International Criminal Court

Appeals Chamber

Situation: Darfur, Sudan

In the case of The Prosecutor v. Omar Hassan Ahmad Al-Bashir - ICC-02/05-01/09

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

Appeals Hearing - Courtroom 1

Thursday, 13 September 2018

(The hearing starts in open session at 9.34 a.m.)

THE COURT USHER: [9:34:52] All rise.

The International Criminal Court is now in session.

Please be seated.

PRESIDING JUDGE EBOE-OSUJI: [9:35:30] Thank you very much. Welcome back.

Court officer, please put the matter on the record for the day.

THE COURT OFFICER: [9:35:40] Thank you, Mr President.

Good morning, your Honours.

The situation in Darfur, Sudan, in the case of The Prosecutor versus Omar Hassan Ahmad Al-Bashir, case reference ICC-02/05-01/09.

For the record, your Honours, we are in open session.

PRESIDING JUDGE EBOE-OSUJI: [9:35:59] Thank you very much.

I can see that there have been some changes in formation. I see --

MR O'KEEFE: [9:36:12] Mr President, Mr Magliveras is not --

PRESIDING JUDGE EBOE-OSUJI: [9:36:14] Mr Magliveras is no longer with us, and also, formally the Ambassador for the Arab League is not with us any more.

And the AU, any changes?

MR TLADI: [9:36:37] Thank you very much, your Honour.

Ms Negm and Ms Omale will be joining us a bit later.

PRESIDING JUDGE EBOE-OSUJI: [9:36:38] They will be joining us a bit later.

MS BRADY: [9:36:46] Your Honour, I also notice that Ms Yolanda Gamarra is not in Court as well.

PRESIDING JUDGE EBOE-OSUJI: [9:36:51] Thank you very much. Then we will, all that having been noted on the record, we will proceed.

At 11 o'clock today, there will be a minute of silence around the Court in memory of the late Kofi Annan whose funeral is today in Ghana and it is fitting that that be done. We will also be doing that in the courtroom.

As we all know, this Court was established during his tenure as Secretary General and he was instrumental in the effort and continued to support the Court after he left office. So we will be doing a minute's silence at 11.

Prosecutor, I understand you want to make some -- I have a note here that you would like to say something.

MS BRADY: [9:37:44] Yes, your Honour, I wanted to make some submissions on behalf of the Prosecution in relation to the discussions yesterday on group B. And I saw that basically we were turning to a new set of questions and I wanted to make a brief set of responses on that.

PRESIDING JUDGE EBOE-OSUJI: [9:38:02] There will be some -- we're not yet done with group B. There are some questions from the Judges still.

MS BRADY: [9:38:06] Yes.

PRESIDING JUDGE EBOE-OSUJI: [9:38:07] Let's see how that goes --

MS BRADY: [9.38:08] Sure.

PRESIDING JUDGE EBOE-OSUJI: [9:38:08] -- whether that gives you an

opportunity --

MS BRADY: [9:38:13] Of course.

PRESIDING JUDGE EBOE-OSUJI: [9:38:15] -- to make your submissions.

Judge Ibáñez will ask a question.

JUDGE IBÁÑEZ CARRANZA: [9:38:19] Thank you, Mr President. Unfortunately, Professor Zimmermann could not join us in these hearings; however, I would like to ask the parties and participants if they have any comments on the potential applicability of the international law principle of abuse of rights, l'abus de droit, advanced by him in his written submissions in the case of Sudan's behaviour.

Thank you.

PRESIDING JUDGE EBOE-OSUJI: [9:39:01] Yes, Mr O'Keefe.

And then after that, Ms Lattanzi.

MR O'KEEFE: [9:39:08] Judge Ibáñez, I'll be very brief. There really is no international principle of abus de droit. It's found in pockets of international law, but very specific pockets. The main one being that, for example, in the Law of the Sea and various other areas like that, a State is, in very narrow areas, not permitted to abuse its right in relation to its own territory or its own maritime spaces to the detriment of other States. There's a provision in the WTO, but this is something on which there has been much, much academic debate and scholarship and it is not a general principle of international law. That is the first point.

The second point is, does it not presuppose that Mr Al-Bashir is guilty to say that Sudan is behaving abusively in claiming immunity in relation to him? Sudan has a perfect right under international law to claim immunity on behalf of its sitting Head of State. Only if we assume that that Head of State has somehow committed a crime would that be an abuse, and even were it the case that he committed a crime, it's not

an abuse.

As the International Court of Justice made perfectly clear in the Arrest Warrant case, they are not providing for his impunity. There is nothing to say that Mr Al-Bashir may not fall from power, as happened in many States, and be prosecuted. There is nothing to say that at some point, in some other way, he will end up in the dock. But to say that it is an abuse of right to assert what is Sudan's perfect right under international law seems to me rather extraordinary and to put the cart before the horse.

But coming back to the main principle, there is no general principle of abuse of right in international law.

PRESIDING JUDGE EBOE-OSUJI: [9:41:25] But if the idea is that Sudan is under an obligation of full cooperation, which obligation, assuming -- again here, we have to make some assumptions, assuming that that obligation of full cooperation includes a duty on Sudan to surrender its officials to the Court, can they later on assert immunity in that regard without triggering questions about whether there's an abuse?

MR O'KEEFE: [9:42:07] Well, Mr President, I think that assumes rather a lot. It assumes that there is actually an obligation to waive his immunity.

PRESIDING JUDGE EBOE-OSUJI: [9:42:14] I'm saying assuming that --

MR O'KEEFE: [9:42:18] Absolutely.

PRESIDING JUDGE EBOE-OSUJI: [9:42:18] -- I already said that.

MR O'KEEFE: [9:42:20] But of course the International Criminal Court is based on the principle of complementarity. Sudan in its cooperation with the Court may, for example, be obliged to prosecute him at home or something like that. I think even that's going to too far, but I think it really is stringing together rather too many tendentious strings to say it's a abuse.

But anyway, it's not the case that Sudan would be relying on its own illegality in a way. It's got two separate things here. It's refusing to comply, okay, but on the other hand, it does have a perfect right to assert immunity.

So let's just say you -- and I'm sure this would never happen, you steal from me £10, but actually I owe someone else £10, right? I still have a right to get £10 back from you, even though I really owe someone else £10 as well. The two things are separate. Okay, that person may have a grievance against me, but I'm still entitled to ask you back for my £10.

PRESIDING JUDGE EBOE-OSUJI: [9:43:23] But what if it's the same £10 we're talking about?

MR O'KEEFE: [9:43:26] Sure. I'm still entitled to ask them back from you, and I will have to give them to that person. Simple as that.

JUDGE IBÁÑEZ CARRANZA: [9:43:35] Professor O'Keefe, I have listened to you very carefully, but however, can it be said there is a doctrine of abuse of right in the international arena?

MR O'KEEFE: [9:43:49] Well, with all due respect, Judge Ibáñez, that's precisely what I just said, there isn't. There are specific rules --

JUDGE IBÁÑEZ CARRANZA: [9:43:55] You said there is no --

MR O'KEEFE: [9:43:58] There is not --

JUDGE IBÁÑEZ CARRANZA: [9:44:00] -- international --

MR O'KEEFE: [9:44:00] -- not --

JUDGE IBÁÑEZ CARRANZA: -- principle --

MR O'KEEFE: [9:44:00] -- not a general --

JUDGE IBÁÑEZ CARRANZA: [9:44:01] -- general principle --

MR O'KEEFE: [9:44:01] -- international principle --

JUDGE IBÁÑEZ CARRANZA: [9:44:02] -- but is it different to a doctrine. Could it be said that there is a doctrine? That it exits? A doctrine?

MR O'KEEFE: [9:44:08] I'm wondering if you could explain the difference to me actually because I'm not sure --

PRESIDING JUDGE EBOE-OSUJI: [9:44:11] No, no, no.

MR O'KEEFE: [9:44:12] -- what the difference is.

PRESIDING JUDGE EBOE-OSUJI: [9:44:13] We will not do that.

MR O'KEEFE: [9:44:14] No, no, I don't understand the question. I don't --

PRESIDING JUDGE EBOE-OSUJI: [9:44:16] The point is this, you can simply say you've got nothing else to add to it.

MR O'KEEFE: [9:44:17] Yes.

PRESIDING JUDGE EBOE-OSUJI: [9:44:18] If you say that you've spoken to the absence of rule of international law in that regard.

MR O'KEEFE: [9:44:29] Sorry, maybe I just raised it the wrong way. I was actually trying to clarify what the question was. I didn't mean it, I'm very sorry, in any insolent way. I was just trying to work out what I was being asked. I'm very sorry if that came across the wrong way and I apologise unreservedly. I was trying to ascertain what the question might be getting at, but if the Court is satisfied, I'll happily sit down.

PRESIDING JUDGE EBOE-OSUJI: [9:44:54] We can leave it that.

MR O'KEEFE: [9:44:55] Sure, sure.

PRESIDING JUDGE EBOE-OSUJI: [9:44:58] Ms Lattanzi, please.

MS LATTANZI: [9:45:04] (Interpretation) Well, we are here to apply the Rome Statute. We are here to apply the Rome Statute. Article 21(3) I think provides that the Court shall also apply the general principles of law. Abuse of right is a general

principle of law and does apply pursuant to the Statute. That's my first point. Secondly, the obligation on Sudan to fully comply or to fully cooperate with the Court, that duty is not presumed. It is well established by the Court itself. Therefore, one could say that failure to cooperate is an abuse of right. Thank you.

MR CROSS: [9:46:23] Good morning, your Honours. And thank you. Perhaps unsurprisingly, we would agree that abus de droit is potentially relevant to your Honours' consideration and we would also agree with Ms Lattanzi's comments just now.

If, first, I can take Mr O'Keefe's point about the question as to what the abuse is, we would also agree with the premise of your Honour's question to Mr O'Keefe, that here the relevant abuse would be Sudan's failure to cooperate fully with the ICC under Resolution 1593 under terms of the Statute. And we would say that the analogy between two different people and the £10 is not an apt analogy, because here Sudan has failed to cooperate with the Court by arresting and surrendering Mr Al-Bashir. And then they would seek to rely upon the immunity that they cannot rely upon directly before the Court in their dealings with a third party, Jordan which is an ICC State Parties acting on behalf of the Court. But we would say --

PRESIDING JUDGE EBOE-OSUJI: [9:47:30] So it's the same £10?

MR CROSS: [9:47:32] -- it's the same £10 and actually owed to the same person. We have Jordan standing in between in this case as a sort of intermediary, but we would say the fundamental obligation which is relevant is ultimately Sudan's obligation to the Court, and it is trying to, if you like, rely on its inability to raise that immunity before the Court, but to raise it instead before Jordan, and that puts Jordan in the invidious position that Jordan relies upon.

Just turning to the second point about the status of abus de droit as a doctrine, we

would not perhaps get into the intricacies of the status of abus de droit as a matter of general international law, unless we really had to. But we would draw your Honours' attention both to Resolution 1593, which says "cooperate fully" and also Article 86 of the Statute.

Now, we'll come to this a little bit in our submissions on group C, but in short, our view would be that the kind of almost equitable principle which underlies Article 86 is the same sort of basic notion which underlies abus de droit as well as other doctrines such as the notion of coming to the Court with clean hands and so on and so forth.

So we would say not only, as Ms Lattanzi said, you might find abus de droit as a general principle of law common to the major legal systems of the world for the purpose of Article 21(1)(c), but you might also find that same notion already in the Statute in Article 86.

Thank you your Honour.

PRESIDING JUDGE EBOE-OSUJI: [9:49:09] Thank you very much.

Mr Tladi.

I also note on the record the Ambassador Negm is with us now.

Please proceed. And after you, Mr Murphy.

MR TLADI: Well, thank you very much, your Honour. We, in fact, do address the issue in our written submissions, and I believe we also addressed the issue in our oral submission. The point that we made in our written submission is, we referred to, for example, the statement by Sir Hersh Lauterpacht, who cautioned that even to the extent that it is used, it ought to be wielded, and I believe the words that he used were "with steadied restraint".

Sir Ian Brownlie himself had said, "Though it might well be an instrument for

progressive development, it in fact did not exist in positive law."

We also stated that to the extent that it might be possible to rely on the doctrine of the abuse of right, in the instances in which it has been referred to, it has always been in a bilateral context, where the State purportedly abusing its right has done so to the detriment of the State claiming an abuse of right.

Relying on it in this context would require States to be treated as enforcers of UN Security Council resolutions when they have not been mandated to do so by the Council itself.

In other words, and I guess this to some extent goes to the 10-pound analogy, the doctrine cannot be used to avoid obligations owed to one State on account of the fact that the latter State has not complied with obligations owed to other states.

I will just make a final point which is not in our written submissions and which we did not allude to in our oral submissions, in the course of the work on State responsibility and codifying the rules on State responsibility, there had been a proposal on an abuse of right doctrine, and it was not included in the draft articles on State responsibility, and I think that that's a point that I think ought to be borne in mind.

PRESIDING JUDGE EBOE-OSUJI: [9:51:28] When I asked this question, Mr O'Keefe can also respond to it later and also perhaps Mr Murphy when he speaks, but the question is this, Mr Tladi, I think you're bringing in the notion of responsibility of States for internationally wrongful act is quite apt. That's one very apt way to look at, to examine this question, and it comes in this way:

A State has a duty to fully cooperated. It has not done so. And again on the assumption that "fully cooperate" also includes, you know, your Head of State has no immunity at your instance, right, not outside. Basically it's Sudan's Head of State

cannot enjoy immunity before this Court. Good.

But he goes to Jordan, and Jordan says: Well, I'm sorry, sir. We have to send you to the ICC.

And Sudan goes: No, you can't do that. You've done it. We're going to sue you at the ICJ and claim reparations.

The question is: How does it work when this claim for reparation occurs at the ICJ? Yes, we have not complied with our obligation placed under us, but we're going to sue you, because you've done something to violate our immunity that we don't have in our own right.

That would be one way to look at the abuse of right document. We call it abuse of right. In different systems they call it something else. In common law, I think there is another notion, ex turpi causa non oritur actio, out of one's wrong a right of action cannot arise.

Can a right of action arise for Sudan against Jordan in that kind of scenario?

MR TLADI: [9:53:42] Well, it seems clear to us, your Honour, that indeed it arises, a right of action arises, and the reason is that there is an obligation under customary international law which is unrelated, completely unrelated to the duty to which you are referring to under operative paragraph 2.

And so in that context that right remains, and there is nothing in operative paragraph 2 that takes away this relationship, this customary international law relationship relating to immunity. So of course the right of action remains.

PRESIDING JUDGE EBOE-OSUJI: [9:54:14] And no concerns about clean hands?

MR TLADI: [9:54:18] Excuse me, your Honour, could you repeat?

PRESIDING JUDGE EBOE-OSUJI: [9:54:20] I said Sudan in those sorts of circumstances need not worry about doctrine of clean hands, they can boldly go to

the ICJ and claim reparation.

MR TLADI: Well, I think so and I think the reason again is because are unrelated obligations, so that's the point. Because they are unrelated obligations, I don't think that the doctrine of clean hands would apply.

PRESIDING JUDGE EBOE-OSUJI: [9:54:42] Thank you very much.

Mr Murphy first and then perhaps you, Mr O'Keefe.

MR MURPHY: [9:54:48] Thank you, Mr President.

If I can I would begin by noting that again this is not actually an issue on appeal as far as Jordan would be concerned. We didn't see anything about the doctrine of abuse of rights in the Pre-Trial Chamber's decision. We didn't see anything on this doctrine in any of the prior Pre-Trial Chambers' decisions. We didn't address this in our request for appeal. We didn't address this in our appeal brief.

The first time this issue is raised is not even by the Prosecution but by Professor Zimmermann. And so I just wanted to start by highlighting that this is again a part of the concern that we have generally about Jordan being held accountable for theories that were not articulated until about six weeks ago.

But to address the issue on the merits, it's even unclear in this room what right is supposedly being abused.

If I heard Professor Lattanzi correctly, she believes that Jordan abused a right of some sort.

I believe I heard the Prosecution say: No, we're talking about Sudan's abuse of its rights.

We would submit that Jordan has not abused any rights whatsoever.

If the question is has Sudan abused a right, that then presupposes that there is a right, that there is a Head of State immunity. To us, the doctrine would necessarily require

you to assume that there is a Head of State immunity and that Sudan is using that in a manner that is somehow improper, abusive and so on.

To us, that then answers the case, to us. In fact, we feel that the application of this doctrine is rather question begging. It's basically just another way of saying: Is Sudan acting in accordance with the law or not? And we fully accept that's an issue here. But talking about it in the context of abuse of right does not help.

And I would just finish by saying --

PRESIDING JUDGE EBOE-OSUJI: [9:57:11] Are you also telling us to be careful how we use that in a way that negatively affects Jordan?

MR MURPHY: [9:57:18] Well, I think so, to the extent that there is something to do with Sudan and abuse of rights, how that then applies to Jordan is certainly not obvious to us. And we have some doubts about the doctrine being a well-settled doctrine of international law. Even in the context of unclean hands, in the River Meuse case, it's a single, separate opinion; it's not the Court as a whole.

States have repeatedly approached the International Court of Justice invoking this doctrine, and the Court has not habitually accepted it. They tend to view it as question begging and saying instead: Let's just go directly to what is at issue in the case.

PRESIDING JUDGE EBOE-OSUJI: [9:57:59] Mr O'Keefe and then --

MR O'KEEFE: [9:58:01] Mr President, I would just affirm what was last said about the doctrine of clean hands. That too is an incredibly contentious point in international law.

Let me give you an example. Nicaragua went to the International Court of Justice in relation to the United States of America. Now, the obvious contention was that Nicaragua itself had sent troops into Honduras and Guatemala, but the International

Court of Justice was perfectly clear that that was a separate issue. What was at issue in that case was the United States' action against Nicaragua.

Secondly, the doctrine of abuse of right is not found in the common law. The famous case of Bradford and Pickles -- Pickles and the Bradford Corporation stated that. It's a doctrine found sometimes in equity and certain specific doctrines of the law of equity, but it is famous amongst comparative lawyers that it's not found in the common law. So it's not even a general principle of law recognised by civilised nations.

PRESIDING JUDGE EBOE-OSUJI: [9:59:04] Yes, Ms Lattanzi and then Mr Cross.

THE INTERPRETER: [9:59:17] Microphone, please.

MS LATTANZI: [9:59:19] (Interpretation) I do apologise for asking to address the Court once again, but I would like to answer the first objection raised by the representative of Jordan and the fact that the relevance here of the abuse of right is not relevant here to the Appeals Chamber, because this is not a question that was put at the Trial Chamber level.

And we need to use the iura novit curia principle that applies especially to an Appeals Chamber. And so it is up to the Appeals Chamber to my mind to take up all the issues or questions that they feel can shed light on the matter in legal terms in this case.

Now, as to the abuse of right, if it is abuse of right on the part of Sudan and Jordan, I believe it is both, I think we could apply this general principle of law on the basis of Article 21(c) to the lack of cooperation on the part of Jordan and Sudan.

I do understand that Jordan might say that Sudan does not have the right, that it is not party to the Statute, that, well, I do contest that it does not have the obligation to cooperate. But I do believe that Jordan is well aware -- that Sudan is well aware that

Jordan has ratified the Statute and that it is therefore obliged pursuant to the Statute to cooperate and has not done so, has not cooperated pursuant to a decision of the Court, and this falls within the jurisdiction of the Court.

I thank you.

PRESIDING JUDGE EBOE-OSUJI: [10:02:00] Thank you very much.

Yes.

MR CROSS: [10:02:02] Thank you, your Honours.

If I might just add a couple of points of clarification in response to Mr Murphy's comments.

The first is that yes, as your Honour alluded to, we would understand the doctrine of abuse of rights being relevant if we assume that there is a relevant obligation to accord immunity to Mr Al-Bashir. So if there is no such obligation, then obviously, from our point of view, we wouldn't be getting into this discussion. So this is an argument which becomes relevant if your Honours decide that there is prima facie an obligation to accord immunity to Mr Al-Bashir for these purposes.

The second point is perhaps just to come back on how we might see this analysis fitting into the analysis that this Court is obliged to undertake. And of course under Article 98(1), before proceeding with a request for arrest and surrender, this Court has to ask itself the question whether or not the requested State is obliged to afford immunity to a third State.

So this Court has to delve into, if you like, the bilateral relationship, in this case between Jordan and between Sudan. So therefore the doctrine is relevant because it comes to the question whether or not Jordan would be placed in the invidious position of committing internationally wrongful act by arresting Mr Al-Bashir.

PRESIDING JUDGE EBOE-OSUJI: [10:03:36] Did you say the doctrine is relevant or

irrelevant?

MR CROSS: [10:03:41] Relevant.

PRESIDING JUDGE EBOE-OSUJI: Relevant. Thank you.

MR CROSS: Thank you, your Honour.

In other words, therefore, what the Court has to do is look to see whether or not Jordan would commit an internationally wrongful act vis-à-vis Sudan, and here we would say it would not, if your Honours were minded to go down the abuse of rights road, because Sudan cannot rely for the purposes of any action against Jordan with regard to arresting and surrendering Mr Al-Bashir to this Court, because it is itself under an obligation to arrest and surrender Mr Al-Bashir to this Court. And that would be link. So, yes, it's bilateral, but your Honours are taken to that through 98(1). Thank you.

PRESIDING JUDGE EBOE-OSUJI: [10:04:20] Thank you very much.

Judge Hofmański has a question.

JUDGE HOFMAŃSKI: [10:04:30] Thank you, Mr President.

I have a question related to the position taken by Jordan yesterday.

Is it your position that even if Article 27 could be said to apply to the referred situation in the case Darfur it does not apply to the referred State, in this case Sudan? It is a little bit difficult to understand for anybody who saw the political map of Africa.

MR MURPHY: [10:05:14] Thank you, Mr President. Thank you, Judge, for that question.

Our position is that paragraph 1 of the Security Council's resolution refers a situation. It places that situation, and, more specifically, the crimes that occurred in that area within the jurisdiction of the Court. It does not in some fashion trigger some unique

status for any particular State, including Sudan. That is our position.

PRESIDING JUDGE EBOE-OSUJI: [10:05:49] When you say some unique status, can you?

MR MURPHY: [10:05:52] Well, there have been various characterisations put forward. I think UNSC Situation Referral State as a category, or quasi-State Party, or something. But all of that seems to be saying that Sudan is a State by virtue possibly of paragraph 1, or paragraph 1 in conjunction with paragraph 2 somehow transforms the State of Sudan into some unique relationship with the Rome Statute, and we just don't think that's what paragraph 1 accomplished.

PRESIDING JUDGE EBOE-OSUJI: [10:06:34] Yes.

MS BRADY: [10:06:35] Just to clarify one point, and it's a question of how we use the term UN Security Council Referral State. That is a shorthand by the Prosecution and I think that's clear in our submission. That is a shorthand term meant to cover those States, ie, in this case Sudan, who are bound to comply with the Court because of the referral. We're not inventing a new category of State. It is a shorthand term, a quick term for saying that it is a State which is obliged because the situation on its territory has been referred, it's a State which is obliged to comply. In the same, we say, as a State Party would be obliged to comply, and a State making an Article 12(3) declaration. And we mean no more than that by the term.

And also, we're not making Sudan magically into a State Party. We're saying that the Court was right to find that the triggering of jurisdiction made the obligations in the Rome Statute incumbent on Sudan as if it was in the position of a State Party.

