

1 International Criminal Court
2 Pre-Trial Chamber II
3 Situation in Darfur, Sudan
4 In the case of The Prosecutor v. Omar Hassan Ahmad Al Bashir - ICC-02/05-01/09
5 Presiding Judge Cuno Tarfusser, Judge Marc Perrin de Brichambaut and
6 Judge Chang-Ho Chung
7 Status Conference - Courtroom 1
8 Friday, 7 April 2017
9 (The hearing starts in open session at 9.35 a.m.)
10 THE COURT USHER: All rise.
11 The International Criminal Court is now in session.
12 Please be seated.
13 PRESIDING JUDGE TARFUSSER: Good morning. Good morning to everybody
14 here in the courtroom.
15 Good morning to the delegation of the Republic of South Africa, to the Prosecutor,
16 Prosecution office, to the public, which is very numerous today, and to who is
17 watching us probably through the broadcast.
18 Please, first of all, court officer, could you call the case, please.
19 THE COURT OFFICER: Thank you, Mr President. The situation in Darfur, Sudan
20 in the case of the Prosecutor versus Omar Hassan Ahmad Al Bashir, case reference
21 ICC-02/05-01/09.
22 For the record, we are in open session.
23 PRESIDING JUDGE TARFUSSER: Thank you very much.
24 I would now ask the parties, the delegation of the Republic of South Africa and the
25 office of Prosecutor, to introduce their teams, their members.

1 So I would ask the head of the South African delegation to introduce the team.

2 Thank you.

3 MS DE WET: Mr President, Mr President, honourable Judges of the Pre-Trial

4 Chamber, I wish to take this opportunity to introduce the legal team that has been

5 mandated to present South Africa today before this Court in this public hearing

6 convened here. I'm Sandra de Wet. I'm the Chief State Law Advisor for

7 International Law of the Department of International Relations and Cooperation of

8 the Republic of South Africa and an advocate of the High Court of South Africa.

9 I'm joined today by Professor Tladi, professor in international law, advocate of the

10 High Court and the Ministers of International Relations and Cooperations Advisor.

11 I'm also joined today by my legal team, Mr Thanisa Naidu-Lewin and Ms Romi

12 Brammer, both State law Advisors in the Office of the Chief State Law Advisor in

13 Pretoria; by Mr Andre Stemmet, advocate of the High Court in South Africa serving

14 as legal counsellor in The Hague. And of course we are accompanied today by His

15 Excellency Ambassador Bruce Koloane, the South African Ambassador to the

16 Kingdom of Netherlands.

17 Judge, I'm not sure how you want to proceed. We have a few general statements

18 before we would indicate how we would want to address the Court today. Thank

19 you.

20 PRESIDING JUDGE TARFUSSER: Thank you very much. I will give you the floor

21 as soon as we have finished these preliminaries. Now I refer to the Office of the

22 Prosecutor asking for the presentation of the team of the Office of the Prosecutor.

23 MR NICHOLLS: Good morning, your Honours.

24 Good morning to my colleagues from South Africa.

25 My name is Julian Nicholls. I'm joined today by Mr Phakiso Mochochoko, Mr Manoj

1 Sachdeva, Stan Talontsi, Rod Rastan, our case manager, Biljana Popova, Melissa
2 Simms, Florence Darques-Lane and Edward Jeremy. Thank you.

3 PRESIDING JUDGE TARFUSSER: Thank you very much.

4 The Chamber, this Chamber, Pre-Trial Chamber II, is composed by Judge Marc Perrin
5 de Brichambaut on my right and Judge Chang-Ho Chung on my left. I'm Judge
6 Cuno Tarfusser, presiding.

7 And the legal team of the Chamber is composed by Silvestro Stazonne, Simon
8 Grabovec and Drazen Djukic, associate legal officers, and by two interns, Marie Dang
9 Van Sung and Rebecca Freud.

10 So before giving the floor to the parties to this hearing, let me give you an overview
11 on how this hearing will unfold.

12 We will have three hearing sessions, each of approximately one hour and a half.

13 And we have immediately an exception because the first one will last a little bit
14 longer, because I have been informed that both parties will need for their presentation
15 about one hour and a half.

16 So while my own introductory remarks will last about 15, 20 minutes maybe,
17 obviously, in order not to cut the first speakers, we will go for sure over the one hour
18 and a half up to about two hours if needed. But after two hours, I have to stop
19 because I have to give time to the interpreters and court reporters for their break. So
20 the first session will be between one hour and a half and two.

21 Then we will have half an hour break and we will continue with the second session of
22 one hour and a half approximately. Then we will have probably exhausted both
23 presentations. We will have the lunch break. And after the lunch break, and there
24 is also obviously time to think about it, the representative of the Republic of South
25 Africa will have the opportunity to reply to the oral arguments of the Office of the

1 Prosecutor.

2 So this is how things will unfold. We will in any case end in the afternoon at around
3 4 o'clock, 4 something. Now, this is how the hearing will unfold.

4 I will now, if there is nothing else to discuss about, I will introduce this hearing and
5 give some preliminary remarks.

6 The present hearing has been convened by the Chamber on 8 December 2016 -- 2015, I
7 think, no -- 2016 under Article 87(7) of the Statute and Regulation 109(3) of the
8 Regulations of the Court, with a view to discussing any issue relevant to the
9 Chamber's determination of whether to make a finding of noncompliance by the
10 Republic of South Africa with the Court's request for arrest and surrender of Omar Al
11 Bashir and refer the matter to the Assembly of State Parties to the Rome Statute
12 and/or to the Security Council of the United Nations under Article 87(7) of the Statute.
13 Prior to opening today's discussion on the merits of the present hearing, it is helpful
14 to provide a summary of the relevant facts to the extent that they are not contested of
15 the main procedural steps in the present proceedings.

16 On 31 March 2005, the Security Council of the United Nations, acting under Chapter
17 VII of the UN Charter, adopted Resolution 1593(2005), referring the situation in
18 Darfur, Sudan to the Prosecutor of the International Criminal Court.

19 Following investigations on the part of the Prosecutor into the situation in Darfur,
20 Sudan and upon application by the Prosecutor, a Pre-Trial Chamber of this Court,
21 acting under Article 58 of the Rome Statute, issued on 4 March 2009 and on 12 July
22 2010, two warrants of arrest against Omar Al Bashir for war crimes, crimes against
23 humanity and genocide.

24 The Court, pursuant to Part 9 of the Statute, transmitted to the Republic of South
25 Africa - as a State Party to the Rome Statute - the request for arrest and surrender of

1 Omar Al Bashir pursuant to the two warrants on 5 March 2009 and 16 August 2010
2 respectively.

3 On 28 May 2015, the Registrar of the Court transmitted to South Africa a note verbale,
4 referring to public information regarding Omar Al Bashir's potential travel to South
5 Africa for the purposes of attending the African Union summit scheduled from
6 Monday, 7 to Tuesday, 15 June 2015 in Johannesburg.

7 In this note verbale, the Court requested cooperation by South Africa, reminding
8 South Africa of its duties, to arrest and surrender Omar Al Bashir to the Court should
9 he enter into the territory of South Africa in accordance with Articles 86 and 89 of the
10 Statute, and in case of any problem impeding or preventing the execution of the
11 request for cooperation, to consult with the Court without delay in order to resolve
12 the matter.

13 On Thursday, 11 June 2015, the Embassy of South Africa in The Netherlands
14 contacted the Registry to request an urgent meeting between the Registrar and the
15 Chief State Law Advisor to the Government of the Republic of South Africa and a
16 delegation from the Embassy at 5 p.m. the following day, with a view to engaging in
17 consultations pursuant to Article 97 of the Statute.

18 The Registry indicated to the Embassy of South Africa that it would request guidance
19 from the Chamber and revert to it as soon as possible.

20 The next morning, Friday 12 June 2015, the Chamber was informed of South Africa's
21 request to have a consultation meeting with the Court at 5 p.m. later that day.

22 After receipt of a response by the Office of the Prosecutor to South Africa's request
23 and a further information through the Registry on the content of the consultation
24 meeting sought by South Africa, it was decided to schedule a meeting at the time
25 proposed by South Africa to be presided by the Presiding Judge of the Chamber with

1 the attendance of representatives of the Republic of South Africa, representatives of
2 the Registry and representatives of the Office of the Prosecutor.

3 Some aspects of this meeting, in particular in terms of nature, purpose and outcome
4 are disputed issues in the present proceedings -- and therefore I call it "meeting" and
5 not "consultation meeting" just for the record -- so for the purposes of the present
6 summary it is sufficient to note that this meeting indeed took place at 5 p.m. on
7 Friday, 12 June 2015 and lasted for approximately one hour.

8 The day after now, this is Saturday, 13 June 2015, Omar Al Bashir entered the territory
9 of the Republic of South Africa.

10 In the course of the same day, the Chief State Law Advisor of the Republic of South
11 Africa met, separately, representatives of the Registry of the Court and
12 representatives of the Office of the Prosecutor.

13 In the evening of the same day, the Chamber received an urgent request from the
14 Office of the Prosecutor seeking that the Presiding Judge issue an order clarifying that
15 there is no ambiguity regarding South Africa's obligation to immediately arrest and
16 surrender Omar Al Bashir to the Court, that issues relating to domestic law do not
17 nullify or change South Africa's obligations under the Statute, and that South Africa's
18 immediate obligation to arrest and surrender Omar Al Bashir is not subject to any
19 delay, stay or suspensive effect.

20 In the same evening of Saturday, 13 June 2015, I would also say late evening, the
21 Presiding Judge rejected this request from the Office of the Prosecutor, observing that
22 the position of the Court maintaining that South Africa had the obligation to arrest
23 and surrender Omar Al Bashir to the Court had already been made sufficiently clear
24 and that no further reminder or clarification was necessary.

25 Omar Al Bashir eventually left the territory of the Republic of South Africa in the

1 morning of Monday, 15 June 2015.

2 Therefore, despite the Court's request for his arrest and surrender, South Africa did
3 not arrest and surrender Omar Al Bashir while he was on South Africa's territory
4 between Saturday 13 and Monday 15 June 2015.

5 On 4 September 2015, the Chamber held that these events warranted the opening of
6 proceedings pursuant to Article 87(7) of the Statute according to which the Court, in
7 case of noncompliance by a State Party with a request for cooperation by the Court,
8 may make a finding to that effect and refer the matter to the Assembly of State Parties
9 or, where the Security Council referred the matter to the Court, to the Security
10 Council. And I'm referring here to the decision of this Chamber number 247 in the
11 record of the case.

12 In accordance with regulation 109 of the Regulations, prior to making any such
13 finding, the requested State shall be heard, so the Chamber requested submissions by
14 South Africa on this matter by 5 October 2016.

15 The Chamber subsequently granted a request by South Africa for extension of time
16 for these submissions, and eventually decided to convene today's hearing by decision
17 number 274 of 8 December 2016.

18 Prior to this hearing, the Chamber authorised and received on 17 March 2017 written
19 submissions by the Office of the Prosecutor, and I'm referring to filing number 289 in
20 the record of the case, and by South Africa, and I'm referring to filing number 290 in
21 the record of the case.

22 In addition, the Chamber received written observations from the Kingdom of Belgium,
23 attached as annex to filing 277 in the record of the case, and from the Southern Africa
24 Litigation Centre, and this is filing 288.

25 The subject matter of today's hearing has been defined by the Chamber in decision

1 number 274 of 8 December 2016 I referred to earlier.

2 The Chamber will hear today any submission, in law or fact, which may be relevant
3 for the Chamber to take an informed decision on two consecutive issues:

4 The first issue is whether South Africa failed to comply with its obligations under the
5 Statute by not arresting and surrendering Omar Al Bashir to the Court while he was
6 on South Africa's territory despite having received a request by the Court under
7 Articles 87 and 89 of the Statute for the arrest and surrender of Omar Al Bashir; and, if
8 so, and this is a second issue, whether circumstances are such that a formal finding of
9 noncompliance by South Africa in this respect and referral of the matter to the
10 Assembly of States Parties to the Rome Statute and/or the Security Council of the
11 United Nations within the meaning of Article 87(7) of the Statute are warranted.

12 The Republic of South Africa and the Office of the Prosecutor are represented in this
13 hearing.

14 As recalled before, South Africa has indeed a right to be heard, in accordance with
15 regulation 109 of the Regulations, prior to the Chamber making any finding of
16 noncompliance and referral of the matter to the ASP and/or to the Security Council of
17 the United Nations.

18 As concerns the Office of the Prosecutor, as explained in decision number 286 of this
19 Chamber, the Chamber invited the Prosecutor to attend and provide submissions at
20 the present hearing as the Prosecutor's request under Article 58 of the Statute is at the
21 origin of the warrant of arrest against Omar Al Bashir, the execution of which we are
22 discussing today.

23 It is therefore appropriate to start with the submissions on behalf of the Republic of
24 South Africa, which is the primary actor in the present hearing, and then give the
25 floor to the representatives of the Office of the Prosecutor. And if the representatives

1 of South Africa would then wish to respond to any argument made orally by the
2 Prosecutor, they will be given the opportunity to do so, as I said in my introduction.
3 If this is all right with you, I would then give the floor to the representatives of South
4 Africa for the remainder of the present session.

5 And I see that I close it at 10 o'clock, so you have full one hour and a half to make
6 your submissions.

7 So I will give the floor to the representatives of the Republic of South Africa. Please,
8 you have the floor.

9 MS DE WET: Thank you very much, Mr President, your Honours.

10 Yes, before we share with you what we plan for today, I would just want to say a few
11 words at the beginning of this submission.

12 Mr President, your Honours, you would know that these proceedings here today is
13 the first of many in this process. First of all, these proceedings, as this is the first
14 time that there is a public hearing that has been called as far as our knowledge, it's the
15 first time the public hearing is called in terms and proceedings of Article 87(7) and
16 which we are eternally grateful for, and we hasten to say that we would want to use
17 this opportunity to for the first time also in a public forum express our submissions.
18 It is also the first time as far as we know that as part of the public hearing other
19 interested --

20 PRESIDING JUDGE TARFUSSER: I would not like to interrupt you, but I just would
21 ask you to speak a little bit slower because of the interpretation.

22 MS DE WET: The five-second rule.

23 PRESIDING JUDGE TARFUSSER: It's just a bit slower because we have two
24 working languages, and we have the interpretation into French as well. Thank you
25 very much.

1 THE INTERPRETER: Many thanks from the interpreters.

2 MS DE WET: Thank you, Mr President.

3 As I said, this is the first time that there was a public hearing called. It is also as far
4 as we understand the first time that other interested parties and the United Nations
5 have been requested to make submissions on the matter before the Court in these
6 proceedings.

7 It is also true that preceding these proceedings, it was the first time that a State
8 positively responded to the request for consultations under Article 97 of the Statute.

9 And as far as we are concerned, it was also the first time that the Court had also to
10 grapple with what the nature and contents of such consultations would be.

11 We have certain -- and Mr President, your Honours, you have also already alluded to
12 the fact that we have of course fundamental differences of opinion on how the Article
13 97 consultations was done, what transpired, and how that whole process played out.

14 But we are not here today to rehash that event. We are here today to present to this
15 Court the legal arguments in this matter that are at the essence of the heart of the
16 questions that the Court has put to South Africa to respond to in order to enable the
17 Court of proper submissions to come to a finding.

18 But let me say we have dealt with Article 97 extensively in our submissions, so we
19 will not go back to that, but we want to make for the public record the following
20 observations.

21 It is our belief that there were in the conduct of Article 97 consultations three
22 fundamental errors that occurred.

23 Firstly, with regard to the request for consultations by the ambassador of South Africa
24 was a request and not the consultation itself, it is unfortunate that it is our
25 interpretation that it was dealt with as the consultations itself.

1 Secondly, we believe that the request was treated as a quasi-judicial process rather
2 than what was intended by the drafters of Article 97 as diplomatic and political
3 processes.

4 Article 97 creates a consultative mechanism, and we believe if we read the Court
5 findings in this regard that the Court would deem these useful as the Court lamented
6 a case, particularly the DRC matter, where the Court lamented the fact that the party
7 did not positively respond to the request for consultations as it may have prevented
8 the proceedings.

9 THE INTERPRETER: Message from the interpreters: Could the speaker kindly
10 slow down.

11 MS DE WET: Thirdly, and I think this is the crucial one, and looking forward in how
12 this process will unfold in the ICC, we believe this is the area where the ICC would be
13 best served by developing the necessary rules.

14 Indeed, there are no rules applicable to the consultations of Article 97. When South
15 Africa wanted to engage the Court, when South Africa wanted to engage the Court on
16 Article 97, it was very difficult and impossible to find rules and procedure that were
17 developed that deal specifically with Article 97.

18 South Africa is not an accused. We are a sovereign state and sovereign states, as you
19 would know, are governed by rules and procedure, and that is what we were looking
20 for. That was not available, and it is still not available.

21 This for us has been addressed in the Assembly of State Parties where the assembly
22 recognised that there is a problem with respect to Article 97 consultations. We
23 therefore welcome the fact that in 2015 at the 14th Session of the Assembly of State
24 Parties, the State Parties agreed to embark on a process where the rules and
25 guidelines will be developed. These rules and guidelines we believe would be a

1 very good instrument for all parties in the future. It would enable parties to, with
2 confidence and with a clarity of understanding, approach the Court with a request for
3 consultation.

4 We also believe that this would enable the Court, we are very much dependent and I
5 think essentially dependent on the cooperation of States, to play its part and its role as
6 part of the international criminal justice framework.

7 Your Honour, your Honours, I now want to explain how we will go about our work
8 here today. Professor Tladi will introduce our legal arguments based on our written
9 submission, but also we want to upfront reserve the right for rebuttal as you have
10 already allowed us to do, if that is needed. So I would with no longer taking time
11 request my learned colleague, Professor Tladi, to present South Africa's legal
12 arguments. Thank you.

