

Appeals Hearing

(Open Session)

ICC-02/05-01/09

1 International Criminal Court
2 Appeals Chamber
3 Situation: Darfur, Sudan
4 In the case of The Prosecutor v. Omar Hassan Ahmad Al-Bashir - ICC-02/05-01/09
5 Presiding Judge President Chile Eboe-Osuji, Judge Howard Morrison,
6 Judge Piotr Hofmański, Judge Luz de Carmen Ibáñez Carranza,
7 Judge Solomy Balungi Bossa
8 Appeals Hearing - Courtroom 1
9 Wednesday, 12 September 2018
10 (The hearing starts in open session at 9.36 a.m.)
11 THE COURT OFFICER: [9:36:41] All rise.
12 The International Criminal Court is now in session.
13 Please be seated.
14 PRESIDING JUDGE EBOE-OSUJI: [9:37:03] Thank you very much. And welcome back
15 everyone.
16 Court officer, please put the matter on the record for the day.
17 THE COURT OFFICER: [9:37:15] Thank you, Mr President. Good morning,
18 your Honours.
19 The situation in Darfur, Sudan, in the case of the Prosecutor versus Omar Hassan Ahmad
20 Al-Bashir, case reference ICC-02/05-01/09.
21 For the record, your Honours we are in open session.
22 PRESIDING JUDGE EBOE-OSUJI: [9:37:36] Thank you very much.
23 There are changes in appearance. I understand that somebody else has joined us. If you
24 can kindly introduce yourself, please.
25 MS GAMARRA: [9:37:55] I'm Yolanda Gamarra, I'm from Zaragoza University,

1 Professor of Public International Law. I'm working on these kind of topics from 10 years
2 ago. Thank you very much.

3 PRESIDING JUDGE EBOE-OSUJI: [9:38:11] Thank you very much. And welcome and
4 thank you for joining us.

5 No more changes in appearance? Everyone is here? No. We are all the same.

6 MR HMOUD: [9:38:26] Sorry, Your Honour, one of our colleagues, Mr Amer Hadid, will
7 be absent for this morning for official engagement. Thank you.

8 PRESIDING JUDGE EBOE-OSUJI: [9:38:39] Thank you, Ambassador, thank you.

9 I have been informed that Mr Newton is also not in court.

10 All right. We do these things so that the record will remain the same, three or four, ten
11 years down the line, we don't want somebody assuming that somebody was in the room
12 all along when they were not. Thank you.

13 Now, the Chamber received a request -- thank you very much. The Chamber received
14 a request from the representative of the League of Arab States, Ambassador Abdelaziz, to
15 give his observations on group B and C together during the session this morning when it
16 is his turn to speak, because he will be unavailable from Thursday. And we have
17 decided to accommodate that request and for that reason we will proceed as follows: For
18 purposes of enabling him to do so, Judge Ibáñez will now read on to the record the group
19 C questions, that is only for the benefit of the ambassador. So when it is his turn to speak
20 he will speak to both at once. But for the rest of us, we will reserve our comments today
21 to group B and then take group C in turn when the time comes.

22 So why don't we proceed in that way, and I invite my colleague Judge Ibáñez to read the
23 group C questions onto the record. Judge Ibáñez.

24 JUDGE IBÁÑEZ CARRANZA: [9:40:51] Thank you, Mr President. Group C - Articles
25 86, 87(7), 97 and 98(2) of the Statute. Question (a): What types of 'international

1 agreements' are covered by Article 98(2) of the Statute, and does the 1953 Convention on
2 the Privileges and Immunities of the Arab League fall within its scope?

3 (b) Article 86 of the Statute enjoins States Parties to 'cooperate fully with the Court in its
4 investigation and prosecution of crimes within the jurisdiction of the Court'. Does this
5 obligation include the duty to arrest and surrender persons in respect of whom the Court
6 has issued arrest warrants, leaving aside any question of immunity?

7 (c) How should the general obligation to cooperate fully with the Court in Article 86 of the
8 Statute be understood in light of Article 27(2) of the Statute and paragraph 2 of the
9 Resolution 1593?

10 (d) In what circumstances, if any, would it be desirable for the Court to refer a State to the
11 Assembly of States Parties and/or the Security Council in respect of non-compliance
12 pursuant to Article 87(7) of the Statute, when it is no longer immediately possible to
13 obtain the specific cooperation requested, such as in the present case when Mr Al-Bashir
14 was no longer present on Jordanian territory at the time of the referral?

15 (e) What specific action actions, if any, were taken by the Hashemite Kingdom of Jordan
16 to communicate to the Court the difficulties encountered in its execution of the arrest
17 warrant in respect of Mr Al-Bashir in accordance with Article 97 of the Statute?

18 (f) What specific action, if any, has been taken by the African Union and/or the Republic of
19 the Sudan to address the alleged gross violations of human rights committed in Darfur?

20 Thank you, Mr President.

21 PRESIDING JUDGE EBOE-OSUJI: [9:43:49] Thank you very much, Judge Ibáñez.

22 Now we will continue where we left off yesterday, and that will take us to the
23 observations from the African Union. They will speak to group B questions for 25
24 minutes. And after that, the League of Arab States will then speak to groups B and C.
25 Counsel.

1 MR JALLOH: [9:44:32] Mr President, Honourable Judges of the Appeals Chamber,
2 learned counsel opposite, good morning.

3 It is a great honour to appear before you today in my capacity as external counsel
4 representing the African Union Commission. Your Honours, my task this morning, as
5 Ambassador Negm indicated on Monday, is to address the group B questions. Since we
6 only have about 25 minutes, addressing each of the 15 questions will leave me roughly
7 one and a half minutes per question. Yet, some, if not all of the questions in group B,
8 cannot be fully addressed in so little time.

9 For these reasons, I appreciated that you stressed over the past two days that the
10 questions are intended to be a guide and need not be answered individually.

11 Consequently, while I will do my best to take up as many of them as possible, I will be
12 selective and focus on the especially important ones based on the submissions so far.

13 Additionally, I also want to save a few minutes for the end to share several responses to
14 the Prosecution's arguments on this important cluster of questions that, in many ways, are
15 at the heart of the legal quandaries in this historic appeal.

16 Your Honours, questions A and B concern the powers of the Council under Chapter VII.

17 I have three main points to offer. First, as a textual matter, given the nature of the

18 Charter and the body it created, the issue of immunities for persons accused of

19 international crimes were not contemplated either by Chapter V or Chapter VI. Neither

20 does Chapter VII. The Charter Articles 24 to 26, 39 to 42, which explain the functions of

21 the Council and empowers it to taking make binding decisions that all Member States

22 must abide by, certainly do not explicitly entrust the Council with any power to "waive,

23 displace or override the immunity" of Heads of State under customary or conventional

24 international law.

25 THE COURT OFFICER: [9:46:48] Mr Jalloh --

1 MR JALLOH: [9:46:50] So even under Chapter VII, which is the Council's most robust
2 power, there is no express textual red override button provided for immunities. Even if
3 it did, I am not sure whether we would assume that the Council might have pressed it in
4 relation to Sudan.

5 Second --

6 PRESIDING JUDGE EBOE-OSUJI: [9:47:09] Counsel, I have to -- we have this pace
7 warning we give from time to time.

8 MR JALLOH: [9:47:15] I apologise, your Honours.

9 PRESIDING JUDGE EBOE-OSUJI: [9:47:17] Not too fast, but not too slow that we fall
10 asleep. Calibrate it somewhere.

11 MR JALLOH: [9:47:22] I will do my best, your Honours.

12 Second - I was going to move to my second point - the Charter does not give the Council
13 any powers to "make conventional provisions" of any treaty applicable to States that are
14 not parties to those treaties. The Council is not a world legislator. Thus, to suggest as
15 much would be to imagine a breath-taking power that sovereignty conscious States would
16 not have accepted back in August 1945. It is certainly not one that States would accept in
17 September 2018. Any such legislative powers would also step on the sensitive toes of the
18 General Assembly which in Article 13(1)(a) of the Charter was actually mandated to
19 promote international cooperation in the political field and to encourage the codification
20 and progressive development of international law.

21 THE INTERPRETER: [9:48:15] This from the English interpreter, could counsel please be
22 requested to slow down.

23 MR JALLOH: [9:48:20] Third, there are, of course, some exceptions where the Council
24 has, in its practice, adopted Chapter VII resolutions with general and abstract obligations
25 that have been deemed quasi-legislative. For example, resolution 1373 on terrorism

1 financing and resolution 1540 on weapons of mass destruction. Resolutions 827 and 955,
 2 which created the aptly named Chapter VII tribunals for Yugoslavia and Rwanda, have
 3 been described as quasi-legislative as well.

4 But, have said that, the resolutions creating the ICTY and ICTR differ in their legal
 5 character from those on terrorism and WMDs. They, inter alia, established new and
 6 independent legal bodies that also subsidiary organs of the Council under Article 25.

7 Therefore, analogising resolutions 827 --

8 PRESIDING JUDGE EBOE-OSUJI: [9:49:09] Mr Jalloh, is it really about being a legislator
 9 or is it about perhaps being an executive arm of an institution? Liken it in this way, in
 10 the national system, there is a law that says human beings or citizens' autonomy to be
 11 respected, there is no assault permitted in the national system, assault meaning touching
 12 somebody is an assault. But a police is entitled to arrest somebody. When they do that,
 13 are we looking at legislative function of the police or is it a matter of executive? Can we
 14 liken that to what the Security Council does under Chapter VII?

15 MR JALLOH: [9:50:05] Your Honours, thank you. I only made reference to the idea of
 16 legislative because, in a way, when you think about the role of the Council, there is
 17 a debate as to the extent to which it can bind Member States of the United Nations.

18 PRESIDING JUDGE EBOE-OSUJI: [9:50:22] But it is about immunity, and immunity,
 19 again, the example I gave you, there is something of immunity in it in the sense that the
 20 citizen is immune from assault in the ordinary sense as a matter of relations within the
 21 State. I'm not allowed touch you in a way you don't want to be touched without your
 22 consent. It is a different matter if the police are doing their work. So that immunity that
 23 human beings have or citizens have in a State is there, but a police can override it. That's
 24 the kind of distillation I'm looking at here.

25 MR JALLOH: [9:51:13] Thank you, your Honours.

1 I have a couple of very quick observation to make. I do have in the remarks that I have
2 prepared an aspect that deals with the role of the Council relative to the question in the
3 sense of the executive. So if that will be permissible, I could come to it later on. If that is
4 okay, your Honours? Okay. Thank you.

5 Because then I actually was just referring to the international criminal tribunals for the
6 former Yugoslavia and Rwanda, and was trying to suggest, your Honours, that they are
7 distinctive in the sense of the adoption of resolutions 827 and 955 whereby the Council, in
8 comparison to the Article 13(b) referral power would indeed be able to exercise some kind
9 of executive authority and bind of course under Chapter VII States. But both in relation
10 to in the particular context of this case, so the question of immunity *ratione materiae*, and
11 more directly to the particular questions on appeal, the duty of third states such as
12 Sudan -- or, sorry, such as Jordan or South Africa to cooperate fully and arrest a suspect
13 such as Mr Al-Bashir of Sudan in relation to immunity *ratione personae*.

14 Let me just start very quickly with immunity *ratione materiae*. In the ad hoc tribunals, a
15 plea based on official capacity, your Honours, is irrelevant to prosecutions when the
16 suspect is before the tribunal. That is the same as Article 27(1) of the ICC Statute. So he
17 could not plead functional immunity had the Council instead created a new ad hoc
18 international criminal tribunal for Sudan modelled on the template of the Chapter VII
19 tribunals. And of course referring here to the question. The plea of official capacity as
20 a substantive defence to criminal responsibility would, in any event, be unavailable under
21 customary international law as per Nuremberg Principle III.

22 But that immunity type is not an issue regarding the exercise of criminal jurisdiction here.
23 The key is that he must be before the Court before such a claim could be asserted. For
24 now, he is not. If he ever does come, say after he is no longer in office like Mr Taylor of
25 Liberia, and if he does then make the argument at the ICC, as did Mr Taylor at the SCSL,

1 the answer would be simple. It is in Article 27(1), and in 6(1) of the statutes of those two
2 tribunals. As Mr Taylor knows, those immunities did not help him to avoid trial,
3 conviction or punishment. If anything, far from benefiting him, his Head of State status
4 was used as an aggravating factor by the Special Court when determining his sentence in
5 light of his special responsibilities.

6 Thus, the more pertinent comparison then is the binding effects of the cooperation
7 established for those international criminal tribunals vis-à-vis Article 27(2) for UN
8 members, in relation to ICC non-parties like Sudan that have not yet waived their
9 customary law immunities under Article 98(1). In the context of the Chapter VII
10 tribunals, and this is a major contrast, in my view, to the Sudan scenario, all UN members
11 were obligated to cooperate with the ICTY and the ICTR in Articles 28 and 29 of their
12 respective statutes. States were, in Chapter VII resolutions, unequivocally directed by
13 the Council to "cooperate with the International Tribunal in the investigation and
14 prosecution of persons accused of committing serious violations of international
15 humanitarian law." So had they arrested a sitting Head of State they would have --

16 PRESIDING JUDGE EBOE-OSUJI: [9:54:52] Pace, pace. Pace falling.

17 MR JALLOH: [9:54:56] I apologise, your Honours. I naturally speak very fast. I have
18 to slow down, I understand. Thank you. I will do my best again.

19 So had they arrested a sitting Head of State, they would have a legal obligation that they
20 could point to that, when combined with the supremacy clause in Article 103 of the UN
21 Charter, gives Council imprimatur to their actions under international law. To the extent
22 that they would have had contrary obligations under other international agreements, of
23 course as did Jordan in respect of the Arab League.

24 The States were further directed, by the same Council which, notably, did not impose the
25 same duty to arrest on all States in relation to the Sudan referral, to "comply without

1 undue delay with any request for assistance or an order issued by a Trial Chamber,
2 including, but not limited to, the 'arrest or detention of persons' and 'the surrender or the
3 transfer of the accused to the international tribunal'.
4 Subsequent Chapter VII resolutions, especially several adopted in relation to the ICTY,
5 "Urge[d] all States to cooperate fully with the international tribunals and [their] organs in
6 accordance with their obligations" under the resolutions establishing those tribunals.
7 Hence, contrary to what the Prosecution mentioned, there are some significant legal
8 differences between the Yugoslav and Rwanda situations, on the one hand, and the
9 Darfur referral on the other. The reason being that cooperation duties were imposed
10 only on the "Government of the Sudan". Whereas Yugoslavia and Rwanda and all UN
11 Member States were subjected to the same obligations to assist the Chapter VII tribunals
12 which as the Prosecution rightly mentioned yesterday, even had primacy over all national
13 courts.
14 In sum, your Honours, the Security Council has not mentioned the immunities in its
15 referral in this case and it cannot be assumed or taken by implication it has done so.
16 This brings me then to questions (c) to (c). I start with (c) regarding Article 13(b) of the
17 Statute when it provides that the Court must exercise its jurisdiction in situations of
18 Council referrals "in accordance with the provisions of this Statute", which is found in the
19 opening chapeau of Article 13. Here too, I have three quick points to make.
20 Firstly, it means that the ICC can only act as provided for in its constitutive instrument.
21 Second, it also means that the ICC could be given jurisdiction where it would not
22 otherwise exist. It still has to follow its Statute. What it does not, and cannot mean, is
23 that it magically transforms Sudan into a State Party or something akin to one.
24 Otherwise, why does it not have to pay membership dues, attend ASP meetings, or
25 nominate a judge for the ICC bench? Is forced membership, by indirect Security Council

1 imposition, free membership? Is membership a one-way street - only obligations and
2 absolutely no rights?

3 Third, and finally on this point, your Honours, the 13(b) language "in accordance with the
4 provisions of this Statute" is also an umbrella or a shield for the ICC. Otherwise, what is
5 to prevent the Council from amending the legal framework of the ICC Statute by, for
6 example, altering the subject matter, personal or temporal jurisdiction of the ICC through
7 its Chapter VII resolutions?

8 Your Honours, several questions focus on the potential applicability of part or a whole of
9 the ICC Statute to the Sudan situation. Here we are wowed by legal gymnastics on the
10 interactions of the UN Charter and the ICC regime and the magical rain of
11 resolution 1593.

12 Let me turn to the Pre-Trial Chamber decision to illustrate these magical tricks that you
13 should not try to perform, your Honours, as the ICC's highest court, deliberate on this
14 appeal. The first point to make about the decision of the Pre-Trial Chamber is that it does
15 not per se turn on an interpretation of the ICC Statute for the conclusion. The Chamber
16 determines that, under the ICC, a serving head of a non-State Party would have immunity
17 both from the jurisdiction of the Court and from the authorities of potential cooperating
18 States. The same reasoning was reflected in the South Africa decision.

19 The Chamber found that Mr Al-Bashir does not enjoy immunity from arrest by States
20 Parties, and therefore Article 98 does not apply, because the Council when referring the
21 Darfur situation implicitly waived his immunity.

22 The Chamber determines that paragraph 2 of resolution 1593 constitutes an implicit
23 waiver of Mr Al-Bashir's immunities.

24 With the permission of the Chamber, I wish to quote paragraph 2 of resolution 1593 in
25 relevant part:

1 "Decides that the Government of Sudan and all other parties to the conflict in Darfur, shall
2 cooperate fully and provide any necessary assistance to the Court".

3 In our view, turning to the question of how to determine its jurisdiction through Council
4 resolutions, the next question calls for proper interpretation of those resolutions. The
5 rules applicable to treaty interpretation are of course applicable mutatis mutandis to
6 Council resolutions.

7 The ICJ has confirmed this in the Kosovo Advisory Opinion citing Article 31 of the VCLT,
8 and noting that it may be applied to the interpretation of Council resolutions. As has
9 several Chambers of this Court.

10 While the ICJ, in its advisory opinion just mentioned, cautioned that the peculiarities of
11 Council resolutions may require consideration of additional elements, it proceeded to
12 apply the Vienna rules to the interpretation of resolution 1244, which concerned the
13 setting up of UNMIK.

14 How then do we interpret Resolution 1593? It is through the application of Article 31 of
15 the VCLT which, as your Honour knows, states:

16 "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be
17 given to the terms of the treaty in their context and in light of its object and purpose."

18 Like Jordan, and perhaps even the OTP, we submit that this requires a consideration of
19 three inter-related elements:

20 (i) the ordinary meaning of the terms of paragraph 2;

21 (ii) the context in which they appear, which includes the rest of resolution 1593;

22 And (iii) the object and purpose of resolution 1539.

23 We submit that each and every one of these three elements support the interpretation that
24 operative paragraph 2 did not affect the immunities of Mr Al-Bashir because of the
25 automatic application of Article 27 and that Jordan therefore remained under an

1 obligation to respect his immunities which means, contrary to the Pre-Trial Chamber
2 decision, Article 98 continues to apply.

3 I would have wanted to proceed to examine each of these elements in turn, but for the
4 sake of time I am going to skip them. If your Honours would like to hear the submission,
5 I will be happy to come back to them.

6 So we submit, in respect of this element, that paragraph 2 of resolution 1593 does not
7 relate to immunities at all.

8 Even if, which we do not accept, paragraph 2 shows somehow immunities were
9 implicated, the ordinary meaning of paragraph 2 suggests that Sudan would be obliged to
10 waive immunities. Failure to do so, assuming that's what paragraph 2 required, would
11 result in State responsibility for non-compliance, but would not in and of itself amount to
12 a waiver. So on the clear term of the words, paragraph 2 is not self-executing.

13 Very briefly, on the second element of context, if we look at the context we find there is
14 nothing in the resolution that suggests a waiver of immunities. If anything, context
15 suggests that immunities are not affected by the resolution.

16 Furthermore, as part of context, we submit that in this resolution, the Council has made it
17 plain the intention to deviate from existing rules when it has sought to do this.

18 In particular, looks at paragraph 6 of the resolution, which the Chamber asked about in
19 question (I), the Council departs from two important rules of international law. In so
20 doing, it makes plain its intention - much in the same way it did in an earlier Chapter VII
21 resolution 1497 of 2003 concerning Liberia.

22 (i) Once the ICC has jurisdiction over a situation, nationality does not play a role with
23 regards to its jurisdiction over particular cases. Paragraph 6, however, purports to
24 exclude the Court's jurisdiction over the nationals of non-parties in certain circumstances.
25 That we highlight this provision in no way suggests our view as to its validity.

1 (ii) Furthermore, under international law, a State determines its own jurisdiction, subject
2 of course to any prohibitive rules. Paragraph 6, however, similarly seeks to oust the
3 potential universal jurisdiction of States over crimes committed by non-nationals in those
4 circumstances.

5 The resolution cannot therefore be reasonably construed, in our view, as recognising other
6 exception by implication.

7 Indeed, even the paragraph 6 exception generated very serious pushback within the
8 Council, your Honours. That is manifested by the statements of Brazil, which you may
9 have alluded to I think yesterday, your Honours, which called the carve-out "a legal
10 exception that is inconsistent with international law" and that of Denmark, which
11 considered that "the ICC may be a casualty of resolution 1593". Since, according to
12 Denmark, by limiting the reach of the ICC and subsuming its independence to the
13 "political and diplomatic vagaries of the Council", the exceptions contained in operative
14 paragraph 6 of the resolution, "is killing [the ICC's] credibility - softly, perhaps, but killing
15 it nevertheless".

16 All this goes to show that there is a great danger, your Honours, in endorsing the
17 recognition of exceptions by implication, one that other States, including those on the
18 Council, would themselves prefer to know in advance to allow for proper deliberation
19 and decision making.

20 Overall then, your Honours, the correct position, in our minds, is this: If the Council had
21 the intention to deviate from the rules on immunity, it would have, similar to the ouster
22 clauses that have done so expressly.

23 Very briefly, on object and purpose, your Honour, it is clear from a review of the
24 resolution, a holistic review, that the review is multifaceted. The jurisdiction of the ICC is
25 but one cog of a wider strategy which had been preceded with the Commission of Inquiry

1 and the establishment of peacekeeping mission to Sudan. Jurisdiction of the ICC cannot
2 thus be achieved at all costs.

3 Mr President, ordinary meaning, context and object and purpose all support the
4 interpretation the resolution does not address and thus leaves the rule of immunity under
5 international law intact.

6 Mr President, your Honours, I indicated at the outset that I will try to respond to some
7 specific points raised by the Prosecution yesterday. I wish to submit six specific
8 observations for your consideration.

9 One: The overall theory that Council Resolution plus Article 27(2) minus Article 98 is so
10 complicated and so obscure that it seems far-fetched to imply that the Council "necessarily
11 intended" its resolution to have such drastic legal consequences. I hope to speak to these
12 a little bit more tomorrow.

13 If this interpretation of the meaning of the resolution was so obviously intended, why did
14 it take the ICC Pre-Trial Chamber 17 years to identify this as a correct legal theory for
15 stripping away immunity?

16 The truth is that it is much more likely that the Council had no such intention. And if the
17 Council's members had focused on the issue of foreign criminal jurisdiction, the most
18 obvious understanding would have been that Article 98 would resolve any possible
19 conflicts.

20 PRESIDING JUDGE EBOE-OSUJI: [10:07:05] What is the significance of 17 years you
21 mentioned?

22 MR JALLOH: [10:07:08] I'm sorry, your Honours?

23 PRESIDING JUDGE EBOE-OSUJI: [10:07:11] What is the significance of 17 years you
24 mentioned?

25 MR JALLOH: [10:07:14] Your Honours, the significance is only to point to the

1 non-obviousness of the question.

2 PRESIDING JUDGE EBOE-OSUJI: [10:07:23] Was that question pending for 17 years?

3 MR JALLOH: Well, it took the Chamber quite a while, your Honours, to make the
4 ruling.

5 PRESIDING JUDGE EBOE-OSUJI: [10:07:30] From when to when?

6 MR JALLOH: [10:07:31] So from the passage of the resolution in 2003 -- 2005, sorry, to
7 the issuance of the earlier decisions.

8 So the suggestion, your Honours, is that it's not so obvious that this was the intent.

9 My third point is that it can hardly be said that immunity from criminal jurisdiction
10 renders the referral meaningless, and that has been suggested over the course of the past
11 few days. Certainly as of March 2005, the referral had very real meaning even if Head of
12 State immunity was unaddressed since, one, persons other than Sudan's Head of State or
13 Foreign Minister would not have had a Head of State immunity; two, Sudan's Head of
14 State or Foreign Minister, if indicted, might voluntarily surrender to the ICC - we saw that
15 happen in the Kenya situation; three, Sudan's Head of State/Foreign Minister might fall
16 from power and thus lose their immunity.

17 And of course I mentioned earlier this happened to Mr Taylor in the context of the Special
18 Court. He was no longer in office, so it was possible to have Nigeria transfer him to the
19 Special Court by request of Liberia and of course with the support of the
20 international committee, in particular the Security Council.

21 Three, Sudan's Head of State might -- sorry, I've addressed the third question already.

22 The final point was to say if such circumstances did not come to pass in this particular
23 case, the Council could of course have returned to the issue. And we heard yesterday
24 a discussion with Mr Wood about the difficulty for the Council, at least the lack of practice
25 whereby the Council returned to a particular question.

1 Fourth, one can't conclude, your Honours, from the Council's referral when we look at the
2 second instance of the referral - and this, of course, is the reference to the Libya
3 situation - whereby the Council adopted anything about the theory supporting the
4 stripping away of immunity. I mean, there had already been a debate, your Honours,
5 with respect to this particular question, and the Council was aware of that debate and yet
6 adopted more or less with some changes the same resolution with the same limitations
7 imposed under the jurisdiction of the International Criminal Court.

8 Five, the UN ICC Cooperation Agreement was helpfully pointed to by the Office of the
9 Prosecutor yesterday. Article 19 of that explicitly raises, addresses the issue of the waiver
10 of immunities of persons who fall within the jurisdiction of the court, but says nothing
11 about waiver of immunities of State officials.

12 Six, the indictment and issuance of arrest warrant by the SCSL and the ICTY in respect of
13 Milosevic and Taylor do not strike me as that relevant when interpreting the referral to
14 the ICC in the context of Chapter VII.

15 Your Honours are very familiar with the work of the Special Court for Sierra Leone, and
16 you are of course aware I was duty counsel in the Taylor case. And in the Taylor case,
17 a key point of distinction would be first the legal nature of the tribunal. The Special
18 Court for Sierra Leone was never established under the basis of Chapter VII; rather, it was
19 the first treaty-based international criminal court whereby there was a bilateral agreement
20 between the United Nations and one of its Member States, in this case Sierra Leone. It
21 was not rooted in Chapter VII. And the tribunal in the Taylor decision and in
22 a number of other decisions had to address that particular question. It essentially
23 responded that we are an international criminal court.

24 PRESIDING JUDGE EBOE-OSUJI: [10:10:43] Time, watch your time. Your time is not
25 up yet, but you've got about five more minutes.

