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**PRE-TRIAL CHAMBER II**

**Before:** Judge Cuno Tarfusser, Presiding Judge  
Judge Marc Perrin de Brichambaut  
Judge Chang-ho Chung

**SITUATION IN DARFUR, SUDAN**

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

**Public**

**Decision under article 87(7) of the Rome Statute on the non-compliance by South Africa with the request by the Court for the arrest and surrender of Omar Al-Bashir**

To be notified, in accordance with Regulation 31 of the Regulations of the Court, to:

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**Pre-Trial Chamber II** (“Chamber”) of the International Criminal Court (“Court”), acting under article 87(7) of the Rome Statute (“Statute”), issues this decision concerning the non-compliance by the Republic of South Africa (“South Africa”) with the request by the Court for the arrest and surrender of Omar Hassan Ahmad Al-Bashir (“Omar Al-Bashir”).

## **I. BACKGROUND AND PROCEDURAL HISTORY**

### *A. Proceedings against Omar Al-Bashir before the Court*

1. On 31 March 2005, the Security Council of the United Nations (“Security Council”), acting under Chapter VII of the Charter of the United Nations, adopted Resolution 1593 (2005), whereby it referred the situation in Darfur, Sudan, since 1 July 2002 to the Prosecutor of the Court and decided that “the Government of Sudan and all other parties to the conflict in Darfur, shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor”.<sup>1</sup>
2. Following investigations on the part of the Prosecutor into the situation as referred by the Security Council, and upon application by the Prosecutor,<sup>2</sup> Pre-Trial Chamber I issued, on 4 March 2009 and 12 July 2010, two warrants of arrest against Omar Al-Bashir for war crimes, crimes against humanity and genocide allegedly committed in Darfur from March 2003 to, at least, 14 July 2008.<sup>3</sup>
3. Following the issuance of the two warrants of arrest, the Court, pursuant to Part 9 of the Statute, transmitted to the States Parties to the Statute requests for the arrest of

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<sup>1</sup> S/RES/1593 (2005).

<sup>2</sup> ICC-02/05-151-US-Exp and annexes.

<sup>3</sup> “Warrant of Arrest for Omar Hassan Ahmad Al Bashir”, 4 March 2009, ICC-02/05-01/09-1; “Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir”, 12 July 2010, ICC-02/05-01/09-95.

Omar Al-Bashir and his surrender to the Court. South Africa was notified of the requests on 5 March 2009 and 16 August 2010 respectively.<sup>4</sup>

4. To date, the warrants of arrest against Omar Al-Bashir are yet to be executed and, pending his appearance before the Court, proceedings against Omar Al-Bashir remain halted.

***B. Omar Al-Bashir's visit to South Africa between 13 and 15 June 2015***

5. In May 2015, the Court learned from media reports that Omar Al-Bashir was intending to travel to South Africa for the purpose of attending a summit of the African Union due to take place in Johannesburg from Monday, 7 June, to Tuesday, 15 June 2015 ("African Union Summit").
6. On 28 May 2015, the Registrar of the Court, acting on the basis of these media reports, notified to the competent authorities of South Africa of a request for cooperation requesting South Africa: (i) to arrest Omar Al-Bashir and surrender him to the Court should he enter South African territory, in accordance with articles 86 and 89 of the Statute; and, in the event of any problem impeding or preventing the execution of the request for cooperation (ii) to consult with the Court without delay in order to resolve the matter.<sup>5</sup>
7. On Thursday, 11 June 2015, the Embassy of South Africa in the Netherlands contacted the Registry to request an urgent meeting between the Registrar and the Chief State Law Adviser to the Government of the Republic of South Africa and a delegation from the Embassy at 17.00 hours the following day, with a view to entering into consultations pursuant to article 97 of the Statute.<sup>6</sup> The Registry

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<sup>4</sup> See reference in ICC-02/05-01/09-239-Conf-Anx1.

<sup>5</sup> ICC-02/05-01/09-239-Conf-Anx1.

<sup>6</sup> ICC-02/05-01/09-239-Conf, para. 3.

indicated to the Embassy of South Africa that it would request guidance from the Chamber and advise it of the outcome as soon as possible.<sup>7</sup>

8. The following morning – on Friday, 12 June 2015 – the Chamber was informed of the request by South Africa to have a consultation meeting with the Court at 17.00 hours that day.<sup>8</sup>
9. After the Prosecutor responded to the request by South Africa<sup>9</sup> and further information was provided through the Registry on the content of the consultation meeting sought by South Africa, it was decided to schedule a meeting at the time proposed by South Africa, to be presided by the Presiding Judge of the Chamber, Judge Cuno Tarfusser, and to be attended by representatives of South Africa, the Registry and the Office of the Prosecutor. This meeting took place at 17.00 hours on Friday, 12 June 2015.<sup>10</sup>
10. During this meeting, the Presiding Judge pointed out, *inter alia*, that: (i) all of the issues tabled by South Africa had already been decided upon by the Court; and (ii) the consultations had no suspensive effect on South Africa's outstanding obligations under the Statute to cooperate with the Court and proceed with the arrest and surrender of Omar Al-Bashir.
11. The following day, Saturday, 13 June 2015, Omar Al-Bashir entered the territory of the Republic of South Africa.

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<sup>7</sup> *Ibid.*, para. 4.

<sup>8</sup> *Id.*

<sup>9</sup> ICC-02/05-01/09-240.

<sup>10</sup> See transcripts of this meeting, ICC-02/05-01/09-243-Anx2.

12. In the course of the day, the Chief State Law Adviser of the Republic of South Africa met, separately, with representatives of the Registry of the Court and with representatives of the Office of the Prosecutor.<sup>11</sup>
13. In the evening of the same day, the Chamber received an urgent request from the Prosecutor seeking that the Presiding Judge issue an order clarifying that (i) there was no ambiguity regarding South Africa's obligation immediately to arrest Omar Al-Bashir and surrender him to the Court, (ii) issues relating to domestic law did not nullify or change South Africa's obligations under the Statute, and (iii) South Africa's immediate obligation to arrest and surrender Omar Al-Bashir was not subject to any delay, stay or suspensive effect.<sup>12</sup>
14. Later in the evening of Saturday, 13 June 2015, the Presiding Judge rejected the Prosecutor's request, observing that the position of the Court maintaining that South Africa had an obligation to arrest and surrender Omar Al-Bashir to the Court had already been made sufficiently clear and that no further reminder or clarification was necessary.<sup>13</sup>
15. Omar Al-Bashir left the territory of the Republic of South Africa in the morning of Monday, 15 June 2015.
16. Despite the Court's request for the arrest of Omar Al-Bashir and his surrender to the Court, South Africa did not arrest and surrender him while he was on its territory between 13 and 15 June 2015.

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<sup>11</sup> ICC-02/05-01/09-243, paras 3 and 4

<sup>12</sup> ICC-02/05-01/09-241.

<sup>13</sup> "Decision following the Prosecutor's request for an order further clarifying that the Republic of South Africa is under the obligation to immediately arrest and surrender Omar Al Bashir", ICC-02/05-01/09-242.

*C. Proceedings under article 87(7) of the Statute and regulation 109 of the Regulations of the Court*

17. On 4 September 2015, the Chamber held that the events recounted above warranted the opening of proceedings pursuant to article 87(7) of the Statute and, in line with regulation 109 of the Regulations of the Court (“Regulations”), requested the competent authorities of South Africa to submit “their views on the events surrounding Omar Al-Bashir’s attendance of the African Union summit in Johannesburg on 13, 14 and 15 June 2015, with particular reference to their failure to arrest and surrender Omar Al-Bashir, for the purposes of the Chamber’s determination pursuant to article 87(7) of the Statute”.<sup>14</sup> The Chamber set the time limit at 5 October 2015.
18. On 15 October 2015, the Chamber, upon request by South Africa for an extension of this time limit,<sup>15</sup> granted South Africa “until such time as the currently ongoing relevant judicial proceedings before the courts of South Africa are finalised”.<sup>16</sup> In addition, the Chamber ordered “the competent authorities of the Republic of South Africa to promptly report to the Chamber on any developments in the relevant domestic judicial proceedings as they occur”.<sup>17</sup>
19. Following the Chamber’s decision, South Africa submitted three reports concerning the progress of the ongoing domestic judicial proceedings before its national courts on 21<sup>18</sup> and 24<sup>19</sup> December 2015, and on 4 May 2016.<sup>20</sup>

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<sup>14</sup> “Order requesting submissions from the Republic of South Africa for the purposes of proceedings under article 87(7) of the Rome Statute”, ICC-02/05-01/09-247.

<sup>15</sup> ICC-02/05-01/09-248 and ICC-02/05-01/09-248-AnxI.

<sup>16</sup> “Decision on the request of the Republic of South Africa for an extension of the time limit for submitting their views for the purposes of proceedings under article 87(7) of the Rome Statute”, ICC-02/05-01/09-249, p. 6.

<sup>17</sup> *Id.*

<sup>18</sup> ICC-02/05-01/09-256 and ICC-02/05-01/09-256-Anx.

<sup>19</sup> ICC-02/05-02/09-257.

<sup>20</sup> ICC-02/05-01/09-258 and ICC-02/05-01/09-258-Anx.



20. On 30 November 2016, the Registrar filed in the record of the case a note verbale addressed by South Africa to the Secretariat of the Assembly of States Parties and dated 21 November 2016.<sup>21</sup> In this note verbale it was stated that “the domestic court processes have now been concluded” and that “South Africa will be submitting its views and observations for the purposes of the Article 87(7) proceedings”.<sup>22</sup> In this regard, South Africa requested the Court to provide “guidance on the rules and procedures which would govern the submission of its views and observations in terms of Article 87(7)”.<sup>23</sup>
21. On 8 December 2016, the Chamber decided to convene a hearing for the purpose of receiving submissions, in law or fact, concerning the subject matter of the present proceedings under article 87(7) of the Statute and regulation 109 of the Regulations, in particular on the issues of:
- (i) whether South Africa failed to comply with its obligations under the Statute by not arresting and surrendering Omar Al-Bashir to the Court while he was on South African territory despite having received a request from the Court under articles 87 and 89 of the Statute for the arrest and surrender of Omar Al-Bashir; and, if so,
  - (ii) whether circumstances are such that a formal finding of non-compliance by South Africa in this respect and referral of the matter to the Assembly of States Parties to the Rome Statute and/or the Security Council of the United Nations within the meaning of article 87(7) of the Statute are warranted.<sup>24</sup>

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<sup>21</sup> ICC-02/05-01/09-273-Anx1.

<sup>22</sup> *Ibid.*, p. 4.

<sup>23</sup> *Ibid.*, p. 5.

<sup>24</sup> “Decision convening a public hearing for the purposes of a determination under article 87(7) of the Statute with respect to the Republic of South Africa”, ICC-02/05-01/09-274, para. 15.

