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Date: 28 September 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

Final Submissions of the Prosecution following the Appeal Hearing

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Introduction

1. The judgment in this appeal—addressing a problem to which many judges have now applied themselves, uniting in the same ultimate conclusion that ICC States Parties must arrest and surrender President Al-Bashir¹—will confirm the nature of the obligations that States Parties to the Rome Statute have freely assumed, under articles 27, 86, 89, 97, and 98. Giving effect to such freely assumed obligations, whatever they may be, cannot “break the international legal system”;² rather, it gives effect to its animating spirit—the principle that States are bound by those obligations to which they have consented (*pacta sunt servanda*).³
2. ICC States Parties have also expressly accepted that this Court is the guardian of its own “judicial functions”, vested with exclusive competence to “settle” any differences of opinion which may arise.⁴ The Prosecution, like other participants in this process, has consistently acted in good faith to assist the Appeals Chamber with the various legal implications of the arguments in Jordan’s appeal.⁵ The Appeals Chamber—five distinguished judges elected by those same States Parties—will now decide on the merits of these arguments.

Submissions

3. The Prosecution hereby provides its final submissions on certain discrete matters arising from these appeal proceedings. These submissions should, however, be read with the Prosecution’s previous oral and written submissions in their entirety.

A. Grounds 1 and 2: interpreting the Statute and resolution 1593

4. The majority of the Pre-Trial Chamber correctly interpreted the relevant provisions of the Statute, and resolution 1593, and grounds 1 and 2 of Jordan’s appeal should be rejected.

A.1. *The appeal can and should be decided on the basis of the Statute*

5. Precisely *because* States Parties have unequivocally accepted the Court as possessing exclusive competence to settle any differences of opinion concerning its own judicial

¹ See also [ICC-02/05-01/09-T-4](#), p. 81:14-16 (Judge Eboe-Osuji).

² *Contra* [ICC-02/05-01/09-T-8](#), p. 28:18-19 (African Union).

³ See also [ICC-02/05-01/09-T-8](#), p. 27:6-7 (African Union; referring to “the right of a State based on its sovereignty to express its consent to be bound”).

⁴ See [Statute](#), art. 119(1).

⁵ Cf. [ICC-02/05-01/09-T-4](#), p. 27:4-12 (Jordan); [ICC-02/05-01/09-T-5](#), p. 28:1-4 (Jordan); [ICC-02/05-01/09-T-8](#), p. 88:7-10 (Jordan). *But see e.g.* [ICC-02/05-01/09-T-4](#), pp. 46:21-48:13 (Prosecution); [ICC-02/05-01/09-T-5](#), pp. 43:20-45:14.

functions under the Statute,⁶ the Statute is the natural starting point for the Court's legal analysis in the present circumstances.⁷ This is further confirmed by article 21(1), and the constant jurisprudence of the Appeals Chamber. To the extent that the Statute disapplies under article 27(2) *all* immunities which might be opposable to the request to arrest and surrender Mr Al-Bashir, it is unnecessary to entertain more general questions of the contours of those immunities in international law beyond the Statute.⁸

6. The Parties in this appeal agree that the Statute should be interpreted according to the principles of the Vienna Convention.⁹ However, the urging of some Parties and participants to give primary consideration to harmonising the Statute with their view of customary international law is doubtful.¹⁰ While “relevant rules of international law applicable in the relations between the parties” shall “be *taken into account*, together with the context”,¹¹ this cannot mean that treaty provisions shall be interpreted *primarily* on the basis of their consistency with other rules of international law.¹² Such a view would defeat one of the primary purposes of treaty law, which is to allow States to create law which extends *beyond* pre-existing rules of general international law.¹³ To endorse the principle that treaties must always be ‘read down’ to customary international law would be to abdicate the potential for States to develop the law progressively through binding treaties. Such an approach is also plainly rejected in the hierarchy of sources of law established for this Court in article 21(1).

7. Likewise, it cannot be correct that a particular interpretation of a provision is only legally sustainable when the wording is “not open” for any other “interpretive possibilities”—this would defeat the purpose of interpretation altogether, and is inconsistent with the three-fold principle in article 31(1) of the Vienna Convention.¹⁴

⁶ See above para. 2.

