

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-02/05-01/09

Date: 30 April 2018

APPEALS CHAMBER

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

SITUATION IN DARFUR, SUDAN

**IN THE CASE OF
*THE PROSECUTOR v. OMAR HASSAN AHMAD AL-BASHIR***

PUBLIC

Request by Dr. Kiyani for Leave to Submit Observations

Source: Dr. Asad Kiyani, University of Victoria

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

The Office of the Prosecutor
Ms Fatou Bensouda, Prosecutor
Mr James Stewart

Counsel for the Defence

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

States' Representatives
Competent authorities of the
Hashemite Kingdom of Jordan

Amicus Curiae

REGISTRY

Registrar
Mr Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

I. Introduction

1. This is a request made by Dr. Asad G. Kiyani for leave to submit *amicus curiae* observations on the merits of the legal questions arising in the appeal of the Hashemite Kingdom of Jordan against the finding of non-compliance issued by Pre-Trial Chamber II.¹ This request is made pursuant to the order of the Appeals Chamber dated 29 March 2018.²

II. Particular Expertise of Dr. Kiyani

2. Dr. Kiyani is an Assistant Professor of Law in the Faculty of Law at the University of Victoria (Canada). He has published a number of articles on relevant subjects in international criminal law, including on: the question of President Al-Bashir's immunity;³ the relationship between the AU and ICC, particularly in light of the Darfur referral;⁴ on the history, theory and practice of international criminal law;⁵ and on selectivity in international criminal law.⁶ Dr. Kiyani's article on immunity was cited by the Supreme Court of Appeal in *Minister of Justice and Constitutional Development v Southern Africa Litigation Centre* (867/15) [2016] ZASCA 17. Dr. Kiyani is a recipient of the 2017 Antonio Cassese Prize for International Criminal Law Studies.

III. Summary Conclusion

3. Contrary to the finding of the Pre-Trial Chamber of the International Criminal Court ('the Court'), Jordan was under no legal obligation under the Rome Statute ('the Statute') to arrest President Al-Bashir.

IV. Summary Argument

4. Customary international law obligates states to accord absolute inviolability and immunity *ratione personae* to the head of another state. This inviolability and immunity attach to the office of head of state, not to the individual seated in that office. The

¹ '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 Omar Al-Bashir', ICC-02/05-01/09-326, 12 March 2018.

² 'Order inviting expressions of interest as *amici curiae* in judicial proceedings (pursuant to rule 103 of the Rules of Procedure and Evidence)', ICC-02/05-01/09 OA2, 29 March 2018.

³ Asad G Kiyani, "Al-Bashir & the ICC: The Problem of Head of State Immunity" (2013) 12 Chinese JIL 467 – 508.

⁴ Asad G Kiyani, "The Antinomies of Legitimacy: On the (Im)possibility of a Legitimate International Criminal Tribunal", (2014) 7 Afr. J. Leg. Stud. 495 – 526.

⁵ Asad G Kiyani, "International Crime and the Politics of Criminal Theory: Voices and Conduct of Exclusion." (2015) 47 *NYU Journal of International Law & Politics* 127 – 206; and, Asad G Kiyani & James G Stewart, "The Ahistoricism of Legal Pluralism in International Criminal Law", (2017) 65 *Am. J. Comp. L.* 393–449.

⁶ Asad G Kiyani, "Group-Based Selectivity and Local Repression: The Custom and Curse of Selectivity" (2016) 14 *JICJ* 939–957.

immunity continues under customary international law until either the individual concerned no longer holds the office of head of state, or until the state itself waives the immunity. There is no exception where a head of state is accused of international crimes. The domestic law of the state holding the immunity may provide for its own exception to inviolability and immunity for the purpose of domestic trials.⁷

5. President Al-Bashir was and is the head of state of Sudan, which is not party to the Statute, and which has not accepted the jurisdiction of the Court through a declaration under Article 12(3) of the Statute. The Court has also not obtained from Sudan a waiver of the inviolability and immunity that arises under customary international law. Customary international law therefore obligated Jordan to accord President Al-Bashir inviolability and immunity. As a result, the Court's request to Jordan to arrest and surrender President Al-Bashir was *ultra vires* because it violated Article 98(1) of the Statute.
6. State obligations to cooperate with the Court are defined by Part 9 of the Statute. Article 27(2) does not concern cooperation but clarifies that individuals who are before the Court may not claim immunity as a procedural bar to prosecution. Article 27(2) is an ongoing waiver of immunity, including those arising under customary international law such as head of state immunity, that is agreed to by state parties and non-party states that consent to the jurisdiction of the Court under Article 12(3). This ongoing waiver in respect of consenting states means that it is not rendered ineffective simply because of the operation of Article 98(1) in respect of non-consenting states such as Sudan. Similarly, the Court's jurisdiction is not frustrated simply because, in accordance with its own Statute, it must satisfy certain preconditions before requesting state parties to arrest and/or surrender nationals of non-party states who benefit from immunities under international law.
7. Article 98(1) of the Statute generally precludes the Court from proceeding with a request for surrender that requires a state party to act inconsistently with its obligations under customary international law with respect to the inviolability from arrest and immunity from judicial proceedings of officials of a state that is not party to the Statute.

⁷ Article 60 of the 2005 Interim National Constitution of Sudan accords the President and First Vice-President immunity from any legal proceedings while in office, unless three-fourths of the National Legislature passes a resolution bringing charges before the Constitutional Court.

Under the terms of Article 98(1), the Court may only proceed with such a request where the non-party state has waived the inviolability or immunity.

8. Article 98(1) can only apply in respect of nationals of non-party states. The obligations contained in Article 98(1) are placed not on requested states but on the Court itself to obtain a waiver from the non-party state holding the relevant immunity. When the Court requests state parties to arrest and surrender nationals of other state parties, Article 98(1) is not implicated as the Court has already obtained a waiver of immunity.
9. Security Resolution 1593 (2005) does not affect this obligation. It did not grant the Court any independent authority under Chapter VII, including the authority to disregard the obligations placed on the Court by Article 98(1) of its constituent treaty. The Security Council is not competent to delegate such authority to the Court, and the Court is not competent to receive or exercise any such purported authority.
10. Security Council referrals under Article 13(b) of the Statute operate analogously to self-referrals under Article 13(a) or *proprio motu* investigations under Article 13(c): they permit the Court to exercise its jurisdiction over a given situation, whether it involves state parties or non-state parties. Security Council referrals are not the source of jurisdiction.
11. That Resolution 1593 was passed pursuant to Chapter VII of the UN Charter does not, on its own, affect the inviolability and immunity of President Al-Bashir. The Security Council has not, but may have the authority to, *inter alia*, explicitly abrogate the immunity and inviolability of President Al-Bashir. In addition, neither the Statute nor its preparatory works indicate that a Security Council referral under Article 13(b) on its own implicitly abrogates the inviolability or immunity of nationals of non-party states.
12. As such, Jordan was under no legal obligation to arrest and/or surrender President Al-Bashir.

V. Subsidiary Initial Observation

13. For Jordan to arrest and/or surrender President Al-Bashir would be an intentionally wrongful act. However, to do so would not necessarily preclude the Court from exercising its jurisdiction over President Al-Bashir.



Dr Asad G. Kiyani
University of Victoria, Faculty of Law, Canada

Dated this 30 April 2018

At Victoria, Canada