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Date: **18 June 2018**

THE APPEALS CHAMBER

Before: **Judge Chile Eboe-Osuji, President**
Judge Howard Morrison
Judge Piotr Hofmański
JudgeLuz 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 Document

Writen observations of Professor Claus Kreß as amicus curiae, with the assistance of Ms Erin Pobjie, 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 with the assistance of Ms Erin Pobjie**

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Introduction

1. The legal issues before the AC go to the heart of the international criminal justice system *stricto sensu*, as established by the ICC Statute. At the material time, Jordan would not have acted inconsistently with any of its obligations under international law as referred to in article 98(1) of the ICC Statute ('the Statute'), had it complied with the International Criminal Court's ('the Court') request for the arrest and surrender of President Al-Bashir to the Court while he was present on Jordanian territory. The same is true, *mutatis mutandis*, with respect to article 98(2) of the Statute. Therefore, I respectfully submit that the appeal is to be rejected.
2. In my submissions, I shall explain the legal conclusion set out in para. 1. On article 98(2) of the Statute, I shall write no more than that Jordan has *not* pointed to the existence of any 'international agreement' within the meaning of that provision.
3. In the year-long debate about the case against President Al-Bashir, two main legal avenues have been identified in order to reach the conclusion that article 98(1) of the Statute does not prevent the Court from proceeding with requesting a State Party to the Statute to arrest and surrender President Al-Bashir when he is present on the territory of that State. The first legal avenue, which, over time, has been articulated in two main variants,[1] is based on the legal effect of Security Council resolution 1593 ('the Security Council avenue'). The second legal avenue is based on the view that, first, there exists a customary international law exception to the customary international law immunity right *ratione personae* of States for the purpose of proceedings before the Court and that, second, this exception extends to the triangular legal relationship of vertical co-operation between the Court, a requested State Party and the Non-State Party of which the person sought is the incumbent Head of State ('the Customary Law avenue').
4. In accordance with the position taken by PTC I in its Malawi[2] and Chad[3] decisions, I respectfully submit that the Customary Law avenue is open and that it should therefore be taken by the AC. I have set out the explanation of this position in greater detail in my academic work and I would respectfully refer the AC to the additional explanations provided there[4] as an integral part of the following considerations.

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[1] For a summary of those two, see Claus Kreß/Kimberly Prost, in Otto Triffterer/Kai Ambos, eds, Commentary on the Rome Statute of the International Criminal Court, 3rd ed. (Beck/Hart/Nomos), 2008, pp. 2117 – 2145, at pp. 2140/1 (MN 39).
[2] PTC I, 12 December 2011, ICC-02/05-01/09-139.
[3] PTC I, 13 December 2011, ICC-02/05-01/09-140.
[4] Claus Kreß, 'The International Criminal Court and Immunities under International Law for States not Party to the Court's Statute', in: Morten Bergsmo/LING, Yan, eds, State Sovereignty and International Criminal Law

The Customary Law Avenue

5. In its Malawi[5] and Chad[6] decisions, PTC I decided the question before the AC in accordance with the view stated in para. 4 above. PTC I provided fairly detailed reasons for this legal position.[7] PTC II, beginning with its decision of 9 April 2014,[8] has changed direction and pursued a 'Security Council avenue' *without explaining* this departure from the 'Customary Law avenue' chosen by PTC I. Also in its subsequent decision on the matter on 6 July 2017,[9] which it affirmed in the appealed decision,[10] the PTC II only *stated*, but *failed to explain* its departure from the Customary Law avenue.
6. I respectfully submit that the AC should take the Customary Law avenue seriously even though the conclusion for the case against Al-Bashir is the same irrespective of which of the two possible avenues is chosen. The choice between the two legal avenues before it has implications that transcend the case in question. Given its broader appellate function, the AC should have this wider picture in mind:
7. Only the Customary Law avenue enables the Court *equally* to exercise its jurisdiction under article 12(2) of the ICC Statute, over those Non-State Party officials who generally enjoy immunity *ratione personae*. Conversely, the Security Council avenue will be open to the Court only if the Security Council makes a *political* decision to that effect. The need for the Court to apply international criminal law as equally as possible is not only firmly enshrined in the fabric of the ICC Statute (for example, by requiring the Court to exercise its jurisdiction over 'situations' and not just 'cases'), but goes to the heart of the *legitimacy* of the exercise of international criminal jurisdiction. This is all the more true with respect to those high ranking State officials who otherwise enjoy immunity *ratione personae*, as those officials will very often be among those *most* responsible for the commission of crimes under international law.
8. The Customary Law avenue exists, but it is admittedly not (yet) firmly entrenched and fortified. Only one international judicial decision to date, the 2004 Charles Taylor jurisdiction decision by the AC of the Special Court for Sierra Leone, has unambiguously decided the case before it on the basis of the legal proposition that customary international law has crystallized an exception from the traditional immunity right *ratione personae*

