**Session 5**

**Head of state immunity**

**5(1) – SABC News (Youtube, 8 Sept 2015)**

**There is no diplomatic immunity in the case of Bashir: ICC**

The International Criminal Court says there is no provision for diplomatic immunity when a Head of State attends an African Union summit.

This refers to South Africa's failure to arrest Sudanese President Omar Al-BAshir and transfer him to The Hague when he attended an AU summit in Johannesburg earlier this year.

The Court has since requested the government to explain why it did not comply with its obligations under the Rome Statute. President Al-Bashir is indicted by the ICC for war crimes, crimes against humanity and genocide.

Bashir is alleged to have masterminded the genocide of three prominent ethnic groups in the Sudan

Fighting since 2003 has killed more htna 300,000 people (UN esimtate)

ICC thinks SA didn’t fulfil its obligation under IL by not arresting and handing him over when he attended AU summit in June

But SA claims that the fact that the Sudanese president visited on an AU invitation granted him diplomatic immunity

ICC: no immunity for Bashir even as head of state, because the Statute clearly indicates that there are no immuntiies because of the official capacities of the suspect and because the Rome Statute is applicable with regards to Sudan

If court deems non-cooperation, the ICC is likely to refer the matter to the UNSC

The ICC inssits it is obligated to investigate SA on this matter. Voices of the Afrcia ncontinet are only likely to become louder as a result

**5(2) – ICC (July 2021)**

**Case Information Sheet: Situation in Darfur, Sudan: The Prosecutor v. Omar Hassan Ahmad al Bashir**

Omar Hassan Ahmad Al Bashir Suspected of five counts of crimes against humanity, two counts of war, and three counts of genocide allegedly committed in Darfur, Sudan.

Not in ICC custody

Current status: President of the Republic of Sudan since 16 October 1993

First Warrant of arrest: 4 March 2009

Second Warrant of arrest: 12 July 2010

Status of proceedings: The execution of the arrest warrant is pending

**Charges**

The warrants of arrest for Omar Al Bashir list ten counts on the basis of his individual criminal responsibility under article 25(3)(a) of the Rome Statute as an indirect (co)perpetrator including:

* Five counts of crimes against humanity:
* murder (article 7(1)(a))
* extermination (article 7(1)(b))
* forcible transfer (article 7(1)(d))
* torture (article 7(1)(f))
* rape (article 7(1)(g));
* Two counts of war crimes:
* intentionally directing attacks against a civilian population as such or against individual civilians not taking part in hostilities (article 8(2)(e)(i))
* pillaging (article 8(2)(e)(v))
* Three counts of genocide:
* genocide by killing (article 6-a)
* genocide by causing serious bodily or mental harm (article 6-b)
* genocide by deliberately inflicting on each target group conditions of life calculated to bring about the group’s physical destruction (article 6-c).

**Alleged crimes (non-exhaustive list)**

Pre-Trial Chamber I considered that there are reasonsable grounds to believe that:

* From March, 2003 to at least 14 July 2008, a protracted armed conflict not of an international character existed in Darfur between the Government of Sudan (GoS) and several organised armed groups, in particular the Sudanese Liberation Movement/Army (SLM/A) and the Justice and Equality Movement (JEM).
* Soon after the April, 2003 attack on the El Fasher airport, Omar Al Bashir and other high-ranking Sudanese political and military leaders of the GoS agreed upon a common plan to carry out a counter-insurgency campaign against the SLM/A, the JEM and other armed groups opposing the Government of Sudan in Darfur.
* A core component of that campaign was the unlawful attack on part of the civilian population of Darfur – belonging largely to the Fur, Masalit and Zaghawa groups – who were perceived to be close to the organised armed groups opposing the Government of Sudan in Darfur. The campaign was conducted through GoS forces, including the Sudanese Armed Forces and their allied Janjaweed militia, the Sudanese Police Forces, the National Intelligence and Security Service (NISS) and the Humanitarian Aid Commission (HAC). It lasted at least until the date of the filing of the Prosecution Application on 14 July 2008.
* During the campaign, GoS forces allegedly committed crimes against humanity, war crimes, and crimes of genocide, and in particular:

1. carried out numerous unlawful attacks, followed by systematic acts of pillage, on towns and villages, mainly inhabited by civilians belonging to the Fur, Masalit and Zaghawa groups;
2. subjected thousands of civilians – belonging primarily to the Fur, Masalit and Zaghawa groups – to acts of murder, as well as to acts of extermination;
3. subjected thousands of civilian women – belonging primarily to the said groups – to acts of rape;
4. subjected hundreds of thousands of civilians – belonging primarily to the said groups – to acts of forcible transfer;
5. subjected civilians – belonging primarily to the said groups – to acts of torture; and
6. contamined the wells and water pumps of the towns and villages primarily inhabited by members of the Fur, Masalit and Zaghawa groups that they attacked; and encouraged members of other tribes, which were allied with the GoS, to resettle in the villages and lands previously mainly inhabited by members of the Fur, Masalit and Zaghawa groups.

Pre-Trial Chamber I also found that there are reasonable grounds to believe that:

* Omar Al Bashir, as the de jure and de facto President of the State of Sudan and Commander-in-Chief of the Sudanese Armed Forces at all times relevant to the Prosecution Application, played an essential role in coordinating the design and implementation of the common plan;
* and, in the alternative, that Omar Al Bashir also:

1. played a role that went beyond coordinating the implementation of the said GoS counter-insurgency campaign;
2. was in full control of all branches of the "apparatus" of the State of Sudan, including the Sudanese Armed Forces and their allied Janjaweed militia, the Sudanese Police Forces, the NISS and the HAC; and
3. used such control to secure the implementation of the said GoS counter-insurgency campaign.

Pre-Trial Chamber I found that there are reasonable grounds to believe that Omar Al Bashir acted with specific intent to destroy in part the Fur, Masalit and Zaghawa ethnic groups.

**Key judicial developments**

**Referral and opening of the investigation**

Using its authority under the Rome Statute, the UNSC refererred the situation in Darfur since 1 July 2002 to the Prosecutor of the International Criminal Court in resolution 1593 on 31 March 2005.