1 MR JALLOH: [10:10:48] Thank you, your Honours. That's very kind, and I will be able
2 to finish my points.

3 The second point I was going to make, your Honours, about the Special Court for
4 Sierra Leone is that one has to look at the duty to cooperate that flows from the bilateral
5 nature of the agreement between Sierra Leone and the United Nations. Essentially, the
6 Council and the Secretary General acknowledge that there what was no possibility of
7 doing something similar to the ICTY and ICTR, whereby it could impose binding
8 obligations on all other States. Rather, the only duty to cooperate with the tribunal in the
9 sense I was discussing earlier vis-à-vis the Chapter VII tribunals was only on Sierra Leone.
10 Even Liberia, which had been implicated in the conflict in Sierra Leone at the time and
11 had Chapter VII decisions by the Council admonishing it for doing so, had no party status
12 to the treaty. So, therefore, even Liberia could not be said to have been bound.

13 Lastly, with respect to the Special Court, we know of course ultimately after Mr Taylor
14 had stepped down, he was transferred to The Hague. The legal basis for that transfer
15 effectively was a Chapter VII resolution, Resolution 1688 of 16 June 2006, whereby the
16 Council requested all Member States of the United Nations to cooperate with the Special
17 Court and to assist it to ensure that Mr Taylor could be tried in the Hague.

18 So, Mr President, with those brief six points in rebuttal that I wanted to raise in reaction to
19 the OTP submission, I conclude the main part of my remarks. I'm happy, of course, to
20 take any questions that the Chamber might have. I'm in your hands.

21 PRESIDING JUDGE EBOE-OSUJI: [10:12:32] Not a technical question just yet, but just
22 a small matter for clarification on the Charles Taylor transfer. You say the transfer was
23 done under Chapter VII, but the court itself, the Special Court was not created under
24 Chapter VII. Was that the case?

25 MR JALLOH: [10:12:51] Yes, your Honours. And so the court was created by treaty

1 between the United Nations and the government of Sierra Leone. But then what I'm
2 trying to suggest --

3 PRESIDING JUDGE EBOE-OSUJI: [10:13:00] No, no, it's not about what you are
4 suggesting.

5 MR JALLOH: Okay.

6 PRESIDING JUDGE EBOE-OSUJI: I just wanted to get on the record the circumstances
7 of the creation of the Special Court versus the matter of transfer --

8 MR JALLOH: [10:13:12] Yes, your Honour.

9 PRESIDING JUDGE EBOE-OSUJI: [10:13:13] -- of Mr Taylor on the specific instance, that
10 is all.

11 MR JALLOH: [10:13:17] Yes. So, your Honours, yes, the Special Court was created by
12 bilateral treaty; but on the other hand, when it came to transferring him for trial, at that
13 point, of course, we had the Liberian government requesting he be transferred, even
14 though he was on asylum in Nigeria.

15 Then there was then a need, because the Netherlands had indicated a willingness to try
16 him, there was a need for the Council to pass a Chapter VII resolution that would then
17 allow that transfer to be effected, because after all, otherwise there would not be an
18 obligation at all for the Netherlands or other UN Member States to cooperate.

19 So my point is to make a comparison with the Chapter VII tribunals and of course to link
20 it back to the Resolution 1539. We did not in the particular context of this case have a
21 similar effect on other States or against Sudan. I hope that is helpful, your Honours.

22 PRESIDING JUDGE EBOE-OSUJI: [10:14:09] It is. Now here is a technical question.
23 You don't need to answer it now, you can answer it later, but I put it on the record now
24 also to enable the speaker after you, since he will be leaving, to consider it, if he can.

25 Here we are dealing with interpretation of a UN Security Council Resolution adopted

1 under Chapter VII of the Charter. In the Tadić jurisdictional appeals decision, the ICTY
2 Appeals Chamber, I believe it was in paragraph 31 of that decision, sought to make
3 a distinction between coercive effect and mandatory effect. If everyone in their turn can
4 help speak to this, that would be immensely helpful.

5 And the court in that case found that a respect of the -- I think you used a terminology of
6 "culprit entity or State", that the effect of the Chapter VII power was coercive, but for the
7 rest of the UN membership, the power was mandatory. I just put it on the record to see
8 whether that helps us in making our way through the difficult matter we must deal with
9 here. You don't need to speak to it immediately. You may take your time and look at
10 the provision also in context of the discussion around it -- sorry, the paragraph in terms of
11 the context around it. You can speak to that later, and everyone else. Thank you.

12 MR JALLOH: [10:16:14] Thank you, your Honours.

13 PRESIDING JUDGE EBOE-OSUJI: [10:16:16] Now, Ambassador, your turn next.

14 MR ABDELAZIZ: [10:16:25] Thank you very much, Mr President. Mr President,
15 members of the Appeals Chamber, it is again with great pleasure to appear before you
16 today on behalf of the League of Arab States, this time with respect to Jordan's second and
17 third grounds of appeal, along with the group B and group C questions.

18 The Arab League is very grateful that the Chamber decided to accommodate its schedule
19 so as to allow me to address group C issues this morning.

20 On group B issues, with respect to the second ground of appeal and the group B
21 questions, the League wishes to note that its Member States have a very rich history
22 serving as member of the United Nations Security Council in accordance with
23 arrangements that allows it to rotate between African Arab members and Asian Arab
24 members of the League.

25 In fact, Jordan served as a member in 2014-15, and at present Kuwait is a Council member,

1 to be followed by Tunisia starting next year, in 2020.

2 At the time of the adoption of Security Council Resolution 1593 (2005), Algeria was
3 the Arab member of the Security Council; hence members of the League have
4 long-standing experience with the Council and its practices.

5 We have addressed issues relating to the second ground of appeal in our written
6 observations, and the League wishes to reaffirm those points to you today.

7 For present purposes, I focus your attention on the Prosecution's arguments concerning
8 the effects of Security Council resolution 1593. In our view, these arguments are not
9 persuasive and are based upon a wholly unrecognisable approach to interpreting
10 Security Council resolutions.

11 First, the Prosecution takes an unjustifiable State-centric approach to Resolution 1593 by
12 inventing a novel category of States that are not parties to the Rome Statute which it labels
13 as "UN Security Council situation referral states".

14 Such an approach fails to recognise that the Council does not refer States to the
15 International Criminal Court. So there is no basis for constructing such a category.

16 Rather, the council refers a situation to the Court, and this is precisely what was done in
17 paragraph 1 of Resolution 1593.

18 That situation did not even encompass the entire territory of the State of Sudan, but only
19 a portion of its territory which is limited to Darfur.

20 Thus, the act of referral in paragraph 1, which in turn relates to the Court's jurisdiction
21 under Article 13(b) of the Rome Statute is not focused on any particular States and cannot
22 be deemed to have resulted in consequences for any particular State. As such, there is no
23 basis in the resolution to declare that Sudan has become a UN situation referral State.

24 Second, no matter what label one might affix to Sudan based on Resolution 1593, the
25 League submits that Sudan remains without doubt a non-Party State with respect to the

1 Rome Statute. Even the Prosecution concedes that Resolution 1593 did not turn Sudan
2 into a State Party to the Rome Statute.

3 Consequently, the League submits that the Sudan must be treated as a non-Party State for
4 purposes of the Statute and, in particular, for the purposes of Article 98.

5 Third, the Prosecution asserts that simply as a consequence of Security Council referral
6 which concerns a situation and not a State, a particular non-party State, Sudan, is bound
7 to unspecified Rome Statute obligations. The League accepts that the referral activates
8 the Court's jurisdiction under Article 13(b) of the Rome Statute, but does not agree that it
9 has any further effect.

10 In short, the Prosecution argument in this regard has no basis in the text of paragraph 1 of
11 the resolution, which essentially just mirrors Article 13(b) of the Rome Statute.

12 Further, the Prosecution argument has no basis in the negotiating history of the resolution.
13 No member of the Council said anything at the time of the resolution's adoption
14 suggesting anything beyond their desire to activate the Court's jurisdiction.

15 Instead, the Prosecutor argument boils down to a bold assertion that the provision for
16 a Security Council referral would be entirely defeated if that referral did not impose upon
17 the United Nations Security Council situation referral State all the necessary obligations of
18 the Statute as expressed by its terms.

19 In a considerable leap, reminiscent of the waiver theory that has now been discarded by
20 the Pre-Trial Chamber, the Prosecution concludes that Sudan by becoming a party to the
21 UN Charter must be viewed as having consented to unspecified obligations under the
22 Statute. Yet, regarding the Council's referral as simply activating the Court's jurisdiction
23 does not somehow defeat the purpose of the referral, it simply means that the Court then
24 proceeds on the basis of the terms of the Rome Statute that would normally apply
25 whenever the Court has jurisdiction over a situation, including Article 98.

1 As is always the case, securing custody over indicted persons may be easy in some
2 instances and more difficult in others. The members of the Council understood that and
3 took no action to address such circumstances.
4 Fourth, and perhaps sensing the difficulties of its state-centric approach, the Prosecution
5 sometimes shifts to a situation-centric approach, asserting that the resolution has the effect
6 that the Rome Statute applies in its entirety with respect to the situation in Darfur. Yet,
7 such an assertion also has no basis in the term of the Statute or Resolution 1593 and, in
8 any event, does not explain why that places the State of Sudan in some special category
9 that denies it the status of being a non-party to the Rome Statute. Such a situation-centric
10 approach is clearly untenable for reasons previously explained by Jordan as well as
11 entirely inconsistent with the Prosecution's state-centric approach that I previously
12 discussed.

13 Of course, it may be open to the Security Council when making a referral to include
14 additional requirements, but it must do so in clear terms and the requirements must be
15 consistent with both the United Nations Charter and with the Statute. As it happens,
16 Resolution 1593 did impose an additional requirement upon Sudan and upon Sudan alone
17 in the form of paragraph 2 of the resolution. There, the Security Council decided that the
18 government of Sudan and all other parties to the conflict in Darfur shall cooperate fully
19 with and provide any necessary assistance to the Court and the Prosecutor. This created
20 an obligation upon Sudan that would otherwise not exist, and that would have been
21 wholly unnecessary, if the Prosecution is correct, that the status already applies to Sudan
22 by virtue of paragraph 1 of the resolution.

23 In short, neither the simple referral of a situation nor the imposition of an obligation of
24 a non-Party State to cooperate fully with the Court removes treaty-based immunities of
25 that State's officials or the immunity of its Head of State under customary international

1 law from the criminal jurisdiction of another State since doing so would be contrary to
2 Article 98 of the Rome Statute. This would need to have been done expressly.

3 Mr President, members of the Appeals Chamber, for these reasons it is the League's
4 contention that the second ground of appeal by Jordan should be granted.

5 Let me now turn to group C issues. With your permission I turn now to Jordan's third
6 ground of appeal and the group C questions which the League also addressed to an extent
7 in our written observations.

8 Assuming, *arguendo*, that Jordan did fail to comply with its obligations under the Rome
9 Statute by not arresting and surrendering President Al-Bashir to the Court, the League
10 considers that the Pre-Trial Chamber's referral of Jordan to the Assembly of States Parties
11 and to the Security Council was based on errors of fact and law and further constituted an
12 abuse of discretion.

13 I begin here by noting that the Appeals Chamber is empowered to review and reject the
14 decision on referral reached by the Pre-Trial Chamber. While it is true that in the
15 Kenyatta case, the Appeals Chamber found that the Pre-Trial Chamber had a considerable
16 degree of discretion, the Appeals Chamber then found that the Trial Chamber erred in the
17 exercise of that discretion. One of those errors was the Pre-Trial Chamber's assessment of
18 whether securing compliance with the cooperation request at issues would further the
19 proceedings and whether further cooperation by Kenya was possible.

20 Similar errors exist in the case given that the Pre-Trial Chamber paid no attention
21 whatsoever to whether a referral was necessary to secure Jordan's compliance or whether
22 further cooperation by Jordan was possible. Moreover, the two factors that the Pre-Trial
23 Chamber invoked when making the referral are manifestly errors that must be corrected
24 by the Appeals Chamber.

25 The first factor advanced by the Pre-Trial Chamber which may be found at paragraph 53

1 of its 2017 decision was simply the fact of Jordan's noncompliance. According to the
2 Pre-Trial Chamber, Jordan's noncompliance arose from a request to Jordan from the Court
3 and from Jordan's decision in March 2017 not to comply with that request. While the
4 Prosecution seeks to recharacterise this factor as addressing some extraordinary act of
5 noncompliance, no special circumstances arose of that kind.
6 Certainly, the Pre-Trial Chamber's assertion that Jordan took a very clear position when
7 making that decision cannot be regarded as some special factor that extends beyond
8 Jordan's decision not to comply with the request.
9 Likewise, the Pre-Trial Chamber's assertion that Jordan choose not to execute the Court's
10 request for arrest and surrender of Omar Al-Bashir also is not some special factor.
11 Indeed, it is precisely the act that gave rise to the finding of noncompliance.
12 Finally, the Pre-Trial Chamber assertion that Jordan did not require or expect from the
13 Court anything further that could assist, that could assist it in ensuring the proper exercise
14 of its duty to cooperate is opaque, but in any event is simply a variation of they took
15 a very clear position assertion.
16 In short, the first factor identified by the Pre-Trial Chamber is in essence simply
17 a recitation of the fact that Jordan decided not to comply with the Court's request. As
18 such, it constitutes a decision by a Pre-Trial Chamber to refer the findings of
19 noncompliance based simply on the fact of noncompliance. This Appeals Chamber,
20 however, has stated that the decision of noncompliance standing alone does not result in
21 an automatic referral. In Prosecution versus Kenyatta, the Appeals Chamber said that
22 based on the wording of Article 87 of the Rome Statute, an automatic referral to the
23 external actors is not required as a matter of law.
24 Furthermore, this Appeals Chamber was not persuaded that such automatic referral
25 would be beneficial as a matter of policy as contended by the Prosecutor.

1 The second factor advanced by the Pre-Trial Chamber as warranting the referral, which
2 may be found in paragraph 54 of its 2017 decision, was that the Pre-Trial Chamber had
3 previously expressed an unequivocal position to an entirely different country, which is
4 South Africa, that it was obligated to arrest President Al-Bashir. This reliance by the
5 Pre-Trial Chamber on such a factor is manifestly an error of law, as the Prosecution itself
6 concedes. An indiscriminate comparison of two States Parties would be inappropriate.
7 A State Party's referral must be decided primarily with reference to its own facts, not to
8 the situation of a different State Party. This is precisely what the Pre-Trial Chamber did
9 not do in its reliance on the second factor.

10 The Prosecution seeks to argue that the second factor somehow concerns a general
11 principle and statement of law that all States Parties were obliged to arrest Omar
12 Al-Bashir, rather than a reference to the Pre-Trial Chamber's decision on noncompliance
13 with respect to a completely different State Party, which is South Africa. That assertion is
14 misleading and rather clearly rebutted by the actual text of paragraph 54 of the decision
15 under appeal, which says nothing about a general principle or about a statement of law or
16 about all State Parties. Instead, paragraph 54 expressly refers to the Pre-Trial Chamber's
17 unequivocal position expressed with respect to South Africa.

18 As one of its questions posed in advance of the hearing, the Appeals Chamber asked in
19 what circumstances, if any, would it be desirable for the Court to refer a State to the
20 Assembly of States Parties and/or the Security Council in respect of noncompliance
21 pursuant to Article 87(7) of the Statute when it is no longer immediately possible to obtain
22 the specific cooperation requested.

23 The League does not wish to suggest hypothetical circumstances in response to this
24 question, but we do wish to point to the Appeals Chamber's own standard which was
25 expressed in the Kenyatta case. There, the Appeals Chamber said that a referral should

1 only be sought when the Chamber concludes that it is the most effective way of obtaining
2 cooperation in concrete circumstances at hand. No such conclusion was reached by
3 Pre-Trial Chamber in the present case.

4 Mr President, members of the Appeals Chamber, due to the Pre-Trial Chamber's manifest
5 errors, it is the League's contention that the third ground of appeal should be granted.

6 The Arab League attaches the highest importance to this ground since it could be very
7 damaging to the operation of the League if a Member State were brought before the
8 Security Council and the Assembly of States Parties simply because it was fulfilling its
9 duties as host State of the Arab League summit in accordance with our agreements.

10 I conclude, Mr President, by reiterating the League's basic position. In our view Jordan
11 was obliged under the pact of the League of Arab States and under the 1953 Convention
12 to respect the immunity of President Al-Bashir during his visit to Jordan in March 2017 to
13 attend the Arab League summit.

14 Furthermore, Sudan was a sending State within the meaning of Article 98(2) of the Rome
15 Statute, such that the Court could not proceed with the request of Jordan for the arrest and
16 surrender of President Al-Bashir in the absence of a waiver from Sudan. Neither Article
17 27 of the Rome Statute nor Security Council Resolution 1593 affected these obligations of
18 Jordan with respect to the Arab League. Had Jordan arrested the Head of State of
19 a Member State of the Arab League during its summit, it would have severely
20 undermined the proper functioning of the Arab League and jeopardised its ability to
21 pursue its objective, which include the maintenance of peace and security within the Arab
22 region and the world at large.

23 The League once again appreciates your willingness to allow us to address both groups, B
24 and C, this morning. And before concluding, there was a question posed by you,
25 Mr President, about the effect of Chapter VII. And I heard a lot about Chapter VII

1 yesterday, and having served in the United Nations for about 35 years as Ambassador
2 and as Diplomat and as Under-Secretary-General in the United Nations there is a lot,
3 there are many ways to read the implications of Chapter VII in Security Council
4 resolutions.

5 Many of the peacekeeping operations, for instance, are established by resolutions of the
6 Security Council under Chapter VII, but nonetheless, it requires an agreement between
7 the United Nations and the State concerned where the United Nations find sometimes
8 difficult to reach because the State concerned can ask that specific countries do not
9 participate in this force, can ask that this force be limited in presence into certain locations,
10 can ask that certain leadership should be accorded and certain linkage between the
11 political and the security structures of the peacekeeping operations should be established,
12 and the Member State can ask that this peacekeeping operation, even though it is
13 established under Chapter VII, leave the country. And that happened in Burundi, when
14 Burundi asked that BINUB leave the country and the United Nations struggled legally
15 with whether its obligation that the establishment of a peacekeeping operation under
16 Chapter VII would allow the UN to go, to impose itself on Burundi, and the United
17 Nations realised it cannot. And that is for one.

18 And the other one is related also to the situation in Darfur, UNAMID itself. When Sudan
19 requested that UNAMID would leave, Sudan did that, if I recall correctly, in 2008 or 2009.
20 Maybe my memory is not serving me right. And the UN had to enter into very extensive
21 negotiations with Sudan, even though this is a Chapter VII operation, and this resulted in
22 lowering the composition of the mission down to the half and to major changes in the
23 political structure and the relation between the political and the military and the police
24 components of this particular mission.

25 So saying that Chapter VII gives absolute authority to the Security Council on the ground

1 is not 100 per cent true. There is still sovereignty, there is still negotiations, there is still
2 the role of the State concerned. Thank you.

3 PRESIDING JUDGE EBOE-OSUJI: [10:41:36] Thank you very much, Ambassador.

4 There was one question I had posed earlier. When you made reference to my question, I
5 thought that's the one you were coming to, but it wasn't. I had asked the question before,
6 in the manner of when we have summits of regional groups, regardless of, or without
7 prejudice to the legal question or not, would it be something to consider. Some
8 Professors have spoken to it, some of them very reluctantly, like Professor Kreß did not
9 want to speak to it, but he did. It is something to be said that in those circumstances,
10 regardless of the correct legal answer that perhaps diplomatic sensitivities and that sort of
11 thing may make it a wise policy to not seek arrest in those sorts of meetings. It is
12 something that the Arab League will urge? As a matter of policy, not of law.

13 MR ABDELAZIZ: [10:42:54] As a matter of policy, the Arab League is looking into what
14 are going to be the implications of the implementation of this kind of decision. And the
15 implications of going to be severe because as I explained in my presentation before, the
16 summit meets only once a year and it meets to review the results of about 19 organs of the
17 Arab League that are meeting year round, including two ministerial meetings for
18 ministers of foreign affairs and many other ministerial meetings that are related to others.
19 So all these decisions are pouring in these particular meetings, so implementation of this
20 kind of decisions will have severe implications on the ability of the Arab League to
21 implement its regional decisions and its regional dimensions and that is where, in the
22 essence that is, the Arab League is committed to the implementation of Article 14 of the
23 1953 Convention, which I cited in my submission last time.

24 PRESIDING JUDGE EBOE-OSUJI: [10:44:16] One more question for you about the
25 interpretation of Security Council resolutions under Chapter VII. You have spoken to

1 that it can be different animals depending on circumstances and you are saying it may be
2 simplistic to take only one view of it. Do you recall how it all played out in the context of
3 Kosovo?

4 MR ABDELAZIZ: [10:44:48] Well, I'm not an expert on Kosovo, sorry --

5 PRESIDING JUDGE EBOE-OSUJI: [10:44:53] All right. I will leave you then.

6 MR ABDELAZIZ: [10:44:56] Apologies, Mr President.

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

8 MR ABDELAZIZ: Thank you.

9 PRESIDING JUDGE EBOE-OSUJI: [10:45:00] Thank you very much.

10 Now we will take submissions from the legal scholars. We will begin with Mr Kreß.

11 MR KREß: [10:45:14] Your Honours, the questions in group B essentially concern the
12 legal effects of Security Council Resolution 1593 on the alleged immunity *ratione personae*
13 of President Bashir. In my statement today, I wish to make six points in that respect.

14 First, the customary law avenue, which as I have shown is open to the Court, is a logically
15 prior to the Security Council avenue with which I shall deal today.

16 Second, it is also open to the Court to proceed through the Security Council avenue to
17 reach the result that the Court was entitled to request Jordan to arrest and surrender
18 President Bashir without the need to first obtain a waiver of immunity by Sudan.

19 Third, in case the Court does not wish to deal with the customary law avenue for reasons
20 of judicial economy, it must not negate it by implication.

21 Fourth, the Security Council avenue has appeared in two variants in the jurisprudence of
22 this Court. These are not fundamentally different. Instead, their legal essence is the
23 same. Under both variants, paragraph 2 of the Security Council resolution has displaced
24 Sudan's possible immunity rights *ratione personae* for the purposes of the present
25 proceedings.

1 Fifth, the more straightforward and therefore preferable variant of the Security Council
2 avenue is to interpret paragraph 2 of Security Council Resolution 1593 as implying the
3 direct displacement of the possible immunity *ratione personae* of President Bashir.

4 Sixth, the same result may be reached as a fallback option through the second variant of a
5 Security Council avenue, that is, the application of Article 27(2) of the ICC Statute to
6 Sudan, again, by virtue of the paragraph 2 of Security Council Resolution 1593.

7 Let me begin by explaining my first three points.

8 Since 2008, I have been maintaining that there are two legal avenues to reach the result
9 that the Court may request a State Party to arrest and surrender President Bashir without
10 the need to first obtain a waiver of immunity by Sudan. For convenience sake, I have
11 been calling the first legal avenue the customary law avenue. I have set out this avenue
12 in some detail in my written observations, in my interventions and in my interventions
13 during this hearing so far.

14 I have been calling the second legal avenue the Security Council avenue. Here, it is the
15 legal effect of Security Council Resolution 1593 that allows the Court to request a State
16 Party to arrest and surrender President Bashir without the need, first, to obtain a waiver of
17 immunity by Sudan.

18 As a matter of legal logic, the customary law avenue is prior. This is for the following
19 reason: As the immunity *ratione personae* is subject to a customary international
20 criminal court exception, including the cooperation level, there was no need for
21 a Security Council resolution to displace such immunity.

22 The logical priority of the customary law avenue over the Security Council avenue does
23 not mean, however, that the Chamber must proceed through the customary law avenue.

24 In fact, as the Prosecution has correctly pointed out, the Chamber can also choose, for
25 reasons of judicial economy, to proceed through the Security Council avenue.

1 You know well, your Honours, that this is not what I suggest the Chamber should do.
 2 But if the Chamber wished to do so nonetheless, it should make one thing clear, that it is
 3 hereby not reaching a negative decision on the customary law avenue by a necessary
 4 implication. The Chamber should then say, for example, that any possible immunity
 5 *ratione personae* of President Bashir has been displaced for the purposes of the present
 6 proceedings by virtue of Security Council Resolution 1593.

7 Let me now turn to the Security Council avenue more in detail and to my other three
 8 points which relate to it.

9 In the jurisprudence of Pre-Trial Chamber II, as well as in international legal scholarship,
 10 the Security Council avenue has appeared in two variants. Let me first explain why
 11 those variants differ only by way of a nuance.

12 PRESIDING JUDGE EBOE-OSUJI: [10:51:19] One second. I'm looking at the --

13 MR KREß: [10:51:24] Excuse me, sir.

14 PRESIDING JUDGE EBOE-OSUJI: [10:51:27] Thank you. This question has been
 15 hanging in the air, the Prosecutor has been arguing it and now you. You say the
 16 resolution lies -- the answer to the question lies in dealing with customary international.
 17 So it doesn't have to be done but to say any possible immunity left has been displaced. Is
 18 that the ideal way to do it? Or is there not in this case a necessary need to verify the
 19 existence or not of immunity under customary international law and then say, regardless
 20 of the existence, it has been displaced, if that is the correct answer, that the
 21 Security Council had displaced that? Can we proceed, say, if we don't want to know
 22 whether there is customary international law, is that a safe way to answer this question?
 23 If it is, does it avoid a possibility of another instance of a similar question, perhaps not in
 24 identical circumstances arising in future and we are all here again in a few years' time?

25 MR KREß: [10:52:55] Thank you, Mr President, for this extremely important question. I

1 will address it fully, if you allow me, in my final observation, but I will be brief here not in
2 order to lose too much time, but just a few observations.

3 If you follow Jordan's argument that the Security Council avenue has not displaced the
4 alleged immunity, then I think you must approach the question of customary
5 international law, because it is premised on that argument.

6 And this, as you know, is a question that has not yet fully been reasoned by the Appeals
7 Chamber so far. Pre-Trial Chamber I in the Chad and Malawi decision has taken the
8 unanimous stance on customary international law, which is fully in line with my position.

9 Pre-Trial Chamber II has then as we all know deviated from that, but with --

10 PRESIDING JUDGE EBOE-OSUJI: [10:54:01] But this is the Appeals Chamber. We are
11 bound by neither pronouncement --

12 MR KREß: That's true, yes.

13 PRESIDING JUDGE EBOE-OSUJI: -- of either Pre-Trial Chamber.

14 MR KREß: And all the more I would encourage the Appeals Chamber in those
15 circumstances, in those circumstances to pronounce its own view, precisely because
16 Pre-Trial Chamber II has simply asserted that there is no customary international law but
17 has not reasoned it. But on the --

18 PRESIDING JUDGE EBOE-OSUJI: [10:54:28] But basically you are saying in the
19 jurisprudence of the Court there are two views from the Pre-Trial Chamber: One
20 Pre-Trial Chamber says something about customary international law, it is there; another
21 Pre-Trial Chamber says no, it is answered on a different basis and say there is a need to
22 resolve that.

23 MR KREß: [10:54:51] This is precisely to the point. I believe, Mr President, therefore I
24 would think in case you follow Jordan, that the Security Council avenue is of no avail, I
25 think you have to deal with customary international law.

1 What I was saying in addition, if you, however, take the view, which I find correct,
2 agreeing with the Prosecution and others - and I shall explain that - that the
3 Security Council avenue is also open, in that case I believe, even though the customary
4 law avenue is logically prior, you can for reasons of judicial economy leave the question of
5 custom open and still reach the correct result. In my concluding observations, I will
6 argue that this would be a missed opportunity.

