

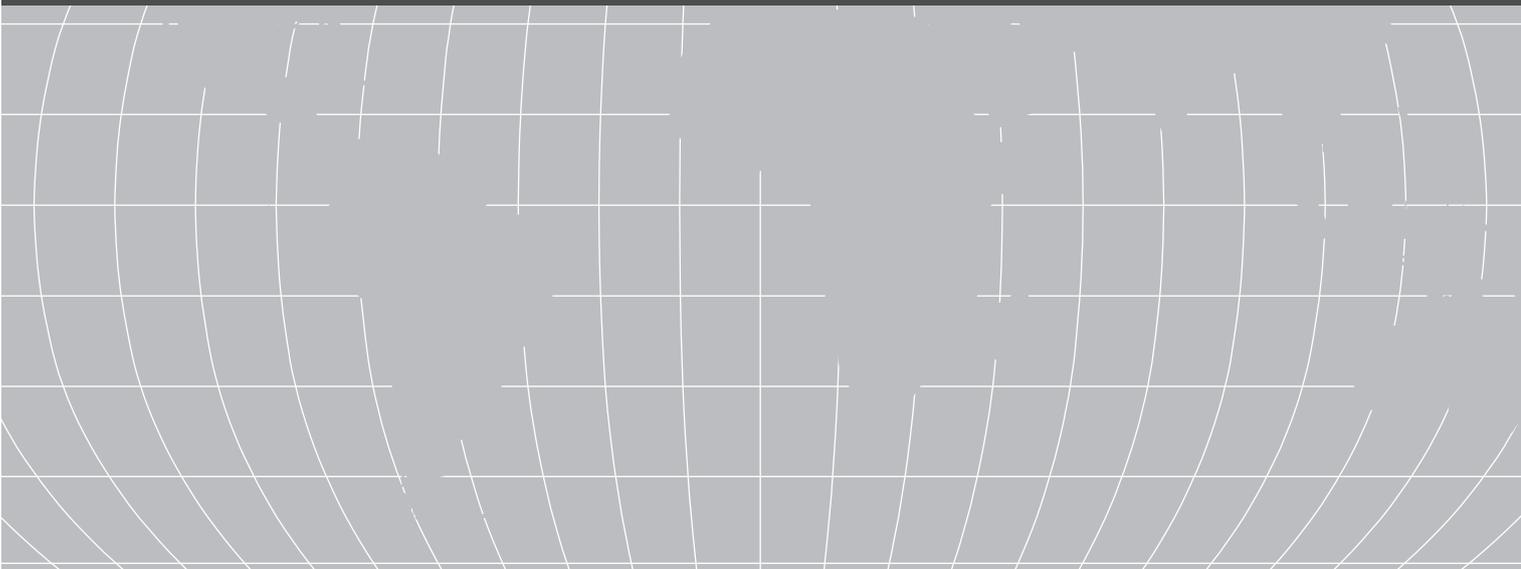
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**Preliminary Observations on the ICC Appeals Chamber's
Judgment of 6 May 2019 in the Jordan Referral re Al-Bashir Appeal**

Claus Kreß



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Claus Kreß*

Since 2009 the question of immunity has occupied various Chambers of the International Criminal Court (‘ICC’) in the case against the now former and then incumbent Sudanese President Al-Bashir.¹ The question as to whether the Court was prevented, by virtue of a right to immunity *ratione personae* possessed by Sudan under customary international law, from proceedings against Mr. Al-Bashir or at least from requesting Jordan to arrest Mr. Al-Bashir during his presence in Jordan, has now received a

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¹ International Criminal Court (‘ICC’), Situation in Darfur, Sudan, *Prosecutor v. Al Bashir*, Pre-Trial Chamber, Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 4 March 2009, ICC-02/05-01/09-3 (<http://www.legal-tools.org/doc/e26cf4/>); *idem*, 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, 12 December 2011, ICC-02/05-01/09-139 (<http://www.legal-tools.org/doc/476812/>); *idem*, Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir’s Arrest and Surrender to the Court, 9 April 2014, ICC-02/05-01/09-195 (<http://www.legal-tools.org/doc/89d30d/>); *idem*, Decision following the Prosecutor’s request for an order further clarifying that the Republic of South Africa is under the obligation to immediately arrest and surrender Omar Al Bashir, 13 June 2015, ICC-02/05-01/09-242 (<http://www.legal-tools.org/doc/c2dc80/>); *idem*, Decision under article 87(7) of the Rome Statute on the non-compliance by South Africa with the request by the Court for the arrest and surrender of Omar Al-Bashir, 6 July 2017, ICC-02/05-01/09-302 (<http://www.legal-tools.org/doc/68ffc1/>); *idem*, 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, 11 December 2017, ICC-02/05-01/09-309 (<http://www.legal-tools.org/doc/5bdd7f/>).

negative answer by the Court's Appeals Chamber.² This negative answer has been given unanimously.

The Appeals Chamber has conducted its proceedings not only transparently, but also, in due consideration of the fundamental importance of the legal issue before it, quite inclusively.³ The Chamber has, in particular, conducted a hearing, running over five days, during which Jordan, represented by three members of the International Law Commission, and the African Union, represented by two members of the International Law Commission, as well as the League of Arab States, were given ample opportunity to submit their arguments. The Chamber has genuinely engaged with these arguments during an intensive legal conversation in open court.

The Appeals Chamber has also invited professors of international law to submit their arguments to it in the capacity as *amici curiae*. Fifteen professors of international law have accepted this invitation. For reasons of full transparency, I wish to state right at the outset of the following observations that I was one of those scholars. I had articulated my conviction for the first time in 2006 in a commentary on the Charles Taylor judgment in André Klip's and Göran Sluiter's *Annotated Leading Cases* series.⁴ I had further developed my position in a chapter contributed to the volume *State Sovereignty and International Criminal Law*, edited by Morten Bergsmo and LING Yan in 2012,⁵ and, most recently, as part of the explanations given together with Kimberly Prost (writing in her scholarly capacity) on Article 98 in the third edition of the Triffterer Commentary, edited by Kai Ambos in 2016.⁶ Especially in the last two publications,

² *Idem*, Appeals Chamber, Judgment in the Jordan Referral re Al-Bashir Appeal, 6 May 2019, ICC-02/05-01/09-397-Corr ('Judgment') (<http://www.legal-tools.org/doc/0c5307/>).

³ For a full documentation, see *ibid.*, paras. 18–32.

⁴ Claus Kress, "Decision on Immunity from Jurisdiction, *Prosecutor v. Taylor*, Case No. SCSL-2003-01-I, A. Ch., 31 May 2004: Commentary", in André Klip and Göran Sluiter (eds.), *Annotated Leading Cases of International Criminal Tribunals Volume 9: The Special Court for Sierra Leone 2003-2004*, Intersentia, Antwerp, 2006, pp. 202–08.

