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No.: **ICC-02/05-01/09**
Date: **16 July 2018**

THE APPEALS CHAMBER

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

SITUATION IN DARFUR, SUDAN

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

Public

Prosecution Response to the Observations of Eleven *Amici Curiae*

Source: **Office of the Prosecutor**

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Introduction

1. Pre-Trial Chamber II ruled that the Kingdom of Jordan was required to arrest Omar Al-Bashir, the President of the Republic of Sudan, when he was on its territory, and that Jordan's non-compliance with this obligation, when assessed separately, merited referral to the ICC Assembly of States Parties (ASP) and the UN Security Council.[1] Jordan was subject to this obligation by operation of the Rome Statute, to which it had consented as an ICC State Party. Sudan was likewise bound to the necessary extent by the effect of UN Security Council Resolution 1593, adopted under chapter VII of the UN Charter, by which Sudan had consented to be bound as a UN Member State. Jordan appealed the Pre-Trial Chamber's decision, challenging the interpretation of the Statute, the legal effect of Resolution 1593, and the Pre-Trial Chamber's exercise of discretion in issuing the referral.[2]

2. With leave of the Appeals Chamber,[3] 11 *amici curiae* (together, "*Amici*") have filed observations in the appeal.[4] The Prosecution hereby responds, particularly in light of the Appeals Chamber's direction that "the Appeals Chamber may invite all or some of the *amici curiae* to make oral submissions at the hearing as it deems appropriate."[5] The Prosecution further recalls that it is at the oral hearing that the Parties themselves will receive further "opportunity to address specific issues arising from their submissions", as well as any questions from the Appeals Chamber.[6]

Submissions

3. The majority of the *Amici* support Pre-Trial Chamber II's legal reasoning in finding that Jordan was obliged to arrest and surrender Omar Al-Bashir, and that its breach of this obligation, assessed separately, merited referral to the ASP and the UN Security Council. The Prosecution will thus primarily address any potential areas of disagreement which arise, within the context of the three grounds of appeal identified by Jordan and addressed in the Prosecution's Response. This does not mean, however, that only those *Amici* advancing more contentious interpretations of the law (in the Prosecution's view) should be invited to

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[1] *See* ICC-02/05-01/09-309 ("Decision").
[2] *See* ICC-02/05-01/09-326 OA2("Appeal"). *See also* ICC-02/05-01/09-331 OA2("Response").
[3] *See* ICC-02/05-01/09-351 OA2 ("Order").
[4] *See* ICC-02/05-01/09-355 OA2 ("Tsagourias Brief"); ICC-02/05-01/09-356 OA2 ("Magliveras Brief"); ICC-02/05-01/09-357 OA2 ("Zimmermann Brief"); ICC-02/05-01/09-358 OA2 ("Lattanzi Brief"); ICC-02/05-01/09-359 OA2 ("Kreß Brief"); ICC-02/05-01/09-360 OA2 ("O'Keefe Brief"); ICC-02/05-01/09-361 OA2 ("Newton Brief"); ICC-02/05-01/09-362 OA2 ("Robinson et al. Brief"); ICC-02/05-01/09-363 OA2 ("Ciampi Brief"); ICC-02/05-01/09-364 OA2 ("Gamarra Brief"); ICC-02/05-01/09-365 OA2 ("Gaeta Brief").
[5] Order, para. 12.
[6] Order, para. 12.

participate in the forthcoming oral hearing. To the contrary, appropriate weight should be given to the preponderance of academic opinion which has been expressed. Moreover, some issues—such as those arising in the context of the Third Ground of Appeal—have now been sufficiently ventilated, and do not require the relevant *Amici* to make oral submissions.

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

4. Seven of the *Amici* concur with the Prosecution that Pre-Trial Chamber II did not err in analysing the obligations under the Rome Statute, especially articles 27 and 98.[7] Two of the *Amici* simply do not opine on this issue.[8] Two *Amici*—Roger O'Keefe and Paola Gaeta—disagree with the Prosecution, both asserting, in essence, that article 98 of the Statute must be read in isolation from article 27.[9] In responding to these observations, the Prosecution will briefly explain: first, why it is important that the Appeals Chamber rules on the merits of the issues raised in the First and Second Grounds of Appeal; and, second, the basis for its disagreement with the views expressed by those *Amici*.

A.1. The Appeals Chamber should rule on the merits of the First and Second Grounds of Appeal

5. While supporting the outcome of the Decision,[10] Andreas Zimmermann argues that the Appeals Chamber "does not need to take a position" on whether Jordan was obliged, as an ICC State Party, to arrest Omar Al-Bashir pursuant to a warrant issued in the Darfur situation, which was referred to the Court by the UN Security Council under chapter VII of the UN Charter.[11] This is because, in his view, the *abus de droit* doctrine precludes Sudan's reliance on the doctrine of Head of State immunity, and thus article 98(1) of the Statute is inoperative in any event. This would dispose of the First and Second Grounds of Appeal.[12]

6. The Prosecution agrees that the *abus de droit* principle—in other words, that "a State may […] not invoke a right in order to sustain or re-establish an otherwise unlawful situation

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[7] *See* Tsagourias Brief; Magliveras Brief; Lattanzi Brief; Kreß Brief; Robinson et al. Brief; Ciampi Brief; Gamarra Brief.
[8] *See* Newton Brief (addressing only Ground Three of Jordan's appeal); Zimmermann Brief (arguing that the Appeals Chamber may resolve the appeal on the doctrine of *abus de droit*, and thus that it is unnecessary to rule more broadly). Concerning Zimmermann's position, *see further below* paras. 5-9.
[9] *See* O'Keefe Brief; Gaeta Brief.
[10] *See e.g.* Zimmermann Brief, paras. 43-44.
[11] *See e.g.* Zimmermann Brief, paras. 12, 16, 27, 44 ("the Court does not need to decide the question whether a rule of international law exists, permitting a State to arrest and then surrender a sitting head of State who is not a contracting party of the Rome Statute […], be it by virtue of a Security Council referral or otherwise").
[12] *See e.g.* Zimmermann Brief, paras. 13, 26-28, 43-44.

caused by itself"[13]—constitutes a general principle of international law in the sense of article 38(1)(c) of the Statute of the International Court of Justice,[14] which likewise underpins various rules of customary international law such as those expressed in articles 61(2) and 62(2)(b) of the Vienna Convention on the Law of Treaties.[15] This principle may, consequently, be applied by the Court under article 21(1)(b) of the Statute.

7. The Prosecution also agrees that the *abus de droit* doctrine is applicable to this situation. Sudan is in material breach of its obligation under UN Security Council Resolution 1593 to "cooperate fully" with the Court—*inter alia*, by arresting Omar Al-Bashir—and, consequently, Jordan has committed no internationally wrongful act *vis-à-vis* Sudan in executing such an arrest.[16] Upholding any such claim would amount to maintaining the situation of illegality that Sudan has itself created.

8. Nevertheless, although it does not object to the Appeals Chamber making *additional* findings on the *abus de droit* doctrine if it considers appropriate, the Prosecution does not consider that the Appeals Chamber should refrain from deciding the crux of the Appeal—which is whether the Decision was correct in the terms on which it was decided.[17] In particular, the mechanics of the relationship between articles 27 and 98 of the Statute, and between the Court and its States Parties and those non-States Parties which are otherwise subject to obligations under the Statute, are matters of fundamental interest to the Court and the international community.