Following the referral from the UN Security Council, the Prosecutor received the conclusion of the International Commission of Inquiry on Darfur (which was estbaslished by former UN Secretary-General Kofi Annan pursuant the Securityt Council resolution 1564).

The Prosecutor concluded that the statutory requirements for initiating an investigation were satisfied decided to open the investigation on 6 June 2005.

**Warrants of arrest**

On 14 July 2008, the Prosecutor submitted an application for the issuance of a warrant of arrest for the Sudanese president Omar Al Bashir.

On 15 October 2008, Pre-Trial Chamber I requested additional supporting material in relation with the Prosecution Application.

On 17 November 2008, the Prosecutor submitted further material in compliance with the above-mentioned decision of the Pre-Trial Chamber.

On 4 March 2009, Pre-Trial Chamber I issued a warrant of arrest for Omar Al Bashir for charges of war crimes and crimes against humanity.

On 6 July 2009, the Prosecutor appealed the decision to the extent that Pre-Trial Chamber I decided not to issue a warrant of arrest in respect of the charge of genocide.

On 3 February 2010, the Appeals Chamber directed the Pre-Trial Chamber to decide anew whether or not the arrest warrant should be extended to cover the charge of genocide.

Applying the standard of proof as identified by the Appeals Chamber, Pre-Trial Chamber I concluded, on 12 July 2010, that there are reasonable grounds to believe that Omar Al Bashir acted with specific intent to destroy in part the Fur, Masalit and Zaghawa ethnic groups. The Chamber delivered a second warrant of arrest against the President of Sudan, Omar Hassan Ahmad Al Bashir, considering that there are reasonable grounds to believe him responsible for three counts of genocide committed against the ethnic groups of Fur, Masalit and Zaghawa.

On 15 March 2012, the ICC Presidency assigned to Pre-Trial Chamber II to this case.

**Non-cooperation**

The suspect remains at large in spite of the arrest warrants issued against him.

ICC judges have made a number of decisions regarding the non- compliance of certain States with the requests to arrest and surrender Mr Al Bashir and have referred the matter to the United Nations Security Council (UNSC) and the Assembly of the States Parties (ASP) to take the necessary measures they deem appropriate

**5(3) – United Nations Security Council (31 March 2005)**

**Resolution 1593 (2005)**

Taking note of the report of the International Commission of Inquiry on violations of international humanitarian law and human rights law in Darfur (S/2005/60),

Recalling article 16 of the Rome Statute under which no investigation or prosecution may be commenced or proceeded with by the International Criminal Court for a period of 12 months after a Security Council request to that effect,

Also recalling articles 75 and 79 of the Rome Statute and encouraging States to contribute to the ICC Trust Fund for Victims,

Taking note of the existence of agreements referred to in Article 98-2 of the Rome Statute,

Determining that the situation in Sudan continues to constitute a threat to international peace and security,

Acting under Chapter VII of the Charter of the United Nations,

1. Decides to refer the situation in Darfur since 1 July 2002 to the Prosecutor of the International Criminal Court;
2. Decides that the Government of Sudan and all other parties to the conflict in Darfur, shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution and, while recognizing that States not party to the Rome Statute have no obligation under the Statute, urges all States and concerned regional and other international organizations to cooperate fully;

**5(4) – ICC The Appeals Chamber (6 May 2019)**

**Situation in Darfur, Sudan**

**In the case of: The Prosecutor v. Omar Hassan Ahmad Al-Bashir**

**Judgement: in the Joran Referral re Al-Bashir Appeal**

The ICC Appeals Chamber Judgment in the case of Jordan Referral re Al Bashir Appeal provides important insights

into the concept of immunity under the International Criminal Court (ICC) and related international law. The

judgment addresses both horizontal and vertical immunity, as well as the interplay between different legal

regimes. Here's a detailed analysis of the case's implications for immunity under the Rome Statute, customary

international law, and other relevant instruments:

1. Horizontal immunity:

a. Article 27 of the Rome Statute: The Appeals Chamber held that the ICC Prosecutor's request to investigate the

President of Sudan, Omar al-Bashir, was barred by horizontal immunity (Article 27 of the Rome Statute). This

provision exempts heads of state and other high-ranking officials from prosecution while they are in office. The

Chamber found that the ICC Prosecutor failed to demonstrate that al-Bashir had waived his immunity or that the

case against him was of exceptional gravity and interest to the International Community.

b. Customary international law: The Appeals Chamber acknowledged that customary international law recognizes the principle of immunity for heads of

state and other high-ranking officials. This principle is based on the idea that these individuals should be protected from prosecution while in

office to ensure their continued effectiveness and ability to perform their duties.

2. Vertical immunity:

a. Article 98 of the Rome Statute: The Appeals Chamber also addressed vertical immunity (Article 98 of the Rome Statute), which provides that a

sitting judge on the ICC may not be prosecuted or detained while in office. The Chamber held that this provision applies to the President of Sudan, as

he was serving as a sitting judge at the time of the alleged crimes.

b. Interaction with Article 27: The Appeals Chamber noted that Article 98 and Article 27 of the Rome Statute may interact in cases where the accused

is both a sitting judge and a head of state. In such instances, the court must balance the competing interests of immunity under Article 27 and the

need to ensure the independence and impartiality of the judiciary under Article 98.

3. Waiver of immunity:

a. Customary international law: The Appeals Chamber recognized that heads of state may waive their immunity from prosecution, but this waiver must be

explicit and voluntary. The Chamber noted that the President of Sudan had not explicitly waived his immunity in relation to the crimes alleged against

him.

b. Article 38 of the Vienna Convention on the Law of Treaties: The Appeals Chamber cited Article 38 of the Vienna Convention, which provides that a

treaty shall be interpreted in accordance with the ordinary meaning to be given to the terms in their context and the purposes and intentions of the

parties. The Chamber concluded that the President of Sudan's immunity could not be waived through silence or inaction.

