[267] According to the ILC, obligations *erga omnes* are those owed to the international community as a whole and all States, irrespective of their particular interest in the matter, are entitled to invoke State responsibility in case of breach.[268]

174. In sum, the above demonstrates that the atrocities subject to the jurisdiction of this Court such as those identified in the Cassese Report as allegedly committed in Darfur, Sudan, not only constitute international crimes under the Rome Statute but also, and very importantly, amount to gross violations of internationally recognised human rights and to violations of *ius cogens* norms. As a result, the investigation, prosecution and punishment of those responsible for such atrocities are in the interest of the international community as a whole, given that the obligation to prosecute and punish these atrocities is *erga omnes*. As stated above, it is this *erga omnes* character that makes the obligation of States Parties under the Rome Statute to prosecute and punish crimes under the jurisdiction of the Court a reinforced obligation. As it will be further explained, when failing to comply with its obligation to cooperate with the Court in the arrest and surrender of Mr Al-Bashir, Jordan infringed both its

[264] J. Tasioulas, 'Custom, Jus Cogens, and Human Rights', in C. A. Bradley (ed.), *Custom's Future: International Law in a Changing World* (Cambridge University Press, 2016), p. 11.
[265] J. Tasioulas, 'Custom, Jus Cogens, and Human Rights', in C. A. Bradley (ed.), *Custom's Future: International Law in a Changing World* (Cambridge University Press, 2016), p. 11.
[266] International Law Commission, article 41 of Responsibility of States for Internationally Wrongful Acts, 12 December 2011, A/56/49(Vol. I)/Corr.4.
[267] R. Ago, 'Fifth Report on State Responsibility' in *II(1) ILC Yearbook 33* (1976), para. 101 ('The specially important content of certain international obligations and the fact that respect for them in fact determines the conditions of the life of international society are factors which, at least in many cases, have precluded any possibility of derogation from the rules imposing such obligations by virtue of special agreements. These are also the factors which render a breach of these obligations more serious than failure to comply with other obligations').
[268] United Nations, General Assembly, 'Report of the Study Group of the International Law Commission', 13 April 2006, A/CN.4/L.682, para. 380.

obligations under the Rome Statute and its *erga omnes* obligation to assist in the investigation, prosecution and punishment of international crimes.

(b) UNSC Resolution 1593 (2005) and its mandatory nature

175. Under article 13(b) of the Statute, the UN Security Council may refer a situation to the Court in the exercise of its mandate under Chapter VII of the UN Charter to maintain international peace and security. The purpose of article 13(b) of the Statute is to trigger the jurisdiction of the Court in order to enable it to investigate, prosecute and eventually punish those responsible for the commission of the most serious crimes of concern to the international community as a whole. Those crimes not only constitute a threat to international peace and security; they also allow the Court to exercise its jurisdiction, thereby prompting the fulfilment of the Court's mandate to put an end to impunity for the perpetrators of those crimes as set out in the preamble. Article 13(b) of the Statute also has the function of enabling the Security Council to carry out, in an effective manner and as part of the non-military measures at its disposal, its mandate to maintain international peace and security under Chapter VII of the UN Charter.

176. Chapter VII of the UN Charter is composed of various provisions which set out the different measures that the UN Security Council may adopt in cases where there is a threat to international peace and security,[269] including provisional measures under article 40, non-military measures under article 41 and military measures under article 42. Arguably, a referral by the UNSC of a situation to the Court pursuant to article 13(b) of the Statute amounts to a non-military measure under article 41 of the UN Charter. Under the UN Charter, UN members are obliged to carry out decisions of the UN Security Council. This stems from the clear wording of article 25 of the UN Charter: '[t]he Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter'; as confirmed by article 48 stating that the decisions of the UNSC adopted 'for the maintenance of international peace and security […] shall be carried out by the Members of the United Nations directly and through their action in the appropriate

[269] Charter of the United Nations, articles 40-42.

international agencies of which they are members'; and as clarified in article 103 of the UN Charter: '[i]n 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'. The foregoing legal framework makes clear that Jordan has a duty to cooperate as a member of the UN and this responsibility prevails, making the obligation to cooperate with the Court in the arrest and surrender of Mr Al-Bashir a reinforced obligation.

177. In the case at hand, on the basis of the findings reported by the Cassese Commission, the UNSC determined that 'the situation in Sudan continues to constitute a threat to international peace and security' and decided to refer the situation in Darfur since 1 July 2002 to the Prosecutor of the Court imposing on Sudan the duty to 'cooperate fully' with the Court.[270] In the present case, as it is clearly explained in the Majority Opinion, the UNSC imposed concrete obligations to cooperate with the Court.[271]

178. As a result of the UNSC referral, the Prosecutor initiated an investigation into the Darfur situation on 1 June 2005[272] and subsequently, on the basis of the facts and circumstances summarily mentioned in section VIII.A.1(d)(i) above, requested the issuance of a warrant of arrest against Mr Al-Bashir. The Pre-Trial Chamber issued a first warrant of arrest on 4 March 2009 and a second one incorporating charges of genocide on 12 July 2010.[273] The warrants of arrest against Mr Al-Bashir list ten counts on the basis of his individual criminal responsibility under article 25(3) (a) of the Rome Statute as an indirect (co)perpetrator including: five counts of crimes against humanity (murder (article 7 (1) (a)); extermination (article 7 (1) (b)); forcible transfer (article 7 (1) (d)); torture (article 7 (1) (f)); and rape (article 7 (1) (g)); two counts of war crimes (intentionally directing attacks against a civilian population as such or against individual civilians not taking part in hostilities (article 8 (2) (e) (i)); and pillaging (article 8 (2) (e) (v)); and three counts of genocide (genocide by killing (article 6-a), genocide by causing serious bodily or mental harm (article 6-b) and

[270] UNSC Resolution 1593, p.1.
[271] Majority Opinion, paras 118, 122-127.
[272] 'Decision by the Prosecutor to Investigate Sudan', 1 June 2005, ICC-02/05-2.
[273] First Decision on Warrant of Arrest; Second Decision on Warrant of Arrest.

genocide by deliberately inflicting on each target group conditions of life calculated to bring about the group's physical destruction (article 6-c).[274]

179. It is clear from the foregoing legal and factual framework that decisions adopted by the UNSC, including a decision to refer a situation to the Prosecutor of this Court for investigation and prosecution, are mandatory by nature. Failure to comply with these decisions, including the UNSC resolution 1593, could result in the impositions of sanctions or special measures by the UNSC. To date, sanctions by the UNSC have taken a number of different forms, ranging from comprehensive economic and trade sanctions[275] to more targeted measures such as arms embargoes,[276] travel bans, and financial or commodity restrictions.[277] The Security Council has applied sanctions to support peaceful transitions, deter non-constitutional changes, constrain terrorism, protect human rights and promote non-proliferation.[278] In case of a failure to comply with UNSC resolution 1593, any of the foregoing sanctions could be deemed appropriate by the UNSC. Therefore it is important to point out that the non-cooperation of a State Party in the execution of warrants of arrest issued in a case that originates from a UNSC referral could mean that Jordan has also breached its obligations before the UNSC under the UN Charter.

2. Jordan's duty to comply with the UNSC resolution 1593 (2005) and in the execution of the mandate of the UNSC as an international obligation before the international community

180. A relevant consideration concerns Jordan's duty to comply with the UNSC resolution and in the execution of the mandate of the UNSC as an international obligation before the international community as a whole. As explained above, by virtue in particular of articles 25, 41, 42, 48 and 103 of the UN Charter, UN members are obliged to carry out the UNSC resolutions rendered under Chapter VII in the execution of the mandate of that body to maintain international peace and security.