9. Similar considerations should lead the Appeals Chamber, in considering the Second Ground of Appeal, expressly to address the legal effect of UN Security Council Resolution 1593, and not merely the position in customary international law.[18]

A.2. The O'Keefe and Gaeta Briefs misinterpret articles 27 and 98, and their relationship with customary international law on Head of State immunity

10. As already noted, two of the *Amici*, O'Keefe and Gaeta, argue that Pre-Trial Chamber II erred in law by finding that Jordan was required to comply with the warrant for Omar Al-Bashir's arrest. In their view, Jordan was instead subject to a *contrary* international

[13] Zimmermann Brief, para. 28.
[14] Zimmermann Brief, paras. 28, 31-36 (also citing *inter alia* judgments of the PCIJ in *Chórzow Factory* and *Courts of Danzig*, and the ICJ in *Gabčikovo-Nagymaros Project*).
[15] Zimmermann Brief, para. 29.
[16] Zimmermann Brief, paras. 37-41.
[17] *See below* para. 24.
[18] *See below* paras. 19-22 (concerning the Kreß Brief).

obligation—owed to Sudan, to afford immunity to Omar Al-Bashir—and hence they consider that article 98(1) of the Statute precluded proceeding with a request for Mr Al-Bashir's arrest and surrender. The primary basis for their conclusion is the assumption that Sudan may assert a relevant immunity under customary international law, and that Resolution 1593 has no impact on any such immunity, directly or indirectly. Consequently, these matters are primarily addressed in the context of the Second Ground of Appeal.[19] Yet O'Keefe and Gaeta also address the interpretation of articles 27 and 98 of the Statute,[20] and their relationship with customary international law, which pertains to the First Ground of Appeal. In particular:

- O'Keefe dismisses the relevance of article 27(2) to the Decision, based on his view that the provision only applied "to proceedings against a person before the Court itself, after that person has been arrested and surrendered".[21] This view is not supported by any reasoning, and sparse authority.[22]

- Gaeta conceptualises article 27(2) as the reflection of a narrow "customary rule", which provides only for "the irrelevance of immunities from the *adjudicatory jurisdiction* of the ICC and does not apply in the field of requests of judicial cooperation to States parties."[23] She contrasts this with article 98(1), which she considers to preclude in express terms any broader application of article 27(2) and which in her view would be made redundant if article 27(2) applied more broadly.[24]

11. The Prosecution respectfully disagrees. First, article 27(2) is a treaty provision, with an autonomous purpose and function. Attempting to construe its meaning by reference to the 'narrow' basis of any analogue in customary international law, *arguendo*, disregards this fact. Moreover, when undertaking the necessary interpretive exercise, the Statute should be

[19] *See below* paras. 16-18.
[20] *See e.g.* O'Keefe Brief, para. 7("[t]here is no relationship whatsoever between, on the one hand, articles 89(1) and 98(1), […] and, on the other, article 27(2)"); Gaeta Brief, pp. 9-10 ("I do not agree […] that […] Article 27(2) would equally extend in the matter of judicial cooperation").
[21] O'Keefe Brief, para. 7.
[22] *See* O'Keefe Brief, para. 7 (fn. 7, citing *Re Sharon and Yaron* (2003) 127 ILR 110, at 124; *Minister of Justice and Constitutional Development v. Southern Africa Litigation Centre* [2016] ZASCA 17, paras. 69, 77). *Sharon*, concerning the inadmissibility of a case brought in Belgium under the principle of universal jurisdiction, asserts merely that article 27(2) does not apply to *prosecutions* before national courts, and does not address the nature or extent of article 27's effects on States Parties pursuant to a prosecution before *this* Court. *Southern Africa Litigation Centre* likewise contains no reasoning in support of the proposition, but merely states that "a number of commentators have pointed out" that a State is not *necessarily* "entitled to ignore head of state immunity when requested to cooperate with the ICC", and adds that "[i]t is in this context that *the question* […] arises": para. 69, emphasis added.
[23] Gaeta Brief, p. 10 (emphasis supplied). *See also* p. 3.
[24] Gaeta Brief, p. 10.

considered as a whole, and not in a fragmented manner. Accordingly, it is incorrect to stress the *effet utile* ("purposive interpretation") of article 98(1), but not to consider this question also from the perspective of article 27(2), properly understood.[25] As explained in the Response, the plain terms, context, and object and purpose of article 27 support not only its vertical but also horizontal effect.[26] In particular, if article 27 is read narrowly only to encompass proceedings before the Court, then it is unclear whether any Head of State—even of an ICC State Party—could be effectively arrested and surrendered in the first place, absent an express waiver by the State concerned.[27]

12. Second, Gaeta's analysis appears to be underpinned by the assumption that customary international law precludes judicial cooperation in arresting and surrendering persons wanted by an international court, because such a prohibition is necessarily encompassed within the immunity *ratione personae* granted to Heads of State. However, this assumption misconceives the scope of the relevant customary rule. If the rule is narrow, then conduct falling outside that rule is presumptively permissible, unless *another* applicable rule of customary international law can be discerned.[28] This requires showing not only "extensive and virtually uniform" State practice but "general recognition that a rule of law or legal obligation is involved" (*opinio juris*).[29]

13. In the Prosecution's view, and consistent with the typical approach of customary international law, the rule of Head of State immunity should indeed be conceived as narrowly framed, to extend no further than strictly required by its underlying purpose, which is to preserve the sovereign equality of States.[30] As the ICJ has stressed, "immunities enjoyed under international law […] represent a bar to criminal prosecution" only "*in certain circumstances*".[31] Notably, circumstances in which the rule does *not* apply—which were not

[25] *See also* Magliveras Brief, para. 9.
[26] Response, paras. 15-41.
[27] *See* Response, para. 40.
[28] *See generally* ILC, *Immunity of State Officials from Foreign Criminal Jurisdiction: Second Report by Mr. Roman Anatolevich Kolodkin, Special Rapporteur*, UN Doc. A/CN.4/631, 10 June 2010, para. 54 (distinguishing between 'exceptions' to the rule of immunity, and situations in which the rule simply does not apply).
[29] ICJ, *North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)*, Judgment of 20 February 1969, ICJ Reports 1969, p. 3, para. 74. *See also Case concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America)*, Judgment of 27 June 1986, ICJ Reps 1986, p. 14, para. 186.
[30] *See e.g.* A. Clapham, *Brierly's Law of Nations*, 7th Ed. (Oxford: OUP, 2012), pp. 271-277; ICJ, *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment of 3 February 2012, ICJ Reps 2012, p. 99, para.57.
[31] ICJ, *Case concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment of 14 February 2002, ICJ Reports 2002, p. 3 ("*Arrest Warrant* Judgment"), para. 61 (emphasis added).

exhaustively defined by the ICJ—include when a person is "subject to criminal proceedings before certain international criminal courts, where they have jurisdiction."[32]