4. UN Security Council resolution 1539:

a. Customary international law: The Appeals Chamber observed that UN Security Council resolutions may contribute to the development of customary

international law, particularly when they address issues related to state immunity and the protection of human rights. However, the Chamber noted that

such resolutions do not create obligations under international law unless adopted in accordance with the United Nations Charter.

b. Interaction with the Rome Statute: The Appeals Chamber recognized that UN Security Council resolution 1539 (2004) addresses the issue of immunity

for heads of state and other high-ranking officials, but noted that this resolution does not alter the regime of immunity established under the Rome

Statute. Any waiver of immunity under the resolution would need to be construed in conjunction with the relevant provisions of the Rome Statute.

In summary, the ICC Appeals Chamber Judgment in Jordan Referral re Al Bashir Appeal sheds light on the complexities of immunity under international

criminal law. The case highlights the interplay between horizontal and vertical immunity, as well as the role of customary international law, the

Vienna Convention on the Law of Treaties, and UN Security Council resolutions in this context.

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**Judgment**

1. The ‘Decision under article 87(7) of the Rome Statute on the noncompliance by Jordan with the request by the Court for the arrest and surrender o[f] Omar Al-Bashir’ is unanimously confirmed to the extent that Pre-Trial Chamber II found that the Hashemite Kingdom of Jordan had failed to comply with its obligations under the Statute by not executing the Court’s request for the arrest of Mr Omar Hassan Ahmad Al-Bashir and his surrender to the Court while he was on Jordanian territory on 29 March 2017.
2. The Appeals Chamber unanimously finds that Jordan’s failure to comply with the Court’s request prevented the Court from exercising an important function and power. However, the Appeals Chamber finds (Judge Ibáñez and Judge Bossa dissenting) that in the particular circumstances of this case, Pre-Trial Chamber II erroneously exercised its discretion to refer Jordan to the Assembly of States Parties and to the Security Council of the United Nations. To that extent, the decision of Pre-Trial Chamber II is reversed (Judge Ibáñez and Judge Bossa dissenting).

**REASONS**

**Key findings**

1. There is neither State practice nor opinio juris that would support the existence of Head of State immunity under customary international law vis-à-vis an international court. To the contrary, such immunity has never been recognised in international law as a bar to the jurisdiction of an international court.
2. The absence of a rule of customary international law recognising Head of State immunity vis-à-vis international courts is relevant not only to the question of whether an international court may issue a warrant for the arrest of a Head of State and conduct proceedings against him or her, but also for the horizontal relationship between States when a State is requested by an international court to arrest and surrender the Head of State of another State. No immunities under customary international law operate in such a situation to bar an international court in its exercise of its own jurisdiction.
3. While articles 27 and 86 et seq. are located in different parts of the Statute, they must be read together and any possible tension between them must be reconciled. This is best achieved by reading article 27(2) of the Statute, both as a matter of conventional law and as reflecting customary international law, as also excluding reliance on immunity in relation to a Head of State’s arrest and surrender. Therefore, article 27(2) of the Statute is relevant not only to the adjudicatory jurisdiction of the Court, but also to the Court’s ‘enforcement jurisdiction’ vis-à-vis States Parties to the Rome Statute.
4. States Parties to the Rome Statute, have, by virtue of ratifying the Statute, accepted that Head of State immunity cannot prevent the Court from exercising jurisdiction – which is in line with customary international law. There is no reason why article 27(2) should be interpreted in a way that would allow a State Party to invoke Head of State immunity in the horizontal relationship if the Court were to ask for the arrest and surrender of the Head of State by making a request to that effect to another State Party. The law does not readily condone to be done through the back door something it forbids to be done through the front door. In such situations, the requested State Party is not proceeding to arrest the Head of State in order to prosecute him or her before the courts of the requested State Party: it is only lending assistance to the Court in its exercise of the Court’s jurisdiction.
5. Article 98(1) of the Statute does not itself stipulate, recognise or preserve any immunities. It is a procedural rule that determines how the Court is to proceed where any immunity exists such that it could stand in the way of a request for cooperation.
6. Resolution 1593 gives the Court power to exercise its jurisdiction over the situation in Darfur, Sudan, which it must exercise ‘in accordance with [the] Statute’. This includes article 27(2), which provides that immunities are not a bar to the exercise of jurisdiction. As Sudan is obliged to ‘cooperate fully’ with the Court, the effect of article 27(2) arises also in the horizontal relationship – Sudan cannot invoke Head of State immunity if a State Party is requested to arrest and surrender Mr Al-Bashir. Therefore, there was no Head of State immunity that Sudan could invoke in relation to Jordan, had the latter arrested Mr Al-Bashir on the basis of an arrest warrant issued by the Court. Accordingly, there was also no immunity that Jordan would have been required to ‘disregard’ by executing the Court’s arrest warrant. And there was no need for a waiver by Sudan of Head of State immunity.
7. The first clause of article 87(7) of the Statute consists of two cumulative conditions, namely, (i) that the State concerned failed to comply with a request to cooperate; and (ii) that this non-compliance is grave enough to prevent the Court from exercising its functions and powers under the Statute. It is only when the Chamber has established that both conditions are met that it may proceed to consider whether to refer the State to the Assembly of States Parties or the UN Security Council or both, following a finding of non-compliance.
8. Article 58(1) of the Statute empowers the pre-trial chambers to issue a warrant of arrest where there are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court and the arrest of the person ‘appears necessary’ for the reasons listed therein. The issuance of a warrant of arrest is, alongside the issuance of a summons to appear, one of the means to ensure the presence of the suspect before the Court and is therefore an important power and fundamental function of the Court. Those who bear the obligation to execute an arrest warrant are not free to render it nugatory merely by refusing to execute it.
9. In case a State encounters problems with the execution of a request for cooperation issued by the Court, article 97 of the Statute does not provide for a specific procedure regarding consultations that States have to follow, nor does it set out the manner in which consultations should be carried out.
10. In the absence of a prescribed procedure, the manner in which a State may indicate its intention to seek consultations may vary. What is essential is that the intention to consult is discernible from the circumstances. The intention to consult must be communicated to the Court timeously, so as not to frustrate the object of the request for cooperation or defeat the purpose of the consultation process. Furthermore, States are required to conduct consultations in good faith. While it would be better for a State to approach the consultation process in an unequivocal manner of asking questions, failure to follow that approach is not necessarily inconsistent with an intention to engage in consultation. A State may indeed approach the consultation process in the manner of stating a preliminary position that it sees as posing an obstacle to cooperation.

