1 International Criminal Court
2 Appeals Chamber
3 Situation: Darfur, Sudan
4 In the case of The Prosecutor v. Omar Hassan Ahmad Al-Bashir - ICC-02/05-01/09
5 Presiding Judge President Chile Eboe-Osuji, Judge Howard Morrison,
6 Judge Piotr Hofmański, Judge Luz de Carmen Ibáñez Carranza,
7 Judge Solomy Balungi Bossa
8 Appeals Hearing - Courtroom 1
9 Friday, 14 September 2018
10 (The hearing starts in open session at 9.32 a.m.)
11 THE COURT USHER: [9:32:59] All rise.
12 The International Criminal Court is now in session.
13 Please be seated.
14 PRESIDING JUDGE EBOE-OSUJI: [9:33:30] Thank you very much.
15 Court officer, please put the case on the record.
16 THE COURT OFFICER: [9:33:35] Thank you, Mr President.
17 Good morning, your Honours.
18 The situation in Darfur, Sudan, in the case of The Prosecutor versus Omar Hassan
19 Ahmad Al-Bashir, case reference ICC-02/05-01/09.
20 For the record, your Honours, we are in open session.
21 PRESIDING JUDGE EBOE-OSUJI: [9:33:55] Thank you very much.
22 I take it appearances remain as they were in the latter part of yesterday? No.
23 MS BRADY: [9:34:01] Your Honour, there is one change in the Prosecution team, our
24 case manager Ms Carmen Garcia Ramos is not with us today. Thank you.
25 PRESIDING JUDGE EBOE-OSUJI: [9:34:09] Thank you.

1 MR ROBINSON: [9:34:11] Michael Newton is not here today either.
2 PRESIDING JUDGE EBOE-OSUJI: [9:34:18] Thank you very much.
3 And other than that, we remain as we were. Thank you.
4 We will continue. Yesterday I indicated the hope, and it was only an expression of
5 hope, was to finish before lunch time. We will see if we can manage that, but we did
6 give indication of times that we have to observe, the time that we have given you to
7 make your roundup remarks. We must take those in the indicated time, even if that
8 means going a little past lunch-time.
9 But for now, we will begin with a question that Judge Ibáñez has; we'll begin with
10 that. But again, before I call up on her, I will also tell you that at the end of the
11 process, everyone will be given 10 pages maximum, an allowance of 10 pages to make
12 any more written submissions they wish to make on something that has not been
13 submitted upon either in writing or orally that you feel important enough to inform
14 us of or brief us on. The 10 pages, for everyone to do that, within two weeks of our
15 rising.
16 That is it for housekeeping.
17 Now I will invite Judge Ibáñez for her question.
18 JUDGE IBÁÑEZ CARRANZA: [9:36:11] Thank you, Mr President.
19 The question goes to the professors especially, but if the parties want to address the
20 issue, it is good as well.
21 According to Article 97, what is the object of consultations? Is it to notify or inform
22 the Court about a difficult situation faced by a State Party that impedes the fulfilment
23 of its cooperation obligations or is it to permit the Court, after proper consultation
24 proceedings, to decide on the matter? Is it possible for the requested State to resolve
25 by itself the object of the consultation?

1 PRESIDING JUDGE EBOE-OSUJI: [9:37:15] While you think about that, while it is
2 processing in the back of the mind, there was one question that I also -- a related
3 question I believe I placed on the table yesterday where I said whether there are any
4 thoughts that may be expressed on how to improve the process. Again, as I said
5 earlier at some point, international law is law made workable by a large dose of
6 commonsense. The concern is that we must not allow that lubricant of
7 commonsense to turn into a pollutant of essential principles, but in the meantime, let's
8 think about how we can improve the consultation process.
9 I'll add that question onto Judge Ibáñez's.
10 MR KREß: Thank you very much, Mr President and your Honour for your question,
11 and I am actually pleased you raised them because having been one of the drafters of
12 those provisions, Article 97 in particular, I have of course posed the question to
13 myself, could we have done better? And I think there is one feature, which is crucial
14 and distinct when the provision of Article 97 on cooperation is applied in the context
15 of Article 98, and I think now, after having reflected a long time about this question, I
16 think one has to admit this distinctive challenge could have been addressed better.
17 Now speaking from a matter of drafting perfection, the distinctive feature is as such.
18 In the normal situation of cooperation, and this is the perspective from where we
19 drafted Article 97, consultation begins once the request has been issued. There is the
20 request and then there is consultation.
21 But now, in the context of Article 98, something is very distinct. It is at the moment
22 of the issuance of the request that Article 98 requires the Court to exercise its, and I
23 could not have stressed it enough during this week, procedural function. The
24 procedural function to look most carefully to the legal situation in place and to issue
25 the request only if this very Court is convinced that it will not place the requested

1 State in a conflict of obligations.
2 So the Court, and I guess as much as or the more this Court clarifies the legal issues,
3 the less this will be a problem, but at the early moment in time of the practice of this
4 Court, and we are still in a juvenile period, this Court may not yet be in a position of
5 all the legal elements.
6 For example, it is not obvious for a chamber sitting quietly without contact to States to
7 know about the 1953 agreement, just one example to which Jordan has referred.
8 PRESIDING JUDGE EBOE-OSUJI: [9:41:08] It can also be a Treaty of Friendship
9 we don't know about and may get in the way.
10 MR KREß: [9:41:23] I absolutely agree, I absolutely agree, Mr President. So here I
11 think what is implicit in Article 98 but which, I confess that we should have made
12 explicit in the drafting, is that the Chamber should feel very free, I would even think
13 it would be a wise course for the Pre-Trial Chamber in such a situation to approach
14 a State like Jordan and so proactively and to say, "Is there anything you would like to
15 wish us to know before we issue the request? "
16 This does not mean, and here I fully concur with the Prosecution, that there will then
17 be at this moment in time a kind of negotiation process about the law. That is
18 certainly not what those provisions require. But the Chamber should make sure at
19 the early stage that it is in full possession of the relevant legal materials as the
20 requested State sees them.
21 And one practical problem then comes into play. We are not here in a situation, this
22 Court, Prosecution, Chamber is not in the situation from a practical perspective of an
23 academic seminar, which gives the Prosecution and chamber all the time in the world
24 at this moment in time already to do a kind of hearing that we have had in this week
25 to really fully exhaust the matters from all directions.

1 It might be for the Prosecution a pressing need to go ahead, because a visit, for
2 example, of a sitting head president might only last a little while. And that's another
3 practical suggestion, this shows how useful it is to issue this arrest as early as possible
4 because this allows, even proactively for the Chamber concerned, to enter into
5 a debate with a requested State of Jordan which, as we have seen, shows
6 a constructive spirit and to see and to receive the answer: Are there any legal
7 considerations we should be aware of?
8 Of course, then it is the burden on that State to communicate, to fully and honestly
9 communicate. And if this onus is not discharged, this will fall back heavily on this
10 State.
11 But this, I think, should be considered, and that I think is precisely the gist of your
12 question in the future practice of this --
13 Yes, Mr President?
14 PRESIDING JUDGE EBOE-OSUJI: [9:44:24] Can we look at it also from the
15 perspective of the State? I mean, you say the negotiation process or the consultation
16 process should not turn into negotiation about the law. Is it as simple as that, to put
17 it that way? You heard Mr Robinson yesterday say, "Look, the matter of asking one
18 State to arrest the Head of State of another state is not a small matter."
19 So where one State views, "Look, this a big ask of us, and we are not sure that the law
20 allows us to do this", how is this supposed to work out in this consultation process?
21 MR KREß: [9:45:06] Yes. I would agree both with my learned friend and with what
22 is implicit in your question, that this space of dialogue between the Court and the
23 requested State concerned is also a moment of time not, certainly not of negotiations.
24 That's not the issue. But the moment for the Chamber, the Prosecution, to pause and
25 to reflect on -- and you mentioned the term, Mr President, the policy consideration of,

1 for example, Mr Darryl Robinson saying is this an essential contact? This key word,
2 and Mr Robinson used that word wisely and deliberately and sensitively for what has
3 actually been happening in the Assembly of States Parties. So it was not, so to speak,
4 just his invention of these words.
5 So it could give room to the Court to exercise what I would call discretion, whether
6 this is a moment where one should insist on what I believe is the law or whether it is
7 perhaps in this specific moment wiser not to do it in recognition of considerations
8 which I do not - and I will of course explain that again in my observations - which I
9 do consider as legally compelling, but which may have political merit.
10 PRESIDING JUDGE EBOE-OSUJI: [9:46:47] Thank you very much, Mr Kreß.
11 Yes, Mr Rastan.
12 MR RASTAN: [9:46:56] Thank you, your Honour.
13 I don't want to go before any of my academic colleagues, but as the question was also
14 addressed in the invitation to the parties, I just wanted to offer one or two additional
15 thoughts.
16 So certainly turning to Article 97 and paragraph (c), it is of course of general
17 application, not only to Article 98, one can imagine that these questions may also arise
18 in other contexts. So, for example, in Article 90 dealing with competing requests for
19 extradition, there may be again a situation of horizontal obligations which may be
20 necessary for the Court to be aware of.
21 And while indeed Article 97(c) can be also a vehicle for addressing those questions
22 which may be relevant for an Article 98 determination, and we don't discount that, I
23 think it is also instructive to examine how the Pre-Trial Chamber examined the
24 relationship of 97 to 98, but also to Rule 195.
25 Of course, Rule 195 is, if you like, lex specialis to 98 and consultation, because it is the

1 specific rule that was adopted to implement, to give effect to Article 98.
2 And that's why the Pre-Trial Chamber first proceeded to examine it and under that
3 heading and then came back and said, well, in any event we can also then examine 97,
4 because 97 is the provision that was notified to South Africa in the initial context and
5 in this case to Jordan.
6 So just in terms of coming back to 97, of course the context of raising consultations
7 with the Court is to identify problems which may impede or prevent the execution of
8 the request, to consult with the court without delay and, critically, in order to resolve
9 the matter. So the object is to resolve the matter one way or the other, to come to
10 a conclusion of whether or not in this case, for example, the request might need to be
11 modified, the request might have to be withdrawn, or the request could proceed or
12 should proceed in the manner as originally sent.
13 And then looking at 195, I think this is highly instructive, 195 in paragraph 1 clarifies
14 that when the requested State receives a request for surrender from the Court, and it
15 identifies a problem within the scope of Article 98, the requested State shall provide
16 any relevant information to the Court to assist the Court in the application of Article
17 1 or Article 98.
18 So the critical aspect there which the Pre-Trial Chamber emphasised in both the
19 South Africa and Jordan decisions is that, while the State of course is encouraged to
20 provide such information, fundamentally it is for the Court to apply Article 198.
21 There is no process of -- I know this is not in Jordan's submissions, but in the context
22 of South Africa, where this issue was discussed, there was a question that there was
23 a process of consultation which involves some to-and-fro and coming to some kind of
24 mediated solution and agreement or consensus or even negotiation of what the
25 obligations of South Africa might be, and of course that's not the case. It is not that

1 type of consultation. It is not a political negotiation or a negotiation over the
2 meaning of the terms between the State and the Court.
3 The State will provide the information to the Chamber, and the Chamber will then
4 apply Article 98 because, of course, Article 98 directs itself to the Court. The Court
5 may not proceed with the request.
6 And then finally on this question, indeed as Professor Kreß mentioned, of the short
7 window that may arise in the context of an opportunity to execute a request for arrest
8 and surrender. Again, this doesn't arise from the facts here, but your Honour raised
9 the question.
10 I think it is also instructive again to look at what had happened in the South Africa
11 context, where at the domestic level when seeking to execute and implement the
12 request for arrest and surrender, the initial order that was given by the domestic
13 authorities, by the domestic court, was an interim injunction barring Mr Bashir
14 leaving the territory, not to take him into custody, but to restrict his liberty only to the
15 extent of not allowing him to leave the territory until this matter was resolved.
16 And, of course, this is typically how it works in extradition practice when, for
17 example, Augusto Pinochet was prevented from leaving the United Kingdom, he was
18 not placed in custody, but he was restricted from leaving until the litigation resolved
19 itself.
20 The same thing happens quite frequently in extradition practice. Sometimes these
21 are very high profile cases, such as recently in respect of extradition requests from, for
22 example, Serbia objected to by Kosovo and so on. But this may also give an analogy
23 that is of interest to us, and in that context it is interesting to note that Article 98 only
24 says the Court may not proceed with the request for surrender. It doesn't say the
25 Court may not proceed with the request for arrest.

1 And coming back to what it says indeed in Article 89, States are under, it would
2 appear, an absolute obligation to arrest. And then maybe the Court can't proceed
3 with the rest of it until hearing what the objections are, having the consultation with
4 the relevant State and then either agreeing that the person should be allowed to
5 return back to their own territory or that they should remain, because this issue needs
6 to be resolved, or that having resolved it the person should be surrendered to the
7 Court.
8 Now, we had raised these issues in our pleadings in South Africa. The
9 Pre-Trial Chamber in its decision didn't find that to be necessary or in fact found to
10 the contrary, it found that a request for surrender that the Court cannot proceed with
11 must also include the arrest aspect of it.
12 But just to note, because it was raised here that this is one aspect that may also assist
13 in how the Court practically deals with consultations to fully ventilate them in
14 complex matters without have to necessarily be bound by the few hours where there
15 is an arrest opportunity and so on.
16 Thank you, your Honours. That's all.
17 PRESIDING JUDGE EBOE-OSUJI: [9:53:18] Would you, listening to both Mr Kreß
18 and Mr Robinson, speak on this matter, Mr Rastan. Is it possible really, you can
19 forgive the analogy, is it possible to look at this: I mean, if you looked at, when you
20 see two people who know how to dance Tango, it is a beautiful thing to see those who
21 do it well. But underlying it is all kinds of subtle communication between them:
22 Shall we go this way or not? Okay, don't go that way. If you go that way, I will not
23 go with you, that sort of thing. It is a subtle, quick thing that goes on and works out
24 very well.
25 Isn't it somehow, when it all boils down, how this thing should be played out

1 considering that analogy of the, I like to use the word "giant", but somebody put it on
2 the table, whatever it is, without legs.
3 MR RASTAN: [9:54:22] So my wife would certainly understand that analogy, being
4 Colombian, and myself not being very adept to the rhythms.
5 But for sure, to resolve the consultations, the Court and the State must understand the
6 context in which they are negotiating or sort of consulting, sorry, and the relevant
7 norms that apply. And ideally, this should be a process that can be resolved rapidly
8 indeed.
9 There is this emphasis throughout Part 9, particularly also in the provisions that we
10 discussed, that the resolution should be reached without delay.
11 And of course restricting the liberty of anybody, particularly if they should not be
12 surrendered is something that should be resolved early, even more so when the
13 stakes are so high, when we are talking about somebody enjoying Head of State
14 immunity.
15 And the Court, of course, is grappling with this issue for, let's say, the first or second
16 time in terms of a State coming back and consulting, so it is still early. But I think it
17 is relevant to go back to nonetheless the ordinary meaning of the terms "object",
18 "purpose" and "read in the context" and so on, which are very clear in terms of what is
19 the purpose of this consultation.
20 It is not a procedure to raise objections or refusals or reservations. Any information
21 that's raised is done with a purpose to resolving the matter within the procedure, the
22 dispute settlement procedure, if you like, that has been agreed to by State Parties
23 when joining the Statute.
24 And that dispute resolution mechanism foresees that it is the Chamber that will
25 decide, not the State. The State will not have the opportunity to bilaterally refuse or

1 unilaterally refuse the request, because it has a different opinion. And, again, this is
2 one of the things that was raised in the South Africa context, but that it is ultimately
3 for the Chamber to resolve that dispute, and the State has to accept the authority of
4 the Court to make that ruling.
5 Now, of course, the State can appeal it, but in the first instance the State cannot simply
6 say: Well, we have heard your decision, we have heard your call that arrest and
7 surrender must be effected, that it has no suspensive effect, we've heard all that, but
8 we still disagree. We still think that immunity applies, therefore, we will not
9 comply.
10 PRESIDING JUDGE EBOE-OSUJI: [9:56:42] So then there are two things there.
11 First of all, the matter of the law, some may look at it as something that comes in as
12 a matter of last resort, when you have tried something else, and you feel really that
13 you have to go to the letter of the law, if it is necessary to do, that that gets done.
14 But there may be instances where communication may well avoid that incidence of
15 last resorts and say, okay, do we really need to push it to that limit or is it something
16 we can resolve without having to get to the letter and spirit of the law question.
17 That is one.
18 And the second question occurred from your last intervention, saying of course it
19 may well be that the State may appeal. Is it something that is envisaged within the
20 process of 97 to the extent that it may cross over to 98?
21 So if there is disagreement in the context of the consultation on the question of law, so
22 there will be a quick mechanism, perhaps an expedited process of appealing it, as one
23 would do in certain domestic instances where you have extraordinary rights of appeal
24 quickly on some things.
25 MR RASTAN: [9:58:11] Yes. So, I mean, first of all, I think thank you, your Honour,

1 for the questions. And again maybe the professors, particularly Professor Kreß and
2 others may be better suited.
3 But I think the letter and spirit of the law is not, I would submit, a last consideration.
4 It is the first, it's the primary, it's the totality of considerations that apply. And the
5 scope for consultations is not to take into consideration, I would submit, extralegal
6 considerations that are outside of the scope of the Statute, but to give effect to those
7 very provisions of the Statute that require considerations of specificity, relevance, and
8 necessity to be made out before a request is put to a State and the State executes it.
9 These are the three principles that I recalled in the case law of the Court, of course, in
10 relation to requests for assistance. Those principles of relevance, specificity and
11 necessity are reflected in Article 96.
12 PRESIDING JUDGE EBOE-OSUJI: [9:59:07] One would think that in matters of
13 every litigation, matters of every litigation, it is always possible for parties to - this is a
14 question to you - to reserve their rights, the legal rights until they really have to assert
15 it.
16 MR RASTAN: [9:59:23] Yes. What I only mean is that the consultation procedure
17 here that, for example, allows a State to bring additional information to the Court and
18 so on is, of course, to be read in the context of other provisions that specify
19 throughout Part 9 that there may be circumstances where the State says they are not
20 refusing the request, because under Part 9, of course, there is no scope for refusal as
21 such, but perhaps one can make the exception from Article 72, which talks about
22 denial of a request; but even that triggers a separate procedure. So there is no scope
23 for refusal as such but there is much scope for a State to come back and say that the
24 request in its current form can't be executed because domestic law doesn't envisage it
25 or that the request is unclear, it's too broad, it's not specific, the relevance is not being

1 made out or, for example, the request for the coercive measure is not necessary
2 because this can be obtained through another mechanism and so on.
3 So all of these form vital aspects that are within the legal considerations and they may
4 be capable of resolution by consultation with the State and the Court to resolve the
5 matter, it may be a technical matter in terms of a lack of clarity of the information, it
6 may be an operational matter because of the form in which the request is requested
7 and then it may be also a fundamental problem in terms of the law itself,
8 a fundamental legal principle and so on.
9 So all of these considerations are within the statutory scheme and are open for
10 resolution. So I think when we are at the Article 98 stage we can't go really beyond
11 those mechanisms that are already within the scheme.
12 I don't know if that answers your Honour's question.
13 PRESIDING JUDGE EBOE-OSUJI: [10:01:00] Yes. Thank you very much.
14 Professor Lattanzi, please.
15 MS LATTANZI: [10:01:06] (Interpretation) Thank you, Mr President. Judge Ibáñez
16 has asked us above all what is the purpose of the consultations and I would just like
17 to briefly respond to that particular part of the issue at hand.
18 And this is not really about the rules to be applied. The rules are there on the basis
19 of Article 98, and the Chamber is of course completely capable of reading the report
20 and determining the links or the relationship between 27 and 98.
21 So, you see, the consultations are provided for, in my opinion, as a means of dialectics
22 so that the Chamber receives all information regarding the existence of what you have
23 provided as example, the various obligations coming under an international
24 agreement that the Chamber may not be aware of and that might reflect conflict of
25 obligations. But the problem here with conflicting obligations in relation to the

1 applicability of Article 27 for a State that the Chamber has -- for which the Chamber
2 has already determined that the State in question is bound by the Statute, that cannot
3 be the topic of consultations. For the State in question the respect of the
4 presumption of the function of the Chamber with regard to interpretation of the
5 regulations found within the Statute.
6 PRESIDING JUDGE EBOE-OSUJI: [10:03:26] Yes, Mr Murphy and then Mr O'Keefe.
7 MR MURPHY: [10:03:36] Thank you, Mr President. Judge Ibáñez asks a very
8 important question and we welcome the opportunity to speak to it.
9 In our view, Article 98 of the Statute says the Court may not proceed with a request
10 until certain things have happened. The request, in our view, should not have even
11 been made to Jordan without first at least considering that if you are directing the
12 request in the context of a summit of a regional organisation, it is inevitable that there
13 will be Article 98 issues at hand and consequently that's the manner in which the
14 starting point of the request should have occurred.
15 Professor Kreß says we didn't really, when we were negotiating 97 and 98, think
16 about this. I don't know if he is speaking in his personal capacity or as a former
17 delegate for the government of Germany or what. If it's the latter, perhaps we could
18 put him on the stand over there and ask him a few questions. But the point is, in our
19 view --
20 PRESIDING JUDGE EBOE-OSUJI: [10:04:52] There have been others who have
21 given us their own views of what happened during negotiations. We did not put
22 them on the stand.
23 MR MURPHY: [10:05:03] Fair, enough, Mr President. It was a mere debating point,
24 really.
25 But in our view it makes sense as written, the Court should be satisfying itself. Now,

1 it is understood that perhaps the Court is not aware of the exact treaties that exist
2 which relate to these summits, that's an opportunity for the Court to approach
3 a State Party before launching the request to engage in this kind of dialectic, if you
4 will.
5 But even if you set that aside and say that the Court can launch a request in a context
6 such as this without attempting to satisfy itself as to what possible impediments
7 might exist that would trigger Article 98. Once you get to Article 97, and this is
8 Judge Ibáñez's question, to us it is clear that it is saying the purpose of the
9 consultations are to resolve the matter. That means not just the State Party saying
10 we have a difficulty, we accept that. It means that it is a dialectic between the Court
11 and State Party to talk through the issue. As you put it, Mr President, ideally it's
12 some form of a Tango. We would submit that we showed up at the dance and no
13 one asked us to Tango.
14 In our view, it needs to be a conversation between the two sides and if you are asking
15 for how might one improve this matter, we would say that the Court should be
16 diligent, if it does launch a request, about being in contact with the party, perhaps
17 requesting a meeting. If there is some fear that there is delay here that needs to be
18 addressed, perhaps setting up a meeting with the parties, as was done in the context
19 of South Africa. Perhaps trying to talk through -- you know, you say that there is
20 a Head of State immunity. In our view, Article 27 has this effect on 98. The reason
21 why the Council's resolution, even though it doesn't say anything about immunity, is
22 best interpreted as doing the following. All of that is a part of that conversation, that
23 discussion. And again, I know you are talking about this in the broader context, but
24 we really do feel in our context it was not Jordan's fault that this conversation did not
25 move forward.