⁵ Claus Kreß, "The International Criminal Court and Immunities under International Law for States Not Party to the Court's Statute", in Morten Bergsmo and LING Yan (eds.), *State Sovereignty and International Criminal Law*, Torkel Opsahl Academic EPublisher, Beijing, 2012, pp. 223–65 (<http://www.toaep.org/ps-pdf/15-bergsmo-ling>).

⁶ Claus Kreß, "Article 98", in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd edition, C.H.Beck/Hart/Nomos, Munich, 2016, pp. 2117–42.

detailed reference is made to the full spectrum of views voiced in the jurisprudence and in scholarly writings and I do not wish to repeat those references in this short essay. For the sake of completeness, reference is also made to my *amicus curiae* brief⁷ and to the transcripts of my oral submissions to the Appeals Chamber.⁸

The Appeals Chamber judgment comprises 98 pages. Judges Eboe-Osuji, Morrison, Hofmański and Bossa have added 190 pages of further analysis in the form of a Joint Concurring Opinion.⁹ The overall length not only reflects the importance and the complexity of the matter. It also demonstrates the genuine intent to comprehensively address the many considerations advanced during the proceedings in support of answers that differ from those now given by the Appeals Chamber. The almost 300 pages do not always make for an entirely easy reading. This is unavoidable to the extent that the analysis includes reasoning on the basis of principles and references to more abstract legal concepts, such as ‘international community’, ‘obligation *erga omnes*’ and ‘*ius cogens*’. But it would, at least in my case, have facilitated the full digestion of the analysis if it had been set out in one single document.

⁷ ICC, Situation in Darfur, Sudan, *Prosecutor v. Al Bashir*, Appeals Chamber, Written observations by Professor Claus Kreß as *amicus curiae*, with the assistance of Ms Erin Pobje, 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), 18 June 2018, ICC-02/05-01/09-359 (*‘Amicus Curiae Brief’*) (<http://www.legal-tools.org/doc/85f44c/>).

⁸ *Idem*, Transcript, 10 September 2018, ICC-02/05-01/09-T-4-ENG, p. 107, line 15–p. 114, line 18, p. 115, lines 3–8, 10, 13–17 (<http://www.legal-tools.org/doc/2a3643/>); *idem*, Transcript, 11 September 2018, ICC-02/05-01/09-T-5-ENG, p. 37, line 13–p. 38, line 1, p. 38, line 12–p. 39, line 3, p. 39, lines 6–19, p. 53, lines 17–21, p. 88, line 15–p. 89, line 4, p. 89, lines 8, 10–17, 20–21, p. 89, line 24–p. 92, line 12 (<http://www.legal-tools.org/doc/7d7497/>); *idem*, Transcript, 12 September 2018, ICC-02/05-01/09-T-6-ENG, p. 29, line 11–p. 31, line 11, p. 31, line 13, p. 31, line 25–p. 32, line 9, p. 32, lines 12, 14–17, p. 32, line 23–p. 37, line 5, p. 37, lines 7, 10, p. 37, line 13–p. 38, line 6, p. 122, lines 22–23, p. 123, lines 1–17 (<http://www.legal-tools.org/doc/ed8caa/>); *idem*, Transcript, 13 September 2018, ICC-02/05-01/09-T-7-ENG, p. 26, lines 8–20, p. 66, line 23–p. 68, line 19, p. 68, line 21–p. 69, line 21, p. 69, line 23–p. 71, line 9, p. 121, line 24–p. 123, line 2 (<http://www.legal-tools.org/doc/882337/>); *idem*, Transcript, 14 September 2018, ICC-02/05-01/09-T-8-ENG, p. 3, line 10–p. 4, line 7, p. 4, line 10–p. 5, line 13, p. 5, line 21–p. 6, line 9, p. 32, line 11–p. 40, line 17, p. 40, line 19–p. 41, line 2 (<http://www.legal-tools.org/doc/4760a5/>).

⁹ *Idem*, Joint Concurring Opinion of Judges Eboe-Osuji, Morrison, Hofmański and Bossa, 6 May 2019, ICC-02/05-01/09-397-Anx1 (*‘Joint Concurring Opinion’*) (<http://www.legal-tools.org/doc/fd824a/>).

1. The Legality of the Security Council Avenue

The Appeals Chamber has found that Security Council resolution 1593 has made it impossible for Sudan to rely on any customary international law immunity *ratione personae* that might otherwise have been applicable. In paragraph 149 of the Judgment (see also paragraph 7 of the Judgment), the reasoning underlying this 'Security Council Avenue' is summarized as follows:

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.¹⁰

I am in agreement with the Chamber's finding as well as with the essence of its reasoning and do not wish to go through it in any detail here.¹¹ I just wish to state the following: The interpretation given in paragraphs 133 to 143 of the Judgment with regard to Security Council resolution 1593 is persuasive.¹² Two further elements of the Chamber's reasoning are of more general importance: first, the Chamber explains in paragraphs 120 to 129 of the Judgment that Article 27(2) of the ICC Statute also addresses the co-operation limb of the proceedings,¹³ be it in case of a request for arrest and surrender issued to the State whose Head of State is sought by the Court, be it in case of a request for arrest and surrender issued to another State Party. In paragraphs 130 to 131 of the Judgment, the Chamber sets out, second, why this interpretation of Article 27(2) is not in conflict with Article 98(1) of the ICC Statute.¹⁴ The Chamber acknowledges that Article 98(1) does not itself recognize any immunities. The Chamber points out that, instead, Article 98(1) merely imposes the

¹⁰ Judgment, para. 149 (see also para. 7), see above note 2.

¹¹ But see my oral submissions to the Appeals Chamber, Transcript, 12 September 2018, p. 33, line 7–p. 37, line 18, above note 8.

¹² *Ibid.*, paras. 133–143.

¹³ *Ibid.*, paras. 120–129.

¹⁴ *Ibid.*, paras. 130–131.

procedural requirement for the Court to consider, before issuing a request for arrest and surrender, whether the State concerned owes an international immunity obligation that would conflict with the execution of the request under consideration. All this, in my humble view, is correct.¹⁵ The explanation of the interplay between Articles 27(2) and 98(1) is further developed in impressive detail in paragraphs 267 to 451 of the Joint Concurring Opinion.¹⁶ It bears emphasizing that the correct understanding of this interplay is of crucial importance also where the triangular co-operation relationship, other than in the case against Mr. Al-Bashir, involves two States Parties. It must therefore be considered of great value for the future practice of the Court, that its Appeals Chamber has now authoritatively clarified this interplay.