14. In this context, Gaeta's assumption that the customary rule on immunity encompasses State action which does *not* amount to exercising adjudicatory jurisdiction over a foreign Head of State—but merely gives effect to the enforcement jurisdiction of a competent international court—is doubtful. If anything, such a norm would be a separate rule of customary international law, for which Gaeta presents no relevant practice or *opinio juris*. Indeed, the drafters of the Statute consciously sought to *avoid* endorsing such a view in framing article 98(1),[33] which "provides no basis for a presumption that a certain international law immunity exists."[34] Nor would any putative customary rule restricting States from enforcing requests for arrest and surrender by a competent international court serve the distinct purpose underlying Head of State immunity *stricto sensu*[35]—especially when Gaeta herself seems to accept that there is a principled distinction between the assertion of jurisdiction by an international court and domestic authorities.[36]

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

15. Seven of the *Amici* concur with the Prosecution that Pre-Trial Chamber II did not err in analysing the legal effect of UN Security Council Resolution 1593.[37] Two of the *Amici* simply do not opine on this issue.[38] Two *Amici*—O'Keefe and Gaeta—disagree with the Prosecution, both asserting, in essence, that Resolution 1593 has no legal effect relevant to

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[32] *Arrest Warrant* Judgment, para. 61. On this question, *see further below* paras. 20-21.
[33] C. Kreß, 'The International Criminal Court and Immunities under International Law for States Not Party to the Court's Statute,' in M. Bergsmo and Ling Y. (eds.), *State Sovereignty and International Criminal Law* (Brussels: Torkel Opsahl Academic EPublisher, 2012) ("Kreß (2012)"), p. 232 ("While it is true that the drafters of Article 98(1) of the Statute were certain that a provision of the Statute could not take away a right under international law of a State not party to it, the inclusion of Article 98(1) of the Statute does not express the drafter's recognition of a customary international law immunity for the Head of such States that would prevent the Court from exercising its jurisdiction *or at least prevent it from requesting such a person's surrender to a State Party*. Instead, Article 98(1) of the Statute has been carefully worded so as to avoid any view on this question of general international law").
[34] Kreß (2012), p. 233. *See further* pp. 232-233, 236; Response, para. 50 (recalling that a primary consideration underlying article 98(1) related to State or diplomatic premises or property, not persons).
[35] *See above* fn. 30.
[36] *See* Gaeta Brief, pp. 4, 9 (being "fully convinced that the ICC can exercise its jurisdiction over […] Omar Al-Bashir, and that his immunities under international law do not constitute a bar to the jurisdiction of the ICC and the issuance of an arrest warrant against him", even though rejecting the view that the obligations of the Statute bind Sudan pursuant to UN Security Council Resolution 1593). *See further below* paras. 16-18.
[37] *See* Tsagourias Brief; Magliveras Brief; Lattanzi Brief; Kreß Brief; Robinson et al. Brief; Ciampi Brief; Gamarra Brief.
[38] *See* Newton Brief; Zimmermann Brief. *See further above* fn. 8.

this appeal.[39] In responding to these observations, the Prosecution will briefly outline: first, that O'Keefe and Gaeta misinterpret the legal effect of UN Security Council Resolution 1593; second, that recognising this legal effect does not prejudice customary international law concerning Head of State immunity more generally; and, third, that customary international law does not contain a further, freestanding immunity enabling Heads of State to attend international conferences.

B.1. The O'Keefe and Gaeta Briefs misinterpret the legal effect of UN Security Council Resolution 1593

16. O'Keefe and Gaeta argue that UN Security Council Resolution 1593 had no legal effect either in making Sudan subject to obligations under the Statute, such as article 27, or in otherwise rendering provisions such as article 98(1) inapplicable. However, their arguments contrast. Specifically:

- O'Keefe allows for the possibility that the UN Security Council, acting under chapter VII, could impose obligations on a State under the Statute or otherwise remove any immunities, but that it would need to do so explicitly.[40] Construing the terms of Resolution 1593 itself, he concludes that it did not do so.[41] Nor does he accept that the necessary effect of any UN Security Council resolution referring a situation to the Court is to impose such obligations.[42]

- Gaeta considers that the Statute itself precludes a UN Security Council referral imposing obligations such as those in article 27(2) upon non-States Parties.[43] In her view, this would: prejudice the equality of persons before the Court;[44] subordinate the Court to the will of the UN Security Council;[45] and be incompatible with the treaty-based nature of the Court.[46] She likewise rejects the possibility that Resolution 1593 could itself

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[39] *See* O'Keefe Brief; Gaeta Brief.
[40] O'Keefe Brief, para. 13.
[41] O'Keefe Brief, paras. 12, 14.
[42] O'Keefe Brief, paras. 10-11, 14.
[43] Gaeta Brief, pp. 4, 6 (referring to "[a] careful reading of the relevant provisions of the Rome Statute", citing arts. 1, 6-8, 12).
[44] Gaeta Brief, p. 5 ("Should the ICC recognize that the referrals by the Security Council have legal effects other than those expressly envisaged in the Rome Statute, the risk would be to make the ICC appearing ready to serve the political goals of the Security Council […] with long-term prejudicial effects on its universal reach").
[45] Gaeta Brief, p. 5 ("this would imply that the Security Council could modify at its own discretion the legal framework set forth in the Rome Statute in any matter whatsoever").
[46] Gaeta Brief, pp. 5-6 ("the ICC can only be endowed with the powers and competences delegated to it by states parties on the basis of […] the Rome Statute").

"implicitly waive[]" Sudan's claim of immunity,[47] or that there is any power for the UN Security Council to "affect the rights and powers of another international organization".[48]

17. As the Prosecution explained in its Response, UN Security Council Resolution 1593 is properly interpreted as imposing the obligations of the Statute upon Sudan, including article 27(2), both as a consequence of its particular wording and by necessary implication.[49] Nor is it correct to assert that the Statute in some way precludes this. Not only are Gaeta's contrary arguments primarily based on policy considerations, but those considerations are far from inevitable—as the Prosecution has already noted, correctly recognising that the legal character of a UN Security Council referral, and its effects, does not amount to giving the UN Security Council *carte blanche* to modify the regime of the Statute. Quite to the contrary, UN Security referrals to the Court entail the equal and consistent application of the Statute as a whole. This is a condition of their validity, assessed by the Prosecutor in her independent examination under article 53 of the Statute.[50] Conversely, however, this does not mean that the UN Security Council is not competent, when acting under chapter VII, to impose obligations on States which require their cooperation with an international organisation acting within its mandate.

