

1 International Criminal Court
2 Appeals Chamber
3 Situation: Darfur, Sudan
4 In the case of The Prosecutor v. Omar Hassan Ahmad Al-Bashir - ICC-02/05-01/09
5 Presiding Judge President Chile Eboe-Osuji, Judge Howard Morrison,
6 Judge Piotr Hofmański, Judge Luz de Carmen Ibáñez Carranza,
7 Judge Solomy Balungi Bossa
8 Appeals Hearing - Courtroom 1
9 Tuesday, 11 September 2018
10 (The hearing starts in open session at 9.06 a.m.)
11 THE COURT USHER: [9:06:44] All rise.
12 The International Criminal Court is now in session.
13 Please be seated.
14 PRESIDING JUDGE EBOE-OSUJI: [9:07:09] Thank you very much.
15 Court officer, please put the case on the record for the day.
16 THE COURT OFFICER: [9:07:23] Thank you. Good morning, your Honours.
17 The situation in Darfur, Sudan, in the case of The Prosecutor versus Omar Hassan
18 Ahmad Al-Bashir, case reference ICC-02/05-01/09.
19 For the record, your Honours, we are in open session.
20 PRESIDING JUDGE EBOE-OSUJI: [9:07:41] Thank you very much.
21 Are there any changes in appearance?
22 MR JALLOH: [9:07:53] Good morning, your Honours. Charles Jalloh with the
23 African Union Commission, Office of the Legal Counsel in my capacity as external
24 counsel for the African Union Commission. Thank you.
25 PRESIDING JUDGE EBOE-OSUJI: [9:08:12] Thank you, Mr Jalloh, for joining us.

1 Now we will continue where we left off yesterday. We were taking submissions
2 from friends of the Court, the academic friends of the Court. And let's now go to
3 Mr O'Keefe.

4 Before you proceed, just to indicate that we will sit until 10, for one hour, and then we
5 will take a break and come back.

6 Please.

7 MR O'KEEFE: [9:08:49] Mr President, your Honours, I will be speaking on the issues
8 in relation to immunity raised by the questions in group A, rather than on the
9 questions of treaty interpretation. I will start with two points of information or
10 clarification, before moving to the heart of the matter.

11 First, strictly speaking, immunity imports an obligation under international law to
12 ensure, in the present context, only that a person is not subjected to judicial
13 proceedings, insofar as this may be necessary under the State Party's national law, for
14 his or her surrender to the Court. It is a person's inviolability where international
15 law provides for it, not immunity *stricto sensu*, which imports an obligation to ensure
16 that the person is not subjected to arrest.

17 Now it is generally accepted, including by the Pre-Trial Chamber in the present case,
18 that the reference in Article 98(1) of the Rome Statute to immunity encompasses also
19 inviolability, since surrender presupposes arrest and since Article 89(1), the ICC's
20 power under which Article 98(1) qualifies, speaks of a request for arrest and
21 surrender. It is nonetheless important to keep in mind that immunity from judicial
22 proceedings, including proceedings for the surrender of a person to the ICC and
23 inviolability from arrest constitute distinct international legal concepts and distinct
24 international legal obligations.

25 Secondly, when speaking of the immunity -- sorry, secondly, and in relation to

1 question (g) posed under group A, in dealing with the immunity and inviolability
2 *ratione personae* of a Head of State, we are not dealing with sovereign immunity as
3 question (j) and counsel for the Prosecutor both suggest. The immunity *ratione*
4 *materiae* of all serving and former State officials in respect of acts performed by them
5 in their official capacity is a manifestation of sovereign immunity, which is itself
6 a corollary of the sovereign equality of States.

7 The broader immunity and inviolability *ratione personae* of a narrow circle of high
8 ranking, serving State officials and of diplomatic agents and certain other envoys is
9 a different creature entirely, even if it overlaps to an extent with immunity
10 *ratione materiae*. While the immunity of a serving Head of State originated in
11 sovereign immunity or, more precisely, while the mutual immunity of sovereigns,
12 that is sovereign immunity, gave rise to the immunity of all serving Head of State
13 from foreign criminal jurisdiction, the latter, immunity *ratione personae* and
14 inviolability *ratione personae* of the serving Head of State, is now more plenary than
15 sovereign immunity and, importantly, is today rationalised on different grounds.

16 Whereas immunity *ratione materiae* is founded on the principle of respect for the
17 sovereign equality of States, the rationale, as explained by the International Court of
18 Justice at paragraph 53 of the Arrest Warrant case, for the immunity and inviolability
19 *ratione personae* of those who benefit from them, among them serving Head of State,
20 is purely pragmatic, namely, and I quote, "to ensure the effective performance of their
21 functions on behalf of their respective States."

22 Turning to the critical issues, it is essential to emphasise, contrary to what counsel for
23 the Prosecutor and some of my fellow amici curiae have suggested, that insofar as
24 judicial proceedings may be necessary under a requested State's law for the surrender
25 of a person to the ICC, such proceedings constitute criminal proceedings and, as such,

1 constitute an exercise by the requested State of its criminal jurisdiction, specifically its
2 criminal adjudicative jurisdiction over the person.

3 Indeed, they constitute as much an exercise of its own criminal jurisdiction by the
4 requested State as would the person's prosecution or proceedings for the person's
5 extradition to another State. They represent, in the words of the International Court
6 of Justice in *Certain Questions of Mutual Assistance in Criminal Matters*, at
7 paragraph 170, the requested State's, quote, "subjection of the person to a constraining
8 act of authority." As such, where the person is an official of another State, surrender
9 proceedings engage the request State's international legal obligation to accord that
10 other State's official immunity from its criminal jurisdiction in the same way as would
11 the prosecution or proceedings for the extradition of the official.

12 To say that in surrendering the official to the ICC the requested State is acting as the
13 ICC's agent or jurisdictional proxy is, with respect, legally meaningless. It is also, I
14 would point out, an inaccurate metaphor since it is the States Parties which have
15 conferred jurisdiction on the Court, not the other way around.

16 What engages immunity and inviolability is the subjection of the official to the power
17 of a foreign State's own criminal courts and own police. The source or purpose of
18 any such request for subjection is immaterial.

19 This is the premise of Article 98(1) of the Rome Statute, which would be redundant
20 were proceedings before the courts of a requested State for the surrendering of
21 another State's official to the ICC not to engage the question of the official's immunity.

22 The same goes *mutatis mutandis* for a State's arrest of another State's official at the
23 request of the ICC and that official's inviolability.

24 Now as for the argument of counsel for the Prosecutor that the fact that a requested
25 State Party is barred by Article 59(4) of the Rome Statute from enquiring into the

1 legality of the issue of the warrant is unique to surrender to the ICC, on the contrary, I
2 would draw the attention of the Court to the European arrest warrant, under which
3 the executing judicial authority of a Member State may not enquire into the legality of
4 the issue by the issuing Member State of the warrant. That is the heart of the
5 European arrest warrant and a feature of the system which has proved controversial
6 in some Member States.

7 I would also draw the Court's attention to Article 20 of the Council Framework
8 Decision on the European arrest warrant under which such jurisdictional immunities
9 as may apply in the executing Member State continue to apply. In other words, just
10 as with the request from the ICC for arrest and surrender, the executing Member State
11 of a European arrest warrant is not a mere agent or jurisdictional proxy of the issuing
12 Member State.

13 Returning to the ICC, since it is the requested State's subjection of another State's
14 official to judicial proceedings, where these are required under its law for surrender
15 to the ICC and to arrest, which engage immunity and inviolability under international
16 law and which in doing so engage Article 98(1) of the Rome Statute, it is irrelevant
17 that in accordance with Article 27(2) of the Statute, immunities pose no bar to the
18 exercise by the Court of its own jurisdiction.

19 Now, that on a correct interpretation of Article 27(2), according to the rules of treaty
20 interpretation, it pertains only to the exercise by the Court of its own jurisdiction, is
21 a point I will address in detail in my oral observations on the questions in group C,
22 where the issue is raised by question (c) in group C.

23 I am only speaking here of the more structural or logical question. The
24 unavailability of immunity by the ICC itself has no bearing on the availability of
25 immunity as a bar to the exercise by the requested State's, by the requested State's

1 court of its jurisdiction in the form of surrender proceedings, let alone on the distinct
2 availability of inviolability as a bar to the requested State's arrest of the official. Now
3 this point was highlighted by the Supreme Court of South Africa in Minister of
4 Justice and Constitutional Development, quoted to us yesterday, and SALC at
5 paragraphs 69 and 77.

6 The same goes, and this is important, for the unavailability of immunity as a bar to
7 the exercise by other past and present international criminal courts of their respective
8 jurisdictions as provided for in their respective statutes. The fact, for example, that
9 immunities were no bar to the exercise by the Nuremberg Tribunal or by the
10 International Criminal Tribunal for the former Yugoslavia or by the Special Court for
11 Sierra Leone of their own jurisdiction when the accused was before them, is, with
12 respect, beside the point.

13 Now since proceedings before the courts of the requested State for the surrender of
14 another State's official to the ICC constitute as much an exercise by the requested
15 State of its own criminal jurisdiction over the official as would its prosecution of the
16 official or subjection of him or her to extradition proceedings, the question in the
17 present case is ultimately not whether one can identify a discrete rule of customary
18 international law positively obliging the requested State to accord the head of another
19 State immunity from proceedings for his or her surrender to an international criminal
20 court in respect of international crimes as question (1) and counsel for the Prosecutor
21 suggest. The question, rather, is whether the established customary obligation on
22 the requested State to accord the head of another State immunity from its criminal
23 jurisdiction is exceptionally inapplicable in such circumstances or in the more specific
24 circumstances of that Head of State's surrender to the ICC on charges alleging
25 responsibility for international crimes, among them genocide.

1 The same goes mutatis mutandis for a Head of State's customary inviolability from
2 arrest by a foreign State, in other words, it falls to the Prosecutor to establish
3 positively, according to the rigorous tests laid down by the International Court of
4 Justice and proudly quoted by counsel for the Prosecutor himself that such
5 a customary exception exists.

6 So does such a customary exception exist? Moving quickly over the first possible
7 basis, the international character of the alleged crimes and leaving aside both the
8 crime of genocide and the possibility of a specific exception in relation to surrender to
9 an international criminal court, I think it seems agreed on all sides that no customary
10 exception in respect of allegations of international crimes currently exists to a Head of
11 State's customary immunity *ratione personae* from criminal jurisdiction and
12 inviolability from foreign arrest. This is what --

13 PRESIDING JUDGE EBOE-OSUJI: [9:22:44] You will of course --

14 MR O'KEEFE: -- the Pre-Trial Chamber said. I beg your pardon?

15 PRESIDING JUDGE EBOE-OSUJI: [9:22:44] You will of course speak to the
16 genocide.

17 MR O'KEEFE: [9:22:48] Yes, I am coming right now to genocide.

18 PRESIDING JUDGE EBOE-OSUJI: Thank you.

19 MR O'KEEFE: [9:22:51] As for the crime of genocide, and in answer to question (p),
20 Article IV of the Genocide Convention does nothing to alter the availability as a bar to
21 foreign criminal proceedings of the customary immunity *ratione personae* of a Head
22 of State. Now on this point I endorse what has been said by counsel for the African
23 Union. Article IV of the Genocide Convention, which echoes Article 7 of the
24 Nuremberg Charter is directed not towards the question of procedural immunity, but
25 to the substantive plea in defence that was ultimately raised and rejected at

1 Nuremberg, that individuals are juridically incapable of bearing criminal
2 responsibility in the first place under international law for acts performed in their
3 capacity as State officials, the so-called substantive act of State defence, as ruled out in
4 proceedings before the ICC by Article 27(1), as distinct from Article 27(2) of the
5 Rome Statute.

6 Now this is not surprising. It is not surprising that Article IV of the Genocide
7 Convention does not relate to the procedural immunity under international law of
8 officials of other States, since the Genocide Convention does not provide for
9 extraterritorial forms of jurisdiction and it is really only in the context of universal
10 jurisdiction, passive personality jurisdiction, and other extraterritorial bases of
11 prescriptive jurisdiction that one would expect the immunity in relation to the crime
12 of genocide of the Head of State of another State to come before one's courts.

13 PRESIDING JUDGE EBOE-OSUJI: [9:24:43] Can you then tell me what the point is
14 with the Genocide Convention that says in Article I that -- I hate to call it the
15 Genocide Convention, I prefer to call it the anti-Genocide Convention, but you know
16 what I mean.

17 MR O'KEEFE: [9:25:03] Sure.

18 PRESIDING JUDGE EBOE-OSUJI: [9:25:05] It says in Article I that States Parties
19 have an undertaking to prevent and punish genocide, if what it boils down to is that
20 States have that undertaking but don't exempt people from it?

21 MR O'KEEFE: [9:25:29] With respect, Mr President, this is the point I am making, it
22 doesn't envisage that they will --

23 THE COURT OFFICER: [9:25:36] Counsel has four minutes left.

24 MR O'KEEFE: [9:25:37] Sure. It doesn't envisage that they will spare people, that
25 they will exempt people. It really only envisages the assertion of jurisdiction over

1 genocide committed on their own territory, the exception being that it will be
2 committed by their own people on their own territory. And when we talk about
3 punish, we talk about responsibility. We are not really talking about the question of
4 procedural immunity. It was also up against the backdrop of the Nuremberg
5 Charter that this was adopted, and at Nuremberg the allies saw themselves as
6 exercising, and they said this in the judgment, the criminal jurisdiction of Germany, of
7 Germany. Therefore --

8 PRESIDING JUDGE EBOE-OSUJI: [9:26:20] But Article VI, isn't it, of the convention
9 says that a State in whose territory the offence occurred, or an international --

10 MR O'KEEFE: [9:26:33] Or an international court, exactly.

11 PRESIDING JUDGE EBOE-OSUJI: [9:26:35] -- tribunal --

12 MR O'KEEFE: [9:26:36] I am talking --

13 PRESIDING JUDGE EBOE-OSUJI: -- will do that.

14 MR O'KEEFE: -- about the exercise of jurisdiction over another State's official, which
15 is not ruled out under the convention, that is not --

16 PRESIDING JUDGE EBOE-OSUJI: [9:26:45] What I mean is - if you hold on for
17 a minute - with that kind of dual avenue of trial and prosecution, national jurisdiction
18 where the offence occurred, and an international tribunal, are we still to sustain the
19 proposition that the purpose or the object of the obligation to punish, prevent and
20 punish is only limited to the territory where the crime occurred?

21 MR O'KEEFE: [9:27:15] Under the convention, yes, but that does not rule out, as the
22 International Court of Justice has itself said, the customary application of any such
23 extra-territorial forms of jurisdiction. Equally, I would point out that the obligation
24 to punish can include just as much an obligation to waive the immunity of one's own
25 official in another state.

1 So punishment doesn't necessarily mean exercising jurisdiction contrary to immunity
2 over another state's official; it could just as much mean that the State whose official it
3 is obliged to waive. So the two aren't necessarily in clash, if you see what I mean,
4 and given it doesn't provide for universal jurisdiction, it's a bit of a stretch to suggest
5 that it was thinking of it.

6 If I may thank you.

7 When it comes to jus cogens, I would simply add two points to the argument of
8 counsel for Jordan and the African Union. The first, there really is little scope for
9 difference between reasonable minds on the matter, as counsel for the Prosecutor said,
10 in jurisdictional immunities of the State, which referred back to arrest warrants and to
11 criminal jurisdiction, saying jus cogens is irrelevant. The Court decided by 13 votes
12 to two. Now in Australia, we call that a "shellacking", an annihilation, okay? The
13 point is dead and buried.

14 Secondly, while I won't address it here for lack of time, I would say the Barcelona
15 traction and the concept of obligations erga omnes is separate from the concept of jus
16 cogens and not relevant to present proceedings. If you are happy with that, I will
17 take that in questions but move on.

18 Finally, I would simply say there is no customary exception in relation specifically to
19 surrender to an international criminal court. There is simply insufficient state
20 practice and opinio juris positively to establish an exception. No head of a serving
21 State has ever been surrendered, first of all, to an international criminal court. So
22 Mr Milošević was surrendered by his own state; Mr Taylor was not the Head of State
23 at the time and his own State actually requested the surrender.

24 As for the ICTY and the ICTR, I will deal with that in part B in the powers of the
25 Security Council. I will simply say in relation to my friend Professor Kreß's

1 observation that Yugoslavia was not a member of the United Nations at the time. I
2 think given that for 10 years or more Yugoslavia strenuously asserted its membership
3 of the UN and that the International Court of Justice had accepted this in the early
4 stages of the genocide case, I think it is fanciful in the extreme to imagine that Judge
5 Hunt, or the Member States that seemed to go along with it, was utterly confident that
6 Yugoslavia was not a member of the United Nations when he requested Member
7 States to arrest him.

8 It was such a complicated question that even the genius of international lawyers in
9 the room struggled over it, let alone Judge Hunt, who was a lovey man, but was
10 a district court in New South Wales, where I'm from, and other Member States of the
11 United Nations.

12 PRESIDING JUDGE EBOE-OSUJI: [9:30:40] No, we wouldn't do that, not with
13 Judge Hunt. We don't want to diminish his stature in international law.

14 MR O'KEEFE: [9:30:48] No, no, no. I'm only -- I was -- an off-the-cuff remark; I'm
15 very sorry about that. I'm simply saying it was an inordinately difficult question
16 and to imagine that everyone knew that Yugoslavia at the time was not a member of
17 the United Nations is, I think, reading into the question much, much more than is, I
18 think, probably plausible.

19 Finally, I would simply remind the Court that immunity and inviolability constitute
20 legal obligations on the parts of the forum state and correlative legal rights on the part
21 of the official state. They are not matters of mere comity or courtesy; so they can't be
22 a question of balancing these rights against ostensibly competing values. Nor can
23 the simple assertion of these rights constitute their abuse.

24 Moreover, as Professor Kreß does, with all due respect to Professor Kreß, distinguish
25 between Head of State responsible for international crimes for whom immunity is

1 supposedly not designed and "innocent" Head of State for whom it supposedly is, is
2 to assume guilt. Everyone, even a Head of State, is innocent until proven guilty and
3 when we are dealing with immunity from criminal jurisdiction we are, by definition,
4 dealing with someone who is yet to be proven guilty or, for that matter, to be
5 acquitted.

6 If I can be of any assistance to the Court, and with sincere apologies to friends and the
7 family of Judge Hunt.

8 Thank you very much.

9 PRESIDING JUDGE EBOE-OSUJI: [9:32:45] Thank you very much.

10 We now go next to Mr Robinson.

11 MR ROBINSON: [9:32:54] Your Honours, my name is Darryl Robinson and, as you
12 know, I am here speaking for a group of professors well known in the field,
13 Professors Cryer, de Guzman, Lafontaine, Oosterveld, Stahn and myself.

14 Our overall position is that the Pre-Trial Chamber was correct and that the Appeals
15 Chamber should affirm its decision. In a nutshell, an order under Chapter VII to
16 cooperate fully, in our view, includes the loss of immunities under Article 27.

17 We see ourselves not just as advocates for one side though, but as genuine friends of
18 the Court and, as such, we do want to acknowledge strengths of the arguments on
19 both sides and in the coming days, we want to suggest some possible ways for the
20 Appeals Chamber to possibly recognise legitimate concerns and real difficulties in
21 this case.

22 Today, under group A, I wanted to talk about two topics -- number one, I just want to
23 make one point about applicable law; and then number two, I want to express my
24 group's hesitations about the international court exception, the customary law theory.
25 My remarks today under ground A are actually going to sound a little bit

1 conservative. The reason for that is we are all supporters of the Court and we want
2 to help the Chamber reach a decision that is going to be measured and will withstand
3 criticism.

4 So, first up on applicable law, I just want to talk about the first question on object and
5 purpose. We agree, of course, that the object and purpose includes preventing
6 impunity and yes, that is a very important consideration. We just want to register
7 two notes of caution. The first is one that others have already pointed out, that in
8 addition to object and purpose, we have to also look at text and context. Context
9 includes the surrounding rules of general international law, that's in Article 31(3)(c) of
10 the Vienna Convention; it's the principle of systemic integration that we want the
11 institution to work harmoniously within a surrounding system.

12 But the second point, which wasn't made, is, I also want to emphasise that good
13 teleological analysis requires an awareness of multiple aims and goals and values.
14 Every legislative enactment reflects a tension negotiated between competing purposes
15 and values. So a good interpretation has to identify the tensions so that we can make
16 a thoughtful responsible interpretation that would earn wide respect.

17 I will explain what I mean by this. I want to give you an analogy of the World Trade
18 Organisation. Often, decisions of the WTO, they really emphasise that their purpose
19 is to promote free trade and they use an aggressive teleological approach that
20 squeezes out provisions in their charter that were intended to protect the
21 environment, human health, public safety. And so the WTO has been criticised for
22 that single-minded aggressive types of interpretation. So I just want to suggest
23 a good teleological interpretation has to also look at the purpose of the limits and
24 constraints in the Statute so we can advance our goals with judicial sensitivity to other
25 community values.

1 The Rome Statute, it is not a single-minded instrument. All throughout the
2 Rome Statute, it accommodates over shared legitimate interests. Article 8 has a lot
3 on military effectiveness, national proceedings, rights of the accused, national security,
4 diplomatic relations, international peace and security and I want to suggest that that
5 is a strength of the Statute. It is not a weakness of the Statute. We want the ICC to
6 be an enduring institution with wide support that makes a contribution as an
7 accepted part of the system.

8 So for that reason, I think it is important to acknowledge the tension, the concerns on
9 the other side, preserving multilateral conversations for regional peace and security
10 and for governance.

11 Yesterday, we had a little bit of talk about law versus policy, as if the fight against
12 impunity is law and all other considerations are somehow inferior or inappropriate or
13 dirty or political, which I don't think that is correct. I don't think that any of these
14 community values should be ignored. I think they are all part of a legal analysis.

15 So that line of thinking, sensitivity to multiple aims shapes the position that my group
16 of scholars would suggest to you. Again, we think the Pre-Trial Chamber approach
17 was correct and should be affirmed, but the Court should be judicious and
18 acknowledge concerns.

19 So in the coming days, I want to point out that there might be some legal avenues to
20 accommodate some legitimate concerns, particularly where there is a treaty providing
21 immunities for a conference of an international governmental organisation. There
22 are some legal avenues that maybe could be recognised and, if so, it would address
23 one of the strongest concerns expressed by a lot of States Parties. It is a possibility, it
24 is up to you.

25 And the second line for us is that we can acknowledge that there was a genuine

1 controversy and real legal uncertainty here and maybe look at the position of the
2 State of Jordan with some understanding, and that maybe the solution is for the
3 Appeals Chamber to just simply clarify the law for the future.
4 So that's on the applicable law. So the rest of my time I want to speak about
5 the -- a lot of the questions are about customary law and this international court's
6 exception. And now here, I am in an awkward spot in that I historically almost
7 always agree with my excellent friend, Claus Kreß; so this is somewhat painful for me,
8 but my group of scholars, we would unanimously urge the Appeals Chamber not to
9 adopt the international court exception at this time. All of us are supporters of
10 international justice, but we have principle concerns, principle legal concerns at least
11 about it at this time. Maybe let's come back to it in 30 years with more practice and
12 more authority, but it might not be necessary for today.

13 First of all, it is not clear that it is really raised on this appeal by Jordan and as granted
14 by the Pre-Trial Chamber. Second, the international court argument, it emerged in
15 the Taylor decision of the Sierra Leone special court and it has received severe
16 criticism even from strong supporters of the Court. Arguably, it does not fit very
17 well with some basic legal principles; I will explain what I mean by that in a moment.
18 And third is a matter of judicial economy. We have available a classic route rooted
19 in State consent, indirect State consent, the Security Council avenue. So it just seems
20 the more economical and narrow approach where you have a Security Council
21 referral to use that.

22 Let me elaborate a little bit more. This theory in the Taylor case, which is --
23 PRESIDING JUDGE EBOE-OSUJI: [9:40:49] Mr Robinson, do you see any solution to
24 this question that would now be open to severe criticism?

25 MR ROBINSON: [9:41:01] I mean, to me, the solution would be, give it a couple of

1 more decades, accumulate more. If the theory gets support in national decisions and
2 International Law Commission statements, if, over time, it could build up a strong
3 body of State practice and *opinio juris*, then I think the time would be right to try it.

4 Is that -- okay.

5 So this theory emerged in the Taylor case that by virtue of being an international
6 court, one, the court doesn't have to respect immunity. I think there are problems
7 with that, not just as a rule, but how that rule even fits within the system of
8 international law, and let me illustrate what I mean.

9 To take two countries, neither Canada nor the United Kingdom on their own have the
10 power to ignore the personal immunity of another State. And so I don't think
11 Canada and the UK can create a court together and bestow upon it the power to
12 ignore the personal immunities of another State. They cannot bestow a power that
13 they themselves don't have. And I think that problem exists if it is two States or 10
14 or 50 or a hundred, they cannot bestow a power they don't have. And I think that
15 is fundamental. And the ICC is a court of law and a court of law has to be built on
16 a bedrock of legal principles.

17 Now, the argument then for the international court theory is the international court
18 says: Well, I am not just an aggregate of States Parties; guess what, I represent the
19 entire international community and therefore I have special powers. I think that the
20 targeted State would be entitled to some scepticism of that kind of claim. Nowhere
21 in international law, nowhere in international law is there any principle or doctrine
22 where claiming to represent the international claim gives you the power to ignore
23 rights of non-consenting States. You can look at all the textbooks you want, Shaw,
24 Oppenheim, Brownlie, there's no other rule like that. So it just strikes me as an
25 unknown legal technique. The basic structure of the international legal system is

1 State consent, so it is better to try to find State consent.

2 I think there is concern, particularly in the Global South about this type of claim that,
3 oh, I'm acting for the international community and therefore I have special powers.
4 The worry about it is that it gives those who have voice in the community even more
5 power to override the rights of outlying States. And that's why I think it's better to
6 root yourself in State consent, either direct State consent, the State ratifies the Statute,
7 or indirect, they ratify the UN Charter, including Chapter VII and the powers given
8 there.

9 But then what about this Arrest Warrant decision by the ICJ? We think that the
10 Taylor decision of the Sierra Leone Special Court put inordinate weight on one
11 sentence in the Arrest Warrant decision, and we think it took that sentence out of
12 context. I don't think the ICJ was declaring a new previously unheard of substantive
13 rule. If they were, there would have been some support authority development
14 argumentation. I think it was a passing remark. I think the ICJ was simply
15 addressing possible concerns about impunity and they were gesturing to avenues of
16 recourse, and they said: Look, you can give waiver, you can wait until he is out of
17 office, or you can go to international courts. I think they were just simply observing
18 that there are international courts that have the power to supersede immunities, but
19 they have that power in accordance with known principles of international law.

20 The tribunals can set aside immunities because they have Chapter VII. For the ICC
21 you can set aside immunities where you have a State Party or the State has accepted
22 the Court's -- has unilaterally accepted the obligation to comply or where there is a
23 Security Council order.