2. The Legality of the Customary Law Avenue

The Appeals Chamber could have left the matter here. It has, however, chosen to take this opportunity to answer the immunity question more comprehensively and, in paragraph 114 of the Judgment (see also paragraph 2 of the Judgment), it has decided as follows:

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.¹⁷

2.1. Reasons in Support of Addressing the Customary Law Avenue

There were a number of weighty reasons for the Appeals Chamber to address the 'Customary Law Avenue'. First, in one sense at least, the Customary Law Avenue possesses logical priority. For if there was no customary Head of State immunity applicable in the case of Al-Bashir, there

¹⁵ On the relevance of Article 27(2) for the co-operation limb of the proceedings, see my oral submissions to the Appeals Chamber in Transcript, 12 September 2018, p. 36, line 19–p. 38, line 6. On the interpretation of Article 98(1), see my oral submissions in Transcript, 10 September 2018, p. 111, line 20–p. 112, line 18, above note 8.

¹⁶ Joint Concurring Opinion, paras. 267–451, see above note 9.

¹⁷ Judgment, para. 114 (see also para. 2), see above note 2.

was no such immunity to be displaced by the Security Council. Second, one Pre-Trial Chamber had previously decided the immunity question in the same case on the basis of the Customary Law Avenue. This avenue had then been abandoned in subsequent Pre-Trial Chamber decisions, but more in the form of assertions than in terms of an elaborate argument. Third, the Customary Law Avenue is of very considerable practical relevance, as the allegations of deportation of members of a Muslim group from the Republic of the Union of Myanmar to the People's Republic of Bangladesh ('Bangladesh'), and of torture by US officials in Afghanistan in pursuance of a State policy, demonstrate. Fourth, the debate about the Customary Law Avenue is inextricably linked with the debate about the true nature of the Court's jurisdiction. This question is of such fundamental importance that its clarification is a prerequisite for the Court to ground its work on a coherent overall legal explanation. Fifth, the question as to whether the Customary Law Avenue is open is of central importance for the legitimacy of the Court's exercise of jurisdiction. I shall return to the fourth and fifth considerations a little later.

2.2. A Provisional Analysis of the Judgment and Joint Concurring Opinion

I am in agreement with the Appeals Chamber's finding that the Customary Law Avenue is applicable *vis-à-vis* the Court. I am less certain, however, whether I can fully agree with the Appeals Chamber's reasoning. Within the limited scope of the following reflections, it is impossible to do full justice to the extraordinarily rich reasoning contained in the Judgment and, in particular, in the Joint Concurring Opinion. I must also confess that I am still struggling to absorb the significance of certain passages, some of which I shall highlight in the following. At this point of my study, it seems to me that the reasoning of the Appeals Chamber is in need of further nuancing at least in one important respect. But I wish to emphasize that the observations that follow are provisional, beyond the truism that the articulation of a scholarly opinion is inherently of a preliminary nature.

2.2.1. The Question of the Onus

The first noteworthy point is the Chamber's position regarding the question of where the 'onus' for the demonstration of the Customary Law Avenue lies. In that respect, paragraph 116 of the Judgment states as follows:

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*.¹⁸

When recognizing, in paragraph 61 of its judgment in the *Arrest Warrant* case, the non-availability of Head of State immunity *ratione personae* before international criminal courts, including the ICC, the International Court of Justice ('ICJ') added the qualification "certain" before "international criminal courts".¹⁹ The latter qualification is missing in paragraph 114 of the Judgment of the Appeals Chamber.²⁰ This gives rise to my central query to which I shall return in some detail later. For now, I wish to stay for a moment with the question of where the onus lies. The statement in paragraph 116 appears to suggest that the Customary Law Avenue is open before an international criminal court as long as a customary law rule to the contrary has not come into existence.²¹ The legal proposition would seem to be as follows: The scope of the recognized customary Head of State immunity rule has never developed up to the point to include international criminal courts. An extension of that customary rule to proceedings before an international criminal court would therefore require the identification of sufficient State practice and *opinio juris* to that specific effect. I do not think that any participant in the proceedings had answered the question of where the onus lies in precisely that way. But this is of course not to say that the Chamber's proposition is flawed. To the contrary, it constitutes a thought-provoking idea not to see the non-availability of immunities before international criminal courts as an ex-

¹⁸ *Ibid.*, para. 116.

¹⁹ International Court of Justice, *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, 14 February 2002, pp. 25–26, para. 61 ('Arrest Warrant Case') (<http://www.legal-tools.org/doc/c6bb20/>).

²⁰ Judgment, para. 114, see above note 2.

²¹ *Ibid.*, para. 116.

ception from a more general immunity rule, but to start the analysis from the premise that the scope of the original immunity rule was limited in scope. I wish to leave that matter here because I need more time for proper reflection on it.

My submission to the Chamber on the question where the onus lies was narrower. I submitted that, once an international criminal court exception to the customary Head of State immunity rule has come into existence in accordance with the ordinary process of the formation of customary international law, this exception must be construed so as to include the horizontal (co-operation) limb of the triangular legal relationship between the requested State Party and the State whose Head of State is sought – unless a customary law rule to the contrary has come into existence.²² While it would appear, as I have just highlighted, that paragraph 116 of the Judgment goes further, it bears emphasizing that the analysis of State practice and *opinio iuris* provided in 103 to 113 of the Judgment²³ and, even more, in paragraphs 65 to 174 of the Joint Concurring Opinion,²⁴ very much reads like the identification of a customary law rule excluding Head of State immunity before certain international criminal courts. As a matter of identification of a customary law rule, this analysis is not beyond challenge, but it is persuasive. The analysis is not beyond challenge because it is possible to reduce the significance of some of the materials, to which reference is made in the above-mentioned passages of the Judgment and Joint Concurring Opinion. It is possible to reduce their significance to the applicability of substantive international criminal law to State organs and, if this is considered to be a separate legal issue, to the non-existence of immunity *ratione materiae* in cases of crimes under international law, rather than to the (procedural) customary Head of State immunity *ratione personae*. Yet, the analysis provided in the Judgment and the Joint Concurring Opinion is persuasive: All the materials concerned can be given a meaning that encompasses the (procedural) customary Head of State immunity *ratione personae*²⁵ (for a general summary of the point, see paragraphs 175 to 180 of the Joint Concurring Opinion) and to construe those materials in that more inclusive way much better reflects

²² Transcript, 10 September 2018, p. 112, line 19–p. 113, line 18, above note 8.

²³ *Ibid.*, paras. 103–113.

²⁴ Joint Concurring Opinion, paras. 65–174, see above note 9.