13 PRESIDING JUDGE TARFUSSER: Thank you very much.

14 Professor, you have the floor.

15 MR TLADI: Thank you very much, Advocate de Wet.

16 Your Honours, Mr President, I want to first of all take this opportunity to thank the
17 Chamber for giving us the opportunity to present South Africa's observations on the
18 questions that you asked in your decision of 8 December, namely, whether South
19 Africa has failed to comply with its obligations under the Rome Statute with respect
20 to the arrest and surrender of Mr -- I have to speak slower than this? Oh, it's going
21 to be very difficult, but okay.

22 PRESIDING JUDGE TARFUSSER: Not very much, but just slightly.

23 MR TLADI: Not very much slower? Well, okay.

24 -- and if so, whether South Africa should be referred to the UN Security Council
25 and/or the Assembly of States Parties.

1 I want to especially place on record our appreciation at the Chamber's willingness to
2 give us more time to allow the proceedings in South Africa to be completed before
3 completing these procedures.

4 Now, these two procedures, the Article 87(7) procedures and the domestic procedures
5 in South Africa which have since been completed are of course different. They deal
6 with different matters and, in fact, there are different legal rules that are applicable to
7 them. Nonetheless, we believe that it would have been less than ideal for these two
8 procedures to run concurrently. The point that we want to emphasise here is that
9 the issue before us today is not whether South Africa violated its legal obligations
10 under South African domestic law. The question squarely before us is whether
11 South Africa was in violation of its duties under the Rome Statute and international
12 law in general.

13 Let me interpose at this point by stating that we have not in our written submissions
14 and we will not in our submissions today be addressing matters that we believe fall
15 squarely within the jurisdiction of the South African courts. This is because this
16 Court, the International Criminal Court, this Chamber, does not have jurisdiction to
17 make determinations concerning South African law.

18 Now, the Office of the Prosecutor in its submission has made a number of unfounded
19 and misleading factual assertions designed to show impropriety and mala fides on
20 the part of the government. In our view, most of these are immaterial to these
21 proceedings. Nonetheless, I wish to highlight some of them just by way of
22 illustration.

23 So in the submission, the Office of the Prosecutor creates the impression that the host
24 country agreement was concluded with the sole aim of protecting Mr Al Bashir. You
25 can see this at paragraphs 12 to 13, paragraph 84 of their submission. The truth,

1 however, is that every intergovernmental conference, not most, not some, every
2 intergovernmental conference that is hosted by South Africa, every intergovernmental
3 conference that is hosted by South Africa is done so on the basis of a host country
4 agreement. Each and every one of these host country agreements, not some, not
5 most, every one of them contains immunity provisions. So it is not true to suggest
6 that the host country agreement was concluded solely for the protection of one person,
7 Mr Al Bashir.

8 It is not true, as is alleged at paragraph 11 and paragraph 17 of the OTP submission,
9 that South Africa, and I quote "took a number of steps to prepare for unimpeded
10 travel of Mr Al Bashir," unquote. The steps that were taken with respect to the
11 preparation for the AU Summit were taken for the preparation of the AU Summit as a
12 whole, not for one person, not for Mr Al Bashir as such.

13 It is similarly not true, as is stated at paragraph 82 and paragraph 83, that South
14 Africa put in place political impediments -- sorry, potential impediments to the
15 execution of the Court's request. At any rate, although we do not agree with these
16 submissions, we do not intend to dwell on them because, as we've said, we believe
17 that they are immaterial to the matter at hand.

18 Mr President, your Honours, we intend to show that a referral by this Chamber of
19 South Africa to the UN Security Council and the Assembly of States Parties is
20 unwarranted. The arguments we shall be proffering are contained in our written
21 submissions which are dated 17 March 2017. It is not our intention to recite all of
22 those submissions. Rather, during this hearing we intend to highlight, substantiate
23 and augment where necessary the critical issues contained in those submissions and
24 which we believe are necessary for the Chamber to make its determination.

25 Now, Mr President, your Honours, our introduction is rather lengthy, but it is rather

1 lengthy because we believe that much is riding on these submissions and much is
2 riding on the determination that you are going to make. This case will have
3 profound and far-reaching legal consequences far beyond Mr Al Bashir. It is not just
4 about Mr Al Bashir. It is not just about the immunities of Mr Al Bashir. It is about
5 the immunities of many other heads of state.

6 But more than that, it is about the very integrity of our system, the very integrity of
7 the Rome Statute. The whole world is watching. If legitimate legal arguments,
8 legitimate legal arguments are ignored in order to come to a particular conclusion,
9 this we believe will damage the integrity of the Court.

10 For that reason, even before making our arguments, we wish, if you like, to present
11 sort of the lay of the land. These proceedings that the Chamber has initiated -- and
12 I'm glad that Mr President mentioned that it was the Chamber that initiated these
13 proceedings and not as is normally the case, the Office of the Prosecutor. We believe
14 that in past cases it has been the Office of the Prosecutor. These proceedings in our
15 view call for two determinations. The first determination is whether there is in fact a
16 duty to cooperate in the particular circumstances. So in the matter before us, really,
17 the question is whether there is or, more accurately, was on 15 June 2015 a duty on the
18 Republic of South Africa to arrest and surrender Mr Al Bashir. Second, in the event
19 that there was such a duty and that duty was not complied with, whether a referral to
20 the Assembly of States Parties and of the Security Council is warranted.

21 Now, it's important to establish at this early phase that none of these two issues can
22 be assumed. They have to be shown. So the Chamber cannot assume that there
23 exists a duty on South African and international law or in particular under the Rome
24 Statute to arrest Mr Al Bashir. And in the event that a finding of non-cooperation is
25 made, it's not -- that in itself is not sufficient for a referral to the UN Security Council

1 or the Assembly of States Parties.

2 Again, I have been elaborate in addressing what might seemingly be a minor point,
3 but I do this because, again, in the submissions of the Office of the Prosecutor there is
4 a suggestion that this first issue, the issue concerning the existence of the legal duty,
5 ought to be dispensed with, that we need not address this, that we should simply
6 move on the assumption that there is such a legal duty and simply move to address
7 the factual question.

8 In paragraph 51 of its submissions, the Office of the Prosecutor states as follows, and
9 with your permission I wish quote, "Despite the lengthy nature of these proceedings,
10 at its core, the matter before the Court is a simple one, in fact and in law. It is
11 whether South Africa failed to comply with its duty under the Statute and whether
12 that failure warrants a judicial finding and a referral to the ASP and the UN Security
13 Council."

14 At paragraph 52, even more direct, "The litigation is thus primarily a procedural one.
15 It should not focus on the substantive law relating to the alleged immunity of Mr Al
16 Bashir in light of the purportedly conflicting treaty obligations since these matters
17 have been adjudicated by the Chambers of this Court."

18 Now, this dismissive point appears to be based on the decision of 13 June by the
19 Single Judge. In paragraph 1, paragraph 1, before the issues had been discussed, the
20 Single Judge states, and I quote, "In the present circumstances, any further reminder
21 or clarification to the Republic of South Africa is unnecessary, in claris non fit
22 interpretatio. Indeed, it is plain from the following that there exists no ambiguity or
23 uncertainty with regards to the obligation of the Republic of South Africa to
24 immediately arrest and surrender Mr Al Bashir."

25 We intend to show today that the Office of the Prosecutor's eagerness to dispense

1 with the question of the legal, the existence of the legal obligation and the Single
2 Judge's emphatic proclamation on which this eagerness is based is both erroneous as
3 a matter of law and fact.

4 Your Honours, the fact that this Chamber has previously decided a matter in a
5 particular way cannot be the end of the matter as such, and this is particularly the
6 case since in this instance the Appeals Chamber has yet to rule on the matter. We
7 recognise that the Court, and this Chamber in particular, can only make
8 determinations on the basis of legal arguments that are presented to it.

9 From our research, the DRC case on which the Single Judge based his position, the
10 State before the Chamber, the DRC, did not address the issue of the significance of the
11 UN Security Council and certainly did not do so in the detail that we are going to do
12 so today.

13 This serves and to our minds to emphasise the importance of the *audi alteram partem*
14 rule. Even in cases where the Court has previously made a ruling, the basic rule, the
15 basic and most fundamental rule is that each case must be seen on its own merit and
16 each party to the case must be permitted to make its own arguments and the Court
17 should then make a determination based on that State's arguments.

18 It is appropriate at this point to point out that the Rome Statute is a new treaty and
19 the jurisprudence is developing. So the Chamber should be open, even if it means
20 changing its mind, to new arguments that it has not previously heard.

21 So in the light of this, let me recap that we intend to make the following arguments.

22 There is no duty under international law in general and in particular under the Rome
23 Statute on South Africa to arrest a serving head of a non-State party such as Mr Al
24 Bashir. And it is our contention that today's proceedings really turn on this question,
25 and it is this question that we intend to focus on.

1 Second, even if there was a duty, and we believe that there wasn't a duty, there is no
2 cause under these circumstances to refer South Africa to the UN Security Council or
3 the Assembly of States Parties.

4 So I proceed now to address the first leg of our argument, namely, that there was no
5 legal duty to arrest a sitting Head of State, such as Mr Al Bashir. But it is useful
6 perhaps to sort of sketch out what I think we can all agree to. The Prosecutor I think
7 will agree to the three points I'm about to make. I think the Chamber, if one looks at
8 the previous decisions made by the Chamber, would agree. I think we can all agree
9 that under the Rome Statute, there is a general duty to cooperate with the Court
10 under Part 9. There, I've said it. I think we can agree that heads of state have
11 immunity *ratione personae* or, as it is commonly known, absolute immunity from the
12 jurisdiction of national courts of foreign states.

13 I think we can agree to that as a general rule. I think we can agree that Article 98
14 provides an exception to this general rule. These are general propositions that I
15 think we can all agree to. The question that we probably cannot agree is whether or
16 not the case of Mr Al Bashir is covered by Article 98. That I think is really the point
17 of contention.

18 Now, there are a number of arguments that have been advanced to suggest that in
19 fact Mr Al Bashir is not covered by the rule in Article 98. So our submission today
20 will primarily seek to show that each and every one of the arguments that has been
21 advanced is in fact incorrect and flawed as a matter of law.

22 In sum, our submission is that Article 98 does apply to the case concerning Mr Al
23 Bashir, and the arguments that it does not are ill-conceived.

24 I will now proceed to substantiate the argument by making four submissions. The
25 last three of these submissions are a response to the arguments against Article 98.

1 The first of these submissions is really that the Single Judge erred when he asserted
2 that there exists no ambiguity and no uncertainty with respect to the obligations on
3 South Africa to arrest and surrender Mr Al Bashir. We will show that even this
4 Court has not been able to this point find a consistent basis for that obligation.

5 The second submission that we will make is that the decision of Pre-Trial Chamber I,
6 which is the first argument to suggest that Article 98 does not apply to the case of Mr
7 Al Bashir, so Malawi and Chad, that these decisions are fundamentally flawed.

8 The third submission would be that the decision of Pre-Trial Chamber II in the DRC
9 case, which has since been repeated in subsequent cases and on which the Single
10 Judge's remarks were made, misconstrued and misinterpreted UN Security Council
11 Resolution 1593.

12 Finally, our submission will show that an alternative approach which seems to be
13 advanced by the Office of the Prosecutor in the current submission for the basis of the
14 duty to arrest Mr Al Bashir is itself flawed.

15 So I now proceed to address these matters in turn, and I begin with the first one,
16 namely, that there exists no ambiguity or uncertainty. The statement by the Single
17 Judge, which has been relied on by the Office of the Prosecutor that the law is clear,
18 that the matter is clear, that it is clear that South Africa has a duty to arrest Mr Al
19 Bashir, has no basis either in law or in fact. And I will start with the facts.

20 The lively academic debate in the literature that offers contrary views is itself an
21 indication that the law cannot be clear. I'm an academic and I know that academics
22 don't write about things that are clear. So the fact that there is so much literature is
23 itself an indication.

24 Moreover, if you look at that literature, if you take the authors that agree with the
25 Chamber, most of them have very different reasons. So that in itself must suggest

1 that the law isn't clear, that everyone is coming up with different reasons to find that
2 there is in fact a duty to arrest Mr Al Bashir.

3 But really academics and their writings aren't that important. What's really
4 important is that this Court, the International Criminal Court, has itself not been able
5 to agree on a legal basis, on the correct and appropriate legal basis for the duty to
6 arrest Mr Al Bashir.

7 And it's not just that the reasons are different. That would be understandable. It's
8 not just that the legal bases are different. No. The reasonings in Malawi and Chad
9 and the DRC are so inconsistent as to be mutually exclusive. In other words, they
10 can't both be correct. If you take those two decisions and you put them side by side,
11 it's not possible for both of them to be correct.

12 Finally, this inconsistency and lack of clarity is also obvious from the Office of the
13 Prosecutor's own submissions in a manner that suggests that in fact the OTP is aware,
14 although it doesn't want to say it, that the DRC decisions -- or, rather, the decision in
15 the DRC case is not beyond reasonable critique.

16 First, if you go through the OTP submission at paragraph 109, the OTP seems to
17 accept the reasoning in Pre-Trial Chamber II in the DRC case. However, as you read
18 on, paragraph 113, the Office of the Prosecutor essentially advances a different
19 approach. It comes to the same conclusion, but it advances a different approach.

20 There it states, and I quote:

21 "Thus, while the UN Security Council can refer a situation, the functions and powers
22 of the Court to act in relation to that situation are not regulated by the UN Security
23 Council resolution or the UN Charter, but by the Statute."

24 Yet, as we will demonstrate, Pre-Trial Chamber II in the DRC case and the decision on
25 13 June 2015 relied not on the Statute, but on UN Security Council resolution 2015,

1 and in particular paragraph 2 of that resolution.

2 Pardon me.

3 Your Honours, at this stage I'm not concerned with showing what is the correct legal
4 position. I'm simply trying to show that in fact there are so many different bases that
5 it would be unfair to suggest that the law is clear, that there is no uncertainty, that
6 there is no ambiguity, that we should simply skip this first step of determining the
7 legal obligation and conclude that in fact there is a legal obligation.

8 I now want to show that not only were these two decisions, Malawi and Chad on the
9 one hand and the DRC different, but that they were in fact inconsistent and mutually
10 exclusive, and I will begin with Malawi and Chad.

11 Now, the Malawi and Chad decision, the duty to arrest and surrender Mr Omar Al
12 Bashir was based solely on the Statute, in particular Article 27. So at paragraph 68,
13 the Pre-Trial Chamber I states, and I quote:

14 "The current position of Omar Al Bashir as a Head of State which is not a party to the
15 Statute has no effect on the Court's jurisdiction over the present case."

16 Now, this conclusion is made independent of any assessment of a resolution. The
17 Chamber decides that Malawi, Chad are not entitled to rely on Article 98 of the
18 Statute, and for this conclusion they advance essentially four propositions, well, it's
19 actually one proposition which is couched differently and presented as four
20 propositions.

21 So the first one, immunity before international courts does not exist, that's the first
22 proposition on which the duty to cooperate and arrest Mr Omar Al Bashir is based.
23 Second, Head of State immunity before international courts has been rejected over
24 and over again. That's the second proposition.

25 Thirdly, under Article 27, which by the way also speaks about immunity before

1 international courts, states have renounced their claims to the immunity of their
2 heads of state.

3 Fourth, Malawi and Chad ratified the whole statute, including Article 27. In fairness
4 to the Pre-Trial Chamber, at paragraph 44, they also advance what might be described
5 as an effet utile argument, namely that the interpretation of Article 98 advanced by
6 Chad would undermine the ICC.

7 But in sum, the Court is simply saying, Pre-Trial Chamber I is simply saying that
8 because Mr Al Bashir does not have immunity before the International Criminal
9 Court, there is a duty to arrest him.

10 Now, the DRC case is different, of course it comes to the same conclusion, the
11 conclusion is never at issue, but the reasoning is different.

12 It comes to the conclusion not on the basis of the Statute, but on the basis of UN
13 Security Council Resolution 1593.

14 With respect to the Statute, the Chamber accepts, seems to accept as a general rule
15 that it would ordinarily not have jurisdiction over a head of a state of a non-State
16 party.

17 At paragraph 26 of the DRC decision, the Court states, and I will quote:

18 "Given that the Statute is a multilateral treaty governed by the rules set out in the
19 Vienna Convention on the Law of Treaties, the Statute cannot impose obligations on
20 third states without their consent. Thus, the exceptions of the Court's exercise of
21 jurisdiction provided for in Article 27 should in principle be confined to those States
22 Parties that have accepted it."

23 I'll note this is very different from what was said in Malawi and Chad.

24 Later on the Pre-Trial Chamber II says:

25 "When the exercise of jurisdiction by the Court entails the Prosecution of a head of a

1 state of a non-State party, the question of personal immunities might validly arise.

2 The solution provided for in the Statute to resolve such a conflict is found in Article
3 98(1)."

4 Thus, for the Court, Pre-Trial Chamber II, the DRC decision, Article 98 precludes as a
5 general rule not only the duty to cooperate, but seemingly also the jurisdiction of the
6 Court. It is only because of paragraph 2 of UN Security Council resolution, only
7 because of paragraph 2 of UN Security Council resolution that the ICC has
8 jurisdiction according to Pre-Trial Chamber II in the DRC case.

9 This is completely inconsistent from what was decided in Malawi. In Malawi and
10 Chad, the duty under the Rome Statute to cooperate is deduced from Article 27. In
11 the DRC case it is deduced from Resolution 1593. So under Malawi and Chad, even
12 if you don't have paragraph 2, the ICC has jurisdiction and there is a duty to
13 cooperate. In the DRC, if you don't have a paragraph 2 of UN Security Council
14 Resolution 1593 or an equivalent, there is no duty to cooperate. There is no duty to
15 cooperate. So these two decisions are mutually exclusive.

16 Now, having demonstrated that, and I think we have demonstrated that, that the duty
17 to arrest Mr Al Bashir is not as clear as what the Office of the Prosecutor would
18 suggest, I now wish to address the substantive merits and address the various
19 arguments that have been advanced to show that there is in fact a legal duty to arrest
20 with a view to showing the flaws in those legal arguments.

