International Criminal Court

Appeals Chamber

Situation: Darfur, Sudan

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

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

Appeals Hearing - Courtroom 1

Monday, 10 September 2018

(The hearing starts in open session at 9.32 a.m.)

THE COURT USHER: [9:32:50] All rise.

The International Criminal Court is now in session.

Please be seated.

PRESIDING JUDGE EBOE-OSUJI: [9:33:18] Thank you very much.

Court officer, please put the case on the record.

THE COURT OFFICER: [9:33:30] Good morning, Mr President, your Honours.

Situation in Darfur, Sudan, in the case of The Prosecutor versus Omar Hassan Ahmad Al-Bashir, case reference ICC-02/05-01/09 before Judge Chile Eboe-Osuji, presiding, Judge Howard Morrison to his right, Judge Piotr Hofmański to his left, Judge Luz del Carmen Ibáñez Carranza to the far right, Judge Solomy Balungi Bossa to the far left.

And for the record, your Honour, we are in open session.

PRESIDING JUDGE EBOE-OSUJI: [9:34:13] Thank you very much.

We will take appearances for the record, beginning with the appellant's counsel.

MR HMOUD: [9:34:30] Mr President, members of the Appeals Chamber, the Hashemite Kingdom of Jordan is grateful to the Chamber for the present hearing in its appeal against the decision of Pre-Trial Chamber II of 11 December 2017.

It's an honour for me to introduce Jordan's legal team for the present appeals proceedings. I am Mahmoud Hmoud, Ambassador of the Hashemite Kingdom of Jordan to the Republic of Singapore, and a member of the International Law Commission of the United Nations.

The other members of the Jordan team are Professor Sean Murphy of George Washington University to the far left, and he is also a member of the International Law Commission. And to my left, Sir Michael Wood, a member of the English Bar and a member of the International Law Commission. And behind me is Mr Alfredo Crosato Neumann from the Graduate Institute of International and Development Studies of Geneva and member of the Peruvian Bar. And Mr Amer Hadid from the Embassy of Jordan to The Netherlands. Thank you, Mr President.

PRESIDING JUDGE EBOE-OSUJI: [9:35:42] Thank you very much.

And then we'll take appearances from the respondent's counsel.

MS BRADY: [9:35:49] Good morning, your Honours. My name is Helen Brady. I'm the senior appeals counsel, the Prosecution. With me today is Mr Rod Rastan, legal advisor. And then to his left is Mr Matthew Cross, appeals counsel. And behind me Ms Priya Narayanan, Ms Nivedha Thiru, both appeals counsel. And our case manager, Ms Carmen Garcia Ramos. Thank you very much.

PRESIDING JUDGE EBOE-OSUJI: [9:36:17] Thank you very much.

And appearances from the counsel for African Union.

MS NEGM: [9:36:25] Good morning, your Honours.

On behalf of the African Union I would like to present myself first. My name is Namira Negm, I'm an Ambassador and the Legal Counsel of the African Union. In my team today is Professor Dire Tladi from the University of Pretoria, and he is a professor of international law and a member of the International Law Commission.

Still on his way to The Hague, will arrive today, my colleague Professor Charles Jalloh from University of Florida, and he's also a member of the International Law Commission.

Behind me is Ms Lami Omale from my office, legal associate. And also Mr Sean Yau, assistant to us in this case.

I thank you.

PRESIDING JUDGE EBOE-OSUJI: [9:37:12] Mr Jalloh is not yet in the courtroom. But you're saying he will be joining us? Thank you very much.

I will take appearances from counsel for the League of Arab States.

MR ABDELAZIZ: [9:37:30] Good morning, your Honour. It is my privilege and honour (microphone not activated)

THE INTERPRETER: Microphone please.

MR ABDELAZIZ: -- the League of Arab States. My name is Maged Abdelaziz. Sorry.

Good morning, your Honours. It is my privilege and honour to be the only representative representing the League of Arab States. My name is Maged Abdelfatah Abdelaziz, I'm the Ambassador and the Permanent Observer of the League of Arab States to the United Nations in New York.

PRESIDING JUDGE EBOE-OSUJI: [9:38:09] Thank you very much.

And then we will move to appearances from other friends of the Court, the legal scholars, taking it in turn as seated.

Can we have you please put your names on the record.

MR KREß: [9:38:33] Mr President, your Honours, my name is Claus Kreß, I'm a professor of law at the University of Cologne.

MR ROBINSON: [9:38:47] Mr President, my name is Darryl Robinson. I'm a

professor at Queen's University in Canada. I'm here representing a team of academics which includes Professor Robert Cryer, Professor Meg de Guzman, Professor Fannie Lafontaine, Professor Valerie Oosterveld, Professor Carsten Stahn, and myself.

Thank you.

PRESIDING JUDGE EBOE-OSUJI: [9:39:07] But for the record, you are the only one in the courtroom.

MR ROBINSON: [9:39:11] That's correct.

PRESIDING JUDGE EBOE-OSUJI: [9:39:12] Thank you very much.

MR NEWTON: [9:39:18] Good morning, Mr President, Honourable Bench. My name is Professor Mike Newton from Vanderbilt University Law School in Nashville, Tennessee.

PRESIDING JUDGE EBOE-OSUJI: [9:39:26] Thank you.

MR O'KEEFE: [9:39:31] Mr President, your Honours, my name is Roger O'Keefe. I am the professor of international law at Bocconi University in Milan, and honorary professor of law at University College of London, where until Monday and when I submitted my written submissions, I was professor of public international law.

PRESIDING JUDGE EBOE-OSUJI: [9:39:48] Any more appearances from?

MS LATTANZI: [9:39:55] (Interpretation) My name is Flavia Lattanzi and I am a professor at the LUISS University in Rome. I am teaching international public law there.

Thank you.

PRESIDING JUDGE EBOE-OSUJI: [9:40:10] Is there any more appearances to be made on the record?

We're done. Thank you very much.

The Appeals Chamber is convened to hear oral submissions in the appeal of the Hashemite Kingdom of Jordan, hereafter "Jordan", against the decision of Pre-Trial Chamber II dated 11 December 2017. In that decision, the Pre-Trial Chamber determined as follows:

One, that Jordan failed to comply with its obligation, under both the Rome Statute and UN Security Council Resolution 1593 (2005), to comply with a request by the Court for the arrest and surrender of President Omar Al-Bashir of Sudan and, consequently;

Two, that Jordan must be referred to the Assembly of States Parties to the Rome Statute, to which Jordan is a party, and to the UN Security Council.

The question at the heart of this appeal has troubled modern international law, especially, though not exclusively, as it is applied in this Court. This is the very first time that the Appeals Chamber has been called upon to consider that question.

The question, to put it rather broadly, but also specifically in a sense, is whether a State Party to the Rome Statute is justified in declining to execute the Court's request for cooperation, when the request involves arresting President Omar Al-Bashir of Sudan and surrendering him to the Court. In particular, is the State that declines that request justified in doing so, on the basis that President Omar Al-Bashir enjoys immunity as Head of State, which immunity that State is bound to respect as an international obligation that is in competition with that State's obligation to cooperate with the ICC?

I am bound, of course, to observe that the issue before us comes in the manner of the apparent procedural requirement that the Court is to obtain consent from a third State whose immunity would be violated by a State Party that is obligated under the Rome Statute to comply with the Court's request for cooperation. For obvious reasons,

however, that procedural requirement does not obscure the substantive inquiry into the subsistence or existence of any such obstacle of immunity in the first place.

In order to ensure that we have cast our thinking net as far and wide as is reasonably possible, we issued a call for expressions of interest to international organisations, specifically the United Nations, the African Union, the League of Arab States, the European Union, and the Organisation of American States, to enable us invite them to give us the benefit of their observations.

THE INTERPRETER: [9:43:40] Message from the booth. If the Presiding Judge could kindly slow down.

PRESIDING JUDGE EBOE-OSUJI: [9:43:44] That call for expression of interest was also extended to the world's legal scholars who have done research and writing in this subject area.

Because of their past, potential and general interest in the issue, we also invited expressions of interest from States Parties to the Rome Statute. And, most importantly, we invited the same from the Government of Sudan and President Al-Bashir, because of their own very specific interest in the matter.

Of the international organisations and States to whom the call had gone, only the African Union and the League of Arab States expressed interest in participating. We invited them to file written briefs, and they did. As we did with everyone who filed written submissions at our invitation, we further invited them to attend these oral hearings. They accepted, and counsel appearing on their behalf are with us today.

We are grateful to everyone who responded to our invitation, and to all those who filed written submissions, and all of you who found time to join us.

Regrettably, due to logistical reasons, we could not accommodate all the legal scholars who had expressed interest in participating in the written and oral debates.

We have, however, selected a cross-section among them on the basis of seniority as scholars, demonstrated record of research and publication on the subject matter under consideration and uniqueness of their views.

We are confident that their participation will assist us in ensuring that we have left no stone unturned in the thinking process that is called for in our decision on this question.

Unfortunately, we have received no expression of interest in the appeal from either the government of Sudan or from President Al-Bashir. They were always welcome to participate in these proceedings had they expressed interest, exactly in the same way that we had been willing to welcome the participation of international organisations, States and persons directly or indirectly concerned in the matter.

And because of the particular interest that Sudan and President Al-Bashir have in this matter, we will be glad to welcome them amongst us at any time in the course of these hearings.

This Court belongs to the whole world. It is no less so for the people of Sudan. That we are all convened here today bears true testament to that unavoidable reality.

Now, a minor housekeeping matter. It is truly impressive to know that all counsel in the courtroom are women and men of recognized distinction. Esteemed titles of academic and national merits bear proof to such distinction. It is often the case that we receive in this Court counsel from all over the world who have been similarly honoured in their home countries and their universities. However, the tradition in our courtroom, for those unfamiliar with it, is that we address all counsel by the uniform title of "Mr" or "Ms". It is no sign of disrespect. It is just a rule borne out of convenience.

Now to the substance of our proceedings. I must set the stage. I do so not only for

the benefit of anyone who may not be familiar with the matter before us or the context of it. I set the stage also because of particular features of the case that it is hoped will guide the submissions of counsel in order to give the proper depth and dimension to their debate.

On 31 March 2005, the Security Council of the United Nations adopted Resolution 1593 (2005). By that resolution, the Security Council referred the situation in Darfur to the Prosecutor of this Court. The Security Council is entitled to do this pursuant to Article 13(b) of the Rome Statute. Ordinarily a treaty creates rights and obligations for only the States that are parties to it. But Article 13(b) of the Rome Statute provides for the possibility that the Security Council may refer a situation to the ICC Prosecutor pursuant to Chapter VII of the UN Charter, thereby bringing within the Court's jurisdiction a situation concerning a country that is not a State Party to the Rome Statute on condition that such a referral is made pursuant to Chapter VII of the UN Charter. It is recalled that Chapter VII of the Charter gives the Security Council the prerogative to maintain and manage international peace and security as well as contain threats to them.

So it comes as no surprise that the UN Security Council referred the situation to the ICC Prosecutor, after having determined, quote, "that the situation in Sudan continues to constitute a threat to international peace and security." That is one critical element of Resolution 1593 (2005).

Another critical element of the resolution is that the very first thing that the Security Council did in it was to take note of "the report of the International Commission of Inquiry on violations of international humanitarian law and human rights in Darfur." That five-person Commission was chaired by the late Antonia Cassese. The other four members of the commission were Mohamed Fayek, Hina Jilani, Dumisa

Ntsebeza and Theresa Striggner-Scott. We may conveniently refer to the commission by the shorthand name of "the Cassese Commission".

It may of course be fitting to note in passing that Cassese was a most eminent luminary in the field of international criminal law. Among his many accomplishments, he was the first president of the International Criminal Tribunal for the former Yugoslavia and served at that court as a judge for many years.

For present purposes, however, it is not necessary to conceive that value into the report of the Commission that he led.

We must though advert our minds to certain key findings of that report, noting its proper place in Resolution 1593 (2005).

So then what were some of those key findings of the Cassese report?

We may begin by recalling that the Commission was set up pursuant to Security Council Resolution 1564 (2004), which requested the UN Secretary-General to set it up with the following terms of reference:

(1) to investigate reports of violations of international humanitarian law and human rights law in Darfur by all parties;

(2) to determine whether or not acts of genocide have occurred;

(3) to identify the perpetrators of violations of international humanitarian law and human rights law in Darfur and;

(4) to suggest means of ensuring that those responsible for those violations are held accountable.

The Commission began its work on 25 October 2004. Three months later on 25 January 2005, they rendered their report to the UN Secretary-General, who then was recently late Mr Kofi Annan, who promptly submitted the report to the Security Council.

So what did they find in those three months? The report included the following key findings.

First, as regards the first question indicated in their terms of reference, that is to say, "investigate reports of violations of international human rights law and humanitarian law", the Commission reported as follows, amongst other things: "Based on a thorough analysis of the information gathered in the course of its investigation, the Commission established that the Government of the Sudan and the Janjaweed are responsible for serious violations of international human rights and humanitarian law amounting to crimes under international law."

For particulars of that finding, the Commission continued as follows:

"In particular, the Commission found that government forces and militias conducted indiscriminate attacks, including killing of civilians, torture, enforced disappearances, destruction of villages, rape and other forms of sexual violence, pillaging and forced displacement, throughout Darfur. These acts were conducted on a widespread and systematic basis, and therefore may amount to crimes against humanity. The extensive destruction and displacement have resulted in a loss of livelihood and means of survival for countless women, men and children. In addition to the large scale attacks, many people have been arrested and detained, and many have been held incommunicado for prolonged periods and tortured. The vast majority of the victims of all of these violations happened from the Fur, Zaghawa, Massalit, Jebel Aranga and other so-called 'African tribes'."

The Commission also took care to reflect the government's side of this story. In that connection, the Commission reported as follows:

"In their discussions with the Commission, Government of Sudan officials stated that any attacks carried out by government armed forces in Darfur were for

counter-insurgency purposes and were conducted on the basis of military imperatives. However, it is clear from the Commission's findings that most attacks were deliberately and indiscriminately directed against civilians. Moreover even if rebels or persons supporting rebels were present in some of the villages - which the Commission considers likely in only a very small number of instances - the attackers did not take precautions to enable civilians to leave the villages or otherwise be shielded from attack. Even where rebels may have been present in villages, the impact of the attacks on civilians shows that the use of military forces was manifestly disproportionate to any threat posed by the rebels."

I have been requested to slow down for the interpreters and I shall do so.

That was an unquote.

I pause here to express the hope that these allegations of perpetration or complicity of the Government of Sudan or other officials in relation to these violations are to be kept in mind and addressed during the debate: Concerning whether the Security Council had or ought reasonably to have had in mind the immunity of officials of the Government of Sudan as Resolution 1593 (2005) was being drafted and adopted.

Now returning to the findings of the Commission, we will now consider what they found as regards the second question, which is whether or not, quote and unquote, "acts of genocide occurred".

I shall come to that matter presently, but it is more convenient to address at this juncture the findings of the commission as concerns their mandate to "identify the perpetrators of violations of international humanitarian law and human rights law in Darfur".

Here again I pause to observe that we must keep the Commission's findings in mind for purposes of the debate as to whether the Security Council had, or ought

reasonably to have had in mind immunity of officials of the Government of Sudan when the Security Council Resolution 1593 (2005) was being drafted and adopted. So what did the Commission find in relation to the identity of the suspects? It found as follows:

"Those identified as possibly responsible for the mentioned violations consist of individual perpetrators, including officials of the Government of Sudan, members of militia forces, members of rebel groups and certain foreign army officers acting in their personal capacity. Some government officials, as well as members of militia forces, have also been named as possibly responsible for joint criminal enterprise to commit international crimes. Others are identified for their possible involvement in planning and/or ordering the commission of international crimes or of aiding and abetting the perpetration of such crimes. The Commission also has identified a number of senior government officials and military commanders who may be responsible, under the notion of superior (or command) responsibility, for knowingly failing to prevent or repress the perpetration of crimes. Members of rebel groups are named as suspected of participating in a joint criminal enterprise to commit international crimes and as possibly responsible for knowingly failing to prevent or repress the perpetration of crimes committed by rebels."

Now, this should be a convenient place to return to the Commission's findings on the question of genocide. In that regard the Commission reported as follows:

"The Commission concluded that the Government of the Sudan had not pursued a policy of genocide."

Notably, that was a conclusion regarding the policy of genocide and about whether the government as such had pursued such a policy. It is to be recalled that the Commission's terms of reference had asked them whether acts of genocide had been

committed. And to that the Commission said as follows:

"Arguably, two elements of genocide might be deduced from the gross violations of human rights perpetrated by government forces and militias under their control. These two elements are first the actus reus consisting of killing or causing serious bodily or mental harm, or deliberately inflicting conditions of life likely to bring about physical destruction; and, second, on the basis of a subjective standard, the existence of a protected group being targeted by the authors of criminal conduct."

Continuing, the Commission observed as follows:

"However, the crucial element of genocidal intent appears to be missing, at least as far as the central Government authorities are concerned. Generally speaking the policy of attacking, killing and forcibly displacing members of such tribes does not evince a specific intent to annihilate, in whole or in part, a group distinguished on racial, ethnic, national or religious grounds. Rather, it would seem that those who planned and organised attacks on villages pursued the intent to drive the victims from their homes, primarily for purposes of counter-insurgency warfare."

Having said all that, the Commission took care to register two important caveats to its findings on the question of genocide. First, the following:

"The Commission does recognise that in some instances individuals, including Government officials, may commit acts with genocidal intent. Whether this was the case in Darfur, however, is a determination that only a competent court can make on a case-by-case basis."

And then the Commission said this:

"The conclusion that no genocidal policy has been pursued and implemented in Darfur by the Government authorities, directly or through the militias under their control, should not be taken in any way as detracting from the gravity of the crimes

perpetrated in that region. International offences such as the crimes against humanity and war crimes that have been committed in Darfur may be no less serious and heinous than genocide."

Now, for purposes of our hearings, we must take care to put these findings on the question of genocide in their procedural legal context. That context is this:

On 12 July 2010, the Pre-Trial Chamber issued a decision on a second warrant of arrest against President Al-Bashir. The significance of that being a second warrant of arrest is this:

The crimes attaching to the first warrant of arrest, issued on 4 March 2009, were crimes against humanity and war crimes. The Pre-Trial Chamber had declined, on that occasion, to extend the warrant of arrest to the crime of genocide. The Pre-Trial Chamber's reasons for declining to do so was because the Prosecutor had sought to infer genocidal intent from the material submitted to the Pre-Trial Chamber for purposes of the arrest warrant. But the Pre-Trial Chamber was not persuaded that genocidal intent was the only reasonable inference that could be drawn from the materials in question. The Prosecutor appealed that decision. On appeals, the Appeals Chamber reversed the Pre-Trial Chamber on the point. The Appeals Chamber held as follows: For purposes of issuance of arrest warrant, as opposed to conviction on the charge, it was enough that the genocidal intent was one inference that could reasonably be drawn from the available evidence. It need not be the only inference, reasonable.

Thus, in their decision of 12 July 2010, the Pre-Trial Chamber felt guided by the Appeals Chamber decision and issued a warrant of arrest against President Al-Bashir for three modes of genocide: Genocide by killing; by causing serious bodily or mental harm; and by deliberately inflicting on each target group conditions of life

calculated to bring about the group's physical destruction.

Perhaps, the point is to say this, in respect of Cassese Commission report as concerns the question of genocide, the Pre-Trial Chamber has since issued an arrest warrant against President Bashir, on grounds that there are reasonable grounds to believe that he must stand trial for the crime of genocide.

Now, let us return to another important element of the Cassese Commission report. Having found that violations of international humanitarian law and human rights law had occurred in Darfur, and having identified possible suspects of those violations, the Commission had to account for the final mandate given to it by the Security Council. The mandate was to, "suggest means of ensuring that those responsible for such violations are held accountable". In that regard, the Commission suggested as follows:

"The Commission strongly recommends that the Security Council immediately refer the situation of Darfur to the International Criminal Court pursuant to Article 13(b) of the ICC Statute. As repeatedly stated by the Security Council, the situation constitutes a threat to international peace and security. Moreover, as the Commission has confirmed, serious violations of international human rights law and humanitarian law by all parties are continuing. The prosecution by the ICC of persons allegedly responsible for the most serious crimes in Darfur would contribute to the restoration of peace in the region."

As a crucial consideration in making this recommendation, the Commission observed as follows, amongst other things:

"The Sudanese justice system is unable and unwilling to address the situation in Darfur. This system has been significantly weakened during the last decade. Respective laws that grant broad powers to the executive have undermined the

effectiveness of the judiciary, and many of the laws in force in Sudan today contravene basic human rights standards. Sudanese criminal laws do not adequately proscribe war crimes and crimes against humanity, such as those carried out in Darfur, and the Criminal Procedure Code contains provisions that prevent the effective prosecution of these acts. In addition, many victims informed the Commission that they had little confidence in the impartiality of the Sudanese justice system and its ability to bring to justice the perpetrators of serious crimes committed in Darfur. In any event, many have feared reprisals in the event that they resort to the national justice system. The measures taken so far by the Government to address the crisis have been both grossly inadequate and ineffective, which has contributed to the climate of almost total impunity for human rights violations in Darfur."

Those are some of the crucial elements of the Cassese Commission report that the Security Council noted in Resolution 1593 (2005), when referring the situation in Darfur to the ICC Prosecutor.

And here we must stress that the reason we have reviewed the Cassese Commission report as we have done is simply, and purely, because all the relevant authorities are agreed that a report like that is part of what we must consider in the task of interpreting resolutions of the Security Council, such as Resolution 1593 (2005).

From the point of view of Security Council's exercise of Chapter VII powers to contain threats to international peace and security, in relation to Darfur, Resolution 1593 (2005) will dominate our debate and rightly so. But, it may be important to observe that Resolution 1593 (2005) marks the zenith of the trajectory. But the journey started earlier.

Notably, on 26 May 2004, the President of the Security Council made a statement on behalf of the Council.

On 30 July 2004, the Security Council adopted Resolution 1556 (2004), under Chapter VII powers, having determined that the situation in Sudan "constitutes a threat to international peace and security and to stability in the region".

On 18 September 2004, the Security Council adopted Resolution 1564 (2004), acting under Chapter VII powers, having determined that "the situation in Sudan constitutes a threat to international peace and security and to stability in the region".

And very significantly, as we have noted, it was pursuant to that resolution that the Cassese Commission was set up.

Following the Commission's report on 25 January 2005, crucial elements of which report we have already reviewed, the Security Council then adopted 1593 (2005), on 31 March 2005.

During the debate on the adoption of the resolution, all members of the Security Council, even those abstaining from voting, agreed that the climate of impunity prevailed in Darfur region and it needed a joint response of international community in order to put an end to it.

Those are some of the backgrounds to our proceedings.

And, I stress, we scope them now, in the manner of vexing questions, posed up front, in the hope that counsel will take them in the stride of submissions, and help us resolve the important questions that these considerations raise in the context of the matter before us.

Turning now to the conduct of these proceedings, it is recalled that on 27 August 2018, the Appeals Chamber issued an order setting out some of the questions which it wishes to hear counsel address during their submissions. The order also indicated the schedule for the conduct of the proceedings. A revised order was subsequently issued on 30 August 2018, adjusting the days allotted for the hearing and time

allocated for submissions of counsel.

Counsel are urged to avoid mere repetition of arguments already made in their filings. We have read them and will continue to do so. Counsel are to address the issues outlined in the order, being guided by the questions therein set out. We leave it to counsel to speak to those questions in the manner that is most convenient to them, emphasising what they wish to emphasise, and they need not address every point raised in the questions, using the questions as guides to what we want to hear.

To help us manage time and cover more ground, counsel are strongly encouraged to refrain from going over grounds already covered by those who spoke earlier in agreement; unless there is a substantial disagreement, in a way that requires more to be said. When there is agreement, it will do simply to say so and move on to other subjects.

Naturally, the issues are complex. There will, inevitably, be other questions arising which the Judges will be asking either during the flow of the submissions or at any other convenient moment.

May I also remind counsel that they are expected to complete their submissions within the indicated time frame, regardless of questions from the Bench. It is all in the nature of the exercise.

The court officer will monitor the time and will indicate to the party or participant when it is about to expire; about five minutes to time.

Now, in order to avoid monotony of the voice, the Judges will take turns reciting onto the record the set questions contained in the order of 27 August 2018.

Now, without further ado, I will call upon, I will call upon my colleague Judge Morrison to put on record the first cluster of questions.

But I was just handed up a note that someone had entered the courtroom that needed

to be put on the record that will reflect the new addition.