⁷ See also [ICC-02/05-01/09-T-4](#), p. 47:14-20 (Prosecution); [ICC-02/05-01/09-T-5](#), p. 17:2-8 (Professor Robinson).

⁸ See e.g. [ICC-02/05-01/09-T-4](#), pp. 47:21-48:13 (Prosecution); [ICC-02/05-01/09-T-6](#), pp. 30:24-33:5 (Professor Kreß). Cf. [ICC-02/05-01/09-T-4](#), pp. 33:17-19, 36:21-24, 50:8-15 (Judge Eboe-Osuji).

⁹ See e.g. [ICC-02/05-01/09-T-4](#), pp. 48:19-51:2 (Prosecution); [ICC-02/05-01/09-T-5](#), pp. 28:23-29:1 (Jordan), 81:19-23 (Professor Lattanzi). See also [ICC-02/05-01/09-T-7](#), pp. 104:22-105:1 (Prosecution); [ICC-02/05-01/09-T-8](#), pp. 67:21-68:2 (Prosecution). *Contra* [ICC-02/05-01/09-T-4](#), p. 39:23-25 (Jordan); [ICC-02/05-01/09-T-8](#), p. 86:2-9 (Jordan).

¹⁰ See e.g. [ICC-02/05-01/09-T-4](#), pp. 82:19-83:20 (African Union); [ICC-02/05-01/09-T-5](#), p. 13:1-16 (Professor Robinson).

¹¹ [Vienna Convention on the Law of Treaties](#), art. 31(3)(c) (emphasis added).

¹² See also [ICC-02/05-01/09-T-4](#), p. 49:15-19 (Prosecution; emphasising article 31(1), Vienna Convention).

¹³ See also [ICC-02/05-01/09-T-4](#), pp. 116:24-117:1 (Professor Lattanzi).

¹⁴ *Contra* [ICC-02/05-01/09-T-7](#), pp. 28:17-30:2 (African Union).

A.2 *Upholding the decision on appeal still gives full effect to article 98(1)*

8. Nothing in article 98(1) contradicts the majority of the Pre-Trial Chamber's correct interpretation of article 27(2).¹⁵ Article 98(1) is indeed a "conflict-avoidance rule", ensuring that ICC States Parties are not placed in a situation where their cooperation obligations require them to breach an obligation owed to a third State.¹⁶ But this does *not* mean that the rule is deprived of meaning if article 27(2) is correctly interpreted to disapply immunities as a bar to States Parties arresting and surrendering their own officials,¹⁷ nor that the majority's reasoning requires a Requested State Party to breach any obligation owed to a third State.¹⁸

9. To the contrary, article 98(1) remains an important procedural safeguard in *all* situations because it *always* requires the Court to *consider* whether a Requested State owes an immunity obligation to a Third State before proceeding with a request for arrest and surrender, and will *always* bar proceedings which create a genuine conflict—such as when an immunity obligation exists, the Third State is not subject to article 27(2), and no waiver is obtained.¹⁹ Furthermore, article 98(1) also applies to cooperation requests under article 93 (for purposes other than arrest and surrender), and which may fall entirely outside the scope of article 27. But nothing in article 98(1) can be taken to suggest that the drafters of the Statute sought to preserve all immunities against arrest and surrender²⁰—this is entirely contrary to the ordinary meaning of the terms used,²¹ as well as the context and object and purpose.²²

A.3. *Resolution 1593 matters because it places obligations upon Sudan under the UN Charter*

10. Since article 98(1) requires the Court to consider whether the Requested State (Jordan) owes an immunity obligation to a Third State (Sudan), this appeal necessarily turns on the question whether Sudan can raise immunity against Jordan. It is in this context that resolution

¹⁵ Cf. [ICC-02/05-01/09-T-7](#), pp. 62:1-63:11 (African Union).

¹⁶ See [ICC-02/05-01/09-T-8](#), p. 87:9-11 (Jordan). See also [ICC-02/05-01/09-T-6](#), p. 98:17-18 (African Union); [ICC-02/05-01/09-T-4](#), p. 99:14-20 (Arab League). See also *below* paras. 14-16.