24 Another question that we were given is, well, is there enough State practice and
25 opinio juris to show that specifically international criminal courts have to respect

1 immunities. So it is demanding practice specific to international criminal courts.
2 But I think that question has the wrong frame, as Mr Tladi said yesterday, I think it
3 reverses the onus of customary law. An international criminal court is a creation of
4 States. It's still part of the international legal system and it's still governed by the
5 same legal principles, unless there is some recognised legal basis for it to be different.
6 I think you can't just sidestep all the rules by saying, oh, well, those rules say State
7 and I'm not a State.
8 To give an example, the prohibition on the use of force says that States may not use
9 force. So States can't get together, create an international organisation and have it
10 use force and then the organisation says, oh, I'm not a State, I am an international
11 organisation. Instead the same principles apply. International criminal courts are
12 State creations, by default subject to the same rules, the same system, the same
13 principles. And we can look at their statutes to see what special powers have been
14 bestowed upon them by consent.
15 And if we look at the practice of international criminal courts in setting aside personal
16 immunities, I think in every case we will see that there was a consent based basis to
17 do so. So in Nuremberg, Germany had unconditionally surrendered, so the allies
18 were the executive, legislative and judicial branch that there was the consent there.
19 Other times you have ratification of the ICC Statute. You have Security Council
20 where all UN Member States are obliged to carry it out.
21 The Milošević situation is a tricky one, but there is two answers to that. One, the
22 Federal Republic of Yugoslavia was claiming and insisting that it was the successor
23 State to Yugoslavia, so it claimed to be a UN Member State. And in any case, the
24 FRY had ratified the Dayton Accords in which it promised to cooperate fully with
25 the tribunals. And as we will be submitting in later days, I think the obligation to

1 cooperate fully includes a removal of immunity.
2 I am almost done, which is great.
3 The jus cogens argument, I think people have already addressed this enough. The
4 argument is, well, genocide is jus cogens; therefore, that overrides immunities. That
5 argument, others have addressed it. The International Court of Justice has
6 addressed it. The European Court of Human Rights has addressed it. The problem
7 with the argument is the jus cogens prohibition is on committing the crimes, and as
8 the ICJ has explained, that's on a different plane from these issues of prosecuting,
9 immunity, jurisdiction. As the International Court of Justice explained in *Germany v*
10 *Italy*, just because Germany committed jus cogens crimes doesn't mean that
11 immunities don't apply. And then we also have the *Al-Adsani* decision of the
12 European Court of Human Rights; the *Jones* case, the UK House of Lords;
13 International Law Commission, a report on jus cogens. It's a pretty strong body out
14 there.
15 Yesterday we talked about Nuremberg Principle III, which was interesting and
16 important too. I think though that Nuremberg Principle III, I think it's customary
17 law, but it talks about responsibility. Just because you have official capacity doesn't
18 mean you are not responsible. It means that you're still responsible for your crimes.
19 So I think that is about functional immunity, it is about being responsible.
20 Personal immunity, as the ICJ explained in the *Arrest Warrant* case, is different, it has
21 a different rationale. It is not about the individual's responsibility, it's about
22 a procedural shield. And there is authorities for that are that Nuremberg Principle
23 III is about functional immunity. One authority would be the *Alabek* Treatise on
24 international law, it's cited in our brief, and another is the ILC report on jus cogens.
25 So there are a couple authorities on that theme.

1 I think I will just finish ahead of time.
2 For further arguments on this I would refer you to the Cryer et al treatise on
3 international criminal law, chapter 21. On the customary law, I mean, the Chamber
4 doesn't have to close the door on it forever, you could just leave it open, which would
5 be fine. But there is no need to decide it today. We have a Security Council order
6 to a UN Member State and, yes, there is interpretive disputes which we will be talking
7 about in the coming days, but that seems to me the much more secure, narrow
8 grounds. So in the name of judicial economy, I would suggest that's how to
9 resolve this.

10 Thank you, unless you have any questions.

11 PRESIDING JUDGE EBOE-OSUJI: [9:50:08] I actually do.

12 MR ROBINSON: [9:50:10] I thought you might.

13 PRESIDING JUDGE EBOE-OSUJI: [9:50:11] About the distinction procedural versus
14 substantive.

15 MR ROBINSON: [9:50:18] Yes.

16 PRESIDING JUDGE EBOE-OSUJI: [9:50:19] There was that case from the Supreme
17 Court of Canada, I think it is called --

18 MR ROBINSON: [9:50:30] Bazari (phon) maybe?

19 PRESIDING JUDGE EBOE-OSUJI: [9:50:31] No, no, no. Tolofson and Jensen,
20 Tolofson and Jensen, where Mr Justice La Foret basically decried that kind of
21 distinction, procedural versus substantive, saying the Canadian judges are moving
22 towards a trend of disregarding it. He put it in rather tough terms. Before that
23 there was a case out of the Australian High Court, I think it's Maxwell and Murphy
24 where the chief justice, Dixon, I think he was then, also was very critical of that
25 kind of distinction. And then we see a repeat of that criticism by

1 Judge Awn Al-Khasawneh, who I didn't need to mention, very authoritative jurist in
2 his own right from Jordan, who also in the Arrest Warrant case said that it is a very
3 artificial distinction that seeks to circumvent an embarrassing question of whether
4 immunity would translate to impunity.

5 Now, you see where they are going with this. And as I asked the question yesterday,
6 we are in a criminal court where somebody today has said there is a presumption of
7 innocence. It is about a process and Judge Koroma in the Arrest Warrant case
8 distilled that distinction by supporting it, it's about freedom from legal liability. He
9 said that's not what immunity is about, immunity is, rather, about the exemption
10 from legal process. I am using precise terminology he used, that is exemption from
11 legal process. And the question becomes this: At what point, when do you get to
12 legal liability if you are exempt from the legal process in a criminal case? Can you
13 tell me, please.

14 MR ROBINSON: [9:52:56] Yes, excellent. First of all, I will look at those cases with
15 interest. I absolutely sympathise with your point and you made -- I thought you
16 made a very good point yesterday about if there is continually procedural barriers
17 you never get to the substantive responsibility, and I thought that was a very strong
18 point.

19 The answer I suppose, however --

20 PRESIDING JUDGE EBOE-OSUJI: [9:53:21] It wasn't about a point. I wanted
21 clarification. I want you to help me --

22 MR ROBINSON: Yes, yes, yes.

23 PRESIDING JUDGE EBOE-OSUJI: -- because these are things we must deal with.

24 MR ROBINSON: [9:53:28] Sure. I think the answer is there always -- this problem
25 disturbs jurists in all immunity cases, not just criminal, but domestic. In immunity

1 cases around the world you will often be confronted with something awful, a drunk
2 driver has killed someone, someone got tortured, immunity cases are always
3 frustrating, immunity does admittedly frustrate the ability to apply justice. The
4 problem is if we do what you suggest and sort of erase procedure versus substance,
5 you would wind up erasing immunity eventually, which would be quite a big step.
6 Do you see what I mean? Now there is a problem still remaining: What about
7 these Head of States of non-States Parties, right? There is this gap. And I agree.
8 But my answer to that is we should keep doing our work, keep trying to do credible
9 work, promote ICC ratification and eventually get universal ratification as the
10 solution. I recognise that is a long-term way, but that's the legal way.

11 PRESIDING JUDGE EBOE-OSUJI: [9:54:34] I still will need further help from you, if
12 you can. Again, I return to Judge Al-Khasawneh and also this time the joint separate
13 opinion of Judges Higgins, Kooijmans and Buergenthal, who sort of, you know,
14 were not too enthusiastic about those exceptions of those saving or recovery
15 arguments made in paragraph 61 of the Arrest Warrant case. And I think it was
16 Judge Al-Khasawneh that said, look, these kinds of crimes are usually, according to
17 him, if I remember, or the joint judges, maybe some things you say government
18 officials commit. And in many countries, the exception of France and Kenya, for
19 example, who have made exception for their own Head of State when being
20 prosecuted under the Rome Statute, many countries have this exception that their
21 Head of State will not be prosecuted in their countries. And when you have a Head
22 of State for life, or a monarchical Head of State who wields executive power, by
23 definition stay there for life, at what point do you get to get to the legal liability, if you
24 exempt them at home and then exempt them overseas as well?

25 MR ROBINSON: [9:56:16] Again, my answer would be keep pursuing universal

1 ratification of the ICC. My other thought, again, I agree with you about the difficulty
2 of this big puzzle, but I would say --

3 PRESIDING JUDGE EBOE-OSUJI: [9:56:26] So until then, until we --

4 MR ROBINSON: Until the --

5 PRESIDING JUDGE EBOE-OSUJI: [9:56:28] Until we get universal ratification?

6 MR ROBINSON: Okay, until we get to universal ratification, I would say let's work
7 on the case before us and the case before us is a State, it's a UN Member State that has
8 been subjected to an order to cooperate fully, so I think we can resolve the case before
9 us without having to figure out this much more difficult question of an international
10 court's exception. How about -- yes? Thank you.

11 PRESIDING JUDGE EBOE-OSUJI: [9:56:55] Thank you very much.

12 I think we now can take the responses.

13 First from the Prosecutor, five minutes.

14 MR RASTAN: [9:57:20] Thank you, your Honour, Judges.

15 I wanted to make one or two brief points in the five minutes allotted, but of course, as
16 I heard the very thorough presentations this morning by Professor O'Keefe and
17 Professor Robinson, there are additional things that I would like to respond to, but
18 perhaps I won't use the five minutes here and if you allow the courtesy perhaps in the
19 Q and A session when we have quite a lot of time, we can come back to some of those
20 important points that were raised.

21 I just wanted to make some very brief observations and of course we are very happy
22 that we have the benefit of the presence of the AU and Arab League and Jordan itself
23 of course and other scholars who can guide us on the question of customary
24 international law in this issue.

25 I just wanted to pick up on the point that Professor Tladi made yesterday that there

1 are of course several cases that support Jordan's proposition. We don't doubt that
2 there are such cases and indeed we also referred to them. I think what we merely
3 observe is that there are also ample examples that point in the opposite direction and
4 we clearly cannot be satisfied in resting only on one set of cases and not looking at the
5 others.

6 So we ask, for example, in relation to the existence of such cases, and the suggestion
7 of an apparent positive practice by States confirming Jordan's position, how do we
8 then respond to the statement made as recently as July of this year by a group of some
9 35 States which we cited at paragraph 22 of our filing 377 that these 35 States
10 condemned the failure of Djibouti and Uganda to abide by their obligations under
11 international law. Those were the terms how they expressed it.

12 Or how shall we consider the emphatic position of African States such as Botswana
13 and Malawi, among others - and this was at reference A19 in our submissions
14 yesterday - that have said that they would honour their duties to arrest and surrender
15 Mr Bashir? Or indeed the recent Kenyan High Court ruling that affirmed the same.
16 How should we characterise the implementing legislations of States such as Australia,
17 Canada and New Zealand, Germany, South Africa, Croatia, Trinidad and Tobago,
18 Samoa, Estonia, et cetera? Are all such States to be considered persistent objectors,
19 or have such States acted contrary to their international obligations and their
20 requirements of customary law?

21 We say a more reasonable approach is to suggest that State practice and *opinio juris*
22 on this matter, as evidenced by this divergent practice and *opinio juris*, is indeed
23 unsettled.

24 Now we also heard yesterday some insight about the ILC's considerations of draft
25 Article 7, in particular subparagraph 3 that we referred to yesterday. And again, we

1 are not saying that you've come to a collusion on it, you mentioned that five members
2 wanted it out, one member wanted it in. I think we can only be guided by the
3 records of the ILC's own debates. So we merely pointed to the fact that indeed some
4 members wanted to continue the discussion, but also we look at the most recent ILC
5 report just issued --

6 PRESIDING JUDGE EBOE-OSUJI: [10:00:31] Mr Rastan, you are addressing us, not
7 them. Thank you.

8 MR RASTAN: [10:00:35] Yes, sorry.

9 The most recent ILC report -- I'm responding, sir, so I apologise.

10 So the most recent ILC report is reference A/73/10. And I just want to cite the
11 paragraphs so your Honours can examine them further. At paragraphs 277, 280, and
12 327, we find that consideration of this issue about a possible exemption from
13 customary international law in the circumstances that we described yesterday
14 concerning international courts and tribunals, their surrender process, that this
15 remains ongoing.

16 And if we look at the reported views of those members that did not want to consider
17 this issue further, we see, and I quote, this is at paragraph 327, quote, "while some
18 members supported studying what effect an obligation to cooperate with the
19 International Criminal Court might have on the immunity of State officials, others
20 oppose such a consideration, viewing it as incompatible with the agreed scope of
21 draft article 1, according to which the draft articles were without prejudice to the
22 immunity from criminal jurisdiction enjoyed under special rules of international law."
23 In other words, that this issue did not fit within the scope of the customary
24 international law study, the study in general, relations of customary international law
25 affecting State officials from foreign criminal jurisdiction.

1 Now if those ILC members felt so clearly that existing interstate custom in fact also
2 encompassed the ICC surrender process, which is also the proposition put forward by
3 Professor O'Keefe, we would have expected that they would have expressly affirmed
4 in their study that the ICC surrender process should also be captured within the
5 scope of the present study and drafted, in fact, a rule attaching to this important
6 conclusion. Instead we find the opposite. We find that either ILC members believe
7 that it falls outside the scope of their mandate or they have considered, albeit maybe
8 a small minority, a draft rule that would expressly exclude it from the scope of
9 existing immunities.

10 Now, in any event, I don't think we need to debate here the ILC's own internal
11 processes. Colleagues here are much better placed to do that because we believe that
12 the underlying State practice, as we come back to again, an opinio juris is, as we
13 stated, so unsettled.

14 THE COURT OFFICER: [10:02:57] Your time is up.

15 MR RASTAN: [10:02:59] Okay. So I will address the remaining points I wanted to
16 make later on. But that's fine for now. Thank you.

17 PRESIDING JUDGE EBOE-OSUJI: [10:03:05] Thank you very much. We still have
18 some time at the end --

19 MR RASTAN: [10:03:09] Yes, thank you.

20 PRESIDING JUDGE EBOE-OSUJI: [10:03:10] -- I think on Friday for the rest to be
21 said.

22 Now we have the response from Jordan. Yes, please.

23 MR MURPHY: [10:03:27] Thank you, Mr President. My name is Sean Murphy and
24 I'm appearing on behalf of the Hashemite Kingdom of Jordan. It's a great pleasure to
25 appear before you.

1 In the five minutes that I have I would just like to touch on a few of the many points
2 that were raised over the course of the past day, starting with our reiteration of the
3 point made by Ambassador Hmoud in his opening statement, which is that this is an
4 appellate proceeding. There is a Pre-Trial Chamber decision below that reached
5 very specific findings on fact and law. The government of --

6 PRESIDING JUDGE EBOE-OSUJI: [10:04:11] Are you arguing ultra petita now?

7 MR MURPHY: [10:04:21] I am arguing, I hope, Mr President, that in thinking
8 through the issues that are currently being discussed, in our view, it is important to
9 keep a focus on the decision below and what was decided and what was not decided
10 and I hope a focus on the grounds of appeal that we brought before you. Nothing
11 beyond that.

12 PRESIDING JUDGE EBOE-OSUJI: [10:04:44] But you know about so many
13 authorities that say the Court can look at what it needs to look at to arrive at its
14 decision.

15 MR MURPHY: [10:04:56] And in the event that the court wishes to speak about
16 aspects of law or fact that are beyond the scope of our appeal, our submission would
17 be you might end up upholding all three grounds of our appeal and, in the course of
18 doing that, speak to aspects of law that you wish to speak to.

19 PRESIDING JUDGE EBOE-OSUJI: [10:05:19] I am sure you will like that very much.

20 MR MURPHY: [10:05:24] For example, Mr President, the issue of Head of State
21 immunity is not on appeal before you. The Pre-Trial Chamber, as we indicated, was
22 quite clear in finding that President Al-Bashir has Head of State immunity and we
23 accept that conclusion. We did not appeal that conclusion. The Prosecution did not
24 appeal that conclusion. And although the Prosecution sought to expand the scope of
25 what was being appealed, the Pre-Trial Chamber refused to allow it to do so.

1 Consequently, while we have heard many issues here discussed about Head of State
2 immunity, we didn't brief that in our appeals brief and we do feel that we are being
3 placed in a difficult position at a relatively late stage of the process in having to
4 address that issue. I don't have time to do it right now. We are willing to do it if
5 there is continued interest on the part of the Court with respect to that issue. In the
6 question/answer period we would be happy to return to it.

7 PRESIDING JUDGE EBOE-OSUJI: [10:06:40] I don't want to detain you by
8 prolonging this discussion between us, but if I remember the ambassador when he
9 was making the opening statement actually did say that this is a very important
10 appeal. It deals with Head of States immunity. I think the transcript will show that.
11 But go on, please.

12 MR MURPHY: [10:07:01] You are absolutely, correct, Mr President, that we do
13 understand that there are very important issues here. Our view is that they don't
14 actually have so much to do with the case below and the grounds we are appealing
15 on. And again, if the Court wishes to go off in a particular direction, we just hope
16 that you will bear in mind what it is that we were trying to bring before the Court and
17 bear in mind that in the context of the written proceedings as they unfolded. We
18 would be happy in the Q and A period to talk about Head of State immunity, if that is
19 helpful. With all due respect, I think the Prosecution completely misunderstands
20 what is happening at the International Law Commission and we would be happy to
21 go into that. I sympathise, it's not easy to follow what is happening sometimes at the
22 Commission.

23 If I can, I would like to move on to a second point, which is that the Prosecution said
24 that the Vienna Convention on the Law of Treaties is a central starting point for
25 interpretation, the rules set forth in Articles 31 and 32. We completely agree with

1 that, but we would note that the Prosecution immediately blows past the starting
2 point for that analysis, which is the ordinary meaning of the text of the treaty
3 provisions at issue, that they didn't spend any time talking about what does
4 Article 27(2) actually say? What does Article 98 actually say?
5 And after looking at that ordinary meaning, thinking about the context, one is in
6 Part III of the Statute, which has everything to do with the way the Court operates
7 and very little to do with the Court's cooperation with Member States, while
8 Article 98 is in Part IX, which has everything to do with cooperation with the States,
9 and we think that context is quite important.
10 They didn't talk about Article 31(3)'s concept of subsequent practice of States parties
11 and how they were interpreting Article 98. And any possible relationship with
12 Article 27, States Parties don't seem to see Article 27 as having this effect on Article 98
13 that the Prosecution is now advancing, and no discussion of the travaux préparatoires.
14 Did the drafters at Rome believe that Article 27 was having this powerful effect on
15 Article 98? There is no evidence of that whatsoever.
16 I have very little time. I would like to pass on to a third point, this idea that
17 Article 98 is only creating some sort of procedural obligation that the Court is able to
18 perhaps in its discretion apply or not apply. We just don't think that's a plausible
19 interpretation of the article. Part IX is replete with the concept that States are
20 cooperating with the Court in accordance with the provisions of Part IX. And it talks
21 about, and I'm looking at Article 89, that States Parties shall, in accordance with this
22 part, comply with requests for surrender. So that by the time you get to Article 98
23 where it says the Court may not proceed with the request in certain circumstances
24 unless it gets a waiver, that is all part of a single package, if you will, that can't be
25 expressed as simply a question of the Court having an option to do something or not

1 do something.

2 And my last general point is much discussion was made here about this idea that the
3 States being requested are agents or proxies of the Court. We generally agree with
4 much of what Professor O'Keefe said on this point. I would just reiterate that there
5 were questions yesterday about Article 59, for example. Article 59 says that a State
6 Party upon receiving a request from the Court --

7 THE COURT OFFICER: [10:11:23] Your time is up.

8 PRESIDING JUDGE EBOE-OSUJI: [10:11:27] Unfortunately we have to stick to the
9 time. Hopefully you will also return later on.

10 MR MURPHY: [10:11:36] Thank you, Mr President.

11 PRESIDING JUDGE EBOE-OSUJI: [10:11:37] We will now rise for 30 minutes, and
12 then we will return. There will then be questions from the Bench. Maybe that will
13 give counsel opportunity to clarify or finish some thoughts they had.

14 THE COURT USHER: [10:12:00] All rise.

15 (Recess taken at 10.12 a.m.)

16 (Upon resuming in open session at 10.49 a.m.)

17 THE COURT USHER: [10:49:10] All rise.

18 Please be seated.

19 PRESIDING JUDGE EBOE-OSUJI: [10:49:43] Thank you very much, and welcome
20 back.

21 The Judges have some follow-up questions.

22 We will begin with Judge Ibáñez.

23 JUDGE IBÁÑEZ CARRANZA: [10:50:06] Thank you, Mr President, for the floor.

24 For the professors will be this question. Any of you can ask or address the issue.

25 Yesterday, we heard submissions from professors that referred to the Pinochet case.

1 In that case, it was established, among other important findings, that if, as alleged,
2 Senator Pinochet organised and authorised torture, he was not acting in any capacity
3 which gives rise to immunity *ratione materiae* because some actions were contrary to
4 international law.

5 In this regard, I would also like to refer to another important extradition case, namely,
6 the Fujimori case, the former President of Peru, in which it was also established that
7 the former Head of State and current vital senator at the time of the extradition
8 proceedings did not enjoy immunity in relation to grave violations to human rights,
9 such as torture.

10 The question is, are the standards for arrest and surrender under the cooperation
11 regime in the Statute higher or lower than those required in the context of
12 extradition?

13 PRESIDING JUDGE EBOE-OSUJI: [10:51:44] Yes, Professor -- Mr O'Keefe, as we say
14 in the court, please.

15 MR O'KEEFE: [10:51:50] Judge Ibáñez, if I could just address the premise of your
16 first question about the Pinochet case. And, with the greatest of possible respect,
17 what you quote as the ratio of the case is not the ratio of the case.

18 As explained subsequently by the UK House of Lords and as revealed in the case
19 when analysed closely of which there were three to four separate reasons given by the
20 respective judges, the ratio is not, with the greatest of respect, that international
21 crimes or indeed the specific crime of torture can never be considered official acts
22 such as not to give rise to immunity *ratione materiae*. The ratio is, rather, more
23 complicated and perhaps less convincing, but it is as follows: The torture
24 convention, specifically, the Convention against Torture, to rightly pick up on a light
25 motif, I guess, of what the President said before, obliges States Parties not only to

1 provide for extraterritorial forms, indeed universal prescriptive jurisdiction over
2 torture as defined in the convention, but obliges them in the event that someone
3 suspected of that crime turns up on their territory, to prosecute the person or, in order
4 to get around prosecuting the person, to relieve themselves of that obligation. As the
5 international court said in Belgium and Senegal, to hand the person over to another
6 State Party that will.

7 The House of Lords also pointed out that the definition of torture in Article 1.1 of the
8 torture convention is such that someone accused of torture must have been acting in
9 an official capacity at the time or, at the very least, under the cloak of someone else's
10 official capacity.

11 So what the House of Lords said is this, you have a crime defined in such a way that
12 only those who would otherwise be able to rely on immunity *ratione materiae*
13 committed. On the other hand, you have a convention obliging States to assert
14 universal jurisdiction over and to prosecute such persons. The two can't go together.
15 So this inconsistency within the torture convention itself, they are resolved by saying,
16 well, then, the parties must not have intended or envisaged that immunity would be
17 available *ratione materiae* specifically in relation to the crime of torture as provided
18 for and prosecuted under the torture convention. And as later said by the very same
19 House of Lords in the case of *Jones v the Ministry of Interior of the Kingdom of*
20 *Saudi Arabia*, it was the not the ratio that these things cannot be official acts such as to
21 enjoy immunity. Indeed, the Court pointed out, that is an absurd reading because
22 torture is defined as an official act. That is the first thing I would say.

23 The second thing I would say is all of that immunity *ratione materiae*, and as they
24 said in the *Pinochet* case, if he had still been the Head of State, there is no question
25 but that he would have enjoyed immunity from the extradition proceedings before

1 them.

2 PRESIDING JUDGE EBOE-OSUJI: [10:55:53] On the grounds of --

3 MR O'KEEFE: [10:55:55] I would just challenge that particular point.

4 PRESIDING JUDGE EBOE-OSUJI: [10:55:58] On the grounds of what?

5 MR O'KEEFE: [10:55:59] I beg your pardon? On the grounds of --

6 PRESIDING JUDGE EBOE-OSUJI: [10:56:00] Ratione personae?

7 MR O'KEEFE: [10:56:01] On the grounds of that immunity --

8 PRESIDING JUDGE EBOE-OSUJI: [10:56:02] Ratione personae?

9 MR O'KEEFE: [10:56:03] -- ratione personae has no exception in that regard or,
10 putting it another way, is not dependent on the official capacity on which the person
11 was acting at the time, such as to fall within their ratio based on official capacity. So
12 I will just address that first point. Perhaps others can address the Fujimori point
13 with your permission.

14 PRESIDING JUDGE EBOE-OSUJI: [10:56:28] Before you sit, on that, just a follow-up,
15 when you spoke earlier, you spoke about an altered rationale, so to speak, for
16 immunity ratione personae --

17 MR O'KEEFE: [10:56:45] Indeed.

18 PRESIDING JUDGE EBOE-OSUJI: [10:56:47] -- being to enable those who hold
19 office, to which it applies, to perform their functions effectively. But the point had
20 been raised here, I believe, and also hangs in the air, when we say perform functions
21 effectively, what exactly are we talking about when we are saying, that is the question
22 being posed, that the Head of State used office to commit genocide or crimes against
23 humanity, is that the efficient performance of function for which immunity
24 ratione personae should exempt someone from the legal process?

25 MR O'KEEFE: [10:57:39] Right. Well, this is precisely what the International Court

1 of Justice itself addressed in the Arrest Warrant case in which it explicitly said that
2 ministers for foreign affairs and, it told us, Head of State and heads of government
3 enjoy absolute immunity *ratione personae*.

4 PRESIDING JUDGE EBOE-OSUJI: [10:58:01] Even if they commit genocide?

5 MR O'KEEFE: [10:58:04] Yes, yes. And the reason that the Court gave is as follows:

6 It is immaterial whether the capacity in which they are alleged to have done this was
7 private. It is immaterial whether, on some reading of what ought to be the sorts of
8 things people do in their official capacity that the act of genocide or the act of torture
9 or the crimes against humanity or grave breaches in that case fell outside that.

10 The Court's point was this, if you allow prosecution or arrest, while the minister for
11 foreign affairs is the minister for foreign affairs, while the Head of State is the foreign
12 state, while the head of government is the foreign government, you still interfere with
13 their performance of their functions on behalf of the State.

14 Let me put it this way, the Head of State --

15 PRESIDING JUDGE EBOE-OSUJI: [10:59:05] Let me alter that scenario for you.

16 MR O'KEEFE: [10:59:07] Sure.

17 PRESIDING JUDGE EBOE-OSUJI: [10:59:08] When you have, for instance,
18 a scenario where, and hypothetically speaking, where somebody wasn't a Head of
19 State, but somehow they managed to shoot themselves into office, perhaps
20 committing genocide and then there is a charge against them on that basis, would
21 they still enjoy immunity *ratione personae*?

22 MR O'KEEFE: [10:59:32] Yes, yes, yes. Because the point of immunity
23 *ratione personae*, to use the words of a former advertisement for British Telecom, is
24 that it is good to talk. What the Court says is, diplomats, the minister for foreign
25 affairs, the Head of State, the head of government represent their state abroad. And

1 therefore, putting it bluntly, we have to swallow the bitter pill and perhaps accept
2 that there are some circumstances in which it is not at all attractive that they all enjoy
3 immunity, but nonetheless they must in the interests of international intercourse.
4 So the point is this, if the King of Saudi Arabia goes to London to shop at Harrods in
5 his personal capacity and is arrested in his personal capacity, he is, nonetheless,
6 incapacitated as the Head of State of Saudi Arabia and therefore incapable of
7 representing his state in the event he is called on to represent his state. Is that
8 sufficient?