1 PRESIDING JUDGE EBOE-OSUJI: [10:07:39] Mr O'Keefe first and then Mr Jalloh.
2 MR O'KEEFE: [10:07:44] Mr President, I had been wondering how sitting down all
3 day you maintain your svelte physic, but now I hear the dulcet tones of Astor
4 Piazzolla, I can picture you in the smoky bars of San Telmo in Buenos Aires.
5 A point of information on what Mr Rastan said, and it's not to rebut it or anything,
6 because it seems to me that is not the idea of this particular part of the hearing, but to
7 assist in trying to develop recommendations as to what might happen, just a point of
8 information, it is absolutely clear under the law of immunity that a restraining order
9 is a violation of immunity, in the same way that an order to testify in anyone's
10 proceedings, but a mere compulsory order to testify has made clear in the
11 International Court of Justice case of Mutual Assistance in Criminal Matters and as
12 made clear in the Vienna Convention on diplomatic relations, is in and of itself a
13 violation of immunity, let alone handling the person, arresting the person, which is a
14 violation of inviolability.
15 On that latter point I think the Court should be hesitant to separate in the context of
16 Article 28 immunity from inviolability. I thought that we were acting under the
17 assumption here that Article 98 covers the both of them, and so I think
18 a recommendation along the lines of, well, let's violate immunity or let's violate
19 inviolability and then decide whether to violate immunity and inviolability it seems
20 to me is not a workable way forward. There would have to be some way which
21 didn't prejudice the rights of all concerned.
22 PRESIDING JUDGE EBOE-OSUJI: [10:09:24] Mr Jalloh.
23 MR JALLOH: [10:09:24] Thank you, your Honours.
24 Good morning. I just wanted to take the floor after listening to the conversation to
25 maybe make three points. It struck me as very interesting to hear Mr Kreß explain

1 about the drafting challenges and then further on Mr Rastan picking up the more
2 practical sides, the challenges that have been posed for the Court in terms of dealing
3 with what 97 means in practice.
4 And of course Judge Ibáñez has raised an important issue that I think, and Mr Kreß is
5 of course in a better position to share the logic at the time, but it seems to me 97 and
6 98 are essentially twin provisions, twin provisions in the sense that 97 places a burden
7 on the State and 98 places a burden on the Court.
8 And when you look at 97 it essentially says you, the State, identify the problem and
9 tell the Court what those problems are. And then it goes on, as your Honours know,
10 to give the examples of the kinds of problems that might, a State might be facing that
11 could prevent it from meeting a request from the Court.
12 Those types of problems strike me as very interesting because in many ways they
13 assume the good faith on the part of that State, right. The State is trying to help the
14 Court to resolve the issue so we can kind of move forward. I am not talking now
15 specifically to this case, I am wanting to just step back, as your Honours invited, to
16 make a broader observation.
17 So those examples are good because you are trying to solve the problem. And then
18 when you tell us what the problems are, we could then, after we have gone through
19 this consultation process, we will then be in the place with all the information in hand
20 by the time we get to 98 to decide not to put you in that place of difficulty.
21 Now I wondered whether in the discussions at Rome and maybe now at the policy
22 level, because this is very much a policy discussion, what that might mean for the
23 Court. What about the situations where the State may not be trying to assist the
24 Court or what about situations where the State may actually have genuine
25 impediments but they may appear to be bad faith in terms of, if you think about

1 saying, well, insufficient --
2 PRESIDING JUDGE EBOE-OSUJI: [10:11:50] It may even be a matter of
3 communication, someone --
4 MR JALLOH: [10:11:53] Exactly. And --
5 PRESIDING JUDGE EBOE-OSUJI: [10:11:55] -- may be saying something in a hurry
6 but --
7 MR JALLOH: Exactly. And --
8 PRESIDING JUDGE EBOE-OSUJI: -- comes across as saying something different.
9 MR JALLOH: -- your Honours, there is also that without delay element to it. But
10 think about the complexity of the State. So there may well be, if you think about
11 time, this request goes to the executive branch, but you know a ruling may have to be
12 made, if you think about Mr Rastan's point, by the courts in the national system
13 because there is a problem with the request. That doesn't -- you know, that moves in
14 a system of rule of law in its own way, depending on the country that is at issue.
15 So in a sense you could then find yourself, and the Court may well be in this position,
16 where it may appear that the State is stalling, not acting in good faith, but if fact there
17 might be other things going on at the national level.
18 So it is very, very interesting as a challenge in the sense of what it then could mean for
19 the Court's decision under Article 98 because you have that potential difficulty.
20 So I will just end, there is a second point that's a very brief point, which basically then
21 says, in my mind at least, it is a question for the Court to consideration, in the context
22 of South Africa, if I recall correctly, they had a view, South Africa had a view as to
23 what the consultation process was. And in the Schabas commentary to the
24 Rome Statute he describes in a very sort of succinct way how that went in the
25 discussions. Essentially South Africa was told, yes, we already resolved that

1 problem. And going back to Mr Murphy's point, disagreed that the problem had
2 been resolved at the level of the consultation with the embassy. And of course
3 others here may have be a part of those discussions, but the way he portrays it based
4 on the decision of the Chamber was South Africa was basically told: Well, your
5 problems are not real problems. But of course we are here precisely because they
6 had a different view essentially by the time we get to 98 because then the Court
7 essentially ignored those concerns raised by the ambassador, I believe, in what they
8 thought should be the consultation that's the two part and then got that request, and
9 of course we had a decision.
10 So just a final point might be then at the policy level could this then be an issue
11 perhaps for the rules of procedure process or the ASP, perhaps, in terms of policy for
12 the Court?
13 Thank you, your Honours.
14 PRESIDING JUDGE EBOE-OSUJI: [10:13:58] Do you also consider, Mr Jalloh, that in
15 all of this, I mean you talked about some things may appear as stalling when they
16 may not be. Quite apart from, and this point I make here doesn't have to relate to
17 this case. As we know, we are saying how can we improve the system beyond the
18 specifics of this particular case? That in mind, is there a sense in which it may be
19 taken into account whether or not there are systems, there is an assumption the
20 systems work the same in every country?
21 MR JALLOH: [10:14:36] (Microphone not activated) of the -- sorry, the mic was off.
22 I apologise.
23 So, your Honours, I was just saying that was a great point that you raised and I have
24 had the privilege of being in the crimes against humanity and war crimes section of
25 the justice department in Ottawa where the responsibility of the office is essentially

1 now to implement what will be the Crimes Against Humanity Act incorporating the
2 Rome Statute and Canadian law. And we were dealing with cases, your Honours, in
3 diverse settings of individuals who have come to Canada who are accused of being
4 involved with international crimes in all the different regions, and they required
5 rogatory commissions in some instances, so we'll have to travel to fulfil the
6 obligations under the Canadian Charter of Rights and freedoms in terms of Canadian
7 law with judges to certain parts of duality; think about former Yugoslavia. And
8 there was a very complicated process at the national, in the national system. And
9 this is a very, very developed country, it is a country that has gone very far doing
10 a great job in trying to fulfil its obligations.
11 So the requests take a long time, because the office that is carrying out the
12 investigation has to rely on what they call the International Assistance Group. So we
13 send the request there depending on the issue. And then it goes to the other State
14 through the diplomatic travel. A trip is then made. I mean, it takes months, if you
15 will. That is the point I am trying to make.
16 If you switch to the African continent, we have cases coming from Rwanda, and some
17 of them matured, like in Munyaneza and so on to actual prosecutions. They take
18 a lot of time.
19 But there is another element, your Honours, it is very expensive as well. And there is
20 another element from the point of view of the receiving State, the State receiving the
21 request. A lot of these countries - and with all due respect, I come from the Africa
22 region - they may face challenges that are very genuine, and this is where the work is
23 happening in terms of the ICC.
24 So when you think of those States, and you say, "Well, you are not responding fast
25 enough", well, it may be that there is no one to deal with the request. It may be that

1 we don't have the resources to even respond, and we are trying to figure that out.
2 So it is a complicated issue, your Honours, and my sense is it's an area where because
3 the practice is very early that the Court could be very deliberative and perhaps at the
4 policy level have some thinking done. I think it is more a matter for the rules
5 perhaps.
6 Thank you, your Honours.
7 PRESIDING JUDGE EBOE-OSUJI: [10:16:47] Thank you very much. Yes,
8 Mr Rastan. Thank you.
9 MR RASTAN: [10:16:51] I won't be very long. Just to come back on a few questions
10 of the issues that were raised and then your question of recommendations.
11 Now, in terms of your Tango analogy, I have been reminded that of course while it
12 does take two to dance, one needs to lead, one of the two needs to be lead. And of
13 course in this instance we believe that it is in Article 98, the nature of it, that the Court
14 leads.
15 And in the South African context, indeed, I was involved in that, and the issue that
16 was engaged there and that was not in dispute here is that, yes, South Africa did raise
17 an impediment. They raised a legal impediment, which in that case was they
18 believed that Head of State immunity prevented them to proceed.
19 And then in the consultation that happened, although on an expedited basis
20 nonetheless, the Court recalled its jurisprudence on the matter and said: But this
21 legal objection had already been resolved in the case law. Therefore, that's why we
22 ask you to proceed with the request.
23 It wasn't that it was merely ignored, it is that the Court took a position, but
24 South Africa disagreed with that, and we know, of course, how it ultimately played
25 out.

1 Now, in terms of the very good point that Roger O'Keefe, Mr O'Keefe raised, yes, of
2 course, there are considerations of inviolability which would be potentially breached
3 by the mere fact of restricting the movement of a person who enjoys immunity, but
4 that is actually how it works in an extradition practice.
5 In the Pinochet case, it was functional immunities, but notwithstanding while the
6 courts heard whether or not functional immunities would avail him, they nonetheless
7 retrained him.
8 Now, I know we are to my Head of State immunity, but in South Africa, again, the
9 High Courts, notwithstanding that the mere barring his departure from the territory
10 of South Africa could have been considered to be a breach of his fundamental
11 inviolability or the full scope of the personal immunities that he enjoyed, nonetheless
12 the interim injunction was given that, pending resolution of this issue, he should not
13 be allowed to leave.
14 And of course we get then into a Catch-22. If a court that is seized of a request for an
15 extradition or in our case more clearly a surrender can never again get to the question,
16 because the person has already left, then you get into a strange scenario. And I think
17 in that context it is important to make again this distinction between the international
18 and national.
19 At the national level, even the mere issuance of the warrant is already breaching the
20 rule on personal immunities. That's according to the ICJ, of course, in the Arrest
21 Warrant decision; whereas it has never been suggested, certainly not even here in
22 terms of the vertical effect of Article 27, I think all parties accept the Court is entitled
23 to issue a warrant. So it is then distinguishable from the national process.
24 And then the question is: Well, what other aspects are also distinguishable? And
25 certainly we would say at the minimum it can't be that the Court can't even ask for

1 the person to be held pending the resolution of the issue. Now, this is not of course
2 the heart of our submissions or what is on appeal. But in terms of policy
3 recommendation and all the rest, I think all of this goes to the question of how this
4 might be dealt with.
5 And your question of whether or not the Court could do this on an expedited basis,
6 well, of course we can also look to other provisions of the Statute that deal with
7 similar types of disputes, for example, in Article 90 in paragraph 3, when dealing with
8 a request, competing requests for extradition and surrender, there it also directs the
9 Court to, if necessary, make a determination on an expedited basis.
10 And then if we look to Article 97 --
11 PRESIDING JUDGE EBOE-OSUJI: [10:20:23] The point is not about really, the point
12 is not so much dealing with it on an expedited basis as it is about resolving it on an
13 expedited basis, including any question of law that's getting in the way, resolving it
14 by way of appealing it and getting quickly a bit more or less definitive answer to it.
15 MR RASTAN: [10:20:51] Yes, your Honour, that could be a possibility. But of
16 course resolving it in the context of dispute resolution is, of course, the function of the
17 Chamber, so whether it is the first instance or second instance.
18 And of course the appeal, even if it was within the procedure, it would not have
19 suspensive effect, of course, unless of course ordered by the Appeals Chamber.
20 So the resolution of the issue is directed to the Court. Of course, the parties and the
21 State concerned receiving the cooperation request engages in the process of
22 consultation, but the resolution is not done jointly by consensus. It is the Court that
23 then will ultimately make a determination on how this issue should be resolved,
24 particularly when there is a legal question.
25 PRESIDING JUDGE EBOE-OSUJI: [10:21:30] If the State concerned said: Well,

1 Pre-Trial Chamber, yes, you have answered this question, legal question to the best of
2 your ability, and we accept it in good faith; we are just not reassured, and we would
3 like to appeal that point to get some definitive answer on it. Is it something that
4 makes sense, although it may not be precisely provided for in the Statute? I don't
5 think it does, but it is something to think of?
6 MR RASTAN: [10:22:12] (Microphone not activated) Of course, we have the
7 different routes for appeal, and of course under 82(1)(d), if it would actually exist in
8 the resolution of the matter, one could imagine that that might be potentially
9 something that could be appealable. That would be obviously something that would
10 have to be determined by the relevant Chamber. But again the aspects of whether or
11 not that would have suspensive effect, what would be the meaning of such a
12 procedure if the person has already left the territory, the case law of the Court that
13 also says that when a matter is being dealt with by the Court, the State must not take
14 efforts or steps that would frustrate the ultimate outcome of that decision that would
15 preempt it. That was in the context of admissibility decisions, if I recall.
16 So allowing the person to depart the territory of that State before this issue has been
17 resolved would then frustrate the purpose of seeking such resolution or final appeal.
18 But I just wanted to come back also, your Honours, to just in Article 97, can we think
19 of recommendations, how to improve it and all the rest. Of course we can recall that
20 there was a process that was triggered at the ASP, indeed by South Africa, I think its
21 experience with the initial procedure that led to a working group being set up by the
22 ASP. This working group spent about a year, year and a half to look at the question
23 of whether or not the procedures, particularly in Article 97(c), consultations could be
24 improved, and they submitted a recommendation to the Bureau that was adopted.
25 This is resolution ASP/16/Res.3. And those understandings, which are adopted, are

1 there for the record.
2 And the important aspects, I just wanted to emphasise, is that it emphasises in the last
3 three paragraphs of the understanding that "Neither the request for consultations, the
4 consultations, nor any outcome of the consultations has suspensive effect, unless
5 a competent Chamber so orders"; that all of these understandings are without
6 prejudice to the independence of the Chamber and the need for the consultations to
7 be conducted in accordance with Article 97; and of course that they have to be
8 interpreted, of course, in line with the Statute and Rules.
9 So these are the understandings that were adopted by the States Parties themselves.
10 Now, obviously the first part talks about the technical procedure of how a request for
11 consultation is made, where is it channelled to, who are the different actors involved.
12 But I think it is important to recall that this process has been ventilated at quite some
13 length in that working group. So while your Honours could of course suggest some
14 other recommendations, one should not ignore that.
15 PRESIDING JUDGE EBOE-OSUJI: [10:25:16] Mr Rastan, we are aware of those
16 recommendation from the ASP. Whether or not that resolves all the concerns we are
17 talking about here is a different question. But we are aware of the ASP resolution.
18 All right. Why don't we move on then to other matters.
19 Now we will begin with our final observations. According to the schedule, the AU
20 goes first, 40 minutes, 40 minutes.
21 DR NEGM: [10:25:59] Thank you, your Honour.
22 Mr President, members of the Chamber, it is my honour to present the closing
23 statement of the African Union. In this regard I would like to thank your Honours
24 for the extra time, but I don't intend to delve extensively into what we have already
25 exhausted in our statements.

1 Allow me before addressing the legal issues to make a few general remarks.
2 The African Union does not encourage impunity. As explained previously and
3 described fully in our written submissions, the African Union has adopted policies
4 and instruments to hold the perpetrators of egregious violations of international
5 criminal law and breaches of norms of jus cogens accountable.
6 However, the fight against impunity has to be taken up within the parameters of the
7 rule of law and without threatening the stability of international relations.
8 The rule of law will be greatly prejudiced if, as has been the case, the
9 Appeals Chamber follows the à la carte and shifting sands approach in which any
10 legal theory works as long as the outcome is there should be a duty to arrest
11 Mr Al-Bashir.
12 The rules of international law which have been reflected in the Rome Statute make it
13 clear that Heads of State are immune from the exercise of foreign jurisdiction under
14 Article 98.
15 It is equally clear that there are no exceptions from this basic rule. We cannot agree
16 with the interpretation that this Court in addressing the matter before it should be
17 confined only to the Rome Statute.
18 The Rome Statute is a treaty that was adopted in an existing legal system, and it
19 cannot be studied and interpreted in the abstract. There was no legal void with
20 regard to immunities as a right and as part of customary international law before and
21 after the Rome Statute.
22 We are before conflicting legal obligations on States Parties to the ICC, and although
23 we heard the call that this Court should set the hierarchy between these obligations,
24 in our view, with all due respect, this is not the job of this Court to decide for the
25 international community which treaty obligation overrides the other or which comes

1 first. This will have serious consequences on the work of this Court and will create
2 further confusion among members of the international community.
3 As extensively detailed by my colleague Professor Tladi, the referral by the
4 Security Council to the ICC doesn't put a State non-party to the Rome Statute
5 analogous to a State Party. In fact, as complex as this issue is, in our view, this will
6 be an end to fundamentals of international law, which is the right of a State based on
7 its sovereignty to express its consent to be bound, otherwise consequences will be
8 faced with a new legal system that we are yet to discover.
9 State practice, bilaterally and within international organisations, together with
10 international jurisprudence proved that it is a legal obligation to honour immunities
11 bestowed by States to her agents, senior officials and Heads of State with no
12 exceptions.
13 I want to emphasise that the reflection of this general rule is that all States and not
14 some States have unanimously affirmed that under international law there are no
15 exceptions for immunity from foreign criminal jurisdiction. Here, I am not speaking
16 of African States, but all States, States from Europe, the Americas, Asia and Africa. I
17 mean all States.
18 The only fora that have held otherwise are the various Pre-Trial Chambers of the ICC.
19 Surely, Mr President, it cannot be that the whole world, except the ICC, is wrong.
20 We have heard the argument that when a State acts in cooperation with the Court, it
21 is not the State acting but, rather, the Court is acting through the State. That is to say,
22 the State is an instrument of the Court. We were referred to Article 4(2)
23 of the Statute, which provides that, "The Court may exercise its functions and powers,
24 as provided in this Statute, on the territory of any State Party ..."
25 Yet, on a plain reading of this text, it only refers to cases where the Court exercises

1 functions and not where the State itself exercises the function. Moreover, in
2 accordance with Articles 2 and 4 of the draft articles on State responsibility, it is
3 obvious that the conduct by any State organ is attributable to this State.
4 Our position is clear with regard to the distinction between Articles 27 and 98 of the
5 Rome Statute. The first, addresses clearly a procedural matter in relation to
6 jurisdiction. The second addresses the obligations of States Parties towards their
7 other international obligations. The real question is whether Jordan or the visited
8 African states that are party to the Rome Statute have violated their obligations under
9 this statute by not arresting and surrendering President Al-Bashir to the Court.
10 Moreover, none of these States that President Al-Bashir visited stood before this Court
11 to contest the applicability of Article 27 because that is not the point in these
12 proceedings. It is true that the treaty should be read in its entirety, but that should
13 not ignore the fact that when we interpret the treaty, we need to consider the object
14 and purpose of every provision therein.
15 Moreover, the call that Article 27 denies these parties to the statute the application of
16 immunities towards third States, then one wonders, why do we have Article 98 in the
17 same statute? Your Honour, the Rome Statute was adopted to fight impunity in
18 genocide, crimes against humanity and others. It was not adopted to break the
19 current international legal system. We are of the view that the intention of the
20 drafters of the Rome Statute was very clear: For the sake of justice and in case of
21 failure by a State to prosecute perpetrators in the most heinous crimes, an
22 international court may take this job; while, at the same time taking into consideration
23 that this Court will not in any way hamper international peace and security or be
24 used as a political tool to initiate vendettas between political rivals.
25 Article 98 addressed specifically the legal obligations of States outside the