(Torkel Opsahl Academic EPublisher, 2012), pp. 223 – 265, at p. 243 et seq.) as well as in Kreß/Prost, note 1, at pp. 2128 – 2139 (MN 23 – 36)).

[5] PTC I, 12 December 2011, ICC-02/05-01/09-139.

[6] PTC I, 13 December 2011, ICC-02/05-01/09-140.

[7] It is reprinted in Kreß/Prost, note 1, at pp. 2129 – 2131 (MN 25).

[8] PTC II, 9 April 2014, ICC-02/05-01/09.

[9] PTC II, 6 July 2017, ICC-02/05-01/09-302, para. 68.

[10] See the mere reference to the relevant paragraph of the 6 July 2017 Decision in para. 27 of PTC II, 11 December 2017, ICC-02/05-01/09-309 ('the appealed decision').

before *international* criminal courts,[11] and the *ratio decidendi* of the Charles Taylor decision does not even directly cover our second legal proposition that the customary law exception to the immunity right *ratione personae* extends to the triangular co-operation relationship envisaged by article 98(1) of the Statute.

9. In order to embrace the Customary Law avenue, one must therefore go beyond the consideration of State pronouncements or judicial decisions that *directly* articulate the existence of the customary law rule in question. Instead, one must also be prepared to accept engaging in reasoning, which includes deductive elements derived from broader principles – to the extent that such principles have been endorsed by States. I respectfully submit that the latter course of action is the correct one in the ascertainment of customary international law: Nothing in the concept of customary international law speaks against holding States to the principles they have articulated in their (verbal) practice and nothing precludes the deduction of rules of customary international law from such principles if the content of such rules naturally flows from such principles. In fact, it is well known that much of the body of international criminal law, as currently applied by this Court, has evolved (and, very often, could not otherwise have evolved) in this way. By way of an important example, I respectfully ask the AC to consider the following pronouncement by the Nuremberg International Military Tribunal, which is widely considered as the judicial starting point of the legal evolution in question:

> 'The principle of international law, which under certain circumstances, protects the representatives of a state, cannot be applied to acts which are condemned as criminal by international law. The authors of these acts cannot shelter themselves behind their official positions in order to be freed from punishment in appropriate proceedings. Article 7 of the Charter expressly declares: "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." On the other hand the very essence of the Charter is that individuals have international duties which transcend the national obligations of obedience imposed by the individual state. He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the state if the state authorizing action moves outside its competence under international law.'[12]

This judicial pronouncement contains a strong deductive character and, yet, while its precise legal significance is open to question, it has never been discarded as irrelevant by those having subsequently been engaged in the international legal discourse.

10. It was therefore correct for PTC I, in its decisions referred to in para. 7, to refer to a consistent line of State practice confirming these principles going back to the Charters for

[11] Special Court for Sierra Leone, Prosecutor v. Charles Ghankay Taylor, Decision on Immunity from Jurisdiction, 31 May 2004, SCSL-2003-01-I, para 52. For the less certain precedential value of the relevant ICTY case law in re Milosevic, see Kreß/Prost, note 1, at pp. 2135/6 (MN 32).
[12] International Military Tribunal (Nuremberg), Judgment and Sentences, 1 October 1946, (1947), 41 *AJIL* 221.