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[274] First Decision on Warrant of Arrest, paras 12-15; Second Decision on Warrant of Arrest, para. 4.
[275] *See e.g.* United Nations, Security Council, Resolution 661, 6 August 1990, S/RES/661; E. De Wet, *The Chapter VII Powers of the United Nations Security Council*, (Hart Publishing, 2004), p. 226.
[276] *See e.g.* United Nations, Security Council, Resolution 713, 25 September 1991, S/RES/713.
[277] *See e.g.* United Nations, Security Council, Resolution 841, 16 June 1993, S/RES/841.
[278] *See* United Nations, Security Council, '2019 Fact Sheet: Subsidiary Organs of the United Nations Security Council', 8 February 2019.

181. A UNSC referral triggers the jurisdiction of the Court which must be exercised in accordance with the Statute as clearly stipulated in article 1 of the Statute: '[t]he jurisdiction and functioning of the Court shall be governed by the provisions of this Statute' and in the *chapeau* of article 13 of the Statute: '[t]he Court may exercise its jurisdiction […] in accordance with the provisions of this Statute'. In particular in relation to UNSC resolution 1593, this means that States Parties have a double obligation or a reinforced obligation to fully cooperate with the Court in accordance with Part 9 of the Statute, including the obligation to execute an order to arrest and surrender persons indicted by the Court in accordance with article 89(1) of the Statute.

182. In this regard, it must be observed that by failing to comply with the Court's request to arrest and surrender Mr Al-Bashir, Jordan has not only infringed its cooperation duties under the Statute but it has potentially failed to observe its duties under the UN Charter. In the context of this case, it is clear that Jordan has failed to carry out UNSC resolution 1593 (2005) issued under Chapter VII thereby possibly infringing articles 25, 48 and 103 of the UN Charter, making it imperative in this case to refer the matter under article 87(7) of the Statute both to the ASP and the UNSC.

183. The Darfur situation was referred to the Court, and Jordan was imposed the obligation to cooperate fully with the Court, by virtue of resolution 1593 (2005) issued by the UNSC in the exercise of its mandate under Chapter VII of the UN Charter to maintain international peace and security.[279] The obligation of Jordan to cooperate fully with the Court pursuant to the Rome Statute is therefore reinforced by resolution 1593 in the light of articles 25, 48 and 103 of the UN Charter, making it a double or reinforced obligation.

184. Given that cases arising out of situations referred to the Court by the Security Council are clearly relevant to the effective execution of its mandate to maintain international peace and security, it is only logical that a State's non-compliance can impinge upon the effective discharge of the Security Council's functions and powers. As stated in the *travaux préparatoires* of article 87(7) of the Statute, '[t]he legal basis of the role of the Security Council will also have to be viewed in the context of the

[279] Charter of the United Nations, articles 24, 39, 41-42; UNSC Resolution 1593.

powers of the Security Council in the Charter of the United Nations'.[280] Article 87(7) is a provision that makes available a remedy for those situations of non-compliance that affect not only the functioning of the Court but also that of this important organ of the UN in cases where a situation originates from a UNSC referral, thereby making a referral of non-compliance to that organ the logical consequence of a Court's finding of a failure to cooperate. It has been established that Jordan has violated both its obligations under the Statute and those owed to the UNSC thereby fulfilling the requirements of article 87(7) of the Statute. The UNSC is entitled to proceed and adopt, as a political organ, the measures deemed most appropriate to ensure future cooperation of States to secure the discharge of its mandate and resolutions.

185. Moreover, the Court and the UN have agreed in the Negotiated Relationship Agreement between the International Criminal Court and the United Nations that 'with a view to facilitating the effective discharge of their respective responsibilities, they shall cooperate closely, whenever appropriate, with each other and consult each other on matters of mutual interest pursuant to the provisions of the […] Agreement and in conformity with the respective provisions of the Charter and the Statute'.[281] Furthermore, the ICC-UN agreement explicitly refers to findings under article 87(7) in the following terms: 'Where a matter has been referred to the Court by the Security Council and the Court makes a finding, pursuant to article 87, paragraph [..] 7, of the Statute, of a failure by a State to cooperate with the Court, the Court **shall inform the Security Council or refer the matter to it, as the case may be**'.[282] This aspect of the agreement reinforces the content of article 87(7) of the Statute in the sense that this provision must be observed and applied in the framework of the provisions of the Rome Statute and the agreements between the Court and the UN which reflect the aspirations of the international community as a whole.

[280] United Nations, General Assembly, 'Report of the Preparatory Committee on the Establishment of an International Criminal Court _ Volume II Compilation of proposals', 14 September 1996, A/51/22, footnote 82.
[281] Assembly of State Parties, 'ASP 3rd Session Resolutions', 7 September 2004, ICC-ASP/3/25, article 3.
[282] Assembly of State Parties, 'ASP 3rd Session Resolutions', 7 September 2004, ICC-ASP/3/25, article 3.

186. The functions and powers of the UNSC afforded to maintain international peace and security were possibly obstructed as a result of Jordan's failure to comply with the Court. This calls for a referral by the Court to that organ and the Court is enabled to do so by virtue of the clear wording and meaning of article 87(7) of the Statute. Refusing to refer Jordan's failure to comply to the UNSC would not only be in contravention of the relevant provisions of the Rome Statute and the Negotiated Relationship Agreement between the International Criminal Court and the United Nations but would also prevent the UNSC from taking any measures deemed appropriate to tackle the lack of cooperation in relation to all aspects relevant to the UNSC resolution 1593 (*inter alia,* requesting explanations from the non-compliant State, making recommendations, or eventually imposing sanctions) to thereby ensure that its mandate to maintain international peace and security is effectively discharged.

Conclusion on Jordan's duty with the UNSC resolution and in the execution of the mandate of the UNSC as an international obligation before the international community

187. In sum and for the reasons set out above, given that by failing to cooperate with the Court, Jordan infringed both its obligations to cooperate with the Court in contravention of the provisions of the Rome Statute and potentially also its international obligations owed to the UNSC under the UN Charter – Chapter VII, a referral of Jordan's failure to cooperate to the ASP and the UNSC is the logical and legally correct outcome pursuant to article 87(7) of the Statute. Such determination is both reasonable and necessary. The referral is required in order to take those measures deemed appropriate to ensure future compliance and thereby the fulfilment of the mandates of both the Court and the UNSC and the achievement of the object and purpose of both the Rome Statute and the UN Charter.

3. Infringement of Jordan's obligations under the Rome Statute and the frustration of the object and purpose of the Statute as a result of Jordan's failure to comply

188. Jordan, as a State Party to the Rome Statute, has assumed the rights and obligations set out in the Rome Statute, including the cooperation obligations set out in Part 9 of the Statute. The cooperation of States with the Court is crucial given the lack of its own enforcement mechanisms by the Court. Indeed, State cooperation is the only possible way for the Court to exercise its functions and powers and fulfil its mandate as set out in the preamble to put an end to impunity for the perpetrators of the most serious crimes of concern to the international community as a whole and bring justice to the victims of such atrocities.