7 Let me now come back to the Security Council avenue in more detail. And I need to
8 speed up a little bit to catch up time.

9 In the jurisprudence of the Pre-Trial Chamber II, as well as in international legal
10 scholarship, it has appeared in two variants. Let me first explain why both variants
11 differ only by way of a nuance.

12 Under the first variant used in the DRC decision, the Security Council has by virtue of the
13 second paragraph of Resolution 1593 displaced any possible immunity right of Sudan
14 *ratione personae* for the purposes of these proceedings. In other words, the imposition
15 on Sudan of a duty fully to cooperate with the Court has displaced any possible immunity
16 *ratione personae* of Sudan for the purposes of these proceedings. Jordan could therefore
17 not have acted inconsistently with such immunity right if it had executed the Court's
18 request.

19 Under the second variant used in the South Africa and in the Appeals decision,
20 Resolution 1593 has got precisely the same effect, but here, this effect results from the fact
21 that Article 27(2) of the ICC Statute has become applicable to Sudan.

22 I agree with Jordan that Pre-Trial Chamber II could have been more than a little clearer
23 regarding the question: Which of the first, which of the first two paragraphs of
24 Resolution 1593 has made Article 27(2) applicable? Jordan's reading of the South Africa
25 decision that this applicability is the result of a combined effect of both paragraphs is

1 a plausible one. My suggestion is that reliance on the first paragraph is not essential.
2 The second paragraph of the resolution is key here as well.
3 Jordan has placed emphasise on the difference between the two variants even to the point
4 that only the second is on appeal. I respectfully submit that this is a significant
5 overstatement. To the contrary, the core of the two variants is identical. Under both
6 variants, paragraph 2 of the Security Council has displaced Sudan's possible immunity
7 rights *ratione personae* for the purposes of the present proceedings.
8 Under variant 1, the imposition on Sudan of the duty fully to cooperate has displaced
9 Sudan's possible immunity without further. Under variant 2, the duty fully to cooperate
10 has ultimately done the same, but through an intermediary step. This step consists of
11 having triggered the applicability of Article 27 to Sudan.
12 There is thus no more than a nuance between the two variants. And it is therefore
13 unsurprising that two main arguments that Jordan has directed against the
14 Security Council avenue concerned both variants.
15 Let me take them up briefly to express my agreement with the Prosecution that none of
16 those arguments is convincing.
17 The first argument is that the displacement of immunity by the Security Council requires
18 an explicit provision to that effect. I understand this to mean that the relevant
19 resolutions mentions the very words "*immunities ratione personae*". With all due respect,
20 this proposition is untenable. There is no legal requirement to that effect and the
21 Security Council's own practice clearly speaks against that proposition.
22 Just consider that it is consistent practice of the Security Council to authorise the use of
23 force without using the words "use of force".
24 To save time, I shall leave it to my distinguished colleague and friend Mr Robinson to say
25 more on this. His *amicus curiae* brief contains an entire list of powerful arguments in

1 that respect and I fully endorse them.

2 The second argument is that the ordinary means of interpretation of a Security Council
3 resolution would not justify the conclusion that paragraph 2 has displaced the possible
4 immunity *ratione personae* of President Bashir. This argument, too, lacks persuasive
5 force. Instead of rehearsing them, I fully endorse the entire list of powerful
6 considerations which were set out by the Prosecution yesterday with regard to the
7 ordinary meaning, the context, the background, and the purpose, and which are also
8 contained in the *amicus curiae* brief of the Darryl Robinson group. I only wish to
9 explicitly comment on one counterargument because this argument has not only left my
10 unconvinced, it has also saddened me.

11 Reference has been made to the continued inaction of the Security Council after the
12 repeated briefings provided by the Prosecutor of this Court about Sudan's obvious failure
13 fully to cooperate. It has been suggested that this could count as subsequent practice
14 against the displacement of Sudan's possible immunity. And this, although it is clear that
15 the continued Security Council inaction is not based on a unanimous legal view of its
16 members, but essentially on political considerations.

17 As a humble citizen of the world, Mr President, if I may take up your words, I take the
18 liberty to express my sadness that the Security Council has first mandated this Court to
19 take action in the situation of Sudan in order then to let the same Court down when the
20 Council's support was needed.

21 Let me now take up the one single argument which I believe to have detected which is
22 specifically directed against the first variant of the Security Council avenue. That is, the
23 direct displacement of possible immunities through paragraph 2 of the resolution.
24 Jordan argues that the Security Council cannot invent new cooperation obligations in
25 addition to Part 9. But by displacing Sudan's possible immunity, the Security Council

1 has not invented any new cooperation obligation. It has done nothing more than to make
2 it impossible for Sudan to pose an obstacle to its full cooperation.

3 I therefore respectfully submit that the most straightforward and therefore preferable
4 variant of the Security Council avenue is to hold that the Security Council by virtue of
5 paragraph 2 of Resolution 1593 has displaced Sudan's possible immunity right
6 *ratione personae*.

7 But this is not to say that the second variant of the Security Council avenue is flawed. It
8 is only a little less straightforward because it takes a short detour via Article 27. In case
9 the Chamber disagrees with my view that paragraph 2 of the resolution should be
10 interpreted as implying the direct displacement of President Bashir's possible immunity,
11 the detour via Article 27 offers a perfectly sound fallback option.

12 Let me briefly, to conclude, explain that proposition. The words "cooperate fully" as
13 contained in paragraph 2 of the Security Council resolution also appear in Article 86 of the
14 ICC Statute. Article 86 states the general cooperation obligation of States Parties. This
15 is a very clear indication that paragraph 2 of the Security Council resolution seeks to place
16 Sudan in the same legal position as State Parties as regards cooperation, not transforming
17 it into a States Parties. That's not the point. But to place Sudan in the same legal
18 position as State Parties as regards cooperation.

19 But is Article 27(2) relevant for cooperation? Jordan argues that it is not. I respectfully
20 beg to differ. Instead, I agree with the view of the Pre-Trial Chamber and that of the
21 Prosecutor that Article 27(2) is very relevant to the cooperation level. Article 27(2) states
22 that immunities *ratione personae* among other things shall not bar the Court from, I quote,
23 "exercising its jurisdiction over a person". The exercise of the Court's jurisdiction over
24 a person includes the issuance of a cooperation request for arrest and surrender with
25 respect to this person. This interpretation based on the ordinary meaning of the words

1 used in Article 27(2) is powerfully supported by the need to ensure that Article 27(2) has
2 a practical effect.

3 What would be the consequence if Article 27(2) were of no relevance to the power of this
4 Court to issue a request for arrest and surrender? The consequence would be as
5 follows --

6 THE COURT OFFICER: [11:06:02] Counsel has five more minutes.

7 MR KREß: [11:06:04] May I finish these two paragraphs or?

8 PRESIDING JUDGE EBOE-OSUJI: [11:06:06] It was a five-minute call. You have got
9 five more minutes.

10 MR KREß: [11:06:12] Thank you, Mr President. But I will not --

11 PRESIDING JUDGE EBOE-OSUJI: [11:06:15] Much, much more time than I am sure you
12 expect.

13 MR KREß: [11:06:18] Yes. No, I will not exhaust them, I was just -- it was just such
14 a relief. Thank you so much.

15 The consequence -- now I can really slow down. The consequence would be as follows:
16 The same State Party that has waived its possible immunity *ratione personae* in its direct
17 relationship with the Court by virtue of Article 27(2), could rely on that very same
18 immunity when being in a position of a third State within the context of Article 98(1).
19 This would not only slightly, but drastically reduce the practical effect of Article 27.
20 Here we should not be naïve and ignore all historical experience of international criminal
21 justice. This experience tells us the following: It is only too realistic to expect that
22 a State Party whose sitting Head of State is subject to an ICC arrest warrant will be as
23 reluctant to fulfil its arrest and surrender obligation under the Statute as Sudan is
24 reluctant, to put it mildly, to fulfil its arrest and surrender obligation under Security
25 Council Resolution 1593.

1 Thus, Article 27(2) must be of relevance, also for the cooperation level, in order
 2 a substantial practical effect is maintained. This provision can therefore be applied to
 3 Sudan in view of the fact that its duty under paragraph 2 of the Security Council
 4 resolution fully to cooperate has placed that State, once again, in the same legal situation
 5 as a State Party as regards cooperation.

6 This concludes the explanation of my six points. I thank your Honours.

7 PRESIDING JUDGE EBOE-OSUJI: [11:08:27] Thank you very much, Mr Kreß.

8 We will go next to the next speaker. Ms Lattanzi.

9 MS LATTANZI: [11:08:45] (Interpretation) Thank you, Mr President, for giving me the
 10 floor on what I consider to be the crux of this Al-Bashir case.

11 Within the meaning of Chapter VII of the Charter, the Security Council has the power to
 12 waive the customary rules or conventional rules when it comes to the immunity of Heads
 13 of States in case it does not concern the principles of the United Nations in accordance
 14 with Article 24(2), which you mentioned in one of your questions.

15 That is what the Security Council did in resolution 1593, in particular paragraphs 1 and 2,
 16 by rendering applicable, in conformity with a chapeau of Article 13, and 13(b) of the
 17 Statute, all the rules of the Statute under exercise of the Court by its jurisdiction of
 18 commission and execution in the situation of Darfur, including Article 27 relating to
 19 Sudanese officials benefiting from immunity in domestic and international law.

20 And if it is, that is, if it is relevant, the provisions of Article 98(1) and (2). I do not
 21 understand why we should refer all the time to Article 98(1) and (2) after having affirmed
 22 that Article 27 is not being implemented and they are related. In fact, given that the
 23 Security Council in the preamble of its resolution referred to the report, of the Cassese
 24 report, and as the President said yesterday in his introduction, raised the responsibilities
 25 of government officials. The Council had clearly in mind the fact that some high-ranking

1 officers could be the subjects of warrants of arrest by the Court.

2 So you cannot oppose this necessary consequence of the joint implementation of Article
3 13, chapeau 13(b), and resolution 1593. And this can only be done to render applicable
4 Article 27. In order to do that, the Security Council would have expressed itself clearly
5 on that.

6 Apart from that, it would have drawn up the entire list of rules of the Statute applicable in
7 this situation, but if the Council had explicitly raised the exception to immunities raised in
8 Articles 27, that would have constituted undue interference in the exclusive jurisdiction of
9 the Court, that is to decide even in the interest of justice under Article 53(2), which
10 suspects of crimes should be prosecuted in the Darfur situation.

11 So one cannot even be surprised by the fact that the Security Council never took a position
12 under so-called denunciation in the periodic reports of the Prosecutor of the persistent
13 non-cooperation with the Court of Sudan, and the other States requested to arrest and
14 hand over Al-Bashir. In this area, the intervention of the Security Council in the cases of
15 violations of the Statute, even in the case of referring situations to the Court, this is
16 provided for by a specific procedure which gives the jurisdiction to the Chambers to make
17 a determination as to these possible referrals. So by its silence on the consequences of the
18 said non-cooperation, the Security Council correctly refrained from interfering in this
19 jurisdiction.

20 For the same reason, it did not say anything about a possible conflict between the
21 obligations of the State in the area of immunities under Article 98, but it took into
22 consideration Article 98(2) when it decided in paragraph 6 of the resolution the
23 application of this article to staff members of the contingents placed at the disposal of
24 Member States of the United Nations.

25 This is linked to the main responsibility of the Council under Chapter VII, and this implies

1 that it does not want to allow the sole responsibility for interpretation of Article 98(2) to
2 the Court. In fact, such a disposal was applied in conformity with its literal meaning and
3 appeared in the preparatory work, that is, with regard to the obligations of the Statute.
4 Relating to another question raised by the Judges, I would like to seize the opportunity to
5 underscore the fact here that the Security Council refer to paragraph 6 of resolution 1593,
6 to a specific exception to the jurisdiction of the Court, and this is one of the functions of
7 the United Nations. This does not mean at all that there is a recognition of the possibility
8 of other exceptions, it actually means the opposite. Otherwise it would have been
9 worded explicitly.

10 In order to conclude on this issue of implementability of the Statute, that is, by jointly
11 implementing the provisions of the Statute and the resolution to non-party States but
12 which are involved in referred situations, this constitutes the implementation of two
13 international treaties or acts that have been adopted to the context to situations or systems
14 that are different but which are part of the same international order, and this can be
15 combined on condition that they are subjected to criteria of implementation consistent
16 with the Vienna Convention. So the Security Council did not find it necessary to
17 explicitly mention the normative effect of the resolution in relation to Sudan, or even the
18 implementability of Article 27. I would like to refer to an interesting question that you
19 put to the representative of Jordan regarding the possibility of distinguishing between an
20 obligation and a duty or a coercive value. You were quite correct on the fact that it is
21 necessary to make this distinction. There are compulsory decisions of the
22 Security Council, that is one thing, but there is also the binding effect of such decisions,
23 which in addition to compelling a State actually also limits the sovereignty of the States,
24 so these binding instruments affect the sovereignty of the States. The Council might
25 resolve this problem on the basis of Article 27 of the Charter which is -- in order to be

1 more specific with regard to the provisions of Chapter VII.

2 When it comes to resolution 1593, does not mean that the State involved should become
3 a State Party or a quasi-State Party. I agree with Jordan here that such a status does not
4 exist in international law.

5 The normative effect means that the State involved, while is not a State Party, but the
6 other parties are compelled to recognise the jurisdiction of the Court and to fully
7 cooperate with the Court in accordance with the provisions of the Statute so as to make it
8 possible for the Court to fully exercise its jurisdiction, that is, both the recognised
9 jurisdiction and the enforceable jurisdiction, that is arrest and the transfer, and the
10 requests for arrest and transfers.

11 Now regarding the question that you put about the differences between the various
12 approaches of the Security Council in relation to this issue of cooperation regarding what
13 States Parties did on the one hand and what Sudan did on the other hand, as well as what
14 was done by States that are members of the United Nations but not State Parties to the
15 Rome Statute.

16 Sudan is compelled to cooperate fully, but the word that the Security Council used, that is,
17 "urges" - and I'm using that word in English because the original of the resolution is in
18 English - the Security Council uses that word "urges" when it talks about the cooperation
19 requested from non-Party States other than Sudan. But it does not include the obligation
20 of these States to such a cooperation.

21 But there is a certain accepted doctrine. Maybe I cannot quote it correctly. But we can
22 understand from that that requesting cooperation brings about other waivers in order to
23 maintain international peace and affects immunities by granting faculty or ability to
24 cooperate with the Court itself.

25 Now, when it comes to the resolutions of the Security Council there are legal differences

1 between the obligation to cooperate and the request to cooperate, and the exercise of a
2 State's powers will bring about a problem with the relationship between Article 27 and
3 Article 98(1) in relation to an arrest warrant addressed to a non-Party State to the Rome
4 Statute other than Sudan. It would be requesting Sudan to renounce its rights to
5 immunity, and if Sudan did not accept the Court could address to the said Head of State
6 for an arrest and surrender of the accused person on the basis of resolution 1593. In fact,
7 that would not be a violation of the Statute. However, such a decision could be
8 submitted to a different assessment on the basis of the Charter of the United Nations, to
9 which you have referred in two or three questions that you have raised.

10 That fact can also explain why States non-parties to the Rome Statute tried to avoid the
11 presence of Al-Bashir on their territory.

12 The different approach of this issue of cooperation is quite consistent with the
13 discretionary power of the Security Council under Article 39 to either decide or to
14 recommend measures in relation to situations provided for under that article.

15 But it is not surprising that the Security Council simply requests these other members of
16 the United Nations to cooperate rather than compelling them to cooperate with the Court.
17 Would you imagine, for example, that the permanent members of the Security Council
18 that are not State Parties to the Rome Statute, such as China, the US, Russia, would they
19 have adopted a resolution that would have compelled them to cooperate? Unfortunately,
20 that is not the case.

21 Now, relating to the question that you put about the resolution of the Security Council,
22 whether it is compelling in relation to other resolutions. In fact, it is only the
23 Security Council that can adopt binding resolutions. Obviously, it is not a question of
24 instrumentalisation, and this refers to another question that you put. I believe that the
25 resolution establishes harmonious cooperation between that power and the jurisdiction of

1 the Court. We can say that the Court is using the Security Council and the
2 Security Council is using the Court, each within its own domain.
3 Relating to the issues about the Court being a brainchild of the UN, I think I will skip that
4 part in order to save time because it was a matter of a decision from like-minded States.
5 And this Court, of course, is an institution that is quite separate from the UN and we do
6 not need to go back to how it was created. It was a diplomatic conference and a treaty or
7 agreement was adopted.
8 In relation to the request for arrest and the transfer of the accused, the State, in
9 implementing the request, I think that rather than acting by delegation of the Court,
10 which does not have a judicial police at its disposal and, therefore, with this regard has
11 nothing at all to delegate. I believe that by virtue of this request - I apologise - and in
12 executing this request, the State provides the Court, pursuant to the Statute, merely with
13 the necessary coercive means for the execution of the request for arrest and surrender
14 because the Court does not have any judicial police.
15 Now, we are talking here about the relations between the Court and the States, and the
16 international tribunals and the States. Now, in this request for arrest and surrender, the
17 Court does not therefore request that the State execute its jurisdiction, rather than within
18 the very strict limits of Article 59 of the Statute.
19 PRESIDING JUDGE EBOE-OSUJI: [11:29:43] You have about five more minutes, just so
20 you know.
21 MS LATTANZI: [11:29:46] (Interpretation) Article 59 is particularly illuminating in this
22 regard because it does not give the internal jurisdiction any - any activities in terms of
23 immunities. And I'm going to skip to another point now.
24 Now, there is a group of issues that you put, questions that you put, that cover the
25 relations between the decisions made by the Security Council with the activities of the

1 Security Council in terms of peace and the requirement for the States to execute the
2 decision. And there are the general provisions that are the same as that you have
3 mentioned, that say, that provide for the execution of said decisions.

4 Now, the immunities. So Sudan and Jordan, who have not respected the decisions of the
5 Security Council, find themselves in an illegal situation in a very important matter of
6 international law. That is, repression of crimes. So they certainly expressed the
7 principle of *par in parem non habet jurisdictionem*. But I do not believe that this is the
8 case for personal immunities of the high officials of State, or even of those who are lower
9 in the rungs.

10 Now, it is in the interest of unfettered inter-State relations that has nothing to do with
11 a question of sovereignty. It is of minor interest here and these can therefore be waived
12 in the interest of superior matters.

13 And all the rules can be applied here in order to permit the respect of the decisions taken
14 by the Security Council and the State cannot oppose an obligation of customary law.

15 And in this regard - and I would allow myself here to suggest an approach to the
16 Chamber, the Appeals Chamber - I believe that we need to remind ourselves of a general
17 principle of law that for international law is a fundamental principle. And even more so
18 than for international law, that is, the *lex specialis derogat generali*.

19 And before putting the problem as to whether there is a customary law in existence, yes or
20 no in the instant case, we have to wonder whether there are specific rules that apply. I
21 would refer ourselves here to a very interesting report on the fragmentation of the
22 international legal system by the International Law Commission that specifically talks
23 about this *jus specialis derogat generali*. And here we have one of the specific rules that
24 are the rules of the Statute and we will have, yet again, specific rules that are the rules of
25 resolution 1593. These are the rules that should also, on the basis of Article 21(1) of the

1 Statute, be foremost taken into consideration. And it is only on the basis of those rules
2 that the Appeals Chamber will be - if they are not in a position to resolve the
3 problem - they will then ask themselves whether there are any customary law rules in
4 existence.

5 Of course, I have many other things that I would like to broach. Do I have any other
6 minutes outstanding?

7 PRESIDING JUDGE EBOE-OSUJI: [11:35:09] No. Your time expired two minutes ago.
8 Thank you very much. Did you hear?

9 MS LATTANZI: [11:35:21] Sorry, sorry, sorry. Thank you so much. I end.

10 PRESIDING JUDGE EBOE-OSUJI: [11:35:26] Thank you very much.

11 MS LATTANZI: [11:35:28] Thank you.

12 PRESIDING JUDGE EBOE-OSUJI: [11:35:31] It is our time for our morning break, but I
13 note on the record that Mr Newton has now joined us.

14 Perhaps for general discussions --

15 MS LATTANZI: [11:35:40] Sorry, I was not following.

16 PRESIDING JUDGE EBOE-OSUJI: [11:35:45] It's okay. Perhaps one way to look at one
17 of these questions, amongst many that have been posed, is again in light of the distinction
18 that the ICTY Appeals Chamber drew between coercive effect and mandatory effect. But
19 whether or not "urge", when the Security Council "urged" all States to cooperate, whether
20 that can translate into mandatory effect for purposes of UN Charter. Even beyond the
21 question, even in that way, there remains another way to look at it, and if we looked at it
22 from the perspective of responsibility of State for an internationally wrongful act, could it
23 be that a State that is urged by the Security Council under Chapter VII to fully cooperate,
24 mainly on the basis of fact, transgress any immunity that is agreed to exist, but then plead
25 a defence, if there is litigation arising from that, "Look, we were urged to do this thing and

1 we were fully cooperating according to that urge, so we are absolved from an
2 internationally responsible act."

3 Let's leave it at that for now and come back in 30 minutes. Thank you very much.

4 THE COURT OFFICER: [11:37:18] All rise.

5 (Recess taken at 11.37 a.m.)

6 (Upon resuming in open session at 12.11 p.m.)

7 THE COURT USHER: [12:11:58] All rise.

8 Please be seated.

9 PRESIDING JUDGE EBOE-OSUJI: [12:12:17] Thank you very much, everyone, and

10 welcome back again. And we will now continue the debate. Next we'll go to Mr

11 Magliveras.

12 MR MAGLIVERAS: [12:12:36] Thank you, Mr President, members of the Appeals

13 Chamber.

14 As with group A questions, I have attempted to answer specific questions, so I will also do
15 that with group B questions.

16 Starting from questions A and B, I believe that the grammatical interpretation of Article
17 13(b) and Article 16 of the Statute would suggest that in the former case, the UN Security
18 Council must act within the parameters of and by observing the substantive conditions
19 laid down in Chapter VII, while in the latter case only the voting conditions of Chapter
20 VII have to be followed.

21 According to this submission, an Article 13(b) decision may be taken only when the
22 Security Council has determined that the situation where Article 5 crimes have allegedly
23 been committed constitutes a breach of the peace.

24 On the contrary, a request for deferral of investigation or prosecution only demand that
25 the relevant decision meets the voting rule of Article 27, paragraph 3, UN Charter.

1 Indeed, the text of Resolution 1422 of July 2002, requesting that the Court does not
2 commence a case against any personnel in a UN peacekeeping operation from a State not
3 an ICC party, makes no determination as to any actual or potential threats to the peace or
4 breach of the peace.

5 If this submission stands, it follows that the Security Council may waive, displace or
6 override a Head of State's immunity if it were to be justified as a Chapter VII measure
7 aimed at restoring peace and security and contributing towards meeting the United
8 Nations' mandate under Article I of the Charter. In such an instance, the Security
9 Council should be able to waive the immunity of a Member State's Head of State.

10 Where such State is also an ICC party, should not be of relevance and the same applies to
11 whether it is a contracting party to treaties envisaging directly or indirectly Head of State
12 immunity.

13 While one can only speculate on the precise nature of such waiver, presumably the
14 Security Council will opt for a blanket waiver as not only applying to ICC proceedings,
15 but for any other criminal proceedings.

16 As regards specifically question B, the answer, in my opinion, should be in the negative,
17 since conventional provisions of the Rome Statute applicable to non-State parties would
18 run against the sacred rules concerning State sovereignty. And this is because these
19 provisions would become binding on the State, on its government and on its population,
20 despite the apparent wish not to be a contracting party to the Statute.

21 Thus, there is an important differentiation between question A and question B. In the
22 former case, in my opinion, there will be a change in the personal capacity and attributes
23 of a specific individual who, tomorrow, may or may not be a Head of State, while in the
24 latter case, a whole country will come under a legal regime to which it has not consented.
25 Moving to question (f). Article 13(b) should, in my opinion, be disassociated from the

1 relationship existing between the ICC and the UN, which is based on Article 2 of the
2 Statute. The Court may be the brainchild of the UN, but its Statute was not adopted as a
3 decision by a UN organ.

4 On the contrary, Article 13(b) should be seen as the vehicle to prevent impunity in
5 situation having an international dimension and being of direct concern to the global
6 community, without having to create costly ad hoc tribunals, like the ones in the former
7 Yugoslavia and Rwanda.

8 This suggestion would lead to the argument that the ICC should also be seen as an
9 international judicial organ with limited criminal jurisdiction *ratione materiae* in the sense
10 of being restricted to rule only on Article 5 crimes, but with unlimited jurisdiction *ratione*
11 *personae* when so requested by the Security Council.

12 This argument, of course, is not without problems, especially since the United Nations'
13 Security Council operation suffers from inadequate representation of the entire UN
14 membership, something that the African Union has constantly reminded us, since its
15 resolutions are not subject to a procedure akin to judicial review, since it quite often
16 succumbs to political considerations ignoring political rules and norms, et cetera.

17 Regrettably, the Rome Statute has not adequately equipped your Court to act in this
18 capacity as well.

19 For example, Article 4, paragraph 2 of the Statute ought to have provided that the Court
20 exercises its functions and powers pursuant to the terms of Security Council referrals as
21 well. This could be addressed if the Statute were amended, which may or may not
22 happen in the future. However, in the meantime, the Court should pronounce on this
23 additional competence, if, of course, you believe that it exists, and apply the Rome Statute
24 accordingly.

25 I will now address questions (g) and (f) together. In my opinion, the distinction in

1 paragraph 2 of Resolution 1593 could be explained by arguing that it is addressed to the
2 government of the Sudan and, therefore, the latter is obliged to carry it out because it had
3 been ordered to do so, while paragraph 2 expects all other States and international
4 organisations concerned to cooperate because the effectiveness of international criminal
5 justice demands that the whole global community participates in bringing impunity to an
6 end.

7 Moreover, Resolution 1593 could not have prescribed any obligations to States other than
8 the Sudan because they were not involved in the Darfur situation and, consequently, on
9 principle, they were disassociated from the crimes allegedly perpetrated there.

10 For this reason, taken on its own, paragraph 2 of Resolution 1593 should not afford the
11 third States a licence, excuse or defence to derogate from the immunities that the Republic
12 of the Sudan enjoy or may enjoy under international law.

13 However, the relevant passage in paragraph 2 may not take precedence over the
14 obligations and duties that third States have in their capacity, in their specific capacity as
15 ICC parties. To put it otherwise, the effect of paragraph 2, in my opinion, cannot be to
16 diminish the Rome Statute obligations to mere discretion and argue that the ICC parties
17 are no longer bound by the express obligation to fully and unconditionally cooperate with
18 the Court. This construction would be totally irrational.

19 There is probably no basis in international law to argue that the organ of an international
20 organisation may curtail the obligations that States have freely assumed and, I repeat,
21 freely assumed, by ratifying a multilateral treaty.

22 I move now to answer question (j). Immunity essentially derives from sovereignty and
23 the respect that States must show to each other always acting as civilised nations.