21 So I will start with Malawi and Chad, and I start with Malawi and Chad because it is
22 relatively the easier of the grounds that have been advanced. Subsequent to Malawi
23 and Chad, as the honourable members will know, these decisions were severely
24 criticised even by those commentators that agreed with the decision. Nonetheless,
25 for completeness sake, I still wish to point out the flaws in Malawi and Chad.

1 The main problem with the Pre-Trial Chamber I decision in Malawi and Chad is
2 really that the Chamber conflicts questions of jurisdiction before the international
3 court and the duty to cooperate in any exception that might arise from that.
4 So what the Chamber assumes, that because there is a duty to -- or, rather, because the
5 Chamber and the ICC has jurisdiction under Article 27, and Article 27 has removed
6 immunity, that that means by definition that there is a duty to cooperate and there is
7 no immunity interstate, right. And the rules of immunity interstate have also been
8 addressed by Article 27.

9 But Article 98 is not concerned with the jurisdiction of the international court.
10 Article 98 is concerned with something completely different. It is concerned with the
11 exception from the duty to cooperate. It regulates a different set of relationships.
12 So while Article 27 regulates the relationship between the accused and the Court,
13 Article 98 really addresses the relationship between the Court and States Parties, not
14 accused. It also addresses the relationship between States Parties and non-States
15 Parties.

16 So you cannot from one deduce certain rules or the applicability relating to the other
17 one.

18 It is our submission that the approach of Malawi and Chad is really tantamount to
19 ignoring the clear terms of Article 98. Article 98 is clear, it provides that the Court
20 may not request cooperation in the form of surrender where such cooperation would
21 result -- would require the requested state to act inconsistently with its obligations
22 under international law with respect to the state or diplomatic immunity of a person
23 or property of a third state.

24 So judicial practice and state practice is unanimous. There is no case, not a single
25 case, which asserts jurisdiction of national courts, national jurisdiction over a person

1 with immunity *ratione personae*, even for international crimes, not one.

2 Mr Al Bashir is such a person, therefore, he's entitled to such immunity. The

3 Pre-Trial Chamber I's failure to account for Article 98 is thus fundamentally flawed

4 and erroneous because the presence of jurisdiction of an international court or

5 tribunal is not equal to the absence of immunity from national jurisdiction. And I

6 wish to repeat that. The presence of jurisdiction of an international court or tribunal

7 is not equal to the absence of immunity from national jurisdiction.

8 So it's not surprising that Malawi and Chad was criticised as much as it was, and it is

9 also not surprising that Pre-Trial Chamber II, when it got the opportunity again in the

10 DRC case, decided to follow a different path.

11 And so now we should test that path, test whether the path towards the duty to

12 cooperate and the duty to arrest and surrender Mr Al Bashir that was followed by

13 Pre-Trial Chamber is also not perhaps incorrect.

14 I'll just make sure that my words were captured correctly.

15 The first point to make about Pre-Trial Chamber II in the DRC case is that it does not

16 turn on interpretation of the Rome Statute. And this is an important point. It might

17 also be an important point depending on what the Prosecution might say in their

18 opening. But I want to leave it out there. It does not turn on the interpretation of

19 the Rome Statute. The Chamber determines that under the Rome Statute as a

20 general rule, a serving head of a non-State party would ordinarily be immune from

21 the jurisdiction of the Court and also from the jurisdiction of potential cooperating

22 states.

23 The Chamber determines however, that Mr Al Bashir does not have immunity from

24 the arrest by states because the resolution that referred the situation to the ICC

25 implicitly waived his immunity.

1 In particular, Pre-Trial Chamber II concluded that operative paragraph 2 of that
2 resolution, Resolution 1593, implicitly waived Mr Al Bashir's immunity.

3 So obviously, paragraph 2 is very important then because it is the very basis that
4 Pre-Trial Chamber II comes to the conclusion that there is, in fact, a duty to arrest Mr
5 Al Bashir.

6 I would, therefore, like to read in full paragraph 2. It provides:

7 "The Security Council decides that the government of Sudan and all other parties to
8 the conflict," excuse me, "shall cooperate fully and provide any necessary assistance to
9 the Court and the Prosecutor pursuant to this resolution and, while recognising that
10 states not party to the Rome Statute have no obligation under the Statute, urges all
11 states and concerned regional organisations to cooperate fully."

12 Now, in the Chamber's view in the DRC case, the implicit waiver of immunity flows
13 from the duty on Sudan to cooperate. In the view of the Chamber, and again I quote,
14 "cooperation envisaged in the resolution was meant to eliminate any impediments to
15 the proceedings before the courts, including the lifting of immunities."

16 So really - so that should be an unquote there - but, really, the question then is how do
17 we interpret UN Security Council's resolutions? Do we simply say, well, we are
18 looking at the text and on the basis of the text we can say it implies the following?

19 In our view, whilst UN Security Council resolutions are not treaties, it is generally
20 accepted that the rules applicable to treaty interpretation are applicable mutatis
21 mutandis to UN Security Council resolution.

22 The ICJ in the Kosovo advisory opinion UDI has confirmed that customary rules of
23 treaty interpretations found in Article 31 of the Vienna Convention on the Law of
24 Treaties may be applied to the interpretation of UN Security Council resolutions.

25 Now, it may be that there are different rules perhaps, but there must be some rules.

1 What in our view is not permissible is for an interpreter, including a tribunal or a
2 court, to extract implicit obligations without the application of any rules whatsoever.
3 And if you go through the DRC case, and you go through the paragraphs in which
4 the Pre-Trial Chamber comes to the conclusion that there is an implicit waiver, you do
5 not find a single rule of interpretation. This in our view is dangerous. It is
6 dangerous and it risks turning the process of interpretation, which is the search for an
7 objectively correct meaning of an instrument, it risks turning this process into a
8 process for the justification of policy preferences. This is dangerous even if the
9 policy preference is laudable.

10 To illustrate the point, a person looking at paragraph 2 that likes, that loves
11 immunities, that wants to protect immunities, could say, well, it is obvious, it's
12 implicit that the UN Security Council didn't want to touch immunities because they
13 didn't say anything about immunities.
14 Only the rules of interpretation as contained in the Vienna Convention on the Law of
15 Treaties can provide an objective interpretation of the UN Security Council resolution
16 divorced from our policy preferences, whatever those may be.

17 So how do we then interpret UN Security Council Resolution 1593? I won't read, I
18 know I have a tendency to read things too much, so I won't read the Vienna
19 Convention on the Law of Treaties because I'm assuming, I know, in fact, for a fact,
20 that the Chamber and the Office of the Prosecutor is aware of its contents. I will
21 simply say the following. For us, if you look at Article 31 of the Vienna Convention
22 on the Law of Treaties, there are a number of elements that would be useful in the
23 interpretation of the treaty.

24 The first three elements are an absolute requirement in the interpretation of any
25 instrument, including the resolution.

1 One, the ordinary meaning of the terms of paragraph 2 of UN Security Council
2 resolution. That's where we must start. What do the words in paragraph 2 of UN
3 Security Council Resolution 1593 actually say?
4 Two, the context in which those words appear, and the context is not just paragraph 2,
5 although paragraph 2 is very important for context, the context is the whole
6 resolution, all right. So what does that say? The object and purpose of Resolution
7 1593, what is it aimed at?
8 So these three elements, these three means of interpretation, we absolutely have to
9 look at and have, right, and absolutely have to apply.
10 The Vienna Convention then says in addition, right, certain means shall be taken into
11 account. And we have identified two means that are relevant in this instance. The
12 first is any other rules of international law that are applicable. So we will discuss
13 those, because those must be taken into account in trying to find the meaning of
14 article -- sorry, of paragraph 2 of UN Security Council Resolution 1593.
15 Second, this one is a little difficult and complicated, but subsequent practice, right, so
16 we also have to look at subsequent practice of States to try to identify precisely what
17 the paragraph 2 means.
18 We submit, your Honours, Mr President, that each and every one of these elements,
19 each and every one, supports the interpretation that the immunities of Mr Al Bashir
20 have not been affected by UN Security Council Resolution 1593, and I turn now to
21 address each one of these in turn.
22 The ordinary meaning. A consideration of the ordinary meaning in paragraph 2 of
23 UN Security Council Resolution 1593 suggests that it is not at all concerned with
24 immunities. What does it do, or at least the part that the Chamber based its decision
25 on? It places a positive duty on Sudan to cooperate. This is not the equivalent of a

1 waiver.

2 Now, you might say "But what else would cooperation mean?" And I think

3 cooperation must be seen in the context of the Rome Statute. Look at Part 9. The

4 first and perhaps the most important or at least the clearest form of cooperation, the

5 one to which most articles are dedicated, is arrest and surrender, right?

6 So paragraph 2, if you're thinking about it then would mean, at least in relation to Mr

7 Al Bashir, that Sudan is obliged to arrest Mr Al Bashir. Sudan is obliged to arrest Mr

8 Al Bashir.

9 This does not implicate, it does not concern immunities because again remember that,

10 at least under international law, a Head of State does not have immunity before his

11 own national authorities. He might have it under domestic law, but not under

12 international law. So that particular duty to cooperate does not in any way affect or

13 implicate immunities.

14 But other types of immunities that are listed in Article 93 do not include waiver of

15 immunities. So where does the Chamber get this implicit waiver of immunities in

16 paragraph 2 of UN Security Council Resolution 1593?

17 But, your Honours, even if we were to accept, and we do not accept, but even if we

18 were to accept that paragraph 2 somehow implicated immunities, somehow the word

19 "cooperation" in paragraph 2 contained or included also waiver of immunity, even if

20 we accepted that, the ordinary meaning of the words in paragraph 2 suggest that

21 Sudan, Sudan would be obliged to waive immunities. Failure to do so, in other

22 words, failure by Sudan to waive immunities would result in state responsibility for

23 Sudan for noncompliance of its obligation.

24 So the point I'm making is that the clear ordinary meaning of the words in paragraph

25 2 is that paragraph 2 is not self-executing, or at least the duty to cooperate on Sudan is

1 not self-executing, right. In other words, noncompliance by Sudan with its duty to
2 waive immunities, assuming it existed, is a matter between Sudan and the Council,
3 and it entails the responsibility of Sudan for violation of that duty and the possibility
4 for Council, for the Security Council to take measures in response.

5 The approach of Pre-Trial Chamber II in the DRC is essentially to push, to thrust the
6 responsibility of the Council for acting against noncompliance with duties on Sudan
7 onto individual states. And, again, this is something that we believe is dangerous
8 and a recipe for anarchy.

9 States Parties remain bound by their customary international law obligations which
10 require them to respect immunities of serving heads of state such as Mr Al Bashir.

11 Failure to do so on the part of South Africa, if we don't respect such a duty and we
12 proceed to arrest and surrender Mr Al Bashir, right, we would have violated our
13 obligations and Sudan could hold us accountable.

14 So we refer the Chamber here to part 4 of the Articles on State Responsibility, which
15 provides the grounds of justification for breaches of international law.

16 There is nothing in those articles, nothing at all that suggests that a state like South
17 Africa is excused from its obligations under customary international law because
18 Sudan did not comply with its duties under UN Security Council resolution, nothing
19 at all.

20 There is nothing in the resolution that South Africa could legitimately rely on in
21 Defence for any alleged breach of its customary international law obligations, nothing
22 at all.

23 Indeed, it is noteworthy, and this might be an argument in context but, in any event,
24 it is noteworthy that the Security Council could have, it deliberately decided not to, it
25 could have placed an obligation to cooperate on all parties. It didn't.

1 As such, the resolution, UN Security Council Resolution 1593 creates no rights and no
2 obligations on States other than Sudan.

3 I have to speak slower, and I have to make pauses every two or three sentences. I
4 shall do so.

5 PRESIDING JUDGE TARFUSSER: As I'm not -- I have not reached the right
6 authority, I have to rely on the court officer --

7 MR TLADI: Yes.

8 PRESIDING JUDGE TARFUSSER: -- and hopefully it works.

9 MR TLADI: I accept the authority of the court officers. I try to accept the authority,
10 I try to implement, I try to cooperate, but alas it seems I was unsuccessful. So I shall
11 try to be slower.

12 Whatever the possible ramifications and conjecture that we can draw up, the fact is
13 that if we confine ourselves to the ordinary meanings of paragraph 2, we will come to
14 the conclusion, if we're honest, we will come to the conclusion that the ordinary
15 meaning is clear and does not affect immunities at all.

16 The second element that we will now proceed to deal with is context. Pause. Again,
17 if we turn our attention to context, we find that there is nothing in the context that
18 suggests a waiver of immunity. If anything, context suggests that immunities are
19 not affected by UN Security Council Resolution 1593.

20 Before coming to specific points of context, allow me to begin by recalling a general
21 context, and that is that this resolution is not just about Mr Al Bashir. So we cannot
22 read it just to fit his circumstances. It's not about Mr Al Bashir. UN Security
23 Council Resolution 1593 is not just about Mr Al Bashir's immunities.

24 Moreover, more importantly, we should not reduce the criminal justice project to a
25 single individual. We should not reduce the criminal justice project, in particular the

1 work of the International Criminal Court in Darfur to a single individual.

2 Now, with respect to paragraph 2 itself, the duty on Sudan to cooperate and provide
3 assistance to the Court, you note if you look at it that it's not absolute. The duty is
4 qualified by the phrase "pursuant to this resolution."

5 Now, if you turn your head to paragraph 3 of UN Security Council Resolution 1593,
6 you will note that paragraph 3 requires the Court and the African Union to, and I
7 quote, "discuss practical arrangements to facilitate the work of the Court."

8 Now, Pre-Trial Chamber II's statement in the DRC case that the purpose of paragraph
9 2 is the elimination of impediments to proceedings in our view is one such practical
10 arrangement. The consequence of this is that it is not up to the Court unilaterally to
11 determine that the resolution waives immunity. The Council has requested the
12 Court to engage with other stakeholders, in particular the African Union, with regard
13 to these practical arrangements, such as those that would eliminate impediments to
14 proceedings before the Court.

15 Furthermore, as part of context, we submit that this resolution itself provides a good
16 context because it shows this resolution, 1593, that whenever the Council in this
17 resolution seeks to depart from rules of international law, it doesn't do so implicitly.
18 It does so explicitly.

19 I turn your attention, your Honours, to paragraph 6 of the resolution. And there the
20 Court -- the Council, sorry, departs from rules of international law in two ways, but it
21 does so explicitly.

22 First, with respect to a specific rule of international law, it purports, and I use that
23 word "purports" on purpose, it purports to exclude the jurisdiction of this Court in
24 circumstances where this Court would otherwise have jurisdiction, right. So in other
25 words, it's changing international law. It's saying ICC, even though you would have

1 jurisdiction over non-nationals in Darfur, we are saying you will not, right. That's
2 paragraph 6. So it does it explicitly, not implicitly.

3 The second one, it purports to exclude the potential universal jurisdiction of states, of
4 national states, right. It does so explicitly, not implicitly. The correct interpretation,
5 therefore, to our minds is that whenever the counsel wants to depart from existing
6 rules of international law, it does so explicitly, not implicitly.

7 I turn now to the third means of interpretation, object and purpose. Now, with
8 regards to the object and purpose, it's clear to us that a holistic reading of the
9 resolution is that the resolution is multifaceted and that the jurisdiction of the ICC is
10 but a cog in the strategy of the Council. If you look at the resolution as a whole, you
11 get a sense that jurisdiction is not to be achieved at all costs. It's not all about
12 jurisdiction. It's not all about judicial processes and remedies. The ouster of ICC
13 and national jurisdiction that I have just referred to in paragraph 6 is but one example
14 of this.

15 Similarly, paragraph 3, imploring of a cooperative approach and engagement
16 between the ICC and the African Union is equally reflective of this fact. I also refer
17 to paragraph 5 which asserts the need to promote healing and reconciliation. All of
18 these show one thing that, yes, jurisdiction of the Court and trials and prosecutions
19 are important, but that the UN Security Council is concerned with more than that.
20 So we cannot interpret paragraph 2, or P2, as if jurisdiction is the only thing that's
21 important, that everything is lost unless we can catch one individual.

22 So ordinary meaning, context and object and purpose all support that the
23 interpretation that the resolution does not address and thus leaves the rules of
24 immunity under international law intact.

25 I proceed now to look at any relevant rules of international law and these we find at

1 Article 31(3)(c) of the Vienna Convention on the Law of Treaties. And essentially
2 this provision requires that when we interpret treaties, in this case a resolution, that
3 we shall take into account any relevant rules of international law. Simply put,
4 this -- and by the way it's "shall" take into account, it's not "may," it's "shall" take into
5 account -- this rule of interpretation requires that we interpret the Resolution 1593 to
6 the extent possible in such a way that it is consistent with existing international law
7 that is applicable including, including the law relating to immunities.

8 The rule of interpretation, this rule of interpretation precludes the implicit
9 interpretation approach that is followed in the DRC decision where such an
10 interpretation conflicts with existing rules.

11 So there is a general rule on international law, a rule of immunity that would shield
12 Mr Al Bashir from arrest in South Africa. And this rule should be taken into account
13 in determining what the duty to cooperate on Sudan in paragraph 2 means.

14 As a result thereof, unless the Council had expressly removed the immunity of
15 Mr Al Bashir, we should interpret paragraph 2 of the resolution in such a way that it
16 respects the rule, if that's possible, and we suggest that it is, because if you look at
17 Part 9, if you look at Article 93, there are many other ways that Sudan can cooperate
18 which does not implicate immunities.

19 This is particularly the case since the international court has described the rules
20 relating to immunity as, and I quote, "one of the fundamental principles of the
21 international legal order."

22 Article 32, Article 32(2), so Article 32 paragraph 2 of the Vienna Convention on
23 Diplomatic Relations is a relevant rule also for the interpretation of paragraph 2 of
24 this resolution because, remember, this resolution would also apply to diplomats.