18. Indeed, it is fundamentally flawed to conceive "Sudan's position *vis-à-vis* the Rome Statute" as "not [being] actually altered by the Security Council referral"[51]—Gaeta's view that the "ICC's jurisdiction over Darfur is grounded in the Rome Statute" cannot be correct, because Sudan was never party to the Statute.[52] The conclusion that Resolution 1593 altered Sudan's legal position is inescapable—and, as explained in the Response, this is consistent with the basic structure of international law because Sudan consented to the UN Security Council exercising such a power.[53]

[47] Gaeta Brief, p. 7 (suggesting that this interpretation "clearly contradicts" article 98(1) of the Statute).
[48] Gaeta Brief, p. 7.
[49] Response, paras. 64-84.
[50] *See e.g.* ICC-02/05-01/09-T-2-ENG, p. 68, lns. 4-6.
[51] *Contra* Gaeta Brief, pp. 6-7 (continuing, "The ICC's jurisdiction over Darfur is grounded in the Rome Statute; it is not 'imposed' by the Security Council on non-states parties to the Rome Statute, such as Sudan. Therefore Sudan's relationship vis-à-vis the Rome Statute is a relationship governed by the principle enshrined in Art. 34 of the 1969 Vienna Convention on the [Law of Treaties], subject to the applicability of some of the provisions of the Rome Statute *qua* customary international law (as is the case with Art. 27(2))").
[52] Nor can this contradiction be resolved by resort to customary international law, since this may provide for relevant principles, but does not itself provide specifically for the Court's exercise of jurisdiction in the Darfur situation. Likewise, conceiving the UN Security Council referral as 'removing' a condition which otherwise prevents the Court's exercise of jurisdiction is no answer, because Sudan would still never have consented to that jurisdiction.
[53] *See e.g.* Response, paras. 10-14.

B.2. Recognising the legal effect of UN Security Council Resolution 1593 does not prejudice customary international law concerning Head of State immunity

19. Relying upon the legal effect of UN Security Council Resolution 1593 to make Sudan subject to the obligations of the Statute, including article 27, did not entail ruling whether there exists under customary international law any immunity which would preclude the arrest and surrender of Omar Al-Bashir. Indeed, Pre-Trial Chamber I, in previous decisions, has concluded there is no immunity applicable in such circumstances,[54] as have other Judges of this Court.[55] But, formally, it remains the case that this was not the basis on which the current matter was decided.

20. In his brief, Claus Kreß makes clear that he finds no error in the reasoning in the Decision.[56] But he submits that the Appeals Chamber should also "take the Customary Law avenue seriously even though the conclusion for the case against Al-Bashir is the same".[57] He argues for the proposition that "customary international law has crystallized an exception from the traditional immunity *ratione personae* before *international* criminal courts,"[58] even though "admittedly not (yet) firmly entrenched and fortified",[59] and invites the Appeals Chamber to "proceed through the Security Council avenue" *only* if it "were to decide *not* to follow the Customary Law avenue".[60] In his view, this is appropriate in light of the "implications" of this question which "transcend the case in question."[61]

21. The Prosecution does not dispute the customary law analysis undertaken by Kreß, and welcomes his thoughtful elaboration of this matter. If anything, the trend in State practice and *opinio juris*—contrary to the O'Keefe's and Gaeta's submissions—is towards the

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[54] *See e.g.* ICC-02/05-01/09-139, para. 36 ("the principle in international law is that immunity of either former or sitting Heads of State cannot be invoked to oppose a prosecution by an international court"); ICC-02/05-01/09-140, para. 13.
[55] *See e.g.* ICC-01/09-01/11-777, paras. 66 (referring to "the contemporary norm of international law according to which public officials are no longer entitled to immunity for violation of international criminal law"), 70 (referring to "the (now usual) removal of immunity from jurisdiction on grounds of official position").
[56] *See e.g.* Kreß Brief, paras. 6, 20.
[57] Kreß Brief, para. 6.
[58] Kreß Brief, para. 8 (emphasis supplied, citing SCSL, *Prosecutor v. Taylor*, SCSL-2003-01-I, Decision on Immunity from Jurisdiction, 31 May 2004, para. 52). *See further* paras. 10-19.
[59] Kreß Brief, para. 8. *See also* paras. 9 ("one must therefore go beyond the consideration of State pronouncements or judicial decisions that *directly* articulate the existence of the customary law rule in question" and "must also be prepared to accept engaging in reasoning, which includes deductive elements derived from broader principles—to the extent that such principles have been endorsed by States", emphasis supplied), 19 (suggesting that "[t]he question is not whether the Customary Law avenue has come into existence, but rather whether it has been closed as a result of subsequent practice by States to the contrary").
[60] Kreß Brief, para. 20 (emphasis supplied).
[61] Kreß Brief, para. 6. *See also* paras. 7, 22.

interpretation he proposes. Nevertheless, the Prosecution disagrees with Kreß's proposed route to deciding *this* appeal, as a matter of appellate procedure.[62]

22. The correctness of the Decision should initially, and primarily, be assessed in the terms of Pre-Trial Chamber II's own reasoning. In the context of the Second Ground of Appeal, this rests on analysing the legal effect of UN Security Council Resolution 1593. If that reasoning was erroneous, it will be necessary for the Appeals Chamber, applying the established appellate standard of review, to determine whether the Decision was in any event not materially affected due to an *alternative* legal analysis leading to the same outcome[63]—such as the general position in customary law. Alternatively, if the Appeals Chamber agrees with Pre-Trial Chamber II's reasoning, the Appeals Chamber would have discretion as to whether it is appropriate to explain a *further* basis supporting the correctness of the Decision. But the Appeals Chamber should not simply ignore the legal effect of Resolution 1593, in favour of a customary law analysis, if it does not consider the Pre-Trial Chamber's analysis to be incorrect.

B.3. Customary international law does not recognise any freestanding immunity specific to Heads of State attending international conferences, nor is it required

23. The Prosecution agrees that the legitimate concerns of States must not be taken lightly, and that the Statute was crafted to ensure that the mandate of the Court can be reconciled with other legitimate social goals, and *vice versa*.[64] Fundamental to this approach, indeed, is the view that the Court rules on the law as it concretely exists at the material time, in accordance with article 21 of the Statute. For this reason, arguments *de lege ferenda* are not cognisable, since they inevitably lead the Court to attempt to address matters of policy which should be left for resolution by States and, ultimately, their citizens.

24. In this context, the Prosecution cannot accept the undeveloped suggestion in the Robinson et al. Brief that there is a new and sweeping rule of customary international law which bestows immunity upon "heads of state or government attending conferences of

[62] It is also noted that Kreß's approach rests on some assumptions concerning the jurisdictional foundations of the Court: *compare e.g.* Kreß Brief, paras. 11, 13-14, 22-23, *with* Robinson et al. Brief, para. 17.
[63] *See e.g.* Statute, art. 83(2).
[64] *See* Robinson et al. Brief, para. 18. *See also* Kreß Brief, para. 21 (but noting that, in his view, the interpretation proposed by Robinson et al. is an unnecessary "overreach").

intergovernmental organizations."[65] The necessity of such a rule tends to presuppose that such persons no longer enjoy an immunity under customary law opposable to the Court[66]—otherwise, it would be superfluous. But even more significantly, absolutely no State practice or *opinio juris* has been presented which would justify discerning such a rule.[67] Moreover, the concept which has been framed is so broad as to be unworkable—"international conferences" are by no means created equal, and it would be impossible to determine as a matter of customary law which conferences are deserving of such protection, and which are not.[68] Any such rule could be prone to widespread abuse.