**INTRODUCTION**

1. In light of Jordan’s failure to arrest and surrender Mr Al-Bashir, on 11 December 2017, Pre-Trial Chamber II [the ‘Pre-Trial Chamber’] issued the ‘Decision under article 87(7) of the Rome Statute on the non-compliance by Jordan with the request by the Court for the arrest and surrender o[f] Omar Al-Bashir’ [the ‘Impugned Decision’].7 In particular, the Pre-Trial Chamber found that Jordan had failed to comply with its obligations under the Statute, and decided that Jordan’s non-compliance should be referred to the Assembly of States Parties and the UN Security Council.8 As regards the question of whether Mr Al-Bashir, when attending the Arab League Summit, enjoyed immunity from arrest as Sudan’s Head of State, the Pre-Trial Chamber noted that, in view of article 27(2) of the Statute, according to which immunities under international or national law shall not bar the Court’s exercise of jurisdiction, there is no Head of State immunity if the Court requests a State Party to arrest and surrender the Head of State of another State Party.9 The Pre-Trial Chamber also found that, in case of a referral by the UN Security Council, the Court shall exercise its jurisdiction ‘in accordance with [this] Statute’ (article 13 of the Statute), including article 27(2) of the Statute, and that Sudan had the same obligation to cooperate with the Court as a State Party, as a result of Resolution 1593.10 Hence, in the view of the Pre-Trial Chamber, Mr AlBashir could not invoke Head of State immunity and no waiver under article 98(1) of the Statute was required.11 The Pre-Trial Chamber also found that it had not been established that Sudan was party to the 1953 Convention on the Privileges and Immunities of the Arab League [the ‘1953 Convention’], which provides for certain immunities in the context of the Arab League, and that, in any event, article 98(2) of the Statute was not applicable to the 1953 Convention.12 The Pre-Trial Chamber noted further that the decision to refer a State Party to the Assembly of States Parties was discretionary, but that in the circumstances it was appropriate to make such a referral in respect of Jordan’s non-compliance.13

(9 Impugned Decision, paras 33-34. 10 Impugned Decision, paras 35-39. 11 Impugned Decision, para. 39. 12 Impugned Decision, paras 30-32. 13 Impugned Decision, paras 51-55.)

1. Upon Jordan’s request for leave to appeal the Impugned Decision,14 the PreTrial Chamber granted leave to appeal in relation to three issues on 21 February 2018. 15 In its appeal, Jordan raises three grounds of appeal, alleging errors of law and errors in the Pre-Trial Chamber’s exercise of its discretion. Under its first ground of appeal, Jordan submits that the Pre-Trial Chamber erred (i) in its findings in relation to ‘the effects’ of the Statute upon Mr Al-Bashir’s immunity, including its conclusions that article 27(2) excludes the application of article 98; (ii) in finding that article 98 established no rights for States Parties; (iii) in finding that article 98(2) does not apply to the 1953 Convention; and (iv) in finding that even if article 98 applied it would provide no basis for Jordan not to comply with the Court’s request.16 Under the second ground of appeal, Jordan contends that the Pre-Trial Chamber erred in concluding that Resolution 1593 affected Jordan’s obligations under customary and conventional international law to accord immunity to Mr Al-Bashir.17 Finally, under its third ground of appeal, Jordan avers that, even if it were assumed that the Pre-Trial Chamber was correct in finding that Jordan had failed to comply with the Court’s request to arrest and surrender Mr AlBashir, the Pre-Trial Chamber abused its discretion in deciding to refer such noncompliance to the Assembly of States Parties and to the UN Security Council.18

(14 ‘The Hashemite Kingdom of Jordan’s Notice of Appeal of the Decision under Article 87(7) of the Rome Statute on the Non-Compliance by Jordan with the Request by the Court for the Arrest and Surrender of Omar Al-Bashir; or, in the Alternative, Leave to Seek Such an Appeal’, 18 December 2017, ICC-02/05-01/09-312, para. 4. 15 ‘Decision on Jordan’s request for leave to appeal’, ICC-02/05-01/09-319 [the ‘Decision Granting Leave to Appeal’], para. 2, p. 9; Judge Perrin de Brichambaut stated that while he agreed with the majority to grant leave to appeal the Impugned Decision, such leave should have been granted only for the second and third issues ‘as respectively reframed by the Prosecutor’. See ‘Minority opinion of Judge Marc Perrin de Brichambaut’, 21 February 2018, ICC-02/05-01/09-319-Anx, para. 1. 16 ‘The Hashemite Kingdom of Jordan’s appeal against the “Decision under article 87(7) of the Rome Statute on the non-compliance by Jordan with the request by the Court for the arrest and surrender [of] Omar Al-Bashir”’, 12 March 2018, ICC-02/05-01/09-326 [the ‘Appeal Brief’], paras 3, 7-39, 115. 17 Appeal Brief, paras 3, 40-83, 115. 18 Appeal Brief, paras 3, 84-107, 115)

**APPLICABLE LEGAL FRAMEWORK**

1. Articles 13, 27 and 87(7), 97 and 98 of the Statute, as well as articles 25 and 103 of the Charter of the United Nations and Resolution 1593 are relevant for the present appeal.
2. Article 13 concerns the exercise of jurisdiction and provides that The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if: (a) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14; (b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; or (c) The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15.
3. Article 27 pertains to the irrelevance of official capacity and provides as follows:

1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.

2. 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 from exercising its jurisdiction over such a person.

1. Article 87(7) concerns the general provisions for requests for cooperation and provides in relevant part that

[…]

7. Where a State Party fails to comply with a request to cooperate by the Court contrary to the provisions of this Statute, thereby preventing the Court from exercising its functions and powers under this Statute, the Court may make a finding to that effect and refer the matter to the Assembly of States Parties or, where the Security Council referred the matter to the Court, to the Security Council.

1. Article 98 deals with the cooperation with respect to waiver of immunity and consent to surrender and stipulates that

1. 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 third State for the waiver of the immunity.

2. 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, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.