25 As the Chamber will be aware, Article 32(2) of the Vienna Convention provides that

1 "waiver must always be expressed." And I didn't insert the word "always," it's in the
2 treaty, not as the Pre-Trial Chamber II concludes implicit, it must be explicit, express.
3 Moreover, and consistent with all of these principles, whenever the counsel wants to
4 depart from general rules of international law, it does so explicitly. I've already
5 referred to paragraph 6 of UN Security Council Resolution 1593, but there are other
6 resolutions. So if you look at the resolutions on piracy, look at the resolutions on
7 terrorism, right, whenever the Council wants to depart from existing rules of
8 international law, it does so expressly and implicitly.

9 Your Honours, Mr President, I turn now to subsequent practice. Now, I left this
10 element as a last one for the interpretation because admittedly it is a difficult one to
11 apply to resolutions largely because of the changing configuration of the Council.
12 Nonetheless, it is worth pointing out that States on the Security Council have never,
13 have never expressed the view that Resolution 1593 amounted to the waiver of
14 immunity from foreign national jurisdiction. They have said other things, but they
15 have never said this.

16 And they interact, members of the Security Council interact with a Prosecutor on this
17 file twice a year. They have never said this. In fact, we have had some members
18 that have consistently made the point that it does not affect immunities between
19 States, all right, so immunities from national jurisdiction of foreign states.

20 But finally, the practice of States Parties to the ICC also suggest that this resolution
21 should not be interpreted in the manner suggested by Pre-Trial Chamber II in the
22 DRC case.

23 All the states, including staunch supporters of the ICC that have hosted Mr Al Bashir
24 over the years have not arrested him, have had the same interpretation of that
25 resolution; Kenya, Chad twice, Malawi, Djibouti twice, the DRC, Nigeria, South

1 Africa, Uganda and, of course most recently, Jordan.

2 This is legally relevant and it should be taken into account because it suggests what
3 States Parties believe is the content of the resolution.

4 So, your Honours, Mr President, it is our submission to you that Pre-Trial Chamber II
5 erred in the DRC case when it held that paragraph 2 of UN Security Council
6 resolution implicitly waived the immunities of Mr Al Bashir.

7 I turn now, I turn now to consider the alternative approach that we find in the Office
8 of the Prosecutor's submissions.

9 Mr President, your Honours, as described above, while paying lip service to Pre-Trial
10 Chamber II, in reality the Office of the Prosecutor essentially advances a completely
11 different proposition for why there is a duty on the Republic of South Africa to arrest
12 and surrender Mr Al Bashir, and it is this submission to which we turn. The
13 submissions of the Office of the Prosecutor in this regard can be found at paragraphs
14 113 to 120.

15 The submission of the Prosecutor can be summarised as follows: The referral of the
16 situation by the UN Security Council resolution provides the Court with jurisdiction.
17 That's the first proposition on which the OTP bases its conclusion or its views that
18 there is a duty to arrest Mr Al Bashir.

19 Second, such a referral triggers the application of the entire legal framework, and I
20 think there should be an emphasis placed on "entire."

21 Thirdly, because the referral was done according to Chapter VII, States are obliged to
22 accept the conferral of jurisdiction and to act in accordance with the obligation.

23 Fourth, accordingly, the entire legal framework including Article 27, which removes
24 immunity, applies to the situation in Darfur. On this basis, the Office of the
25 Prosecutor concludes that there is no -- that there is a duty. I wish they had

1 concluded there is no duty. They conclude that there is a duty on States Parties to
2 arrest Mr Al Bashir.

3 Mr President, your Honours, even if all of these propositions are correct, one to four,
4 even if they are all correct, it doesn't justify the conclusion. It simply does not follow
5 from those propositions that there is a duty to arrest. And to show that, I will take
6 each one in turn.

7 The first one, so the first one is that the referral confers the Court with jurisdiction
8 over Mr Al Bashir. But the jurisdiction of the Court is not at issue here. What is at
9 issue is the duty to cooperate. We can readily accept that the counsel conferred
10 jurisdiction over Mr Al Bashir, but that doesn't mean there is a duty to cooperate.

11 Such a referral triggers the application of the whole Statute, of the entire legal
12 framework. Okay, we could accept that. But the entire legal framework includes
13 Article 98. Unless the Prosecution wishes to argue that it only triggers some
14 provisions of the Rome Statute, then we would need to justify why.

15 Third, States are obliged to accept the jurisdiction of the Court and the obligations
16 imposed by the resolution. Again, South Africa has not disputed the jurisdiction of
17 the Court. As for the obligations under the Resolution, the UN Security Council
18 Resolution created obligations on Sudan, not on South Africa. The obligations, the
19 obligations on South Africa are to be found in the Rome Statute in Part 9 and Part 9
20 includes Article 98. So you cannot wish it away.

21 Fourthly, the whole legal framework of the Rome Statute including Article 27 applies
22 *prima perfect*. But Article 27 applies to the removal of immunity from the
23 jurisdiction of the ICC. That's not at issue. At any rate, if you look at Article 27,
24 you must look at Article 98, which is also part of the Statute.

25 The fundamental flaw in our view if you look at all of these propositions and the

1 conclusion that is made is essentially the same one that haunted the Pre-Trial
2 Chamber 1 in Malawi and Chad. The fundamental flaw is that it assumes that the
3 existence of the jurisdiction by the Court and the applicability of Article 27 removes
4 the immunity from national jurisdiction of foreign courts. This, as we have argued
5 before, is not correct. On the basis of the foregoing, it is our submission that there is
6 and was no duty on South Africa to arrest Mr Al Bashir.

7 Your Honours, we have shown above that there was no duty on South Africa to arrest
8 and surrender Mr Al Bashir. However, even if such a duty did exist, it is our
9 submission that a referral to the UN Security Council and/or the Assembly of States
10 Parties would be unwarranted and unnecessary.

11 In judgment of the Appeals Chamber in August 2015 in relation to the Kenyatta
12 matter on cooperation, the Court affirmed that a referral need not be intended to cast
13 a bad light on the state that has not complied. We submit that the only purpose, the
14 only purpose that would be served by referring South Africa to the Assembly of
15 States Parties and/or the Security Council would be to cast it in bad light. That is the
16 only purpose. The Appeals Chamber considered that a referral is not an automatic
17 consequence. It must be after the exercise of discretion by the Chamber. In
18 exercising this discretion, the Chamber should consider all the facts and
19 circumstances.

20 Now, a key factor that the Office of the Prosecutor addresses in its submission is
21 whether a referral would provide an incentive for cooperation. At paragraph 97 of
22 its submission, the OTP suggests that a referral would foster and promote future
23 cooperation. But empirically this is just not the case. It's just not true. There have
24 been a raft of referrals, none of which have fostered cooperation. It is our
25 submission that only a clear legal position - because at this point there isn't a clear

1 legal position - only a clear legal position would foster cooperation.

2 And perhaps, members of the Chamber, the time has come for the Chamber to
3 reconsider what has up to this stage since Malawi and Chad been an automatic
4 referral of cases of non-cooperation. I mean, one option, one option that the
5 Chamber might consider would be to direct an unambiguous request from the UN
6 Security Council to clarify the contents of paragraph 2 so that we are brought into
7 clear daylight. And if the Council says yes, we have waived immunity, voila, then it
8 is clear. That would force the cooperation in the future.

9 Your Honours, as I conclude, I wish to sketch out some political and diplomatic
10 contexts. Since Mr Al Bashir's attendance of the AU Summit in South Africa in June
11 2015, he has visited three other States Parties without being arrested. The most
12 recent of these was to Jordan. Jordan is a very close friend of the Court. Its national
13 Prince Zeid bin Ra'ad al-Hussein was the Court's -- the Assembly of States Parties'
14 first president. And of course, as we know, Jordan was hosting the Arab League
15 much like South Africa was hosting the African Union Summit.

16 Now, all of these cases of non-cooperation, Chad, Malawi, DRC and so on and so on,
17 all of these cases together with the previous cases of alleged non-cooperation are for
18 reasons that we have highlighted earlier under subsequent practice legally relevant.
19 But more than that, politically, they also show the risk of alienating staunch
20 supporters of the ICC in favour of what is at best a doubtful legal proposition in
21 interpretation. It's worth recalling here that most of the cooperation requests that
22 have resulted in referrals have concerned Mr Al Bashir, a sitting head of a non-State
23 party. We cannot and must not continue to do the same thing hoping for different
24 results.

25 But for South Africa, the political and diplomatic complexities also arise because of a

1 multiplicity of factors including the leading role of peacemaker that we play on the
2 continent. Our commitment to peacemaking, to peacekeeping, is tangible. It's not
3 academic. It's not just about statements that we make at the African Union or the
4 United Nations. More than 40 South Africans have in recent years lost their lives.
5 As a leading player in peace efforts, we cannot disengage from the African Union or
6 adopt a policy that would suggest we're not going to host AU heads of state. It's just
7 not possible.

8 The government has consistently made this point to the Assembly of States Parties in
9 our efforts to find a political solution. So far that political solution has not been
10 found, but we understand that it's continuing. But the political and diplomatic
11 complexities are actually mirrored in this legal and judicial labyrinth, and we hope
12 that the Court, as it considers the submissions that we have made as well as the
13 submissions of the Prosecutor, will take these into account.

14 In the light of the above, we pray for the following: That the Chamber find that
15 South Africa did not act contrary to its obligations under Article 87 and 89 of the
16 Rome Statute and that this matter not be referred to either the Assembly of States
17 Parties or the Security Council.

18 South Africa further requests the Chamber to obtain an authoritative interpretation of
19 UN Security Council Resolution 1593 from the UN Security Council, including by
20 calling upon the UN Security Council to request the International Court of Justice for
21 an advisory opinion in terms of Article 96(1) of the UN Charter.

22 In the alternative, should the Chamber find that South Africa did indeed violate
23 Article 87(7) of the Rome Statute, South Africa requests that the Chamber grant it
24 leave to the Appeals Chamber for the purposes of a final determination of the legal
25 questions raised in this submission.

1 I thank the members of the Chamber, Mr President. Thank you very much.

2 PRESIDING JUDGE TARFUSSER: Thank you, Professor, for these submissions. It
3 is now 11.15. We take the break, half an hour, until 11.45. And then I will give the
4 floor to the Office of the Prosecutor for one hour and a half more or less as announced
5 and after which we will have the lunch break. Thank you very much. The hearing
6 is adjourned to 11.45.

7 THE COURT USHER: All rise.

8 (Recess taken at 11.15 a.m.)

9 (Upon resuming in open session at 11.46 a.m.)

10 THE COURT USHER: All rise.

11 Please be seated.

12 PRESIDING JUDGE TARFUSSER: Good morning once again. It's always so
13 strange coming in here and not seeing the witness in front of me, because it's a
14 different proceeding, so I have to look on the left and the right only.

15 The floor is now to the Office of the Prosecutor. You have the floor.

16 MR NICHOLLS: Thank you, your Honours.

17 I will speak first, followed by my friend Mr Rastan.

18 Your Honours, this hearing is primarily about two issues, as you said in your
19 preamble to the hearing this morning:

20 One, whether South Africa failed to comply with its obligations under the Statute by
21 not arresting and surrendering Mr Al Bashir despite having received the request from
22 the Court; two, and this one has the two parts, whether the circumstances are such
23 that the Chamber should make a formal finding of noncompliance and refer the
24 matter to the Assembly of State Parties and/or the UN Security Council.

25 Our answers to these questions are "yes" and "yes." Yes, you should find that under

1 all the circumstances South Africa failed to comply with its obligation under the
2 Statute by failing to arrest and surrender Mr Al Bashir; and yes, given the gravity and
3 all the circumstances of this noncompliance, you should make a formal finding and
4 refer the matter both to the ASP and to the Security Council.

5 Now in the end, as we said in our pleadings and which is challenged today, but I'll
6 say it again, these issues, the issues for today are not particularly complicated in fact
7 or in law.

8 On 15 June, South Africa permitted Mr Al Bashir and his delegation to depart in his
9 plane from a military airbase. It did so after the Court here in The Hague had made
10 clear just three days earlier that under the law of the ICC, South Africa was obliged to
11 arrest and surrender Mr Al Bashir. It did so in violation of an express order issued
12 by the High Court in Pretoria.

13 And I'll get into this a bit later, but some of the pronouncements from the South
14 Africa domestic litigation are relevant because they show that South Africa acted in
15 violation and unlawfully in those courts, judgments which have been accepted by
16 South Africa, the Supreme Court of Appeals, in allowing Mr Al Bashir to leave.

17 I'll address three topics during this session, first, in a little more detail, our position
18 that you should make a formal finding and refer it of noncompliance; second, I will
19 discuss some of South Africa's complaints about the conduct of the Article 97
20 consultations, the meeting that took place on 12 June 2015; and third, I'll discuss the
21 evolution of South Africa's legal arguments regarding Articles 98(1), 98(2) over the
22 course of this litigation. And then I will turn over the floor to Mr Rastan, who will
23 respond to some of the other legal arguments on immunity.

24 Now, the reason for our position of answering yes to the two issues posed, quickly,
25 are as follows: First, South Africa simply failed to comply with the request without

1 giving any valid justification. It knew of its obligation to arrest Mr Al Bashir, which
2 significantly up until June 2015 it had acknowledged all the way back to 2009. It had
3 the ability to arrest and surrender him and chose not to do so.

4 And this is a key, and we saw it again today, I would submit, the only justifications
5 ever put forward by South Africa before the Court here in The Hague, before the
6 domestic courts, although they changed over time, are purely legal disagreements,
7 fundamentally with the law as set out by this Court.

8 All of those reasons for not arresting Mr Al Bashir in the end simply boil down to
9 South Africa disagreed with the ICC jurisprudence, the law as set out by the
10 Chambers, so it did not comply. And you see that approach reflected starkly in
11 paragraph 51 of their submissions.

12 Now, this is not to say, of course, that decisions of the Court, of any court, can't be
13 challenged, that all decisions are made by infallible judges. Of course decisions can
14 be contested. They can be challenged. They can be litigated. And, indeed, this
15 was made clear during the Article 97 consultations at page 21, line 17 to 23, of the 12
16 June transcript.

17 But what can't be accepted, which is what happened here, that a State Party simply
18 disregards an obligation to cooperate because it disagrees with the law, and in this
19 case a reasonable interpretation of the law, even if South Africa ultimately disagrees.

20 Second, as to a formal finding of noncompliance and referral, we have to remember
21 this was a grave act of noncompliance, the failure to arrest and surrender a person for
22 whom this Court issued two warrants for the most serious crimes under the Statute.

23 Just Simply put, without cooperation from State Parties in arrest and surrender,
24 except in very rare cases where a suspect chooses to surrender him or herself, the
25 Court is going to be unable to carry out its most basic function, putting on trial

1 persons charged with the most serious crimes of concern to humanity and
2 determining their guilt or innocence.

3 Let me talk for a moment here about the issue of context, as my friends put it, which
4 South Africa discusses in paragraph 17 to 24 of their written submissions as well as a
5 reference today.

6 In paragraph 17, South Africa argued that "this matter should be considered in the
7 context of South Africa's commitment to international peace and security, the
8 protection of human rights and the fight against impunity."

9 And we fully agree with that description of South Africa's commitment, leaving aside
10 the unfortunate, is the word I would use, episode under discussion today, we
11 acknowledge South Africa's demonstrated commitment to these important ideals, we
12 acknowledge their significant and valuable support to the Court in the past.

13 But that context cannot excuse noncompliance. And here let me recall the Chamber's
14 Djibouti decision of 11 July 2016, at paragraph 14, in which the Chamber stated:

15 "State Parties to this Statute must pursue any legitimate or even desirable political
16 objectives within the boundaries of their legal obligations vis-à-vis the Court.

17 Indeed, it is not in the nature of legal obligations that they can be put aside or
18 qualified for political expediency."

19 And this was also made clear during the Article 97 consultations, at pages 8 to 9 of the
20 transcript, where the Single Judge explained that in this case South Africa had to take
21 responsibility and accept the consequences in deciding whether to, quote, "to go one
22 way or another" and that there was not a third solution, there's only a decision to be
23 taken by South Africa if President Al Bashir comes to South Africa.

24 Under all the circumstances which I will discuss a bit more as I go on, South Africa's
25 noncompliance should be referred both to the Assembly of State Parties and to the

1 Security Council so that those institutions can do what they can to prevent a
2 recurrence should Mr Al Bashir travel to South Africa in the future and to promote
3 compliance in the future by other State Parties. My friend made reference to several
4 State Parties that have failed to arrest and surrender Mr Al Bashir. That is not a
5 reason to stop referring these cases to the only bodies that they can be referred to.
6 And there is no reason therefore in this case why it should, South Africa should be
7 treated differently than Djibouti, Uganda, DRC and the others which have been found
8 similarly noncompliant.

9 Okay. Now I will turn to the conduct of the Article 97 consultations, not meeting,
10 consultations were held, which South Africa has characterised as unfair to the point of
11 violation of due process. 97 consultations have been held before. However, South
12 Africa was the first State to request them in regard to an arrest and surrender request.
13 We addressed the facts and the law surrounding the consultations mainly in
14 paragraphs 14 to 22 and 77 to 96 of our submissions. I won't go through all of them
15 again, but it should be kept in mind as we talk about the consultation process the fact
16 that South Africa requested these consultations, which is to South Africa's credit, of
17 course, and that these consultations then took place.

18 One, the fact that the consultations were requested and took place did not in any way
19 alter, suspend the pre-existing, clear, standing obligation to comply with the arrest
20 warrants, which again had been acknowledged before back to 2009.

21 And second, once those consultations clarified and re-affirmed South Africa's
22 obligation, South Africa should have complied even if it was not satisfied in the
23 manner in which the way those consultations had been held.

24 In our submissions, at paragraphs 87 to 96, we make clear that consultations were
25 conducted in a completely fair, appropriate and reasonable manner to South Africa,

1 as well as to the Registry, as well as to the Prosecution.

2 I won't repeat all the points, as I said, but I will respond to South Africa's main
3 categories, which were reiterated today in the courtroom this morning. South Africa
4 claims that the errors in the consultations were three: First, by regarding the request
5 for consultation as a consultation itself; second, by treating these requests, which they
6 say were directed at the Registry and intended to be a diplomatic and political
7 process as a quasi-judicial process without applicable procedures; and third, that in
8 doing so somehow basic principles of natural justice and due process were not
9 adhered to.