1 Rome Statute context. In particular, it addresses the legal obligations of States
2 relating to immunities and customary international law. This was not done
3 haphazardly. This was the outcome of intensive negotiations, knowing that the
4 issue of immunities and waiver may create situations that may threaten peace and
5 security in the world.
6 The Rome Statute itself has acknowledged in Article 98 the existence of immunities of
7 State officials. Furthermore, at this point, we can just pause for a moment to ask
8 a question: On behalf of Jordan and African States that President Al-Bashir visited
9 during summits, if the arrest had taken place, what would have been the
10 consequences on the relations between Jordan, those African States and Sudan?
11 Have we considered at any point that not honouring the immunities to a sitting Head
12 of State may lead to political and possibly military fallout, destablising regions in the
13 world? In our view, the Rome Statute took that into consideration when it was
14 adopted with Article 98. So the entire week's debate against the right to immunity is,
15 in our view, redundant.
16 This of course is a policy argument and the ICC should be guided not by policy
17 arguments, but by the law. But this policy argument is precisely the reason why
18 States are willing to contemplate the possibility of exceptions to immunity
19 ratione materiae, but are all strongly opposed to exceptions to immunity
20 ratione personae. In this regard, we are positive that this esteemed Court will find
21 an appropriate remedy respecting the rule of law rather than serving political and
22 policy objectives.
23 Mr President, members of the Chamber, one of the arguments that has been used to
24 justify the shifting sands approach of the Pre-Trial Chamber is that any other
25 approach would disable the Court and make it less effective. This is a red herring

1 that is not borne out empirically by the experience of the ICC. Since it officially
2 began its operations in 2002, the ICC has indicted more than 40 individuals. Only
3 one of these cases would be affected by the African Union argument.
4 In our view, it is the interpretation of the Rome Statute advanced by
5 Pre-Trial Chamber II in the DRC, South Africa and the Jordan decisions that would, at
6 least for future cases, significantly affect the reach of the Court. Those decisions
7 limit the applicability of Article 27 to States Parties save for the rare circumstances
8 where there is a Security Council resolution.
9 It should be recalled that under the interpretation advanced by the Pre-Trial Chamber,
10 the ICC itself would be barred, notwithstanding Article 27, from exercising
11 jurisdiction over any official of a non-State party. It is against this background,
12 members of the chamber, that the African Union submits to you the following:
13 One, there is, under international law as it currently stands, no exception to immunity
14 ratione personae from foreign criminal jurisdiction, which Mr Al-Bashir has by virtue
15 of being the Head of State of Sudan.
16 The Appeals Chamber has been provided with no State practice, nor international
17 jurisprudence to suggest that in cases relating to proceedings before an international
18 tribunal there are exceptions to this immunity to enable arrest and surrender to the
19 international court concerned. Without such practice or jurisprudence, the Chamber
20 should hold that there are no exceptions to the fundamental rule of international law
21 on the immunity of State officials.
22 Two, we pray that the chamber will hold that the UN Security Council Resolution
23 1593 does not waive the immunity of Mr Al-Bashir. In our view, any expansion in
24 the interpretation of the Security Council resolutions, especially under Chapter VII,
25 will lead to severe ramifications in international relations. Otherwise, many illegal

1 actions of use of force could be deemed legal by implication.
2 Our submission is that this Court should accept that Security Council resolutions are
3 subject to extensive negotiations before their adoption. Hence, the intent of the
4 drafters of Resolution 1593 is what is reflected in its express language, that is to say,
5 no waiver to the immunities.
6 Three, we pray that the Court rejects the fiction that the referral under Article 13(b)
7 places a State that is not a party to the Rome Statute in a situation analogous to that of
8 a State Party. There is nothing in any means of interpretation that has been
9 advanced to justify that conclusion, nothing, except the political and policy objective
10 to which I referred earlier.
11 Indeed, quite apart from the absence of anything to justify the fiction, the conclusion
12 that Article 13(b) has any effect on immunities of a State that is not a party to the
13 Rome Statute is flawed for at least two reasons.
14 It ignores that the conferral of jurisdiction does not itself remove immunity. Indeed,
15 immunity presupposes the existence of jurisdiction, so the mere fact that the ICC is
16 granted jurisdiction does not remove immunity. To the extent that this fiction is
17 based on the notion that an Article 13(b) referral requires the whole statute to be
18 applicable to the situation, the whole statute includes Article 98.
19 Your Honours, finally, you have been presented with interesting theoretical
20 arguments that have no basis in law and should be rejected outright. These include,
21 contrary to its Article 6, the proposition that the Genocide Convention amounts to
22 a waiver of immunity by Sudan, and that through the controversial abuse of rights
23 doctrine, the immunity owed to Mr Al-Bashir should be considered.
24 As a Court of law and not a populist institution, the ICC should allow legal rules to
25 constrain it. This includes legal rules that might affect its policy objectives. That is

1 what is meant to respect and promote the rule of law.
2 It is our hope that this Appeals Chamber will lead by example and allow those legal
3 rules to constrain it. On this basis, we pray that the Appeals Chamber will find that,
4 by virtue of the operation of the Rome Statute and customary international law, there
5 is no duty to arrest Mr Al-Bashir.
6 And I thank you.
7 PRESIDING JUDGE EBOE-OSUJI: [10:42:49] Thank you very much, Ambassador.
8 We will now go next to the scholars, the legal scholars. In alphabetical order, we will
9 begin with Mr Kreß.
10 Twenty-five minutes is your time. You don't have to use it all up.
11 MR KREß: [10:43:12] Your Honours, please allow me to introduce this statement
12 by recalling an instance of State practice from around the hour of birth of modern
13 international criminal law. For the specific reference, I refer to paragraph 283 of the
14 reasons of 5 April 2016 of Judge Eboe-Osuji in the case against Ruto and Sang.
15 Confronted with the American idea to put the major German war criminals to trial,
16 British lawyers produced an aide-mémoire, which was handed over to the
17 United States on 23 April 1945. In this aide-mémoire, the British observed that, I
18 quote, "It would be manifestly impossible to punish war criminals of a lower grade by
19 a capital sentence pronounced by a Military Court unless the ringleaders are dealt
20 with equal severity."
21 The reference to the ringleaders explicitly included Hitler who, at this moment in time,
22 was believed to be alive and in office.
23 This statement demonstrates what is at stake when the Appeals Chamber of the first
24 permanent international court, International Criminal Court, in legal history will, for
25 the first time, squarely address the question of immunity of sitting Heads of States in

1 proceedings before it. It has been said in the course of this hearing that it constitutes
2 a momentous decision for a State to arrest and surrender the sitting Head of State of
3 another State.
4 This is undeniably true.
5 But the British aide-mémoire makes it clear why it constitutes in turn a momentous
6 impediment to the enforcement of ius puniendi of the international community when
7 a sitting Head of State enjoys immunity from criminal proceedings before the
8 competent International Criminal Court.
9 The reason, quite simply, is this: The sitting Head of State will often be the
10 ringleader, or to use the now accepted term of art, the person most responsible for the
11 commission of crimes under international law.
12 The British lawyers, guided by their fine sense of justice, saw the problem at their
13 time. It would no doubt pose a fundamental problem of legitimacy to punish the
14 lower-ranking recipients of criminal orders, while sparing the masterminds behind
15 the entire criminal system.
16 In these hearings Jordan has repeatedly tried to diminish this basic legitimacy
17 problem by places emphasis on the difference between immunity and impunity.
18 From a technical legal perspective, Jordan's point is of course impeccable. But
19 Jordan's perspective misses that crucial point of legitimacy.
20 During the week we have more than once been referred to the possibly to see
21 President Al-Bashir walking into this room out of his free will.
22 Had I head the argument, I would no doubt have been given a gentle smile. Here
23 speaks the ivory tower of academia, one would have said. But the same argument
24 does not become less detached from historical experience and current practice when
25 advanced by State counsels.

1 To put the point in the clearest possible terms, the risk that immunity will result in
2 impunity is all too real, in practice.
3 During this hearing two legal avenues have been discussed, the customary law
4 avenue and the Security Council avenue. From the angle of the basic point of
5 legitimacy underlying the British aide-mémoire, the customary law avenue and the
6 Security Council avenue differ considerably. Let us be realistic: The
7 Security Council avenue does not carry us very far if we look to the foreseeable future.
8 The prospects for a consistent practice of Security Council referrals are slim. What is
9 more, sadly, the practice of the Council subsequent to the referral of the situation of
10 Darfur has shown how little this body is a reliable partner to the Court. Again, the
11 prospects for a change of direction in the Council's practice are less than
12 overwhelming.
13 Thus, only the customary law avenue allows the Court to exercise its limited
14 jurisdiction over nationals of non-State Parties in a manner that will not all too often
15 spare the ringleaders.
16 This is why I wished to explain to the Chamber my conviction that
17 Pre-Trial Chamber I was correct to unanimously find that the customary law avenue
18 is open under the lex lata.
19 In fact, the primary reason why I have chosen to make my humble request to appear
20 before the Chamber as an amicus curiae was not to point out that the Security Council
21 avenue is perfectly sound as a matter of existing law. Instead, I was requested to
22 appear in order to state my reasons why there is another legal avenue, which is also
23 legally sound, but which is more legitimate, more legitimate because more in line
24 with the fundamental aspiration of an equal enforcement of the law.
25 And I firmly believe that legitimacy is the most precious currency for international

1 criminal justice and its quintessential expressive function to the world.
2 Fear not, your Honours, I shall not now rehearse my arguments in support of the
3 customary law avenue. I shall also not summarise the flaws which I believe to have
4 detected in most of the counterarguments that we have heard in the past days.
5 Instead, in order to be truthful to my role as amicus curiae, I wish clearly to
6 acknowledge the two central arguments against the customary law avenue and I wish
7 to focus on them.
8 To the first such argument Judge Morrison alluded in the one single question I recall
9 him asking during the hearing. And Mr Robinson made the argument. The
10 argument is based on the principle that nobody can transfer more rights than he
11 possesses himself.
12 If the counterargument holds, which starts from there, a customary international
13 criminal court exception cannot even exist at the vertical level of the Court's exercise
14 of jurisdiction. Article 27(2) of the ICC Statute would then not be reflective of
15 customary international law, even in its vertical dimension. There can be no doubt
16 that this counterargument deserves the closest analysis, and yet, such analysis reveals
17 that the argument does not fully appreciate the ultimate basis of the ICC's
18 jurisdiction.
19 More specifically, the argument is based on the idea that the ICC's jurisdiction results
20 from a delegation of national criminal jurisdiction. Under this delegation theory the
21 basis of the ICC's jurisdiction is no different from that of a bilateral criminal court
22 which, say, Germany and France would establish tomorrow.
23 But here common sense alone makes us pause. Is there really no qualitative
24 difference between the ICC and the French-German criminal court? I am convinced
25 there indeed is such a qualitative difference. The difference results from the fact that

1 the entire evolution of international criminal law has been inspired by the idea that
2 war crimes are so horrendous that they affect the international community as a whole.
3 There is an ius puniendi that transcends State sovereignty and instead resides in the
4 international community itself.
5 Already the Nuremberg judgment, which was then unanimously affirmed by the
6 General Assembly, articulates the essence of this idea. We can articulate this very
7 idea with greater precision, since the concept of international community has fully
8 crystallised as a legal concept, a crystallization which is apparent from the passage of
9 the ICJ's judgment in Barcelona Traction, which we have looked at.
10 If States have recognised through their practice and opinio juris that such an ius
11 puniendi of the international community exist, they must be entitled to provide this
12 community with an organ, no other than an international criminal court to enforce it.
13 Certainly Germany and France cannot claim to be entitled to do that on their own.
14 This would be a hegemonic hostage-taking of the idea of the international
15 community.
16 But States must be entitled to initiate a treaty negotiation process, which is open to
17 universal participation and guided by universally accepted human rights standards,
18 all this with the transparently stated goal to provide the international community
19 with a permanent judicial organ to enforce this ius puniendi.
20 If it was otherwise, the only way to provide the international community with such
21 organ to enforce the ius puniendi would be by virtue of an ad hoc decision of the 15
22 members of the UN Security Council. I respectfully submit that the line of reasoning
23 which I have just set out offers the most plausible explanation of the international
24 court, international court's recognition of the customary international criminal court
25 exception in the Arrest Warrant case.

1 This reasoning explains why the ICJ has not limited this exception to
2 Security Council-based ad hoc tribunals. And the same reasoning explains why the
3 ICJ has not referred to international criminal courts without qualification, but only to
4 certain international criminal courts, including this Court.
5 This reasoning, therefore, allows us not to dismiss a key passage in a judgment of the
6 principle judicial organ of the United Nations as an essentially unreflected statement
7 made in passing. Instead, it explanation why the ICJ has correctly found in
8 paragraph 61 of the Arrest Warrant case that customary international law contains an
9 International Criminal Court exception to the immunity ratione personae, an
10 exception which includes this Court.
11 To conclude on the first central counterargument, the ICC's jurisdiction is not fully
12 understood on the basis of a delegation of powers theory. I therefore urge the
13 Appeals Chamber not to belittle in its decision the basic underpinnings of its own
14 jurisdiction and not to make this Court indistinguishable from a transnational
15 criminal court where a group of States have bundled their forces to pursue their joint
16 national interests in the Prosecution of cross-border crimes.
17 The second central counterargument concerns the inclusion of the cooperation level
18 into the international criminal law exception. The argument has been voiced clearly
19 and loudly during the week. The execution of an ICC request for arrest and
20 surrender is believed to constitute an exercise of foreign national criminal
21 proceedings. And this counterargument again deserves the closest possible
22 attention. And I wish to make one point very clear, to present the counterargument
23 as sharply as possible. The organs of the State Party who physically execute
24 a request issued by the ICC remain, at least in my humble view, legally organs of that
25 State Party in the sense of the customary international law of attrition.

1 So the ultimate question is whether this technical legal perspective of attrition should
2 answer the matter. As you know, I am convinced that it should not. Instead, I have
3 explained why I believe that the proper delineation between the customary immunity
4 rule for national criminal proceedings and the International Criminal Court exception
5 to it should be guided by the purposes underlying the rule, on the one hand, and the
6 exception on the other.
7 As I have set out to you, Your Honours, why on the basis of such an approach the
8 cooperation level must come within the International Criminal Court exception.
9 Now, I can almost see Mr Wood saying: Caught you, that's deduction, and we don't
10 do deduction when we identify rules of customary international law.
11 My answer to this hypothetical criticism would be: Well, not quite.
12 If we become so deduction adverse in international law that we do not even allow
13 deduction when we have to delineate an existing rule from an existing exception to
14 this rule, we shall end up producing legal voids.
15 Is this a call from the ivory tower of academia? Your Honours, my answer is again:
16 Well, not quite. Let me show you why.
17 During this week we have spoken a lot about paragraph 61 of the Arrest Warrant case,
18 but let us now look for a brief moment on paragraphs 53 and 54 of the same judgment.
19 Here the court explains why the customary law rule on immunity ratione personae
20 extends to sitting foreign ministers. That the core of the ratio decidendi of that case.
21 Here the court does not cite a single case or any other piece of State practice which
22 would have been directly relevant. The court rather proceeds with a deductive,
23 a functional or, if you wish, a purposive ascertainment of the content of the rule.
24 This was not a judicial aberration. In fact, I believe it was fully justified and it has
25 been accepted as such by nobody less than the International Law Commission.

1 This concludes my argument in support of the customary law avenue.
2 Now, though legally correct, the customary law avenue neither is obvious, nor is it
3 uncontroversial. I have never pretended that it is, and I shall not do so now.
4 Therefore, if the Chamber finds merit in my humble submissions, it will nevertheless
5 most carefully ponder whether it should not better proceed through the avenue
6 which, to me, is almost obviously available, that is the Security Council avenue.
7 If the Chamber will eventually heed the Prosecution's call for judicial economy, then
8 I can only hope that it will leave the customary law avenue open for a fresh
9 consideration at another occasion.
10 I respectfully remind the Chamber of my suggestion to speak of the displacement of
11 any possible immunity of President Al-Bashir when proceeding through the
12 Security Council avenue.
13 I shall not say anything more on the Security Council avenue.
14 Instead, your Honours, please allow me to conclude my modest contribution to this
15 hearing by a few observations on Article 87(7) and on the third ground of appeal.
16 What is the purpose of a referral under Article 87(7)? The key purpose I should
17 think is to allow the body to which the matter is referred to take measures which may
18 help ending the violation of the duty to cooperate or where the violation is complete,
19 as in our case, which help preventing its repetition in the future. I find much merit
20 in the Prosecution's proposition that there might also be a broader purpose, namely
21 that to allow the bodies concerned to take measures which, under the circumstances,
22 seem useful to enhance cooperation more generally. But I do not think the third
23 ground of this appeal turns on any such possible broader purpose. For the core
24 consideration of non-repetition by Jordan is certainly relevant in the present case in
25 view of President Al-Bashir's persistent inclination to travel.

1 Now, is there a sufficiently powerful countervailing consideration? I believe there
2 indeed is, and that is the serious legal controversy that has been with us since too
3 many years now. Jordan holds a legal view that I am completely convinced is
4 incorrect on several important fronts. But I of course recognise that there has been
5 a serious legal debate on the matter since many years now. And the fact that
6 a number of highly distinguished colleagues present in this room defend Jordan's
7 position, confirms the persistence of this serious legal debate.
8 And also I believe that Jordan deserves credit, credit for having been engaging
9 constructively in the endeavour to allow this Chamber now to authoritatively clarify
10 the legal situation in a reasoned manner. I confer with the Darryl Robinson group,
11 what is really needed after this debate is precisely that, the authoritative clarification
12 of the legal situation by this august Chamber.
13 Once such clarification has happened, however, this Court has done everything it
14 possibly could. The Court will then be unreservedly, and I repeat, unreservedly
15 entitled to expect from Jordan, as from all other State Parties, to act according to its
16 authoritative clarification of the law. May the content of the latter please Jordan and
17 other State Parties or not.
18 THE COURT OFFICER: [11:03:32] Five more minutes, Counsel.
19 MR KREß: [11:03:35] It will be just one sentence. But let me emphasise that final
20 sentence to make a last point.
21 If State Parties are not prepared to show such basic loyalty vis-à-vis this Court, the
22 ambitious undertaking vested by humanity with so much hope, of establishing a
23 permanent International Criminal Court to enforce the ius puniendi of the
24 international community, cannot succeed.
25 I wish to thank you, your Honours, for giving me what I consider the immense

1 privilege to listen to me during this week.
2 Thank you.
3 PRESIDING JUDGE EBOE-OSUJI: [11:04:25] Thank you very much, Mr Kreß. The
4 privilege goes both ways in relation to all of you.
5 Ms Lattanzi, your turn, please.
6 MS LATTANZI: [11:04:46] (Interpretation) Thank you, your Honour, for this
7 opportunity to address the Court and to present my final observations to you.
8 Now that we find ourselves at the end of this debate, the discussions of the past few
9 days have been very interesting and have revealed diverging opinions even amongst
10 the friends of the court on this central issue in this case, whether or not Jordan had the
11 obligation to arrest Mr Al-Bashir and surrender him to the Court pursuant to the
12 mandate of arrest from the Court for crimes that he has been accused of by the Court,
13 crimes allegedly committed in Darfur.
14 In addition, everyone seems to agree that if we are to resolve this issue, the following
15 rules must apply:
16 The customary rule regarding personal immunity of chiefs and I make reference to
17 the discretional power of the Court. I believe everyone here agrees that if we are to
18 resolve this issue, the following international rules are relevant. The customary rule
19 regarding the personal immunity of heads of State, the provisions of, the provisions of
20 Security Council Resolution 1593, and a number of rules found in the Rome Statute.
21 In the opinion of one of the friends of the Court, a customary standard calling for the
22 ius puniendi of the international community for crimes of international concern, this
23 ius puniendi that has been placed in the hands of the ICC would be an exception to
24 the customary rule regarding immunity and thus would be a solution that would
25 manage to take us out of this case or would solve the case.