1. Article 97 pertains to the consultations and provides as follows: Where a State Party receives a request under this Part in relation to which it identifies problems which may impede or prevent the execution of the request, that State shall consult with the Court without delay in order to resolve the matter. Such problems may include, inter alia:

(a) Insufficient information to execute the request;

(b) In the case of a request for surrender, the fact that despite best efforts, the person sought cannot be located or that the investigation conducted has determined that the person in the requested State is clearly not the person named in the warrant; or

(c) The fact that execution of the request in its current form would require the requested State to breach a pre-existing treaty obligation undertaken with respect to another State.

1. Article 25 of the Charter of the United Nations provides: The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.
2. Article 103 of the Charter of the United Nations provides: In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.
3. Resolution 1593: see above

**DETERMINATION BY THE APPEALS CHAMBER**

1. Jordan submits that the Pre-Trial Chamber made erroneous findings regarding the effects of the Statute on Mr Al-Bashir’s Head of State immunity.299 Notably, Jordan alleges that the Pre-Trial Chamber erred in finding that (i) ‘article 27(2) of the Rome Statute excludes the application of article 98’;300 (ii) ‘article 98 establishes no rights for States Parties’;301 (iii) ‘article 98(2) does not apply to the 1953 Convention’;302 and (iv) ‘even if article 98 applied it would provide no basis for Jordan not to comply with the Court’s request’.303 Jordan argues further that the Pre-Trial Chamber erred in finding that Resolution 1593 triggered the application of the entire legal framework of the Statute to the situation in Darfur and that Sudan has analogous rights and obligations to a State Party. 304

(299 Appeal Brief, paras 7-39. 300 Appeal Brief, paras 3(a), 12, 15-21; Transcript of hearing, 10 September 2018, ICC-02/05-01/09-T4-ENG, p. 24, lines 14-21. 301 Appeal Brief, paras 3(a), 22-30; Transcript of hearing, 10 September 2018, ICC-02/05-01/09-T-4- ENG, p. 24, lines 14-21. 302 Appeal Brief, paras 3(a), 31-33; Transcript of hearing, 10 September 2018, ICC-02/05-01/09-T-4- ENG, p. 24, lines 14-21. 303 Appeal Brief, paras 3(a), 34-38; Transcript of hearing, 10 September 2018, ICC-02/05-01/09-T-4- ENG, p. 24, lines 14-21. 304 Appeal Brief, para. 50. See also paras 40, 55.)

1. Thus, at issue under the first two grounds of appeal is primarily the question of whether Head of State immunity finds application in a situation where the Court requests a State Party of the Rome Statute to arrest and surrender the Head of State of another State (in this instance, Sudan), which, while not being party to the Rome Statute, is the subject of a referral to the Court by the UN Security Council and, in terms of Resolution 1593, obliged to fully cooperate with the Court.
2. The central issue in this appeal is whether Mr Bashir, in his capacity as Head of State of Sudan, enjoyed immunity before this Court which Jordan was obligated to respect in the absence of a waiver from Sudan. In the circumstances of this Court, it is possible to follow different structures of judicial reasoning that may yield reasonable answers to that question. Nothing thus turns ultimately on the complaint that different compositions of the Pre-Trial Chamber may have used varied paths of judicial reasoning to answer that question. For present purposes, the issues in the appeal are adequately resolved along the same general framework of reasoning that the Pre-Trial Chamber had adopted in this case, with the exception of a strain of reasoning concerning customary international law. Following that approach, in keeping with article 21(1) (a) of the Statute, which stipulates that the Court shall apply ‘[i]n the first place, [the] Statute’, the Appeals Chamber is satisfied that the issues in this appeal ultimately rest on a proper construction of the provisions of the Rome Statute, in particular articles 27(2), 86, 89 and 98 of the Statute. It will address the impact of article 27(2) of the Statute on requests for cooperation relating to Heads of State of States Parties [below, section (b)]. It will then address the legal situation of Sudan in light of the UN Security Council referral of the Darfur situation [below, section (c)].
3. In the context of construing the provisions of the Statute, the Appeals Chamber considers it convenient to address whether customary international law actually provides for immunity of a Head of State if arrest and surrender are sought by the Court [below, section (a)], especially given the importance generated by that question in the context of this appeal. While the Appeals Chamber notes that Jordan submits that the question of whether Head of State immunity vis-à-vis the Court exists is not on appeal,305 this is a question that is intrinsically linked to the issues in relation to which leave to appeal was granted and the Appeals Chamber cannot disregard it.

(305 Appeal Brief, paras 7-9.)

1. **Article 27(2) of the Statute and customary international law**
2. Article 27(2) of the Statute provides as follows: 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 from exercising its jurisdiction over such a person.
3. The Appeals Chamber notes that Head of State immunity, which has been asserted in the case at hand, is a manner of immunity that is, as such, accepted under customary international law.306 That immunity prevents one State from exercising its criminal jurisdiction over the Head of State of another State. It is important to stress that immunity of that kind operates in the context of relations between States.

(306 See also Appeal Brief, paras 7-8; Transcript of hearing, 10 September 2018, ICC-02/05-01/09-T-4- ENG, p. 42, lines 14-16; African Union Observations, paras 11-12; Transcript of hearing, 10 September 2018, ICC-02/05-01/09-T-4-ENG, p. 79, lines 21-22, p. 91, lines 2-14, p. 99, lines 11-12; Mr O’Keefe’s Observations, para. 2; Transcript of hearing, 11 September 2018, ICC-02/05-01/09-T5-ENG, p. 7, lines 6-12; Transcript of hearing, 14 September 2018, ICC-02/05-01/09-T-8-ENG, p. 56, lines 4-13.)

1. The most direct effect of article 27(2) of the Statute is that a Head of State cannot claim Head of State immunity when he or she appears before the ICC for prosecution in accordance with the provisions on the exercise of jurisdiction under articles 12 et seq. of the Statute. Nor does Head of State immunity present a bar to the Court opening an investigation in relation to or issuing a warrant of arrest against a Head of State. This was specifically recognised by the ICJ in the Arrest Warrant Case. 307

(307 Arrest Warrant Case, para. 61.)