¹⁷ *Contra* [ICC-02/05-01/09-T-4](#), pp. 31:6-9, 35:6-11, 44:10-11 (Jordan); [ICC-02/05-01/09-T-5](#), p. 4:13-23 (Professor O'Keefe); [ICC-02/05-01/09-T-7](#), pp. 110:22-111:11 (Judge Eboe-Osuji, Professor O'Keefe), 111:16-23 (African Union, Judge Eboe-Osuji). See also [ICC-02/05-01/09-T-5](#), p. 29:16-18 (Jordan).

¹⁸ *Contra* [ICC-02/05-01/09-T-4](#), p. 79:12-15 (African Union).

¹⁹ See also [ICC-02/05-01/09-T-4](#), p. 47:21-24 (Prosecution); [ICC-02/05-01/09-T-7](#), p. 84:17-20 (Professor Robinson).

²⁰ *Contra* [ICC-02/05-01/09-T-7](#), p. 109:2-14 (Professor O'Keefe).

²¹ See e.g. [ICC-02/05-01/09-T-8](#), p. 70:6-10 (Prosecution).

²² See e.g. [ICC-02/05-01/09-T-4](#), p. 112:5-18 (Professor Kreß); [ICC-02/05-01/09-T-8](#), pp. 68:12-70:5 (Prosecution). See also [ICC-02/05-01/09-T-8](#), p. 17:4-5 (African Union).

1593 is significant,²³ because it can only correctly be interpreted to trigger the Court's jurisdiction over the situation in Darfur and require Sudan to “cooperate fully” with the Court—which means making Sudan subject to the necessary obligations laid out in the Statute, including *inter alia* in article 27 and Part 9.²⁴ Notwithstanding claims of the need for ‘express’ wording, it seems to be accepted that broader interpretive considerations remain appropriate.²⁵ In undertaking this analysis, claims that individual States have later revealed their view of the Security Council's collective intent in resolution 1593, or indeed the scope of obligations under the Statute, require great caution as they are necessarily partial, and inevitably shaded by considerations of comity and diplomacy.

A.4. Treaty-based immunities are immaterial in this case

11. If resolution 1593 is interpreted correctly, so that Sudan is made subject *inter alia* to article 27(2) of the Statute, the existence or otherwise of treaty-based immunities under the Pact of the Arab League or the 1953 Convention has no impact on this case. This is because in such circumstances both Sudan and Jordan must be considered to fall within article 30(3) and 30(4)(a) of the Vienna Convention,²⁶ which apply to States mutually bound *both* by an earlier treaty (such as the 1953 Convention) *and* a later treaty (such as the Statute, in Sudan's case via resolution 1593 and the UN Charter). In this scenario, the provisions of the earlier treaty remain effective between those States only to the extent consistent with the later treaty. Consequently, Jordan is not subject to any conflict of legal obligations (and, therefore, commits no internationally wrongful act) creating a bar for the purpose of article 98(1) of the Statute because article 27—in combination with resolution 1593 and the Vienna Convention—is equally effective in displacing any prior treaty-based immunities as it is in displacing any immunities under customary international law. It is thus not necessary to resort

²³ See also [ICC-02/05-01/09-T-6](#), p. 100:10-14 (African Union). Jordan's obligation to comply with the Court's request emanates from its status as an ICC State Party, not resolution 1593: see also [ICC-02/05-01/09-T-6](#), p. 116:2-12 (Jordan); [ICC-02/05-01/09-T-7](#), p. 18:22-25 (Professor Robinson). The fact that conduct may potentially be attributed to a State for such purposes as international human rights law does not preclude the instance of that conduct as an exercise of the Court's jurisdiction—this would lead to absurd consequences. *Contra* [ICC-02/05-01/09-T-8](#), p. 90:10-19.

²⁴ See further ICC-02/05-01/09-331 (“[Response](#)”), paras. 68-81, *especially* para. 77; [ICC-02/05-01/09-T-6](#), pp. 79:16-83:13 (Professor Robinson). *Contra* [ICC-02/05-01/09-T-5](#), p. 103:8-13 (Jordan); [ICC-02/05-01/09-T-6](#), p. 70:3-10 (Professor O'Keefe); [ICC-02/05-01/09-T-7](#), p. 63:15-18 (African Union).