1 First of all, I would observe that the Chamber, the appellate Chamber, in keeping with
2 the principle iura novit curia, by ruling on the issue, the rule has to do with an -- but
3 even if the Appeals Chamber came to such an agreement that such a rule existed,
4 the Chamber could not avoid taking into account the conventional and
5 sub-conventional rules that, according to both parties, are relevant in this case.
6 And the parties provide diverging interpretations. My observations will solely
7 touch upon the application and interpretation of these rules. The customary rule on
8 personal immunity of Heads of State, the fundamental difference of opinion is
9 whether or not this rule expresses the principle of sovereign equality of States and
10 whether or not a Security Council resolution based on Chapter VII can be an
11 exception to this.
12 I will not reiterate the arguments that lead me to be of the opinion that it does not
13 express this fundamental principle, but even if this were the case, a Security Council
14 decision under Chapter VII can infringe upon this principle because of an even
15 greater more important interest, namely the keeping of international peace. Even
16 though Jordan and the organisations that the Chamber has invited to take a stance on
17 the issue, believe that the customary rule expresses the principle of sovereignty and
18 has an absolute value, I believe Jordan and these organisations contradict themselves
19 by asserting that the International Court of Justice has taken a particular stance and
20 has indicated that within the statutes of international criminal courts, and I believe
21 that this is the reading that I would propose, the ruling from the International Court
22 of Justice, and according to the opinion that I believe is the dominant one, or as
23 a confirmation of the customary exception if one believes that such a thing exists.
24 But at this juncture I can state that a number of major differences are to be seen in the
25 positions of the various parties and friends of the Court.

1 Does this exception to immunity apply or not? In this case according to Jordan the
2 exception does not apply because Article 27 does not apply to dealings between
3 Jordan and Sudan, Sudan not being a party to the Statute.
4 Also according to Jordan 27 would not apply pursuant to the Security Council
5 resolution because the Security Council should have said so expressly and did not do
6 so and it is not possible to deduce this by necessary implication.
7 Allow me, your Honours, to reiterate my position. It is a fact that Sudan is not
8 a party to the Rome Statute, and in international law there is no status of
9 semi-State Party or some analogous state. And I believe we must apply both
10 Article 13(b) and its chapeau and the resolution from the Security Council.
11 Paragraph 1 of the resolution refers the Darfur situation to the Prosecutor of the ICC,
12 thus establishing jurisdiction of this Chamber over the situation. On the other hand,
13 the referral triggers the investigations and possible prosecution before the Court. I
14 would add that such an interpretation of the referral function is nearly unanimous
15 within doctrine, in opposition to a position held by very small minority, people who
16 are the view that a decision by the Security Council does not establish such
17 jurisdiction.
18 In my view, the Security Council, by way of this referral, is using a technique that it
19 uses quite commonly, quite often. At times it incorporates rules of international law
20 explicitly, other times it necessarily incorporates decisions, for example, the Geneva
21 rules, sometimes by explicit reference, sometimes by way of implication.
22 But here incorporation by necessary implication is much more obvious because the
23 referral of the situation is called for in the same instrument that is the object of such
24 incorporation and thus the necessary implication results from joint application of
25 Article 13 and its chapeau, on the one hand, and the resolution from the

1 Security Council on the other. The resolution incorporates the Statute in terms of
2 substantive and procedural rules that allow the Court to carry out investigations and
3 prosecutions in the Darfur situation and bring to trial those who may be charged with
4 the crimes. So this is inclusive of Article 27 and the rules are incorporated as well.
5 In Part 5 of the Statute, which deals with investigations and prosecutions, we also
6 have Article 58 relating to the arrest warrant and Article 59 relating to the procedure
7 of arrest in the custodial State. These provisions do not touch on the rules relating to
8 governance as pointed out by Professor Robinson. The incorporation concerns rules
9 on the cooperation of States with the Court, without which all the activities provided
10 for in the previous chapters could not be carried out. These rules are provided for in
11 the separate parts of the Statute. This part, and that is Part 9, also contains Article 98,
12 which therefore is also incorporated in the resolution.
13 One of Jordan's objections also relates to my own position on this matter. If the rules
14 of the Statute on the obligation to cooperate are applicable by implication, then why
15 would that not have been clearly articulated in the resolution? Rather than merely
16 stating that Sudan must fully cooperate.
17 The applicability to Sudan of the Rome Statute derives from the joint implementation
18 of two international instruments, which must both be binding on Jordan and Sudan
19 and particularly on Sudan. If the obligation to recognise the jurisdiction of the Court
20 in the situation of Darfur is founded on the Statute and the resolution, this, by
21 implication, would require the incorporation and implementation of all the relevant
22 rules.
23 And the resolution must state clearly that the Council decides that Sudan must fully
24 cooperate; otherwise, the joint implication is not feasible, and this is in particular
25 because Article 86 applies specifically to the States Parties and if States that are not

1 parties are excluded by the binding effect, then the resolution of the council should
2 clearly state what they want.
3 Paragraph 2 also deals with this cooperation by the States that are not parties to the
4 Rome Statute and which, like Sudan, are not involved in the situation. This has been
5 covered or, rather, the reasons and consequences for this have been covered in my
6 answers to the judges' questions under group B.
7 If I still have some time left, I would like to talk about cooperation in the area of the
8 enforcement of an arrest warrant and the request for transfer. When a State enforces
9 an arrest, they are not acting by delegation of the Court, given that the Court does not
10 have a judicial police force and therefore cannot delegate such duties. The Court
11 simply needs to use the means available to the States.
12 In its request for arrest and transfer, in fact, the Court is not asking the States to
13 exercise its jurisdiction. So I cannot agree with Jordan's claim that it is the national
14 or domestic jurisdiction that decides. The arrest warrant is issued by the Court and
15 the request for the enforcement of the arrest warrant is issued by the Court.
16 Therefore, the Court is merely asking the State pursuant to Articles 58 and 59 to
17 implement that request.
18 Article 59 is particularly edifying because it states clearly that the national jurisdiction
19 does not at all deal with matters relating to immunity. Article 59 states that the
20 domestic jurisdiction carries out controls, but only with very limited objectives and
21 that national jurisdiction must ensure that the warrant applies to that person; that the
22 person has been arrested in accordance with the proper process and that the person's
23 rights have been respected. And immunity is not one of the rights of the accused, so
24 the judicial police of the State has to take care of those issues.
25 The obligation of cooperation in Article 86 of the Statute covers all the aspects of the

1 activities of the Court, that is, all the activities deployed in accordance with its
2 recognised jurisdiction as from the moment it receives a referral right up to the
3 investigation or acquittal of an innocent person.
4 And this covers -- in fact, the States have to cooperate in the arrest and throughout all
5 the phases of the jurisdiction of the Court and this is covered by the two terms,
6 investigations and prosecutions, under chapter 5, if I am not mistaken.
7 So the fact of saying that in Article 86 nothing is mentioned about request of arrest
8 and transfer, this is because the Court does not have its own judicial police force.
9 That is a weakness of the Court; so this is one of the reasons for the obligation of
10 cooperation by the States, and the Court cannot carry that activity out itself.
11 Such an interpretation of the provisions of the Statute would -- also related to the
12 consequences of requests for cooperation from the Court, and it should also deal with
13 sanctions in cases of non-compliance. You could have consequences in the case of
14 non-implementation of arrest warrants.
15 Given that it is not possible to obtain the cooperation of Jordan in the instant case,
16 we cannot rule out the fact that the Court can, in the future, address a request for the
17 arrest of Mr Al-Bashir to this State and even to other States.
18 The fundamental difference with regard to the South African situation is that it is
19 a decision of the Court which asked for the arrest and transfer of the Court. Why
20 would the Chamber have decided -- why could the Chamber have decided to refer
21 the case of South Africa --
22 PRESIDING JUDGE EBOE-OSUJI: [11:25:50] About four more minutes.
23 MS LATTANZI: [11:25:53] (Interpretation) Thank you very much, Mr President.
24 Can we think that a government can refuse to implement a decision of the Supreme
25 Court? The preliminary -- or, rather, the Pre-Trial Chamber has certain possibilities.

1 There can be a referral of Jordan to the Security Council or the States Parties for
2 non-compliance with the request to arrest and transfer Mr Al-Bashir. If there are no
3 consequences, if the States continue not to comply with decisions of the Court, then
4 this will lead to a gradual erosion of the authority and credibility of the Court until it
5 completely collapses, as wished for by certain governments; whereas millions and
6 millions have hope in the Court that the Court can restore some of their lost dignity.
7 Thank you very much, Mr President.
8 PRESIDING JUDGE EBOE-OSUJI: [11:27:36] Thank you very much,
9 Professor Lattanzi.
10 Mr O'Keefe.
11 MR O'KEEFE: [11:27:43] Your Honours, the rationale of the adversarial system of
12 legal proceedings is that through the back and forth, the claim and counterclaim, the
13 cut and thrust between the parties, the more persuasive of the two arguments is
14 revealed to the judge. It is an ancient system, but it is also very modern, perhaps
15 postmodern in that it acknowledges that, in the realm of epistemology as distinct
16 from faith, the best approximation of the truth for which we can hope, is the
17 more -- or when others are involved, most persuasive argument.
18 The drawback of this system is that, except for tactical concessions, it is impossible for
19 either of the two parties, each briefed by a client or employer to whom it owes
20 a professional duty, to throw up its hands and publicly acknowledge the superior
21 persuasiveness of the opposing argument.
22 No such professional duty, however, constrains the professor of law, acting as the
23 professor of law and, what is more, appearing as amicus curiae, a friend of the court.
24 Indeed, the duty of the professor of law is to be a seeker of and witness to the more
25 persuasive argument. And the duty of the amicus curiae, at least of the

1 amicus curiae appearing unpaid and indeed at his or her expense, although hopeful
2 of an increase in book sales with the attendant 0.5 percent royalties, is to draw the
3 court's attention to that more persuasive argument.
4 What may constrain the professor of law is ego or, at least, a sentimental attachment
5 to a firmly held personal view, but it can be exciting, bracing and a satisfying, perhaps
6 self-congratulatory reminder of the vocation of the professor of law to concede that an
7 argument other than one's own, what in intellectual terms may even be seen as an
8 opposing argument, is the more persuasive.
9 In the course of these written and oral proceedings, which do great honour to this
10 Court, to you, your Honours, and to you, Mr President, in their sincere pursuit of the
11 more persuasive argument through the invitation to a range of natural and legal
12 persons to participate in assisting the Court as amici curiae, I have twice had cause
13 fundamentally to reassess what was a firmly, indeed passionately-held personal view,
14 although I am sure all present will struggle to believe that I hold personal views
15 firmly or passionately.
16 The first time was in relation to the meaning in Article 98(1) of the Rome Statute of
17 "third State" the doubtfulness of my position on which had already, two years or so
18 ago, been kindly alerted to me in a public blog exchange with my friend Professor
19 Robinson. I had always taken the view that the meaning of "third State" in
20 Article 98(1) accorded with the meaning given to it in Article 2(1)(b) of the Vienna
21 Convention on the Law of Treaties, namely "a State not a party to the treaty".
22 But, and although the question is not as clear-cut as many would think, a point in
23 which I humbly invite scholars to read paragraph 8 of my request to submit
24 observations on the merits of the present case, while preparing my eventual written
25 observation on the merits I was compelled by my profession and, indeed, personal

1 commitment to the more persuasive argument, to concede the point and to accept that
2 "third State" in Article 98(1) meant simply a State, non-party and party alike, other
3 than the State Party to which the Court's request for arrest and surrender was
4 directed.
5 The second such occasion, which was consummated last night, as it were, was in
6 relation to my formally, firmly and indeed passionately held view that although
7 Article 27(2) of the Rome Statute manifestly had and has no application to arrest and
8 criminal proceedings at the national level for surrender of a person to the Court by
9 a State Party, the States Parties to the Rome Statute nonetheless mutually consented to
10 the surrender of each other's State officials to the Court through their agreement to
11 the unqualified terms of the second sentence of Article 98(1) of the Statute, the
12 obligation of arrest and surrender to the Court of a person the subject of the Court's
13 request to a State Party for arrest and surrender.
14 While preparing paragraphs 4 to 6 of my written observation on the merits, the
15 realisation had dawned on me that I was suggesting that implied consent to the
16 waiver of immunity and inviolability - indeed to the abrogation of immunity and
17 inviolability by another State Party - was sufficient, contrary to the usual requirement
18 in international law that waiver be explicit, a point I freely conceded to the Court
19 yesterday. I nonetheless remain sufficiently persuaded that it was understood by
20 the States Parties that they would arrest and surrender each other's officials. Under
21 a withering barrage of blows yesterday from my dear friend and sparring partner
22 Professor Kreß, to whose arguments, presentational skills, passion, and unfailing
23 courtesy throughout these proceedings I pay sincere honour, and after reflection on
24 the matter last night after enjoying a tasty Belgian beer called Affligem, which turned
25 my mind to affliction and ultimately, as one raised in the Catholic faith to repentance,

1 I came to the conclusion that my acceptance of a State Party's implied consent to the
2 waiver, indeed the abrogation by other States Parties, of the immunity and
3 inviolability owed to it under international law in respect of its State officials was the
4 less persuasive of the two arguments.
5 This led me, as foreshadowed yesterday, to an unavoidable conclusion. If this was
6 so, if Article 89(1) did not amount to the waiver by States Parties of the immunity and
7 inviolability owed to them by other States Parties in respect of their officials, the
8 choice presented to the Court was and is stark.
9 On the one side is what I understand to be the implicit position of Jordan that the
10 effect of Article 98(1) of the Rome Statute, the provision on which this case turns, is
11 that the arrest and surrender to the Court of a State Party of an official even of another
12 State Party in respect of whom the first State Party owes obligations under
13 international law to accord inviolability and immunity can be effected only if the
14 Court first obtains the explicit waiver by the second State Party of that immunity and
15 inviolability, a position the teleological justification for which would be that the
16 State Party may always, on request from the Court, itself be required to arrest and
17 surrender the official to the Court or to waive that official's inviolability and
18 immunity from the criminal jurisdiction of the other State.
19 On the other side is the position of the Prosecutor, that Article 27(2) of the Statute has
20 the effect at the national level, in relation to arrest by a requested State Party's police
21 and to surrender proceedings before that requested State Party's courts, of a waiver
22 by the State Party whose official it is of the immunity and inviolability owed to it
23 under international law by the requested State Party.
24 In this regard I have to say that I was astonished twice to hear Mr Rastan blithely
25 assert that the vertical effect of Article 27(2) appeared to be agreed on between the

1 parties and among all other participants, by which I take him to refer to the theory
2 that as among States Parties themselves Article 27(2) has the effect of rendering
3 inapplicable in the context of arrest and surrender at the national level the immunity
4 and inviolability ratione personae under international law of a Head of State.
5 Unless I am embarrassingly mistaken, in which case I ask counsel for Jordan in due
6 course to correct me, this is precisely not accepted and now, I believe, persuasively so,
7 by Jordan, which maintains, in my understanding, that even as among States Parties
8 Article 27(2) has no so-called vertical effect.
9 Mr President, your Honours, as a professor of international law and a true friend of
10 the Court, I too am unable to accept the Prosecutor's argument, and I never have been
11 able to accept the Prosecutor's argument. As a matter of treaty interpretation, and
12 with the greatest and sincerest of respect to the labour and ingenuity of counsel for
13 the Prosecutor, I find the claim that Article 27(2) of the Statute applies also to the
14 national level utterly implausible. The ordinary meaning of Article 27(2) is that
15 immunity poses no bar to the prosecution of a State official, whether of a State Party
16 or a State not party to the Statute, before the Court itself, after that official has been
17 arrested and surrendered to the Court. The context of Article 27(2) supports this
18 ordinary meaning.
19 The other provisions of the Rome Statute and the Statute's overall structure, to which
20 paragraph 97 of the judgment of the International Court of Justice in Application of
21 the Interim Accord of 13 September 1995 instructs us to have regard are clear - indeed,
22 except in the eyes of those who will not see, self-evident. Part 3 of the Statute, all of
23 the other provisions of which specify and are taken to specify by the States Parties the
24 general principles of criminal law applicable in proceedings before the Court itself, is
25 restricted to general principles of criminal law applicable in proceedings before the

1 Court itself. Part 9 of the Statute, as its title indicates, regulates international
2 cooperation and judicial assistance by States Parties to the Court. There are other
3 provisions sprinkled throughout. My point here goes rather to Part 3 than to Part 9.
4 Were Article 27(2), as a matter of treaty interpretation, to extend to arrest and
5 surrender proceedings at the national level, it would be the only provision of the
6 whole of Part 3 to do so. This is simply not the more persuasive argument.
7 Nor can the consequences of this conclusion be obviated by recourse to the patent
8 fiction that the arrest of a person by a State Party's own police and surrender
9 proceedings against that person before a State Party's only courts do not amount to
10 the exercise by that State Party of its own criminal jurisdiction, enforcement and
11 adjudicative. Horizontal, vertical or diagonal, how can the arrest of a person by
12 a State Party's own police and surrender proceedings against that person by a State
13 Party's own courts not amount to the exercise by that State Party of its only criminal
14 jurisdiction?
15 If the theory of the vertical effect of Article 27(2) of the Statute is correct, what
16 purpose does Article 98 serve in the Statute? Why does Article 88 provide that
17 States Parties shall ensure that there are procedures available under their national law
18 for all forms of cooperation which are specified under this part? Why does Article
19 90 take into account competing requests to the requested State for the surrender of
20 a person? And paragraph 6 of Article 90 ultimately permit the requested State, in
21 the event of a competing request from a State not party to the Statute to which it owes
22 an international obligation to extradite the person, to give priority to the request from
23 the non-party State? At this point, and again with respect, the position of
24 the Prosecutor strains credulity to breaking point. The Prosecutor's position exists in
25 transcendent realm of metaphysics. It is an act of faith, not a proposition of law.

1 The response of the Prosecutor to all this is to resort to the Cassesean metaphor of the
2 giant with, I thought, no arms, but perhaps it is no legs, to say that Jordan's position
3 would render the Court powerless and therefore simply cannot be accepted. This is
4 to elevate contingent fact above the rule of law. The law says what it says and must
5 be applied faithfully by a court of law. It is on the law that the States Parties to
6 the Statute agree. The agreement or - dare I use the "C" word in this Court - consent
7 of the States Parties is the bedrock of the law of treaties. Indeed, whether we like it
8 or not, the agreement or consent of States remains the bedrock of the international
9 legal order.
10 Try telling the People's Republic of China, the Russian Federation, and the
11 United States of America - all of them States not party to the Statute, all of them
12 involved in the adoption of Security Council resolution 1593 - that consent does not
13 matter. As it is, who says that Jordan's position would amputate the Court's limbs?
14 As Article 86 provides, a State Party is bound to cooperate fully with the Court. As
15 Article 89(1) stipulates unambiguously a State Party is obliged to arrest and surrender
16 to the Court any person the subject of a request for arrest and surrender to the Court.
17 The contingent fact that a State Party may fail to comply with its obligations of
18 cooperation under the Statute is no ground for relaxing the rule of law. The failure
19 by a State Party to a treaty, including in the fields of international humanitarian law,
20 international human rights law, and international criminal law, is sadly an everyday
21 occurrence. International law is imperfect. Its bedrock, State consent, can make it
22 intensely frustrating. But this is contingent fact. The rule of law transcends
23 contingent fact. And the point of opposing impunity is to uphold the rule of law.
24 If, then, under the Statute the immunity and inviolability of a State Party's official is
25 not, through the invocation of the mystical effect at the national level of Article 27(2),

1 abrogated but must still, in accordance with Article 98(1), be explicitly waived by
2 a State Party before its official may be arrested and surrendered to the Court, an arrest
3 and surrender which Article 89(1) of the Statute obliges the State Party itself to effect,
4 if requested by the Court to do so, the very most that paragraph 1 of Security Council
5 Resolution 1593 would achieve, via Article 25 of the Charter, by hypothetically
6 imposing on a UN Member not a State Party to the Rome Statute, by mere and highly
7 unpersuasive virtue on the referral of the situation in Darfur to the Court, the full
8 panoply of obligations binding as a function of the Statute on States Parties would be
9 to impose on Sudan an obligation to arrest and surrender Mr President Al-Bashir to
10 the Court in the event that the Court should request this.
11 Paragraph 1, at its unpersuasive highest, could not of itself have the effect, even
12 leaving aside its singular lack of explicitness, me demanded by paragraph 50 of the
13 ELSI case, of abrogating the immunity and inviolability of President Al-Bashir from
14 foreign criminal jurisdiction and, in doing so, to render inapplicable to his case the
15 restriction on the Court's power specified in Article 98(1) of the Rome Statute.
16 This goes mutatis mutandis for paragraph 2 of Security Council Resolution 1593 and
17 its decision, binding on Sudan by virtue of Article 25 of the UN Charter, that Sudan
18 shall cooperate fully with the Court and the Prosecutor. Even were this, which it is
19 not, sufficiently explicit to render binding on Sudan the gamut of obligations binding
20 as a function of the Rome Statute on States Parties, this could not of itself have the
21 effect of abrogating the immunity and inviolability of President Al-Bashir from
22 foreign criminal jurisdiction and, in doing so, to render inapplicable to his case the
23 restriction on the Court's power specified in Article 98(1) of the Rome Statute.
24 In both cases this is because the Rome Statute itself, even as among States Parties,
25 does not have the effect of abrogating the immunity and inviolability of a State Party's

1 officials from foreign national criminal jurisdiction.
2 On the contrary, immunity and inviolability from foreign criminal jurisdiction are
3 preserved by Article 98(1). The most paragraph 1 or 2 of Resolution 1593 could do
4 would be to oblige Sudan, on receipt of the Court's request and in accordance with
5 Article 89(1) of the Statute, to arrest President Al-Bashir and surrender him to the
6 Court. The contingent fact that Sudan has not done this is, as a matter of law and of
7 the rule of law, neither here nor there.
8 This then leaves the Prosecutor with only a single possible argument, namely the
9 alleged customary rule that a State is not obliged to accord an official of another State
10 immunity and inviolability from its criminal jurisdiction, adjudicative and
11 enforcement, where requested to arrest and surrender that official to an international
12 criminal court. Because this alleged rule would constitute an exception to the
13 well-established customary immunity and inviolability of State officials from criminal
14 jurisdiction, it must be proved positively by the Prosecutor to the exacting standards
15 for the identification of rules of customary international law demanded by
16 international law, as elaborated on by the International Court of Justice and as
17 underscored by counsel for the Prosecutor on the first day of this hearing.
18 At its highest, however, the Prosecutor's argument is, as specifically regards arrest
19 and surrender to an international criminal court, that state practice and opinio juris in
20 favour of the customary immunity and inviolability of State officials from foreign
21 criminal jurisdiction in this context is a little less well -- sorry, is a little less
22 well-established than one might expect. But a little less well-established than one
23 might expect does not satisfy the exacting standards for the identification of rules of
24 customary international law. It goes nowhere near doing so.
25 THE COURT OFFICER: [11:49:44] Professor, you have three minutes left.