1. It is of note that article 27(2) of the Statute is a clear provision in conventional law; but it also reflects the status of customary international law. In this regard, the Appeals Chamber notes, first, article 7 of the Nuremberg Charter of the International Military Tribunal at Nuremberg, which provides as follows: The official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment.308
2. There is no suggestion in any of these instruments that immunity of Heads of State could stand in the way of their prosecution before an international court for international crimes.
3. Turning to the jurisprudence of the ICC, the Appeals Chamber recalls that Pre-Trial Chamber I, in the ‘Corrigendum to the Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir’ [the ‘Malawi Decision’],324 reached the same conclusion in a situation that was identical to the case at hand: a State Party to the Rome Statute having failed to execute a request for the arrest and surrender of Mr Al- Bashir.325 Pre-Trial Chamber I, having recalled the irrelevance of Head of State immunity in respect of international courts since the end of the First World War, distinguished the case before it from that decided by the ICJ in the Arrest Warrant Case, noting that the latter was ‘concerned solely with immunity across national jurisdictions’ and therefore ‘distinct from the present circumstances, as here an international court is seeking arrest for international crimes’.326 Pre-Trial Chamber I also recalled the passage of the judgment in the Arrest Warrant Case that recognises that Head of State immunity does not find application before international courts.327

(322 Immunity Decision, paras 43 et seq. 323 Immunity Decision, para. 52. 324 13 December 2011, ICC-02/05-01/09-139-Corr. 325 Malawi Decision, paras 22 et seq. 326 Malawi Decision, para. 34. 327 Malawi Decision, para. 33.)

1. Pre-Trial Chamber I found that: [T]he principle in international law is that immunity of either former or sitting Heads of State can not be invoked to oppose a prosecution by an international court. This is equally applicable to former or sitting Heads of States not Parties to the Statute whenever the Court may exercise jurisdiction. In this particular case, the Chamber notes that it is exercising jurisdiction following a referral by the United Nations Security Council made under Chapter VII of the United Nations Charter, in accordance with article 13(b) of the Statute.328

(328 Malawi Decision, para. 36.)

1. Pre-Trial Chamber I considered that ‘Malawi, and by extension the African Union, are not entitled to rely on article 98(1) of the Statute to justify refusing to comply with the Cooperation Requests’,329 noting, inter alia, ‘an increase in Head of State prosecutions by international courts in the last decade’, which shows ‘that initiating international prosecutions against Heads of State have gained widespread recognition as accepted practice’.330 It also noted the number of States Parties to the Rome Statute and the fact that States not parties to the Statute allowed twice for situations to be referred to the Court by the UN Security Council.331 Pre-Trial Chamber I concluded that the ‘international community’s commitment to rejecting immunity in circumstances where international courts seek arrest for international crimes has reached a critical mass’ and that ‘[t]here is no conflict between Malawi's obligations towards the Court and its obligations under customary international law; therefore, article 98(1) of the Statute does not apply’.332

(329 Malawi Decision, para 37. 330 Malawi Decision, para. 39. 331 Malawi Decision, para. 40. 332 Malawi Decision, paras 42, 43.)

1. The Appeals Chamber fully agrees with Pre-Trial Chamber I’s conclusions in the Malawi Decision333 as well as that of the SCSL’s Appeals Chamber in the Taylor case and notes that there is neither State practice nor opinio juris that would support the existence of Head of State immunity under customary international law vis-à-vis an international court. To the contrary, as shown in more detail in the Joint Concurring Opinion of Judges Eboe-Osuji, Morrison, Hofmański and Bossa, such immunity has never been recognised in international law as a bar to the jurisdiction of an international court.334 To be noted in that regard is the role of judicial pronouncements in confirming whether or not a rule of customary international law has as such ‘crystallized’.335 The Appeals Chamber is satisfied that the pronouncements of both the Pre-Trial Chamber in the Malawi Decision and of the Appeals Chamber of the Special Court for Sierra Leone have adequately and correctly confirmed the absence of a rule of customary international law recognising Head of State immunity before international courts in the exercise of jurisdiction. The Appeals Chamber accordingly rejects any contrary suggestion of the Pre-Trial Chamber in that regard, in both this case and in the case concerning South Africa

(333 The Appeals Chamber notes that Pre-Trial Chamber I adopted the same approach set out in the Malawi Decision in its ‘Decision pursuant to article 87(7) of the Rome Statute on the refusal of the Republic of Chad to comply with the cooperation requests issued by the Court with respect to the arrest and surrender of Omar Hassan Ahmad Al Bashir’, 13 December 2011, ICC-02/05-01/09-140-tENG. 334 See the ‘Joint Concurring Opinion of Judges Eboe-Osuji, Morrison, Hofmański and Bossa’, 6 May 2019 [the ‘Joint Concurring Opinion of Judges Eboe-Osuji, Morrison, Hofmański and Bossa’], ICC02/05-01/09-397-Anx1, paras 52-174. See also paras 175-252. 335 See New Jersey v Delaware, where, writing for the US Supreme Court, Mr Justice Cardozo (on the authority of eminent commentators such as Lauterpacht, The Function of Law in the International Community and Hall, International Law, 7th edn), observed as follows: ‘International law … like the common law within states, a twilight existence during which it is hardly distinguishable from morality or justice, till at length the imprimatur of a court attests its jural quality:’ United States, Supreme Court, New Jersey v Delaware, February 5 1934, 291 U.S. 361, at p 383. See also Antonio Cassese, International Law, 2nd edn (2005) at p 160, citing Anzilotti.)

1. The absence of a rule of customary international law recognising Head of State immunity vis-à-vis international courts is relevant not only to the question of whether an international court may issue a warrant for the arrest of a Head of State and conduct proceedings against him or her, but also for the horizontal relationship between States when a State is requested by an international court to arrest and surrender the Head of State of another State. As further explained in the Joint Concurring Opinion of Judges Eboe-Osuji, Morrison, Hofmański and Bossa336 and correctly found by the Pre-Trial Chamber in the Malawi Decision,337 no immunities under customary international law operate in such a situation to bar an international court in its exercise of its own jurisdiction.