189. In the particular circumstances of this case concerning cooperation in the arrest and surrender of Mr Al-Bashir, the most relevant provisions of Part 9 of the Statute are those addressing the obligation of a State Party to cooperate in the execution of warrants of arrest issued by the Court. In this regard, article 86 stipulates that 'States Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court'. Specifically in relation to requests to cooperate in the arrest and surrender of a person, article 89(1) of the Statute states in clear terms that 'States Parties ***shall***, in accordance with the provisions of this Part and the procedure under their national law, ***comply with requests for arrest and surrender***'. If a State Party fails to comply with a Court's request to cooperate 'contrary to the provisions of th[e] Statute, thereby preventing the Court from exercising its functions and powers under this Statute', article 87(7) affords the Court the power to 'make a finding to that effect and refer the matter to the Assembly of States Parties or, where the Security Council referred the matter to the Court, to the Security Council'.

190. For reasons explained unanimously by the Appeals Chamber in the determination of the first and second grounds of appeal, it is clear that Jordan has failed to comply with its obligation to cooperate under the Rome Statute. Furthermore, on the basis of the reasons given in section VI.A.1, Jordan's failure to cooperate has prevented the Court from exercising its functions and powers within the

meaning of article 87(7) of the Statute. This, in turn, has negatively impacted upon the fulfilment of the object and purpose of the Rome Statute.

191. The object and purpose of the Rome Statute is crystallised in the preamble of the founding treaty of this Court. In relevant part, States Parties express mindfulness 'that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity', recognise that 'such grave crimes threaten the peace, security and well-being of the world' and affirm that 'the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured'. In the preamble, States Parties further state their determination 'to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes', and their resolution 'to guarantee lasting respect for and the enforcement of international justice'.

192. Of particular relevance is the mandate given to the Court to put an end to impunity thereby bringing justice to the victims of those atrocities that form the subject-matter jurisdiction of the Court. In other words, justice for victims is the *raison d'être* of the International Criminal Court. Victims are at the heart of international justice. It was precisely by acknowledging the unimaginable suffering caused to victims as a result of the grave atrocities constituting the crimes under the jurisdiction of this Court that the international community as a whole finally reached an agreement in Rome to establish this Court to put an end to impunity for such crimes, and in that way contribute to global peace and security.

193. As noted by Antonio Cassese as President of the International Criminal Tribunal for the former Yugoslavia (ICTY) in his first report to the UN Security Council and General Assembly,

> from the victim's point of view, what matters is that there should be public disclosure of the inhuman acts from which he or she has suffered and that the actual perpetrator of the crime be tried and, if found guilty, punished. […] [T]he punishment of the authors of those barbarous acts by an impartial tribunal can be a means, at least in part, of alleviating their suffering and anguish.[283]

[283] ICTY, '1st Annual Report' 29 August 1994, A/49/342, S/1994/1007, paras 50-51.

194. In the case at hand, it is justice for the victims in the situation in Darfur that must be done in order to materialise the object of the Rome Statute and this Court. By failing to cooperate with the Court in the arrest and surrender of Mr Al-Bashir, Jordan has effectively contributed to the frustration of this goal. This frustration could be further exacerbated by the failure of the Appeals Chamber to confirm the Pre-Trial Chamber's decision insofar as it determined that a referral of Jordan's failure to comply with the ASP and the UNSC was warranted. Indeed, reversing the referral of Jordan's failure to cooperate with the Court would be contrary to seeking the achievement of the object and purpose of the Rome Statute, that is to put an end to impunity and bring justice to victims.

Conclusion on the Infringement of Jordan's obligations under the Rome Statute and the frustration of the object and purpose of the Statute as a result of Jordan's failure to comply

195. In light of the foregoing considerations, it is clear that Jordan's failure to cooperate with the Court frustrated the object of the Rome Statute to put an end to impunity and bring justice to the victims in Darfur. These findings require the Court to refer Jordan's failure to cooperate in the arrest and surrender of Mr Al-Bashir to the ASP and the UNSC.

4. Benefits of Referral to the ASP

196. An additional consideration relevant to determining the correctness or otherwise of the Pre-Trial Chamber's decision to refer Jordan's failure to comply with the Court's request in the arrest and surrender of Mr Al-Bashir to the ASP and UNSC is the beneficial results that past referrals of non-compliance of States Parties to the ASP under article 87(7) of the Statute have yielded.

197. As explained by the Prosecutor during the oral hearing,[284] referrals in the case of Malawi and the DRC have yielded positive results. Following referral to the ASP, Malawi developed a dialogue with the president of the ASP affirming that Malawi did

[284] Transcript of hearing, 13 September 2018, ICC-02/05-01/09-T-7-ENG, p. 57, lines 8-12, 16-17.

not intend to repeat their non-compliance.[285] Subsequently, the Government of Malawi declined to host Mr Al-Bashir at a subsequent African Union summit, leading even to the venue of that summit being changed.[286] Similarly, following several other ASP initiatives, the DRC has now accepted recommendations to fully cooperate with the Court.[287]

198. In relation to the above, it is important to emphasise that the *raison d'être* of article 87(7) of the Statute and the positive impact that the application of this provision has on the cooperation of States Parties is a strong indication that Jordan's non-compliance ought to be referred. As noted earlier in this opinion, 'the object and purpose of the provision is to foster cooperation' and a referral is a measure 'that may be sought when the Chamber concludes that it is the most effective way of obtaining cooperation in the concrete circumstances at hand'.[288] As already found above in the context of discussing the differential treatment afforded to South Africa *vis-à-vis* Jordan, since Jordan has not yet affirmed its commitment to cooperate in the future in the arrest and surrender of Mr Al-Bashir, engaging external actors such as the ASP and the UNSC remains 'the most effective way of obtaining cooperation'.[289] Furthermore, the referral of Jordan to the ASP and the Security Council should not be considered as a punitive measure[290] or a measure aimed at shaming the State – rather, as submitted by Mr Magliveras,[291] it should be considered an opportunity to start a dialogue between Jordan, the ASP, the Security Council and the Court to make the cooperation of Jordan possible.

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[285] Assembly of State Parties, Report of the Bureau on non-cooperation, 1 November 2012, ICC-ASP/11/29, para. 5.
[286] Assembly of State Parties, Report of the Bureau on non-cooperation, 1 November 2012, ICC-ASP/11/29, para. 10.
[287] Assembly of State Parties, Report of the Bureau on non-cooperation, 1 November 2012, ICC-ASP/11/29, para. 22.
[288] *Kenyatta* OA5 Judgment, para. 51.
[289] *Kenyatta* OA5 Judgment, para. 51.
[290] *Kenyatta* OA5 Judgment, para. 53 ('it is important to note that a referral may be value-neutral and not necessarily intended to cast a negative light on the conduct of a State').
[291] 'Amicus curiae observations under rule 103 of the Rules of Procedure and Evidence on the merits of the legal questions in the appeal of the Hashemite Kingdom of Jordan lodged on 12 March 2018 against the finding of Pre-Trial Chamber II that it did not comply with the request to arrest and surrender President Omar Al-Bashir of Sudan', 14 June 2018, ICC-02/05-01/09-356 ('Mr Magliveras's Observations'), para. 12.

Conclusion on the Benefits of Referrals to the ASP

199. The foregoing analysis allows the dissenting judges to conclude that past examples of the referrals of other States' failure to cooperate with the Court have yielded positive results in achieving the object and purpose of article 87(7) of the Statute, namely fostering cooperation.