22. The Chamber invited to the hearing, in addition to the representatives of South Africa, also the Prosecutor of the Court and representatives of the United Nations.<sup>25</sup> Subsequently, the Chamber, observing that “the participants in the present proceedings are not the same as in the proceedings on the merits of the case against Omar Al Bashir”, further explained that:

The only indispensable participant is South Africa, which has the right to be heard in accordance with regulation 109 of the Regulations. Beyond that, the Chamber also involved the Prosecutor, whose request to the Chamber under article 58 of the Statute is at the origin of the warrants of arrest against Omar Al Bashir, as well as the United Nations, considering that the Prosecutor initiated an investigation into the situation in Darfur, Sudan, following a referral by the Security Council. The Prosecutor and the United Nations were involved not as a matter of right but because the Chamber deemed they could make submissions relevant to the Chamber’s determination.<sup>26</sup>

23. The United Nations subsequently responded, stating that it would not be sending a representative to attend the hearing and would not be making written submissions for the Chamber’s consideration.<sup>27</sup>
24. As authorized by the Chamber, written submissions in advance of the hearing were filed on 17 March 2017 by the Office of the Prosecutor<sup>28</sup> and by South Africa.<sup>29</sup>
25. In addition, the Chamber received written observations from the Kingdom of Belgium (“Belgium”)<sup>30</sup> and from the Southern Africa Litigation Centre.<sup>31</sup>

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<sup>25</sup> *Ibid.*, para. 14.

<sup>26</sup> “Decision on the ‘Request to present views and concerns in 7 April 2017 public hearing for the purposes of a determination under article 87(7) of the Statute with respect to the Republic of South Africa”, 9 March 2017, ICC-02/05-01/09-286, para. 6.

<sup>27</sup> ICC-02/05-01/09-282-Anx.

<sup>28</sup> ICC-02/05-01/09-289.

<sup>29</sup> ICC-02/05-01/09-290.

<sup>30</sup> ICC-02/05-01/09-277-Anx (also available in English: ICC-02/05-01/09-277-Anx-tENG).

<sup>31</sup> ICC-02/05-01/09-288.

26. On 7 April 2017, a public hearing took place before the Chamber.<sup>32</sup> Representatives of South Africa and of the Office of the Prosecutor made submissions, in fact and in law, on the issues under consideration.

## II. SUBMISSIONS

### *A. Submissions of South Africa*

27. South Africa submitted at the hearing, first, that three fundamental errors had occurred in the conduct of article 97 consultations in June 2015: (i) South Africa's request for consultations had been wrongly dealt with as had the consultations themselves; (ii) the request had been subjected to a quasi-judicial rather than a diplomatic and political process; and (iii) no rules applicable to consultations under article 97 of the Statute were available.<sup>33</sup>
28. In its written submissions in advance of the hearing, South Africa made more detailed arguments on this matter. It submitted that it was "inappropriate and not acceptable" for the Court to disregard the fact "that the South African Ambassador [had] a specific mandate to make a request for consultations, and that in addition he indicated clearly that he was not mandated to represent the Government in consultations or in proceedings before the Court".<sup>34</sup> It argued that it had not been afforded the opportunity to be appropriately represented at the consultations and that, in the absence of rules of procedure applicable under article 97 of the Statute, the Court "should have erred on the side of caution in its approach to the request".<sup>35</sup>
29. At the hearing, South Africa emphasized that the present proceedings and the domestic proceedings in South Africa on a very similar subject matter – which have recently been completed – are different and that the question before the Chamber is

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<sup>32</sup> ICC-02/05-01/09-T-2-ENG.

<sup>33</sup> *Ibid.*, p. 10, line 21, to p. 11, line 17.

<sup>34</sup> ICC-02/05-01/09-290, para. 40.

<sup>35</sup> *Ibid.*, paras 47 and 48.

not whether South Africa had violated its legal obligations under South African domestic law but whether South Africa was in violation of its duties under the Rome Statute and international law in general.<sup>36</sup>

30. On the question of whether South Africa was obliged to arrest Omar Al-Bashir and surrender him to the Court, South Africa submitted that the fact that this Chamber had previously decided on a matter in a particular way could not be conclusive, in particular since the Appeals Chamber had yet to rule on the matter.<sup>37</sup> South Africa further submitted that in spite of a prior ruling, “the basic and most fundamental rule is that each case must be seen on its own merit and each party to the case must be permitted to make its own arguments”.<sup>38</sup>
31. South Africa also disputed the suggestion that there was no ambiguity and no uncertainty with respect to its obligation to arrest and surrender Omar Al-Bashir and asserted that previous decisions of the Court on this matter had been inconsistent.<sup>39</sup> It challenged the decisions of Pre-Trial Chamber I on the non-compliance of the Republic of Malawi and the Republic of Chad, on the ground that those decisions improperly conflate the presence of jurisdiction of an international court with the absence of immunity from national jurisdiction.<sup>40</sup> It also challenged the decision of this Chamber on the non-compliance of the Democratic Republic of the Congo, essentially on the ground that it lacked reasoning for its crucial finding, namely that Security Council Resolution 1593 (2005) constitutes a waiver of Omar Al-Bashir’s

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<sup>36</sup> ICC-02/05-01/09-T-2-ENG, p. 13, lines 4-10.

<sup>37</sup> *Ibid.*, p. 17, lines 4-6.

<sup>38</sup> *Ibid.*, p. 17, lines 14-17.

<sup>39</sup> *Ibid.*, p. 19, lines 1-4; see also ICC-02/05-01/09-290, paras 38, 70.

<sup>40</sup> *Ibid.*, p. 23, line 21, to p. 25, line 7; making reference to Pre-Trial Chamber I, “Corrigendum to the Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir”, 13 December 2011, ICC-02/05-01/09-139-Corr, and “Decision pursuant to article 87(7) of the Rome Statute on the refusal of the Republic of Chad to comply with the cooperation requests issued by the Court with respect to the arrest and surrender of Omar Hassan Ahmad Al Bashir”, 13 December 2011, ICC-02/05-01/09-140-tENG.

immunity.<sup>41</sup> In its written submissions, South Africa presented the additional argument that it is questionable whether the Security Council has the authority to waive immunities of Heads of State.<sup>42</sup>

32. In essence, the position expressed by South Africa at the hearing is that Omar Al-Bashir enjoys immunity from criminal proceedings, including from arrest, under customary international law, and that since that immunity had not been waived by Sudan or otherwise, the Court was precluded by article 98(1) of the Statute from requesting South Africa to arrest and surrender Omar Al-Bashir and, consequently, South Africa was not obliged to arrest Omar Al-Bashir and surrender him to the Court.<sup>43</sup>
33. While South Africa's submissions at the hearing identified customary international law as the basis for Omar Al-Bashir's immunity,<sup>44</sup> its written submissions made in advance of the hearing also stated that it was under an obligation, under article VIII(1) of the Host Agreement concluded between itself and the African Union, to respect the immunities of Omar Al-Bashir.<sup>45</sup>
34. In South Africa's submission, Resolution 1593 (2005) cannot be interpreted to include a waiver of Omar Al-Bashir's immunity as Head of State. South Africa argued that a consideration of the ordinary meaning of paragraph 2 of the resolution "suggests that it is not at all concerned with immunities".<sup>46</sup> South Africa added that even if it were accepted that said paragraph implicated immunities, its ordinary meaning would suggest that Sudan would be obliged to waive immunities and that

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<sup>41</sup> ICC-02/05-01/09-T-2-ENG, p. 25, line 11, to p. 27, line 13; see also ICC-02/05-01/09-290, paras 61-67; making reference to Pre-Trial Chamber II, "Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court", 9 April 2014, ICC-02/05-01/09-195.

<sup>42</sup> ICC-02/05-01/09-290, para. 85.

<sup>43</sup> ICC-02/05-01/09-T-2-ENG, p. 38, lines 7-8; see also ICC-02/05-01/09-290, paras 53, 71-74, 101.

<sup>44</sup> *Ibid.*, p. 18, lines 10-12.

<sup>45</sup> *Ibid.*, paras 75-80.

<sup>46</sup> *Ibid.*, p. 28, lines 22-24; see also ICC-02/05-01/09-290, para. 86.1.

non-compliance with that duty would be a matter between Sudan and the Security Council.<sup>47</sup> To hold otherwise is, in the words of South Africa, “to thrust the responsibility of the Council for acting against noncompliance with duties on Sudan onto individual states”.<sup>48</sup> In this context, South Africa made reference to the possibility of its becoming liable to Sudan for a violation of the latter’s rights under international law.<sup>49</sup>

35. South Africa further submitted that there is nothing in the context of Security Council Resolution 1593 (2005) that suggests a waiver of immunity. It argued that, on the contrary, the consequence of paragraph 3 of the resolution – which invites the Court and the African Union to discuss practical arrangements that will facilitate the work of the Prosecutor and of the Court – is that it is not up to the Court unilaterally to determine that the resolution waives immunity.<sup>50</sup> It also submitted, referring to paragraph 6 of the resolution, that to the extent that the Security Council sought in this resolution to depart from rules of international law it did so explicitly.<sup>51</sup>
36. In the submission of South Africa, as concerns the object and purpose of Resolution 1593 (2005), “a holistic reading of the resolution is that the resolution is multifaceted and that the jurisdiction of the ICC is but a cog in the strategy of the Council. If you look at the resolution as a whole, you get a sense that jurisdiction is not to be achieved at all costs.”<sup>52</sup> South Africa also submitted that Resolution 1593 (2005) should, to the extent possible, be interpreted in a way that is consistent with existing international law, including the law on immunities.<sup>53</sup> To support its contention that any waiver of immunity must be explicit, South Africa also referred to article 32(2) of

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<sup>47</sup> ICC-02/05-01/09-T-2-ENG, p. 29, line 17, to p. 30, line 4.

<sup>48</sup> *Ibid.*, p. 30, lines 5-7.

<sup>49</sup> *Ibid.*, p. 30, lines 9-22.

<sup>50</sup> *Ibid.*, p. 32, lines 5-14.

<sup>51</sup> *Ibid.*, p. 32, line 15, to p. 33, line 6.

<sup>52</sup> *Ibid.*, p. 33, lines 7-11.