24 Exactly because of sovereignty, States can never be forced to join any international
25 organisation. However, if they choose to accede to an international organisation, they

1 are required to fully adhere to its norms. They are not allowed to pick and choose which
2 norms to obey and which norms to disobey. It follows that the effects of a Charter VII
3 measure cannot be avoided even if a Member State invokes its own sovereign immunity.
4 The Security Council may give dispensation to a Member State if the effects of such a
5 measure are disproportional for that member to the intended aim, but this is not the case
6 here. On the other hand, continued participation in an international organisation, it's not
7 something which has to be maintained in perpetuity.

8 If a Member State, for whatever reason, is unhappy with Chapter VII measures or indeed
9 with any other action that the Security Council may take or does no longer wish to execute
10 what the Security Council asks, it should be considered free to withdraw. But if that
11 State stays on, it has no alternative to follow the dicta of the Security Council.

12 Moving now to question (I). In this question, your Court has given two scenarios which,
13 taken on their own, I believe that they have different legal effects. By creating a new ad
14 hoc criminal tribunal, the Security Council establishes a new subsidiary UN organ over
15 which it exercises full and uncontested control. It can determine all applicable rules;
16 who can be prosecuted, presumably not only individuals but also States, if the Security
17 Council thinks that is the proper way to address a breach of the peace; for the commission
18 of which crimes over which period of time, with what penalties, et cetera.

19 The Security Council can also decide when to kill that new subsidiary organ or when to
20 transform it. It can basically decide whatever it likes, since there are no restrictions
21 imposed by a higher authority. But when the Security Council refers a case to this Court,
22 effectively what it does is to take away the jurisdiction that domestic courts might have --

23 PRESIDING JUDGE EBOE-OSUJI: [12:28:40] Professor, you need to take into account in
24 that proposition, "the Security Council can do whatever it likes." In the Tadić
25 jurisdictional appeal, the Appeals Chamber wouldn't go that far. I thought they said the

1 Security Council is necessarily limited in its action, even for purposes of Chapter VII
2 powers, necessarily limited to the charter. You go back to the beginning, the principles
3 of the charter are expressed there. Then, just to know whether that helps with what you
4 are going to say next. Think about that. Thank you.

5 MR MAGLIVERAS: [12:29:29] Thank you, Mr President.

6 So when a case is referred by the Security Council to this Court, it entrusts all procedural
7 and substantive law aspects of the situation at hand from the stage of the investigation
8 until the stage of awarding satisfaction to the victims to this Court.

9 I believe that the Security Council cannot take back the referral. It could presumably ask
10 for a deferral, Article 16, but otherwise it has set a process in motion which cannot be
11 stopped. Of course, with the obvious exception that the Prosecutor and/or the Court
12 may conclude that there are no actionable crimes committed, or cannot tie specific crimes
13 to specific alleged perpetrators.

14 Legally speaking, the Court does not become an agent of the Security Council even
15 though it does assist it in maintaining peace and security in the world. While the
16 Prosecutor has been under the duty to provide the regular reports to the UN Security
17 Council on the situations referred, I believe this is merely a technicality. It neither alters
18 the relationship between the Court and the UN, nor places the former in a position of
19 inferiority vis-à-vis the latter. And I believe that the Prosecutor made this exact point
20 quite clear during the Security Council ICC meeting which took place on 6 July of this
21 year, when she said that they are of equal standing.

22 If the Security Council had created an ad hoc tribunal for Darfur - a proposition which
23 presumably is still possible; perhaps the Security Council will ask this Court to transfer
24 the existing proceedings to the new ad hoc tribunal - following the model of the former
25 Yugoslavian and Rwandan ad hoc tribunals, there is no reason to believe that Mr

1 Al-Bashir would have enjoyed immunity before it. Article 7 and Article 6 of the
2 respective Statute.

3 In the case of executive presidential republics such as the Sudan, in reality, the holder of
4 the immunities attached to the Head of State under international convention and
5 customary law is the office of the presidency and not the individual who happens to hold
6 this office at any given moment. In my opinion, what represents the Republic of the
7 Sudan on the international plane, in other words, the manifestation of the Sudan's
8 sovereignty in relation to the global community and its transactions with it --

9 THE COURT OFFICER: [12:33:18] You have five minutes left.

10 MR MAGLIVERAS: [12:33:21] Thank you.

11 -- is the presidency, irrespective of the individual who happens to possess the title of
12 president. It has not been argued, to the best of my knowledge, that Sudan's presidency
13 has been involved in the alleged commission of the crimes in Darfur. It is the person of
14 Mr Al-Bashir who has been accused of genocide and crimes against humanity,
15 international crimes which were allegedly committed when Mr Al-Bashir held the post of
16 commander of the armed forces of the Sudan, a position which he held since 1989. He
17 retired from the post in January 2010 in order to be eligible to participate in the April 2010
18 presidential elections, which he won by 68 per cent of the popular vote.

19 Whether the person of Mr Al-Bashir and the State of Sudan are one and the same is a
20 debatable issue. Often in African countries the person of the Head of State and the State
21 itself coincide. It is difficult to distinguish between the two and determine which acts
22 should be attributed to the former and which to the latter.

23 But in the present appeal I believe that this determination ought to be made. Did Mr
24 Al-Bashir act on behalf of the State of the Sudan or did he act on his own free volition? If
25 he acted on his own, surely he should not be entitled to immunity, to any immunity. If

1 he acted effectively on behalf of the State of the Sudan, he could be entitled to certain
2 immunities, but the nature, the ferocity, and the mass scale of the crimes allegedly
3 committed should be taken into consideration, perhaps leading to taking away immunity
4 and leaving open the question of the responsibility of the State of Sudan.

5 Thank you.

6 PRESIDING JUDGE EBOE-OSUJI: [12:36:27] Thank you very much, Professor.

7 Next on the speaking list would be Mr Newton, please.

8 MR NEWTON: [12:36:34] Thank you, Mr President, may it please the Court.

9 As an outset matter I wish to thank the Bench for leave to have been out of court earlier
10 this morning. That was a gracious gesture and I appreciate it.

11 I reiterate my position not as an advocate for either party, but as the voice and the
12 interpreter of the data that we have collected. The data itself has no voice, and the
13 Mapping Bashir team has worked very hard to provide value added to these deliberations
14 and to other people that are interested for other research purposes. The value of that
15 data lies in the ability to distill it into legal and policy prescriptions. And as I said the
16 other day, I do hope to add the voice of pragmatism and empirical reliability that will give
17 the Court some grounding to decide these complex issues.

18 Before I turn to the three substantive issues that I want to raise related to questions in
19 cluster B, I want to very briefly revert to the issues that were insightfully raised by the
20 Bench yesterday regarding comparison of pre-arrest travel and post-arrest travel. I
21 answered from memory and from recollection and from insight in the data. I did not
22 have the numbers at the top of my head. I want to give them to you now. I believe the
23 word yesterday was baseline, so that you have the baseline. My answer yesterday was
24 there was no marked difference until the issuance of the second arrest warrant, in which
25 case we noted a marked increase.

1 Here is the data pre-arrest warrant: 2016 we noted 15 trips. I'm sorry, 2006 we noted 15
2 trips; 2007 we noted 9; 2008, for the record, we noted 10. Those facts, yesterday I didn't
3 have the numbers at easy hand to give you because it was just from memory.

4 In contrast, just to reiterate for the purposes of the record, post-warrant: 2009, 10; 2010, 4
5 trips; 2011, 10; 2012, 11; 2013, 18; 2014, 15; 2015, 27; 2016, 23; 2017, 24. There is that
6 marked increase that I commented upon. And then up to date this year, 2018, we've
7 recorded 11 trips.

8 That constitutes subsequent State practice, in our view, where States are motivated by
9 various considerations of Head of State immunity. And that is applicable both to States
10 Parties and non-States Parties. The Bench has that entire data set for further analysis.

11 Second thing, we briefly mentioned yesterday the issue regarding cancellations, and I
12 didn't -- honestly, I just forgot to mention this, in the data that you have is a chart that lays
13 out all of those cancellations and the reason. There was some concern from the Bench
14 that there were potentially diplomatic private correspondence and things that we had
15 missed. In the data set where it shows the explanations for cancellations, you'll see that
16 many of those private things are reflected in the public record. The thing I forgot to note
17 is that both sides to a cancellation are incentivised to highlight that. The political parties
18 that have arranged for that such as, for example, the United States, that dissuaded
19 attendance to the UN General Assembly, see it as being in their political interest to make
20 sure that fact is widely known and publicly available. So that's why you see statements
21 from foreign ministries, et cetera.

22 Conversely, States who really would have wanted that travel to take place but felt that the
23 cancellation was necessitated by other external factors, there is even examples where
24 travel is -- cancellation is just blamed on the media, for example.

25 That data is in the spreadsheet that you have as one nice, neat compiled thing.

1 Let me turn to the questions raised in question B, with specific reference to the Security
2 Council resolutions and the Security Council debate.

3 Ms Brady yesterday commented that it would be totally illogical for the Security Council
4 to have used Article 13(b) to refer a situation regarding Darfur to this Court while
5 implicitly -- or, expecting a different jurisprudential standard to apply. It's quite true
6 that the members of the Security Council had watched the implementation of various
7 resolutions for the ad hoc tribunals. They had seen Milosevic go to trial. They had seen
8 the Plavšić case. They had seen Šainović, Milutinović, and other politicians. And her
9 suggestion was that it seems absurd to suggest that the ICC has less power because it was
10 empowered by the Security Council in this case as the alternative to creating an ad hoc
11 tribunal. I think that's exactly right so far as it goes. And I'll explain why.

12 The distinction lies in something that I raised earlier but which is absolutely very clearly
13 reflected in the Security Council debates at the time of the adoption of the resolution 1593
14 and subsequent, for reasons I'll get into.

15 The Security Council was extremely conscious of the fact that there is a duality of
16 groundings from pure Chapter VII coercive authority and the corollary responsibilities of
17 States Parties under the Rome Statute. And I'll give you many examples directly from
18 the record here in just a few minutes.

19 With respect to Sudan itself, the record is very clear from States Parties -- both from States
20 Parties and other members of the Security Council that Sudan itself is absolutely bound by
21 the full Chapter VII authority of the Council. Let me read you just one example of many
22 that I could read. Here is the Mexican delegation on 4 December 2009:

23 "The Government of Sudan is obliged to investigate and prosecute the perpetrators of
24 international crimes committed within its jurisdiction."

25 This is a basic principle. Absolutely it is. And a premise of the system created by the

1 Rome Statute. Yes.

2 Events since the adoption of resolution 1593 show that, faced with the Government's
3 inaction, the International Criminal Court should exercise its jurisdiction. All of the
4 other parties to the Darfur conflict - note that does not include, as was just said, other
5 States and other areas such as Jordan, et cetera. But the parties to the conflict should
6 cooperate with it.

7 Therefore, we recall that the total lack of cooperation of the Government of Sudan is a
8 challenge not only to the work of the Court, but also to the authority of the Security
9 Council. And I could give you dozens more of those statements. They're in the record
10 that we have provided.

11 With respect to Sudan, the record is absolutely clear and the Prosecutor is absolutely right,
12 that the resolution and the Security Council fully expected full cooperation, no immunity
13 claims. There are other arguments, when arguments are raised by Sudanese officials,
14 that they may rely on the fact that they're a non-State party under the Vienna Convention
15 and argue that line of argument. Very explicit pushback on that from the Security
16 Council.

17 At the very same time, there is extensive evidence in the record that the Security Council
18 was very aware that there is a duality of relationships between pure Chapter VII ad hoc
19 organisations and the Rome Statute as a sui generis treaty based court that's constitutive
20 power derives from the treaty at its core.

21 You know, Article 90 speaks of an existing international obligation to extradite. There
22 have been allusions in this Court and in debates in the Security Council to the entire
23 admissibility regime and the primary duty of sovereign States to exercise jurisdiction.
24 That's replete throughout the record.

25 The record shows that the Security Council clearly understood that the constitutive

1 document of the Rome Statute requires a healthy synergy and it requires -- does not
2 require total displacement of all other international legal obligations, or all other treaty
3 obligations, or all other relevant pieces of international law. That's very clear in the
4 record.

5 Turning to the data quickly, I note that I've got about 10 minutes and I want to give you
6 three quick examples from the data that support these premises.

7 It's important to note, I think, for the record that the Prosecutor performed an extremely
8 valuable service through these 27 reports, because what you see are very clear
9 prosecutorial reports and increasingly strident pleas for cooperation. In the very first
10 report Mr Ocampo said "I can't do my job without the full cooperation and the full
11 support of the Council". He pleaded for support. Then that thread runs continuously
12 through.

13 We speculated yesterday on whether and what the Security Council knew of the Charles
14 Taylor verdict. As early as 2009, the OTP staked out the position that has been raised
15 here in court that sovereign immunity automatically is washed away in all aspects
16 vis-à-vis Sudan. In 2009, the Prosecutor made that very, very clear.

17 Most importantly for the context of this, in 2011 on 15 December, the Prosecutor explicitly
18 alerted the Security Council, not only to the Malawi and Chad decisions, but to the precise
19 legal analysis underpinning those, the reference of those Pre-Trial Chambers to Article
20 98(1) and in the Prosecutor's words "The Chamber concluded that Article 98(1) of the
21 Statute does not apply and therefore that Malawi had failed to cooperate with its
22 obligations and to consult with the Chamber and failed to cooperate."

23 In that session Sudan immediately pushed back relying on the other really admissibility
24 arguments.

25 It's important to note that in that session and in no other subsequent session did the

1 subject of Article 98 obligations come up. Now, on the one hand we could say, well, they
2 were busy, they had other things, you know, we can't really derive from the fact that they
3 didn't immediately reply to that. But for the record, sitting there were Brazil, Colombia,
4 Germany, Portugal, South Africa and all the P5.

5 The point is that if you search the records that's the only time that Article 98 derivative
6 obligations as derived from the Sudanese waiver by virtue of the Chapter VII authority,
7 but the derivative effect on Article 98, the Prosecutor explicitly raised that, it was never
8 raised again and never, never emphasised again by any party to include the French, the
9 Germans, nobody debated that any further.

10 If you search the record for the word "immunity," what you see is consistent statements in
11 the Security Council that Sudanese officials do not enjoy immunity from the exercise of
12 criminal law by this Court or by virtue of the resolution in their own systematic processes,
13 an implicit deference to Article 17 to 19.

14 Now, the issue was raised yesterday about, okay, so the Security Council must have
15 known about Charles Taylor. Yes, they did. On 13 December 2012, the German
16 delegation raised exactly that issue. But it's important to note in the context that they
17 raise it. And I'll just read to you exactly word for word what the record shows.

18 The Prosecutor's report makes clear that cooperation, no such will to cooperate exists at
19 the relevant levels of the government of Sudan. The focus throughout the records
20 throughout is always on the government of Sudan, very seldom on explicit legal duties on
21 other States.

22 However, that does not mean that justice will not be done at some time. Eventually the
23 Sudanese, again, will have to decide what is ultimately best for them and their country.
24 "The recent sentencing of Charles Taylor by the Special Court for Sierra Leone to 50 years
25 in prison" --

1 PRESIDING JUDGE EBOE-OSUJI: [12:48:44] You are now quoting?

2 MR NEWTON: [12:48:46] Yes, sir.

3 PRESIDING JUDGE EBOE-OSUJI: You're quoting --

4 MR NEWTON: This is a direct -- this is a quote.

5 PRESIDING JUDGE EBOE-OSUJI: [12:48:47] From Germany.

6 MR NEWTON: [12:48:49] Yes.

7 PRESIDING JUDGE EBOE-OSUJI: [12:48:50] Thank you.

8 MR NEWTON: [12:48:50] Date 13 December 2012.

9 "The recent sentencing of Charles Taylor by the Special Court for Sierra Leone to 50 years
10 in prison is a clear sign that the age of accountability is neither a dream nor a mere
11 concept, but is becoming a reality. We must not waiver in our determination to foster
12 that reality. Perpetrators of genocide, crimes against humanity and other serious crimes
13 must not and cannot be allowed to avoid justice."

14 Here is the key: "Notwithstanding the Sudan's primary responsibility to cooperate, we
15 have taken full note of the Court's findings regarding the non-cooperation of other
16 countries when they have been visited by President Al-Bashir. The non-execution of
17 Court requests severely affects its function to fulfil its mandate. Germany therefore
18 reiterates its call upon all States Parties to fully honour their obligations" and now we're
19 waiting for the punchline. Do they flow from the Security Council resolution as
20 mandated or assumed by -- no. The German delegation says their obligations under the
21 Rome Statute, in particular their obligations to cooperate with the Court and execute any
22 warrant of arrest.

23 Implicitly that argument includes of course Article 98, the admissibility regime, all the
24 other provisions of the Statute that rely and directly incorporate both other provisions of
25 substantive international law as well as other procedural provisions of international law.

1 To summarise, and I could give you many more quotes of that nature, they're replete in
2 the record. There is lots of hand wringing, lots of hand wringing. There is lots of
3 generalised political disapproval. There's lots of States that say: We wish they would
4 cooperate. We're aware of this travel. We sympathise with your plight, Madam
5 Prosecutor. We wish and we want this case to be tried.

6 But no effort by the Security Council in the record to directly tie the obligations of third
7 party and corollary States that are not parties to the situation in Darfur to explicit duties
8 derived from the Security Council, beyond the repeated and obvious exhortation "We
9 urge cooperation. We would like cooperation."

10 PRESIDING JUDGE EBOE-OSUJI: [12:51:05] Isn't that a matter of interpretation of the
11 applicable law in the particular circumstances?

12 MR NEWTON: [12:51:19] Mr President, I think you are right, it is an interpretation.

13 PRESIDING JUDGE EBOE-OSUJI: [12:51:24] Yes. So, right, as we heard yesterday from
14 Mr Wood that the Security Council is a political organ, so they make political decisions,
15 right, the law follows, or vice versa as the case may be.

16 Yet one thought that has been occurring all along is this: In the, I think it was in the
17 Wimbledon case, the PCIJ said that a treaty can restrict sovereignty in the sense of
18 requiring how sovereignty is to be exercised in the particular circumstances. Now, so the
19 emphasis there is treaty obligations restricting sovereignty by directing its exercise.

20 If we have a scenario where the Security Council, acting under Chapter VII powers of the
21 UN, which is a treaty that its members are signatories to, and that exercise of power
22 engages the question about full cooperation of Sudan, and it raises the question what does
23 full cooperation mean, does it include saying if your Head of State is implicated in crime,
24 you have to surrender him, that is Sudan now?

25 If that is the case, assuming that is the correct view of it as to the obligation of Sudan, can

1 that scenario generate then immunity for the Head of State of Sudan who Sudan is
2 obligated to surrender, can it then generate immunity for him that is opposable to Jordan
3 that Jordan must respect? That is one question that has been troubling me personally
4 discussing all this stuff. Thank you.

5 MR NEWTON: [12:54:05] Thank you, Mr President. I note for the record that I have 90
6 seconds left, so I would request just a slight deviation, both to answer your question but
7 also to very quickly raise the third point.

8 I think you are right insofar as Sudan goes. And the record and the Prosecutor has very
9 clearly said and the debates in the Security Council absolutely reflect that understanding,
10 that vis-à-vis the Court in a vertical relationship, absolutely no question, full Chapter VII
11 authority relying on 103 and the duty of all States, in this case Sudan, or, and it's worth
12 remembering, not only Sudan but any other State involved or the agents of that State
13 involved in the situation. That's what they, that's what they're talking about.

14 But here I think it's very interesting, and I urge you to take the time to look at the data,
15 because I've only briefly summarised many, many other statements, in this case you're
16 absolutely right, as we all know, that these are political statements in a political context.

17 But it's most interesting that repeatedly the legal arguments are raised very explicitly with
18 regard to Article 98(1) and with regard to the derivative legal duties of other States who
19 are caught in essentially a conflict of laws, a dual avoidance, not to frustrate the will of the
20 Security Council and at the same time to honour their binding Rome Statute obligations,
21 given the fact that the Rome Statute does in fact build in respect for other international
22 legal obligations. That's the quandary. Those issues are directly raised to the Security
23 Council over and over and over and over again. And I would note for the record, if you
24 go back and read again, I think the Prosecutor's reports do a great deal of value here,
25 they're more explicitly raised and more stridently raised as time goes on.

1 Now, in that context what is marked here, both as a matter of subsequent State practice
2 but also as a matter of subsequent practice within the Security Council, those derivative
3 arguments vis-à-vis third party States, which was your question, get zero traction, none.
4 There is very little push-back on the legal technical issues, and they're explicitly raised.
5 In fact, and I'll briefly conclude, there is a great number of statements once the African
6 Union resolutions come into fore, a number of statements of States who specifically argue
7 the exact opposite, that there is a *lex specialis*, that there is a regional duty to comply with
8 the conflicting duties of the regional organisation. And I could read you as many as you
9 would let me have time to read you, where they explicitly say we have the duty to comply
10 with our regional organisation in violation of what you might otherwise impose on Sudan.
11 And again, no push-back, nothing that I could find in the record where States come back
12 and say: Hold on a minute. Hold on a minute. Subordinate regional organisation
13 duty, implicit duty, coercive duty derived from Chapter VII, there is none of that in the
14 record. There is some mushy political statements urging cooperation.
15 My point, sir, is I wish that they had directly confronted these issues on the record, and
16 they were in fact directly confronted with these issues in the form of statements, both
17 from the Prosecutor and from other States.
18 And there is a very strong trend, we could call it *lex specialis*, we could call it a regional
19 custom, we could frame it in different ways, but that's very clearly raised repeatedly by a
20 number of States. And I would note also for the record, not only by African States.
21 PRESIDING JUDGE EBOE-OSUJI: [12:57:42] Now, good news for you is you have four
22 minutes. I said good news for you, you have four minutes left.
23 But within that can you also take this variation of the conundrum I posed earlier, duty to
24 implement -- sorry, duty of full cooperation on Sudan.
25 Now, one can get, I say this because you've, I asked this because you've put onto the

1 record Prosecutor's statements to the Security Council report saying there is zero
2 cooperation.

3 As regards Sudan, for instance, who bears that primary duty to cooperate? One could
4 say: Well, Sudan, it's one thing for you to say, "We don't have to surrender our Head of
5 State to you as a matter of full cooperation". But there are other things we have done,
6 Sudan, to fully cooperate in other ways. Prosecutor, you are now going for the overkill
7 to want us also to cough up our Head of State.

8 Now the question is: What has Sudan done other than surrender of their Head of State?
9 Which one could say amounts to cooperation at all or in full minor surrender of Head of
10 State. Does that come into the discussion? In what way?

11 MR NEWTON: [12:59:07] Yes, it does, Mr President. Let me briefly address that and
12 then I'll give you some statements on the *lex specialis* regional peace when the exact
13 opposite issue is raised by other States.

14 The issue of cooperation is repeatedly raised by Sudan in the form of statements that say:
15 Wait a minute. Time out. The Rome Statute is built on a tiered allocation of authority.
16 We have the right to handle these things ourselves. Other States and the Security
17 Council who at large calls their hand on that and says: All right, demonstrate concrete
18 progress.

19 The only repeated answer in the record is to say: Ah, but it's in the agreements. Give
20 us time. We're working on it.

21 And over and over and over again the reply from other Security Council members is: No.
22 You've shown, again, if you search for immunity, that's where you see it coming up in the
23 record. You've demonstrated immunity from your domestic processes vis-à-vis all
24 Sudanese officials, therefore, recourse to the Court is totally appropriate.

25 But again for the record, those issues are raised in the context of Sudan. And when

1 complaints are raised about non-cooperation of other States, both States Parties and
2 non-States Parties, you don't have nearly that same degree of technical legal
3 argumentation in terms of a binding duty flowing from resolution 1593.
4 You have resort instead to the broader duties of the fit, the interconnected complicated fit
5 of the Rome Statute as a treaty, but a treaty that also embeds duties owed to other States,
6 procedural restraints, et cetera.

7 PRESIDING JUDGE EBOE-OSUJI: [13:00:49] The question then becomes this, another
8 question: Is it possible then to say we're looking at a condition - and I know everybody
9 will speak to it in their turn - a condition of the very opposite of full cooperation on the
10 part of Sudan, which is none cooperation at all? If that is the case, is it possible to view
11 that as a condition of illegality, which no Member State should sustain or encourage?

12 MR NEWTON: [13:01:35] It's an interesting question. It's a nice hypothetical. I like
13 that.

14 I think the Charter is framed in Article 25 in exactly the opposite manner, that nation
15 States have the duty to accept and carry out.

16 So were the Security Council using Chapter VII authority to implicitly invoke the coercive
17 power of Article 41, et cetera, and say: We find that the non-arrest - and the example that
18 comes to mind is from Somalia where the Security Council did exactly the same
19 thing - the non-arrest and non-transfer to justice of this person or these group of officials
20 we deem to be a threat to international peace and security, therefore we decide under
21 Chapter VII that all nation States have the duty to facilitate that transfer. The
22 hypothetical you raise, that would be perfectly lawful, totally appropriate, and in fact has
23 been done. Somalia is the one example that comes to mind.

24 But that was not done here. In fact, it was not done after the Prosecutor repeatedly
25 requested, and again I say more stridently as time goes by and trips mount up. And for

1 the record, the sort of coordinated responses from the African Union became more
2 pointed. You began to see a large number of statements, which I can read to you later,
3 you can find them yourselves, I'm sure, where the African Union and other States come in
4 and repeatedly say: No. There is a regional exemption here. There is a regional duty
5 owed to this organisation.

6 And just I'll summarise, that's typically framed in two ways, which is interesting. One,
7 that there is a subordinate duty owed by those States Parties to that regional organisation
8 under a competing treaty and, therefore, that duty in that context not to arrest takes
9 precedence. That's one strand of argument.

10 The other strand of argument is to say: Yes, we recognise that resolutions, regional
11 resolutions that ostensibly oblige us not to arrest might in fact contradict the will of the
12 Security Council as expressed in 1593, but - and this is where I get the *lex specialis*
13 argument - the regional organisation and the regional States know what is best in terms of
14 peace and security and therefore, Security Council, we ask you to defer while they at the
15 regional level work out what they think is best for regional peace.

16 And the time may come when you have to take a Somalia-type solution and order express
17 actions which, as you postulate, would then require duties on the part of all States. But
18 we're not there yet because regional peace and stability is moving in the right direction.
19 We are improving in a variety of metrics.

20 PRESIDING JUDGE EBOE-OSUJI: [13:04:20] Actually, I was thinking about Draft Article
21 41(2) of the draft articles on responsibility of States for international wrongful act. And
22 that's the sense of it. But we don't need to detain ourselves on that. Thank you.

23 MR NEWTON: [13:04:36] No.

24 My last words, Mr President, I mentioned other States. Clearly you have a range of
25 African States raised in that *lex specialis* argument. I mentioned that there were other

1 States from external. You can find this yourselves. Equatorial Guinea, Vietnam, Latin
 2 American States, Bolivia, a number of other States raised that, both from without the
 3 region.

4 And, again, the key point is that these issues in terms of it's a wonderful debate if you
 5 read it, because the legal issues are squarely teed up in front of the Security Council:

6 98(1), the collateral duty of States, the collision between treaty obligations under the Rome
 7 Statute and broader obligations owed vis-à-vis other States. Those issues are squarely
 8 teed up and consistently avoided.