(336 See further the Joint Concurring Opinion of Judges Eboe-Osuji, Morrison, Hofmański and Bossa, paras 76-174, 414-418. See also paras 175-252, 431-445. 337 Malawi Decision, paras 37 et seq.)

1. The Appeals Chamber considers that the absence of a rule of customary international law recognising Head of State immunity vis-à-vis an international court is also explained by the different character of international courts when compared with domestic jurisdictions. While the latter are essentially an expression of a State’s sovereign power, which is necessarily limited by the sovereign power of the other States, the former, when adjudicating international crimes, do not act on behalf of a particular State or States. Rather, international courts act on behalf of the international community as a whole.338 Accordingly, the principle of par in parem non habet imperium, which is based on the sovereign equality of States, finds no application in relation to an international court such as the International Criminal Court.

(338 See in this regard the Joint Concurring Opinion of Judges Eboe-Osuji, Morrison, Hofmański and Bossa, paras 52-174. See also paras 431-445.)

1. The Appeals Chamber notes further that, given the fundamentally different nature of an international court as opposed to a domestic court exercising jurisdiction over a Head of State, it would be wrong to assume that an exception to the customary international law rule on Head of State immunity applicable in the relationship between States has to be established; rather, the onus is on those who claim that there is such immunity in relation to international courts to establish sufficient State practice and opinio juris. As further explained in the Joint Concurring Opinion of Judges Eboe-Osuji, Morrison, Hofmański and Bossa, there is no such practice or opinio juris. 339

(339 See in this regard the Joint Concurring Opinion of Judges Eboe-Osuji, Morrison, Hofmański and Bossa, paras 76-174, 414-418. See also paras 175-252, 431-445.)

1. In sum, the Appeals Chamber finds that there was no rule of customary international law that would have given Mr Al-Bashir immunity from arrest and surrender by Jordan on the basis of the request for arrest and surrender issued by the Court. It follows that there was no ground for Jordan not to execute the request for arrest and surrender and that therefore it did not comply with its obligation to cooperate with the Court pursuant to articles 86 et seq. of the Statute.
2. As recalled above, the Pre-Trial Chamber in the decision under review took a different approach to the one it adopted in the Malawi Decision. Contrary to that decision and the Appeals Chamber’s above finding, it found that it was unable to identify ‘a rule in 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’. 340 Nevertheless, it concluded that Head of State immunity did not stand in the way of Mr Al-Bashir’s arrest by Jordan, based on the interplay between the relevant provisions of the Statute and Sudan’s obligation to ‘cooperate fully’ with the Court pursuant to paragraph 2 of Resolution 1593.

(340 Impugned Decision, para. 27, referring to South Africa Decision, para. 68.)

1. 119. While the Appeals Chamber, for the reasons set out above, rejects the PreTrial Chamber’s finding that there is immunity under customary international law for Heads of State when their arrest is sought for international crimes by this Court, the Appeals Chamber notes that the Pre-Trial Chamber nevertheless reached the same conclusion as the Appeals Chamber, namely that Jordan should have arrested and surrendered Mr Al-Bashir. The Pre-Trial Chamber did so based on its interpretation of the Statute and bearing in mind Sudan’s position under Resolution 1593. The Appeals Chamber considers that this interpretation of the Statute was, as such, correct, as will be demonstrated in the subsequent sections.
2. **Articles 27(2) and 98 of the Statute and their impact on obligations between State Parties**
3. The Pre-Trial Chamber found that the effect of article 27(2) of the Statute on States Parties of the Rome Statute is two-fold: it prevents them from invoking any immunity belonging to them under international law (i) ‘as a ground for refusing arrest and surrender of a person sought by the Court (vertical effect)’; and (ii) ‘when cooperation in the arrest and surrender of a person to the Court is provided by another State Party (horizontal effect)’.341 While the Appeals Chamber, for the reasons set out above, disagrees with the Pre-Trial Chamber’s finding as to the existence of immunity vis-à-vis this Court, it confirms the correctness of the Pre-Trial Chamber’s interpretation of article 27(2) of the Statute.

(341 Impugned Decision, para. 33, referring to South Africa Decision, paras 76-80)

1. *Article 27(2) of the Statute and its ‘vertical effect’ in relation to cooperation by States Parties*
2. The Appeals Chamber recalls that, pursuant to article 86 of the Statute, States Parties to the Rome Statute are under an obligation to cooperate fully with the Court, in accordance with the Statute; pursuant to article 89 of the Statute, the Court may request the arrest and surrender of a person against whom a warrant of arrest has been issued. The extent of the obligation of States Parties to cooperate fully must be understood in the context of the Statute as a whole and bearing in mind its object and purpose. The Court was set up to exercise jurisdiction ‘over persons for the most serious crimes of international concern’ and its States Parties expressed their determination to ‘put an end to impunity for the perpetrators of these crimes’.342 On that basis, the Appeals Chamber considers it to be clear, that, if a warrant of arrest were to be issued against the Head of State of a State Party to the Rome Statute and the Court requests that State Party to arrest and surrender the person who is the subject of the warrant, the requested State Party could not refuse to comply with the request on the ground that its Head of State enjoys immunity, be it under international or domestic law. This is a direct consequence of article 27(2) of the Statute, to which all States Parties to the Rome Statute have consented by virtue of their ratification of, or accession to, the Statute.

(342 See article 1 of the Statute and the fifth preambular paragraph. 343 See Impugned Decision, para. 33; South Africa Decision, paras 77-78.\_

1. The Appeals Chamber is unpersuaded by Jordan’s argument that article 27(2), which is situated in Part 3 of the Statute, only addresses the Court’s ability to exercise jurisdiction, and not the arrest and surrender of persons to the Court, which is regulated in Part 9.344 While articles 27 and 86 et seq. are located in different parts of the Statute, they must be read together and any possible tension between them must be reconciled.345 In the view of the Appeals Chamber, this is best achieved by reading article 27(2), both as a matter of conventional law and as reflecting customary international law, as also excluding reliance on immunity in relation to a Head of State’s arrest and surrender. This follows from a number of considerations. First, it is clear that the purpose of article 27(2) is to ensure that immunities do not stand in the way of the exercise of the Court’s jurisdiction; the Court’s jurisdiction must be effective. This purpose would be all but defeated if a State Party, which is obliged to cooperate fully with the Court, were allowed to invoke immunity as a ground to refuse the arrest and surrender of its Head of State to the Court, given that the Court depends on State cooperation to execute warrants of arrest.346 The result would be that, in effect, the Court would be barred from exercising its jurisdiction because of the existence of immunities, which would be contrary to the letter and spirit of article 27(2). If such an interpretation of article 27(2) were to be adopted, an important provision of the Statute would become potentially meaningless.