MR MAGLIVERAS: [10:15:11] Mr President, my name is Konstantinos Magliveras, and I am appearing as an amicus curiae. Thank you.

PRESIDING JUDGE EBOE-OSUJI: [10:15:19] Thank you very much.

Now, during the appropriate time the Registrar will find him the proper attire for the courtroom. But for now, welcome. Thank you.

And Judge Morrison, over to you.

JUDGE MORRISON: [10:15:36] These questions are already known, but it's necessary to read them out so that they form part of this hearing's public record.

Group A questions: Applicable law and its interpretation and Head of State immunity under customary international law and conventional law.

Question (a): According to Article 31 of the Vienna Convention on the Law of Treaties, otherwise known as the Vienna Convention, the provisions of a treaty must be interpreted in the light of its context, including the preamble, and its object and purpose.

What is the significance of such a contextual interpretation of the Statute, in the light of its object and purpose as set out in its preamble, namely "to put an end to impunity for the perpetrators of [the most serious crimes of concern to the international community as a whole] and thus contribute to the prevention of such crimes", in the determination of the appeal?

(b): In interpreting the relevant provisions of the Statute, at what stage, if at all, should guidance be sought from customary international law, given the terms of Article 21(1) of the Statute?

(c): In deciding the issues on appeal, how should the Appeals Chamber ensure that Article 21(3) of the Statute is complied with?

(d): Article 2(3)(a) of the International Covenant on Civil and Political Rights stipulates that States must ensure that "any person whose rights or freedoms as herein recognised are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity". What is its relevance, if any, vis-à-vis the position of the Hashemite Kingdom of Jordan regarding Mr Al-Bashir's alleged immunity?

(e): According to Article 64 of the Vienna Convention, jus cogens norms are "peremptory norms of general international law". Is the prohibition against committing international crimes, such as those allegedly committed by Mr Al-Bashir, including genocide by killing and the crimes against humanity of extermination, torture and rape, a jus cogens rule?

(f): Can a customary rule or conventional international law provision on immunities be superior to a jus cogens rule?

(g): What is the origin and nature of Head of State immunity in international law? Is it a right or a privilege, and what is the relevance of such a distinction, if any, to the case at hand?

(h): Are there any limits or restrictions to Head of State immunity and, if so, on which bases?

(i): Leaving aside the potential impact of the Statute and a referral to the Court from the United Nations Security Council, otherwise the Security Council, does a Head of State enjoy immunity from arrest by another State under customary international law when the arrest is sought by an International Criminal Court in respect of international crimes?

(j): When has sovereign immunity been pleaded, successfully or otherwise, before, or in relation to, an International Criminal Court?

(k): The International Court of Justice in the Arrest Warrant case refers to a potential exception to Head of State immunity under customary international law in respect of "criminal proceedings before certain international criminal courts, where they have jurisdiction". How should this be understood and what is its relevance, if any, to the case at hand?

(l): Are there consistent State practice and opinio juris requirements for the purposes of identifying a rule of customary international law in the area of Head of State immunity, where the arrest is being sought at the instance of an international criminal court? If so, is there sufficient *State practice in this area to identify the existence of the rule of customary international law, that a Head of State enjoys immunity from arrest by another state when the arrest is sought by an international criminal court in respect of international crimes? Has there been any change in State practice or opinio juris in this regard since 1998, when the Statute was adopted?

(m): Is Article 98(1) of the Statute an indication of the existence of Head of State immunity under customary international law when the arrest is sought by the Court? Or does it concern such immunity that remains opposable in the circumstances, taking into account possible unavailability of immunity otherwise applicable according to customary rules or treaty provisions in international law?

(n): If it were to be found that customary international law recognises an exception to Head of State immunity if arrest is sought by the Court, what effect, if any, would this have on conventional international law immunities?

(o): How, if at all, should one balance Head of State immunity against responsibility for the international crimes allegedly committed by Mr Al-Bashir which amount to core violations of human rights?

(p): What is the impact, if any, of the Convention on the Prevention and Punishment

of the Crime of Genocide on Head of State immunity?

(q): What is the relevance, if any, of, and the applicable basis for, the abuse of rights principle and the maxim that no one may profit from his own wrongdoing to the case in hand?

PRESIDING JUDGE EBOE-OSUJI: [10:22:22] Thank you very much, Judge Morrison. Now, the first speaker in the matter would be the appellant, the Hashemite Kingdom of Jordan. And we know that perhaps each of these questions will require a Ph.D. thesis, but do your best in the 45 minutes you have.

Thank you.

MR HMOUD: [10:22:56] Mr President, members of the Chamber, I shall introduce Jordan's case in this appeal. Sir Michael Wood will then set our position on the first ground of appeal, and in doing so respond to questions from the Chamber under group A. As the Court is aware, this is an appeal from Pre-Trial Chamber II'S decision of 11 December 2017.

The facts underlying that decision will be addressed in greater detail in later parts of Jordan's presentation. For the present purposes, I note that Jordan received a communication from the Court's Registry stated 21 February 2017 concerning a possible visit to Jordan by Sudan's President Omar Al-Bashir, as part of the 28th Summit of the League of Arab States in March 2017.

That communication requested Jordan's assistance in arresting President Al-Bashir and surrendering him to the Court.

Jordan responded to the Court by note verbale on 24 March 2017 providing information as to the dates of the summit and the invitation that had been extended to representatives of Sudan to attend, while noting that there was no official confirmation that President Al-Bashir would be among the attendees.

On 28 March 2017, Jordan sent a further note verbale informing the Court that President Al-Bashir was expected to attend the summit. Moreover, Jordan indicated that it was consulting with the Court because of its belief that President Al-Bashir was immune from the exercise of Jordan's criminal jurisdiction. Having regard to Article 98 of the Rome Statute, which Jordan did not regard as affected either by Article 27 of the Statute or by Security Council resolution 1593 of the year 2005, Jordan considered that President Al-Bashir enjoyed immunity from arrest in Jordan and further that such immunity had not been waived by Sudan.

Jordan received no response from the Court to this communication. Thereafter, on March 29, 2017, President Al-Bashir attended the Arab League Summit in Amman, and he departed Jordan's territory the next day.

In the months that followed, Jordan provided further information and explanations of Jordan's legal position explaining why we regarded President Al-Bashir, a sitting Head of State, a sitting Head of State, to be immune from arrest. This was done principally in notes verbale addressed to the Court on 30 June 2017 and 6 October 2017.

Despite these explanations, the Pre-Trial Chamber decided in December 2017, without a hearing, that Jordan had failed to act in compliance with its obligations under the Rome Statute. The Pre-Trial Chamber found, by a vote of 2 to 1 majority, that Jordan failed to comply with its obligations under the Statute by not executing the Court's request for the arrest of Omar Al-Bashir and his surrender to the Court while he was on Jordan's territory on 29 March 2017.

The Chamber further decided, also by a majority, I quote, "that the matter of Jordan's non-compliance with the request for arrest and surrender of Omar Al-Bashir to the Court be referred, through the President of the Court in accordance with Regulation

109(4) of the Regulations of the Court, to the Assembly of States Parties of the Rome Statute and the United Nations Security Council".

Jordan maintains that the December 2017 decision entailed various errors of law and fact. On 21 February 2018, Jordan obtained leave from Pre-Trial Chamber to appeal the decision on three grounds. On 12 March 2018, Jordan filed its appeals brief, and on 3 April 2018 the Prosecution responded. As a part of this appeal, the Pre-Trial Chamber's decision on referral has been suspended.

Amicus briefs were then filed by eleven professors of international law, to which Jordan and the Prosecution responded on 16 July 2018. Amicus briefs were also filed by the African Union and the Arab League, to which Jordan and the Prosecution responded on 14 August 2018. The African Union and the League of Arab States, which together represent almost 70 States, agreed with Jordan's position regarding its three grounds of appeal, and rejected the Prosecution's contrary assertions.

In summary, our position regarding the appeal is as follows: With respect to the first ground of appeal, the Pre-Trial Chamber erred in its conclusions regarding the effects of the Rome Statute upon immunity of President Al-Bashir. These conclusions were that Article 27(2) of the Statute excludes the application of Article 98; that Article 98 establishes no rights for States Parties; that Article 98(2) does not apply to the 1953 Convention on the Privileges and Immunities of the Arab League; and that, even if Article 98 applied, it would provide no basis for Jordan not to comply with the Court's requests.

With respect to the second ground of appeal, the Chamber erred in concluding that Security Council resolution 1593 affected Jordan's obligations under customary international law to accord immunity to President Al-Bashir.

With respect to the third ground of appeal, even if the Chamber's decision of

December 2017 with respect to non-compliance was correct quod non, the Chamber acted on the basis of incorrect conclusions of fact and law, and further abused its discretion, in deciding to refer such non-compliance to the Assembly of States Parties and the Security Council.

Jordan wishes to stress that these grounds of appeal touch upon important questions that are at the core of the functioning of the Court and of international legal order. They concern the arrest and surrender of a sitting Head of State that is not a party to the Rome Statute. They concern his immunity from foreign criminal jurisdiction of a State to which he has travelled to attend a summit meeting of the Arab League. They concern the conflict-avoidance rules set forth in Article 98 of the Rome Statute. They concern the effects of the referrals of Security Council under Article 13(b) and the proper interpretation of the Security Council resolutions. And, importantly, they concern the manifestly unfair circumstances in which a State Party to the Statute, Jordan, was referred to the Security Council and to the Assembly of States Parties for its alleged violation of the Statute.

Mr President, it is important to be clear at the outset what this appeal is about and what it is not about. As I indicated, Jordan appealed the December 2017 decision on three grounds, and three grounds only. Pre-Trial Chamber II granted Jordan leave to appeal on these three grounds and only on these three grounds. Again, when Jordan requested leave to appeal, the Prosecution attempted to reframe the issues so as to considerably broaden their scope, but the Pre-Trial Chamber declined to permit this. Jordan's appeals brief, its main written pleadings, focused exclusively on those three grounds, and so did the Prosecution's response.

Notwithstanding this, Mr President, we now see an evolution in the proceedings. The Appeals Chamber issued on 29 March an order inviting all States, certain

international organisations and professors of international law to submit as amicus curiae, amici curiae. Some professors were given leave and as a result several have submitted observations, and this seems to have opened the door for a whole range of new arguments and theories to be put forward which, in Jordan's view, relate to issues that do not arise in this appeal from the December 2017 decision.

The Prosecution appears to have seized the opportunity to widen the appeal. Perhaps not entirely convinced of the arguments advanced in its response to Jordan's appeals brief, the Prosecution now seems to think that Appeals Chamber can consider all kinds of arguments, theories and even hypothesis that the Appeals Chamber -- that have nothing to do with the December 2017 decision.

They now say, for example, that there is an exception under customary international law to the immunity of a sitting Head of State. Alternatively, and contradicting themselves, they now say that immunity simply does not exist when the arrest and surrender of a sitting Head of State is sought by an international criminal court.

They shift gears further so as to say that there is an expressed removal of immunity in Security Council Resolution 1593, that there exists here a situation of abuse of rights, that Genocide Convention may have the effect of removing any applicable immunity and so on.

Taken together, Jordan counts at least six different hypotheses, six alternative arguments, advanced or supported by the Prosecution in order to maintain that Pre-Trial Chamber II came to the right conclusion in December 2017 decision.

The Prosecution's strategy seems to be put forward as many disparate arguments as possible. One reason for this might be that they are not convinced by Pre-Trial Chamber II's actual legal analysis, which says nothing about the implicit waiver, abuse of rights and so on.

Another reason may be to compel Jordan to respond to new and irrelevant arguments at a late stage of this appeal and to only do so orally and within a very limited period of time. Perhaps they hope to distract attention from the real issues that arise from December 2017 decision. The Prosecution's approach seems to be that legal process is irrelevant, that limited scope of this appeal is irrelevant, and that the only thing that matters is the result that somehow on some legal theory or hypothesis finds that Jordan should have arrested President Al-Bashir even if that legal theory has no connection whatsoever to the Pre-Trial Chamber II actual decision.

Mr President, in our view this is an abusive strategy, one that puts Jordan, the appellant party, the party whose rights and obligations are at stake, in a highly disadvantaged position in the present proceedings and we wish to place our discontent on the record.

Mr President, the Appeals Chamber will need to decide how to approach the three grounds of appeal now before you. Perhaps you will decide that three grounds are irrelevant and that the scope of these proceedings may be expanded well beyond the bounds of the decision below. Indeed, you may decide that there are no limits as regards to the arguments that can be put forward against Jordan, at whatever stage of the proceedings, and that the Chamber can make additional findings of fact and law not even pled before you.

Perhaps this is the way the Appeals Chamber wishes to proceed. The large number and wide range of questions addressed by the Chamber to all participants just a few days before the opening of this hearing suggests this may be so. But if this is the case, Jordan is of the respectful view that this is not an appellate proceeding, but something in the nature of an advisory opinion, one that has very little to do with Jordan.

Before I conclude, Mr President, I wish to stress four points.

First, Jordan is committed to the fight against impunity and the need to bring to justice those responsible for crimes within the jurisdiction of the Court. Jordan has been one of this Court's strongest supporters since the inception and remains so today. Its representatives have played an important role in the negotiation and implementation of the Rome Statute.

Second, the fight against impunity cannot be at the expense of fundamental rules and principles of international law aimed at securing and maintaining the proper functioning of States, sovereign equality and peaceful relations among States, including rules on immunity. To overlook such rules and principles would do more harm than good in the long term; the maintenance of peaceful relations among States is one of the essential elements for fostering State cooperation and preventing those crimes. These goals should not be seen as opposing, but rather complementing each other.

Third, in all respects Jordan deeply regrets that Pre-Trial Chamber's treatment of Jordan at the time it sought consultations with the Court, strongly disagrees with its December 2017 decision and is especially troubled by its decision to refer Jordan to the Security Council and the Assembly of States Parties.

Fourth, we believe that there are two options before you. The first is to reject some or all of the three grounds on appeal, in which case the Pre-Trial Chamber's findings of fact and law in this regard remain intact.

The second option is to uphold some or all of the three grounds of appeal, and it is our hope that you uphold all three. When engaging in this option, the Appeals Chamber can indicate its own views as to the correct law for the grounds that it upholds. As will be noted in the course of our presentation and as observers of the

Court have noted, previous decision of Pre-Trial Chambers on these matters have been replete with inconsistencies based on one legal theory and then another and yet then another. Such shifting theories have engendered considerable confusion and controversies among State Parties to the Rome Statute and harm the reputation of the Court. That confusion and controversy existed in March 2017 and exists today. Indeed, concern with the widely disparate Pre-Trial Chamber's theories has engendered calls for addressing the problem through other means, such as by requesting the Security Council to give an authoritative interpretation of its resolution or having the General Assembly seeking an advisory opinion from the International Court of Justice.

Indeed, it may be understandable if the Appeals Chamber wishes to establish today, as an eye to the future, a clear and well-grounded legal analysis addressing the obligations of States Parties in the circumstances that have arisen in this case. A decision from the Appeals Chamber based on sound legal reasoning may be viewed as critical for guiding States in the years to come based on the rules of international law and not on policy preferences. Yet our submission is that in doing so, in doing so, you should still uphold our three grounds of appeal which are focused on specific findings of fact and law by the Pre-Trial Chamber.

Mr President, members of the Chamber, that concludes my introductory statement. With your permission, Sir Michael Wood will now address you on the first ground of appeal, group A questions.

Thank you.

PRESIDING JUDGE EBOE-OSUJI: [10:40:59] Thank you.

Please proceed.

MR WOOD: [10:41:18] Mr President, members of the Appeals Chamber, it is a great

honour to appear before you and to do so on behalf of Jordan.

Today I shall address Jordan's first ground of appeal. This turns on the correct interpretation of Article 27(2) and Article 98 of the Rome Statute and the effect of these provisions, if any, on the immunity of State officials from foreign criminal jurisdiction arising under customary and conventional international law when the arrest and surrender of such officials is sought by the Court.

In addressing this first ground of appeal, I shall also respond to some of the group A questions circulated by the Appeals Chamber a few days ago. But by no means all of these questions are, in our respectful view, relevant to this appeal.

On this and on the other grounds of appeal, Jordan has set out its position fully in its appeals brief, in its response to the observations submitted by professors of international law, and in its response to the observations of the African Union and the League of Arab States. As you yourself said this morning, we shall not seek to repeat all that we said there. We maintain that in full.

We were asked to respond to the Prosecution's response to our appeals brief in the course of this oral hearing, but in fact, we have already addressed many of their points in our written pleadings so far.

My statement will be as follows: First, I shall explain that the Pre-Trial Chamber II committed serious errors of law when interpreting Article 27(2) and Article 98 of the Statute. In doing so, I will say a few words about the proper approach to the interpretation of the Rome Statute and then I will address some remaining group A questions.

Mr President, members of the Chamber, Jordan's first ground of appeal turns on the proper interpretation of Article 98 of the Statute and whether it is affected in any respect by Article 27(2).

Our position can be summarised as follows. Article 98 of the Statute preserves the immunity of officials of both States Parties and non-party States from foreign criminal jurisdiction. When immunity applies, the Court is obliged to obtain a waiver by the State concerned before making a request for arrest and surrender.

As for Article 27(2), it concerns only immunity with respect to the exercise of the Court's own jurisdiction. This provision alone does not and cannot affect issues of immunities from foreign criminal jurisdiction. Article 98 cannot be written out of the Statute by reading into Article 27(2) what is not there, yet this is precisely what the Pre-Trial Chamber and indeed the Prosecution seek to do.

So the starting point for the analysis must begin with Part 9 of the Rome Statute, which concerns international cooperation and judicial assistance. This is the part of the Rome Statute that addresses the relationship of the Court with the States Parties; whereas, earlier parts of the Statute address the establishment and operation of the Court itself. Thus, Part 9 contains provisions that speak to the obligation of States Parties to cooperate with the Court, Article 86, and the manner in which the Court may request cooperation from them, Article 87, including a request for the arrest and surrender of a person, Articles 89 to 92. Among other things, Part 9 contemplates the possibility of the requested State seeking consultations with the Court in the event that it identifies "problems which may impede or prevent the execution of the request", Article 97.

Importantly, Article 98 addresses the situation when a requested State is being asked to arrest and surrender a person in contravention of obligations under international law with respect to a third State. You will find, members of the Chamber --

PRESIDING JUDGE EBOE-OSUJI: [10:46:07] One minute, please. Just so I understand the train of submission, are you saying that we are not to look at Article

27 when we construe Article 98? Is that what you are saying?
MR WOOD: [10:46:27] Essentially, yes, Mr President. I will come on to Article 27 and its non-relevance a little bit later in my submissions, if I may.
PRESIDING JUDGE EBOE-OSUJI: [10:46:36] Fair enough.
MR WOOD: [10:46:39] Members of the Chamber, you will find the text of Article 98 at page 3 of the very slim judges' folders that I hope you have in front of you.
PRESIDING JUDGE EBOE-OSUJI: [10:46:49] Yes, we have received it, yes.
MR WOOD: [10:46:55] It's very short. Anyway, no doubt you know it by heart. But I would like to emphasise it by reading Article 98. Article 98 says that:
"The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that State for the waiver of the immunity."
And then paragraph 2 of Article 98 reads, "The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending state is required to surrender a person of that State to the Court," again, "unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender."
Article 98 is, in essence, a conflict-avoidance rule. It seeks to ensure that, when requested by the Court to arrest and surrender a person, a State Party does not act inconsistently with its other international obligations; in particular, with the rules of international law concerning the immunities of States, their officials and property. And for this purpose, Article 98 imposes a procedural obligation upon the Court, an

obligation to obtain a waiver of immunity or consent to surrender from the State concerned whenever immunity applies.

Question (m) in group A of the questions from the Chamber asks whether Article 98 is an indication of the existence of Head of State immunity under customary international law when the arrest and surrender of a Head of State is sought by the Court.

Article 98 does indeed acknowledge the existence of immunities and other procedural bars that exist under customary and treaty law, which in some situations will preclude the arrest and surrender of person to the Court.

Mr President, in Jordan's view these provisions are clear and speak directly to the issue of the visit of the president of Sudan to Jordan on 29 March 2017. Jordan had obligations under customary international law to respect the immunity of Sudan's Head of State and under treaty law to respect the immunity of Sudan's representatives to the League of Arab States' 2017 summit. In light of those obligations, the Court was supposed, was obliged to first obtain a waiver of such immunity before proceeding with its request.

PRESIDING JUDGE EBOE-OSUJI: [10:50:02] Mr Wood, does that beg the question as to the existence of immunity? Or is that something that needs first to be established by looking at international law in its panoply?

MR WOOD: [10:50:16] Well, Mr President, I will be coming on to the question of Head of State immunity and the immunity under the League of Arab States' treaties a little later, but --

PRESIDING JUDGE EBOE-OSUJI: [10:50:32] Please proceed.

MR WOOD: [10:50:34] -- certainly, it is our view that there is immunity and that, therefore, the obligation on the Court under Article 98 was applicable.

I'll now turn to Article 27(2) very briefly. The Pre-Trial Chamber and the Prosecution essentially seek to dismiss Article 98, despite its express terms. They do so by turning to Part 3 of the Statute. But Part 3 says nothing about the cooperation of States Parties with the Court. Instead, it is entitled, "General Principles of Criminal Law." There they find Article 27(2), which they seize upon to override the carefully constructed provisions of Part 9, including Article 98.

In our submission, the terms of Article 27(2) are clear. It is at page 4 of the judges' folders. The provision relates exclusively to immunity with respect to the exercise of the Court's own jurisdiction. It reads, and I quote, "Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court" - the Court - "from exercising its jurisdiction over such a person."

I repeat, "Shall not bar the Court from exercising its jurisdiction." There is no word here about States exercising their jurisdiction. By contrast, Part 9 in various places expressly addresses the issue of procedures under national law.

In our submission, Article 27(2), interpreted in good faith in accordance with its ordinary meaning, is not concerned in any way with the immunity of State officials from foreign criminal jurisdiction, that is, from the criminal jurisdiction of other States, whether parties to the Statute or non-parties. That matter is regulated by Article 98 of the Statute. In Jordan's view, no convincing reasons have been given to depart from the ordinary meaning of Articles 27(2) and 98 of the Statute.

Rather than accept the express terms of these Articles, the Pre-Trial Chamber concluded that Article 27(2) of the Statute, and I quote, "prevents States Parties from invoking immunity belonging to them when cooperation in the arrest and surrender of a person to the Court is provided by another State". It termed this the "horizontal

effect" of Article 27(2).

And the Chamber concluded that Article 98(1), which concerns State and diplomatic immunity is, and I quote, "Without object in the scope of application of Article 27(2) ... No waiver is required as there is no immunity to be waived." That's the decision at paragraphs 33 and 34.

Notably, this interpretation requires that Article 98 be read as only applying to obligations owed to non-party States, otherwise it would erase Article 98 entirely from the Statute. While normally Sudan would still benefit from Article 98 under the Pre-Trial Chamber's approach, the Pre-Trial Chamber then uses Security Council resolution 1593 to essentially transform Sudan into a fictitious status of a State Party, at which point they claim that Article 98 is no longer relevant.

We've explained in our appeals brief why we consider these to be manifest errors of law, it's at paragraphs 7 to 39. In its response to Jordan's appeals brief, the Prosecution attempts to justify the Pre-Trial Chamber's finding in an even more obscure manner. They assert, for example, that "the vertical and horizontal effects of Article 27 are indivisible"; that "... the horizontal effect of Article 27 means that States Parties ... must, in their mutual relations, each respect that the other is likewise bound vertically by Article 27"; that "... the horizontal effect of Article 27 is the necessary corollary of its vertical effect"; and I quote again, and "... that these vertical and horizontal effects of Article 27 are inevitably intertwined".

Mr President, members of the Court, such strained language is surely a clear sign of a weak case. But all these claims are unsupported. They do not follow from the text of the Rome Statute. As we explained in our written pleadings, to hold that Article 27(2) excludes the immunity of State officials from foreign criminal jurisdiction would require two things. First, it requires an extraordinarily expansive interpretation of

27(2), which the text itself simply does not sustain.

Secondly, it requires an interpretation of the term "third State" in Article 98 that would be inconsistent with the way "third State" and "State not party" are employed throughout the rest of the Statute.