²⁵ See [ICC-02/05-01/09-T-6](#), pp. 123:1-16 (Professor Kreß), 125:17-21 (Professor Robinson). *Cf.* [ICC-02/05-01/09-T-6](#), pp. 119:1-20 (Jordan), 126:10-17 (Professor O'Keefe).

²⁶ *Contra* [ICC-02/05-01/09-T-8](#), pp. 103:4-104:22 (Jordan). See also *below* paras. 15-16.

to resolution 1593 or article 103 of the UN Charter for any purpose other than establishing Sudan's obligations.²⁷

12. Nor do treaty-based immunities have any other relevance in this case.²⁸ While various Parties and participants have referred to the 1953 Convention as establishing an immunity for the benefit of an international organisation—the Arab League²⁹—this is not clearly supported by article 14 of the 1953 Convention. Specifically, while immunities under the Convention cannot be waived if prejudice is caused “to the purpose for which immunity is accorded”, the right of waiver nonetheless appears to be vested in the “*Member State*”.³⁰ The 1953 Convention thus appears to grant an immunity to protect a particular function—the Member State's participation in the organisation—but as a right of the Member State, and not the organisation. In this sense, immunities under the 1953 Convention may apply to persons who are not otherwise entitled to immunity under customary law, but have no material significance for Mr Al-Bashir, in the context of this case.

B. Ground 3: referring Jordan's non-compliance to the ASP and UN Security Council

13. The Pre-Trial Chamber did not err in deciding to refer Jordan's non-compliance to the ASP and the UN Security Council, and ground 3 of Jordan's appeal should be rejected.

B.1. Jordan's “use” of article 97 is unsupported in law

14. The very first provision in Part 9 of the Statute—article 86—obliges States Parties to “cooperate fully” with the Court. Nothing in any subsequent provision of Part 9 (including articles 97 and 98) dilutes or diminishes this obligation in any way. This emphasis on—indeed, expectation of—“full cooperation” is demonstrated by the Statute's plain text,³¹ its object and purpose,³² and, in no small measure, by its drafting history.³³ In particular, as the

²⁷ Cf. [ICC-02/05-01/09-T-7](#), p. 36:10-16 (Jordan).

²⁸ *Contra* [ICC-02/05-01/09-T-5](#), p. 14:5-23 (Professor Robinson); [ICC-02/05-01/09-T-6](#), p. 86:5-20 (Professor Robinson); [ICC-02/05-01/09-T-7](#), p. 85:9-11 (Professor Robinson).

²⁹ See [ICC-02/05-01/09-T-5](#), p. 83:9-17 (Arab League); [ICC-02/05-01/09-T-7](#), p. 18:15-16 (Jordan). Compare [ICC-02/05-01/09-T-4](#), p. 100:2-8 (Arab League).

³⁰ *Contra* [ICC-02/05-01/09-T-5](#), p. 83:9-17 (Arab League; stating “that the Arab League is the one that is going to decide”).

³¹ See *Oxford English Dictionary* (OED Third Edition, December 2016 online) (“*fully* (adverb): In a full manner or degree; to the full; in (its) entirety or totality; completely, entirely”).

³² [Statute](#), Preamble (“Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured [...] by enhancing international cooperation”).

³³ See e.g. P. Mochochoko, “International Cooperation and Judicial Assistance” in R. Lee (ed.), *The International Criminal Court—the Making of the Rome Statute: Issues, Negotiations, Results* (The Hague: Kluwer, 1999) (“Mochochoko”), p. 307 (“[...] States Parties are to ‘cooperate fully’ with the Court in its

drafters' intentions confirm, Part 9 contains no grounds for a State to refuse to surrender a person to the Court.³⁴ Article 97 must also be similarly interpreted: as the drafters' wisdom confirms once more, its scope does not include a "refusal or adversarial challenge" by a State Party.³⁵ Indeed, interpreting a provision that was meant to be a "flexible mechanism" for the "successful execution of the Court's requests for assistance" to now include a State Party's "unilateral refusal" to execute the Court's request, as Jordan does, is both unsupported and a leap too far.³⁶

15. At all points, the Court is the master of the analysis and decision making.³⁷ To find otherwise would attribute to States the Court's essential judicial function.³⁸ Any "conflict of obligations" issue is decided by the Court under article 98: once so decided, States may not use article 97 to dispute the decision or advance contrary interpretations. In this case, nine different judges of the Pre-Trial Chambers had decided that States Parties were obliged to arrest Mr Al-Bashir and surrender him to the Court. But, despite this, Jordan impermissibly remained of a different view.

