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APPEALS CHAMBER

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

SITUATION IN DARFUR, SUDAN

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

Public
With Public Annex

Amicus Curiae Observations of Professors Robinson, Cryer, deGuzman, Lafontaine, Oosterveld, and Stahn

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The Office of the Prosecutor

Ms Fatou Bensouda, Prosecutor
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States Representatives

Competent authorities of the Hashemite Kingdom of Jordan

REGISTRY

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OVERVIEW

1. Professors Darryl Robinson, Robert Cryer, Margaret deGuzman, Fannie Lafontaine, Valerie Oosterveld and Carsten Stahn ("the Amici") offer the following observations to assist the Appeals Chamber.

   (a). The Appeals Chamber should uphold the interpretation adopted by the Pre-Trial Chamber (PTC) in the appealed decision.[1] The Amici propose to assist the Chamber by analysing common criticisms of that interpretation.

   (b). The Amici also suggest legal avenues to respect competing legitimate concerns. The Amici will propose that there are legal grounds to respect immunity of a head of state or government participating in a conference of an intergovernmental organization, and that Jordan need not be referred to the ASP or UNSC.

A. "COOPERATE FULLY" INCLUDES ARTICLE 27(2)

2. The Pre-Trial Chamber's approach is the most convincing reconciliation of the provisions of the Statute, the customary immunities of heads of state, and the powers of the UN Security Council (UNSC).[2] While all possible positions on this matter may be criticized, the Pre-Trial Chamber's approach has considerable, well-reasoned academic support,[3] and is supported by national judicial decisions.[4]

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[1] ICC-02/05-01/09-309. See also ICC-02/05-01/09-302 6 July 2017 (South Africa decision).
[2] Consistent with Vienna Convention on the Law of Treaties, Article 31(3)(c).
[3] Dapo Akande, 'The Legal Nature of Security Council Referrals to the ICC and its Impact on Al Bashir's Immunities,' [2009] 7 JICJ 333; Roseanne van Alebeek, *The Immunity of States and Their Officials in International Criminal Law and International Human Rights Law* (OUP 2008) at 280; Kai Ambos, *Treatise on International Criminal Law, Vol III* (OUP 2016) at 618-22; Annalisa Ciampi, "The Obligation to Cooperate" in Cassese, Gaeta and Jones, *The Rome Statute of the International Criminal Court: A Commentary (Vol II)* (OUP 2002) 1607 at 1609-1616; Robert Cryer et al, *An Introduction to International Criminal Law and Procedure*, 3rd ed (2014) at 557-561; Joanne Foakes, *The Position of Heads of State and Senior Officials in International Law* (OUP 2014) 199-204; Hazel Fox and Philippa Webb, *The Law of State Immunity* (OUP 2015) at 564; Erika de Wet, 'The Implications of President Al-Bashir's Visit to South Africa for International and Domestic Law', 13 JICJ 1049 (2015); Erika de Wet, 'Referrals to the International Criminal Court Under Chapter VII of the United Nations Charter and the Immunity of Foreign State Officials', 112 AJIL Unbound (2018) 33.
[4] *Attorney General v Kenya Section of the International Commission of Jurists*, H.C. Misc Crim Appl No 685 of 2010 (High Court of Kenya 2011) at pp. 52-55 (see excerpt in List of Authorities). See also, indirectly supporting, *Minister of Justice and others v SALC and others* (867/15), (867/15) [2016] ZASCA 17 15 March 2016 (Supreme Court of Appeal of South Africa) at paras 80-82 and 103-104.