The Prosecution's response to Jordan's appeals brief is thoroughly unconvincing in the way it treats this question of third State. They suggest, for example, that the term can be interpreted differently depending on whether a particular situation concerns the immunity of officials or the immunity of premises and property. But no support is given for this in their arguments and there is no support in the text. And even more surprising, the Prosecution assert that it doesn't matter which interpretation of the term "third State" is correct. Ultimately, the main argument put forward by the Prosecution to justify departing from the ordinary meaning of the terms of Articles 27 and 98 is that the Court depends on States' cooperation in order to exercise its jurisdiction. But that is a highly problematic argument because, if upheld by the Appeals Chamber, it would render the carefully negotiated terms of Part 9 of the Statute meaningless and would invite all kinds of expansive interpretations.

For example, the Court could refuse to allow a State Party under Article 94 to postpone the execution of a request because it would interfere with an ongoing national investigation, claiming that that would impede cooperation with the Court.

Mr President, another point is that --

PRESIDING JUDGE EBOE-OSUJI: [10:58:14] May I ask you while you are setting up your other point, just briefly, I'm still interested in the earlier question, whether we're to explore international law and its panoply for purposes of discerning whether immunity exists to begin with. But for now, you looked at Article 27, 27(2). 27(2), if I may look at it again, page 4 of your handout, it's a convenient page. Are you with

me?

MR WOOD: [10:58:49] Yes.

PRESIDING JUDGE EBOE-OSUJI: [10:58:50] Says, quote:

"Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law" -- if we may stop there for a minute before we proceed, I want to know what it is saying.

Up until this point, whether under national law or international law, would it capture the question of whether or not immunity under customary international law exists at a national level for a visiting Head of State? Is that part of what is contemplated there?

MR WOOD: [10:59:41] Well, I think, Mr Chairman, the rules of international law on immunity exist at the level of international law, but obviously certainly in the United Kingdom and, no doubt, in many other countries, they're given effect to under national law and they're in a sense, therefore, incorporated or form part of, in England, the common law.

PRESIDING JUDGE EBOE-OSUJI: [11:00:06] So then that kind of immunity, if it exists, will come -- will be captured in this part of 27(2) that I have read up till now, that is "Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law".

So that's the kind of thing we're looking for, isn't it? I want to know. When Jordan -- sorry, President Bashir goes to Jordan and says "I have immunity, don't touch me", can we look at 27(2) and say, well, that's actually what 27(2) is talking about? Or are we wrong? Is that the wrong way of looking at it?

MR WOOD: [11:01:00] Well, in my submission, our submission, that would be, with respect, wrong because 27, as I emphasised, is talking about the effect of these

immunities on the Court's exercise of its jurisdiction. It's not talking --

PRESIDING JUDGE EBOE-OSUJI: [11:01:18] What is 27(2) then contemplating when it talks about immunities under international law? What is 27(2) contemplating in that idea?

MR WOOD: [11:01:33] For example, if a State Party, let's say Sudan -- sorry, a State, let's say Sudan, were to invoke before this Court its own national law, that would be addressed by this paragraph. But what --

PRESIDING JUDGE EBOE-OSUJI: [11:01:48] What about international law? I'm talking about international law now.

MR WOOD: [11:01:52] If a State were to invoke either its own national law or international law before this Court as a reason for this Court not exercising a particular jurisdiction, say, demanding evidence as happened in the Blaškić case I think.

PRESIDING JUDGE EBOE-OSUJI: [11:02:09] All right.

MR WOOD: [11:02:10] Then that would -- that that's what it's aimed at in our view very clearly. It has no relevance to the question of immunities before domestic courts in domestic proceedings, which as we say and which I hope to explain is precisely what was at issue in the case, in this case.

PRESIDING JUDGE EBOE-OSUJI: [11:02:31] So you know where I am going with this. I have read 27(2) up until the part where I said that was contemplated. Now let's look at the other part. Is it possible then, just to cover the areas, or just for clarification - I understand what you are saying - what this means in fact. Is it possible that 27(2) is amenable to an interpretation in this way: That in national, in certain countries, Head of State or senior State official a la arrest warrant case go on a visit to a certain country, but in that country the invocation of immunity for that

person cannot be done in a way that bars the ICC from exercising its jurisdiction.

MR WOOD: [11:03:42] Well, that, Mr President, is certainly not our interpretation of this.

PRESIDING JUDGE EBOE-OSUJI: [11:03:48] But is it a reasonable way to look at it or totally unreasonable?

MR WOOD: [11:03:54] We would say that Article 27, being placed where it is in the Statute, with Article 98 there, and the plain language of Article 27 is concerned with the Court's exercise of its own jurisdiction, not with national courts' exercise of their jurisdiction when they are called upon, for example, to arrest and surrender. This applies when the person is before this Court, not at the stage when he or she is still before the national court. That is our submission.

PRESIDING JUDGE EBOE-OSUJI: [11:04:27] Thank you. Please proceed. I don't know if you have much time.

MR WOOD: [11:04:33] Mr Chairman, I'm conscious that I have relatively little time left. And I'm going to --

PRESIDING JUDGE EBOE-OSUJI: [11:04:43] One second, please.

THE COURT OFFICER: [11:04:46] Yes, so counsel has eight minutes, after which the five minute reminder will be set off.

PRESIDING JUDGE EBOE-OSUJI: [11:04:56] So you have eight more minutes in your time for this segment. Please proceed.

MR WOOD: [11:05:00] Well, I'll do my best, Mr Chairman, but I may have to skip some points.

It seems to us that the Prosecution's argument, and perhaps even the Pre-Trial Chamber's argument is essentially dictated by policy, the policy that at all costs persons should be surrendered to the Court.

We would submit that the Appeals Chamber should approach the matter strictly as a question of the interpretation and application of international law. It must begin with the fact that the Rome Statute is a treaty. As a treaty, it's to be interpreted in accordance with the rules set forth in the Vienna Convention. The general rule in paragraph 1 of Article 31 reads:

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

In our view, a good faith interpretation of Article 98 inevitably leads to upholding the first ground of our appeal. And perhaps at this point I'll just address one or two of the questions in group A. In our view, question (a) invoked certain elements of this general rule of treaty interpretation, but did so selectively, while ignoring other elements and, most fundamentally, the ordinary meaning in terms of the treaty, which is starting point of all interpretation. The question also refers selectively to one preambular paragraph in the Rome Statute, while ignoring the others.

And on that I just say that of course the States Parties to Rome are motivated by their determination to put an end to impunity. But they have given effect to this through the operative provisions of the Statute and it is these operative provisions that must be applied by this Court. In addition, the preamble reaffirms the purposes and principles of the UN Charter, which includes sovereign equality, which itself is the origin of State immunities. And that's clear from the International Court's Germany v. Italy judgment.

Question (b) asks at what stage guidance should be sought by the Court from customarily international law in interpreting the Statute, given Article 21 of the Statute. As we understand it, Article 21 is an applicable law provision, it's not a rule

of interpretation.

And it *provides that the Court shall - shall - apply in the first place the Statute, elements of crime, rules of procedure, and it is second, and only where appropriate, applicable treaties and principles and rules of international law. The key point there I think is that it can use these other matters in order to interpret the Statute, but not to amend the Statute.

PRESIDING JUDGE EBOE-OSUJI: [11:08:32] Counsel, I know -- why don't we do this, this is the time for morning break. You do have how many more minutes, court officer? You've got 10 more minutes, or you have 10 more minutes left on your time. We should be on morning break now. Why don't we do that? Then when we come you can do the rest of your submissions.

MR WOOD: [11:09:00] Yes, Mr President.

PRESIDING JUDGE EBOE-OSUJI: [11:09:01] So the Court will rise and we reconvene in 30 minutes.

THE COURT USHER: [11:09:06] All rise.

(Recess taken at 11.09 a.m.)

(Upon resuming in open session at 11.43 a.m.)

THE COURT USHER: [11:43:03] All rise.

Please be seated.

PRESIDING JUDGE EBOE-OSUJI: [11:43:21] Thank you very much. Welcome back, everyone.

Counsel, please proceed.

MR WOOD: [11:43:29] Mr President, members of the Court, I'd now like to speak briefly about the two types of immunity that are at the heart of this case, immunity of the Head of State under customary international law and the immunity of a

representative attending meetings of the Arab League.

Mr President, Pre-Trial Chamber II correctly recognised in its December 2017 decision that the president of Sudan enjoyed immunity ratione personae from Jordan's criminal jurisdiction under customary international law. It cited its own South Africa decision of July 2017, and you'll find this at page 5 of the judges' folders. I quote:

"Customary international law prevents the exercise of criminal jurisdiction by States against Heads of State of other States. ... The Chamber is unable to identify a *rule of customary international law that would exclude immunity for Heads of State when their arrest is sought for international crimes by another State, even when the arrest is sought on behalf of an international court, including, specifically, this Court".

That is the Pre-Trial Chamber's decision.

That responds, and in our submission responds correctly, to questions (g, (h) and (k) posed by the Appeals Chamber. Under customary international law, Head of State immunity from foreign criminal jurisdiction is not subject to any exceptions, and the International Court did not suggest otherwise in the Arrest Warrant case.

Mr President, that finding by the Pre-Trial Chamber is fundamental to the present case, and it is not on appeal. It is a correct statement of the customary law governing the immunity of heads of state from foreign criminal jurisdiction. Neither Jordan nor the Prosecution contested that finding in their initial written pleadings; both accepted it.

It is likewise clear that the president of Sudan, in addition to having immunity as a Head of State under customary law, also had immunity under treaty when he visited Jordan in March 2017, as Ambassador Hmoud has explained, under both the Pact of the League of Arab States and the 1953 Convention on the Privileges and Immunities

of the League. That was spelt out in our appeals brief and in the Arab League's brief. Jordan fully agrees with the League's position that the Pre-Trial Chamber's extraordinary failure to accept that Sudan was a party to the 1953 Convention constituted a serious error of fact, an error to which neither Jordan nor the Arab League bears any responsibility.

Mr President, in its response to the African Union and the Arab League, the Prosecution now appears to have shifted its position on the president of Sudan's entitlement to immunity, or at least hints at a change of position. It now suggests, and I quote, "the appeal could alternatively be dismissed because no immunity under international law is in any event applicable in this situation".

The Prosecution bases this on a remarkable new theory, namely that, in arresting the president of Sudan and surrendering him to court, Jordan would not have been exercising its own criminal jurisdiction, but rather the enforcement jurisdiction of the Court. The Prosecution suggests in this regard that a requested State is, and I quote, "nothing more than the Court's agent in executing the Court's arrest warrant".

Mr President, members of the Court, this is an extraordinary argument. In our view, nothing whatsoever in the Statute suggests that States Parties are merely agents or organs of the Court when they cooperate with it.

PRESIDING JUDGE EBOE-OSUJI: [11:47:53] What about Article 59, will somebody be addressing that? Article 59 of the Rome Statute, as well as perhaps 4(2) of the Rome Statute.

MR WOOD: [11:48:06] Sorry, I didn't catch the --

PRESIDING JUDGE EBOE-OSUJI: [11:48:08] What about Article 59 of the Rome Statute, perhaps together with Article 4(2) of the Rome Statute? Do they have any bearing on that issue?

MR WOOD: [11:48:29] Well, Mr Chairman, at first sight, Article 4(2) does not. But we could look at it more carefully, and perhaps during the question and answer session that we're going to have tomorrow, we could respond on these points.

PRESIDING JUDGE EBOE-OSUJI: [11:48:45] Fair enough. Fair enough. Please proceed. Sorry.

MR WOOD: [11:48:48] Article 59 I don't think detracts from the point I'm making, which is that a State is exercising its own jurisdiction when it engages in arrest and surrender. And we think that's very clear from other provisions of the Statute, which we could refer to perhaps tomorrow.

Indeed, if the Prosecution's new late theory were correct we wonder whether Article 98 would have any purposes at all. Moreover, there is a very clear distinction in the Statute between a State's jurisdiction and that of the Court, complementarity and all that, but we'll come back to this at a later stage, if we may.

In the very few minutes, I think I perhaps have 5 minutes remaining.

THE COURT OFFICER: [11:49:47] Counsel has 5 minutes.

MR WOOD: [11:49:49] Five minutes. I'll just address a couple of the other questions.

In particular I'll address question (e), which refers to Article *64 of the Vienna Convention, one of the articles dealing with jus cogens. It provides that if a new jus cogens norm emerges, any existing treaty that conflicts with that norm it becomes void and terminates. But there is no treaty at issue in this case that conflicts with any such norm and we don't think the provisions about jus cogens are relevant.

The prohibitions of genocide and crimes against humanity may well be considered jus cogens norms, but the status of those prohibitions does not affect the immunities that operate to protect State officials from foreign criminal jurisdiction. That we say is

clear from the Arrest Warrant case, paragraph 60, and the Germany v. Italy case at paragraph 93.

Question (f) asks whether a customary rule or conventional international law provision on immunities can be superior to a jus cogens rule. But in our submission the question of a hierarchy of norms simply doesn't arise in this situation because the rules in question address quite different issues and are not in conflict. The International Court explained this very well in Germany v. Italy and we put paragraph 95 in the Judges' folders, and if I could just quickly refer you to that. The Court said, "To the extent that it is argued that no rule which is not of the status of jus cogens may be applied if to do so would hinder the enforcement of a jus cogens rule, even in the absence of a direct conflict, the Court sees no basis for such a proposition. A jus cogens rule is one from which no derogation is permitted but the rules which determine the scope and extent of jurisdiction and when that jurisdiction may be exercised do not derogate from those substantive rules which possess jus cogens status, nor is there anything inherent in the concept of jus cogens which would require their modification or would displace their application."

Mr President, members of the Chamber, I think I'll conclude at this point. I'm conscious that we haven't answered all the questions in group A, but we do have this session where if there are particular questions we'd be very happy to address you on them. So I thank the Chamber very much for its attention.

PRESIDING JUDGE EBOE-OSUJI: [11:52:52] I thank you very much. Now response submissions, 45 minutes.

MS BRADY: [11:53:06] Yes, your Honour. Mr Matthew Cross will be the first speaker on the group A part, and after that it will be Mr Rod Rastan.

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

MR CROSS: [11:53:18] Good morning, your Honours.

I will begin today by introducing the Prosecution's submissions, and will also address group A, questions (a) to (f) and question (o) concerning the applicable law. This should take about 15 to 20 minutes. My colleague Mr Rastan will then address the remainder of group A, concerning Head of State immunities as such.

Your Honours, multiple Pre-Trial Chambers of this Court, some nine different judges, have consistently affirmed that Sudan, while not a State Party to the Statute, is nonetheless subject to the necessary obligations of the Statute, by the effect of UN Security Council resolution 1593. This includes the obligation to arrest and surrender to the Court Mr Al-Bashir, the president of Sudan, notwithstanding his official capacity.

Despite the lengthy arguments in this appeal, and the many distinguished lawyers in this room, the question to be decided in this appeal we say is a simple one.

If it is true that Sudan cannot rely on Mr Al-Bashir's official capacity to bar its own obligation to arrest and surrender him, does the Statute or international law permit Sudan to rely on that same official capacity to prevent an ICC State Party, in this case Jordan, from arresting and surrendering Mr Al-Bashir?

In other words, if Sudan is barred from asserting any immunity vertically against the ICC, can it still assert that same immunity horizontally against an ICC State Party?

And as your Honours know, we say that the answer is no.

As your Honours are also aware, different benches have varied somewhat in explaining exactly why this is so. But something is not necessarily less true just because different people describe it differently. Context is everything in recognising when such differences matter, and when maybe they do not. And here we say pure common sense confirms the consistent legal findings of the Pre-Trial Chamber, even if

they are explained differently by different judges. And indeed, your Honours can even see in the decision on appeal where there is a difference between the majority and the minority in the reasoning, but they still reached, essentially, the same conclusion. If international law does not permit Sudan to assert its own immunity directly before this Court, then surely it cannot assert it indirectly before this Court. We also submit, as we have tried to explain all along in this appeal, that the legal explanation by the majority in the decision on appeal, similar to its approach in the South Africa decision, is perhaps the best explanation. By interpreting Article 27 correctly, in our view, and recognising that Sudan is subject to that obligation in Article 27, it explains how the drafters of the Statute ensured that any immunities do not apply before this Court, even for Security Council referrals and either when a suspect is here in The Hague or when the Court is seeking the arrest and surrender of that suspect.

And we say that this approach in the decision is not only correct, but also prudent, for two reasons:

First, the majority's approach limits the principle which they applied to where it belongs, specifically, to States which have chosen to accept the Statute's obligations by ratification or under Article 12(3), and also to those very limited circumstances where the UN Security Council has acted under the Statute and the UN Charter to refer a situation to the Court.

The majority's approach also ensures the continued effectiveness of Article 98(1). It ensures that the Court always remains the master of questions of immunity. But on the other hand, also that the Court always respects the rights of States which are not subject to its obligations, and it does that by requiring the procedural process that is set out in Article 98(1).

Second, your Honours, the majority's approach is also prudent because it promotes judicial economy, making it unnecessary at this stage to rule on the exact contours of any immunities under international law. Instead, the majority assumes that such immunities may exist, for the sake of argument, and focuses on the accommodation made in the Statute for that very purpose.

And we say that there may be some wisdom in that approach. Accordingly, in answering your Honours' questions over the coming week, we are of course keen to assist as much as we can in this process, and so we will try and engage with all of the various issues that have been raised. But we do submit that the strength of the decision on appeal lay in recognising that this situation is far from unexpected. The Statute, and perhaps also the Security Council, already foresaw the circumstances in which we find ourselves, and indeed, given the purpose of this institution, it's hardly surprising that this is so.

Turning now to some specific questions. And broadly, these address; first, the applicable law; second, the relevance of human rights; and third, the relevance of jus cogens.

I shall begin first with questions (a) and (b), which ask about the correct procedure for this Court to interpret and apply the law.

And on this point, your Honours, I think largely we agree with the submissions of Mr Wood, which is that it is very well established that Article 21(1) requires the Court to apply in the first place the law of the Statute and only in the second place, and if appropriate, the principles and rules of international law more generally. And the Appeals Chamber has said that resort to these subsidiary sources may only be made when there exists a lacuna in the primary sources. And Your Honours can find that reference at A1 of the list we filed on Friday, which is filing 383.

This means, to answer question (b) directly, that this Appeals Chamber should seek guidance from customary law either if there is a lacuna in the Statute or if the Statute itself unambiguously makes reference to customary law, as in the Ntaganda appeal concerning Article 8. And that's also in reference A1.

For these reasons also, your Honours, it is essential to interpret the Statute by the correct method, following the approach of the Vienna Convention. And again on that I think we agree with Mr Wood, it is not our view that our arguments are based on policy. It is our view that our arguments are based on the Vienna Convention approach to interpreting all of the provisions of the Statute.

Your Honours can find references for this point at reference A2. These authorities also illustrate that the general rule of interpretation, Article 31(1), is pre-eminent. And here perhaps I may not have understood, but we may have some difference with Mr Wood, who seemed to suggest that the Statute may be interpreted not least with reference to customary international law as part of the 31(1) rule of interpretation. We would just note that under 31(3)(c) of the Vienna Convention, reference to other rules of international law perhaps shall be taken into account, but they have a lesser status than 31(1). 31(1) in its own terms just says the ordinary meaning of the text, the context and the object and purpose. And we would urge your Honours to start from that basis.

It is also well established that the three elements that I have just described must be considered jointly when interpreting a provision. So your Honours cannot and should not give more emphasis to the ordinary meaning than the context or more to the object and purpose than the ordinary meaning. The interpretive task is to consider those three elements as a whole.

To answer question (a), therefore, we say that the content of the preamble of the

Statute, which aspires, amongst other things, to end impunity, is highly relevant in interpreting the Statute's core provisions, including Article 27. And this is because the Statute not -- I beg your pardon, this is because the preamble not only illustrates the object and purpose of the Statute, but it also forms an indispensable part of the text of the Statute itself and thus is equally relevant to the contextual analysis. And we say that's made clear by Article 31(2) of the Vienna Convention.

Before I move on I would like -- your Honour.

PRESIDING JUDGE EBOE-OSUJI: [12:03:24] Before you move on, you make it look so simple that, if I understand you, you expressed agreement with Mr Wood, and do I understand you to say there is no need to inquire into customary international law or not? That's what I'm trying to follow. Your thesis that there is no immunity which Sudan is entitled to assert in its own right cannot produce an immunity which other States are obligated to respect, if I understand you, you would tell us how you arrive at that conclusion that Sudan is not entitled to assert immunity in its own right and whether it can do that without also looking at customary international law.

Your Honour is absolutely correct that the premise of the Pre-Trial Chamber's majority's approach and also therefore the premise of our response is based on the idea that Sudan is subject to the obligations within the Statute, which we say comes from Resolution 1593, which Ms Brady will be addressing tomorrow.

PRESIDING JUDGE EBOE-OSUJI: [12:04:40] But Mr Wood does not agree, if I understand him correctly, that the answer lies in the Rome Statute.

MR CROSS: [12:04:46] That is where we have a point of difference.

PRESIDING JUDGE EBOE-OSUJI: [12:04:48] And that's why I was wondering whether you really agreed with Mr Wood as you asserted you did.

MR CROSS: [12:04:53] We agree in terms of the interpretive approach. So we agree

that your Honours should look first of all at the Statute and your Honours should look at the Statute through the lens of 31(1).

If it turned out that your Honours, contrary to our preferred view but in your own view, may consider perhaps hypothetically that the Statute did not answer the question or left a lacuna, then of course consistent with 21, you can then go to look at customary international law. Our point is more a priority of arguments rather than to say that one necessarily excludes the other.

And perhaps in that vein, your Honour, just to answer my learned friend's point, throughout its arguments in this case, obviously the Prosecution is not seeking to expand the scope of this appeal, but we are seeking to address the arguments that we have heard and it is in the nature of this particular set of legal issues that all the arguments are rather conditional on one another. So that if one fails, then that takes you to a second place and so on and so forth. And so we find ourselves in the area of customary international law even though we started in the area of treaty law.

So moving on, I would just like to briefly address some particular applications of the interpretive argument to the two provisions of the Statute central to this appeal, and those are Articles 98(1) and 27.

As we have said in our written submissions and we stress again, Article 98(1) establishes a procedural obligation for this Court to consider before proceeding with any request for arrest and surrender whether any relevant immunities are owed by the requested State to the third State, and the whole discussion in this appeal and the Pre-Trial Chamber discussions below show that this provision is actually serving its purpose.

Two points follow from that:

First, this procedural obligation is on the Court and it grants no particular right to the

requested State. And this follows not only from the plain terms of Article 98(1) which refers to the Court, but also from the broadest context and object and purpose. For example, we say this is confirmed by provisions such as Articles 89(1), 91(4) and 97(c). I would be very happy to explain this a bit further during the question session, if I may, your Honours, but given the shortage of time, I'll move on for now.

Second, the term "obligations" in Article 98(1) must give effect to its underlying rationale, which is to prevent, which is to prevent States Parties from being obliged by this Court to breach other international obligations, specifically to ensure that compliance by the requested State would not be a wrongful act occasioning its State responsibility to a third State.

And this means that it is insufficient for the Court merely to determine that an immunity might in principle be engaged in a particular situation, but it also has to consider the other circumstances in that situation which might disapply that immunity, such as, for example, the consent of the third State, in this case Sudan.

For these reasons, we say that when the Court makes its assessment under Article 98(1), it must in practice always first consider whether the relevant third State itself bears any duty to comply with Article 27 of the Statute.

And this brings us of course to the question of how Article 27 should be interpreted. On this we have three points:

First, notwithstanding the question of customary law, which will be addressed by Mr Rastan in a moment, Article 27 is a treaty provision. As such, it must be autonomously interpreted like any other part of the Statute. And for the purpose of interpretation, it cannot simply be assumed that the content of Article 27(2) mirrors perhaps customary international law, especially not to limit its scope unless the Statute itself requires such a reading.

Second, Article 27(2) clearly applies, in our view, not only to what might be termed part 3 matters but also Part 9 matters. In other words, 27(2) not only bars a State from raising immunity when their officials appear before the Court as suspects, but also from raising immunity to avoid arresting and surrendering their own officials. And this reading is necessary to give effect to the basic object and purpose of the Statute and also perhaps for consistency with the first sentence of Article 27(1) as well as other parts of the Statute perhaps such as the preamble. But it is also confirmed, and this I think comes to your Honour Judge Eboe-Osuji's question to Mr Wood earlier by the specific reference in Article 27(2) to national law. Now, we say that this reference would be redundant and meaningless if Article 27(2) did not apply to Part 9 matters.

National law can of course never be opposable to this Court's jurisdiction once a suspect has appeared here before it. But by contrast States might well often seek to rely on national law as a bar to arrest and surrender of their own officials. And reference therefore to national law in Article 27(2) we suggest specifically implies the application to Part 9 cooperation.