9 PRESIDING JUDGE EBOE-OSUJI: [11:00:47] I think so. Thank you.

10 JUDGE IBÁÑEZ CARRANZA: [11:00:56] Thank you, Professor O'Keefe. From
11 your answer, are you stating that immunities or immunity is an absolute concept or
12 an absolute institution that does not have any restriction or limitation? Because in
13 the field of rights, we all know that even rights have some limitations. How can
14 immunity that is a privilege that is borne up from exemptions from the principle of
15 territorial jurisdictions of the states be an absolute concept? Could you explain it,
16 what is your view?

17 MR O'KEEFE: [11:01:39] Sure.

18 JUDGE IBÁÑEZ CARRANZA: [11:01:40] Yes.

19 MR O'KEEFE: [11:01:41] Can I first go back to this notion of a privilege. It is not a
20 privilege. It is an immunity. The conventions on privileges and immunity
21 distinguish between privileges and immunities, but the distinction is completely
22 technical. An immunity is an immunity from jurisdiction and would include
23 inviolability from enforcement measures. A privilege is something like a substantive
24 exemption from the taxation regime of the local state. Substantive. A substantive
25 exemption from visa requirements. Immunities are procedural, but both are rights

1 held by the State whose official it is.

2 Now this idea that somehow they are to be read narrowly because they constitute
3 exceptions to the principle --

4 PRESIDING JUDGE EBOE-OSUJI: [11:02:31] The point, actually, the point of the
5 question is, however we characterise it, whether we call it a right or a privilege, we
6 can agree for the purposes of the discussion that it is a right. The point of
7 the question is, is it an absolute right with no exception? That is the question.

8 MR O'KEEFE: [11:02:52] Yes. And the answer to the question is, if you read the
9 Arrest Warrant case, if you read everything said so far by the International Law
10 Commission in relation to immunity *ratione personae*, if you read States' reactions to
11 that in the Sixth Committee of the General Assembly and if you read every single
12 domestic court judgment you find, it is while that person is in office absolute.
13 Now some people say, "Ah, but the French Cour de Cassation, in the case in relation
14 to President Gaddafi, mentioned the exception." They said, "This does not fall
15 within one of the exceptions of the immunity of a Head of State." The exceptions of
16 immunity of a Head of State are in the civil sphere. In the civil sphere, just as with
17 diplomats. There are some extraordinarily narrow exceptions to the otherwise
18 absolute immunity *ratione personae* of these people in relation to, let's say, a diplomat,
19 accredited to the Court of St James's in London, starts dealing speculative in real
20 estate. If he were or she were to be sued for damages, then that is an exception from
21 civil proceedings.

22 But there are no exceptions. As the international court, the International Law
23 Commission and the unwavering practice of States tells us to immunity
24 *ratione personae*. The only State that tried this, Belgium, ended up in the
25 International Court of Justice, lost, and its own court, the cassation, said that it had

1 violated international law.

2 It may sound unpleasant. And as my colleague and friend, Professor Robinson said,
3 there are no doubt very uncomfortable issues raised by this. But the answer, as
4 States have agreed, seems not to be to take away the immunity. The answers seem
5 to be, as the International Court of Justice said in paragraph 61 of the Arrest Warrant
6 case, waiver, wait till they're gone, put them before an international court whose
7 statute specifically relates to this question and takes away immunity.

8 PRESIDING JUDGE EBOE-OSUJI: [11:05:28] Thank you very much.

9 Professor --

10 JUDGE IBÁÑEZ CARRANZA: [11:05:30] (Microphone not activated)

11 PRESIDING JUDGE EBOE-OSUJI: [11:05:33] Yes, Professor Kreß wanted to respond
12 to the question or the discussions so far.

13 MR KREß: [11:05:43] Thank you, Mr President. Might I make one comment on the
14 answer just given by my distinguished colleague and friend, Roger O'Keefe, and then
15 turn to the last bit of your question, your Honour.

16 It is true, and I don't think anybody has disputed that, that immunity *ratione*
17 *personae* in national proceedings is absolute. I certainly have not disagreed with it
18 in my written observations, I have made that crystal clear. The ICJ was crystal clear
19 and I accept that as a matter of customary international law.

20 However, the ICJ has gone further in one very important paragraph, 61, and has said,
21 the matter is different, explicitly, when it comes to proceedings before certain
22 international criminal courts, including the ICC.

23 This is the issue, and the key question is not whether immunity *ratione personae* is
24 absolute there where it has to apply in national proceedings. The question before
25 that chamber is whether we are confronted here with an issue of national proceedings

1 or international proceedings?

2 PRESIDING JUDGE EBOE-OSUJI: [11:07:08] The question there, the issue, it seems,
3 sometimes we, in both the written matter and the discussion, we may forget that
4 nuance. The issue is whether what is said in paragraph 61 of the Arrest Warrant
5 case relating to international courts, whether that kind of exemption, if we call it that,
6 can be dragged into the national realms when there is a request for arrest of
7 somebody so the person can be tried at an international court, which is not the issue
8 before the ICJ in the Arrest Warrant case.

9 In the Arrest Warrant case, it was purely a matter of the Belgian court exercising
10 jurisdiction over international crimes, but here it is. Can we drag that into an ICC
11 scenario like where we are now?

12 MR KREß: [11:08:14] I would agree, just with this one qualification. You said in the
13 "national realm." If I understood you correctly here, I would make an important
14 qualification; that's just the question as a matter of law, national jurisdictional or
15 international. That is the issue on which we have spoken.

16 And I will take the opportunity to elaborate a little bit on this issue on the basis of the
17 last part of your question, if I understood your Honour correctly. And the last bit
18 seemed to be, is there a difference between interstate extradition proceedings and the
19 vertical cooperation-ship between a State Party and the ICC? And that's a crucial
20 question because it is at the heart of the issue.

21 And I would argue respectfully that there is a difference, a crucial difference, and let
22 me just respond to one important and very helpful consideration, again by my
23 distinguished colleague and friend, Roger O'Keefe, who drew the attention of judges
24 to the European Arrest Warrant scenario, saying that perhaps the court should draw
25 an analogy from there. And I would only answer to this with a degree of caution.

1 The European Arrest Warrant system at first glance may seem similar, but if you look
2 closer to it, it is far more similar to a traditional interstate cooperation. But then to
3 the level of vertical --

4 PRESIDING JUDGE EBOE-OSUJI: [11:10:02] Mr O'Keefe, can you turn off your
5 microphone, please. Thank you.

6 MR KREß: [11:10:09] To the system of vertical cooperation we have here, I will make
7 it very clear -- I will try to make it very clear to your Honours under what conditions
8 the analogy would hold. The analogy with the European Arrest Warrant system
9 would hold if there would be a system of crimes under European law with
10 a European court of justice to adjudicate those crimes, and, most importantly, with an
11 established European court immunity exception, parallel to the one I have yesterday
12 explained to you, which has come into existence under customary international law,
13 and then under such a system, a system of vertical cooperation between this
14 hypothetical European court of justice and European Member States.

15 This would be a correct analogy. And if this were the case, your Honours, I would
16 not hesitate a second to apply the same reasoning I have presented respectfully to you
17 yesterday to this scenario. But I think it is obvious that the European Arrest Warrant
18 system as it exists today has little to do with the hypothesis I have just explained.
19 Thank you.

20 PRESIDING JUDGE EBOE-OSUJI: [11:11:32] Thank you very much.

21 Yes, Mr Rastan.

22 MR RASTAN: [11:11:36] Your Honour, may I ask on the topic of the European
23 Arrest Warrant, I also want to make some observations, and if this is an appropriate
24 time?

25 PRESIDING JUDGE EBOE-OSUJI: [11:11:42] Please, proceed.

1 MR RASTAN: [11:11:43] I just wanted to follow-up on the point that Professor Kreß
2 has made. It is an interesting analogy that Professor O'Keefe points to. But, of
3 course, the European Arrest Warrant framework is fundamentally an interstate
4 framework, it basically builds on existing extradition practice. So it is quite different
5 from the surrender process. You will recall that the Statute of course makes
6 a distinction between arrest and surrender processes and extradition.
7 So, for example, in the European Arrest Warrant we see Articles 3 and 4 of it that
8 States retain the traditional exceptions to granting extradition, which include the
9 principle of double criminality, which doesn't apply here; the statute of limitations,
10 doesn't apply here; amnesties, not clear applies here, it is currently in dispute in some
11 cases of the first instance; as well as respecting decision not to proceed without
12 exposing them to a genuineness assessment again doesn't apply here.
13 The only thing that the warrant, the framework decision provides is for a mutual
14 recognition framework, which is the analogy perhaps to what Professor O'Keefe was
15 saying. But that is again based upon the consent of the relevant States to implement
16 that system.
17 And then the express reference to observing the provisional immunities that might
18 apply in relation to Article 20 of the framework decision again is something that
19 States have expressly chosen to confirm; whereas in Article 98 we say the drafting
20 history, and we did deal with the drafting history, doesn't show itself to be definitive.
21 So just turning to the question asked now, we absolutely agree, and we also I think
22 are on common ground that of course personal immunities --
23 PRESIDING JUDGE OBOE-OSUJI: [11:13:26] With who?
24 MR RASTAN: [11:13:28] With everybody here in terms of the scope of personal
25 immunities, yes, of course. At the national level it applies to -- it is without

1 exception. And the ILC indeed in its adopted conclusions, which it has transmitted
2 and finalised recently recalls that. So we are not disputing that either.
3 But we are similarly, as Professor Kreß has just noted, trying to understand the
4 relevance of that to proceedings before this Court. And what we fear is that the way
5 that the matter has been approached by, well, Professor O'Keefe this morning or AU
6 and LAS and Jordan counsel earlier appears to conflate these two essential processes,
7 the national and the international. It would be as if creating a Catch-22 situation
8 where the ICC is distinguishable from national criminal jurisdictions. It is there
9 actually set up to be a complementary mechanism that would replace the inability or
10 the unwillingness of States to operate, including in these kinds of contexts as one of
11 the key contexts in which the ICC operates, distinguishable from national
12 jurisdictions is in relation to the irrelevance of official capacity.
13 States are mandated to enforce the orders of the ICC, because the ICC doesn't have its
14 own enforcement limbs. But then the very process of enforcing it smothers the ICC's
15 exercise of jurisdiction into national rules and customary international rules that
16 apply at the inter-State level. So that would create an illogical outcome in
17 a circumstance where, while that assertion could well be made, we don't see the
18 evidence for it. So in terms of where does the evidence -- where the burden lie, while
19 even if it lied with us, we have given examples of inconsistent state practice and
20 opinio juris to show that we can't see that this matter is settled; that this necessary
21 analogy between national immunity rules is directly transferred to the ICC. We say,
22 at best, this question remains unsettled. And certainly the result of that is that you
23 have to then go back to special international law, which is the applicable treaty
24 regime, and that engages into the discussions that we will grapple with tomorrow.
25 PRESIDING JUDGE EBOE-OSUJI: [11:15:39] During the first I believe iteration of

1 ILC, in 1947 or thereabouts, I think it was Monsieur Henri Donnedieu de Vabres, who
2 was a French judge at the Nuremberg tribunal at the time who urged the creation of
3 an international criminal court, because he observed, say that when they were in
4 Nuremberg they were very much alive to the complaint that it was - according to him,
5 not me - a victor's court, a victor's court. So the creation of an international criminal
6 court makes a difference. So it will remove that kind of suspicion, and that would be
7 something you'll agree with, isn't it?

8 MR RASTAN: [11:16:30] Yes. I mean, the reason that in our submissions yesterday
9 I said that the phenomena of a national execution of an ICC warrant really begins
10 from the 1990s onwards, it's because - and here I agree with Professor
11 Robinson - what happened after World War II, it is quite unique, there is indeed no
12 question of national enforcement of an international warrant. The Allied Countries
13 were in occupation, were in total control and had the ability to exercise all powers
14 within the relevant States, so the issue did not arise in the same way. I think it only
15 arises possibly at the ICTY and then expressly in the ICTR and then with the ICC
16 Statute.

17 PRESIDING JUDGE EBOE-OSUJI: [11:17:06] Thank you very much.

18 MS LATTANZI: (Microphone not activated)

19 PRESIDING JUDGE EBOE-OSUJI: [11:17:09] Yes, please, Madam.

20 MS LATTANZI: (Interpretation) I have two small points or maybe three. I would
21 like to hop back to what Mr O'Keefe said in relation to torture. We must recall that
22 in those matters this provision for relative universal jurisdiction based on four criteria
23 in relation to acts committed by a State functionary, the 1984 Convention only deals
24 with what in general terms is referred to as State torture.

25 Then I also want to underscore in relation to what Professor Kreß said, that I want to

1 underscore that domestic jurisdictions, when it comes to immunity whether in
2 relation to commission or execution at the domestic courts level, all of that happens
3 within the system of the ICC, which in itself is a transfer of power system in criminal
4 matters. What I mean is that the States transfer their jurisdiction to the ICC.
5 So this is a system which tends to limit sovereignty of States when it comes to
6 criminal matters within the State.

7 Now, in the case at hand which we are talking about, the system is further reinforced
8 by the Security Council resolution, which was issued based on a limitation of the
9 sovereignty of Member States.

10 Let me conclude by dealing with the analogy between the European arrest warrant
11 and the requests for arrest and surrender from the ICC. Let me deal with that.

12 These are, in fact, two entirely different systems. In the one system, the European
13 arrest warrant system, the situation is one of the inter-State relations, whereas when it
14 comes to the ICC system, we are dealing with limitation of the sovereignty of States
15 when it comes to prosecuting and issuing arrest warrants and requests for surrender.

16 Thank you.

17 PRESIDING JUDGE EBOE-OSUJI: [11:20:47] Thank you very much. In order to
18 cover as much ground and interests as possible, I will give the floor to my colleague
19 Judge Hofmański.

20 JUDGE HOFMAŃSKI: [11:21:04] Yes. Thank you very much, Mr President.

21 I have two questions. One is related -- it's basically a question which is procedural in
22 its nature. We will agree that there is a complicated legal question before us. The
23 counsel of the Hashemite Kingdom of Jordan argues that the Pre-Trial Chamber has
24 already determined that Mr Al-Bashir enjoys the immunity and, therefore, if the
25 Appeal Chamber would deal with this problem, the scope of grounds of appeal

1 would be exceeded. I would be happy to hear the reaction of the Prosecutor counsel
2 related to this matter. This is the first question.

3 MS BRADY: [11:22:26] Your Honour, I was actually going to touch on this point
4 when I come to my submissions in group B, but I can definitely do so now.

5 PRESIDING JUDGE EBOE-OSUJI: [11:22:37] One second then, one second.

6 (Trial chamber confers)

7 PRESIDING JUDGE OBOE-OSUJI: In that case, why don't we wait until -- if you are
8 going to --

9 MS BRADY: [11:22:49] I don't mind dealing with it now, because it is not strictly
10 about B. I mean, I can easily deal with the point.

11 PRESIDING JUDGE EBOE-OSUJI: [11:22:55] Okay. If you can do that then very
12 quickly --

13 MS BRADY: Sure.

14 PRESIDING JUDGE OBOE-OSUJI: -- because we also -- I understand counsel for
15 the African Union would also like to say something on the first question.

16 MS BRADY: [11:23:08] Sure. I think it is important to put what our view is on the
17 matter as to how this Court should approach the decision of the court below. So in
18 our view, the Appeals Chamber should follow and uphold obviously the
19 Pre-Trial Chamber's reasoning in the Jordan decision. And we will show you this
20 afternoon that it is the legally most convincing one, but also as a matter of best
21 appellate practice, and because of judicial economy, which has also been raised, and
22 because it is in accordance with Article 83(2) of the Statute.

23 Why do I say that? It is the ratio of the decision. That's clear. And also it is within
24 the four corners, we could say, or the three grounds of the appeal to do so.

25 But I want to make a point, and it relates to Article 83(2). Your task as an Appellate

1 Chamber is obviously to decide whether under Article 83 if there is an error of law
2 which materially affects the decision.

3 So if you agree with the decision and you agree with the reasoning, as we have said in
4 the brief, our suggestion is that you can and should stop there. But if you agree with
5 the decision on different --

6 PRESIDING JUDGE EBOE-OSUJI: [11:24:32] In two pages.

7 MS BRADY: [11:24:34] -- on a different reasoning, if you agree with the decision but
8 for different reasoning, you can go there, and you would not be necessarily bound by
9 every argument in the appeal; and that's because the question before you is whether
10 the decision was correct.

11 There could be an alternative basis for why this decision is correct, and you could go
12 there. And also you could go there, even if you uphold the decision, you agree with
13 the reasoning, but you find there are alternative bases, additional reasoning that you
14 could give to support that reasoning. Thank you.

15 PRESIDING JUDGE EBOE-OSUJI: [11:25:17] Thank you very much.

16 I must reflect for the record that Ambassador Namira Negm has joined the Court for
17 the record. She was not there in the morning. That is counsel for
18 the African Union.

19 Now, the African Union would like to make some response and then Jordan as well.
20 Please, Mr Tladi, quickly.

21 MR TLADI: [11:25:50] Thank you very much, Mr President.

22 In response to the first group of questions, we went back to this question of yesterday
23 as to whether or not the rule is somehow different when the immunity involves
24 a person who is sought by an arrest warrant. And again we seem to be going back to
25 paragraph 61 of the arrest warrant case.

1 It is important to emphasise, again, that paragraph 61 of the arrest warrant case
2 speaks about the exercise of jurisdiction by an international court. It is not the
3 exercise of jurisdiction by a national court in relation to proceedings before an
4 international court. That is a reading in that's not there.

5 We were also offered some practice, the one example of practice, for example, was the
6 Milošević case. But there are couple of things that make that inapplicable here.

7 One, he was arrested by his own State. Two, at the time that he was arrested he was
8 not a sitting Head of State.

9 But there is a third more important reason. And that is the circumstances under
10 which he was arrested are completely different. There was a UN Security Council
11 resolution that explicitly, without kind of a requirement for fictions or reading in that
12 explicitly obliged all members of the United Nations, and by the way, it doesn't
13 matter if Yugoslavia was or was not a State Party, the UN Security Council resolution
14 explicitly, not implicitly, not through some fiction, explicitly obliged all UN Member
15 States to cooperate.

16 We have been referred also to the Kenya decision. I had the opportunity again to
17 reread that decision.

18 PRESIDING JUDGE EBOE-OSUJI: [11:27:40] Does it make a difference that when
19 the arrest warrant or the indictment, the arrest warrant, I believe, of Mr Milošević
20 were unveiled in public he was a sitting Head of State, but there was no protest
21 saying --

22 MR TLADI: That's correct.

23 PRESIDING JUDGE EBOE-OSUJI: -- no, you cannot do that, as a sitting Head of
24 State. Does it make a difference?

25 MR TLADI: [11:28:12] Actually it doesn't. And this is a point of course that

1 Mr Kreß raised yesterday. Linking the decision that there is a duty to arrest with the
2 silence, but silence -- rather, the lack of objection is qualitatively relevant for the
3 purposes of establishing some kind of practice or customary international law if there
4 was in fact some reaction sought. Mr Kreß has not advanced a single reason why
5 African States would react to this, a single reason why Western European States
6 would react to this, a single reason why American States would react to this. So
7 there was no requirement -- the circumstances did not call for reaction, so of course
8 they wouldn't object.

9 PRESIDING JUDGE EBOE-OSUJI: [11:28:58] All right. And you are a sitting Head
10 of State and you see another sitting Head of State being indicted, that shouldn't tell
11 you, hang on, I may be next so this is a time for me to say no to this thing; isn't that an
12 invitation in itself to other Head of States to say, no, we can't allow this?

13 MR TLADI: [11:29:23] Well, no, I still don't think so, and the reason again is because
14 the circumstances do not call for a reaction because, particularly with the groups of
15 States that I have just mentioned, there is no call on them to act in any particular way.
16 The circumstances would call for a reaction if there was, in fact, if that decision were
17 directed to them. But the decision is not directed to them because there is no way
18 that they could effect arrest.

19 But in any event, but in any event, the most important point was even at the time that
20 the decision was made, even at the time that the decision was made there was of
21 course a UN Security Council Resolution that explicitly that overrides everything,
22 that overrides everything. So that in fact even if this was real practice and you could
23 read some kind of a practice into this, the fact is there that was a UN Security Council
24 resolution that explicitly obliged obligated States to cooperate, which is not the case
25 here.

1 We were referred to the Kenya case. Again, I had the opportunity to look at that
2 case again yesterday and it is a very interesting case because it is complicated.
3 I won't do a full analysis, but I will just say a couple of things about that case.
4 First of all, at I think pages 41 to 42, the Supreme Court of Appeal re-emphasises the
5 absolute nature of immunity *ratione personae*. And then it is true, as Mr Kreß said,
6 that later on in the judgment argue on the basis of *jus cogens* the Court reaches the
7 conclusion that such immunity *ratione personae* does not apply in that case.
8 But the real reason for the decision we find later in the judgment. Later in the
9 judgment the Court, and I wish to quote for you, if I may, what the Court says. It
10 says, "We agree in this regard, with a holding of both Pre-Trial Chamber II in the
11 South Africa decision and the South African Supreme Court of Appeal decision in
12 *Minister of Justice v SALC*, both of which confirmed that, one, sitting Head of State
13 ordinarily enjoy immunity under customary international law, and two, that in
14 principle the ICC may not request the State Party to arrest a sitting Head of State." I
15 pause here to emphasise that so far that decision is quoting the very decision that in
16 fact upheld the absolute nature of immunity.

17 Thank you.

18 PRESIDING JUDGE EBOE-OSUJI: [11:31:43] Thank you very much.

19 Counsel for Jordan, please.

20 MR WOOD: Thank you, Mr President. Mr President, I just wanted to make two
21 quick points that arose out of Judge Ibáñez's question.

22 Firstly, and I hesitate to get into this, but the Fujimori case, as I understand it, was
23 a case where Peru itself requested extradition from Chile, so clearly Peru was not
24 relying on any immunity that its official might have been entitled to. So I think that
25 is quite distinguishable.

1 On the Pinochet case I agree entirely with what Professor O'Keefe has said.
2 I really wanted to take the floor to refer very briefly to paragraph 61 of the Arrest
3 Warrant case, which Professor Kreß and others have referred to quite often in these
4 proceedings. I think it's very important, I agree with what Mr Tladi has said about,
5 but it's very important to look at what the Court actually says there, particularly
6 about the International Criminal Court. In paragraph 61 it says, "Fourthly, an
7 incumbent or former minister for foreign affairs may be subject to criminal
8 proceedings before certain international criminal courts, where they have
9 jurisdiction."
10 Then it goes on to say, for example, "examples include ... the International Criminal
11 Court". It then says "The latter's Statute expressly provides, in Article 27,
12 paragraph 2, that immunities or special procedural rules which may attach to the
13 official capacity of a person" we know the rest of it, "whether under national or
14 international law, shall not bar the Court from exercising its jurisdiction over such
15 person."
16 So it would seem to me that what the Court said in paragraph 61 adds nothing to this
17 case. It was merely saying, stating the obvious, which is that under the Statute of
18 this Court there may be circumstances where people with immunity *ratione personae*,
19 a foreign minister, for example, come before the Court and cannot rely on immunity.
20 That is the case if they are officials of States Parties. So I don't read anything
21 significant, unlike Professor Kreß, into paragraph 61.
22 I would respond, but I won't, to -- we will do it later -- to what the Prosecution have
23 just repeated about their theory that there is some indeterminate area where the law is
24 indeterminate between proceedings before an international criminal court and
25 national proceedings. As we said yesterday, we think that is wholly wrong, we

1 think that there is nothing in the Statute of the Court that supports that rather
2 extraordinary proposition, but we could elaborate that in more detail at a subsequent
3 in the proceedings.

4 Thank you.

5 JUDGE IBÁÑEZ CARRANZA: [11:34:59] Thank you, Mr President. I, for the
6 record, I just would like to make a clarification because the quote of the representative
7 of Jordan, yes, it is true, Peru didn't recognise the immunity of the former president,
8 Fujimori, but also it is true that former president Fujimori in the proceedings argued
9 in its defence, in his defence, the principle of immunity about him. And also it is
10 true that Chile finally didn't recognise Fujimori's immunity. So there is two States,
11 there is two countries that didn't recognise this immunity alleged or argued by the
12 former president Fujimori. Thank you.

13 PRESIDING JUDGE EBOE-OSUJI: [11:35:56] Thank you very much.

14 Mr Wood or Mr Murphy, please briefly, while we've got some time, a reference has
15 been made repeatedly to paragraphs 60 and 61 of the Arrest Warrant case. I mean
16 what are we to make of Judge Al-Khasawneh's dissent on that point? I note, of
17 course, this morning when Mr O'Keefe spoke, he counted numbers and said
18 something about shellacking for two. But we also know there have been many
19 instances in jurisprudence where a single dissenting opinion could later on turn
20 things around in the development of the law. I am not saying that is going to be the
21 case here, but was he absolutely out of the realms of a jurisprudential reasonableness,
22 I mean Judge Al-Khasawneh in, his dissent?

23 MR HMOUD: [11:37:21] Thank you, your Honour. Judge Al-Khasawneh was
24 a member and a judge of the International Court of Justice. He served there in his
25 capacity as a judge and, as such, his views on the matter are related to himself. It

1 does not reflect on Jordan's views on the matter.

2 Now that you raise that, your Honour, I would like to say that Judge Al-Khasawneh's
3 view on the matter is related to the case being related to the minister of foreign affairs.

4 It is not a sitting Head of State. And there is a big difference because the ultimate
5 dismemberment of the State in the performance of its capacities when its sitting Head
6 of State is arrested by a foreign country.

7 PRESIDING JUDGE EBOE-OSUJI: [11:38:14] When he spoke he did not qualify it, he
8 spoke in terms of the distinction. He disapproved of the distinction being made
9 between procedural and substantive immunities, saying that they will be translating
10 into impunity. That's the point he made. I don't think he qualified it.

11 MR HMOUD: [11:38:42] Thank you, your Honour.

12 Again, this is Judge Al-Khasawneh's personal views as a judge on the International
13 Court of Justice, not Jordan. I would refer you to the decision by the Court itself
14 when it said immunity and responsibility are distinct and can read that. This is the
15 law. This is the law, it still is the law. The ICJ repeated that and it reversed
16 Germany and there is no exception. Thank you, sir.

17 PRESIDING JUDGE EBOE-OSUJI: [11:39:15] Thank you very much.

18 And Judge Morrison next, please.

19 JUDGE MORRISON: [11:39:26] I am really aiming this at professor, Mr Robinson,
20 because I know he likes obtuse questions.

21 Gerald Fitzmaurice held that there was no conflict between domestic law and
22 international law because they operated in different realms. Now, whatever the
23 merits of that analysis, the basic principle is this, that no personal or other legal entity
24 can delegate a greater power than they themselves possess. Are there permissible
25 exceptions to that premise in international law?

1 MR ROBINSON: [11:40:09] Off the top of my head, sorry, off the top of my head
2 I can't think of any, but if any of my fellow professors have any examples. Off the
3 top of my head, I cannot think of a circumstance where States delegated what they
4 don't have. But -- pardon me?

5 JUDGE MORRISON: (Microphone not activated)

6 MR ROBINSON: No, even in the UN Charter the Member States, the Member States
7 pool together their sovereignty and they agree to comply with the UN Charter, but
8 they are just binding themselves to it. But anyways, I invite anyone else. Off the
9 top of my head, I don't think you can delegate what you don't have. I think it's just a
10 fundamental, but I stand to be corrected if anyone has a thought.