<sup>53</sup> *Ibid.*, p. 33, line 25, to p. 34, line 7; see also ICC-02/05-01/09-290, paras 86.2 and 88.

the Vienna Convention on Diplomatic Relations and, generally, to “the resolutions on piracy [and] terrorism”.<sup>54</sup>

37. South Africa also made an argument for an interpretation of Resolution 1593 (2005) based on subsequent practice. It submitted that member States of the Security Council have never expressed the view that Resolution 1593 (2005) amounted to a waiver of immunity and, separately, that States Parties to the Statute have previously hosted Omar Al-Bashir and not arrested him.<sup>55</sup> In the written submissions, a similar argument was made, namely that “if the UNSC intended to remove immunity, it could have clarified the situation by adopting another resolution”.<sup>56</sup> The refusal of the Security Council to defer proceedings under article 16 of the Statute is, in the view of South Africa, not relevant, as that discussion is related not to the immunity of Omar Al-Bashir, but to “the peace versus justice issue”.<sup>57</sup>
38. At the hearing South Africa also contested the proposition that the immunity of Omar Al-Bashir is inoperable because the entire Statute, including article 27(2), applies to the situation in Darfur as a result of Security Council Resolution 1593 (2005). It argued that, if the Security Council made the Statute applicable to Sudan, that included article 98, and that article 27(2) applies only to immunity from the jurisdiction of the Court.<sup>58</sup>
39. Alternatively, South Africa submitted that, were the Chamber to find non-compliance on its part, a referral to the Security Council and/or the Assembly of States Parties would be unwarranted as its only purpose would be to cast South Africa in a bad light and it would not provide an incentive for cooperation.<sup>59</sup>

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<sup>54</sup> ICC-02/05-01/09-T-2-ENG, p. 34, line 22, to p. 35, line 8; see also ICC-02/05-01/09-290, para. 87.

<sup>55</sup> ICC-02/05-01/09-T-2-ENG, p. 35, line 12, to p. 36, line 1.

<sup>56</sup> ICC-02/05-01/09-290, para. 90.

<sup>57</sup> ICC-02/05-01/09-T-2-ENG, p. 84, lines 24-25.

<sup>58</sup> *Ibid.*, p. 36, line 15, to p. 37, line 24; see also ICC-02/05-01/09-290, para. 52.2.

<sup>59</sup> *Ibid.*, p. 38, lines 11-23.

40. South Africa also referred to the “political and diplomatic contexts” and made the argument that “[a]s a leading player in peace efforts, [it] cannot disengage from the African Union or adopt a policy that would suggest [it is] not going to host AU heads of state”.<sup>60</sup>
41. South Africa further requested the Chamber to “obtain an authoritative interpretation of UN Security Council Resolution 1593 from the UN Security Council, including by calling upon the UN Security Council to request the International Court of Justice for an advisory opinion in terms of Article 96(1) of the UN Charter”.<sup>61</sup> In the alternative, should the Chamber make a finding of non-compliance, South Africa requested that the Chamber grant it leave to the Appeals Chamber for the purposes of a final determination.<sup>62</sup>

## ***B. Other submissions received in the present proceedings***

### **1. Submissions of the Prosecutor**

42. At the hearing the Prosecutor submitted that South Africa had known of its obligation to arrest and surrender Omar Al-Bashir, had acknowledged that obligation until June 2015, and had had the ability to arrest and surrender him, but had chosen not to do so.<sup>63</sup>
43. As concerns consultations under article 97 of the Statute, the Prosecutor submitted that the fact that the consultations were requested and took place did not alter or suspend the “pre-existing, clear, standing obligation to comply with the arrest warrants”.<sup>64</sup> In the view of the Prosecutor, “once these consultations clarified and re-affirmed South Africa’s obligation, South Africa should have complied even if it

<sup>60</sup> *Ibid.*, p. 39, lines 9-10; p. 40, lines 5-6; see also ICC-02/05-01/09-290, paras 17-24.

<sup>61</sup> ICC-02/05-01/09-T-2-ENG, p. 40, lines 18-21; see also ICC-02/05-01/09-290, paras 94 and 103.

<sup>62</sup> ICC-02/05-01/09-T-2-ENG, p. 40, lines 22-25; see also ICC-02/05-01/09-290, para. 104.

<sup>63</sup> ICC-02/05-01/09-T-2-ENG, p. 43, lines 1-3; see also ICC-02/05-01/09-289, para. 57.

<sup>64</sup> ICC-02/05-01/09-T-2-ENG, p. 45, lines 18-20.



was not satisfied in the manner in which [...] those consultations had been held”.<sup>65</sup> The Prosecutor also contended that South Africa’s request for consultations had been untimely since it had had confirmation of Omar Al-Bashir’s attendance at the African Union Summit as early as “the beginning of June 2015”.<sup>66</sup>

44. On the question of immunity, the Prosecutor took the position that the Chamber’s decision on the non-compliance of the Democratic Republic of the Congo was authoritative with regard to the issue at hand and did need not to be re-litigated.<sup>67</sup> With this reservation, the Prosecutor nevertheless proceeded to make submissions on the substance of the question.
45. In this regard, the Prosecutor emphasized that the source of Sudan’s obligation to cooperate with the Court was Chapter VII of the UN Charter, but that “it is self-evident that the Court can only exercise its jurisdiction in accordance with the Statute”.<sup>68</sup> References to article 13 of the Statute and to article 17 of the Negotiated Relationship Agreement between the International Criminal Court and the United Nations were made in support of this argument.<sup>69</sup>
46. In response to South Africa’s argument relating to subsequent Security Council practice, the Prosecutor submitted that “when seized of requests to defer and suspend the case against Omar Al Bashir on the basis, inter alia, of his status as Head of State, pursuant to Article 16 of the Statute, has declined to do so” and that “all indications are that the Security Council, which is reminded in person by the Prosecutor every six months of the existence of a warrant against Mr Al Bashir, has seen no cause to interfere with the Court’s discharge of its mandate in the

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<sup>65</sup> *Ibid.*, p. 45, lines 21-23; see also ICC-02/05-01/09-289, para. 63.

<sup>66</sup> ICC-02/05-01/09-T-2-ENG, p. 47, lines 1-5, making reference to ICC-02/05-01/09-289-AnxB; see also ICC-02/05-01/09-289, paras 81-86.

<sup>67</sup> ICC-02/05-01/09-T-2-ENG, p. 60, lines 8-13; see also ICC-02/05-01/09-289, para. 52.

<sup>68</sup> ICC-02/05-01/09-T-2-ENG, p. 65, lines 11-15; see also ICC-02/05-01/09-289, paras 111-117.

<sup>69</sup> ICC-02/05-01/09-T-2-ENG, p. 65, lines 18-24; p. 66, lines 15-21.

prosecution of its case against a sitting Head of State”.<sup>70</sup> In the interpretation of the Prosecutor, paragraph 6 of Resolution 1593 (2005) shows that “the Security Council was aware of the issue of immunities, addressed it in paragraph 6 in relation to one aspect [...], and by contrast chose not to address it in relation to paragraphs 1 and 2, suggesting that it did not wish to disturb the ordinary application of the Rome Statute vis-à-vis the Court’s jurisdiction in relation to Darfur”.<sup>71</sup> The Prosecutor further contended that the Security Council cannot have been unaware of the relevance of the potential scope of an investigation or subsequent proceedings before the Court, considering that it took note, in the preamble to the resolution, of the report of the International Commission of Inquiry, which “refers to the fact that the crimes which it had identified implicated the responsibilities of government officials”.<sup>72</sup>

47. The Prosecutor also made submissions on the relationship between articles 27(2) and 98(1) of the Statute, and argued that “there is no requirement for the Court to seek the consent of a State Party for the waiver of immunity with respect to its officials in the execution of a surrender request by another State Party, because consent to the exercise of the Court’s jurisdiction has already been provided. Put differently, the waiver has already been provided by acceptance of Article 27(2).”<sup>73</sup>
48. As for Sudan, the Prosecutor submitted that, by requiring it to “cooperate fully” with the Court, the Security Council “has decided that the Sudan shall give effect to the exercise of that jurisdiction by accepting and carrying out any cooperation duties required in the discharge of the Court’s mandate”.<sup>74</sup> The content of the duty to cooperate, in the submission of the Prosecutor, is regulated by the Rome Statute, and

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<sup>70</sup> *Ibid.*, p. 67, lines 14-22.

<sup>71</sup> *Ibid.*, p. 68, lines 7-11.

<sup>72</sup> *Ibid.*, p. 68, lines 12-20.

<sup>73</sup> *Ibid.*, p. 70, lines 3-11.

<sup>74</sup> *Ibid.*, p. 70, line 24, to p. 71, line 2.

the effect of Resolution 1593 (2005) is “to place the Sudan in a situation comparable to States Parties”.<sup>75</sup>

49. As a result, the Prosecutor argued that “a requested State Party will not be under a conflicting international obligation towards another State Party if that third state has consented to the non-applicability of procedural immunity bars to the exercise of the Court’s jurisdiction, either directly by becoming a State Party or indirectly by its duty to accept and carry out decisions of the Security Council”.<sup>76</sup> Therefore, the Prosecutor submitted that in the present case “there was no conflicting obligation at the horizontal level between South Africa and the Sudan”.<sup>77</sup>
50. As concerns any immunities under the Host Agreement concluded for the purpose of the African Union Summit in June 2015, the Prosecutor submitted that the same logic applies, *i.e.* paragraph 2 of Resolution 1593 (2005) “waived any immunities granted by an international agreement pursuant to which the consent of a sending State is required to surrender a person of that State to the Court”, within the meaning of article 98(2) of the Statute.<sup>78</sup>
51. The Prosecutor also argued that under the terms of article 98(1) of the Statute, even if consultations should have taken more time, South Africa “failed to comply with the Statute by failing to hold Mr Al Bashir pending the exhaustion of additional consultations and a determination by this Court on the merits”.<sup>79</sup>
52. In the written submissions in advance of the hearing, the Prosecutor also argued that rule 195 of the Rules of Procedure and Evidence (“Rules”) confirms that it is for the Court to determine whether the conditions of article 98(1) or (2) of the Statute are

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<sup>75</sup> *Ibid.*, p. 71, lines 5-12.

<sup>76</sup> *Ibid.*, p. 71, lines 17-22.

<sup>77</sup> *Ibid.*, p. 71, lines 24-25.

<sup>78</sup> *Ibid.*, p. 78, lines 11-13; see also ICC-02/05-01/09-289, para. 119.

<sup>79</sup> ICC-02/05-01/09-T-2-ENG, p. 78, lines 21-24.

met, and that if the Court determines that they are not, it may proceed with the request for cooperation and the requested State Party must comply.<sup>80</sup>

53. The Prosecutor requested that the Chamber make a formal finding of non-compliance, and refer the matter to the Security Council and to the Assembly of States parties.<sup>81</sup> In the view of the Prosecutor, a referral was necessary because the Court had been prevented from exercising critical functions and powers under the Statute and because it would promote further cooperation.<sup>82</sup>

## 2. Submissions of Belgium

54. In its submissions to the Chamber Belgium addressed a specific point relating to the relevance, under article 98(1) of the Statute, of immunities accorded to representatives of States attending diplomatic meetings held by international organizations, a number of which are hosted by Belgium.<sup>83</sup> As submitted by Belgium, representatives of States invited to meetings in Belgium generally enjoy international immunity, accorded for the benefit of international organizations and not for the benefit of Belgium.<sup>84</sup> In the submission of Belgium, the reference to “third State” in article 98(1) of the Statute is to be interpreted to include not only States that are not parties to the Statute but also any other subject of international law.<sup>85</sup> At the same time, Belgium submitted that article 98(1) of the Statute applies only to potential conflicts between the obligation to cooperate with the Court and a pre-existing obligation concerning immunity.<sup>86</sup>
55. Specifically with respect to the situation at hand and Resolution 1593 (2005), Belgium submitted that, contrary to the implicit lifting of Omar Al-Bashir’s immunities as

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<sup>80</sup> ICC-02/05-01/09-289, para. 60.