²⁵ For a general summary of the point, see *ibid.*, paras. 175–180.

the basic principles underlying the evolution of international criminal justice. In its paragraphs 76 to 124, the Joint Concurring Opinion demonstrates with great care that States (and not just scholars) articulated those principles as early as during the preparation of the Versailles Treaty.²⁶ France and Great Britain were the driving forces behind a 'new international law', which should include the possibility of prosecuting Heads of States before an international criminal court in cases of crimes of concern to the international community as a whole. Importantly, while Emperor Wilhelm II was no longer in office, the two States concerned made it clear that the idea, on which their demand rested, included incumbent Heads of States. The Joint Concurring Opinion does, of course, not fail to note that, primarily due to the resistance by the United States, France's and Great Britain's attempt ultimately proved unsuccessful. But this only underscores the importance of the United States' change of opinion during the preparation of the Nuremberg trial. Here again, the Joint Concurring Opinion is careful to demonstrate (in paragraphs 125 to 132) that this change of opinion was not confined to former Heads of State.²⁷ I have highlighted this part of the elaborate customary law analysis contained in the Judgement and the Joint Concurring Opinion because the relevant body of early State practice had received far too little attention in the prior discourse. Taking its analysis of State practice and *opinio iuris* as a whole, I believe that, even if the Appeals Chamber appears not to have deemed that necessary, it has persuasively identified a customary law rule excluding Head of State immunity *ratione personae* before certain international criminal courts. In the highlighted part of its paragraph 66, as cited in the following, the Joint Concurring Opinion appears to see it in precisely that way:

[...] it should be beyond reasonable dispute by now that customary international law has never evolved to recognise immunity—even for Heads of State—before an international court exercising jurisdiction over crimes under international law. *That view of customary international law, as will become evident in the study conducted below, results from the consistent and repeated rejection of immunity (even for Heads of State) in sundry instruments of international law since World War II. And such repeated rejection has resulted*

²⁶ *Ibid.*, paras. 76–124.

²⁷ *Ibid.*, paras. 125–132.

*in a general understanding of customary international law in that way.*²⁸

2.2.2. The Horizontal (Co-operation) Limb

Whether this customary law rule includes the horizontal (co-operation) limb of the triangular legal relationship between the ICC, the requested State Party and the State whose Head of State is sought, constitutes both an important and a difficult question in need of additional reflection. In paragraph 414, the Joint Concurring Opinion rightly speaks of “a vexed question indeed”.²⁹ Jordan and those participants coming to Jordan’s support had placed much emphasis on the idea that, whatever the legal situation in the direct relationship between the Court and Mr. Al-Bashir, Jordan’s execution of the Court’s request for arrest and surrender would have constituted the exercise of the criminal jurisdiction by a foreign State over Mr. Al-Bashir in a manner that triggers the application of the customary international law rule providing for immunity *ratione personae*, as recognized by the ICJ in the *Arrest Warrant* case. In paragraphs 414 to 445, the Joint Concurring Opinion explains why the Judgment takes a different view.³⁰ In my humble view, the careful analysis of what is called in paragraph 443 the “carefully calibrated regime” of Article 59 of the ICC Statute,³¹ constitutes the central consideration. The core point is summarized as follows in paragraph 444 of the Joint Concurring Opinion:

The combined effect of article 4(2) and article 59 thus serves to insulate the criminal jurisdiction of the requested State from attaching, as such, to the foreign sovereign of a third State indicted at the ICC. Therefore, the requested State should not be seen as exercising the kind of jurisdiction that is forbidden of forum States under customary international law in relation to foreign sovereigns.³²

²⁸ *Ibid.*, para. 66 (emphasis added).

²⁹ *Ibid.*, para. 414.

³⁰ *Ibid.*, paras. 414–445.

³¹ *Ibid.*, para. 443.

³² *Ibid.*, para. 444.

I agree with this carefully worded qualification of the execution by a State Party of a request issued by the Court.³³ It is important to note that this reasoning covers the legal qualification of the execution of a request for arrest and surrender issued by the Court, whether or not the Court's jurisdiction is based on a Security Council referral. Yet, the Joint Concurring Opinion, in paragraph 445, concludes its analysis as follows:

The foregoing analysis has an enhanced value, in the specific circumstances of the need to implement Security Council resolution 1593 (2005). It is important to stress, in this connection, that this conclusion, as it specifically concerns Security Council resolution 1593 (2005), depends on the unique circumstances of that resolution as a Chapter VII measure, which all UN Member States are obligated (or expected) to implement according to its terms, pursuant to the various provisions of the UN Charter which create that obligation or expectation. If in implementing that resolution, States Parties to the Rome Statute execute the ICC request under the direction of article 59, they should not be seen as exercising their own criminal jurisdiction. They are merely acting as jurisdictional surrogates of the ICC, for the purposes of enabling it to exercise its jurisdiction effectively as authorised by the Security Council resolution in question.³⁴

This is taken up in paragraph 451 and transposed into the following more concrete legal propositions:

In the circumstances of article 98(1) of the Rome Statute, the difficulty presented to the assertion of immunity at the horizontal plane involves three scenarios: (a) in a relationship between States Parties to the Rome Statute, it is not plausible that the third State (party to the Rome Statute) may assert in relation to the requested State (also party to the Rome Statute) the immunity of the high state official of the third State who is a suspect or an accused at the ICC; (b) it is also not readily accepted that as between Member States of the UN, the third State (not party to the Rome Statute) may successfully assert the immunity of its official in relation to the requested State

³³ For my oral submissions to the Appeals Chamber on that point, see Transcript, 10 September 2018, p. 110, line 8–p. 111, line 2, p. 112, line 19–p. 114, line 18, 14 September 2018, p. 37, line 17–p. 39, line 1, above note 8.

³⁴ Joint Concurring Opinion, para. 445, see above note 9.

(that is a party to the Rome Statute), where the Security Council specifically requires the third State to cooperate fully with the ICC, pursuant to a resolution taken under Chapter VII of the UN Charter for purposes of conferring jurisdiction upon the Court through an article 13(b) referral; and, (c) as concerns two UN Member States not party to the Rome Statute, it should not be assumed that immunity may successfully be asserted in the context of a Security Council referral made under article 13(b) of the Rome Statute, where the resolution has only urged, rather than required, the concerned State to cooperate fully with the ICC.³⁵

This list does not include the relationship between a third State that is not party to the Rome Statute and a requested State Party in a case in which the Court's jurisdiction is exercised not on the basis of a Security Council resolution, but under Article 12(2)(a) of the ICC Statute. As I said, the Appeals Chamber's reasoning, as summarized in paragraph 444 and cited above,³⁶ covers that scenario as well. It seems to me that the Appeals Chamber, by not listing it as a fourth scenario in the list of scenarios set up in paragraph 451, has introduced an element of ambiguity in its analysis.