25. Nor in any event is any novel approach required. To the contrary, article 16 of the Statute already provides for the UN Security Council to defer any proceedings with an investigation or prosecution at the Court, when acting under chapter VII of the UN Charter. As such, provided that an international conference is necessary to maintain or restore international peace and security, the UN Security Council can act to ensure that the Court does not harm the broader interests of the international community. This entirely answers the problem identified in the Robinson et al. Brief, and is not only the preferable solution because it is unequivocally *lex lata* but also because it addresses the practical question of how it should be decided which international conferences are "essential".[69] This is plainly not the case here,[70] not only on the facts of these proceedings but also because the UN Security Council has manifestly declined to take measures in this situation under article 16.[71]

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[65] Robinson et al. Brief, paras. 20-21 (citing an *amicus* submission in previous proceedings by Belgium: ICC-02/05-01/09-277-Anx). The Prosecution notes, however, that Belgium has not sought to participate as an *amicus curiae* in the present proceedings, notwithstanding the express invitation extended to States.

[66] *See above* paras. 19-22.

[67] Robinson et al. Brief, paras. 20-21. Likewise, the *amicus* submission by Belgium merely reasons that article 98(1) of the Statute would potentially accommodate respect for any international obligations owed to international organisations but, crucially, does not identify what those obligations may be as a matter of customary international law, let alone suggest that persons who are *not* the staff of international organisations—such as Heads of State or government—might also be encompassed in these obligations. *See* ICC-02/05-01/09-277-Anx-tENG, pp. 6-7 (citing only the Convention on the Privileges and Immunities of the United Nations, and the Agreement between the International Criminal Court and the European Union on Cooperation and Assistance). *See also* Lattanzi Brief, paras. 2 ("It is firmly established in international law that the immunity from foreign criminal jurisdiction enjoyed by Heads of State is based on customary law, including when they participate as delegates to meetings of international organizations. The 1953 Convention on the Privileges and Immunities of the Arab League […] is no exception to this", being "silent on the position of Heads of State" and therefore "leav[ing] to customary law the identification of their appropriate level of treatment"), 15.

[68] *See below* paras. 34-36.

[69] *See* Robinson et al. Brief, para. 21.

[70] *See below* paras. 34-36.

[71] *See e.g.* ICC-02/05-01/09-T-2-ENG, p. 67, lns. 14-22 (recalling that the UN Security Council has declined to take action under article 16).

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

26. Of the eleven *Amici* accepted as participants in this appeal, six specifically addressed the question of the Pre-Trial Chamber's referral of Jordan to the ASP and Security Council (following Jordan's non-compliance).[72] Of these six, four (Konstantinos Magliveras, Flavia Lattanzi, Annalisa Ciampi and Yolanda Gamarra) support the Pre-Trial Chamber's exercise of discretion to refer Jordan to the ASP and Security Council. In their collective view, the referral was not only correct on the facts of the situation, but necessary to enhance the Court's work and to fulfil the mandate the Security Council entrusted it regarding the Darfur situation.[73]

27. Two other *Amici* (Darryl Robinson et al. and Michael Newton) address the referral issue, but without raising any specific errors in the Pre-Trial Chamber's exercise of discretion.

- Robinson et al. argue that Jordan need not be referred to the ASP and Security Council.[74] Of note, they introduce a "high-level conference" exception to a State Party's obligation to execute the arrest warrant against Omar Al-Bashir and argue—on the strength of that exception—that "there is no violation to refer".[75] This exception is unsupported in law and in fact.

[72] Magliveras Brief, paras. 1-4, 7, 12; Lattanzi Brief, paras. 17-18; Ciampi Brief, pp. 10-12; Gamarra Brief, paras. 17-19, 23-25; Robinson et al. Brief, paras. 18-26 and Newton Brief, paras. 1-19. The remaining (Tsagourias Brief, Zimmermann Brief, Kreß Brief, O'Keefe Brief and Gaeta Brief) chose not to address the third ground of appeal.
[73] *See* Magliveras Brief, paras. 1-4, 7, 12 ("By referring Jordan's non-compliance, the Pre-Trial Chamber may have tried to protect and defend the Court as an institution as well as its values and principles. This behaviour is neither unfair nor unreasonable and certainly within the limits of the Bench's discretion. It could further be justified if regarded as (yet another) attempt to persuade the ASP and the UNSC to finally address in earnest those states refusing to comply with legitimate cooperation requests by taking appropriate (even punitive) measures."); Lattanzi Brief, paras. 17-18 ("Conclusively, Jordan committed serious violations of international law and acted in bad faith throughout the cooperation process […] a referral of Jordan to the UNSC and the [ASP] may 'enhance the work of the Court, for example, promoting future cooperation', thereby preventing future instances of non-compliance and fostering the fight against impunity for egregious crimes of international concern."); Ciampi Brief, pp. 10-12 ("Because [a]rticle 87, paragraph 7, requires a judicial finding that a characterized infringement has occurred, the referral also implies a reasonable prospect that it will sort some positive effects on the 'functioning of the Court'. This assessment should include not only Jordan as the State subject to the referral but more widely the international society as a whole […]"); Gamarra Brief, paras. 17-19, 23-25 ("While the Court does not have enforcement powers, it is competent to make a judicial finding concerning a State's failure to comply with the Statute and other legal documents of the Court, and to report that judicial finding to the UN Security Council. Such reporting powers constitute the only tool the Court has to ensure the cooperation and to fulfil the mandate entrusted to it by the UN Security Council to prosecute the most responsible for serious violations of international humanitarian law committed in the territory of Sudan.").
[74] Robinson et al. Brief, paras. 18-26.
[75] Robinson et al. Brief, paras. 18-23.

- Newton relies exclusively on research undertaken in the *Mapping Bashir* project (documenting Omar Al-Bashir's travel patterns) at the International Law Practice Lab at Vanderbilt University Law School.[76] Although the submission conveys certain findings relating to Omar Al-Bashir's travel patterns, the relevant research itself is not properly before this Chamber.[77] Nor is the research germane to the concrete issues before this Chamber.

28. The *Amici*'s views on the question of the Pre-Trial Chamber's referral of Jordan to the ASP and Security Council are based on the public record of this case, which mirrors—to a large extent—the confidential record currently unavailable to them.[78] As such, their collective submissions reflect a broad spectrum of views. They have sufficiently briefed the issue to assist the Court at this stage. Further written or oral submissions from the *Amici* on the third ground of appeal are not required.[79]

C.1. Response to the Amici submissions on the Third Ground of Appeal

29. The *Amici* raise the following issues, to which the Prosecution responds.

C.1.a. The established standard of review for discretionary decisions governs the Chamber's exercise of discretion

30. In the circumstances of the case, the Pre-Trial Chamber properly exercised its discretion to refer Jordan to the ASP and Security Council.[80] The Prosecution agrees, in principle, with Magliveras's submission that a Chamber's proper exercise of discretion is governed by certain "upper limits".[81] Those "upper limits" are properly reflected in the established standard of review governing such discretionary decisions. As the Prosecution has submitted, none of the "limited conditions" which could prompt the Appeals Chamber to disturb the Pre-

[76] Newton Brief, paras. 6-19.
[77] *See generally* Newton Brief and para. 5 (referring to the research publicly available on a specific website). It is unclear what the precise nature of this research is (and whether it is intended as evidence as such). Notwithstanding, and even if the information is publicly available, the general principles governing the availability of information on appeal (not available at first instance) should apply. (*See by analogy,* ICC-01/04-01/06-3121-Red ("*Lubanga* AJ"), paras. 53-64).
[78] The content of the relevant *notes verbales* is classified as confidential, although the Decision (available publicly) describes the relevant events.
[79] *See* Order, para. 12.
[80] *See* Response, paras. 96-124.
[81] Magliveras Brief, para. 12 ("Whenever a legal entity […] power exercises discretion, there are legal principles to be observed (e.g., legitimate expectations, reasonable confidence, proportionality, fairness), there are upper limits which should not be exceeded, while allegations of arbitrariness or capriciousness must be proven by the complainant.")