<sup>81</sup> ICC-02/05-01/09-T-2-ENG, p. 81, lines 22-24; see also ICC-02/05-01/09-289, para. 124.

<sup>82</sup> ICC-02/05-01/09-289, paras 101-106.

<sup>83</sup> ICC-02/05-01/09-277-Anx, p. 5.

<sup>84</sup> *Id.*

<sup>85</sup> *Ibid.*, p. 6.

<sup>86</sup> *Ibid.*, p. 7.

Head of State, the immunities belonging to international organizations were not lifted, as the resolution did not create an obligation for international organizations to cooperate with the Court in the way that it created such an obligation for Sudan.<sup>87</sup>

### 3. Submissions of the Southern Africa Litigation Centre

56. The submissions of the Southern Africa Litigation Centre addressed four discrete points. First, the Southern Africa Litigation Centre sketched out the domestic law of South Africa which it deems relevant to the issue.<sup>88</sup> Second, it provided its narrative of the relevant facts associated with Omar Al-Bashir's presence in South Africa and his non-arrest by South African authorities.<sup>89</sup> Third, it identified certain documents and information which, in its opinion, should be made available to the Chamber by South Africa.<sup>90</sup> Finally, it argued in favour of a finding of non-compliance and a referral to the Security Council, while also submitting that the Court should "clarify the position of [Head of State immunity] in light of articles 27 and 98 of the Statute".<sup>91</sup>

## III. RELEVANT PROVISIONS OF THE STATUTE AND THE RULES OF PROCEDURE AND EVIDENCE

57. The Chamber's determination of the matter primarily depends on articles 27(2) (entitled "Irrelevance of official capacity") and 98(1) of the Statute (entitled "Cooperation with respect to waiver of immunity and consent to surrender"), which read as follows:

#### Article 27(2)

Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.

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<sup>87</sup> *Ibid.*, p. 8.

<sup>88</sup> ICC-02/05-01/09-288, paras 6-24.

<sup>89</sup> *Ibid.*, paras 25-34.

<sup>90</sup> *Ibid.*, paras 38-38.

<sup>91</sup> *Ibid.*, paras 39-45.

#### Article 98(1)

The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.

58. The Chamber also notes article 13 of the Statute, which in the relevant part reads:

The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if:

[...]

- (b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; [...].

59. Further provisions of Part 9 of the Statute (“International cooperation and judicial assistance”) are also of relevance. In particular:

#### Article 86

##### General obligation to cooperate

States Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court.

#### Article 87

##### Requests for cooperation: general provisions

[...]

5. (a) The Court may invite any State not party to this Statute to provide assistance under this Part on the basis of an ad hoc arrangement, an agreement with such State or any other appropriate basis.

(b) Where a State not party to this Statute, which has entered into an ad hoc arrangement or an agreement with the Court, fails to cooperate with requests pursuant to any such arrangement or agreement, the Court may so inform the Assembly of States Parties or, where the Security Council referred the matter to the Court, the Security Council.

[...]

7. Where a State Party fails to comply with a request to cooperate by the Court contrary to the provisions of this Statute, thereby preventing the Court from exercising its functions and powers under this Statute, the Court may make a finding to that effect and refer the matter to the Assembly of States Parties or, where the Security Council referred the matter to the Court, to the Security Council.

## Article 89

### Surrender of persons to the Court

1. The Court may transmit a request for the arrest and surrender of a person, together with the material supporting the request outlined in article 91, to any State on the territory of which that person may be found and shall request the cooperation of that State in the arrest and surrender of such a person. States Parties shall, in accordance with the provisions of this Part and the procedure under their national law, comply with requests for arrest and surrender.

## Article 97

### Consultations

Where a State Party receives a request under this Part in relation to which it identifies problems which may impede or prevent the execution of the request, that State shall consult with the Court without delay in order to resolve the matter. Such problems may include, inter alia:

- (a) Insufficient information to execute the request;
- (b) In the case of a request for surrender, the fact that despite best efforts, the person sought cannot be located or that the investigation conducted has determined that the person in the requested State is clearly not the person named in the warrant; or
- (c) The fact that execution of the request in its current form would require the requested State to breach a pre-existing treaty obligation undertaken with respect to another State.

60. Lastly, rule 195(1) – which is placed under Section V of Chapter 11 of the Rules entitled “Cooperation under article 98” – complements article 98(1), providing:

When a requested State notifies the Court that a request for surrender or assistance raises a problem of execution in respect of article 98, the requested State shall provide any information relevant to assist the Court in the application of article 98. Any concerned third State or sending State may provide additional information to assist the Court.

#### IV. ANALYSIS

61. Article 87(7) of the Statute enables the Chamber to make a formal finding of non-compliance and refer the matter to the Assembly of States Parties or the Security Council in cases where non-compliance, contrary to the provisions of the Statute, prevents the Court from exercising its functions and powers under the Statute.<sup>92</sup> This is a discretionary power and not a mandatory course of action. Indeed, as the Appeals Chamber has also emphasized, the Chamber must assess the particularities of each situation to determine the most favourable course of action.<sup>93</sup>
62. Accordingly, the Chamber addresses separately and in turn the two salient questions: (i) whether South Africa failed to comply with the request for arrest and surrender of Omar Al-Bashir contrary to the provisions of the Statute; and (ii) whether a referral of the matter to the Assembly of States Parties and/or the Security Council is warranted.

##### *A. Whether South Africa failed to comply with the request for arrest and surrender of Omar Al-Bashir contrary to the provisions of the Statute*

63. On the basis of the submissions received, and in order to determine whether South Africa failed to comply with the request for arrest and surrender of Omar Al-Bashir contrary to the provisions of the Statute, the Chamber is called upon to analyse whether South Africa was entitled not to comply with the Court's request for arrest and surrender on two independent grounds, namely: (i) on account of Omar Al-Bashir's immunity; and/or (ii) as a result of South Africa's interactions with the Court in June 2015.

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<sup>92</sup> *The Prosecutor v. Uhuru Muigai Kenyatta*, "Judgment on the Prosecutor's appeal against Trial Chamber V(B)'s 'Decision on Prosecution's application for a finding of non-compliance under Article 87(7) of the Statute'", 19 August 2015, ICC-01/09-02/11-1032, paras 41 and 49.

<sup>93</sup> *Ibid.*, paras 51-53.



1. Whether South Africa was entitled not to comply with the Court's request for arrest and surrender on the ground of Omar Al-Bashir's immunity

*(a) The legal basis for Omar Al-Bashir's immunity at the relevant time*

64. Answering the question as to whether South Africa was obliged to arrest and surrender Omar Al-Bashir when he was present on South African territory in June 2015, or instead was entitled not to do so on the grounds of his immunity, first requires identification of the legal basis for any such immunity.
65. South Africa argued two distinct legal bases for Omar Al-Bashir's immunity at the time of his visit to South Africa in June 2015, namely customary international law (on account of his position as the sitting Head of State of Sudan), on the one hand, and the Host Agreement concluded between South Africa and the African Union for the purposes of the African Union Summit, on the other.
66. The Chamber is not persuaded by South Africa's latter argument, namely that during his visit to South Africa in June 2015, Omar Al-Bashir benefitted from immunity from arrest on the basis of the Host Agreement concluded for the purpose of holding the African Union Summit in Johannesburg.<sup>94</sup> The relevant provision relied upon by South Africa in support of this argument is article VII(1) of the Host Agreement, which provides:

The Government shall accord the Members of the Commission and Staff Members, the delegates and other representatives of Inter-Governmental Organizations attending the Meetings the privileges and immunities set forth in Sections C and D, Articles V and VI of the General Convention on the Privileges and Immunities of the OAU.

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<sup>94</sup> "Agreement between the Republic of South Africa and the Commission of the African Union on the material and technical organization of the meetings of the 27<sup>th</sup> ordinary session of the Permanent Representatives Committee from 7 to 9 June 2015, the 27<sup>th</sup> ordinary session of the Executive Council from 10 to 12 June 2015 and the 25<sup>th</sup> ordinary session of the Assembly on 14 to 15 June 2015 in Pretoria (7 and 8 June 2015) and Johannesburg (10 to 15 June 2015), Republic of South Africa", ICC-02/05-01/09-290, pp. 33-47.

67. Irrespective of any other considerations regarding South Africa's argument, the Chamber finds it sufficient to observe that the provision at issue, on its terms, does not apply to Omar Al-Bashir and thus could not have conferred upon him any immunity. Omar Al-Bashir was not present on South African territory in June 2015 as a member of the Commission of the African Union, as a staff member of said Commission, or as a delegate or other representative of an inter-governmental organization, but attended the African Union Summit in Johannesburg in his capacity as Head of State of Sudan. More generally, no provision of the Host Agreement appears to confer on Omar Al-Bashir any immunity from arrest. This conclusion makes it unnecessary to consider the issue of treaty-based immunity any further.
68. The situation is different as far as customary international law is concerned. In this regard, the Chamber notes that customary international law prevents the exercise of criminal jurisdiction by States against Heads of State of other States.<sup>95</sup> This immunity extends to any act of authority which would hinder the Head of State in the performance of his or her duties.<sup>96</sup> The Chamber is unable to identify a rule in customary international law that would exclude immunity for Heads of State when their arrest is sought for international crimes by another State, even when the arrest is sought on behalf of an international court, including, specifically, this Court.
69. It should be emphasized that the issue before the Chamber, disputed in the present proceedings, does not revolve around the effect of any possible immunity of Heads of State on the exercise *per se* by the Court of its jurisdiction (when triggered in accordance with the Statute). Indeed, no dispute has arisen with respect to the general validity of the proceedings against Omar Al-Bashir before the Court or of the warrants issued for his arrest.

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<sup>95</sup> International Court of Justice, "*Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*", Merits, Judgment of 14 February 2002, [2002] ICJ Reports 3, para. 51.

<sup>96</sup> *Ibid.*, para. 54.

70. Instead, the matter under consideration concerns whether there existed a duty on the part of South Africa to execute the request for arrest and surrender of Omar Al-Bashir to the Court while he was on South African territory. This question relates to the law applicable between States, *i.e.*, in this particular case, between South Africa, which the Court has requested to arrest and surrender Omar Al-Bashir, and Sudan, of which Omar Al-Bashir is the sitting Head of State.

*(b) Effect of article 27(2) of the Statute on immunities based on official capacity*

71. As observed above, customary international law provides for the immunities of Heads of States from arrest by other States. The Chamber must therefore determine whether and, if so, in what circumstances, there exists any derogation to the general regime of immunities under international law when the Court seeks the arrest and surrender of a person enjoying immunity as a Head of State. This determination concerns primarily the interpretation of article 27(2) of the Statute and of its relationship with article 98(1) of the Statute.