5. Conclusion on whether there are any additional objective factual and legal reasons warranting the referral of Jordan's failure to comply with the Court's request in the arrest and surrender of Mr Al-Bashir to the ASP and the UNSC

200. The analysis in this section allows us to draw the following conclusions. In addition to the objective factual and legal reasons relied upon by the Pre-Trial Chamber to determine that Jordan's failure to comply with the Court's request ought to be referred to the ASP and the UNSC pursuant to article 87(7) of the Statute, there are other relevant considerations that reinforce the correctness of the Pre-Trial Chamber's decision.

201. First, because by refusing to cooperate with the Court, Jordan infringed both its obligations of cooperation under the Rome Statute and potentially the international obligations owed to the UNSC pursuant to the UN Charter – Chapter VII, a referral of Jordan's non-compliance to the ASP and the UNSC is required so as to allow the taking of those measures deemed appropriate to ensure future compliance and thereby the fulfilment of the mandates of both the Court and the UNSC.

202. Second, reversing the Pre-Trial Chamber's decision insofar as it decided to refer Jordan's non-compliance to the ASP and the UNSC would be contrary to the object and purpose of the Rome Statute of putting an end to impunity for the perpetrators of the most serious crimes of concern to the international community as a whole. Indeed, such a determination would negate justice for victims which is the *raison d'être* of this Court and could in fact amount to perceived inaction by the Court in this regard.

203. Third, past examples of referrals to the ASP of the failure to comply with the Court's request to cooperate in the arrest and surrender of Mr Al-Bashir of other States Parties demonstrate that a referral of Jordan's non-cooperation to that organ has the very real prospect of yielding positive results in terms of future cooperation.

204. The foregoing considerations lead to the conclusion that in addition to those factual and legal reasons relied upon by the Pre-Trial Chamber in the Impugned Decision, there are other important legal and factual reasons that further support the conclusions and the determination of the Pre-Trial Chamber.

C. Did the Pre-Trial Chamber abuse its discretion in referring the matter to the ASP and the UNSC?

205. Prior to determining whether a referral to the ASP and/or the UNSC is warranted under article 87(7) of the Statute, the respective chamber must first establish two cumulative conditions, namely (i) that the State concerned failed to comply with a request to cooperate; and, (ii) that this non-compliance prevented the Court from exercising its functions and powers under the Statute. The Majority also notes the existence of this requirement prior to determining whether discretion under article 87(7) of the Statute was properly exercised. In this regard, the Appeals Chamber has unanimously decided that both conditions are met: Jordan failed to cooperate with the Court and this failure prevented the Court from exercising its functions and powers under the Statute.

206. As explained in the standard of review section, article 81(1) and (2) of the Statute set out the specific grounds of appeal that can be raised by the parties in respect of final appeals and although the Court's legal instruments do not set out the grounds of appeal that may be raised in interlocutory appeals, the Appeals Chamber has established that appellants may raise the same errors as in final appeals, notably errors of law, errors of fact, and procedural errors.[292] Furthermore, the legal framework of the Court does not contemplate abusive exercise of discretion by a first instance chamber as a ground of appellate review. Notwithstanding this, in the interests of justice, the jurisprudence of the Appeals Chamber has elaborated the concept of abuse of discretion as a ground of appellate review and has developed the

[292] *See e.g. Situation in the Democratic Republic of Congo*, 'Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled "Decision on the Prosecutor's Application for Warrants of Arrest, Article 58"', 13 July 2006, ICC-01/04-169 (OA), paras 32-34. *See also Prosecutor v. Joseph Kony and others*, 'Judgment on the appeal of the Defence against the "Decision on the admissibility of the case under article 19 (1) of the Statute" of 10 March 2009, 16 September 2009, ICC-02/04-01/05-408 (OA3), paras 46-47.

appropriate standard of review in this regard.[293] Therefore, it must be determined whether, under the high and strict applicable standard of review for discretionary decisions, it can be successfully maintained that in referring Jordan's failure to comply to the ASP and the UNSC, the Pre-Trial Chamber abused its discretion.

1. Relevant Part of the Impugned Decision

207. In deciding that Jordan's failure to cooperate with the Court should be referred, the Pre-Trial Chamber considered that: (i) Jordan had taken a very clear position that it was not under an obligation to arrest Mr Al-Bashir; (ii) Jordan chose not to execute the Court's request; (iii) Jordan did not require anything further that would assist in ensuring the proper exercise of its duty to cooperate; (iv) at the time of Mr Al-Bashir's visit, the Court had already expressed in unequivocal terms that States Parties are under an obligation to arrest Mr Al-Bashir and that consultations did not have suspensive effect on this obligation; and (v) Jordan had not been the first State Party to approach the Court with a request for consultations – the first one being South Africa.[294] The Pre-Trial Chamber further noted that while in the case of South Africa 'a request for consultations militated against a referral' to the ASP or UNSC, such circumstance did not exist with respect to Jordan.[295]

2. Submissions of the Parties

208. Jordan alleges that the Pre-Trial Chamber's decision to refer it to the Assembly of States Parties and the UN Security Council 'constituted an abuse of discretion' given (i) the alleged Pre-Trial Chamber's differential treatment between South Africa and Jordan in similar circumstances;[296] and (ii) the Pre-Trial Chamber's failure to give weight to relevant considerations in reaching its decision on referral.[297] In that regard, Jordan submits that while the Pre-Trial Chamber considered favourably South Africa's consultations with the Court as it was the first State Party to do so, it failed to

[293] *Kenyatta* OA5 Judgment, para. 22.
[294] Impugned Decision, paras 53-54.
[295] Impugned Decision, para. 54.
[296] Appeal Brief, paras 96-102; Jordan's Final Submissions, para. 30.
[297] Appeal Brief, paras 103-106; Jordan's Final Submissions, para. 31.

consider Jordan's good faith and to discuss Jordan's efforts at consultations prior to Mr Al-Bashir's visit.[298]

209. The Prosecutor submits that the Pre-Trial Chamber has a considerable degree of discretion in determining whether to refer a matter to the ASP or the UNSC.[299] She argues that the Pre-Trial Chamber correctly interpreted the law and reasonably assessed the facts.[300] The Prosecutor argues that the Pre-Trial Chamber did not abuse its discretion because: (i) the Pre-Trial Chamber's analysis was focused on Jordan's own conduct – the South Africa case was different and therefore it was justified for the Pre-Trial Chamber to arrive at different conclusions;[301] and (ii) Jordan did not consult in good faith with the Court – Jordan approached the Court late and only to inform that it was not going to arrest Mr Al-Bashir.[302]

3. Findings and Conclusions in the Majority Opinion

210. The Majority finds that 'the Pre-Trial Chamber erred when it found that Jordan had not sought consultations with the Court' and maintains that '[t]his error led to an erroneous exercise of the Pre-Trial Chamber's discretion in its appreciation of Jordan's position, notably by treating Jordan differently than South Africa in respect of the referral to the Assembly of States Parties and the UN Security Council'.[303]

211. As a result of the foregoing, the Majority concludes that 'the Pre-Trial Chamber failed to exercise its discretion judiciously when it decided to refer the matter of Jordan's non-compliance to the Assembly of States Parties and the UN Security Council'.[304]

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[298] Appeal Brief, paras 103-104; Transcript of hearing, 13 September 2018, ICC-02/05-01/09-T-7-ENG, p. 47, lines 14-20; Transcript of hearing, 14 September 2018, ICC-02/05-01/09-T-8-ENG, p. 95, line 23 to p. 96, line 7.
[299] Prosecutor's Response, paras 98-99.
[300] Prosecutor's Response, paras 100-114.
[301] Prosecutor's Response, para. 117.
[302] Prosecutor's Response, paras 119-120.
[303] Majority Opinion, para. 212.
[304] Majority Opinion, para. 213.