I think that was probably clear already from my submissions, but I thought it was worth adding again.

PRESIDING JUDGE EBOE-OSUJI: [10:08:02] And Mr Murphy, on that, I don't know

whether you have spoken to this before, but there has been a question that I have been putting to counsel. This discussion and abuse of rights somehow brings it back in, though not for purposes of abuse of rights as such, but also the question has connection to a discussion we ended at yesterday on the meaning of "urge", whether urge somehow can mutate into an obligation.

And here the issue is this: If the -- again, part of this thing has -- my concern here is about the characterisation, whether we say Security Council waived immunity and all that, it all goes there. But the point isn't as such what we call it, as much as the effect of it, perhaps. And if the effect we are talking about, negation of a claim, negation of a claim, that claim being immunity and that negation occurring at its base, at the base of that claim or right, and that base being Sudan, does it really matter how that negation occurs, whether we call it waiver of immunity or not? If the point is that by operation of law, applicable law, be it Security Council resolution 1593, or in combination with the ICC Statute, we say, all of us in this room, if you agree to that, that Sudan does not enjoy immunity in its own right as such in Sudan. Upon crossing border does that now revive into an immunity by the factor of Mr Bashir has crossed the border into another territory?

So at home Mr Bashir does not have that immunity vis-à-vis the ICC, but by mere fact of having travelled outside Sudan, somehow what he doesn't have at home becomes something for him overseas that will now trouble exercise of jurisdiction of the Court.

MR MURPHY: [10:10:54] Thank you, Mr President.

If I understand the question, it seems to be assuming that we have a single immunity here that operates in a lot of different places. And I think the west way to think of it is a Sudanese official might have immunity under the law of Sudan with respect to the jurisdiction of Sudanese courts, a Sudanese official might have immunity vis-à-vis

the jurisdiction of this Court, a Sudanese official might have immunity with respect to the exercise of foreign criminal jurisdiction, which might arise under international law, it might arise under a 1953 convention, a pact of the Arab League and so on. So I think one needs to ask the question in these different context.

We would submit by the referral, in paragraph 1 of the resolution, it is clearly the case that if the president of Sudan were before this Court he would not be able to invoke Head of State immunity. Article 27(2) we think makes that clear.

But it's a different question, a very different question if he is in a foreign criminal jurisdiction such as Jordan. There I think you have to then run a different kind of analysis that we don't think paragraph 1 referred to. We think that maybe you could say paragraph 2 in some fashion is referring to this. The argument would be that by deciding that Sudan must cooperate that ipso facto waives immunity even in foreign criminal courts that Jordan is supposed to be cognisant of and take account of. But our position would be actually paragraph 2 uses the words urging with respect to third states. And when you combine that with that existence of immunities, that I would note are immunities that the Arab League views as owed to the League itself.

And this relates a little bit back to the abuse of rights doctrine. If the claim -- if Professor Lattanzi is continuing with her claim that Jordan abused its rights, then I think it's a claim that the Arab League is abusing its right as well.

PRESIDING JUDGE EBOE-OSUJI: [10:13:25] (Microphone not activated)

MR ROBINSON: [10:13:33] Thank you, your Honours.

I think that in case we're talking a lot about the urge language. But I think in this case it doesn't matter. I think it could conceivably matter if there was a case where a non-party State arrested Al-Bashir. In this case Jordan is a State Party so they're already bound by the Statute by virtue of being a party.

Even if there were a case with a non-party State, what I would suggest is even there the urge language doesn't matter. But that's because of my view that the UN Security Council removed Al-Bashir's immunities vis-à-vis the ICC. Al-Bashir has no immunities opposable to the ICC, therefore even for a non-party State they would be committing no internationally wrongful act. So in way, I think that the urge debate might not matter.

PRESIDING JUDGE EBOE-OSUJI: [10:14:21] Mr O'Keefe, and then Mr Rastan was --

MR O'KEEFE: [10:14:28] Just a very, very brief point, Mr President. And forgive me if this is absolutely unnecessary to say, but it was thrown up by your last question to counsel for Jordan. I think I should make it absolutely clear, just to everyone present, and perhaps you already know this, but international law says absolutely nothing as to whether a Head of State is immune in his or her own State. International law says nothing as to whether any other State official is immune from the jurisdiction of his or her own State. The State doesn't owe an obligation to itself. International law deals only with the situation that you said, of a Head of State vis-à-vis a foreign State, or a Head of State vis-à-vis the Court. So whether Mr --

PRESIDING JUDGE EBOE-OSUJI: [10:15:19] But international law does know whether the Head of State has immunity before an international court.

MR O'KEEFE: [10:15:28] Sure. That's all I'm saying. Yes.

But all I'm saying is that - I don't know, and perhaps I misunderstood the premise of your question - international law says absolutely nothing as to whether Sudan must accord or must not accord Mr Al-Bashir immunity in Sudanese courts. The laws of some State provide that the Head of State is immune while he or she is in office in their own State. The laws of other States don't. That's national law. I just thought I would make that clear. It's neither here nor there.

PRESIDING JUDGE EBOE-OSUJI: [10:15:56] Thank you.

Mr Rastan.

MR RASTAN: [10:15:59] Actually, your Honour, Ms Brady with address one point and then I will address the second point if you permit.

PRESIDING JUDGE EBOE-OSUJI: [10:16:06] Fair enough.

MS BRADY: [10:16:07] Thank you, your Honour.

Mr Robinson raised an important point, and it's something that the Prosecution wanted to come back on from yesterday's discussions. And the question very much in the discussion yesterday was how does Resolution 1593 operate in terms of the obligations on the various categories of State. Now for Sudan I think we're all agreed, the resolution clearly obliged Sudan in relation to the Darfur situation to cooperate.

But where we disagree with Jordan, and some of the others, is that it's not on obligation to cooperate just in some kind of ad hoc way, but rather in the way that the Pre-Trial Chamber majority found correctly, subject to the same obligations as a State Party, including the fully cooperate obligation and not being able to raise Head of State immunity.

That's category 1 only covering Sudan.

What about State Parties? And this is where the case is -- this is where the action of the case is, for Jordan and other State Parties. They're not specifically named in the resolution, although I take your point, your Honour, you made yesterday that they're negatively discussed by virtue of the fact that paragraph 2 states while recognising States not party to the Rome Statute, so they're sort of negatively, by implication, they're discussed. But they're not specifically named.

But, your Honours, it's no wonder that they're not specifically dwelt on in the

resolution because they're already bound by the Rome Statute to comply, by virtue of being a party to the Statute, to comply with the obligations in the Statute.

So for them, and for the Prosecution, the position for them is clear, it's as the majority found: They're obliged to comply with the -- and respect and comply with the Rome Statute. That means when they receive a request for arrest and surrender of a State, Head of State that is also bound to comply with the Statute, and again whether that be another State Party, whether that be a State bound to comply because of a Security Council resolution or because they have made an Article 12(3) declaration, that State Party cannot turn to Head of State immunity and claim it as a bar under Article 98. That's the facts.

Now, finally I want to turn, because we got a lot into the question of non-State Parties yesterday, that is non-State Parties apart from Sudan. And again, I think many in the room have noted that that's not the situation we're here today about. And this word in paragraph 2, "urge", that we discussed at length yesterday. Now I think I made it clear already in my submissions earlier in the week, they are not bound, non-State Parties are not bound to comply with the Court request to arrest and surrender. That's pretty clear. They're strongly encouraged to do so.

And in answer to my colleague Mr O'Keefe yesterday, my reference to Blaškić was not meant to suggest otherwise. I merely mentioned Blaškić to highlight the potential breadth of the Security Council Chapter VII's powers and to answer the President's question about the distinction between mandating and coercive measures.

PRESIDING JUDGE EBOE-OSUJI: [10:19:37] And the reason I also interrupted you when you brought in Blaškić, was whether we could look at Blaškić in the context of perhaps what the Appeals Chamber of ICTY meant by States who were, who bore the coercive effect of the Security Council resolution there under contemplation. I mean,

could Croatia be considered to be part of the situation State, situation State that would bear that coercive effect? In which case the obligation on it may well be different from that borne by other UN Member States.

MS BRADY: [10:20:23] Well, your Honour, clearly the binding order that was made by the Trial Chamber, and confirmed by the Appeals Chamber, was directed a Croatia. So the holding of the case concerned that State.

But as I, perhaps not so successfully, tried to say the other day is that it had other -- the cases stand for a wider proposition in the facts of the ad hoc tribunal for the former Yugoslavia. And I'm not suggesting that this is the case necessarily here because of the terms of the resolution, at least for non-State Party. That it had wider effects for all Members States of the UN. And I pointed to some of the paragraphs of that the other day.

But I think, you know, for non-State Parties Blaškić has to be read within the confines of the ICTY resolution and the specifics of that case.

Your Honours, so going back to non-State Parties, they're not bound to comply. That's not our position. But what we're saying is it's not necessarily the end of the story, because a non-State Party may choose to voluntarily comply. And that's a hypothetical situation where they do so. And the question is what effect would that have for his immunities if they do choose to comply? And I think I described this the other day; it's not, it's the case before us and it is a difficult question. But in our view, in the event that a non-State Party voluntarily decided to cooperate with the Court and arrest and surrender Mr Al-Bashir, they may - and I put it no more highly than that - they may be in the same position as States Parties and, if so, then his Head of State immunity would likewise not be opposable. But as I said before, it doesn't arise on the facts. And as well, in light of the position I've just taken, respectfully,

we don't think we need to make a further answer to the question about whether the "urge" in paragraph 2 does amount to a licence or excuse or defence permitting derogation from immunities that Sudan may otherwise enjoy.

Thank you.

PRESIDING JUDGE EBOE-OSUJI: [10:22:43] Thank you.

Mr Rastan briefly, and then Mr Kreß.

MR RASTAN: [10:22:51] Thank you, your Honour.

So also just to complete just our discussion on terminology. And the reason that we emphasise just now the difference between States Parties and non-States Parties, and whether or not they could voluntarily consider to cooperate, it is because we have this discussion about whether or not there is a relevant immunity that would be engaged that Sudan can claim.

And this goes back to a discussion that has repeatedly come up, and I think we discussed this term in different ways, the parties involved, and the amici, in terms of what is meant by the notion of domestic criminal jurisdiction, since this is of course to what personal immunities attaches under international law, under customary rules, it attaches to the exercise of foreign criminal jurisdiction to domestic criminal jurisdiction. So the question is: Does an ICC surrender process that is channelled through a national authority constitute the exercise of domestic criminal jurisdiction? And Jordan made the point, I believe, that because their courts will be engaged in that process, because their police will be engaged in giving effect to the warrant, that this necessarily triggers the exercise of national criminal jurisdiction.

But we just wanted to emphasise the distinction that the mere fact that national courts or the police apply domestic law, necessarily, that they apply domestic criminal law and domestic criminal procedure, this does not mean that they are asserting, that is

national courts are asserting, the exercise of domestic criminal jurisdiction against Mr Bashir. For the reasons that we said previously, we believe that they clearly are not. It is the court of course that is asserting criminal jurisdiction and, as we said, also Article 59 does not permit the national courts to consider themselves to be in that position.

And just lastly, I think the arguments that Jordan has put forward in its statement would also create an absurd outcome by completely extinguishing the relevance of the ICJ's distinction in paragraph 61 of the Arrest Warrant judgment to which we keep on referring. Because it would mean that, although the warrant is issued by this Court for its own criminal process, the execution of that warrant which is mandated by the Statute triggers automatically the application of customary rules in the way that, as the ICJ found in the case of Belgium, the mere issuance of a domestic order or a warrant to give effect to an ICC warrant necessarily is unlawful. Because, as we all recall, the ICJ held that the mere issuance by Belgium of the domestic warrant against the person enjoying personal immunities was unlawful. So we believe that this outcome would be absurd.

PRESIDING JUDGE EBOE-OSUJI: [10:25:40] While you're on your feet, Mr Rastan, and also please everyone else in the room, if we can look at Article 4(2) of the Rome Statute. We've already discussed and Mr O'Keefe had spoken to Article 59 of the Rome Statute and he and Mr Rastan joined issues on that. But looking at Article 4(2), can it help us get anywhere in our thinking process in this case. 4(2) says:

"The Court may exercise its functions and powers, as provided in this Statute, on the territory of any State Party and, by special agreement, on the territory of any other State."

Now, we want to contrast what is being said there from what is being said in

Article 3(3), which is:

"The Court may sit elsewhere, whenever it considers it desirable, as provided in this Statute."

They're not saying the same thing. I'm more interested in 4(2). Does a combination of 4(2) and 59 help us answer that question about jurisdictional proxy, whether or not it is what's happening here?

MR RASTAN: [10:27:09] Of course, your Honours, I'm speaking on my feet, so forgive me if I may ask to return to this point. But I think the term "functions and powers" in Article 4(2) is interesting to the extent that it also mirrors --

PRESIDING JUDGE EBOE-OSUJI: [10:27:19] Why don't you do this, why don't you think about it.

MR RASTAN: [10:27:24] No, I can give you a preliminary response, if I may.

PRESIDING JUDGE EBOE-OSUJI: Keep going.

MR RASTAN: Yes. I think I just want to draw out one further interesting point, that those terms "functions and powers" are also reflected in Article 87, paragraphs 5 and 7 of Article 87. That it relates to the failure of a State Party to cooperate, which has the result of frustrating the Court's ability to exercise its functions and powers under the Statute. So cooperation givens effect to the Court's functions and powers and the State can be held in non-compliance if it has failed to give effect to the Court's functions and powers.

So I think indeed, your Honour, there is something beyond the mere ability of the Court to sit in a foreign territory that reflected in Article 4(2), and it is the fact that the Court's functions and powers are given effect through the mechanisms of State cooperation.

PRESIDING JUDGE EBOE-OSUJI: [10:28:12] (Microphone not activated)

MR RASTAN: [10:28:13] Yes, exactly.

PRESIDING JUDGE EBOE-OSUJI: [10:28:15] (Microphone not activated) State Parties.

MR RASTAN: [10:28:16] Yes. Yes, exactly.

PRESIDING JUDGE EBOE-OSUJI: [10:28:18] Thank you very much. Mr O'Keefe, Mr Kreß first. Mr O'Keefe, I will come to you later.

Mr Kreß first.

MR KREß: [10:28:22] Mr President, I'm extremely conscious of the time constraints under which we are operating here, and therefore I have so far not engaged in the fascinating debate about the precise legal effects of Security Council Resolution 1593 for non-States Parties to the ICC Statute other than Sudan. I have not done so because up to that point I'm still not entirely convinced to what extent this question is relevant to our appeal. But as it has been argued so extensively I only wish to make one short observation. I wish to refer this honourable Bench to pages 342 to 348 of Dapo Akande's article in the Journal of International Criminal Justice, Volume 7, year 2009. In my humble view what my distinguished colleague and dear friend Dapo Akande writes there is spot on with regards to all these issues. I just want to place on the record I fully subscribe to those positions and they entirely support what Darryl Robinson has just said in brief intervention, and Helen Brady.

Thank you, Mr President.

PRESIDING JUDGE EBOE-OSUJI: [10:30:05] Thank you. One second, please. Thank you. AU please, and then we'll come to Mr O'Keefe.

MR JALLOH: [10:30:14] Thank you, your Honour.

I have been listening to the conversation very carefully and, your Honours, it strikes me that the Prosecutor's position with respect to the whole discussion we've been

having this morning brings us in many ways back to the question that occupied us quite a bit yesterday, framed in the terms of necessary implication. And so what I propose to do is to just offer a number of observations, your Honours, that might be helpful in the context of the decision that you have to make on Jordan's appeal. Because in many ways that assumption of the OTP with respect to Sudan's obligations really turns on this issue.

So here I have about four points that I would like to make very briefly, and I want to also cite some authorities as well along the way, because of course it will be helpful I think for the Chamber in dealing with this particular question.

So the first point is this: In my humble submission, in order to attribute a meaning to a provision, the text itself must refer to the meaning either expressly or by necessary implication. Expressly or by necessary implication seems to be a phrase that is used across the ICJ, the ICC, and even in the ILC. It may suggest that the standard for reading a meaning into the text by necessary implication is so high that, in effect, it must be as if it was done expressly.

And I say this because if you look at what the International court of Justice said in Aerial Incident of July 27, 1955, at page 144, the Court states in respect, this is the dispute between Israel and Bulgaria, and I'm quoting now, "These were events" - referring back to the events in the case - "to which Bulgaria, which became a party to the Statute only as a result of its admission to the United Nations in 1955, was not privy; It would be permissible to have reference to those dates in respect of the application of Article 36, paragraph 5, only if that provision had referred thereto expressly", expressly, "or by necessary implication; ..."

That's the first authority, your Honours.

The second reference was by your Honour's Judge Eboe-Osuji in the context of the

Ruto case. Paragraph 106, separate further opinion, 3 June 2014, and I quote: "It is, in my view, both appropriate and desirable to maintain the same approach in the formulation of the standard of proof for purposes of 'no case' submissions made at the close of the case for the Prosecution. It is to be recalled that the review of authorities (conducted above) indicates ample support for such a lower standard, either by explicit pronouncement of the highest national courts or by necessary implication." There is more, your Honours. The third one from the ILC, commentary on the draft Article 69 of the VCLT, in the Yearbook of the International Law Commission 1964, Volume II, A/CN.4, 173, page 202, the International Law Commission says, "Moreover, the jurisprudence of the Court", the ICJ, of course, "contains many pronouncements from which is it permissible to conclude that the textual approach to treaty interpretation is regarded by it as established law. In particular, the Court has more than once stressed that it is not the function of interpretation to revise treaties" to revise treaties "or to read into them what they do not, expressly or by necessary implication, contain." ILC, 1969, VCLT discussion.

That was the first point, your Honours.

Second point: In my submission, interpreting a treaty provision then, in the light of these authorities, by a necessary implication means that such interpretation is not open for the interpretative possibilities. I think we can all agree here, whether it is the Prosecution, whether it is Jordan, which it's the amici, amici on all sides of the issue, that in fact we are saying there are different interpretive possibilities. That is in fact, I think I can take that as a fair reading of the room. So in a sense it suggests this idea of necessary implication, the claim cannot be sustained. And there is an authority here that is also useful because it comes from the ICC itself. It's in the Blé Goudé case, a decision from 1 November 2016. And of course there is long

paragraph 80 and I just want to go directly to the elements because they are from the Appeals Chamber, this is an Appeals Chamber decision, "the Appeals Chamber does not consider that the necessary implication of the Trial Chamber's reasoning is that the evidence of war crime base witnesses may be introduced under Rule 68(3) of the rules" and I'm going to skip the next sentence, but then it says "no general conclusions can be drawn on that basis alone. Many of the reasons warranting the hearing of testimony viva voce in its entirety may apply equally to crime base evidence. Such reasons may include" and the Chamber gave some examples. Again, paragraph 80, Appeals Chamber in the Blé Goudé case.

Then of course we come to Bemba, partly dissenting opinion of Judge Eboe-Osuji, 17 June 2015, paragraph 9, and I quote, "The necessary implication of these omissions regarding the confirmation decision is that the Rome Statute contemplates the DCC", document confirming charges of course "as the primary instrument which notice is given to the accused. This is the principle of international criminal law well settled" well settled "before the ICC opened its doors to judicial business". Your Honours, Bosco Ntaganda, judgment of the Appeals Chamber, paragraph 40, 22 March 2016.

PRESIDING JUDGE EBOE-OSUJI: [10:36:58] Mr Jalloh, are you about to finish?

MR JALLOH: [10:37:04] Sorry, your Honours.

PRESIDING JUDGE EBOE-OSUJI: [10:37:06] Are you about to finish?

MR JALLOH: [10:37:08] Yes, your Honours. I only have two further points, very brief. And I maybe will just cut, just for the sake of time, your Honours. Because indeed Mr Tladi wanted to react very quickly, if it would be permissible to the Court, to Mr Rastan's point.

Let me move on to third point. So this point here was the second point relating to the idea of the standard being so high it cannot be left open, it cannot be used where

we are all accepting that there are separate interpretive, different interpretive possibilities. And again here we are, I think, in agreement that there is, whether it's respect to 1593 and the obligations of Sudan and the obligations of non-parties in respect of arrests and so on.

So I'm going to move on very quickly to the last two points, your Honours. And essentially --

PRESIDING JUDGE EBOE-OSUJI: [10:37:51] Can you make that in one minute, please.

MR JALLOH: [10:37:53] Okay, one minute. Yes, I can. I'll do my best, your Honours.

So essentially I will come down to the conclusion of the ICJ, and let me just use this, where in the judgment involving the case concerning rights of nationals of the United States of America and Morocco on 22 August 1952, page 196, the Court says "in these circumstances the Court cannot adopt a construction by implication of the provisions of the Madrid Convention which would go beyond the scope of its declared purposes and objects. Further, this contention would involve radical changes and additions to the provisions of the Convention." That's why I'm citing to this. And it concludes, "It is duty of the Court to interpret the Treaties, not revise them."

So, your Honours, in essence, the result of treaty interpretation by necessary implication must not go beyond the prescribed purposes and objects. And I would submit this is in relation to 1593 as well as the paragraph 2. In my view it is not for the Court to essentially by necessary implication read in obligations for Sudan that were not explicit from the decision of the Council in light of Article 13(b).

So if your Honours will permit me, I will pass the floor to Mr Tladi. Thank you very much, sir.

PRESIDING JUDGE EBOE-OSUJI: [10:39:22] Can we leave it at that. And we maybe have another opportunity to return, but let's now go briefly to Mr O'Keefe. After that --

MR O'KEEFE: [10:39:35] Briefly is the word.

PRESIDING JUDGE EBOE-OSUJI: [10:39:35] -- and briefly We will take a question from Judge Bossa.

MR O'KEEFE: Briefly is the word, Mr President.

PRESIDING JUDGE EBOE-OSUJI: We still have time tomorrow.

MR O'KEEFE: [10:39:40] Three very brief things: An answer, a question, and a placing on the record.

The answer to the question about Article 4(2), the Court sends investigators onto territories of other States, it sends officials of the Court onto the territory of other States, eg, in Libya where those officials unfortunately ran into trouble. Article 4(2) was about that.

Article 87(5) is about that. If a State Party is requested to let an official of the Court onto its territory and says no, that's Article 87(5). And it's striking that the Prosecutor never once mentioned Article 4(2) until prompted.

Second point, a question: If the exercise by a requested State of its judicial and police powers in, the latter first, arresting and then surrendering to the Court a person wanted by the Court is not an exercise by that State of its own jurisdiction, why is Article 98(1) in the Statute?

The final point, placing on the record: Chapter 14 of my estimable tome, International Criminal Law, Oxford University Press 2015, where all good books are sold, I stand by that. If you think that's a commercial plug, I have no commercial sense whatsoever, which is why I'm appearing at my own expense here as

amicus curiae.

PRESIDING JUDGE EBOE-OSUJI: [10:41:12] Mr Tladi, can you make the point in one minute, please.

Then after that we need to take a question from Judge Bossa.

MR TLADI: [10:41:23] Well, I'll certainly be able to make it in one minute because the first part of the statement has already been made, it was this interpretation of Article 4(2).