10 And to appreciate the context and understand the context under which the Article 97
11 consultations took place and whether these complaints have any validity, it's really
12 crucial to look at the timing of the request for the consultations and the circumstances
13 under which they were held in June 2015.

14 Now, first let me remind us of the relevant Article, the law on consultations, the
15 guidance.

16 "Article 97. Where a State Party receives a request under this Part in relation to
17 which it identifies problems which may impede or prevent the execution of the
18 request, the State shall consult with the Court without delay in order to resolve the
19 matter."

20 Let's look at the facts keeping that, the requirements of that article in mind. As your
21 Honour reminded us this morning, on 28 May the Registry, because of the
22 widespread open source public knowledge that Mr Al Bashir was likely or may travel
23 to South Africa for the summit, the Registry on 28 May sent a note verbale to South
24 Africa to remind, not trigger, but remind South Africa of its obligation to seek
25 consultations if it identified any foreseeable difficulties in the request.

1 Moving to South Africa, in the beginning of June, as South Africa has stated in
2 affidavits submitted in the domestic litigation, and this is before the request to
3 continue these proceedings, Mr Al Bashir's attendance at the AU Summit was
4 confirmed in the beginning of June and the legal aspects of Mr Al Bashir's potential
5 visit to South Africa were discussed at a cabinet level.

6 I'd like to look at what's tab 6 in our binder, this is not confidential. Nothing I'm
7 going to show today is confidential. This is an affidavit of the Director-General of
8 the Presidency and the Secretary of the Cabinet, which was submitted to the Pretoria
9 High Court on 15 June by South Africa's lawyers.

10 THE COURT OFFICER: For the information of the participants in the courtroom,
11 the document will be displayed on the evidence 2 channel.

12 MR NICHOLLS: And I'll skip to the relevant section, again, this is the supporting
13 affidavit of the Director-General of the Presidency and the Secretary of the Cabinet
14 before the High Court on 15 June 2015.

15 And if we could go, going on please to paragraph 3.1 to see what was happening.

16 The sworn affidavit tells us, paragraph 3.1:

17 On or about the beginning of June 2015, the Cabinet was made aware that
18 Mr Al Bashir had been invited by the AU to attend the summit in South Africa and
19 "indeed confirmed his attendance."

20 Paragraph 3.2: The confirmation was accompanied by a request from Sudan for
21 immunity."

22 Paragraph 3.3: That the Cabinet, that South Africa knew of and considered the ICC
23 warrants for Mr Al Bashir.

24 Paragraph 3.4: The recognition that the Republic of South Africa as a State Party to
25 the Rome Statute was "obliged to give any request" to the ICC pertaining the arrest on

1 the warrant.

2 Paragraph 3.5: That accordingly, as a result of the two warrants and the hosting of
3 the summit, the Cabinet deemed it "prudent and necessary," I quote, to deliberate and
4 discuss whether South Africa was required to arrest Mr Al Bashir while attending the
5 summit, which sounds like identifying a potential legal problem.

6 3.6: That in early June the Cabinet requested legal advice from the Chief State Law
7 Advisor, deliberated on this issue at length, and considered the implications of the
8 Host Agreement on the privileges and immunities of Mr Al Bashir.

9 Paragraph 3.7: The Cabinet accepted and decided that South Africa was obliged to
10 uphold the terms of the Host Agreement and not arrest Mr Al Bashir in terms of the
11 ICC warrants.

12 In paragraph 3.8, which is significant for the legal discussion: The Cabinet collectively
13 appreciated and acknowledged that this decision not to arrest Mr Al Bashir "can only
14 apply for the duration of the AU Summit."

15 I'm done with that.

16 And on or about 4 June 2015, the Host Agreement was decided, published the next
17 day on 5 June, which purportedly gave immunity to Mr Al Bashir as an AU delegate
18 to the summit.

19 Now, setting aside that in 2009 South Africa had publicly acknowledged that if Mr Al
20 Bashir came to South Africa to attend the presidential inauguration, which again is
21 notice, I would say, that a problem may exist, that that was a position taken years
22 earlier, let's look at all the other points at which notice of a 97 problem arose.

23 After receiving the note verbale on 28 May, receiving confirmation of Mr Bashir's
24 attendance at the AU Summit and Sudan's request for immunity in the beginning of
25 June, and formally concluding a Host Agreement on 4 June, which supposedly

1 provided immunity to Mr Al Bashir, South Africa still had not come to the Court for
2 consultations.

3 As your Honour stated in the chronology this morning, South Africa only on 11 July
4 requested the consultations under Article 97 should take place the following day, 12
5 June -- excuse me, I think I said July -- 12 June 2015 at 1700 hours. That's a Friday at
6 5 p.m., literally on the eve of Mr Al Bashir's travel to South Africa. That's when the
7 consultations were requested and when they were held.

8 Now, South Africa in their written submissions asserts at paragraph 36 that it made
9 its request for Article 97 consultations, I quote, "when it became a real possibility that
10 the president of Sudan would attend the AU Summit."

11 And however that phrase "real possibility" is construed, as the affidavit of the
12 Director-General which we just looked at shows, in the beginning of June to the
13 Cabinet, Mr Al Bashir had confirmed his attendance and requested immunity, and
14 that was enough of a real possibility to trigger all that activity we see in the affidavit,
15 seeking legal consultations, debating the issue, deciding on the law, concluding the
16 Host State agreement. But it wasn't enough to come yet to the Court.

17 Now, as to the Court's reaction, the effect of the late request, the Court acted quickly
18 and convened the consultations immediately, acting on the request, and held the
19 consultations at the requested time.

20 South Africa has maintained, and we heard this in short this morning, that the
21 meeting on 12 June at 5 p.m. should have been regarded only as a request for
22 consultations which would take place later. But the Court was faced with what it
23 must have concluded and which was a genuine possibility of a State Party arresting
24 Mr Al Bashir. That was a small window, possibly a rapidly closing window of
25 opportunity, given Mr Al Bashir's practice of visiting State Parties for very brief

1 periods.

2 So under those urgent circumstances, it was absolutely proper, it was necessary for
3 the Court to hold consultations at that time for the purpose of Article 97 to resolve
4 any potential problem.

5 Now, the Court quickly decided on the format of the consultations to be held, the
6 Single Judge, and as we said in paragraph 91 of our submissions, Article 97 states that
7 consultations shall take place between the Court and the State. This intentionally
8 leaves open which organ should be involved, depending on the nature of the issue
9 and the competence required to solve the potential problem.

10 And, again, this complaint about the way the consultations were held, the procedures,
11 is simply another instance where it's up to the Court to decide within its discretion,
12 not for the party to impose on the Court how it should hold those consultations.

13 And the Court explained, the Single Judge explained why the consultations were
14 being held at that time, how they would be held and the procedures it would follow.

15 And that's even apparent from paragraph 38 of South Africa's submissions.

16 And here we need to look at why did South Africa come to consult. South Africa in
17 their note verbale requesting the consultations came with one and one issue only, a
18 legal impediment alleged under Article 98(2). And my friend has explained today
19 his view of the law and the relationship of Article 98(2) to Article 27 in the Security
20 Council referral and stated that this is a complex issue on which scholars are divided.
21 Reasonable minds can disagree. That was the problem they came with. Is it at all
22 feasible that a question of that nature, a complex legal question, the application of
23 98(2), is something that should be directed, that the Registry can handle on its own as
24 some kind of political and diplomatic process? It's by its very nature a legal issue, so
25 of course it will require a chamber, it will require judges to determine that legal issue.

1 As far as the timing again, the Court held the consultations immediately because of
2 the urgency, and the Court was not the cause of the delay, was not responsible for any
3 personnel from South Africa that they may have wished to be present not arriving.
4 The Chief State Law Advisor was held up by a visa problem. That was not the
5 Court's -- that was not within the Court's control. And the Court responded
6 appropriately by consulting with the representatives who had appeared, the
7 ambassador and the legal Advisor from the embassy.
8 During these consultations the Court fulfilled the purpose of Article 97. It resolved
9 the problem identified by the State Party coming to the Court.
10 The Single Judge set out the law and guidance with absolute precision and removed
11 any ambiguity regarding South Africa's obligation to arrest Mr Al Bashir.
12 The issue was resolved at the end of that hearing.
13 Therefore, in my submission, South Africa's arguments at paragraphs 41 to 43, that
14 there was no clear outcome to the consultations is simply not correct.
15 Now, even though the Chief State Law Advisor unfortunately wasn't present, the
16 same precise reasoning from the consultations was provided to him the next day at
17 12.40 in the afternoon. He was provided with a copy of the transcript of the entire
18 hearing which set out the Court's reasoning and the jurisprudence relied upon,
19 primarily the DRC decision, and was also provided with a copy of the DRC decision.
20 So the only unsettled point possibly at the end of this hearing on 12 June was whether
21 consultations might or might not continue over the weekend. That was also made
22 clear at 12.40 to the legal Advisor, to the legal Advisor at 12.40 the following day.
23 And in this context it's also I think relevant to recall that the guidance that the
24 Chamber gave in resolving the matter and the legal jurisprudence cited was nothing
25 new, was nothing novel, it was a DRC decision which was clear jurisprudence that

1 had guided other decisions. And all these points were made clear again in the
2 urgent decision issued later that night, the evening on June 13th, denying the
3 Prosecution's request.

4 And this is a theme I think I will come back to, but all of South Africa's complaints
5 regarding the 97 consultations again are just disagreements with the Court's decisions,
6 decisions made by the Court within its discretion as to how to hold them. There is
7 nothing in the hearings that violated due process or natural justice, and that's clear
8 from a reading of the transcript.

9 All these problems, alleged problems, could have been mitigated, avoided and there
10 would have been no confusion of any kind if South Africa had approached the Court
11 sooner to have these consultations and bring up these issues which they say are quite
12 complex.

13 One additional point is in regard to the assertion made today and in paragraph 49 by
14 South Africa in their filings, that the ASP had, quote, "acknowledged that a problem
15 exists in respect of Article 97 consultation and there is a lacuna in the procedures of
16 the Court."

17 In that respect, I urge the Court to read the actual decision cited by South Africa, the
18 Bureau. This is in tab 3 in our binder. It's the 3 June 2016 ASP Bureau meeting.

19 All that is stated there is that the Bureau decides to establish a working group of the
20 Bureau chaired by the ambassador of Chile to examine the application of Article 97 in
21 close consultation with the Court. In performing this task, the judicial independence
22 of the Court will be fully observed.

23 South Africa came and asked and moved for the establishment of this working group.
24 The establishment of this working group alone cannot be viewed as any kind of
25 endorsement of these criticisms, and in fact it has not made any criticisms of those

1 nature.

2 But in the big picture, for the two questions before us today, the format, the way the
3 consultations were carried out in this instance should have minimal weight, if any, on
4 the Court's determination of issues one and two. That's for two reasons. One,
5 because again the only legal issue was disposed of with finality by the Court, the only
6 legal issue presented by South Africa, the only impediment was removed.

7 Second, even if there had been flaws in the process, which is not our view and we
8 don't accept, but even if there had been, the fact is that nothing in the consultations
9 impacted negatively on the ability of South Africa to cooperate in the sense of
10 arresting and surrendering Mr Al Bashir. There were no barriers put up to South
11 Africa during that consultation.

12 So if we look at the 19 August 2015 Kenyatta judgment, paragraph 87, it's clear that
13 while the conduct of the proceedings and the parties can be a relevant factor in the
14 noncompliance proceeding, it's only if it somehow negatively impacts the ability of
15 the State Party to comply, which did not happen in this case.

16 Let me move quickly now to my third topic, which is the evolution at different times
17 and in fact sometimes contradictory positions and legal arguments taken by South
18 Africa regarding why it was supposedly not obliged to arrest Mr Al Bashir on the
19 basis of 98(1) or (2).

20 Now, on 15 June 2015, during the domestic litigation in Pretoria before the High
21 Court, that's three days after the consultations here in The Hague, South Africa took
22 the same position it had taken consistently since 2009. It agreed that it was obliged
23 to arrest Mr Al Bashir under the ICC arrest warrants.

24 As we saw in the affidavit of the Director-General, which I put up on the screen a few
25 minutes ago, South Africa now raised the Host Agreement and the Host Agreement

1 alone as a supposed bar to its obligation to cooperate with the Court. And South
2 Africa was asked by the High Court expressly about its duty as a State Party to the
3 Rome Statute to arrest Mr Al Bashir, and South Africa's advocate answered expressly
4 and clearly.

5 If I could go to slide 2. if we could go to the second page, I think, Biljana.

6 This is the hearing in Pretoria in the High Court on 15 June 2015. And if we see -- I
7 can't see it on mine because it's too small, but the Judge, the Presiding Judge, asked at
8 the beginning to South Africa's advocate:

9 "But the first point I want to clarify with you, having listened to all the submissions, is
10 it is not denied on your part that South Africa has international obligations in terms of
11 the Rome Statute?

12 Answer: Yes."

13 Okay. That might be slightly ambiguous, but the Judge continues:

14 "And insofar as those obligations go, arising from the warrants issued against
15 President Al Bashir, South Africa is excused from complying with those obligations in
16 this instance because of the notice it has issued, because ... based on the domestic
17 legislation that is here in the Cabinet Decision."

18 And there the Judge is referring to the Cabinet Decision and the Host State
19 Agreement.

20 "Answer: That's right.

21 Judge: So if he were to come here for a holiday, South Africa would arrest him?

22 Answer: South Africa will arrest him. That is why the applicants started their
23 founding affidavit" -- referring to SALC -- "by making the Court aware of the

24 invitation that was extended to President Bashir during the inauguration of the

25 President of the Republic of South Africa. Because at that time he was coming or he

1 would have come to the Republic as the guest of the Government of the Republic of
2 South Africa, South Africa could not assure him safety ... and he elected not to come."
3 But this is an entirely different scenario to the inauguration in 2009, where an
4 agreement was concluded between the South African government and the AU in
5 respect of the AU Summit which South Africa has been requested to host, and that is
6 the context in which it makes this matter different from the others, going back again
7 to 2009.

8 So South Africa's position could not be clearer from this exchange in court on 15 June.
9 But for the Host Agreement, South Africa was required to arrest Mr Al Bashir just as
10 it had determined previously in 2009, essentially the same argument as presented in
11 South Africa's note verbale requesting consultations delivered on 12 June.

12 The only conclusion is that in June 2015, South Africa accepted it was obliged to arrest
13 Mr Al Bashir on the basis of the ICC warrants. There is no Head of State Immunity,
14 customary international law or 98(1) issues in play other than in relation to the Host
15 Agreement.

16 And it was during this same hearing that Mr Al Bashir departed the country in
17 violation of the court order set down by the High Court. The High Court wrote in its
18 written judgment of 23 June at paragraph 39, this is annex KRK 8 to SALC's filing:
19 "The departure of President Bashir from this country before the finalisation of this
20 application and in full awareness of the explicit order of Sunday, 14 June 2015,
21 objectively viewed demonstrates noncompliance with that order."

22 And the High Court unanimously found, contrary to South Africa's arguments, that
23 the Host Agreement entered into on or about 4 June 2015, quote, "on its terms," end
24 quote, did not confer immunity on AU member states or the representatives or
25 delegates and that it did not confer immunity on Mr Al Bashir.

1 These are important points because they go against South Africa's argument that it
2 was under competing obligations. It was under a consistent obligation at home in
3 South Africa and to this Court when it let Mr Bashir leave on 15 June.
4 Let me move on now and again talk about the way the arguments have shifted in
5 relation to this issue. South Africa appealed the High Court judgment to the
6 Supreme Court of Appeal, which is why these proceedings were continued. We did
7 not object to that. They were continued in order to get all the facts and the
8 circumstances from those proceedings. And the High Court -- excuse me, the
9 Supreme Court of Appeal varied the High Court order and stated that the conduct of
10 the respondents in failing -- South Africa Government, in failing to take steps to arrest
11 and detain for surrender to the International Criminal Court, the President of Sudan,
12 Omar Hassan Ahmad Al Bashir, after his arrival in South Africa on 13 June 2015 to
13 attend the 25th Assembly of the African Union, was inconsistent with South Africa's
14 obligations in terms of the Rome Statute and Section 10 of the Implementation Act.
15 The Supreme Court of Appeal also confirmed that the High Court had been a
16 hundred per cent correct in its finding that the Host Agreement did not confer any
17 immunity on Mr Al Bashir.
18 But, and this brings me back to the point of the shifting legal arguments we've seen
19 here, the Supreme Court of Appeal judgment noted that, while in the High Court,
20 South Africa had relied on the hosting agreement argument alone, in the appeal,
21 quote, "an entirely different argument emerged," which was now based upon "what
22 were said to be the provisions of customary international law and the provisions of
23 the Diplomatic Privileges and Immunities Act." That's at paragraphs 12 to 13.
24 Now, we see the same shifting legal justifications happening here at the Court as well,
25 your Honour, as I alluded to earlier. It started in The Hague on 12 June, in South

1 Africa on 14 or 15 June. It's in effect an argument limited to 98(2). Cooperation
2 with the request regarding the warrants would force South Africa to act inconsistently
3 under international agreements, the Host Agreement.
4 South Africa at that time was taking the same position as it had in 2009. Now, here
5 in their written submissions, as it did before the Supreme Court of Appeal, and here
6 today, South Africa has moved away from 98(2) and relied principally on 98(1). And
7 I suggest that what that shows is that South Africa did not begin this process by
8 identifying a legal impediment to an obligation and seek a way to resolve it. It was
9 actually the reverse. South Africa identified a political and diplomatic problem in
10 the obligation and since then has been searching for a legal impediment to rely on.
11 And the common thread again running through all these arguments even as they
12 change, is the same: South Africa did not comply with a request for cooperation to
13 arrest and surrender Mr Al Bashir because it disagreed with the Court's statement of
14 the law, because it disagrees with the DRC decision.
15 Regarding the new arguments put forward by South Africa and the Supreme Court of
16 Appeal and really here based upon Head of State Immunity under customary
17 international law, I just want to look quickly at the holding of the Supreme Court of
18 Appeal, which South Africa has accepted. This is paragraph 103. It's in tab 4 in the
19 binder.
20 In this paragraph, the Supreme Court of Appeals Judge writes in the judgment, "I
21 conclude therefore that when South Africa decided to implement its obligations
22 under the Rome Statute by passing the Implementation Act, it did so on the basis that
23 all forms of immunity, including Head of State immunity, would not constitute a bar
24 to the prosecution of international crimes in this country or to South Africa
25 cooperating with the ICC by way of the arrest and surrender of persons charged with

1 crimes before the ICC where an arrest warrant had been issued and a request for
2 cooperation made." And they continue at the bottom of the paragraph, speaking
3 about this holding, "It does not undermine customary international law, which as a
4 country we are entitled to depart from by statute."