A1. Resolution 1593 and Chapter VII of the UN Charter

3. The UN Charter expressly conveys broad powers on the UNSC once it identifies a threat to international peace and security. Jointly, Articles 41 and 42 convey exhaustive powers to require measures, whether involving the use of force or not. The International Court of Justice has confirmed that this express grant of powers is not confined to the illustrative list of examples.[5] The UNSC "enjoys a wide margin of discretion" in choosing measures.[6] The recognized limitations on these powers are *jus cogens* norms and the Purposes and Principles of the United Nations,[7] none of which preclude removal of immunities for international crimes.[8]

4. It has been argued that the UNSC cannot override customary international law and thus cannot affect immunities,[9] but this argument is flawed. Enforcement measures "inevitably have an impact on customary law rights of states",[10] and the UNSC routinely overrides customary international law to carry out its duties.[11] It is "widely accepted" that the UNSC has the power to do so. [12]

5. Under its mandate to protect international peace and security, the UNSC can order UN member states to cooperate with other bodies. The UNSC has done so numerous times.[13] In requiring cooperation, the UNSC does not violate the law of treaties nor

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[5] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)*, Advisory Opinion, I.C.J. Reports 1971, p. 16. at para 110; *Prosecutor v Tadić*, Decision on the Interlocutory Appeal on Jurisdiction, IT-94-1-AR72, 10 October 1995, para 35; Niko Krisch, 'Article 41' in Simma et al (eds.), *The Charter of the United Nations: Commentary* (OUP, 3rd ed., 2012), at 1311 and 1320.
[6] *Tadić* (*supra*) para 31-32.
[7] UN Charter Article 24(2); Niko Krisch, "Chapter VII" in Simma, *Charter* (*supra*) at 1256-62.
[8] Immunities are not *jus cogens*, as otherwise states could not waive them or relinquish them by treaty, as they clearly do in state practice.
[9] Asad Kiyani, "Al-Bashir & the ICC: The Problem of Head of State Immunity" 12 Chinese J Int L (2013) 467.
[10] De Wet, *Chapter VII* (*supra*) at 182.
[11] For example, Resolution 1846 (2008) permits states to pursue suspected pirates in the territorial waters of Somalia, a deviation from customary law of the sea: De Wet, 'Implications' (*supra*) at 1060.
[12] Krisch, "Chapter VII" (*supra*) at 1262; Stefan Talmon "The Security Council as Dispenser of (or with) International Law" in Crawford and Nouwen, eds, *Select Proceedings of the European Society of International Law*, *Vol 3* (Hart, 2012) at 252 ("widely accepted"); Andreas Paulus and Johann Ruben Leiss, "Article 103" in B Simma, ed, *The Charter of the United Nations* (*supra*) at 2133 ("prevailing view"); Jan Wouters and Jed Odermatt in Popovski and Fraser, eds *The Security Council as Global Legislator* (Routledge, 2014) at 73-75: ("obligations imposed by a binding Security Council resolution also prevail over customary international law obligations."); *Report of the International Law Commission: Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law* A/CN.4/L.682,13 April 2006, paras 344-5 ("prevailing opinion"); de Wet, "Chapter VII" (*supra*) at 182.
[13] Examples include: Res. 687 (1991) paras 9b, 12, 30 (cooperate with WHO, IAEA, and ICRC); Res. 757 (1992) para 10 (cooperate with European Commission Monitoring Mission); Res. 1044 (cooperate with

does it "make a state a party" to the relevant treaty. The UNSC is *directly* ordering a UN member state to cooperate, under its Chapter VII authority. The UN member state has accepted to carry out UNSC decisions pursuant to Article 25 of the UN Charter. When the UNSC orders a state to "cooperate fully" with the ICC, the *content* of the obligation is delineated by the Rome Statute, but the *source* of the obligation is the resolution and the UN Charter. The Rome Statute is not being applied *qua* treaty. The UNSC incorporates, pursuant to its own authority, the relevant provisions of the Rome Statute to delineate the obligation imposed by the resolution.

6. There is no exception to the UNSC's power under the UN Charter stating that the UNSC cannot impose obligations if those obligations are also stipulated in a treaty. Several resolutions have imposed obligations also found in treaty law.[14] Resolution 1373, which imposes several obligations found in a counter-terrorism treaty, has been criticized because the UNSC was legislating, rather than responding to a particular situation.[15] That objection does not apply to Resolution 1593, which is a response to a particular situation.