'investigation and prosecution' of crimes within the jurisdiction of the Court [...] At the same time, that obligation is further defined in compulsory terms through, for instance, [a]rticle 89(1) and [a]rticle 93(1) which provide that States Parties 'shall comply' with requests by the Court for arrest and surrender and for other forms of cooperation. These requirements for compliance, combined with no grounds for refusal to surrender and one limited ground for refusal of other forms of assistance, constitute the general legal framework for States Parties to provide judicial assistance to the Court. [...] Limiting the grounds for refusal was an essential component of strengthening the cooperation regime [...]; *Report of the Preparatory Committee* (Rome, 15 June-17 July 1998), [Draft Statute](#), A/CONF.183/2/Add.1, 14 April 1998, pp. 133-139 (listing various options under article 87, but which, ultimately, were not included in that form).

³⁴ Mochochoko, pp. 310-314 (noting that the draft statute of the PrepCom contained five grounds for refusal to surrender "couched in such broad terms that they would have virtually left it within the unilateral power of States to refuse requests from the Court, relating either to the transfer of persons or any other matter, thus effectively denying cooperation on any conceivable basis", but that following the discussions, "[t]he result of all these efforts is that Part 9 of the Rome Statute contains no grounds on the basis of which a State may refuse to surrender a person to the Court. [...]").

³⁵ [K. Prost, 'The surprises of Part 9 of the Rome Statute on international cooperation and judicial assistance,'](#) [2018] 16(2) *Journal of International Criminal Justice* 363 ("Prost"), p. 370 ("[...] The idea was to have a specific statutory provision available to states should there be practical problems with the execution of a request. At the same time, it should be a flexible mechanism which could be used to encourage successful execution of the Court's requests [...] as opposed to providing for refusal or adversarial challenge[...]").

³⁶ See [Prost](#), p. 370; [ICC-02/05-01/09-T-8](#), p. 4:16-18 (Professor Kreß ruling out "negotiations" about the law as falling under article 97). See also [ICC-02/05-01/09-293-Anx1-Corr](#) ("[28 March 2017 Note-Verbale](#)"); [ICC-02/05-01/09-301-Anx](#) ("[30 June 2017 Note-Verbale](#)")—stating that Jordan would act consistently with Mr Al-Bashir's "immunity"—and [ICC-02/05-01/09-T-7](#), p. 94:1-2 ("Well, if the issue is, could we have physically arrested a person in Jordanian territory, it's true, Jordan decided not to do that."). See further [ICC-02/05-01/09-T-7](#), pp. 51:17-55:17; [ICC-02/05-01/09-T-8](#), pp. 6:16-9:16, 10:16-11:4 (stating, *inter alia*, that article 97 is not meant to dispute the Court's decision, and especially at the last minute). See also rule 195.

³⁷ See [ICC-02/05-01/09-T-4](#), p. 47:21-25; [ICC-02/05-01/09-T-8](#), p. 80:10-11 (Prosecution); see also [Prost](#), p. 368 (noting that concerns about "breaches of existing international law or treaty" were "ultimately addressed in [a]rticle 98, albeit deliberately not as a ground of refusal", emphasis added).

³⁸ [Statute](#), art. 119(1) ("Any dispute concerning the judicial functions of the Court shall be settled by the decision of the Court").