Thirdly and finally, your Honours, Article 27(2) must also be read in context with provisions such as Article 86. I shall return to this topic later in the week when we discuss group C. But very shortly, this means that States are bound by Article 27(2) to not act inconsistently with their Article 27(2) obligations. Specifically, if a State cannot raise immunity for its own officials when it is the requested State under Article 89, no more can it do so when another State Party is the requested State. This is another way of describing the so-called horizontal effect of Article 27(2) described both by the majority of the Pre-Trial Chamber and in our written submissions.

Your Honour.

PRESIDING JUDGE EBOE-OSUJI: [12:11:46] But is a State free or not to say, I mean, the receiving State in the event of a visit, are they free to say, well, the visitor State, what your national law says is a matter for you, but as far as we are concerned, international law says we are to do something else which may not be consistent with your national law.

MR CROSS: [12:12:20] Your Honour, again, there may perhaps be a distinction here potentially between the national law of the State which is receiving the visitation and international law. If the receiving State has the obligation under this Statute under Article 89 to comply with a request from this Court by arresting and surrendering the visitor to that State, then that is their obligation, and if they breach that obligation as a matter of international law, they may well be responsible for that.

There may be a separate question if under their own national law their national law says that they are obliged to respect certain immunities of the visitor, but they can't raise the national law as a defence to international law in that circumstance.

PRESIDING JUDGE EBOE-OSUJI: [12:13:05] That's one part of the question. But I also have in mind a circumstance where the guest or host State in the event of a visit would say, well, international law as we understand it requires us to accord you Head of State immunity so we will do that regardless of what your national law says on the matter, to say that to the guest State as it were, is that something we need to think about?

MR CROSS: [12:13:42] Your Honour, I apologise, I'm just going to check that I understand the thrust of your question precisely.

In terms of the bilateral relations between the State receiving the visit from the third State, it's of course a question whether or not there may be a legal obligation, an international legal obligation between those two States.

The question that we have on the facts before us here as we understand it is that any such obligation which may be relevant precedes by some considerable time the obligation in the Rome Statute and that takes us to one legal scenario where we say absolutely we do not think that the obligation owed to this Court is in any way diminished by what came before. Indeed, we would say that that immunity is disapplied by virtue of Article 27 so on and so forth.

If the sequence of events were different, then it may be that there would be a slight nuance to that position, but that's not on the facts before us as we understand it.

PRESIDING JUDGE EBOE-OSUJI: [12:14:57] In either event, the answer does not depend on what the guest State said in their national law, is that your point?

MR CROSS: [12:15:10] Yes, that's correct, your Honour. I'm also aware that I'm in danger of doing Mr Rastan a bit of disservice by running over in terms of time. I have two more points I was going to make just on questions of human rights and on jus cogens. If I were to take another five minutes, would your Honours also give some time to Mr Rastan to make up for that? I guess he would need another half an hour after, so another 35 minutes for our submissions. I don't know where we stand on the time at the moment.

THE COURT OFFICER: [12:15:41] So counsel has 34 minutes in total remaining.

MR CROSS: [12:15:46] Marvelous. Then in that case, we'll go for 34 minutes and do our best.

PRESIDING JUDGE EBOE-OSUJI: [12:15:51] We wanted to keep to your time.

MR CROSS: [12:15:52] Thank you, your Honours. Turning then very quickly to the question of human rights in questions (c), (d) and also (o) of your order, very simply, I think we'd all agree that Article 21(3) also requires the Court to apply and interpret all the law under Article 21 consistent with internationally recognised human rights.

And in question (d), your Honours refer to a specific right, which is the right to an effective remedy, which is contained in Article 2(3)(a) of the ICCPR to which both Jordan and Sudan are State Parties.

And in that context, we would just very briefly refer your Honours to general comment 31 of the Human Rights Committee, for example. And there, the Human Rights Committee recognises the tension between the right to an effective remedy and immunities under international law especially, and they refer to this Court for conduct falling within Article 7 of this Court's Statute.

Now, the committee merely urged ICC States Parties and, I quote, "to assist each other to bring to justice" suspects of these crimes, and that's reference A3 in our list.

But they, importantly, do not go further than that. What they don't say is that any applicable immunities under international law are simply unenforceable in the interstate context. They simply say nothing.

And we would also refer your Honours to the case law of the African commission and the European court which is, on these issues, similarly nuanced. At most we can see they find that member States cannot lawfully grant immunities for gross violations of human rights beyond what is, quote, "strictly required by international law", and that's reference A4.

So if we come to question (o), your Honours asked how Head of State immunity might be balanced against gross violations of human rights. And in this case in our view this means, at the very least, simply giving due effect to Sudan's obligation under Article 27(2) and resolution 1593, which make clear that in this case immunity for Mr Al-Bashir is not strictly required by international law and therefore should not be applied.

These same principles may also potentially have informed the Security Council's

thinking on the matter back when it made resolution 1593 in the first place.

Now finally, your Honours, coming quickly to questions (e) and (f), which ask about the possible significance of jus cogens, I heard Mr Wood state earlier, and we agree, that the prohibitions of genocide and crimes against humanity are themselves jus cogens norms and there is an authority for that at A5.

Coming to question (f), which asks the significance of this fact, we also agree that that is a more complicated position and your Honours have been referred to the ICJ case in the jurisdictional immunities case, which makes the point that although jus cogens norms are superior to ordinary rules of customary law, it's a question of the scope of the jus cogens norm as to whether it necessarily conflicts with, for example, a rule of immunity.

And the ICJ seems to take the view that there is no necessary conflict. We would just very briefly refer your Honours to the academic discussion in reference A, that would be A7, where there is a variety of opinion, although, if I remember correctly, I think that comes before the ICJ case, but just to show that reasonable minds may still be debating this issue. And we refer to the question of jus cogens in our response to the AU and the Arab League simply to note that the law is perhaps somewhat uncertain on this point, but we do not go out on it ourselves because we say that actually in this case, Article 27 and resolution 1593 are sufficient for the Court's current purposes.

And on that, I think I really do need to give the floor to Mr Rastan at this point. I would be very happy to deal with any questions in the session tomorrow, if I may. Thank you, your Honour.

PRESIDING JUDGE EBOE-OSUJI: [12:20:10] Mr Rastan.

MR RASTAN: [12:20:15] So your Honours, moving swiftly on, I will address the relevance of customary international law to the Prosecution's submissions and I don't

intend to take longer than 29 minutes possibly, but I may be a minute or two over. I'm aware of the pace for the interpreters.

PRESIDING JUDGE EBOE-OSUJI: [12:20:32] You'll also be dealing with jus cogens?

MR RASTAN: [12:20:36] I'm going to address the cluster of questions on customary international law, so that's from question (g) onwards.

PRESIDING JUDGE EBOE-OSUJI: [12:20:42] Now, for counsel on all sides, including the academic counsel, I do not, in reading the materials, I did not see any reference by anyone to the Barcelona Traction case, and I would like you to look at that and submit on it at some point, whether what is said in paragraph 33 and 34 of the Barcelona Traction case, the second phase, has anything to do with our discussion. Please proceed, Mr Rastan.

MR RASTAN: [12:21:16] Yes, in relation to peremptory norms of international jus cogens and their erga omnes effects, I think we would rest on what we had said briefly, but we can develop it more generally in terms of --

PRESIDING JUDGE EBOE-OSUJI: [12:21:26] I'm speaking specifically about whether the Barcelona Traction case, paragraphs 33 and 34 helps us.

MR RASTAN: [12:21:36] Sure. We can come back to it in our next sessions. So if I can briefly recall our general approach to this appeal, and this is a point that Jordan also has emphasised, we say that the Appeals Chamber can confirm the correctness of the Pre-Trial Chamber's decision by examining the combined effect of two treaties, the Rome Statute and the UN Charter, and ordinarily, of course, we would have set out our substantive case first to you in our presentation of these hearings, but because of the ordering of the groups, you'll, in fact, hear our substantive submissions on that cluster of arguments tomorrow from Ms Brady. But given our reliance on the so-called Security Council route, we actually believe,

and this is the question you asked earlier, that there is no need to delve into customary international law. However, others, of course, have raised custom. They have raised custom either in opposition to the Security Council route to say that relevant immunities apply or, as an alternative to it, to say that relevant immunities do not apply. Thus, your Honours, we have only explored customary international law in response to the arguments put forward by others, and of course as Mr Cross said, there is nothing strange in disposing of an appeal in this manner.

So what, naturally you may ask, is our position on customary international law? Well, we do not doubt the enduring relevance of the immunity of head of states before foreign domestic criminal jurisdiction. This is something I believe all in this courtroom agree with.

However, we have come to question whether this rule is directly transferable to the ICC context. As is well-known, this customary rule derives from the principle of sovereign equality, which was conceived and applied in relation to the assertion of domestic criminal jurisdiction by the authorities of one State against the foreign sovereign.

An ICC surrender process is, to our minds, a wholly different context. Indeed, the domestic execution of a warrant issued by an International Criminal Court or tribunal is, in fact, a relatively new phenomena arising from the 1990s onwards.

We say that this new phenomena, the national execution of warrants for international courts materially falls outside of the parameters of the existing customary international law rule.

And its rationale is also wholly different and causes no offence to the principle of sovereign equality.

So given these distinctions, we say that customary international law on personal

immunities cannot simply be extended to the ICC surrender process by analogy. If immunity does also apply to an ICC surrender process, this must be proved empirically by evidence of sufficiently consistent and general State practice and supporting opinio juris. It cannot be merely inferred or deduced.

So your Honours may ask, so then, what's the position between, what's the difference between our position and the position of, say, Professor Kreß or the Pre-Trial Chambers in their decisions concerning Malawi or Chad?

Well, if we think of the customary international law arguments as a spectrum, we can say that at one end, there is the argument that's been put forward by, for example, Professor Kreß and relied upon by the Pre-Trial Chambers; that customary international law positively requires States to surrender sitting heads of states to the ICC irrespective of consent, and at the other end of the spectrum is the argument that customary international law prohibits the surrender by States of a sitting Head of State to the ICC, absent express consent.

And I understand that that consent Jordan accepts could be obviously expressed by being a party to the Statute or by waiving it or through the Security Council expressly providing for it.

So our position on this spectrum between those who say customary international positively requires you to surrender and the other end that says customary international law prohibits you from surrender, our position is somewhere in the middle, you could say, but slightly closer to Professor Kreß.

And I'll explain what I mean. What I mean is that while we agree with Professor Kreß that developments in international law appear to be moving in the direction he proposes, that we therefore see merit in the approach taken by the PTC in the decisions concerning Malawi and Chad, we are unsure that there is sufficiently settled

State practice and opinio juris to support it.

However, looking back at the other end of the spectrum, we also question the assertion that traditional interstate immunities apply to an ICC process because of that same divided State practice in opinio juris. But you may wonder, isn't the outcome the same? Don't we arrive at the same result as Professor Kreß?

Well, your Honours, I believe there are two key differences in our approach. First, whereas Professor Kreß and indeed Jordan must prove their assertion of the existence of relevant customary international law by providing evidence of settled State practice in opinio juris, we are in the reverse position, so to speak. We challenge the assertion made by both sides, by both sides saying, "Prove it. Give us the evidence" --

PRESIDING JUDGE EBOE-OSUJI: [12:27:21] What is your position on that? You stated -- you are trying to assert a middle course. You've set out the two extremes and you said your position is in the middle. Can you remind us exactly. I don't know whether you've said it already. I've been waiting for it. In a nutshell.

MR RASTAN: Yes.

PRESIDING JUDGE EBOE-OSUJI: So we can then follow your development of that.

MR RASTAN: [12:27:36] We believe that the *status of customary international law on either side of the spectrum is not proven because there is neither State practice, sufficiently settled State practice, opinio juris, to support a positive rule requiring States to surrender under custom, nor a practice showing that the prohibition that applies at the interstate level is transferable to the ICC.

So we are saying that the relevant status of customary international law in relation to the unique context of an ICC surrender process, which is a relatively new phenomena, is unsettled. So, therefore, is it possible to come to any conclusion on the bearing of

customary international law on this precise context of a national execution of an ICC surrender?

PRESIDING JUDGE EBOE-OSUJI: [12:28:24] But Professor -- or rather, Mr Kreß will speak to his own submissions --

MR RASTAN: [12:28:31] Yes.

PRESIDING JUDGE EBOE-OSUJI: [12:28:32] -- in time, but I noted a reference to Nuremberg principle, specifically Nuremberg principle 3. Regardless of what he may have said eventually, does that also give you some position along the spectrum in the sense of saying possibly that Nuremberg principle 3 is customary international law, and if it is customary international law, it nullifies immunity. Is it a way to look at this?

MR RASTAN: [12:29:15] No, that's a good distinction. *And not wanting to break it down into too many different categories, but I think you can also consider looking at Article 21 in relation to the different sub-paragraphs obviously.

So Article 27(1) is, of course, a restatement of Nuremberg principle number 3. And as many academics have said, and your Honour has also said in his own writings, and I think the Office of Legal Affairs in preparation of the relevant memos triggering the debate of the ILC on jurisdictional immunities, on immunities of foreign heads of states, also made the point Article 27(1) represents *customary international, reflects customary international law. But, of course, this hearing is not about Article 27(1). It's about Article 27(2). And it's in relation to that, well, we say the horizontal effect in terms of the meaning of the absence of immunity for how States are to give effect to arrest warrants, it's in relation to that process that we're engaging on questions of customary international law and trying in this group A submissions to identify what those customary international law provisions are, what that rule is,

and as the submissions I'm making, whether there is evidence of State practice and opinio juris to support it.

PRESIDING JUDGE EBOE-OSUJI: [12:30:30] But is it possible to look at Article 27(2) in the terms that it is a mechanism to operationalise, if will, what is stated in Article 27(1) especially, especially given the distinction between immunity, material, you know, the material form of it and the personal form of it, that distinction.

MR RASTAN: [12:30:58] Yes, of course that can be made, but I think --

PRESIDING JUDGE EBOE-OSUJI: [12:31:00] Ratione materiae, ratione personae.

MR RASTAN: [12:31:02] I think that can be a basis for an argument, but we would then say that that's again a kind of deduction, that's a way of asserting customary international law by way of a legal reasoning, which as the ICJ has said, that customary international law is not identified by a process of deduction but by a process of induction by positive evidence of State practice, opinio juris. So it's to that extent we are being fair to the evidence before us and we are saying that we can't identify the relevant State practice opinion juris to settle this matter on the status of customary international law in relation to this matter.

So that's our first distinction, that we don't have to prove it, if you like, because both sides are asserting it in different ways. We are saying that we see that there is an absence of relevant evidence to support the assertion of customary international law.

And then our second distinction in terms of how our position is different to other positions, well, whereas Professor Kreß and indeed Jordan posit customary international law as an alternative to the Security Council route, either to oppose it or to render it superfluous, we say the opposite. We rely on an analysis of customary international law to confirm the correctness of the Security Council route. And here I stress we are not changing our argument. We are analysing customary

international law to come back to our submissions.

For if customary international law is not made out in relation to a particular alleged rule, what happens is that you fall back on special international law, namely, the treaty relations that bind the relevant States, and in this context we say that is the combined effect of the Rome Statute and the UN Charter.

So to summarise these introductory remarks and give you an image, we would say, and excuse the turn of phrase, that in relation to the domestic execution of an ICC warrant, we are in a custom free zone. In other words, the traditional rules of customary international law which we of course acknowledge continue to apply to the domestic assertion of criminal jurisdiction against a foreign sovereign do not apply here simply because a rule of customary international law is not extendible to a different set of circumstances absent evidence of sufficiently consistent and settled State practice and opinio juris to support it.

Now, your Honours, our arguments might appear a little far-reaching, but they are in fact grounded in the uncontroversial case law of the International Court of Justice, repeated verbatim by other international courts and tribunals on the applicable standard of proof and burden of proof for identifying evidence of an existing customary rule or of a separate new rule which, if I may turn to now, will respond further to your questions (i), (h) and (l), which collectively deal with the questions of the requirements for identifying customary international law or whether there are the restrictions or limitations to such rules and the relevant scope of relevant customary immunities before international courts.

So the three points I wish to make in relation to this cluster of questions is the first that the tests for identifying the existence of customary law is, as is well-known, stringent, that the burden to establish the existence of customary law is on the litigant

asserting it, and third, that when looking for the purpose of this case at the actual evidence of State practice and opinio juris exemplified by such classic criteria as official statements, domestic judicial rulings, national legislation and so on, that there is sharp divergence.

Now I'm aware that we'll need to switch to evidence channel 2 because I wanted to bring up some of the citations on your screens for ease of reference. That's evidence channel 2. You'll find it next to your microphones for colleagues in the room.

Now as your Honours know, the threshold to identify customary law is stringent and that classic formulation was set out -- is it appearing?

THE COURT OFFICER: [12:35:25] I'm sorry, the evidence channel 2 can be found on the console box. There is a button indicating evidence 2.

PRESIDING JUDGE EBOE-OSUJI: [12:35:32] We all have them now. Proceed.

MR RASTAN: [12:35:34] Right. I don't have a tremendous amount of citations, but I thought just to bring the key ones on the screen. And I've highlighted the parts that I'm going to cite to.

So of course this is not particularly new, it's well-known that the classic formulation set out by the ICJ in its 1969 judgment of North Sea Continental Shelf quoted on your screens and available at reference A8 requires State practice of being both, quote, "extensive and virtually uniform" and in relation to opinio juris, quote, "to show a general recognition that a rule of law or legal obligation *is involved." End quote.

Now, the standard, as I mentioned earlier, has been recalled not just by the ICJ but by other international courts and tribunals, by regional courts, by national courts. And Mr Wood, in his capacity as the ILC special rapporteur indeed on this topic, has given ample such examples. And that's at reference A9 when he refers to how this standard has been applied by other international courts and regional courts and

domestic courts.

And Mr Wood has also noted that this phrase, this citation has been referred to by the ICJ in terms of the requirement of a general practice in similar phrases such as, quote, "a settled practice", quote, "very widespread and representative", "established and substantial", "uniform and widespread" or "constant and uniform". That's at reference A10.

And in the Nicaragua case at reference A11 and also on your screens, the ICJ observed that while State practice need not be perfect nor in absolute rigorous conformity it must in general be consistent.

And of course the ILC, with the benefit of State comments, has formally adopted on second reading similar wordings in its final conclusions on the topic which you will find at reference A12.

And likewise on opinio juris, the ICJ has held, as you can see at reference A13 and on your screens, that evidence of a settled practice must be accompanied by "evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it", which in this quote you'll see is also to be distinguished from extra-legal motives, purely extra-legal motives or mere habitual practice. And other ICJ cases, as well as Mr Wood's study and conclusion number 9 of the ILC also agree, and that's at reference A14.

Now, that's I think not in dispute. I only recall it because of the evidence issue we come to later.

And then the burden of proof, which I again just will mention very briefly is that it is, we say, on Jordan to show the existence of the relevant customary law as the ICJ held in the Asylum case at A15 and on your screens, I quote, "The party which relies on a custom must prove this custom is established in such a manner that it has become

binding on the other party."

There are other authorities making the same point at A16.

While obviously this Court is not the ICJ, we say that the approach remains sound.

Since Jordan challenges the conclusions of the Pre-Trial Chamber by reference to its view on customary law, it is for Jordan, we say, to show the custom in question.

And indeed, this position is consistent with the general burden on litigants before this Court to substantiate their arguments.

And then bearing in mind the standard of proof and the burden of proof, if we look very briefly to the evidence of State practice on this matter, what we see are areas of disagreement strongly held opposing views and different approaches in the national legislation implementing the Rome Statute. We've identified various examples in our filing number 377, that's our last filing, which I will briefly summarise.

Firstly there are examples of divided State practice and opinio juris that are evidenced by the statements of a number of States, whether acting individually or collectively, that have called on other State Parties hosting Mr Bashir to arrest and surrender him to the Court. Or they have condemned failures to do so or stated that they themselves would arrest Mr Bashir if he entered their territory. And you can find reference to that at paragraph 22 of our filing number 377.

We can also look at the drafting history of Article 98(1). And in your question (m) indeed your Honours specifically asked whether Article 98(1) can be taken as an indication as to the existence of Head of State immunity when surrender is sought by the Court or its opposability to an ICC surrender process. In other words, can the very wording of Article 98 appear to acknowledge that customary international law relative to Head of State immunity would be applicable potentially in an Article 98 context.

The answer we give is no, because the drafting history indicates that Article 98(1) was included not because of consensus on the scope or existence of immunities that might apply to an ICC surrender process, but precisely because States could not agree on this point when the issue was discussed late during the negotiations in Rome. The only agreement that States were able to reach on this matter was a procedural one, which is what we see today in Article 98(1), which leaves it to the Court to determine whether any immunity issues might apply, but formally takes no position on the issue. And you can find references to that drafting history at A17.

And then of course domestic court rulings have also been at variance, with the Courts of some States such as South Africa and Kenya stating that Mr Bashir should be surrendered to the ICC, while other courts such as in Uganda have stated the opposite. That's at reference A18.

And State practice and opinio juris is also divided in reaction to assurances reportedly sought by the Government of Sudan from States seeking to ensure that he will not be surrendered to the ICC upon entry to their territory. This has reportedly resulted in trips by Mr Bashir, whether for attendance at inter-governmental conferences or bilateral visits, being either not considered or cancelled by the Government of Sudan. And references can be found at A19.

Now of course while it's difficult to quantify a negative, assuming these examples are to some extent representative of a broader pattern, Sudan's concern to take these precautions and then the necessity of Mr Bashir not attending certain places again weighs against the idea that customary law immunities so clearly shield him from surrender to this Court.

And then the implementing legislation of a number of State Parties similarly contemplates the surrender of persons sought by the Court irrespective of official

capacity. Now while we note that a minority of such legislation, for example in the UK, Malta and Ireland, distinguish in this context between State Party nationals and non-party nationals, other States make no such distinction.

And then finally we observe the debates within the International Law Commission and the comments made by States in response to its reports, which have revealed divided opinion on the matter.

I can refer you to A20 and on your screens I'm bringing up, I believe this is the fifth report by the special rapporteur, Ms Hernandez, and in this report her task that she *set herself was to identify the circumstances where immunity would not apply.

And she had initially proposed in subparagraph 3 an *exception or limitation of draft Article 7 in relation to, I quote, "any provision of a treaty that is binding on the forum State and the State of the official, under which the immunity would not be applicable", so this is the inter partes rule, if you like, and secondly, quote, the "obligation to cooperate with an international tribunal which, in each case, requires compliance by the forum State" which appears to represent a Security Council imposed rule.

Now, of course we recognise, and I see some reaction from the other side, of course we are alive to the fact that the draft Article 7, in particular its discussion on functional immunities, has been perhaps the most controversial aspect of the ILC's consideration of the topic. *And of course we are aware that there is a danger that *early reports of the ILC can be taken as representing its final views. And we know that the final views on this matter are pending.

However, the reason that we cited to draft Article 7 is not because of its conclusiveness but on the contrary its inconclusiveness. In particular, and this comes up now, according to ILC's record, I quote, on your screens "some members considered the without prejudice clause" this is subparagraph 3 we just looked at,

some members consider this "acceptable" while others, according to the ILC's reports, considered that the issue could be better examined by taking a broader perspective in the context of the procedural aspects of immunity which remain ongoing. That's reference A21, which is included in the last report. In other words, as this lively debate shows, these questions are nowhere near as clear cut as Jordan and some others would suggest.

So looking at the evidence then, State practice and opinio juris on the domestic execution of an ICC surrender request concerning a foreign Head of State is not, quote, "extensive and virtually uniform" or "undertaken with a sense of legal right or obligation".

Instead, the situation is actually similar to what the ICJ found in other cases, such as in the Fisheries case, on your screen and at reference A22, where the ICJ found discrepancy in the relevant State practice, such that the supposed rule had "not acquired the authority of a general rule of international law".

Or similarly, in the Asylum case, on your screens and at reference A23, the ICJ found the circumstances disclosed "so much uncertainty and contradiction", "so much fluctuation and discrepancy", and "considerations of political expediency", that it was impossible to discern "any constant and uniform usage accepted as law".

So in question (n) your Honours ask: What should happen if it were to be found that customary international law did not clearly extend to immunities opposable to this Court?

Well, we believe the answer has been given, by the ICJ again, in the Gulf of Maine case - that's reference A24 and on your screens - which recalled that where a customary rule is not made out, recourse must be made to "special" international law, i.e. The law in force between the parties, or treaty law. In that case it was the 1958

Convention on the Continental Shelf. In this case we say the Rome Statute and the UN Charter, exactly the focus of the Pre-Trial Chamber. And to the extent that the obligations under the 1953 Arab League Convention or the 1945 Pact are also relevant to this analysis, as will be emphasised by my colleagues in answering your questions in group B and C, we would say that Article 103 of the UN Charter would, in any event, take precedence given the necessary effect of resolution 1593, which would then bring into operation the provisions of the Rome Statute.