11 MR RASTAN: [11:40:50] I mean, I am sure the academic colleagues here would be
12 better placed, and I think Professor Kreß has also talked about the *ius puniendi* of the
13 international community, but I think the only thing I would say, of course normally
14 the rule of delegation applies, but one can think of, well, the very creation of the UN
15 Charter establishes powers which individually those members cannot exercise. Now,
16 that's done on the basis of consent, but all rules are created by consent.

17 In the case of the ICC we are not arguing that there is a necessity to go beyond the
18 consent framework which is expressed in this context by virtue of the creation of this
19 Chapter 7 authority which then triggers the obligation of the Rome Statute. So we
20 think and here we agree I think with Professor Robinson's earlier statement that we
21 don't need to go into wide-ranging areas of public international law to resolve this
22 matter. We think we can confine it to the issues that are before us, which can be
23 dealt with by examining the relevant treaty obligations that apply, and to that extent
24 also to trigger analysis of the Arab League convention, if necessary. And certainly
25 we will not want to fossilise the progressive development of the law if it may be going

1 in a certain direction.

2 But coming back to what your Honour asked earlier, in this case there is something
3 that has been delegated to the Court by the Security Council, in fact, and the authority
4 that is being exercised vis-à-vis Sudanese nationals is that which is delegated to the
5 Court. So I am reversing, if you like, the scenario.

6 I know that our colleague is not satisfied with my scenario of the UN Charter as an
7 extraordinary constitutional framer perhaps, but I think in any event we are returning
8 back to delegation either way, because we believe that the framework within which
9 we are operating here is one that is expressions of consent by the government of
10 Sudan, whether directly or indirectly, and we say indirectly through the operation of
11 the Security Council route.

12 Maybe I have caused more confusion than clarity.

13 PRESIDING JUDGE EBOE-OSUJI: [11:42:50] Thank you very much.

14 JUDGE MORRISON: [11:42:51] I am very grateful for that, because now I can stop
15 thinking about it.

16 PRESIDING JUDGE EBOE-OSUJI: [11:43:00] Yes, Mr Kreß, briefly, please.

17 MR KREß: [11:43:05] I am not offering an example, the example you have asked.

18 I am just reminding you that in my written observations I have devoted a long
19 paragraph to saying that your question does not exhaust the matter on this crucial
20 issue. I would just remind you on that. I am happy to elaborate at any instance just
21 for the record.

22 JUDGE MORRISON: [11:43:31] Well, this is confession avoidance time. It was
23 reading that paragraph that put the question into my head in the first place.

24 PRESIDING JUDGE EBOE-OSUJI: [11:43:38] Thank you very much.

25 Now we will come back to Judge Hofmański and then next to Judge Bossa.

1 JUDGE HOFMAŃSKI: [11:43:46] Yes, thank you. Thank you, Mr President.

2 I have a short question to Professor Newton. Did you also collect data about
3 President Al-Bashir's travels before the issuance of the first and second ICC arrest
4 warrant? Would such data be helpful to determine whether there was any change in
5 travel frequency as a result of these arrest warrants?

6 MR NEWTON: I think we have some limited data on that in the sense that we didn't
7 go back and try -- it's difficult to try to pick an arbitrary date, you know, to say -- I
8 think we have some data from approximately the prior year, maybe the 18 months. I
9 would have to go back and actually check the data. And our analysis of that data
10 showed no change at all.

11 If fact, when you overlay, as we did in the annual charts, we were also interested in
12 this interface between travel in an official capacity or some other private capacity and
13 the actions or the engagements with the international chamber. So we overlaid
14 that with Prosecutor's reports. We overlaid that with the referral, the beginning
15 involvement of the Pre-Trial Chamber, and what we saw was a consistency of travel
16 of patterns.

17 PRESIDING JUDGE EBOE-OSUJI: [11:45:05] But don't we need some sort of
18 controlled picture so as to compare things so if we -- your data is collected over
19 a certain period after the issuance of arrest warrant, issuance, rather, of an arrest
20 warrant. But we need to also work backwards before that, the same time frame so as
21 to try to make any reading out of the pattern, whether it has changed.

22 MR NEWTON: Well, as I said, based on the limited data that we had before the
23 issuance of the first arrest warrant, the answer to your question, your Honour, is that
24 no, there was no change. And, in fact, there was some periods in response to some
25 things, decreased travel in some circumstances.

1 For example, after the -- in this narrow band, after the referral of Chad and in that
2 context, for the next year there was no travel to States Parties, the year 2012. But
3 things are cyclical. So as an overall matter, we noticed no change at all, subject to
4 some certain circumstances.

5 And this gets back actually in an interesting way, back to Judge Morrison's question
6 and in fact the President's observation with respect to Milošević, et cetera. It is
7 important to remember that in the ICTY and the ICTR context, those were very
8 circumscribed both temporal and geographic jurisdictions.

9 So in response to your question, sir, I wouldn't have seen a reason for many other
10 presidents to jump up and arbitrarily and in that some context, until there was a valid
11 arrest warrant and a valid Chapter VII resolution, the rights of other States weren't
12 even implicated. The rights of other travel weren't even implicated. It was only
13 then that there began to be interchange between the organs of this court and the State
14 officials of other States, both States Parties and non-States Parties.

15 But the basic answer to Judge Hofmański's question is that we have noticed no
16 change at all in terms of the frequency, in terms of the rationales, et cetera, as a macro
17 matter. There have been some periods for various reasons where you see some
18 trends, but nothing on the whole. If that's responsive, sir.

19 PRESIDING JUDGE EBOE-OSUJI: [11:47:22] Since you touched on the other matter
20 about Milošević, what about the picture of the Charles Taylor arrest, when he was the
21 president of one country?

22 MR NEWTON: I think again --

23 PRESIDING JUDGE EBOE-OSUJI: But the events, the fact pattern in the case
24 happened in a neighbouring country. So we now have a cross-border scenario.
25 That's different from Rwanda and Yugoslavia in a sense, but still involved the

1 unveiling of the indictment of a sitting Head of State at the time and in fact also an
2 arrest warrant at the time. Doesn't it -- and also, if you remember, as I seem to recall,
3 his arrest warrant was served upon him when he was attending an ECOWAS
4 meeting.

5 MR NEWTON: Yes, in a neighbouring state.

6 PRESIDING JUDGE EBOE-OSUJI: [11:48:21] The protest was that they were
7 embarrassed about it, but not for the fact of the indictment and the arrest warrant
8 itself. Does it tell us anything?

9 MR NEWTON: In my mind really not, your Honour, which gets back to the
10 observation a few minutes ago about the delegation of power. In that context there
11 was an indirect delegation through the Security Council, we all, I think we recognise
12 that, and other nation States said it is a very circumscribed jurisdiction, only those
13 who bear the greatest responsibility for this situation for that which indirectly and by
14 extension included President Taylor. But, again, he was not in office. You know,
15 he had --

16 PRESIDING JUDGE EBOE-OSUJI: [11:49:05] Do you remember if Colonel Gaddafi
17 at the time protested? Because he was also implicated in the Sierra Leone events
18 and --

19 MR NEWTON: Not that I am aware of.

20 PRESIDING JUDGE EBOE-OSUJI: Okay.

21 MR NEWTON: Not that I am aware of. And there was a good reason for that, was
22 because the indirect -- the joint criminal enterprise theory under which Gaddafi might
23 have been implicated was pretty much discredited both in academia and in practice,
24 and it never really got off the ground.

25 PRESIDING JUDGE EBOE-OSUJI: [11:49:27] It is not about, it is not about the theory

1 whether Gaddafi read about joint criminal enterprise and understood it in order to
2 protest. It is about the facts of indictment of a sitting Head of State, a colleague
3 of his.

4 MR NEWTON: Right. My reading, your Honour, says that Mr Gaddafi didn't feel
5 threatened by that court because of the narrow circumscription of the power. And
6 remember that this is an entirely different situation, because this Court is built on the
7 delegation of power vis-à-vis ratification of the treaty. I've written about this and
8 called it transferred territoriality, where you are transferring, and in fact under
9 Article 27 States Parties are waiving. This is a different issue.

10 PRESIDING JUDGE EBOE-OSUJI: [11:50:07] Now a question from Judge Bossa.

11 JUDGE BOSSA: [11:50:15] Let me start with a question related to that of
12 Judge Hofmański. And it is directed at Professor Newton. Is it correct that the data
13 analysed by you, Professor, are derived from publicly available information only, and
14 that there may therefore be other trips of President Al-Bashir that did not take place
15 because invitations were not extended to him or because it was made clear to him, for
16 instance, through confidential diplomatic channels that the inviting State would not
17 heed his immunity if he decided to travel to a given state? If this is correct, is there
18 not a risk that the data are tilted in one direction?

19 I have a second question after this one.

20 MR NEWTON: I would say, Madam, that it is partially correct. You are absolutely
21 right that there, no doubt, may have been some private diplomatic correspondence.
22 Much of that is captured in a number of ways, for example, analysis of the
23 Security Council debates where those exchanges are recommended.
24 But, if fact, there is a number of press reports that talk about that private
25 correspondence, and we have captured that.

1 And the other thing is that in many of the correspondence as raised in the Registry
2 reports, there is mention of diplomatic communications.

3 So I think you are right, absolutely, that it is entirely possible that we have missed
4 a few. But it is a very extensive search. And you are always trying to prove the
5 negative. I had this conversation yesterday with somebody. You are always trying
6 to prove the negative, where the very possibility of arrest precludes trips.

7 The dataset contains a large number of cases that fit exactly that description, where
8 there is a warning. For example, the trip to the United States to the UN General
9 Assembly, reported in the press, but the official exchanges for that were formal
10 diplomatic correspondence. The trip to Malawi that was cancelled in 2012 following
11 the referral of Chad fits exactly the same category. That is in our dataset because
12 we've captured it from a number of other sources, some public, some private.

13 The other thing that we have done, which again maybe limited in our capacity to do it,
14 is that where we could, where we knew there was a trip potentially planned to this
15 location on that date, we have gone to the foreign ministry records and in some cases
16 actually translated what the foreign ministry of the receiving country said, so Malawi
17 or China or Saudi Arabia or Russia or some of those other countries. And, again,
18 that doesn't reflect the private correspondence, but it reflects the fact that there was
19 correspondence and that the net result of that correspondence was a cancelled trip.

20 So I can't speak to some cases that might be out there that we don't know, but I will
21 tell you, Madam, that we have done our very best to capture the ones that we do
22 know about and, more importantly, to drill down into the reasons why.

23 So it is a hypothetical, and the short answer to your question is it is partially true.

24 JUDGE BOSSA: [11:53:49] Thank you, Professor.

25 The next question is actually addressed to the AU delegation, because it arises from

1 the submissions of the professor.

2 Do you consider that the UN Chapter VII Resolution needs interpretation in
3 accordance, in light of the provisions of Article 13(b) and 16 of the Rome Statute?

4 MR TLADI: [11:54:32] Well, thank you very much, your Honour.

5 I think that is a very important question. And of course when we get down into the
6 group B questions, we will drill down much more into that question.

7 So what I will say for now is the following. Indeed, the UN Security Council
8 resolution has to be interpreted. We have heard two basic grounds which suggest
9 that on the basis of UN Security Council resolutions, there is a duty to arrest. So the
10 first ground is that the UN Security Council resolution itself waives immunity, right.
11 For that, you have to interpret the UN Security Council resolution itself to see if in
12 fact it does that. You would have to look at operative paragraph 2, and you would
13 have to apply the rules of interpretation.

14 And as we will show you when we tackle the group B questions, when you apply
15 each and every single means of interpretation to that UN Security Council resolution,
16 you come to a single conclusion, and that conclusion is that immunity must be
17 respected.

18 The other legal theory that has been advanced, of course, is a combination of the
19 UN Security Council resolution itself and Article 13(b), which would suggest that
20 Sudan is placed in a position analogous to that of a State Party.

21 Again, as with the first theory, that depends on fictions and conjecture. There is
22 nothing, and if you apply the rules of interpretation to Article 13(b), there is nothing
23 that leads to that conclusion.

24 Article 13(b), if you apply the rules of interpretation, good faith, ordinary meaning,
25 context, object and purpose all direct to one thing, Article 13(b) grants the ICC

1 jurisdiction over the situation. It does nothing more than that. Every other single
2 rule in the Rome Statute continues to apply. So Article 27 applies, of course, but also
3 Article 98 applies.

4 So, indeed, you have to apply the rules of interpretation, but our submission will be
5 that the application of those rules of interpretation lead you to a single conclusion,
6 and that was Pre-Trial Chamber II erred in its findings.

7 I thank you.

8 JUDGE BOSSA: [11:56:31] What about Article 16?

9 MR TLADI: [11:56:36] So Article 16 concerns the power to defer. And yes, that also
10 is subject to --

11 JUDGE BOSSA: [11:56:46] May I complete my question?

12 MR TLADI: [11:56:48] Yes, please.

13 JUDGE BOSSA: [11:56:50] Doesn't that implicitly, isn't the presence of this article in
14 the Statute an implicit or even explicit indication that when a referral is made, what is
15 expected to follow are investigations and prosecutions?

16 MR TLADI: [11:57:18] Well, indeed, a proper interpretation of all the provisions
17 of the Statute, and that would include Article 13(b), but it would also include Article
18 16, is that when a referral is made, there is a duty to investigate and then, if necessary,
19 to prosecute. Absolutely, there is no disagreement about that.

20 The question though is, what does that mean for immunity? And our response is
21 that it means nothing for immunity. Every other provision of the Statute continues
22 to apply, so Article 19 continues to apply.

23 You are absolutely right, your Honour. It creates an obligation or it creates the
24 possibility for the Office of the Prosecutor to investigate and, if needs be, bring
25 charges, but that says nothing, absolutely nothing about the rules relating to

1 immunity.

2 PRESIDING JUDGE EBOE-OSUJI: [11:58:03] Mr Tladi, there is this elephant in the
3 room in relation to that provision, Article 16, and this case in particular, and it is this:
4 I think as a matter of, we can call it, judicial notice we can agree that the African
5 Union made a request for deferral pursuant -- it's after the indictment of President
6 Bashir, sorry, after the arrest warrant was issued, he made a specific request for
7 deferral under Article 16. The Security Council did not defer. Does that tell us
8 anything?

9 MR TLADI: [11:58:51] Indeed, it tells us a lot but it doesn't tell us anything about
10 immunity.

11 PRESIDING JUDGE EBOE-OSUJI: [11:58:57] That is precisely about immunity.
12 Does it tell us anything about immunity?

13 MR TLADI: [11:59:02] It tells us absolutely nothing about immunity. So let me say
14 a couple of things. In fact, the first request for a deferral came before the arrest
15 warrant. It came in 2008, and it was the AU's Peace and Security Council rather than
16 the assembly that requested a deferral. So that was the first one.

17 But understand what the basis for the referral was. The basis for the referral was not
18 that it is President Al-Bashir that is being indicted, that was not the basis of the
19 request for a deferral. The basis of the request for a deferral was that there were
20 ongoing peace negotiations and that, indeed, a deferral under Article 16 would be
21 appropriate because it would allow those ongoing processes for peace to continue. It
22 had nothing, nothing to do with immunity.

23 Thank you.

24 Dr Jalloh would like to add something, if you permit?

25 PRESIDING JUDGE EBOE-OSUJI: [12:00:04] Yes, please, proceed.

1 MR JALLOH: [12:00:06] Thank you, your Honours. It is a great privilege to appear
2 before you and, if I may, I am trying to exercise a lot of restraint out of courtesy, of
3 course, Mr Tladi has been dealing with the group A questions, but if I could offer
4 a couple of observations with your permission with respect to Judge Bossa's question.
5 The first observation relates to Article 13(b) of the Rome Statute. She suggested
6 a link to Article 16, which deals with deferrals. That is indeed correct. But I think if
7 we step back, it raises another interesting question that Mr Tladi has not raised, which
8 is, what is the whole point of having the Security Council involved in matters of
9 international criminal justice as applied by the International Criminal Court?
10 If we look at the history, the drafting history of the Rome Statute, we would find at
11 least opposite views. One view was we could have the Security Council be involved
12 in matters relating to international criminal justice because, in any event, the council
13 had developed, at least began to develop a kind of practice where it would create
14 tribunals. And we had two examples at that point, the Yugoslavia scenario with the
15 ICTY, and, of course, the ICTR with respect to Rwanda.
16 Now, there was the opposite view where countries were uncomfortable with the idea
17 of Security Council involvement and the reason primarily was that you were going to
18 politicise the court. But in the end, the view prevailed that we should have a role for
19 the Security Council because, in fact, it exercises an important responsibility for the
20 maintenance of international peace and security under the charter.
21 That could then mean if we allow the Security Council to send referrals to the Court,
22 where it deems that the possible investigation and prosecutions of international
23 crimes could contribute -- could contribute, I underscore "could" because we do not
24 know as an empirical matter, then that's fine. But that does not bind the Court to
25 proceed. In fact, if you look very carefully at the text, the investigation could happen

1 after a referral and the Prosecutor may choose not to proceed. That was something I
2 wanted to underscore.

3 With respect to Article 16, what does it mean? It means if there is an ongoing
4 investigation or prosecution and the council determines that that could be
5 problematic for its own role, its own primary responsibility to maintain international
6 peace and security, it could say to the Court, "Well, hang on, stop." And there was
7 a qualifier. You could stop for a year, and if the council wants to change that, it has
8 to come back each time to have a conversation with the other members of the council
9 so it could make that determination.

10 So the fact that in the context of the facts that we are looking at here where the AU
11 requested, at least on a couple of occasions, a deferral, goes more centrally to the
12 question of peace versus justice and the sequencing of peace in the Sudan, keeping in
13 mind that there had been engagements by the AU with respect to settling the long
14 conflict in the Sudan. Not so much a question of immunity. Immunity was not in
15 the minds of the AU when they made that request.

16 I hope that is helpful to your Honours. Of course we will be coming back to the
17 issue of the Security Council and its role much later on.

18 And your Honours, if I may just very briefly say, I was very provoked by your
19 question about the SCSL in relation to the Taylor arrest, but then of course I missed
20 the opportunity to jump in because I didn't want to overstep my boundaries with
21 respect to Mr Tladi. But it is an interesting scenario that you posed, but there is an
22 element of the relationship of that question in terms of Ghana and other African states
23 and their own reaction because they were, of course, not happy with the issuance of
24 an arrest warrant in the middle of a peace negotiation.

25 Thank you, your Honours.

1 PRESIDING JUDGE EBOE-OSUJI: [12:03:53] Thank you.
2 I put one of my own, as if I haven't done that already, but I am going to read-in some
3 material, if you don't mind. I want to set the stage, and I do so by going to the
4 joint separate opinion of Judges Higgins, Kooijmans and Buergenthal in the
5 Arrest Warrant case. Paragraph 5 of that says this, if I may, towards the middle.
6 And, by the way, Mr Murphy, I would like you to respond to this, if you don't mind,
7 in case you didn't get enough chance to speak in the morning or so far.
8 And the quote is this, I will begin with it and I will go to the Barcelona traction case.
9 Beginning with the joint opinion, so it says --
10 "One of the challenges of present-day international law is to provide for stability of
11 international relations and effective international intercourse while at the same time
12 guaranteeing respect for human rights. The difficult task that international law
13 today faces is to provide that stability in international relations by a means other than
14 the impunity of those responsible for major human rights violations. This challenge
15 is reflected in the present dispute and the Court should surely be engaged in this task,
16 even as it fulfils its function of resolving a dispute that has arisen before it. But
17 through choosing to look at half the story -- immunity -- it is not in a position
18 to do so."
19 I think we can agree that maybe that is where we are. But now let's look at how to
20 resolve it, whether this is one way to look at it, and so we go to the Barcelona Traction
21 case, paragraph 33, and 34. I am going to read the whole thing onto the record, both
22 of them. 33 says --
23 "When a State admits into its territory foreign investments or foreign nationals,
24 whether natural or juristic persons, it is bound to extend to them the protection of the
25 law and assumes obligations concerning the treatment to be afforded them. These

1 obligations, however, are neither absolute nor unqualified. In particular, an essential
2 distinction should be drawn between the obligations of a State towards the
3 international community as a whole and those arising vis-à-vis another State in the
4 field of diplomatic protection. By their very nature the former are the concern of all
5 States. In view of the importance of the rights involved, all States can be held to
6 have a legal interest in their protection; they are obligations erga omnes."

7 And it continues, paragraph 34 --

8 "Such obligations derive, for example, in contemporary international law from the
9 outlawing of acts of aggression, and of genocide, as also from the principles and rules
10 concerning the basic rights of the human person, including protection from slavery
11 and racial discrimination. Some of the corresponding rights of protection have
12 entered into the body of general international law ..."

13 It quotes the reservations to the convention of genocide case, " "... others are conferred
14 by international instruments of a universal or quasi-universal character."

15 The question then becomes this, these two quotes, one from Higgins and Kooijmans
16 and Buergenthal on the one hand and the opinion, paragraphs 33 and 34, in Barcelona,
17 do they help us in resolving this matter? Especially in light of Judge Ibáñez's first
18 question, is immunity absolute?

19 MR MURPHY: [12:08:57] Well, thank you, Mr President.

20 Starting with the separate opinion of Judges Higgins, Buergenthal and Kooijmans in
21 the Arrest Warrant case, I think it is worth emphasising it is a separate opinion; it is
22 not a dissent and, therefore, the judges were fully in accordance with the majority's
23 view with respect to the immunity issue.

24 Therefore, those three judges were fully in agreement with the proposition that
25 a sitting foreign minister, and they included with that a sitting Head of State, is

1 absolutely immune from the foreign criminal jurisdiction of Belgium.

2 I would interpret that particular paragraph of their separate opinion --

3 PRESIDING JUDGE EBOE-OSUJI: [12:09:53] Which says that looking at immunity is
4 looking at half the story.

5 MR MURPHY: [12:09:57] Exactly. Which says that we are looking at half the story.

6 I would interpret that as the three judges saying, "We would have liked the Court to
7 address the fact that Belgium has jurisdiction in the case."

8 PRESIDING JUDGE EBOE-OSUJI: [12:10:18] Which is what they end up saying.

9 MR MURPHY: [12:10:19] Which is what they then go on to discuss in the separate
10 opinion. So they would come to a conclusion that there is jurisdiction over the
11 foreign minister, but that does not mean a lack of immunity. And so for purposes of
12 this proceeding, I think a comparable scenario would be an acceptance that this Court
13 has jurisdiction in this case, but that there is nevertheless an immunity present that
14 needs to be taken account of in the context of the way the Court's Statute operates.

15 PRESIDING JUDGE EBOE-OSUJI: [12:10:57] And that takes us to the Barcelona
16 traction.

17 MR MURPHY: [12:11:01] So in the context of the Barcelona traction case, our view is
18 that the case stands for the proposition that when a State, and I emphasise "a State"
19 because it is not talking there about an individual in a criminal context, but I would
20 emphasise that a State that commits certain egregious acts to include genocide, crimes
21 against humanity, it is possible in that situation for other States to regard themselves
22 as enabled to bring a claim. Because even if their nationals have not been harmed,
23 nevertheless the nature of the offence is one that is an obligation owed erga omnes
24 that would allow other states to bring a claim.

25 Consequently in this context, a country such as Jordan in theory could bring a claim

1 against a country such as Sudan, possibly, for alleged genocide, crimes against
2 humanity and so on. But Jordan is not obliged to do that under Barcelona Traction.
3 And since the decision was issued in the 1950s no State has viewed those paragraphs
4 as obligating States to bring claims against other States.

5 PRESIDING JUDGE EBOE-OSUJI: [12:12:35] Is there some -- at a level of obstruction
6 where paragraph 33 is telling us that, look, when someone comes into your territory,
7 there are rules of international law that govern what you do with them while they are
8 in your territory, the diplomatic protection, and so on. But that is not exclusive,
9 there are other considerations that must also be taken into account in order to adjust,
10 so to speak, the right result in the particular circumstances. And the Genocide
11 Convention, Mr O'Keefe says there is no exception including for genocide. I am not
12 sure that that's what Barcelona traction tells us.

13 The point of the matter, though, is there any principle to be distilled from paragraph
14 33 and 34?

15 MR MURPHY: [12:13:42] I think the only principle would be that on that interstate
16 level it does enable a country perhaps to bring a claim. I don't think it speaks to this,
17 to the possibility that when an official travels to your country you are enabled to
18 arrest that person, notwithstanding the existence of these immunities. I just don't
19 think the one carries over to the other.

20 And just to emphasise again, even in the Arrest Warrant case, the court was quite
21 clear the existence of jurisdiction does not imply the absence of immunity. That's the
22 heart of it. And I think that that does have to be kept in mind even as we read
23 separate or even possibly dissenting opinions.

24 PRESIDING JUDGE OBOE-OSUJI: [12:14:26] But then, again, maybe this is your
25 chance to speak to it. I have asked that question to a number of speakers in the past

1 who have spoken.

2 Doesn't that assume a lot of unstated variables, that kind of distinction? One of them
3 being, for instance, that evidence does not deteriorate with time, victims of the
4 conduct live forever, so do witnesses, so that a Head of State who is Head of State for
5 life, it is possible for us to wait and not worry that sometime in the future there will
6 be a prosecution to benefit the victims and the case will be intact? Isn't that some of
7 the things we need to deal with for purposes of that distinction that was made in
8 paragraphs 60 and 61?

9 MR MURPHY: [12:15:33] Well, I think the court in all likelihood would have
10 acknowledged that these factors do exist.

11 PRESIDING JUDGE EBOE-OSUJI: [12:15:39] They do in paragraph 61 -- well, not
12 quite ...

13 MR MURPHY: [12:15:42] Well, they don't, I think, go into it in a way that you have.
14 But I think their answer was there is a possibility of waiver, there is a possibility that
15 an official falls from power and then can be prosecuted. There is the possibility that
16 they themselves walk in your door here and you have jurisdiction, and they can't
17 claim immunity from you under Article 27. These are unsatisfactory answers in
18 certain context, whereas you say Head of State for life, you know, how do we get at
19 them?

20 But I do think that the court nevertheless says in the Arrest Warrant case, immunity
21 *ratione personae* from foreign criminal jurisdiction is absolute for very much the
22 reasons that I believe it was Professor O'Keefe was talking about, is absolute because
23 of a belief that we do have a need for interstate conversation, the ability to interact
24 among each other. And without that, denying that possibility for foreign ministers
25 and Head of States and government is a very serious intrusion into their ability to

1 function. And that is an important value that I think the court in the Arrest Warrant
2 case was recognising and that is fully consistent as well with its other decisions in the
3 context of, for example, Germany v Italy.

4 So I think that's where we stand. And as unsatisfactory as it may be, that is the law.

5 PRESIDING JUDGE EBOE-OSUJI: [12:17:13] When I mentioned

6 Judge Al-Khasawneh, it wasn't because he was Jordanian, I want to make that very
7 clear. Just that he is a jurist from a serious pedigree and he disagreed that that
8 distinction is practical, the result in practical -- it is a key practical result.

9 And so in a sense, to the joint judges who were of a joint opinion, Judge Higgins,
10 Kooijmans and Buergenthal, that it may be a little too, like a will-o'-the-wisp to say,
11 well, let's wait until they get out of office and we will then do something. Are we to
12 ignore those dissenting opinions on that point?

13 MR MURPHY: [12:18:07] Well, I don't know is one would ignore it, but I would first
14 focus on the fact that it is a single judge and it is a dissent, and that this matter was
15 fully litigated before the court and that the court overwhelming came down in the
16 place that it came down.