Trial Chamber's exercise of discretion have been shown.[82] And there is good reason to maintain these "limited conditions" (or "upper limits") in the review of such decisions. These conditions assist the Appeals Chamber in assessing the propriety of the referral decision, while, at the same time, they preserve "the core of the relevant Chamber's exercise of discretion"—a "core" essential to such decisions.[83] This test was crafted to maintain a delicate, but necessary, balance.

31. Moreover, notwithstanding differing views,[84] the Prosecution notes that a referral decision by a Chamber at this Court is not one that automatically involves the "censure" of a particular State Party.[85] As this Court's case law has underscored, a referral may be "value-neutral".[86] That the referral in this case was "value-neutral" is also apparent from the Decision.[87] The Pre-Trial Chamber did not "sanction" Jordan. In this case, the referral merely made available measures usually at the disposal of the ASP and the Security Council to ensure cooperation (in particular, political and diplomatic avenues which are unavailable to a Chamber of this Court within the remit of judicial proceedings).[88] Although some *potential* measures that the ASP or Security Council *could* impose *may* be punitive in nature (and this

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[82] Response, para. 99 ("Jordan's appeal against the referral fails to demonstrate any of the *limited conditions* which could prompt the Appeals Chamber to disturb the Pre-Trial Chamber's exercise of discretion. It fails to show an erroneous interpretation of the law or a patently incorrect conclusion of fact. It also fails to show an abuse of discretion 'so unfair or unreasonable' so as to 'force the conclusion that the Chamber failed to exercise its discretion judiciously'. And even if *arguendo* the Chamber had improperly exercised its discretion, Jordan fails to argue—let alone show—that such error materially affected the Decision."). *See also* ICC-01/09-02/11-1032 OA5 ("*Kenyatta* AD"), paras. 21-26 and para. 64 (setting out the standard of review for discretionary decisions and noting 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.")

[83] *See Kenyatta* AD, para. 64 (*also* para. 21, listing other discretionary decisions, such as those relating to conditional release, determining the admissibility of a case on a Chamber's own motion, procedural issues in the course of proceedings such as whether to hold a hearing, and sentencing).

[84] *See e.g.,* Magliveras Brief, para. 12 (referring to the Pre-Trial Chamber as a "legal entity holding censure power"); Ciampi Brief, p. 12 (referring to a "blaming and shaming" effect).

[85] Likewise, the referral decision does not involve questions of guilt or innocence in a criminal case. (*See e.g.,* ICC-01/05-01/08-3636-Anx3 A ("*Bemba* Judge Eboe-Osuji's Concurring Opinion"), para. 38).

[86] *Kenyatta* AD, para. 53 ("[I]t 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."); ICC-01/09-02/11-1037 ("*Kenyatta* Second Decision"), para. 38 (referring Kenya to the ASP, noting the "deadlock reached in cooperation", that "the ASP is specifically mandated to consider questions relating to non-cooperation", that "the ASP would be best placed to address the lack of cooperation, in order to provide an incentive for the Kenyan Government to cooperate with the Court […]"); ICC-01/11-01/11-577 ("Article 87(7) Libya Decision"), para. 33 ("[Article 87(7)] is value-neutral, and not designed to sanction or criticise the requested State. [T]his provision makes available to the Court an additional tool so that it may seek assistance to eliminate impediments to cooperation.").

[87] Decision, para. 55 ("Accordingly, the Chamber does not consider that there remains anything to be undertaken by the Court and that the case of Jordan's non-compliance should be referred to the [ASP] and the Security Council.")

[88] *See* Ciampi Brief, p. 12; Gamarra Brief, para. 25 (suggesting further that failing any action taken or recommended by the ASP or the Security Council, States Parties (or Member States of the UN) may resort to remedies generally available to them under international law to ensure compliance with cooperation requests from the Court).

remains to be seen), the referral itself was not.[89] In these circumstances, the Appeals Chamber need not devise a further "test" to assess the propriety of referrals in general.[90]

C.1.b. Jordan was properly referred to the ASP and Security Council

32. Having first correctly found that Jordan had failed to comply with its obligations—as a State Party—to arrest and surrender Omar Al-Bashir to the Court, the Pre-Trial Chamber then properly referred Jordan to the ASP and Security Council.[91] Several of the *Amici* correctly interpret the public record and clearly support the Pre-Trial Chamber's decision to refer Jordan to the ASP and Security Council.[92]

33. Several *Amici* argue persuasively for why a referral was necessary in this case. For instance, the Prosecution agrees with Magliveras that the referral was necessary "to protect and defend the Court as an institution as well as its values and principles".[93] Likewise, both Lattanzi and Ciampi correctly argue that the referral could enhance the Court's functioning.[94] Moreover, the converse is certainly true—without the referral (which would make further options to ensure cooperation possible), the Court cannot expect any further cooperation from Jordan, as demonstrated by the record.[95] Indeed, Gamarra's submission properly echoes this very logic.[96] As Gammara states, the Court must not allow anything short of "full and expedient" cooperation from States Parties in executing arrest warrants—as it affects the core of the Court's mandate to address international crimes and provide redress to the victims of these crimes.[97] And as Magliveras states, the referral provides Jordan a further opportunity to convey to the ASP and Security Council the reasons underpinning its position, and choice,

[89] *See* Response, para. 107.
[90] *Contra* Magliveras Brief, para. 12 ("Thus, the Appeals Chamber ought to lay down the upper limits of discretion and devise a test to determine whether such referrals comply with or breach these limits").
[91] *See* Response, paras. 96-124.
[92] *See e.g.*, Magliveras Brief, paras. 4, 12; Lattanzi Brief, paras. 17-19.
[93] Magliveras Brief, para. 12.
[94] Lattanzi Brief, para. 18; Ciampi Brief, p. 11.
[95] *See* Decision, paras. 46-55; Response, paras. 96-97, 100-124 (noting that Jordan had expressed unambiguously its position, and choice, not to execute the Court's request before Omar Al-Bashir's visit, and essentially provided "advance notice of [its] non-compliance"; that, at the time when it chose not arrest Omar Al-Bashir, Jordan already had proper and unequivocal notice of both its obligation to arrest and surrender Omar Al-Bashir and that, in principle, invoking consultations with the Court did not suspend Jordan's obligations; and that the manner in which Jordan approached the Court for consultations warranted referral to the ASP and Security Council for appropriate measures.)
[96] Gamarra Brief, para. 23 (noting that the Court itself lacks "enforcement powers" and that such reporting powers constitute "the only tool" the Court has to ensure cooperation and to fulfil the mandate entrusted to it by the Security Council).
[97] *See* Gamarra Brief, para. 19 ("Therefore, full and expedient cooperation in the transfer of persons against whom the Court has issued a warrant of arrest is a necessary element of the cooperation regime. In sum, [Jordan's] willingness to completely fulfil its obligation to cooperate with the Court is questioned.")