9 Thank you, Mr President.

10 PRESIDING JUDGE EBOE-OSUJI: [13:05:21] Thank you very much, Mr Newton.

11 Now we will go next to Mr O'Keefe.

12 MR O'KEEFE: [13:05:39] Mr President, members of the Court. I hope I can be forgiven
 13 for speaking a little bit more quickly than yesterday because, as well as covering the
 14 material I had intended to cover, I do want to move to the questions, Mr President, that
 15 you have posed this morning in relation to the mandatory versus coercive distinction
 16 flagged in Tadić and, ultimately, to the hypothetical permissive effect of urging the other
 17 members of the Council.

18 The stenographers and the interpreters have the vast body of my text, so I plead their
 19 indulgence.

20 I will look first at the argument chiefly relied on by counsel for the Prosecutor, the
 21 so-called "route 1" in the terms of Professor Kreß.

22 The idea that the mere referral of the situation in Darfur to the ICC under paragraph 1 of
 23 resolution 1593 had the effect of rendering binding on Sudan, a State not party to the
 24 Statute, the obligations binding by virtue of the Statute on States Parties.

25 I will then turn to route 2.

1 Starting then with route 1.

2 The referral of a situation to the Prosecutor of the International Criminal Court by the
3 United Nations Security Council does not of itself render binding on a State not party to
4 the Statute the obligations binding under the Statute on States Parties. It is simply one of
5 the three procedural means by which the Court may be seized of its jurisdiction. This is
6 the short answer to question (d).

7 Subject to the terms of the resolution by which the Council refers the situation, the
8 consequence of the referral of a situation by the Council in accordance with Article 13(b)
9 of the Statute, just like that of a referral of a situation by a State Party in accordance with
10 Article 13(a) and the initiation of an investigation by the Prosecutor proprio motu in
11 accordance with Article 13(c), is merely in the words of the chapeau to Article 13, that the
12 Court may exercise its jurisdiction in accordance with the provisions of the Statute, that is,
13 in answer to question (c), as provided for on the face of the Statute.

14 Now, to the limited extent that referral by the Security Council differs in substantive effect
15 from referral by a State Party or initiation of an investigation proprio motu, namely in
16 relation to the preconditions to the exercise by the Court of its jurisdiction, this is specified
17 explicitly in the Statute, in Articles 12(2) and 15bis and ter. Let me say that again.

18 Where referral of the situation by the Security Council differs in substantive effect from
19 other referrals or from investigation proprio motu, it is specified explicitly in the Statute.
20 Were referral of a situation by the Security Council, without more, to render binding on a
21 State not party to the Statute the obligations binding on States Parties, one would expect
22 the Statute to provide for this explicitly too.

23 Indeed, the Statute would need to provide for this explicitly, given that the pacta tertiis
24 rule, which stipulates that a treaty creates neither rights nor obligations for a State not
25 party to it without that State's consent, is a cardinal tenet of the customary international

1 law of treaties.

2 Now I refer the Court in this regard to footnote 11 of my written observations, and there
3 you will see that the International Court of Justice in Elettronica Sicula case, Italy versus
4 the United States of America, known as the ELSI case, at paragraph 50 said, and I quote,
5 that, "an important principle of customary international law" is not to be "held to have
6 been tacitly dispensed with, in the absence of any words making clear an intention to
7 do so".

8 PRESIDING JUDGE EBOE-OSUJI: [13:10:05] But I think the problem with that - you
9 need to help me understand it in context - is that was, Elettronica Sicula was dealing with
10 this scenario of exhaustion of local remedies, isn't it, before you can kick off the case
11 before the ICJ? So it's either you exhaust local remedies or you go to the ICJ and the ICJ
12 say: Well, the provision in the agreement or contemplation that refers to the ICJ cannot
13 readily be taken as displacing the rule of exhaustion of local remedy.

14 But are we there in the same scenario as well we find ourself here, where you have the
15 Security Council that has taken a decision under Chapter VII and referring a situation,
16 trial or justice system that is basically constructed on something big .

17 MR O'KEEFE: [13:11:14] Mr President, your question raises a subsequent issue which, if
18 you don't mind, I am getting to. I'm simply talking at the moment of the interpretation
19 of the Statute before turning, indeed, to the interpretation of the resolution. But it is, as
20 you say, a good question.

21 You will also notice that in paragraph 14 of their recent joint dissenting opinion in the
22 preliminary objections phase of Immunities and Criminal Proceedings (Equatorial Guinea
23 v France) Judges Xue, Sebutinde, Robinson, and Kateka of the International Court of
24 Justice applied the Court's statement in ELSI to "the important customary rules on foreign
25 State immunity".

1 What they said is the treaty they were reading was not to be taken without explicit words
2 to the effect to abrogate the important customary rules on foreign State immunity,
3 which --

4 PRESIDING JUDGE EBOE-OSUJI: [13:12:08] Yesterday you spoke about shellacking.

5 MR O'KEEFE: [13:12:11] Yes, exactly.

6 PRESIDING JUDGE EBOE-OSUJI: [13:12:13] You remember shellacking?

7 MR O'KEEFE: [13:12:15] No, no, no. No, no. Yes, exactly. But this is something
8 other than a shellacking. We have a four-Judge joint dissenting opinion. And there
9 were others, indeed, in the case. I am just really highlighting the potential application, as
10 it were, to Head of State immunity and ultimately -- sorry, not to Head of State immunity
11 in this context, but to the pacta tertiis rule.

12 My argument is that if the Rome Statute wants to do away with one of the cardinal rules
13 of the international legal order, one would expect it to do so explicitly and, indeed, one, I
14 think, would need it to do so explicitly. But nowhere does the Rome Statute explicitly
15 provide or even, I would have to say, even necessarily imply that the referral of a situation
16 by the Security Council of itself renders binding on a State not party to the Statute the
17 obligations binding under the Statute on States Parties.

18 Now, the assertion that the Security Council's referral of the situation under Article 13(b)
19 of the Rome Statute of itself renders binding on a State not party to that Statute the
20 obligations binding on States Parties raises an overlooked question. And I'm a bit
21 surprised it hasn't been raised in the case yet.

22 If this were indeed so, in other words, if the Security Council's decision in paragraph 1 to
23 refer the situation in Darfur to the Court were in and of itself sufficient to create for Sudan
24 all the obligations which would otherwise be considered treaty obligations under the
25 Statute, then why did the Security Council not satisfy itself with paragraph 1, but go on in

1 paragraph 2 to decide that the Government of Sudan shall cooperate fully and provide
2 any necessary assistance to the Court and the Prosecutor?

3 Why would the decision in paragraph 2, which gave rise to an obligation for Sudan under
4 Article 25 of the United Nations Charter, that Sudan shall, and I quote "cooperate fully"
5 with the Court have been necessary where the obligation in Article 86 of the Rome Statute
6 to, and I quote, "cooperate fully with the Court", by virtue of paragraph 1 of resolution
7 1543, was already binding on Sudan?

8 Why reproduce the very same obligation found in the Statute in a separate decision in the
9 subsequent provision, if that obligation as a statutory obligation were already applicable
10 to Sudan?

11 I would also point out that the Security Council adopted exactly the same approach in its
12 only other referral of a situation to date to the Court, namely, in relation to Libya, a State
13 which, like Sudan, is not a party to the Rome Statute.

14 In paragraph 4 of Resolution 1970 of 2011, the Security Council decided to refer the
15 situation in the Libyan Arab Jamahiriya since 15 February 2011 to the Court.

16 In paragraph 5, the very next paragraph, using, *mutatis mutandis*, language identical to
17 that in paragraph 2 of Resolution 1593, the council decided, and I quote, that "... the
18 Libyan authorities shall cooperate fully with and provide any necessary assistance to the
19 Court and the Prosecutor pursuant to this resolution."

20 Again, why would the imposition in paragraph 5 of a charter-based obligation on Libya to
21 "cooperate fully" with the Court have been necessary, had the mere act of referral of the
22 situation to the Court in paragraph 4 imposed on Libya the obligation in Article 86 of the
23 Rome Statute to, and I quote, "cooperate fully" with the Court?

24 In short, what I am saying is this, Mr President and members of Court, that route 2 is
25 incompatible with route 1. If you say that the council under paragraph 2 is capable of

1 and, indeed, did bind Sudan, then you can't at the same time say, well, our fallback
2 position really is that it is one and they can both sort of live together.

3 Now I don't for a minute maintain that route 2 is sustainable as you'll see in a minute.

4 And so I don't draw the same conclusions as Professor Kreß. But I do thank him for
5 drawing attention to the likeness of text between the two provisions.

6 So I think route 1 is, with the greatest of respect, highly implausible.

7 Well, what about route 2? And in answer to question (b), so that answers question (a), I
8 think.

9 In answer to question (b), I do believe it would be within the power of the Security
10 Council acting under Chapter VII to decide that a member of the United Nations which is
11 not a State Party to the Rome Statute shall be bound by the obligations binding under the
12 Statute on States Parties.

13 Now, in this regard, I refer simply to the detailed explanation that I've given in paragraph
14 13, including footnote 15 of my written observation. There, I derive this conclusion from
15 the powers of the Security Council.

16 I don't think we have much disagreement on that particular point. The disagreement, it
17 seems to me, on this point is whether any such decision by the council would need to be
18 explicit. And I do believe it does need to be explicit for the reasons given in ELSI, as
19 backed up again recently in the joint dissenting opinion of Judges Xue, Sebutinde,
20 Robinson and Kateka in Equatorial Guinea and France.

21 In other words, what we are seeking to do through paragraph 2 of Resolution 1593 would
22 be to dispense with, in this particular situation, a cardinal tenet, not only of customary
23 international law, but one would say of the international legal order the idea that one
24 State is not bound by the bargains of other States.

25 Now I do believe the Security Council could do this, but I think it would have to do so

1 explicitly, and I do not believe it has done so in Resolution 1593, paragraph 2, and, to this
2 extent, I agree with absolutely everything said by counsel for Jordan on the interpretation
3 of Security Council Resolution 1593.

4 Now, I am not saying that the council would have to say in paragraph 2 that Sudan shall
5 henceforth be bound by all the obligations binding on States Parties under the Statute.

6 Let me suggest what it might say and show you that it didn't say it. It may be enough to
7 say, and I don't want to say anything more than that because it's a hypothetical, that
8 Sudan shall cooperate fully with and provide any necessary assistance to the Court and
9 the Prosecutor, so far so much has been said in paragraph 2, pursuant to the Rome Statute.

10 That might be enough. I think personally that might be explicit enough to say that
11 Sudan shall cooperate with the Court and the Prosecutor pursuant to the Statute.

12 But instead what it said is this. In paragraph 2 of Resolution 1593, the Sudan shall
13 cooperate fully with and provide any necessary assistance to the Court and the Prosecutor
14 pursuant to this resolution. And it went on later in the same paragraph, as it did in
15 relation to Libya, to say that States not party to the Rome Statute have no obligation under
16 the Statute.

17 And it seems to me that that's pretty persuasive pursuant to this resolution --

18 PRESIDING JUDGE EBOE-OSUJI: [13:20:50] What does that tell us though? That is a
19 very important phrase in there. What does it tell us in its, where it occurs in paragraph 2.
20 In OP2, the first sentence is, "Decides that the Government of Sudan and all other parties
21 to the conflict ... shall cooperate fully with and provide any necessary assistance to the
22 Court and to the Prosecutor pursuant to this resolution ..."

23 MR O'KEEFE: [13:21:26] Yes.

24 PRESIDING JUDGE EBOE-OSUJI: [13:21:27] And then continues, "... while recognizing
25 that States not party to the Rome Statute have no obligation under the Statute, urges all

1 States ..." and so on and so forth.

2 MR O'KEEFE: [13:21:44] Sure, sure.

3 PRESIDING JUDGE EBOE-OSUJI: [13:21:44] But can that, that thing that's said here in
4 the middle, have some sort of backward reflection on the obligations of Sudan vis-à-vis
5 the Rome Statute?

6 MR O'KEEFE: [13:21:57] Sure. I'm not necessarily suggesting that where it's placed was
7 referable to Sudan. I think where it is placed is referable to the other States with whom --

8 PRESIDING JUDGE EBOE-OSUJI: [13:22:06] I know. But I'm saying, the fact that it
9 referred to what we know that States Parties not -- sorry, States not parties to the Rome
10 Statute are not obligated under it, doesn't that suggest to somebody that it is some sort of
11 carve out that could also reflect whether or not Sudan is obligated to cooperate pursuant
12 to the Rome Statute, even though it doesn't spell it out in those terms?

13 MR O'KEEFE: [13:22:40] With the greatest of possible respect, Mr President, I think the
14 implication is directly the opposite. I think the implication pursuant to this resolution
15 followed by a statement like that, which, of course, as we've just said, does not
16 syntactically refer to Sudan. Nonetheless, putting those two together, I think it's pretty
17 clear that --

18 PRESIDING JUDGE EBOE-OSUJI: [13:23:00] But pursuant to the resolution in the
19 context of that middle part --

20 MR O'KEEFE: [13:23:05] Yes.

21 PRESIDING JUDGE EBOE-OSUJI: [13:23:06] -- could be to be saying States Parties
22 not -- sorry, States, UN-Member States not party to the Rome Statute, we're not going to
23 impose obligations upon you pursuant to the Rome Statute.

24 MR O'KEEFE: [13:23:20] Mm-mm. Sure. I mean --

25 PRESIDING JUDGE EBOE-OSUJI: [13:23:22] Just by this resolution we're not doing that.

1 MR O'KEEFE: [13:23:25] Sure, sure.

2 PRESIDING JUDGE EBOE-OSUJI: [13:23:26] Does that lead to an implication for Sudan?

3 There is that obligation there.

4 MR O'KEEFE: [13:23:32] Well, it could, but I think it would require a lot of imagination
5 and a certain mental calisthenics.

6 I think really the far clearer implication, pursuant to this resolution and so on here, is the
7 opposite. So I wouldn't say it's impossible. I would just say it's implausible. But
8 many things are possible in this world, only certain things are plausible and even fewer
9 things are persuasive. So with respect, I would say that that's that.

10 I would like to turn to the powers of the Security Council because this touches on what
11 you've said, and I will answer some of the questions raised in your revised order and then
12 some of the questions you have raised this morning, Mr President.

13 Article 25 of the United Nations Charter provides that members agree to accept and carry
14 out the decisions of the Security Council. Now, notice that word, "decisions". Only
15 decisions of the Security Council are binding on members. But, and this begins to build
16 up the picture as to the mandatory coercive distinction, as made clear by the International
17 Court of Justice, paragraph 113 of the Namibia case, a decision of the Security Council
18 need not be taken under Chapter VII of the Charter for it to be binding.

19 What counts is that it can be characterised as a decision. Now, I'll go on to see how we
20 characterise something as a decision. But the point is that it's characterised as a decision
21 rather than its taking under Chapter VII which makes it binding.

22 Now, nonetheless as counsel for Jordan pointed out, apart from routine institutional or
23 housekeeping decisions, it is almost always the case that the council takes decisions under
24 Chapter VII.

25 Now, the reasons for this are partly factual. Usually, it takes a decision in the area of the

1 maintenance of international peace and security. But they are partly legal, and, in legal
2 terms, there are four advantages for the Security Council in taking a decision under
3 Chapter VII which are relevant to the present case.

4 Now, only the first of these is relevant to the bare referral of a situation to the ICC. In
5 other words, only the first of what I am about to say is directly relevant to question (e).

6 The third is relevant to the question posed by you, Mr President, to counsel for the
7 African Union as to the distinction between mandatory and coercive, and the fourth is
8 relevant to question (l)(b) to do with Chapter VII tribunals.

9 Now, the sole advantage relevant to the bare referral by the council of a situation to the
10 ICC, in taking something under Chapter VII, is the specification in Article 2(7), 2
11 paragraph 7 of the United Nations' Charter that measures taken under Chapter VII fall
12 outside that provision's prohibition on intervention by the UN in matters essentially
13 within the domestic jurisdiction of a State.

14 In other words, the condition in Article 13(b) of the Rome Statute that referral be affected
15 by the Security Council acting under Chapter VII pre-empts the potential objection that
16 the referral of a situation like that in Darfur, which is internal to a State --

17 PRESIDING JUDGE EBOE-OSUJI: [13:26:49] Counsel, four more minutes for you.

18 MR O'KEEFE: [13:26:51] Sure -- constitutes an impermissible intervention by the UN in
19 a manner within that State's domestic jurisdiction. So Article 2(7) is of use to the bare
20 referral.

21 I'll skip over my next point, it is not particularly germane and turn now to your question,
22 Mr President.

23 Now, the following is of relevance only where the Security Council wishes to go beyond
24 the mere referral of the situation to impose on a UN Member an obligation under the
25 Charter in connection with the referral, just like it did in paragraph 2 of 1593. So

1 paragraph 1 refers the situation. Paragraph 2 decided that Sudan shall cooperate.
2 Now, this touches on the distinction between mandatory and coercive measures. I just
3 said that a decision does not have to be taken under Chapter VII for it to be mandatory.
4 But to back up that decision with the coercive powers specified in Article 41 of the United
5 Nations' Charter, the non-forcible coercive measures against a State, the council must take
6 its decision under Chapter VII.
7 So that is, although the council need not rely on Chapter VII to take a mandatory decision,
8 decisions are binding per se, only when acting under Chapter VII may the council back up
9 a mandatory decision with the so-called big stick of sanctions decided upon it in the
10 exercise of its coercive powers under Article 41, which is in Chapter VII of the Charter.
11 So a decision is mandatory because it is a decision, but if you want to impose on the State
12 towards which you are directing a certain decision or if you want to decide that Member
13 States of the United Nations shall take measures, such as the interruption of
14 telecommunications and travel and so on, then you need to decide under Chapter VII to
15 bring into play the non-forcible coercive measures.
16 So with the greatest of respect, Mr President, the distinction between mandatory and
17 coercive has nothing to do with the possible permissive effect of an urging, to which I will
18 now turn.
19 What is the decision of the Security Council within the meaning of Article 25? The
20 Namibia case says language first, but you have to look also to the drafting and so on.
21 Well, in the practice of the council, before 1990, both the terms "decides" and "calls upon"
22 could, in the right context, in the latter context looking at the drafting and the arguments
23 in the council, constitute a decision binding on a State.
24 Since the 1990s, the council uses "decides" and "decides alone" for decisions.
25 Either way it has never been in doubt that the word "urges" denotes no more than a

1 hortatory recommendation, a non-binding recommendation. Now of course, Mr
2 President, you are not suggesting that "urging" is binding. What you are suggesting is
3 that through the "urge", as it were, you could use that as a license or a permission to
4 abrogate immunities. Well, the answer is, with the greatest of possible respect, you
5 could not.

6 Let's look at treaty-based immunities. What you would have, let's say you have an
7 obligation under the United Nations Charter to abrogate immunity and an obligation
8 under a treaty to uphold immunity; Article 103 of UN Charter, a tie-breaker between
9 treaties says the Charter prevails. But you have to have a decision of the Security
10 Council. You have to have an obligation under the Charter. In the very words of
11 Article 103, "urging" does not create an obligation. In other words, "urging" would not
12 allow you to break a treaty like the treaty in relation to the Arab League.

13 Now, what about customary international law?

14 PRESIDING JUDGE EBOE-OSUJI: It would have to --

15 MR O'KEEFE: Some people would argue and it's been argued in this Court that Article
16 103 itself --

17 PRESIDING JUDGE EBOE-OSUJI: [13:31:12] Counsel, you need to finish that thought
18 and we'll leave it there.

19 MR O'KEEFE: [13:31:15] Can I just finish the customary point, because it is very
20 important to what you are saying?

21 PRESIDING JUDGE EBOE-OSUJI: [13:31:17] Yes, we'll let you finish that, but your time
22 is up.

23 MR O'KEEFE: [13:31:19] Yes. My personal argument would be, at least in this case, you
24 don't need to rely on 103. A treaty obligation always is applied over a customary
25 obligation to the extent of the inconsistency. But, again, you don't have an obligation

1 here. You have an urge.

2 So the short answer to your question is that urging could not permissibly be used as a
3 licence to abrogate either treaty-based or customary immunities.

4 And with that, I will hand over to you, Mr President.

5 PRESIDING JUDGE EBOE-OSUJI: [13:31:53] Thank you very much, Mr O'Keefe.

6 (Trial Chamber confers)

7 PRESIDING JUDGE EBOE-OSUJI: [13:32:09] We would have another 9 minutes to go
8 before breaking for lunch, but I think we should do it now so we don't have counsel
9 starting and breaking their submissions and coming back to pick it up. So let's take our
10 lunch break at this time, and we come back at 3 o'clock. Thank you very much.

11 THE COURT USHER: [13:32:44] All rise.

12 (Recess taken at 1.32 p.m.)

13 (Upon resuming in open session at 3.05 p.m.)

14 THE COURT USHER: [15:05:00] All rise.

15 Please be seated.

16 PRESIDING JUDGE EBOE-OSUJI: [15:05:30] Thank you, and welcome back,
17 everyone.

18 I understand there may be a need to update the record of appearances, so we note
19 whether somebody has been absent or new people joined us. No?

20 MR HMOUD: [15:05:54] Thank you, your Honour. Mr Amer Hadid is back with us
21 in the delegation.

22 PRESIDING JUDGE EBOE-OSUJI: [15:06:00] Thank you very much, Ambassador.
23 Yes, please.

24 MS NEGM: [15:06:03] Thank you, your Honour. Mr Sean Yau joined us as well.

25 Thank you.

1 PRESIDING JUDGE EBOE-OSUJI: [15:06:07] Thank you, Ambassador.

2 All right, let's then continue with the submissions then. I think it is the turn of
3 Mr Robinson now.

4 Yes, please.

5 MR ROBINSON: [15:06:18] Thank you, your Honours. I know it's been a long
6 week and you have been doing a lot of listening, so I will make things easier on you
7 in two ways.

8 Number one, I expect that I only need 15 minutes. I can take 12 minutes on points
9 where I think I have something particular to help you on key points that have been
10 raised in just the last couple of days. And then I will take three minutes outlining
11 these ideas that my group of scholars had for finding middle ground.

12 To make it also easy I will just tell you right upfront what I think are the three most
13 important points that I am going to make.

14 The first is I think the Appeals Chamber should address and rebut the recurring
15 argument that this interpretation by the Pre-Trial Chamber, quote, "turns Sudan into
16 a State Party". I think it's important to address that. Sudan is not a party, but the
17 Council has imposed obligations of cooperation under Chapter VII which are
18 delineated by the Rome Statute. And the obligations the Council has imposed are
19 less burdensome than the obligations that were imposed when it created the Yugoslav
20 and Rwanda tribunals.

21 Second, the UN Security Council has previously removed immunities and the
22 formula it used to do that was cooperate fully. It is the identical technique they used
23 here, cooperate fully with an instrument that removes immunities.

24 And the third point I am going to make is about ordinary language. The phrase
25 "cooperate fully" has to mean all the cooperation obligations in the Statute because if

1 it doesn't, then it's cooperate less than fully and I think just the cooperate less than
 2 fully is not a reasonable interpretation of cooperate fully.

3 I should also say at the outset that my group of scholars, we agree with Roger O'Keefe
 4 that the mere referral probably does not move immunities. In our view it is the
 5 obligation to cooperate fully that does the work.

6 But jumping straight to the interesting bits. So one of the interesting questions:
 7 Can the Council impose obligations that are the same as those found in treaties? The
 8 answer I think is clearly yes. There is no exception in Chapter VII saying that the
 9 Council cannot impose obligations if they are also found in a treaty. And the
 10 Council has already done so with counter-terrorism, nuclear test ban, nuclear
 11 non-proliferation.

12 Even more saliently, the Council routinely orders cooperation with other
 13 international bodies, including bodies created by treaties, World Health Organisation,
 14 African Union, OPCW. It's been suggested that's extraordinary. I don't think it is.
 15 I think it's routine. And doing so does not violate the law of treaties. The Council
 16 is imposing obligations under the UN Charter pursuant to the law of treaties.

17 So that brings me to this first key point that we suggest that the Appeals Chamber in
 18 its decision should address this argument because it is a source of confusion, that the
 19 Security Council can't turn a State into a party, a quasi-party, a fictitious party and
 20 so on.

21 It is important to explain that it's not what is happening. The Council is imposing an
 22 obligation under Chapter VII. The Council delineates the scope of the obligation that
 23 it imposes by reference to the Rome Statute. So the source of the obligation is the
 24 charter, the content is delineated by the Statute.

25 Now earlier today Roger O'Keefe said that it takes calisthenics to think that the

1 Security Council meant to delineate the obligations by the Statute. I think the
2 opposite. I think it takes calisthenics to think that they didn't mean to refer to the
3 Statute. Otherwise what does "cooperate fully" mean? Is Sudan supposed to
4 provide tea and biscuits if the Prosecutor arrives? There is only two possible ways to
5 interpret "cooperate fully". Either we take it literally and it means do everything that
6 ICC asks, that's the literal interpretation. Alternatively, we give Sudan the benefit of
7 all the exceptions and limitations enjoyed by States Parties, which I think it is the
8 second one.

9 But the Rome Statute is the obvious circumscription of the scope of the obligation and
10 the Security Council referred to the Rome Statute four times in the preamble.

11 Now, importantly, Sudan's obligations differ from a States Party in two ways. And I
12 think this is important to clarify because there have been expressions of confusion
13 about what is Sudan's obligation.

14 First of all, Sudan, the Council has only imposed the cooperation obligations. So the
15 Rome Statute also contains governance obligations, paying assess contributions, rules
16 on how do you elect judges and so on. Those are not imposed. It's just the ones
17 about facilitating the investigation or prosecution of a case.

18 But the second important limit is the Council only imposed obligations in relation to
19 the Darfur situation where States Parties have to cooperate in relation to all situations.

20 And the council imposed this narrowish obligation in response to a threat to
21 international peace and security, namely the killing of 300,000 human beings. And
22 this obligation is less burdensome than what the Council imposed. When the
23 Council imposed the Yugoslav and Rwanda tribunals on States Parties, it imposed a
24 series of open-ended obligations that were left for the tribunals to interpret. By
25 contrast with the ICC, it's really quite regulated and spelled out in advance.

1 Now, people argue, if the Council effects immunity, it needs to be express. I think
2 the Chamber's decision should say since when? Since when is this a rule? The
3 Security Council, when it created the Yugoslav and Rwanda tribunals, it removed
4 immunities and it did so without saying the word "immunity". So there is no such
5 requirement, it's directly contradictory to the UK Security Council's practice.
6 Moreover, the Security Council routinely makes decisions that have massive
7 imprecations with very few words. It's a famously succinct, famously terse body,
8 the Security Council. Which brings me to my second key point. And Helen Brady
9 touched on this yesterday and I was glad to hear it because I don't think it's made
10 enough.

11 This formula "cooperate fully" which we are told is not clear enough to remove
12 immunities is the identical formula that the council used when it created the Yugoslav
13 and Rwanda tribunals, everyone seems to agree that removed immunity. And what
14 it did is it ordered full cooperation with an instrument that removes immunities.

15 Now, I have seen some efforts by people to argue that those words for some reason
16 worked for the tribunals but somehow don't work for the ICC. And I think the
17 distinctions are strange. One distinction I read was it worked for the tribunals
18 because the Security Council appended the Statute to the resolution. Another one I
19 have heard is it worked because the tribunals are a Security Council creation. Those
20 are seizing on details that have nothing to do with the legal technique. The legal
21 technique was Council under Chapter VII orders full cooperation with an instrument
22 that removes immunities of the States bound to it. It is the same technique.