16. Jordan’s specific reliance at the hearing on article 97(c) to contest its obligation was inapposite.³⁹ By their nature, and by a straightforward application of the Vienna Convention, “pre-existing treaties”—such as the 1945 Arab League Charter and the 1953 Convention—cannot constitute “legal impediments” to *contest* the Court’s article 98(1) analysis. Articles 30(3) and 30(4)(a) of the Vienna Convention prevent Jordan from relying on its “pre-existing” treaty obligations to invalidate its obligations under the Rome Statute—the later treaty. Jordan and Sudan are both bound by their obligations under the Rome Statute, and this must prevail.⁴⁰ A good faith interpretation of the duty imposed on States Parties leads to the same conclusion: Jordan must be presumed to have known its pre-existing treaty obligations when it signed the Rome Statute in 1998 and ratified it in 2002. Moreover, the onus remains on the State Party to invoke article 97(c) in a timely and appropriate way. Jordan did not do so. At best, article 97(c) is an avenue for States to bring to the Court’s attention any pre-existing treaties which may not have ordinarily come to the Court’s attention. But this does not mean that the Court must *expressly* address every “pre-existing treaty” in its article 98(1) analysis. Indeed, if the article 97(c) information provided renders the article 98(1) analysis unaltered—as it did in this case—the Court need not consider it any further.

B.2. Jordan’s non-compliance frustrated the exercise of the Court’s powers and functions under article 87(7)

17. Jordan’s failure to execute the Court’s arrest warrant contrary to the Statute’s provisions prevented the Court from exercising its powers and functions, and appropriately led to the article 87(7) finding of non-compliance and the subsequent referral to the ASP and Security Council.⁴¹ The execution of the Court’s arrest warrants is fundamental to the Court’s powers and functions: the Statute and the many article 87(7) decisions thus far addressing States Parties’ failures to execute the Court’s arrest warrants make this clear.

18. Issuing and executing the arrest warrant is an essential part of the Court’s process. Article 58 of the Statute outlines the Court’s powers to issue arrest warrants and protects the Court’s function. Indeed, a necessary requirement to issue warrants is to ensure that the trial can take place with the accused’s appearance. In other words, a trial cannot be held without the accused, more so in the case of Mr Al-Bashir.⁴² The Pre-Trial Chamber, in issuing the

³⁹ See e.g., [ICC-02/05-01/09-T-7](#), p. 94:5-8.

⁴⁰ See above para. 11.

⁴¹ [ICC-02/05-01/09-T-7](#), pp. 95:16-99:10.

⁴² See [Statute](#), art. 58(1)(b)(i) (“The arrest of the person appears necessary to ensure the person’s appearance at trial”); C. Hall and C. Ryngaert, “Article 58”, in O. Triffterer and K. Ambos (eds.), *The Rome Statute of the*

arrest warrants against Mr Al-Bashir, conducted exactly this analysis.⁴³ Notwithstanding the limited possibility of confirmation proceedings *in absentia*,⁴⁴ the execution of the arrest warrant—as the plain terms of article 58 show—is intrinsically connected with the trial itself. One does not exist without the other.⁴⁵ And if one is frustrated, so is the other. Moreover, dissociating the execution of arrest warrants from the Court’s other core functions sends the unwelcome message that States Parties need not execute its arrest warrants—presumably because the trial remains unaffected. Rather than achieving “legal liability” despite “legal process”,⁴⁶ this would entrench impunity (and the notion that personal immunities effectively remain inviolable before this Court) and undermine the Statute’s object and purpose.

19. The Statute does not allow trials *in absentia*.⁴⁷ The Appeals Chamber has said so.⁴⁸ Commentators agree.⁴⁹ Moreover, as the Appeals Chamber has held, articles 63(1) and 67(1)(d) together preclude any interpretation that “would allow for a finding that the accused had implicitly waived his or her right to be present by absconding or failing to appear for trial.”⁵⁰ Further, the Statute’s object and purpose requires the accused’s appearance for trial. The accused is not “merely a passive observer of the trial”: he or she should follow witness testimony, and confront it where necessary. The accused’s absence from his own trial could adversely affect the morale and participation of victims and witnesses and undermine public

International Criminal Court: a Commentary, 3rd Ed. (München/Oxford/Baden-Baden: C.H. Beck/Hart/Nomos, 2016), p. 1448, mn. 16 (noting that trials *in absentia* are not permitted by the Statute and that reasons requiring a person’s appearance at trial include the person’s political position, international contacts and/or economic resources, the seriousness of the crimes and the length of the likely sentence, the rejection of the Court’s jurisdiction and the State’s history of non-cooperation with the Court in executing arrest warrants).