But the second point would also be that to accept the interpretation would actually suggest that when a State exercises its jurisdiction as the Court, then it would not be responsible. But the reality is that if you look at the articles of State responsibility, the exercise of jurisdiction would be conduct by an organ of a State. So it is not clear how it would be anything other than that State.

That was the second point I wanted to make. Thank you very much.

PRESIDING JUDGE EBOE-OSUJI: [10:42:02] To speak to 4(2)? Yes, please.

MR MURPHY: [10:42:07] Yes, Mr President, I'll be brief as well. I think we would associate our thoughts with the last two speakers. But if I could just follow on by reiterating one goes to Articles 59 and Part 9, it's quite clear that the national law and procedures of the requested State are fully functioning and that that requested State can do things that this Court is not looking for, provisional release of the person requested, a refusal to provide documents that are being requested. It's all very clearly spelled out in that regard. And in particular you might want to take note of Article 90 which is on competing requests, so a request is sent by the Court to the custodial State, a request comes in from another State, how do we handle that? As it turns out, it's quite clear in paragraph 2 that an important issue is whether that requesting State is a State Party, in which case the Court wins, if you will.

But in paragraph 4 if the requesting State is not a State Party, then the custodial State can uphold its obligation to that third State.

So this to us suggests that it is not the national authorities acting as a proxy. And one final thought, that differentiation between a State that's a State Party and a State that is not a party is quite important for the interpretation of Article 98, where the word is a third State, not a non-party State, which is the way that the Prosecution wishes to interpret it. A third State, which would include either a party State or a non-party State.

PRESIDING JUDGE EBOE-OSUJI: Thank you very much.

Judge --

MR RASTAN: [10:43:58] Your Honour, can I take 10 seconds on 4(2) and then I'll sit down?

PRESIDING JUDGE EBOE-OSUJI: [10:44:01] Let's not do that, thanks.

MR RASTAN: Let's not do that.

PRESIDING JUDGE EBOE-OSUJI: We'll do that later.

These are very involved issues, we know that. tomorrow there will be opportunity for closing speeches and anything that's burning in the mind that hasn't been said, we can use that opportunity as well.

For now, Judge Bossa.

JUDGE BOSSA: [10:44:24] Thank you, Mr President. Good morning everyone in court.

My question goes to Jordan. We've been told here, and I stand to be corrected if I'm wrong, that when the United Nations Security Council made resolutions referring the respective situations in the former Yugoslavia and Rwanda to the ad hoc tribunals respectively, these had the effect of displacing immunity relating to official capacity,

even for sitting Heads of State. And the provision I have been able to trace in the statute of the tribunal for Rwanda is 6(2) which reads that "The official position of any accused person, whether as Head of State or government or as a responsible government official, shall not relieve such person of criminal responsibility nor mitigate punishment."

We have also been told by one amicus that the words "cooperate fully" used in those resolutions also displaced immunity.

Now, these resolutions were accompanied by statutes. So you could say that the resolution happened first and the statute followed, or they came at the same time.

Now, in the present case there is an existing Statute which has a provision in Article 27 which appears to be even stronger than Article 6(2) and the equivalent in the ICTY statute because this one has two limbs, it has 27(1) and 27(2). And they all talk about and at least 27(2) is specific that immunities of special procedures, procedural rules which may attach to official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.

Now, it has also been argued here that the Resolution 1593, yes, also had the same effect of displacing immunity.

Now, from a reading of both paragraphs 1 and 2 of that resolution, my question is: Does the fact that in this latter position, that is the present case, the Statute predates the resolution make the effect of the referral analysis legally effective, for want of a better word. I don't know whether you understand what I mean. That is my question.

MR WOOD: [10:48:27] Well, I'm very grateful to Judge Bossa for that question and I'll endeavour to respond.

I think the starting point is that, as we've explained before, the ad hoc tribunals, being subsidiary organs of the Security Council, being established by the Security Council, are really in a very different position to the International Criminal Court, established by treaty, albeit with the resolution that we're paying so much attention to, 1593. Having said that, I think the question of Head of State immunity before the ad hoc tribunals was not as I understand it ever decided. It's, as it were, an open question. There was an arrest warrant issued in relation to Milosevic when he was president, but the actual trial took place later and indeed he was surrendered by his own State. So I think the situation has never been finally clarified in relation to the ad hoc tribunals.

The provision which you read out from the ad hoc tribunal statutes corresponds, of course, to paragraph 1 of Article 27. It's the official capacity provision. So how one is to read that, certainly the ICC Statute is clearer in this regard because it has the two paragraphs and it separates out these two ideas of official capacity not being a substantive defence and immunity.

So I think the situation when one comes to look at the two sets of provisions, the statutes of the ad hoc tribunals and the Statute of the ICC, is really very different. And we don't unfortunately have any real guidance from the practice or case law of the ad hoc tribunals because the issue did not arise.

The question arose because we got into this debate about implication or necessary implication and the comparison between 1593 and whatever implications there may be in that and such implications that there may be in the resolutions adopting the statutes of the ad hoc tribunals.

We would say I think that there is really no comparison between this and it doesn't assist us in interpreting 1593, to make a comparison with a very different, very

different tribunals, under very different legal structures and where the tribunals themselves didn't reach a conclusion on this question of Head of State immunity. I've tried to answer. The key point as well of course is that, or a key point, is that in our Statute, in your Statute, we have Article 98, which is quite clear. That is something that was not present or relevant in the case of the ad hoc tribunals, which were UN organs, UN resolutions, binding on all States. There was no notion of non-Party States in relation to the ad hoc tribunals.

If I could just come back on a point, the Prosecution went back to this question of urges, and I do feel we're beginning to repeat ourselves, but I'd just like to repeat myself on that and say there is a very important legal difference between an obligation under a Security Council resolution which has its effect by virtue of Article 103 of the Charter to override other obligations including obligations relating to immunities, whereas an obligation under a treaty does not do that.

The fact that 1593 did not impose an obligation on States but simply urged them is very significant because there is no Charter obligation on Jordan or on anyone else that would supersede obligations under international law more generally.

If I could just, finally since we're on the urging paragraph, say a word about the phrase "while recognising that States not party to the Rome Statute have no obligation under the Statute", those words, it seems to me, are superfluous. They are there for a reason. No doubt one or more permanent members wanted that to be said very clearly, though it's absolutely clear even without them.

It is a statement of the law by the Security Council, but it's a pretty obvious statement of the law that a non-party to the Statute has no obligation under the Statute. And I can imagine why it was put in, a permanent member or possibly more than one insisted on that. Thank you.

PRESIDING JUDGE EBOE-OSUJI: [10:53:58] Mr Wood, I think that last point is noted.

But returning to Judge Bossa's question, the distinction, you made that distinction saying the ad hocs were created under Chapter VII, so it subsidiary. I'm trying to see to what extent that difference really matters if one considers the effect of Article 13(b), does that not suggest - this is a question, an open question - does that not suggest that the ICC may well be in the position of a Court created by the Security Council using Chapter VII, the difference being that there was already a Court set up, being the ICC, with a corpus of law in the Rome Statute, and all that the Security Council felt it needed to do on that occasion was to, by a process of adhesion, attach the situation in Darfur to the ICC, which makes life perhaps, one might say, easier for the Security Council had it wanted to go this route of creation of a new ad hoc tribunal, setting it up and negotiating its terms and agreements and all that stuff.

Does that difference really matter in the end between the ad hocs and the ICC if we looked at what Article 13(b) was seeking to achieve?

MR WOOD: [10:56:00] Well, I think, Mr President, it's a crucial difference. I won't repeat what I said about the differences between the ad hocs and this Court's Statute, but they're very significant, the wording is quite different on these matters. We have 27(1), we have 27(2), and above all we have 98. If you look at the statutes of the ad hoc tribunals, they're very different.

Coming to your point about Article 13(b), I think we've explained earlier our view of Article 13(b). And in our view it's very clear from the wording of 13(b), the effect of 13(b) is simply to put within the jurisdiction of the Court a situation, more particularly, crimes that may have been committed in the context of a situation; and it applies the Statute to the Court's activities. The Court exercises its jurisdiction in

accordance with the Statute, as is stated in the chapeau of 13(b), no more and no less. That is our submission on 13(b). Thank you.

PRESIDING JUDGE EBOE-OSUJI: [10:57:17] Thank you very much.

In the absence of any more questions in this segment, why don't we then proceed now to - again, we are watching the time for our 11 o'clock postmark. We needed to do that - but I think we can now begin our submissions on the third cluster, group C, which we already put on the record. We don't need to repeat reading it on to the record. Judge Ibáñez Carranza has already done that. Whatever we can get into the record for two minutes and then let's all watch the time.

Yes, please, Jordan.

MR MURPHY: [10:58:26] Thank you, Mr President. Perhaps you'll just signal to me if I'm supposed to stop at a particular point.

In this presentation I'll be addressing Jordan's third ground of appeal as well the group C questions relevant to this ground of appeal.

As the Chamber well knows, in addition to finding that Jordan failed to comply with its obligations under the Rome Statute, the Pre-Trial Chamber decided that Jordan's non-compliance with the request for the arrest and surrender of President Al-Bashir be referred to the Assembly of States Parties and to the United Nations Security Council.

Jordan strongly believes that the Appeals Chamber should in all fairness set aside the decision on referral. In our view, the Pre-Trial Chamber's decision arises from manifest errors of law and fact and amounts to an abuse of discretion.

Let me turn first to the circumstances of the visit to Jordan. Question (e) in group C asks: What specific actions, if any, were taken by Jordan to communicate to the Court the difficulties encountered in its execution of the arrest warrant in respect of

Mr Al-Bashir in accordance with Article 97 of the Statute?
In response --
PRESIDING JUDGE EBOE-OSUJI: [11:00:11] Okay. I think we've got our 11 o'clock. Why don't we stand for a minute of silence.
(Pause in proceedings)
PRESIDING JUDGE EBOE-OSUJI: [11:01:07] Thank you very much. Please proceed.
MR MURPHY: [11:01:11] Thank you, Mr President.
In response to the inquiry from the Court regarding President Al-Bashir's potential visit, Jordan sent to the Court on 24 March a note verbale, and we provided a Judges' folder for you today. You'll find at item 1 of this Judges' folder the March 24 note verbale from Jordan to the Court.
You will see in that note verbale, which is at item 1, that it provided information about the upcoming Arab League summit, it indicated that invitations had been sent to Sudan, and it stated that Sudan had requested visas, including for President Al-Bashir. At the same time, the note verbale indicated that there was no official confirmation that President Al-Bashir would in fact visit.
On the same day, March 24, the Prosecution filed observations on Jordan's note verbale with the Pre-Trial Chamber. And here I would direct you to item 2 in the Judges' folder where you will find the Prosecution's observations.
The Prosecution said that it was not yet clear whether Jordan intended to comply with its obligations under the Rome Statute and thus as of 24 March the Prosecution did not view Jordan as necessarily in a status of non-compliance. Instead, the Prosecution urged the Pre-Trial Chamber to seek immediate clarification from Jordan so as to resolve any question or misunderstanding that may have arisen on the part of

Jordan with respect to its obligations.

Despite the Prosecution's urging to the Pre-Trial Chamber, the Chamber took no action on that request on March 24. It took no action on March 25 or March 26 or March 27 or March 28. Instead, Jordan on its own initiative followed up with a second note verbale, this time dated 28 March 2017. And you'll find that in your Judges' folder at item 3.

This note verbale reported that confirmation had been received from Sudan that President Al-Bashir intended to attend the summit. It said that Jordan, and I'm quoting here, "Jordan is hereby consulting with the ICC under Article 97 of the Rome Statute" and then it continues "as regards to the content of the arrest and surrender warrants."

The note verbale said that Jordan considers that President Omar Al-Bashir enjoys sovereign immunity as a sitting Head of State and it said that it considers that the immunity has not been waived by the Sudan, and then finally it says said that Jordan did not think that the Security Council Resolution 1593 contained anything that could be interpreted as a waiver. That was the current theory as to why perhaps there was no immunity.

This March 28 note verbale to the Court was an effort pursuant to Article 97 to consult with the Court. The note is quite clear in saying "we are hereby consulting". And it's quite clear in identifying a complicated scenario potentially involving different rules of international law which, as we know, arise under treaty, under custom and under a Security Council resolution. And without doubt Jordan was explaining to the Court what it viewed to be impediments to the request for surrender and arrest in the form of immunity and the lack of a waiver of immunity.

Now at the time of the events in question the Prosecution immediately recognised this

as an effort by Jordan to engage in consultations. On March 29 the Prosecution filed further observations with the Pre-Trial Chamber. You have this in your Judges' folder at item 4.

In these observations the Prosecution unequivocally stated that Jordan's note verbale, and I'm quoting here, "formally identifies an alleged legal problem which it communicates to the Court by way of Article 97 consultations." End quote. This is the Prosecution's own language.

Indeed, the Prosecution then further acknowledged that Jordan had, and I'm quoting, "triggered consultations."

Moreover, the Prosecution did not view Jordan's position as demonstrating inevitable non-compliance. Rather, when you read the observations, the Prosecution again is requesting the Pre-Trial Chamber, and here I'll quote, "to proceed urgently to resolve any misunderstanding that Jordan may perceive with respect to its obligations under the Statute." End of quote.

Jordan would have welcomed the Pre-Trial Chamber proceeding with such action. Instead, Jordan received no response whatsoever from the Pre-Trial Chamber. This I hope, Mr President, responds to your question yesterday about whether Jordan had simply and conclusively stated a firm and unwavering position with no interest in reactions from the Court. That simply isn't the scenario. Jordan was genuinely seeking consultations and it was doing so in good faith. Nevertheless in the December 2017 decision the Pre-Trial Chamber decided to refer Jordan to the Council and to the Assembly of States Parties.

So allow me to turn now to the standard you should apply in reviewing that decision. As the Appeals Chamber well knows, a Pre-Trial Chamber's decision on whether to refer a finding of non-compliance is a discretionary decision. It's not mandatory.

Indeed, this Appeals Chamber has stated that it will disturb the exercise of a Chamber's discretion where it is shown that an error of law or fact or procedure was made.

And we have included in your Judges' folder at item 5 an extract from the decision you reached in the situation in the Republic of Kenya, and particularly at paragraph 22 you'll see the point I just made. You'll also find that the Appeals Chamber went on to say that you'll correct an exercise of discretion in three broad circumstances: If it's based on an erroneous interpretation of law, it it's based on a patently incorrect conclusion of fact, and if the decision amounts to an abuse of discretion.

In any particular case these elements may be closely interrelated. We submit that what the Appeals Chamber has to do at the end of the day is to make an overall assessment, having regard to all the circumstances of the soundness of the Pre-Trial Chamber's decision to refer, bearing in mind whether there was good faith on the part of the State concerned.

The Pre-Trial Chamber's explanation for why it was referring Jordan consists of four sentences, four sentences. They're found at paragraphs 53 and 54 of the December 2017 decision.

We have included at item 6 in your Judges' folder the portion of the December 2017 decision where the Pre-Trial Chamber discusses the possibility of referral. Although there are a few paragraphs captured in that excerpt, you will see that ultimately there are only two paragraphs that speak to why the referral is being made, and this is paragraphs 53 and 54. So that will be at the bottom of the first page of the extract we've given you at item 5 over to the top of the second page.

What are these two paragraphs saying? Well, the first paragraph, 53, is essentially saying that we are referring Jordan because it didn't comply with our request. I'm

paraphrasing and obviously it says a little bit more than that, but in our submission that's essentially what it comes down to.

The second reason stated in paragraph 54 is that, and here I'll quote, Al-Bashir's presence in Jordan in March 2017 -- "at the time of Al-Bashir's presence in Jordan March 2017, the Chamber had already expressed in unequivocal terms that another State Party, the Republic of South Africa, had in analogous circumstances the obligation to arrest President Al-Bashir".

We submit that these reasons, these two reasons for the referral were based on patently incorrect conclusions of fact and erroneous interpretations of the law.

Let's take the first reason. Clear error of fact here. The Pre-Trial Chamber in asserting this first reason in our view failed to acknowledge that Jordan was seeking consultations from the Court. You see there that among other things at paragraph 53 they say Jordan did not require or expect from the Court anything further. And that simply is not correct as a matter of fact. Consultations were sought. The Prosecution accepted that that's what was happening, that there was a misunderstanding that we needed to get back to Jordan. And that's not what happened.

Now, the Prosecution now in their pleadings attempts to paint a picture of Jordan being adamant from the outset that it would not arrest President Al-Bashir and that it made no effort to engage in consultations with the Court and that that's the reason why the referral occurred, but as we've explained in our pleadings and as I just did, that narrative is simply incorrect. Jordan's March 28 note verbale was an effort to engage with the Court.

Curiously, the Prosecution appears to think it would have been better for Jordan to be less clear about what it thought the legal position was. But in our view, being clear

about what you think the law is is precisely the starting point for engaging in a consultation as to whether you are correct or incorrect in your assessment. If there was some defect in the way in which Jordan went about its consultations, we would submit it's not of our making. Article 97 contains none of the requirements that the Prosecution it now trying to impose on us. It simply provides that a State Party shall consult without delay, and we believe that that's what we did once the problem presented itself.

The Prosecution has also tried to argue that we knew as far back as 2009 that we had this obligation to arrest and surrender based on the issuance of the arrest warrants, but there's nothing in those decisions on the arrest warrants, either in 2009 or in 2010, that's speaking to the issue of immunity let alone in the context of foreign criminal jurisdiction immunity. So we simply don't accept it as a factual matter one can point to that.

Ultimately, ultimately, Mr President, it has to be borne in mind that the basic position, legal position advanced by Jordan in its note verbale, which is that immunity exists for a Head of State that is not implicitly lifted by the Security Council, that position is accepted by the Pre-Trial Chamber below. They have accepted that this idea of implicit waiver is incorrect. They have accepted the position that Jordan took in March. They have gone on to identify a different legal theory, but the position that was expressed by Jordan is one that the Pre-Trial Chamber itself accepts, and therefore we would submit it can't be said that we've acted in bad faith based on the conduct in March.

So in sum we were operating in good faith and it was an error of fact to say otherwise.

PRESIDING JUDGE EBOE-OSUJI: [11:15:47] Are you saying then that the theory, that the ultimate theory that was settled upon in the decision was not canvassed or

explained to Jordan in the process of the consultation?

MR MURPHY: [11:16:07] Certainly that theory was never explained to Jordan in the consultations for two reasons. Nothing was explained to Jordan by the Pre-Trial Chamber in these consultations. There was no comeback from the Pre-Trial Chamber. Moreover, the Pre-Trial Chamber only attaches to the current theory months after the visit. In July of 2017 in the decision on South Africa that's where the current theory is articulated. As of mid-March the current theory doesn't exist. We would also submit that this first reason being offered up by the Pre-Trial Chamber in its paragraph 53 was an error of law. And why is that? You cannot refer a State based simply on the fact of non-compliance. The Appeals Chamber has stated non-compliance standing alone does not result in an automatic referral. Again, in item 5 of your Judges' folder at paragraph 49 you'll see that quite clearly being stated. For the Pre-Trial Chamber to proceed on that basis essentially, we submit, is a manifest error of the law.

And we think Article 87(7) of the Rome Statute is quite clear about this. In interpreting that provision the Appeals Chamber, and here I'll direct you to paragraph 51 of what's in item 5, the Appeals Chamber has said "the object and purpose of Article 87(7) of the Statute is to foster cooperation", foster cooperation, and a referral to the Assembly of States Parties or the Security Council, and here I quote again, "was not intended to be the standard response to each instance of non-compliance, but only one that may be sought when the Chamber concludes that this is the most effective way of obtaining cooperation in the concrete circumstances at hand." Instead, when you look at paragraph 53, there's no discussion about what it is about the concrete circumstances at hand that would require a referral in order to bring about or induce Jordanian cooperation.

And the Pre-Trial Chamber itself in the South Africa decision acknowledged that it should be considering whether engaging the external actor would, in the circumstances of the case, be an effective way to obtain cooperation. We've included that at item 7 in your Judges' folder. It's paragraph 135 of the South Africa decision. But at the end of the day we feel that that reason was an automatic referral and, consequently, a manifest error of law.

Let me turn to the second reason that the Chamber gave which had something to do with its dealings with South Africa. Here too errors of fact, errors of law. Errors of fact, as a matter of fact, the Chamber had not as of March 2017 expressed in unequivocal terms to Jordan that South Africa had failed to comply with its obligations under the Rome Statute.

Now, take just what was going on in the South Africa context, as of March 2017, the Pre-Trial Chamber is convening a hearing --

THE COURT OFFICER: [11:19:46] Counsel has five minutes.

MR MURPHY: [11:19:48] Five minutes, thank you.

-- is convening a hearing with respect to South Africa. And it's only later in July of 2017 that the Chamber finds that it has been unequivocally established that South Africa must arrest Omar Al-Bashir and surrender him to the Court. So in our view, even vis-à-vis South Africa there hadn't been an unequivocal expression as to the circumstances of the legality or illegality of the failure to arrest.

Moreover, and this is perhaps even more salient, they never communicate any of this to Jordan. Right. Jordan is supposed to just be aware of things that are happening in the South Africa context. In fact, when you look at the footnotes in the December 2017 decision we're supposed to be aware of transcripts of a meeting between the Pre-Trial Chamber and South Africa, a transcript that was actually

confidential for an entire year before it's made public. So it's very strange to think that this was somehow communicated through to Jordan. Also an error of law in that the Pre-Trial Chamber does not explain why dealings with South Africa have any relevance with respect to Jordan. It's quite clear from your jurisprudence that you are not supposed to be taking the circumstances relating to one State Party and transposing it to another State Party. These are all factually dependent circumstances and one shouldn't immediately draw a precedent from one to the other and, consequently, we would submit an error of law as well.

My time is short, Mr President. I was going to say a bit about abuse of discretion. We think that the comparison with South Africa was unfair and unreasonable. When you look at the South Africa decision there's a very lengthy discussion of why referral might or might not occur, and then a conclusion that it should not occur. There's none of that discussion with respect to Jordan, none of the issues about Jordanian law or availability of Jordanian courts, or anything. There is nothing that analyses why it is us, just a few months after South Africa, should be referred. For example, discussion in the South Africa decision about the number of Security Council meetings that didn't result in anything, therefore doesn't seem like we need to do a referral, it's not getting us anywhere. Five months later the story changes, even though nothing additional has happened at the Security Council. We should be entitled to an explanation as to why it is differential treatment is being expressed.

And then finally, failure to give weight to relevant considerations. The Chamber doesn't talk at all about our effort at consultations. They don't talk at all about these multiple legal interpretations that have been floating and whether that should be a factor to take into account as to whether Jordan should be referred. And a failure, certainly, to consider whether a referral would assist in inducing further cooperation

from Jordan.

The lack of dealing with these various considerations, in our mind, is an abuse of the Chamber's discretion, which we believe supports setting aside their decision.

There was a question (d) in the group C questions, that if I have another minute I'll try to finish up before I'm --

PRESIDING JUDGE EBOE-OSUJI: [11:23:37] You do have one minute, and four seconds.

MR MURPHY: [11:23:40] One minute. Well, you asked the question, it's question (d), what circumstances would it be desirable for a referral to be made? It's a good question.

We would submit that, you know, obviously you're talking about a State that's a State Party. The State, in our view, should be willfully refusing to engage with the Court, obstructing things, trying to do something that's antagonist, maybe not even responding to the Court. Circumstances of that kind might merit a referral, but not the circumstances that you have before you here. We think that under no scenario should it be the case that Jordan would be regarded as acting in bad faith in its relations with the Court.