4. Analysis

212. As explained in the standard of review section, the legal framework of the Court does not specifically provide for appellate review in cases of abuse of discretion. Nonetheless, the jurisprudence of this Court has developed this possibility in the interests of justice. In light of the analysis carried out by the Majority and the seemingly confusion between the concepts, it is important to highlight the conceptual and legal differences between errors and abusive exercise of discretion. This is indeed an important distinction in resolving the question of whether the Pre-Trial Chamber abused its discretion when deciding to refer Jordan's failure to cooperate with the Court to the ASP and the UNSC.

(a) The Error in the field of law

213. In the field of law, an error is a false representation of reality that may result from ignorance of the existence of something that really exists or from a wrong belief in the existence of something that actually does not exist.[305] Indeed, it has been correctly pointed out that the error is traditionally defined as the false conception that one has about the reality of an event or the rules that govern it.[306] The error consists of a false judgment that is made of a thing or a fact, based on ignorance or incomplete knowledge, or on the incomplete or erroneous valuation of facts or principles of law that are linked with the facts'.[307] This false representation may concern facts (error of fact) or the applicable legal framework (error of law) giving rise to either factual or legal errors.

214. An error has the effect of vitiating the free will of the person that commits it with the concurrent consequence of annulling the validity of the concrete juridical act.[308] In the field of criminal law, an error of fact or law can have the effect of

[305] S. Litvinoff, 'Vices and Consent, Error, Fraud, Duress and an Epilogue on Lesion' in *50 Louisiana Law Review 1* (1989), p. 11.
[306] J. Colombo Campbell, 'Los Actos Procesales Tomo I', (Editorial Juridica de Chile, 1997), p. 243.
[307] J. Colombo Campbell, 'Los Actos Procesales Tomo I', (Editorial Juridica de Chile, 1997), p. 243.
[308] V. Tadros, 'Wrongs and Crimes', (Oxford University Press, 2016), p. 241 ('If a person is in error about facts that are relevant to her decision to give consent, her control over the conduct of those who owe her consent-sensitive duties is also negated, diminished, or made less valuable. This is because the value of conduct prohibited by a consent-sensitive duty often depends on facts about the conduct, or about the circumstances in which it is performed. If the person is in error about these facts, she cannot assess their value for herself, and she thus loses control over whether an act that she values is performed. This supports the view that error sometimes undermines the validity of consent').

excluding the criminal responsibility of a defendant. This possibility is also explicitly regulated in the Rome Statute in article 32.[309]

215. In the ambit of the exercise of judicial functions, the concept of errors of fact refers to decisions made by judges that are based on an evidently incorrect or incomplete perception of facts.[310] An error of law is an erroneous determination of the legal rules governing procedure, evidence or the matters at issue between the parties.[311]

216. In the case of errors committed in a judicial decision, such error if materially affecting the decision concerned can have the effect of annulling *per se* the judicial determination. In the context of this Court, this criterion is derived from article 83(2) of the Statute.

217. Both types of errors could lead to an erroneous evaluation by the judge in a given case. However, in those cases the basis of such erroneous evaluation is always a misrepresentation of reality which prevents the judge from exercising his or her will in a different manner because of the existence of an error that vitiates it. It must be stressed that this erroneous evaluation is not linked to the operation of weighing different relevant factors that rests and is vested upon the judge. The latter is an exercise of discretion by the judge and it is freely made, out of his or her own volition, logic, responds to common sense and within the boundaries of the law. Therefore an erroneous evaluation cannot lead to an abuse of discretion.

(b) Judicial Discretion

218. Judicial discretion is a power given to judges by law to choose among several alternatives.[312] This means that the discretion afforded to the judicial organ finds a

[309] 'A mistake of fact shall be a ground for excluding criminal responsibility only if it negates the mental element required by the crime. 2. A mistake of law as to whether a particular type of conduct is a crime within the jurisdiction of the Court shall not be a ground for excluding criminal responsibility. A mistake of law may, however, be a ground for excluding criminal responsibility if it negates the mental element required by such a crime, or as provided for in article 33'. *See also* W. Schabas, *The International Criminal Court*, (Oxford University Press, 2010), p. 501.
[310] *See e.g.* H.J. Snijders and C.J.M. Klaassen, *Nederlands Burgerlijk Procesrecht* (2002), pp. 31-32.
[311] Columbia Electronic Encyclopedia.
[312] A. Barak, *Judicial Discretion* (Yale University Press, 1989), p. 7.

legal foundation. It must be observed that the alternatives among which the judge can choose must all be lawful.[313] Indeed, there is no discretion involved if the choice is between a lawful act *vis-à-vis* an unlawful act.[314]

219. The discretion of the judge is exercised on a weighted basis, logically and responding to common sense, giving appropriate weight to the circumstances of the case. Discretion is never based on an error – it is an inherent attribute of the judge that can resolve what is not specifically provided in the law. In such case, there is no misrepresentation of reality, but rather a free and wilful use of the power afforded to the judge to choose the best solution to the legal uncertainty within the boundaries of the law. Indeed, a judge 'has no discretion in making his findings of fact. He has no discretion in his rulings on the law. But when, having made any necessary finding of fact and any necessary ruling of law, he has to choose between different courses of action, orders, penalties, or remedies, he then exercises a discretion'.[315]

220. Furthermore, the definition of judicial discretion operates on the presumption that the judge will not act mechanically but will weigh, reflect, gain impressions, test, and study.[316] However, this does not mean that judicial discretion is a reflection of the emotional or a mental state of the judge(s) exercising it. It is also not an activity guided by the subjectivity of the judge. Rather, it is 'a legal condition in which the judge has the freedom to choose among a number of options'.[317] The choice of the judge must be based on the objective factual circumstances and prior to weighing and considering all relevant aspects in order to adopt the most reasonable and appropriate option.

221. In the specific case of the exercise of judicial discretion pursuant to article 87(7) of the Statute, the lawful options open to the judges are (i) not make a finding on non-compliance; (ii) make a finding on non-compliance and refer the matter to the ASP and the UNSC; or (iii) make a finding on non-compliance and not refer the matter to the ASP and the UNSC. Therefore, the exercise of discretion by the Pre-Trial

[313] A. Barak, *Judicial Discretion* (Yale University Press, 1989), p. 7; I. Lifante Vidal, *Dos conceptos de discrecionalidad jurídica* (Biblioteca Virtual Miguel de Cervantes, 2005), p. 417.
[314] A. Barak, *Judicial Discretion* (Yale University Press, 1989), p. 8.
[315] T. Bingham, *The Business of Judging: selected essays and speeches* (Oxford University Press, 2000), p.36.
[316] A. Barak, *Judicial Discretion* (Yale University Press, 1989) p. 7.
[317] A. Barak, *Judicial Discretion* (Yale University Press, 1989) p. 8.

Chamber in this case was clearly within the options envisaged in the applicable legal provisions and thus it exercised discretion within the boundaries of the law.