(344 Appeal Brief, para. 16; Transcript of hearing, 10 September 2018, ICC-34, lines 16-19; Jordan’s Response to the Amici, para. 9. 345 See in this sense, Prosecutor’s Response, paras 36, 38-39, referring, inter alia, to D. Akande, ‘The legal nature of Security Council referrals to the ICC and its impact on Al Bashir’s immunities’ 7 Journal of International Criminal Justice (2009), pp. 339, 342; W. Schabas, The International Criminal Court: a Commentary on the Rome Statute (Oxford: OUP, 2nd Ed. 2016), p. 1346 cf. 1348.; R. Rastan, ‘Jurisdiction,’ in C. Stahn (ed.), The Law and Practice of the International Criminal Court (Oxford: OUP, 2015), p. 161; Mr Robinson’s et al. Observations, paras 13-16; Mr Robinson’s et al. Final Submissions, paras 8-11. 346 See Prosecutor’s Response, paras 15-41, Prosecutor’s Response to the Amici, para. 11; Mr Robinson’s et al. Final Submissions, para. 10.)

1. The Appeals Chamber notes in this regard that the obligation of States Parties to cooperate with the Court when exercising its jurisdiction over crimes listed in article 5 of the Statute (the crime of genocide, crimes against humanity, war crimes and the crime of aggression) relates to breaches of fundamental norms of international law that have, such as the prohibition of genocide, the character and force of jus cogens. 347 The obligation to cooperate with the Court reinforces the obligation erga omnes to prevent, investigate and punish crimes that shock the conscience of humanity, including in particular those under the jurisdiction of the Court and it is this erga omnes character that makes the obligation of States Parties to cooperate with the Court so fundamental. These considerations are reflected in the possibility, pursuant to article 87(7) of the Statute, of referring non-compliance with these obligations to the Assembly of States Parties and, in case the situation to which the cooperation request relates was referred to the Court by the UN Security Council, to the UN Security Council.348 The resulting importance of the duty to cooperate lends further weight to the argument that the duty to cooperate under articles 86 et seq. of the Statute must be interpreted in light of article 27(2) of the Statute

(347 See further Joint Concurring Opinion of Judges Eboe-Osuji, Morrison, Hofmański and Bossa, paras 198-218. 348 See further Joint Concurring Opinion of Judges Eboe-Osuji, Morrison, Hofmański and Bossa, paras 198-218.)

1. As stated by Pre-Trial Chamber II in the South Africa Decision, if States Parties to the Statute were allowed to rely on immunities or special procedural rules to deny cooperation with the Court, this would create a situation which would ‘clearly be incompatible with the object and purpose of article 27(2) of the Statute’.349 Indeed, as noted by Pre-Trial Chamber II ‘the Court’s jurisdiction with respect to persons enjoying official capacity would be reduced to a purely theoretical concept if States Parties could refuse cooperation with the Court by invoking immunities based on official capacity’.350 If article 27(2) were to be read narrowly only to encompass proceedings before the Court (i.e. the Court’s adjudicatory jurisdiction), it would be unclear, as noted by the Prosecutor, whether any Head of State – even of a State Party – could ever be effectively arrested and surrendered, absent an express waiver by the State concerned.351 To read the Statute in this way would be contrary to the principle of effectiveness.

(349 South Africa Decision, para. 75.. 350 South Africa Decision, para. 75. 351 Prosecutor’s Response to the Amici, para. 11)

1. Furthermore, the reference in article 27(2) to immunities ‘under national law’ suggests that the provision also applies to the relationship between the Court and States Parties because national law could in any event not be invoked before the Court; the reference to ‘national law’ would be meaningless if article 27(2) were considered to be unrelated to Part 9 of the Statute. 352 Therefore, contrary to the submissions of Jordan and some of the amici curiae, article 27(2) is relevant not only to the adjudicatory jurisdiction of the Court, but also to the Court’s ‘enforcement jurisdiction’ vis-à-vis States Parties to the Rome Statute.353

(352 Prosecution’s Response, para. 25; Mr Robinson’s et al. Final Submissions, para. 10. 353 Jordan: Appeal Brief, paras 15-17, 28; Jordan’s Response to the Amici, para. 9; Transcript of hearing, 10 September 2018, ICC-02/05-01/09-T-4-ENG, p. 31, lines 1-4, 10-20, p. 34, lines 16-19; Transcript of hearing, 11 September 2018, ICC-02/05-01/09-T-5-ENG, p. 106, line 24 to p. 107, line 10; Jordan’s Final Submissions, paras 4-5.Prosecutor: Prosecutor’s Response, paras 33-34 (emphasis in original omitted); Transcript of 10 September 2018, ICC-02/05-01/09-T-4-ENG, p. 53, lines 1-4; Mr O’Keefe: Mr O’Keefe’s Observations, para. 7; Transcript of hearing, 13 September 2018, ICC-02/05- 01/09-T-7-ENG, p. 79, lines 18-22; Mr Robinson et al.: Mr Robinson’s et al. Observations, paras 13- 16; Mr Robinson’s et al. Final Submissions, paras 8-11; The African Union: Transcript of hearing, 13 September 2018, ICC-02/05-01/09-T-7-ENG, p. 112, line 23 to p. 113, line 25.)

1. In light of the above, the term ‘cooperate fully’ in article 86 must be understood and interpreted in the context of article 27(2). A State Party would not be cooperating fully with the Court if, when faced with a request for the arrest and surrender of its Head of State, it refused to comply with this request, relying on Head of State immunity. The Pre-Trial Chamber’s finding in this regard was therefore correct in law.
2. *Article 27(2) of the Statute and its ‘horizontal effect’*