72. Article 27(2) of the Statute states:

Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.

73. South Africa made the argument that this provision does not have any effect on the rights and obligations of States vis-à-vis the Court (which, it argues, are exclusively regulated in Part 9 of the Statute), but concerns only the Court's jurisdiction, ensuring that such jurisdiction is not excluded in cases of immunity or special procedural rules attaching to the official capacity of a person.<sup>97</sup>

74. The Chamber does not subscribe to this view and finds that article 27(2) of the Statute also excludes the immunity of Heads of State from arrest. First, the Chamber

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<sup>97</sup> See above, para. 38.

considers that since immunity from arrest would bar the Court from the exercise of its jurisdiction, the general exclusionary clause of article 27(2) of the Statute, in its plain meaning, also encompasses that immunity. Had the drafters of the Statute intended exclusion only of a narrow category of immunities, they would have expressed it in plain language. The language used in that provision, however, conveys comprehensiveness and is not compatible with the proposition that the immunity from arrest of Heads of State is excluded from it.

75. Furthermore, reliance by States Parties to the Rome Statute on immunities or special procedural rules to deny cooperation with the Court would create – at least as concerns requests for the arrest and surrender of individuals subject to a warrant of arrest – an insurmountable obstacle to the Court’s ability to exercise its jurisdiction. Such a situation would clearly be incompatible with the object and purpose of article 27(2) of the Statute. Indeed, the Court’s jurisdiction with respect to persons enjoying official capacity – the exercise of which fully depends on States Parties’ execution of the Court’s warrants of arrest and assistance in the conduct of investigations – would be reduced to a purely theoretical concept if States Parties could refuse cooperation with the Court by invoking immunities based on official capacity.
76. That said, the Chamber considers that the effect of article 27(2) of the Statute as just described concerns both, vertically, the relationship between a State Party and the Court and, horizontally, the inter-State relationships between States Parties to the Statute.
77. With regard to the former – vertical – line, any immunity belonging to a State Party, including that of its Head of State, is irrelevant and cannot be raised as a ground for refusing the arrest and surrender of a person sought by the Court. In other words, in accordance with the Statute, a State Party would have the duty to arrest and surrender to the Court its own Head of State if the Court made a request for cooperation to that effect.

78. In this regard, the Chamber recalls that functional immunities based on official capacity are not provided, in international law, for the benefit of a particular individual, but are grounded on the need to avoid interference with the functioning and sovereignty of one State by another State. By ratifying the Statute, States Parties have in fact accepted the irrelevance of immunities based on official capacity, including those that they may otherwise possess under international law. Beside the formulation of article 27(2) of the Statute, this is also a necessary corollary of the general obligation of States Parties to give effect to requests for cooperation by the Court other than when exceptions are explicitly provided for by the Statute.
79. Second, and correspondingly, the same effect exists horizontally between States Parties, meaning that a State Party cannot refuse to arrest and surrender an individual on the grounds that the individual benefits from immunities based on official capacity belonging to another State Party to the Statute. Indeed, just as States Parties cannot invoke their “own” immunities based on official capacity to refuse to cooperate with the Court, they cannot invoke those same immunities when cooperation in the arrest and surrender of a person is provided by another State Party. This is the effect *inter partes* of the Statute, an international treaty.
80. The result is therefore that a State Party cannot refuse to comply with a request by the Court for the arrest and surrender of the Head of State of another State Party as any possible immunity vis-à-vis the Court has been rendered inapplicable with the ratification of the Rome Statute. The irrelevance of immunities based on official capacity with respect to proceedings before the Court is incorporated in the Statute as a basic principle to which States Parties subscribe by having voluntarily ratified the Statute.
81. As there exists no immunity from arrest and surrender based on official capacity with respect to proceedings before the Court where any such immunity would otherwise belong to a State Party to the Rome Statute, article 98(1) of the Statute – in

the part in which it addresses situations of possible State or diplomatic immunity preventing the arrest and surrender of an individual – is without object in the scope of application of article 27(2) of the Statute. No waiver is required as there is no immunity to be waived.

82. It is evident that this applies only to States that have consented to such a regime, which are in the first instance States Parties to the Statute and States which accept the jurisdiction of the Court under article 12(3) of the Statute. States that are not parties to the Statute in principle have no obligation to cooperate with the Court and the irrelevance of immunities based on official capacity as enshrined in article 27(2) of the Statute has no effect on their rights under international law. Conversely, with respect to States that are not parties to the Statute, the applicable regime is that of article 98(1) of the Statute. Pursuant to this provision, the Court shall not make a request for arrest and surrender to a State Party (imposing on it a duty to cooperate) which would require the State Party to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity belonging to a State not party to the Statute. Simply put, the Court may not, in principle, without first obtaining a waiver of immunity, request a State Party to arrest and surrender the Head of State of a State not party to the Statute.
83. The fundamental distinction – as always when considering issues of cooperation with the Court – is thus between States Parties and States not parties to the Statute. Nevertheless, the Statute provides for a particular situation where obligations defined in the Statute may become incumbent upon a State not as a result of its acceptance of the Statute, but as a result of, and under, the Charter of the United Nations. It is to this *sui generis* regime that the Chamber now turns.

(c) *Effect of Security Council Resolution 1593 (2005)*

84. The Court's jurisdiction in the instant case was triggered by Security Council Resolution 1593 (2005), whereby the Security Council, acting under Chapter VII of the Charter of the United Nations, referred the situation in Darfur to the Prosecutor.
85. The Chamber finds, in line with previous decisions of other Chambers of the Court<sup>98</sup> that the effect of a Security Council resolution triggering the Court's jurisdiction under article 13(b) of the Statute is that the legal framework of the Statute applies, in its entirety, with respect to the situation referred. In this regard, article 13 of the Statute indeed indicates that the Court exercises its jurisdiction "in accordance with the provisions of the Statute" and that this is so irrespective of how the exercise of jurisdiction is triggered in the particular situation. Similarly, article 1 of the Statute provides that "[t]he jurisdiction and functioning of the Court shall be governed by the provisions of the Statute", and article 21 mandates the Court to apply, "in the first place", the Statute, the Elements of Crimes and the Rules of Procedure and Evidence.
86. A Security Council referral under article 13(b) of the Statute is the conferring of jurisdiction in a particular situation within defined parameters on a permanent, independent court. The ordinary meaning of the term "refer", the context of a referral (*i.e.* the entirety of the Court's legal regime), and its object and purpose all confirm that the effect of a referral is to enable the Court to act in the referred situation, and to do so under the rules according to which it has been designed to act. In other words, the only legal regime in which this Court may exercise the triggered jurisdiction is the one which is generally applicable to it, its Statute *in primis*.

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<sup>98</sup> Pre-Trial Chamber I, *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, "Decision on the postponement of the execution of the request for surrender of Saif Al-Islam Gaddafi pursuant to article 95 of the Rome Statute", 1 June 2012, ICC-01/11-01/11-163, paras 28-29; Trial Chamber IV, *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, "Decision on 'Defence Application pursuant to articles 57(3)(b) & 64(6)(a) of the Statute for an order for the preparation and transmission of a cooperation request to the Government of the Republic of the Sudan'", 1 July 2011, ICC-02/05-03/09-169, para. 15; Pre-Trial Chamber I, *Situation in Darfur, Sudan*, "Decision on Application under Rule 103", 4 February 2009, ICC-02/05-189, para. 31.

87. Moreover, by deciding that Sudan shall cooperate fully with the Court, the Security Council, in addition to triggering the jurisdiction of the Court, has also imposed on Sudan – acting under Chapter VII of the Charter of the United Nations – an obligation vis-à-vis the Court (to cooperate fully and provide any necessary assistance) which Sudan would not otherwise have as it has not ratified the Statute. This was also the finding of the Appeals Chamber in a situation similar to the present one, namely the situation in Libya. In that context, indeed, the Appeals Chamber confirmed that Libya – which is not a State Party to the Statute – has an obligation to cooperate with the Court that originates in the Security Council resolution referring the situation to the Prosecutor of the Court.<sup>99</sup>
88. The terms of such cooperation are set by the Rome Statute. The Court is an institution whose competences are established by its Statute and, indeed, which cannot receive cooperation but in accordance with its Statute. The Chamber finds, by majority, that the necessary effect of the Security Council resolution triggering the Court's jurisdiction in the situation in Darfur and imposing on Sudan the obligation to cooperate fully with the Court, is that, for the limited purpose of the situation in Darfur, Sudan has rights and duties analogous to those of States Parties to the Statute.
89. It is acknowledged that this is an expansion of the applicability of an international treaty to a State which has not voluntarily accepted it as such. Nonetheless, the finding of the majority of the Chamber in this respect is in line with the Charter of

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<sup>99</sup> Appeals Chamber, *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, "Decision on the request for suspensive effect and the request to file a consolidated reply", 22 November 2013, ICC-01/11-01/11-480, para. 18.



the United Nations, which permits the Security Council to impose obligations on States.<sup>100</sup>

90. It may be emphasized that Sudan's rights and obligations are only those related to the situation referred by the Security Council and strictly within those parameters. It is for this reason that Sudan does not have rights and obligations with respect to other Statute-based activities of the Court, and – as mentioned by South Africa<sup>101</sup> – does not have the right to vote in the Assembly of States Parties and does not pay contributions towards the expenses of the Court in line with article 115 of the Statute.
91. Accordingly, as a result of Security Council Resolution 1593 (2005), the interactions between Sudan and the Court with respect to the Court's exercise of jurisdiction in the situation in Darfur are regulated by the Statute. One consequence of this is that article 27(2) of the Statute applies equally with respect to Sudan, rendering inapplicable any immunity on the ground of official capacity belonging to Sudan that would otherwise exist under international law.
92. This means, in the first instance, that Sudan cannot claim, vis-à-vis the Court, Omar Al-Bashir's immunity as Head of State: Sudan has the obligation to arrest him and surrender him to the Court.
93. Second, the immunities of Omar Al-Bashir as Head of State do not apply vis-à-vis States Parties to the Statute when they seek to execute a request for arrest and surrender issued by the Court in the exercise of its jurisdiction in the situation in Darfur. Accordingly, article 98(1) of the Statute is not applicable to the arrest of Omar Al-Bashir and his surrender to the Court: no immunity needs to be waived and States Parties can execute the Court's request for arrest and surrender of Omar Al-Bashir

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<sup>100</sup> See International Court of Justice, "Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)", Advisory Opinion of 21 June 1971, [1971] ICJ Reports 16, para. 116.

<sup>101</sup> ICC-02/05-01/09-T-2-ENG, p. 86, lines 7-9.

without violating Sudan's rights under international law. Therefore, States Parties, including South Africa, have the obligation to arrest Omar Al-Bashir and surrender him to the Court.