the Nuremberg and Tokyo Tribunals (articles 7 and 6 respectively), Principle III of the 1950 Nuremberg Principles, Article 7(2) of the ICTY Statute, Article 6(2) of the ICTR Statute, and article 7 of the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind. It is true that these provisions are framed in terms of substantive law and do thus not address the immunity issue in the same direct way as article 27(2) of the Rome Statute. But it is also true that the concepts of substantive law and immunity have not been neatly distinguished in the earlier drafting practice of international criminal law. Rather, as is evident from the classic passage in the Nuremberg judgment, as cited above in para. 9, the immunity issue has been addressed in conjunction with the statutory provision that confirms the applicability of the substantive law. It is therefore in line with the historic development that the ILC states in its commentary on Article 7 of the 1996 Draft Code of Crimes against the Peace and Security of Mankind: '[...] the absence of any procedural immunity with respect to prosecution or punishment in appropriate judicial proceedings is an essential corollary of the absence of any substantive immunity or defence.'[13] In addition, the line of State practice referred to is formulated without any distinction between immunity *ratione materiae* and *ratione personae* and the classic passage in the Nuremberg judgment does not contain such a distinction, either.

11. PTC I was all the more correct in its approach as the very concept of international criminal law *stricto sensu* strongly points in the direction of an exception to the customary law of immunities.[14] The ultimate purpose of international criminal law *stricto sensu* is to strengthen and to protect certain international rules of conduct the importance of which, in the view of States, transcend their national interests. Crimes under international law therefore concern the international community as a whole. This sentiment already underlies the classic Nuremberg *dictum*, as cited above, that 'the very essence of the Charter is that individuals have international duties which transcend the national obligations of obedience imposed by the individual state'. Subsequently, States and the ICJ have come explicitly to embrace the concept of 'international community' in legal texts, judicial decisions and in the international legal discourse more broadly.[15] To date, the articulation of the fundamental idea underlying the entire evolution of international criminal law *stricto sensu* since Nuremberg has taken the form of the fourth preambular paragraph according to which they are the 'most serious crimes of concern to the

[13] Para. 6 of the Commentary on Article 7, in Gabrielle Kirk McDonald and Olivia Swaak-Goldman, eds, Substantive and Procedural Aspects of International Criminal Law, vol. II, part 1, (Kluwer Law International, 2000, p. 354).
[14] For a powerful recent contribution in support of this view, see Harmen van der Wilt, 'The Continuing Story of the International Criminal Court and Personal Immunities', in: Bruce Ackermann/Kai Ambos/H Sikri, eds, Visions of Justice. Liber Amicorum Mirjan Damaska (Duncker & Humblot, 2016), pp. 457 – 469).
[15] For the precise references, see Kreß/Prost, note 1, p. 2133 (MN 29).

international community as a whole which must not go unpunished'. In their practice, States have thus come to embrace the idea of an international *ius puniendi* over a narrowly defined set of crimes under customary international law. This international *ius puniendi* necessarily transcends the concept of national sovereignty, and, from the outset, it has been chiefly directed to the conduct of (high ranking) State officials. Therefore, the very concept of international criminal law *stricto sensu* strongly points in the direction of an exception to State immunity rights, including those *ratione personae*.

12. All this is *not* to question the decision made by the ICJ in the Arrest Warrant case that customary international law has *not* crystallised an international criminal law exception to the State immunity right *ratione personae* for the purpose of *national* criminal proceedings.[16] The practice of States in support of *this* finding by the ICJ can be *distinguished* in a principled manner from the situation before *certain* international criminal courts: It is certainly desirable that States, acting as fiduciaries of the international community as a whole, adjudicate crimes under international law. There is an inherent danger, though, that this power may be abused for political reasons in a decentralized international legal order. And the risk of political abuse is particularly serious in cases of the most high-ranking foreign State officials due to the inevitable political implications of such proceedings. If such an abuse in fact occurs, the damage to the sovereignty of the State concerned and the stability of international relations will necessarily be severe. Understandably therefore, current customary international law gives precedence to the interest in preventing such damage from occurring over the interest underpinning the international *ius puniendi*.