Now, your Honours in my last few minutes -- yes.

PRESIDING JUDGE EBOE-OSUJI: [12:47:30] Article 103 of the Charter, is it applicable to custom?

MR RASTAN: [12:47:38] The short answer is yes. We will deal with that in group B because it forms part of that set of issues, and Ms Brady will develop it further. But we find authority, including from the ILC, that Article 103 should also extend to custom. It's one of the conclusions of the ILC in its fragmentation study.

Now, we are aware of obviously possible counterarguments to our position and we wanted to address them head on.

One could be that the situation that we are describing as a new phenomena is nonetheless sufficiently comparable to the exercise of national criminal jurisdiction to make the customary international law rules applicable by analogy.

And secondly, what might be called a "pooled sovereignty" objection, that States cannot simply create international institutions in order to subvert or avoid interstate rules that would otherwise apply under custom.

Now turning to the first possible counterargument based upon analogy, as you can see on your screens, it is true of course that the Permanent Court of International Justice acknowledged in the well-known Lotus case the need for "examining

precedents offering a close analogy", which might help to identify a general principle that might be applicable. That's at reference A25. However, we say when looking at the evidence there is no close analogy in this case.

And here, your Honours, I would like to take up question G concerning the origin and nature of Head of State immunity and emphasise, as we noted earlier, it is of course common ground that customary international law rules on personal immunities derive from the principle of sovereign equality, which encapsulates of course the prohibition against the authorities of one State judging a foreign sovereign. The relevant immunity attaching to the Head of State in this regard is a privilege accorded to the person while in office, and not his or her own right, but in fact belongs to the State itself.

Now, by contrast to this rationale and this history and origin, this Court is not the jurisdiction of another State; it is supra-national both institutionally and in its application of relevant norms. That is also why, and in responding to your question (j), sovereign immunity has never been successfully pleaded before any international criminal court or tribunal. Indeed, to the contrary, in the Taylor case, as is well-known, at the Special Court for Sierra Leone, the Appeals Chamber expressly rejected such a plea. That's reference A26.

And we say the same distinction is brought out by the Arrest Warrant case. And here I would like to address question (k), where your Honours ask us how the ICJ's analysis should be understood.

Now we'll bring it up on the screen, but your Honours will recall that the ICJ emphasised in the much cited Article 61 of the Arrest Warrant case, that immunities under international law -- under law, sorry, I'm getting a tongue twister here -- that immunities under international law do not bar criminal prosecution in certain

circumstances. It went on to cite four such circumstances, and the fourth it gave as being criminal proceedings before international criminal courts where they have jurisdiction.

Now, of course, some commentators have lamented the imprecision of this holding, and of course it was not the central issue in dispute. Or they have suggested that this only refers to the ICC's adjudicative jurisdiction and not its enforcement jurisdiction. And I believe the Kingdom of Jordan made similar interpretations this morning of how this should be understood.

But we say it is important to look more closely and to also recall the context in which this particular statement is made. First, when examining the scope of personal immunities in that case, before national courts, the ICJ held that Belgium could neither assert its jurisdiction, by having its courts issue a warrant, nor seek to have it enforced.

Second, the whole raison d'être of the ICJ's discussion leading up to this statement is that personal immunities represent only a procedural bar. It is in this context that the ICJ clarified where the ordinary procedural limitations governing immunities would and would not apply, in order to emphasise the oft-repeated point, that immunity does not mean impunity, which is the point also emphasised again in the jurisdictional immunities case.

And thirdly, when looking at this statement, it is notable that the ICJ illustrates what it means not by citing to Article 27(1) of our Statute, which as we recall deals with the question of individual criminal responsibility, but by expressly citing to and quoting Article 27(2) --

THE COURT OFFICER: [12:52:35] Counsel has 5 minutes.

MR RASTAN: [12:52:37] -- which deals with immunities or special procedural rules

under national or international law which as the provision reads cannot operate as bar to the exercise of the Court's jurisdiction.

Thus, we believe that paragraph 61 of the Arrest Warrant judgment should be understood to set out the outer scope of procedural bars represented by the rule of customary international law on personal immunities. It says that before the ICC, where it has jurisdiction, neither national nor international law immunities may be pleaded against the exercise of the Court's jurisdiction over a State official. Dealing both with its adjudicative and enforcement jurisdiction. We say that the analogy to national practice on immunities is not close; it could hardly be farther.

And I can emphasise this point with one further observation that responds to something that Jordan, the Kingdom of Jordan made at the very start of its submissions, that it bears emphasising that the enforcement by States of an ICC warrant does not constitute the exercise of domestic criminal jurisdiction by that State. A surrendering State makes no assertion of its own criminal jurisdiction and nor does the Statute permit such an assertion: the warrant is issued by this Court under its own jurisdiction. And what a surrendering State does in executing the warrant is also restricted by the Statute. And this is Article 59, which your Honour set out earlier, and we had indeed addressed in our written submissions, which makes it clear that the competent authorities of the surrendering State may not, and I quote, "consider whether the warrant was properly issued".

Now, no such limitation would be permissible if the surrendering State was exercising its own jurisdiction, because it's an essential feature actually of the exercise of substantive jurisdiction that a court must be able to determine the lawfulness of the measure that it is ordering. So we say that by divesting the surrendering State of this essential authority, the Statute clarifies that the criminal jurisdiction in the matter

emanates solely from the Court, and not the surrendering State.

And we say that this distinction is not displaced by the fact that the implementing legislation of some States gives effect to the request that by requiring the competent judicial body to issue a domestic warrant in order to domesticate the ICC warrant. Even in that scenario, the national judge does not issue the warrant in the assertion of national criminal jurisdiction, but is executing the authority, empowered by domestic legislation, to oversee and implement the execution of the ICC warrant. And doing so does not engage the assertion of the State's own criminal jurisdiction since the substantive limitations set out in Article 59 continue to apply, as do the duty of State Parties to give them effect.

And in fact -- I apologise, your Honours, what I have said here jumps a little ahead to some of the questions from group B and question (o), which inquired into relevant role of the surrendering State. But since you raised the question just now I thought I would address it now.

So for these reasons, this Chamber should find that the customary rule concerning the assertion of domestic criminal jurisdiction over foreign State officials is too remote to offer a close analogy. Indeed, returning to the Gulf of Maine judgment, on your screens and at A28, the ICJ observed that customary law must be "tested by induction". This is the quote I referred to earlier. They say customary international law must be, quote, "tested by induction", end quote, i.e. by empirical evidence of relevant State practice and opinio juris and not by "deduction from preconceived ideas".

And then the ICJ went on in that same case to say that, in such circumstances, as you'll see the last highlighted part, a more useful course was to seek a more precise formulation of the fundamental norm at question, and the Appeals Chamber, if

necessary, can do just that.

PRESIDING JUDGE EBOE-OSUJI: [12:56:38] Now, when the Gulf of Maine's case says that customary international law is not to be deduced, so to speak, that necessarily speaks to the establishment or the existence of the rule of customary international law and not necessarily the application of that rule in specific circumstances once deduced so that - correct me if this is the way to understand it or not - once we establish the existence of a customary rule of international law, then its application can be a matter of deduction; is that one way of looking at it or not?

MR RASTAN: [12:57:33] Yes, but I think that's open to your Honours. But I think the point we're making is the process of identifying the existence of a relevant rule, which Jordan is asserting by nature of the interstate rule which they're saying is extendible to the ICC process, presumably by a process of saying that it's sufficiently *comparable - there is a similar analogy - and by reference to the close analogy suggestion given in the Lotus case, we're saying well, that's not enough. You have to then test it and see if there is, in relation to that analogy, is it then supported by relevant State practice, opinio juris. And if it's not, if it's merely based by deduction and there is no induction, there is no empirical evidence, then that fails to meet the relevant standard according to the ICJ.

Then, as I say, they say that then we should turn to the fundamental norm if that customary rule has not been established. And in saying that we would say that the fundamental norm at play here is not the principle of sovereign equality on which personal immunities under international law rest, but the fundamental norm is rather the non-applicability of immunities or special procedural rules which may attach to the official capacity of a person whether under national or international law as a bar to the Court from exercising its jurisdiction over Mr Bashir.

Now, your Honours, on pooled sovereignty I have just 3 minutes of suggestions or notes to make if your Honours want to hear it now, I can wrap it up, or otherwise I can leave it for the question and answers.

THE COURT OFFICER: [12:59:01] Counsel has 1 minute.

MR RASTAN: [12:59:02] So in relation to pooled sovereignty -- and I'll try not to stress out the interpreters too much.

Now, some commentators have said that, for example, Professor Akande, Dapo Akande, with whose approach we generally agree, he has nonetheless raised concerns there could be an objection that any two or more states could simply create an international court simply as a means to circumvent customary rules on inter-State immunities. And that's at reference A29. And that that danger might be at play here when the Court is asserting its jurisdiction.

But in our view, the essential characteristics of the ICC are, yes, that it has been established by multiple States, but it is also structured in an independent fashion which ensures that it is more than just the instrumentality of a few of its members.

Now, obviously, I'm not going to recite the drafting history of Rome Statute, but sufficient to recall that the efforts to create an international code of crimes and a permanent court to give effect to the Nuremberg principles, which you referred to earlier, were of course emphasised at the very first session of the General Assembly 1946. They were recalled two years later in the adoption of the Genocide Convention where a mandate is given to the ILC to study the desirability and possibility of creating such a court. I think this is sufficient to make the point that this institution is not some side project of a few wily States, but has been a poor --

THE COURT OFFICER: Counsel's time is up.

MR RASTAN: [13:00:21] I'll finish the sentence -- but that this has been one of the

core objectives pursued by the United Nations over the course of its existence. And we were just going to make the final point that of course we're also not bound by our parties, we're not an inter-governmental body, and the Judges of course act independently.

And on that, your Honours, I'm grateful for the time. And we haven't addressed (p) and (q), but we can take those up perhaps in the question and answers. Thank you.

PRESIDING JUDGE EBOE-OSUJI: [13:00:48] I thank you very much. As I also understand it, on the last day there may be opportunity for counsel to speak to other matters they would like to speak to.

MR RASTAN: [13:00:56] Sure.

PRESIDING JUDGE EBOE-OSUJI: [13:00:57] Now we will move next to the observations from the counsel for African Union.

MS NEGM: [13:01:09] Thank you, your Honour.

Honourable President, honourable members of the Court, it is my honour to represent the African Union before your esteemed Court in these important and historic proceedings based on our mandate by the Assembly of Heads of States and Governments of the African Union since 2009. I'll be presenting the opening remarks on behalf of the Union. Then Professor Tladi will address group A set of questions.

PRESIDING JUDGE EBOE-OSUJI: [13:01:39] Remember you have 25 minutes both.

MS NEGM: We know, your Honour.

PRESIDING JUDGE EBOE-OSUJI: [13:01:44] Thank you.

MS NEGM: [13:01:46] Mr President, members of the Court, these proceedings are historical for the African Union and the ICC for several reasons. First, the 20 years of the International Criminal Court, the Appeals Chamber will be deciding on one of the

most complex questions of international law to ever come before it, that is whether States Parties are obliged to arrest a sitting Head of State, notwithstanding customary international law.

Second, our acceptance of the Appeals Chamber's invitation to submit observations as amicus curiae signifies the beginning of a more constructive legal approach in the relationship between the African Union and the International Criminal Court.

As elaborated in paragraphs 4 to 10 of our written submission, the question is whether in dispensing the measure of justice the International Criminal Court will itself act within the confines of the established rules of international law on immunities.

It is beyond any doubt that these delicate issues bear broader relevance for all States Parties to the Rome Statute from all regions of the world. In fact, we are here to address the call by this Court for Jordan and African states to violate their obligations towards Sudan under customary international law by arresting and surrendering a sitting president.

The African Union, like the League of Arab States and other regional and international organisations, holds many summits of Heads of State. Hence, a ruling country to the existing law will give rise to diplomatic and other frictions with negative consequences, not only for States but also for the international community as a whole. The African Union reaffirms that the choice for this Chamber is obvious. The appropriate legal position is simple, no exceptions to the rule of immunities of heads of state.

As requested, the African Union will only respond to the questions raised by the Chamber. In that connection, Professor Tladi will address group A set of questions. Professor Jalloh, group B. I, together with Professor Tladi, will do group C.

Please now allow me to leave the floor to my colleague, Professor Tladi, to address the questions. Thank you.

PRESIDING JUDGE EBOE-OSUJI: [13:04:13] Thank you very much, Counsel. Proceed.

MR TLADI: [13:04:16] Honourable Presiding Judge, honourable Judges of the Chamber, I join Ambassador Dr Namira Negm in thanking you for the opportunity to present oral arguments on behalf of the African Union on this very important and historic matter.

The Rome Statute is a treaty system under international law. It is not a separate legal system with no connections to international law. It should be treated as an integral part of that system.

We believe the questions raised by the Chamber in group A set of questions go directly to this point.

As Ambassador Negm has intimated in her opening address, we will restrict ourselves to responding to the questions that have been posed by the Chamber on the understanding of course that the Chamber has acquainted itself well with our written submissions.

Now, counsel for the Prosecution has suggested that there are reasons for the differing reasons that have been offered by the Pre-Trial Chamber with respect to why there is a duty to arrest Mr Al-Bashir. With respect, the issue is that it is not just that the reasons are different. The reasons have been inconsistent and mutually exclusive, and we think that is something that the Appeals Chamber should take into account in assessing our responses to these questions.

Questions (a) and (b) concern the rule of interpretation. I wish to preface my remark by noting that the rules of interpretation to which the Chamber has referred apply not

only to the Rome Statute, they also apply to host country agreements which may include provisions on immunity --

PRESIDING JUDGE EBOE-OSUJI: [13:06:05] Mr Tladi.

MR TLADI: [13:06:07] Yes, sir.

PRESIDING JUDGE EBOE-OSUJI: [13:06:08] Is it unusual in a court of law, even a supreme court of some countries, that judges on it may answer a question come to the same answer ultimately using different reasoning, some of which may be inconsistent? Is there something surprising in that?

MR TLADI: [13:06:33] Yes, well, indeed, there is something very surprising in that. It seems to suggest to us that the only common conclusion that the Chambers have been able to come to is that there is a duty to arrest. The reasons are so different and mutually inconsistent that it might suggest in fact that there is a policy objective and it's not an application of the law.

PRESIDING JUDGE EBOE-OSUJI: [13:06:54] Or perhaps a difficult question could explain that.

MR TLADI: [13:06:59] It might well be.

PRESIDING JUDGE EBOE-OSUJI: [13:07:01] Fair enough. Proceed.

MR TLADI: [13:07:02] So as I was saying, question (a) concerns rules of interpretation and these rules have to apply not only to the Rome Statute but also to host country agreements and in fact to the UN Security Council Resolution 1593. Allow me at this point just in response to the remarks by the Presiding Judge to say that while the Cassese report might well constitute subsidiary means in the interpretation of UN Security Council resolution, that does not mean that its contents can be read into UN Security Council Resolution 1593. That said, of course, my co-counsel will address tomorrow the issue of UN Security Council Resolution 1593.

Now it is true that the object and purpose of the Rome Statute is inter alia to put an end to impunity and that that object and purpose is an integral part of the interpretation process according to the Vienna Convention on the Law of Treaties. That said, the rules under the Vienna Convention do not require that a treaty be interpreted only in light of its object and purpose. Rather, it requires that a treaty be interpreted in good faith, in accordance with the ordinary meaning of the words in the treaty and in light of the object and purpose.

As the International Law Commission noted in its 1966 draft articles and more recently during the 70th session, this is a single combined operation requiring an integrated approach.

The object and purpose cannot override good faith. The object and purpose cannot override the text. The object and purpose cannot override context. The object and purpose must in fact be seen as an integral part of a whole in this interpretation process.

Now, Mr Wood noted that the text of the Rome Statute, including the clear import, clear language of Articles 98 and Article 27, as well as the context, including the placement of Article 98 in contradistinction to the placement of Article 27, all point towards an interpretation that in fact respect Head of State immunity.

Other rules of international law as a means of interpretation under Article 31(3)(c) similarly point to an interpretation that respect Head of State immunity.

The object and purpose of the Rome Statute, including the fight against impunity, would from our perspective be better served by construing Article 27 concerning immunity from the ICC itself broadly as applying to both officials of States Parties and officials of non-States Parties.

Consistent with the distinction made by you, Presiding Judge, in the Ruto acquittal

case, this broad construction of the non-application would not apply to immunity from national jurisdiction.

Regarding the stage that customary international law should be considered in the light of Article 21(1) of the Statute, it does appear that the Statute lays a hierarchy of applicable rules with the Statute being at the apex or a first tier rule.

Nonetheless, it is our submission that customary international law should be considered at the stage of interpreting the Rome Statute itself as part of this first tier or apex rules.

PRESIDING JUDGE EBOE-OSUJI: [13:10:12] At what point, 27 or 98?

MR TLADI: [13:10:16] Could you say that again?

PRESIDING JUDGE EBOE-OSUJI: [13:10:17] I said at what point, at 27 or at 98?

MR TLADI: [13:10:20] Well, at all points, as long as we're interpreting, as long as the Court or counsel is interpreting the Rome Statute, customary international law must be taken into account and I wish to explain why that's the case.

First, the Statute itself incorporates the rules of customary international law into Article 98 so that the rules of customary international law relating to the immunity of Heads of State themselves are part of the Statute. So that's the first reason.

The second reason is that by virtue of Article 31(3)(c) of the Vienna Convention customary international law relating to immunity of Heads of State must be, not sometimes, must be, the Vienna Convention says they shall be taken into account.

Questions (c) to (f) roughly concern the relevance of the fact that the charges being faced by Mr Al-Bashir all concern serious and gross human rights violations and possibly violations of norms of jus cogens.

In our view, Article 2(3)(a) of the International Covenant on Civil and Political Rights is completely irrelevant to the matter before us.

It seems clear to us from the text and context of Article 2(3) that it refers in fact to civil remedies. This reading is also clear from paragraph 16 of general comment number 31 of the Human Rights Committee with respect to that same particular provision. Moreover, the phrase "notwithstanding that the violation has been committed by a person acting in an official capacity" is also irrelevant here for two other reasons. First, as a treaty obligation, all that it does is it obligates the State Party concerned to ensure redress for violations occurring in its own territory. It is thus not applicable to the exercise of jurisdiction over officials of one State by another State. And more to the point it does not at all concern immunities.

But even if it did concern the application of immunities, the reference to, and I quote, "persons acting in an official capacity" by definition refers to immunity ratione materiae, which is not at issue in these proceedings. What is at issue in these proceedings is immunity ratione personae.

With respect to questions (d) and (e), it is the case, we agree with all that have spoken so far, that the prohibition of crimes against humanity and genocide constitute peremptory norms of general international human law, jus cogens as defined in Article 53.

The key question, however, is not whether these norms constitute jus cogens norms, but rather what is the consequence of that status. The question could even be more pointedly and explicitly formatted as follows: Whether as a consequence of jus cogens normativity is the application of immunity.

Now in 2017 during its 69th session, the International Law Commission adopted draft Article 7, which has been referred to by counsel for the Prosecution, that provision concerning immunity ratione materiae. Now while that provision caused large disagreements within the Commission and among States, there was universal

agreement, both within the Commission and among States, that even in respect of jus cogens crimes, there were no exceptions to immunity ratione personae. In its observations on the submissions of the African Union and the League of Arab States at paragraph 21, the Office of the Prosecutor suggests that the International Law Commission decided to defer for further study the question of whether this basic rule applies to the enforcement of an arrest warrant by an international tribunal. This is decidedly not the case. In 2017 the Commission rejected the special rapporteur's proposal for a without prejudice clause that was shown on the screen. It's not in the final text.

In 2018 the special rapporteur reintroduced the issue by offering a further study. Now, the debate has not yet been concluded, but I can tell you that five members spoke on this and only one member supported that proposal.

In 2018, the -- I think I will skip this part to save time.

Now, the conclusion that there are no exceptions for jus cogens crime does not mean that a normal rule of customary international law would trump a jus cogens norm because, as the International Court of Justice noted in the jurisdictional immunities case which was quoted at length by Mr Wood, these two rules operate at different levels, so that in fact no conflict arises between them.

Members of the Chamber, questions (g) to (l) concern the rules relating to immunity in a general sense.

The main element of the question in (g) concerns whether immunity is a right or a privilege, and whether there is a distinction between the two. Indeed, there is a distinction between the two. A privilege is accorded and can be denied by the privilege grantor.

Not so for immunity, however, because it is a legal rule which operates between

States in terms of which they owe each other a duty to respect that legal rule.

As to the question in (h), it seems now universally accepted that there are no exceptions or restrictions or limitations to the immunity of Heads of State in general international law, and we were quite surprised by the arguments that were proffered by the Office of the Prosecutor.

PRESIDING JUDGE EBOE-OSUJI: [13:15:58] Mr Tladi, does jus cogens have an applied value or is it merely something in the nature of what one author in a different context described as *a benediction brooded low, you know, manifesting itself in beauty, in peace and absolute repose, emphasis there on "absolute repose". Is that what jus cogens is about? It may manifest itself in, you know, dolorous dignity and helpless melancholy and absolute repose. Is that where we are with jus cogens?

MR TLADI: Absolutely.

PRESIDING JUDGE EBOE-OSUJI: [13:16:49] Does it have an applied value? If so, what is it?

MR TLADI: [13:16:54] Yes, indeed. Jus cogens does in fact have a value beyond its beauty. So one value is that it invalidates inconsistent treaties or treaties that are in violation of jus cogens are invalidated.

PRESIDING JUDGE EBOE-OSUJI: [13:17:10] Only treaties?

MR TLADI: Another value --

PRESIDING JUDGE EBOE-OSUJI: Only treaties? Rules of customary international law as well?

MR TLADI: [13:17:15] No, no. So it invalidates treaties, it invalidates inconsistent customary national law. But if the customary international law rule is indeed inconsistent, and as we have shown by virtue of what the International Court of Justice stated in Germany v. Italy, in fact there is no inconsistency. It invalidates

inconsistent decisions by international organisations, including even UN Security Council resolution. It establishes a duty on States to cooperate in order to end violations. So there are in fact value. But that value does not extend to immunity because the rules on immunity are different. They don't apply in the same --

PRESIDING JUDGE EBOE-OSUJI: [13:17:57] Was Judge Awn Al-Khasawneh of the ICJ wrong, necessarily, in his views in the Arrest Warrant case, his dissenting opinion, where he clearly disagreed with that distinction that was made in paragraph 60 and 61. I believe, if I recall, he described it in terms of artificial distinctions whose purpose was to circumvent an embarrassing question, that embarrassing question being whether immunity translates into impunity, he said. And I believe also Judges Higgins, Kooijmans and Buergenthal in their joint separate opinion expressed feelings of being less than sanguine about the discussion in paragraph 61 of the Arrest Warrant case. Was Judge Al-Khasawneh absolutely wrong in saying that distinction should be given short shrift?

MR TLADI: [13:19:20] I have very strong views on that, so I'm happy to share them with you. The views that I have expressed, and also expressed in the International Law Commission, was that at the time he was not wrong. But you have to remember what makes customary international - what makes customary international law is the practice of States. And, generally, that decision that you're referring to was issued in 2002. And since then States have consistently accepted the pronouncement from the judgment, from the majority judgment so that in fact the rule as far as international law is concerned, is expressed in the majority judgment which has since been now approved also in the ICJ decision in Germany v. Italy. So there is an evolution of international law.

PRESIDING JUDGE EBOE-OSUJI: [13:20:08] But the majority judgment - again, let

us know if we are getting the reading wrong - seemed to have suggested that before an international court properly exercising jurisdiction, there is no immunity, is that understanding incorrect?

MR TLADI: [13:20:32] Well, that's the question to which the Chamber posed in question (k), to which I will most certainly come to.

But before coming to that question, I do just wish to rebut the observations that have been made by the Office of the Prosecutor, that there is in fact on this particular issue no rule of customary international law. There are several sources, several sources that have in fact confirmed that there is a rule of customary international law under which a Head of State is completely and absolutely immune. The first one is the Arrest Warrant case and, of course, we will talk about this particular element that you raise, the work of the International Law Commission itself and the responses thereto by States. Even decisions of national courts, even decisions of national courts in relation to the matter of Mr Al-Bashir, we will refer to the Supreme Court of Appeal decision in Minister of Justice v. * SALC. In fact, if you look at that decision, in its description of international law it comes to the conclusion that there is no exception under customary international law to Head of State immunity. It finds that there is a duty to arrest on the basis of something else, domestic law. But as far as international law is concerned it is absolute. And it considers the jus cogens argument, it considers all matter of arguments, and comes to the conclusion that there is no exception.