94. This is the result of the horizontal effect of article 27(2) of the Statute (on the basis of which a State Party to the Statute cannot refuse to arrest and surrender to the Court an individual on the ground that that individual enjoys immunities belonging to another State Party) being applicable also in respect of Sudan following the Security Council's triggering of the Court's jurisdiction in the situation in Darfur and imposition on Sudan of the duty to cooperate with the Court.
95. It is opportune to emphasize that for this conclusion it is immaterial whether the Security Council intended – or even anticipated – that, by virtue of article 27(2) of the Statute, Omar Al-Bashir's immunity as Head of State of Sudan would not operate to prevent his arrest sought by the Court in relation to the proceedings in the situation in Darfur referred to the Prosecutor of the Court in Resolution 1593 (2005). As explained, this is a necessary, un-severable, effect of the informed choice by the Security Council to trigger the jurisdiction of this Court and impose on Sudan the obligation to cooperate with it.
96. In this regard, the majority of the Chamber notes that at the hearing South Africa contested the proposition that Security Council Resolution 1593 (2005) can be seen as including a "waiver" of Omar Al-Bashir immunities as Head of State, within the meaning of article 98(1) of the Statute.<sup>102</sup> The majority of the Chamber clarifies that, indeed, it sees no such "waiver" in the Security Council resolution, and that, in any case, no such waiver – whether "explicit" or "implicit" – would be necessary. A waiver can be conceived of only where immunity applies. However, as explained above, all immunities based on official capacity which could bar the Court from

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<sup>102</sup> See above, paras 34-37.

exercising its jurisdiction have been made inapplicable as a result of the effects of article 27(2) of the Statute and Security Council Resolution 1593 (2005). Any discussion of the rules and principles of international law applicable to the act of waiver of immunity can therefore have no bearing on the conclusion.

97. Accordingly, in the absence of immunity preventing the arrest and surrender of Omar Al-Bashir pursuant to a request of the Court – and the ensuing inapplicability of article 98(1) of the Statute to the situation at hand – South Africa was under the duty to arrest Omar Al-Bashir and surrender him to the Court while he was on South African territory in June 2015.

*(d) Nature of article 98 of the Statute and its effect on States Parties' duty to cooperate with the Court*

98. At this juncture – and while, as just stated, article 98(1) of the Statute does not apply to the situation of Omar Al-Bashir – the Chamber considers it necessary, in light of certain arguments made by South Africa in the course of the proceedings, to lay out the scope of this provision in terms of procedure under the Statute.
99. In particular, the Chamber finds it necessary to emphasize that article 98 of the Statute provides no rights to States Parties to refuse compliance with the Court's requests for cooperation.
100. Indeed, article 98 of the Statute addresses the Court, and is not a source of substantive rights (or additional duties) to States Parties. While it does indicate that a tension may exist between the duty of a State Party to cooperate with the Court and that State's obligation to respect immunities under international law, it leaves to the Court, and not to the State Party, the responsibility to address the matter. The text of rule 195 of the Rules confirms this understanding as it provides:

When a requested State notifies the Court that a request for surrender or assistance raises a problem of execution in respect of article 98, the requested State shall provide any information relevant to assist the Court in the application of article 98.

101. This provision is of particular significance as it relates to situations such as the present one: a State Party holding the view that a request for cooperation transmitted by the Court gives rise to an issue under article 98 of the Statute. The fact that, in such cases, the State “shall provide any information relevant to assist the Court in the application of article 98” indeed suggests that the requested State cannot refuse cooperation.
102. Accordingly, the Chamber considers that, in the case at hand, South Africa was not entitled to rely on its own understanding of article 98 of the Statute (whether on its own or in relationship with article 27) to decide unilaterally not to comply with the Court’s request for the arrest of Omar Al-Bashir and his surrender to the Court. Irrespective of all considerations made above as to the inapplicability under the Statute of immunities on the ground of official capacity, the Chamber notes that the fact that an individual whose arrest and surrender is sought by the Court enjoys diplomatic or State immunities is not as such an exception to the State Parties’ duty to cooperate with the Court.
103. Indeed, while establishing a general duty to cooperate with the Court, the Statute also explicitly provides for a number of situations where the obligation to execute requests for cooperation may be qualified or suspended. For example, article 89(2) of the Statute permits a State to postpone the execution of a request for surrender in the presence of a challenge before a national court on the basis of the principle of *ne bis in idem* until the Court makes a determination on admissibility of the case. Similarly, in the event of a competing request from another State for the surrender of the same person, a State Party may, under article 90 of the Statute, postpone the execution of the request for surrender until the Court decides on the admissibility of the case or, in particular cases, it may decide unilaterally whether or not to give effect to the Court’s request. A further example is the right of a State, under article 95 of the Statute, to postpone the execution of a request for surrender in the presence of a

challenge to the admissibility of the case pending a determination of this challenge by the Court.

104. It is evident that article 98 of the Statute is construed in very different terms. It does not provide that the requested State may refuse cooperation with the Court, or postpone execution of the request for arrest and surrender. Even less does this provision grant discretion to States Parties to choose whether to cooperate with the Court or refuse such cooperation on the ground of a disagreement with the Court's interpretation and application of the Statute. While in particular circumstances certain procedural remedies (such as appeal) may be available, disregarding the determination of a court of law is, manifestly, not one of these legitimate remedies.
105. Rather, article 98 of the Statute provides that it is the Court which shall not request cooperation until a waiver of the relevant immunity is obtained from the third State by the Court itself. Specifically in the case at hand, this means that it was not open to South Africa to delay cooperation and question the validity of the Court's request for cooperation once the Court elected to transmit one. The Court having proceeded with a request for the arrest and surrender of Omar Al-Bashir, and having confirmed such request following the information provided to it by South Africa as foreseen by rule 195 of the Rules,<sup>103</sup> South Africa had the obligation to execute it and could not claim vis-à-vis the Court with any consequence the existence of a conflict of obligations.
106. Even assuming, for the sake of argument, its existence, such a conflict of obligations would not have relieved South Africa of its duties vis-à-vis the Court, or given it discretion to dispense with such duties. Article 98 of the Statute simply does not have this effect. Accordingly, even in this scenario of the applicability of article 98(1) to the

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<sup>103</sup> See ICC-02/05-01/09-243-Anx2; see also "Decision following the Prosecutor's request for an order further clarifying that the Republic of South Africa is under the obligation to immediately arrest and surrender Omar Al Bashir ", ICC-02/05-01/09-242.

situation at hand, South Africa – as a result of having chosen not to give effect to the Court’s request for cooperation – would still be found in non-compliance with its obligation to arrest and surrender Omar Al-Bashir to the Court.

*(e) Conclusion*

107. The Chamber finds, by majority, that because the rights and obligations as provided for in the Statute, including article 27(2), are applicable to Sudan (by imposition of the Security Council acting under Chapter VII of the UN Charter), the immunities of Omar Al-Bashir as Head of State do not bar States Parties to the Rome Statute from executing the Court’s request of his arrest and surrender for crimes under the jurisdiction of the Court allegedly committed in Darfur within the parameters of the Security Council referral. Article 98(1) of the Statute is not applicable to the situation of Omar Al-Bashir, and States Parties to the Rome Statute are under the duty to execute the warrants of arrest issued by the Court, and to implement the Court’s request for the arrest of Omar Al-Bashir and his surrender to the Court.
108. In addition, irrespective of whether South Africa considered itself obliged to respect the Head of State immunity of Omar Al-Bashir under customary international law, it nevertheless had the duty under the Statute to arrest him and surrender him to the Court, as article 98 of the Statute – even if applicable to the present situation – does not foresee the possibility for a requested State Party to unilaterally refuse compliance with a Court’s request for arrest and surrender.
109. As a final point, the Chamber notes that both South Africa and Sudan are parties to the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, and that one of the warrants for the arrest of Omar Al-Bashir has been issued for the crime of genocide. While not necessary in light of the conclusions reached above and despite the absence in the present proceedings of submissions by any participant on this point, the Chamber has in any case considered the question whether that Convention renders inapplicable, between South Africa and Sudan and with respect

to implementation of the warrant for arrest for the alleged crime of genocide, the Head of State immunity of Omar Al-Bashir. The majority of the Chamber is however unable to answer this question in the affirmative. Above all, this is because the Genocide Convention, unlike the Statute in article 27(2), does not mention immunities based on official capacity, and the majority does not see a convincing basis for a constructive interpretation of the provisions in the Convention such that would give rise to an implicit exclusion of immunities. Article IV of the Convention speaks of individual criminal responsibility of “persons committing genocide” – which, as convincingly explained by the International Court of Justice,<sup>104</sup> must not be confused with immunity from criminal jurisdiction – and can be effective even without reading into it an implicit exclusion of immunities based on official capacity. As for Article VI of the Convention, the majority observes that this provision is concerned with the allocation of competence among the national and international jurisdictions in trying “persons charged with genocide”, and, again, does not bear upon immunities. Therefore, and irrespective of any other consideration, no consequences relevant to the issue under consideration can be derived from the Genocide Convention.

2. Whether South Africa was entitled not to comply with the request for arrest and surrender because of its interactions with the Court in June 2015

110. At the hearing of 7 April 2017, South Africa argued that fundamental errors occurred in the conduct of consultations under article 97 of the Statute,<sup>105</sup> which were, it is recalled, aimed at discussing the application of article 98(1) of the Statute. It did not, however, make specific submissions on how its argument relates to the considerations of the Chamber under article 87(7) of the Statute.

<sup>104</sup> International Court of Justice, “Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)”, Merits, Judgment of 14 February 2002, [2002] ICJ Reports 3, paras 60 and 61.

<sup>105</sup> See above, para. 27.

111. At the outset, the Chamber reiterates, as explained above,<sup>106</sup> that the application of article 98(1) of the Statute is incumbent upon the Court. This provision, on its plain terms, does not give procedural rights, including any right to suspend or deny cooperation, to the requested State.
112. Turning to article 97 of the Statute, the Chamber considers – without prejudice to the general duty of States Parties to cooperate with the Court as enshrined in article 86 of the Statute – that this provision is built on the implicit and realistic expectation that, due to practical reasons, straightforward cooperation may occasionally not be possible. For such situations, article 97 of the Statute requires States Parties to consult with the Court without delay in order to resolve problems which may impede or prevent the execution of a request for cooperation by the Court. This provision mentions as possible examples: (i) insufficient information to execute the request; (ii) in cases of requests for surrender, the fact that, despite best efforts, the person sought cannot be located or that the investigation conducted has determined that the person in the requested State is clearly not the person named in the warrant; and (iii) the fact that execution of the request in the form in which it is made would require the requested State to breach a pre-existing treaty obligation undertaken with respect to another State.
113. While observing that this list is non-exhaustive, the Chamber notes that article 97 of the Statute does not make explicit reference to situations falling under article 98(1). This appears consistent with the fact that article 98(1) of the Statute already provides the solution for a possible conflict between the duty to comply with a request for arrest and surrender and the duty to respect certain immunities under international law.

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<sup>106</sup> See above, paras 98-106.



