

Cour  
Pénale  
Internationale



International  
Criminal  
Court

Original: **English**

No.: **ICC-02/05-01/09 OA2**

Date: **30 April 2018**

**THE APPEALS CHAMBER**

**Before:** Judge Chile Eboe-Osuji, Presiding Judge  
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***

**Request by Professor Claus Kreß with the assistance of Erin Pobjie for leave to submit observations on the merits of the legal questions presented in ‘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”’ of 12 March 2018 (ICC-02/05-01/09-326)**

**Source:** Professor Claus Kreß  
Director, Institute for International Peace & Security Law  
Chair for German and International Criminal Law  
University of Cologne  
Albertus-Magnus-Platz  
D-50923 Cologne, Germany  
claus.kress@uni-koeln.de

**Confidentiality:** Public

## **Request for Leave to Submit Observations on the Merits of the Legal Questions Presented in Jordan Referral re Al-Bashir Appeal**

1. This is a request by Professor Claus Kreß with the assistance of Erin Pobjie, pursuant to the order of the Appeals Chamber entitled ‘Order inviting expressions of interest as amici curiae in judicial proceedings (pursuant to rule 103 of the Rules of Procedure and Evidence)’ of 29 March 2018 (ICC-02/05-01/09/330), for leave to submit observations on the merits of the legal questions presented in ‘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”’ of 12 March 2018 (ICC-02/05-01/09-326).

### **Particular Expertise of Professor Kreß in the Legal Questions Presented**

2. Professor Claus Kreß (Dr. jur. Cologne; LL.M. Cantab.) is Professor for Criminal Law and Public International Law. He holds the Chair for German and International Criminal Law and he is Director of the Institute of International Peace and Security Law at the University of Cologne. Since 1998 he has been representing Germany in the negotiations regarding the International Criminal Court. He was member of the Expert Group on the German Code of Crimes under International Law (2000/2001) and he acted as War Crimes Expert for the Prosecutor General for East Timor (2001), as Head of the ICC’s Drafting Committee for the Regulations of the Court (2004) and as a sub-coordinator in the negotiations on the crime of aggression. Claus Kreß is co-editor of several law journals, including the Journal of International Criminal Justice. He is the author of the book chapter ‘The International Criminal Court and Immunities under International Law for States Not Party to the Court’s Statute’, in M. Bergsmo and Ling Y. (eds.), *State Sovereignty and International Criminal Law* (Brussels: Torkel Opsahl Academic EPublisher, 2012), and together with Kimberly Prost, co-author of the book chapters ‘Article 87’, ‘Article 97’ and ‘Article 98’ in O. Triffterer and K. Ambos (eds.), *The Rome Statute of the International Criminal Court: a Commentary*, 3rd Ed. (München/Oxford/Baden Baden: C.H.Beck/Hart/Nomos, 2016). Professor Harmen van der Wilt has read this request and he might co-sign the brief, his time allowing.

### **Summary Conclusion and Initial Observations**

3. Article 98 of the Rome Statute (‘the Statute’) is not applicable to the situation of Omar Al-

Bashir. Jordan, being a State Party to the Statute, was under the duty to execute the International Criminal Court's ('the Court') request for the arrest of President Al-Bashir and to surrender him to the Court while he was on Jordanian territory. The Pre-Trial Chamber was therefore correct in finding that Jordan's failure to comply with the Court's request was contrary to the provisions of the Statute.

#### A. Argument in Outline

4. Article 98 of the Statute does not relieve Jordan of its obligation under the Statute to comply with the Court's request for the arrest and surrender of President Al-Bashir to the Court while he was present on Jordanian territory. Article 98(1) is not applicable, as the Court's request for arrest and surrender did not require Jordan to act inconsistently with its obligations under international law with respect to the immunity of a person of a third State (Sudan). This position is supported by two independent arguments: firstly, the existence of an international customary law exception to international law immunity of States *ratione personae* with respect to their Heads for proceedings before an international court, including this Court. Secondly, in the alternative, President Al-Bashir's immunity *ratione personae* was waived as a result of UN Security Council resolution 1593 (2005).
5. There exists an international customary law exception to international law immunity of States *ratione personae* with respect to their Heads for international criminal law proceedings before an international court. The International Court of Justice ('ICJ') has given credit to such a customary exception in its dictum in the Arrest Warrant Case, when it stated *obiter dictum* that a person who holds an office to which immunity *ratione personae* is attached 'may be subject to proceedings before certain international criminal courts, where they have jurisdiction', including specifically this Court (para 61). The crystallisation of such an international customary law exception is evidenced by a consistent line of verbal State practice going back to the Charter for the Nuremberg Tribunal, the *Milošević* precedent before the International Criminal Tribunal for the Former Yugoslavia (although with limited effect), on a literal formulation of the ICJ's dictum referred to above in the Arrest Warrant case and on the culmination of all this in the *Charles Taylor* decision by the Special Court for Sierra Leone. This exception means that immunity *ratione personae* of an incumbent Head of a non-State Party is not a bar to the Court exercising jurisdiction over that person, and must also extend to the international legal relationship between the requested State and the non-State Party to

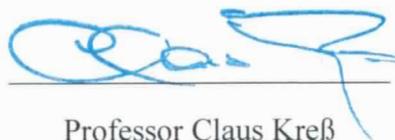
which the beneficiary of the international immunity right *ratione personae* belongs.