7. It is sometimes argued that because immunities are sensitive or 'delicate', the UNSC must be explicit when removing them.[16] There are four responses. First, the UNSC's practice has been the opposite: it has been explicit when it wishes to *preserve* immunities.[17] UNSC members have considered it necessary to state when immunities are *not* affected by their Resolutions.[18] Second, UNSC practice routinely issues 'sensitive' orders in a brief and terse manner. For example, the simple phrase "all necessary measures" authorizes the much more intrusive measure of military force.[19] Third, the Rome Statute has other implications that are sensitive, including national security information and surrender of nationals.[20] The UNSC is not required

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OAU); Res. 1929 (2010) para 5 (cooperate with IAEA); Res. 2118 (2013) para 6 (cooperate with OPCW); Res. 1556 (2004) para 2 (cooperate with AU mission in Darfur).

[14] Res. 1172 (1998) (non-proliferation and nuclear test ban); Res. 1373 (2001) (terrorism); Res. 1540 (2004) (weapons of mass destruction); Res. 2310 (2016) (nuclear test ban).

[15] Alan Boyle, Jacques Hartmann and Annalisa Savaresi, 'The United Nations Security Council's Legislative and Enforcement Powers and Climate Change" in Scott & Ku, eds, *Climate Change and the UN Security Council* (Edward Elgar 2018).

[16] See eg. Minority Opinion of Judge Perrin de Brichambaut, ICC-02/05-01/09-302-Anx, para 67.

[17] See eg. UNSC Resolutions 1422, 1497, 1593, and 1973.

[18] See also de Wet, "Implications" (*supra)* at 1061: "the submission that the Security Council must stipulate all deviations from international law explicitly in the text of the resolution is not in accordance with the established and accepted practice of the Security Council, which supports the opposite conclusion."

[19] De Wet, "Referrals" (*supra*) at 36.

[20] Rome Statute, Arts 72 and 89.

to specifically single out Article 27(2).[21] Fourth, the UNSC order *was* express: it obliges Sudan to "cooperate fully". The only question is to identify the package of cooperation obligations imposed by those terms.

8. Past UNSC practice supports these conclusions. It is sometimes suggested that "cooperate fully" is not clear enough to remove immunity. However, the UNSC has previously used precisely the same formula and the technique to remove immunity. The UNSC used the identical phrase – "cooperate fully" – when it ordered states to cooperate with the ICTY and ICTR, the Statutes of which removed immunity. It is widely accepted that this technique successfully removed immunity;[22] in Resolution 1593, the UNSC used the same words and same technique.[23]

9. The UNSC specifically turned its mind to the issue of immunities. In paragraph 6, the UNSC exempted officials of non-party States *other than Sudan.*[24] That provision was controversial, because many regarded it as inconsistent with the anti-immunity provisions of the Rome Statute regime.[25] Council members were well-informed of the possible involvement of high-level state officials, which was part of the reason for a referral.[26] Council members were aware of the policy of international prosecutors to pursue the most responsible senior leaders.[27]