PRESIDING JUDGE EBOE-OSUJI: [11:24:29] So your point being, there needs to be a finding of bad faith? You're saying it should be dependent on bad faith for referral to be made?

MR MURPHY: [11:24:39] Well, I think it's a number of different factors. But certainly that is a critical component, that if you view Jordan as acting in good faith, certainly the referral should not occur.

PRESIDING JUDGE EBOE-OSUJI: [11:24:49] Well, let's do this. Thank you very much, Mr Murphy. We will take our morning break now and then return, so we

don't break your discussion. We will adjourn and come back in 30 minutes.

THE COURT USHER: [11:25:01] All rise.

(Recess taken at 11.25 a.m.)

(Upon resuming in open session at 11:59 a.m.)

THE COURT OFFICER: [11:59:50] All rise. Please be seated.

PRESIDING JUDGE EBOE-OSUJI: [12:00:12] Thank you very much and welcome back.

Mr Murphy, I know we rose 5 minutes to 11. Did you have more to add? I know that in all these submissions there would be -- we do note that a lot of the questions posed of counsel, there necessarily would not be enough to say all that everyone would like to say on them, but we will try and do our best with the time that we have. And by the way, tomorrow, just so we know, the closing speeches, there will be more time. I think we may have doubled the time already communicated so to allow counsel more time to say more. And we will be indicating from what we already published in the original timetable, we have adjusted the time to increase it for everybody. So we will then proceed along those lines.

Now, one more thing I would like to suggest by way of just a suggestion. As we speak to this, I remember one of my old law professors in international law saying international law is law plus a large dose of common sense to it.

So I would suggest that we, especially in this part that deals with consultation, and Mr Murphy said: Look, if there is any fault, it is not of our own making. Along those lines, if there are any thoughts we may share or you may share in your submissions as to how to improve the system so we can take that into account to make the system work better, it would be welcomed to share such thoughts.

We all recognise that legal drafting is not a perfect art; it requires returning to things.

Therefore, we've worked them to see whether they could be improved, at least we can make suggestions to those who have the responsibility to improve them, the process of consultation in the things. Thank you.

So then we will now go the Prosecutor. Thank you.

MS NARAYANAN: [12:02:51] Good afternoon, your Honours. I'm Priya Narayanan for the Prosecution.

And I will now address you on some of the questions in group C, and my colleague Mr Cross will take over once I'm done.

Now specifically right upfront we'll note that the last question in group C, which is question (f), seems to be directed to the African Union, who speak after us, so with your permission we will defer our response to that to when they actually speak.

But let me turn now to the issues relevant to the referral of Jordan's non-compliance to the ASP and the Security Council. I will address question (e), that is on any Article 97(7) consultations, before question (d), relating more generally to the referral.

And of course we keep in mind, your Honours, that common sense is the key.

But first let me just make some very quick points on Mr Murphy's submissions.

Your Honours, a majority of the submissions have been briefed in writing, and we feel like we have written several hundred pages on it, but just some very key points.

Just with respect to the Prosecution's submissions and the decision itself, we don't think that this is a question of a few lines or four lines or one paragraph. But one has to read it in context and in their totality. And specifically, and since that was referred to, Prosecution filings 292 and 294, at no point did the Prosecution say that there were valid or genuine Article 97 consultations. In fact, I think we'd even use the word "alleged".

And the Prosecution has always maintained across all these filings before the

Pre-Trial Chamber and the Appeals Chamber that Jordan had an obligation and must arrest Mr Al-Bashir, that there were no legal impediments as such, and those obligations were not suspended by consultations or the request to consult.

And similarly, your Honours, on the decision as well, we don't think that one should focus on the ultimate finding, one again needs to read it in context and including the very extensive chronology that the Pre-Trial Chamber included in its decision and only some of which has been refer to.

And my last brief point upfront is on automatic referral. Now again, your Honours, much has been said about this, but as the party bringing the appeal in the Kenyatta case, we feel the need to clarify what the decision meant. What that decision stands for, and that is a response to one of the Prosecution's arguments on appeal, is that there is no automatic compliance as a matter of law. It was a question of statutory interpretation there, not a question on the facts. And then we may ask: What does that mean on the facts? All that means is that the Pre-Trial Chamber should apply its mind to the separate question of the referral. And we can see that the Pre-Trial Chamber did just that from paragraphs 51 onwards of that decision.

But let me turn now, your Honours, to try to assist you on question (e) and question (d). You ask in question (e) whether Jordan had taken any specific actions under Article 97 to consult with the Court on purported difficulties they may have faced in executing the arrest warrant.

The short answer is that Jordan took no meaningful actions relevant to Article 97.

And this is because Jordan faced no genuine difficulty that required the Court's intervention.

Now, as the record shows, the only issue that stood in the way of Jordan's execution of the arrest warrant was Jordan's own decision and choice not to do so.

And I believe, Judge Ibáñez, you may have referred to this yesterday in one of your questions.

Your Honours, there were no consultations in terms of Article 97. In fact, Jordan did not even communicate with the Court until it was asked about the visit by the Court's Registry. And even when they were so prompted, Jordan responded with considerable delay on the 24 March 2017, which was a mere five days before Mr Al-Bashir's visit to Amman on 29 March 2017.

And when Jordan did finally communicate with the Court, they did not express any difficulty in executing the arrest warrant. But to the contrary, they alluded to what was a precis of their ultimately position not to arrest Mr Al-Bashir.

This should now be on your screen, your Honours, I believe on evidence 2.

As you will see, the relevant part of Jordan's 24 March 2017 note verbale said, "Jordan adheres to its international obligations, including those the applicable rules of customary international law, while taking into account all its rights thereunder" unquote, and its response to this statement, that the Prosecution sought clarification, which of course subsequently the Prosecution withdrew once it became clear what Jordan's position was.

Jordan's first and only mention of Article 97 came very late in the day, and to be quite precise, it was on the 28 March 2017, the day before the summit began. And the Prosecution was itself officially notified of this document after working hours somewhere close to midnight. Jordan's document, the one of the 28 March, was limited to these few words, which I believe Mr Murphy has already read out, but I will do so anyway, quote, "Jordan is hereby consulting with the ICC under Article 97 of the Rome Statue of the International Criminal Court (Rome Statute) as regards the content of the arrest and surrender warrants ..." unquote.

Your Honours, the remainder of that note verbale provided little more than an outline of the legal arguments that we have heard Jordan express in their written submissions and at the hearing today to defend their decision not to arrest Mr Al-Bashir.

Put quite simply, Jordan asked no question of the Court. They identified no difficulty, no impediment to executing the request, and they relayed no uncertainty for the Court to settle. Instead, it expressed a clear legal position supporting their resolve not to execute the Court's request.

And this, your Honours, is the sum total of Jordan's interactions with the Court before Mr Al-Bashir's visit to Amman in March 2017.

Now, your Honours, Jordan argues that since Mr Al-Bashir's immunity had not been waived, this in itself was the impediment preventing it from executing the Court's request. But the Court has made it amply clear that any such immunity claimed did not bar States from proceeding with its request. And it has said so not once, but multiple times.

And it is no defence to argue that different Pre-Trial Chambers arrived at their conclusions differently. Your Honours, different judges are entitled to reason differently.

And I believe, Judge Eboe-Osuji, you may have even remarked on I think what was the first day of the hearing that this is hardly surprising. We agree. This happens routinely at courts the world over and even at this Court, when Judges reason differently in concurring opinions but they agree on the ultimate outcome.

Now, if different judges within one chamber, the same chamber, can do this, why can't two different Pre-Trial Chambers of this Court?

Whatever the routes taken by Pre-Trial Chamber I and Pre-Trial Chamber II, your Honours, what matters is that all roads lead to Rome, and in this case, the Rome

Statute. And they did. Every decision stated unambiguously that States Parties were obliged to arrest and surrender Mr Al-Bashir to the Court. And apart from Jordan, no other affected State has even appealed the outcome of these decisions, let alone challenge their reasoning.

Article 97 is not meant for the purposes of expressing a contrary position of law at odds with the Court's position at the 11th hour. If Jordan's interpretation of Article 97 is correct, then it would be open for any other State Party to negotiate with the Court on whether or not to execute its arrest warrants.

Now, this is not to say that questions of law may not be raised as potential impediments under Article 97. But when they are, they should be those that require the Court's genuine engagement and dialogue. And as my colleague Mr Cross will say, a State's reading of Article 97 should also be consistent with its obligation to fully cooperate under Article 86. And in our view, any other reading, any different reading would not be in line with the letter and spirit of Part 9 of the Statute.

Jordan's few interactions with the Court raise no questions or difficulties that fit the Article 97 framework. And unlike Jordan's suggestion, which they made in writing, for our purposes today, we do not have to consider if the consultations procedure as such was unclear. The ASP's review of Article 97 is purely procedural. But on the other hand, the plain text, the statutory text of Article 97 obliges States Parties, including Jordan, to consult without delay. This did not happen.

Let me conclude on this question. Jordan did not consult with the Court in terms of Article 97, nor did it make such a request. And even if Jordan had meant to launch an Article 97 consultation, why did it wait until the last minute? It was well known that Mr Al-Bashir was a possible attendee of the summit, which was held in March, and it was well known since January that year.

Jordan had many opportunities to communicate with the Court about the arrest warrant, if it wished to. It could have done so in 2009, when it was notified of the arrest warrant, the first one, and in 2010, when it was notified of the second arrest warrant, and it could have equally done so any time in the intervening eight years. Your Honours, Jordan could have done so when it was a member of the Security Council in 2014 and 2015, when the Prosecutor reported to that same Council on the state of the law and the situation with South Africa, a situation which, in Jordan's view, raised very many similar issues.

And Jordan was listening, since it endorsed that same Prosecutor's report before the Council. And I'd like refer you, your Honours, to the authorities in C3 on our list. And by some coincidence, I hope I'm right, it may even be that our learned friend, Mr Hmoud, was ably representing Jordan at that time in the Security Council.

And Jordan could also have communicated with the Court when it invited Mr Al-Bashir to the summit and when it was reminded of its obligation by the Registry in February 2017. But it never did. And in these circumstances, the Pre-Trial Chamber correctly described Jordan's communications with the Court as only providing an advanced notification of its noncompliance.

Your Honours, I will move to question (d) now, on whether it is still desirable for the Court to refer a non-compliant State under Article 87(7) when it is no longer -- yes, your Honours?

PRESIDING JUDGE EBOE-OSUJI: [12:18:20] Before you proceed there, either you or Mr Cross, whoever will deal with the question, to take it in stride, but do we have difficulty with the scenario, a certain dilemma, is it possible that there is a dilemma that occurs in this way:

A State Party to whom a request to arrest and surrender has been made is looking at

the request and saying, okay. It is thinking immunity, whether or not they're right - wrong or right about it doesn't really matter - but they are worried about immunity. And they are worried about being held responsible for an internationally wrongful act if they transgressed immunity.

And they come to the ICC and say: Look, the way we are looking at this thing, we do see a problem of immunity.

And ICC says: Never mind, go ahead and arrest.

And then they say: Well, when we get sued at the ICJ, you will not be there to defend us. So is it that clear cut for us to go ahead and arrest?

If we have that kind of -- do we see that problem here at all in good faith? And if we do, how do we deal with that?

It may not be a matter of anybody's fault, but it could be a matter of drafting. I don't know, but think about it. Is there something to be said that where there is such a legal question, you know, the issue is fraught with there needs to be a process of quickly and rapidly resolving the legal question, perhaps to a definitive stage, before we engage the responsibility for noncompliance.

MS NARAYANAN: [12:20:28] Your Honour, I will just very briefly say at this point - and you are right, we will probably come back to it in the course of the discussion over the next day - but very briefly, we don't necessary think that that is the issue that we are addressing quite right now because of Jordan's appeal, and just we think that it is a natural flow, Article 86, Article 97, and Article 87, and that is what the Pre-Trial Chamber's decision reflects.

But of course we will think of the bigger question and come back to you, if we may.

Your Honours, on question (d), yes, your Honours, a referral under Article 87(7) would still be desirable and necessary in the circumstances when the immediate

object of the compliance is no longer possible.

A referral may not yield instant results, but it can reap long-term rewards.

And I'd like to come back to your question, your Honour, Judge Eboe-Osuji, about whether referral is only meant for situations when there is a finding of bad faith. No, absolutely not. And we would like to show that there are very many other benefits of a referral to the ASP and the Security Council, and that is exactly why we have 87(7).

Now, and I would just like to make two key points on this. First, referrals under Article 87(7) can yield long-term rewards. And this was the case with Malawi. Following its referral to the ASP, the authorities of Malawi developed a dialogue with the president of the ASP affirming that they did not intended to repeat their non-compliance. And these dialogues bore fruit. The Government of Malawi declined to host Mr Al-Bashir at a subsequent African Union summit, leading even to the venue of that summit being changed. And similarly following several other ASP initiatives, leading to discussions at the Human Rights Council in the Universal Periodic Review, the DRC has now accepted recommendations to fully cooperate with the Court.

And as other reports of the ASP show, progress can be made through a variety of diplomatic and, you know, avenues and strategies. And I would refer your Honours to the authorities in C4 of our list. And we would just like to note that in their submissions Jordan did not address the value of an ASP referral. And no doubt the Security Council is also well placed to foster further cooperation among States. And of course, in this respect, we note that when Jordan sought suspensive effect of the decision, the referral decision, it conceded that the Security Council may indeed take action.

And regarding the Security Council, and responding to Jordan's submissions, it would be incorrect to rely on the Pre-Trial Chamber's statement in the South Africa decision in paragraph 138 to devalue the referral in this case. The decision to refer cannot depend on whether the Security Council meetings have yielded any tangible results so far, and to do so would be to put the cart before the horse.

And here we also must note that, within the Security Council itself, the States such as New Zealand that have supported a reform of the response that the Council has to non-cooperation and non-compliance, and this has been supported by Sweden, Uruguay, Senegal, and France. But in any event, the Security Council's perceived inaction was not decisive in the decision not to refer South Africa. There were several other factors that the Chamber relied on and, crucially, due to South Africa's comprehensive national proceedings, the government accepted its obligation to cooperate with the Court. This made the difference, your Honours. And, naturally, in such a case we can say that the ASP and the Security Council need not be further engaged. But Jordan's case is obviously different. It has neither accepted its obligation to cooperate with the Court nor are there any national proceedings of any note.

And turning to my second and final point --

THE COURT OFFICER: [12:25:19] Counsel has five more minutes.

MS NARAYANAN: [12:25:24] Yes. Thank you.

We have said that Article 87(7) referral proceedings are not intended for any instant or quick fix solutions, and this is not also the benchmark against which such referrals are measured. One must take a long-term view, and this is why it is a judicial determination. A non-compliance proceeding being a judicial one, requires the Chambers of this Court to hear the State concerned, as we are doing right now, and to

make careful factual and legal determinations as the ones that the Pre-Trial Chamber made in this case.

The referral is also not an end in itself. It is only a means to the end. It is for the ASP as the guardian of the Rome Statute, and the Security Council as the guardian of the specific situation referred, to devise strategies tailored to each situation of non-compliance.

So one can say it is inherent in these proceedings that they will take some time. And this, your Honours, is precisely the judicial wisdom that has been reflected in every Article 87(7) referral decision that this court has taken, whether it concerns matters of execution of arrest warrants or otherwise, as we have seen in Kenya.

And this brings me just to my conclusion on question (d). Article 87(7) of the Statute necessarily requires the Court and you, your Honours, to take a long view. And there is wisdom in doing so. The Court has no police force of its own and it depends in a very significant way on State cooperation.

Article 87(7) makes certain political and diplomatic remedies available to the Court that otherwise may not be.

And Article 87(7) is also the only statutory remedy in the face of non-compliance.

Your Honours, it is our responsibility to strengthen it, not dilute it or simply delete it.

Thank you very much. If there are a few minutes, I would like to yield the floor to Mr Cross, my colleague.

PRESIDING JUDGE EBOE-OSUJI: [12:27:48] You have two and a half minutes exactly.

MR CROSS: [12:27:54] Thank you, your Honours. I shall be very brief indeed, mindful of the time.

I had hoped to address questions (a), (b) and (c) of group C but, given the timing

position we're in, perhaps I might defer that until those questions come up, as they may, in the question session after the break. And instead I might just add one comment in light of your Honour, Judge Eboe-Osuji's comment to my co-counsel Mr Narayanan.

You asked whether States might be put in -- perhaps we even say an impossible position as a consequence of the cooperation regime of this Court. Very briefly, your Honour, we would say no, and the safeguard for that is in Article 98(1). And we have tried to stress throughout these submissions that 98(1) says that the Court will not proceed with requesting arrest, where that obligation exists, such that it puts the State in the position that you described.

There is a question, of course, as to the process by which the Court, it might be right, it might ultimately prove to be wrong. But the safeguard is in 98(1) in the first place.

PRESIDING JUDGE EBOE-OSUJI: [12:29:11] Are we not back in a loop of sorts?

MR CROSS: [12:29:13] And I was coming to that.

So the second half then, in terms of 97(c) as a matter of consultation. Obviously, 97(c) in its own terms comes after the request has already been issued, and that is in the plain wording of the provision. So we take it from that that by the time you have the 97(c) consultation, the Statute's premise is that 98(1), the Court is already satisfied that there is no problem.

Now, if the State comes along with, for example, reference to a treaty obligation which perhaps was not known to the Court; 97(c) in fact specifically refers to treaty obligations. Then in that way we can see there is some space for a dialogue then between the requested State and the Court where the requested State brings this matter to the Court's attention and says very respectfully: I'm sorry, your Honours, there may be this fact of which you are unaware, there may be this practical difficulty,

there may be something of the nature that wasn't part of the original decision.
But for 97(1) itself, we would say if you don't have something new and you just say "I disagree with the decision", that's part of 98(1)
And obviously I have to stop there. Thank you, your Honours.
PRESIDING JUDGE EBOE-OSUJI: [12:30:38] Thank you very much, Mr Cross.
So we will now move to the African Union.
MR TLADI: [12:30:49] Thank you very much, your Honours.
PRESIDING JUDGE EBOE-OSUJI: [12:30:51] You have 15 minutes.
MR TLADI: [12:30:53] We have how many minutes?
PRESIDING JUDGE EBOE-OSUJI: [12:30:56] Fifteen minutes.
MR TLADI: [12:30:57] Fifteen. Thank you very much. We will be brief.
I will give the floor over to Ambassador Negm in a few minutes to discuss the question that was specifically posed to the African Union. Our intention is not to address all the issues, particularly the issues specific to Jordan. Our intention is to address the more general issues and, unfortunately, that takes us back to some of the issues that have been raised in clusters A and B. But since the questions were asked we thought we would address them.
What I would say though, on the issues relating to I think the main issues in this cluster, is simply to say that we fully share and endorse the arguments that have been made by Jordan. And in response to the Prosecution in terms of the difference between the treatment of Jordan and South Africa, I would point out that, as someone who had been involved in the South Africa case, in fact, South Africa did not make a commitment to further cooperate. The reaction was actually a quite a negative reaction but to start processes to withdrew. I just think that that ought to be on the table and sort of thinking about the difference in the treatment.

So now I move directly to the question, and with respect to question (b) it is correct that the duty to cooperate fully in Article 86 of the Statute includes a duty to arrest and surrender. But by the express terms of Article 86 the duty to cooperate operates, and I quote, "in accordance with the provisions of this statute". The provisions of this Statute include, again, Article 98, and of course we have differences here about what precisely the implications of Article 98 would be.

I pause here to mention that the very interesting and thoughtful arguments that have been advanced by the Office of the Prosecutor, Mr Kreß, and others, concerning the implications of the "fully", really apply to Sudan -- really apply to Sudan in this instance and has no effect in the relationship between Jordan and the Sudan.

With respect to question (c), the Chamber asked about the interaction between Article 86, Article 27(2), and then operative paragraph 2 of UN Security Council resolution 1593. All that we would point out here is that there is something very important missing and, again, for some reason Article 98 is left out of that question and yet it is a very integral part of the interaction. As we see it, the interaction would be as follows, the interaction between these four sources, which would include Article 98.

So Article 86 and Article 27(2) of course address very different things. Article 86 concerns the relationship between the Court and States Parties, whereas Article 27 addresses else. Article 27 relates to the relationship between the -- and this was on its clear terms, we have had this discussion, but it is on its clear terms that addresses the relationship between the Court and the accused. No mention in Article 27(2) of the State, right. Of any State.

So Article 86 then in the context of arrest and surrender addresses simply the possible ways that an accused could be brought before the Court. But these possible ways, again, are subject to Article 98.

Now with respect to the role of operative paragraph 2 of UN Security Council resolution, this will depend. With respect to Sudan it is true, we accept, that the implications of operative paragraph 2 would be that Sudan has to fully cooperate. But again, that imposes a duty on Sudan and nobody else, and does not affect the relationship between Sudan and Jordan, so that Sudan cannot use that as a justification for violating its obligations to respect the immunities of Sudan.

As to its effect on other States, including Jordan, we would say the following: As a matter of law, operative paragraph 2 has no relationship whatsoever with Article 27. None whatsoever. As explained by Mr Jalloh in response to group B questions, operative paragraph 2 leaves intact the Rome Statute rules, including of course Article 98. I note here that one of the legal theories that have been advanced by the Office of the Prosecutor and others is that the resolution places Sudan in a position analogous to States.

I just want to point to something that has not been picked up yet. In the course of the oral pleadings, counsel for the appellant made a very compelling argument which hasn't been responded to, hasn't been responded to by the applicants, no questions have been forthcoming. The very clear language of operative paragraph 1 refers to the situation in Darfur to the Court. It does not refer Sudan, it does not refer Darfur. Right. So I think again in sort of interpreting the impact of operative paragraph 2, it is important to note this particular provision.

Now, one last point that I wish to make. Much has been made about the fact that Article 27(2) refers to immunities under both national and international law. With respect, this is really from our perspective an non-issue. It ignores that a plain reading of the language in Article 27(2) makes no reference to interstate relations or ICC State relations. It referrals only to the accused. Right.

What it also forgets is that it is possible, we seem to be assuming that it is not possible, for an accused to plead national immunities before the ICC. I don't know why that is not possible. That plea is unlikely to be successful, but it is possible, and it seems to me that the only language that that language does is to make it clear that if that's pleaded that plea would be unsuccessful.

Secondly, and I think this is even more important, it should not be forgotten that Article 21(3) of the Rome Statute does make it possible for national law to be pleaded and to be applied by the ICC.

With these brief points, I now wish to hand over to Ambassador Negm.

MS NEGM: [12:37:54] Thank you, your Honour.

As described in our submission, the African Union has taken a number of decisions and policies to promote the fight against impunity. In this part, I will only tackle mainly the practice of the AU with regard to this case and others.

This is evident in Article 4(h) of the African Union Constitutive Act. Moreover, although the Malabo Protocol is yet to enter into force, its adoption signifies the strong will of the Union to prosecute perpetrators of the most heinous crimes.

Specifically, with respect to the current issue, the African Union established the high-level panel on Darfur in 2009, led by former President of South Africa, Thabo Mbeki. This panel made a number of recommendations directed at promoting accountability for atrocities in Darfur. Recommendations of the panel have been endorsed by the African Union Peace and Security Council at its 207th meeting held on 29 October 2009 at the level of Heads of States and Government.