5 My final document I want to show you, your Honours, is a statement from the
6 department, through the Department of Justice by the Minister of Justice, confirming
7 South Africa's understanding that based on this warrant it is required to arrest
8 persons for whom the ICC has issued arrest warrants. This press release or this
9 statement was issued on 21 October 2016 after the Supreme Court of Appeal's verdict.

10 "In exercising its international relations with foreign countries, particularly with
11 countries in which serious conflicts occur or have occurred, South Africa is hindered
12 by the implementation of the Rome Statute of the International Criminal Court Act.

13 This Act and the Rome Statute of the International Criminal Court compel South
14 Africa to arrest persons who may enjoy diplomatic immunity under customary
15 international law but who are wanted by the International Criminal Court for
16 genocide, crimes against humanity and war crimes and to surrender such persons to
17 the International Criminal Court. South Africa has to do so, even under
18 circumstances where we are actively involved in promoting peace, stability and
19 dialogue in those countries."

20 And just one more section at the top of the second page. In the matter of, and they're
21 quoting the High Court, the Supreme Court of Appeals judgment, "The Supreme
22 Court of Appeal confirmed that in terms of customary international law, heads of
23 state enjoy immunity against arrest. However, the Supreme Court of Appeal found
24 that in enacting the implementation of the Rome Statute of the International Criminal
25 Court Act 2002, South Africa had expressly waived the immunity of such heads of

1 state and that South Africa was obliged to arrest persons wanted for crimes against
2 humanity."

3 Now, the significance of these findings, your Honours, is that, one, by virtue of that
4 domestic legislation alone, there was no 98(1) or 98(2) bar to cooperation with the
5 Court on arrest warrant request, neither was there a bar under customary
6 international law.

7 Two, in the legally and factually specific circumstance of Mr Al Bashir's visit to South
8 Africa in June 2015, South Africa was required to comply with the ICC request to
9 arrest and surrender Mr Al Bashir.

10 Three, South Africa has accepted that Supreme Court of Appeals judgment, accepted
11 the law, withdrawn its further appeals, although it now attempts to argue some of the
12 same points before this Court. There was no legal impediment under 98(1) or (2) to
13 the arrest of President Bashir in 2015.

14 And your Honours, again, what we see running through all of this is that South
15 Africa's argument boils down to where a State Party disagrees with the law of the ICC,
16 the jurisprudence of the ICC, even a decision on which the commentators are divided
17 and which my friend has written many commentators find reasonable, the DRC
18 decision. Simply disagreeing with that law is acceptable and that the parties should
19 be able some 17 months later to try to litigate that again. South Africa could have
20 come earlier, brought all these questions to the Chamber when it received
21 confirmation of Mr Al Bashir's attendance and gone through the process and cleared
22 this up.

23 With that, your Honours, I'll pass the floor to Mr Rastan.

24 PRESIDING JUDGE TARFUSSER: Thank you very much, Mr Nicholls.

25 Mr Rastan.

1 MR RASTAN: Thank you, your Honour. I'll try to be within the 45 minutes left.
2 I'm conscious of having to speak slowly for the interpreters and I've been practising,
3 but in case I do speak too fast, I'll be guided, and if more time is needed, perhaps we
4 may need to have an additional few minutes perhaps after the lunch break.

5 PRESIDING JUDGE TARFUSSER: I know, but I think if it's only a matter of a few
6 minutes, we can go up to also half past. I mean, there is no -- we're flexible here.

7 MR RASTAN: Sure. I'm guided.

8 Your Honours, as we noted in our written submissions, we're not here today to
9 litigate the law on immunities. The decision that treated those issues, which was
10 based on this Chamber's prior decisions concerning the DRC, is now nearly two years
11 old. Now, we're not seeking to ignore legitimate legal arguments, as counsel
12 suggested this morning, but procedurally pointing out the procedure before this
13 Court.

14 Nonetheless, as the Chamber has welcomed, quote, "any submission which the
15 Prosecutor and South Africa consider relevant to these issues," end quote, and
16 anticipating that they would indeed be raised, both our and South Africa's written
17 submissions have addressed the applicable law on immunities to the extent that it
18 may be relevant.

19 PRESIDING JUDGE TARFUSSER: You might have exercised, but not enough.

20 MR RASTAN: Yes, yes. I have "slow down" written on the top of every page.

21 PRESIDING JUDGE TARFUSSER: Yes.

22 THE INTERPRETER: Many thanks from the interpreters.

23 MR RASTAN: As I was mentioning, we have addressed this and South Africa has
24 addressed this to the extent that it may be relevant to the Chamber's determination.
25 Relevance in this regard of course depends on whether it serves to clarify the issue in

1 these proceedings.

2 Turning to South Africa's submissions on the law regulating immunities, I will
3 address two aspects. Firstly, South Africa's submission that the Court is not
4 competent to interpret the effects of Security Council resolutions, this being a role
5 properly reserved for other competent bodies; and two, its submission that the
6 rationale underlying the Chamber's decisions is flawed.

7 South Africa is incorrect on both grounds. This Court is competent to interpret the
8 effects of Security Council Resolution 1593. Indeed, it must do in order to determine
9 its own competence and the scope of Sudan's obligations towards it; and this
10 Chamber's analysis of the effects of Resolution 1593 as reflected in the DRC decision
11 was correct.

12 On South Africa's first complaint, whether the Court is competent to interpret the
13 effects of Security Council resolutions, South Africa appears to take the view that this
14 Court is not competent to determine its own jurisdiction. In particular, South Africa
15 argues that by relying on Resolution 1593 and interpreting its meaning, the Court
16 acted *ultra vires* by encroaching on the authority of other bodies to authoritatively
17 interpret Security Council resolutions, referring in this context in its submissions to
18 the International Court of Justice. Similar submissions were made this morning
19 about the lack of competence of the Court in relation to matters effecting the effects
20 and interpretation of the Security Council resolution.

21 Your Honours, this statement misapprehends the nature and the basis of the
22 Chamber's decisions. As your Honours know, the urgent decision of 13 June 2015
23 and the oral decision issued the day before was based on the legal reasoning
24 contained in the Chamber's decision concerning the cooperation of the DRC, and that
25 decision has also been echoed in the Chamber's later decisions concerning both

1 Uganda and Djibouti. In these decisions, the Chamber looks to Security Council
2 Resolution 1593 to determine its own competence and the legal duties imposed upon
3 Sudan. This is nothing unusual.
4 In the Tadic case, of course, the ICTY Appeals Chamber affirmed the general power of
5 any court to determine the scope of its own competence, of course, the principle of
6 competence de la competence. In the Ayyash, et al case, the Special Tribunal for
7 Lebanon Appeals Chamber likewise accepted its power to interpret the effects of a
8 Security Council resolution, which importantly it distinguished from the power to
9 review the correctness of the Security Council's decision-making. The same power
10 of course is replicated in Article 19 of this Statute, and the Statute expressly states in
11 Article 119(1) that the Court must determine disputes over its judicial functions.
12 And what is more judicial than the scope of its jurisdiction?
13 Your Honours, because the Court can only assert jurisdiction over the territory of a
14 non-Party State by virtue of a Security Council resolution, and here I'm setting aside
15 of course ad hoc declarations by non-Party states, it will always be necessary in such
16 situations for the Court to interpret the relevant resolution.
17 First, it must identify the parameters of the referred situation since this defines the
18 scope of its exercise of jurisdiction. The Security Council referral will be the starting
19 point for identifying the Court's jurisdiction in terms of its temporal, geographic
20 and/or personal scope.
21 Second, the Security Council resolution will serve as the basis for the non-Party State
22 concerned to cooperate with the Court, since other than those Chapter VII obligations
23 placed upon that state, the Court will have no basis to request its cooperation,
24 excluding of course a voluntary agreement.
25 In other words, the Court will always need to identify the scope of the duty to

1 cooperate established by the Security Council and must consider the effects of that
2 obligation within the legal framework of the Statute. Indeed, the Court would be
3 unable to act without such an analysis.

4 As for the reasons explained, there is nothing extraordinary or incorrect in the
5 Chamber's reliance on Resolution 1593 to determine its legal effects for this Court, for
6 the Sudan, and to the extent that it impacts on the application of States Parties under
7 the Rome Statute, the effects of the resolution for its States Parties.

8 Here I would just like to observe that counsel for South Africa suggested that in
9 paragraph 113 of our written submissions, this is submission 289 in the record of the
10 case, that we had suggested that the entire legal framework of the Rome Statute as a
11 consequence of the Security Council resolution becomes applicable to all states. I'd
12 just like to observe that we, as consistent with our written submissions and what we
13 have just said here, we refer to the application of the legal framework of the ICC in
14 relation to the States concerned, and here, of course, this is the Sudan.

15 In fact, this is not our submission. This is in fact the finding of the Court. The
16 Pre-Trial Chambers have consistently held in both the Libya situation and the Darfur
17 situation that the result of a Security Council resolution referring a situation to the
18 Court and placing obligations on that state to cooperate results in the entire legal
19 framework of the Court applying. In that context it referred to in particular its
20 complementarity and cooperation provisions. But as I said, the statement was in
21 relation to the entire legal framework.

22 Your Honours, I will now turn to the second aspect of South Africa's submissions,
23 that the rationale of the DRC decision which is relied upon by the Single Judge in
24 both the meeting and in the Urgent Decision is somehow incorrect.

25 Since the question here concerns the triangular relationship between the Court, the

1 State of the suspect's nationality or the State to whom the immunity is owed and the
2 surrendering state, I will touch on each of these relationships briefly in turn.

3 Now, your Honours, although South Africa devotes much of its written submissions
4 as well as some time this morning to the decision of Pre-Trial Chamber I concerning
5 Malawi and Chad, of course, this Chamber in its decision concerning South Africa
6 based its reasoning on the later DRC decision. And in these limited submissions, it
7 is not necessary to address the soundness of those earlier decisions, even though they
8 arrived at the same result. Indeed, counsel suggested this morning that Chambers
9 could approach legal submissions in different ways and arrive at different results, but
10 nonetheless criticises this Chamber for having departed from the reasoning by a
11 different Pre-Trial Chamber concerning the matter of cooperations owed by State
12 Parties.

13 Turning to the DRC decision, the central basis for the Chamber's rationale is its
14 examination of the effects of Security Council Resolution 1593 within the legal
15 framework of the ICC. For the reasons set out below, this approach was correct.
16 Specifically, the Pre-Trial Chamber examines the relationship between Article 27(2),
17 which removes procedural immunity powers to the exercise of the Court's jurisdiction,
18 and the requirement in Article 98(1) for the Court to seek a procedural waiver of
19 immunity from a third State. Given that the Security Council has legally required
20 Sudan under Chapter VII of the UN Charter to, quote, "cooperate fully," end quote,
21 and quote, "provide any necessary assistance to the Court" end quote --

22 THE INTERPRETER: Message from the interpreters: Could counsel kindly slow
23 down.

24 MR RASTAN: -- the Chamber asks whether obtaining such a procedural waiver
25 from the Sudan is required.

1 It found that it is not. It states that since immunities attached to Mr Al Bashir are a
2 procedural bar, the cooperation envisaged in Resolution 1593 was meant to eliminate
3 any impediment to the proceedings before the Court, including the lifting of
4 immunities.

5 As such, it holds that the "cooperation of that third State, the Sudan, for the waiver of
6 immunity" as required under the last sentence of Article 98(1) of the Statute has
7 already been ensured by the language used in paragraph 2 of Resolution 1593.

8 Now, several aspects of this reasoning are important, your Honours. The first is
9 whether, when the Security Council says that the Sudan must "cooperate fully" and
10 "provide any necessary assistance to the Court," the content of those duties is
11 regulated by the Rome Statute. To be clear, the source of the obligation on Sudan to
12 cooperate with the Court is of course Chapter VII of the UN Charter, but what we
13 need to determine is what precisely those obligations are and which provisions apply.
14 Your Honours, it is self-evident that the Court can only exercise its jurisdiction in
15 accordance with the Statute, because the referral of a situation by the Security Council
16 triggers the exercise of the Court's jurisdiction, the applicable law that applies in the
17 exercise of that jurisdiction is and must be the Rome Statute. This is not an invention.
18 This is clear from a close reading of Article 13, which says, quote, "The Court may
19 exercise its jurisdiction with respect to a crime referred to in Article 5 in accordance
20 with the provisions of this Statute if" -- and one of the conditions are, paragraph B,
21 where the Security Council has referred a situation to the Prosecutor acting under
22 Chapter VII of the UN Charter. In this way, the Statute expressly provides that
23 when the Court's jurisdiction is triggered by a UN Security Council referral, the
24 applicable law is the Rome Statute.

25 Now, it cannot plausibly be suggested that the Security Council was unaware of these

1 provisions or that it should have expressly clarified in its resolution which provisions
2 of the Statute did and did not apply, as suggested by South Africa. Its silence on the
3 matter suggests that it regarded this as obvious. And unlike the resolutions
4 establishing the ICTY and ICTR, the Yugoslavia and Rwanda tribunals, the Security
5 Council referral did not create a new sui generis body requiring it to set out the
6 applicable law. Rather, the whole point of the referral mechanism is that the Court
7 already exists, applying a well-established statute, indeed, a statute that was
8 negotiated under the auspices of the UN, even if the institution was ultimately set up
9 as an independent body.

10 Your Honours, there could be no doubt that requesting the Court to exercise its
11 jurisdiction would result in the Court exercising that jurisdiction in accordance with
12 the terms of the Statute.

13 Nor is the absence of an express reference to Article 13 in the Security Council
14 resolution determinative. This is because the matter has already been settled.
15 Under the Relationship Agreement between the Court and the UN, first seen in
16 paragraph 2 of the Statute and approved by both the General Assembly and the
17 Assembly of State Parties, Article 17 of the Relationship Agreement recognises that a
18 referral of a situation by the Security Council to the Prosecutor will occur pursuant to
19 Article 13(b) of the ICC Statute, the terms of which article specify that a Security
20 Council referral will trigger the exercise of jurisdiction by the Court "in accordance
21 with the provisions of this Statute."

22 And among the provisions of the Statute that thus become applicable to the situation
23 of Darfur, in Darfur, as a consequence of a Security Council referral is Article 27(2),
24 which provides that, quote, "immunities or special procedural rules which may attach
25 to the official capacity of a person, whether under national or international law, shall

1 not bar the Court from exercising its jurisdiction over such a person."

2 Therefore, one of the legal effects of the Security Council referral subjecting Darfur to
3 the jurisdiction of the ICC and requiring Sudan to cooperate fully with it is that the
4 Sudan, as a UN member state which is bound by Article 25 of the UN Charter, must
5 accept the exercise of jurisdiction by the Court with respect to alleged crimes
6 occurring on the territory of Darfur since July 2002 and must carry out the decisions
7 issued by the Court.

8 In this context, and I only touch on this aside, South Africa has suggested in its
9 written submissions, and it appears to have alluded to also this morning, but there is
10 no evidence that the Security Council intended specifically for the immunity of Mr Al
11 Bashir as Head of State to be removed, stating in its written submissions that the
12 matter is, quote, "constantly raised" at the Security Council during consideration of
13 the Prosecutor's bi-annual report, with little clarity provided.

14 Your Honours, although the Prosecution does not believe that this has any direct
15 bearing on the issues before this Court, it merely observes that the Security Council
16 has also on a number of separate occasions, when seized of requests to defer and
17 suspend the case against Omar Al Bashir on the basis, inter alia, of his status as Head
18 of State, pursuant to Article 16 of the Statute, has declined to do so.

19 Instead, all indications are that the Security Council, which is reminded in person by
20 the Prosecutor every six months of the existence of a warrant against Mr Al Bashir,
21 has seen no cause to interfere with the Court's discharge of its mandate in the
22 prosecution of its case against a sitting Head of State.

23 Your Honours, this was raised in the written submissions and we didn't see it
24 necessary to address it, but as it was recalled again today in the oral submissions,
25 counsel refers to paragraph 6 of Security Council 1593, where the Security Council

1 decides that the nationals, current or former officials or personnel from other states
2 outside the Sudan shall not be subject, or shall be subject to the exclusive jurisdiction
3 of those states.

4 Now, we agree that this is a purported carve-out of jurisdiction. We are not taking
5 the position that we accept this carve-out, and I think if the matter was to be raised in
6 the future, we would be happy to litigate on it. But I would merely note that, if
7 anything, this shows that the Security Council was aware of the issue of immunities,
8 addressed it in paragraph 6 in relation to one aspect, namely, other states, not the
9 Sudan, and by contrast chose not to address it in relation to paragraphs 1 and 2,
10 suggesting that it did not wish to disturb the ordinary application of the Rome Statute
11 vis-à-vis the Court's jurisdiction in relation to Darfur.

12 And lastly, just to note that of course the Security Council in the first paragraph of the
13 preamble of the resolution takes note of the report of the International Commission of
14 Inquiry, and that report, in its public report, refers to the fact that the crimes which it
15 had identified implicated the responsibilities of government officials.