114. The object and purpose of article 97 of the Statute also appear to confirm this understanding. Indeed, the Chamber considers that the shared feature of the situations identified in this provision as examples of matters which may be the subject of consultations under article 97 of the Statute is that a remedial action on the part of the Court to remove the obstacle to cooperation may be possible. Indeed, in order to resolve the matters raised by the requested State, the Court could, as the case may be, provide more information (in situations under article 97(a)), withdraw its request for surrender to the requested State and address a request to another State (article 97(b)), or amend the “current form” of the request so that it would no longer require the State to breach pre-existing treaty obligations (article 97(c)).
115. Crucial in this context is also the provision of rule 195 of the Rules, which addresses, in substance, the interaction between a Court and the requested State when a situation under article 98 of the Statute arises. Rule 195 stipulates that, when a requested State considers that a request for surrender or assistance raises a problem of execution in respect of article 98, it “notifies” the Court and provides any information relevant “to assist the Court in the application of article 98”. This provision therefore places a duty on the State to share all relevant information with the Court and confirms that the responsibility for “the application of article 98” rests with the Court itself. This set-up is conceptually different from that of “consultations” under article 97 of the Statute. Indeed, it appears that the mechanism foreseen in situations under article 98 is not one of a bilateral exchange aimed at resolving the matter, but one in which the Court is provided with all relevant information by the requested State (and, possibly, also by the third State) and, also on that basis, is competent to decide, *i.e.* either to issue/confirm its request for cooperation or not issue/withdraw it.
116. That said, the Chamber does not consider that articles 97 and 98 of the Statute must be interpreted as strictly as to say that the instrument of consultations cannot also be used for problems under article 98 of the Statute. Indeed, communication between

the requested State and the Court in relation to article 98, including provision of information by the State under rule 195 of the Rules, may in practice take the same form as consultations. Moreover, the nature of a possible obstacle to cooperation may not always be clear from the outset and it is, after all, through consultations that such clarity can be obtained.

117. As a matter of fact, South Africa was given the opportunity to raise with the Court the problems that it had identified under article 98 of the Statute with the execution of the Court's request for arrest and surrender of Omar Al-Bashir. However, again as a matter of fact, it became clear during consultations that the resolution of the matter brought by South Africa under article 98(1) of the Statute concerned the binary question of whether or not South Africa had the duty vis-à-vis the Court to arrest Omar Al-Bashir and surrender him to the Court. No room was available for possible remedial measures to be addressed through consultations between the Court and the requested State. It was eventually for the Court – considering all the information made available to it – to decide on the matter, and, effectively, either “confirm” or “withdraw” its request for cooperation to South Africa. After hearing South Africa's arguments, the Court eventually determined that South Africa's duty to arrest Omar Al-Bashir and surrender him to the Court stood and had to be fulfilled.<sup>107</sup>
118. Given the nature of the issue before the Court, no purpose, in this case, could have been achieved through continued and prolonged “consultations” between the Court and South Africa on the question of whether, as a matter of law, Omar Al-Bashir's immunity as Head of State of Sudan prevailed over South Africa's obligation to arrest him and surrender him to the Court. Indeed, the Chamber is of the view, contrary to South Africa's submission,<sup>108</sup> that the matter raised by South Africa –

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<sup>107</sup> See ICC-02/05-01/09-243-Anx2; see also “Decision following the Prosecutor's request for an order further clarifying that the Republic of South Africa is under the obligation to immediately arrest and surrender Omar Al Bashir”, ICC-02/05-01/09-242.

<sup>108</sup> See above, para. 27.

involving, as it did, the effect of any immunities of Omar Al-Bashir's on a request for his arrest and surrender to the Court – could be settled only as part of a judicial process and with reference to the applicable law, rather than through a “political and diplomatic process”.

119. In any case, the Chamber underscores that consultations (whether requested or ongoing) between a State and the Court do not, as such, suspend or otherwise affect the validity of the Court's request for cooperation. Even more, the availability of a channel for dialogue between the Court and a State Party – irrespective of the form that such dialogue may take – cannot be understood as resulting in a (unilateral) suspension of the execution of a request for cooperation. This is particularly important in cases such as the one at hand, where execution of the request for cooperation could succeed only in a narrow window of time.
120. As explained above, rule 195 of the Rules mandates the requested State to provide the Court with any relevant information concerning problems under article 98 of the Statute. South Africa did seize the Court in accordance with said rule and received the requested answer from the Court. It is untenable to hold that consultations were ongoing and the duty to arrest Omar Al-Bashir suspended on the grounds that more information could be given to the Court a few days later (after Omar Al-Bashir's planned departure from South African territory) – in particular considering that any such information would exclusively concern points of law. In addition, it is important to emphasize that, even if South Africa had understood that consultations were still ongoing, a request for cooperation from the Court remains valid until it is explicitly withdrawn or suspended by the Court itself. It was not for South Africa (as it is not for any requested States outside the explicit situations for which exceptions exist) to declare unilaterally that the Court's request for arrest and surrender was “suspended” for any reason. This is even more the case considering that the Court had made clear to South Africa that the request for arrest and surrender of Omar Al-Bashir was at all times valid and had to be executed.

121. Indeed, it is not in the nature of legal obligations that they can simply be put aside on the grounds of a disagreement with a determination of a competent court of law, or perceived unfairness of the process and/or the result. In these circumstances, the possible remedies can only be of a judicial nature and the matter must ultimately be settled judicially by the court.
122. To conclude, the Chamber is of the view that the arguments raised by South Africa in relation to the interactions with the Court between 11 and 13 June 2015 do not affect the Chamber's finding above that South Africa was under the duty to arrest Omar Al-Bashir and surrender him to the Court while he was on South African territory.

### 3. Conclusion

123. The Chamber concludes that, by not arresting Omar Al-Bashir while he was on its territory between 13 and 15 June 2015, South Africa failed to comply with the Court's request for the arrest and surrender of Omar Al-Bashir contrary to the provisions of the Statute, thereby preventing the Court from exercising its functions and powers under the Statute in connection with the criminal proceedings instituted against Omar Al-Bashir.

#### *B. Whether a referral of the matter to the Assembly of States Parties and/or the Security Council is warranted*

124. The Chamber now turns to the second question before it, namely "whether circumstances are such that a formal finding of non-compliance by South Africa and a referral of the matter to the Assembly of States Parties to the Rome Statute and/or the Security Council of the United Nations within the meaning of article 87(7) of the Statute is warranted". Having found that South Africa failed to comply with a request to cooperate issued by the Court contrary to the provisions of the Statute, thereby preventing the Court from exercising its functions and powers under this Statute, the substantive question to be addressed at this juncture is whether it is appropriate to refer this matter to the Assembly of States Parties and/or the Security

Council.<sup>109</sup> This is a separate question from that of whether there has been non-compliance on the part of the requested State. Indeed, as confirmed by the Appeals Chamber, “an automatic referral to external actors is not required as a matter of law”.<sup>110</sup>

125. In addition, the Appeals Chamber has held that, when deciding whether to refer a matter of non-cooperation to the Assembly of States Parties and/or the Security Council of the United Nations, a Chamber “has discretion to consider all factors that may be relevant in the circumstances of the case, including whether external actors could indeed provide concrete assistance to obtain cooperation requested taking into account the form and content of the cooperation”.<sup>111</sup> The Chamber will be guided by these considerations in its determination and, irrespective of its finding that South Africa failed to comply with a request to cooperate under article 87(7) of the Statute, it will determine, in light of the relevant circumstances of the instant case, whether it is warranted to refer to either the Assembly of States Parties or the Security Council of the United Nations the matter of South Africa’s non-compliance with the Court’s request for the arrest and surrender of Omar Al-Bashir. In particular, the Chamber will provide below its considerations with respect to the manner in which South Africa has approached its obligation to execute the Court’s request for the arrest and surrender of Omar Al-Bashir and interacted with the Court on the matter at issue, as well as on the issue of whether engaging external actors by resorting to measures under article 87(7) of the Statute would be an efficient way to obtain cooperation from South Africa.

126. The Chamber clarifies that the considerations below are relevant exclusively with respect to the Chamber’s discretionary determination on whether to engage external

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<sup>109</sup> See, in this regard, *The Prosecutor v. Uhuru Muigai Kenyatta*, “Judgment on the Prosecutor’s appeal against Trial Chamber V(B)’s ‘Decision on Prosecution’s application for a finding of non-compliance under Article 87(7) of the Statute’”, 19 August 2015, ICC-01/09-02/11-1032, para. 43.

<sup>110</sup> *Ibid.*, para. 49.

<sup>111</sup> *Ibid.*, para. 53.

actors under article 87(7) of the Statute in the matter of South Africa's non-compliance with its obligations under the Statute. In other words, nothing in the factual considerations expressed in this section of the present decision can be considered as negating or mitigating the Chamber's conclusion that by not arresting Omar Al-Bashir and surrendering him to the Court South Africa failed to comply with its obligations under the Statute.

1. South Africa's interactions with the Court with respect to the execution of the Court's request and surrender of Omar Al-Bashir

127. At first, the Chamber considers that the manner in which South Africa has approached its obligation to cooperate with the Court is a significant consideration in the determination of whether a referral under article 87(7) of the Statute is warranted. In this regard, the Appeals Chamber has indeed held that "[w]ith regard to the conduct of parties in the proceedings, the primary obligation to cooperate lies with the requested State".<sup>112</sup> The Chamber considers that South Africa's request to consult with the Court under article 97 of the Statute – which was made with a view to obtaining a final determination on the legal questions before the Chamber – distinguishes the conduct of South Africa from that of other States that, in the past, have been involved in proceedings under article 87(7) of the Statute.

128. In particular, the Chamber notes that South Africa is the first State Party specifically to invoke article 97 of the Statute following receipt of a request for arrest and surrender. The Chamber recalls that, in accordance with general practice, when the Registry becomes aware that Omar Al-Bashir may be about to travel to a State Party, it routinely reminds that State of its obligations to arrest and surrender Omar Al-Bashir and requests it to consult with the Court under article 97 of the Statute if difficulties regarding the request for cooperation are identified.<sup>113</sup> No State Party

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<sup>112</sup> *Ibid.*, para. 87.

<sup>113</sup> See, for example, ICC-02/05-01/09-7; ICC-02/05-01/09-101; ICC-02/05-01/09-137.

involved, however, has thus far triggered article 97 of the Statute. This Chamber has in fact previously held that another State Party “should have consulted or notified the Court in accordance with article 97 of the Statute and rule 195 of the Rules of the existence of a problem related to article 98(1) of the Statute which prevented it from discharging its obligations as a State Party to the Statute prior to or during the visit of Omar Al Bashir and before his departure”.<sup>114</sup> It is this previous holding that prompted South Africa’s request for consultations under article 97 of the Statute.<sup>115</sup>

129. South Africa triggered article 97 of the Statute in an attempt to resolve what it perceived to be conflicting obligations under international law.<sup>116</sup> South Africa’s subsequent conduct is also of relevance in this regard. South Africa presented extensive written and oral legal arguments on the matter at hand<sup>117</sup> and indicated its intention to avail itself of the possible remedy of lodging an appeal in the event that the Chamber found that it had violated its obligations under the Statute.<sup>118</sup>

130. The Chamber considers that the fact that South Africa was the first State Party to seek to consult with the Court under article 97 of the Statute and sought – including in the present proceedings under article 87(7) of the Statute – a final legal determination by the Court of the relevant legal issues is a significant factor in that it sets it apart from other situations involving failure to comply with the request for arrest and surrender of Omar Al-Bashir.