Upon the adoption of the said recommendations, the African Union established the high-level implementation panel. The work of the panel proceeded as recently at 2017. Its members met with the Government of Sudan to discuss the obstacles for

challenges pertaining to the endorsed recommendations in order to facilitate their speedy implementation.

Furthermore, we would like to reiterate that international regional organisations, including the African Union, usually incorporate in their host country agreements with States hosting their summits, meetings, and events a clause of guarding immunities. This clause extends immunities to all participants in any meeting, including members of organisation secretariat, representatives of Member States, observers, and it goes without saying, Heads of States and government.

Your Honour, for the African Union, I just want to clarify how this process goes for us. Any State offering to host one of our meetings, the organisation conclude a host country agreement for the specific event. This is a matter of practice. Host country agreements always contain the provision that the host State shall ensure the immunity of all participants to the meeting - This is a quotation we always have in our agreements - including the immunity from arrest or prosecution. This agreement, as executed by the international organisation and the host country constitutes an international agreement carrying obligations for each of the parties.

The fact that this host country agreement is always entered into before a State is allowed to host a meeting of the international organisation indicates that there is a State practice on the matter.

In the case of the organisation of African Unity and the African Union, this has been an ongoing practice since the establishment of the organisation in the sixties, and has never been contested by any of our Member States.

THE COURT OFFICER: [12:41:20] Counsel has five more minutes.

MS NEGM: [12:41:26] I will finish before the five minutes. This fact and this provision with regard to the immunities has never been contested by any of our

Member States or any other State hosting our AU partnership meetings.
Moreover, my office is the one concluding these agreements on behalf of the organisation, and we don't debate that element. It is fundamental in our model and we insist that it is not a privilege, but it is a right, and including it in our agreements is mere repetition to declare what customary international law stipulates in the matter.
That said, it is the submission of the African Union that the mentioned activities, save in the potential context of complementarity, have no bearings on the current proceedings, except the last part I have mentioned with regard to the immunities in order to bring it to the attention of your Honours.
I thank you.
PRESIDING JUDGE EBOE-OSUJI: [12:42:29] Thank you very much, Ambassador. So we will now, in the absence of the representative of the League of Arab States, we will begin our round of submissions from the legal scholars.
Before we do that, I need to pose my question for the OTP to think about. In his reaction, Mr Tladi said something in passing, but I'm not sure it is that small. He said that in fact South Africa did not cooperate but they took a rather extremely antagonistic position of depositing notice of withdrawal. We need to address that, in the sense that whether that is indeed what happened, if so, should they get credit for it where Jordan doesn't? That hasn't deposited such -- taken that kind of approach.
Thank you.
Now let's take the submission from Mr Kreß.
MR KREß: [12:43:54] Your Honours, in this intervention I only wish to do two things.
First, with your permission, I would like to briefly return to a very important point

which had been left pending on Tuesday, it is related group (c). Second, I wish to address two legal questions pertaining to the 1953 agreement, in conjunction with the Pact of the League of Arab States. I would also be more than happy to offer to the honourable Chamber a few observations on Article 87(7) of the ICC Statute, and on the third ground of appeal. I will not be, probably not be able to make it in this extremely brief amount of time of ten minutes, but if the Chamber deems it to be of your help, I might use the five minutes question time to make these observations.

Let me begin with the promised small addition to the important point which is still pending from our previous conversation. Our debate on the relevant customary law had made it abundantly clear how central one question is. The question, whether the execution of a request by the ICC for arrest and surrender forms part, either of the foreign criminal jurisdiction of the requested State Party, or of the international criminal jurisdiction. Jordan believes in the former alternative and, understandably, from its perspective, keeps emphasising the point in its interventions. The Prosecution and I believe in the latter alternative.

The point has been debated, and I shall of course not be wasting your Honours' time by rehearsing it. The one point which is pending is whether or not the ILC has taken a position on this point. And in view of the undeniable authority of the ILC this is important to know. Earlier in our debate, I and, as I believe others as well, understood Mr Murphy to say that the ILC has in fact taken the position Jordan prefers. I was surprised about this statement and have over the past two nights tried to review the ILC files with my humble means. The result is as follows: In her sixth report on immunity of State officials from foreign criminal jurisdiction of 12 June 2018, the special rapporteur in paragraph 43 addresses the point. This is an extremely interesting paragraph, but it is fairly long and in -- for reasons of time, I

cannot read it out within my 10 minutes. I would be very happy to do it at any moment later, if you allow me, but I want to refer very clearly the Chamber to this paragraph. To me, this paragraph not at all sounds like a position taken, let alone one in the sense Jordan prefers.

Apart from that, the record seems to suggest that the debate about our point, the very specific point I have referred to, though having begun during the 2017 session, has not yet been completed. Your Honours, it is of course perfectly possible that I have overlooked evidence to the contrary. But in that case I should be most grateful if Jordan could be kind enough to point that out to the Chamber with specific references.

Let me now turn to the 1953 agreement. I wish to make two points.

First, this agreement, the 1953 agreement does not fall under Article 98(2) of the Statute.

Second, this agreement can, and indeed it must, be interpreted in harmony with the customary International Criminal Court exception to immunity ratione personae.

I begin with Article 98(2) of the ICC Statute. And I respectfully submit again, the 1953 agreement does not fall under this provision.

As is well known, Article 98(2) has been one of the most controversial provisions of the Statute during the negotiations and thereafter.

THE COURT OFFICER: Counsel has five more minutes.

MR KREß: [12:49:14] I mentioned this to signal that this provision must be approached with extreme caution.

The 1953 agreement does not use the terms sending and receiving State and does not establish to refer, or refer to a procedure for seeking and providing consent to surrender.

More specifically, it does sound a little odd, doesn't it, to say that the State of Sudan sent President Bashir to Jordan? Sitting Heads of States, it would seem to me, are the ones who sent lower-ranking officials rather than being sent. The ordinary wording of the proceeding does therefore speak against the inclusion of the agreement under Article 98(2).

Now, Jordan criticises such insistence on the wording as, and I quote, "unsustainably restrictive reading".

I agree with Jordan that a legal text should not be interpreted unsustainably restrictive. I only wish to add the call for consistency and I invite Jordan to accept that also Article 27(2) of the Statute, and also paragraph 2 of the Security Council resolution 1593 should not be interpreted, in Jordan's word, unsustainably restrictively.

So I agree with Jordan on the point of method that the analysis of the ordinary meaning of Article 98(2) of the ICC Statute does not exhaust the matter. But what this analysis certainly does is to place a stringent burden on Jordan to demonstrate why the 1953 agreement, despite the serious difficulty with the wording, falls within the scope of Article 98(2). I fail to see that this burden has been discharged. Indeed, a contextual interpretation strongly supports the result the ordinary meaning suggests. Let me explain why. Jordan itself has been emphasising throughout these proceedings that the relevant provision of the 1953 agreement deals with the question of immunities --

PRESIDING JUDGE EBOE-OSUJI: [12:51:27] Pace, pace.

MR KREß: [12:51:30] My apologies, Mr President.

Immunity obligations are, however, addressed in paragraph 1 of Article 98.

Jordan's proposed broad interpretation of Article 98(2) therefore results in partial

conflation and duplication within Article 98 and is, therefore, something which is sound contextual interpretation should certainly seek to avoid.

I now wish to explain my second point, that the 1953 agreement should be read in parallel with customary international law. The reasons for this or the reason for this is as follows. Article 14 of the Pact of the Arab League does not explicitly mention Head of States. The key function of that article appears to be to provide certain other representatives of Member States with certain privileges and immunities which they did not enjoy under customary international law.

As Heads of States already possessed immunities ratione personae under customary international law, there was no need to deal with them.

If Article 14 is interpreted to cover them nonetheless, the content of the immunities remains to be defined by custom. According to its preamble, the 1953 agreement seeks to specify the immunities referred to in the pact and to define clearly the manner of their application. This was again important with respect to those representatives which or who did not enjoy those immunities under customary international law.

If Article 11 of this agreement is still read to cover Heads of States, it is highly implausible that a new content of that immunities compared with the already existing customary standard was hereby introduced.

It is equally highly implausible that the provision of a new conventional basis for Head of State immunity meant that its content was from now on to be construed without regard to the development of customary international law governing Head of State immunity. More in particular, it is highly implausible to assume that the conventional immunity protection for a Head of State contained in Article 11 does not leave room for a harmonisation with a customary international criminal law

exception, for this exception serves nothing less than the effective enforcement of the ius puniendi of the international community through a permanent international criminal court.

I would therefore respectfully submit that we are here confronted with a situation where customary international law, just this sentence, constitutes an essential guide to the correct interpretation of the treaty, a principle today reflected in Article 31(3)(c) of the Vienna Convention of the Law of Treaties.

Now would be the time to address the third ground of appeal, but I leave it to you whether I may.

PRESIDING JUDGE EBOE-OSUJI: [12:54:37] We will leave it there. We are out of time. Thank you very much.

We will next invite Ms Lattanzi.

MS LATTANZI: [12:55:15] (Interpretation) Thank you, Mr President, for giving me the opportunity to address the Court on group (c) questions.

The provision of Article 98(2) also represents like that of Article 98(1) an exception to the jurisdiction of the Court. But from the wording of Article 98(2) and its legislative history, it is clear that it does not fall within the category of agreements considered in this provision relating to 98(2). In fact, within the meaning of this provision, the Court cannot request the host State to arrest and surrender a person if that State is obliged by an international agreement to receive the consent of the surrendering State, unless the Court itself first obtains the cooperation of the said State.

These agreements, which derogate from the criteria of alternative jurisdictions accepted in Rome, that is the national and territorial criteria, by requiring the ad hoc consent of the national State tends to conflate the two criteria. They have a clear objective, namely, of removing the person from the national State accused by the

Court from the jurisdiction of the Court.

And they raise exceptions to the jurisdiction of the Court. In fact, these agreements do not envisage the application of the principle of complementarity, which implies that the person is compulsorily subjected to the jurisdiction of the involved State where there is application of territoriality and nationality.

In order to understand both the ratio and the interest underlying the exception to the jurisdiction of the Court, I'm sorry to say this, but it is necessary to consider the process followed in the drafting of this Statute, not only in relation to the provision of Article 98(2), but also to the preparatory work on the criteria pertaining to jurisdictions.

The provision of Article 98(2) in fact came about as a result of the interest of the United States, which, while having made a significant contribution to the elaboration of the Statute, has always expressed a certain reservation to the establishment of the ICC, out of fear that its citizens, but more so its officers, may be exposed to prosecution by the Court.

It was the United States which fought during the preparatory work to ensure that the criteria of national consideration was enshrined in the statute. But prior to that it was the national and territorial criteria that worked, but then they sought compromise at the behest of the United States to only provide for the national criterion.

But after the defeat of both attempts and after the like-minded States - the like-minded States, they won the battle for two criteria but lost that for four criteria - now after the defeat of the United States in relation to those proposals, they began a campaign, they launched an intensive campaign to enter into bilateral agreements with a number of States in relation to the above-mentioned provisions,

the preparatory work on the specific provision, therefore, then to confirm the nature of these agreements.

Now unfortunately I have to refer to this reality, which is confirmed by the statement by Mr Bolton, the statement of yesterday. So the battle of the United States to remove its officers from prosecution from the Court is still ongoing.

I am sure that the legislative history of Article 98 and of the various criteria of the jurisdiction of the Court can shed light and enable us to understand why the convention is not part of this provision. This has already been mentioned by Professor Kreß and that the language -- I'm sorry?

PRESIDING JUDGE EBOE-OSUJI: [13:01:15] You have about four minutes left, four and a half minutes.

MS LATTANZI: [13:01:17] Sorry.

PRESIDING JUDGE EBOE-OSUJI: You have about four and a half minutes.

MS LATTANZI: (Interpretation) Four minutes.

Well, all I wanted to do was to speak a little bit about these procedural matters in relation to Article 98(2). The point is that they function in the same manner as 98(1). And for purposes of interpretation, the Court has exclusive dominus. It is the Court that interprets it before seeking a request for arrest and surrender by a State.

So the possible question of international conflicts does arise in relation to those States. And therefore which State are we dealing with? Is it the State that is not a State Party to the Statute or is it a State that is not involved as a State of which the Court has made a request to arrest an accused person and to surrender such person accordingly, given that such an accused person may have been involved and in spite of the principle of presumption of innocence, that such a person may have been involved in crimes and therefore involved in a situation that has been referred by the

Security Council?

Or are we dealing with a State which under the Statute is bound pursuant to its acceptance of the jurisdiction, the ad hoc jurisdiction of 12 -- I don't remember, 12 what ... I don't exactly remember the reference. I think it's Article 12(3) maybe, but I might be mistaken.

Therefore, mindful of that provision which is under review, the Preliminary Chamber did not err in law when it forwarded a request for arrest and surrender of Mr Al-Bashir to Jordan, a State Party which under 27(2) is bound to uphold its relations with Sudan, which is a non-State Party, which in any event is also bound by Article 27(2) based on other considerations relating to the Statute.

Thank you very much.

PRESIDING JUDGE EBOE-OSUJI: [13:04:14] Thank you very much. Now we'll take submission from Mr Newton.

MR NEWTON: [13:04:25] Thank you, Mr President. May it please this Court. These have been long and contentious and swirling issues. I wish to bring in the light of our data just some clarity to the issues. And actually I hadn't planned to do this so directly, but I would like to take up the President's offer to offer some prospective suggestions, and I'll do that in a minute.

The Polish delegate at the last 27th OTP report recommended that the Council adopt a persuasive course of action with the ultimate goal, which I think everybody in this room shares, and Jordan shares and South Africa shares, of actually improving international peace and stability. That is the point.

This has been the problem throughout. And the challenge that we face is how to use these legal instruments in a way that actually enhances regional peace and security.

This is the statement from Costa Rica on 5 June 2009. He said, "This Council should

not fool itself. The damage caused by the anti-juridical conduct of the government of Sudan is neither negligible nor limited to merely legal technicalities. This Council by its tolerant attitude towards that government has contributed to eroding trust in international justice and has defended impunity."

That is a pretty hard charge in 2009. And yet here we are in 2018 with these issues squarely presented. And the data shows, which is in the record and provided to the Court, a number of trips that reflect disagreement over what the Costa Rica delegate dismissed as just legal technicalities.

Going back to Judge Bossa's question, I think it's a relevant question, a very important question, because it precisely framed the issues in a way that my good friend and colleague Claus Kreß just addressed very clearly: Are domestic States faced with these challenges in fact using their own internal domestic processes, which is what the Statute says in Article 87 and Article 59, or are they acting essentially as agents for the international community?

The problem here is, unlike the ICTY and the ICTR, that the Statute does not require that domestic law always be fully displaced, nor does it require, in fact, it specifically contemplates that other treaty obligations and other obligations flowing from customary international law or treaty law are relevant.

Mr Kreß alluded earlier to Article 97(c), and he was exactly right. It talks about States who face pre-existing treaty obligations that prevent them or, in their view, may prevent them.

The challenge here is that the patterns of travel show that referral of itself can have some political impact. The example of Malawi in 2012 was given. That's exactly the right analogy and perfectly on point. But they can also have a perverse incentive. Chad, travel to Chad has increased subsequent to referral and subsequent -- so

referral itself as an act of this core has a very unpredictable effect on actual travel. But what really matters to me, and I hope what matters to this Court and I hope what matters to the Security Council, a negligible effect on the rule of law inside Darfur and ending impunity. That's the challenge.

In that spirit, let me offer three observations which we draw from the data in terms of Security Council debates. And the reason the totality of the travel is important, of course, is it reflects State practice, as I said, but at the same time, the travel, in one sense reflects opinio juris of States and officials who say we have this right and therefore my right to immunity must be respected, that's opinio juris on the part of those States. But the travel also generates opinio juris and statements of opinio juris. In the Council debates that we have provided you will find the record is replete with examples, very concrete examples of reaction to these issues framed as opinio juris on the part of States.

Let me give you three recommendations in terms of a referral because 87(7) talks about -- it just simply uses the word "refer". It doesn't have any limitations as to the normative practical content of a referral. It simply says when States have acted contrary to the provisions of the Statute. So that's the heart of the issue.

THE COURT OFFICER: [13:09:34] Counsel has five more minutes.

MR NEWTON: [13:09:37] Oh, I thought I had like two. Good.

The heart of the issue is that there is disagreement in the international community, just as there is disagreement among the parties here as to the precise interface of domestic law, which is absolutely embedded in the Statute, and larger treaty obligations. That's the big reason why this Court, built on the foundation of a treaty, is different from the ad hoc tribunals. Because it is a treaty that operates in the context of other treaties, as envisioned by Article 97, Article 98(1), Article 98(2),

et cetera. We all know that.

The challenge is that within the international community there is vehement disagreement over how to resolve that dispute. And I would just give you as one example, there are many in the record, here is the delegation from Malaysia on 9 June 2016. It says, "We reject any measure taken against African States on the pretext that these States do not respect or assume their responsibilities under the Rome Statute or that they are not upholding Resolution 1593. We reject any measure against States that have not arrested or delivered President Al-Bashir to the ICC, especially" and here is the opinio juris part, which is reflected in other statements, "especially since African countries must respect their obligations stemming from resolutions and decisions of the African Union summit as well as the constitutive act of the African Union."

My first of these recommendations for a referral should this Court proceed with a referral. And I hope that over time this process serves to smooth out legal understandings, to incentivize compliance.

In the first place, to the extent that a referral springs from a genuine disagreement over what acts constituted compliance with the Statute or not and their relationship with the Security Council, I think, in my opinion, based on the analysis of the data is that a referral should specifically request the Security Council to take action. Not in a generic way. Here it should frame the dispute over the actions of a State, the State claims they have complied with their duties under international law, the Court and the Prosecutor feel differently, that's what a referral should do. Refer that issue to the Security Council for action. Not as a generic in and of itself.

Number two, to the extent that non-compliance or lack of full cooperation is built on treaty conflicts, we have talked in this Court about Article 103, the way to cut through

that Gordian knot is using the power of Article 103 of the UN Charter because specifically that will solve the problem. That will eliminate the treaty conflict, set up a hierarchy.

And so to the extent that there are treaty conflicts, again, the data shows that some States, perhaps acting in bad faith, other States acting in good faith, will use the rational of a treaty conflict, which in some instances may be very well permitted under international law. And other instances may not be. A referral in my view, based on the data, should specifically request the Security Council to address those treaty conflicts.

And third, to the extent that non-compliance is based on the application of domestic law, which is exactly what the Statute envisions in Article 59, a request to the custodial State. It says it will be handled in accordance with the domestic law of the State. And we have talked before about the other provisions in Article 89 that do exactly the same thing under national law. This is the heart of the conflict that my friend Mr Kreß just mentioned.

Again, the way to cut through that is with the explicit Chapter VII authority of the Security Council because, as was mentioned yesterday by Mr O'Keefe, that is the legal authority, using the Security Council authority to legally normatively impact matters which are essentially within the domestic jurisdiction of the State, in this instance a conflict of their domestic provisions with their larger international law obligations.

To my mind, that's what a referral should do, to try to move these issues forward, to try to incentivize compliance, to try to address this proliferation of travel.

We very much appreciate, this is my last sentence, we very much appreciate the ability to make these presentations, but the data itself is very instructive. That's why we have taken such care to be as complete as we possibly could be and provide that

to this Court. Thank you.

PRESIDING JUDGE EBOE-OSUJI: [13:14:51] Thank you very much. Now Mr O'Keefe.

MR O'KEEFE: [13:14:57] Mr President, your Honours, I will focus solely on one aspect of question (c) and I will attempt to do so by inadvertently insulting anyone, present, absent, living or dead.

That aspect of the question --

PRESIDING JUDGE EBOE-OSUJI: [13:15:18] Try, try very hard.

MR O'KEEFE: [13:15:18] Yes, exactly.

That question is one we've touched on before, and I approached it from a different angle before, a logical angle and I'm going to approach it from an angle of interpretation now, which is how the general stipulation in Article 86 of the Rome Statute that States Parties shall cooperate fully with the Court or perhaps more to the point how the specific stipulation in the second sentence of Article 89(1) that States Parties shall comply with requests for arrest and surrender should be understood in the light of Article 27(2) of the Statute.

My answer as foreshadowed in my oral submissions on the questions in group A is, no differently from how they should be understood on their face. That is, there is no relationship whatsoever between Article 86 and the second sentence of Article 89, on the one hand, which apply to the arrest and surrender of a person to the Court by a State Party, and Article 27(2), which applies to proceedings against a person before the Court itself only after that person has been arrested and surrendered to the Court.

Now, it is common ground that the starting point for the interpretation of Article 27(2) of the Rome Statute is the customary rules of treaty interpretation, supplemented by such uncodified canons of treaty interpretation as are generally accepted and applied

by international courts, in particular, the International Court of Justice.
One of these canons is the maxim ut res magis valeat quam pereat, the principle of effectiveness, which dictates, as we have heard throughout these proceedings, that insofar as it is possible, an interpretation must not be adopted which would render redundant words found in a treaty provision.
In the light of this maxim, it has been suggested my friend Professor Robinson and it has been implied in other questions that an interpretation of Article 27(2) which would restrict its application to proceedings before the ICC itself and not lend it an application to national proceedings for the purpose of surrender of a person to the Court would render redundant the words "under national law" found in Article 27(2).
Professor Robinson argues that it is so obviously that immunities or special procedural rules which may attach to the official capacity of a person under national law could not possibly bar the Court from exercising its jurisdiction over the person when that person is before the Court itself, that it would be absurd to suppose that the drafters of the Rome Statute would think it necessary to state this. In effect, he says, and I know he has a good sense of humour and won't mind my putting it this way, any fool has heard of the Alabama Claims principle that national law is no defence to international law. Why would the drafters bother spelling this out?
Mr President, your Honours, statutes of limitations are a phenomenon known --
PRESIDING JUDGE EBOE-OSUJI: [13:18:24] What about under international law? What does it say? What is it doing there? There is --
MR O'KEEFE: [13:18:30] Well, your Honour, there it's not allowing Head of State immunity under international law. That I'm taking as read, sure. Absolutely. Thank you. I'm focusing on national law. Sorry.
Statutes of limitation, they are a phenomenon known to national law alone. There is

no such thing under international law as a statute of limitations, no international legislature has ever enacted a statute of limitations because there is no international legislature. Nor does international law otherwise recognise a time bar to proceedings before an international criminal court.

And yet we find it stated in Article 29 of the Rome Statute that the crimes within the jurisdiction of the Court shall not be subject to any statute of limitations.

Now Article 29, like the surrounding provisions, apply to proceedings before the Court itself. No State Party to my knowledge interprets Article 29 to bar a State Party under its own law and in its own courts from subjecting the crimes within the jurisdiction of the Court to statutes of limitations. Indeed, many States Parties do precisely this, at lease when it comes to war crimes, and not infrequently also to crimes against humanity.

In short, it is acknowledged by States Parties that Article 29 applies only to proceedings before the ICC itself. Now, by parity of reasoning with immunities it ought to have been so obvious to the drafters of the Rome Statute that a statute of limitations under national law pose no bar --

THE COURT OFFICER: Five more minutes.

MR O'KEEFE: -- to proceedings before the Court itself that they would not have bothered to state this and yet Article 29 makes it clear for the avoidance of doubt, that an accused may not plead a national statute of limitations as a procedural bar to prosecution before the Court itself for the avoidance of doubt.