2.2.3. International Courts or Certain International Criminal Courts?

Let me now turn to my central query regarding the Appeals Chamber's reasoning underlying the Customary Law Avenue. This query pertains to the question *vis-à-vis* which international criminal courts the Customary Law Avenue is open. I believe this query is relevant irrespective of whether the Chamber is correct as to where the onus for identifying the Customary Law Avenue lies. For even on the assumption that the onus is on those who wish to identify a rule precluding the Customary Law Avenue for the reason that the reach of the traditional customary Head of State immunity *ratione personae* is limited, it is open to question whether this limitation is such that all international criminal courts are excluded.

³⁵ *Ibid.*, para. 451.

³⁶ *Ibid.*, para. 444.

The Appeals Chamber explains its concept of international court in some detail in paragraphs 56 to 60 of the Joint Concurring Opinion.³⁷ The first key passage in paragraph 56 is as follows:

An 'international court' or an 'international tribunal' or an 'international commission' (in the context of administration of justice)—nothing turns on the choice of nomenclature—is an adjudicatory body that exercises jurisdiction at the behest of two or more states.³⁸

This definition, no doubt, is technically correct. But does this mean that the Appeals Chamber has taken the view that the Customary Law Avenue is open *vis-à-vis* all international criminal courts falling within that broad definition? While certain passages of the judgment and of the Joint Concurring Opinion appear to suggest that the Chamber indeed is of that view, a closer inspection of the Chamber's reasoning makes me doubt. Paragraph 115 of the Judgment seems to be of particular importance in that respect. In this paragraph, the Chamber distinguishes between national and international criminal jurisdictions, a distinction that is essential to the Chamber's reasoning. Here you find the following sentences:

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 jurisdiction. 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.³⁹

The highlighted qualification suggests that the Judgment's endorsement of the Customary Law Avenue is confined to international criminal courts with the very specific and narrow subject-matter jurisdiction over "international crimes". This understanding is further supported by the fact that the reference to this subject-matter jurisdiction is taken up at several points in the Joint Concurring Opinion. May it be recalled that,

³⁷ *Ibid.*, paras. 56–60.

³⁸ *Ibid.*, para. 56.

³⁹ Emphasis added.

in summarizing the relevant practice and *opinio iuris*, paragraph 66 of this Opinion contains the following sentence:

[I]t should be beyond reasonable dispute by now that customary international law has never evolved to recognise immunity—even for Heads of State—before an international court exercising jurisdiction *over crimes under international law*.⁴⁰

When the Joint Concurring Opinion, beginning with paragraph 175, sets out a series of detailed reflections on the basis of certain fundamental concepts, principles and interests recognized in the international legal order,⁴¹ it almost constantly (see already paragraph 176) refers to the exercise of jurisdiction by an international criminal court over “international crimes”.⁴² In that respect, the Joint Concurring Opinion, in paragraph 196, lists genocide, crimes against humanity, war crimes and the crime of aggression and the Opinion does so in a non-exemplary manner.⁴³ Those same crimes are referred to when the Joint Concurring Opinion, beginning with paragraph 198, explains the Customary Law Avenue in light of the concepts of “obligation *erga omnes*” and “*jus cogens*” (a reference to the crime of aggression is missing in paragraph 207 of the Opinion).⁴⁴

I am therefore inclined to believe that the Appeals Chamber has endorsed the Customary Law Avenue only *vis-à-vis* those international criminal courts that exercise jurisdiction over crimes under international law. The conduct amounting to such a crime appears to be understood by the Chamber as being in violation of an obligation *erga omnes* and as being contrary to *jus cogens*. By implication, a “crime under international law”, as referred to by the Appeals Chamber, appears to be ultimately rooted in general customary international law.

If this is a correct reading of the Judgment, I am in full agreement with it. For I am convinced that the Customary Law Avenue is applicable only *vis-à-vis* an international criminal court that exercises jurisdiction over crimes under (general customary) international law.⁴⁵ But I believe

⁴⁰ Emphasis added.

⁴¹ Joint Concurring Opinion, paras. 175 ff., see above note 9.

⁴² *Ibid.*, para. 176.

⁴³ *Ibid.*, para. 196.

⁴⁴ *Ibid.*, paras. 198 ff.

⁴⁵ See, in particular, *Amicus Curiae* Brief, para. 11, above note 7.

that the scope of application of the Customary Law Avenue is limited further than that. I do not believe that State practice and *opinio iuris* support the view that the Customary Law Avenue applies *vis-à-vis* a bilateral international criminal court set up, say, by France and Germany even if the subject-matter jurisdiction of such a court would be limited to crimes under international law. In fact, from the end of the Great War on, States, when discussing the establishment of an international criminal court to pursue those most responsible for the commission of crimes that concern the international community as a whole, have invariably displayed a vivid sense for the need of searching for an institutional format by which the international criminal court in question is shielded, as far as possible under the circumstances, from the intrusion of particular national interests. This sentiment is reflected in the fact that none of the materials to which the Judgment and the Joint Concurring Opinion correctly refer in order to identify State practice and *opinio iuris* constitutes a bilateral or regional international criminal court.

I do also not believe that a sound principle can be articulated on the basis of which a bilateral or regional international criminal court could be persuasively distinguished from a national criminal court for the specific purpose of the applicability of the Customary Law Avenue. In order to explain that point a little further, let me return to paragraph 115 of the Judgment, which appears to take a different view by stating as follows:

While [domestic jurisdictions] are essentially an expression of a State's sovereign power, which is necessarily limited by the sovereign power of the other States, [international courts], *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.⁴⁶

I am not convinced by that distinction. Rather, I believe that national criminal courts, when adjudicating crimes under international law, also act on behalf of the international community. This is most clearly visible in a case where a national criminal court exercises universal jurisdiction over such a crime. In such a case, the national or regional criminal court does not act in the pursuit of a national prosecution interest, but the national criminal court is made available for the decentralized enforcement of the *ius puniendi* of the international community and accordingly acts as

⁴⁶ Emphasis added.

a kind of trustee of that international community. Yet, States have, as correctly recognized by the ICJ in the *Arrest Warrant* case, nevertheless more or less consistently taken the view that the traditional customary Head of State immunity *ratione personae* is applicable in national criminal proceedings for crimes under international law. What is then the underlying principle that explains that States have been prepared to open the Customary Law Avenue before certain international criminal courts? This principle is articulated in paragraph 63 of the Joint Concurring Opinion. Here, it is stated:

The more important consideration remains the seising of the jurisdiction upon an international court, for purposes of greater perceptions of objectivity.⁴⁷

Indeed, the evolution of the conversation since the end of the Great War suggests that States have not come to see a bilateral or a regional criminal court, despite their being international in the technical sense, as capable of giving rise to such a strong perception of objectivity that the traditional customary Head of State immunity *ratione personae* should not extend to it when adjudicating crimes under international law. All this reflects the recognition by States of a genuine conflict of principles, which are both protected by the international legal order, and the attempt by those same States to strike a proper balance. This conflict of principles exists between the effective enforcement of the *ius puniendi* of the international community over those allegedly most responsible for the commission of crimes under international law and the need to protect States and the stability of international relations from the risk of an abusive (hegemonic) use of the criminal law instruments in politically motivated proceedings. In paragraph 12 of my *amicus curiae* brief, I had articulated this point in the following terms:

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. 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 fidu-

⁴⁷ *Ibid.*, para. 63.

ciaries 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*.⁴⁸

Against this background, the ICJ was correct to add, in paragraph 61 of its judgment in the *Arrest Warrant* case, the qualification “certain” before “international criminal courts” when recognizing the applicability of the Customary Law Avenue *vis-à-vis* international criminal courts. But the ICJ was also correct to include the ICC within its formula of “certain international criminal court”. Unfortunately, the ICJ has not spelled out the principle justifying the ICC’s inclusion in any detail. I have repeatedly made the attempt to do so and have summarized my proposition in paragraph 14 of my *amicus curiae* brief:

In view of criticisms voiced against the distinction between *national* and *international* criminal proceedings, it will be important for the [Appeals Chamber] 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

⁴⁸ *Amicus Curiae* Brief, para. 12, see above note 7 (emphases in the original).

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.⁴⁹

I wished I could say that I find the core of this reflected in the Judgment or in the explanation given for the Judgment in the Joint Concurring Opinion. But I fear this is not possible: In its paragraph 57, the Joint Concurring Opinion contains the important consideration:

An international court may be regional or universal in orientation. In the latter case, the universal character remains undiminished by the mere fact that any of the States entitled to join it elected to stay out in the meantime, or declined to consent to the court's jurisdiction as the case may be.⁵⁰

This is a lucid statement. It could have provided the Appeals Chamber with the proper starting point for articulating and developing the idea that those "certain international criminal courts" *vis-à-vis* which the Customary Law Avenue is open must be those that credibly display such universal orientation and that are therefore entitled to the perception of being reliable shielded against the risk of hegemonic abuse. But to my regret, I have not been able to identify, in either the Judgment or the Joint Concurring Opinion, the articulation and development of that idea in a clear and coherent fashion.

This idea would also have provided the clue to deal with what is probably the most prominent argument advanced against the Customary Law Avenue in both its vertical and horizontal dimensions. This argument is based on the two general principles of *res inter alios acta* and *nemo*

⁴⁹ *Ibid.*, para. 14 (emphases in the original).

⁵⁰ Joint Concurring Opinion, para. 57.

plus iuris transferre potest quam ipse habet. Unfortunately, the Joint Concurring Opinion deals with this argument only in the context of Article 13(b) of the ICC Statute in paragraphs 339 and 340.⁵¹ It hereby fails to do full justice to this argument.⁵² The argument based on the principles of *res inter alios acta* and *nemo plus iuris transferre potest quam ipse habet* rests on the idea that the ICC's jurisdiction, to the extent that it is pursuant to Article 12(2) of the ICC Statute, has been created through the delegation of national criminal jurisdiction possessed and is therefore no more than a bundle of national criminal jurisdiction based on the traditional principles of territoriality and passive personality. This, in my humble view, fails to recognize that the ICC has been established to exercise the *ius puniendi* of the international community with respect to crimes under international law. The ICC Statute has not created this *ius puniendi* and the latter can also not be properly conceived of as having resulted from a delegation of national criminal jurisdiction titles. Instead, the *ius puniendi* of the international community with respect to crimes under international law has come into existence through the ordinary process of the formation of a rule of (general) customary international law. This process started at the end of the Great War and States not party to the ICC Statute, such as the US, the Russian Federation or India, have played an important part in this development. Those States may choose not to be bound by the ICC Statute as such. But as a matter of customary international law, they cannot completely distance themselves from the fact that the international community, in full conformity of a central guiding principle of the customary process, has been provided, by virtue of the ICC Statute, with a court of universal orientation for the enforcement of this community's *ius puniendi*.

In my humble view, under current international law, the Customary Law Avenue is thus open for the enforcement of the *ius puniendi* of the international community over crimes under international law with respect to a sitting Head of State only if, but also whenever if, an international criminal court with a genuine universal orientation, as circumscribed in

⁵¹ *Ibid.*, paras. 339 and 340.

⁵² In my oral submissions to the Appeals Chamber, I acknowledged the central importance of the argument and I provided my response to it: see Transcript, 14 September 2018, p. 35, line 8–p. 37, line 16, above note 8.

some detail above, has been made available by States for such an enforcement.

3. The Customary Law Avenue as Part of a Coherent Theory of International Criminal Justice

I do not say that anything written in the preceding paragraphs is necessarily at odds with the Judgment and the Joint Concurring Opinion. To the contrary, the Judgment and the Joint Concurring Opinion refer to those central principles and concepts that, all being creatures of State practice and *opinio iuris*, underpin the historical evolution of international criminal justice of which the Judgment and the Joint Concurring Opinion give such an impressive account. Yet, it is not readily apparent that the Judgment and the Joint Concurring Opinion have brought all this together in the form of a clear and coherent theory of international criminal justice, part of which would be the finding that the Customary Law Avenue is open for the enforcement of the *ius puniendi* with respect to a sitting Head of State only if, but also whenever if, an international criminal court with a genuine universal orientation has been made available by States for such an enforcement.