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[21] Claus Kress, 'The International Criminal Court and Immunities under International Law for States Not Party to the Court's Statute' in Morten Bergsmo and Ling Yan (eds.), *State Sovereignty and International Criminal Law* (FICHL 2012) at 241.
[22] Prosecutor v Milošević, Indictment, IT-99-37, 22 May 1999; Foakes, *Position of Heads of State* (*supra*) at 198-99; Alebeek, *Immunity* (*supra*) at 221; Naomi Roht-Arriaza, "Prosecutions of Heads of State in Latin America" in Ellen L Lutz & Caitlin Reiger, eds, *Prosecuting Heads of State* (Cambridge University Press, 2009) 46 at 54; M Cherif Bassiouni, *Introduction to International Criminal Law: Second Revised Edition* (Martinus Nijhoff 2014) at 76; de Wet, *Chapter VII* (*supra*) at 341-42.
[23] Some argue that this technique worked for the ICTY and ICTR and yet not for the ICC, citing as differences that the former Statutes were annexed to the Resolution, or that the former tribunals were created by the UNSC. These arguments invoke arbitrary distinctions that have nothing to do with the legal logic: with the ICTY, ICTR and ICC, the UNSC acting under Chapter VII ordered the relevant state to cooperate fully with an instrument that removes immunities.
[24] Resolution 1593, para 6.
[25] UNSCOR, 60th Year. 5158th Mtg, UN Doc S/PV.5158 (2005) at 10-11 statements of Benin ("We regret the fact that the text we have adopted contains a provision of immunity from jurisdiction, which runs counter to the spirit of the Rome Statute") and Brazil ("considering the need to approve the referral, Brazil acceded to such a limited immunity").
[26] *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General Pursuant to Security Council Resolution 564 of 18 September 2005*, S/2005/60, 25 January 2005, at eg. paras 531 and 572. The reason for a referral to the ICC was that the involvement of high-ranking state officials made domestic prosecution unlikely: *ibid* at para 572.
[27] The UNSC helped establish the general prosecutorial policy of focusing on "the most senior leaders suspected of being most responsible for crimes": Resolution 1503(2003) and Resolution 1534 (2004).

A2. "Cooperate fully" includes the horizontal effect of Article 27(2)

10. **"Cooperate fully":** There are only two viable possibilities as to the meaning of cooperate "fully". Taken literally, it could mean that the state must cooperate with every ICC request whatsoever, without any limitations. Such an interpretation would be implausibly ungenerous. The remaining plausible interpretation is that it means to cooperate subject to the same limitations enjoyed by states parties.[28] Any lower standard would be 'cooperate *less than fully*'. Such an interpretation would be contrary to the express terms of resolution 1593.

11. When setting out cooperation obligations, the Rome Statute refers to "States Parties" rather than "states obliged to cooperate fully". Accordingly, it has to be understood that when a state takes on the obligation to "cooperate fully" – including in an Article 12(3) declaration or by virtue of Chapter VII – it means those same stipulated cooperation obligations.[29] If that understanding is not adopted, then the cooperation obligations would be quite literally gutted.

12. **Cooperation not governance.** The Chapter VII obligation to "cooperate fully" does not 'transform' Sudan into a state party. It imposes only the *cooperation* obligations (and rights), not the *governance* obligations (and rights), such as assessed contributions to the ICC's budget.[30] Furthermore, Sudan must cooperate only in relation to Darfur proceedings. By contrast, states parties must cooperate in general.

13. **Cooperation obligations are not confined to Part 9**. It is sometimes argued that "cooperate fully" imposes only the obligations in Part 9. In fact, however, cooperation obligations appear throughout the Statute, as referenced in Article 86.[31]

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[28] Michael Wood, 'The Law of Treaties and the UN Security Council: Some Reflections", in Enzo Cannizzaro (ed), *The Law of Treaties Beyond the Vienna Convention* (OUP, 2011) at 251: "at least as comprehensive as those it would have been if it had been a party"; Ciampi, "The Obligation to Cooperate" (*supra*) at 1615: "It is only when the Security Council has referred a case to the Court that the distinction between States Parties and non-parties States loses significance. However, the nature and the content of the obligation to cooperate do not vary, nor are the limits to such an obligation and the remedies available in cases on non-compliance any different"; Foakes, *Heads of State* (*supra*) at 199 and 201; Ambos, *Treatise, Vol III* (*supra*) at 618; DeWet, "Referrals" (*supra*) at 35; Akande, "Legal Nature" (*supra*) at 342; Kress, "Immunities" (*supra*) at 242.

[29] Rule 44(2) of the Rules of Procedure and Evidence.

[30] Arts 9(2), 12, 13(a), 14, 36(4), 36(8), 51(2), 112, 115, 117, 121(1).