23 Another argument that I've seen is that it worked for the tribunals but not the ICC
24 because for the tribunals the obligation was imposed on all UN Member States. But I
25 think that is irrelevant. In this case we have a trilateral relationship: The ICC,

1 Sudan, and Jordan. Sudan and Jordan are both bound to cooperate fully. The
2 situation of every other State is relevant to the analysis.
3 In any case, the Council here was express. They expressly said cooperate fully. So
4 the only job we have, you have is to identify. That's a package of obligations, you
5 have to interpret what does it mean and the package is going to be interpreted by
6 reference to the ICC Statute.
7 So what does this phrase mean "cooperate fully" in the resolution? By the way, I
8 think that when you interpret "cooperate fully" for this case you will also be saying
9 what does it mean for States that make an Article 12(3) declaration, because it's the
10 same phrase. I think it's going to have the same meaning.
11 Now some say that that obligation only imposes the obligations in Part 9
12 of the Statute, and I suggest to you that's really untenable because there are
13 cooperation obligations sprinkled throughout the Statute.
14 Now in our brief we just put a footnote listing examples, but let me actually expand
15 more than we did there and just give you some examples. Article 48, a state has to
16 respect the immunities of ICC officials visiting the State. Article 58, you have to
17 transmit a summons to appear if the ICC asks. Article 72 and 73, you have to hand
18 other national security information with various safeguards. Article 75 helps us out
19 with reparation orders. None of those obligations appear in Part 10, they're
20 throughout the Statute. But to exclude those cooperation obligations just because
21 they are not in Part 9 would mean cooperate less than fully.
22 And I think, this is my third key point, I think the Appeals Chamber in its judgment
23 should emphasise ordinary language. I think you should cite a dictionary. I looked
24 in the Oxford English Dictionary at the word "fully". Fully means completely or
25 entirely to the fullest extent, which I think is an important point to make here.

1 Anything other than all the cooperation obligations is not fully and not compatible
 2 with the words of the Security Council.

3 PRESIDING JUDGE EBOE-OSUJI: [15:16:33] And your argument, I understand,
 4 would be that, in the end, it appears that cooperate fully in the sense you are
 5 interpreting it, in the sense of according to the Rome Statute, in fact, it's a protection
 6 for Sudan than anything else, otherwise it may expose Sudan to arbitrary requests for
 7 which they may be bound to cooperate fully in relation to. Is that what you are
 8 saying?

9 MR ROBINSON: [15:17:01] Yes, that's a way of to conceive of it, right, because again
 10 we have two interpretations, literally cooperate fully means do anything the ICC says.
 11 And I think the more generous to Sudan interpretation is cooperate with the same
 12 benefits, exactly as you say, the same limits and exceptions that the States Parties have
 13 given themselves. That's exactly correct.
 14 So in this chain of reasoning I think there is only one step that is uncertain or arguable.
 15 The one step that I see as debatable is whether the immunity stripping provision of
 16 Article 27(2) has horizontal effect. Is that a cooperation obligation? And I agree it's
 17 open to argumentation. My group of scholars all would say yes for five reasons:
 18 Number one, the text. Again the importance of text. The text, we think, indicates
 19 that it is for horizontal effect. Article 27 says it removes immunities under national
 20 law. It is already basic that you cannot plead domestic law before the ICC, so that
 21 word only makes sense if Article 27(2) is contemplating surrender process.
 22 Number two, I think it clearly is a cooperation obligation, this removal of immunity,
 23 because it relates to the moving forward of a case. It removes an impediment to the
 24 Court's exercise of jurisdiction over a particular case.
 25 Third reason, my impression is there is wide agreement here that Article 27(2) has

1 horizontal effect among States Parties that if I'm asked to surrender the Head of State
2 of a State Party I don't need waiver because they are parties. And I would say the
3 situation has to be analogous with States under the obligation to cooperate fully
4 because otherwise then it's not cooperate fully, it is less than fully.

5 Fourth reason, I think the arresting State is certainly acting on behalf of the ICC.

6 Claus Kreß yesterday, or Monday maybe, invoked Antonio Cassese's analogy of the
7 giant with no arms and legs. Article 27(2), again turning to the text talks about the
8 exercise of jurisdiction by the Court. If we can't get arrest, that prevents the exercise
9 of jurisdiction by the Court.

10 And the fifth of these points is, there has been a lot of emphasis that Article 27 is in
11 Part 3, not Part 4 and it has been suggested that's significant. So then my question is:
12 Did the drafters of the Statute need to copy Article 27(2) and repeat it again in Part 4,
13 is that what we had to do? It seems to me unnecessary. It's a general principle and
14 to me general principles are general. I don't think we can disconnect Part 3 and 4 in
15 that way. And I will give you an illustration. Part 3 says there is no statute of
16 limitations. So if we were in the cooperation phase, some State was asked to
17 surrender, they said no because the crimes happened too long ago, I think the Court
18 would say, no, you have to surrender, there is no statute of limitations. I think Part 3
19 informs Part 4.

20 Now I just want to use three minutes to talk about this more experimental part where
21 my group wants to just suggest to you some tentative possibilities if the
22 Appeals Chamber is minded to look for a middle path. It is just highlighting those
23 options.

24 It seems to us the strongest concern and irritant among States has been about
25 high-level attendance at intergovernmental conferences. And there are some

1 benefits to those: Dispute resolution, regional governance, peace and security.

2 Now I noticed from the Prosecution response that our brief apparently wasn't
3 suitably clear. The Prosecution thought that we were arguing for a sweeping
4 customary law exception on international conferences. That's not what we were
5 saying. We are suggesting two avenues. One avenue is related to treaties in
6 Article 98 and the other avenue is through the rules of procedure.

7 So the first avenue concerns treaties that provide immunities for conferences of
8 intergovernmental organisations such as the Arab League 1953 Convention. This
9 argument was actually advanced by Belgium as an Amicus, I think it was in the
10 South Africa hearing, which incidentally shows that there is concern among States at
11 all latitudes about these issues.

12 I won't do the argument in detail. The gist of it is the immunity is for the
13 functioning of the international organisation. The international organisation is not
14 subject to the obligation to cooperate fully. Therefore, arguably, Article 98 preserves
15 that immunity for the benefit of the international organisation. The argument has
16 some weaknesses, but it is one possible route that the Court might do.

17 The second route, which I think is the better route, could be to suggest that there is an
18 openness to a rule of procedure and evidence. The Appeals Chamber could lay
19 down here's what we think is the basic legal structure. But then you could indicate
20 that there is space here for the Rules of Procedure and Evidence to legislate limits, for
21 example, that the States Parties could create a consultation process involving essential
22 contacts.

23 What I am invoking here is something called dialogue theory. Dialogue theory is the
24 idea that the judiciary and legislative branch both have a role to play. On Monday
25 we talked about this and how this is a policy matter. I think Mr President was using

1 the phrase "policy matter" and maybe it is a policy matter. And if it is policy, we will
2 leave it to the legislative branch.

3 If States Parties can't agree on such a rule, then that's fine, the default rules that you
4 set down will apply. But if two-thirds of States Parties actually manage to agree on
5 some rule about essential contacts or something, then that would say that there is
6 a widespread sense that that is the best balance around a legitimate concern. It
7 would give prospective notice of the rules, it would give some clarity, it might give
8 some voice and buy-in to the States with concerns.

9 I don't know if there is going to be an appetite of those sorts of options, we are
10 highlighting them for you in case you are interested in a middle path.

11 That completes my submissions, unless your Honours have any questions.

12 PRESIDING JUDGE EBOE-OSUJI: [15:23:23] Thank you very much.

13 We will move on next now to the responses. We will begin with the Prosecutor.

14 Then after the Prosecutor we have the Hashemite Kingdom of Jordan. And we will
15 take a 20-minute break after that and come back. Thanks.

16 MS BRADY: [15:24:06] Good afternoon, your Honours. I only have five minutes
17 for this brief reply or response. And I think that all the points -- most of the points
18 that have been made today and yesterday by Jordan on group B we have already
19 covered in our written submissions, so I don't want to repeat and backtrack to that. I
20 think that we can rest on our submissions.

21 So I will be very focussed in this five minutes. I just want to make a few brief points
22 in reply to the African Union on two points, in response to Mr O'Keefe on a couple of
23 points, and possibly in relation to the League of Arab States, if I get that far.
24 Firstly, in relation to the submissions this morning by Mr Jalloh for the African Union,
25 one point I wanted to deal with is that he made the submission that essentially the

1 theory that was relied upon by the Jordan and South Africa decisions were so sort of
2 complicated and obscure that it is hard to imagine that the Security Council could
3 have had that in mind so many years ago when drafting 1593, and in fact it took
4 17 years for the Court to work that position out.

5 I just want to make a correction to the premise of that. Actually, what we see is the
6 security referral route, as we might want to call it, has its genesis in the very first
7 decision that we see on Mr Bashir and that's the March 2009 decision on the arrest
8 warrant.

9 The Bashir Article 58 decision of that Court actually addressed the UN
10 Security Council route, albeit in very broad outline form. It was defining really the
11 contours of that through Article 27 Resolution 1593 and 103 of the UN Charter.

12 And I draw your Honours' attention in particular to a couple of paragraphs of that
13 decision, in particular paragraph 41, where the Chamber said that it considers that the
14 current position of Omar Al-Bashir as Head of State which is not a party to the Statute
15 has no effect on the Court's jurisdiction over the present case. And then in
16 paragraph 42, 43 onwards, sets out effectively its reasoning for reaching that
17 conclusion on the basis of certain considerations. And one of those important
18 considerations was a reference to Article 27(1) and (2) of the Statute, and then they set
19 out the core principles in those provisions. That's paragraph 43.

20 Then in paragraph 246, the Pre-Trial Chamber said there, "according to Article 103 of
21 the UN Charter, in the event of a conflict between the obligations of the members of
22 the United Nations under the present charter and their obligations under any other
23 international agreement, their obligations under are the present charter shall prevail."
24 And then concluding in paragraph 247 we find that the government of Sudan's
25 obligations pursuant to the resolution to cooperate fully with and provide necessary

1 assistance to the Court shall prevail over other obligations that the government may
2 have undertaken. Now, I am not suggesting this was the same -- there was a level of
3 legal sophistication in the ensuing and next judgments. We can see that developed
4 in the Pre-Trial Chamber in the DRC, the Djibouti and the Uganda decisions from
5 2014 to '16. They provide more legal reasoning for why that route makes such
6 crystal clear sense. And then we see it again in the further reasoning in the
7 South Africa and Jordan decisions.

8 And I agree with what Mr Kreß has said, Professor Kreß, that actually between those
9 two decisions, it is a question of legal nuance. One provides more backbone, as it
10 were, more background to the other, but they are reaching the same result at the end
11 of the day, that is through Chapter VII, through Article 25 of the Charter, through
12 Article 103 and the Resolution.

13 I will move on to the second point I wanted to make in relation to the African Union.
14 It is a very brief point.

15 Mr Jalloh mentioned Article 19 of the ICC UN Relationship Agreement, and we are
16 just not sure of the relevance of that, because that relates to privileges and immunities
17 of staff members of the ICC. It's not to do with waiver of immunities of officials.
18 And, indeed, it would be very unusual to see something about waiver of immunity of
19 officials in that agreement, especially when it is already covered in the Rome Statute,
20 Article 27(2).

21 Sorry, I meant to say "UN staff", not "ICC staff", of course.

22 The next set of submissions I would like to make a brief response to are those of
23 Professor O'Keefe. I just want to make a couple of points. Firstly --

24 PRESIDING JUDGE EBOE-OSUJI: [15:30:14] In four minutes.

25 MS BRADY: [15:30:17] Four more minutes. Yes. Oh, I am at four minutes, okay.

1 I would like to distinguish the cases.

2 PRESIDING JUDGE EBOE-OSUJI: [15:30:31] I am told that I gave you the time for
3 questioning, but go on, from the Judges. The additional five minutes we normally
4 would tag on to your session.

5 MS BRADY: So how much time --

6 PRESIDING JUDGE EBOE-OSUJI: So your time is up, but go on, take our time.

7 MS BRADY: [15:30:46] Okay, I will just briefly then respond to Mr O'Keefe.

8 The Elettronica Sricula case, in our opinion, can be distinguished from the present
9 situation, firstly, as your Honour pointed out, the case can be considered, should be
10 considered in light of the specific context. It was dealing with a commercial bilateral
11 treaty between two countries and a specific dispute resolution. Here, of course, we
12 are speaking of the multilateral treaty, the Rome Statute, drafted with the
13 participation of over 160 countries to establish the permanent International Criminal
14 Court, and whose provisions not only include a Security Council referral mechanism
15 in relation to non-State Parties but also the immunities provision.

16 Most importantly, this, what is a ruling on a preliminary matter, it is a summary
17 ruling by the ICJ, doesn't stand for the proposition that the intent to do away with or
18 waive or override a fundamental principle of international law must be expressed;
19 rather, that it should be apparent from the words of the treaty that there was an
20 intention to do away with a fundamental principle of international law. And this
21 can also arise from the clear implication of the treaty's terms.

22 So for this reason this case is not inconsistent with our position because, again, as I
23 have shown yesterday, the ordinary terms "in context, in light of the object and
24 purpose" of Article 13(b) shows what the necessary effect of a Security Council
25 referral is.

1 Likewise, the Equatorial Guinea case, the dissenting opinion in that case also doesn't
2 undermine our position. As I think Mr O'Keefe himself said, it was on that point an
3 11-4 decision. He is relying on the dissenting judges. But, in fact, the majority's
4 determination in that case is more apt for our present case.

5 The majority found that the article in its ordinary meaning, read in context, and in
6 light of the object and purpose of the convention - there dealing with the Palermo
7 Convention - did not incorporate the customary international law rules on
8 immunities of States and States officials. So that means that the majority actually
9 applied the Vienna Convention rules and found that the customary international law
10 rule on immunities could not be read into the Palermo Convention, and that accords
11 again with our approach.

12 I am out of time, so I will stop there, but we have time for questions.

13 PRESIDING JUDGE EBOE-OSUJI: [15:33:39] Thank you very much.

14 We will now turn the floor over to Jordan. We will also give you our own five
15 minutes for purposes of equality of arms. Please, Mr Murphy.

16 MR MURPHY: You are very kind, Mr President. We appreciate that.

17 Let me just start with the ELSI case, which is where counsel for the Prosecution ended.

18 If anything, in the context of a bilateral treaty between two countries where they have
19 systematically laid out their inter-State relationship and they have a compromissory
20 clause calling for dispute settlement, I think it is the case that the court was saying:

21 Wait a minute, incredibly important rule of customary international law. Do not
22 assume that the parties have simply pushed that aside. Apply it.

23 And we would submit that Professor O'Keefe is absolutely correct, in this context,

24 Head of State immunity is an incredibly important immunity under international law.

25 If you are going to try to set it aside, you would expect that it would be in some

1 fashion done expressly.

2 Prosecution in its presentation yesterday said that we should look at the backdrop to
3 the adoption in 2005 of Resolution 1593. In that respect they did point to the 2005
4 Cassese Commission Report, which you, Mr President, also referred to in your
5 opening. We note that at that time of the issuance of the report there are no
6 indictments, there is no discussion about, you know, we are focusing on a Head of
7 State.

8 Consequently we just don't think that from that report one can draw the kinds of
9 conclusions that the Prosecution now is trying to draw.

10 If you are going to draw some implication from that report, we would note that on
11 pages 162 to '64 of the report, there are a couple of recommendations from the
12 commission. One recommendation is directed at the government of Sudan. And in
13 that context they specifically say that it is essential that Sudan take the necessary steps
14 under Sudanese law to eliminate immunities of its government officials. That is
15 recommendation number 2.

16 In recommendation number 1, focussed on the Security Council, there is no
17 discussion about immunities whatsoever. So in our view if there is an implication to
18 be taken, if immunities was in the mind of Judge Cassese and his colleagues, it was
19 focussed on Sudan's own actions, not the actions in the context of something that the
20 Security Council might do.

21 The core, we submit, of the Prosecution's case and the Trial Chamber below, the core
22 is can we read into the Security Council's resolution a necessary intendment that
23 immunities were supposed to be eliminated, not just from this court, but in the
24 context of foreign criminal jurisdiction? Is that what the Council members intended?
25 And we would submit that there is really not evidence of that at all. Indeed, the

1 evidence points the opposite direction. The Pre-Trial Chamber below's theory,
2 which is also advanced here by the Prosecution, is extraordinarily complicated.
3 There is nothing simple about it. It is not a brief detour of some sort. You are
4 taking Article 27. You are reading certain things into it. You are having powerful
5 effects on Article 98, and in that context we have to read into Article 98 that it is only
6 referring to non-State Parties, even though it says "Third States", non-State Parties.
7 We have to then read into paragraph 2 and either also paragraph 1 or not paragraph 1,
8 depending on whose theory it is, this desire to buy into this theory that is operating
9 within the Rome Statute. There is nothing obvious about that. And, consequently,
10 to assume that the Council members in 2005 intended when they drafted paragraph 2
11 to have that effect just seems to us quite implausible.
12 Further, we think that the African Union was correct, that if this was so obvious, then
13 why was it that this very complicated theory is only articulated in July of last year,
14 when the Pre-Trial Chamber reaches a decision with respect to South Africa? It is
15 simply not the case.
16 When you look at the Malawi decision or any of the other Pre-Trial Chamber
17 decisions, that this connect-the-dots theory is articulated. Sure, they talk at times
18 about the Security Council resolution, they talk at times about there being no
19 immunities whatsoever, and they talk about certain other theories, but they are
20 obviously struggling. And the counsel for the Prosecution even says it's an
21 evolution. Well, fine, that just to us demonstrates that as of 2005, no one has this in
22 their minds.
23 To us, the most obvious understanding, if we are trying to project what was in the
24 minds of the Council members, is that they looked at the Rome Statute, they triggered
25 your jurisdiction, and if they are thinking about foreign criminal jurisdiction, they are

1 observing that there is an Article 98 that might in some circumstances come into play.
2 That's the most obvious explanation for what would have been in the counsels'
3 minds.

4 PRESIDING JUDGE EBOE-OSUJI: [15:39:28] So your point being then that it is one
5 thing to say that Sudan's duty to cooperate is something that binds on Sudan and
6 whether or not the immunity of its Head of State is engaged by that. That is one
7 proposition. But it may be something else to say that Security Council had other
8 States in mind in the concept of this triangulated duty to fully cooperate.

9 MR MURPHY: Absolutely, Mr President. I think that immediately takes you then
10 to the paragraph 2 of the resolution, what were they saying? To the extent that they
11 are imposing an obligation to fully cooperate, which Professor Robinson emphasises,
12 that's a decision, a decision directed at the government of Sudan, not even at the State
13 of Sudan, I would note, which might be relevant to a referral of the State concept, but
14 it is directed at the government of Sudan.

15 And as Professor O'Keefe says, the decision is focussed just on that. So fair enough
16 that one could say it strips away immunity of a Head of State of Sudan that shows up
17 in the court. Okay. But that doesn't speak to other States. If anything, the latter
18 part of paragraph 2 speaks to it, and there it urges States to cooperate fully, which
19 does not impose that Chapter VII binding obligation upon the state. And that is
20 a very important distinction, we would submit, that we really don't think
21 the Prosecution and others that have supported their position has really grappled
22 with.

23 PRESIDING JUDGE EBOE-OSUJI: [15:41:04] I promised not to interrupt you, but
24 like you say, sometimes you said my questions excite you.

25 MR MURPHY: Absolutely.

1 PRESIDING JUDGE EBOE-OSUJI: [15:41:14] You see, one of the, in reading the
2 decisions of the -- decision of the Pre-Trial Chamber in this case and especially
3 pertaining to ground 3, we will talk about later, there is a sense in which one worries,
4 okay, had it been, for instance, that the argument of Jordan had been: Well, we are
5 in a difficult position. We are not quite sure. When we look at -- you are telling us
6 this thing is simple, but it doesn't seem to be the case. So we are not sure. That's
7 one way to look at it.

8 But another way to look at it is, well, we are quite sure that that is not the case. So
9 you are telling us it is simple. We know it isn't that. But we know the answer, the
10 answer is that. And we are telling you that.

11 You know what I am talking about? Sudan basically have Jordan telling the
12 Pre-Trial Chamber what the answer is on the question of law. As opposed to saying
13 "We don't feel safe enough to do what you are asking us to do", because it is all well
14 and good for you to tell us go ahead, it is okay; but when somebody takes us to the
15 ICJ, you wouldn't be there to be paying reparations for us. So we are not sure that it
16 is that straightforward.

17 That is the nuance in perhaps in the manner of presenting the question that one might
18 say, okay, it was going on here or what. I don't know if I have complicated things.
19 But you know what I am talking about?

20 MR MURPHY: Well, I mean, we may be straying a bit into the ground 3, group C
21 part. My short answer would be we feel Jordan approached the Pre-Trial Chamber
22 on March 28, 2017 and said, "We would like to consult with you. This is our view
23 that the resolution doesn't have this effect." And we wait. And we don't hear back
24 the next day or the day after that or the day after that. But perhaps that's a matter
25 for tomorrow for us to discuss.

1 In any event, back to the intention in paragraph 2. If there was an intention by
2 the Council to require third States to fully cooperate, if that's the thing, then why not
3 write paragraph 2 to not urge States but require them to take a step? The Council
4 just didn't do that and we think, if we are trying to draw implications, that's
5 a pertinent point.

6 Another aspect of the Prosecution's claims here is that the referral becomes
7 meaningless if we interpret the Council as not stripping away Head of State
8 immunity from foreign criminal jurisdiction. What's the point in the referral if we
9 are not doing that in paragraph 2?

10 And our answer would be that there are plenty of persons other than a Head of State
11 that would be exposed to potentially the jurisdiction of this Court and otherwise. It
12 is always possible that a Head of State might surrender themselves to the Court; that's
13 not inconceivable, it's even happened before.

14 We would submit that certainly Heads of State fall from power and thereafter are
15 brought before an international court and tribunal. That's happened too. There are
16 various ways in which a referral that triggers an investigation and indictments could,
17 at the end of the day, result in the prosecution of a Head of State and, therefore,
18 necessarily stripping away the immunities from foreign criminal jurisdiction simply is
19 not an essential aspect of making a referral to this Court.

20 There is also a claim being made that because Sudan is analogous to a State Party, that
21 this is something that is completely normal in the context of Security Council practice,
22 or that it would be considered normal or whatnot.

23 We would submit that in the past, it is true that the Council has called upon States to
24 act in accordance with provisions of treaties to which they are not a party. They
25 have also called upon States to ratify treaties. They have encouraged States to

1 negotiate a treaty. They always are very express when they do that and they have
2 never gone to the step of saying, "You are a party to this treaty." Everybody would
3 accept that's a step too far and I think that's common ground among us.

4 But even a step before that, of saying, "You have a lot of treaty obligations" is
5 a significant step and that is one in which you would expect there to be express
6 language speaking to the issue if that's, in fact, what the Council had in mind.

7 PRESIDING JUDGE EBOE-OSUJI: [15:46:28] Thank you very much, Mr Murphy.
8 You were allowed three-more minutes beyond the full time.

9 MR MURPHY: [15:46:36] Okay. Thank you very much, Mr President.

10 PRESIDING JUDGE EBOE-OSUJI: [15:46:39] It is because of my interruption.
11 Thank you.

12 We will now adjourn for 20 minutes and we will come back for Judges' questions, and
13 then we will take it from there to the end of the day. Thank you.

14 (Recess taken at 3.46 p.m.)

15 (Upon resuming in open session at 4.03 p.m.)

16 THE COURT USHER: [16:03:11] All rise.

17 Please be seated.

18 PRESIDING JUDGE EBOE-OSUJI: [16:03:39] Thank you, and welcome back.

19 We will now go to questions from the Bench. Judge Ibáñez has a question.
20 Judge.

21 JUDGE IBÁÑEZ CARRANZA: [16:03:54] Thank you, Mr President.

22 The question was for the League of Arab States, but now they are not here. I am
23 going to do the question in an open manner so anybody can answer the question.

24 The League of Arab States has indicated that its entity has, and continues to be
25 a supporter of the Court. Given Jordan's refusal to arrest and surrender

1 Mr Al-Bashir to the Court, I would like to ask, in what way the League envisages
 2 cooperation with the Court in the Darfur situation?

3 It is a very pragmatic question and I would like pragmatic answers. Thank you.

4 PRESIDING JUDGE EBOE-OSUJI: [16:04:57] We thought that the ambassador
 5 would be away only from tomorrow, but apparently -- all right. Is anybody able to
 6 assist with that? If not, we can then -- yes.

7 MS NEGM: [16:05:10] Thank you, your Honour. Actually pragmatically, if we are
 8 speaking in the context of international organisations, because we had similar
 9 situations like Jordan had with President Bashir's visit --

10 PRESIDING JUDGE EBOE-OSUJI: [16:05:22] So we can make clear on the record
 11 that you are not speaking for the League of Arab States.

12 MS NEGM: No.

13 PRESIDING JUDGE EBOE-OSUJI: You are the legal counsel for the African Union.

14 MS NEGM: [16:05:31] I know my country is a member of it, but no.

15 PRESIDING JUDGE EBOE-OSUJI: Please proceed.

16 MS NEGM: [16:05:33] Thank you very much.

17 In fact, one of the reasons we have Article 98 in the Rome Statute is to protect this
 18 kind of situation. So if we are talking about the cooperation within the parameters
 19 of the international organisations like ours with States Parties, then it should be away
 20 from our context. Because there are agreements, if I recall correctly as well your
 21 question, your Honour, with regard to the policy issue with international
 22 organisations. It is not only a policy that will grant immunities, but also it is a matter
 23 of law because we have legal obligations imposed on all States Parties to our
 24 conventions, our Member States and those who host even any of our meetings. So
 25 this a legal obligation.

1 So the cooperation envisaged with the ICC, it should be within the parameters of the
2 international legal system. It should not go beyond it. This is how we see it.

3 PRESIDING JUDGE EBOE-OSUJI: [16:06:46] The interesting -- yes, the interesting,
4 should I say, nub there that we need to get around is the value of Article 103 of the
5 UN Charter in there, and that's what probably triggers the question whether to look at
6 the matter from the perspective of policy or of law.

7 We have heard submissions in the room in the past few days that in light of Article
8 103 of the UN Charter, when that article sponsored, so to speak, a UN resolution
9 taken under Chapter VII, it sponsors it into the equation, then that will cancel out any
10 regional agreements that grant immunity. That argument has been made in many
11 ways.

12 And then that raises a question: All right, assuming that to be the correct way to
13 look at it, so 103 clears out the way for Charter VII resolution, that's how come the
14 question of policy comes into it. Say all right, regardless of that, yes, we may agree
15 to that effect of 103, does it also assist to make the system work to say, okay, ICC,
16 when there is a regional organisation dealing with regional issues, it may be best to
17 not go there and scare the cows, so to speak, in a manner of speaking, dumping
18 something in there that frightens everybody who wants to solve a sensitive problem.
19 That's the point.