The Judgment will not be the Court's last word on those fundamental issues. Instead, it may be hoped that the Judgment and the Joint Concurring Opinion will provide a sufficiently fertile ground on which the Court will be able to move forward in the direction of clarifying the true nature of its jurisdiction. At this point in time, it is difficult to deny that the Court's case law displays conflicting elements. On 6 September 2018, Pre-Trial Chamber I, after careful analysis, concluded in paragraph 48 of its Decision on the Prosecution's Request for a Ruling on Jurisdiction on Article 19(3) of Statute:

In the light of the foregoing, it is the view of the Chamber that more than 120 States, representing the vast majority of the members of the international community, had the power, in conformity with international law, to bring into being an entity called the "International Criminal Court", possessing objective international personality, and not merely personality recognized by them alone, together with the capacity to act against impunity for the most serious crimes of concern to the international community as a whole and which is complementary to national criminal jurisdictions. Thus, the existence of the ICC is an objective fact. In other words, it is

a legal-judicial-institutional entity which has engaged and cooperated not only with States Parties, but with a large number of States not Party to the Statute as well, whether signatories or not.⁵³

This is a sound judicial pronouncement and it is very much in line with the general thrust underlying the Judgment and the Joint Concurring Opinion. But this must be compared with a statement contained in paragraph 35, in the Second decision on the Defense's challenge to the jurisdiction of the Court in respect of Counts 6 and 9 of 4 January 2017 in *Ntaganda*. Here, Trial Chamber IV found that the ICC Statute "is first and foremost a multilateral treaty which acts as an international criminal code for the parties to it".⁵⁴ This statement was made in order to liberate the Court from any requirement that the crimes under its jurisdiction must ultimately be rooted in (general) customary international law. This deeply unfortunate statement is in stark contrast with the spirit underlying the Judgment and the Joint Concurring Opinion and also with paragraph 48 of Pre-Trial Chamber I's decision of 6 September 2018 as cited above.⁵⁵ For it is impossible to maintain at the same time that (a) the Customary Law Avenue is open with respect to the Court's enforcement of the *ius puniendi* with respect to a sitting Head of State and that (b) the ICC Statute is first and foremost an international criminal code to the parties to it that may extend (general customary) international law at their liberty. In paragraph 6 of its final submission in the proceedings before the Appeals Chamber, the Prosecution submitted the following:

To endorse the principle that treaties must always be 'read down' to customary international law would be to abdicate the potential for States to develop the law progressively through binding treaties. Such an approach is also plainly re-

⁵³ ICC, Pre-Trial Chamber, Decision on the "Prosecution's Request for a Ruling on Jurisdiction on Article 19(3) of Statute", 6 September 2018, ICC-RoC46(3)-01/18-37, para. 48 (<http://www.legal-tools.org/doc/73aeb4/>).

⁵⁴ ICC, Situation in the Democratic Republic of the Congo, *Prosecutor v. Ntaganda*, Trial Chamber, Second decision on the Defense's challenge to the jurisdiction of the Court in respect of Counts 6 and 9, 4 January 2017, ICC-01/04-02/06-1707, para. 35 (<http://www.legal-tools.org/doc/2de239/>).

⁵⁵ See above note 53.

jected in the hierarchy of sources of law established for this Court in article 21(1).⁵⁶

While it is a truism that no such principle exists with respect to all treaties, and while it is also true that no such principle governs the ICC Statute in its entirety, the Prosecution's submission lends itself to a fundamental misunderstanding if applied to the crimes under international law listed and circumscribed in Articles 5 to 8 of the ICC Statute. These crimes have not been listed and circumscribed therein in order to "develop the law progressively through binding treaties". Instead, they have been listed and circumscribed in Articles 5 to 8 so as not to extend beyond the *ius puniendi* of the international community as a whole.

My call for a coherent theory of international criminal justice of which the Customary Law Avenue *vis-à-vis* the ICC forms a part, should therefore not be misunderstood as a call for a light-handed expansion of international criminal law through progressive treaty-making by an 'enlightened' group of States and through judicial activism within such a treaty framework. Quite to the contrary, the coherent theory of international criminal justice restated in this paper entails the need both for treaty makers and for judges to verify with rigor whether the crimes adjudicated are indeed condemned as criminal by the international community as a whole and thus rooted in general customary international law.

4. The Legitimacy of the Customary Law Avenue *vis-à-vis* the ICC

Up to this point, I have dealt with the legality of the Customary Law Avenue. I believe it is important not to end the analysis here, but to approach the matter also from the angle of the legitimacy of the enforcement of the *ius puniendi* of the international community. I have therefore addressed the question of legitimacy in my concluding statement before the Appeals Chamber:

Your Honours, please allow me to introduce this statement by recalling an instance of State practice from around the hour of birth of modern international criminal law. For the specific reference, I refer to paragraph 283 of the reasons of 5 April 2016 of Judge Eboe-Osuji in the case against Ruto

⁵⁶ ICC, Situation in Darfur, Sudan, *Prosecutor v. Al Bashir*, Appeals Chamber, Final Submissions of the Prosecution following the Appeal Hearing, 28 September 2018, ICC-02/05-01/09-392, para. 6 (<http://www.legal-tools.org/doc/17139f/>).

and Sang. Confronted with the American idea to put the major German war criminals to trial, British lawyers produced an aide-mémoire, which was handed over to the United States on 23 April 1945. In this aide-mémoire, the British observed that, I quote, "It would be manifestly impossible to punish war criminals of a lower grade by a capital sentence pronounced by a Military Court unless the ringleaders are dealt with equal severity."

The reference to the ringleaders explicitly included Hitler who, at this moment in time, was believed to be alive and in office.

This statement demonstrates what is at stake when the Appeals Chamber of the first permanent international court, International Criminal Court, in legal history will, for the first time, squarely address the question of immunity of sitting Heads of States in proceedings before it. It has been said in the course of this hearing that it constitutes a momentous decision for a State to arrest and surrender the sitting Head of State of another State.

This is undeniably true.

But the British aide-mémoire makes it clear why it constitutes in turn a momentous impediment to the enforcement of *ius puniendi* of the international community when a sitting Head of State enjoys immunity from criminal proceedings before the competent International Criminal Court.

The reason, quite simply, is this: The sitting Head of State will often be the ringleader, or to use the now accepted term of art, the person most responsible for the commission of crimes under international law.

The British lawyers, guided by their fine sense of justice, saw the problem at their time. It would no doubt pose a fundamental problem of legitimacy to punish the lower-ranking recipients of criminal orders, while sparing the masterminds behind the entire criminal system.

In these hearings Jordan has repeatedly tried to diminish this basic legitimacy problem by plac[ing] emphasis on the difference between immunity and impunity.

From a technical legal perspective, Jordan's point is of course impeccable. But Jordan's perspective misses that crucial point of legitimacy.

During the week we have more than once been referred to the possibly to see President Al-Bashir walking into this room out of his free will.

Had I [made] the argument, I would no doubt have been given a gentle smile. Here speaks the ivory tower of academia, one would have said. But the same argument does not become less detached from historical experience and current practice when advanced by State [counsel].

To put the point in the clearest possible terms, the risk that immunity will result in impunity is all too real, in practice.