⁴³ See e.g. ICC-02/05-01/09-3 (“[Article 58 Decision](#)”), paras. 227-236 (noting that Mr Al-Bashir’s arrest was necessary to ensure his presence at trial, to ensure that he does not obstruct or endanger the proceedings, and to prevent him from continuing to commit the crimes).

⁴⁴ See ICC-01/11-01/11-440 (“[Gaddafi Pre-Confirmation Decision](#)”), paras. 23-25 (noting that the confirmation proceedings *in absentia* under article 61(2) may be held, and that a Chamber must decide “whether there is cause” to hold confirmation of charges *in absentia*); ICC-01/11-01/11-425-Red (“[30 August 2013 Prosecution Submission](#)”), para. 28, fn. 51 (noting that commentators remain divided on whether confirmation proceedings *in absentia* can be conducted without the initial appearance of the accused.”)

⁴⁵ See ICC-01/09-01/11-1066-Anx (“[Ruto Joint Separate Opinion of Judges Kourula and Ušacka](#)”), para. 7 (noting that excusing an accused from the obligation to attend trial would render a warrant or summons issued on that basis redundant).

⁴⁶ ICC-02/05-01/09-T-4, p. 93:12-13 (Presiding Judge Eboe-Osuji: “Does there come a point where in a criminal case you cannot get to legal liability [jurisdiction] without a legal process [immunity]?”)

⁴⁷ [Statute](#), art. 63(1) (“The accused shall be present during the trial”). Rule 134 *quater* only allows for the possibility of “excusal from presence at trial due to extraordinary public duties” if subject to a summons.

⁴⁸ ICC-01/09-01/11-1066 (“[Ruto Continuous Presence AD](#)”), para. 53 (“[...] Ultimately, concerns in relation to the rights of the accused, as well as the practical utility of trials *in absentia* and their potential to discredit the Court prevailed and article 63(1) [...] was incorporated in order to preclude this possibility”).

⁴⁹ See e.g. A. Cassese et al. (eds.), *The Rome Statute of the International Criminal Court: a Commentary* (Oxford: OUP, 2002), p. 1283 (“Trial *in absentia*, or *par contumace*, that is, in the absence of the accused, is not provided for by the Statute. [...] *In absentia* proceedings are in absolute contradiction with the recognised fundamental human right of the accused to be present at trial”).

⁵⁰ [Ruto Continuous Presence AD](#), para. 54.

confidence in the Court.⁵¹ Similar considerations—and the complexity of the trials and the gravitas of the proceedings—demand the accused’s appearance for trial⁵²—all the more in Mr Al-Bashir’s case, when Sudan has publicly rejected the Court’s jurisdiction.⁵³

20. Several practical reasons militate against holding *in absentia* proceedings in this case. The arrest warrants are public: vulnerable and insider witnesses are unlikely to cooperate knowing that they could be retaliated against. The possibility that Mr Al-Bashir may interfere with witnesses and obstruct justice was a reason for his arrest.⁵⁴ The Court may incur heavy protection, operational and financial costs in hearing the evidence at this stage without control over the accused, only to have it repeated should he be apprehended at a later stage. This course of action may not assist the search for truth, or improve efficiency in the long term.

21. The Prosecution acknowledges the Presiding Judge’s previously expressed view that a Trial Chamber has the discretion to hold a trial *in absentia* for an absconding accused,⁵⁵ but remains respectfully of a different view (as expressed at the hearing). Notwithstanding, the question of trials *in absentia* is beyond the scope of *this* appeal, and might even require a full consideration in a different appeal following an appropriate first instance decision. At this late stage of the appeal—and with few pages at its disposal—the Prosecution’s ability to fully ventilate the issue is limited. However, given the onerous consequences for the Court (requiring the ASP to legislate) and possible prejudice to its functions, the Prosecution respectfully requests the Appeals Chamber—if intending to make the *in absentia* principle the *ratio* of its decision—to allow it additional time and pages to address the issue squarely.