20 MS NEGM: [16:08:52] Thank you very much, your Honour. Well, Article 103 does
21 not actually speak of removing the agreements. Yes, it addresses the bilateral
22 agreements and the regional agreements, but our agreements are not, not in
23 conformity with the UN Charter. We still have within the UN Charter and the host
24 country agreements, even signed by the United Nations itself to host events anywhere,
25 it includes the immunities. So we are working still within the parameters of

1 international law and our decisions, when it comes to the policy issue or when it
2 comes to the legal issues here, it is still in conformity with international law and with
3 the UN Charter. Thank you so much.

4 PRESIDING JUDGE EBOE-OSUJI: [16:09:41] Thank you.

5 MS NEGM: [16:09:43] Can my colleague add something?

6 PRESIDING JUDGE EBOE-OSUJI: [16:09:44] Yes, quickly and then we will go to
7 Mr Magliveras.

8 MR TLADI: [16:09:50] Thank you very much, your Honour. And I will be brief.

9 I will just point out that the proposition that you put forward assumed in fact that
10 there is a legal obligation under the Charter. But in this instance there isn't a legal
11 obligation under the Charter. I think counsel for Jordan made that absolutely clear.
12 The only legal obligation under the Charter which would then take on an Article 103
13 character is an obligation on Sudan, not on Jordan, not on South Africa, not on any
14 other State. So there is no competing legal obligation under the UN Charter. That
15 is just the point I wanted to make.

16 PRESIDING JUDGE EBOE-OSUJI: [16:10:25] But he did not assume anything I said,
17 just for purposes of argument, assuming that to be the case, that's the premise. It
18 wasn't -- yes, thanks. Please.

19 MR MAGLIVERAS: [16:10:37] Thank you, Mr President. I will attempt to answer
20 the Judge's question on the basis of teaching the law of the League of Arab States for
21 almost 15 years now.

22 To the best of my knowledge, the League of Arab States has consistently avoided
23 dealing with questions of alleged violations of human rights and humanitarian law in
24 its Member States.

25 The first time the League of Arab States did invoke competence to deal with such

1 a matter was in the popular uprising against the regime of the late Colonel Gaddafi.

2 In that instance, the counsel of the League of Arab States, without invoking a specific
3 legal basis, decided to suspend the participation of Libya in the activities of its
4 organisation. In reality, it didn't suspend the participation of the State of Libya, it
5 did suspend the participation of Colonel Gaddafi's regime.

6 The second time the League of Arab States got involved into a similar situation was in
7 the case of Syria. And following the example set by suspending Libya, it also
8 suspended Syria from the activities of the League of Arab States. Thank you.

9 PRESIDING JUDGE EBOE-OSUJI: [16:12:31] Thank you very much.

10 Any more reaction?

11 Yes, please, Mr Wood.

12 MR WOOD: Mr President, to be clear, I am not speaking for the League of Arab
13 States either and I am not going to go into a policy on the history of the Arab League
14 as the previous speaker has sought to do.

15 I just wanted to reinforce the point that Professor Tladi has made on behalf of the
16 African Union because reference was made to Article 103 of the Charter. Article 103
17 is a crucial provision of the Charter. It is the article that gives power to the
18 United Nations and, in particular, to the Security Council to override other
19 international obligations.

20 And it is very short and very clear. It says, "In the event of a conflict between the
21 obligations"-- I stress that -- "the obligations of the Members of the United Nations
22 under the present Charter and their obligations under any other international
23 agreement," which may, if necessary, include customary international law, "their
24 obligations under the present Charter shall prevail."

25 And so it's only if an obligation had been imposed upon members of the Arab League

1 not to apply the obligations under their agreements on immunities that this would
2 come into play, and it has been our contention throughout that no such obligation
3 was imposed by Resolution 1593.

4 Since this point is, in a way, related to your question about paragraph 31 of the
5 celebrated Tadić appeal, would it be a moment to talk about that?

6 The sentence to which you drew our attention says that, "These powers" -- that is
7 powers of the Security Council -- "are coercive vis-à-vis the culprit State or entity.

8 But they are also mandatory vis-à-vis the other Member States, who are under an
9 obligation to cooperate with the Organisation and with one another in the
10 implementation of the action or measures decided by the Security Council."

11 This is a sentence that occurs in a paragraph, which is a brief general statement by the
12 ICTY Appeals Chamber, concerning the range of measures envisaged under
13 Chapter VII. As far as I can see, this distinction between powers that are coercive
14 vis-à-vis what the Chamber referred to as the culprit State, but also mandatory
15 vis-à-vis other Member States wasn't actually picked up later in the decision, so we
16 can't get much guidance from that.

17 But it seems to me pretty clear what the Appeals Chamber was saying. The
18 Appeals Chamber was drawing attention to the various effects of binding decisions of
19 the Security Council. They are, if you like, coercive vis-à-vis the State against which
20 the measures are taken.

21 For example, when the Council authorises use of force against the State or if it
22 imposes sanctions upon a State and they are mandatory on all the Member States to
23 whom they are addressed, which is usually all Member States, mandatory in the sense
24 that they are all legally obliged to impose the sanctions.

25 And as Professor O'Keefe said this morning, that sentence from Tadić says nothing

1 about whether or not the provision of a Security Council resolution is legally binding
2 on its addressees, and would, therefore, prevail if it was over the other obligations by
3 virtue of Article 103 of the Charter.

4 It says nothing. The statement from the Appeals Chamber of the Yugoslav tribunal
5 is saying nothing about when provisions in Security Council resolutions are legally
6 binding. It is talking about the effects of legally binding provisions and saying what
7 kinds of effects they can have.

8 And, in our case, it is quite clear that under Article 25 of the Charter, it is only
9 decisions of the Council that can impose obligations on Member States. In our case,
10 the word "urges" is to my mind completely clear. It is not binding. The use of the
11 non-binding "urges" reflected a clear policy decision of the Council and I think it is
12 not difficult for any of us to imagine why non-parties to the Rome Statute, including
13 certain permanent members of the Council, would not have accepted the imposition
14 of a legal obligation to cooperate fully with the Court.

15 It is pretty clear to me that the resolution would simply not have been adopted if it
16 had imposed an obligation on non-parties.

17 Thank you, Mr President.

18 PRESIDING JUDGE EBOE-OSUJI: [16:17:58] Thank you very much, Sir Michael. I
19 will come back to you later, I will come back to you later on something else that my
20 colleagues have had a chance to also ask, and I will be asking you about the Kosovo
21 advisory opinion in the context of the UNMIK Regulation. You know that case very
22 well and that was adopted pursuant to Security Council Resolution, I believe, 1244,
23 but I am just letting you now.

24 So I will now invite -- somebody wants to react, yes? Please.

25 MS BRADY: [16:18:35] Your Honour, I just want to make a brief point because of

1 Mr Wood's last intervention concerning the Tadić Appeals Chamber and the
2 paragraph 31 that your Honour pointed to.

3 He is right that that paragraph 31 says that the powers are coercive in relation to, as
4 they put it, the culprit State and they are mandatory vis-à-vis other Member States.

5 He made the further submission that it can only be a decision of the Security Council
6 which then binds the other State.

7 In this regard, your Honours, the decision in Blaškić, the Trial Chamber subpoena
8 decision is important. That decision stands for the proposition that the tribunal
9 there could issue binding orders to States and that States have a duty to comply with
10 those orders.

11 Throughout Blaškić, we see reference, specifically paragraph 81, 82, further
12 paragraphs 86 and 132, this point that the establishment of the ICTY - now we're back
13 in the ad hocs - by the Security Council under Chapter VII, "Clearly calls for the
14 priority of measures adopted by the Security Council to maintain or restore
15 international peace and security and subordinates State sovereignty to these
16 concerns."

17 PRESIDING JUDGE EBOE-OSUJI: [16:20:13] Can we look at that in the context of
18 what that decision was taking about. It wasn't about Croatia, by requiring Croatia to
19 produce documents. Was that the one?

20 MS BRADY: [16:20:25] It was specifically directed to Croatia, but it was applicable,
21 its comments, to States in general.

22 For example, your Honours, if you go to paragraph 86, the Court says, "It is clear that
23 States are obliged to comply with requests for assistance from the ICTY." And that's
24 the way the decision was always read. All countries around the world read the
25 decision in that way; that they were obliged. Confirmed by the Blaškić Appeals

1 judgment.

2 Now the distinction in that case was between what is compulsory, what is mandated
 3 upon Member States because all the comments are made in relation to Member States
 4 versus coercive powers. And Blaškić, in both the Trial Chamber level and the
 5 Appeals Chamber, made the distinction between mandating Member States but
 6 reserving coercive powers to the Security Council; so for sanctioning.

7 And it works in the same way here. I don't recall offhand the specific provision of
 8 the ICTY, but it was similar to 87(7) here. So that's the coercive sanctioning
 9 mechanism, refer back to the Security Council. But nonetheless, it was still clear that
 10 the mandate, the compulsion was upon all Member States. Thank you.

11 PRESIDING JUDGE EBOE-OSUJI: [16:21:53] Thank you very much.

12 Yes, Mr Wood, let me speak.

13 Yes, please, Mr O'Keefe?

14 MR O'KEEFE: [16:22:01] Mr President, with great respect, what has just been said is
 15 utterly beside the point. From where did the International Criminal Tribunal for the
 16 former Yugoslavia draw its mandatory powers?

17 Now let's leave aside this coercive business. In -- and I have dropped my glasses
 18 without which I'm relatively blind. I've found them again now. In paragraph 4 of
 19 Security Council Resolution 827 of 1993, acting under Chapter VII of the Charter, the
 20 Security Council decided that all States were to cooperate with the International
 21 Criminal Tribunal for the former Yugoslavia. That was then translated into its
 22 statute, Article 29.

23 The power of the ICTY to bind states in cooperating with it, providing assistance, or
 24 whatever you want to call it, and leaving aside this complete smokescreen of coercion,
 25 the power to bind them came from the decision of the Security Council, adopted

1 under Chapter VII, but to this extent irrelevant, in paragraph 4 of Security Council
2 Resolution 827, that is the beginning, the middle and the end. Okay. So that is the
3 essential phenomenon here. It is not that the word "urges" or any other thing like
4 a recommendation can create a binding obligation, only a decision.

5 PRESIDING JUDGE EBOE-OSUJI: [16:23:44] Thank you very much.

6 I will return now to Jordan.

7 MR WOOD: Well, thank you very much, Mr President.

8 Just to say that I agree fully with Professor O'Keefe, I couldn't have expressed it as
9 well and as forcefully as he did, but I do agree with that. And it reminds that there
10 was another suggestion about this word "urges", which came up I think this morning
11 and it was that the Council urging states to cooperate was sufficient to absolve them
12 from complying with their obligations under international law, including their
13 obligations in the field of immunities.

14 But I think it is very clear, Mr President, that complying with a non-binding call from
15 the Security Council cannot be a circumstance precluding wrongfulness under the
16 law of State responsibility. Those circumstances are set out exhaustively in Articles
17 20 to 25 of the 2001 Articles.

18 And if there were to be such an interpretation of a non-binding call of the Council, it
19 could have very dangerous implications. The Council is often encouraging States to
20 do things, calling upon them to do things. If that were to override their
21 obligations -- for example, their obligations on the non-use of force, that could have
22 remarkable and remarkably dangerous consequences. So with respect, I think that
23 interpretation of a non-binding call of the Council is simply not correct as a matter of
24 law.

25 Thank you, Mr President.

1 PRESIDING JUDGE EBOE-OSUJI: [16:25:28] Yes, please, Mr Jalloh.

2 MR JALLOH: [16:25:30] Thank you, your Honours. I was hesitating, but I thought
3 this might be a moment to make a couple of observations, and your Honours, these
4 observations actually relate directly to the question about Tadić. And Mr Wood and
5 Mr O'Keefe, I think have made an excellent point because the key issue is not so much
6 about what they decide versus urge. What context has taken place is equally
7 important and he, Mr O'Keefe that is, mentioned Resolution 827 of the
8 Security Council and paragraph 4 where the Council decides -- it decided and this
9 was in the context, as your Honours well know, of the establishment of the ICTY.
10 What I find very interesting, and this is my part of that first observation, when you go
11 down, as the tribunal was now carrying on its work, you will find subsequent
12 resolutions of the Security Council where, for example, in Resolution 1166 from
13 13 May of 1998, the Council passes a decision whereby it is reminding States of their
14 duties to cooperate with the tribunal. Why is that important? Of course it is
15 important because earlier we were having the suggestion that the implication of
16 a bindingness, if you will, is derived from precisely the fact that you are using
17 Chapter VII.

18 So in this context, in paragraph 3, the Security Council says it urges all States to
19 cooperate fully with the international tribunal and its organs in accordance with their
20 obligations under Resolution 827 from 1993, referring back.

21 Now I will spare you the rest of them, but there are several other resolutions,
22 your Honours, that are directly relevant to the question of where do you get this duty,
23 this obligation to arrest.

24 And so, for example, in a subsequent Resolution 1207 from November 1998, the
25 Council does the same thing where now it reiterates its decision. In Resolution 1503,

1 from August 2003, it calls on all States to cooperate, including, in this context, with
2 the international criminal police organisation. And then, finally, in terms of these
3 examples, it is reaffirmed in Resolution 1534 from 2003 the necessity of trial of
4 persons indicted by the ICTR and reiterated, reiterates its call on all States, and
5 specifically it lists a number of individuals that are very familiar to anyone who has
6 worked in the field of international criminal law, Radovan Karadžić, Ratko Mladić.
7 So, your Honours, my point is in terms of take-away is that we shouldn't make too
8 much of -- When they use "urge", are they really indirectly saying something that is
9 binding on them when the context of this particular case, the language of urging is
10 not that helpful because the whole context, the obligation is really just on Sudan.
11 And my second point, your Honours, is actually provoked by a comment made
12 earlier by Professor Newton, and I thought I might introduce it here because again it
13 is dealing with this element of cooperation.

14 PRESIDING JUDGE EBOE-OSUJI: [16:28:53] I think we are to keep in mind here,
15 though, that the urge part of the Resolution 1593, quite apart from the question from
16 your submission just now whether "calls upon" means something different from
17 "urges", we can debate that for another two weeks, I'm not sure, but quite apart from
18 that, in the context of 1593, the language of urging, it is not for Jordan, if I am correct,
19 please point out, I think there is a certain obligation on Jordan for purposes of 1593.
20 The urging upon part deals with States Parties who are not parties to the
21 Rome Statute, they were then urged to fully cooperate. That is the orientation of that
22 concern. Again, you can correct me if I'm wrong.

23 MR JALLOH: [16:29:54] Your Honours, if I may, just very briefly on that point.

24 PRESIDING JUDGE EBOE-OSUJI: [16:30:05] Go on.

25 MR JALLOH: [16:30:06] So I have here 1593, and it does have the sequence that we

1 are used to in terms of the Security Council when it is taking a decision. So you have
2 the preambular statements that are doing things like taking note, recalling, and of
3 course determining, acting and then deciding to refer, and this is of course in
4 paragraph 1. We talked a lot about this this morning. And then in paragraph 2,
5 directly deciding that only the government of Sudan and all other parties to the
6 conflict in Darfur shall cooperate fully and so on, and I would like to come back to
7 that much later on.

8 And essentially, within that same context then using this, at the end of that sentence,
9 your Honours, "urges all States and concerned regional and other international
10 organisations to cooperate fully". And it's very interesting for me that those that
11 have been urged later on will include the African Union in terms of its own role
12 within the context.

13 So I think we shouldn't, if you will, make "urge" now "deciding" within the context
14 where it is very clear that it is saying we know, and I think Mr Wood was correct, that
15 there are members of the Council that were very hesitant even back at Rome at this
16 idea that the Court might even have jurisdiction over the nationals of States Parties.
17 And I'm sure your Honours, you don't need to be reminded of this, but I just want to
18 lay down the marker, because even very recently we are seeing even a great power,
19 just as recently as a few days ago reiterating this as its first major issue with ICC.

20 So if it is permissible to the Court, your Honours, I had said I have two points, and
21 this was the first point.

22 And the second point, I can be very brief on this, and this was in relation to
23 Mr Newton's comment that members of the Security Council, despite repeated pleas
24 from the Office of the Prosecutor and Madam Prosecutor of course in the very
25 difficult position, have not reacted.

1 We will just add that on one occasion when it was, when the matter was addressed,
2 this is the matter raised by Mr Newton, it was made quite clear that to establish an
3 effective duty to cooperate, what was required was for the Council to establish a duty
4 under the resolution to cooperate.

5 And I would like to quote, if you would bear with me for a moment, your Honours,
6 an excerpt of the statement of the Republic of South Africa, South Africa in December
7 of 2012. And a delegate to the Sixth Committee said to who was, of course, in the
8 Security Council at the time, said as follows: "Over the past few months, there have
9 been several meetings, official and unofficial, in which the relationship between the
10 Council and the ICC has been examined. The constant and consistent refrain in all of
11 those meetings has been that the Court is caught in the crossfire of the political
12 dynamics of the Security Council. That is reflected in the skewed manner in which
13 the referral resolutions themselves are drafted."

14 And it is very interesting, given the value that we attached to them here, your Honour.
15 That is just my own comment. And I continue with the quote:

16 "With respect to cooperation" and this is going directly to the issue, "With respect to
17 cooperation, for example, some members of the Council - those that have the greatest
18 influence on the referral resolutions - have reserved for themselves the right not to
19 cooperate with the Court, which raises serious questions about credibility of the
20 process", about the credibility of the process.

21 "In order to enable the ICC to execute its mandate, the Council should insist on full
22 cooperation with the Court by all States Members of the United Nations," all state
23 members of the United Nations, "including permanent members of the Council", and
24 this of course is the difficulty "in situations that it refers to the Court. Until that
25 question and other related questions are resolved, securing cooperation may continue

1 to be an uphill battle. We are convinced that the Prosecutor's call for full cooperation,
2 which South Africa fully supports, will ultimately be realised only when the Council
3 stops seeing referrals as an end in themselves."

4 And your Honours, the reference here is to the summary record of the
5 Security Council. It is the verbatim record of the Security Council and I have the
6 reference. It is from SPV, S/PV.6887, 6887, from 13 December 2012. And if I may,
7 your Honours, the delegate happened to be Mr Tladi of South Africa.

8 PRESIDING JUDGE EBOE-OSUJI: [16:34:36] I am sure he will find it embarrassing
9 to quote it. Thank you very much.

10 Maybe Jordan one more time. When you speak at that, please, to your next point,
11 Michael might look at Article 2, paragraph 5 of the Charter, Article 2, paragraph 5.
12 And the reason why I am scoping it upfront now is to see whether this obligation to
13 give assistance may, how it relates with an urge.

14 But, Ambassador, please proceed.

15 MR HMOUD: [16:35:24] Thank you, your Honour. I will just deal now with
16 paragraph 2 of the Resolution 1593 and then I'll give it to Sir Michael to continue.

17 It should be read under ordinary meaning of the text and the ordinary meaning
18 essentially is decides that Sudan, and that's the decision language that takes us back
19 to Article 25 of the Charter as such. This is the fully cooperate.

20 Now, with regard to what says that recognising that State Parties to the Rome Statute,
21 essentially it is saying your obligations as State Parties to the Statute are governed by
22 the Statute, but it is not placing a direct obligation on the State Party through the
23 resolution. And that's understood from the latter part, says urges all states and
24 concerned regional and other international organisations to cooperate fully, which is
25 an unbinding language.

1 PRESIDING JUDGE EBOE-OSUJI: [16:36:24] So would it be then that it is reminding
 2 States Parties to the Rome Statute there, remember you are obligated under the
 3 Rome Statute and your obligation is governed by that?

4 MR HMOUD: [16:36:37] I beg to differ, your Honour. It's just, essentially it's
 5 saying your relationship with the Rome Statute is what it is. I am not going to be
 6 interfering with this. Thank you, sir.

7 PRESIDING JUDGE EBOE-OSUJI: [16:36:50] Thank you very much.
 8 Professor Lattanzi.

9 MS LATTANZI: [16:36:59] (Interpretation) Thank you. I am sorry if I attempt to
 10 put some order in two issues that have raised confusion during this discussion.

11 The first issue is in relation to the question you raised, Mr President, namely, the
 12 difference between the duty to cooperate and the call for cooperation. Clearly, there
 13 is a difference, a significant difference. In Resolution 1593, consideration is given at
 14 paragraph 2 to three types of States. A State involved in the situation, that is Sudan,
 15 but which is not a State Party to the Statute, to the Rome Statute but which is bound
 16 by the decision of the Security Council and by Article 13(b) to fully cooperate.

17 The second category is mentioned in the negative, namely, States who are members of
 18 the United Nations and party to the Statute and therefore bound by the Statute, the
 19 Rome Statute.

20 And the third category is that of States Parties -- or Member States who are not party
 21 to the Rome Statute. Now, for that last category the Security Council has a clear
 22 position when it comes to Jordan, because it takes a political decision to simply issue
 23 a call to cooperate without obligating them to cooperate. The Security Council could
 24 have done so under Chapter VII(3). That was the decision of the Security Council.
 25 It's not the first time and it's not the last time that it will take such a decision that

1 bears on matters relating to Article 39, for example.

2 But, you see, you have clearly underscored that there is a question as to what is being
3 dealt with here. Reference is not being made to the cooperation of a Member State to
4 the Charter of the United Nations on which the United Nations has not imposed an
5 obligation. We are talking about the cooperation from Jordan. And that is
6 a preliminary matter.

7 Jordan, Jordan, as we can see in paragraph 2, is referred to in the negative, whereas it
8 is a State that is already bound by the rules of the United Nations.

9 So we can have interesting academic discussions around these issues here in terms of
10 what all that represents, but as far as I am concerned, there are some consequences
11 that flow from this vigorous call. You see, this morning, for example, I told you that
12 there is an authorisation here for those States which were called upon to instantly
13 cooperate to not respect matters of immunity when it comes to the Head of State of
14 Sudan.

15 Now, this is optional. I think the States may or may not respond to that call. They
16 may say no. But, however, there would also be some consequences flowing from the
17 very questions that you raised under the group B series of questions. There are
18 a number of general provisions of the UN Charter which provide that States must
19 cooperate and assist the organisation in the achievement of its activities.

20 We could even say that this failure to respond to this call could amount to a breach of
21 these general provisions which you have already mentioned in the questions, and
22 I am not going to repeat that.

23 Secondly, there is another area of confusion in our discussions. The question of
24 Tadić which you raised, there is a clear distinction between an obligation and coercive
25 effects. These are matters that relate to decisions, for example, from the

1 Security Council that can be binding and therefore flow from the law proper. I say
 2 this because, let me clarify, there are other types of decisions which in addition to
 3 being binding can also limit the sovereignty of States. That is exactly what the Tadić
 4 judgment addresses when it comes to the States of the former Yugoslavia, which were
 5 borne out of the disintegration of former Yugoslavia, there was a limitation of their
 6 sovereignty when it came to their criminal jurisdiction of those States. They
 7 therefore could not raise the argument of the primacy of their criminal courts in
 8 relation to the functioning of their domestic courts. And I think that is in addition to
 9 the binding forces of the law. It has a coercive effect and therefore touches on
 10 sovereignty, subject to paragraph 7(2) of the United Nations Charter.

11 That is why, unfortunately, well, I don't agree with Professor O'Keefe when he says
 12 that the coercive impact is of a certain nature that impacts on sanctions. But, by the
 13 way, the word "sanctions" is much more political than legal, come to think of it, when
 14 we look at Article 41 and 42 of the United Nations Charter.

15 The coercive effect therefore also has an impact on the --

16 THE INTERPRETER: [16:45:29] Mr President, could the professor be reminded to
 17 speak away from the microphone.

18 MS LATTANZI: [16:45:38] (Interpretation) Well, there is therefore a duty which is
 19 binding and which relates to the creation of further obligations, further obligations
 20 which flow from Article 41, which is an unexhaustive list of the measures that the
 21 Security Council can adopt. Thank you.

22 PRESIDING JUDGE EBOE-OSUJI: [16:46:03] Thank you very much, Professor.

23 Yes, we will revert now to Jordan. And then after --

24 (Trial Chamber confers)

25 PRESIDING JUDGE EBOE-OSUJI: [16:46:47] We will revert to Jordan, but if it is

1 possible also, the original question posed to the Arab League.

2 I know, Mr Wood, when you spoke earlier you said you wouldn't deal with that. It
3 is all right if you feel, you don't have to respond to it entirely correct, but it is up to
4 you. But we will revert to you in any event. You asked for the floor.

5 MR WOOD: Thank you, Mr President.

6 I am conscious that the question to the Arab League has led to a very lively debate. I
7 really just wanted to respond to your question, sir, on Article 2(5) of the UN Charter,
8 which as you know says that "All members shall give the United Nations every
9 assistance in any action it takes in accordance with the Charter, and shall refrain from
10 giving any assistance to any State against which the United Nations is taking
11 preventive or enforcement action."

12 This is quite a general provision that we find in the Purposes and Principles in
13 Articles 1 and 2 of the Charter.

14 The first point I would make is that we are not here talking about giving assistance to
15 the United Nations. We are here about cooperating with the Court. That's the
16 question before us. So I don't think --

17 PRESIDING JUDGE EBOE-OSUJI: [16:48:21] Isn't Chapter VII, isn't a Chapter VII
18 measure something the United Nations would do for which Member States are
19 required to give assistance?

20 MR WOOD: Well, Mr President, it may be if the Chapter VII measure is actioned by
21 the United Nations. Here the Chapter VII measure was an action in relation to the
22 International Criminal Court, and it talks about cooperation with the International
23 Criminal Court.

24 But the main point I was going to make about Article 2(5) is that it is quite a general
25 provision, as I said. It is one that is not often referred to, I think. But the key is that

1 when it says "shall give every assistance", obviously that means every assistance that
 2 it can give in accordance with the law. There is nothing in Article 2(5) that would
 3 permit a state to ignore obligations such as the prohibition on the use of force or the
 4 requirements of immunities. That was the main point I wanted to make.
 5 Just going back to paragraph 2 of Resolution 1593, it seems to me the position is very
 6 simple as regards Jordan's, the extent to which Jordan is covered by the second part of
 7 that paragraph, the "urges". It does say "urges all States to cooperate fully", so it
 8 covers all States.

9 But, of course, Jordan in addition is a party to the Statute and has an obligation to
 10 cooperate fully. So Jordan has an obligation under the Statute. It does not have
 11 a charter obligation such as would override under the power of Article 103 its other
 12 obligations.

13 Thank you.

14 PRESIDING JUDGE EBOE-OSUJI: [16:50:24] Thank you.

15 (Trial Chamber confers)

16 JUDGE IBÁÑEZ CARRANZA: [16:50:35] Thank you. Thank you.

17 It is for Jordan. Maybe Jordan can still speak on behalf of Jordan, because Jordan has
 18 stated that it has been and it continues to be a stronger supporter of the Rome Statute
 19 and the Court. So in the given situation of Darfur, how can you envisage the further
 20 cooperation with the Court? And if you can, if you can, of course, if you are able to
 21 give me some pragmatic answer maybe. Thank you.

22 MR HMOUD: [16:51:14] Thank you, your Honour. But if you can

23 specifically -- you know, this is a policy question. It is not a legal question. But if
 24 there is something specific you would like us to, you know, refer to, we are happy to
 25 talk to you about in this regard. But it is, you know, to cooperate with the Court on

1 the situation in Darfur, that's -- you know, you have to give me something specific
2 that I can answer you on.