17 PRESIDING JUDGE EBOE-OSUJI: [12:18:27] A single dissent. What happened in
18 Dred Scott case? Remember Dred Scott? Sandford and Dred Scott in the US where
19 the majority of the US Supreme Court once held that slaves were not, could not be
20 citizens of the United States. There was one dissenting judge who disagreed with
21 that, but the majority ruled in a certain way in the case, and then later on that
22 dissenting judge, the issue seemed to have turned the table down the line.

23 MR MURPHY: [12:18:58] And we are all glad that that did change, your Honour,
24 and I think we can probably go to many different jurisdictions and find circumstances
25 where bad decisions are issued and at some later time we change.

1 I would submit though that the Arrest Warrant case, a relatively recent decision, is
2 fully consistent with the other decisions of the court. One could talk about the
3 Djibouti v France case, fully consistent with this idea of immunity *ratione personae*
4 being absolute from foreign criminal jurisdiction, and fully consistent with decisions
5 taken in national courts as well.

6 So the story here is not of an abhorrent international court in the Arrest Warrant
7 going off in some crazy direction and the lone judge, you know, standing up and
8 saying something that others look at and say that's right. I think that's not the
9 narrative that one would take from that case.

10 PRESIDING JUDGE EBOE-OSUJI: Thank you very much.

11 MR CROSS: [12:20:03] Your Honours, perhaps if I might intervene briefly on the
12 same question.

13 Thank you, your Honours.

14 PRESIDING JUDGE EBOE-OSUJI: [12:20:09] Please.

15 MR CROSS: [12:20:11] I do so very cautiously to begin with, but bearing in mind
16 your Honour's reference to Barcelona Traction yesterday we also went away last night
17 and had another look at it.

18 The first comment we would make is that by and large I think we agree very much
19 with Mr Murphy's cautious explanation of the scope of what it means when we talk
20 about an obligation *erga omnes*, and, for example, Article 48 of the ILC articles on
21 State responsibility suggests that it is again a right of standing for State to raise certain
22 violations.

23 But if I may be so bold, I think the question which underlies your Honour's question
24 is the notion which we have all circled around at different point in the last day and
25 a half, which is whether immunity always means impunity, and it is that question

1 which perhaps we start to see in this context. For example, what about the
2 possibility that States may be able to take certain actions within the realms of their
3 existing obligations under international law, so not departing from any positive role
4 but within those realms which may assist in combating impunity when there has been
5 a violation of an obligation erga omnes. One example of that might be, for example,
6 my learned friend from the Arab League yesterday referred to, I think, Article 14 of
7 the Pact of the Arab League, which says that Member States shall waive immunity
8 when, essentially, the interests of justice require and when it will not defeat the
9 purpose for which the immunity was granted. Perhaps, we say, under those
10 circumstances the breach of the obligation erga omnes might be, if you like, the
11 archetypal situation when States may be expected to take that right that they have,
12 and indeed that duty, under international law and under that treaty.

13 We would also, on the other hand, be very cautious in noting that the international
14 community is clearly grappling with what it means when it says immunity must not
15 mean impunity.

16 So, for example, in the sixth report of the ILC's special rapporteur, Ms Hernandez,
17 and that is cited in our written submissions, but it is paragraph 17 of that report.

18 When talking about her conclusions, as we understand it, and her proposal of this
19 Draft Article 17 and the - sorry, Draft Article 7, I beg your pardon - and she describes
20 how the reaction to this is very, very, varied, but she says that the one thing that
21 States do more or less agree on is the notion that immunity must not mean impunity,
22 even though they disagree as to exactly how to achieve that. And again, this same
23 notion that there might one day be a tension, we see it sometimes in some human
24 rights cases, and your Honours have described some scenarios whereby there may be,
25 you know, you can think of hypotheticals where immunity becomes very

1 uncomfortable.

2 For all those reasons, your Honours, we would say that we would take a lot of
3 caution with the positive rules of international law that we are talking about,
4 *jus cogens*, obligations *erga omnes*, and so on and so forth.

5 But here at this Court where the question before us is how we interpret the
6 obligations that are in the Statute and are in the UN Security Council resolution, then
7 maybe there it's these same considerations which might inform our interpretation of
8 the rules that we have and there maybe they will find some value to our discussion.

9 Thank you, your Honour.

10 PRESIDING JUDGE EBOE-OSUJI: [12:24:11] Mr O'Keefe.

11 MR O'KEEFE: [12:24:12] Mr President, if I may make one very legal technical point
12 and one jurisprudential point about what has been spoken about.

13 The legal technical point comes from the last intervention by counsel for
14 the Prosecutor, which does not really go to the question of standing. What
15 the Prosecutor seemed to be suggesting is that a State might take third party
16 countermeasures against a State which breaches an obligation *erga omnes*.

17 In other words, what the Prosecutor in some ways seemed to be suggesting, although
18 it was admirably cautious in not quite coming to this, is saying, States in the exercise
19 of their right might do these things. The exercise of their right has been codified in
20 Article 48 of the Articles on Responsibility of States. It is limited to bringing a claim
21 for cessation and non-repetition, or for reparations on behalf of the injured State or
22 beneficiaries.

23 Rather, what the Prosecutor - although again, strictly saying, keeping within the law,
24 but seemed to be suggesting is in fact, well, it might be within the realm of their rights
25 not to accord immunity in response to a violation of an obligation *erga omnes*.

1 Mr President, in Diplomatic and Consular Staff in Tehran, the famous case in the
2 International Court of Justice involving the 444 days spent in violation, in flagrant
3 violation of the rules of diplomatic immunity, where an argument was raised that in
4 response to that perhaps the United States might itself be able to take measures which
5 would otherwise be unlawful. The court, using the unfortunate language of
6 a self-contained regime, but we knew what it meant, said that is not how it works in
7 the system of diplomatic immunity. In diplomatic immunity you stick to the rules
8 that are provided for, which include declaring someone *persona non grata*, et cetera.
9 So what the court would seem to be saying in our present case is, well, Sudan may
10 have violated its obligations *erga omnes* but that does not justify lifting the immunity.
11 Now, on the jurisprudential point, your Honour, Mr President, you touch on
12 something very fundamental, and that is whether the rule of law is to be relaxed to
13 account for contingent fact.
14 We have a rule which is absolute, it is a rule generally applicable, applicable across
15 the board.
16 Now, I would add that the States in framing this rule are perfectly well aware that
17 there are situations in which we have presidents for life, are perfectly well aware in
18 which we have situations in which a Head of State has done egregious things but they
19 have nonetheless framed that rule.
20 Now are we to relax the rule of law because in certain contingent situations the
21 outcome may be unpalatable? We are human, we see that people have suffered.
22 The terrible temptation is to relax the rule of law to change the systems -- the rules on
23 which we have agreed to take account of what is the deeply human reaction to the
24 situation.
25 But the courage of the court and the courage of the judge is to stick to the rule of law.

1 The courage of the court and the courage of the judge is to accept that there are hard
2 cases which look ugly and that they may take some flak for it. But these are the rules
3 agreed on and those rules do contemplate, perhaps if you put it in informal terms
4 what you refer to as, let's say, constructive impunity. But it is not formal impunity
5 and those are the rules that are agreed.

6 PRESIDING JUDGE EBOE-OSUJI: [12:28:45] But it may well be more than the
7 unpalatability of an outcome.

8 We may look at it from, let's say, from the backyard, so to speak, in the sense of
9 asking the question what happens really in circumstances where the host state ignores
10 the claim of immunity of a visiting Head of State who is under indictment for
11 genocide and decide "we are going to arrest you, sir, send you to the ICC".

12 There is a practical question, question being this: What will happen to the guest
13 State? Yes, that takes us, doesn't it, to the concept of responsibility of States for
14 internationally wrongful act for which the breach of which results in reparation, you
15 go to the ICJ to make a claim. Would they succeed? Would the guest State succeed
16 in that claim for reparation because they had indicted somebody who was under an
17 arrest warrant for the crime of genocide?

18 In answering that question you may explain to us, as you mentioned that those Draft
19 Articles, Draft Articles 40 and 41 is telling us in that regard.

20 MR O'KEEFE: [12:30:41] Right. Well, Mr President, you touch upon Articles 40 and
21 41, and this was precisely a point raised in the case, in the civil context, between
22 Germany and Italy. What Italy had argued is in the civil context, essentially what
23 you are arguing here, which is that could we not say that the removal of Germany's
24 immunity from civil proceedings and from civil execution was a measure taken
25 pursuant to our obligations recognised in Articles 40 and 41 of the articles on

1 responsibility of States.

2 PRESIDING JUDGE EBOE-OSUJI: [12:31:25] The difference, the difference is that in
3 that case Italy was exercising its own jurisdiction. But in the fact scenario I gave you
4 I said, "Sir, we are going to arrest you and send you to the ICC for trial.

5 MR O'KEEFE: Yes. Well, Mr President, you touch on another fundamental
6 question here. Let's just say it is Jordan and let's just say it is Mr Al-Bashir.

7 Jordan's police arrest Mr Al-Bashir. Let's say under Jordanian law a judicial
8 proceeding is required for surrender. A Jordanian court will hear that proceeding.

9 Now if the Jordanian police and the Jordanian courts do not represent an exercise of
10 criminal jurisdiction by Jordan of its own jurisdiction, then whose jurisdiction is it?

11 It is not the international courts because the international -- they are Jordanian police.

12 Okay. This is what really this boils down to, Mr President.

13 When it is the Jordanian police, and when it is the Jordanian courts, that is an exercise
14 by Jordan of its criminal jurisdiction. Now, that isn't necessarily the end of the story,

15 because of course there may then be a customary exception to immunity from

16 Jordan's criminal jurisdiction in respect of surrender to the court. But that has to be
17 proved positively by the Prosecutor, and so far what we have had from the

18 Prosecutor is that it's unsettled. Well, unsettled does not displace a settled rule of

19 customary international law, which says that the exercise by Jordan by its police, by
20 its courts of jurisdiction violates its immunity.

21 PRESIDING JUDGE EBOE-OSUJI: [12:33:31] (Microphone not activated)

22 MR TLADI: [12:33:48] Thank you very much, your Honour.

23 Just a couple of points. First of all, I share entirely the views that have just been
24 expressed by Mr O'Keefe and earlier by Mr Murphy.

25 I just want to make a couple of additional points, and in fact the first point starts off

1 precisely where he left off, with Draft Articles 40 and 41.

2 What we have to remember - and I was just trying to pull them up and I haven't been
3 able to pull them up - but what we have to remember, though, is that both of those
4 Draft Articles specifically say that the measures that are to be taken are measures
5 within the law, so they have to be respectful of international law. And of course
6 international law would then include also the obligations relating to immunity.

7 Again on the question of the Barcelona Traction case, there is an issue that we ought
8 not to forget in sort of trying to figure out what the paragraphs that you have read
9 into the record mean. We ought not to forget that many, many years after that
10 decision has been given there was the Arrest Warrant case, which did not, did not
11 read into those paragraphs the complete removal of immunity *ratione personae*.

12 There was the Jurisdictional Immunities case in *Germany v Italy* which did not, did
13 not read into those paragraphs this idea that those paragraphs remove immunity.

14 Right.

15 It seems clear, and I think there is a general agreement even amongst the participants
16 in these proceedings, with very few exceptions, that there is no exception to this rule
17 relating to customary international law, and it has been said over and over again.

18 We have been presented with some practice, right, so we have been presented with
19 some practice, but if you look at that practice, that practice all pertains to the same
20 issue. The practice that the Office of the Prosecutor has presented to us all relate to
21 the matter of Mr Al-Bashir, so it cannot be practice that constrains the Court.

22 The final point that I would like to leave you with, which I think is a point that was
23 made both by Mr Murphy and Mr O'Keefe, is that it is important, as uncomfortable as
24 some situations are, that this Court if it is to be seen as a court of law, if it is to be seen
25 as a court that is bound by the rule of law, allows itself to be constrained by its rules,

1 even if the outcomes are uncomfortable.

2 PRESIDING JUDGE EBOE-OSUJI: [12:36:06] You said you did not have Article 41.

3 MR TLADI: [12:36:10] Forty-one. I am just pulling it up.

4 PRESIDING JUDGE EBOE-OSUJI: [12:36:10] And the reference to 41, perhaps you
5 can speak to this quickly, actually the interest is in 41(2), Draft Article 41, paragraph 2,
6 if I may quote.

7 MR TLADI: Yes.

8 PRESIDING JUDGE EBOE-OSUJI: "No State shall recognise as lawful a situation
9 created by a serious breach within the meaning of article 40, not render aid or
10 assistance in maintaining that situation." Unquote.

11 Article 40 deals with jus cogens.

12 Now the question then becomes is it -- of course, we know a difficult situation where,
13 you know, there is an occupation, a new State, some illegal occupation, and that the
14 occupying State creates, assigns some jurisdiction, the international community says
15 no, that is unlawful, no recognition.

16 But that cannot be the only situation that 41(2) speaks to. The question is could 41(2)
17 include a scenario where a breach of a peremptory norm, say genocide has been
18 committed and there is an obligation to repress and punish, so we have effectively an
19 unlawful situation under international law. Can that be recognised as lawful when
20 the person who is under indictment shows up in another State saying, hang on, I have
21 immunity?

22 MR TLADI: [12:37:49] I am very embarrassed to say this, your Honour, but I in fact
23 in my last report to the International Law Commission on jus cogens, I considered
24 precisely the meaning of that particular provision. Obviously we haven't included it
25 as our materials but, thankfully, the Office of the Prosecutor has included the third

1 report on jus cogens, so I will just say a couple of things about this particular
2 provision.

3 The report makes it clear after an analysis not only of the commentary to that
4 provision. But also of the case law to which that provision is based. That that
5 particular provision, or this particular provision in this instance would mean there is
6 a duty on States not to recognise the violation of jus cogens, and the violation of
7 jus cogens in this instance is the commission of the crime of genocide. That that's
8 what is not to be recognised, right (Overlapping speakers)

9 PRESIDING JUDGE EBOE-OSUJI: [12:38:43] But they can recognise immunity from
10 that?

11 MR TLADI: [12:38:47] But this takes us back to the ICJ judgment in Germany v Italy
12 to say these are two different concepts that operate on two different things.

13 Again, we seem to be conflating. They are two different things and so the
14 recognition of genocide, or the non-recognition of genocide does not mean the
15 non-recognition of immunity, because they are two different things and there is no
16 conflict between them.

17 With respect to the second part of the provision that you read out, providing aid or
18 assistance would mean a State coming in and assisting in the commission of those
19 crimes. There is no relationship with this provision -- rather, between this provision
20 and the rules of immunity.

21 PRESIDING JUDGE EBOE-OSUJI: [12:39:32] Can we look at it in terms of it is not
22 just assisting the commission of genocide. It says here, "nor render aid or assistance
23 in maintaining that situation", that situation meaning a situation of non-punishment
24 of the crime of genocide, which the Genocide Convention obligates States to assist in,
25 isn't it?

1 MR TLADI: [12:39:59] No, I would disagree. That situation is not the maintenance
2 of the non-punishment. That situation is the maintenance of the situation of the
3 commission of the crime. It is a different thing, it is not about immunity.

4 Thank you.

5 PRESIDING JUDGE EBOE-OSUJI: [12:40:18] Yes, we have Professor Lattanzi,
6 please.

7 MS LATTANZI: [12:40:30] (Interpretation) Yes, thank you, Mr President. I had
8 sought to address the Chamber before this, but I was not seen. So with your leave I
9 would like to come back to the issues or questions put by Judge Bossa.

10 PRESIDING JUDGE EBOE-OSUJI: [12:40:50] (Microphone not activated)

11 MS LATTANZI: (Interpretation) So there were two questions that I think are very
12 relevant here. Firstly, the question about the possible interpretation of resolution
13 1593 on the basis of Article 13(b), and the other on the basis of the powers given to the
14 Security Council to put a stop to proceedings before the ICC.

15 Now with regard to the first question, naturally, the Security Council rendered
16 a decision, or rendered the decision 1593 on the basis of the powers under Chapter VII,
17 but also on the basis of a specific provision contained in Article 13(b) to use that very
18 mechanism, that is Chapter VII of the Security Council. So this means that the
19 resolution must be absolutely interpreted on the basis also of Article 13(b) and
20 therefore also under the heading that specifically mentions the fact that the Court
21 shall exert its jurisdiction according to the rules of the Statute.

22 Now, with regard to the power of the Security Council on the basis of Article 16 and
23 still according to its powers under Chapter VII, I would say that the
24 Security Council -- and also this Article 16 and the possibility of the Security Council
25 using it can assist us in understanding Resolution 1593. And why is that? Because

1 here we have heard that and it has also been written about a great deal and some
2 academics have said also why it is that the Security Council has not explicitly granted
3 an exception to the immunity of the representatives of the Sudanese government.
4 Now, I will ask tomorrow why the Security Council did not do this, but whatever the
5 case, the argument is equally valid. If the Security Council had considered that
6 Mr Al-Bashir, President Al-Bashir was enjoying immunity, then he could have used
7 Article 16 of the Statute and therefore put a stop to the proceedings. And as Article
8 16 says, it can renew this request. It did not do so, however.

9 And even if there were a number of denunciations on the non-cooperation of States in
10 the execution of the arrest warrant and surrender of the person in question, then I
11 think that the two questions put -- I think that the question put by Judge Bossa as to
12 the usage of Article 13 and the jurisdiction of the Security Council on the basis of
13 Article 16 are extremely relevant.

14 But with your leave, I would also like to hark back to the discussions on the issue of
15 the absolute character of immunity, personal immunity of a Head of State. Now, we
16 need to use words in their correct meaning. We cannot talk about general character
17 in customary law and absolute character and also talk about jus cogens all in one fell
18 swoop.

19 As you know, the jus cogens in international law is relevant. But this is not an
20 absolute right, because there is the death penalty. And international law has not yet
21 been able to resolve this issue in putting a stop to the death penalty, forbidding it. It
22 has the possibility of killing an enemy whilst at war and, in legal terms, jus cogens,
23 but it is not absolute as such and the right of a State to personal immunity on the
24 *ratione personae* level of its Head of State.

25 Now, I think that we should not confuse the two. The immunities and the right to

1 the immunities that a State enjoys as such that are linked to its sovereignty and the
2 par in parem non habet iudicium, we should not confound or confuse that with the
3 right of a State to the immunity of its Head of State being recognised or
4 acknowledged by international courts. That has something completely different to
5 do.

6 It is quite simply to say that the representatives of a given State who automatically
7 have the Head of States and also the Minister of Foreign Affairs or maybe the heads of
8 government, the head of government should explain their functions without in any
9 way impeding anything. But this does not mean that that right, the right of a state is
10 not restricted in any manner.

11 So the Statute of the International Criminal Court might foresee an exception to this.

12 But this provision, as somebody said, is invalid.

13 Now, there might also be the possibility as in the case of war crimes, where very
14 serious violations are committed during their office, whilst they are in office during
15 times of war, that they might not respect international humanitarian law during war.
16 However, these or this immunity of the agent of a State or the immunities, according
17 to the *ratione materiae* are -- so they do not have a *jus cogens* character and do not
18 have an absolute character.

19 Now, according or with regard to a question that the representative of or one of the
20 representatives of the Office of the Prosecutor had raised, we would need to remind
21 ourselves in reading the preparatory works, there are many preparatory works ahead
22 of the Statute of the International Criminal Court that reveal very clearly what the
23 spirit was in the establishment of this Court. And the fundamental reason on the
24 basis of which the international community since Versailles, the requirement came
25 into being that of an international criminal mechanism on the basis of the substantive

1 but not formal idea of complementarity as laid out in the Statute, that is to say that the
2 States have been negligent in terms of repression of international humanitarian law.
3 So here when we are talking about the implication of the leaders of international
4 States, so we need, in order to contrast or compare and contrast the situation, we had
5 to create an international mechanism, and this means that the International Criminal
6 Court has provided for in Article 27 -- I apologise, that the States, the Member States
7 in Article 27 of the Statute of the International Criminal Court, this was to really take
8 care of this negligence in terms of international humanitarian law. And there has
9 been a certain erosion.

10 Thank you very much.

11 PRESIDING JUDGE EBOE-OSUJI: [12:53:17] Thank you very much.

12 I will invite the counsel for the League of Arab States to address the Court. I would
13 also put on the record that he has now joined us. He was not here in the morning
14 session. Please proceed.

15 MR ABDELAZIZ: Thank you, your Honour. And apologies for coming a little bit
16 late in the morning for some consultation purposes.

17 Let me start by referring to the question that you posed to the League of Arab States
18 yesterday with regard to Article 98 of the Rome Statute, whether the League is
19 advocating for the application more of paragraph 1 of Article 98 or of paragraph 2.
20 And I have checked with our legal team back home, and I am instructed to say that
21 we attach great importance for the application of both paragraphs of Article 98 of the
22 Rome Statute.

23 I would like to make a further comment on the application of Article 14 of the
24 1953 Convention that, based on the comments that were made by the distinguished
25 representative of the Prosecutor. And in fact with regard to the waivers, the

1 paragraph 14 is very clear. It states that, and I am quoting here, "Consequently,
2 Member States," and here the reference is for the sending States, "must waive the
3 immunity of their representatives," and this is the emphasis that this is the sending
4 States that are instructed, "in all cases where it appears that the immunity would
5 impede the course of justice" -- and that runs, of course, in parallel with the
6 provisions that are stipulated in paragraph 98 of the Rome Statute -- "and if it can be
7 waived," and this is the tricky part, "without prejudice to the purpose for which the
8 immunity is accorded."

9 So that is a condition for the waiver of immunity. But who is going to decide that
10 there is no prejudice to the purpose for which the immunity is accorded?

11 PRESIDING JUDGE EBOE-OSUJI: [12:55:43] But I thought the purpose would be for
12 the efficient functioning of the Arab League.

13 MR ABDELAZIZ: [12:55:49] Exactly, exactly. But it is the Arab League that is
14 going to decide. It is not Sudan, it is not Jordan, and it is not the Court. So that
15 distinction has to be very clear in the application, that the Arab League is the one that
16 is going to decide according to the institution of procedures as depository of the
17 1953 Convention. Thank you.

18 PRESIDING JUDGE EBOE-OSUJI: [12:56:16] Thank you very much.

19 Next is Mr Kreß. Did you want to speak? I have you on the list.

20 MR KREß: [12:56:23] Yes.

21 PRESIDING JUDGE EBOE-OSUJI: [12:56:27] All right. After you then we will go to
22 Jordan.

23 MR KREß: [12:56:36] I can defer to Jordan happily, if you wish.

24 PRESIDING JUDGE EBOE-OSUJI: Fair enough, yes.

25 MR MURPHY: [12:56:42] Thank you, Mr President. Just a small reminder that in

1 the Arrest Warrant case, the charges against the Foreign Minister did relate to crimes
2 against humanity and serious war crimes. So whether we are talking about
3 jus cogens or whether we are talking about erga omnes obligations, those kinds of
4 issues were certainly before the Court when they reached the decision that we
5 reached and I think it's important.

6 PRESIDING JUDGE EBOE-OSUJI: [12:57:10] But I think it is important also to clarify
7 that the only judge who talked about jus cogens was Judge Al-Khasawneh and no
8 other in the Arrest Warrant case.

9 MR MURPHY: [12:57:25] Well, yes, the International Court case best to look at on
10 the jus cogens issue would be the Germany v Italy case, where it was squarely in front
11 of the court, and the court was quite clear that an allegation of a jus cogens violation
12 did not have the effect of overriding immunity.

13 That's where they did clearly set up the idea that there is a procedural side to things,
14 there is a substantive law side to things, and these are two different things.

15 PRESIDING JUDGE EBOE-OSUJI: [12:57:54] So then if there is any serious doubt
16 about that distinction, does the thesis collapse then?

17 MR MURPHY: [12:58:04] Well, I think it comes down to at least in this context of
18 jus cogens how you conceive of what is jus cogens. Jus cogens is saying you cannot
19 commit certain types of acts, and you can't do that by basis of a treaty. You can't do
20 that by the basis of something else.

21 If you accord immunity to someone, you are not committing that act. When Jordan
22 recognises the immunity of President Al-Bashir, it is not committing an act of
23 genocide. It is not committing crimes against humanity. It is not transgressing
24 a peremptory norm of international law. I think that is the heart of what the court
25 was discussing in the Germany v Italy case.

1 PRESIDING JUDGE EBOE-OSUJI: [12:58:51] But is it possible that the court's
2 distinction for purposes of saying there was no comfort of jus cogens with immunity
3 was by saying they speak to different considerations, the two ideas in that case, and
4 they address immunity as speaking to something else, whereas jus cogens speaks at
5 different interest. I think that seems to be an understanding of how they arrive at
6 that distinction.

7 The question then becomes then: Are we in a scenario, for instance, where there is
8 law in the national jurisdiction that says when a motorist and a cyclist conflict on the
9 highway, on the roadway, in order to preserve life, the motorist should yield to the
10 cyclist?

11 But then we have a scenario where the two at some point arrive at a roundabout and
12 there is a collision, and the judge says: Well, there is no conflict that should have
13 resulted in the motorist yielding in this scenario because the motor vehicle, it is
14 a different mode of transportation, whereas a bicycle is of a different character and
15 serves a different mode of transport.

16 Do we have that problem with that kind of distinction that was made in the
17 Arrest Warrant case?

18 MR MURPHY: [13:00:50] No, I don't think so. If I understand the hypothetical
19 correctly, in both instances the question is: Can you engage in an act that would
20 transgress some kind of peremptory norm? In that instance, who is supposed to
21 yield in the circle?

22 But in the context of immunity, we are not talking about that. We are talking about
23 perhaps a later point in time where someone is trying to maybe bring a case against
24 the motorist, and there, to the extent that that motorist does have an immunity,
25 upholding that immunity does not result in the failure to yield in the circle. It

1 doesn't transgress the norm.

2 And I think the court has also made this clear in the Democratic Republic of the
3 Congo case versus Rwanda, where the DRC says: We think that you, Rwanda,
4 violated jus cogens; therefore, there is jurisdiction in the International Court of Justice.

5 And the court says these are two totally different things. You know, you can't
6 transgress the jus cogens norm. But that norm does not have the effect of knocking
7 down immunities, creating jurisdiction in a court and so on. That's not what
8 jus cogens is all about.

9 But if I can, Mr President --

10 PRESIDING JUDGE EBOE-OSUJI: [13:02:04] Yes, I am going to say I believe what
11 they said in the DRC case was that jus cogens does not create jurisdiction that doesn't
12 exist.

13 MR MURPHY: [13:02:13] Correct.

14 PRESIDING JUDGE EBOE-OSUJI: [13:02:14] That's something else.

15 MR MURPHY: [13:02:16] Yes. And I was just using that to highlight another
16 example of how jus cogens doesn't do something. It might be nice to have
17 jurisdiction in the ICJ to vindicate a jus cogens claim, but that's not what is happening;
18 and likewise, it might be nice to lift the immunity in order to vindicate a jus cogens
19 claim, but that's not what it is all about.

20 But if I could go on, Mr President, just because the Prosecution once again has
21 returned to the International Law Commission, and I just wanted to make it
22 completely clear to the Court what has happened and what hasn't happened at the
23 ILC. And I can do this fairly --

24 PRESIDING JUDGE EBOE-OSUJI: [13:02:55] I think we can notice that ILC is
25 heavily tilted on that side, on the left side of the courtroom.

1 MR MURPHY: [13:03:01] We are of course speaking in our capacities as

2 representatives of either Jordan or the African Union, Mr President.