16 So it cannot be plausibly suggested that the Security Council was either unaware of
17 the potential scope of an investigation or subsequent prosecutions before the Court in
18 relation to the Sudan, nor that it was unaware that the issue of immunity would apply
19 when the Court exercises its jurisdiction, given that Article 27(2) was set out
20 expressly.

21 Now, your Honours, and I don't know how I'm doing for time, the next question that
22 arises --

23 PRESIDING JUDGE TARFUSSER: You have at least 20 minutes.

24 MR RASTAN: Okay. I hope I can finish within that time, and if not, then I'll beg
25 your indulgence perhaps after the break.

1 Your Honours, the next question that arises is the interrelationship between Article 27
2 and 98.

3 While Article 27 regulates the exercise of jurisdiction by the Court with respect to
4 individuals, Article 98 concerns the competing obligations that arise for a requested
5 State Party towards another State when acting to give effect to an ICC warrant.

6 And I think here we agree across the benches, it is one thing to say that the Court can
7 exercise its jurisdiction with respect to an individual and another to say that a
8 particular State is bound by the terms of a statute, and this is a key issue that this
9 Chamber grapples with in the DRC decision.

10 In that decision, the Chamber's analysis is phrased by two key considerations which
11 we have identified. One, since the immunity of a Head of State or other high office
12 holder is a right that belongs to his or her state, the DRC decision recalls at paragraph
13 26 that a third state cannot be bound by the terms of a treaty without its consent,
14 Article 98 therefore providing that the Court must first seek the consent of that third
15 State before proceeding with the surrender request.

16 And second, the DRC decision at paragraph 29 recalls that the personal immunities
17 accorded by international law to heads of states and certain other high office holders
18 are essentially procedural in nature, quoting in that context the decisions of the ICJ
19 where the ICJ recalls that personal immunities of course regulate the exercise of
20 jurisdiction over particular conduct and are distinct from the substantive law question
21 whether that conduct is unlawful or attracts individual criminal responsibility.

22 I note some confusion perhaps this morning in the submissions by counsel referring
23 that perhaps this Court has accepted that it does not have jurisdiction at all in relation
24 to Mr Al Bashir. Perhaps I misunderstood. But of course, the Court does not make
25 that assessment in the DRC decision. It clearly makes a distinction, and if the Court

1 had no jurisdiction, well, it would not have issued a warrant in the first place. But
2 perhaps I may have misunderstood.

3 Now, as the Chamber observes in the DRC decision, State Parties to the Statute,
4 including South Africa, well, including in our context South Africa, have consented to
5 the exercise of the Court's jurisdiction with with regard to the immunities attached to
6 their officials or to the officials of other State Parties.

7 This means that as a result there is no requirement for the Court to seek the consent of
8 a State Party for the waiver of immunity with respect to its officials in the execution of
9 a surrender request by another State Party, because consent to the exercise of the
10 Court's jurisdiction has already been provided. Put differently, the waiver has
11 already been provided by acceptance of Article 27(2).

12 Article 98, therefore, ordinarily preserves the right of a third State that is not a party
13 to the Statute or which has otherwise not accepted to be bound by its terms by virtue
14 of an ad hoc declaration. And at paragraph 26 of the DRC decision, the Chamber
15 indeed confirms that such a third State is entitled to expect that any procedural
16 waiver of the applicable immunity attached to one of its officials will occur only
17 through its consent to waive such immunity.

18 Now, the situation is different, of course, for the Sudan, although it is not a State Party.
19 Because the Security Council has referred the situation in Darfur to the Court acting
20 under Chapter VII of the UN Charter, Sudan is required by Article 25 of the UN
21 Charter to accept that exercise of jurisdiction, as we stated earlier. Thus, the Sudan
22 cannot dispute the Security Council's authority under Chapter VII to confer
23 jurisdiction on the ICC or the authority of the Court which flows as a result.
24 And by requiring the Sudan to "cooperate fully" with the ICC, the Security Council
25 has decided that the Sudan shall give effect to the exercise of that jurisdiction by

1 accepting and carrying out any cooperation duties required in the discharge of the
2 Court's mandate.

3 Again, the source of Sudan's obligation to do so derives, as the wording of paragraph
4 2 of Resolution 1593 makes clear, quote, "pursuant to this resolution," end quote.

5 And the content of that duty to cooperate is, of course, regulated by the Rome Statute.

6 Again, as Article 13 makes clear, the legal consequence of triggering the ICC's
7 jurisdiction by the Security Council is that the Court will exercise its jurisdiction "in
8 accordance with the provisions of this Statute;" one of those provisions being the
9 non-applicability of procedural immunity bars to the exercise of the Court's
10 jurisdiction.

11 The effect of Resolution 1593 is thus to place the Sudan in a situation comparable to
12 State Parties. This outcome does not violate Article 34 of the Vienna Convention on
13 the Law of Treaties since the relevant treaty under which Sudan has expressed its
14 consent to be bound is the UN Charter. And it is acting under the UN Charter that
15 the Security Council has created certain legal effects for the Sudan, in consequence of
16 its duty to cooperate fully with the ICC "pursuant to this resolution."

17 Turning briefly then to the duties on a surrendering State Party under Article 98, a
18 requested State Party will not be under a conflicting international obligation towards
19 another State if that third state has consented to the non-applicability of procedural
20 immunity bars to the exercise of the Court's jurisdiction, either directly by becoming a
21 State Party or indirectly by its duty to accept and carry out decisions of the Security
22 Council.

23 In such circumstances, the conditions set out in Article 98(1) are not engaged, and this
24 is both what the Single Judge and the courts in South Africa found, that there was no
25 conflicting obligation at the horizontal level between South Africa and the Sudan.

1 Now, your Honours, there are elements of this argument that South Africa accepts
2 and elements that it does not accept. Although South Africa does not dispute that
3 Mr Al Bashir has no immunity before the Court in application of Article 27, it insists
4 that his immunity persists in view of the horizontal relationship between States in the
5 execution of the Court's surrender requests. I believe this is a correct
6 characterisation.

7 In its view, Article 27 governs only the relationship between the Court and the
8 suspect and does not impact the customary international law principle of sovereign
9 equality, namely, that one national criminal jurisdiction may not sit in judgment on a
10 foreign sovereign.

11 According to South Africa's interpretations, State Parties could never arrest a foreign
12 Head of State at the Court's request without seeking the express consent of his or her
13 state of nationality.

14 South Africa's interpretation would render Article 27 of the Statute entirely illusory
15 since the Court's jurisdiction could never be given effect. Except in the rare case of
16 voluntary surrender, the ICC would never be able to obtain the consent of the State of
17 immunity and that State would similarly deny its consent for surrender to any other
18 State.

19 Indeed, under South Africa's argument, unless a Head of State found him or herself
20 on the premises of the ICC, perhaps in the context of a courtesy visit, State Parties
21 would be powerless to give effect to the Court's jurisdiction, rendering Article 27
22 futile, contrary to the principle of effective interpretation of a treaty, the *effet utile*
23 principle that my colleague referred to earlier.

24 As a result, one of the most fundamental provisions of the Statute governing the
25 effects -- giving effect to its mandate to combat impunity for the most serious crimes

1 of international concern, would be rendered inoperable.

2 Even if South Africa's submissions were limited to the heads of States of non-Party
3 States, which is not entirely clear from the written submissions because of its general
4 reliance on the assertion of a customary international law bar at the national level, but
5 I believe it was made clear this morning in the oral submissions, but even if South
6 Africa's argument only related to the heads of States of non-Party States, its view
7 would render a key objective of the Security Council's resolution and the Court's
8 mandate to combat impunity inoperable.

9 In this sense, the Court would be emasculated in relation to its legal effects in relation
10 to one of its key objectives.

11 Now, your Honours, the ICC was created specifically to deal with this type of
12 criminality. One of the objectives of the Rome Statute is, inter alia, to address the
13 responsibility of heads of States. Because these crimes are often committed with the
14 involvement of States, they're often State crimes. The whole point of Article 27 is to
15 enable this objective. And Security Council resolution will be deprived of its effects
16 if Article 27(2) will be rendered inoperable.

17 Indeed, this is addressed in the DRC decision at paragraph 33 where it refers to the
18 importance of cooperation in relation to these aspects of the Security Council's
19 mandate. Now, I'm just going to quote very briefly from the DRC decision. And
20 the Chamber here is addressing the need for follow-up by the Security Council, but its
21 observations are equally apt in relation to cooperation duties generally.

22 And the Chamber states at paragraph 33 of its DRC decision, that's decision 195 in the
23 record of these proceedings,

24 "In this context, the Chamber wishes to reiterate that, unlike domestic courts, the ICC
25 has no direct enforcement mechanism in the sense that it lacks a police force. As

1 such, the ICC relies mainly on States' cooperation, without which it cannot fulfil its
2 mandate ... if there is an apparent failure on the part of State Parties to the Statute or
3 Sudan to cooperate in fulfilling the Court's mandate as entrusted to it by the
4 Council ... any referral by the Council to the ICC under Chapter VII of the UN Charter
5 would never achieve its ultimate goal, namely, to put an end to impunity.

6 Accordingly, any such referral would become futile."

7 Again, I recall that the context was in relation to the follow-up action by the Security
8 Council, but nonetheless the key sentences there are eminently applicable to the
9 situation before us.

10 Now, your Honour, the suggestion that the Security Council has no or only limited
11 powers to override customary international law and/or cannot invoke Article 103 of
12 the UN Charter to do so, as claimed by South Africa in its submissions, also appears
13 to understate the difference of views on the matter.

14 South Africa suggested the matter is well settled. However, just to give one example,
15 the 2006 report of the study group of the International Law Commission, finalised by
16 Martti Koskenniemi, on the topic of 'Fragmentation of International Law' notes that,
17 "The practice of the Security Council has continually been grounded on an
18 understanding that the Security Council resolutions override conflicting customary
19 law."

20 And it goes on to state, "Therefore, it seems sound to join the prevailing opinion that
21 Article 103 should be read extensively so as to affirm that Charter obligations prevail
22 also over UN member States' customary law obligations."

23 And also I don't think South Africa is making this argument, and certainly we would
24 resist it, the suggestion that the law regulating personal immunities, being procedural,
25 could somehow constitute a jus cogens norm that would thereby serve as a limitation

1 on the Security Council's powers.

2 Your Honours, South Africa's argument that national law and the domestic sphere,
3 not the Rome Statute, governs the execution of a surrender request is also inapposite.
4 Article 27(2), which South Africa as a State Party has expressly accepted, refers to
5 immunities both "under national or international law."

6 Given that national law in this context will always be applied by the surrendering
7 State in operation of the Court's request, the provision serves to prevent State Parties
8 from relying on national roles governing immunities to prevent surrender.

9 Indeed, the national legislation of a number of State Parties has expressly recognised
10 this, including notably Section 10(9) of South Africa's Implementation Act. That Act
11 expressly denies any ground for refusal to surrender a person sought by the Court,
12 quote, "despite any other law to the contrary, including customary and conventional
13 international law, the fact that a person is or was a Head of State or government, a
14 member of a government or parliament, an elected representative or a government
15 official."

16 As both the High Court and the Supreme Court of Appeal in South Africa found, the
17 Government of South Africa could not rely on any other piece of domestic legislation
18 such as the Diplomatic Immunities and Privileges Act, nor the Host Agreement, nor
19 customary international law to avoid its obligations to arrest and surrender Mr Al
20 Bashir to the Court.

21 I have a few more pages.

22 Now I would like to turn very briefly to the significance of the International Court of
23 Justice's ruling in the Arrest Warrant case which is relied upon by South Africa in
24 their written submissions.

25 The government's reliance on this particular decision, the Arrest Warrant case,

1 Belgium versus Congo, does not alter the conclusions set out above.

2 In that case, the ICJ recalled the fundamental principle under customary international
3 law that in terms of the relationship between States, the courts of one State cannot
4 assert criminal jurisdiction over an incumbent foreign minister, which is the context
5 that we are dealing with, but of course they extended that also in recognition to the
6 Head of State and certain other high office holders of another State.

7 Now, the Prosecution does not contest this finding, which is indeed mirrored in the
8 decision issued by this Chamber concerning the DRC; however, we would like to
9 distinguish the legal issues at play.

10 The bar against the exercise of domestic criminal jurisdiction against the foreign Head
11 of State does not apply to the situation before us.

12 As the ICJ observed, because jurisdictional immunity is procedural in nature, the
13 immunity enjoyed under international law by an incumbent high office holder that
14 does not represent a bar to criminal prosecution in certain circumstances.

15 This is the famous paragraph 61 of the judgment. And one such exception which
16 was identified by the ICJ was in relation to criminal proceedings that have been
17 instituted, quote, "before certain international criminal courts where they have
18 jurisdiction."

19 And the ICJ went on to specify the ICTY, the ICTR and the ICC as examples, and
20 directly cited to the expressed provision in Article 27(2) of the Rome Statute
21 governing the non-applicability of procedural immunity bars with respect to the
22 official capacity of a person as a limitation to the ICC's exercise of jurisdiction.

23 Your Honours, there is nothing in the ICJ judgment stating that the execution by
24 national authorities of an international warrant violates customary international law.

25 Instead, the judgment upholds only the bar on the assertion of criminal jurisdiction by

1 the Courts of one State over a foreign national.

2 And, your Honours, we believe that both in their written submissions and in the
3 submissions today, South Africa appears to conflate these two separate concepts
4 assuming that the ICJ decision or the bar that the ICJ identifies also applies to national
5 jurisdictions giving effect to an ICC warrant.

6 Accordingly, because a claim of immunity cannot be raised in the abstract but must
7 be connected to the legal process against which it is being asserted, State Parties
8 cannot simply rely on interstate customary international law as a basis for their
9 refusal.

10 Instead, both the requested State Party and the Court must examine whether, in the
11 circumstances of the case, the State asserting immunity with respect to its officials has
12 consented to or is otherwise bound to accept the removal of procedural immunity
13 bars, meaning that no further consent for the waiver of immunity is required.

14 On the facts of this case, the requested State Party, South Africa, was under no
15 conflicting obligation because no bar to surrender applied in terms of its horizontal
16 relationship between South Africa and Sudan.

17 And lastly, just very briefly, as although South Africa seems to have all but
18 abandoned its reliance on the Host Agreement as a competing international
19 obligation or competing international agreement, the same of course would apply in
20 relation to Article 98(2).

21 And just to note, we accept the point made earlier that of course the Host Agreement
22 was not concluded exclusively to deal with Mr Al Bashir, but clearly as is evidenced
23 from the cabinet minutes that we observed earlier, the Host Agreement was
24 specifically discussed in the context of Mr Al Bashir's visit and was relied upon as a
25 basis to nullify its obligations to arrest and surrender him to the Court.

1 Thus, turning to the DRC decision's logic, also in the case of the Host Agreement, we
2 would argue that the Single Judge was correct during the meeting and again in the
3 DRC -- in the Urgent Decision of 13 June 2015 to find that South Africa was not
4 entitled to raise Article 98(2) as a bar to arresting Mr Al Bashir and surrendering him
5 to the Court. This is because with respect to the requirement that the Court, quote
6 "first obtain the cooperation of the sending State for the giving of consent for
7 surrender" as contained in Article 98(2), the effect of Security Council Resolution 1593
8 is the same.

9 By virtue of paragraph 2 of this resolution, the Security Council implicitly waived the
10 immunities accorded -- afforded to Mr Al Bashir under international law and attached
11 to his position as Head of State. And the same paragraph waived any immunities
12 granted by an international agreement pursuant to which the consent of a sending
13 State is required to surrender a person of that State to the Court.

14 Now, your Honours, I have just five minutes. Shall I continue? The last topic I
15 would like to address --

16 PRESIDING JUDGE TARFUSSER: Just I would go ahead until you finish.

17 MR RASTAN: Yes. Thank you.

18 PRESIDING JUDGE TARFUSSER: So we can adjourn then.

19 MR RASTAN: The last topic I would like to address just in about five minutes is the
20 issue of the interim injunction.

21 Your Honours, as a final comment, we observe that even if South Africa is correct that
22 the consultations should have taken more time, it failed to comply with the Statute by
23 failing to hold Mr Al Bashir pending the exhaustion of additional consultations and a
24 determination by this Court on the merits.

25 Indeed, a close examination of Article 98 reveals that the carefully formulated

1 provision focuses on whether, quote, "the Court may proceed with a request for
2 surrender."

3 "Proceeding" in this context suggests that the first component of the request has
4 already been implemented. Indeed, the provision only makes sense if the State Party
5 has acted at a minimum on an interim basis to prevent the person absconding
6 pending a determination on the merits.

7 This is also why Rule 195 of the Rules of Procedure and Evidence before this Court
8 requires that the requested State Party seize the Chamber of all relevant information
9 in order to assist the Chamber in the application of Article 98. Again, it is the
10 Chamber that applies Article 98 and the State assist the Chamber in that application.

11 If no interim measures have been taken, the provision of such information and any
12 subsequent determination by the Chamber will be rendered meaningless and moot
13 since the person will have since taken flight.

14 Your Honours, this is also how the comparable rule applies at the national level in the
15 context of extradition proceedings. When a high profile person is arrested abroad at
16 the request of a third State, it has not been uncommon for a State of that person's
17 nationality to object to the person's extradition to a third State. And obviously not in
18 the context of personal immunities, but this has occurred in the past on the basis of
19 functional immunities or in an allegation that this is a political offence or on other
20 grounds.

21 Famous examples include, of course, the arrest of former President Augusto Pinochet
22 in the United Kingdom on the basis of extradition requests from Spain, France,
23 Belgium and Switzerland, which was consequently objected to by Chile. And a
24 more recent example concerns the arrest in France of Ramush Haradinaj on an
25 extradition request by Serbia, objected to by Kosovo.

1 Now, what happens in all such cases is that the requested State will order the
2 individual to remain in the country under judicial supervision or some other
3 condition restricting their liberty pending a resolution on the merits, leading either to
4 the State proceeding with the extradition request or instead allowing the individual to
5 leave.