13. But the picture is different if the exercise of the international *ius puniendi* is entrusted to an *international criminal court which represents the international community as a whole and is therefore to be considered a direct embodiment of this community*. In such a case, the risks of a politically motivated and thus abusive intrusion into State sovereignty and of causing damage to the stability of international relations are reduced to a point where the interest underpinning the international *ius puniendi* weighs far stronger. In its Arrest Warrant decision, the ICJ therefore convincingly distinguished between *national* and *international* criminal proceedings and held that, quite apart from the case of a waiver by the State concerned, an exception from the customary State right to immunity *ratione materiae* is conceivable before 'certain international criminal courts, where they have jurisdiction'. The ICJ included specifically *this* Court in the list of courts given by way of

[16] International Court of Justice, 14 February 2002, Democratic Republic of the Congo v. Belgium (Arrest Warrant Case), ICJ Reports 2002, p. 3 (paras. 58, 61).

example in that connection. It is also noteworthy that the ICJ's distinction between national and international criminal proceedings has gained traction in the subsequent international legal discourse. This is true, for example, for the 2004 Charles Taylor jurisdiction decision by the AC of the Special Court for Sierra Leone,[17] as it is true for the two decisions of PTC I referred above in para. 7. Also China has stated: 'Immunity from criminal jurisdiction of a foreign State was not the same as immunity from international criminal jurisdiction such as that of the International Criminal Court, *and the two should not be linked* (emphasis added).'[18]

14. In view of criticisms voiced against the distinction between *national* and *international* criminal proceedings, it will be important for the AC to specify that that distinction only holds if the jurisdiction of the international criminal court in question transcends the delegation of national criminal jurisdiction by a group of States and can instead be convincingly characterized as the *direct embodiment of the international community for the purpose of enforcing its ius puniendi.* This is not only the case where an international criminal court has been established or otherwise endorsed by the Security Council. Rather, it is also true, and perhaps even more so, where such a court has been established on the basis of an international treaty which constitutes the *legitimate* attempt to provide the international community as a whole with a judicial organ to directly enforce its *ius puniendi.* Such a treaty must have resulted from negotiations within a truly universal format, such a treaty must contain a standing invitation to universal membership, such a treaty must incorporate the internationally applicable fair trial standards and such a treaty must be confined to international criminal law *stricto sensu*, that is to crimes under *customary* international law. If all of these conditions are fulfilled, there can be no question of (a risk of) 'hegemonic abuse'. The Statute fulfils all of these conditions and therefore the ICC constitutes a judicial organ entrusted with the direct enforcement of the international *ius puniendi.* In particular, articles 5 to 8 of the Statute were drafted with the shared intent to ensure that only crimes under customary international law are included and that the definitions do not exceed existing customary international law.[19]

15. In light of the foregoing, the AC of the Special Court for Sierra Leone in its 2004 Charles Taylor jurisdiction decision, while being the first international criminal court to explicitly decide its case on that basis, could build on a sufficiently robust and coherent line of State

[17] Special Court for Sierra Leone, Prosecutor v. Charles Ghankay Taylor, Decision on Immunity from Jurisdiction, 31 May 2004, SCSL-2003-01-I, para. 52.
[18] A/C.6/63/SR.23, 21 November 2008, para. 35.
[19] Philippe Kirsch, who chaired the Committe of the Whole, has made a number of authoritative statements recording the Drafter's Intent that the crimes included in the Statute do not exceed existing customary international law. Kirsch's statements are recorded and explained in and by Leena Grover, *Interpreting Crimes in the Rome Statute of the International Criminal Court* (Cambridge University Press, 2014), at 340.

practice when it held that '[T]he principle seems now established that the sovereign equality of states does not prevent a Head of State from being prosecuted before an international criminal tribunal or court.'[20] In addition, it is worth noting that this decision did *not* provoke any criticisms by States. This is the background against which PTC I rightly decided in its two decisions referred to above that customary international law has crystallized an exception to the right of States to immunity *ratione personae* for the purpose of proceedings before certain international criminal courts, including *this* Court.

16. However, as explained up to this point, the exception does not necessarily extend to the triangular legal relationship of vertical co-operation between the Court, a requested State Party and the Non-State Party of which the person sought holds office to which immunity *ratione personae* normally attaches, and no direct reliance can be placed on the 2004 Charles Taylor decision in that respect. What is more, it may be asked whether an arrest and surrender executed by a State Party at the request of the Court does not rather form part of that State Party's *national* criminal jurisdiction so that the *international criminal court*'s customary law exception to the immunity right *ratione personae* of a Non-State Party is *in*applicable at that level. If this were so, the immunity right *ratione personae* would have to be respected in line with the ICJ's decision in the Arrest Warrant case.