3 PRESIDING JUDGE EBOE-OSUJI: [13:03:07] Yes. Please proceed.

4 MR MURPHY: [13:03:08] But let me just note that the Commission has for several
5 years been working on the topic, immunity of state officials from foreign criminal
6 jurisdiction. So it is very clearly on point to some of the issues being discussed here.

7 In that topic, in 2013, in 2014, the Commission unanimously decided that there is
8 a category of immunity *ratione personae* and that it is absolute. There was no
9 disagreement on the commission.

10 What does that mean? It covers a Head of State, head of government, foreign
11 minister. It gives them complete immunity for either their public or their private
12 acts while they are in office and whether those acts occurred before they took office or
13 while they are in office.

14 No disagreement of any kind about there being exceptions to that, including in the
15 context of arresting someone in a national jurisdiction for submission to an
16 international court. Absolute immunity.

17 The Prosecution --

18 PRESIDING JUDGE EBOE-OSUJI: [13:04:26] Was that specifically discussed?

19 MR MURPHY: [13:04:29] Yes.

20 PRESIDING JUDGE EBOE-OSUJI: [13:04:31] Arresting for purposes of transfer to an
21 international court?

22 MR MURPHY: [13:04:33] If I can go on?

23 PRESIDING JUDGE EBOE-OSUJI: All right. Go on.

24 MR MURPHY: We then proceeded to discuss are there exceptions to immunity?

25 And the only proposal put forward by the special rapporteur relates to exceptions to

1 immunity *ratione materiae*. In that context the special rapporteur proposed maybe
2 there is exception for immunity *ratione materiae*, not Head of State immunity, in the
3 context of surrender to an international court.

4 And in that context the International Law Commission, without any significant
5 disagreement, set aside that exception.

6 Now, there were other exceptions that generated considerable disagreement. But all
7 of that is in the box of immunity *ratione materiae*. None of it, none of it relates to the
8 2013/2014 discussions about Head of State immunity. On that the Commission is
9 absolutely clear, as I think Professor O'Keefe indicated, and governments in the Sixth
10 Committee receiving our reports in 2013/2014 reacted very positively to that across
11 the board. So there really is no disagreement about this and the context of immunity
12 *ratione personae*.

13 PRESIDING JUDGE EBOE-OSUJI: [13:06:05] Thank you very much.

14 Mr Kreß. Now I think after you, your speech, we will have to rise for lunch.

15 MR KREß: [13:06:18] Yes. Mr President, I wanted to respond to your two specific
16 questions. But before doing this, allow me an immediate response to what my
17 distinguished colleague Sean Murphy has just said, because I think it is really
18 important.

19 One of the very crucial questions before us is whether the arrest and surrender of
20 a sitting Head of State for the purposes of international criminal proceedings falls
21 within the immunity rule *ratione personae* on foreign criminal proceedings the ILC
22 is dealing with right now.

23 I am not privy, of course, to conversations that ILC members may have among
24 themselves, but I have written the materials closely, and I have not been able to detect
25 during all these years anything close to a discussion of this specific limited issue, let

1 alone anything in the current texts that would settle that question. And therefore I
2 humbly ask if this is a proposition which is in the room that we are referred to this
3 specific language that I understood there is somewhere present in the documents. I
4 have not detected it.

5 PRESIDING JUDGE EBOE-OSUJI: [13:07:41] And just so the record is clear, when
6 you say "specific situation", you mean in terms of before an international criminal
7 court?

8 MR KREß: [13:07:48] Absolutely, absolutely.

9 PRESIDING JUDGE EBOE-OSUJI: All right.

10 MR KREß: Now on your two questions, Mr President, I will keep it brief in
11 recognition of the time.

12 You have referred us to two quotes, and you have invited us to ask or to ask ourselves
13 to reflect whether this can be of help to our important considerations.

14 I have understood your question not to imply that the Appeals Chamber can derive
15 a solution from simply applying those broad principles. You have asked us in the
16 manner of is that food for thought which is useful for deliberation, and my answer
17 is yes.

18 PRESIDING JUDGE EBOE-OSUJI: [13:08:25] You perfectly understood the purport
19 of the question, yes.

20 MR KREß: [13:08:30] Thank you, sir.

21 Let me start with a second quote from Barcelona Traction.

22 PRESIDING JUDGE EBOE-OSUJI: [13:08:36] And you say the answer to -- I
23 interrupted you. You say the answer to the question generally speaking is what?

24 MR KREß: [13:08:44] Well, I am just giving it, trying to give it. Let me start with
25 what the Barcelona Traction or how the Barcelona Traction quote is important to our

1 case.

2 For me, the most important part of your citation is the words "there are obligations of
3 states vis-à-vis the international community". And I cannot emphasise it enough
4 that this is part, not of a scholarly treatise of some creative fancy scholar. This is in
5 a judgment, not even a minority or dissenting opinion, this is a judgment of the
6 International Criminal Court.

7 What does it mean? It does mean the recognition by this Court, the International
8 Court of Justice, that there exists an international community to which States have
9 under customary international law obligations.

10 And this is very important, I would suggest, to the question on, and that's a very
11 fundamental question, on what the jurisdiction of this court is based. And it was
12 a little bit implicit in the question raised by Judge Morrison a minute ago, to which I
13 would respond, I have just responded, it does not exhaust the matter.

14 If there are obligations of states vis-à-vis the international community, as a point of
15 reference, there may also be - and I would argue there is - a *ius puniendi* residing in
16 this international community which transcends States. This is at the very essence of
17 this entire enterprise.

18 And my argument which I have developed, and I shall keep it brief, in the written
19 observations, is that this has consequences, and from that it follows that just to
20 conceive of the International Criminal Court as the result of delegation of national
21 powers does not exhaust the matter.

22 I just wanted to allude to the fact that this is not fanciful speculation, but that we have
23 ICJ jurisprudence endorsing the core idea.

24 On the joint opinion by the honourable Judges Higgins and others, here I think the
25 core point helpful for our considerations is to be a little careful with the assumption

1 that the value of international stability, stability of the international relation, you can
2 phrase it in different words, invariably, imperatively requires to grant immunities in
3 all circumstances, full stop.

4 We all agree here that as a matter of current international law there is absolutely
5 immunity *ratione personae* for national criminal proceedings. We are in
6 disagreement how far this rule applies, but we are in agreement.

7 So we can say currently, currently States are of the opinion - that is the underpinning
8 value - that there is too much of a danger to international stability to make, to allow
9 for an exception from immunity *ratione personae* in national criminal proceedings.

10 But what this phrase suggests, that may not be the full story, to quote. It may be that
11 the very purpose for States coming together and establishing an international criminal
12 court is that this is an instrument, so to speak, to change the risk calculus.

13 The only thing in the speech of my distinguished colleague and friend Roger O'Keefe
14 that I did not enjoy, otherwise I enjoyed it thoroughly, even though I profoundly
15 disagree, but the only thing I didn't enjoy was that he seemed to interpret me as, so to
16 speak, taking offence at the presumption of innocence.

17 I am not just a public international lawyer, I am a criminal lawyer, too. The
18 presumption of innocence, for the record, is sacred. And this, Mr President, this is
19 what is behind the immunity rule.

20 Just because we do not know at the start of criminal proceedings whether the person
21 concerned, the sitting Head of State is guilty or not, therefore we must be so sensitive
22 to possible abuses, possible misconduct of proceedings, especially in cases which are
23 politically so sensitive, like the ones against sitting Head of States.

24 But now the calculus, this risk calculus which is behind the immunity rules, it changes
25 I would argue fundamentally when States have come together to establish an

1 international criminal court, and we have negotiated for years to shield this
2 International Criminal Court against the danger of political abuse and so forth.
3 Here, and one thing cannot be disputed, more than a hundred States, State Parties
4 have come to the conclusion that the stability of international relations between them
5 is not jeopardised if there is an exception from immunity *ratione personae*.
6 And I would argue just because they trust this International Criminal Court and,
7 therefore - and this is in line with this statement you have helpfully referred us
8 to - the question mark which these honourable judges place before us might be the
9 risk calculus before international criminal courts of this nature here, be different than
10 in national criminal proceedings. And my suggestion is this includes vertical
11 cooperation with this Court.

12 Thank you, Mr President.

13 PRESIDING JUDGE EBOE-OSUJI: [13:15:11] Thank you very much. And perhaps
14 one might add to that that at this international court, arrest warrants, also indictments
15 need to be confirmed by Judges, not just the Prosecutor.

16 We can leave it at that for now and come back at 2.40, at 2.40 and resume our sittings.

17 The Court will rise.

18 THE COURT USHER: [13:15:40] All rise.

19 (Recess taken at 1.15 p.m.)

20 (Upon resuming in open session at 2.46 p.m.)

21 THE COURT USHER: [14:46:21] All rise.

22 Please be seated.

23 PRESIDING JUDGE EBOE-OSUJI: [14:46:54] Thank you very much. And welcome
24 back everyone.

25 We will now proceed with the next cluster of questions. I understand that the legal

1 team for Jordan would have liked to make a few more observations in the last
2 segment. We will try and capture some of that as we go along. Thank you very
3 much.

4 So we will proceed to the next cluster of questions and my colleague,

5 Judge Hofmański, would put those questions on the record.

6 JUDGE HOFMAŃSKI: [14:47:40] Thank you very much, Mr President. Excuse me
7 for taking your time, but it's really necessary to read all the questions to the record.

8 I will start. The cluster B, Security Council referrals under Article 13(b) of the Statute
9 and Resolution 1593.

10 Question (a): For the purposes of Chapter VII of the United Nations Charter, does
11 the Security Council have the power to waive, displace or override the immunity of a
12 Head of State under customary international law or conventional international law?
13 If so, must this be done expressly or can it be by necessary implication?

14 Question (b): For the purposes of Chapter VII of the UN Charter, does the Security
15 Council have the power to make conventional provisions of the Statute applicable to
16 States that are not party to it? If so, must this be done expressly or can it be by
17 necessary implication?

18 Question (c): In this respect, what is the intendment of Article 13(b) of the Statute
19 when it provides the Court must exercise its jurisdiction in accordance with the
20 provisions of the Statute?

21 Question (d): Does Article 13(b) of the Statute entail the application of the Statute to
22 a non-State Party on the same basis as a State Party or does it only serve to
23 instrumentalise the Court through the Chapter VII powers of the Security Council?

24 Question (e): What is the significance, if any, of the fact that the Security Council
25 referrals of situations to the Court under Article 13(b) of the Statute can only be

1 accomplished by the Security Council under Chapter VII, not under any other chapter
2 of the United Nations Charter nor by the United Nations General Assembly?

3 (f): Is a proper understanding of the effect of Article 13(b) of the Statute assisted by
4 the hypotheses that the Court -- (a) is the brainchild of the UN; and/or (b) was
5 established as a separate entity rather than a part of the United Nations?

6 Question (g): What is the legal significance and effect of the distinction in paragraph
7 2 of Resolution 1593 between imposing an obligation to the Republic of the Sudan to
8 cooperate fully, while only urging all other States to cooperate fully?

9 Does the former obligation have the same effect on States not party to the Statute,
10 whether UN Member States or otherwise, as it does on the Republic of the Sudan
11 from the perspective of any immunities cognisable under Article 98 of the Statute?

12 (h): Does the "urge" in paragraph 2 of Resolution 1593 on all other States to
13 cooperate fully amount to a licence, excuse or defence permitting States to derogate
14 from any immunities that the Republic of the Sudan might otherwise enjoy under
15 international law?

16 (i): Given the express recognition in paragraph 6 of Resolution 1593 of specific
17 exceptions to the Court's jurisdiction, can the resolution reasonably be construed as
18 recognizing any other exceptions by implication, notwithstanding the requirements of
19 cooperation placed upon UN Member States by virtue of various provisions of the
20 UN Charter, including Articles 2(2), 2(5), 2(7), 24(1), 25, 49 and 103?

21 (j): Is it right to say that the immunity derives essentially from sovereignty? If so,
22 can a UN Member State plead its own sovereign immunity in order to avoid the
23 effects of a Chapter VII measure, particularly having regard to Articles 1(1), 1(3) and
24 1(4) of the UN Charter and its preamble.

25 (k): Can a rule of customary international law be pleaded by a State as a bar against

1 the implementation of a decision of the Security Council taken under Chapter VII,
2 particularly having regard to Articles 2(2), 2(5), 2(7), 24(1), 25, 48, 49 and 103 of the
3 UN Charter?

4 Question (l): Is there a difference between the legal effects in the following
5 scenarios where the Security Council uses Chapter VII powers to -- (a) refer a case to
6 the Court; (b) create a new ad hoc tribunal like the International Criminal Tribunal for
7 the former Yugoslavia or the International Criminal Tribunal for Rwanda? If the
8 Security Council had created a new ad hoc tribunal for Darfur modelled on the
9 template of the resolutions used in the creation of the ICTY and ICTR, would
10 Mr Al-Bashir have enjoyed immunity before that tribunal?

11 (m): Since the adoption of the Resolution 1593, to what extent, if any, has the
12 Republic of the Sudan complied with its obligation to cooperate fully, other than in
13 the matter of the arrest and surrender of Mr Al-Bashir? How many citizens of the
14 Republic of the Sudan are currently subject to an arrest warrant issued by the Court,
15 and what is the extent of the Republic of Sudan's cooperation in the arrest and
16 surrender of such persons to the Court?

17 Question (n): Would the recognition of immunity in respect of Mr Al-Bashir render
18 Resolution 1593 wholly or substantially ineffective?

19 And the last question, question (o): In the context of a request for arrest and
20 surrender issued by the Court following a Security Council referral, could the State be
21 said to be acting as the Court's jurisdictional proxy or otherwise in the execution of
22 such a request? What is the relevance, if any, of Article 59 of the Statute in this
23 regard?

24 Thank you.

25 PRESIDING JUDGE EBOE-OSUJI: [14:55:11] Thank you very much,

1 Judge Hofmański.

2 And we now come to the second cluster as you might have already discerned. We
3 may have in the last segment got ahead of ourselves by foreshadowing some of these
4 questions, but if you've already spoken to it at that time, just merely need to refer that
5 you've already spoken to it before. But the cluster now gives everyone a systematic
6 opportunity to speak to those questions in case they hadn't done so before.

7 So we will then begin as before. The idea is that these questions should guide
8 counsel in their submissions so they know some of the questions that are troubling
9 the Judges, but again speak freely as you would.

10 We will now invite counsel for Jordan.

11 Mr Murphy, I see you standing to go first. Please proceed.

12 MR MURPHY: [14:56:16] Thank you, Mr President.

13 PRESIDING JUDGE EBOE-OSUJI: [14:56:20] I am required to say something to you
14 which I also need to keep in mind myself for purposes of proper transcription of the
15 proceedings and interpretation, for us to speak in moderate tone, not too slowly, but
16 not fast so that things can be captured properly. As I said, I will take note of that
17 caution myself. So please proceed.

18 MR MURPHY: [14:56:47] Thank you, Mr President. I will certainly do my best to
19 follow that intermediate path.

20 Jordan has filed a second ground of appeal before the Appeals Chamber, which
21 I would like to address. And after I speak, with your permission, Mr Wood will
22 continue, particularly focussing on some of the questions that fall within this group B.
23 Our second ground of appeal is that the majority in the Pre-Trial Chamber erred in
24 concluding that the necessary effect of Security Council resolution 1593 was that
25 Sudan has rights and duties analogous to those States of States Parties to the Statute.

1 This status that it determined Sudan had of being analogous to a party supposedly
2 came about due to a combined effect of paragraphs 1 and 2 of the resolution, which to
3 us is a rather curious alchemy that is challenging to follow and requires analysing, not
4 just the December 2017 decision which related to Jordan, but also the July 2017
5 decision that related to South Africa.

6 In any event, this analogous to a party status for Sudan is a crucial part of the
7 Pre-Trial Chamber's legal theory. For the Pre-Trial Chamber, as we previously
8 discussed, accepted that President Al-Bashir enjoys Head of State immunity and
9 further accepted that such immunity would normally protect him from Jordan's
10 criminal jurisdiction under Article 98 of the Rome Statute since Sudan is not a party to
11 the Statute. Yet, under the force of Article 27 of the Statute, the majority below said
12 that Article 98 basically drops away because Sudan is no longer a non-party but
13 instead has the status of analogous to a party,

14 And once that Article 98 disappears Jordan is suddenly non-complaint for failing to
15 recognise this "connect the dots"" approach.

16 In response to the Prosecution's April 2018 pleading I'd like to just address a few
17 points if I may.

18 First, Jordan believes it to be obvious that the Pre-Trial Chamber and, with respect,
19 the Prosecution as well, failed to interpret Security Council resolution in accordance
20 with what would be viewed the proper methodology.

21 As indicated by the International Court of Justice in the Kosovo Advisory
22 Opinion -- and we have included in the Jordan Judges' folder for the day at page 3 the
23 extract from the Kosovo Advisory Opinion. If you look at that paragraph 94 on
24 page 3 of your Judge's folder, there are a few elements that the Court points to.
25 They start with the idea that guidance may be found in Articles 31 and 32 of the

1 Vienna Convention, which by its terms applies to treaties but provides a basic
2 methodological approach that the Court says is relevant even when you're
3 interpreting a Security Council resolution.

4 It then goes on to say that Security Council resolutions may also require the Court to
5 analyse statements by representatives of the Council made at the time of the adoption
6 of the resolution, other resolutions of the Security Council on the same issue, and the
7 subsequent practice of relevant UN organs and of States affected by the given
8 resolutions.

9 In our view, neither the Chamber nor the Prosecution have really confronted this
10 methodology squarely and systematically. If they did, we submit that the ordinary
11 meaning of the resolution would lead to a conclusion that supports our second
12 ground of appeal. We think you have to look at the ordinary meaning, we think
13 when you look at the context and when you look at the statements of the Council
14 members of the time of the adoption and the practice of the Council thereafter, the
15 interpretation that we advance is the correct one.

16 PRESIDING JUDGE EBOE-OSUJI: [15:02:06] Mr Wood, Mr Wood did write a very
17 useful article on this long before this case arose, in 1995 I think it was or 1998. But go
18 ahead, please. It think it is more or less the same thing.

19 MR MURPHY: [15:02:22] Yes, indeed, your Honour. And as the lead counsel for
20 Kosovo in the Advisory Opinion case I think he brought his knowledge to good use in
21 that instance as well.

22 In our view, you may want to take a hard look at Judge Brichambaut's minority
23 opinion, to a certain extent in the December 2017 decision, but even more so in the
24 July 2017 South Africa decision because he does employ this methodology where he
25 systematically goes through the elements. We think that's the right methodology

1 and we encourage this Court to approach it in the same way.

2 I would also note that Jordan's position has been supported by the African Union and
3 the Arab League in terms of the proper way of interpreting the resolution, and the
4 result from that interpretation.

5 Let me turn to a second point, which is when you look at the resolution itself, and
6 here I would direct you to page 4 of our Judges' folder where we have reproduced the
7 resolution. If you look at the resolution itself, to us, the ordinary meaning leads to a
8 relatively straightforward interpretation. If you look at operative paragraph 1 you
9 see the Council deciding to refer the situation in Darfur since 2002 to the Prosecutor.
10 In so doing, the Council triggered this Court's jurisdiction in accordance with
11 Article 13(b) of the Rome Statute.

12 In the second paragraph of the resolution the Council decides, and I'll quote it, "the
13 Government of Sudan ... shall cooperate fully with and provide any necessary
14 assistance to the Court and the Prosecutor pursuant to this resolution".

15 This is binding on the Government of Sudan, there's no dispute about that, in terms of
16 the way it would operate with Article 25 of the UN Charter.

17 Now, obviously neither of these provisions, paragraph 1 or paragraph 2, says
18 anything about the denial of immunity from foreign criminal jurisdiction. They
19 further say nothing about immunity at all. Neither provision says anything about
20 Article 27 of the Rome Statute, and certainly nothing about Sudan becoming a party
21 or a quasi-party or analogous to a party to the Rome Statute. Or, to use the
22 Prosecution's somewhat convoluted tongue-twister, UNSC situation referral State.
23 That also appears nowhere in the resolution or in the Rome Statute for that matter.
24 Instead, what you see there in paragraph 1 is that the resolution is using language
25 that very much mimics the language of a single article of the Rome Statute, which is

1 Article 13. And we've included that as well at page 6 of your Judges' folder, although
2 I'm quite sure you have all of the Rome Statute at your finger trips.

3 Recall that paragraph 1 of the resolution has the Council deciding to refer the
4 situation in Darfur to the Prosecutor of the International Criminal Court. Meanwhile,
5 Article 13(b) is providing the Court with jurisdiction over a situation in which one or
6 more of the crimes appears to have been committed is referred to the Prosecutor by
7 the Security Council acting under Chapter VII.

8 To us, this symbiotic relationship, if you will, between paragraph 1 of the resolution
9 and Article 13(b) of the Statute is very clear that that's what the resolution in
10 paragraph 1 is triggering, and it speaks volumes about the ordinary meaning of
11 paragraph 1. In short, all paragraph 1 does is activate the exercise of jurisdiction by
12 the Court with respect to the situation in Darfur in relation to the crimes that are
13 referred to in Article 5 of the Rome Statute. It does no more than that. It does no
14 less than that.

15 Had the Pre-Trial Chamber focussed more closely on the ordinary meaning of the
16 resolution, it would have had to accept that paragraph 1 is referring a situation to the
17 Court, not a State. Indeed, a reference to the State of Sudan, or even the government
18 of Sudan appears nowhere in paragraph 1. The reference is to the situation in Darfur
19 and that of course is a reference to a geographic area which is in Sudan, but it's not a
20 reference to the State of Sudan. Indeed the resolution could not, consistent with the
21 Rome Statute, have referred a State to the Prosecutor. That's not what the
22 Rome Statute says. We think this is an important point and it's not a point that
23 either the Prosecution or the Pre-Trial Chamber has really grappled with.

24 Article 13(b) of the Statute provides for referral of situations to the Prosecutor, not
25 referrals of States.

1 If only a situation can be referred, it's difficult to understand why a non-party State
2 should be treated as if it's a State Party or analogous to a State Party, or whatever
3 other name you want to put on it. The position of that State, that non-party State
4 vis-à-vis the Court and the Statute remains unchanged based on this referral, unless
5 the Security Council takes some further action beyond what's happened in this
6 resolution. And paragraph 2, which I'll turn to in a moment, is really not of any
7 assistance here given that it too does not refer to the State of Sudan.

8 Mr President, members of the Chamber, what Resolution 1593 accomplished is simply
9 that crimes occurring in Darfur since July 2002 are within the jurisdiction of the Court,
10 while Sudan remains a non-party to the Rome Statute.

11 Now, if we go past the language of Resolution 1593 and looked at other elements for
12 this proper interpretation, we would find that the understanding of what this means
13 doesn't change. There's virtually no support for the interpretation placed on this by
14 the Prosecution in the statements made by the Council members at the time
15 resolution 1593 was adopted. There's virtually no support in the statements made
16 by Council members in the past 13 years, and there's no practice of any kind by the
17 Council itself since 2005 that would support the proposition that resolution 1593 was
18 attempting to strip away immunity from foreign criminal jurisdiction.

19 Time precludes running through that practice. I do refer you to Jordan's appeals
20 brief, particularly at paragraphs 73 to 76, and I would note that some of Mr Newton's
21 comments at the end of yesterday regarding subsequent State practice are pertinent in
22 this regard.

23 I do want to note that for years now the Prosecution has been making reports to the
24 Security Council claiming that States are failing to comply with their interpretation of
25 the Council's resolution. Despite that, and despite some referrals to the Council, the

1 Council has taken no action at all to address these purported violations of its
2 resolution.

3 Both the Pre-Trial Chamber and the Prosecution press hard on the idea that the
4 entirety of the Rome Statute applies to the situation in Darfur, and then they
5 somehow hypothesise that that speaks to the entirety of the Statute applying to
6 Sudan.

7 The origins of this hypothesis, the leap that it makes and its significance is a bit of a
8 mystery to us as, again, the text of the Statute -- sorry, the text of the resolution says
9 nothing about applying the entirety of the Rome Statute to anything, let alone to
10 Sudan.

11 And how that hypothesis differs from declaring Sudan to be a party to the
12 Rome Statute, which as we understand it both the Prosecution and the
13 Pre-Trial Chamber disclaim, that too is a mystery to us. If this hypothesis were
14 really true, then it would lead to a conclusion that Sudan is being treated essentially
15 as a party to the Rome Statute, which would have been completely unnecessary then
16 to have paragraph 2 of the resolution, since if Sudan was already essentially a party
17 there would be no need for paragraph 2 if they're already bound to Part IX of the
18 Statute. So when I turn --

19 PRESIDING JUDGE EBOE-OSUJI: [15:12:43] I would like to ask you a question at
20 some point, but perhaps this may be a place for you to start thinking about this if you
21 want to get to it later. You will of course tell us, what other provisions of the Rome
22 Statute beyond Article 13(b) would apply in the situation, in the prosecution of
23 anyone in the Darfur situation that is beyond Article 13(b)?

24 Is there any provision of the Rome Statute that applies? If so, why would that apply
25 and not other provisions? I'm sure you've thought about that, because the

1 submission seems to be that 27 doesn't apply, but 98 does, and we're saying okay.

2 Now, I'm not sure of that, I rephrase my understanding of your submission

3 correctly, but the point being we would like to know what provisions of the

4 Rome Statute apply.

5 Thank you.

6 MR MURPHY: [15:13:52] Thank you, Mr President.

7 I'm happy to answer that question. It depends what you're saying it applies to.

8 Our submission is that the Rome Statute in its entirety, or several provisions, or

9 whatever, don't apply directly to Sudan. Our submission would be there's been a

10 referral of a situation to the Court and then the Court's Statute does operate with

11 respect to that situation. So I suppose you could say the Statute applies to the

12 situation, fair enough, but it's a leap to say that the Statute therefore applies to the

13 State of Sudan. And that's where we're pausing, because the claim is that we now

14 have a UNSC referral situation State, or situation referral State, that has placed Sudan

15 essentially in a party-like status and we don't see that.

16 So our submission would be Article 13(b) has triggered your jurisdiction with respect

17 to a situation, you proceed under the Statute as you would whenever you have

18 jurisdiction over a situation, but it doesn't change the status of Sudan.

19 PRESIDING JUDGE EBOE-OSUJI: [15:15:11] But beneath the application of the

20 Statute to Sudan is the essential question of application of the Statute in the case

21 concerning President Al-Bashir; isn't it the case?