131. In the view of the Chamber, these considerations are not negated or called into question by the arguments advanced by the Prosecutor to the contrary. In this regard, the Chamber notes that the Prosecutor, in her written observations, submitted that “[t]he fact that South Africa took measures to create a legal

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<sup>114</sup> “Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir’s arrest and Surrender to the Court”, 9 April 2014, ICC-02/05-01/09-195, para. 15.

<sup>115</sup> ICC-02/05-01/09-290, para. 36.

<sup>116</sup> ICC-02/05-01/09-243-Anx1.

<sup>117</sup> ICC-02/05-01/09-290, paras 50-99.

<sup>118</sup> *Ibid.*, para. 104.

impediment to the execution of the pending warrants of arrest for Omar Al-Bashir, and only sought consultations with the Court on the eve of the visit, despite having been in a position to do so earlier, are relevant factors for the Chamber to consider when determining the good faith of the parties involved in the cooperation process”.<sup>119</sup> At the hearing, the Prosecutor added that the shifting legal position of South Africa before its domestic courts and/or this Court establishes that South Africa first identified a legal and political problem and then sought a legal impediment to rely upon.<sup>120</sup>

132. At first, the Chamber notes that South Africa explained that any delay in approaching the Court arose as a result of domestic processes.<sup>121</sup> The Chamber considers this to be a reasonable explanation in the circumstances of the case, including the complexity and lack of full clarity on the matters that needed to be addressed by South Africa and a certain level of uncertainty due to the novelty of the issues involving the use of the instrument of consultations with the Court. The Chamber is accordingly of the view that, contrary to the Prosecutor’s submission, the fact that South Africa did not approach the Court until 11 June 2015 does not indicate *per se* absence of good faith on its part.
133. Similarly, the Chamber is not persuaded by the Prosecutor’s argument that South Africa “took measures to create a legal impediment to the execution of the pending Arrest Warrants against Omar Al-Bashir”.<sup>122</sup> In this regard, the Prosecutor referred to the purported granting of immunity to Omar Al-Bashir by virtue of the Host Agreement for the African Union Summit in June 2015.<sup>123</sup> First, the Chamber recalls, as observed above,<sup>124</sup> that the Host Agreement did not provide immunity and

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<sup>119</sup> ICC-02/05-01-09-289, para. 86.

<sup>120</sup> ICC-02/05-01/09-T-2-ENG, p. 57.

<sup>121</sup> ICC-02/05-01/09-T-2-ENG, pp. 87-89.

<sup>122</sup> ICC-02/05-01-09-289, para. 86.

<sup>123</sup> *Ibid.*, para. 84.

<sup>124</sup> See above, paras 66 and 67.



privileges to Heads of State attending the African Union Summit. In any case, the Chamber notes that the Host Agreement is a common instrument in the preparation of an international meeting such as the African Union Summit and that the document in question appears to be framed in the manner usual for such instruments. The Chamber also notes that according to article 31 of the Vienna Convention on the Law of Treaties, the Host State Agreement should be interpreted in good faith. In this regard, the Chamber finds that the Host Agreement did not concern Omar Al-Bashir specifically, but is a general legal document regulating a broad scope of issues. Thus, it cannot be concluded that the signing of the Host Agreement by South Africa reflected an intention on its part to implement obstacles for the execution of the Court's request for the arrest and surrender of Omar Al-Bashir.

134. The related submission by the Prosecutor to the effect that South Africa would have espoused conflicting legal positions is also immaterial to the matter under consideration. The Chamber notes that the issue before it concerns a multi-faceted legal problem whose resolution is not straightforward in that distinct legal aspects must be considered in their mutual interaction. It is also acknowledged that previous decisions by the Court, while invariably concluding that States Parties to the Statute have a duty to arrest Omar Al-Bashir and surrender him to the Court, have not employed exactly the same legal argumentation on the matter.<sup>125</sup> In these circumstances, the Chamber does not consider that any variation by South Africa in its legal argumentation on the matter in its submissions before the Chamber evidences an intent to impose a legal obstacle to the execution of the request for the arrest and surrender of Omar Al-Bashir.

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<sup>125</sup> See, for example, Pre-Trial Chamber I, "Corrigendum to the Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir", 15 December 2011, ICC-02/05-01/09-139-Corr and Pre-Trial Chamber II, "Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court", 9 April 2014, ICC-02/05-01/09-195.

2. Whether a referral of South Africa's non-compliance would be an effective way to foster cooperation

135. The Chamber also recalls that the Appeals Chamber has found that, since the object and purpose of article 87(7) of the Statute is to foster cooperation, a referral to the Assembly of States Parties and/or the Security Council of the United Nations “was not intended to be the standard response to each instance of non-compliance, but only one that *may* be sought when the Chamber concludes that it is the most effective way of obtaining cooperation in the concrete circumstances at hand”.<sup>126</sup> The Chamber should therefore consider whether engaging external actors would, in the circumstances of the case, be an effective way to obtain cooperation.
136. The Chamber notes that South Africa's domestic courts have found that the Government of South Africa acted in breach of its obligations under its domestic legal framework by not arresting Omar Al-Bashir and surrendering him to the Court. In particular, the Supreme Court of Appeal of South Africa has concluded that the conduct of the Government of South Africa was “inconsistent with South Africa's obligations in terms of the Rome Statute and section 10 of the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002, and unlawful”.<sup>127</sup> Importantly, this ruling has become final as the Government of South Africa has withdrawn its previously lodged appeal against it.<sup>128</sup> It therefore appears that the Government of South Africa has accepted its obligation to cooperate with the Court under its domestic legal framework. In addition, the present decision comprehensively and conclusively disposes of the matter as concerns South Africa's obligations under the Rome Statute.

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<sup>126</sup> *The Prosecutor v. Uhuru Muigai Kenyatta*, “Judgment on the Prosecutor's appeal against Trial Chamber V(B)'s ‘Decision on Prosecution's application for a finding of non-compliance under Article 87(7) of the Statute’”, 19 August 2015, ICC-01/09-02/11-1032, para. 51.

<sup>127</sup> See ICC-02/05-01/09-258-Anx, p. 4.

<sup>128</sup> See ICC-02/05-01/09-289-AnxH.

137. Therefore, should there have existed any doubt in this regard, it has now been unequivocally established, both domestically and by this Court, that South Africa must arrest Omar Al-Bashir and surrender him to the Court. In these circumstances, as any possible ambiguity as to the law concerning South Africa's obligations has been removed, a referral of South Africa's non-compliance with the Court's request for the arrest and surrender of Omar Al-Bashir would be of no consequence as a mechanism for the Court to obtain cooperation.
138. In addition, the Chamber observes that States Parties have been referred to both the Assembly of States Parties and the United Nations Security Council in six instances in relation to failures to arrest and surrender Omar Al-Bashir.<sup>129</sup> However, the past 24 meetings of the Security Council of the United Nations following the adoption of Resolution 1593 (2005), including meetings held on the occasion of the biannual reports made by the Prosecutor to the Security Council of the United Nations, have not resulted in measures against States Parties that have failed to comply with their obligations to cooperate with the Court, despite proposals from different States to develop a follow-up mechanism concerning the referral of States to the Security

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<sup>129</sup> Pre-Trial Chamber I, "Corrigendum to the Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir", 13 December 2011, ICC-02/05-01/09-139-Corr; Pre-Trial Chamber I, "Decision pursuant to article 87(7) of the Rome Statute on the refusal of the Republic of Chad to comply with the cooperation requests issued by the Court with respect to the arrest and surrender of Omar Hassan Ahmad Al Bashir", 13 December 2011, ICC-02/05-01/09-140-tENG; Pre-Trial Chamber II, "Decision on the Non-compliance of the Republic of Chad with the Cooperation Requests Issued by the Court Regarding the Arrest and Surrender of Omar Hassan Ahmad Al-Bashir", 26 March 2013, ICC-02/05-01/09-151; Pre-Trial Chamber II, "Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court", 9 April 2014, ICC-02/05-01/09-195; Pre-Trial Chamber II, "Decision on the non-compliance by the Republic of Djibouti with the request to arrest and surrender Omar Al-Bashir to the Court and referring the matter to the United Nations Security Council and the Assembly of the State Parties to the Rome Statute", 11 July 2016, ICC-02/05-01/09-266; Pre-Trial Chamber II, "Decision on the non-compliance by the Republic of Uganda with the request to arrest and surrender Omar Al-Bashir to the Court and referring the matter to the United Nations Security Council and the Assembly of State Parties to the Rome Statute", 11 July 2016, ICC-02/05-01/09-267.

Council by the Court.<sup>130</sup> The Chamber considers that these considerations further strengthen its belief that a referral of South Africa is not warranted as a way to obtain cooperation.

### 3. Conclusion

139. In sum, the Chamber considers of significance that South Africa is the first State Party to seek from the Court a final legal determination on the extent of its obligations to execute a request for arrest and surrender of Omar Al-Bashir. In addition, the Chamber is not convinced that a referral to the Assembly of States Parties and/or the Security Council of the United Nations would be warranted in order to achieve cooperation from South Africa, in light of the fact that South Africa's domestic courts have already found South Africa to be in breach of its obligations under its domestic legal framework and in light of the resolution of any remaining open matter by virtue of the present decision.
140. In view of the specific circumstances of this case, and bearing in mind its discretion under article 87(7) of the Statute, the Chamber therefore considers that a referral to the Assembly of States Parties or the Security Council of the United Nations of South Africa's non-compliance with the Court's request for arrest and surrender of Omar Al-Bashir is not warranted.

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<sup>130</sup> For example by Argentina at the 6974<sup>th</sup> meeting of the Security Council (S/PV.6974, p. 12), and by New Zealand at the 7582<sup>nd</sup> meeting (S/PV.7582, p. 7).

**FOR THESE REASONS, THE CHAMBER HEREBY**

**FINDS** that South Africa failed to comply with its obligations under the Statute by not executing the Court's request for the arrest of Omar Al-Bashir and his surrender to the Court while he was on South African territory between 13 and 15 June 2015; and

**DECIDES** that, in the present circumstances, a referral to the Assembly of States Parties or the Security Council of the matter of South Africa's non-compliance with the Court's request for the arrest of Omar Al-Bashir and his surrender to the Court is not appropriate.

Judge Marc Perrin de Brichambaut appends a minority opinion.

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



**Judge Cuno Tarfusser**  
**Presiding Judge**



**Judge Marc Perrin de Brichambaut**



**Judge Chang-ho Chung**

Dated 6 July 2017

At The Hague, The Netherlands