1 MR O'KEEFE: [11:49:48] To conclude, Mr President, your Honours, as well as
2 raising fascinating technical questions of law, this case raises a profound question of
3 principle.
4 Are the collective arrangements of some States to operate in violation of the rights of
5 other States? Where an international criminal court is established by way of a treaty
6 to which a State is not party, the exercise by that court of a power in derogation of
7 that State's rights infringes those rights unless the State otherwise manifests its
8 consent to the derogation. For example, by explicitly waiving the immunity and
9 inviolability ratione personae owed to it in respect of its serving Head of State. The
10 State, not being a party to the treaty, cannot, absent manifest consent otherwise, be
11 taken to have consented to the exercise in derogation of its rights of the powers
12 conferred on that court by the treaty. The fact that the court is international of itself
13 makes no difference.
14 States have no greater authority under international law to do together what none of
15 them may, as a matter of international law, do alone. There is, quite simply, no such
16 thing legally as the ius puniendi of the international community, unless by
17 "international community" we mean all UN Members inter se acting through an
18 explicit decision taken by the Security Council under Chapter VII of the UN Charter.
19 The 123 States Parties to the Rome Statute do not constitute the international
20 community, of which there are at least 193 and up to 196 Member States. Even less
21 do the 123 States Parties to the Statute constitute the international community, when
22 the rights of a State not party to the Statute are at stake.
23 To say otherwise is an act of faith. In the realm of political theory, it is the tyranny of
24 the majority or plain hegemony.
25 PRESIDING JUDGE EBOE-OSUJI: [11:52:22] Thank you very much, Mr O'Keefe.

1 Mr O'Keefe, there is a point to make, I want to make sure that I understand it very
2 well. We shouldn't -- it's a dangerous thing to ask a lawyer to answer a question yes
3 or no, but let's try.
4 Is it your proposition that Article 98(1) preserves the immunity of the Heads of State
5 of States Parties to the Rome Statute --
6 MR O'KEEFE: [11:52:58] As well.
7 PRESIDING JUDGE EBOE-OSUJI: [11:52:59] -- despite Article 27(2), is that your
8 proposition?
9 MR O'KEEFE: [11:53:03] That is absolutely my proposition, Mr President.
10 PRESIDING JUDGE EBOE-OSUJI: [11:53:07] Thank you very much. And then on
11 that note we will take our break now and let's come back at 12.30, at 12.30 and then
12 we will sit and end from there. The court is adjourned.
13 THE COURT USHER: [11:53:23] All rise.
14 (Recess taken at 11.53 a.m.)
15 (Upon resuming in open session at 12.34 p.m.)
16 THE COURT USHER: [12:34:28] All rise.
17 Please be seated.
18 PRESIDING JUDGE EBOE-OSUJI: [12:34:51] Thank you. Welcome back, everyone.
19 Now we've reserved two and a half hours so we can do that dash to the end.
20 Professor Robinson will speak next.
21 But as a matter of housekeeping, as we indicated earlier, anything anyone feels they
22 need to say that they didn't get a chance to say, there is that 10-page indulgence given
23 of written matter that may be submitted afterwards. I say two weeks. Let me point
24 a date to it, 28 September 2018 will be the deadline. Thank you.
25 Mr Robinson, your turn.

1 MR ROBINSON: [12:35:44] Thank you, Mr President. Thank you, your Honours.
2 I will continue my practice of short interventions. I was given generously 25
3 minutes. I expect to take nine. By hitting only the highlights, I hope I can make this
4 really worth your while.
5 I have five specific suggestions about drafting the judgment and then three short,
6 more general suggestions.
7 The first is, I would suggest that you emphasise the ordinary meaning of cooperate
8 fully. Several parties here have emphasised the importance of text. I suggest we do
9 as they say.
10 And I've referenced this before, but the Oxford English Dictionary definition of "fully"
11 is completely or entirely to the fullest extent. And, as I explained in a previous
12 session, I think that means either we interpret that literally, in which case it means
13 Sudan must do anything the ICC asks; or, contextually and more generously, we give
14 Sudan the benefit of the limitations enjoyed and available to States Parties.
15 The second suggestion is, I think it's important to emphasise, because it's not
16 necessarily clear to the world at large, the cooperation obligations are not only in
17 Part 9 but throughout the Statute. Examples are already in my brief. Those
18 examples are needed in order for effective cooperation, and if we restrict it to the
19 obligations in Part 9, that is not cooperating fully.
20 The third suggestion is that it's important to highlight that Article 27(2) contains a
21 cooperation-related obligation. It removes an impediment to moving forward
22 specific cases.
23 To demonstrate that horizontal effect, I think again I would suggest that you highlight
24 text and ordinary meaning and, in particular, the word national, national immunities,
25 which suggests that they do contemplate application not just at the ICC.

1 Other arguments showing the horizontal effect have already been given in these
2 proceedings, but I have a new thought about the text itself. Some of the parties here
3 that are insisting on ordinary language are also insisting that Article 27(2) says, "in the
4 courtroom." But Article 27(2) does not say "in the courtroom." Article 27(2) says, "...
5 shall not bar ..." the exercise of jurisdiction by the Court.
6 Now, I agree with the African Union. Of course, arrest by State officials is
7 attributable to the State. That's clearly correct. But the issue here is not attribution.
8 The question is, does it fall within the terms of Article 27(2)?
9 Here, I think the Court might find helpful the idea of dédoublement fonctionnel, the
10 dual roles. Sometimes State agents are doing things, and that's attributable both to
11 their State, but they are also acting on behalf of an international organisation and I
12 think that's what is happening here.
13 Of course, States have immunities before foreign national systems, but the question is
14 the Article 27 obligation and does it displace that.
15 So the interpretive question is: Is surrender part of the exercise of jurisdiction by the
16 Court? And I think it is a part. It's an indispensable part of the exercise of
17 jurisdiction by the Court.
18 Furthermore, I think it's almost universally agreed, except as of today by Roger
19 O'Keefe, that between States Parties, Article 27 informs the interpretation of Article 98.
20 And what I suggest to you is it works the same for all those obliged to cooperate fully.
21 It's a cooperation obligation.
22 The African Union asks: Well, if Article 27 removes immunities, then why is Article
23 98 in the Statute? And the answer is, it preserves immunities of those States that are
24 not subject to the obligations.
25 Fourth suggestion. I think the Appeals Chamber should expressly respond to a

1 powerful and commonly made criticism that this technique is, "turning Sudan into a
2 party." But we've discussed this already. It's important to emphasise this
3 obligation is imposed by the UN Security Council pursuant to the UN Charter, but by
4 reference to the Rome Statute. And it's important to point out two limits: the
5 Council has only imposed the cooperation obligations, not the governance obligations;
6 and number two, it's only in relation to one situation.
7 And it's probably also worth noting the Council did this in response to a threat to
8 international peace and security, which was the killing of 300,000 human beings.
9 I have a new idea to offer. I realised last night that part of the impasse in this room,
10 part of the ways we're not understanding each other, Sean Murphy made a great
11 point about the extent of treaty obligations being imposed on Sudan, and that thought
12 struck me. And I realised the underlying objection of Jordan, AU, some amici on
13 their view, the ICC is just some statute, some treaty. It's just some treaty getting
14 imposed on a non-party.
15 Whereas, in my mind, I think on this side of the room, we see the ICC as a standing
16 facility meant to be available to the UN and the Council as an alternative to
17 continuous new ad hoc tribunals and I think it might be useful to point that out in a
18 judgment, because that might make the imposition of these obligations seem less
19 strange. It would be useful --
20 PRESIDING JUDGE EBOE-OSUJI: [12:41:19] Maybe somebody on that side of the
21 room who doesn't share that view.
22 MR ROBINSON: [12:41:23] There is, yes, there is, yes, yes. It might be useful to cite
23 the Report of the Ad Hoc Committee, 1995, at paragraph 120.
24 Interestingly, the International Law Commission already debated the issue of does the
25 ICC need to be subsidiary organ of the UN in order to do this? The ILC concluded

1 it's sufficient to create the ICC by treaty and bring it into a close relationship with the
2 UN through a relationship agreement.
3 And you can see that in the ILC report on the Draft Statute, 1994, in the Commentary
4 to Article 2, and that's exactly what was done. The ICC was created. It contains
5 Article 2. A UN relationship agreement was adopted by the General Assembly.
6 If it's somehow problematic to impose the ICC because it's a treaty, if it's somehow
7 inferior to tribunals, then that defeats that particular enterprise. We have to go back
8 to creating ad hoc tribunals. So I think it is worth noting that it's meant to be a
9 standing facility linked to the UN obviating the need for tribunals.
10 My fifth suggestion is that the Appeals Chamber should respond to the argument that
11 is confidently expressed that the Council has to be explicit in order to remove
12 immunity. The argument is prima facie very plausible, but it's important to point
13 out that we already have Security Council practice directly on this point. The
14 Council has already removed immunities. The technique it used was ordering States
15 to cooperate fully with an instrument that removed immunity. The ICC Statute is
16 actually clearer than the precedence because they also added Article 27(2).
17 Jordan and the AU suggest, well, the Rome Statute is different because it includes
18 Article 98 which confuses matters. But Article 98 only matters if someone has
19 immunities opposable to the ICC and Sudan's immunities were moved.
20 So I close now with my three quick general suggestions. The first one is, as we all
21 know here, this is a very controversial and divisive issue. If the Chamber is able to
22 find some middle ground, I think that would be commendable.
23 Mr President, you talked about injecting commonsense into law. If there were, if the
24 tribunal were minded to suggest that there could be scope for consultations on
25 essential contacts, I think that could be an important safety valve here.

1 I think if there were such a suggestion, it would be important to require that States
2 consult the Court in a timely manner so that there is time for the Court to respond yes
3 or no.
4 Second to my general suggestions, as for referring Jordan, my group of scholars
5 suggests that there are errors of fact and law on the two main arguments of the
6 Chamber to refer Jordan, so there is a ground for the Appeals Chamber to reconsider
7 it. We think Jordan was not being defiant. Jordan was just stating what it
8 perceived as obstacles.
9 The Pre-Trial Chamber said the law had been unequivocally settled. But in fact, in
10 fact, error of fact, the South Africa decision was not yet available. The theory that
11 Jordan objected to has been significantly refined. We know that this matter is
12 intensely controversial throughout the community in the best of faith.
13 Moreover, the referral test asks, what is best for cooperation? And I hope that we
14 will ask that question with a big, long -- a big, big-picture vision of what's best for
15 cooperation.
16 I'll stop there. I'll just do two suggestions, actually. So I thank the Bench for
17 granting leave to my group and I thank you very much for your generosity to the
18 amicus curiae in this matter. Thank you.
19 PRESIDING JUDGE EBOE-OSUJI: [12:45:18] Thank you very much, Mr Robinson.
20 And that was well, much, much well within your time limit.
21 Now we will go to the round of remarks of the Prosecutor.
22 MS BRADY: [12:45:50] Good afternoon again, your Honours.
23 In our final remarks, the Prosecution will briefly return to highlight our position and
24 address a few points that we believe may still benefit from clarification. I plan to be
25 about 15 minutes. I'll give a final overview of our position on all three grounds and

1 address one specific issue on ground 2 relating to the Security Council's referral and
2 Resolution 1593.
3 Mr Cross will then address you for about 15 minutes on ground 1, on Articles 27 and
4 98. Mr Rastan will briefly address a few points from the customary international law
5 discussion and Ms Narayanan will do the same on a few issues relating to Jordan's
6 referral.
7 Your Honours, in the Prosecution's view, the Pre-Trial Chamber was correct to find
8 that Jordan failed to comply with the Court's request to arrest and surrender Mr
9 Bashir and we ask you to uphold that decision.
10 In our view, the majority's reasoning, based as it was on its interpretation of the Rome
11 Statute, Articles 27 and 98 and the effect of the Security Council's referral by
12 Resolution 1593, was the most straightforward and legally convincing articulation for
13 reaching that decision.
14 In our written submissions and our oral submissions throughout the course of this
15 week, and in answering your questions, we have entertained and we've recognised
16 that there are other legal theories that would be equally valid and would lead to the
17 same conclusion reached by the Pre-Trial Chamber. But when all is said and done,
18 we maintain our position that the Appeals Chamber should follow the course taken
19 by the majority, not only as a matter of judicial economy, but also as a matter of best
20 appellate practice, as I answered Judge Hofmański's question the other day.
21 Specifically on ground 1, the Court correctly analysed Article 27 and 98, their
22 interrelationship and their effect on Head of State immunity at the Court.
23 Importantly, the second paragraph of Article 27, by not allowing immunities based on
24 official capacity to bar the Court from exercising jurisdiction, does have what we've
25 referred to in these proceedings and in the judgment as both vertical and horizontal

1 effects for States bound by the obligations in the Rome Statute.
2 As a result, any personal immunity under customary or conventional law that a Head
3 of State like Mr Al-Bashir may otherwise arguably enjoy under international law
4 cannot procedurally bar the Court's exercise of jurisdiction, including enforcements of
5 its arrest orders.
6 For State Parties to the ICC, the reach of Article 27(2) is clear. When they ratify the
7 Rome Statute and they consent to its terms, they agree to the inapplicability of
8 immunities, including that of a Head of State, for their own State officials. Neither
9 the suspect or his or her State of nationality can raise Head of State immunity to bar
10 the Court's proceedings, including its request to arrest that person.
11 The horizontal effect of Article 27(2) for State Parties is equally clear. If a State Party
12 receives a request from the Court to arrest and surrender a Head of State of another
13 State Party, it must comply. It cannot argue that Head of State immunity held by the
14 non-requested State, State Party, prevents it from enforcing the Court's order. Why?
15 What's the rationale? Because the requested State Party must proceed on the basis
16 that the State Party whose official is sought is likewise vertically bound by its
17 obligations in the Statute, especially Article 27(2), and is unable to raise its official's
18 immunity before the Court. This means the requested State Party is obliged to arrest
19 and surrender that official and cannot raise Article 98(1) as a bar. In that
20 circumstance, it becomes irrelevant or inapplicable since there is no inconsistent
21 obligation owed to another State under international law.
22 In what circumstances then does this vertical and horizontal effect for State Parties
23 apply to non-State Parties? And this is perhaps the real crux of the appeal and the
24 subject of ground 2.
25 Most relevantly for the present case it's when a non-State Party is bound by the

1 obligations in the Statute by virtue of a Security Council referral of a situation in its
2 territory. And this is the position that Sudan was in by virtue of Resolution 1593.
3 The Council's referral of the situation of Darfur to the ICC using its Chapter VII
4 powers, obliging Sudan to fully cooperate, meant that the Rome Statute framework
5 applied to the Darfur situation and did indeed place Sudan in a position analogous to
6 a State Party. Sudan was thereby obliged to respect the cooperation provisions of
7 the Statute, and those provisions on cooperation include Article 27(2). So it's really
8 by the combined effect of the Rome Statute, Resolution 1593 and the UN Charter that
9 Sudan was obliged to arrest and surrender its president, notwithstanding any
10 immunity to which he may otherwise have been entitled.
11 But because Sudan is bound to comply with the Court's request to arrest and
12 surrender their Head of State, the same logic applies as in the State Party-State Party
13 situation. That means a State Party, here Jordan, requested to arrest and surrender
14 that Head of State is obliged to comply with the Court's arrest warrant and cannot
15 rely on Article 98. Again, why? Because it's not being asked to act inconsistently
16 with its obligations under international law in respect of the State immunity of Sudan.
17 I want to emphasise at this point how we see the interrelationship between
18 paragraphs 1 and 2 of the Security Council resolution, Resolution 1593. In our view
19 the majority was correct that the referral of the situation was in itself sufficient, this is
20 paragraph 1, was in itself sufficient to bind Sudan to the obligations in the Statute. It
21 made it akin to a State Party. It invoked the cooperation obligations under Part 9
22 and other relevant cooperation provisions, including Article 27(2), and because Sudan
23 was vertically bound to comply, this had consequential effects for how Jordan was to
24 approach the request.
25 That was the holding of the majority and we agree with it. But as I also stressed, if

1 we then look at the resolution itself, especially paragraph 2, requiring Sudan to fully
2 cooperate, we can see the Security Council's intention that immunities would be
3 disapplied. And this comes from reading paragraph 2 in context and in light of the
4 resolution's drafting background and object and purpose.
5 On the question raised the other day, well, why have paragraph 2 in the resolution if
6 referral already had the necessary effect? The answer is simple. Paragraph 2 is
7 confirmatory of that effect for Sudan. Indeed, we would find it odd if in a resolution
8 referring a situation in that country that there was not a clause specifically directed at
9 it.
10 So for us, these interpretations of paragraph 1 and 2 are what we would call mutually
11 supportive and reaffirming. They operate together. But equally, in our view, you
12 could rely on either one on its own and still reach that same conclusion.
13 Finally, just briefly on ground 3, in our view the Pre-Trial Chamber did correctly
14 exercise its discretion. It made no error in referring Jordan to the ASP and the
15 Security Council. The reasoning may have been concise, at least in that portion of
16 the decision, but the Chamber considered the relevant factors, namely, Jordan's clear
17 position and choice not to comply before the visit made at a time when Jordan was on
18 notice of the Court's position that State Parties were obliged to arrest and surrender
19 Mr Al-Bashir to the Court and considering the manner in which it approached the
20 Court the day before his visit.
21 Your Honour, before handing the floor to Mr Cross, the Prosecution would like to
22 acknowledge the obvious complexity and the novelty of the issues in this appeal, and
23 we recognize that this is the first time that the Appeals Chamber is addressing these
24 issues on Article 27, Article 98 and the immunity of Heads of State. So in many ways
25 it's very much a matter of first impression for this Court. And we also recognize that

1 the appeal concerns issues that overlap with more general principles on public
2 international law and that are both important and sensitive for all States, State Parties
3 and non-State Parties alike.
4 And the Prosecution appreciates the open and rigorous manner in which Jordan, the
5 African Union, the League of Arab States and all the invited amici have approached
6 the topic.
7 And even though we have quite markedly different views on many of the topics
8 discussed, the legal debate for us has been a highly constructive one.
9 In sum, your Honours, the issues in this appeal go to the core of the Court's ability to
10 arrest and surrender persons to the Court and hence its ability to effectively exercise
11 its jurisdiction.
12 But at the end of the day to ensure that this Court can do what it was designed to do,
13 end impunity for crimes which are of concern to all of humanity, its warrants must be
14 enforced.
15 The current situation where the Court is paralysed from functioning in this situation
16 because some of its own State Parties refuse to enforce its request should not continue.
17 A decision upholding the appeal -- a decision upholding the decision on appeal can
18 go a long way to stop that impasse.
19 And I'll now hand the floor to Mr Cross. Thank you.
20 MR CROSS: [12:58:24] Good morning, your Honours.
21 Your Honours are, I would imagine, by now well aware of the primary arguments
22 which show in our view and the view of others that Article 27(2) prevents States
23 Parties and other relevant States from raising official capacity to bar arresting and
24 surrendering their own officials, the so-called vertical effect of Article 27(2). And as
25 we have said, in our view, these arguments are based on the Vienna Convention

1 criteria of the ordinary meaning of the terms "the context" and the "object and
2 purpose."
3 But rather than repeating those arguments to you again, I would like to focus in these
4 submissions on two other important considerations which have so far received less
5 attention. I will also briefly address one matter raised yesterday, and so I have three
6 points for your Honours.
7 My first point concerns supplementary means of interpretation under Article 32 of the
8 Vienna Convention. Now, it's clear from our vigorous and informative discussions
9 in this courtroom that the different counsel in the room speak not only with different
10 legal views, but also come from different legal backgrounds. Distinguished
11 members of the ILC are of course extremely well represented, as are distinguished
12 academics. But we are also fortunate to hear from actual delegates to the Rome
13 Statute negotiations.
14 Now, they have been extremely modest in their interventions and they have sought to
15 ensure that their remarks remained objective and verifiable at all times. And in
16 particular, amongst these persons, if I recall correctly, I refer to Ms Lattanzi, Mr Kreß,
17 Mr Robinson and indeed my colleague Ms Brady.
18 But their modesty does not excuse us from the duty of asking that important question,
19 which is so often a vital aspect of treaty interpretation: What evidence do we have of
20 what the drafters of the Statute actually intended?
21 After all, the points which arise in this case are not only important, but they were also
22 eminently foreseeable. And this question is perhaps most apposite for Article 98(1),
23 which all the parties and participants have sought to rely upon in different ways.
24 Indeed this morning both counsel for the African Union and Mr O'Keefe have
25 stressed the relevance of this provision.