(c) Abuse of discretion

222. The concept of abuse of discretion imports the exercise of unsound, unreasonable and/or illegal decision-making.[318] It relates to decisions that are 'grossly unsound, unreasonable, illegal, or unsupported by the evidence'.[319] By definition, an abuse of discretion always implies arbitrariness[320] and the unrestrained or capricious exercise of discretion.[321]

223. Different from situations in which a court of law commits an error, in situations where there is an abuse of discretion, the free will of the judges is not vitiated. Indeed, an abuse of discretion implies the free and deliberate will of the judges exercising such discretion. Because an error affects the free will of the judge, the presence of an error is incompatible with an abusive exercise of discretion given that the latter presupposes the existence of free will on the part of the person acting. Similarly, an abusive exercise of discretion cannot be based on an error because the latter prevents the free will in exercising discretion. These concepts are therefore mutually exclusive.

224. It has been contended that in circumstances in which an appeal is brought against the exercise of discretion as in the case at hand, 'then the appellate court should interfere only when it considers that the judge in the lower court has not merely preferred an imperfect solution which the court of Appeal might or would have adopted, but has exceeded the generous ambit within which a reasonable disagreement is possible'.[322]

[318] Black's Law Dictionary (10th ed. 2014), 'abuse of discretion'.
[319] Black's Law Dictionary (10th ed. 2014), 'abuse of discretion'.
[320] Oxford English Dictionary (OED Online), 'arbitrary': ('[r]elating to, or dependent on, the discretion of an arbiter, arbitrator, or other legally recognised authority; […] unrestrained in the exercise of will; of uncontrolled power or authority, absolute; hence, despotic, tyrannical').
[321] Black's Law Dictionary (10th ed. 2014), 'arbitrary' ([o]f a judicial decision) founded on prejudice or preference rather than on reason or fact. This type of decision is often termed arbitrary and capricious').
[322] P. Loughlin & S. Gerlis, *Civil Procedure* (Routledge-Cavendish, 2004) p. 595.

225. The foregoing demonstrates that the concept of an abuse of discretion is linked to the ideas of unfairness, unreasonableness and arbitrariness by a judge and is not linked to an error – indeed these concepts are mutually exclusive.

226. In this regard, the Inter-American Court of Human Rights has held that decisions adopted by domestic bodies that could affect human rights should be duly justified, otherwise they would be arbitrary.[323] Indeed, the argumentation of a decision must allow knowing what were the facts, motives and rules on which the authority based its decision, in order to rule out any indication of arbitrariness; it must also show that the submissions of the parties as well as the evidence have been properly assessed and taken into account.[324] For this important Court, arbitrariness is reflected in decisions that are void of any proper reasoning which is so serious that can impact negatively upon internationally recognised human rights. Here again it becomes clear that an error cannot be the basis of an abuse of discretion – these are indeed different juridical categories.

227. The ICJ has further explained that 'arbitrariness is not so much something opposed to *a* rule of law, as something opposed to *the* rule of law' and in this regard it explained that this idea was expressed by the Court in the *Asylum* case, when it spoke of "arbitrary action" being "substituted for the rule of law" (Asylum, Judgment, I.C.J. Reports 1950, p. 284)' and it held that arbitrariness 'is a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety.'[325] In this case, the ICJ links arbitrariness to a breach of the rule of law and with a plain disregard for the due process of law. This important judicial institution

[323] IACHR, *Case of Claude Reyes et al. v. Chile*, 19 September 2006. Series C No. 151, para. 120. *Cf. Case of Palamara Iribarne case*, para. 216; and *Case of YATAMA case*, para. 152. Also, *cf. García Ruiz v. Spain [GC]*, no. 30544/96, § 26, ECHR 1999-I; and ECHR, *Case of H. v. Belgium*, Judgment of 30 November 1987, Series A no. 127-B, para. 53.

[324] IACHR *Case of San Miguel Sosa et al. V. Peru*, 8 February 2018, Series C No. 348, para. 189; IACHR, *Case of Dismissed Employees of Petroperú et al. v. Peru*, 23 November 2017, Series C No. 344, para. 171 ('*la Corte ha afirmado que el requisito de que la decisión sea razonada no es equivalente a que haya un análisis sobre el fondo del asunto, estudio que no es imprescindible para determinar la efectividad del recurso. Sin embargo, tal como se menciono anteriormente, la argumentación de un fallo debe permitir conocer cuales fueron los hechos, motivos y normas en que se baso la autoridad para tomar su decisión, de manera clara y expresa, a fin de descartar cualquier indicio de arbitrariedad*').

[325] ICJ, *Elettronica Sicula SpA (ELSI) (United States of America v. Italy)*, 'Judgment of 20 July 1989', 20 July 1989. para. 128 (emphasis added).

therefore clarifies that an error cannot be the basis of an arbitrary or abusive exercise of discretion.

228. As it becomes clear from the foregoing, an error of fact, error of law or an incorrect evaluation based thereon cannot be linked to the power to exercise discretion; least can it be its basis because these distinct juridical categories exclude each other.

229. It has been explained that '[i]n a legal sense, discretion is abused whenever, in its exercise, a court exceeds the bounds of reason, all the circumstances before it being considered'.[326] In such circumstances, if a court is to prevent an abuse of power without taking over the use of the power, in reviewing the exercise of discretion, 'it has to do so in a way that gives the initial decision maker a leeway that corresponds to the reasons why the power was allocated to that person or institution'.[327] This means that in preventing an abusive exercise of discretion, the reviewer of such exercise cannot replace such discretion with that of its own – rather in the course of reviewing it must give the initial decision maker the appropriate margin of deference considering that such power was allocated specifically to such person or institution in the first place.

230. In general, when determining whether there was an abuse of discretion, it must be assessed if the power was exercised in a reasonable, fair and non-arbitrary manner. In terms of determining whether a decision was so unreasonable so as to force the conclusion that there was an abuse of discretion, it has been argued that 'a court will not interfere unless it finds a kind of unreasonableness that it can act on, while showing respect for the fact that the power to make the decision was allocated to the initial decision maker.'[328] This can be done if a decision 'is so unreasonable that no reasonable authority could ever have come to it, or more simply, if it is a decision that no reasonable body could have come to'.[329]

[326] *Sharon v. Sharon*, 75 Cal. 1 (Cal. 1888).
[327] T. Endicott, *Administrative Law*, (Oxford University Press, 2018), p. 237.
[328] T. Endicott, *Administrative Law*, (Oxford University Press, 2018), pp. 244,245.
[329] T. Endicott, *Administrative Law*, (Oxford University Press, 2018), p. 245.

(d) Abuse of discretion in the jurisprudence of the Appeals Chamber

231. As explained above, the legal framework of the Court does not specifically provide for appellate review in cases of abuse of discretion.[330] Nonetheless, the jurisprudence of this Court has developed this possibility in the interests of justice.[331] The jurisprudence developed by the Appeals Chamber is in line with the concepts set out above. With respect to the idea of an abuse of discretion, the Appeals Chamber has previously held that it

> […] may interfere with a discretionary decision [that] amounts to an abuse of discretion. Even if an error of law or of fact has not been identified, an abuse of discretion will occur when the decision is so unfair or unreasonable as to 'force the conclusion that the Chamber failed to exercise its discretion judiciously'. The Appeals Chamber will also consider whether the first instance Chamber gave weight to extraneous or irrelevant considerations or failed to give weight or sufficient weight to relevant considerations in exercising its discretion.'[332]

232. The above jurisprudential determination sets out a standard that is less strict to that explained in this Dissenting Opinion because it imports that in order to determine whether there was an abuse of discretion, the decision was so unfair or unreasonable so as to force that conclusion. Nevertheless, in this opinion, an additional criterion is considered in this regard, namely whether the decision was arbitrary.