3 JUDGE IBÁÑEZ CARRANZA: [16:51:50] Maybe it is because Jordan still is
4 a member of the States Parties of the Rome Statute with the specific obligations of
5 cooperation with the Court. So now all of these appeals is about a refusal of arrest
6 and surrender of Mr Al-Bashir. Okay, you have your reasons. But then how could
7 we understand the complish of your obligations under the Rome Statute to cooperate
8 with the Court in this specific case? I mean, if you have the answer --

9 MR HMOUD: Yes.

10 JUDGE IBÁÑEZ CARRANZA: -- okay, you can do it. If you don't have it, it is
11 okay otherwise. It will help us a lot.

12 MR HMOUD: [16:52:32] Of course.

13 JUDGE IBÁÑEZ CARRANZA: Thank you.

14 MR HMOUD: Of course. Thank you, your Honour.

15 Our appeal is with regard to the specific issue of the visit of the President Al-Bashir to
16 Jordon on 28 March 2017. Jordan has been -- obviously we want to deal within this
17 context in this regard.

18 Our cooperation is mentioned, it is governed by Article 86, which makes it contingent
19 that cooperation will be in accordance with the provisions of the Statute, and as such
20 we are referring to Part 9 of the Statute in this regard.

21 This limits the kind of cooperation in this regard. But we have been a very strong
22 supporter. We are the ones who negotiated the Rome, one of the negotiators of the
23 Rome Statute, and we are among the first 60 countries to have ratified the Statute.

24 We have -- our cooperation will continue with the Court.

25 Our issue here is the appeal of the decision by PTC-II with regard to referral, finding

1 of violation of the Rome Statute, duty of cooperation, as well as referred to the

2 Security Council and the ASP. Thank you, your Honour.

3 JUDGE IBÁÑEZ CARRANZA: Thank you.

4 PRESIDING JUDGE EBOE-OSUJI: [16:53:49] And your case there is that the essence
5 of that appeal is that, like the fog, if I may call it that, that one finds in Article 98 what
6 it means for everybody, including Jordan.

7 MR HMOUD: [16:54:02] Yes.

8 PRESIDING JUDGE EBOE-OSUJI: Yes.

9 MR HMOUD: This is an aspect about it as was mentioned in our appeals brief.
10 Thank you.

11 PRESIDING JUDGE EBOE-OSUJI: [16:54:19] Judge Hofmański.

12 JUDGE HOFMAŃSKI: [16:54:23] Thank you, Mr President.

13 I have further to question to Jordan. First one is related to Jordan's answer to the
14 question (a), and this question concerns the power of the Security Council to displace,
15 to waive, to displace or override the immunity of Head of States, specifically whether
16 or not this must be done expressed or can be done by a necessary implication.

17 Mr Woods, how you would explain, you explain the requirements that the
18 Security Council of the United Nations, when referring to the situation of Darfur to
19 the ICC Prosecutor, would at the same time waive the immunity of the Head of State.
20 Don't you think that such a decision could constitute the impermissible suggestion to
21 the Prosecutor as to who should be held responsible in that case?

22 I have also the second question to Jordan, if you allow me maybe.

23 PRESIDING JUDGE EBOE-OSUJI: [16:55:49] Maybe after this one.

24 JUDGE HOFMAŃSKI: After this one, okay. Thank you.

25 MR WOOD: Well, Judge, that is obviously a very good question, and I can certainly

1 understand where you are coming from on it. When we say the lifting of immunity
2 required express language, as I think was also said by one of the friends of the Court,
3 that doesn't necessarily mean it has to say that we hereby lift the immunity of
4 President Al-Bashir of Sudan.

5 It could have been done by saying we hereby lift all immunities that may apply to
6 anyone who may be indicted or whose arrest may be sought by the Court. And so it
7 could be done in a way that it could have been formulated in a way that was
8 absolutely clear, express, but which did not imply that any particular person was
9 covered.

10 So I hope that's an answer.

11 And if I could take the opportunity to respond to something that was said this
12 morning, I think by the Prosecution. It was said, well, the use of force is authorised
13 by general language, it is not express. There is this expression "all necessary means".
14 But I have to say the expression "all necessary means" is fully understood in
15 the Council. It is known precisely what that implies when that is put into
16 a resolution. There is a long-standing practice of the Council that those words
17 expressly authorise the use of force, and Council Members are very careful about the
18 use of those words.

19 So I think that was not a good response to our view that express language is needed.
20 Exactly what the express language is is another matter, but I have given the kind of
21 language which could have been used that would not have implied the guilt of any
22 particular individual.

23 PRESIDING JUDGE EBOE-OSUJI: [16:58:03] This is one place, Mr Wood, where the
24 matter I posted earlier, I postmarked earlier comes in, the Kosovo advisory opinion.
25 Here, we are talking here in your -- it arises immediately from your response to

1 Judge Hofmański's question about whether or not express language is needed. And
2 you say it need not be spelt out in that terminology of lifting immunity. But the
3 Kosovo advisory opinion comes in it this way, the question it raises in my mind is
4 here we have in the Kosovo situation wherein, again, you were in that case, if I recall,
5 Resolution 1244, Chapter VII power, preambular statements recognised, if I recall, this
6 sovereignty of Serbia over Kosovo. Then the resolution authorises the
7 General-Secretary to do something -- sorry, Secretary-General appoints representative,
8 representative adopts a series of regulations. One of those was the constitutional
9 framework which introduced certain laws and regulations and that sort of thing.
10 Now, the question then became what effect did both Resolution 1244 and those
11 regulations adopted under it, what effect did they have in international law?
12 And the ICJ said they had the legal effect in international law that effectively
13 amounted to displacement of the sovereignty of Serbia in Kosovo.
14 Did I sum it up well? If so, the question arises, if it is that a regulation adopted by an
15 appointee of the Secretary-General would have such an effect as to displace the
16 sovereignty of Serbia in Kosovo, can we by the same token say, well, we don't see the
17 ICC, the Rome Statute displacing the immunity of Sudan relative to Bashir. You see
18 what I mean? If regulation could do that in Kosovo, why can't the ICC Statute do
19 that in Sudan vis-à-vis Jordan?

20 MR WOOD: Well, thank you, Mr President.

21 And before I answer, I would like to apologise to the Prosecution and Professor Kreß.
22 It was Professor Kreß who came up with I think the notion that all necessary
23 measures was not expressed.
24 But in response to your question, my recollection, and actually Professor Murphy was
25 the one who dealt with Resolution 1244 before the international court, but my

1 recollection is that the international court in its advisory opinion did not go as far as
2 you have said. In fact, I believe that what it was saying was that it was asked
3 a question, "Was the Declaration of Independence in accordance with international
4 law?"

5 PRESIDING JUDGE EBOE-OSUJI: That was the question, yes.

6 MR WOOD: And in order to decide what was international law, it did indeed,
7 contrary to our submissions, I think, take the position that the regulations of the
8 Secretary-General's representatives were international law.

9 And so the question arose "Was the Declaration of Independence in conformity with
10 the constitutional framework?"

11 And then it decided, as I recall, that it didn't need to answer that question, because
12 the Declaration of Independence had not been made by any of the organs of
13 provisional government of Kosovo under the regulation, under the constitutional
14 framework, but had been done by a group of people, the president, ministers,
15 members of the assembly, but not actually of one of the organs of the government of
16 Kosovo.

17 It really wasn't dealing with the displacement of sovereignty, and I don't think it said
18 anything about the displacement of sovereignty. The question was interpreted -- or
19 the question was quite a narrow one. It was certainly interpreted as quite a narrow
20 one in that it allowed the Court to avoid answering difficult questions about
21 sovereignty.

22 PRESIDING JUDGE EBOE-OSUJI: [17:03:24] I may stand corrected, but here is what
23 recall, I have in my notes here what led me to that characterisation. Maybe I may
24 have over-understood what was being said.

25 But there is this quote in paragraph 97 of the advisory opinion, "Viewed together

1 Resolution 1244 and UNMIK regulation 1999/1 therefore had the effect of superseding
 2 the legal order in force at that time in the territory of Kosovo and setting up an
 3 international territorial administration".

4 If you supersede the legal order in a territory and set up an international
 5 administration for that territory, isn't that displacement of sovereignty to that extent?

6 MR WOOD: Well, you could put it in those terms. It is obviously the displacement
 7 of the authority of the Federal Republic of Yugoslavia or Serbia perhaps temporarily,
 8 perhaps not.

9 PRESIDING JUDGE EBOE-OSUJI: [17:04:53] Yes, it said temporarily, interim, yes.

10 MR WOOD: It is precisely what the Security Council did in its resolution and that
 11 was implemented by the constitutional framework. But that just shows the power of
 12 the Security Council. It can do some remarkable things. But I don't think it has any
 13 relevance to the question that we are dealing with.

14 The question here is the precise interpretation of the language in the resolution, of
 15 paragraph 2 of the resolution, of the second half of paragraph 2 of the
 16 resolution -- well, both halves of it. That's a very different situation indeed from
 17 what was going on in the Kosovo case. We may be able to learn things about the
 18 interpretation of resolutions from the Kosovo case, but I don't think it tells us
 19 anything about the meaning of our Resolution 1593.

20 Thank you.

21 PRESIDING JUDGE EBOE-OSUJI: [17:05:52] Thank you very much.

22 MR KREß: [17:06:02] Mr President, as Sir Michael has correctly identified me as the
 23 one who submitted the argument he criticised, would you grant me a word of reply?
 24 (Trial Chamber confers)

25 PRESIDING JUDGE EBOE-OSUJI: [17:06:16] Please proceed.

1 MR KREß: [17:06:21] The point of my argument was about explicitness, the very
2 simple and precise point. Sir Michael for Jordan has just a minute ago again
3 indicated how he would feel the resolution should have framed in order to be
4 sufficiently explicit.

5 He would have liked to see the word "immunity", not with respect to President Bashir,
6 he said, and I agree, he said generally. But "immunity".

7 My simple point was, in those regulations authorising the use of force, which as Sir
8 Michael rightly says are generally understood as authorising use of force, the words
9 "use of force" do not appear. In that sense they are not explicit.

10 Now, Sir Michael says everybody understands them that way. I entirely agree. But
11 why? For example, because reference is had to the Security Council protocols where
12 those who had voted on those regulations have expressed their understanding. But
13 what is this? This is interpretation. And my simple point was this is what security
14 practice has always been about, not the explicit words needs to be used, but under the
15 criteria set out masterfully in Sir Michael Wood's essay, those resolutions have to be
16 interpreted.

17 This is what I wanted to say.

18 PRESIDING JUDGE EBOE-OSUJI: [17:08:18] Yes, please.

19 DR NEGM: [17:08:21] Thank you very much, your Honour. Very briefly in this
20 point. And as a diplomat that spent enough time drafting resolutions in the
21 United Nations, my first comment would be on the language issue.

22 When we draft, yes, we do draft politically rather than legally, but the language we
23 use have a hierarchy. As you mentioned, your Honour, "calls upon" or "urges"
24 might look the same. For us in the United Nations as negotiators, they are not the
25 same. And if the Security Council intended to use "urge" for other Member States to

1 cooperate in the manner of obligation, have ample language we use whether with the
2 deciding or to demand or request Member States to do. So that is one point I just
3 wanted to clear and that is when it comes to 1593.

4 As far as the point that was just debated between Sir Michael Wood and Mr Kreß
5 Claus regarding the decisions and resolutions of the Security Council when it comes
6 to the use of force, the language used consistently in all the resolutions of the
7 Security Council, when it comes to the use of force, it is standard and it is not by
8 implication.

9 Why I am saying this? Because the implication and the ramifications of thinking
10 otherwise, especially when a decision is adopted under Chapter VII is really serious
11 and it will hamper international peace and security rather than just for the purposes
12 of our debate here.

13 I will just recall quickly Resolution 1441 of 2002 of the Security Council, which
14 actually with it the reason that we have no mention of the measures that allow the use
15 of force, the invasion of Iraq was illegal. And this is in relation to paragraph 13 of
16 that resolution, which says, "... recalled, in that context, that the Council has
17 repeatedly warned Iraq that it will face 'serious consequences' as a result of its
18 continued violations of its obligations".

19 It didn't use the same language addressing the use of force and any other measures to
20 be taken by the Council. So let us be very clear here about the distinction in the
21 language and the ramifications, if we go beyond this. This is not only about law and
22 theory, this is about realpolitik. That is about the world out there.

23 Allow me to give the floor to my colleague Dire Tladi to touch upon one extra
24 element. Thank you.

25 PRESIDING JUDGE EBOE-OSUJI: [17:11:22] Very briefly, Mr Tladi, very briefly.

1 MR TLADI: [17:11:26] I shall be very brief.

2 I just wanted to say that in response to the debate that has taken place between
3 Mr Wood and Mr Kreß, I just would like to make this point in addition to all the
4 points that Mr Wood has made which are correct. There is also a reason why in use
5 of force resolutions the Council does not use the phrase "use of force". The Council
6 is essentially saying you are taking action under a particular article of the UN Charter,
7 and that article is Article 42. That article itself doesn't use "force", it uses words like
8 "necessary measures". And that's really the place where this phrase comes from and
9 so why it's not necessary then to have to say "use of force".

10 Thank you very much.

11 PRESIDING JUDGE EBOE-OSUJI: [17:12:13] So using the language of "necessary
12 measure" is enough to accommodate use of force.

13 MR TLADI: [17:12:20] (Microphone not activated)

14 PRESIDING JUDGE EBOE-OSUJI: [17:12:21] Thank you.

15 First of all Mr Robinson and then Mr O'Keefe.

16 MR ROBINSON: [17:12:26] I thank you.

17 I just also wanted to address the alleged rule that the Security Council has to be
18 explicit in order to remove immunities. I think the debate might be a bit off track,
19 because we already have UN Security Council practice directly on this point. The
20 UN Security Council has already removed immunities. It did so in Resolutions 827
21 and 944. The language they used to remove immunities was "cooperate fully". So if
22 there really is a rule that the Security Council has to be explicit to remove immunities,
23 that rule must have emerged at some point after 1994.

24 PRESIDING JUDGE EBOE-OSUJI: [17:13:08] Thank you.

25 Mr O'Keefe.

1 MR O'KEEFE: [17:13:10] Mr President, if I may, in a way the debate has gone off
2 a little bit because certain words were put into my mouth. The point I was trying to
3 make about explicitness, now I was going to go on and make the point that the
4 alternative, if you really wanted to be super explicit about it, would explicitly be to
5 remove immunities. But that was not my point at the time. My point at the time
6 was in a way a bit more generous to the Prosecution, because their argument as it is
7 framed is based on the simple proposition that the obligations of cooperation,
8 equivalent to those in the Statute, become incumbent upon Sudan by virtue of these
9 words "cooperate fully".

10 My point was that if you are going to displace the fundamental rule of treaty law,
11 which is that obligations in treaties don't bind third parties, and we are not saying of
12 course that Sudan becomes a party, but if you are going to displace what is effectually
13 the pacta tertiis rule, one of the cardinal rules of the international legal order, one
14 would want that displacement to be a bit more explicit. Now I said, look, at the very
15 least, words like "cooperate fully pursuant to the Statute" or "pursuant to the
16 obligations" or something like that, but mentioning the Statute. The resolution says
17 "pursuant to this resolution". So that was my point.

18 In relation to Article 8(2)(7), no, what removed the immunities was the Statute.
19 What removed the immunities was the Statute of the International Criminal Tribunal
20 for the former Yugoslavia. In paragraph 2, the Council decided to create a tribunal
21 as provided for in the Statute, which it then annexed, okay. So the focus is not
22 paragraph 4, the obligation of cooperation, the focus is paragraph 2, the establishment
23 of a tribunal which did not allow the invocation of immunity.

24 This brings us finally back to Article 25, because the Article 25 is not just to carry out
25 the decisions of the Council, it is to agree with them.

1 So the reason States had to swallow the abrogation of immunity in relation to the
2 ICTY was the obligation to agree with the decision taken by the Council in paragraph
3 2 to establish a tribunal with the powers in the Statute annexed to it.

4 It was not the obligation to cooperate fully in paragraph 4. So what removed it was
5 the Statute, not paragraph 4, if I can make that distinction.

6 PRESIDING JUDGE EBOE-OSUJI: [17:16:21] Mr O'Keefe, try speaking as close as
7 possible to the microphone.

8 MR O'KEEFE: Oh, sorry. Like you, I --

9 PRESIDING JUDGE EBOE-OSUJI: It makes it easier for the interpreters.

10 MR O'KEEFE: -- I become a bit excited, yes, yes.

11 PRESIDING JUDGE EBOE-OSUJI: [17:16:27] You don't have to lean onto it. Just --

12 MR O'KEEFE: [17:16:30] Sure, sure, sure.

13 That was really the extent of the point I am trying to make is that what took away
14 immunities in relation to the ICTY were not the words "cooperate fully", okay. So in
15 a sense it's a lovely argument, I just find it a bit of a Slight of hand because since
16 paragraph 2 --

17 PRESIDING JUDGE EBOE-OSUJI: [17:16:52] Can you explain, I am trying to
18 understand the difference between your position and Mr Robinson's position.

19 MR O'KEEFE: [17:16:59] Yes, right.

20 PRESIDING JUDGE EBOE-OSUJI: He is arguing that immunity is removed because
21 the Security Council referred to the case pursuant to a document that removed
22 immunity, and you are saying in the ICTY and ICTR scenario, immunity was
23 removed because there was a resolution that annexed a statute that removed
24 immunity.

25 MR O'KEEFE: Right, right.

1 PRESIDING JUDGE EBOE-OSUJI: Help me break it down.

2 MR O'KEEFE: [17:17:28] My focus is not the words "cooperate fully". They weren't
 3 what took away immunity, as it were. What took away immunity was the decision
 4 in paragraph 2 to establish the tribunal which didn't allow immunities, okay. That's
 5 my distinction to that extent.

6 Now, in cooperating fully under the Statute, okay, but the Statute also provides for
 7 Article 98(1), et cetera, et cetera. So in a sense it is a bit of a circular argument. So
 8 that was the simple point I was trying to make.

9 In terms of apologies, I would like to apologise too if I was a bit emphatic in my
 10 previous point. I am accused of having a child-like exuberance, which is probably
 11 another way of saying I'm immature, but I didn't mean to mean any disrespect to
 12 Ms Brady in my former submission.

13 PRESIDING JUDGE EBOE-OSUJI: [17:18:13] We will now take a question from
 14 Judge Bossa.

15 (Trial Chamber confers)

16 PRESIDING JUDGE EBOE-OSUJI: Yes, please, Professor Lattanzi.

17 MS LATTANZI: [17:18:35] (Microphone not activated) (Interpretation) On one point
 18 I do agree with the professor, namely, that it is not saying that fully cooperate and
 19 then remove immunity, but that in the Statute of the former Yugoslavia tribunal there
 20 was the rule which is the same. The wording is slightly different, but it is the same
 21 provision as in the Statute of the ICC.

22 The difference is that in the first case it is the Council itself that created the Statute
 23 and adopted it and thus placed in the Statute this particular exception for immunity.
 24 In the other case, an instrument is being used that already exists that contains the
 25 same rule and also in relation to Article 13(b) and the provisions of the Statute. So

1 by reference to the provision, immunity is suspended as well.

2 So from a substantive point of view the rule is to be found in the Rome Statute. And,
 3 you see, for this rule to be applicable to the Sudan, you see this stems from the
 4 decision taken by the Security Council and the provision -- well, the rule 25.

5 But just one specific point. Earlier it was said all the same, why decide in paragraph
 6 2 of the resolution, why is it that Jordan has said, why are they saying that it is the
 7 decision of the Security Council and must?

8 And Professor O'Keefe is telling us, on his side, that this means that the
 9 Security Council did not remove. But I do not agree with this, because paragraph 1
 10 attributes jurisdiction over the situation to the International Criminal Court, attributes
 11 jurisdiction in accordance with the rules of the Statute. Thus, also under Article 25,
 12 and the word "jurisdiction" is used in that very provision. Afterwards paragraph 2
 13 says that Sudan must cooperate fully. Decide, why decide? Well, why all the same.
 14 Because the obligatory nature is limited. It is limited jurisdiction over Sudan. All
 15 the same, it is the combination, the coming together of the decision taken by the
 16 Security Council and the Article 13(b) of the Statute. That is why the word "decide"
 17 must be used and not "must". Because, you see, for this combination, because of this
 18 combination the Security Council uses this provision, and we must read this
 19 provision in conjunction with. You cannot read it on its own. Paragraph 2 of the
 20 decision taken by the Security Council, it cannot be read without making reference to
 21 the Statute.

22 PRESIDING JUDGE EBOE-OSUJI: [17:23:25] Thank you very much, Professor.
 23 And Mr Newton.

24 MR NEWTON: [17:23:33] Mr President, I rise just a bit reluctantly, conscious of the
 25 hour, but I feel like in some ways we are talking around issues and I want to just call

1 us back to the core.

2 We began today with the word pragmatic and the idea of pragmatism. The real
3 critical issue here is what was the intent of the Security Council in Resolution 1593?
4 And, as I said earlier this morning, a full digesting, if you follow from the beginning
5 of the arrest warrants until today, you will see a very clear distinction in the intent
6 and in the statements of the Security Council between Sudan and the parties in Darfur
7 and the obligations incumbent on other States. It is extremely clear.

8 I simply want to read very quickly, and then I will sit down, the statement from the
9 very last, the 27th Prosecutor's report, this is the United Kingdom delegate. Now
10 notice what he says very carefully:

11 "In adopting Resolution 1593" -- this by the way, for the record, is 20 June of this year,
12 so several months ago.

13 "In adopting Resolution 1593, the Council committed to supporting the Office of the
14 Prosecutor in its efforts to investigate the situation in Darfur." Of course that's true.

15 "We must therefore act upon the Prosecutor's request to the Council to take effective
16 measures to enable the Court to carry out its mandate in Darfur," that references what
17 I said this morning, that there were these consistent and rising pleas, that what you've
18 done is insufficient, please do more, please help us. Here is the key: "in particular
19 by asserting the need for all States to cooperate with the Office's investigation."

20 What does that mean?

21 With specific reference to fugitives, "The United Kingdom continues to be frustrated
22 that fugitives from the Court, including President Al-Bashir, Mr Harun, and
23 Mr Hussein, are still travelling to certain countries unhindered. For its part the
24 United Kingdom will continue to raise its concerns with the relevant governments,
25 including through the European Union."

1 And here is the key language: "We renew our call on all States Parties to cooperate
2 with the International Criminal Court and abide by its obligations under the
3 Rome Statute."

4 If in fact as late as June of this year it was so clear in the eyes of the Security Council
5 that both of those paragraphs, both of those legal duties were fully synonymous, that
6 language would not be necessary. And you see is over and over and over again.

7 A clear distinction between the duties in common, and I completely agree with the
8 last comment, vis-à-vis Darfur, the situation in Darfur and the parties to that conflict,
9 that is extremely clear. But vis-à-vis other States Parties, the consistent call is comply
10 with their obligations in conformity with their obligations under the relevant treaty,
11 which includes Article 98.

12 And therefore no, in my reading of all these records, no Security Council member has
13 stood up and said Article 98 is irrelevant. And therefore I will conclude by exactly
14 what the United Kingdom delegate recommended:

15 "We renew our call on all States Parties to cooperate with the International Court and
16 abide by its obligations under the Rome Statute. We also urge them to consult with
17 the Court if they feel they are unable to cooperate with it for any reason."

18 Meaning, consult with the Court, cooperate with the Court, but you do not have
19 under Resolution 1593 an overarching obligation to do every single thing they ask
20 you to do. If you have a dispute with that or a need for further clarification, or you
21 find yourself in a legal quandary, consult with the Court, which in my understanding
22 is exactly what happened on the facts of this case.

23 PRESIDING JUDGE EBOE-OSUJI: [17:27:19] Thank you very much. And then we
24 will give the floor to the African Union and that will take us to the end of sitting for
25 the day.

1 Yes, Mr Jalloh, you asked for the floor.

2 MR JALLOH: [17:27:30] Thank you, your Honours, I did.

3 Your Honours, I am also mindful of the time, so I will try to be very brief.

4 My point is to do something very similar to what Mr Newton has done, which is do
5 a bit of a reminder. And the reminder is with respect to the debate and the
6 discussion we were having a little bit earlier, but that is actually still central to the
7 particular matter before us in the sense of the circles we are doing around how do you
8 interpret Security Council resolutions?

9 And I think Mr Wood made an important point yesterday where he suggested that
10 we have to remember the Security Council as a political animal. And your Honours
11 underscored that point today as well. And I think my statement earlier, that
12 Mr Tladi on behalf of South Africa also underscored that point.

13 But there is a second point that's a legal point that is very important in this particular
14 context. It relates to your question about resolution 1244 in the context of the
15 Kosovo case. And there is a nice and interesting paragraph where I think the ICJ
16 made three points that we ought to remember, and this is paragraph 94. And if you
17 bear with me very briefly, your Honours, I will just pull out the key points.

18 Essentially, the court was dealing with how then do we interpret this element that
19 you raised earlier. It said: We have to look at the treaty rules, so Articles 31 and 32
20 of the VCLT, and it says they: "may provide guidance, differences between Security
21 Council resolutions and treaties mean that the interpretation of Security Council
22 resolutions also require that other factors be taken into account." And those three
23 factors are very important for the interpretation in this Chamber of 1539.

24 One, "Security Council resolutions are issued by a single, collective body and are
25 drafted through a very different process than that used for the conclusion of a treaty."

1 Two, "Security Council resolutions are the product of a voting process as provided for
2 in Article 27 of the Charter, and the final text of such resolutions represent the view of
3 the Security Council as a body."

4 Three, "Moreover, Security Council resolutions can be binding on all Member
5 States ..." and I believe this is the point that you were emphasising, Madam Legal
6 Counsel, bringing your rich experience in the General Assembly to the discussion in
7 terms of this language. And it says: "... irrespective of whether they played any part
8 in their formulation."

9 And I will conclude with this point. This is again from the ICJ, paragraph 94:

10 "The interpretation of Security Council resolutions may require the Court to analyse
11 statements by representatives of members of the Security Council made at the time of
12 their adoption, other resolutions of the Security Council on the same issue, as well as
13 the subsequent practice of relevant UN organs and of States affected by those given
14 resolutions."

15 My submission, your Honours, is that within the context of 1593 and this whole
16 language that we are debating, "urge" and "deciding", calling upon what are the
17 effects of those. Well, in the end they cannot be taken out of context, they have got
18 to be taken in context. But then you also have to look at the reactions of State. And
19 I think from the perspective of the African Union there has been a clear position on
20 the issue of immunity, but also a clear position on the claim that non-parties would
21 have an obligation in the context of a decision that basically binds only the referred
22 State, and of course I am talking about Sudan.

23 Thank you, your Honours. I know it is late so I am going to end there.

24 PRESIDING JUDGE EBOE-OSUJI: [17:30:58] Thank you very much.

25 We will leave it there for the day and we reconvene tomorrow at 9.30, 9.30.

Appeals Hearing

(Open Session)

ICC-02/05-01/09

- 1 Not 9 o'clock. 9.30.
- 2 THE COURT USHER: [17:31:11] All rise.
- 3 (The hearing ends in open session at 5.31 p.m.)