1 To answer this question, and with apologies for any embarrassment it may cause to
2 Mr Kreß, I will simply read out a brief passage from his observations written together
3 with Judge Prost in her capacity before she was elected as a Judge of this Court,
4 coming from the third edition of Otto Triffterer's Commentary at page 2119. And
5 this reference is also cited in footnote 30 of our filing 377.
6 Mr Kreß and Judge Prost begin, and I quote: "The subject matter of Article 98 did not
7 hold a prominent place in the negotiations on Part 9 for a long time."
8 Then in the next paragraph they add that indeed, and quote again:
9 "The issue of conflicting immunities was rather reluctantly addressed by some
10 delegations, which were of the view that the developments in general international
11 law had substantively reduced, if not eliminated, immunities with respect to crimes
12 under international law as listed in Article 5".
13 Mr Kreß and Judge Prost then conclude, and this is my final quotation:
14 "The solution found in Article 98 is a rather complex one. It was recognised to be
15 both impossible in the time available and undesirable to set up a list of those
16 international obligations regarding immunities" and here I skip a small passage and
17 then continue "that would indeed conflict with the obligation to surrender under
18 Article 89(1). It followed that the determination as to whether a real conflict existed
19 had to be taken on a case-by-case basis. With a view to the relevant future practice,
20 the drafters once more wished to emphasise the competence of the Court to
21 authoritatively rule on the matter." And that ends the quotation.
22 Now, your Honours, we have heard nothing from anyone in this appeal to contradict
23 this account of the drafting history of Article 98(1).
24 And we say that it follows, your Honours, that the drafters' intention therefore was
25 for precisely the kind of process that we have today.

1 Specifically, the drafters provided a broad framework for this Court's analysis,
2 including Article 27 and all of Part 9, but they deliberately refrained in Article 98 from
3 laying down particular rules concerning any immunities which might be opposable to
4 requests for arrest and surrender. Instead, as Mr Kreß has also emphasised in his
5 submissions, they created a procedure in which your Honours could decide.
6 In particular, and crucially, Article 98(1) cannot be read as any reflection of the view
7 that the Court can never proceed with a request for arrest and surrender of an official
8 of a third State, whether that third State is a State Party or not a State Party, without
9 waiver. If this had been the drafters' intention, then the middle part of the first
10 clause of Article 98(1) is entirely unnecessary. It would simply say instead, and this
11 is obviously hypothetical: The Court may not proceed with a request for surrender
12 or assistance with respect to the State or diplomatic immunity of a person or property
13 of a third State, without the waiver from that third State.
14 But that is, of course, not what Article 98(1) says.
15 Now, coming to my second point. One of the concerns raised by my learned friends,
16 especially at the start of the week, was that they found the notion of the horizontal
17 effect of Article 27(2) somehow confusing, or perhaps alien to the Statute. We
18 disagree. There is nothing mystical about horizontal effect. It is just a way of trying
19 to describe some of the additional consequences which might flow from an obligation
20 owed by a State to the Court. And it's not an idea that you would expect to find
21 explicitly in the Statute, because it's essentially a matter of logic.
22 But that being said, the Statute does contain a very significant clue, and that is in
23 Article 86, as both Ms Lattanzi and Mr Robinson have mentioned this morning.
24 Now, the basic idea of Article 86 is simple, setting out the "general obligation to
25 cooperate", that's in the title, and requiring each State Party to "cooperate fully" with

1 the Court in accordance with the Statute. And, since Article 86 is followed in Part 9
2 by detailed provisions which address States Parties' specific obligations to cooperate,
3 the legal effect of Article 86 must lie in its imposition of a particular standard of
4 cooperation. Otherwise, it would be a mere preamble.
5 Again, as Mr Kreß and Judge Prost have said - and that's reference C1 in filing
6 385 - Article 86 must have a normative impact of its own.
7 And if your Honours were still in any doubt about the importance and relevance of
8 Article 86, you might also take comfort from resolution 1593 itself, in paragraph 2,
9 which again specifically places that same obligation of full cooperation on Sudan.
10 And we say this cannot be a coincidence.
11 Nor can cooperating fully just be a pretty sentiment.
12 It means, rather, that States Parties are not only bound by the specific obligations in
13 the Statute, such as in Articles 27 and 89, but also that States have accepted that they
14 may not act inconsistently with those obligations that they have freely assumed. In
15 this way, Article 86 may well have a common ancestry with other notions such as the
16 abuse of right doctrine and the like, which we discussed yesterday. You might even
17 go so far as to call Article 86 an anti-loophole provision. In any event, it is of crucial
18 importance.
19 So what does it mean in practice?
20 As your Honours know, Sudan is obliged to arrest and surrender Mr Al-Bashir in
21 accordance with the vertical effect of Article 27(2) and Article 89(1). And it cannot be
22 doubted that it must also cooperate fully with the Court, both under Article 86 and
23 resolution 1593 itself.
24 So the question arises whether Sudan would be cooperating fully with the Court,
25 especially with regard to Article 27(2) displacing any claim of immunity on behalf of

1 Mr Al-Bashir, if it sought to assert that same immunity against Jordan, when Jordan
2 acts on behalf of the ICC and at the request of the ICC to arrest and surrender Mr
3 Al-Bashir.
4 We say it would not be. If Sudan cannot rely on immunity directly before the Court,
5 it cannot rely on immunity indirectly before the Court. To claim otherwise would be
6 to rely on a mere formality, which is the necessity of the Court executing requests for
7 arrest and surrender through a State Party, and it would do this in order to defeat the
8 primary obligation which applies to Sudan. This simply cannot be right. It lacks
9 the essential foundation of good faith which underpins Article 86, and permeates the
10 entire cooperation regime, indeed, of Part 9.
11 And it is this same logic, although perhaps expressed somewhat differently, which
12 underpins the idea of horizontal effect of Article 27(2). And on this basis, therefore,
13 we say the Pre-Trial Chamber majority was right to find that Sudan could not assert
14 immunity against Jordan for the purpose of the ICC arrest warrant, and that therefore
15 Article 98(1) was no bar to requesting Jordan to arrest and surrender Mr Al-Bashir.
16 And now in my last four minutes, your Honour, the third point.
17 The question was raised yesterday whether Article 27(2) also applies to agreements
18 falling within the scope of Article 98(2). Now, obviously, in our view, this question
19 does not arise on the facts of this case, but, very briefly, we say that it would, and for
20 similar reasons.
21 Articles 98(1) and 98(2) differ, in our view, with respect to the types of agreements to
22 which they apply. 98(1) applies to all kinds of obligations relating to State or
23 diplomatic immunities. 98(2) applies to specific international agreements as defined
24 by the terms of 98(2) itself. These may include status of forces agreements, status of
25 mission agreements, and similar agreements if they fall within that definition.

1 But Articles 98(1) and 98(2) are similar in the way that they work in practice. Both of
2 them require the Court to consider whether the requested State would be required to
3 act inconsistently with its obligations, and both envisage the possibility that the third
4 State or the sending State can disapply that conflict.
5 Consequently, if that third State or sending State is itself subject to the obligations of
6 the Statute under Article 27, then, again, the Court - and I stress it is the Court - may
7 well decide that no inconsistency arises. Indeed, to reason otherwise in the abstract
8 would lead to the view that States Parties could simply contract out of Article 27(2) on
9 an ad hoc basis, and we say that cannot be right.
10 And at that point, your Honours, I thank you very much for your attention and I yield
11 the floor to Mr Rastan.
12 MR RASTAN: [13:13:41] Thank you, your Honours. I will not be very long.
13 So, having heard a recap of our basic argument and our approach to this appeal, I just
14 want to take no more than a few minutes to recall also our response to the arguments
15 raised by Jordan, the AU and others, that the personal immunities of Mr Bashir under
16 customary international law remain unaffected by Security Council resolution 1593;
17 and that, this being such a fundamental rule of international law, it cannot be
18 displaced absent express wording in the resolution itself.
19 Now, you've heard our submissions and why we think that is not the case and why,
20 through the process of the combined operation of the different instruments, the
21 Security Council resolution, the UN Charter, the ICC Statute, the relationship
22 agreement, we believe that is not the case.
23 But I also wish to merely recall and also to invite the Chamber to examine the
24 assumption behind the position that we understand Jordan has proposed, the position
25 that the customary rule of international law forbidding the assertion of foreign

1 criminal jurisdiction against the officials of another State is transferable to the ICC
2 surrender process. To the extent necessary obviously for your judgment, we invite
3 you to examine that assumption.
4 Now having listened to the various arguments, we remain convinced, and perhaps
5 even more clearly today than when we started these hearings, that Jordan and the
6 amici supporting its position on custom have really done nothing more than assert
7 that this is so. We believe that they have drawn an analogy to the assertion of
8 national criminal jurisdiction, or simply asserted that the execution of an ICC
9 surrender process by national authorities is the exercise of domestic criminal
10 jurisdiction.
11 We suggest that no evidence has been presented to support this proposition or
12 assumption, in line with the time tested case law of the ICJ and, as we said, of other
13 international courts an regional tribunals, national courts, et cetera, on the standard of
14 proof and the burden of proof for identifying the existence of an alleged customary
15 rule of international law or the formation of a new rule.
16 We noted that an empirical analysis of actual State practice and opinio juris,
17 evidenced by such classic criteria as statements of States, legislation, domestic court
18 decisions, amongst others, actually demonstrates divergence on the question whether
19 the domestic execution of an ICC surrender request falls within the scope of the
20 existing rule of customary international law on personal immunities.
21 Now, if the Chamber agrees with our analysis, then the precursor question of whether
22 the Government of Sudan can assert the personal immunity of Mr Bashir against his
23 surrender by another State to the ICC leads to the conclusion that it cannot.
24 And as we stated earlier, the absence of a relevant rule of custom that might
25 potentially, or possibly, be opposable to an ICC surrender request, we say, means that

1 Jordan would not have owed any duty towards the Sudan, as a matter of customary
2 international law, were it to have surrendered him to the Court.
3 And moreover, absent relevant customary norms means that this Chamber should
4 direct its own analysis back to special international law, in determining the relevant
5 scope and effects of the different treaties that bear on this question in the manner my
6 colleagues have just addressed.
7 Now, your Honours, this brings me - and I won't rehearse the submissions - but this
8 brings me back to some of the discussion that we've heard on State practice and
9 opinio juris, and we've discussed at various points throughout these proceedings
10 where the evidence of State practice and opinio juris may be found.
11 And in this context I wanted to offer just some several observations on Mr Newton's
12 submissions regarding his data set. I'm sorry that he's not here today. But while of
13 course we welcome Mr Newton's helpful efforts to compile as many sources that may
14 be available from public sources, there were several suggestions that this data set
15 exhaustively or comprehensively captured relevant State practice in this regard, or
16 that, even if incomplete, that it constituted the best record available and should, as
17 such, form perhaps the basis of your Honours assessment of State practice and opinio
18 juris.
19 We only wish to make the obvious point, brought out by also Judge Bossa's question,
20 that since this data set is based on public media sources, it cannot possibly take into
21 account all relevant data, including practice concerning trips not considered or
22 cancelled, or evidence that might exist in confidential diplomatic correspondence,
23 which is the way that States normally interact on such matters.
24 And in this context we find it hard to understand the response to Judge Bossa's
25 question on this point where Mr Newton stated that while he may have missed a few

1 things, they would not be significant in number. If, as Mr Newton admits, his data
2 could be incomplete on this count, how could he quantify the size of what is missing?
3 How can he know the scope of what is unknown?
4 More generally on whether the dataset of Mr Bashir's record represents State practice,
5 we also wanted to State the obvious, that Mr Bashir by selecting where he can travel
6 safely through pre-contacts cannot create his own supporting State practice, nor
7 should we rely solely on such trips as the sole evidence of relevant State practice.
8 For these reasons we would submit the dataset cannot constitute for these
9 proceedings the record or the evidence in the sense of circumscribing the scope of the
10 Chamber's factual analysis on relevant State practice and opinio juris.
11 And while Mr Newton offered his submissions in the name of the voice of objectivity
12 or of empirical fact by using phrases such as "the data shows" or "the record shows",
13 we would suggest that his submissions should be treated with caution in regard to
14 this claim of objectivity since not only does it appear that the data may be incomplete,
15 but he also offered at various times during his presentation his own subjective
16 interpretation on these alleged objective facts and that he was able to distill from the
17 data the reasons why States did not arrest Mr Bashir.
18 Now, this only means that his submissions should be understood and accepted as his
19 interpretive analysis and not as necessarily statements of objective fact.
20 So where should State practice and opinio juris be found? Well, certainly Mr
21 Newton's dataset remains relevant and helpful to this analysis, but so does other
22 relevant data and evidence, including those we referenced, statements of States,
23 national legislation, court decisions and avoidance or cancellations of trips, which I
24 believe Mr Newton would also welcome. I don't think he would suggest anything
25 otherwise. And all of these different sources we believe show wide divergence

1 among States. And of course this Chamber also has the benefit of being able to
2 consult the record in this case, in particular the responses received from States
3 communicated by the Registrar to the Pre-Trial Chamber as to the steps taken by
4 States Parties to execute the warrant should Mr Bashir arrive on their territory, which
5 may also be relevant for ascertaining State practice and opinio juris.
6 Now, on another fundamental point, your Honours, I wanted to agree with Professor
7 Kreß that the Appeals Chamber should also set out its understanding of whether, the
8 essential question whether the national execution of a surrender request constitutes
9 the assertion of foreign criminal jurisdiction with all the attendant consequences of
10 that assertion along the lines set out by Jordan.
11 We agree with Professor Kreß that an essential distinction should be made between
12 the assertion of national and international criminal jurisdiction. If this distinction is
13 not made out, then the ICJ's statement in the Arrest Warrant judgment at para 61
14 discussed here at length would be extinguished, that distinction would be
15 extinguished.
16 Indeed, we would say it is insufficient to say that this statement at paragraph 61 was
17 made in passing, given how fundamental a role it plays within the judgment in
18 identifying the outer scope of the procedural effect of personal immunities on the
19 assertion and exercise of criminal jurisdiction. And, as is also revealed in separate
20 opinions, this statement is clearly the product of considered deliberation. In other
21 words, to say that the assertion of international criminal jurisdiction necessarily
22 engages the procedural effects of the customary rules of personal immunities so as to
23 deny the exercise of that jurisdiction through preventing arrest and surrender, which
24 is again the very heart of the Arrest Warrant judgment, would effectively shut down
25 the alternative route identified by the ICJ at para 61.

1 In Jordan's reading, as we understand it, and we invite them to clarify, this route
2 would remain available should Mr Bashir decide to either come visit the Court or by
3 conditioning the Court's exercise of jurisdiction upon waiver by the State of the Head
4 of State's nationality.
5 But insofar as this might be said to represent the meaning of Article 61 or paragraph
6 61 of the ICJ's judgment, we merely wanted to note that a domestic waiver is in fact a
7 separate alternative route, the second circumstance identified by the ICJ. When it
8 says in paragraph 61, quote, "Secondly, they will cease to enjoy immunity from
9 foreign jurisdiction if the State which they represent or have represented decides to
10 waive that immunity."
11 So we understand paragraph 61 to be setting out separate alternative and not
12 cumulative routes in terms of circumstances where the customary rules would not
13 apply. And we invite the Chamber to draw out the consequences of the ICJ's
14 statement at paragraph 61 to the extent it considers necessary.
15 And finally, just very quickly, I wanted to take up your Honours' cue when you
16 stated at one point, when trying to compare the ICC to the ad hoc tribunals, given the
17 provenance of the referrals, I believe you stated, can't we say that the Security Council
18 creates the ICC. And I think from what I understood of that, I would merely suggest
19 that indeed the Security Council creates the jurisdiction, and we believe this is key,
20 not the forum or institution, but the jurisdiction.
21 At the ICTY, it was the former Yugoslavia, the territory of the former Yugoslavia from
22 1991 onwards. At the ICTR, it was Rwanda and Rwandan nationals abroad within
23 1994. And in the case of the ICC, the jurisdiction it created was in relation to Darfur,
24 the territory of Darfur within Sudan since July 2002.
25 Simply put, if the Security Council did not refer the situation, the ICC would have no

1 jurisdiction. So the Security Council creates the Court's jurisdiction. And the
2 creation or delegation of jurisdiction to the ICC, just like for the ICTY and ICTR, is
3 made under Chapter VII and is attached, as Ms Brady emphasised on Tuesday and
4 has been recalled by Mr Robinson, this was attached to an instrument that removed
5 immunity.
6 Thank you, your Honours.
7 MS NARAYANAN: [13:26:36] Good afternoon again, your Honours. I'll take our
8 last minutes to briefly address some of the submissions made on ground 3 of the
9 appeal.
10 Your Honours, this appeal brings front and centre the issue of what the Court can and
11 should do when it's confronted with an instance of serious non-compliance by a State
12 Party. The decision to refer the matter of Jordan's non-compliance is correct in law
13 and in fact and it is entirely justified and required in the circumstances. I will make
14 four points.
15 Firstly, what is Article 97 not meant for? Obligations owed to the Court under the
16 Statute should not be taken lightly, and if a State Party feels that it cannot meet its
17 obligation, it must bring this to the attention of the Court without delay, and it goes
18 without saying in a manner that allows the Court to resolve the problem.
19 Your Honours, time is of the essence in executing arrest warrants. That is a fact.
20 The summit that Mr Al-Bashir was attending was just a day long. That is also a fact.
21 Jordan knew that Mr Al-Bashir was the Head of State from when it was first notified
22 of the arrest warrant in 2009. That is also a fact. And arguments relating to Head of
23 State immunity in customary international law and treaties that Jordan invoked to
24 resist its obligation are also not new. In these circumstances, waiting until the last
25 moment to bring their inability to execute the warrant to the Court's notice is quite

1 puzzling.
2 And when Jordan had itself invited Mr Al-Bashir to the summit and had
3 acknowledged his participation in that summit, what further confirmation was
4 needed?
5 When the magic words of Article 97 are uttered so late in the day and after working
6 hours the day before the summit, what is the Court expected to do? And what was
7 Jordan's expectation that the Court could do in such a short time?
8 Most definitely what the Court could not do is to solve Jordan's alleged problem, the
9 immunity issue, to Jordan's satisfaction before Mr Al-Bashir left Jordan. And so Mr
10 Al-Bashir remained at large. Yes, your Honours, one may dance the tango, but
11 firstly, as it's already noted, someone has to lead. The Court has to lead.
12 And secondly, Jordan approached the Court so late in the day that they did not allow
13 the Court the opportunity to resolve any issue, even assuming that there was such an
14 issue.
15 And even they only disagreed with the Court's legal ruling and said that they would
16 deny the request.
17 And this is why, your Honours, it cannot be said that there were Article 97
18 consultations in this case. Mere disagreements with the Court's settled law should
19 not fall within the scope of Article 97.
20 If not, what then would prevent another State Party from challenging perhaps your
21 decision in this case, the Appeals Chamber's decision, in the very same manner that
22 Jordan did? This is not just the law, it's common sense.
23 When a State Party fails to comply with its obligations and frustrates the Court's
24 function, an Article 87(7) referral equips the Court with tools to address exactly such a
25 non-compliance. But on the other hand, without the referral -- I beg your pardon, on

1 the other hand, without the referral, the Court has simply no options.
2 Secondly, why should Jordan's non-compliance be referred to the ASP and the
3 Security Council? As Ms Brady said, because Jordan knew what its obligations to
4 the Court were and it knew what the Court's law was. That's decision para 54. But
5 despite knowing this, it decided unilaterally not to comply with these obligations.
6 That's decision para 53. And knowing fully well that seeking 97 consultations did
7 not suspend its obligations, it still did so. And that's decision paragraphs 46 to 49
8 and 54.
9 In paragraph 54 of the decision, the reference to the South Africa process is to two
10 points. Firstly, the law that the South Africa decision expressed, which Jordan knew,
11 not least through its participation in Security Council meetings two years prior to Mr
12 Al-Bashir's visit, and I'd refer you, your Honours, again to our list of authorities from
13 yesterday C3. Jordan had notice before the South Africa decision in 2017 was issued.
14 And secondly, that Jordan may not benefit from triggering consultations in the
15 manner that perhaps South Africa may have benefited from. And indeed, it may
16 not.
17 Even if some doubt may have remained on what Article 97 entailed when South
18 Africa triggered such consultations, there was no such doubt when Jordan
19 approached the Court. And that's decision para 54.
20 Now, you may ask, is it unfair to refer Jordan when South Africa was not referred,
21 especially when South Africa intended to withdraw from the Statute? The Pre-Trial
22 Chamber may exercise its discretion differently in different cases depending on the
23 facts, of course, and we think on these facts that the Pre-Trial Chamber was fair.
24 What distinguished South Africa from Jordan fundamentally is that there were robust
25 judicial proceedings nationally to establish South Africa's obligations to cooperate.