Even the Pre-Trial Chamber decisions too in the DRC case, South Africa case, and Jordan cases, all re-affirm this basic principle.

PRESIDING JUDGE EBOE-OSUJI: [13:22:08] The judge in -- one of the judges in the Constitutional Court disagrees, not in explicit terms, but saying that it was not

necessary for the Court to have gone into the question.

MR TLADI: [13:22:23] That's precisely. The judge did not disagree with the reasoning. The judge simply said why are you spending so much time on an issue that's not relevant? What is relevant is not the international law. What is relevant is the domestic law. So, essentially, I don't think that it's a disagreement. It seems to me that in fact it is an agreement with a general position that is expressed by the Court.

PRESIDING JUDGE EBOE-OSUJI: [13:22:43] So the views of the South African Constitutional Court on the matter would be considered obiter dictum or not.

MR TLADI: [13:22:52] Well, it wasn't an obiter dictum remark, because the Court had this question before it and the Court had to in fact respond to this question. So I don't think it was an arbiter dictum remark.

Now it is true that immunity has not been successfully pleaded before an international court. That's one of the questions that you raised. And by this we mean immunity has not been pleaded, successfully pleaded, to bar the exercise of an international criminal court of its jurisdiction. But the current matter is not about immunity before an international court; it is about immunity before foreign jurisdiction. And with respect to the latter, immunity ratione personae has been consistently pleaded before various courts.

Questions (i), (j), (k) and (l) all seek to enquire whether there is an exception from immunity from foreign criminal jurisdiction, leaving aside UN Security Council referral. The short answer, as I've said, is that no, there is no such exception.

Now, one part of question (j) asks whether immunity has ever been pleaded successfully in relation to proceedings before an international court, in other words, to prevent national authorities from enforcing an arrest warrant by an international

court.

Now, a simple answer to this is no, immunity has not been successfully pleaded in that respect. However, this is an oversimplification of a complex matter. It ignores the fact that immunity, in particular immunity ratione personae in relation to proceedings before international criminal courts has been pleaded in such few cases that no general conclusions can be drawn from them.

The only comparable situation involving immunity ratione personae of a person under an arrest warrant is the current situation involving Mr Al-Bashir. The decisions concerning this case of course cannot form authority, quite apart from the fact that they've been inconsistent and mutually exclusive, also because they are under appeal as we speak.

PRESIDING JUDGE EBOE-OSUJI: [13:24:42] Was there a case out of Kenya where the Court of Appeal pronounced on that? Was there a case, a recent judgment of the Court of Appeal of Kenya?

MR TLADI: [13:24:54] That's correct, I believe.

PRESIDING JUDGE EBOE-OSUJI: [13:24:55] That reached an opposite conclusion, that there is no immunity before Kenyan courts as a matter of customary international law.

MR TLADI: [13:25:04] Yes. But even that particular case was not about general international law. Even that particular case was not about general international law. It was an application of Kenyan domestic law. So as I was saying, there is another reason why the assumption - and I guess this goes also to the pleadings, the oral pleadings of the Office of the Prosecutor - there is another reason why the assumption that is implicit in question (j) is problematic. And by the way, this also applies to question (l). It in fact seeks to reverse the onus of proving a rule of customary

international law and exceptions thereto.

So let's take it step by step. There is a general rule of immunity from foreign criminal jurisdiction. This is not disputed. It was the first time that I heard it being disputed today. But there is a general rule.

An exception to this rule, including in connection with proceedings related to international criminal courts, must be proved by advancing State practice and not the other way around.

The question in (j) requires that the general rule must be proven in relation to specific circumstances, that is where an international criminal court is involved.

In other words, the general rule is that heads of state have immunity from foreign criminal jurisdiction. That's the general rule. Any allegation that, in respect of matters relating to international courts, there is no immunity from foreign criminal jurisdiction must be proved by advancing practice in that respect, and no practice is available.

With respect to question (k), which is the question you were asking me earlier, it is true that paragraph 61 of the Arrest Warrant case provides that prosecution before an international court is a pathway towards accountability for persons with immunity ratione personae.

But prosecution before an international criminal court addresses only the ability of the criminal court to exercise its jurisdiction. It's a bar before the court. It does not address the arrest and surrender by such a person by foreign officials because that's the exercise of foreign criminal jurisdiction.

PRESIDING JUDGE EBOE-OSUJI: [13:27:08] How does an international -- how does international law or an international institution -- or international law supplied through an institution, how is that given effect? Is it given effect through the

cooperation or assistance of States.

MR TLADI: [13:27:27] Yes.

PRESIDING JUDGE EBOE-OSUJI: [13:27:28] Or does international law have its own self-executing instruments or mechanism, as it were, that might have avoided --

MR TLADI: [13:27:38] Well, in this particular instance, and again, this goes to the latter groups of questions that will be responded to in group C. But I will respond to you very quickly and say that in the case of the Rome Statute of course there are specific provisions that deal with how that enforcement is supposed to take place. But in that context there is also specific exclusions and exceptions, and these exclusions and exceptions are on Article 98, so that we cannot say that because there is a duty to cooperate international law itself will be ignored, because Article 98 specifically provides a role for it. Article 98 specifically provides that in these kinds of instances there is no duty to cooperate.

PRESIDING JUDGE EBOE-OSUJI: [13:28:21] And that's what makes our discussion that complex, isn't it?

MR TLADI: [13:28:24] Exactly, precisely.

PRESIDING JUDGE EBOE-OSUJI: [13:28:27] Yes. Thank you.

MR TLADI: [13:28:28] I'm now going to skip to questions (o) to (q), because I notice that you have not been addressed on these questions at all.

Question (o) relates to balancing of heads of state immunity against responsibility. As a legal matter, responsibility and immunity are different legal concepts. Responsibility is a substantive concept that addresses the question whether an individual can be held guilty for an offence, whereas immunity, as the Office of the Prosecutor pointed out, is a procedural concept that prevents the exercise of jurisdiction where it is applicable.

So in our view there is no conflict between the two concepts, and therefore no need to actually arrive at a balance, because the immunity that is bestowed on an individual does not affect, at all, his legal responsibility.

Now this leads us to question (p) where the Court --

PRESIDING JUDGE EBOE-OSUJI: [13:29:21] Mr Tladi, you make arguments that provoke questions perhaps. I will come later on to some of them, but it may be better to pose some of them on the spot.

In Arrest Warrant case, Judge Koroma effectively distilled this distinction, didn't he, in a separate opinion where he said that immunity addresses -- sorry, immunity is a question of legal process, whereas jurisdiction is a matter of legal liability or whether there is freedom from legal liability, so they're not the same. So there is no conflict.

The question then becomes this: Does there come a point where in a criminal case you cannot get to legal liability without a legal process? Isn't it necessarily the case in a criminal case where there is a presumption of innocence, would you ever get to legal liability without the legal process? And if you exempt someone from the legal process long enough, would you ever get to their legal liability, that is to say, has responsibility effectively now been defeated?

MR TLADI: [13:30:56] Not in this case certainly, because again this case, this particular instance that we're dealing with does not concern again the question whether or not he's immune before this Court, right. So this Court establishes a particular rule in Article 27, and it says in this Court you may not plead immunity, all right. And our reading is this is a general rule that applies. But with respect to the enforcement by an individual State seeking to exercise foreign criminal jurisdiction, there is another rule, and that rule is in Article 98 and that rule prevents that.

Now, there are many ways in which that rule can be addressed. Some of these ways

I'm sure will be discussed tomorrow in Group B questions. But, for example, the Security Council could craft its resolution by creating and establishing an obligation on all States, right. So if you create explicitly an obligation on all States, that would address that issue.

But we cannot address the question by simply ignoring the legal rules, which it seems is what is happening.

So I was going to discuss question (p) with respect to the genocide case. And I'll just make a few quick points about the genocide case.

In our view, the genocide case does not apply in this matter. If you look at the two articles that have been referred to by Judge Brichambaut, Article 6 of the Genocide Convention provides for the prosecution of a person by a competent tribunal of the State in which the crimes have been committed - so in this case it would be Jordan, so no questions of immunity would arise - or an international penal tribunal whose jurisdiction is accepted by the parties.

So this provision only concerns a distribution of jurisdiction. It is not applicable in this matter, because the international court being referred to in Article 6 of the Genocide Convention is one whose jurisdiction is accepted by the contracting parties, which would include Sudan.

Sudan has not accepted the ICC and, therefore, it cannot be a competent international court in the context of Article 6 in this matter.

Secondly, contrary to Judge Perrin de Brichambaut, Article 4 of the genocide convention does not deal with immunities at all. Article 4 addresses this distinction that we have just spoken about concerning responsibility, right. So it deals with responsibility and not the question of immunity. So it's important that we don't inflate issues of immunity and issues of responsibility.

This I think is borne out by ICJ arrest warrant case at paragraph 60, where the Court says, while jurisdictional immunity is procedural in nature, criminal responsibility is a question of substantive law, and there are many other references that we can advance.

Finally, question (q) concerns the abuse-of-right argument raised by Professors Zimmermann and Neugebauer.

THE COURT OFFICER: [13:34:01] Counsel has five minutes.

MR TLADI: [13:34:03] Five minutes.

As interesting as this argument is, the doctrine of abuse of right is, with respect, inapplicable to this matter. It is useful to begin by recalling the caution of Sir Hersh Lauterpacht that the doctrine of abuse of power must be "wielded with", quote-unquote, "studied restraint".

More to the point, Sir Ian Brownlie observed that while it may be useful agent for progressive development, it did not exist in positive law.

Moreover, to the extent that it could be relied upon, it has only been relied upon in a bilateral context where the State purportedly abusing its right has done so to the detriment of the State claiming the abuse of right. Relying on it in this context would require States to act as enforcers of UN Security Council resolutions when they have not been mandated to do so by the UN Security Council itself.

In other words, the doctrine cannot be used to avoid an obligation owed to one State on account that the latter State has not complied with an obligation that is owed to another State or entity.

Mr President, honourable members of the Chambers, on this basis it is our submission that the customary international rule in terms of which heads of state are absolutely and without exception immune from foreign criminal jurisdiction applies even in the

context of ICC proceedings.

And I thank you very much.

PRESIDING JUDGE EBOE-OSUJI: [13:35:31] When we say foreign criminal jurisdictions, we don't mean jurisdiction of an international criminal court. We're talking about at the horizontal level; is that correct?

MR TLADI: [13:35:41] Precisely.

PRESIDING JUDGE EBOE-OSUJI: [13:35:42] Thank you very much. Thank you, Counsel, for the submissions.

Now, here we've arrived at the point where we must have lunch. So we will rise and come back at 3 o'clock, and at that time the counsel for the League of Arab States will address the Court.

We will now adjourn.

THE COURT USHER: [13:36:02] All rise.

(Recess taken at 1.36 p.m.)

(Upon resuming in open session at 3.08 p.m.)

THE COURT OFFICER: [15:08:04] All rise. Please be seated.

PRESIDING JUDGE EBOE-OSUJI: [15:08:29] Thank you very much and welcome back everyone.

So now we will take the submissions from the counsel of the League of Arab States.

MR ABDELAZIZ: [15:08:48] Mr President, members of the Appeals Chamber, thank you for the invitation to this hearing on this important case. It is my honour to present to you the views of the League of Arab States with regard to questions posed in group A.

As the Appeals Chamber is aware, the League submitted observations on 16 July 2018, and it wishes to confirm to you today those observations and to extend on

them, bearing in mind the questions that have been asked by the Appeals Chamber. At the outset, the League of Arab States wishes to reaffirm the importance that it attaches to the issues raised in Jordan's appeal. As was indicated in our observations, the League considers that the fight against impunity is of the highest importance and that those responsible for heinous crimes must be brought to justice. This goal, however, cannot be achieved at any cost. The fight against impunity must take place within the framework of international law, including the rules that aim to guarantee orderly relations between states.

The League wishes to call to your attention certain facts relevant to these proceedings. First, the League of Arab States was founded in Cairo in 1945 with the adoption of the Pact of the League of Arab States.

Second, although the League began with six member States, today it consists of 22 member States and five observer States, which straddle the continents of Africa and Asia. Both Jordan and Sudan are member States of the League. Jordan became a member state on 22 March 1945 and Sudan on 19 January 1956, immediately after its independence.

Third, throughout its history, the League has served as an important forum for its member states and observer States to coordinate their policy positions, but also to deliberate on matters of common concern and to settle Arab disputes so as to limit conflicts, including armed conflicts.

Thus, one of the key purposes of the League is to help maintain international peace and security through dialogue among its member States. By way of example, the League was very active in addressing the Iraqi invasion and occupation of Kuwait in 1990-91, including the atrocities that were committed in the course of that conflict. More recently, the League was very active in addressing conflict that arose in Libya in

2011. The League is also quite involved in addressing conflicts between its members and others. For example, at the Beirut summit in 2002, the League adopted the Arab Peace Initiative, which is a peace plan for the Arab-Israeli conflict that has been supported by the United Nations Security Council and by key states and partners involved in the peace process.

Fourth, the dialogue among member states of the League happens, in large part, through the holding of intergovernmental meetings and conferences. The League has an extensive range of meetings at the expert organ and ministerial levels, which then report for action at the annual summit of the League.

The summit gathers together the Heads of State and government of all members of the League to approve important decisions based on earlier meetings and to make plans for the upcoming year for the League, including in its relations to the United Nations. To date, the League has held 35 summits.

Fifth, the representatives attending League summits are protected by immunities that arise under three sources of law. One source of law is the pact of the League of Arab States, which provides in Article 14 that members of the council of the League shall enjoy in the exercise of their duties diplomatic privileges and immunities.

Another source of law is the 1953 convention on the privileges and immunities of the Arab League, which provides the representatives of member States to conferences convened by the League shall, while exercising their functions and during the journey to and from the place of meetings, enjoy certain privileges and immunities, including immunity from personal arrest or detention.

Both Jordan and Sudan are parties to the 1953 convention. Jordan deposited its instrument of accession on 12 December 1953, while Sudan did so on 30 October 1977.

I will return in greater detail to these sources of law later in my submission. The

third source of law with respect to immunity is customary international law. In the League's view, customary international law accords immunity to a Head of State from foreign criminal jurisdiction with no exceptions whatsoever.

Sixth, the overall purpose of the treaty-based immunities is to facilitate the exercise of functions of the League of Arab States in the territories of member states. Simply put, the representatives of the League's member States must be able to travel freely to the territory of the host State without fear of arrest and prosecution.

Indeed, as indicated in the 1953 convention, the purpose in according privileges and immunities under chapter 4 of that convention to representatives of member States is to safeguard the independent exercise of their functions in connection with the League. The immunity of Heads of State under customary international law is essential to safeguard friendly relations and intercourse between sovereign states.

Seventh, of the 22-member States of the League, five are also parties to the Rome Statute. When those five States became parties to the Rome Statute, they knew of the existence of their obligations with respect to immunities that are owed to other League member states and they knew that some League member States might not join the Rome Statute immediately.

Article 98 of the Rome Statute provided the basis for reconciling any possible conflict between League obligations relating to immunities and obligations owed under the Rome Statute.

Mr President, I turn now to legal issues specific to group A.

PRESIDING JUDGE EBOE-OSUJI: [15:17:21] Before you do, Counsel, do I understand the submissions so far to be to this effect: To the extent that there are immunity provisions for Heads of State travelling to Arab League meetings, that immunity needs to be respected for purposes of enabling the Arab League achieve its

purposes?

If that is the understanding, would it then be something of a special argument that does not mean immunity generally under customary international law, but immunity for purposes of enabling an international organisation to fulfil its functions?

MR ABDELAZIZ: [15:18:32] The respect for the immunity in the literature of the League of Arab States is not limiting supplying this immunity only for the purposes of the meeting of the League of Arab States. It's a general provision that does not delve into any specificities with regard to this particular issue.

Mr President, I turn now to legal issues specific to group A.

It is the League's position that Pre-Trial Chamber II's decision of December 2017 and its interpretation of the obligations of States Parties to the Rome Statute as regards to immunities of Heads of State under international law is fundamentally flawed and will have serious negative consequences for the proper functioning of the Arab League, including on the holding of its summit meetings. It also sets obligations of a member state under the League's legal instruments in direct conflict with obligations under the Rome Statute where such a member is a party to the statute.

As a general matter, the League has reviewed and fully agrees with the arguments set out in Jordan's appeal brief and is of the opinion that Pre-Trial Chamber II's decision should be set aside in its entirety. My comments today are intended to address further some issues which the League finds particularly relevant at this stage of the proceedings.

One of the questions of direct concern to the League is the present case in whether Jordan had an obligation to respect the immunity of President Al-Bashir under the 1945 pact of the League and under the 1953 convention when he visited Jordan on 29

March 2017, in order to attend the 28th Arab League summit. Both treaties were in force as between Jordan and Sudan at the time of the visit of President Al-Bashir to Jordan. Pre-Trial Chamber II addressed the question of treaty-based immunity only with respect to the 1953 convention and its reasoning was brief.

The League considers that Pre-Trial Chamber II erred with respect to matters of fact and law. The following arguments are made by the League in its capacity as the depository of the 1953 convention, an institution often called upon to interpret and apply both treaties.

With respect to the Pre-Trial Chamber's error of fact, the League explained in its written observations that the Chamber was unable to conclude that Sudan was a party to the 1953 convention because of a faulty translation by the Registry of the Court, which did not include Sudan among the member States of the League that had deposited instruments of accession. This was, indeed, later acknowledged by the Chamber in its decision granting Jordan leave to appeal, but this does not change the fact that the Chamber had at its disposal all the material to come to the right conclusion, and in the League's view, Jordan should not have been prejudiced by the error for which it bore no responsibility. The Chamber's failure to determine that Sudan was a party to the 1953 convention constituted a serious error of fact.

The Chamber's failure to determine that Sudan was a party to the 1953 convention constituted a serious error of fact. With respect to the Pre-Trial Chamber's error of law, the League respectfully submits that the Chamber erred in not acknowledging that while President Al-Bashir was on Jordan territory for the League's summit, Jordan had an obligation to fully respect his immunities under both the pact of the League of Arab States and the 1953 convention, as well as under customary international law.

The pact of the League of Arab States creates certain organs for the exercise of the League's functions. Article 3 provides that the League shall have a council composed of the representatives of the member States. Each State shall have one vote regardless of the number of its representatives. When a Head of State leads a delegation to the council, he or she is a representative of his or her State to the council of the League.

The first paragraph of Article 14 of the pact concerning immunities reads as follows: "The members of the Council of the League, the members of its Committees and such of its officials as shall be designated in internal organization, shall enjoy, in the exercise of their duties, diplomatic privileges and immunities."

In order to specify in greater detail the kind of privileges and immunities referred to in the pact and to define clearly the manner of their application, the council of the League adopted the 1953 convention. The overall purpose of the 1953 convention is to facilitate the exercise of the League's function in the territories of member states.

While the purpose in according privileges and immunities under chapter 4 of the convention to representatives of member States of the League is to safeguard their independent exercise of their functions in connection with the League, among other things, the 1953 convention provides in Article 11 that, and I quote, "Representatives of Member States to the principal and subsidiary organs of the League of Arab States and to conferences convened by the League shall, while exercising their functions and during the journey to and from the place of meeting, enjoy the following privileges and immunities:

(a) Immunity from personal arrest or detention and from seizure of their personal effects ..."

Further, Article 14 of the 1953 convention provides that, "Privileges and immunities are accorded to the representatives of Member States, not for their personal benefit, but in order to safeguard their independent exercise of their functions in connection with the League.

Consequently, Member States must waive the immunity of their representatives in all cases where it appears that the immunity would impede the course of justice and if it can be waived without prejudice to the purpose for which the immunity is accorded."

The League regards these provisions as crystal clear. While on Jordanian territory for purposes of the 28th Arab League summit, President Al-Bashir acted on behalf of a member of the council of the League. As a representative of Sudan to the council of the League, he enjoyed immunity from arrest or detention by Jordan, both under Article 14 of the pact of the League and Article 11 of the 1953 convention.

The Chamber's error is material given that central arguments of Jordan that it was under a treaty obligation to accord immunity to President Al-Bashir during his visit to Jordan in March 2017. Another question of direct concern to the League in the present case is whether these obligations of Jordan or of any other member state of the league that is a party to the Rome Statute are somehow suspended by obligations under the Rome Statute. In the League's view, they are not.

The Prosecution contends that Article 27(2) of the Rome Statute imposes on States Parties, such as Jordan, an obligation that requires them to violate obligations owed to a non-party State, such as Sudan. In our view, underlying the Prosecution's argument is an erroneous and misguided approach to the interpretation of Article 27 based on a hypothetical series of so-called vertical and horizontal relationships.

We have discussed in our written observations why we view this as erroneous and is not even consistent with the Pre-Trial Chamber's reasoning. The League is of the

opinion that Article 27(2) of the statute does not strip away the immunity of foreign state officials from criminal jurisdiction at the so-called horizontal level that is before the domestic courts of parties to the statute. This is clear from the text of the provision, which refers exclusively to immunity with respect to the Court's own jurisdiction.

Rather, Article 98 of the Rome Statute entitled, "Cooperation with respect to waiver of immunity and consent to surrender" clearly provides that if obligations with respect to immunities are owed by a state party to another state, then such immunities continue to operate in the absence of a waiver.

In short, Article 27 is making clear that no immunity exists once the defendant is before this Court, but Article 98 is expressly and clearly addressing the situation of how to handle immunities owed by a State Party to another State in the context of a request for an arrest and surrender to this Court.

Paragraph 1 of Article 98 says that this Court may not proceed with such a request if it would require the requested state to act inconsistently with its obligations under international law with respect to a foreign State official. That is exactly the position in which Jordan found itself in March 2017 in the context of the League summit.

Paragraph 2 of Article 98 says that, "The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court ..."

That is exactly the position in which Jordan found itself in March 2017. It cannot be said that the text of Article 98 allows for impunity for the text itself contemplates the waiver of such immunity. It cannot be said that Article 98 frustrates the object on purpose of the Rome Statute for Article 98 is a part of the Rome Statute and it was

intentionally and purposefully drafted by States to address a particular issue of which they were aware of. It also cannot be said that Article 98 defeats fundamental norms of international law given that those norms include the avoidance of conflict between States, including armed conflicts, which is one of the reasons why the international law on immunity exists.

The Prosecution challenges this interpretation of the statute. First, it is said that this interpretation reads Articles 27 and 98 as being in opposition to one another.

The League considers that these two provisions are distinct and serve different purposes, just as Part 3 and Part 9 of the statute address different matters. Further, the league views these two articles as operating in harmony and not in conflict as we explained in our written observation.

As regards Article 98(2) of the Rome Statute, Pre-Trial Chamber II found that it does not apply to the 1953 convention because the latter does not refer to a sending state and does not establish or refer to a procedure for seeking and providing consent to surrender.

The Prosecution further argued in its response to Jordan's appeal, that Article 98(2) only applies to certain kinds of international agreements which would not include the 1953 convention. The League finds such arguments wholly unconvincing. There is no reason to regard the ordinary meaning of the term international agreements in Article 98(2) as limited to status of forces agreements or to any other class of agreements. Another important category of international agreements clearly covered by the provision, for example, are those conferring privileges and immunities on persons connected with international organisations, including State representatives.

THE COURT OFFICER: [16:56:25] Counsel has five minutes.

MR ABDELAZIZ: [16:56:30] I'm almost through, almost one page.

PRESIDING JUDGE EBOE-OSUJI: [16:56:37] Before you continue, so that I understand the argument, is it your submission that the convention immunities of the Arab League and perhaps also the pact provisional immunities, I want to understand, are you saying that they belong where? In 98(1) or 98(2) or both?

MR ABDELAZIZ: [16:57:25] This is a typically legal question that I would like to consult upon. May I come back to your Honour with an answer tomorrow?

PRESIDING JUDGE EBOE-OSUJI: [16:57:41] Thank you very much. Please proceed.

MR ABDELAZIZ: [16:57:43] To adopt the Pre-Trial Chamber and Prosecution's excessively narrow interpretation of Article 98(2) is inconsistent with the text and object and purpose. The League wishes to confirm that when a State sends a representative to a meeting of the League, it is clearly acting as a sending state within the meaning of Article 98(2). In sum, the league is of the opinion that the Pre-Trial Chamber erred by finding that Article 98 of the statute does not preserve the treaty-based and customary international law immunity from national criminal jurisdiction of foreign State officials, including Heads of State or government not parties to the statute. It should have concluded that Article 98 does preserve such immunities and that the Court is obliged to obtain a waiver of immunity or consent to surrender from the foreign State concerned before making a request for arrest and surrender.