During this hearing two legal avenues have been discussed, the customary law avenue and the Security Council avenue. From the angle of the basic point of legitimacy underlying the British aide-mémoire, the customary law avenue and the Security Council avenue differ considerably. Let us be realistic: The Security Council avenue does not carry us very far if we look to the foreseeable future. The prospects for a consistent practice of Security Council referrals are slim. What is more, sadly, the practice of the Council subsequent to the referral of the situation of Darfur has shown how little this body is a reliable partner to the Court. Again, the prospects for a change of direction in the Council's practice are less than overwhelming.

Thus, only the customary law avenue allows the Court to exercise its limited jurisdiction over nationals of non-State[s] Parties in a manner that will not all too often spare the ringleaders.

This is why I wished to explain to the Chamber my conviction that Pre-Trial Chamber I was correct to unanimously find that the customary law avenue is open under the *lex lata*.

In fact, the primary reason why I have chosen to make my humble request to appear before the Chamber as an *amici curiae* was not to point out that the Security Council avenue is perfectly sound as a matter of existing law. Instead, I [have] requested to appear in order to state my reasons why there is another legal avenue, which is also legally sound, but which is more legitimate, more legitimate because more in line with the fundamental aspiration of an equal enforcement of the law.

And I firmly believe that legitimacy is the most precious currency for international criminal justice and its quintessential expressive function to the world.⁵⁷

5. The Customary Law Avenue *vis-à-vis* the ICC and the ICJ

As much as the Judgment will not be the last word within the ICC on the true jurisdiction of the Court, it may receive a judicial response from outside. In fact, it is likely that the discussion about asking the ICJ for an advisory opinion, which had begun long before the Judgment, will continue thereafter. In my chapter contributed to the volume *State Sovereignty and International Criminal Law*, edited by Morten Bergsmo and LING Yan and published in 2012, as referred to at the outset of this essay, I had commented on the proposal to bring the matter before the ICJ as follows:

[...] [T]he suggestion submitted by the Member States of the African Union to request the ICJ to render an advisory decision on the matter deserves the closest attention. This suggestion does not imply any disloyalty towards the ICC, but duly recognises the fact that the Court's "sole authority" under Article 98(1) of the Statute does not extend to States not party to the Statute. Of course, an advisory opinion of the ICJ would, by definition, not carry any binding legal force. The authority of the ICJ, however, is such that it would be difficult to criticise the ICC if it followed the advice rendered by the ICJ whatever its content. At the same time, the proceedings before the ICJ would provide all States with the opportunity to set out their *opinio juris* on the matter and the ICJ would be given the chance to clarify its somewhat oracular 'international criminal courts *dictum*' in the *Arrest Warrant* judgment. This is not the place to enter into a debate about the technical details and the best timing for a request for an advisory opinion. It suffices to conclude that the Member States of the African Union are to be commended for having submitted a most constructive proposal to clarify the difficult legal question under scrutiny in this chapter.⁵⁸

I do not see any reason to change direction now that the Appeals Chamber has reached a finding with which I concur. For the fact remains that reasonable international lawyers may differ on certain legal questions

⁵⁷ Transcript, 14 September 2018, p. 32, line 11–p. 35, line 1, see above note 8.

⁵⁸ Kreß, 2012, pp. 263–64, see above note 5.

that were before the Appeals Chamber. If States not party to the ICC Statute wish to see the ICJ pronouncing itself on the matter, States Parties to the ICC Statute should not stand in their way. This is notwithstanding the fact that States Parties to the ICC Statute are bound to respect those findings of the Judgement that have been reached in the fulfilment of the Court's task to apply Article 98(1) of the ICC Statute and, in doing so, to authoritatively rule on the applicable international law on immunities.

It will be for States to choose whether they wish the ICJ to pronounce itself on the Security Council Avenue, on the Customary Law Avenue or on only one of them. In my humble opinion, a pronouncement by the ICJ is more desirable with respect to the Customary Law Avenue because only the question as to whether this legal avenue is open *vis-à-vis* the ICC is of genuinely fundamental importance. The question that should be addressed to the ICJ is to give a full meaning to its *obiter dictum* on "certain international criminal courts" in paragraph 61 of the judgment in the *Arrest Warrant* case. The question should be carefully worded so that it unambiguously extends to the horizontal (co-operation) limb of the triangular legal relationship between the ICC, a State not party to the ICC Statute whose highest official is sought by the Court, and a State Party to the ICC Statute on whose territory such highest official is present.

If the ICJ is asked for its advisory opinion on this question, the ICJ may be expected to respect the Appeals Chamber's interpretation of Articles 27 and 98 of the ICC Statute. The ICJ may also be expected to give full consideration to the interpretation by the Appeals Chamber of Security Council resolution 1593 and to the identification by the Appeals Chamber of the applicability of the Customary Law Avenue *vis-à-vis* the ICC including the Appeals Chambers' weighty account of the early history of international criminal justice. If and to the extent that the ICJ should then nevertheless interpret Security Council resolution 1593 differently or identify a different rule of customary international law with respect to the ICC's exercise of jurisdiction over a sitting Head of State of a State not party to the ICC Statute, the Appeals Chamber of the ICC would act in the service of a well-structured system of international jurisdiction if it let the ICJ have the last word.

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Preliminary Observations on the ICC Appeals Chamber's Judgment of 6 May 2019 in the Jordan Referral re Al-Bashir Appeal

Claus Kreß

By virtue of (1) United Nations Security Council resolution 1593 and (2) customary international law, Jordan, when requested by the International Criminal Court to arrest and surrender Sudan's then President Al-Bashir for the purposes of the proceedings before the Court during his visit to Jordan, was under no obligation *vis-à-vis* Sudan to respect Mr. Al-Bashir's immunity *ratione personae*. These are the two core findings regarding the applicable international law on immunities reached by the Court's Appeals Chamber in its Judgment of 6 May 2019 in the Jordan Referral re Al-Bashir Appeal.

Professor Claus Kreß agrees with those findings. He is, however, of the view that the Appeals Chamber should have circumscribed more narrowly the non-applicability of the customary Head of State immunity *ratione personae*. He argues that the customary Head of State immunity *ratione personae* is inapplicable not *vis-à-vis* any international court, but only *vis-à-vis* those international criminal courts the establishment of which constitutes the legitimate attempt to provide the international community as a whole with a judicial organ to directly enforce its *ius puniendi* (power to punish) over crimes under international law.

The author holds that the Judgment of 6 May 2019, despite its shortcomings, provides a sufficiently fertile ground on which the Court will be able to move forward in the direction of clarifying the true nature of its jurisdiction. The latter does not result from the delegation by the States Parties to the Court's Statute of their national jurisdiction titles. Instead, the Court constitutes a judicial organ vested with the direct enforcement of the pre-existing customary *ius puniendi* of the international community. This *ius puniendi* is confined to crimes rooted in general customary international law.

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