[31] Claus Kress & Kimberly Prost, "Article 86" in O. Triffterer and K. Ambos, *The Rome Statute of the International Criminal Court: A Commentary, 3rd Ed.* (Beck-Hart-Nomos, 2016) at 2106; Ciampi, "Obligation to Cooperate" (*supra*) at 1612 and 1616; Ambos, *Treatise* (supra) at 602.

An incomplete list of these obligations includes Articles 3(3), 4(1), 4(2), 18(5), 18(6), 19(8), 19(11), 27(2), 48, 54(2), 55(2), 56, 57(3), 58(7), 59, 64(6), 73, 75(5) and 109. To exclude these obligations because they are not in Part 9 would be arbitrary and would contradict the Council's injunction to cooperate "fully".

14. **The "horizontal effect" of Article 27(2).** The Pre-Trial Chamber is correct that Article 27(2) has 'vertical' effect (removal of immunity before the ICC) and 'horizontal effect' (removal of immunity for arrest and surrender to the ICC). Indeed, the point of adding Article 27(2) to Article 27(1) was specifically to remove immunities as an obstacle to the ICC's exercise of jurisdiction.[32] Arrest and surrender on behalf of the ICC is a necessary part of the ICC's exercise of jurisdiction. Careful examination of the text of Article 27(2) demonstrates its horizontal effect. The explicit removal of immunity under "national" law would be superfluous if Article 27(2) referred only to proceedings at the Court itself, since national law is no barrier at the Court.[33] Thus, the provision encompasses arrest and surrender proceedings in national systems. There appears to be broad agreement that Article 27(2) has horizontal effect among States Parties; the only controversy is in relation to states subject to a Chapter VII duty to "cooperate fully".[34] But, as noted above, cooperate "fully" must entail the analogous set of cooperation obligations; otherwise it is cooperating *less than fully*. Some may question whether relinquishment of immunity is part of 'cooperation', but it plainly is, as it relates to the exercise of jurisdiction by the Court in a case.

15. **Article 98(1).** Article 98(1) presents no barrier where the state is subject to the cooperation obligations, because by virtue of Article 27(2), the state has no immunity against ICC requests for arrest and surrender. Immunity can be relinquished by becoming a party to the Statute, by undertaking to cooperate fully under Article 12(3), or by virtue of a Chapter VII order to cooperate fully.

16. **Third state.** The Amici agree with Jordan and with the Prosecution that "third state" means a state other than the requested state.[35] It has been argued that "third state"

[32] Kress & Prost, "Article 98" in Triffterer and Ambos, eds (*supra*) at 2125; Akande, "Legal Nature" (*supra*) at 338; Fox & Webb, *Immunity* (*supra*) at 563.
[33] Akande, "Legal Nature" (*supra*) at 338.
[34] See eg. the request for leave by Duplessis, Nouwen and Wilmshurst, ICC-02/05-01/09-338 para 4.
[35] Jordan Appeal Brief, ICC-02/05-01/09-326 para 15; Prosecution Brief, ICC-02/05-01/09-331 para 48.

means a non-party state.[36] However, as Claus Kress and Kimberly Prost note, the Part 9 uses "third state" in the same way it is used in cooperation agreements: a state other than the requested state.[37] The Statute consistently uses "third state" in this way,[38] and uses "State not party to this Statute" for non-parties.[39] It is true that within the Vienna Convention on the Law of Treaties, "third state" means a non-party state, but that is because the VCLT discusses *treaties*, and hence the term refers to a third party to a treaty. Part 9 discusses *requests*, and the term means a third party to a request. To interpret "third state" as "non-party state" would contradict the Statute scheme, and would have problematic effects, as it would deprive ICC States Parties of certain protections for national security information and diplomatic premises specified in in Articles 93(9)(b) and 98(1).[40]