17. Such line of reasoning would, however, stop at considering the *formal* side of things and it would miss the decisive point on *substance*. It is true that arrest and surrender are *formally* executed by the requested State. But, on substance, this is done as part of the operation of a system of *international* criminal justice. In a *pure* system of international criminal justice, the international criminal court would have at its disposal an *international* enforcement apparatus. In reality, however, international criminal jurisdictions must almost always rely on the co-operation of States to enforce their decisions. But this difference in the form of operation does not change the fact that *substantively* (or: *functionally*) a requested State Party, which complies with a request issued by this Court, acts within the legal framework and for the purposes of the *international* criminal proceedings before this Court. As a matter of principle, it is therefore far more convincing, if not even compelling, to extend the 'international criminal court's exception' to the immunity right *ratione personae* from the bilateral relationship between the Non-State Party concerned and the Court to the triangular legal relationship of vertical co-operation between the Court, a requested State Party and the Non-State Party in question. This is what PTC I did in the two decisions referred to above.

[20] Special Court for Sierra Leone, Prosecutor v. Charles Ghankay Taylor, Decision on Immunity from Jurisdiction, 31 May 2004, SCSL-2003-01-I, para 52.

To hold that PTC I was not justified to do so in the absence of a prior international judicial precedent directly on point demands too much for the delineation of the scope of a customary law rule: In view of the absence, prior to the Statute, of a multilateral treaty system establishing a judicial organ to directly enforce the international *ius puniendi*, there could not have been any direct precedent for the interpretation given to the 'international criminal court's exception' by the PTC I. To demand such a precedent would therefore be tantamount to precluding customary international law from taking the only form that fully corresponds with the system of international criminal justice *stricto sensu*, as established by the Statute.

18. For these reasons, including those additionally set out in my above-mentioned writings, I am convinced that PTC I was correct in proceeding with the Customary Law avenue. As so often in the process of the formation of a customary law rule, one may differ with respect to the precise moment in time when the rule in question has come into existence. But in any event, this moment was before the beginning of the commencement of the case against President Al-Bashir and this is what matters for the purposes of these appellate proceedings and for the determination of the current state of the law.

19. I acknowledge that the decisions made by PTC I have been met with criticism by certain States, including, in particular, African States.[21] I also accept the fact that the Customary Law avenue may not remain open forever, but may be closed by virtue of subsequent State practice to the contrary. I do therefore by no means deny the legal relevance of the practice of States subsequent to the decisions rendered by PTC I. But in attributing the proper weight to this practice, it is important to set the starting point of the analysis right: The question is not whether the Customary Law avenue has come into existence, but rather whether is has been closed as a result of subsequent practice by States to the contrary. As States Parties to the Statute have vested the Court with the sole authority to identify the applicable customary law,[22] the crucial question is whether a sufficient number of *Non*-States Parties have come to articulate their opposition to the Customary Law avenue with sufficient clarity. I fail to see that this is the case. At the same time, I do of course accept that the AC will be best placed to paint an accurate picture of the current state of the practice of States.

Security Council Avenue

20. Only if the AC were to decide *not* to follow the Customary Law avenue, would I

[21] For an outline of those criticisms, see Kreß/Prost, note 1, pp. 2137 – 2139 (MN 29 – 34).
[22] Further on that point Kreß, note 4, pp. 261/2.

respectfully submit that it should proceed through the Security Council avenue. The AC should then hold that the Security Council's imposition on the State of Sudan, by virtue of paragraph 2 of its resolution 1593, of the legal obligation to 'cooperate fully with and to provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution' implies the displacement of any international immunity right of the State of Sudan with respect to proceedings before the Court that form part of the situation referred to it by resolution 1593. I shall not argue that point any further in this brief in view of our position that the Customary Law avenue is the correct one. But I wish to respectfully refer the AC to paras. 4 to 6 of Webb's and Juratowitch's 'Expression of interest …', and to paras. 3 to 16 of the written submissions by Robinson, Cryer, deGuzman, Lafontaine, Oosterveld, and Stahn (which I had the benefit of studying in advance), as submitted in these appellate proceedings.[23] I endorse the considerations set out therein, which are in complete conformity with some of my previous writing.[24]