Even if the Appeals Chamber considers that Article 98 does not preserve the immunities of officials of States Parties to the statute by virtue of Article 27(2), those immunities are without doubt preserved with respect to non-party States, such as Sudan, including immunity for the foreign criminal jurisdiction of a State Party to the Rome Statute.

Mr President, honourable members of the Appeals Chamber, based on such errors, it is the League's contention that the first ground of appeal should be granted. And thank you for your attention.

PRESIDING JUDGE EBOE-OSUJI: [16:59:55] Thank you very much, Counsel.

We will now turn to the academic friends of the Court, amici curiae. One question that occurs in the course of the submission of counsel for the Arab League, which you may answer now, sir, if you wish, but later on anyone can also address it, will be this, regardless of where the correct answer lies on the legal question presented and regardless of the operation of Article 103 of the UN Charter, if it does apply in the end, is it something of a recommendation, as a matter of policy that where President Al-Bashir attends a conference of an international regional organisation, perhaps it may be a matter of policy for an arrest not to be sought. It is an open question; anyone can take it in time.

On that note, I will turn the microphone over to, I think Mr Kreß will speak next.

MR KREß: [17:01:53] Your Honours, many questions of group A refer to customary international law. Customary international law indeed provides the Appeals Chamber with the key for a legally correct decision. What is more, only customary international law provides the Chamber with the key for a legally correct decision, which is also in line with the fundamental principle of the equal enforcement of the law.

The Chamber should, therefore, not avoid the application of customary international law on grounds of judicial economy. To the contrary, the Appeals Chamber should find that Jordan would have acted consistent with its obligations under customary international law if it had executed the ICC's request to arrest and surrender President Al-Bashir.

In this statement, I wish to explain three points on the relevant customary law, which are key as the debate so far has shown. First, already at the entry into force of the ICC statute, the customary law immunity ratione personae of a sitting Head of State was subject to an exception for proceedings before certain international criminal courts, including the ICC.

Second, at the same moment in time, this international criminal court exception included the arrest and surrender of a sitting Head of State by a State Party upon the request by the ICC. Not, I should clarify in light of the Prosecution's earlier statement on my position, not as a customary obligation to arrest and surrender, but as the right to non-existence -- as a right to non-existence of immunity.

Let me begin by briefly recalling how the customary international criminal court exception to the immunity ratione personae has come into existence. This happened through the ordinary process of the formation of customary international law based on State practice and opinio juris.

Starting with Article 7 of the Charter of the Nuremberg Tribunal, none of the international legal texts which are relevant for the elimination of immunities for crimes under international law contains an exception for sitting heads of States.

In its reasons of 5 April 2016, in the case against Ruto and Sang, Judge Eboe-Osuji has demonstrated that this is no accident. Instead, as the Judge set out in some detail, the possibility of proceedings against such sitting state officials had explicitly been contemplated during the preparation of the Nuremberg and Tokyo trials.

It is, therefore, also no accident that the recognition of the customary international criminal court exception by the International Law Commission in 1996, again, does not contain an exception for sitting heads of States.

It is true that the relevant Article 7 of the 1996 ILC draft is formulated in terms of

substantive law, but it is also true that the commentary says explicitly that Article 7 is meant to also cover procedural immunities. This reflects the customary evolution. Remember, that Article 7 of the Nuremberg Charter was also formulated in terms of substantive law and this also did not prevent the Nuremberg tribunal from famously rejecting procedural immunities.

Let me recall the tribunal stated explicitly, I quote, "He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the state ..."

That the two paragraphs of Article 27 of the ICC Statute distinguish between substance and procedure is certainly a welcome advance in the clarity of legal drafting, but it is not a novelty regarding the content of customary international law.

In its 1996 commentary, the ILC had limited the customary exception to immunity to, I quote, "appropriate proceedings". The ILC specified, and I quote again, "Judicial proceedings before an international criminal court would be the quintessential example of appropriate judicial proceedings in which an individual could not invoke any substantive or procedural immunity based on his official position to avoid prosecution and punishment."

This is the international criminal court exception. The ICJ should then authoritatively confirm precisely this exception in paragraph 61 of its judgment in the 2002 arrest warrant case. In full conformity with a prior customary evolution, neither the ILC nor the ICJ limited the international criminal court exception to international criminal courts established by the Security Council. To the contrary, the ICJ explicitly included the ICC in this exception.

The international criminal proceedings against Slobodan Milošević and against Charles Taylor were both instituted against sitting Heads of States. I am not aware that States in any significant number would have protested against the institution of

these proceedings, and rightly so, the international proceedings against Milošević and Taylor were applications of an already existing rule of customary international law. Pre-Trial Chamber I of this Court confirmed this rule in its Malawi and Chad decisions. And the same finding was subsequently reached by Trial Chamber V(A) in the case against Ruto and Sang. That Chamber even called the customary international law codified in Article 27 of the ICC Statute, (a), I quote, "cardinal principle of modern international criminal law".

This cardinal principle includes the arrest and surrender of a sitting Head of State at the request of the ICC. This is my second point. It's not a novel theory at all. I am making that point since 2008. Let me explain it. Arresting and surrendering a person at the request of the ICC is something fundamentally different from arresting and surrendering a person in the course of national criminal proceedings.

If the ICC issues a legally binding request for arrest and surrender for proceedings before it, the ultimate legal justification for the execution of such arrest and surrender does not lie at the national level of the requested State. It resides at the international level. This is why Pre-Trial Chamber 1 in the Malawi and Chad decisions correctly stated that State Parties when complying with requests issued by the ICC act as the Court's instrument and do not on substance exercise their national criminal jurisdiction.

Let me use the late *Antonio Cassese's famous picture of the international criminal tribunal as a giant without limbs. To express this basic legal effect in other terms, a cooperating State Party is part of the limbs which enable the ICC to move properly. The cooperation limb of the International Criminal Court exception does therefore not conflict with the principle of sovereign equality. Once again, the State Party which executes a request issued by the Court does not exercise its sovereign national

criminal jurisdiction, but it assists the Court in exercising the Court's international criminal jurisdiction.

It is also often said that immunity ratione personae serves to ensure stable international relations, but that a Head of State who is responsible for horrendous crimes against entire civilian populations remains sitting in his or her office does certainly not constitute a stability which current international law is meant to protect. If it were otherwise, no international criminal court might ever proceed against a sitting Head of States. Thus, only possible procedural errors and political abuse leading to criminal proceedings against an innocent sitting Head of States endanger the stable international relations the immunities ratione personae are meant to protect.

But this danger does not provide a justification for immunity ratione personae in case a State Party is requested by this Court to arrest and surrender a sitting Head of State. Here again, it makes a fundamental difference whether a State exercises its national criminal jurisdiction over a sitting Head of State or whether a State assists the ICC in exercising this Court's international criminal jurisdiction.

Other than very unfortunately many national courts all over the globe, the ICC is shielded against the influence of national politics, and it works on the basis of internationally recognised human rights standards.

Let me now explain why Article 98(1) of the ICC Statute does not at all contradict the fact that the International Criminal Court exception includes the cooperation level. Reference has been made in that context to the unspecified reference in Article 98(1) to, I quote, "obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State".

It has been argued that this would indicate or even require the application of

immunity ratione personae of a sitting head of a non-State Party, which indeed exists in national criminal proceedings, to the cooperation by a State Party with the ICC. This claim, however, is based on a fundamental misunderstanding about the nature and the operation of Article 98(1) of the ICC Statute.

Article 98(1) does not affirm the inconsistency of any immunity obligation with the cooperation requests by the Court. It does no more than to acknowledge the possibility of such an inconsistency. And it entrusts the Court, I quote from the text, the Court may not with a procedural task to determine as the case may arise whether there is indeed an inconsistency.

It has also been said very often that Article 98(1) would become redundant if the immunity ratione personae of sitting heads of non-State Parties in national criminal proceedings would not bar this Court from requesting their arrest and surrender. But this again completely misses the procedural function of Article 98(1). In fact, Article 98(1) cannot become redundant whatever the substantive result of its application will be.

Please consider carefully the consequences if it were otherwise. Article 98(1) would then have the potential to freeze forever the existence of immunity obstacles to the cooperation with the Court.

Let me make one final observation on the inclusion of the cooperation level in the International Criminal Court exception to the immunity ratione personae.

It has been said the State practice and opinio juris since the adoption of the ICC Statute was insufficient to prove this inclusion. But this is not the issue. In 2002, the issue was not to prove the formation of a new rule of customary international law. Instead, the issue was to delineate between the scope of application of an existing rule, the customary immunity ratione personae in national criminal proceeding and an

existing exception to it, the exception regarding international criminal courts.
I have just explained why the inclusion of the cooperation level in the International Criminal Court exception constituted the result of a proper delineation. This is the only nuance, it's an important nuance, with the Prosecution because I'm not suggesting that we are in a situation of a legal void.
The reasons set out so far are sufficient to explain why as from the entry into force of the ICC Statute the International Criminal Court exception included the cooperation level. But I wish to provide the Chamber also with a supporting instance of State practice and opinio juris which most directly relates to the cooperation level.
As mentioned, the ICTY in 1999 instituted international criminal proceedings against the sitting Head of State of the Federal Republic of Yugoslavia, Slobodan Milošević. In that context, Judge Hunt decided to order all member States of the United Nations to arrest and surrender Slobodan Milošević if present on that territory.
I am not aware of any significant State protest against Judge Hunt's order. This is particularly instructive as the Federal Republic of Yugoslavia at the material time was not as such a UN member State and the question of State succession remained unresolved.
The cooperation order was thus made in full awareness of the possibility that Milošević was the sitting Head of State of a non-State Party of the treaty system in question.
This brings me to my third and last point. It is true that subsequent to the adoption of the ICC Statute, some States have taken the view that the International Criminal Court exception does not include the cooperation level. We have heard this today again. But it is also true that as of today this State practice and opinio juris is insufficiently consistent to justify the identification of a change of the customary

international criminal law exception so that it would no longer include the cooperation level.

The Prosecution has just set out this inconsistency. In fact, even the practice and opinio juris of African States is far from consistent on that point. For example, the 16 February 2018 judgment of the appeals court of Kenya stated that under customary international law - I repeat, under customary international law, because I understood my distinguished colleague Mr Tladi to State otherwise - it was legitimate for Kenya to disregard President Bashir's immunity and execute the ICC's request for cooperation by arresting him.

To summarise, customary international law provides the ICC with the limbs which enable it to move properly. In the case against President Bashir and beyond, customary international law therefore provides the Appeals Chamber with a legal avenue in order to decide this case in line with a fundamental principle of equal enforcement of international criminal law. Only the customary law avenue fully corresponds with the very idea of international criminal justice without neglecting any possible countervailing considerations of international law.

May the Appeals Chamber, this is my humble submission, therefore, proceed through this avenue. Thank you, sir.

PRESIDING JUDGE EBOE-OSUJI: [15:57:01] Thank you, Professor.

Now, you heard my earlier question about the advisability of the policy sort of position. Yes, of course, the law is what it is, but there are times when sensible application of policy can as a practical matter avoid some difficulties perhaps some may say for a good cause. The question then becomes this: In a context in which Mr Bashir travels to a country for purposes of an international organisation summit, like Arab League, African Union, perhaps the European Union and so on, would it be

something to think of as a matter of policy the OTP could refrain from proceeding for arrest warrant in those circumstances as opposed to other instances of visit to a State?

MR KREß: [15:58:12] Thank you for this question, Mr President. I have, of course, confined my submissions entirely to questions of international law. This is what I understand, I understood my mission to be. I am not ignoring that there might be situations where there is room for policy considerations. I as a scholar of international law am probably not the most suitable person to give advice on these issues but --

PRESIDING JUDGE EBOE-OSUJI: [15:58:44] You are a citizen of the world.

MR KREß: [15:58:47] I am.

PRESIDING JUDGE EBOE-OSUJI: [15:58:47] Beyond being a professor of international law.

MR KREß: [15:58:49] And in this capacity I would give one humble advice, that to deal with such policy concerns on the so to speak political basis on the way or in a pragmatic manner, but not by recognising a legal, far-reaching exception to cooperation by immunity law, which quite to the contrary takes away all political flexibility.

PRESIDING JUDGE EBOE-OSUJI: [15:59:18] Thank you very much.

Next on the line-up would be Ms Lattanzi, Professor Lattanzi.

MS LATTANZI: [15:59:31] (Interpretation) (Microphone not activated) I will resume. Sorry about that.

Mr President, thank you for giving me this opportunity to address the Court as amicus curiae. Your Honours, allow me to make one preliminary remark.

The opinions that I will be bringing to your attention are the result of collective work done by myself, and also by Professor Mirko Sossai, and Dr Alice Riccardi, with the

assistance of Flavia Pacella and Laura Di Gianfrancesco.

So my responses to the group A concerns, this Bench must deal with a number of complex legal issues that Pre-Trial Chambers have dealt with in a way that was not entirely linear, if I could put it that way, regarding the grounds for the exclusion of immunity of heads of state. And the results were always the same. These issues are very much a matter of debate amongst the friends of the Court.

But I believe, your Honours, that it is the Appeals Chamber that has this duty to recall, amongst these various opinions, to recall and not lose sight of the task that it has received under the terms of the Statute, namely, not to divide the rules up into little bits, but, rather, to interpret them in a coordinated and contextual fashion.

And this is quite clear to be seen from all the preparatory work, and this is also set up in the preamble, in particular the provision that is mentioned in question (a) amongst these rules. We must consider the provisions of Security Council resolution 1593. And as an applicable instrument in this particular case, must be interpreted in a fashion that considers the rules applicable of the Statute. By following such criteria for interpretation that are imposed as a fundamental by the Vienna Convention, the Bench can only come to the conclusion that impunity for the most serious crimes of concern to the entire international community cannot end and peace cannot be reached in Darfur unless those responsible, including the Sudanese Head of State, are put on trial. This is the conviction that lies underneath the provisions of the Rome Statute, and under the Security Council resolution, and these form the very basis of the report by the Cassese Commission and these are the fundamental principles that must guide the Bench in its decision.

Article 21(1) of the Statute codifies the general principle lex specialis derogat generali. So the Court must first apply all the provisions of the Statute, even if they may run

counter to customary standards that are not recognised as jus cogens standards, as is the case for the standard relating to personal immunity of heads of state, which does not touch upon the principle of sovereign -- of State sovereignty. This standard, which is important to guarantee ius representationis omnimodae, can be waived under Article 27. Secondly, as I was saying, this standard can be waived under Article 27.

Secondly, if necessary, and I stress this point - this is something that was touched upon a few moments ago by Jordan's counsel - the Court, if necessary, shall apply other standards of international law, including relevant customary standards at stake. Under Article 21(1)(c), the Court may also apply the general principles of law, such as abuse of law, and the Court must apply only the customary standards of jus cogens, in particular in accordance with paragraph 3 of Article 21, standards dealing with human rights.

Given that under Article 21(3) the Court must apply and interpret the law in a manner consistent with human rights, it is such that the Court must ensure that no perpetrator of serious human rights violations goes unpunished, no matter what that person's official function may be. Thus, Article 98(1) shall be interpreted by the Court with a view to ensuring justice, no matter what the person's official function, ensure justice for any person subject to a warrant of arrest issued by the Court for the crime of aggression, genocide, war crimes or crimes against humanity.

Furthermore, under Article 2(3)(a) of the International Covenant on Civil and Political Rights, the victims of the crimes that occurred in Darfur must at least have effective remedy and the truth must be established. And I will read out the provision, "notwithstanding that the violation has been committed by persons acting in an official capacity". Since that the Statute does not allow for trials in absentia, the truth

about the crimes in Darfur cannot be revealed unless the person who has been charged with responsibility is arrested and surrendered. All the states that are members to the Covenant, including the Sudan and Jordan, are obliged to cooperate with the Court to ensure that this fundamental right is respected, a fundamental right under the Covenant. Violation of this right would have to be observed by the Assembly of States Parties and/or by the Security Council because the convention would apply, particularly Article 21(3).

There is no doubt that the prohibition upon committing these crimes that Al-Bashir has been accused of are covered by the imperative standards of international law, as the ICJ has stated on many occasions. For example, may I mention the case of Armed Activities on the Territory of the Congo, a case before the ICJ. Furthermore, the ICTY has stated in relation to all international crimes under its jurisdiction, Kupreškić, Furundžija, Delalić and Krstić, the jus cogens nature of these prohibitions is also recognised by domestic jurisprudence and unanimously by doctrine. One in particular could look to the Pinochet case before the courts of the United Kingdom and the Bouterse case before Dutch courts.

The international provisions having to do with immunity of State officials, be they customary or conventional, cannot trump imperative standards because such immunity is not an expression of the principle of sovereignty. In fact, personal immunity are only an expression of States' interest in carrying out their usual bilateral and multilateral relations through the jus repraesentationis omnimodae attributed to heads of state of government and to foreign affairs ministers.

Thus, this right to immunity is for the State and not the individual person. The Head of State is merely the recipient of this right when the State calls upon this right, and this is quite clear from a reading of Article 14(1) of the Convention of the Arab League,

the 1953 convention, and I quote, "immunities are accorded to the representatives of member states not for their personal benefits".

So this is not even a privilege that a person could conceivably be entitled to, and even less a fundamental right as Jordan has -- as it has been claimed here.

Now, the International Court of Justice maintained in the Arrest Warrant of 11 April 2000 case, paragraph 61, an exception to the personal immunity of heads of state and foreign affairs ministers can be established by rules found in the statutes of international or hybrid courts in relation to international criminal law. So this is application of lex specialis derogat generali, that is to say a conventional waiver of the usual standard having to do with immunity.

There are three other possibilities mentioned by the Court, renunciation by the State sending the person, and so on and so forth. The fact that a State may renounce such immunity, including the immunity granted to a Head of State, confirms that this is subordinate to the rules of jus cogens.

One must also stress that in the State practice and in jurisprudence, there is no sign of a distinction between personal immunity and between a representation of the interstate dealings direct or a representation of States in the activity of international organisations, which was the case concerning Mr Al-Bashir when he was present in Jordan. In both cases immunity can be limited or subjected to exceptions or can be renounced.

And once again, the 1953 convention confirms this, Article 14(2), "member States are under a duty to waive the immunity of its representatives in any case where the immunity would impede the course of justice". And this was indeed the case here.

One part of the doctrine affirms that the Statute standards that provide an exception for immunity would confirm the customary standards that first emerged from the

Treaty of Versailles and the Nuremberg Statute. These authors limit this exception to proceedings before international criminal courts. According to the arguments presented a few moments ago by Professor Kreß, others would expand this exception to proceedings before State jurisdictions having to do with crimes of international law.

If there is an exception to customary law, the exception can only have an erga omnes effect. Under this rule a Head of State would benefit from immunity in relation to another. On the contrary, if we affirm that the exception to the personal immunity by a Head of State established by the IPC State as lex specialis in relation to the customary rule on immunity, the exception will have a limited subjective application, turning only to the States bound by the Statute.

It cannot be denied, particularly after adoption of the Rome Statute, that a certain trend has emerged in State practice and before the courts. This trend is moving in the direction of the forming of a customary rule regarding the ratione materiae exception for personal immunity, that it to say in relation to crimes of international law before international courts, and in a more prudent manner before domestic courts.

In fact, even though the grounds were different, the exception to the rule of immunity for heads of State before international courts has been applied for sitting heads of State. I won't repeat what has already been said by my learned colleague, Professor Kreß.

And this exception also, this exception was mentioned by the President of this particular Chamber, and was even applied in the case of the International Criminal Court in a number of cases having to do with a vice-president, Vice-President Ruto of Kenya. In those particular cases, reference was made to the statutory rule. The

Court, the International Court of Justice has taken this into account and spoke of the customary nature of this exception in relation to charges before international criminal courts, but they were neither negative nor positive. They left the question open. In any event, whether exists a customary law exception to the personal immunity of heads of States in respect of an arrest requested by the Court, an immunity established by a specific conventional norm in my opinion cannot derogate from the so-called customary law exception precisely because this exception arises out of the protection of fundamental humanitarian values. It is indeed these values that have led to the establishment of the ICC, particularly because domestic courts quite often leave unpunished particularly those who are most responsible.

With regard to domestic case law concerning personal immunity in relation to prosecution for crimes of an international nature before domestic courts, we note a few traces of confirmation of the customary rule. The exceptions, for example, in the case of the French Cassation in the Gaddafi case, but there was an implicit acknowledgement of this in that case.

This tendency also can be noticed when it comes to the inviolability of the execution of State property, which was rejected by Italian judges with a view to protect the fundamental rights of victims of war crimes to effective remedy and therefore to ensure that they kept their right to claim compensation from the responsible State.

An example at hand is from the Italian Constitutional Court which confirmed the constitutional basis for such an exception. The ICJ did not find sufficient internal jurisprudence to recognise the ratione materiae exception in matters of immunity. I believe that this current trend is not yet fully consolidated, not even in the years that have elapsed since the Yerodia judgment.

The conventional law standard still applies as the case says. However, we must note

that the statutes of the hybrid tribunals all contain such an exception. We have already stated that the exception has even been implemented and its customary nature has been acknowledged.

This trend was certainly boosted by the establishment of the International Criminal Court as a permanent institution which has universal geographical jurisdiction. I hope that this trend will be consolidated thanks to the growing number of States who ratify the Statute of the Court. I hope all the States of the world will do so.

Allow me to refer to a decision, your Honours, a decision of the Appeals Chamber recognising Al-Bashir's personal immunity. Such a decision would put an end to this trend which seeks to ensure the protection of the same core values for which the ICC was created.

Furthermore, that decision, such a decision would violate Article 27 of the applicable Statute under referral by the Security Council as well as its resolutions which call for full cooperation from Sudan and urge all other States to firmly provide such cooperation. Such a decision would also violate the convention on genocide when it comes to such prosecutions.

I therefore believe, your Honours, and I will stop there, I believe that the convention on genocide is also applicable by the Court, by your Chamber when it comes to matters pertaining to genocide.

However, let me quickly, with your leave, address one aspect which I believe is very important and which deals with the interpretation of Article 98(1), which establishes the power of the Court, not an obligation on the court. This has already been raised by a previous speaker this morning. It's not an obligation to consider norms which are not implicitly mentioned in the article as such in relation to immunity.

It is a power which exclusively gives such entitlement to the ICC. Pursuant to that

article, it would seem to me that Article 98(1) does not authorise the States to challenge the ICC when it comes to immunities under Article 27 in other contexts such as domestic or national jurisdictions.

Let me conclude by saying, therefore, that I believe that we must understand that there is a misunderstanding, confusion when it comes to interpreting the term "jurisdiction" under Article 27. Jurisdiction, all jurisdictions, whether they are international or domestic, are jurisdictions, whether they deal with commissions or execution. The ICC when it comes to arrest warrants and requests for arrest and surrender, the ICC exercises its jurisdiction so to speak of execution or implementation. It is therefore not an internal jurisdiction of the Court, per se, in the discharge of his duties. There is no other jurisdiction that will implement that. It is the ICC which will see to it that various requests for arrests and surrender are executed by external bodies, and the internal jurisdiction of the Court is not in any way involved in that matter.

I refer you to Article 59 to understand therefore that the jurisdiction internally for the ICC is not involved in the matter of immunity. Immunity only arises in terms of the rights of the accused person. And it must therefore verify, I don't have the time to quote Article 59, but I simply refer you to that article so that you can read it carefully yourself to understand that the internal jurisdiction of the Court will never take into account matters pertaining to arrest warrants and immunity in relation to the arrest and surrender of an individual.

Thank you, honourable Judges. Thank you.

PRESIDING JUDGE EBOE-OSUJI: [16:26:29] Thank you very much, Ms Lattanzi. Now next we go to Mr Magliveras.

MR MAGLIVERAS: [16:26:47] Thank you, Mr President. Thank you, esteemed

members of the Appeals Chamber. I will start with the first question. As regards Article 31 of the Vienna Convention on the Law of Treaties, and given that the application of the Rome Statute has raised issues of importance which apparently were not envisaged by the drafters, the present appeal may legitimately be determined by interpreting the Rome Statute's relevant provisions in a way ensuring that the impunity of Mr Al-Bashir for the alleged perpetration of the most serious crimes to the international community is put to an end.