not to execute the arrest warrant against Omar Al-Bashir and the perceived constraints it faced in being asked to do so.[98]

C.1.c. The "high-level conference" exception to States Parties' obligations to execute the Court's arrest warrants is inapposite

34. Having initially argued, in their request for leave to submit, that "the referral decision was arguably attenuated by errors of fact and law",[99] Robinson et al. now argue that the Pre-Trial Chamber's decision to refer Jordan to the ASP and Security Council is essentially redundant in light of a "high-level conference" exception to States Parties' obligations.[100] As noted above,[101] the Prosecution cannot accept this proposition. Not only is such an "exception" unsupported in law,[102] it is inapposite in fact, and manifestly irrelevant to the question of the referral in this case. Of note, Robinson et al. do not advance specific errors for this Chamber to consider, but rather ask the Court to "show some understanding of the legal stakes for states parties."[103] But policy and politics cannot triumph over law at this Court, more so when such policy-based "exceptions" are introduced on appeal to annul *retroactively* a full factual and legal determination at first instance.[104]

35. *First,* Robinson et al.'s suggestion that the 28th Arab League Summit hosted by Jordan in March 2017 (the visit at issue) qualified as "essential contacts" with Heads of State or government is unsupported.[105] As a matter of law and logic, the premise of "essential contacts" cannot be interpreted so as to frustrate the proper discharge of a core cooperation duty owed by States Parties to the Court, *i.e.,* to execute a Court's arrest warrant. To preserve State cooperation (an essential aspect of the Court's legal framework), the threshold for any such "essential contacts" must be set very high. There would be little,—if anything,—left of the duty to cooperate with the Court under Part 9 of the Statute if it were left entirely to individual States to interpret what constituted "essential contacts" with persons subject to

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[98] Magliveras Brief, para. 12 ("Instead of filing a complaint about its referral, Jordan should have welcomed it as it would allow it to convince the ASP and the UNSC that the ICC has erred. Jordan has nothing to fear and, at any rate, the referral does not compromise, threaten or diminish its sovereign rights").
[99] ICC-02/05-01/09-337 OA2 ("Robinson et al. Request"), para. 8 (based only on the public record on the case and without access to the underlying confidential *notes verbales*).
[100] Robinson et al. Brief, paras. 18-23.
[101] *See above* paras. 23-25.
[102] *See above* paras. 23-25.
[103] Robinson et al. Brief, para. 24 ("[T]he PTC was correct that a request had been issued and the obligation of states parties is simply to comply. Nonetheless, the Court should show some understanding of the legal stakes for states parties […]").
[104] *See e.g.,* Robinson et al. Brief, para. 19 ("One of the most emphatic objections raised by states parties is the particular difficulty when states host a conference of an intergovernmental organisation, to which heads of state or government are invited.")
[105] Robinson et al. Brief, paras. 21, 23.

Court warrants such as Omar Al-Bashir—in the manner that Robinson et al. suggest that Jordan was allowed to do. Indeed, when viewed in context, neither the ASP resolution cited, nor the United Nations policy on contacts with persons subject to ICC arrest warrants can be interpreted to support Jordan's failure to execute the arrest warrant at the 2017 Arab League Summit.[106] The OTP arrest guidelines to States—a strategic document—cannot be interpreted to contravene the Rome Statute, and also do not support such an inference.[107] Although these policy documents are heavily caveated allowing only "exceptional" contact in very limited circumstances and only when strictly necessary, Robinson et al.'s interpretation would provide a *carte blanche* or "blanket excusal" to States Parties (including Jordan) from executing outstanding Court arrest warrants whenever an intergovernmental conference were to be held.[108]

36. Even if the premise of "essential contacts" *vis-à-vis* a State Party's obligation to execute a Court's warrant is accepted (and it is not), the 2017 Arab League Summit was manifestly *not* such an essential contact. As information in the public domain shows, this Summit has of late been held annually. Jordan has hosted it several times.[109] Presumably, any Head of State or government could and would receive many invitations to similar international, regional and national events in his or her time in office. As a Head of State or government, attending such events—to discuss matters of "regional security" or otherwise—is thus *routine,* not *essential*—and patently *not exceptional* in nature.[110]

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[106] Robinson et al. Brief, para. 21, fn. 50. *See e.g.,* ASP Resolution ICC-ASP/15-Res.3 (10th Plenary Meeting, 24 November 2016), para. 5 (urging States Parties to avoid contact with persons subject to a warrant of arrest issued by the Court, unless such contact is deemed essential by the State Party) but *see* p. 1 (noting that contacts with persons in respect of whom an arrest warrant issued by the Court is outstanding should be avoided *when such contacts undermine the objectives of the Rome Statute*); UN Guidelines on contacts with persons who are the subject of arrest warrants or summonses issued by the International Criminal Court (A/67/828 S/2013/210), para. 1 (*As a general rule, there should be no meetings* between United Nations officials and persons who are the subject of warrants of arrest issued by the International Criminal Court); para. 2 (*There should be no ceremonial meetings with such persons* and standard courtesy calls should not be paid on them. The same holds true of receptions, photo opportunities, attendance at national day celebrations and so on); para. 3 ([…] *every effort should be made to meet and liaise with individuals other than the person* subject to a warrant of arrest in order to conduct business); para. 4 ([T]here may still be a need, in exceptional circumstances, to interact directly with a person who is the subject of an International Criminal Court arrest warrant. *When this is an imperative for the performance of essential United Nations mandated activities*, direct interaction with such a person may take place *to the extent necessary only*). (emphasis added); Best Practices Manual for United Nations-International Criminal Court Cooperation (26 September 2016), pp. 9-10.

[107] *See* OTP Prosecutorial Strategy 2009-2012, (1 February 2010), para. 48. *Contra* Robinson et al. Brief, fn. 50.

[108] *See by analogy* ICC-01/09-01/11-1066 OA5 ("*Ruto* Presence AD"), para. 63 (where the Appeals Chamber found that "blanket excusals" of an accused from trial were not allowed, but rather that case-by-case determinations should be made tailored to specific instances and for limited necessary durations).

[109] *See* www.arabsummit2017.jo/en (accessed on 15 July 2018).

[110] *See also* Magliveras Brief, para. 4 (noting that the Summit's agenda did not include items directly bearing on Sudan necessitating Omar Al-Bashir's presence at all costs)(www.arabsummit2017.jo/en)

37. *Second,* the Robinson et al. Brief mistakes the facts at issue.