B.3. Jordan’s submissions misstate the record

22. Despite submissions to the contrary, the record, for instance, shows that (i) the Prosecution consistently viewed Jordan as breaching its obligations and did not “recognise” that Jordan was seeking genuine consultations;⁵⁶ (ii) the Pre-Trial Chamber found that Jordan approached the Court only “one day before”;⁵⁷ (iii) although Jordan approached the Court too late for “consultations” *before* Mr Al-Bashir left Jordan, the Pre-Trial Chamber gave it ample

⁵¹ [Ruto Continuous Presence AD](#), para. 49 and ICC-01/09-01/11-777 (“[Ruto Majority Decision](#)”), para. 104 (requiring the accused’s presence for significant parts of the trial).

⁵² [Ruto Joint Separate Opinion of Judges Kourula and Ušacka](#), paras. 8-9.

⁵³ ICC-02/05-01/09-227 (“[Sudan Non-Cooperation Decision](#)”), paras. 9-12.

⁵⁴ [Article 58 Decision](#), paras. 233-234.

⁵⁵ ICC-01/09-02/11-863-Anx-Corr (“[Kenyatta Judge Eboe-Osui’s Dissenting Opinion](#)”), paras. 37-189.

⁵⁶ See [ICC-02/05-01/09-292](#), paras. 6, 8; [ICC-02/05-01/09-294](#), paras. 4-9; [ICC-02/05-01/09-303](#), paras. 7-29; [ICC-02/05-01/09-T-7](#), pp. 50:19-51:3 (Prosecution). *Contra* [ICC-02/05-01/09-T-8](#), p. 94:13-20.

⁵⁷ ICC-02/05-01/09-309 (“[Decision](#)”), paras. 47-48. *Contra* [ICC-02/05-01/09-T-8](#), p. 95:4-7.

time after the visit to convey its position.⁵⁸ Moreover, Jordan's "notice" did not arise from "transcripts" alone, but rather from when it was itself notified of the arrest warrants, and then from the public record dating back to 2015.⁵⁹ Likewise, Jordan cannot rely on the 2017 South Africa Decision for "notice": the Chamber merely re-affirmed that South Africa's obligations had been "unequivocally" established based on *inter alia* domestic proceedings, but States Parties, including Jordan, were already obliged to arrest Mr Al-Bashir.⁶⁰ If at all, comparing Jordan's situation with other referred States Parties (*e.g.*, Malawi, Chad, the DRC) is more apposite.

23. A judicial determination of the law and facts will decide this appeal, and not a consensus of non-judicial views.⁶¹ Jordan has failed to show error, and cannot rely on "usurpatory appellate intervention" in a discretionary matter that the Pre-Trial Chamber was familiar with.⁶² Moreover, even when asked, Jordan's views on cooperation remained unspecific.⁶³ Finally, the Prosecution regrets Jordan's remarks alleging an "abusive strategy".⁶⁴ Jordan was a party on this appeal. The Prosecution was entitled to respond. Having invoked the Court's processes, making unfounded comments against officers of that same Court for participating in that process is unjustified and unfortunate.

Conclusion

24. For all these reasons, and those contained in the Prosecution's previous submissions and elaborated in the oral hearing, the Appeal should be dismissed.



Fatou Bensouda, Prosecutor

Dated this 28th day of September 2018⁶⁵

At The Hague, The Netherlands

⁵⁸ [Response](#), para. 105. *Contra* [ICC-02/05-01/09-T-8](#), p. 95:11-16.

⁵⁹ [Response](#), paras. 109, 111-112; [ICC-02/05-01/09-385-AnxA](#) (C3). *Contra* [ICC-02/05-01/09-T-8](#), p. 98:3-5.

⁶⁰ [ICC-02/05-01/09-T-8](#), pp. 81:9-82:5. *Contra* [ICC-02/05-01/09-T-8](#), pp. 97:25-98:3.

⁶¹ *Contra* [ICC-02/05-01/09-T-8](#), p. 100:18-22.

⁶² [Kenya Judge Eboe-Osuji's Dissenting Opinion](#), paras. 28-33.

⁶³ [ICC-02/05-01/09-T-6](#), pp. 97:21-98:3, 116:16-118:3 (responding to Judge Ibáñez's question).

⁶⁴ [ICC-02/05-01/09-T-4](#), pp. 26:19-27:12; [ICC-02/05-01/09-T-8](#), pp. 106:17-107:6.

⁶⁵ This submission complies with regulation 36: [ICC-01/11-01/11-565 OA6](#), para. 32.