17. The Amici submit that the foregoing approach (based on the obligation to cooperate fully) is a more convincing basis for the ICC than the 'international court' theory.[41] The latter has attracted much legal skepticism even among supporters of international justice.[42] Many dispute the claim that purporting to act for the international community can bestow special powers. Member states cannot delegate a power that they do not have, and they do not have the power to ignore personal immunities of other states. Thus, the 'international courts' theory of personal immunity should be confined to states that are legally obliged to cooperate with an instrument that removes immunity. The Third Nuremberg Principle is recognized as customary law,[43] but it pertains to functional immunity.[44] The rationale for personal immunity is not *par in parem non habet iudicium*, but rather it is to preclude any

[36] Roger O'Keefe, *International Criminal Law* (2015) at 568 argues that, because the ICC is not a state, any other state would technically be a 'second' state. However, this argument incorrectly focuses on counting the states involved, whereas the term refers to a state that is a *third party* to the request.
[37] Kress and Prost, "Article 98" in Triffterer & Ambos (*supra*) at 2123-24.
[38] Arts 93(9)(b), 98, 108(1)
[39] Arts 87(5)(a), 87(5)(b), 90(4), 90(6).
[40] Articles 93 and 98 give consideration to "third states", which may include states parties. The immunity of diplomatic property is not relinquished under Article 27(2). Kress, Immunities (*supra*) at 232-33.
[41] See eg. ICC-02/05-01/09-139-Corr (Malawi decision).
[42] Zsuzsanna Deen-Racsmaný, "*Prosecutor v. Taylor*: The Status of the Special Court for Sierra Leone and its Implications for Immunity' (2005) 18 Leiden J. Int'l L 299; Micaela Frulli, 'The Question of Charles Taylor's Immunity" (2004) 2 JICJ 1118; David Koller, "Immunities of Foreign Ministers: Paragraph 61 of the Yerodia Judgment as It Pertains to the Security Council and the International Criminal Court" (2004) 20 Am. U. Int'l L Rev 7 at 30-41; King, "Immunities and Bilateral Agreements: Issues Arising from Articles 27 and 98 of the Rome Statute" (2006) New Zealand J. of Public and Int'l L 269; Alebeek, *Immunity* (*supra*) at 242 and 275-80; De Wet, "Implications" (*supra*) at 1056-7; Akande, "Legal Nature" (*supra*) at 339.
[43] *Ruto*, ICC-01/09-01/11-2027-Red 211, Opinion of Judge Eboe-Osuji, para 215.
[44] Alebeek, *Immunity* (*supra*) at 240-43, 266 and 293.

basis to interfere with the performance by high state officials of their representative functions, absent consent.[45] The more secure ground for the Court is the legal relinquishment of personal immunity, either voluntarily or by virtue of a State's obligations under the UN Charter.

B. RESPECTING LEGITIMATE CONCERNS

B1. High-level conferences

18. The ICC should not take lightly the legitimate concerns of states regarding head of state immunity and the extraordinary difficulties of arresting such an official.[46] The Rome Statute is not a single-minded document that brushes away competing considerations. Instead, wherever possible, the drafters balanced competing concerns with Statute aims.[47] The appropriate acknowledgement of legitimate social goals other than the fight against impunity (eg. governance, conflict resolution) helps make the ICC an effective and accepted part of the international architecture.

19. One of the most emphatic objections raised by states parties is the particular difficulty when states host a conference of an intergovernmental organization, to which heads of state or government are invited. Host states often may not even have control over invitations.

20. The Amici suggest a legal solution to address this problem and to build a bridge between competing positions. Where a head of state or head of government is invited to an intergovernmental conference, immunity is bestowed for the effective function of the organization. The obligation to "cooperate fully", and hence the stripping of immunity under Article 27(2), was imposed only on Sudan. Thus, Article 98 arguably preserves respect for the immunity extended by the organization.[48] It is true that Chapter VII obligations are paramount (Article 103 of the UN Charter), but there is no conflict in the obligations, because the ICC