1 Has this been so established for Jordan? We are not aware that it has. And I'd refer
2 you to the South Africa decision, paragraphs 136 and our response to Jordan's appeal,
3 paragraphs 109 to 111 and 116 to 118.
4 And, your Honours, we invite you to look closely at the decision and the record in the
5 light of the parties' submission.
6 Thirdly, should there be any policy exceptions to executing the Court's arrest
7 warrants? In our view, none of the thoughtful proposals suggested by either Mr
8 Robinson or Mr Newton - and, again, I'm sorry that Mr Newton is not here - should
9 form a basis for your decision. What is clear to us is that these proposals cannot
10 apply to the facts of this case. Jordan has never relied on such a policy, in refusing to
11 execute the arrest warrant, and the referral of non-compliance should be addressed on
12 the facts of this case.
13 Still, we now understand that Mr Robinson's suggestion of excepting travel to high
14 level conferences is meant to apply to future cases, requiring the ASP to consider an
15 amendment to the rules. With the greatest respect, the proposal seems to raise more
16 questions than answers. And in this respect we agree with Mr Kreß and Mr
17 Magliveras that we should, indeed, be very wary of any such notion. And we would
18 resist this notion for these reasons:
19 First, as we understand, attending inter-governmental conferences is a big part of the
20 job description, so to say, of Heads of State. So any exception could prevent, even
21 frustrate, the execution of the arrest warrant for the entire term of the Head of State,
22 or at least for a big part of it.
23 Second, this is the same issue, again, with the concept of essential contacts. It's
24 entirely a subjective notion and could encourage an exception that would, in fact,
25 become a rule and swallow up any possibility of arresting a Head of State.

1 And third, what if there are any disputes regarding the application of this policy?
2 How should the Court resolve this?
3 And fourth, as we've stated in our submissions previously, the Statute already
4 contains a safety valve mechanism in Article 16. The UN Security Council has
5 repeatedly declined to make such deferral in such a situation.
6 And turning now to Mr Newton's suggestion, the upshot of the proposal, to us,
7 appears to deprive the Court of its core ability to resolve legal disputes with States
8 Parties, and defer the matter entirely to the Security Council, a political body. So we
9 won't need to say any more at this stage.
10 And fourth and finally, a State Party's failure to execute the Court's warrants cannot
11 be seen in isolation. As your questions have correctly foreshadowed, such
12 non-compliance must be situated within the larger context of the impunity that
13 currently exists for Darfur. And this is something the Prosecutor's reports to the
14 Council have consistently underlined. As has been said, the Commission of Inquiry
15 report that recommended referral to the ICC mentioned the involvement of senior
16 Sudanese government officials.
17 And so now, your Honours, we come a full circle from the first day. So, in this sense,
18 Jordan's failure to arrest Mr Al-Bashir has contributed to the existing impunity, and
19 this is yet another reason to refer Jordan to the ASP and the Security Council. And
20 none of the submissions that we heard this week have allayed our concerns.
21 Thank you very much, your Honours. This concludes the Prosecution's submissions.
22 And on behalf of all of us, that's Ms Brady, Mr Rastan, Mr Cross, Ms Thiru, and
23 myself, I thank you.
24 PRESIDING JUDGE EBOE-OSUJI: [13:38:51] Thank you very much, Ms Narayanan.
25 We will now finally give the floor to Jordan, 60 minutes.

1 MR WOOD: [13:39:16] You would think I would have learned by the end of the
2 week.
3 Mr President, members of the Appeals Chamber, Jordan's final submissions will be
4 organised as follows. After some general comments on the nature of the current
5 proceedings, I shall briefly recall our basic position as to how we think this appeal
6 should be decided. I will then address a few points arising from positions taken by
7 others with respect to the first and second grounds of Jordan's appeal.
8 Professor Murphy will then highlight some important aspects relating to the third
9 ground of appeal, upon which Jordan also places great significance.
10 Ambassador Hmoud will then complete our final submissions.
11 Mr President, we have touched on many fascinating and fundamental questions of
12 international law in the course of this week. But at the end of the day, in our
13 submission, the issues that you have to decide in order to determine this appeal are
14 relatively few in number, limited in scope, and we would say quite straightforward.
15 We have set out our position fully in writing in our appeals brief, our response to the
16 professors of international law, and our response to the African Union and Arab
17 League. And this week we have set out orally our position on each of the three
18 grounds. And we have responded, I hope helpfully, to the many questions put to
19 us.
20 We maintain all of that in full and I'm not going to try to repeat it. So the present
21 closing submissions are an occasion to reaffirm just a few basic points and to respond
22 to one or two outstanding matters.
23 So I'll begin with a few words about the nature of the current proceedings.
24 Mr President, as we have said, this appeal does not seek an advisory opinion from the
25 Chamber. Rather, it is an appeal against a specific decision by a Pre-Trial Chamber,

1 which reached specific conclusions of fact and law directed against Jordan. Jordan
2 sought leave to appeal certain aspects of the decision, and the Pre-Trial Chamber
3 granted leave to appeal based on three, and only three, grounds. It would, we
4 believe, be in accordance with the case law to limit the appeal to the actual grounds of
5 appeal. And we think that authority for this can be found, among others, in The
6 Prosecutor v Bemba decision, judgment on Mr Mangenda's appeal against a decision
7 in relation to compensation. I won't quote it, it's at paragraphs 22 to 23.
8 The Pre-Trial Chamber addressed certain issues, such as its finding that President
9 Al-Bashir has Head of State immunity, which were not appealed by either Jordan or
10 the Prosecution. The Pre-Trial Chamber did not address certain other issues, such as
11 whether Jordan or Sudan violated an abuse of rights doctrine or violated jus cogens,
12 or any number of other assertions that have been advanced in the amicus briefs over
13 the course of this week.
14 In our view, if the Appeals Chamber were to conclude that the Pre-Trial Chamber
15 reached the correct conclusions on fact and law with respect to any of the grounds of
16 appeal, which of course we say it should not do, then it can reject the relevant ground
17 of appeal and uphold the decision below. However, if the Appeals Chamber
18 concludes that the Pre-Trial Chamber did not reach the right conclusions, then the
19 Appeals Chamber should uphold our grounds of appeal. And if, when upholding
20 our grounds of appeal, the Appeals Chamber wishes to indicate correct statements of
21 law, it is of course free to do so, and we accept that doing so may be helpful in
22 guiding States and Pre-Trial Chambers in the years ahead.
23 Mr President, Jordan's basic position on the substance of this appeal is as follows:
24 The Rome Statute is a treaty and, when issues of interpretation arise, it should be
25 interpreted in accordance with the rules contained in the Vienna Convention on the

1 Law of Treaties.
2 I might at this point just respond to what Mr Cross said this morning. He rather
3 skipped over the basic rule of treaty interpretation in Article 31 and led us to the
4 supplementary rules in Article 32. And he particularly emphasised what delegates
5 to the Rome Statute negotiations may have said about those negotiations. I would
6 like to offer a word of warning. In my view, the recollections of negotiators are
7 rarely a satisfactory basis for interpreting a treaty. The published documents of a
8 conference are one thing, but the recollections of the participants have to be treated
9 with great caution. Any participant, and this is natural, they have their own
10 subjective views on what transpired. For example, they very often think they
11 succeeded and the treaty means what they, their instructions, required it to mean.
12 They're not really objective interpreters. So I just wanted to inject that word of
13 caution.
14 The central issue before the Appeals Chamber is how to address Jordan's cooperation
15 with the Court with respect to the arrest and surrender of a foreign Head of State.
16 The part of the Rome Statute that speaks to international cooperation with the Court
17 is Part 9 of the Statute.
18 When you go there, you find a general obligation of a State Party to cooperate with
19 the Court in Article 86, but only in accordance with the provisions of the Statute.
20 Article 89(1) then tells us that a State Party shall, and I quote, "in accordance with this
21 Part and the procedure under their national law, comply with requests for arrest and
22 surrender." The obligation to arrest and surrender in compliance with a request
23 from the Court is predicated on that request being in accordance with Part 9.
24 Article 98 then speaks directly to the issue at hand, it addresses the situation when a
25 requested State is being asked to arrest and surrender a person in contravention of

1 obligations under international law with respect to third States. We regard the text
2 of Article 98 as clear; its ordinary meaning tells us what should happen when a
3 requested State owes obligations to a third State. Paragraph 1 speaks to obligations,
4 customary or conventional, relating specifically to immunity. Paragraph 2 speaks of
5 obligations arising under international agreements pursuant to which consent of a
6 sending State is required. Under both situations, the Court may not proceed with a
7 request for surrender unless it has first obtained a waiver or consent from the third
8 State.
9 As we've said, that provision is, in essence, a conflict-avoidance rule. It imposes a
10 procedural obligation upon the Court so as to preclude imposing upon States Parties
11 irreconcilable obligations under international law.
12 In our view, these provisions speak directly to the issue of the visit of the President of
13 Sudan to Jordan in March 2017. With respect to paragraph 1 of Article 98, Jordan
14 had obligations under customary international law to respect the immunity of
15 Sudan's Head of State and under treaty law to respect the immunity of Sudan's
16 representative to the League of Arab States summit. Under paragraph 2, Jordan had
17 obligations under treaty law that were inconsistent with the surrender of Sudan's
18 Head of State to the Court. In the light of these obligations, the Court was required
19 first to seek waiver of such immunity before proceeding with its request.
20 To erase Article 98 from the Statute as regards Sudan, the Pre-Trial Chamber felt
21 compelled to reach two legal findings, neither of which is sustainable.
22 First, it concluded that Article 27(2), which is located in a completely different part of
23 the Statute, had a powerful effect on Article 98, essentially transforming it into an
24 article that only speaks to non-Party States. In our view, it is clear beyond doubt that
25 Article 27(2) concerns only pleas of immunity by an accused person with respect to

1 the Court's own jurisdiction. This provision alone does not and cannot affect issues
2 of immunities from foreign criminal jurisdiction.
3 Secondly, the Pre-Trial Chamber concluded that Security Council Resolution 1593 or
4 its paragraph 1 or paragraph 2 or some combination we heard this morning of both
5 transformed Sudan from a non-party into, in essence, a party. These claims we say
6 are unsustainable.
7 The Prosecution has put forward or in a sense piggybacked upon several alternative
8 arguments that completely contradict each other. In our view, this shows the
9 weakness of their position. They sought to roll back a bit earlier this afternoon,
10 emphasising that they're relying on the reasoning of Pre-Trial Chamber II.
11 Mr President, I want to return to the question of immunity and customary
12 international law. Questions about this have been raised throughout the week, even
13 though the matter in our view is not under appeal. But some very surprising
14 propositions have been made.
15 In essence, two arguments have been advanced. First, that immunities of Heads of
16 State from foreign criminal jurisdiction does not apply to foreign domestic
17 proceedings for the arrest and surrender of a Head of State sought by an International
18 Criminal Court.
19 Second, that there is an exception to the immunity of Heads of State from foreign
20 criminal jurisdiction when the arrest or surrender is sought by a Court. These are
21 similar but separate arguments it seems to us. The latter advanced by Professor
22 Kreß.
23 The Prosecution's strategy in advancing its novel absence of immunity theory seems
24 to be to place a burden of proof, it seems to intend to place a burden of proof upon
25 Jordan. They're saying there is no clear law, international law giving immunity in

1 these circumstances, so you have to prove it. An initial point is that it is not really
2 appropriate to speak of a burden of proof in the context of identifying customary
3 international law. The Court knows the law jura novit curia. They demand,
4 however, that we show State practice opinio juris and they even do so even though
5 Pre-Trial Chamber II said that such immunity exists and no one appealed that
6 decision.
7 I'd make a few brief points. Firstly, the immunity of Heads of State from
8 international criminal jurisdiction is a firmly established rule of customary
9 international law. This immunity is absolute. International courts and tribunals
10 have been unanimous in this regard.
11 Likewise, the members of the International Law Commission in the topic immunity of
12 State officials from foreign criminal jurisdiction were unanimous in finding no
13 exception whatsoever to the immunity of a Head of State. The Commission adopted
14 draft Article 3 in 2013 entitled "Persons enjoying immunity ratione personae" and it
15 reads "Heads of State, Heads of Government and Ministers for Foreign Affairs enjoy
16 immunity ratione personae from the existence of foreign criminal jurisdiction."
17 And then Article 4 of the Commission's text provides that immunity ratione personae
18 is absolute. There are no exceptions.
19 This conclusion of the Commission was universally welcomed by States in the UN
20 General Assembly. We heard that again this morning from the distinguished
21 representative of the African Union.
22 The Prosecution's theory that immunity of Heads of State does not apply to the
23 present case is based on two false premises. First, that the judicial and other
24 authorities of States Parties are mere agents or organs or proxies of the Court in
25 executing arrest warrants. Second, that as a result they do not exercise their own

1 criminal jurisdiction but, rather, the Court's enforcement jurisdiction.
2 Mr President, these arguments are entirely artificial. States Parties are not mere
3 instrumentalities of the Court. They are independent sovereign subjects of
4 international law. States exercise their own criminal jurisdiction when they seek to
5 arrest and surrender a person. It's irrelevant whether it is the Court that requests the
6 arrest and surrender or another State that requests extradition. Whatever the
7 underlying reasons why a State exercises its criminal jurisdiction, it remains that
8 State's own criminal jurisdiction.
9 We would say that this is self-evident, but if the Court requires further guidance, it
10 can look at the Statute. In particularly it's Part 9, where, as Professor Murphy has
11 already shown, several provisions make it clear that States cooperate with the Court
12 in accordance with their national law. They exercise their own jurisdiction.
13 Mr President, if we were to adopt this proxy argument, it would have, in our view,
14 many unforeseen consequences. For example, at present, an accused may raise
15 human rights complaints at the European Court of Human Rights and the parties to
16 that convention. There have been cases in the United Kingdom where this has
17 happened, in the case of surrender to the ICTY and I think to the Rwanda tribunal.
18 That would not, that could not be done if the English courts are regarded as organs of
19 this Court.
20 It would also lead to all too foreseeable political consequences. Adoption of this
21 theory would, I suggest, be a direct intrusion by this Court into the most sensitive
22 aspects of State sovereignty. Could the Court order the national authorities to adopt
23 a particular attitude in court cases, for example? It would be an intrusion into
24 domestic criminal justice systems. It would, I think, give credence to those who
25 speak out against the International Criminal Court as an infringement of sovereignty.

1 Just a word about the notion that was thrown out this morning about dédoublement
2 fonctionnel. I don't find that particularly attractive and I'm not sure what its effect
3 would be on immunity. Would the Head of State be perhaps half immune in such
4 circumstances?
5 Mr President, the Prosecution rightly noted that one argument that could be
6 advanced against what Professor O'Keefe referred to as its patent fiction is that it
7 would be all too easy for States to set up an international criminal court and so avoid
8 their international obligations. Such an outcome would obviously be unacceptable,
9 yet it would be perfectly possible if the Prosecution's thesis were to prevail.
10 Professor Kreß has sought to distinguish between what he termed a possible
11 Franco-German court and this Court, which he claims has ius puniendi of the
12 international community. I agree with what Mr O'Keefe said this morning about
13 that. If you look at the States who are parties to this Statute, to the Rome Statute, it's
14 hard to see how they can represent the international community. I won't list names.
15 He did that this morning.
16 Mr Chairman, I'd like -- Mr President, if you excuse me, I'd like to turn to Professor
17 Kreß's deductive approach, which we heard again today. In our view, his approach
18 has absolutely no support in the practice of States or the case law of the International
19 Court of Justice as an approach to the identification of customary international law.
20 I've already explained he referred to paragraph 61 of the Arrest Warrant case. We've
21 already explained that that in no way says what Professor Kreß asserts. It does not
22 say that there is a customary international law exception to the immunity of Heads of
23 State. And he's pointed to no other State practice or case law that supports his
24 position.
25 I would respectfully refer the Chamber to the International Law Commission's

1 conclusions and commentaries on the identification of customary international law
2 which were adopted on second and final reading in August. They can be found in
3 the annual report of its session in 2018. And the Commission makes it clear that in
4 the wording of its conclusion 2, to determine the existence and content of a rule of
5 customary international law it is necessary to ascertain whether there is a general
6 practice that is accepted as law opinio juris.
7 Now, with all due respect to my very good friend Professor Kreß, his approach might
8 better be called the invention of customary international law, not its identification.
9 Mr President, Professor Kreß raised again yesterday the work of the International
10 Law Commission on the immunity of State officials. As we've already explained in
11 response to the Prosecution, a proposal in 2018 for a saving clause in Article 7 of that
12 project was made by the special rapporteur. That proposal was not included in the
13 text adopted by the Commission in 2017, it appears nowhere, neither with respect to
14 immunity ratione personae nor with respect to immunity ratione materiae.
15 Professor Kreß asked for documentary references, and I'd refer him to just three.
16 There is paragraph 248 of the rapporteur's fifth report, there is the statement by the
17 chairperson of the drafting committee in 2017, and the 2017 report of the commission
18 to the General Assembly.
19 Yesterday Professor Kreß referred to paragraph 43 of the special rapporteur's sixth
20 report. Debate on that report has just begun and will continue next year. But in
21 paragraph 43 the special rapporteur simply recalls that she expects the commission to
22 consider the saving clause again in the future.
23 Mr President, nothing whatsoever can be deduced for the state of existing law from
24 the fact that a proposal has been made by an ILC special rapporteur which may be
25 considered in the future. That says nothing whatsoever about the commission's

1 views on the matter.
2 Mr President, I was going to say a little bit about the interpretation of Resolution 1593,
3 but I think in fact nothing new was said this morning, and we have set out our
4 position on that in some detail throughout the week.
5 Perhaps just a word about the debate we've had on the necessary implications of
6 Security Council resolutions. As I've already said and as the representative of the
7 African Union said this morning, drawing implications from binding Council
8 decisions under Chapter VII is a very dangerous route to go down. Does the
9 resolution also by implication authorise a State to invade another State so as to bring
10 an indicted person into the Court's custody? Does it authorise a State to enter
11 foreign embassies in its capital to obtain evidence? An interpretation of Security
12 Council referrals which had such results would certainly make referrals highly
13 unlikely in the future.
14 At the end of the day, Mr President, it seems to us that the Prosecution's arguments
15 boil down to this: The immunity of Sudan's Head of State must be lifted because
16 otherwise he could not be brought before this Court.
17 This is simply not the case, as Professor Murphy has explained again this morning.
18 Indeed, experience shows that Heads of State have ultimately appeared before
19 international criminal courts in various ways. But the Prosecution's basic arguments
20 seem to us to be consistent with their apparent view that it really does not matter
21 what line of legal argument one uses, provided that you come to the right result.
22 With very great respect, Mr President, members of the Chamber, this is a court of law.
23 As such, it has to reach decisions on sound legal grounds. The Chamber cannot be
24 swayed by policy considerations. Its task is to apply the law to the facts, not to reach
25 a particular conclusion.

1 Mr President, I thank you for your attention, and with your permission, Professor
2 Murphy will now continue our final submission.
3 MR MURPHY: Thank you, Mr President. As a part of its final submissions, Jordan
4 wishes to revisit and stress a few points relating to its third ground of appeal which,
5 as you know, concerns the propriety of the referral of Jordan to the Security Council
6 and to the Assembly of States Parties.
7 My first point, as we outlined in our written and oral submissions, Jordan strongly
8 believes that the Appeals Chamber should set aside the decision on referral. In our
9 view, the Pre-Trial Chamber's decision arises from manifest errors of law and fact and
10 amounts to an abuse of discretion. And, we appreciate very much Professor
11 Robinson's views in this regard where he agreed that such manifest errors of fact and
12 law do exist.
13 My second point, the circumstances surrounding the interactions of Jordan and the
14 Court at the time of the visit are essentially uncontested. After the Court's initial
15 communication, Jordan sent two different notes verbales to the Court in advance of
16 the visit. At the time, the Prosecution recognized that Jordan was seeking
17 consultations. The Prosecution urged the Pre-Trial Chamber to initiate those
18 consultations, and yet the Pre-Trial Chamber did nothing.
19 Neither the Prosecution nor the Pre-Trial Chamber at that time complained that
20 Jordan was acting improperly or for purposes of delay. Rather, we think the facts
21 are clear; that Jordan took the matter seriously and worked to determine both the
22 facts of a possible visit and the legal situation that it was facing. Again, as Professor
23 Robinson suggests, Jordan was not being defiant.
24 Now, the Prosecution this morning or this early afternoon said that there is an issue
25 here about the timing of Jordan's reaction to the communication from the Registry,

1 that it was so close to the time of the visit. In our view, that is not sustainable. We
2 did approach the Court several days before the visit. The Prosecution urged the
3 Pre-Trial Chamber to act. Nothing happened.
4 Moreover, and this is perhaps the more important point, timing was not an issue
5 according to the Pre-Trial Chamber below. In the decisions with respect to referral,
6 they say nothing about "Jordan, you came to us too late. Jordan, you didn't give us
7 enough time." It's not that at all. It's a claim that Jordan was taking a firm position
8 that was unchangeable in some sense, which we think simply is not sustainable on the
9 record and certainly was not the position that the Prosecution itself was taking at the
10 time.
11 The Prosecution also said that this is a situation where the Court has to lead these
12 consultations. We agree with that. But where was the leadership? We
13 approached the Pre-Trial Chamber days before the visit. The Prosecution urged
14 them to act and nothing happened. To the extent that there was a lack of leadership,
15 we submit that it came from the Pre-Trial Chamber and is not something that can be
16 imposed upon Jordan as some sort of fault with respect to our consultations.
17 My third point, the Pre-Trial Chamber does have discretion as to whether or not to
18 refer a State to the ASP or the Security Council, but that discretion is clearly not
19 unlimited. The Appeals Chamber has made it quite clear that it will set aside a
20 decision to refer in circumstances where there is an erroneous interpretation of the
21 law, a manifest or patently incorrect conclusion of fact or, or where there is an abuse
22 of discretion.
23 My fourth point, the Pre-Trial Chamber's explanation for referring Jordan consists of
24 just four sentences, and those are found at paragraphs 53 and 54 of December 2017
25 decision. Four sentences. And in those four sentences, two very brief reasons.