- Although it assumes, as support for the "high-level conference" exception, that "host states often may not even have control over invitations",[111] Jordan clearly had such control. Not only did Jordan expressly invite Omar Al-Bashir to the Summit, even when reminded of its obligations under the Statute, it did not approach the Court for assistance.[112] It only communicated with the Court on the eve of Omar Al-Bashir's visit when it declared its choice not to execute the arrest warrant.[113]

- Similarly, although Robinson et al. argue that Jordan is not currently withholding assistance as a reason not to refer[114] this fails to acknowledge that Jordan has hosted the Arab League Summit on several occasions and may do so in the future.[115] Nor is it explained why the Chamber must be "forward looking" in relation to Jordan,[116] given its demonstrated non-compliance with its obligations.

38. *Third,* it is unclear what "greater legal clarity" is needed regarding States Parties' unequivocal obligation to execute arrest warrants.[117] The Prosecution agrees that respected members of academia hold "intensely-held and well-argued opinions" on the legal nuance concerning the immunity issue at the Court.[118] But this does not affect Jordan's own obligations owed to the Court. States Parties categorically know that they must execute the Court's arrest warrants: Jordan has known this since 2009.[119] No decision of the Court has ever concluded otherwise. Nor was the Court's record[120] or even public opinion[121] ambiguous. Moreover, even if Jordan had wanted to seek clarity, it could have properly engaged the Court under the consultative mechanism raising genuine questions in a timely

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[111] Robinson et al. Brief, para. 19.
[112] *See* Decision, para. 6 (noting ICC-02/05-01/09-291-Conf-Anx2 "24 March 2017 Jordan *NoteVerbale*") and Response, para. 105 (for relevant chronology).
[113] Decision, para. 7 (noting ICC-02/05-01/09-293-Conf-Anx1-Corr "28 March 2017 Jordan *NoteVerbale*").
[114] Robinson et al. Brief, para. 24.
[115] *See* Ciampi Brief, p. 11 ("The presence of [Omar Al Bashir] on Jordan's territory, that at one moment may seem improbable, remains always possible")
[116] Robinson et al. Brief, para. 26.
[117] Robinson et al. Brief, para. 24.
[118] Robinson et al. Brief, para. 24.
[119] *See* Response, para. 105.
[120] *See e.g., Statement of ICC Prosecutor, Fatou Bensouda, before the United Nations Security Council on the Situation in Darfur, pursuant to UNSCR 1593 (2005)*, 13 December 2016 , para. 15; *Twenty-Fourth report of the Prosecutor of the International Criminal Court to the United Nations Security Council Pursuant to UNSCR 1593 (2005)*, 13 December 2016, para. 15.
[121] *See e.g.,* Magliveras Brief, para. 5 (on the EU's urgent *démarche*) and Human Rights Watch's statement (https://www.hrw.org/news/2017/03/28/jordan-arrest-sudans-bashir, accessed on 15 July 2018).

manner. It did not do so.[122] Likewise, the propriety of individual referrals must be decided on their respective facts. As the Prosecution has already submitted, that South Africa was not referred is inapposite.[123]

C.1.d. The "Mapping Bashir" project does not assist

39. The Prosecution agrees, in principle, with Newton that referral remains "the only mechanism" under the Statute to advance cooperation with States Parties for their failures to arrest Omar Al-Bashir.[124] However, the submission (outlining Omar Al-Bashir's travel patterns since the arrest warrants against him have been issued) is unclear as to its relevance to the issue on appeal.[125] Nor is the underlying research—referred to only *via* a public website—properly before this Chamber. Its methodology and origins are also not apparent.

40. *First,* although the submission suggests that the referrals have made no "appreciable difference" to Omar Al-Bashir's travels,[126] this does not address the right question. To that end, the submission conflates *the issue* on appeal with *its consequence*: the relevant question is whether the remedy (the referral) is appropriate given Jordan's failure to execute the pending arrest warrants against Omar Al-Bashir and demonstrated non-compliance (the issue); and <u>not</u> whether the referral is appropriate given the frequency of Omar Al-Bashir's travels since the arrest warrants (the consequence of States Parties', including Jordan's, non-compliance). Indeed, the *consequences* of States Parties' failures to abide by the Statute cannot be used to undermine the value of a referral as the only statutory remedy available to the Court to advance cooperation in this case. Omar Al-Bashir's travel patterns are therefore not relevant to this appeal. Even less clear is why the exact reasons for such travel (whether political, economic, religious or personal) would matter.[127] Moreover, this information is already available in the Court's public record (*via* the Prosecutor's reports to the Security

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[122] *See* Response, paras. 105, 109-114.
[123] *Contra* Robinson et al. Brief, para. 25 (noting that the Pre-Trial Chamber correctly showed restraint in its response to South Africa). *But see* Response, paras. 117-118 (noting the differences in the situations between South Africa and Jordan, including the active role of South Africa's domestic processes and the Government's acceptance of its obligation to cooperate with the Court); *see also* Lattanzi Brief, para. 17 ("Furthermore, no internal procedure on the question of Al-Bashir had to be at least arrested was activated")
[124] Newton Brief, para. 19.
[125] Newton Brief, paras. 3, 6-17.
[126] Newton Brief, paras. 3, 17 ("[R]eferrals have made no appreciable difference. Research therefore suggests that referral does not substantially affect [Omar Al-Bashir's] subsequent travels. This conclusion is demonstrable by the compiled data.")
[127] Newton Brief, para. 5.

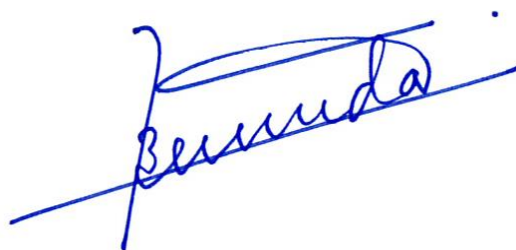
Council on the Darfur situation and the Registry reports recording Omar Al-Bashir's travels) and more generally, in the public domain.[128]

41. *Second,* the precise status of the underlying research and findings of the *Mapping Bashir* project before the Appeals Chamber is unknown. Whether of evidentiary nature or not, the Chamber should be wary of accepting information on appeal that should more properly be presented at first instance (if at all relevant, which it is not). Likewise, the origins of this project, the nature of the expertise offered, the background of the researchers and the methodology used to compile this research and to issue findings is unexplained. All that is known is that "Oliver Windridge" conceived the project,[129] that it is a "co-operative venture" between "Oliver Windridge" and "Vanderbilt University Law School (International Law Practice Lab)" and that it relies on the Court's public record and various news networks, including the Sudan Tribune.[130]

42. In these circumstances, the Chamber should be cautious to rely on the research and findings of the *Mapping Bashir* project to assess whether the referral—as the only statutory remedy for non-compliance—was itself appropriate.

Conclusion

43. For the reasons above, and those contained in the Response, the Prosecution requests the Appeals Chamber to reject the Appeal.



Fatou Bensouda, Prosecutor

Dated this 16th day of July 2018[131]

At The Hague, The Netherlands

[128] *Contra* Newton Brief, para. 5.
[129] *See* ICC-02/05-01/09-350 OA2 ("Newton-Windridge Request for Leave"), para. 4 (introducing Oliver Windridge).
[130] Newton Brief, para. 5. The public website of this Project does not offer any more clarity.
[131] This submission complies with regulation 36, as amended on 6 December 2016: ICC-01/11-01/11-565 OA6, para. 32.