[45] *Case Concerning the Arrest Warrant of 11 April 2000*, ICJ Reports 2002, para 53-57; Cryer et al, p. 563.
[46] In the *Ruto* acquittal decision, Judge Eboe-Osuji notes the importance of listening to legitimate concerns of states: ICC-01/09-01/11-2027-Red 211 at para 211.
[47] Philippe Kirsch and Valerie Oosterveld, 'Negotiating an Instrument for the Twenty-First Century: Multilateral Diplomacy and the International Criminal Court' 46 McGill LJ. (2001) 1141 at 1153-1155.
[48] As argued by Belgium in ICC-02/05-01/09-277-Anx, 'third state' should be interpreted contextually to include international organizations.

obligation explicitly yields to immunities that have not been relinquished (Article 98).

21. This solution recognizes the Court's power to issue arrest warrants against heads of state or government, but allows an exception for heads of state or government attending conferences of intergovernmental organizations. Belgium, one of the staunchest supporters of the fight against impunity, has emphasized the importance of this type of conference immunity.[49] ASP resolutions reflect a similarly nuanced position: they urge states to avoid contacts with persons subject to arrest warrant unless such contact is "essential".[50] Intergovernmental meetings of heads of state or government to discuss topics like regional security are arguably "essential" contacts.

22. Alternatively, the Chamber might consider creating a space for legislative-judicial 'dialogue'. Of course, judges have the final say in interpreting Articles 27 and 98. However, 'dialogue' allows some shared responsibility. The Chamber could affirm the PTC's approach, but hold that the Statute framework leaves space for the ASP to adopt a rule of procedure specifying appropriate exceptions as a matter of legislative policy. Such an approach might provide 'voice' and clarity.

B2. Non-referral of Jordan

23. If the Appeals Chamber adopts the suggested reasoning on intergovernmental conferences, then there is no violation to refer. Even if the Appeals Chamber upholds the PTC approach without the suggested qualifier, there are grounds not to refer Jordan to the UNSC and the ASP. Referral is not automatic.[51]

24. There is no benefit in referral in this instance.[52] Jordan is not currently withholding any assistance. The sufficient and much-needed remedy in this instance is the clarification that the Appeals Chamber will provide. The PTC was correct that a request had been issued and the obligation of states parties is simply to comply.[53] Nonetheless, the Court should show some understanding of the legal stakes for

[49] Amicus submission of Belgium: ICC-02/05-01/09-277-Anx.
[50] Eg. Resolution ICC-ASP/15/Res.3, para 5. The resolution also refers to the "arrest guidelines issued by the Office of the Prosecutor" as well as the UN policy on contacts with persons subject to arrest warrants.
[51] ICC-01/09-02/11-1032 OA 5 (*Kenyatta*), para 49.
[52] A chamber must "consider whether engaging external actors would, in the circumstances of the case, be an effective way to obtain cooperation": South Africa Decision, ICC-02/05-01/09-302, para 135.
[53] Appealed Decision, ICC-02/05-01/09-309, paras 41-45.

states parties. An arrest of a foreign head of state is a momentous action, which would trigger state responsibility if it were not justified, and hence states understandably want great legal clarity. This issue has been clouded by intensely-held and well-argued opinions, which diverge on numerous points. The ICC is the authoritative interpreter of its Statute, and states parties are obliged to comply, but the ICC can still show restraint and understanding, given the stakes, the widespread uncertainty and well-argued controversy.

25. The PTC correctly showed restraint in its response to South Africa.[54] The Appeals Chamber should carefully consider the grounds on which South Africa's situation was distinguished from Jordan's. If the clarified reasoning was not yet available to Jordan, then the same restraint would be appropriate here.[55]

26. These considerations against referral are warranted in and confined to the present case. The Appeals Chamber's contribution on this matter can be forward-looking and clarify the obligations of states parties in similar situations in the future.

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Dated this 17th day of June 2018
At Kingston, Canada

[54] South Africa Decision, ICC-02/05-01/09-302.
[55] Jordan Appeal Brief, ICC-02/05-01/09-326, para 98-101.