233. In the same line of reasoning, the Appeals Chamber confirmed that 'it will not interfere with the Chamber's exercise of discretion merely because the Appeals Chamber, if it had the power, might have made a different ruling'.[333] This is because '***to do so would be to usurp powers not conferred on it and to render nugatory powers specifically vested in the Pre-Trial Chamber'***. [334] The Appeals Chamber has reversed decisions of first-instance chambers as a result of an abusive exercise of discretion in very rare and extreme occasions such as in a case where a first-instance chamber had ordered the production and submission by the parties of in-depth analysis charts without first seeking relevant submissions from the parties despite

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[330] *See supra* paras 18-22.
[331] *See supra* paras 18-22.
[332] *Kenyatta* OA5 Judgment, para. 25. *See also Kony et al.* OA3 Judgment, para. 81, citing *Milošević* Decision, para. 10. *See in addition Karadžić* Decision, para. 7; *Šešelj* Decision, para. 34; *Lubanga* Sentencing Appeal Judgment, para. 43.
[333] *Kenyatta* OA5 Judgment, para. 22.
[334] *Kony et al.* OA3 Judgment, para. 79 (emphasis added); *Ruto and Sang* OA5 Judgment, para. 60.

their clear interest in the matter.[335] The decision was appealed by the Prosecutor and the defence, and both parties agreed that the Pre-Trial Chamber's decision ordering the preparation of in-depth analysis charts should be reversed.[336] The Appeals Chamber concluded that 'the exercise of her discretion in this regard ***was unfair and unreasonable*** and had a material effect on the Impugned Decision'. [337]

234. Specifically in relation to the exercise of discretion under article 87(7) of the Statute, the Appeals Chamber held that 'determining whether to refer a State's failure to comply with a request for cooperation to the ASP or UNSC ***is at the core of the relevant Chamber's exercise of discretion***'.[338] The Appeals Chamber concluded that for the purpose of making a determination under article 87(7) of the Statute, chambers are ***'endowed with a considerable degree of discretion***'.[339]

(e) Application of the foregoing considerations to the present case

235. In the case at hand, it has been established that the Pre-Trial Chamber did not err in law or in fact. This means that the Pre-Trial Chamber's decision was not based on an evidently incorrect or incomplete perception of facts and there was not an erroneous evaluation of the facts by the Pre-Trial Chamber. In terms of the law, the Pre-Trial Chamber properly interpreted article 87(7) of the Statute as providing it with discretion to make a finding of non-compliance and to refer the matter to the ASP and the UNSC. Indeed, as held by the Appeals Chamber, for the purpose of making a

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[335] Appeals Chamber, *Prosecutor v. Dominic Ongwen*, Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber II entitled 'Decision Setting the Regime for Evidence Disclosure and Other Related Matters', 17 June 2015, ICC-02/04-01/15 OA 3, ('*Ongwen* OA3 Judgement'), para. 36.
[336] *Ongwen* OA3 Judgment.
[337] *Ongwen* OA3 Judgment, para. 46. *See also* Appeals Chamber, *Prosecutor v. Jean-Pierre Bemba Gombo*, Judgment on the appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber III entitled 'Decision on the admission into evidence of materials contained in the prosecution's list of evidence', 3 May 2011, ICC-01/05-01/08 OA 5 OA 6, para. 79 ('[i]n the Appeal Chamber's view, this mode of receiving evidence [indiscriminate admission of all witness statements] was an improper exercise of the Trial Chamber's discretion. It resulted in the Chamber paying little or no regard to the principle of orality, to the rights of the accused, or to trial fairness generally. It had the potential effect of depriving Mr Bemba of his right "to examine, or have examined the witnesses against him"').
[338] *Kenyatta* OA5 Judgment, para. 64 (emphasis added).
[339] *Kenyatta* OA5 Judgment, para. 64 (emphasis added).

determination under article 87(7) of the Statute, chambers are '***endowed with a considerable degree of discretion***'.[340]

236. In line with the considerations set out in the preceding sections, it is important to highlight that in assessing whether the Pre-Trial Chamber made an improper exercise of its discretion under article 87(7) of the Statute, the Appeals Chamber is not being called upon to replace the discretion exercised by the Pre-Trial Chamber with that of its own merely because it is of the view that the Pre-Trial Chamber should have afforded different weight to certain circumstances – this would be tantamount to the Appeals Chamber exercising its own discretion thereby 'usurp[ing] powers not conferred on it and […] rendering nugatory powers specifically vested in the Pre-Trial Chamber'.[341] Rather, the Appeals Chamber must review the exercise of discretion by the Pre-Trial Chamber and only reverse the decision if it is able to identify either a clear error underpinning the Pre-Trial Chamber's determination or when 'the decision is so unfair or unreasonable' that it must be concluded that the Pre-Trial Chamber 'failed to exercise its discretion judiciously'.[342] If and when any of the above circumstances is present, the Appeals Chamber can only reverse the impugned decision when the error or abuse of discretion materially affected the impugned decision.[343]

237. As to the objective facts and circumstances of this case, it has been established in this opinion that (i) the conclusion of the Pre-Trial Chamber that Jordan's failure to cooperate prevented the Court from exercising its functions and powers was correct and therefore reasonable; (ii) the conclusions of the Pre-Trial Chamber with respect to the non-existence of consultation within the meaning of article 97 of the Statute were correct and therefore reasonable; and (iii) the differential treatment afforded to South Africa *vis-à-vis* Jordan in the application of article 87(7) of the Statute was reasonable and justified in light of the substantial differences surrounding each of these cases. There was no error in the evaluation of these facts – the Pre-Trial Chamber properly assessed and reasoned them.

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[340] *Kenyatta* OA5 Judgment, para. 64 (emphasis added).
[341] *Kony et al.* OA3 Judgment, para. 79 (emphasis added); *Ruto and Sang* OA5 Judgment, para. 60.
[342] *Kenyatta* OA5 Judgment, para. 25.
[343] *Kenyatta* OA5 Judgment, para. 22.

238. Having determined that no errors of fact or law were established, what is left is the evaluation of the established facts as subsumed in the applicable law by the Pre-Trial Chamber. In order to reverse such evaluation, the Majority was required to demonstrate that the decision rendered by the Pre-Trial Chamber was so unfair, unreasonable or arbitrary as to amount to an abuse of discretion. For the reasons that follow, the dissenting judges are of the view that the Majority has not successfully met this requirement and it seems that the Majority has in fact replaced the evaluation of the Pre-Trial Chamber with that of its own.

239. In this regard, nothing in the Impugned Decision suggests that the decision was unfair, unreasonable or arbitrary. On the contrary, as extensively elaborated in the preceding sections the Pre-Trial Chamber exercised its discretion under article 87(7) of the Statute on the basis of objective factual and legal circumstances. The Impugned Decision is grounded on the law, logic, based on objective factual and legal elements and properly reasoned. Those objective factual and legal reasons are:

a. Mr Al-Bashir enjoyed no Head of State immunity of arrest at the time of his visit to Jordan;

b. Jordan was aware of its obligations under the Rome Statute;

c. Jordan did not engage in consultations with the Court within the meaning of article 97 of the Statute;

d. Jordan failed to comply with its obligation under the Statute to arrest and surrender Mr Al-Bashir (articles 86 and 89 of the Rome Statute);

e. Jordan's failure prevented the Court from exercising its functions and powers within the meaning of article 87(7) of the Statute;

f. A differential treatment between South Africa and Jordan is warranted in light of the differences surrounding the cases of these States; and

g. The conditions set out in article 87(7) of the Statute are met and therefore the logical consequence would be the referral of

Jordan's failure to cooperate with the Court to the ASP and the UNSC.