The Rome Statute is no exception to the maxim that treaties are living instruments and consequently the content ought to reflect at all times the each time prevailing circumstances. However, since the Rome Statute has not been amended to reflect developments, the most appropriate method to ensure that it does not stagnate, but maintains its dynamic nature is to apply Article 31 of the Vienna Convention in a very broad manner.

Turning to question (b), regarding seeking guidance from customary international law, as this is an overarching legal notion saved through many centuries, it arguably applies equally to the first and the second paragraphs of Article 21. Why the exact content of customary international law is not settled but debatable, continuously debatable, one would expect that your Court would not only seek guidance from it without any hesitation but actually develop it so as to close existing gaps in fighting impunity for the most serious crimes to the international community.

Turning to question (e), that jus cogens norms have a more general application than mere grounds for invalidating and lawful international treaties appears to be by now a well-accepted rule. And following the obiter dictum in the decision of the International Criminal Tribunal for the former Yugoslavia in Prosecutor versus Anto Furundžija, it would appear that they do have a direct impact on national law as well.

Why there is no central global authority to authoritatively determine which norms should be regarded as jus cogens, which as customary international law, et cetera? Why the writings of publicists might be biased and State practice political influenced? The 1996 Code of Crimes against Peace, Security of Mankind, adopted by the International Law Commission at its 48th session should be adequate proof that genocide, extermination, torture, and rape are prohibited as jus cogens.

And given jus cogens' direct domestic effect, these international crimes, I will argue, constitute by necessary implication absolutely prohibited acts in Sudan as well. Therefore, no impunity should be granted to Mr Al-Bashir as a matter of domestic Sudanese law.

Turning to question (f) --

PRESIDING JUDGE EBOE-OSUJI: [16:31:25] Counsel, before you continue to question (f), you referred to the decision of Furundžija, Furundžija at the ICTY. Do you have a reference for us? If not, you can hand it up later.

MR MAGLIVERAS: [16:31:45] The reference, Your President, is IT-95-17/1, T-10 Trial Chamber, the judgment of 10 December 1998. And as to the obiter dictum, I was referring specifically to what the court said in paragraph 153 to paragraph 154 of the said judgment.

PRESIDING JUDGE EBOE-OSUJI: [16:32:29] Thank you very much.

MR MAGLIVERAS: [16:32:30] Now turning to question (f), there is also no central global authority to determine the hierarchy of the rules of international law, but presumably this is a matter falling within the rights of international courts, including this Court. And this because international law courts have to apply the rules of international law; they cannot do otherwise. Therefore, this Court should consider that it has the competence to rule specifically on the hierarchy between the most

serious crimes and other competent rules of international law.
It should do so by listening closely to the views and the aspirations of the international community as a whole because, at the end of the day, it is the international community which is the collective end user of the Court's services.
Regarding questions (d) and (o), according to the first paragraph of Article 27 of the constitution of the Sudan - this is the interim, so-called interim constitution of 2005 - there exists a bill of rights as a covenant between the population of the Sudan and the government. All rights and international human rights instruments ratified by Sudan shall be an integral part of this bill of rights. This is stated in paragraph 3 of Article 27.
Moreover, the legislation implementing the rights enshrined in the said bill of rights and, therefore, the rights contained in all ratified international instruments by the Sudan shall not derogate from them. Paragraph 4 of Article 27.
Sudan acceded to the International Covenant on Civil and Political Rights on 18 March 1986. The provision in the bill of rights corresponding to Article 2(3)(a) of the International Covenant should be considered to be Article 35 of the constitution ensuring the right to litigation, and I quote, "The Constitution shall be guaranteed for all persons; no person shall be denied the right to resort to justice."
Regarding now the exception of acting in an official capacity, Article 60 of the constitution of the Sudan contains a limited presidential immunity and impeachment clause, in particular, the president of the Sudan can be charged before the constitutional court in case of its gross violation, which cannot but include breach of the bill of rights. And Article 61 of the Sudanese constitution stipulates that any person aggrieved by an act of the president, and specifically it mentions a breach of the bill of rights, may contest it before the constitutional court.

In conclusion, the constitution of the Sudan does not confer upon Mr Al-Bashir unlimited immunity. And considering that the crimes he's accused of constitute gross constitutional violations, the theoretical until today impeachment before the constitutional court should be regarded as an effective remedy in the meaning of Article 2(3)(a) of the International Covenant on Civil and Political Rights.

The above considerations also answer question (o). Head of State immunity has posteriority to the responsibility for international crimes amounting to core violations of fundamental human rights.

It is clear even from the Sudanese constitution, the provisions of which Jordan arguably failed to take into proper account, that Mr Al-Bashir may not invoke his official capacity to avoid prosecution at a domestic level, let alone prosecution at an international level by the competent transnational criminal court acting in pursuance of a Chapter VII resolution.

Moving to question (n), this question essentially asks if customary international law may legitimise overriding the terms of an international convention.

Since customary international law is ever evolving and developing, while a convention can be static, especially if there have been important developments which have not been catered for through its amendment, or interpretation, or State practice, et cetera, in theory it should be able to lead to the disapplication of specific treaty clauses.

At the end of the day, it all has to do with providing very convincing argumentation. And in the present case, in this appeal, the invocation of the goal to end the disastrous consequences of impunity, the raison d'être of your court.

And if your court were to answer this question in the positive, but finds that the existing argumentation is inadequate or not well developed, it should not hesitate to

augment it and to take it to the next level.

If the Court's argumentation is convincing, it will be applauded and followed in many a year to come. If it is flawed, it will be ignored. But the real or perceived difficulties arising from the parallel existence of the fluid norms of customary international law and the settled norms of conventional international law have to be addressed by your court.

And finally, Mr President, with your permission, I would like to answer the question which you put orally. Now, your question was on the policy of not requesting the arrest of a Head of State attending the meeting of the highest organ of an international organisation in which this State participate as a member.

Mr President, I do not think this would be a valid reason for not requesting the arrest, unless extremely vital national interests of the State concerned were to be discussed at that very meeting. But this was not the case when President Al-Bashir attended the summit of the Council of the Arab League in Jordan last year. As is well-known, the Council of the Arab League meets twice every year, once at the level of Head of State and once at the level of foreign ministers.

Mr Al-Bashir has not attended many of council summits in the past, but this didn't mean that the Sudan was not considered to be participating in the meeting, because another person did represent the Sudan. So the foreign relations of Sudan were not in any way affected by the non-presence of its presidents.

Thank you.

PRESIDING JUDGE EBOE-OSUJI: [16:42:04] Thank you very much.

We will now go to the next speaker on the list, and that will be Mr Newton.

MR NEWTON: [16:42:19] (Microphone not activated) I rise with great respect for this Bench.

For the record, the slides to which I allude had been submitted into the record last week. They're not currently showing on slides. I've asked for them to be submitted to parties as well. These are public documents, public records.

The three things that we've directed to be transferred already were, one, a map of every single trip taken by President Bashir since the issuance of the first arrest warrant; two, an annual map, an annual breakdown of those trips by location and by -- including the cancellations; and then three, the full dataset which documents all of these things.

I rise with great respect for this Court and for the difficult issues that you have taken under your charge. These are indeed some of the most contentious and consequential issues of our day.

President Bashir took his first trip abroad within three weeks of the first issuance of the first arrest warrant.

These issues are far more nuanced than very broad issues of public international law and very broad issues of immunity at large, or even the intellectual issue. It's about the debates we've been talking about between sovereign immunity and the need to address, I would say, the imperative need to address the most serious crimes of concern to the international community.

Those are very well settled questions in the abstract.

This appeal addresses the very difficult balance in contradistinction to the ICTY jurisprudence and the ICTR jurisprudence, and even the Sierra Leone jurisprudence. The very difficult balance of the question between a treaty adopted in contradistinction to pure Chapter VII authority under those tribunals, and this practice. In other words, the focus on the correct interpretation of Article 98 and Article 27 and Article 89(1) is most well taken.

To that end, your Honour, we began to notice very early on a discrepancy between the public reports of travel and the actual documentation of travel. And I just want to say for the record that I very much appreciate this Bench recognising the relevance of this data. We've provided the most comprehensive dataset in the entire world on these issues, which of course will be in the record and have been provided to the parties.

Of particular note in the first year after the issuance of the first arrest warrant, the president took 15 trips, 14 of which were for official purposes and one of which was for a religious purpose. We began to be very concerned that the data as being publicly collected and reported did not include many of those trips.

I particularly appreciate, because I speak with a voice of pragmatism, I'm not an advocate for either party, I speak on what the data shows. We can't talk about State practice unless we look at the data that shows, well, State practice. We should not talk about the correct interpretation of States to include non-States Parties and States Parties and in our data a large number of signatory States without also recognising that these are very difficult issues of the collision between treaty interpretation and the application of the Rome Statute and the application of the Chapter VII authority of the Security Council. In this case, as is very well known, Resolution 1593 conferred jurisdiction, conferred the situation, but did not expressly address the issue of immunity of a sitting Head of State. That's the fundamental problem in this case.

So we began to track the data. And even without these slides, your Honour, I want to take just a second to thank the team that has worked very, very hard on this data. As I said, it's the most comprehensive dataset in the world.

The data itself shows 173 documented trips in distinction to 113 reported by the official organs of the State. To date there have been 27 reports from the OTP to the

UN Security Council on these issues. So any argument that says that those reports provide sufficient basis for decision making in our view is inadequate because it does not reflect the correct data. The correct data shows 173 trips. The OTP data only shows about 65 per cent of those trips. Both of those categories include cancellations, and within our dataset we've taken great care to document the reasons for cancellation, which I will move into in a minute.

As I said, I speak with a voice of pragmatism. So let me read the numbers into the record for the sake of precision.

113 reported trips, including 23 cancelled trips. And I will say that analysis of the data shows that the most effective, the most predictable causal factor for the cancellation of trips is indeed, as has been speculated this morning and we've talked around this issue, but the data shows that the involvement of domestic courts has been in fact the single most important predictive factor in deterring trips or causing cancellations. In every case where a domestic court has taken seriously its responsibility to align domestic law and the international duties to arrest, the trips have either been cancelled or the larger summit has been called off. The data does not show whether that was because of overarching political factors or whether in fact the pending relevance of an arrest warrant was the causal factor.

The other thing we've done in the data, which is available to all the parties and it's available online in the mappingbashir.org website is we've also categorized the purposes of each trip. As I said, within the first year there were a multitude of trips, particularly including summits and other official discussions, whether on economic issues, other issues. Some were for State events, inaugurals, for example. The one State event most recently was to the Olympics with other heads of State there. Some were just for meetings, some were for peace events. And some were for personal

reasons. I alluded to the religious reason. There was also some physical health reasons, et cetera. All of this is in the data.

Let me summarise. 104 trips were planned to 14 non-State Parties, 93 of which were taken for an overall cancellation rate of 11 per cent.

There were 39 trips planned to 9 signatory states, 35 of which were taken for an overall cancellation rate of around 10 per cent.

Not surprisingly, the data shows 30 trips were planned to 10 different States Parties, 22 of which were taken for a slightly larger cancellation rate to States Parties of 27 per cent. The cancellation rate to States Parties is approximately double that of the next category which is signatory States. That's what the data says.

We think it's particularly important to recognize that the reasons for this are unclear. We've done a great deal of in-depth analysis on the data. But one conclusion that is clear, and I say this with the most humility possible, the Mapping Bashir data really does seem to suggest that much of the State practice on non-arrest is in direct relation to President Al-Bashir's position as the Head of State.

In the macro question Head of State immunity in these macro questions and on this dataset after the issuance of these arrest warrants, the Head of State issue was a causal factor and a very key part of the conversation, a very key part of the political conversation, it was also in some instances a key part of the reason for cancellation.

The Head of State issue is a very central part of this case. Nor does our data suggest that that issue is as easily resolved as it might be in theory in the macro. States are having to wrestle with very, very hard questions. Do they maintain these issues? What is the relevance of Article 98(1), which speaks of the duties between States that would require the requested State to act in a way that might be violative of other duties vis-à-vis other States.

Article 89(1) of this Statute says that states, States Parties shall proceed with a request for arrest in all circumstances in accordance with the provisions of their domestic law. So the real battles of shaping domestic conformity with the larger duties flowing either from international treaties or from the broader scope of customary international law, of State immunity, this is causing States to really wrestle with these issues. That is true on the data, both for States Parties and for non-State Parties. The data shows that the Security Council Resolution 1593 in itself is insufficient to automatically assuage the fears of both States Parties and non-States Parties and signatory parties that these conflicting legal issues can be easily aligned.

The data shows that States are wrestling with this. Now, one way of addressing this, one of the slides deals with a number of trips to non-States Parties.

PRESIDING JUDGE EBOE-OSUJI: [16:52:47] Counsel, one minute.

MR NEWTON: [16:52:49] Yes, sir. I'm sorry.

PRESIDING JUDGE EBOE-OSUJI: [16:53:05] The data you're talking about, do they tell us anything about whether or not these States, the host States to those visits actually had their minds pointed to the question of arrest and whether there is opinio juris in their own minds about it? That's one question that I have. Or is it just plainly showing us where President Bashir had been and how many times he had been there?

Second question is, when I read your written matter, it seems you were saying that the majority of those visits were to non-States Parties to the ICC to the Rome Statute with the exception of perhaps two States or so, but correct me if I am wrong. If it is the case that the majority of the visits had been to non-States Parties, would that tell us anything about what they thought the interpretation of Article 98 would mean in the circumstances for purposes of immunity?

MR NEWTON: [16:54:37] Can I answer your questions in the reverse, your Honour?
PRESIDING JUDGE EBOE-OSUJI: [16:54:40] Yes, please.
MR NEWTON: [16:54:42] Well, in reverse, the data over trips to non-States Parties reflect that there has been very little discussion about the substantive, the precise substantive legal issues. In fact, where there is public data either in the form of statements from foreign ministries or in the form of statements at the very reports of the UN Security Council, there has been severe push-back that says we do not accept that this treaty automatically wipes away all sitting Head of State immunity for us as a non-State Party. In fact, the data shows, based on our analysis, that the most frequent analysis or the preference for non-States Parties has been more of a political nature. I'll read you for example the statement from the United States on June 5, 2002: "For our part the United States has continued to oppose invitations, facilitation or support for travel". It's always phrased as a policy preference, as a political imperative and very little data to show that non-States Parties or States Parties who have allowed trips have been dissuaded by the mere fact that there is a Security Council resolution. They do not get into the details whether they're operating on the basis of Article 98, on the basis of their reciprocal duties, except for after the fact.
The first part of your question was on the opinio juris.
Thank you. I've been asked to slow down. That's true. I'm sorry, because I'm trying to summarise all of what graphically is on slides which will be distributed which causes me to speak a little faster. I apologise.
But the number of trips to States Parties, you're right, your Honour, more trips to non-States Parties and in fact more cancellations to States Parties but a significant number of trips to States Parties, which in turn begs the question, your question was about opinio juris, what is the binding legal effect, what can we take away from that

as a matter of opinio juris?

In fact, the majority of cancellations were not due to ICC pressures or politics or, in fact, the invocation. It's the minority of cancellations that are due solely to political pressure or *allusions to the Security Council Resolution 1593. In fact, the majority of cancellations *oftentimes are just happenstance. So the opinio juris is mixed here except that in the opposite direction there are very strong statements from a number of members in the Security Council arguing that Head of State immunity remains in place. There are also a number of very strong statements from the foreign ministries predominantly of non-State Parties.

The real issue in this case though concerns the interface between Article 89, 89(1), which says that States Parties shall proceed with requests in accordance with their domestic law. It's well-known that Article 27 of the Vienna Convention on Law of Treaties says that States cannot invoke their domestic procedures to violate their international obligations.

And here we see States Parties struggling with that, some of which have made statements the data also shows almost a lex specialis argument that there is an overlapping duty to protect international peace and security, which clearly the Security Council has under Chapter VII, and a subordinate regional duty in the form of the African Union also to address regional peace and security.

So there are a number of State statements answering your question, sir, regarding opinio juris, of nation states saying that the local regional assessment of international peace and security, which shows that cancelling trips based on a refusal of immunity has a greater destabilising effect than the Security Council. We've interpreted that as a lex specialis agreement, which says that as a very clear matter, the States Parties where President Al-Bashir has travelled do not automatically concede that either an

Article 98(1) is irrelevant to the larger duties or that 89(1) can automatically be used in their domestic law to supersede larger international duties or even that just by virtue of the fact that 1593 was enacted under Chapter VII, that alone, without an express waiver of immunity from the Security Council, suffices for all these issues.

Again, this is a very complicated contradistinction interface of treaty rights of States and mutual treaty rights and to include obviously the United Nations Charter, which is referenced by your subsequent questions about Article 103.

The problem here is that the State practice shows not only a continuing pattern of practice, but after 2004, an accelerating pattern of practice. After 2004 -- or, I'm sorry, 2014, President Al-Bashir has increased the amount of travel each year since the second arrest warrant, which is relevant to your question about the genocide convention. To the extent that the ICC arrest warrant expanded to include genocide, there is very little evidence of States saying, "Aha, now we have a corollary collateral obligation under the Genocide Convention which is additive that might serve as a domestic basis for our otherwise valid concerns with regard to Head of State immunity". In fact the data shows accelerating travel post-2014.

In our data analysis, we give a lot of credit to the Court organs. In the early days, pre-2012-ish, the data was very spotty. Since 2014 the Court has done a much, much better job of accurately collecting the data.

But as I speak, I will tell you that the posted data that we have provided to the parties, and the posted data that is now available on the Mapping Bashir website shows 173 trips, as opposed to 113 reported by the Prosecutor or the Registry.

The data clearly shows that Head of State immunity is a core concern and has not automatically served in either direction to eliminate travel on these issues.

The political solutions lie beyond my submission. I told you, I'm not advocating as

an advocate, I'm telling you what the data says. And the data says that there is a residual concern among States based on their duties vis-à-vis other States, and that automatically the Security Council resolution has not dissuaded travel.

Now, the Prosecution raised in its submission the totally valid suggestion, we may very well be conflating the issue before this case with the consequences. In fact, as we read the data its exactly the opposite. The established State practice is that President Bashir has travelled in an increasing manner since 2014, both to States Parties and to non-States Parties and to signatory states. That's State practice.

The opinio juris as you allude to is mixed. The best we can do, and I have a document that I'm happy to provide, we've collected every single Security Council statement from every single one of the 27 times that the Prosecutor has made a report to the Security Council, we have that, to the extent that some of those statements do specifically and intentionally reflect opinio juris.

Many others do not. They're on more general political grounds. But I'm happy to provide that document to the Court. It's a consolidated pdf of all of those 27 reports since the very first one.

And as I say, that document backs up the places where there is opinio juris and in fact deliberate opinio juris, as opposed to general political statements or statements of expediency. And what you see is, honestly, the data is mixed in terms of specific opinio juris. The idea that the Chapter VII resolution automatically precludes travel because it imports an international obligation that supersedes all horizontal obligations is not reflected in the statements to the Security Council except for, I would estimate, maybe 25 to 30 per cent of those statements.

An equal or greater number of statements specifically push in the opposite direction, that Head of State immunity, and therefore the right to comply with other pieces of

international law as envisioned by Article 98, or as envisioned by the alignment of domestic systems with their international obligations as envisioned by Article 89, that is very prominent in the Security Council debates. The bottom line is the data does not show that this is a simple, easy matter.

And I apologise, these slides, they're queued to come up. They have been provided to the parties as well as the full dataset.

PRESIDING JUDGE EBOE-OSUJI: [17:04:00] Thank you.

Before you sit, Counsel, and we will wrap it up at that, whether you need to speak to it now or later. At the beginning of your submissions you said that we are in a different situation from ICTY and ICTR would be. I believe that's probably a question on the list on this, but let me put it to you now if you can deal with it.

I know you speak to something else, data. But to the extent you put that opener on the record, the question is this: Would the situation in which we are be really different if, hypothetically speaking, the Security Council had in passing resolution 1593 simply established an ad hoc tribunal in the manner of ICTY and ICTR under Chapter VII, but then referred or, rather, touched or annexed, as was done in the ICTR resolution 1994, it was, and also possibly ICTY which actually annexed the report on the secretary general, which annexed the statute of the ICTY; what if 1593 had created an ad hoc tribunal and had simply annexed the Rome Statute to it, adapted with necessary variation, would we be in a different position in that kind of scenario from where we are now? If not, what is the difference? If you can speak to it now, that's fine. If not, you can take it at another time.

MR NEWTON: [17:06:05] I can, your Honour, but I note for the record that I exceed my mandate, which was to speak directly to the data. I am happy to answer that question from my perspective, if you would like.

PRESIDING JUDGE EBOE-OSUJI: [17:06:15] Go on, please.

MR NEWTON: [17:06:16] I definitely think it's different, because if you go back to the Sierra Leone model, the Charles Taylor issue in terms of sitting Head of State immunity was resolved by reference to the fact that that body was created by virtue of Chapter VII authority.

PRESIDING JUDGE EBOE-OSUJI: [17:06:30] Sierra Leone, Sierra Leone was not, actually.

MR NEWTON: [17:06:33] It was a dual agreement. And if you go back to the jurisdictional findings in the Sierra Leone, the Charles Taylor case, it was that Chapter VII authority that created the ability to overcome sitting Head of State immunity. The same thing was true with regard to the issues when immunity came up in the Yugoslavia context, and the important distinction I think is in the duty to cooperate. Article 25 of the Charter says that all nation states have the duty to accept and carry out the mandates of the Security Council under Chapter VII and is specifically tied to Chapter VII.

The problem in this context is that States Parties in Part 9 have assumed exactly that same duty but they've assumed it by virtue of the treaty ratification and by virtue of State consent.

In this context, had the Security Council done exactly what you propose, mandated full cooperation rather than urging cooperation of non-States Parties, or simply said, addressed very squarely the issue. I mean, part of the problem that you see when you read security -- and I'm conscious of the time, I'll be very brief. When you read the Security Council statements there is this implicit cry of both States and, particularly, the Prosecutor begging the Security Council to address this question, to clarify this issue, to mandate compliance with all the orders of the Court.

The Security Council has not done that, which leaves the lacuna of how do States, both States Parties and non-States Parties, reconcile what are really sui generis issues? These are brand new issues. For the first time in the field this interface between broad principles of non-immunity and broad principles of customary international law, which we all subscribe to, but here the fact that compliance is mandated as a treaty duty. Article 98(1) speaks of the duties owed to other States under larger bodies of international law.

Article 89 speaks to the duty of all States Parties, not non-States Parties, but all States Parties to comply with the request, the orders of the Court in accordance with their domestic law.

So to the extent that domestic law procedures around the world, even in States Parties, embed deference to other Heads of State, or deference for other forms of immunity, it's a barrier. States are then caught in an almost impossible quandary. And the Security Council absolutely, in my view, could have cut through all of that with clarity and definition.

So far they've not shown the political will to do that.

PRESIDING JUDGE EBOE-OSUJI: [17:09:02] Thank you very much.

We will adjourn now and return tomorrow.

We will start at 9 o'clock for tomorrow's proceedings. The Court is adjourned for today.

Thank you very much, everybody.

THE COURT USHER: [17:09:17] All rise.

(The hearing ends in open session at 5.09 p.m.)

CORRECTIONS REPORT

The Appeals Chamber has made the following correction in the transcript:

*Page 86 line 8:

"a benediction-rooted law" is corrected by "a benediction brooded low"

The Court Management Section has made the following correction in the transcript:

*Page 88 line 15:

"Salk" is corrected by "SALC"

SECOND CORRECTIONS REPORT

The Court Management Section has made the following correction in the transcript:

*Page 21, line 9: "State" is corrected to "State practice"

*Page 41, line 2: "applies" is corrected to "provides"

*Page 42, line 8: "role" is corrected to "rule"

*Page 44, line 18: "54" is corrected to "64"

*Page 61, line 18: "state" is corrected to "status"

*Page 62, line 12: "I may not want" is corrected to "And not wanting"

*Page 62, line 19:

"a customary international or" is corrected to "customary international,"

*Page 65, line 20: "is involved.' " is corrected to "is involved.' End quote."

*Page 69, line 9: "said" is corrected to "set"

*Page 69, line 10: "exceptional" is corrected to "exception or"

*Page 69, line 19: "Of course" is corrected to "And of course"

*Page 69, line 20: "earlier" is corrected to "early"

*Page 76, line 13:

"comparable. There is a similar analogy. And" is changed to "comparable - there is a similar analogy – and"

*Page 110, line 20: "Antonia" is corrected to "Antonio"

*Page 135, line 4: "illusions" is corrected to "allusions"

*Page 135, line 5: "often times" is corrected to "oftentimes"