Three Concluding Observations

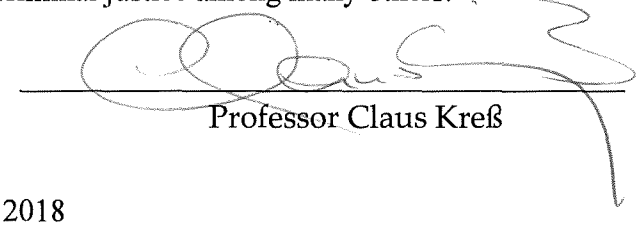
21. In para. 18 of their submissions, Robinson, Cryer, deGuzman, Lafontaine, Oosterveld, and Stahn write that '(t)he Rome Statute is not a single-minded document that brushes away competing considerations. Instead, wherever possible, the drafters balanced competing concerns with Statute aims'. I wholeheartedly concur with this statement. I also see benefit for the AC and for States carefully to consider what my six distinguished colleagues have to say in paras. 18 – 22 of their submission. But the recognition of a customary international law immunity State right *ratione personae* that extends to proceedings before this Court is *in overreach* of those nuanced solutions that may be contemplated in order to find the proper balance between any competing concerns.

22. One problem with any judicial decision on the state of customary international law is that it may inadvertently freeze the state of customary international law at a moment in time when the law is unsettled or in a state of flux. I have indicated why I believe this is the case here. I respectfully submit that the AC should find a proper way to formulate its decision regarding the state of customary law accordingly. This is obviously true in both directions. But I respectfully submit it is even more important should the Court decide against the Customary Law avenue. For, it is only the Customary Law avenue that is fully in line with the idea of an as equal as possible enforcement of the international *ius*

[23] Document dated 30 April 2018, ICC-02/05-01/09 OA 2.
[24] Kreß, note 4, at p. 240 et seq. (the contrary preference regarding the two variants of the Security Council avenue, as expressed in Kreß/Prost, note 1, at p. 2141 (MN 39) is no longer maintained).

puniendi. If the AC decides that the practice of States demonstrates a retreat from one natural consequence of that idea, the formulation of the decision should keep the door open for States to reconsider this recent practice in the near future in view of their responsibilities for the preservation of international conduct rules which those same States have come to accept to be of concern to the international community as a whole.

23. TC IV has very recently stated that the ICC Statute 'is first and foremost a multilateral treaty which acts as an international criminal code to the parties to it'.[25] This may seem innocent at first sight and even politically attractive to 'progressive' minds in light of the consequence drawn by the same Chamber that the Court is free to construe the crimes included in the Statute not only broadly, but also in a manner that oversteps the boundaries of existing customary international law. At an only somewhat closer look, however, the vision advocated by TC IV amounts to an alarming retreat from the idea that the Statute, while of course being formally a multilateral treaty, substantively constitutes the establishment of a system of international criminal justice *stricto sensu*, that is a system to entrust a permanent international criminal court with the enforcement of the *ius puniendi* of the international community. As was already demonstrated in para. 15 above, this central idea underpins the Statute. That this was the drafter's intention is clear furthermore from the way the preamble to the Statute is drafted and also from the fact that the Security Council is given the power to vest the Court with universal jurisdiction. The statement by TC IV signals a fundamentally different vision: that of a group of States having decided to coordinate their response to certain crimes affecting their shared national interests through the conclusion of a multilateral treaty establishing a joint criminal court. I wish to conclude these observations by respectfully urging the AC, at the very least not to formulate its reasoning in a manner that lends, albeit just by inference, the slightest support to TC IV's proposition to downgrade the Statute to constitute just one system of *trans*national criminal justice among many others.



Professor Claus Kreß

Dated this 18th day of June, 2018

At Florence, Italy

[25] Prosecutor v Ntaganda, Trial Chamber IV, Second decision on the Defence's challenge to the jurisdiction of the Court in respect of Counts 6 and 9, ICC-01/04-02/06, 4 January 2017, par. 35.