In Sierra Leone, an amnesty was enacted in respect of certain crimes that also fell within the jurisdiction of the Special Court for Sierra Leone. This amnesty, like all amnesties, was a creature of national law alone. In this case, Sierra Leonean law.

And yet we find it specified in Article 10 of the statute of the Special Court of Sierra

Leone that, quote, "An amnesty granted to any person falling within the jurisdiction of the Special Court in respect of the crimes referred to in Articles 2 to 4 of the present statute shall not be a bar to prosecution" meaning prosecution before the court itself. This again ought to have been too obvious to specify. This again was specified for the avoidance of doubt.

One reason why both Article 29 of the Rome Statute and Article 10 of the statute for the Special Court for Sierra Leone specify what they specify for the avoidance of doubt is that the Alabama Claims principle relies to reliance by States, not individuals, on the substantive, not procedural, defence of the insufficiency or contrary prescription of national law. It is not obvious, with respect, what implications this rejection of a substantive defence to State responsibility might have to the procedural immunity and amenability of an individual to an international criminal jurisdiction in relation to individual criminal responsibility.

As it is, I might add, the Alabama Claims principle itself in its substantive application to State responsibility, is apparently not so obvious that the drafters of Article 27 of the Vienna Convention on the Law of Treaties, and Articles 3 and 32 of the Articles on Responsibility of States for Internationally Wrongful Acts, did not think it advisable for the avoidance of doubt to spell out that national law provides no justification for failure to comply with an obligation under international law.

In other words, even when it comes to a hallowed principle of international law, of which every undergraduate student of international law ought to be aware, it has nonetheless been considered judicious drafting to preempt a possible argument based on national law.

The reality is that the statement in Article 27(2) that immunities or special procedural rules - the latter being a reference to doctrines of non-justiciability such as the

procedural act of State doctrine found in the US, the UK and many States of the Commonwealth, the non-justiciability of certain discretionary acts of a State's own executive branch, and so on - which may attach to the official capacity of a person under national law, shall not bar the Court from exercising its jurisdiction was inserted, for the avoidance of doubt, so as to make it as clear as possible that the accused sitting before the Court itself may not successfully avail themselves of the plea under the national law of their State, that the Head of State, or head of government, or perhaps any other State official, for the duration of their office enjoyed immunity from criminal jurisdiction or under that national law that certain acts of the executive branch or certain acts of foreign States may not be questioned. So to quote the Court of Cassation of Belgium, as quoted in paragraph 7 of my written submissions, Article 27(2) does not affect the availability of immunity where a person is before the national courts of a State. As the memorandum of the UN secretariat for the ILC says, it is generally recognised that Article 27 of the Statute is to be interpreted as excluding the defence of immunity before the International Criminal Court alone.

Indeed, States, to my knowledge, in their response to the memorandum of the secretariat and to the ILC's work, have not said that it affects immunity from proceedings for arrest and surrender by a State party, and this is because it does not.

PRESIDING JUDGE EBOE-OSUJI: [13:25:20] Thank you very much. And now, Mr Robinson.

MR RONINSON: [13:25:32] Thank you very much.

I am going to continue my tradition of restricting myself to fewer minutes than I am allotted. I am going to focus on three points, and I am only going to take about six minutes.

As you know, I'm representing a group of scholars and our main message is that the Pre-Trial Chamber's analysis on the substantive law was exactly correct and should be affirmed.

But as for the remedy, we think there is reasons in the circumstances why it is unnecessary to refer Jordan, and we think that the most helpful thing would just simply be for the Appeals Chamber to clarify the law for States Parties in the future.

I have one point -- actually, it is now two, thanks to the helpful thought by Roger O'Keefe on obligation to cooperate.

I won't repeat the points I have made earlier because I feel like the Bench has wonderfully understood our position. The Council use the same technique it has used in the past; it ordered full cooperation with an instrument that removes immunity. And indeed as Judge Bossa rightly pointed out, here it is even clearer because there is Article 27(2) removing any doubt about personal immunity.

I just want to address one counterargument that has been made by Jordan and the African Union. They point out: Well, the ICC Statute is different because the ICC Statute has Article 98. And I just want to point out that Article 98 only matters where the third State has an immunity opposable to the ICC. It protects, Article 98 protects States whose immunities have not been relinquished. Sudan has lost its immunities. The Security Council has removed Sudan's immunities against ICC warrants. Now, importantly, again, I think we all seem to agree that Article 27(2) has horizontal effect between States Parties. And I think it's the same thing, the obligation to cooperate fully equally applies to, one, States Parties; two, States who have made an Article 12(3) declaration; and, above all, States who have the obligation imposed on them under Chapter VII.

The second thought is on statute of limitations. I thank Roger because I think he has

wonderfully made exactly my point. He asked why is the statute of limitations provision in the Statute when it can't possibly be raised in the ICC courtroom? I think that is a fantastic point. Why is it there? It is there because part 3 informs Part 9. It's there because a national court can't raise the statute of limitations during a surrender proceedings. So I think that is a wonderful point and I thank him for that.

Sorry, just to make sure you are connecting the dots, so therefore, just like Article 27, Article 29, all of part 3 informs the entire Statute, including the surrender proceedings.

Second point on the 1953 convention. I have already noted some options the last time I spoke. One possibility, the Court might consider this argument Belgium made in an amicus that would preserve immunities for international organisations. A second one we suggested was the Chamber could indicated that there is space for a rule of procedure.

But since the President asked about possible improvements to the consultation mechanism, I did have a favoured recommendation that I didn't quite dare suggest, but I will at least float it to the Bench in case you might consider it. You could take note that the States Parties and the UN have showed a lot of concern about, "essential contacts". There is a recurring theme in a lot of resolutions. So it would, in my opinion, be open to the Chamber, if you are thinking about the consultation mechanism, to say States could consult the Court if they do so in a timely manner about what they see as an essential contact. I don't know if you would consider that too adventurous for the judicial role, but just float that possibility to you. Finally, my third point, the referral of Jordan. I want to clarify something about our brief. Our brief was quoted by both the Prosecution and by Jordan as saying that there is no violation to refer. I want to clarify that what we said was, if - I want to underscore

the word "if", two letters, but a very important two letters - if the Appeals Chamber were to adopt this Belgium argument, then there would be no violation to refer. But that is a pretty big if in that context.

However, even assuming that there were a violation, we do think there are reasons not to agree. I was convinced in response to question (d) yes, of course it can still be worthwhile to refer a State even though the person has left their territory. So I think that is correct. But there are some circumstances here warranting restraint.

Arguably you could say, I think, that there was an error of fact and law -- five minutes? Yes. Sweet. Great. Arguably you could say there was an error of fact and law when the Court said that Jordan had taken a clear position, as if Jordan was being defiant, which was not necessarily the case. Arguably there is an error of fact and law when the Pre-Trial Chamber said that they had given an unequivocal message already to Jordan, because really the clarification of the South Africa decision came out later. And I think it would be -- it would show judicial restraint to acknowledge that there is an intense controversy here, there is plausible criticisms, there was an aura of legal uncertainty, that arresting a foreign Head of State is a momentous action. I myself worked for 10 years as a legal officer for a government, and we would want the most extreme legal clarity before we took such a step. So there are reasons to show sensitivity and judicial virtue of restraint. And the remedy here from the Chamber might just be to clarify the law for States Parties for the future.

Unless there is any questions, I am finished there in six minutes.

PRESIDING JUDGE EBOE-OSUJI: [13:31:56] Thank you very much. We still have some time to our lunch break time.

And now, in the absence of more speakers from the scholarly amici, we will return to the Prosecutor.

MS NARAYANAN: [13:32:28] Your Honours, I apologise in advance, and if is not too inconvenient, may we respond after the lunch break? It is just that this set of issues have thrown up a lot for us to think about it, and to make best use of our five minutes I think we would probably need to consult a little bit, but only if it, of course, it suits you.

PRESIDING JUDGE EBOE-OSUJI: [13:32:48] We will take our lunch break now then and we will come back --

MS NARAYANAN: [13:32:52] Thank you.

PRESIDING JUDGE EBOE-OSUJI: [13:32:54] -- at three.

THE COURT OFFICER: [13:32:57] All rise.

(Recess taken at 1.32 p.m.)

(Upon resuming in open session at 3.02 p.m.)

THE COURT USHER: [15:02:44] All rise.

Please be seated.

PRESIDING JUDGE EBOE-OSUJI: [15:03:11] Welcome back, everyone.

We will now continue with the submissions. But for tomorrow, just some housekeeping matters. I indicated earlier that tomorrow for purposes of the closing or round-up remarks, time has been added. So let's announce that for now and see whether we need more time. We hope to finish by lunch break tomorrow.

For now we will say Jordan would have 60 minutes of round-up time tomorrow, so does the Prosecution. And the AU would have 40 minutes and the legal scholars would have 25 minutes each for round-up remarks.

And we hope we can say all that needs to be said, I say that advisedly, within all that time, and we'll see whether we will need to extend any time, if we need to.

Yes, Ambassador Hmoud.

MR HMOUD: Your Honours, thank you. Is it going to be the same sequence that's described in your earlier circular?

PRESIDING JUDGE EBOE-OSUJI: [15:04:45] Yes.

MR HMOUD: [15:04:47] Thank you.

PRESIDING JUDGE EBOE-OSUJI: [15:04:48] The only thing that changes is the time, but the sequence remains. Thank you.

Now we will, it's your turn, Prosecutor, to respond, right? Yes, please.

MS NARAYANAN: [15:05:04] Thank you very much. And thank you for the time before the break as well.

Your Honours, I think we'll just use these five minutes to make what I hope will be three quick points.

First, I think, your Honour Judge Eboe-Osuji, I'd like to try to address your question regarding the South Africa situation. Of course, when I was speaking earlier, and thank you, Mr Tladi, but I was referring to the South African decision, the findings in that decision at paragraph 136. But of course we are aware that things did -- other things happened.

Now, if the question is if South Africa's actions towards withdrawal affects its non-referral in that sense, then I think we would see it as two separate questions. Now, it's one thing what a State does when it is within the fold of the Rome Statute, when it's a State Party, and there there is a duty to fully cooperate and under Article 86 and everything else in Part 9, and so it's assessed on that basis.

But we see it as a somewhat separate question on a State exercising what perhaps is a sovereign right to withdraw from a treaty. Now it's unfortunate but --

PRESIDING JUDGE EBOE-OSUJI: [15:06:24] That's not, that's not the -- maybe we misunderstand each other. The orientation of the question, my question is this, in

the decision, and Jordan is asking on what basis would South Africa be given all the reprieve and not they, and the reprieve we're talking about, a number of things, considerations taken into account by the Pre-Trial Chamber and that included that South Africa indicated they were in a mood of cooperating more, something to that effect, and Mr Tladi said, well, we're not quite sure because South Africa was not in the mood of cooperating as much as indicated in the Pre-Trial Chamber decision.

MS NARAYANAN: [15:07:24] Yes, okay.

PRESIDING JUDGE EBOE-OSUJI: [15:07:25] And The question then becomes this: All right, if South Africa was not in the cooperating mood to the extent of indicating withdrawal, is it then fair to Jordan, who did not act in that way, is it fair to them to not receive the same kind of reprieve that South Africa received?

MS NARAYANAN: [15:07:52] Yes, your Honours. And I think I was trying to come to that. Now, we don't see the question of South Africa's non-referral and its subsequent actions as being anything particularly connected to Jordan's referral. And we've said that quite a few times and I believe this --

PRESIDING JUDGE EBOE-OSUJI: [15:08:11] But there was distinguishment made --

MS NARAYANAN: [15:08:15] I'm sorry?

PRESIDING JUDGE EBOE-OSUJI: [15:08:17] There was a distinguishment, some exercise in distinguishment was made in the Pre-Trial Chamber decision differentiating why South Africa wasn't referred, but Jordan is referred.

MS NARAYANAN: [15:08:34] I think, your Honours, it's referring to paragraph 54. Now, of course, your Honours, perhaps that paragraph could have been written somewhat differently, but we don't get any other sense from that paragraph, except that they were talking about position of law, your Honours. We're talking about the fact that a State Party cannot suspend its obligations unilaterally and that

consultations do not have that effect. And of course we've addressed that point earlier, so I won't do that.

We don't particularly see any factual comparison between South Africa and Jordan. And even if, and this we would not concede really, but even if you were, somebody were to see it that way, there are plenty of other factors in the decision which, you know, we've been through already, which reflect the Pre-Trial Chamber's thinking about why they think perhaps Jordan should be referred.

And I think this would be a good time to emphasise, your Honours, that the referral has many purposes, and the referral in this case was value neutral. We can see that quite clearly from the last paragraph as well as the previous analysis, where they essentially say, well, the Court is a judicial body. This is what we've done.

PRESIDING JUDGE EBOE-OSUJI: [15:09:51] And it returns to the question, doesn't it, would that value neutrality, why didn't it apply to South Africa?

MS NARAYANAN: [15:09:59] Well, but, your Honours, that's for the purpose of the South Africa decision which, as I understand, is not under appeal here. Now, that's a different question altogether I think about the South Africa decision.

PRESIDING JUDGE EBOE-OSUJI: [15:10:13] It's not under appeal as such as much as that it was referred to in the Pre-Trial Chamber decision contrasting that situation.

MS NARAYANAN: [15:10:22] Yes.

PRESIDING JUDGE EBOE-OSUJI: [15:10:22] The Pre-Trial Chamber decision in relation to Jordan.

MS NARAYANAN: [15:10:26] Yes, yes.

PRESIDING JUDGE EBOE-OSUJI: [15:10:27] South Africa was referred to. And Jordan has said that distinction ought not have been made. It has always been their contention.

MS NARAYANAN: [15:10:36] Yes. And I think if I wasn't clear before, I think we were saying that that distinction on a factual basis was not made. If at all they refer to South Africa, it was only in the context of the legal principles which are anyway universal. It's got nothing do with South Africa's non-referral or referral or Jordan's referral. So that's how we read that.

Your Honours, while we're talking about referrals and value neutrality, perhaps this is a good point for me to address Mr Robinson's helpful suggestions. We wanted to do it previously, but perhaps this a good time.

Now, your Honours, about the concept of exercising restraint about a referral, we don't actually see why that should be an issue, given that the Pre-Trial Chamber saw this referral as something that would advance cooperation. And for this, I think I must refer to Mr Kreß's very helpful chapter in, of course, the famous "Commentary", Triffterer, where he makes the point that the State's failure to cooperate, and it's at the non-compliance level that obligations are incurred for the purposes of 87. So in that sense, a referral is not really connected to incurring obligations, and of course I wouldn't want to speak for him any more.

So we really don't see the concept of restraint as necessarily holding back a referral that would advance cooperation in all the many ways that the ASP and the Security Council can do. But then this, perhaps, brings me to the point of the conference, high conference, intergovernmental conference exception, and it may tie-in perhaps to your question earlier about that.

Now, we did listen with a lot of interest at the very thoughtful submissions of Mr Robinson on the need perhaps to introduce such an exception. But what is clear to us is that that proposal can't apply to the facts of this case. Jordan has never really relied on such a policy, and as you see, the note verbales speak about grounds of law,

customary international law, Article 98, all the discussion that we've had. And also I think, if I recall the discussions yesterday from both Jordan and the League of Arab States, there seems to be consensus perhaps unusually that the referral of non-compliance should be addressed to the facts of this case.

But still, considering that suggestion --

PRESIDING JUDGE EBOE-OSUJI: [15:13:18] You're out of time.

MS NARAYANAN: [15:13:19] Shall I address it later?

PRESIDING JUDGE EBOE-OSUJI: [15:13:21] Yes, you may, because there will be question time.

MS NARAYANAN: [15:13:25] Sure. Absolutely.

PRESIDING JUDGE EBOE-OSUJI: [15:13:21] And then you may refer to it at that time. Let's stick to our timetable for now.

MS NARAYANAN: [15:13:30] Yes. Thank you.

PRESIDING JUDGE EBOE-OSUJI: [15:13:31] Thank you very much.

Now Jordan.

MR MURPHY: [15:30:41] Thank you, Mr President.

Just a few comments in response to what we have heard. First of all, the OTP, the Office of the Prosecutor says that it never claimed Jordan's arguments were valid in the process that occurred in March of 2017. That's certainly true. But we don't think that's the relevant issue. The relevant issue is the Prosecution itself said Jordan has approached the Court, Jordan is seeking consultations, Jordan has a legal approach.

We need to clarify that. We need to get back to Jordan. They said that on March 24th. They said that after the March 28th note. And the Pre-Trial Chamber did nothing at all. That's the core issue that I think needs to be kept in mind.

If there is a question about did Jordan do it properly, the consultations properly, did we ask a question, was there some specific magic buzzwords we were supposed to use, the answer is no. That the Rome Statute doesn't say that.

PRESIDING JUDGE EBOE-OSUJI: [15:14:42] There you go. Isn't that the issue about immunity now, whether we have to use specific buzz words to say the effect of something.

MR MURPHY: [3:14:46] Sure. And Jordan said in its note verbale that it believed that President Al-Bashir had immunity and that that immunity is something it must abide by under its obligations under international law.

So we directly raised the issue. We were looking for a response. If there was something more we were supposed to do, it would be interesting to hear what that is.

We did put in your judges' folder as the last item, the December 2017 ASP, Assembly of States Parties, resolution that tries to clarify the consultation process. There, too, no magic words asking questions, whatever, need to be a part of this request for consultations. But what is quite clear in paragraph 4 of the resolution is the obligation upon the Court, upon the OTP to get back without undue delay once the request for consultation comes in, and that was never done.

The Office of the Prosecutor says that this isn't an issue of automatic referral. The Pre-Trial Chamber must just apply its mind to the circumstances. We submit four sentences of analysis is not applying its mind to the facts that were at issue with respect to Jordan.

If you look at the South African referral, it's pages and pages of discussion, weighing back and forth whether a referral was appropriate. In our case, it's four sentences that are extremely parsimonious.

The only thing that stood in Jordan's way was its own decision, says the Prosecution.

Well, if the issue is, could we have physically arrested a person in Jordanian territory, it's true, Jordan decided not to do that.

But the way that the consultation provisions are written in Article 97 is to clearly anticipate that if there is a legal impediment, it's proper to pursue consultations.

And in subparagraph (c), it talks about that in the context of conflict with treaties, but it's an inter alia, among other things, a conflict with treaties.

It's not exhausting the possibility of legal impediments. Jordan did have a legal impediment, both under treaties and under customary international law. The Prosecution says we waited to respond five days before the visit. Well, we were waiting for some reaction from Sudan as to whether the president was actually coming. This was an important issue, and once the visit became a real likelihood, we did approach the Court. We did explain the situation. These were complicated legal issues. Look around us this week, how many people are here trying to sort these things through? It was not easy and, I would submit, the Court itself, if there was some urgency here, waiting too close to the visit, never came back to Jordan at all. It was Jordan that initiated the response.

Most importantly perhaps, many of these issues, all of these issues really, the delay in getting back to the Court, the failure to ask a question of the Court, none of this is in the Pre-Trial Chamber's decision. So if this is the reason for the referral, the Chamber should have said as much and, at the end of the day, they didn't.

Now, the issue of there being a lot of different legal theories and the idea of all roads leading to Rome is a nice concept, but the reality is the road identified in mid-March, ultimately the decision was that doesn't lead to Rome. Ultimately, the Pre-Trial Chamber says, this implicit waiver theory from the Security Council is wrong.

Well, if it's wrong, then Jordan's position in mid-March was correct. And it may be

based on, whatever decision you reach, you'll say, "We think you didn't have it right." Fair enough. But as of mid-March, Jordan identified correctly that a particular theory was wrong, and that meant its approach may well have been right.

The Prosecution says we haven't discussed the value of the referral. We did. In our written pleadings, I believe in our oral pleadings, we don't think a referral would serve any purpose. President Al-Bashir is not in Jordan. Jordan is fully cooperating with this Court. We believe that's evidenced by the fact that we are here this week making our arguments with utmost respect to you, utmost respect to the Prosecution. We don't believe that anything was crystal clear in March 2017 and we would submit that this entire proceeding bears that out.

Last point. If the claim is being made here that a referral is needed for purposes of setting a long-term example for the well-being of the Court for putting Jordan out there as something that the rest of the world should take notice of, we submit that's an arbitrary approach, and we submit that at the end of the day, with all due respect, it's punitive in nature.

PRESIDING JUDGE EBOE-OSUJI: [15:20:08] Thank you very much.

We will now go to questions from the Bench.

I'll begin with a question to the OTP and this question is asked against a back-drop of Mr Newton's data of travels, and the question is this: Here we have all these travels going on in what appears to, to put it very diplomatically, cat-and-mouse game happening whenever travels happen. It engages the question, at least for purposes of whether a State Party who has not complied with a request to arrest and surrender, therefore, needing referral to the Security Council or the ASP. Is exercise of the Court's jurisdiction conditional on arrest and surrender, such that when that doesn't happen from a State Party, that State Party must be referred?

MS BRADY: [15:22:27] Your Honour, I think that has a simple answer, and I think the answer is yes, it does, because the Court can't exercise its jurisdiction, and that's fundamental.

PRESIDING JUDGE EBOE-OSUJI: [15:22:43] Okay. In the joint opinion of Judges Higgins, Buergenthal and Kooijmans in the Arrest Warrant case, they seem to suggest otherwise. Are they wrong saying that there are many countries in the world where accused persons can be tried without them being in the courtroom?

There is some case law from the European Court of Human Rights, for instance, that seems to say that yes, you can proceed and try an accused person if you have given notice, sufficient notice to make them come and defend themselves. If you do that trial and they show up later, you can repeat the trial if it is shown that they did not get proper notice. Is it conclusively out of the question in this Court to proceed in that way, so that we don't do a lot of cat and mouse games with accused persons and having these kinds of proceedings?

MS BRADY: [15:24:10] Your Honour, I think again it's a fairly short answer. We know there are no trials in absentia at this Court. That's very fundamental in the Statute. It was hard fought. There were countries in the Rome negotiations who wanted to have that provision. But we didn't. That was not included. But in the end what was included was Article 61, confirmation of the charges before trial. And that does allow an in absentia proceeding.

But that's as far as it would go. So I take your Honour's point that we could get to a certain level if, if that was the choice of the Prosecutor to take it to that level. But trial, no.

I don't know whether my colleague Mr Rastan wants to say something specifically about the Arrest Warrant ICJ case, but he seems to be rising.

PRESIDING JUDGE EBOE-OSUJI: [15:25:09] Yes. He may rise, but here is another angle to it. Is there a distinction between when we talk about trial in absentia some, in some jurisdictions as I understand it, the concept means different things. Are there places where trial in absentia is when you are proceeding against somebody who there is no basically linkage to jurisdiction in the first place versus somebody who is within the jurisdiction normatively speaking, but refuses to show up at the appointed time for trial? You may have a scenario, for instance, where a non-State Party person, for some reason the Court decides to go after that person, they don't show up, you proceed, versus a scenario where the person from non-State Parties is really within the jurisdiction of the Court either because they have their State -- sorry, the Security Council has made the referral giving jurisdiction. That is a scenario where there is no Security Council referral. And there is also no membership in the Rome Statute, and the Court seeks to proceed against that kind of person.

Do you see what I am getting at? They're different scenarios. Does the concept of trial in absentia and reticence to it apply differently according to those different scenarios?