240. In light of the foregoing, the determination of the Pre-Trial Chamber to refer the failure of Jordan to cooperate with the Court to the ASP and the UNSC is neither unfair, unreasonable, arbitrary, nor capricious or unexpected. On the contrary, it is based on objective factual and legal elements and properly weighed and reasoned.

241. In terms of the weight given to the relevant considerations, it is clear that the Pre-Trial Chamber afforded appropriate and reasonable weight thereto. Indeed, the fact that no consultations took place coupled with the position adopted by Jordan in terms of its consistent refusal to accept its cooperation obligations render the conclusion reached by the Pre-Trial Chamber logical and reasonable. As explained in detail when analysing the alleged consultations, Jordan approached the Court with extreme delay, only after being reminded of its obligations under the Rome Statute, defeated the purpose of consultations and displayed a clear intention not to cooperate with the Court.

242. Moreover, the Pre-Trial Chamber did not give weight to extraneous or irrelevant considerations. As explained in the preceding sections, all the circumstances considered and weighed by the Pre-Trial Chamber are directly relevant to the case and to its exercise of discretion under article 87(7) of the Statute.

243. The Majority finds that 'the Pre-Trial Chamber erred when it found that Jordan had not sought consultations with the Court' and maintains that '[t]his error led to an erroneous exercise of the Pre-Trial Chamber's discretion in its appreciation of Jordan's position, notably by treating Jordan differently than South Africa in respect of the referral to the Assembly of States Parties and the UN Security Council'.[344] However, the Majority seems to disregard the fact that, for the reasons set out above, an error excludes the possibility of finding an abuse of discretion and *vice versa* because an abusive exercise of discretion always presupposes the existence of free will and the deliberate exercise of power in an unreasonable, arbitrary or unfair way on the part of the decision maker.

[344] Majority Opinion, para. 213.

244. The foregoing analysis of the Majority seems to indicate that in order to find an abusive exercise of discretion on the part of the Pre-Trial Chamber, the Majority invokes an alleged error of fact in the analysis of the Pre-Trial Chamber which for reasons explained in detail in this opinion, did not occur. In the previous sections, it has been highlighted that an error is distinct from an incorrect exercise of discretion and that the latter implies the free will that is vitiated in the presence of an error making them irreconcilable. Indeed, a correction of an error is different from a re-evaluation of the established facts as subsumed in the law. However, it appears that the Majority seems to have equated these distinct concepts and juridical categories with the regrettable consequence of reversing the Impugned Decision which, in turn, could lead to debilitating the Court as a result of the lack of cooperation thereby preventing victims from accessing justice in a timely fashion.

5. Conclusion on whether the Pre-Trial Chamber abused its discretion in referring the matter to the ASP and the UNSC

245. From the extensive analysis contained in this dissenting opinion and in line with the jurisprudence of this Appeals Chamber, it is clear that the Pre-Trial Chamber did not commit any errors, either legal or factual, and that the Impugned Decision is neither unfair, unreasonable nor arbitrary. The Impugned Decision was not materially affected by either an error of fact or law or an abusive exercise of discretion. To the contrary, given the concrete circumstances of this case and considering that all the requisites of article 87(7) of the Statute are met, the Pre-Trial Chamber based its determination on objective reasons of law and fact and in light of the impact that the failure of Jordan had on the effective discharge of the mandate of both this Court and the UNSC, a referral of Jordan's failure to cooperate with the Court is but the only legal, fair, reasonable and logical conclusion. The Pre-Trial Chamber exercised its discretion properly, judiciously and without being arbitrary or capricious and choosing between one of the options specifically provided by the law. In light of the foregoing, the dissenting judges disagree with the determination of the Majority and consequently disagree with the outcome of the appeal.

VII. RECAPITULATION AND FINAL CONCLUSIONS

246. As a result of the issuance of this dissenting opinion, the dissenting judges feel in peace with their conscience. The analysis and conclusions reached in this opinion should make crystal clear the fundamental reasons upon which the dissenting judges must dissent from the decision rendered today by the majority of the Appeals Chamber. The dissenting judges consider it appropriate at this concluding stage to recapitulate all the points made in this opinion.

a. Given that the objectives of the warrants of arrest issued against Mr Al-Bashir were frustrated as a result of the failure of Jordan to cooperate with the Court, such failure prevented the Court from exercising its functions and powers.

b. The Pre-Trial Chamber did not err in concluding that consultations did not take place in this case: the *notes verbales* sent by Jordan provided an advance notification that Jordan would respect Mr Al-Bashir's alleged immunity from arrest and did not request any further concrete response or action from the Court.

c. The Pre-Trial Chamber did not err in affording a differential treatment to Jordan *vis-à-vis* South Africa: the circumstances surrounding these cases were different, particularly considering that while South Africa ensured future cooperation with the Court in the arrest and surrender of Mr Al-Bashir thereby making it unnecessary to refer the matter in order to foster cooperation, Jordan has not done so warranting therefore the impugned referral.

d. Not referring Jordan's non-compliance to the ASP and the UNSC would be contrary to the object and purpose of the Rome Statute of putting an end to impunity for the perpetrators of the most serious crimes of concern to the international community as a whole thereby bringing justice to victims – in this case to the numerous victims of international crimes allegedly committed in Darfur, Sudan: the non-referral of Jordan's failure to cooperate with the Court in the arrest and surrender of Mr Al-Bashir could be perceived as inaction by the Court.

e. By refusing to cooperate with the Court, Jordan infringed both its obligations of cooperation under the Rome Statute and potentially the international obligations owed to the UNSC pursuant to the UN Charter: a referral of Jordan's non-compliance to the ASP and the UNSC is required so as to allow the taking of those measures deemed appropriate to ensure future compliance and thereby the fulfilment of the mandates of both the Court and the UNSC.

f. Past examples of referrals to the ASP of the failure of other States Parties to comply with the Court's request to cooperate in the arrest and surrender of Mr Al-Bashir demonstrate that a referral of Jordan's non-cooperation to that organ has the very real prospect of yielding positive results in terms of future cooperation thereby giving effect to the *raison d'être* of article 87(7) of the Statute.

g. In the case at hand the Pre-Trial Chamber was correct, reasonable and fair, and did not abuse its discretion when, based on the particular circumstances of the case and properly weighing all relevant circumstances and facts, and within the boundaries of the law, it correctly applied article 87(7) of the Statute to refer to the ASP and the UNSC Jordan's failure to comply with the Court in the execution of Mr Al-Bashir's arrest warrant.

247. In light of the foregoing conclusions, the vote of the dissenting judges is to confirm the Impugned Decision in its entirety and uphold the determination that Jordan's failure to comply with the Court's request to cooperate in the execution of the arrest and surrender of Mr Al-Bashir ought to be referred to the ASP and the UNSC.

248. This dissenting opinion will achieve its aim if it finds positive responses by Jordan and the international community as a whole in relation to fostering cooperation with the goal of fulfilling the mandate of the Court to put an end to impunity for international crimes and thereby bring justice to the victims of such atrocities.

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

Judge Luz del Carmen Ibañez Carranza

Judge Solomy Balungi Bossa

Dated this 6th day of May 2019

At The Hague, The Netherlands