6 And this is how the High Court in South Africa first treated the issue, according to
7 normal criminal law procedures. It ordered on Sunday 14 June 2015 an interim
8 order preventing Mr Al Bashir's departure from any port of exit from South Africa
9 pending a hearing on the merits scheduled for the following day to determine
10 whether Mr Al Bashir enjoyed immunity from legal process in view of his surrender
11 to the ICC. Meanwhile, in The Hague, the ICC also held that the government was
12 not relieved of its duty to arrest and surrender Mr Al Bashir should he arrive and that
13 any further consultations that South Africa may wish to engage would not have any
14 suspensive effect.

15 Thus, even if South Africa pleads that it should have been allowed more time to
16 consult with the Court in the circumstances, one of the following two scenarios
17 should have occurred.

18 Scenario 1: South Africa triggers Article 97 consultations. The Court rules that
19 South Africa must arrest and surrender Mr Al Bashir and South Africa complies.

20 Or scenario 2: South Africa triggers Article 97 consultations. The Court rules that
21 South Africa must arrest and surrender Mr Al Bashir. South Africa takes the
22 position that it wishes to consult further with the Court. And South Africa takes
23 interim measures to prevent Mr Bashir's departure pending the Court's determination
24 on the merits.

25 Instead, what happened was South Africa triggered Article 97 consultations. The

1 Court ruled that South Africa must arrest and surrender Mr Al Bashir. South Africa
2 takes the position that it wishes to consult further with the Court. South Africa lets
3 Bashir leave.

4 Your Honours, we can safely conclude that the Government of South Africa did not
5 intend to arrest and surrender Mr Al Bashir, as is clear from the cabinet minutes read
6 out earlier. Even after both the High Court in Pretoria and the ICC in The Hague
7 ruled against it, South Africa permitted Mr Al Bashir's hasty escape from justice to
8 avoid its obligations under national law and the Rome Statute. It had no plan B.

9 These, your Honours, are the circumstances that lead us today to this hearing and
10 warrant, in our submission, a finding of noncompliance and a referral of the matter to
11 the ASP and the Security Council.

12 I'll now return the floor to Mr Nicholls for one brief concluding remark.

13 PRESIDING JUDGE TARFUSSER: Thank you, Mr Rastan.

14 Mr Nicholls.

15 MR NICHOLLS: Thank you. Thank you, your Honours.

16 Just to conclude, I'd like to stress again we accept the context of the situation, the
17 circumstances South Africa found itself in, which it speaks about in its filings and
18 today.

19 We acknowledge South Africa's long tradition of support for the Court and assistance
20 to the Court and South Africa's coming and requesting Article 97 consultations in this
21 case.

22 But we must ask that you make a finding of noncompliance, a formal finding, and
23 refer it to the UN Security Council and the ASP because of the seriousness of this
24 situation and the noncompliance.

25 As my friend said, I won't be able to quote him exactly, but the obligation to arrest

1 and surrender a suspect wanted on ICC warrants is one of the highest obligations a
2 State Party has to the Court. Without State Parties fulfilling that obligation, it's
3 impossible for the Court to exercise its most important functions and powers, its
4 ability to put on trial those for whose warrants have been issued for the most serious
5 crimes of concern.

6 Acts of noncompliance of that severity where they've been shown should be
7 acknowledged by the Court, should be referred to the ASP and the UN Security
8 Council for their considerations.

9 That is the situation we find ourselves in. Thank you.

10 PRESIDING JUDGE TARFUSSER: Thank you very much. We adjourn now the
11 hearing to the afternoon. After the lunch break, I would go to 3 o'clock sharp and
12 give the opportunity to South Africa to reply, if they wish so, but contained from the
13 time, contained somehow in an acceptable time limit, which again is very flexible, but
14 try to be contained. I'll leave it to you. Okay. Thank you very much. The
15 hearing is adjourned to 3 o'clock.

16 THE COURT USHER: [13:25:20] All rise.

17 (Recess taken at 1.25 p.m.)

18 (Upon resuming in open session at 3.01 p.m.)

19 THE COURT USHER: All rise.

20 Please be seated.

21 PRESIDING JUDGE TARFUSSER: Good afternoon. Good afternoon to everybody
22 in and outside the courtroom.

23 I give now the floor to the Republic of South Africa, if they wish so, for a reply. I
24 don't know if you want to take advantage of this or not. You have the floor.

25 MS DE WET: Mr President, honourable Judges, yes, indeed, South Africa would

1 wish to make use of this opportunity to make a few further statements in reply.

2 Thank you. I'll hand you to Professor Tladi, who will do that on behalf of our
3 country. Thank you.

4 PRESIDING JUDGE TARFUSSER: Professor Tladi, please, yours the floor.

5 MR TLADI: Thank you very much, Mr President.

6 Let me just preface my remarks by saying that we have limited our rebuttal only to
7 new issues that arise, and so we will not respond to many of the issues that were
8 raised by the Office of the Prosecutor with which we do not agree but which do not
9 raise new issues. And also given the short space of time, our response will be fairly
10 brief and not as comprehensive as it would be if we had two days to respond.

11 So I will raise seven issues. The first issue is that counsel for the Office of the
12 Prosecutor has suggested that South Africa's position concerning the law has been
13 evolving over time. I would like to be clear, South Africa has not submitted any
14 legal arguments to the Court until 17 March 2017, when it filed its submissions with
15 respect to this hearing. It further submitted arguments this morning. These are the
16 only arguments that reflect South Africa's position with respect to its duty under the
17 Rome Statute.

18 We recall that in our submissions this morning we emphasise that we are not
19 concerned here with domestic law, that we are concerned with international law and
20 our international obligations. Arguments made by South Africa in domestic courts
21 concerned domestic law and domestic obligations in terms of that law and not
22 international law. They do not affect at all our international obligations and are not
23 reflective of the position with respect to our duties under the Rome Statute.

24 This much is clear from the 2009 statement by the former Director General of the
25 Department of Foreign Affairs which set out that South Africa is under a duty to

1 arrest Mr Al Bashir, it stated, and I quote, "If today President Bashir landed in the
2 country, in terms of, and I emphasise, the provisions of --" I shall read it again slower.
3 Thank you, sir.

4 "If today President Bashir landed in the country, in terms of, and I emphasise, the
5 provisions of our law, he would have to be arrested," unquote. It is only in this
6 context that we have accepted the duty to arrest.

7 The second issue. In the oral submission, the Office of the Prosecutor suggested that
8 South Africa submitted to the Court that the International Criminal Court, this
9 Chamber, has no authority to interpret UN Security Council resolutions. But of
10 course it does. In fact, we said so this morning that it must. The problem that we
11 expressed this morning was that the Court didn't interpret. Our statement to which
12 we think the Office of the Prosecutor refers can be found at paragraph 92 of our
13 submission.

14 In there what we say is that the Court cannot be seen to be the sole arbiter in terms of
15 the interpretation of the UN Security Council resolution, not that it may not interpret
16 the UN Security Council resolution.

17 Our argument, in fact, is that while the Court may interpret the UN Security Council
18 resolution, it does not have the special powers of interpretation that it has with
19 respect to the Rome Statute.

20 I'll proceed now to the third issue. Counsel for the Office of the Prosecutor argued
21 that the decisions by the UN Security Council to decline the AU's request for deferral
22 is an indication that counsel believes Mr Al Bashir does not have immunity. With
23 respect, that simply does not follow.

24 Article 16 request for deferral is not based on Mr Al Bashir's immunity but, rather, on
25 peace and security and the peace versus justice issue. That's what it is based on, not

1 on immunity. So we can draw no conclusion from the UN Security Council's
2 decision to decline the AU request with respect to immunity.

3 Fourth issue. Counsel for the Office of the Prosecutor made reference to operative
4 paragraph 6 and suggested that this showed an intention by the UN Security Council
5 to waive immunity. I won't repeat the arguments that we made this morning
6 concerning the true effect of operative paragraph 6, since that would not be part of a
7 rebuttal. I would only state that operative paragraph 6 has nothing to do with
8 immunities. On its terms, if you look at the language that is used in operative
9 paragraph 6, it applies to persons with immunity and it applies to persons without
10 immunity. So that cannot tell us anything about immunity.

11 The Office of the Prosecutor suggested, much like the decision in Malawi and Chad,
12 that the interpretation that we offer on Article 98 would, and I quote, "emasculate" the
13 ICC, render it useless, futile. Again, this does not follow. It suggests, this argument
14 suggests that the ICC is only about officials of non-States Parties. It is not. In fact,
15 the ICC is not only about the prosecution of persons with immunity. The large
16 majority of persons before the ICC, of accused persons before the ICC, are persons
17 without immunity.

18 Moreover, there are a host of avenues through which a person such as or a head of a
19 non-State Party such as Mr Al Bashir could be brought before the ICC. Waiver is one.
20 Of course, that is difficult to accept, but it is an avenue. Another avenue is when
21 such a person is no longer a Head of State. Another option, and really the most
22 important option, is if the UN Security Council decides to impose an obligation on all
23 States, then of course there would be a duty to arrest.

24 Finally, the cases we are talking about here really only arise in exceptional
25 circumstances, that is, in those cases where the situation at hand has been referred by

1 the UN Security Council.

2 There have only been two of these cases. For the most cases, heads of state can be
3 arrested, should be arrested, because they would be heads of states of non -- sorry,
4 they would be heads of States of States Parties. So it is therefore a gross
5 exaggeration to suggest that this interpretation that we have offered would
6 emasculate the ICC.

7 Sixth point. Sudan is not, as is suggested by the Office of the Prosecutor, comparable
8 to a State Party. It does not have the right to decide or to vote in the ASP. It does
9 not pay membership fees. The only thing that Article 13(b) of the Rome Statute does
10 or, rather, a UN Security Council pursuant to Article 13(b) does, is to confer
11 jurisdiction on the Court. That is the only thing.

12 And yes, it is also to ensure that the whole Statute applies. But the whole Statute, as
13 we said, includes also Article 98. But it does nothing more than this. Indeed, this is
14 clear from operative paragraph 2 of the UN Security Council resolution. UN
15 Security Council resolution operative paragraph 2 places an obligation on Sudan.
16 This would not be necessary if Sudan was in a position comparable to that of a State,
17 because then Part 9 of the Statute would already apply, and there would already be a
18 duty on Sudan to comply or, rather, to cooperate.

19 My final point in rebuttal. The Office of the Prosecutor referred us to PP1, PP1 is
20 preambular paragraph 1 of Resolution 1593, which notes the report of the
21 International Commission of Inquiry.

22 Now, counsel suggested that because the Commission referred to the fact that most
23 crimes were committed by governments, that in fact this reference in PP1 is an
24 indication that counsel sought to waive immunities. But like most other arguments
25 that we have heard today, it simply does not follow. All that it means, if we were to

1 accept that line of reasoning, is that counsel knew that immunities might be a factor,
2 and it still decided not to address them, thereby leaving the general rules of
3 international law to be applicable.

4 Mr President, your Honours, we have completed our rebuttal. I would only like to
5 once again thank you for your attention and for this opportunity to engage on these
6 very important issues. We remain hopeful that the Chamber will consider our
7 arguments made this morning and during rebuttal this afternoon.

8 We also take this opportunity to confirm that South Africa remains committed to the
9 pursuit of international criminal justice and the pursuit of a peaceful world and a
10 peaceful Africa.

11 Advocate de Wet.

12 PRESIDING JUDGE TARFUSSER: Thank you very much.

13 Madam de Wet.

14 MS DE WET: Thank you, President, honourable Judges. That concludes then the
15 submission that South Africa wanted to bring to the Court today. Thank you.

16 PRESIDING JUDGE TARFUSSER: Thank you very much.

17 This, I would say, concludes today's hearing on this issue scheduled within the
18 Article 70(7) procedure of Article 87(7) of the Rome Statute procedure.

19 I would like to thank both parties for their submissions. We will for sure, we can
20 assure you, I can assure you on behalf of the Chamber, that we will duly consider
21 them.

22 (Trial Chamber confers)

23 PRESIDING JUDGE TARFUSSER: Judge Chung asked me to put some questions on
24 background information to the delegation of South Africa before concluding. So
25 please, Judge Chung.

1 JUDGE CHUNG: Thank you very much. And I also appreciate both parties for
2 providing such variable arguments on these very much difficult and important issues
3 in a very efficient and effective manners.

4 So I'd like to ask some questions to the Republic of South Africa, especially on some
5 background information of request for consultation. It would be appreciated if you
6 could provide us some further information regarding this issue.

7 According to para 36 of your submission, the second sentence, which was also quoted
8 by Prosecution this morning, you stated that the request to the Registry was made
9 when it became a real possibility that the President of Sudan would indeed attend the
10 AU Summit.

11 So would you elaborate on what happened, what happened in South Africa
12 Government between 28 May and 12 June regarding the decision-making process of
13 request for consultation, if available?

14 MS DE WET: Mr President, honourable Judges, thank you for those questions. Of
15 course, we have indicated that in our submissions that we are not going to rehash
16 what happened with Article 97 consultations, but we welcome the question and we
17 want to address that.

18 South Africa has been tasked or requested to host the AU Summit on a very short
19 notice. You will understand, honourable Judges, that in a government system such
20 as South Africa, the wheels can turn very slowly. So we have been, the decision has
21 been taken in January that South Africa would host the AU Summit in June.

22 That triggered a very big roll-out of activities for the government to get ready for that
23 occasion.

24 Of course, one of the issues that we had to determine and to deal with was indeed the
25 conclusion of the Host Agreement. As Professor Tladi indicated this morning, this is

1 the standard practice for South Africa and we do host, similar to Belgium, very often
2 international meetings.

3 So of course you would specifically ask what happened in between a specific period
4 of May, end of May and then the beginning, or 12 June, when we actually made the
5 request for consultation.

6 What happened was that the AU invited heads of government and State to come and
7 attend the AU Summit. Because South Africa was hosting that, we did not fully
8 have control over who will attend and who will not attend. We were dependent on
9 receiving information in this regard.

10 Many of the heads of State long before the meeting would have confirmed the firm
11 confirmation, provided firm confirmation that their heads of State will indeed attend.

12 This was not the case in Sudan. And we want to be very clear and we want also to
13 disburse with the innuendo that South Africa waited until the very last moment to
14 approach the Court. That is simply not true.

15 We are not an individual. This is a country. Its machinery turns very slowly.

16 Indeed, the matter of the attendance of President Bashir was discussed. Indeed, it
17 was a worry for South Africa. But this is how government works. We received the
18 confirmation of the attendance of President Bashir, in fact, after officially he landed in
19 South Africa. Officially we were informed after the fact.

20 When it was clear -- and remember, we were also in South Africa also invited, or

21 President Bashir was also going to attend other functions in South Africa at previous
22 years and there was always a situation where his attendance was avoided.

23 This was now a different situation where we had the AU Summit to be hosted in

24 South Africa. AU invited. The indication that he would come was then very on the
25 table, off the table. South Africa did not know until the very last moment that this is

1 a reality. This does not show, does not mean that we were not worried about what
2 will happen.

3 We were aware that there will be a problem. We just didn't want to jump the gun.

4 And the government in that sense, in hindsight, it would have perhaps been better to
5 be prepared and to have a legal team ready to come here at, say, the Thursday rather
6 than the Friday.

7 Government wheels turn slowly. So that is what we want to place before the Court.

8 We came to the Court with good faith. We came to the Court in an attempt to try

9 and resolve a situation that we find ourselves in. Of course, our Cabinet were

10 informed of this. There is no doubt about that. Of course we want to place on

11 record that we as a government did all that we can to come to the Court in good faith

12 and to trigger a system, a 97 request for consultations that have never been done, and

13 that there are no procedures that guide that process.

14 In that, that is where we found ourselves at the eve of that 12 June, the Friday evening,

15 and that is where the events unfolded, as has been placed before the Court, that

16 happened in our national courts.

17 Thank you, Judges.

18 JUDGE CHUNG: Thank you very much.

19 Just one more question to the Republic of South Africa.

20 At paragraph 40 in your submission, you also state that the Ambassador to The

21 Netherlands was not mandated to represent the government in the consultations.

22 So may I ask why, what made you take this kind of position, the Ambassador was not

23 able to, was not in the position to represent the government at that time and someone

24 from the capital was supposed to represent the government? On what grounds did

25 you make this kind of decision?

1 MS DE WET: Thank you, honourable Judges, for that question. Our Ambassador
2 was tasked with one mandate. The mandate was to approach the Court to request
3 for consultations.

4 I want to say again, there's no rules and regulations or guidelines that govern how the
5 Article 97 consultations should be approached.

6 We thought: Do we start off with this process? We would send our ambassador,
7 together with a note verbale, to request the Court to enter into consultations. The
8 idea was that the legal team would come to The Netherlands, that will come once that
9 consultations are scheduled, to come and represent the government's case.

10 That was a simple matter of fact. Our Ambassador is our political head here. The
11 arguments that we would have wanted to place before the Court in the consultation
12 once we have discovered or once we have been informed of how this would be
13 arranged, would have been not of such a nature that we would have felt that the
14 Ambassador should be burdened to promote those arguments in the consultation.
15 So that was a practical reason why the government at that stage only mandated the
16 Ambassador to make the request. Thank you.

17 JUDGE CHUNG: Thank you very much. That's it for me.

18 PRESIDING JUDGE TARFUSSER: Thank you.

19 Now, once again, this concludes now the hearing of today in this matter. The
20 Chamber obviously will issue its decision in due course. I cannot now foresee what
21 due course or specify better what due course means, but I think I can give two general
22 indications. The first is that we will for sure come out with a decision before the
23 summer recess of the Court, and the second is that we will issue the decision in a
24 public hearing and not just with an anonymous filing.

25 So these are the two indications I can give. And of course, the parties will be and all

- 1 the public will be notified of this well in advance in order to be prepared to attend the
- 2 hearing when the decision is issued.
- 3 Thank you very much. The hearing is closed now and adjourned to whenever we
- 4 are ready. Thank you very much.
- 5 THE COURT USHER: [15:25:08] All rise.
- 6 (The hearing ends in open session at 3.25 p.m.)