MR RASTAN: [15:26:53] Just briefly on trial in absentia, then I come back to the question about jurisdiction. I believe, as Ms Brady said, the framework that we have of course is governed by the Statute and the Security Council cannot fundamentally alter the status of the regime. We've had an amendment of the rules in terms of continuous presence at trial as a result of, you're very familiar of course, the precedence that led to that. So that Rule 134 is there. But that doesn't say that the very start throughout of trial can actually occur without an initial appearance. So we understand that the current regime does not allow the full in absentia proceedings to continue.

And then the question of whether or not, and coming back to Judges Higgins, Kooijmans, and Buergenthal's opinion, whether or not we can look at this question of jurisdiction immunity sequentially.

Well, of course, in our context because the proceedings cannot progress, at least not beyond a confirmation process, without an arrest and surrender occurring, or otherwise an appearance pursuant to a summons occurring, then yes, the non-arrest or the non-surrender of persons pursuant to warrants is fundamental in allowing the proceedings to progress or not.

And this then links very briefly to your comment about Article 4(2) and functions of powers. And actually the comment made by Professor O'Keefe earlier. It does fundamentally impact on the functions and powers of the Court, because the observation was made earlier that if functions and powers in Article 87(7) is looked at, then it only relates to when the Court is exercising functions on the States' territories, investigators or judges personnel, and it doesn't extend to an ICC surrender process. But if that was the case, the functions and powers of an Article 87(7) didn't extend to ICC surrender process, then why are we even here in this hearing? Because this hearing is to determine whether or not there has been an act of non-compliance and that requires a finding that the Court's functions and powers have been frustrated. So the very reason that we're here in this proceedings is because the Court's functions and powers have, according to Pre-Trial Chamber, been frustrated through the non-arrest and surrender of Mr Al-Bashir. So it is fundamental to the way in which the statutory regime operates, we would argue.

PRESIDING JUDGE EBOE-OSUJI: [15:29:11] The distinction was made between proceeding to trial without the person versus doing confirmation hearing without a person. Again we come back to Jordan's scenario here. As I understand it, there

has not been a confirmation hearing. Would we say that Jordan's non-compliance has frustrated even the confirmation hearing to the extent that the Statute allows a confirmation hearing to take place without --(Overlapping speakers)

MR RASTAN: [15:29:47] I would merely observe the opposite. I would say that is their obligation to arrest and surrender suspended pending a hypothetical confirmation in absentia? Their obligation is triggered by the duty that's incumbent upon them as it stands at the day on which the warrant is issued, and certainly that hypothetical scenario cannot be pleaded in excuse of not meeting their obligations.

PRESIDING JUDGE EBOE-OSUJI: [15:30:12] You must say this question came out of nowhere. It's in the process of thinking about your complaints.

Another question, this is to Dr O'Keefe: In interpretation in your submissions on the purport of Article 27(2), if I understand it, you were saying that 27(2) speaks to the doctrine of non-justiciability, in other words act of State, or did I get you wrong?

MR O'KEEFE: [15:31:17] No, Mr President, you got me right, but only to a narrow extent. Because what I'm trying to point out is that Article 27(2) speaks on the one hand of immunities --

PRESIDING JUDGE EBOE-OSUJI: [15:31:28] Yes.

MR O'KEEFE: [15:31:29] -- available under international and national law, or special rules of pleading.

Now the special rules of pleading are specifically those under national law and, indeed, the reference to special rules of pleading, in fact, in a way strengthens my case. So there are certain strictly national law doctrines. For example, in the United Kingdom and a range of other places, that there are certain exercises by the executive of the royal prerogative that may not be reviewed. Certain exercises by States of sovereign powers in the realm of international affairs, the so-called Buttes

non-justiciability, that are also ruled out before the Court. So I wasn't trying to say that only such doctrines are ruled out, I'm trying to say that that is what explains the reference to not only immunities, but special rules of pleading, and those special rules of pleading are rules of national law that are also ruled out before the Court. So in other words, the Court may simply brush away the plea by a Head of State, an official, or something like that, that in being prosecuted you are calling upon the Court to judge the exercise by the royal prerogative of the government off her majesty, or something like that.

So in other words, I'm just trying to explain the full scope of Article 27(2), which goes beyond immunities.

PRESIDING JUDGE EBOE-OSUJI: [15:33:02] Yes. A lot of people have tried to make sense of Article 27(2). So what is it doing, if you have 27(1) that says what it says, what is 27(2) doing there?

And the way you've explained it, it looks like Act of State Doctrine comes under 27(2). Is it possible also to look at 27(2) from the perspective of that distinction, the famous distinction we talked about in the Arrest Warrant case, between jurisdiction speaking to substantive matter and immunity speaking to procedural matter?

MR O'KEEFE: [15:33:49] Right.

PRESIDING JUDGE EBOE-OSUJI: [15:33:50] Again we can look at it in the language of ratione materiae versus ratione personae, which, if we use those kinds of distinctions, which would one apply to 27(2)? As you see, again, this for everyone to help us make sense of 27(2).

Some may say, let me pop it directly, some may say that it goes more to the so-called procedural immunity, ratione personae, then substantive --

MR O'KEEFE: [15:34:30] Right. I get that. Okay.

Mr President, if I may, let me first clarify the second part of your question before addressing the first.

Both immunity ratione personae and immunity ratione materiae are purely procedural bars. Immunity ratione materiae is no less purely procedural than immunity ratione personae. It is simply that their scope is different and that their rationale is different.

If I may explain immunity ratione materiae, it remains a procedural immunity which prevents the exercise by one State of jurisdiction over the official of another State. But it bars that exercise only in relation to acts performed by that person in the exercise of -- in their official capacity. Okay.

But it remains a procedural bar. It is simply a narrower procedural bar than immunity ratione personae in terms of subject matter, it covers only those acts performed by the official in his or her official capacity, whereas immunity --

PRESIDING JUDGE EBOE-OSUJI: [15:35:54] But once you performed that, assuming it is -- we use that expression opposable, assuming it is cognisable that if you are acting in an official capacity you are exempt. And if that is the assumption, does there ever become a time when you will be prosecuted for that thing that you did in your official capacity?

MR O'KEEFE: [15:36:22] Right. Mr President, the simple answer is no. The time will never come. The time will never come.

PRESIDING JUDGE EBOE-OSUJI: [15:36:27] So then isn't it then substantive bar and --

MR O'KEEFE: [15:36:32] Absolutely not.

PRESIDING JUDGE EBOE-OSUJI: [15:36:33] -- ratione materiae?

MR O'KEEFE: [15:36:36] No, no, Mr President because your State could always

waive that immunity. And the fact that the State can waive the immunity proves incontrovertibly that it is purely procedural. Now don't take it from me. Take it from the European Court of Human Rights in the Al-Adsani case, the Kalogeropoulou, and every case on which it's talked about immunity ratione materiae, it stresses time and again it is a purely procedural bar.

Now --

PRESIDING JUDGE EBOE-OSUJI: [15:37:05] What then is the material one? What then is the substantive?

MR O'KEEFE: [15:37:09] Right. Well, this brings me to the first part of your question. And forgive me, this involves a slightly technical thing, but I hope to do it pretty quickly.

The term act of State is used to refer to two separate pleas. It originally at international law referred to the plea raised at Nuremberg, even though it was barred by Article 7 of the Charter.

The substantive plea that the official was not criminally responsible in the first place because he or she acted as the State, as it were. So act of State in that way as used by Hans Kelsen, Lauterpacht, and various people at the time, was used to refer to a substantive exemption from the law.

Now, that is found in Article 27(1) of the Rome Statute, which, in the same manner that Article 7 of the Nuremberg Charter did, and Article 4 of the Genocide Convention did, says that it is not a substantive defence to say that you acted as a State official. In other words, that you cannot be held criminally responsible.

Unfortunately, and this is something that is constantly having to be explained to students in at least the common law world, the same language is referred to -- is used to refer to a completely different concept, one that is one of justiciability which says

that certain subject matters cannot be considered by the Court. Now, that is different once again from immunity ratione materiae. And let me explain the difference. Immunity ratione materiae, although applying with respect to acts performed in an official capacity, serves as a bar to proceeding against the person him or herself. So it remains a procedural bar to the amenability of the person to the jurisdiction of the Court. But in respect of certain acts. The non-justiciability doctrine of act of State bars consideration of the acts themselves regardless of who the defendant or the accused may be.

So you may be prosecuting, for example, a private official -- a private individual, or indeed an official whose immunity has been waived. Let's imagine that case. An official whose immunity has been waived. Such an official would not enjoy immunity, whether ratione materiae or personae, but it is not out of the question that that official might stand before the Court and say: Okay. You have me rightly before the Court because I enjoy no immunity, but you can't adjudicate this question because it involves examining the sovereign acts of the United Kingdom government or the sovereign acts of the United States government or something like that.

Can you see the distinction? So immunity is a bar to proceeding against the person in relation to certain subject matters or in relation, when we're talking immunity ratione personae, to all subject matters while they occupy that position.

Procedural act of State prevents consideration of certain issues. Substantive act of State, Article 27(1), okay, says that you are not responsible. So substantive act of State is in Article 27(1). Procedural immunity and procedural act of State are covered by Article 27(2).

I hope that rather involved and somewhat technical analysis provides assistance to the Court, but I would be delighted to talk about one of my favourite topics which

bores most people.

PRESIDING JUDGE EBOE-OSUJI: [15:41:38] Thank you very much.

Mr Cross.

MR CROSS: [15:41:44] Your Honour, if I might interject a little on this subject. We I think would agree that focus on what is the meaning of 27(2) is the heart of this appeal, and we welcome the fact that we are now coming to look in some detail at what is the intention and effect of Article 27(2) and we agree also that reference to terms such as the significance of national law in 27(2) may well be a very relevant consideration.

Of course from the Prosecution's point of view, our primary view, as also expressed by Mr Robinson, amongst others, is that the reference to national law does indeed give the clue that 27(2) extends among other functions it may have to Part 9 matters to corporation.

Mr O'Keefe has made some valuable comments about some of the other functions that might also be read into 27(2).

And I would note that 27(2) begins in the plural. It says just to quote "Immunities" plural "or special procedural rules" plural "which may attach to the official capacity" and then it goes on.

Whether or not you can read the provision as only referring to one kind of immunity and special procedural rule or multiple immunity and special procedural rules is again a question of interpretation.

My learned friends opposite have told us during the week that the Prosecution is trying to avoid in some way an Article 31(1) interpretation of 27(2). And just to reiterate again, we are not. We welcome a 31(1) interpretation of 27(2). And in that context, we stress again that we have to combine jointly the ordinary meaning of the

terms, the context and the object and purpose.

Now, we're getting into some interesting questions here about the ordinary meaning of the terms. What is the significance of the fact that immunities and special procedural rules are in the plural? What is the significance of the reference to national law? What is the significance of whether or not this will bar the effective jurisdiction of the Court? Those are some of the questions that the ordinary meaning of the terms raise.

How do we answer those questions? Well, we also have to look at the context and we also have to look at the object and purpose.

Now, in terms of the context, one of the key considerations is the relationship between Part 3 and between Part 9. There is a question: How is the Court going to execute a request for arrest and surrender of the official of a State Party? If 27(2) does not say that State Parties may not raise the official capacity of their official as a bar to that request and surrender, then we are faced with a fundamental question about the way in which the Court will function.

To borrow Judge Cassese's analogy, the giant isn't just, at that point the ICC giant, isn't just without arms and legs, but, your Honours, we would submit it's on life support. How is this Court going to function if that basic proposition that official capacity is no bar to your trial here in these proceedings does not also mean that official capacity is no bar to being arrested in order for those proceedings to happen.

Now, again, a key question is the relationship between Part 3 and Part 9. My learned friends have said that your Honours should look at Part 9 as if it were effectively a self-contained regime and Part 3 and Article 27 as if it has nothing to do with Part 9.

We would submit that's entirely inconsistent with the approach in the Statute.

Article 86, for example, the general obligation to cooperate, not only does it say that States shall cooperate fully, and I'd like to come back at a suitable moment on what Article 86 might mean, but it also says in accordance with the provisions of this Statute. It doesn't say just in accordance with the provisions of this part. Likewise, 87(7), another of the provisions which are at the heart of these proceedings, again refers to cooperation in accordance with the Statute, not just this part. Likewise my learned friends mention that I believe Article 89(1) refers this time to this part and not this Statute. But there we think that reference can be explained by reference to the procedure in Part 9, including Article 98. But we don't think you can take from that that this is a suggestion that again Article 89 exists only in the context of Part 9, not least because Article 59, which is entirely relevant to those same questions about what to do when a State receives a request for arrest and surrender, refers to that part.

I'm not sure if there was a question, so I was just posing at that point if Judge Hofmański had a question? No. Thank you.

So for all these reasons we would say when you are looking at 27(2) you have to consider, yes, the reference to those terms in the Statute, but you also have to consider the context. You also have to consider the object and purpose.

And there may well be some tensions. There is some, sometimes some balancing which has to be done in treaty interpretation and that's exactly why 31(1) gives this tripartite test and that's exactly the approach that we're urging your Honours to take. I think probably that concludes my submissions. Thank you.

MR O'KEEFE: [15:48:03] Thank you, Mr President. And I'm sorry if my excitement got the better of me. I also have a confession. While you were speaking about referral, on the subject of which I don't really have a point of view, I was preparing

my notes for tomorrow.

My notes for tomorrow include a reproduction of the argument made at paragraphs 4 to 7 -- sorry, 4 to 6 of my --

PRESIDING JUDGE EBOE-OSUJI: [15:48:27] Can you give it to us tomorrow.

MR O'KEEFE: [15:48:29] Pardon?

PRESIDING JUDGE EBOE-OSUJI: [15:48:30] Can it wait until tomorrow?

MR O'KEEFE: [15:48:32] No, no, no, it can't. It's directly on what was asked there. However, given that I have to learn self-restraint, I will first answer the question of immunities in the plural. There is diplomatic immunity, Head of State immunity, head of government immunity, there is immunities, all of those ratione personae, immunities ratione materiae. There's lots of immunities in the same way there's lots of procedural rules. It doesn't tell us much.

I want to get to the absolute heart of what Mr Cross has just said and it's a point that hasn't come up yet and it's a point that I was going to make tomorrow.

A fundamental objection to the position that I take, the African Union takes, Jordan takes might be precisely what was said a minute ago. If Article 27(2) is incapable of applying to surrender proceedings at the national level, how is it that States Parties, as is uncontested, are not obliged to respect the immunities of the officials of other States Parties when surrendering the person?

The answer is not Article 27(2). The answer is purely and simply the unqualified terms of the second sentence of Article 89(1). Article 89(1), the obligation of surrender, makes no exception on its face for persons who would otherwise benefit under international law from immunity from foreign criminal jurisdiction and inviolability from foreign arrest.

In other words, on its face, and I'll go back to that in a minute, on its face, on its own

terms, Article 89(1), the obligation of arrest and surrender in Part 9 of the Statute requires a State Party to arrest and surrender to the Court any person the subject of a request, on its face, any person the subject of a request. There is no exception made on the face of it in relation to State officials.

In consenting to the unqualified terms of Article 89(1), a State Party accepts by the same token that each other State Party will be obliged to arrest and surrender to the Court any person of the first State Party irrespective of any immunity and inviolability from which the first party would otherwise be entitled under international law to see the person benefit.

Let me put it simply. We all sit down. We all sign something which says we have to hand over people to the Court. No exception made whatsoever in relation to all our officials. We're all therefore recognising you are going to have to hand over our people at some point if asked to do so. We're going to have to hand over your people at some point if asked to do so. Well, it looks like we all agree to that. In so accepting a State Party waives to the same extent any such immunity and inviolability.

Now, of course it might be objected, as rightly it should be objected, that this waiver is not explicit. But in relation to Article 89(1), given that it is absolutely clear from the travaux préparatoires of the Rome Statute that the States involved in the drafting which later became the States Parties understood perfectly well and accepted that the persons to whom their obligation extended under Article 89(1) included the officials of other States whose arrest and surrender was requested by the Court, I think in those circumstances, given what we know of the common understanding and the background and the uncontested acceptance that States Parties are obliged to surrender each other's officials, that we can say that that waiver is sufficiently explicit.

Now, on its face therefore Article 89(1) applies to the officials of non-States Parties. On its face you have to arrest anyone the Court asks you to arrest and that is why Article 98(1) is there, because what Article 98(1) says is that if you are on an obligation to another State in relation to the immunity of one of that State's officials, you're exempted from the obligation to surrender the person to the Court found in Article 89(1).

So let me just put it very simply for you. And Article 27(2) does not come into it at all. Article 89(1) says hand over people to the Court. Just says that, unqualified. I sign it. My friend here signs it. You sign it. We all agree. We've got to hand over everyone to the Court. I know that you've got to hand over my people, you know that I've got to hand over your people, okay.

But this creates a problem in relation to States like Sudan. We don't want to have to hand over the Head of State of Sudan. That's why we put Article 98(1) in the Statute, which says we don't have to hand over the Head of State of Sudan. Article 27(2) has not the slightest thing to do with it. It's all to do with Article 89(1).

PRESIDING JUDGE EBOE-OSUJI: [15:54:42] Does that calculation of we don't want to hand over Head of State of Sudan --

MR O'KEEFE: [15:54:50] Sure.

PRESIDING JUDGE EBOE-OSUJI: [15:54:51] -- doesn't it ignore, hasn't it ignored a critical element in this case? And that is the Head of State of Sudan comes into the story because of a resolution under Chapter VII powers of the UN Charter.

MR O'KEEFE: [15:55:10] Sorry, Mr President --

PRESIDING JUDGE EBOE-OSUJI: [15:55:11] Doesn't that make all the difference?

MR O'KEEFE: [15:55:14] Sure. When I referred to the Head of State of Sudan, sorry, I was just giving an example. I'm leaving aside Resolution 1593 here.

PRESIDING JUDGE EBOE-OSUJI: [15:55:20] Yes, but that is a critical factor --

MR O'KEEFE: [15:55:22] Yes, I know it is.

PRESIDING JUDGE EBOE-OSUJI: [15:55:23] -- because it makes all the difference between 89 and 98 --

MR O'KEEFE: [15:55:28] Sure.

PRESIDING JUDGE EBOE-OSUJI: [15:55:29] -- read just as they are.

MR O'KEEFE: [15:55:30] Sure. What I'm trying to explain is the architecture of the Statute in principle leaving aside the interaction with 1593. I'm just talking about -- let's leave the Head of State of Sudan out of it and call him or her the Head of State of Ruritania. I'm just trying to explain the interrelationship of the provisions. Article 89(1) says we've got to hand over everyone, but Article 98(1) says not if they're an official of a third State, okay, in relation to whom you owe obligations. Well, we don't owe obligations to the States Parties because we've all agreed in Article 89(1).

PRESIDING JUDGE EBOE-OSUJI: [15:56:13] Here is one question for you, and also this question, you may also respond to it, and also Jordan, the question I am going to ask now, because it goes around.

If you can briefly deal with this while you're on your feet, does that loopy conundrum we have by operation of Article 13(b), which Article 13(b) says refer -- exercise jurisdiction according to the Rome Statute, something like that. And then AU and Jordan say, well, that is good, but then that comes in 98. So we get into that loop.

Is the way to break that loop not this way, this is a question, possibility: How do you reconcile then 27 and 98? Is it possible to look at it in terms of you break that loop by saying, when you go to 98, what immunities you recognize in 98 is the remainder of immunities after you've subtracted what is cancelled out in 27? Is that one way to break that loop so that we don't get into this endless loop of 98, 13(b) and

then 98, we keep going back and forth?

MR O'KEEFE: [15:58:03] Mr President, with respect, the very same immunities implicated by Article 27 before the Court would be implicated by Article 98(1) before a national jurisdiction.

Before the Court we're talking about any immunity available under international law. Article 98(1) we're talking any availability under international law of an immunity, but only in relation to, in effect, the officials of States not party.

The very simple fact of the matter is that the Statute envisages situations in which the Court itself, were the person before it would be able to exercise jurisdiction, but because of Article 98(1), the person might not get before the Court. The Statute envisages that situation.

PRESIDING JUDGE EBOE-OSUJI: [15:59:03] Thank you very much.

Mr Tladi.

MR TLADI: [15:59:06] Thank you very much, Mr President. To answer your loop question, I think there are two problems with the loop question. One has been identified by Mr O'Keefe and that is that Article 27(2) speaks of all immunities. I think that's clear. So if you are going to do the all immunities minus what is in Article 27, then you have nothing left for Article 98. So that's the first problem.

PRESIDING JUDGE EBOE-OSUJI: [15:59:34] Are we sure about that?

MR TLADI: [15:59:36] Excuse me?

PRESIDING JUDGE EBOE-OSUJI: [15:59:37] Are you sure about when you basically removed, subtracted immunities in 27 in specific case, it leaves nothing for 98?

MR TLADI: [15:59:48] Yes. If the idea is there are certain immunities that are being considered for the purposes of Article 27 and to identify what is in Article 27 you subtract those, it's not clear to me how you identify that there are certain immunities

that are covered in Article 27 and other immunities are not covered. So what immunities would not be covered under Article 27.

PRESIDING JUDGE EBOE-OSUJI: [16:00:09] Is it a matter of the particular circumstances of a case before the Court on what immunity is in question in there, in a given set of circumstances? Once you identify that in a particular case, and then the same case is a case where somebody tries to invoke 98 and then you say, well, we have this thing in this case, once we remove it from 27, it follows that we can't have it in 98.

MR TLADI: [16:00:44] So again --

PRESIDING JUDGE EBOE-OSUJI: [16:00:46] Isn't that one way of looking at that?

MR TLADI: [16:00:48] So again the problem of course is, if we take a particular case, if there is an individual, that individual has immunity ratione personae, so you've identified that for that particular case and those particular circumstances, that's the immunity that he has. If you are going to subtract those, then there is no other immunity that's left with respect to Article 98. So you are really back to the same conundrum.

But that's only the first problem. I mean the second problem is again there is nothing, if you apply the rules of interpretation, that would justify that. So that even if it were possible to sort of have this minus, on what would it be based? What legal rule of interpretation would it be based? It's really difficult.

PRESIDING JUDGE EBOE-OSUJI: [16:01:29] But why not? Isn't it the rule of interpretation well accepted that the treaty must be read as a whole?

MR TLADI: [16:01:38] Precisely. So the treaty must be read as a whole takes you back to the rules of interpretation. What do the rules of interpretation say?

And I'm just going to look at Article 27(2) and go through but very briefly the main

elements of treaty interpretation in response to what has been said.

So the first point about the plural has already been responded to, so I won't respond to that.

And then the question of the national, again, for me it seems to be a fairly simple point. There is nothing that precludes an accused to raise whatever he wants to raise as a procedural bar. That may be wrong, but he can still raise it. The only thing that that provision seems to be saying to me is to say, well, if you raise it, we're not going to allow it. So there is no significance for this particular issue to the word "national".

So that's one issue with respect to text.

The other issue with respect to text is just look at that. It says "shall not bar the Court exercising its jurisdiction". By the way, counsel for the Prosecution said it's effective jurisdiction. It doesn't say effective jurisdiction. It speaks about shall not bar the Court from exercising its jurisdiction. There is nothing in there about States, absolutely nothing in there about States. It's only about the accused. So when we speak about the person, presumably we're talking about the accused because I can't see what other person. So it's only about the accused and the Court. So you have to read in all manner of things.