6. Even in the absence of an international customary law exception to international law immunity of States *ratione personae*, any such immunity of Sudan with respect to President Al-Bashir was implicitly waived as a result of UN Security Council resolution 1593 (2005) ('Resolution 1593'). The effect of Resolution 1593 referring the situation to the Prosecutor in accordance with article 13(b) of the Statute is that the Court may exercise its jurisdiction 'in accordance with the provisions of [the] Statute', including article 27(2). The Council's decision in Resolution 1593 that Sudan 'shall cooperate fully and provide any necessary assistance to the Court and the Prosecutor', is binding on Sudan as a UN member State in accordance with article 25 of the UN Charter. Although the source of the obligation of Sudan to cooperate fully with the Court is Resolution 1593, the content of its obligations to cooperate is the Statute. The result of Resolution 1593 was therefore to place Sudan in a legal position analogous to that of a State Party to the Statute with respect to the situation in Darfur, including the unavailability of international law immunities pursuant to article 27(2).
7. As Sudan's immunity was and is unavailable due to the indirect application of article 27(2) of the Statute, the Court's request for arrest and surrender did not require Jordan to act inconsistently with its obligations under international law with respect to the immunity of a person of a third State (Sudan) and article 98(1) is therefore not applicable. Although on its face, article 27(2) is addressed to the exercise of the Court's jurisdiction, this provision must be construed to include State acts of arrest and surrender based on a request by the Court. The practical effect of article 27(2) would be largely nullified if this provision governed only the relationship between the Court and the national State of the suspect. To avoid such nullification in light of the Statute's overarching aim to end impunity, the waiver contained in article 27(2) of the Statute must extend to the triangular relationship between the Court, the requested State Party and the 'third' State. As article 27(2) is of both vertical and horizontal application, Sudan cannot plead immunity as a procedural bar before the Court and requested States Parties such as Jordan are also bound to respect Sudan's waiver of immunity.
8. Article 98(1) of the Statute entrusts the Court with the sole competence to determine, if necessary, whether or not a request to cooperate could put a requested State in the position of having to violate its international obligations with respect to immunities. This is

reflected in the wording of that provision and in rule 195(1) of the Rules of Procedure and Evidence. As the Pre-Trial Chamber correctly found that no such competing international legal obligation existed with respect to Jordan, this provision was not applicable to the present case. The Pre-Trial Chamber was therefore correct in finding that Jordan had failed to comply with its obligations under the Statute to cooperate with the Court.

## **B. Subsidiary Initial Observations**

9. The term ‘third State’ in article 98(1) means ‘a State other than the requested State’, and may refer to either a State Party or a non-State Party. Although article 2(1)(h) of the Vienna Convention on the Law of Treaties defines the concept of ‘third State’ in the sense of a ‘State not party to the treaty’, the drafters of the Statute were free to use the term in a different way and they did so. This is supported by the fact that other provisions of Part 9 of the Statute (in particular, article 87(5)) explicitly refer to ‘a State not party to the Statute’, and since negotiations on article 98(1) recognised that the inviolability of diplomatic premises could present an obstacle to the execution of a request for surrender, both with respect to a State Party or a non-State Party, given that the waiver of immunity in article 27(2) attaches only to the official capacity of persons and not the premises or property of a third State which might be subject to State or diplomatic immunity.
  
10. Although not spelled out explicitly, the term ‘international agreements’ in article 98(2) was intended by the drafters to refer to Status of Forces Agreements (‘SOFAs’). This is reflected by the widespread reference to SOFAs in the course of the negotiations leading to article 98(2). Although the language of article 98(2) does not confine that paragraph to SOFAs and may therefore extend to treaty provisions on re-extradition and agreements on special missions, for an international agreement to fall within article 98(2), the agreement must make use of the technical concept of a ‘sending’ and a ‘receiving’ State and the person subject to the Court’s request for surrender must be present on the territory of a receiving State because they have been sent by a sending State.



Professor Claus Kreß

Dated 30 April 2018

At Florence, Italy