1 The fifth point then is to look at that first reason for the referral, which was essentially
2 that Jordan failed to comply with the Court's request. The claim being made by the
3 Pre-Trial Chamber is that we took a clear position about the ability to do the arrest
4 and that we did not expect anything further from the Court. That's essentially a
5 quote. We think that clearly is based on an incorrect conclusion of fact. Jordan was
6 seeking consultations in good faith at the time in question. We were not simply
7 refusing to comply.
8 Moreover, that reason is based on an erroneous interpretation of the law. To the
9 extent that we are being referred simply by virtue of the fact that we were in
10 non-compliance, that is inconsistent with the Appeals Chamber's view that
11 non-compliance should not result in an automatic referral. Rather, the totality of the
12 circumstances of the case must be considered, including whether engaging external
13 actors, such as the Council, such as the ASP would be an effective way of obtaining
14 cooperation. No such discussion of that kind appears anywhere in the Pre-Trial
15 Chamber's decision. Instead, the Chamber simply decided to refer Jordan.
16 My sixth point, I have 10 total in case it is of interest. Sixth point, Article 97 of the
17 Rome Statute contains none of the requirements for consultation that the Prosecution
18 apparently now finds lacking in Jordan's effort to consult. When you look at Article
19 97, it simply provides for a State Party to consult without delay when the party
20 identifies problems which may impede the execution of the request. And we submit
21 that Jordan did that.
22 Now, we think that the discussion this week, including today, makes it quite clear
23 that everyone thinks the procedures regarding consultation need to be improved and
24 I think some of the questions from the Appeals Chamber are along the lines of, how
25 might we do this better?

1 Indeed, we would agree with that, and we think that the steps taken nine months
2 after the visit to Jordan at the ASP to adopt the resolution that it adopted was an
3 effort to deal with improving these procedures.
4 But even on those procedures, it's quite clear the expectation is, when the State seeks a
5 consultation, the Court, whether it is the Pre-Trial Chamber or the Prosecution,
6 should be responding without delay. And that simply did not happen in this case.
7 Consequently, we don't think Jordan can be held at fault with respect to the manner
8 in which the consultation proceeded.
9 My seventh point, the second reason for the referral, according to the Pre-Trial
10 Chamber, was that at the time of President Al-Bashir's visit to Jordan, the Chamber
11 had already expressed in unequivocal terms that South Africa had, in analogous
12 circumstances, the obligation to arrest President Al-Bashir. This reason too is based
13 on a manifestly erroneous error of fact given that the proceedings regarding the
14 legality of South Africa's actions were still ongoing as of March 2017.
15 It's only in July 2017, four months after the visit to Jordan that the Pre-Trial Chamber
16 says, should there have existed any doubt in this regard, it has now, it has now been
17 unequivocally established both domestically and by this Court that South Africa must
18 arrest Omar Al-Bashir and surrender him to the Court.
19 That's when it's unequivocally established. Therefore, it couldn't be the case that
20 four months earlier that was already established.
21 Moreover, regardless of how you think about what was going on with respect to
22 South Africa, there is no unequivocal expression directed to Jordan in this regard.
23 For example, the Registry's communication that originally comes into Jordan prior to
24 the visit says nothing about South Africa's proceedings.
25 The Prosecution this morning refers to meetings at the Security Council that Jordan

1 has attended that somehow puts Jordan on notice. But that was never a part of the
2 Pre-Trial Chamber's claim as to unequivocal expression of the South Africa situation
3 to Jordan. Instead, their view is we should be aware of transcripts of a meeting
4 between South Africa and the Court and that, somehow, that's the way in which we
5 became aware.
6 The reality is, Mr President, the reality is that as of March 2017, there are serious
7 doubts both within the Court and outside the Court as to the principal legal theories
8 that had been advanced by the Pre-Trial Chambers, theories that we have again
9 discussed at some length this week.
10 If those arguments were wrong, and I think in my presentation of a day ago I
11 indicated that the prevailing theory as of March 2017 eventually is determined to be
12 wrong by the Pre-Trial Chamber below, if those arguments were wrong, then it's
13 entirely plausible for Jordan to form a view in good faith in March 2017 that there was
14 still immunity for President Al-Bashir, and we submit that the Pre-Trial Chamber
15 below simply doesn't take account of that.
16 The Pre-Trial Chamber ultimately did conclude in July 2017 by majority, not by the
17 entire Pre-Trial Chamber, that the prevailing legal argument at the time of the visit
18 was wrong. It went on to decide on an entirely new legal theory that involves a
19 complicated scenario of Articles 27 and 98 and, if I understand correctly, an Article 86
20 anti-loophole provision of some sort, and all sorts of bells and whistles come up in
21 July 2017. Fine. None of that is known as of the time that President Al-Bashir visits
22 to Jordan.
23 Indeed, in your order, Mr President, your order of this past summer, May 2018, you
24 said the present appeal presents novel and complex issues, and that this is
25 presumably why we needed to go forward with this particular process involving

1 amicus and so on.
2 The second reason for the referral was also based on an erroneous interpretation of
3 the law, which is that the Pre-Trial Chamber assumed that the law as applied to one
4 set of facts relating to South Africa, automatically applies in the same way to a
5 different set of facts involving a different State Party.
6 The Prosecution yesterday, at least seemed to concede that the circumstances of two
7 different cases of referral should be dealt with separately. Yet that's exactly what the
8 Pre-Trial Chamber failed to do.
9 My eighth point is that in addition to the manifest errors of fact and law, the Appeals
10 Chamber referral constituted an abuse of discretion. In the first instance, it was an
11 abuse of discretion given the Chamber's differential treatment as between South
12 Africa and Jordan.
13 We explain this in our appeals brief. I won't go into it in any depth, but when you
14 look at the discussion in the South Africa context, which then lead to a non-referral,
15 and you compare it to Jordan's situation, it's clear that the reason for us being referred
16 cannot be sustained if one takes seriously that earlier argumentation.
17 For example, if it's relevant that there had been all of these different meetings at the
18 Security Council and Assembly of States Parties that didn't result in anything, and
19 that's a reason not to refer South Africa, presumably, a similar reason should have
20 been employed or at least discussed in the context of Jordan. And that does not
21 happen.
22 My ninth point, the Pre-Trial Chamber's decision to refer was also an abuse of
23 discretion because it failed to give weight to any relevant considerations that we think
24 should have been brought into play.
25 Jordan's efforts at consultations with the Court, the factual record simply isn't being

1 discussed by the Pre-Trial Chamber. The failure to think about, at least, the fact that
2 there is multiple legal theories floating around that might have had an effect on the
3 way Jordan is approaching the matter, nothing in the Pre-Trial Chamber's
4 considerations with respect to that.
5 The OTP says that it's relevant that South Africa had national laws and national court
6 possibilities with respect to implementation of the request from the Court.
7 Well, of course, in that instance it didn't prevent the arrest -- or, it didn't result in the
8 arrest or surrender. But the more important point would be no effort, no interest in
9 querying Jordan about, well, what does your national law say on this? Are your
10 courts open for availability? Maybe the Pre-Trial Chamber would like the answers,
11 maybe not. But it didn't even express any interest in that matter.
12 And then perhaps most importantly, no discussion of how a referral to the ASP or the
13 Security Council would help in some way in bringing about Jordanian compliance.
14 That simply is nowhere to be found in the Pre-Trial Chamber's discussion.
15 My tenth and final point is that it is not appropriate to use Jordan for some broader
16 policy purposes relating to sending a message to States Parties or, even worse,
17 punishing Jordan.
18 Indeed, we were struck, Mr President, that yesterday and this morning, all of the
19 participants in this hearing, except the Prosecution and I think Professor Lattanzi, did
20 not call for a referral, the referral to be upheld. In other words, most of the
21 participants in this proceeding seemed to think that it would be appropriate to set
22 aside the referral.
23 If ultimately the objective is to secure cooperation from States Parties, the most
24 effective way for doing that in this proceeding would not be to uphold the referral.
25 Rather, it would be for the Appeals Chamber simply to reach a soundly based

1 decision on any unresolved legal issues that you see before you as a means of guiding
2 States Parties in the years to come.
3 We think this point was made aptly by Professor Robinson and his colleagues in their
4 observations, and we note and welcome Professor Kreß's comments this morning as
5 well that the sufficient and much-needed remedy may be simply clarification of the
6 law.
7 In conclusion, Mr President, we do believe that you should uphold our third ground
8 of appeal.
9 With your permission, Ambassador Hmoud will complete our final submissions.
10 MR HMOUD: [14:22:01] Mr President.
11 PRESIDING JUDGE EBOE-OSUJI: [14:22:16] You have 17 minutes.
12 MR HMOUD: [14:22:19] Yes.
13 PRESIDING JUDGE EBOE-OSUJI: [14:22:19] Just so you know.
14 MR HMOUD: [14:22:22] Thank you. I think I'll be less than that.
15 Thank you, Mr President.
16 The hearing this week has shown that there are quite divergent views on the state of
17 law as regards the issues on appeal, which my colleagues, Sir Michael and Professor
18 Murphy have just elaborated upon.
19 Jordan fully understands the overall context of the hearing and the various legal
20 interests involved. However, and we have already stressed this many times, we
21 should not forget that this is an appeal of the decision of the Pre-Trial Chamber II.
22 That decision, based on certain findings of law and fact, concluded that Jordan was in
23 violation of its obligations under the Rome Statute, and that it should be referred to
24 the Assembly of State Parties and to the Security Council.
25 The scope of this appeal is the three grounds that Jordan put forward to the Appeals

1 Chamber and that were approved for appeal: nothing more and nothing less. We
2 respectfully ask that the Chamber, taking into account the arguments that Jordan, the
3 Arab League, the African Union and some of the amicus curiae have made, reach a
4 decision upholding all three grounds of our appeal.
5 Jordan has been a party to the Rome Statute since 2002 and, as I mentioned earlier
6 during the hearing, Jordan played a very important role in the negotiation of the
7 Rome Statute and in the establishment of the Court. Indeed, we have always been a
8 firm believer in the rule of international law, which protects the rights of all States
9 and their peoples, without regard to their power or might. This is a key reason why
10 Jordan decided to ratify the Rome Statute. Fighting impunity is not only a
11 humanitarian objective, it is also a tool for the preservation of international peace and
12 security and a deterrence against the threat and use of force. This may be a rhetoric
13 for some and a noble cause for others, but it is also a necessary element for the
14 maintenance of international world order.
15 Being a firm supporter of the Court and committed to the fight against impunity,
16 Jordan finds itself in a peculiar and a difficult position where it has to defend itself
17 against accusations of breaching its international law obligations that trigger its
18 international responsibility.
19 Why has this come to pass?
20 It must be understood that international law is not confined to the objective of
21 fighting impunity. The maintenance of peace through, inter alia, friendly and
22 orderly relations between States is another key objective. We cannot look at the
23 international law from one angle and seek to protect a single cause or legal interest at
24 the expense of others. Rather, we must recognise that different rules are designed to
25 address different objectives. And, as the International Law Commission said in its

1 study on fragmentation, "when several norms bear on a single issue they should, to
2 the extent possible, be interpreted so as to give rise to a single set of compatible
3 obligations".
4 We believe that this goal of harmonious interpretation is embedded in various parts
5 of the Rome Statute, including in Article 98; such a goal seeks to reconcile obligations
6 that arise from different sources, in recognition that States wish to achieve multiple
7 objectives. Helping to maintain international peace and security is a goal that I am
8 sure this esteemed Chamber is seeking to achieve as well as we, Jordan, sincerely
9 hope that our legal position in this appeal will be viewed in such context.
10 It is against this background that I would like to note that Jordan has been a member
11 of the Arab League since its creation, even before the United Nations was established.
12 Jordan has signed and ratified the Pact of the League in 1945, and has been an active
13 member in promoting the goals and purposes of the League; both in promoting
14 regional peace and security, and advancing political, social, economic and cultural
15 integration between Arab countries. Jordan is also a party to the relevant Arab
16 League conventions, including the much talked about this week, the 1953 Convention
17 on the Privileges and Immunities of the Arab League. We take these obligations
18 very seriously; indeed, they are of critical importance to us as a State and as a nation.
19 With respect to the 1953 Convention, maintaining the privileges and immunities of
20 the League representatives at its many meetings, including at the annual summits, is
21 of the utmost importance for the League. Such protections allow the League to
22 properly carry out its functions, as Ambassador Abdelaziz of the League made clear
23 this week.
24 Jordan has important international obligations arising from the League's legal
25 instruments, all of which predate Jordan's ratification of the Rome Statute. Being a

1 member of the League, Jordan must at times host League summits, and must assume
2 presidency of the summit during that year. Hosting the summit on a rotational basis
3 has been approved by the League's Council by concluding a protocol in the year 2000
4 to the Pact of the Arab League. In that context, one of Jordan's crucial obligations is
5 to receive the Heads of State and other representatives of Member States of the
6 League, pursuant to Article 1 of the said protocol. Another obligation is to provide
7 the Head of State, and any other representative of that State, with diplomatic
8 privileges and immunities under Article 14 of the Pact, and immunity from its
9 criminal jurisdiction and inviolability from arrest under Article 11 of the 1953
10 Convention.
11 Now, Mr President, suggestions were made this week that a Head of State need not
12 be present at the summit. Yet any Arab League Head of State who wishes to attend
13 the summit is entitled to do so under the Pact, the Arab League Pact and its protocol,
14 as I described above. If the Head of State attends, then the host State has to fulfil its
15 obligations under the Pact and under the 1953 Convention, including the provision of
16 the necessary immunities from the host country's criminal jurisdiction.
17 Mr President, this background should be considered carefully by the Chamber when
18 it considers the grounds of appeal presented by Jordan. Had Jordan arrested
19 President Al-Bashir, not only would Jordan have violated his immunity ratione
20 personae as a sitting Head of State, but also Jordan's obligations under the Arab
21 league Pact and the 1953 Convention, whose obligations would refer, as you know, in
22 accordance with Article 30(4) of the Vienna Convention of the Law of Treaties.
23 This is why we sought consultations from the Court under Article 97 of the Rome
24 Statute in March 2018 prior to the visit. And Mr Murphy has elaborated on this and
25 on the fact that, to this day, the Chamber, Pre-Trial Chamber II, hasn't responded.

1 We identified legal impediments and we indicated that we did not perceive any way
2 around these impediments.
3 We are now told, Mr President, that our obligations of cooperation under the Rome
4 Statute are crystal clear; that it is obvious to all that Article 27(2) modifies Article 98,
5 and that Security Council resolution 1593 obviously transforms Sudan into a
6 quasi-State Party - with obligations, obviously, but without any rights. This is how
7 we are supposed to understand it.
8 And we are told that if all that is not true, then other things must obviously be true,
9 such as that the Council's resolution waives immunity ratione personae from Jordan's
10 criminal jurisdiction; or that Jordan or Sudan, or both, have abused their rights under
11 international law; or that Jordan - and I think one suggestion was made - has violated
12 jus cogens.
13 Now, the Prosecutor and some amici want you to believe that this was all obvious.
14 But I assure you that none of this was obvious to Jordan in March 2017, and quite
15 frankly it remains an obscure and contentious issue today.
16 Mr President, Jordan has been a member of the United Nations since 1955 and has
17 been on the Security Council three times. The last was in 2014-15, a matter
18 mentioned yesterday and today by OTP. And I didn't want to respond to this, but
19 just like to add, this is where we witnessed the frustration by the Office of the
20 Prosecutor from the process before the Security Council in the same manner that we
21 witnessed that no Security Council member, no member during the four meetings
22 that we were present in the two years when they reviewed the situation in Darfur and
23 the referral in Darfur, even hinting that the President Al-Bashir lacked immunity
24 ratione personae from the criminal jurisdiction of the Rome Statute parties, and no
25 action obviously was taken by the Council.

1 Mr President, since its admission to the United Nations, Jordan has been actively
2 engaged with advancing the principles and purposes of the UN Charter, whether
3 through its contribution to peacekeeping operations, through its engagement with
4 human rights bodies, and membership of the Human Rights Council; by advancing
5 the rule of international law through nominations to the International Law
6 Commission and International Court of Justice; or by taking a leading role in the
7 humanitarian issues of the United Nations.
8 Indeed, Jordan has been playing a crucial role on behalf of the international
9 community in, inter alia, hosting more than 1.3 million Syrian refugees who are not
10 able to return to their country due to the armed conflict and humanitarian disaster in
11 Syria since 2001. We did the same when Iraqis took refuge in Jordan as a result of
12 the second Gulf war, hundreds of thousands came to Jordan. And we are the host of
13 the largest number of Palestinian refugees in the world. So obviously we play a big
14 humanitarian role on behalf of the international community.
15 THE COURT OFFICER: [14:34:37] You have five more minutes.
16 MR HMOUD: [14:34:39] It's two minutes.
17 Jordan has been a voice of moderation and peace, not only in the Middle East, but
18 throughout the world; a country that respects the rule of law, human rights and
19 humanitarian obligations. Therefore, we find it disturbing that we are accused of
20 violating the rule of international law and our obligations under the Rome Statute;
21 that we are contributing to impunity; and that we should be set up as an example to
22 the world to be referred to the Security Council and the Assembly of States Parties;
23 and not least that we are treated here as, quote-unquote, a party to a proceeding in the
24 ICC where we have to respond to the prosecuting arguments, oscillating arguments
25 and connect-the-dot propositions.

1 We see this not only as unfair but an abuse of the process of the Rome Statute; as a
2 troubling effort to find Jordan culpable by whatever means are possible, pursuant to
3 the apparent new motto of the Prosecution that "all roads must lead to Rome".
4 Mr President, Jordan has full respect for the Court. We have appeared before you
5 this week in good faith to explain the arguments as to fact and law that we believe are
6 correct and persuasive.
7 May I stress that you are a court of law, as Sir Michael has said, who should be
8 guided by the principles of international law, not by policy or advocacy; and we are
9 sure that you will be able to uphold the rule of law. This is why it is our hope that
10 you will uphold all three grounds of our appeal. And in that regard I wish to
11 confirm Jordan's request that appear at paragraph 115 of our appeals brief.
12 I now wish to close by placing on the record my government's thanks to the staff of
13 the Court, including the timekeepers, interpreters, escort personnel and security staff
14 for all their hard work this week.
15 And of course I wish to thank you, Mr President, and other members of the Appeals
16 Chamber for the respect, courtesy and attention that you have accorded to Jordan
17 with respect to our appeal.
18 And finally I would like to thank the amici for making the effort to contribute to this
19 hearing.
20 Thank you, Mr President.
21 PRESIDING JUDGE EBOE-OSUJI: [14:37:32] Thank you very much, Ambassador.
22 We have spent the past five days looking at questions presented in this appeal. We
23 have looked at them from many angles for perspective. The exercise has absorbed
24 the minds of lawyers from all corners of the world, a cross-section of whom are
25 gathered or have been gathered in this courtroom for the past five days, from

1 Australia to Canada and the United States and all other regions in between. And
2 when I say "lawyers", that includes those sitting up here on the bench.
3 Every minute of it has been well worth it. The views have converged in some
4 respects, but they have remained mostly diverged on many of the capital issues that
5 trouble the appeal. But that is in the nature of the work of the legal profession.
6 It only underscores the naïveté of any expectation of a perfect answer to a legal
7 question, one that is expected to be immune to any criticism by the brightest legal
8 minds; there is no such thing.
9 That phenomenon was given voice many years ago by Lord Macmillan in a 1931
10 publication of his entitled "Law and Other Things", where he said, "In almost every
11 case, except the very plainest, it will be possible for a judge to rule on either side with
12 sufficient legal justification."
13 We do not pretend to any ambition to prove Lord Macmillan wrong, but we remain
14 guided by the applicable law, both the Rome Statute and international law, in their
15 text and spirit, in their context and in light of their object and purpose.
16 We have been immensely assisted by the views you have shared with us in that
17 regard, but beyond the assistance, it has been a pure joy listening to all of you debate
18 these questions in the past five days. You are amongst the leading legal minds on
19 the questions presented, and we have not missed anyone else assisting us with these
20 questions.
21 Thank you very much for assisting us and for being here, and we wish you safe
22 journey as you travel back home.
23 We thank all the Court staff, the interpreters and the court reporters and the
24 technicians and the security for assisting to make this hearing possible.
25 The hearing is adjourned. Thank you.

1 THE COURT USHER: [14:41:16] All rise.

2 (The hearing ends in open session at 2.41 p.m.)