Now, with respect to context, so we will refer to Article 86 as a context, and the fact that Article 86 speaks about in accordance with the provisions of the Statute rather than in accordance with the provisions of this part. But of course it only takes you to Article 98 because it is only Article 98 in the context of immunities that is related to cooperation.

Part 3 has nothing to do with cooperation. So of course it makes sense in that context if you are thinking about --

PRESIDING JUDGE EBOE-OSUJI: [16:03:32] When you look at it that way, you agreed a moment ago that a treaty has to be read as a whole.

MR TLADI: [16:03:38] Mm-mm.

PRESIDING JUDGE EBOE-OSUJI: [16:03:39] Can you read a treaty as a whole and still have that blinkered reading of it and said we're only going to look at it in different parts?

MR TLADI: [16:03:50] The idea is not that you look at it in different parts, that's not what context means. So when we say Article 98 finds itself in Part 9, that's not to say that we are only looking at Part 9. To say but to understand the context of Article 98 you have to look at the provisions surrounding Article 98. I mean that's what a contextual reading means. Look at the provisions surrounding Article 98 and try to sort of see how the Statute as a whole works. So this idea --

PRESIDING JUDGE EBOE-OSUJI: [16:04:16] I think it says more than that, Mr Tladi, if you looked at Article, was that 31 --

MR TLADI: [16:04:23] (3).

PRESIDING JUDGE EBOE-OSUJI: [16:04:24] Is it (3) of the Vienna Convention, the one that explains what context --

MR TLADI: [16:04:30] That's (2), (2).

PRESIDING JUDGE EBOE-OSUJI: [16:04:32] 31(2), right?

MR TLADI: [16:04:33] Yes, that's right (2).

PRESIDING JUDGE EBOE-OSUJI: Never mind.

MR TLADI: It's 31(2).

PRESIDING JUDGE EBOE-OSUJI: [16:04:37] But it tells us that for purposes of context you look at the preamble to the end, and you look at the, in addition to the text, you look at the preamble, you look at annexes and what else has been done

around it. So if you can go all the way to the preamble from maybe part 10 of a treaty to look at the preamble to look what the context is, and you can look at annexes, how can you move so far but you can't look to another part of the same treaty?

MR TLADI: [16:05:08] No, no. You can look to the other part, but the idea is to try to establish how the different parts work together.

So this idea of identifying that Part 9is about cooperation tells you that the provisions that are relevant for that are in Part 9. It's not to say that every other part is irrelevant. But to understand Article 98, it's important to look at the text around Article 98.

What Article 31(2) simply says is that in addition to the preamble and the annexes, so there is a number of elements that would constitute context.

Now, we have also been referred to object and purpose. What's very interesting about object and purpose, particularly if you limit, and one, we shouldn't do this, but if you were to limit object and purpose to the fight against impunity, what is very interesting is that the DRC and the South Africa and Jordan decisions all in fact are contrary to this object and purpose because while they might in fact be contributing to arrest and surrender in the context of this particular case, in all other cases, it's actually against this.

So Article 27(2) is given a very narrow interpretation on the DRC reading. So in DRC and the South Africa and Jordan reading Article 27(2) has a very narrow reading. Article 27(2) only applies to officials of States Parties. And I want you to look at this very carefully. That's the whole basis of that decision.

So it actually has a very narrow reading. The reading that we are given, that we are proposing is actually from the perspective of object and purpose, much more satisfactory and favourable to the exercise of the jurisdiction of the Court.

So in terms of DRC and South Africa, the Court cannot even exercise jurisdiction over an official of a non-State Party unless it's in these very limited circumstances of a UN Security Council resolution. That's not justified by the text and it's contrary to the object and purpose and yet we're not actually attacking that particular interpretation. I think that's something that ought to be thought of.

One more point. We've also been told about effectiveness, right. So we've been told that this interpretation that's been advanced by Jordan and by the African Union would in fact lead to disabling the Court. But that's just simply not the case. There have been over 40 indictments, there have been over 40 individuals indicted, over 40 individuals indicted, and this interpretation does not at all contribute to the Court not being able to exercise its jurisdiction. It applies in very limited circumstances, and this is one of those limited circumstances.

PRESIDING JUDGE EBOE-OSUJI: [16:07:56] Is it enough to indict?

MR TLADI: [16:07:59] Excuse me?

PRESIDING JUDGE EBOE-OSUJI: [16:08:00] Is it enough to indict.

MR TLADI: [16:08:01] No, no. So my point is not that there have been indictments, that's not my point. My point is that to the extent to which this particular interpretation that we're advancing might limit the ability of the Court to exercise its jurisdiction is really only visible in one case, only in this particular instance.

In all other particular instance, this interpretation has no effect whatsoever on the interpretation of the Court's jurisdiction. I thank you.

PRESIDING JUDGE EBOE-OSUJI: [16:08:27] Thank you very much.

Mr Murphy.

MR MURPHY: Thank you, Mr President. We've covered a few different issues over the past half hour or so. I thought I would just touch on a few of them.

You asked the question about official capacity versus immunity and Article 27(1) and (2). And Professor O'Keefe responded to an extent on that. I think his interpretation is correct.

If it's helpful, the most recent International Law Commission discussion of that very issue appears in the 2017 annual report of the commission in Chapter VII with respect to the draft articles on crimes against humanity, and there is a draft article 6 that has commentary to it where that distinction between essentially 27(1) and 27(2) is discussed in some depth.

Professor O'Keefe also mentioned the Article 91(1) versus 98 scenario. That may well be right, and we would add to it the Article 86 general obligation to cooperate is very much expressed as in accordance with the Statute. So you do have to read the different provisions.

As I understand it, the Prosecution's theory is that 27(2) strips away immunities of officials of State Parties such that when you get to Article 98, the reason why it's there, the residual value of it is that it maintains the immunities for non-State parties and that's why we have it, if I understand their theory correctly.

One problem with the theory, other than this idea that I think Mr Tladi was capturing, that it's a very different part of the Statute and it looks like Part 9 is addressing everything holistically, so why go to 27? But separate from that, when you go to Article 98, paragraph 1 does not refer to non-State Parties. Paragraph 2 does not refer to non-State Parties.

As I indicated this morning, in this very part we do have references to States that are States Parties, States that are not a State Party. I pointed to Article 90, paragraphs 2 and 4.

And so right off the bat, the ordinary language here, the ordinary meaning of Article

98 doesn't really take you to a place that I think the Prosecution feels you have to go to make the Article 27(2) theory work.

And the last point I would add on this is there has been considerable discussion about whether Article 98, paragraph 2, applies with respect to the League treaties. We would submit that it does; that a sending State is fully to be interpreted as a situation where a State like Sudan sends its officials at whatever level to another country. We don't think there is anything unusual about that.

But what is somewhat striking in the Prosecution's at least written pleadings is that they feel very compelled to argue that paragraph 2 doesn't apply to the League treaties because of this sending-State issue. But presumably the Article 27(2) theory should also knock down any immunities operating under those Article 98(2) treaties. In other words, even a status of forces agreement between say the United Kingdom and Afghanistan, if there is any provisions in there on immunities, those presumably are struck down by this Article 27 theory. We have doubts about that as well.

We'd welcome an explanation if they think it does have that effect, because it feels like they're ignoring that and trying to instead very hard say that the League treaties don't fit paragraph 2 for some other reason.

Our view is that the Arab League treaties fit both paragraphs 1 and 2. Paragraph 1 is focusing on immunities under international law generally and the treaties speak to that; paragraph 2 talks about a situation of where you have an obligation not to surrender owed to another State under an agreement, and we submit that the Arab League treaties certainly fit that as well.

If we are correct that they would not apply their powerful Article 27(2) theory to Article 98(2), then it's a reason why the theory is probably wrong, because if it is to apply, it would have to apply to both parts of Article 98.

PRESIDING JUDGE EBOE-OSUJI: [16:13:41] Yes, I will return to Professor Lattanzi and the Prosecution, but to Mr Murphy now.

You've made this submission earlier and you've made it again about certain language that had been used in certain provisions, which we're not seeing in 98 being a clue to what it's supposed to do.

What about this consideration? There are provisions in the Rome Statute that would say, without prejudice to what is said in the other provision, this is what we're saying here. There is another series of provisions worded in that way. If the idea is to exclude 27 from 98, couldn't that kind of formulation have been used in 98(1) say, without prejudice to 27, 27(2)? This is what we are saying in 98.

MR MURPHY: Well, if I understand the question, Mr President, could they have written Article 98 or indeed other parts of Part 9 to in some fashion say either Article 27 has an effect or does not have an effect? Yes, they could have written it that way and, maybe in hindsight, here we are 20 years later, the issue is before us and it would have been helpful to know one way or the other.

But I do think when you look at Part 9 as a whole, you look at the fact that it's addressing the issue of cooperation of States with the Court, it's expressly addressing the issue of immunities. There is no issue there. It is expressly addressing foreign criminal jurisdiction, third-State jurisdiction. It's a package that, to us, seems quite apparent from the ordinary meaning of the text, the context within which it is operating.

And it's quite unusual to go out and reach for a completely different part of the Statute in a different provision that's really speaking just about this Court's jurisdiction as a means of somehow changing -- in our view, at least, changing the meaning of carefully drafted provisions in Part 9. There is nothing sloppy about this.

States were very focused on it and very conscious of what it was they were trying to do and, we think, what they were not trying to do.

PRESIDING JUDGE EBOE-OSUJI: [16:16:28] What about if a Head of State, the visiting Head of State, the visitors from Head of State of a State, a Head of State that's under indictment before the ICC whose State is a State Party to the Rome Statute goes to State B, also a member State of the Rome Statute? In light of your theory that 98 talks about a third State, including also a member State of the Rome Statute, are you saying within that kind of scenario there is immunity for that Head of State?

MR MURPHY: [4:17:06] Jordan's position is that Article 98 would apply by its terms to that. That would include presumably that the sending State, if you will, may have a Rome Statute obligation to cooperate with the Court, which would include then the waiver; but that the Court should then be dealing with the Rome Statute party, whose official is at issue, to get that waiver so that then the third, the host State, if you will, would be able to surrender the person to the Court.

PRESIDING JUDGE EBOE-OSUJI: [16:17:46] Thank you very much.

Professor Lattanzi.

MS LATTANZI: [16:17:52] (Interpretation) Thank you, Mr President. I think that the discussion is complicating matters somewhat. I'm looking at these issues from a simpler perspective, perhaps because I took part in the travaux préparatoires of the Rome Statute and I was a legal advisor to the Italian delegation at that time.

Now, given that if one applies the primary principles of the Vienna Convention, we are not in agreement and we need to look more closely at subsidiary criteria and take into account the preparatory travaux. And I do remember quite well that there is a report -- correction, a link between Article 98 and Article 27, and 98 arose out of two concerns. A number of States did not want their officials to find themselves before

the International Criminal Court and then there were states who were also concerned about the possibility of the ICC for issues having to do with reparations and victims and the like into State matters, State concerns. And this led ultimately to an agreement on Article 98 and it was decided that the wording would be a third party, not a non-State party to the Rome Statute.

Now, the problem here is, given that 98(1) represents indeed an exception to 27, but when does that exception operate? In the case of Jordan, it is clear that it operates even in dealings between States Parties and States for which there is a domestic jurisdiction and something different to ratification by the State, that is to say the decision by the Security Council and acceptance, ad hoc acceptance of jurisdiction.

The only problem that we have before us here today, well, it's not the only one, but one fundamental problem is looking at this exception to Article 98(1) and when it is operative in relation to 27, it never functions or operates. And my interpretation in light of my own experience and as a participant in the travaux préparatoires, you see, there cannot be a conflict of obligations between States Parties to the Rome Statute. There can't be a conflict of obligations because there is Article 27. So there can't be conflict between the States Parties to the Rome Statute and States that have decided to accept ad hoc jurisdiction for situations, for States that are involved in a situation that has been referred by the Security Council.

And thus, I beg your pardon, but I think that the discussion has become somewhat complicated, and there is really not any particular point in making things so complicated.

PRESIDING JUDGE EBOE-OSUJI: [16:22:46] Mr Kreß, please.

MR KREß: [16:23:00] Your Honour, I have listened with great interest to the intervention by Mr O'Keefe and, with very great respect, I have to say that I disagree

with essentially all key points he made about the relationship between Article 27 and 98.

I will not explain again why because it's all in the record and you have heard it.

What I want to point you at is one flaw, one inconsistency in his argument which has become apparent to me today while listening. We have heard Mr O'Keefe yesterday making a passionate pleading for a waiver of immunities requiring something explicit. That was a very fundamental point.

In his argument today it was almost a key point to assume that immunities can be waived implicitly, because he says, again passionately, as if all other positions would be almost nonsense, that Article 27(2) is not dealing with the cooperation context, has no relevance whatsoever for the cooperation context.

A consequence of this argument is that for the purposes of cooperation, these immunities should still be there. Now he is saying they still do not prevent them working within the context, within the relationship between two State Parties. He has said that.

So how has all of a sudden the immunity disappeared? He says, if I have understood correctly, because it is obvious from what State Parties wanted, from what was clear from the travaux préparatoires. This is no explicit waiver. It's the opposite.

And I refrain, and I do this with reservation and to save time, to make the point of my memories of the drafting history, I have been one of the drafters of Part 9. But I don't want to make this argument because whatever is not in the travaux préparatoires doesn't count. My stories doesn't count.

But that's an obvious inconsistency. It seems to me a kind of cherry-picking. One day we say it must be explicit, the most explicit we can imagine, and today we are

very generous in that respect.

Thank you.

PRESIDING JUDGE EBOE-OSUJI: [16:26:07] Thank you.

Now we will hear from the OTP, and then Mr O'Keefe is also on the speaking list.

We have to start thinking about wrapping it up.

But Mr Cross.

MR CROSS: [16:26:21] Thank you, your Honours.

And I have to say I rise with some trepidation, because it's a fast-moving conversation, and where I thought I was starting some 25 minutes ago, we've now covered a lot of territory.

First I'd start by saying I'm very grateful for the observations of Professor Lattanzi and Professor Kreß.

It would seem, at least to me, that Mr O'Keefe's argument that in fact we should be starting from 89(1) and not from 27, but nonetheless to unlock the significance of 89(1) Mr O'Keefe takes us to 98(1) in order to find out actually how we deal with this problem of immunities.

And we would agree absolutely I think that 98(1) and what role that plays in the Statute is crucial. We would say 98(1) in fact points you towards 27, but we'd agree that discerning what the drafters meant by 98(1) is very important.

We would also agree that, given the debate we are having, supplementary means of interpretation, reference to the travaux, we would also urge that consideration.

Just very quickly on I think Mr Tladi's point, that if you take the view that we would submit that in fact 27 is relevant to disapply certain kinds of immunities for States which are, for one reason or another, bound to the obligations of the Statute, that leaves little role for 98(1). We would simply say we disagree with that.

First off, 98(1) in its own terms is clear in not only applying to requests for arrest and surrender, but also other kinds of assistance under the Rome Statute. In its own terms 98(1) specifically refers to property and there, obviously, there are obvious concerns; the Court might seek property from diplomatic premises under Article 93, and then that runs into immunity problems.

There are also other sorts of requests that the Court might well be making under Article 93 which would nonetheless raise questions of immunity vis-à-vis individual persons potentially.

There is also the question which remains, and with which we agree, that 98(1) always has application for immunities which are owed to persons of States which are not in some ways subject to obligations of the Statute. So States which are not States Parties are not 12(3) States and are not subject to a UN Security Council resolution, which in some way brings them into the orbit of the Court.

So no matter which way we look at 98(1) we see 98(1) as an important procedural safeguard in the Statute. And indeed one, which as we said earlier this week, always also finds application, even in the very circumstances of this case where the Court has to consider the 98(1) question, even for States which are subject to the obligation, even if the answer then is a simple one, we say, because of 27(2).

In terms of third States therefore, Mr Murphy has mentioned a couple of times that there may have been some ambiguity in our initial written submissions about whether or not we were trying to take some complicated point about which States fell within 98(1) and which do not. I can just refer your Honours to filing 377, paragraph 27, where we took that point from Jordan and did seek to clarify our position.

The short answer is the third States, we agree, that that's all States other than the requested State. And so therefore it might be States Parties, it might be non-States

Parties, who we are talking about depends on the facts.

In terms of 98(2) - and I'll only go into this I think, with your Honours' permission, a little way for the time being - first off, yes, it is true that we do not think 98(2) is applicable to the 1953 convention, or indeed the 1945, I think, pact in this case. And that is primarily a concern for us out of, if you like, a sort of legal tidiness of mind. We see those treaties, because they relate to privileges and immunities, finding a natural home in 98(1) just because that is their subject matter and that is the notion which is in 98(1).

So for that reason, as Professor Kreß said earlier, we think it would be superfluous to put the same subject matter of treaty in two different provisions of the Statute which both lead you to essentially the same question.

So the reason why we took a somewhat hard line on saying no, we don't see those treaties in 98(2), it's because we see them as being 98(1) and we're then a little puzzled if it falls under both.

The further question which Mr Murphy has now raised, which is, well, what does 27(2) mean in the context of 98(2)? Well, of course, we didn't take that point in this appeal because we don't have a 98(2) agreement at stake here, in our view. And I have to say for my own part it's a really interesting question and I hadn't developed my own thinking a great deal until Mr Murphy mentioned it.

I do have an initial instinctive position, but in the interests of being a good member of the office, with your Honours' permission, I would prefer to share that with you tomorrow once I have had a chance to talk to my colleagues, rather than taking a position which the Office may later we have cause to regret, put it that way.

PRESIDING JUDGE EBOE-OSUJI: [16:32:19] That seems like a very wise approach.

MR CROSS: [16:32:21] Then I'm very grateful and we'll come back to that in the

morning then, your Honours. Thank you.

PRESIDING JUDGE EBOE-OSUJI: [16:32:26] Yes. Now we know that Mr O'Keefe wants the floor.

Mr O'Keefe let's do it quickly.

MR O'KEEFE: [16:32:35] Mr President, I'll try to be brief. I am a little saddened that I'm thought to be saying that my point of view is the only possible one. Quite the opposite. Quite the opposite.

My theory as to Article 89 has a weakness. Waiver has to be explicit. It goes to prove what I'm always told by my partner, by my ex-wife. I'm too nice. I'm too kind. I was trying to find some halfway house. If my halfway house falls down the answer is not 27(2). The answer is precisely what was given to us by counsel for Jordan, we must rely on explicit waiver and that explicit waiver in relation to States Parties would be ordered by, requested by the Court. Now they may not give it, in which case we're stuck. But they'd be requested by the Court.

Why do I say that? It's a simple matter of treaty interpretation. And I'll be brief.

We have been told that we have to look at context. The International Court of Justice speaks of not only the other provisions, but the overall structure of the treaty.

We've heard about the overall structure of the treaty. Part 9 is about cooperation and assistance. Part 3 is, according to this point of view, all about the Court.

We've heard about the provisions of Part 9. I want to just talk, just very briefly, read a few other provisions from Part 3 to show that Part 3 is all about the Court.

Article 25(1): "The Court shall have jurisdiction over natural persons pursuant to this Statute."

Article 26 -- these are all in Part 3: "The Court shall have no jurisdiction over any person who was under the age of 18 at the time of the alleged commission of [the]

crime."

Now they both say "the Court". They clearly have no application at the national level, because in many national criminal justice systems you can be under 18 at the time. In some criminal justice systems moral persons, corporate entities can be held responsible.

Article 22(1): "A person shall not be criminally responsible under this Statute". The only place you are criminally responsible under the Statute is in the Court. At the national level, you're criminally responsible under national law.

Perhaps giving effect to the Statute, but under national law.

Article 24(1): "No person shall be criminally responsible under this Statute for conduct prior to the entry into force of [this] Statute."

Now, we know full well that you can be criminally responsible for a war crime, genocide, crime against humanity in a national jurisdiction prior to the entry into force of the Statute. 24(1) is about being before the Court. 22(1) is about being before the Court. 25(1), "The Court shall have no jurisdiction over". All of Part 3 is about being before the Court.

And let me emphasise, Mr President, honourable members of the Court, the Rome Statute does not oblige States to enact into law the crimes within the jurisdiction of the Court. It does not oblige States to prosecute under national law the crimes within the jurisdiction of the Court. They may, and they sometimes do.

But let's take Article 25(1), individual criminal responsibility, aiding and abetting, et cetera. The vast majority of them when they do, do not give effect to Article 25(2)(a), all that sort of thing, they use their domestic principles of criminal liability.

What I am trying to tell you is that not only is Part 9 all about cooperation, but Part 3, reading the context, all the other provisions of Part 3 are about the Court. If that's

the case, why oh why would a single provision, Article 27(2), have application beyond that context?

And not only that, why would it have application in a context which is already covered by another part of the Statute?

In the International Court of Justice, my final point, in the application of the Interim Accord of 13 September 1995, the former Yugoslav Republic of Macedonia, soon to be renamed in Greece, at paragraph 97 the Court took into account what part of the accord something was in, and said this part of the accord is about this, this part of the accord is about that. And the Court said that the overall structure of the treaty must be taken into account.

So yes, we must read it as a whole, Mr President. And what the whole of the Rome Statute tells us is that Part 9 is where you talk about arresting and surrendering people to the Court, Part 3 is where you talk about what happens in the Court.

It so happens to be that the obligation of cooperation and arrest and the exception therefrom in relation to States in relation to whom you owe obligations, Article 98(1) is in Part 9 and Article 27(2) is in Part 3.

Now, unless it's the only provision of Part 3 that extends beyond the Court, then it applies only to proceedings before the Court.

PRESIDING JUDGE EBOE-OSUJI: [16:38:26] Thank you very much.

I think we -- Mr Robinson, because we've not heard from you in a long time.

MR ROBINSON: [16:38:37] And actually it's not to respond on that. I have a --

PRESIDING JUDGE EBOE-OSUJI: [16:38:40] One second, please. One second.

MR ROBINSON: [16:38:43] Sure.

(Trial Chamber confers)

PRESIDING JUDGE EBOE-OSUJI: [16:39:20] Yes, please, Mr Robinson, proceed.

MR ROBINSON: [16:39:23] Mr President, it's just a procedural comment and I'm not even sure if this is appropriate. You may have given the scholars too much time for tomorrow and I think there might be some support for that, but your goal was to finish by lunch time and I just, as I am doing the math, if there are four amicus curiae, it might be prudent to restrict us to 20 minutes just as food for thought.

MR KREß: [16:39:47] Oh, come on now.

MR ROBINSON: [16:39:49] Yes, enough professors.

PRESIDING JUDGE EBOE-OSUJI: [16:39:51] I see Mr Kreß shaking his head saying no, no, no.

You know what, you can limit yourself. You don't have to take your --

MR ROBINSON: [16:39:56] I'll limit myself to 7 minutes.

PRESIDING JUDGE EBOE-OSUJI: [16:39:58] You can actually say "I don't have anything else to say". We welcome that very much. All right.

I think we thank you very much. It goes without saying that it's been a delight receiving all these views. We very much appreciate it. We'll return tomorrow at 9.30, when we will get the round-up remarks from everyone.

So we adjourn for the day. Thank you.

THE COURT USHER: [16:40:30] All rise.

(The hearing ends in open session at 4.40 p.m.)