22 MR MURPHY: [15:15:31] Well, I would submit that the Court's jurisdiction to

23 investigate a situation and then possibly to indict individuals for crimes committed

24 within that situation is all relevant and is all applicable here. But I would submit

25 that does not somehow transform a non-party State into being something like a party

1 or a quasi-party, or however you would put it. It's still a non-party to the Statute.
2 And related to your question is that if you were to say that somehow Sudan
3 analogous to a party, you then immediately run into the problem that of course it
4 doesn't have all the obligations of a party, it wouldn't be expected to show up at the
5 Assembly of States Parties to pay dues, it couldn't trigger the dispute resolution
6 procedures. All that. Even the Prosecution I think would accept that.
7 I'm sorry, I think I may be speaking too quickly. You excite me with your questions,
8 Mr President.
9 You know, it's clear that Sudan doesn't have all these obligations so it leads you into a
10 further problem of well, which parts of the Statute apply to this status of Sudan and
11 which do not, and we think that that too is speculative, unclear and unrealistic.
12 I think instead we're talking about a situation where they remain a non-party, the
13 Court continues to operate as it does it just now has jurisdiction over a situation.
14 PRESIDING JUDGE EBOE-OSUJI: [15:17:09] But the thing that brought us here is
15 whether President Al-Bashir enjoys immunity. So beneath or beyond or in addition
16 to the question whether the Statute applies to Sudan, it's that other question, the core
17 of it, can President Al-Bashir enjoy immunity when the Security Council has referred
18 the case to the ICC to be tried pursuant to the Rome Statute? That has Article 27
19 in it.
20 MR MURPHY: [15:17:47] Yes. And our submission would be Article 27 clearly
21 says that when an individual appears before you they cannot invoke an immunity.
22 And we would say that that is the case, they cannot invoke an immunity if they're
23 standing here in the courtroom before you. Article 27 applies to that individual.
24 It's not applying to the State of Sudan, if you will.
25 But then it's a different question if that individual is standing in Amman and you're

1 asking the government of Jordan to arrest that individual, now we're in Part IX of the
2 Statute which fully applies, now we're in Article 98 where the Court's not supposed to
3 proceed with a request, unless if there's a conflict between Jordan's obligations to
4 another State --

5 PRESIDING JUDGE EBOE-OSUJI: [15:18:42] But of course Amman authorities
6 would say to that individual, "Sir, we look at this thing, if you appear before this
7 Court, you will not enjoy immunity." Can you explain to us, please, on what basis
8 we are to grant you immunity from a process that sent you to that Court to be tried
9 where you don't enjoy immunity. How do we resolve that?

10 MR MURPHY: [15:19:10] Well, I think that the government of Sudan or that
11 individual would say "Jordan, you have a treaty obligation under the Pact of the
12 Arab League, you also have a treaty obligation under the 1953 convention. I'm here
13 at a summit. I'm protected by these. You're not allowed to arrest me. We are both
14 parties to this treaty, my State and your State. Moreover, I submit that under
15 customary international law I believe I'm entitled to immunity." Jordan can't turn
16 around and say, "But I have a treaty obligation over here to which you're not a party
17 and that allows me to supersede my obligations to you." And if it did try to take that
18 claim, presumably Sudan will say, "Well, wait a minute. As I look at your treaty
19 obligation under the Rome Statute there's an Article 98 that directly speaks to this,
20 and it says when there's a conflicting obligation the Court shouldn't proceed unless
21 you get my waiver. And I haven't waived."

22 PRESIDING JUDGE EBOE-OSUJI: [15:20:13] I don't want to take us back to Security
23 Council resolution about what it does, but you get the point. But please proceed.

24 MR MURPHY: [15:20:21] Well, yes. I mean I think it's critical to analysis, at least as
25 the Pre-Trial Chamber advanced it, that even if Article 27 has an effect on Article 98

1 it's only vis-à-vis States Parties. That's their theory. Non-State Parties still can take
2 advantage of the existence of the immunities. And so it's critical to have the Security
3 Council resolution transform Sudan into being a quasi-State party, and that's what
4 we're submitting is highly doubtful, including this idea that the entirety of the Statute
5 or some significant part of the Statute applies to Sudan.

6 If I can just pass to paragraph 2 of the resolution briefly to say a few words about the
7 effect of paragraph 2.

8 Paragraph 2 says -- or, no, the Prosecution says that the effect of the Council's referral
9 and Sudan's obligation to cooperate fully with the Court is that for the limited
10 purpose of this situation Sudan is placed into a situation comparable to that of a State
11 Party. So that's the theory; you put the two together somehow and Sudan becomes a
12 State Party.

13 In our view, the obligation to cooperate fully under paragraph 2 may well be
14 interpreted as imposing an obligation on Sudan to surrender a person to this Court
15 when requested by the Court. Paragraph 2 is clearly directed at Sudan and is clearly
16 calling for cooperation with this Court. But to us it's a leap from that proposition to
17 a claim that the resolution, even if you're then reading it in conjunction with Part IX of
18 the Statute, obligates Sudan to waive the immunity of its Head of State from the
19 criminal jurisdiction of another State. That's a further proposition that we have
20 doubts about. And most importantly for this proceeding, the resolution cannot
21 possibly be viewed as requiring Jordan, requiring Jordan to disregard an immunity
22 that it is obliged to give to Sudan. That clearly is not a part of paragraph 2 of the
23 resolution.

24 Now, the Prosecution seeks to invent additional obligations in Part IX based solely on
25 this combined effects of paragraphs 1 and 2 of the Council's resolution. But if one

1 could add obligations to Part IX of the Statute simply because certain actions like a
2 waiver of immunity may be regarded as relating to the exercise of the jurisdiction of
3 the Court, then the list of potentials obligations you could ram into Part IX is endless.
4 Merely the fact that the Court's jurisdiction was triggered in Article 13(b) does not
5 have the collateral effect of slicing down and diminishing and taking away the
6 various provisions carefully negotiated that comprise Part IX of the Statute.
7 And as Jordan explained in its appeals brief, even if Sudan has violated
8 resolution 1593, we believe that it's not open to Jordan, and certainly that Jordan is not
9 under an obligation to remedy that situation. If there's a violation of the Council's
10 resolution that's between Sudan and the Security Council.
11 So in sum, Jordan maintains its position that Security Council resolution 1593 did not
12 affect Jordan's obligations under customary and conventional international law to
13 accord immunity to President Al-Bashir. A referral of a situation does not turn a
14 non-party State into a State Party or place it in the status of being analogous to a party.
15 And consequently, the Pre-Trial Chamber's legal reasoning basically falls apart and
16 our second ground of appeal should be up held.
17 That concludes my statement, Mr President.
18 Mr Wood was going to continue to address the group B questions unless you have
19 any questions for me at this time.
20 PRESIDING JUDGE EBOE-OSUJI: [15:24:57] Thank you very much.
21 MR WOOD: [15:25:06] Mr President, members of the Appeals Chamber, I shall
22 endeavour to respond at least some -- to at least some of the very interesting
23 questions in group B. I shall try to be brief, though I think each of them would
24 deserve an article.
25 A convenient way to address many of the questions would be to take you through the

1 text of Security Council resolution 1593 in a bit more detail and explain what it does
2 and what it does not do.

3 And so if I could ask you to turn to the resolution which is at page 4 in the folders.
4 Mr President, the resolution was adopted on 31 March 2005 following intense and
5 difficult negotiations. This can be seen from the statements made after the vote,
6 which are reproduced verbatim in the meeting record. The resolution was adopted
7 by 11 votes in favour, with 4 abstentions. The abstentions were Algeria, Brazil,
8 China and the United States. And of course, as we all know, it was the first time that
9 the Security Council had referred a situation to the Prosecutor in accordance with
10 Article 13(b).

11 The first preambular paragraph notes the Report of the Commission of Inquiry, which
12 you, Mr President, described at the opening of this week of this hearing. While that
13 report is part of the background to the resolution, and while Council Members were
14 clearly well aware of it, it cannot, with respect, be invoked to read into the
15 resolution - which as I've said was the result of lengthy negotiations - provisions
16 which do not appear in the text.

17 In particular, it cannot be read as supporting an implicit Council decision to strip high
18 officials of Sudan of immunities that they enjoy in foreign states.

19 The fourth preambular paragraph is of some interest since in it the Council took note
20 of the existence of agreements referred to in Article 98(2) of the Statute. That is a
21 reference, of course, not to SOFAs, but to the rather controversial Article 98
22 agreements that were being negotiated at the time by a non-party with many States.
23 But it does show that the argument that Article 98(2) only covers SOFAs has no basis
24 in the text or in practice.

25 Next and also in the preamble we find a determination of a threat to international

1 peace and security followed by the statement that the Council is acting under
2 Chapter VII. That, of course, is standard language when the Council is acting under
3 Chapter VII, which it does particularly when it is adopting legally binding decisions.
4 But it's important to recall that often, as was the case here, Chapter VII resolutions
5 contain a mixture of binding and nonbinding provisions.
6 This may be a good moment to respond question (e). That question concerns the
7 significance, if anything, of the fact that the Security Council referrals of situations to
8 the Court under Article 13(b) can only be made by the Security Council under
9 Chapter VII, not under any other chapter of the UN Charter, nor by the United
10 Nations General Assembly.
11 It would not appear to me that this has any particular legal significance relevant to
12 the present case. Article 13(b) seems to have been drafted carefully having regard to
13 the respective powers of the Security Council and the General Assembly.
14 As I have already said, when the Security Council intends to take decisions with legal
15 effect as opposed to making recommendations, it normally acts under Chapter VII.
16 Since referrals have legal effect, it is natural that the Statute provides for them to be
17 made by the Security Council acting under Chapter VII. Action by the Security
18 Council under other provisions of the charter and action by the General Assembly is
19 not normally legally binding.
20 Before turning to the operative paragraphs of the resolution, I should say a word
21 about questions (a) and (b), which concerns the powers of council under Chapter VII.
22 Question (a) asks a rather abstract question, whether under Chapter VII the Security
23 Council has the power to waive, displace or override the immunity of a Head of State
24 under customary international law or conventional international law; and if so,
25 whether this must be done expressly or can it be done by necessary implication.

1 It should first be noted that question (a) concerns an issue which in our submission is
2 not on appeal, the theory of implicit waiver of immunity by virtue of Resolution 1593
3 was set aside by Pre-Trial Chamber II in the South Africa decision and in the decision
4 now under appeal.

5 But since the matter has been much discussed in the written pleadings in this appeal,
6 I'll seek to answer question (a) without prejudice to our view that it's not relevant to
7 the matters on appeal. And the answer I believe is as follows. It would indeed be
8 open to the Security Council in the exercise of its Chapter VII powers to decide with
9 binding effect for UN Member States to lift the immunity of a Head of State under
10 customary or convention international law.

11 But - and this is the essential point - to do so, the council would have to use clear
12 language. It would have to expressly state that it was deciding to lift the immunity
13 of the Head of State. It simply did not do so.

14 As a general matter, when it exercises its powers under Chapter VII, the council needs
15 to be careful to expressly indicate the scope of its binding decisions. As we all know,
16 such decisions can be of the most serious nature, for example, authorising the use of
17 force. To interpret a resolution as taking a legal binding decision merely by
18 implication on a matter as significant as the lifting of the immunity of a sitting Head
19 of State would set a dangerous precedent.

20 PRESIDING JUDGE EBOE-OSUJI: [15:32:33] May I come here, please. And you may
21 know this and address it later, but I thought this might be an appropriate time to
22 interject the question gently.

23 Perhaps the worry about necessary implication might have arisen in the following
24 circumstances. The Cassese report clearly implicated senior government officials of
25 Sudan and also foreign troops in violations.

1 The Security Council resolution in adopting Resolution 1593, does it carve out - and
2 that carve-out, does it specifically say jurisdiction is not extended to foreign
3 government officials or troops but remains silent in relation to senior government
4 officials of Sudan?

5 It raises the question, in referring the case to an ICC, is the Security Council to be
6 presumed to not know that there is an Article 27 in there, 27(2) in that Statute that
7 suggests at least that senior government officials are not immune to proceeding?
8 Are they presumed to be ignorant of that feature of it in referring the case to the ICC,
9 knowing the finger-pointing done in the reports to senior government officials and
10 foreign troops, but only exonerating or rather carving out the exemption for foreign
11 troops?

12 That is what worry perhaps puts in the picture, the interpretation "by a necessary
13 implication".

14 And also another feature of it, just to develop the picture in the fullest form possible,
15 in the Kosovo Advisory Opinion as well as the very helpful article you wrote in '95, to
16 look at the suggestion looking at statements made at the time, one sees that at the
17 time of adoption of 1593, the president of the council at the time was Brazil. They
18 abstained and made a very clear statement, reasons for their abstention. They were
19 abstaining because there is a carve-out. We do not want to sign on to this thing that
20 exempts somebody from jurisdiction. And a lot of States who spoke on that also
21 expressed disquiet about the carve-out, saying under the Rome Statute there should
22 be no carve-out. When you send people there, they should be tried under the Rome
23 Statute. We don't feel comfortable with this carve-out in paragraph 6. This is what
24 raises this question about necessary implication.

25 MR WOOD: [15:36:13] Well, thank you very much. That's a very helpful

1 explanation of the question.

2 Firstly, I'm sure the members of the Council were fully cognizant of the text of the

3 Rome Statute, and obviously they would have known about Article 27. But as we've

4 explained, Article 27 relates not to immunity before domestic courts in the case of

5 surrender, but it refers to immunity when someone is before this Court. That is our

6 position anyway.

7 But as regards paragraph 6 of the resolution, which is the one you referred to with, as

8 you called it, a carve-out, as I think we all know and is clear from the record, this was

9 a very controversial paragraph. It was inserted into the resolution to avoid a veto by

10 a permanent member of the Security Council. It's a very special provision, part of a

11 negotiated package to ensure that persons from a non-party contributing State are

12 subject to the exclusive jurisdiction of that State and not within the jurisdiction of this

13 Court, unless the non-party's exclusive jurisdiction has been and it says "expressly

14 waived".

15 So paragraph 6 concerns jurisdiction, which is not at issue in our case. It does not

16 concern immunity. And in our submission it carries no implication that immunities

17 under general international law do not apply.

18 But it does show two things, I think. Firstly, paragraph 6 shows that the Council

19 knew perfectly well when it adopted the resolution how to refer in its resolutions to a

20 waiver, although in this case it was exclusive jurisdiction that was being waived, and

21 it did so expressly. There was no -- it didn't leave things to necessary implication, it

22 referred to an express waiver of jurisdiction.

23 So turning back to the thought that there might be a necessary implication, I mean,

24 my first comment on that is that it's a very subjective notion, a necessary implication.

25 Some of us may see a necessary implication, others may not in particular situations.

1 But in our view it would be extraordinary to read a specific legal obligation into a text,
2 the waiver of immunity or the lifting of immunity, and perhaps especially into a
3 Security Council text if the only basis for doing so is necessary implication.

4 But in any event, we would submit there is absolutely nothing in 1593 from which it
5 follows of necessity that immunity is lifted.

6 I hope I've been able to answer your question.

7 Just to recall, on the subject of waiver of immunity, under general international law,
8 waiver of immunity must always be expressed. This is reflected in the major
9 international conventions on the subject. For example, the Vienna Convention on
10 Diplomatic Relations provides expressly waiver must always be express. And the
11 UN Convention on the Jurisdiction Immunities of States provides only for express
12 consent to the exercise of jurisdiction. That's Article 7.

13 Mr President, I'm aware that time is moving on. So I'll try not to speak too fast in the
14 remaining few minutes.

15 Question (b) asked whether acting under Chapter VII the Security Council has the
16 power to make provisions of the Rome Statute applicable to States that are not parties
17 to it; and if so, whether this must be done expressly or can be done by necessary
18 implication.

19 My answer is the following: The Security Council acting Chapter VII may indeed
20 impose upon UN Member States obligations corresponding to those that they would
21 have under the provisions a particular treaty, if they were parties to the treaty. But
22 like any other obligations imposed by the Security Council, this would have to be
23 done expressly. It could not be done by implication and it would in fact be a highly
24 exceptional state for the Security Council to take. In our view, this is a hypothetical
25 question since resolution 1593 did not say that Sudan was bound by the Rome Statute,

1 as Mr Murphy has explained.

2 I'd like to turn quickly to question (c), which asks about the reference in Article 13 to
3 the exercise of jurisdiction being in accordance with the provisions of the Statute.

4 Those words appear in the chapeau of the article and they thus apply equally to all
5 exercises of jurisdiction under Article 13. I think these words are the answer, one
6 answer to the question you were putting to Professor Murphy because they expressly
7 say that the Council, when it's exercising its jurisdiction -- following the Court, when
8 it's exercising its jurisdiction following a referral does so in accordance with the
9 provisions of the Statute, that is all the provisions of the Statute, they include
10 Article 98.

11 Question (d) --

12 THE COURT OFFICER: [15:42:20] Counsel has five minutes left.

13 MR WOOD: [15:42:22] Five minutes. Thank you. In which case I'll be a little
14 selective in my responses but there will be an opportunity perhaps later.

15 I'll turn to the question about question (g) and (h) as they say paragraph 2 imposes an
16 obligation on Sudan to cooperate fully, whereas it only urges other States such a
17 Jordan to do so. The Council did not impose a legal obligation on Jordan or other
18 States. It's obviously, we would say, an important distinction. For the Security
19 Council to urge States to cooperate does not authorise them to do that which would
20 otherwise be unlawful, such as to ignore their obligations in relation to immunities.
21 Under Article 103 of the Charter it's only Charter obligations, which include
22 obligations imposed by the Council, that prevail over any other obligations under
23 international agreements or, I would agree, under customary international law.
24 The Council did not impose new obligations on States other than Sudan, so the
25 language of the resolution did not relieve Jordan or any other State of its obligations

1 towards Sudan to respect the immunity of the president.

2 I have dealt with paragraph 6.

3 I'll turn lastly, if I may, to question (l), which is again we say hypothetical, but it's a
4 very interesting question. And it's would things have been different if the Security
5 Council had established a Yugoslav- or Rwanda-type ad hoc tribunal for the situation
6 in Darfur? Obviously the answer would depend on the precise terms of the
7 resolution and the accompanying Statute, but it's likely that the position would have
8 been very different in two fundamental ways.

9 Firstly, the resolution and Statute would presumably have imposed obligations
10 equally on all Member States of the United Nations. They would not have been
11 States Parties and non-parties.

12 And second, by virtue of Article 103 of the United Nations Charter, those obligations
13 under the resolution and Statute, being obligations under the Charter, would have
14 prevailed over all other obligations that the Member States might have.

15 Question (l) goes on to ask whether if a similar tribunal had been established for the
16 situation in Darfur, the president of Sudan would have enjoyed immunity before the
17 tribunal.

18 I'm a bit reluctant to try and answer a hypothetical question. The answer would
19 depend upon a correct interpretation of the Security Council resolution and Statute
20 which, as we've explained, would require having a regard to a whole range of
21 elements, including the negotiating history, statements made in the Council in
22 relation to that particular resolution, and the like.

23 Mr President, I think I've used up all my time and I thank you very much for the
24 questions.

25 PRESIDING JUDGE EBOE-OSUJI: [15:45:58] Thank you very much. Before you sit,

1 maybe later again you might want to ponder on this: In that article you wrote in
2 1995 you spoke to who interprets, who gives authentic interpretation of Security
3 Council and come to the conclusion, sensibly of course -- and of course the author of it
4 is the best person to tell us what they mean, but then you do suggest that there have
5 been precedents in the past, or there may be circumstances in which the Council
6 comes in to correct an interpretation that might have been misdome in the past. And
7 you give the example of a certain resolution in 1995, resolution 1970 of 1995,
8 12 January 1995, where the Council felt somewhat compelled to come and clarify
9 what it meant by previous resolution. Apparently a certain legal officer had given
10 an interpretation and Council came back and reasserted what it meant.

11 You know what I'm talking about. It's in the paper at page 83, I think, of that article.

12 The question becomes this:

13 Here we are so many years after passage of -- adoption of 1593. At least five
14 instances of -- or so at least that much of Pre-Trial Chamber saying there is no
15 immunity. Might one have expected the Council to have intervened and said,
16 "Hang on, you got it wrong. We did not say there is no immunity"? Could we have
17 expected that from the Council, to reverse the certain question that has been hanging
18 around?

19 You might want to think about it, and perhaps after you looked at that material I just
20 referred to that you wrote, then address it later.

21 MR WOOD: [15:48:29] Yes. Well, if I could just respond very quickly and then
22 think about it. I speak first and then I think.

23 PRESIDING JUDGE EBOE-OSUJI: (Microphone not activated)

24 MR WOOD: [15:48:39] The Security Council of course is a very political body and
25 one should not expect it to act consistently. Politics enter into everything it does.

1 Sometimes it takes action, sometimes it doesn't take action. Sometimes it may clarify
2 a resolution; pretty rare, I have to say. Because if a dispute has arisen it's likely to be
3 one that also arises within the Council.

4 So all I was saying in that article was making the legal point that the authentic
5 interpretation is by the body that issued the document, and there is case law for that,
6 though of course everyone can try and interpret it.

7 And then I had to struggle to find examples where the Council had actually
8 interpreted its past resolutions, and I think I found a couple, but it's very rare. And
9 you wouldn't expect -- I would not expect the Council routinely to be issuing
10 interpretations of its resolution.

11 On the other hand, having said that and as we've already said, the subsequent
12 practice within the Council, what is said within the Council, what happens when the
13 Prosecutor reports to the Council, this can all be taken into account in interpreting the
14 resolution. But that's quite different from your question which was about the rather
15 formal process of authentic interpretation.

16 PRESIDING JUDGE EBOE-OSUJI: [15:50:06] But might the pressure, perhaps,
17 political pressure generated by the request on the African Union for deferral of the
18 case after the indictment of Sudan, might it have somehow raised an expectation that
19 if the Security Council really wanted to intervene and perhaps defuse the political
20 tension, this is one where that it might have done it, to come in and say "Well, yes,
21 you may proceed against other government officials but you need not proceed against
22 the Head of State on grounds of immunity."

23 MR WOOD: [15:50:47] Well, I wouldn't want to speculate about what happened on
24 that particular occasion. We heard this morning I think that it was really with a
25 view to --

1 PRESIDING JUDGE EBOE-OSUJI: [15:50:58] I understand that.

2 MR WOOD: [15:50:59] -- improving a peace process, or promoting a peace process
3 rather than a particular concern about immunity that led to that request. I think the
4 Council is, as I said, a highly political body, you have to look very carefully at
5 everything that was said and you have to know the background for each case.

6 PRESIDING JUDGE EBOE-OSUJI: [15:51:15] Thank you very much. So we are left
7 on our own with just the point of it all. Thank you very much, Mr Wood.
8 Now we will take submissions from the Prosecutor, please.

9 MS BRADY: [15:51:32] Good afternoon, your Honours.

10 I will now address your questions in group B of the scheduling order, relating to the
11 effects of Security Council referrals under Article 13(b) of the Rome Statute; the
12 powers of the Security Council under Chapter VII of the UN Charter; and the proper
13 interpretation of resolution 1593.

14 My answers are intended to provide further support for our position - it's already
15 been fully briefed - that the Pre-Trial Chamber majority in the Jordan decision
16 correctly understood the effect of the Security Council referral by resolution 1593 for
17 Sudan, and consequently for Jordan when requested by the Court to arrest and
18 surrender Mr Al-Bashir: The net outcome of this being that Jordan was obliged to
19 arrest and surrender Mr Al-Bashir notwithstanding any immunity he may otherwise
20 arguably have enjoyed under customary or conventional international law.

21 Now, I think at that point it's helpful to briefly recall the majority's reasoning, which
22 we say was correct. And in fact, in our view it was clear, it was legally solid, and
23 this is the reasoning that we encourage your Honours to follow. The majority found
24 that the Security Council's referral of the Darfur situation to the Court had the
25 following effects:

1 One, the legal framework of the Rome Statute applies to the referred situation.
2 Two, resolution 1593 obliges Sudan to fully cooperate with the Court in accordance
3 with the Rome Statute.
4 And three, this thereby places Sudan in an analogous position to a State Party to the
5 Statute in terms of its rights and duties under the Statute for the limited purpose of
6 this situation.
7 As such, Sudan was bound therefore by the cooperation obligations in the Rome
8 Statute, that is those in Part IX as well as Article 27. And as we heard yesterday, my
9 colleague Mr Cross elaborated, that provision, Article 27(2) prevents any otherwise
10 applicable immunities under international law being raised before the Court, both by
11 State Parties in their vertical relations with the Court and in their horizontal relations
12 with each other. Although Sudan is not a State Party to the Statute, its obligation as
13 a UN Member State to accept decisions of the Security Council acting under
14 Chapter VII means not only that it must accept the ICC's jurisdiction, but also that it
15 must comply with provisions that make that jurisdiction effective, that is the
16 cooperation provisions and Article 27(2).
17 And then the logic of the majority, which we agree with, is that since Article 27(2) is
18 deemed binding on Sudan, Sudan cannot claim any Head of State immunity
19 otherwise existing under international law. And accordingly, Article 98(1) did not
20 bar the Court from proceeding with the request to Jordan to arrest and surrender
21 Sudan's Head of State. And thereby Jordan was obliged to comply with its
22 obligations under the Statute, Articles 86 and 89, precisely because it did not owe a
23 relevant international law obligation to Sudan concerning Mr Al-Bashir's immunity.
24 And as I said, we say that reasoning unassailable and should be upheld.
25 So the first thing I want to talk about is the correctness of the Pre-Trial Chamber's

1 reasoning about the effect of the Security Council referral. Obviously a key issue in
2 this appeal is whether the majority was correct about those findings on the effect of
3 the referral. And in our view it was.

4 Resolution 1593, referring the situation under Article 13(b) of the Statute, not only
5 triggered the Court's jurisdiction over Darfur Situation, it had these effects: It
6 invoked the legal framework of the Statute for the referred situation, it obliged Sudan
7 to cooperate fully in accordance with the Statute, and it placed Sudan in a comparable
8 position to a State Party in terms of its rights and duties.

9 So in this respect we disagree with Jordan's submissions that the referral by the
10 Security Council merely triggers the jurisdiction. It has these broader effects, as the
11 Pre-Trial Chamber had found. And nor would these need to be expressly provided
12 for, as they also argued, because in our view it's the necessary effect of a referral
13 under Article 13(b).

14 And I'll show you why that interpretation is correct in a moment, but at this point I'll
15 just backtrack I guess and I'll answer your questions on the powers of the Security
16 Council under Chapter VII of the United Nations Charter. This is questions (a) and
17 (b), because that's a very important lens from which one understands the effect of the
18 referral.

19 Now, it's trite to say that under Chapter VII of the UN Charter the Security Council
20 has broad powers to take measures once it identifies a threat to international peace
21 and security, indeed, up to and including the use of force.

22 The limits on those powers are that such measures cannot violate jus cogens norms,
23 nor can they violate the purposes and principles of the UN. And such Chapter VII
24 decisions by the Security Council are fully binding on UN Member States under
25 Article 25 of the Charter. I don't think there is any contention with what I've said so

1 far.

2 To answer your Honour, your Honour Judge Eboe-Osuji yesterday asked a question
3 about whether those powers may override both conventional law and customary
4 international law pursuant to Article 103. Your Honours, we say it can, and that's a
5 conclusion which was also reached by the ILC in its fragmentation study. I'll refer
6 your Honours to the authorities that we have on that in our list of authorities B1.

7 And as well, Judge Perrin de Brichambaut recognised in his separate opinion in the
8 South Africa decision, he noted that there are these different academic positions on
9 this question, but he also came to the same conclusion. So, again, that much seems
10 established.

11 If I could call it the classic rule is that a treaty such as the Rome Statute does not itself
12 impose obligations upon a State not party to it. This is a rule of customary
13 international law, it's codified in the Vienna Convention, Article 34. It's not a jus
14 cogens norm. That as well, it goes without saying.

15 So under Chapter VII, if deemed necessary to restore international peace and security,
16 that's the trigger for the Security Council's powers under Chapter VII, the Security
17 Council is empowered to make a UN Member State bound by whatever obligations
18 the Council deems appropriate, including those set out in a multilateral treaty to
19 which the State is not otherwise bound.

20 So the short answer to question (b), your Honours, you've asked does the Security
21 Council have the power to make conventional provisions of the Statute applicable to
22 States not party to it is yes. In this respect we're talking about the obligations in the
23 treaty, of course, the obligations in the Rome Statute.

24 Your question goes on to ask: Must this be done expressly? In our view, no, so
25 long as it was the necessary and unseverable effect. In other words, another way of

1 putting it, it's the necessary implication of the Security Council's decision, as it was
2 here through the referral under Article 13(b).
3 Indeed, this is exactly what the Security Council did here by referring the situation in
4 Darfur. It's exactly what is foreseen by Article 13(b). The obligations in the Statute
5 become incumbent on the relevant State. So although Sudan has not ratified the
6 Statute, it's a non-State Party, it has ratified the United Nations Charter and it's
7 thereby consented to the Security Council's powers in Chapter VII to take necessary
8 measures to maintain international peace and security, including, if the council so
9 chooses, by referring a situation to the Court and thereby imposing the obligations in
10 the Statute on a non-State Party.
11 I'll come back to this point at a later point in my submissions, but for the same reason
12 and directly answering question (a), your Honours, the Security Council has the
13 power under Chapter VII to "waive, displace or override", that's from your question,
14 the immunity of a Head of State under customary or conventional law to the extent
15 they may otherwise be applicable.
16 It's our position that this would not override a jus cogens norm, immunities not a jus
17 cogens norm, nor to the extent that you might want to accommodate this concern, nor
18 would it violent a fundamental human right.
19 And I think whether we call it, we've had a debate yesterday and today whether we
20 call this a privilege or a right, that's really just a terminology question, what is clear is
21 that it is not a fundamental human right of the person, because we know, and
22 Professor Lattanzi underscored this point yesterday, that such an immunity belongs
23 to the State and can be waived by it.
24 And in our view, this, a waiver of displacement, rather, of immunity would not need
25 to be spelled out by express words in the resolution when it's already the necessary

1 effect, in other words, the clear implication of the Security Council's decision to refer.
2 And I will get back to that point in a moment.
3 But at this point, your Honours, I want to make a very brief word about question (j).
4 You've asked whether a UN Member State can plead its own sovereign immunity to
5 avoid the effects of a Chapter VII measure.
6 Mr Rastan mentioned yesterday Head of State immunity does derive essentially from
7 the notion of State sovereignty.
8 Mr O'Keefe made further submissions about that being the need to ensure
9 non-interference in the functioning and sovereignty of one State by another, the
10 ability to conduct international relations freely, that's all true. And it's also true that
11 the UN was designed as a collective way that States would try and accomplish the
12 aims such as the maintenance of peace and security.
13 But this doesn't mean that a State should be entitled to plead its own sovereign
14 immunity to avoid the effects of a Chapter VII measure. In fact, your Honours, and I
15 point you to the authorities that we filed, you all know this very well, this line of cases,
16 a similar claim was rejected in the Blaškić case by the ICTY Trial and Appeals
17 Chamber, which is referenced at B2.
18 We also make the comment that if we were to say otherwise that they could put up
19 their own sovereign immunity, it would defeat the point of States having agreed to
20 give the Security Council its broad and binding Chapter VII powers. It could well
21 defeat the purpose of such measures. If you think about, such an argument would a
22 fortiori preclude the Security Council's authorisation of use of force against a
23 sovereign State. And that's something expressly contemplated under the Charter,
24 Article 43.
25 Just to complete this set of questions on powers of the Security Council, because I'm

1 trying to group them all before turning to show you the necessary effect of the article,
2 in a similar vein in question (k), you've asked can a State plead a rule of customary
3 international law as a bar against implementing a decision taken by the Security
4 Council under Chapter VII.

5 Well, it can't, and that's with particular -- we just have to look at Article 25 and 103 of
6 the UN Charter and, again, so long as it's not a jus cogens norm, and Head of State
7 immunity clearly is not.

8 Your Honours, now I think this is the most important part of our submission relating
9 to ground 2 and the Security Council route taken by the Pre-Trial Chamber, and this
10 is the necessary effect of a referral under Article 13(b).

11 In question (c), you've asked what was the intendment of that article? We've set out
12 in many pages of our response brief and various other filings how if you take a
13 correct Vienna Convention interpretation of that provision, ordinary meaning, read in
14 context, in light of object and purpose, it confirms that the majority did indeed
15 correctly understand the effect of the Security Council referral.

16 Now, your Honours will see on evidence channel 2, you know it probably by heart by
17 now, but this is the provision Article 13(b). I want to look first at the ordinary terms
18 of Article 13(b) and in particular the chapeau of that article, and it applies to all three
19 trigger mechanisms, and it provides "The Court may exercise its jurisdiction with
20 respect to a crime ... in Article 5 in accordance with the provisions of this Statute", and
21 I underscore those words.

22 It's been argued by Jordan, we've seen it in the filings of some of the other professors
23 or the African Union or the League of Arab States, that this has to be read very
24 narrowly as just meaning the Court's jurisdiction in the narrow sense. But not all of
25 those provisions necessary to make the jurisdiction effective, in particular the

1 obligations of Part IX and the limitation of immunities in Article 27.

2 We think this is a very constrained and excessively narrow reading of these clear
3 terms. And we can get even more assistance as it were from the interpretation if we
4 read these terms in context with other relevant provisions which support that
5 interpretation.

6 And the interpretation leads to the conclusion that, no matter how jurisdiction is
7 triggered, there is one regime applicable at the Court, the Rome Statute regime. In
8 this regard, your Honours, I point you to Article 1 of the Statute, which provides that
9 "The jurisdiction and functioning of the Court shall be governed by the provisions of
10 this Statute" also, as my colleague Mr Cross mentioned, Article 21(1)(a) on applicable
11 law.

12 Something that hasn't been mentioned yet, and it's very important to this analysis, is
13 Article 17(1) of the UN-ICC Relationship Agreement. It expressly states that a
14 referral of a situation by the Security Council to the Court will occur "pursuant to
15 Article 13(b) of the Statute". This is further proof that Article 13(b) forms part of the
16 critical legal architecture that binds the relationship between the ICC and the UN and,
17 indeed, the Security Council in relevant part.

18 The interpretation --

19 PRESIDING JUDGE EBOE-OSUJI: [16:10:15] It's then not in your, as I understand it,
20 it's not a question of *res inter alios acta* in the treaty only operating amongst those
21 who have consented to it, but it is basically something else more forceful than that
22 that reaches beyond just the parties to the treaty.

23 MS BRADY: [16:10:47] Absolutely, your Honour, absolutely, because when you
24 come to 13(b), this Court's jurisdiction obviously has a much broader effect. It has a
25 potential for worldwide jurisdiction, unlike if there's a State Party referral or a *proprio*

1 motu where it is just restricted to State Parties, that's key in our opinion.
2 The interpretation that I've advocated and that the Pre-Trial Chamber majority
3 adopted also serves the object and purpose of Article 13 and the Statute more
4 generally. So by making the whole legal framework of the Statute applicable to the
5 referred situation and imposing these analogous duties like a State Party, it renders
6 referrals effective. It also promotes consistency and coherence because no matter
7 how the Court's jurisdiction is triggered and indeed even if it's by way of an
8 Article 12(3) declaration, the same regime applies, the Rome Statute one.
9 So it's no surprise from everything I've said that it follows, and answering question
10 (d), that, yes, the Pre-Trial Chamber majority was correct that Article 13(b) does entail
11 the application of the Statute to a non-State Party on the same basis as a State Party.
12 And here's a caveat in some respects and also addressing your Honour's question just
13 asked of my colleague Mr Murphy, at least to the extent necessary to ensure that the
14 referral and the Court's exercise of jurisdiction is effective.
15 Mr Murphy asked, well, which ones, we don't know, well, unclear as to which
16 provisions of the Statute. Well, we say it means the jurisdictional and the
17 cooperation obligations and not, for example, the governance provisions, the right to
18 vote in the ASP, the duty to pay contributions. Your Honours The Pre-Trial
19 Chamber expressed this very well in its South Africa decision at paragraph 88 when
20 they said the source of the duty to cooperate for the non-State Party, here Sudan, is
21 Resolution 1593, but the content of the duty is set by the Statute.
22 Now, we turn to a very important aspect and that is the drafting history of
23 Article 13(b). In our view this interpretation of Article 13(b) is supported by the
24 Statute's drafting history. And just very briefly dealing with question (e), it is
25 significant that the final outcome chosen for this article was that the referrals could

1 only be accomplished by the Security Council acting under Chapter VII as opposed,
2 for example, to another chapter or by the General Assembly because of course, as
3 Mr Wood has already said, only the Security Council has, using its Chapter VII
4 powers, the authority to make decisions which have binding effect on all Member
5 States, unlike a recommendation by, for example, the General Assembly.
6 So let's have a look at just some aspects. It's a long process obviously in the drafting
7 and negotiation. But starting first at the first draft for the ICC, the ILC draft Statute
8 1994, already we can see, the ILC chose to include draft Article 23(1) which
9 contemplated giving the Court jurisdiction over crimes if the Security Council
10 referred a matter. Yes, at that point actually it was called a matter, not a situation, it
11 morphed, but referring a matter to the Court under Chapter VII.
12 And it's important to I think have a look at the commentary in paragraph 1 because
13 the ILC noted specifically that this was not a separate strand of jurisdiction for the
14 Court but rather an avenue of recourse for the Court by dispensing with the
15 otherwise applicable State consent requirements in Article 21. And it specifically
16 noted, I'm quoting now, "the provision is necessary to enable the Council to make use
17 of the Court rather than establishing ad hoc tribunals as a response to crimes which
18 affront the conscience of humankind".
19 And indeed the ILC members had actually discussed whether the General Assembly
20 also ought to be able to refer matters where the Security Council was hampered by a
21 veto, but they rejected it and I think it's very telling why they rejected it. In
22 paragraph 5 of the commentary they said "the General Assembly lacked authority
23 under the Charter ... to directly affect the rights of States against their will, especially
24 in respect of issues of criminal jurisdiction."
25 And we see similar views echoed in the report of the Ad Hoc Committee September

1 of 1995. Again in paragraph 120 of the report several delegations, it's reported that
2 several delegations believed that consistent with the Security Council's role, primary
3 responsibility to maintain peace and security and its powers, the Security Council
4 should be authorised to "refer matters to the Court to obviate the need to create ad
5 hoc tribunals and enhance the effectiveness of the Court as a consequence of
6 Chapter VII referrals."

7 And, your Honours, I also point you to the chapters by Elizabeth Wilmshurst and
8 Lionel Yee referenced in B3 because we see this motive for creating the UN Security
9 Council mechanism, the referral mechanism had then manifested itself by being
10 included. Now, that's not to say there were not -- I think Mr Jalloh this morning said
11 that there were opponents, and there were, and some of those opponents hung on
12 until the very last moment, but it did finally -- it was finally included.

13 What can we draw from this negotiation and drafting history? In our view two key
14 points. Firstly, the drafters saw the Article 13(b) referral route as a more efficient
15 and economical substitute for creating a new ad hoc tribunal at the time.

16 PRESIDING JUDGE EBOE-OSUJI: [16:17:59] A very cheap one, isn't it?

17 MS BRADY: That's key.

18 PRESIDING JUDGE EBOE-OSUJI: A very cheap one, the one you don't have
19 pay for.

20 MS BRADY: [16:18:05] Well, We could, yes, perhaps ask for some more money,
21 that's for sure.

22 Secondly, drafters saw the need for referrals to have a binding effect on Member
23 States, including non-State Parties.

24 So both these points say much about what the drafters intended to be the effect of
25 such a referral for States not party to the Statute.

1 At this stage it's a good point for me to address question (l), which asks whether
2 there's a difference between the Security Council using its Chapter VII powers to refer
3 a situation to the ICC and using those powers to create a new ad hoc tribunal, a la the
4 ICTY or ICTR.

5 In our view in terms of legal effect, and here I'm talking about the State concerned, I'll
6 come to another point about the effect for other States, but insofar as the State
7 concerned there's no palpable difference. Having said that, I'm not downplaying
8 that there are obvious differences between the ICC and the ad hocs in terms of their
9 scope of jurisdiction, their functioning and their structure. The ad hoc tribunals
10 were created and existed as subsidiary bodies of the Security Council within the UN
11 system, had primacy of jurisdiction over national courts, and all Member States, all
12 UN Member States were obliged to comply with their orders.

13 On the other hand, the ICC while conceived within the UN auspices, to use your
14 terms in question (f), the brainchild of the UN, it ultimately was established by way of
15 a multilateral treaty, being the Rome Statute, as a separate entity existing outside the
16 UN system but with a defined relationship with it. And It's got a complementary
17 jurisdiction to national courts.

18 If you just look at the situation without of absent a Security Council referral, the ICC
19 operates on a State consent model based on ratification of the Statute.

20 That means that for the State Party referrals and proprio motu situations, the Court
21 can only exercise jurisdiction when crimes occurred on the territory or by a national
22 of a State Party. And for those tracks its orders can only bind State Parties but not
23 non-State Parties.

24 But these differences, in our view, fall away when the Security Council refers a
25 situation under Article 13(b) and thereby engages a potentially worldwide reach of

1 jurisdiction. If there's a referral by the Security Council, the ICC can exercise
2 jurisdiction over crimes when committed in a territory or by a national of a non-State
3 Party and that State then becomes obliged to cooperate. And then, depending on
4 how the resolution is expressed, and I'll get to the expression in Resolution 1593 in a
5 moment, but depending on that expression, other UN Member States, whether they
6 have ratified or not, can also be obliged to comply or otherwise urged to do so.
7 Another point that I will also develop further, but just to complete the answer on
8 question (1) because it has a second aspect, if instead of referring to the ICC the Darfur
9 situation, the Security Council had created a new ad hoc tribunal for Darfur, and let's
10 assume it was modelled on the exact same template of the resolutions for the ICTY
11 and ICTR and let's assume that it was the exact same statutes that applied, Sudan,
12 speaking of Sudan, would have been obliged to comply with the terms of the Statute
13 and the resolution and could not have raised Mr Bashir's Head of State immunity to
14 bar his arrest and surrender to the Court, and neither could other States have done so.
15 Now having said that, I note, I have to concede that the point was never tested in
16 Court because, as we've heard, by the time former president Milošević was
17 transferred to the ICTY, he was no longer president.
18 But, your Honours, it seems absurd to suggest that the ICC which was referred a
19 situation by the Security Council, should have less powers than a Security Council
20 created body when the referral was made to avert the need to create another ad hoc
21 tribunal.
22 So that's putting, what I've done so far is put how Article 13(b) referrals work, what's
23 the effect of them, because that's very important for when we come to interpret
24 Resolution 1593.
25 At this point I'd like to take a closer look at that resolution and in doing so I plan to

1 address questions (g), (h) and (i) on some specific items you've pointed us to. But I
2 thought it would be helpful at this point to remind you of my answer on question (a)
3 about the Security Council's power to remove or displace immunities.
4 As I've already said, given the Security Council's broad powers under Chapter VII,
5 the Security Council has the power to remove the immunity of a Head of State
6 otherwise existent under custom or conventional law. And I think this much is
7 accepted and recognised by Jordan and the AU, we are talking about powers here.
8 The others, Professor O'Keefe and others. But their argument is that to remove such
9 immunity would be so significant it would have to be done explicitly and not merely
10 by necessary implication. And then they say express language in the resolution
11 would be needed to override such a fundamental rule of international law.
12 In our view, your Honours, such express terms are not required when it's the
13 necessary effect or the necessary implication of the referral. When the Security
14 Council adopted 1593 the necessary effect of the referral was that the Statute,
15 including Article 27(2), would apply, thus rendering inapplicable Head of State
16 immunity. And the majority put it like this, I thought very well, they said this was
17 the "necessary and unseverable effect of the Security Council's informed choice",
18 harping back to a point that your Honour had made to one of the question, informed
19 choice "to trigger jurisdiction and impose on Sudan the obligation to cooperate with
20 it." That's at paragraph 40.
21 So for that reason the majority didn't actually rely on the theory that Resolution 1593
22 impliedly waived Mr Bashir's immunity. They didn't need to because they had
23 already found that it was the necessary effect.
24 But in our view, a proper -- taking all that and agreeing with it, in our view, a proper
25 interpretation of the resolution does lead to that conclusion.

1 Now, we agree with Mr Murphy when he made the point that a Security Council
2 resolution may call for a broader consideration of factors other than those in the
3 Vienna Convention.

4 PRESIDING JUDGE EBOE-OSUJI: [16:26:27] Is there a difficulty there? Could it be
5 the reason why the terminology of waiver raises the red flag is because of a certain
6 understanding of it that it cannot waiver doesn't belong to you?

7 MS BRADY: [16:26:47] Quite possibly.

8 PRESIDING JUDGE EBOE-OSUJI: [16:26:49] Is there something in there?

9 MS BRADY: [16:26:51] Quite possibly. I think this word "waiver", we might be
10 getting stuck on because in fact, and following the Pre-Trial Chamber's reasoning, it
11 was the necessary effect of referral. So the Chamber didn't need to go looking for
12 specific words of express waiver; it was the effect of the referral itself.

13 But our point is that well, actually if you look at the whole resolution and you apply
14 the proper Vienna Convention approach, you would come to the conclusion, and, if I
15 could take -- that immunities were disapplied, you will come to the same position.

16 PRESIDING JUDGE EBOE-OSUJI: [16:27:37] Basically the point being negation of
17 right or privilege however that is achieved?

18 MS BRADY: [16:27:45] Exactly, your Honour. Exactly.

19 So I was very guided by Mr Wood's insightful articles written about the topic of
20 interpreting Security Council resolutions. We have them in B4 of our reference list.
21 And for this reason in particular, I think that the proper lens upon which to start the
22 interpretation of the resolution is to look at the background to its adoption.

23 Your Honour, yesterday in the introduction you spoke at some length about the
24 commission of inquiry report, and as you noted, the Cassese commission of inquiry
25 had been commissioned by the Security Council under Resolution 1564 specifically to

1 investigate reports of violations of IHL and human rights in Darfur; to determine
2 whether acts of genocide had occurred and to identify the perpetrators to ensure that
3 those who -- with a view to ensuring that those responsible are held accountable.

4 And that's exactly what this commission did.

5 Your Honour summarised those findings, so I don't need to redo it and I don't have
6 time to redo it, but the most important findings from the commission are very serious
7 international crimes, crimes against humanity, war crimes, acts of genocide. Yes, we
8 take the point that at that point the commission did not find a policy of genocide, but
9 they did find that acts of genocide had occurred.

10 Then, if you look at who are the perpetrators, the perpetrators identified included
11 senior officials of the government of Sudan, and those words, "officials of the
12 government of Sudan" or "senior officials" are peppered throughout the commission
13 of inquiry. And then, of course, they recommended immediate referral to the ICC.
14 So that's the first, we think, very important background piece of information to have
15 in mind.

16 The second is that, of course, by the time that Resolution 1593 was adopted in
17 March 2005, the Court was already fully functional. It had its established applicable
18 law. The UN-ICC relationship agreement had been adopted by that stage. The
19 relevant instruments were therefore already in existence and could have occasioned
20 no doubt; so no further express reference was needed.

21 Another point that is important to take into account is that it's revealing that the
22 Security Council had already used the language of "shall cooperate fully" in its earlier
23 Resolutions 827 and 955 in the 1990s, when establishing the ad hoc tribunals. And if
24 you look at the resolution, neither of these had expressly waived immunities, and
25 then we fast forward ourselves to 2005, March 2005, when the Security Council is

1 considering and adopting this resolution, it was widely accepted that this formula
2 removed Head of State immunities.

3 And I draw on a comment made yesterday by my learned colleague, Mr Kreß. He
4 mentioned it in a different context in the establishment of customary international law,
5 but I want to say it in terms of what was in the mind of the Security Council. By
6 then, States seemed to have generally accepted the ICTY's 1999 indictment against
7 then sitting President Milošević; although, again, and I know and I concede that the
8 point was ultimately never tested at the ICTY because when he was transferred, he
9 was no longer president. But in our view, it's irrelevant that in the ad hoc
10 resolutions, the Security Council both created the tribunals and annexed the statutes
11 because the same modus is used. For all three of them, the Security Council acting
12 under Chapter VII ordered the relevant state, the former Yugoslavia or Sudan, to
13 cooperate fully with an instrument that removed immunities; the ICC, through
14 Article 27 and the ad hocs, through their respective Articles 7(2) and 6(3).

15 Just finally on this point of what was in the back of their mind, if we could put it like
16 that, is that by 2005, the Appeals Chamber of the Sierra Leone Court had already
17 rendered its 2004 decision in which it had overruled Charles Taylor's claim that the
18 arrest warrant against him was invalid on the basis that when the 2003 indictment
19 was issued against him, he was the sitting Head of State of Liberia.

20 Your Honours, this background informs us when we seek to interpret the terms of
21 Resolution 1593 and --

22 PRESIDING JUDGE EBOE-OSUJI: [16:33:12] It is one thing to say that the Security
23 Council is presumed to know the terms of Article 27 as part of the Rome Statute they
24 were referring Darfur to. Can we also say that about the judgment of the Appeals
25 Chamber of the Special Court for Sierra Leone? That the Security --

1 MS BRADY: [16:33:35] I think, well, it was something that was very well publicized.
2 I mean, I know that this is sort of my area, but I would say this was quite a
3 worldwide-known event because it was quite significant, both for Milošević and for
4 Charles Taylor.

5 PRESIDING JUDGE EBOE-OSUJI: [16:33:52] No, the fact of the arrest, yes, but
6 whether the Security Council would know that the Appeals Chamber of the SCSL had
7 made that pronouncement?

8 MS BRADY: [16:34:06] Well, your Honour, maybe that would be going too far to
9 know the exact decision, but it was more I was making the point that they would
10 have known the outcome of the decision, not every last detail about the decision itself.
11 So your Honours, coming to interpret the terms of Resolution 1593, we agree with
12 Mr Murphy that if you look at paragraph 2 in express terms, it's not about immunities;
13 it's about cooperation obligations.

14 There's no quibble with that point. It requires Sudan to cooperate fully, and then
15 says, after recognizing that States not party to the Rome Statute have no obligation
16 under the Statute, urges other States to do so. And in question (g), you've asked
17 about this legal significance of this distinction.

18 Turning first to what "shall cooperate fully" means for Sudan, I don't think there's any
19 dispute about this. With Jordan, it clearly obliged Sudan for the Darfur situation to
20 cooperate with the Court. But we also say, and this is where we have a dispute with
21 Jordan and some of the others, we also say it meant that as the Pre-Trial Chamber
22 majority found, subject to the same obligations and limitations as a State Party,
23 including those in Part IX and not being able to raise Head of State immunity to bar,
24 arrest and surrender.

25 Then, we turn to what does it mean urging other States to fully cooperate? Well, it's

1 well known that non-State Parties, apart from Sudan, are not obliged to comply with
2 orders from the Court but are urged to do so. The Rome Statute and its obligations
3 are not imposed on them, so they wouldn't be bound to comply with a Court request
4 to execute an arrest warrant for the situation, but they are only strongly encouraged
5 to do so.

6 For State Parties the situation is different. They have to comply by virtue of their
7 obligations.

8 PRESIDING JUDGE EBOE-OSUJI: [16:36:26] You are keeping an eye on the time?

9 MS BRADY: [16:36:30] 10 minutes.

10 PRESIDING JUDGE EBOE-OSUJI: [16:36:31] You've got about five minutes or so.

11 MS BRADY: [16:36:33] Yes, that's fine. All right. But your Honours, what if -- this
12 comes to the second part of question (g), what if a non-State Party chose to voluntarily
13 comply with a court request to arrest and surrender Sudan's Head of State? You've
14 asked in question (g), whether the obligation on Sudan to cooperate fully has the
15 same effect for States non-party from the perspective of Article 98?

16 Your Honours, this is a difficult question to answer. And it actually goes beyond the
17 facts of this case. However, in our view, it would be open to argue that since Sudan
18 is bound to accept the Court's jurisdiction and to cooperate fully with it, and could
19 not raise by virtue of Article 27 his immunity, that any such immunity would likewise
20 not be opposable in the case that a non-State Party voluntarily decided to cooperate
21 and arrest him. But I think we don't actually have to answer that question because it
22 doesn't arise in these facts.

23 Your Honours, I'll turn quickly to look at some other paragraphs in the resolution,
24 which also suggests that the Security Council did intend to waive official capacity
25 immunity or that, rather, the official capacity immunities should not apply vis-à-vis

1 Sudan. The preamble's first paragraph, which refers to the commission's report on
2 Darfur, the report that, as your Honour mentioned yesterday, detailed a catalogue of
3 Sudanese-government orchestrated violence, the potential involvement of senior
4 Sudanese government officials and recommended referral.

5 You've also noted in your questions paragraph 6 of the resolution and asked about
6 the significance of paragraph 6 when we read the resolution. Your Honours,
7 paragraph 6 shows that the Security Council was aware of potential specific
8 exceptions to the Court's jurisdiction and sought to provide for it where it saw fit.

9 The fact that it said nothing about Head of State immunities for high-level Sudanese
10 governments or state officials, despite knowing of their possible involvement in the
11 Darfur crimes through the commission of inquiry report, implies the opposite in our
12 view. Had the Security Council meant to exempt another category from the Court's
13 jurisdiction, one would expect the council to have said something.

14 Your Honours, the non-applicability of immunities also accords with the object and
15 purpose of the resolution. Obviously, the main purpose is to refer the situation in
16 Darfur to the Court, but without the removal of immunities for Sudanese state
17 officials, the referral would be largely, if not wholly, ineffective.

18 And this brings me to question (n) of your questions where you ask, whether
19 recognizing his immunity would render Resolution 1593 wholly or substantially
20 ineffective? And we say it would at least substantially. It's true that Mr Bashir's
21 personal immunity as Head of State will only last as long as he's in power and it's true
22 that the investigations go beyond him; he's just one person. But again, we have to
23 recall that the commission of inquiry had reported to the Security Council a pattern of
24 government-orchestrated violence involving the entire security and Defence
25 apparatus of the State in coordinated military campaigns. If the President of Sudan,

1 the person alleged to be at the top level of this machinery, remains immune even for
2 this period, it would greatly undermine the scope of the Court's inquiry, as well as the
3 deterrent and preventative effect of resolution and referral. Not to mention, greatly
4 hamper the Court's ability to effectively pursue cases and warrants against other
5 persons apart from him. And, as your Honour correctly noted, with the passage of
6 more time it becomes more and more difficult in terms of collection of evidence,
7 preservation of evidence for trials and prosecutions.

8 I won't say much on the subsequent practice. We know that it's unclear for insight,
9 but I think the two main things that are very important to draw from subsequent
10 practice, in particular from the Security Council angle, is this point that although the
11 African Union has requested twice, has requested the Security Council to defer
12 proceedings against Mr Bashir twice under Article 16, it's declined to do so. And
13 although it wasn't expressly written in the Article 16 request, it's clear from all the
14 other statements that the AU has made there cited by Judge Brichambaut in his
15 separate opinion that that was the reason motivating the AU to do so.

16 Another illustrative tool when looking at this resolution is to note that when the
17 Security Council adopted Resolution 1970 referring Libya situation to the Court, it
18 used the same language. Again another indication that the Security Council did not
19 think that the Court had gone beyond the scope of the referral in Resolution 1593.

20 I may be soon out of time. I'm out of time?

21 THE COURT OFFICER: [16:42:32] I'm sorry, your time is up.

22 MS BRADY: [16:42:35] I was out of time. All right. Well, I will not say -- the only
23 question I think I haven't answered in this group is question (m), but I'm happy to
24 take questions on that. Thank you very much.

25 PRESIDING JUDGE EBOE-OSUJI: [16:42:43] Thank you very much. We will leave

- 1 it there for the day. We will resume tomorrow and we will start at 9.30 tomorrow.
- 2 We will rise now.
- 3 THE COURT USHER: [16:43:04] All rise.
- 4 (The hearing ends in open session at 4.43 p.m.)