ASP Side Event - Immunities Under International Law

New York - 8 December 2017

On Friday 8 December 2017, the Wayamo Foundation held a side event during the 16th Annual International Criminal Court Assembly of States Parties. Co-hosted by the governments of the Republic of Uganda, Republic of Sierra Leone and Federal Republic of Nigeria, the event was entitled, "Immunities Under International Law."

Introduction

The event began with Wayamo Foundation Director, Bettina Ambach thanking the co-hosts for their support. Ugandan Ambassador Adonia Ayebare officially opened the event by highlighting the importance of the topic. Ambassador Amadu Koroma, DPR 1 for Political Affairs and the Permanent Representative of Nigeria to the United Nations, Tijjani Muhammad Bande, were also in attendance.

Deputy Director of the Wayamo Foundation and moderator Mark Kersten introduced the panellists and pointed out that Wayamo has always been interested in dialogue and offering support in bringing together people with different perspectives whilst providing the space for respectful and constructive debate on contentious issues such as the immunity question.

Panel discussion

Dapo Akande, Professor of Public International Law, University of Oxford and member of the Africa Group for Justice and Accountability (AGJA) was the first panellist. Akande set the scene by briefly noting the evolution of the immunity debate. Akande said that the issue of whether ICC states parties have an obligation to arrest a head of state wanted by the ICC is thorny and difficult because it: raises issues of the utmost sensitivity as the arrest of a head of state of another state causes political tension; brings difficult

legal questions to the fore because the context in which the issue has arisen relates to a head of state who is not from a state party (this has in turn raised questions about the reconciliation of Rome Statute obligations with obligations under general international law); gives rise to questions of Rome Statute interpretation and; raises legal procedural difficulties as the procedure by which these issues are addressed and the obligations clarified is not clearly spelt out and it does not work well in practice.

Akande indicated that all of these difficulties are amplified by the fact that this issue is one of the central complaints of the African Union (AU) and by the fact that states, including states parties, have repeatedly ignored the Court's requests for cooperation which has undermined the authority of the Court.

According to Akande there are substantive and procedural issues that require clarification. Substantively speaking, he asked whether states parties are obligated to arrest a head of state of a non-state party where there is an arrest warrant from the ICC? Procedurally speaking, he asked, by what procedures are disputes as to whether a person is immune from arrest to be resolved? Usually, the subject of the arrest warrant will only be in the foreign state for a brief period of time meaning at that stage (if the state objects to the validity of the arrest warrant on account of immunity) it is difficult to get a judicial resolution at that point in time.

In answering the substantive question Akande emphasised that the issue is the extent to which state officials have immunity from the jurisdiction of other states (where those other states are acting at the request of the ICC). It is important to stress that the question is: whether in their vertical relationship with each other, states still have to respect the ordinary rules of immunity in cases where that person is wanted by the ICC and where the requested state is an ICC state party with obligations to cooperate with the Court? Akande pointed out that so far, the issue is not whether the person is immune from ICC jurisdiction itself but it is whether the person is immune from the jurisdiction of other states when he or she is wanted by ICC.

Under customary international law heads of state have immunity from arrest and the International Court of Justice (ICJ) has said that this immunity exists even if the serving head of state is accused of an international crime. Akande questioned whether the Rome Statute has changed that position and if it had changed the position in relation to one state arresting the head of another state?

There are two Rome Statute provisions on this issue, article 27 and article 98.

Article 27(2) states that, "Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person" whilst 98 (1) states that, "the Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity."

Akande went on to say that the Court has not had a "great record" in dealing with the immunity question. It recently issued a detailed position on 6 July 2017 arising from South Africa's failure to arrest Bashir when he was in South Africa in 2015. In all of its decisions on the issue the Court has held that immunity is not a bar to arrest even if the head of state is that of a non-state party but it has adopted very different lines of reasoning. In the first line of reasoning produced in the Malawi/Chad decision, the Pre-Trial Chamber held that under customary international law there is no immunity in cases where a person is wanted by an international tribunal. According to Akande, that decision has been the subject of much criticism due to its poor reasoning.

In the Democratic Republic of Congo (DRC) decision, the Chamber held that because the situation had been referred by the UNSC to the ICC, the UNSC implicitly waived Bashir's immunity by imposing an obligation to cooperate. In the 6 July South Africa decision, there is another change in reasoning. Although the focus remained on the UNSC resolution referring the matter to the Court, the Chamber did not use implicit waiver. Instead it held that the Rome Statute was rendered applicable to the Darfur situation and therefore imposed obligations on Sudan. This placed Sudan, in effect, in the same position as a state party to the Rome Statute.

In the 6 July 2017 decision, the Chamber provided what Akande referred to as a fully reasoned decision issued after hearing arguments from the relevant parties. Akande is of the opinion that this decision is more convincing and it happens to take a view that Akande had advocated previously which is that (by imposition of the UNSC acting under Chapter VII of the UN Charter), the customary international law immunities afforded to Bashir do not bar states parties from executing the Court's request for his arrest and

surrender. Although the decision was well reasoned Akande felt that it may not be the last word on the issue as the Appeals Chamber is yet to weigh in.

Akande indicated that because the matter relates to the interpretation of the Rome Statute and the UNSC resolution some might argue that other judicial bodies, for example the ICJ, should pronounce on the correct interpretation of resolutions. In addition, it may not be the last word because there are other questions relating to the scope of immunity that remain in play. For example, which state officials are entitled to immunity even in a situation where it is not a UNSC referral? Does the same immunity apply to foreign ministers of special missions? Even in terms of international customary law these are unresolved questions.

With regard to the correct procedure to resolve these questions Akande pointed out that thus far, these questions have arisen in cases where the Court has issued a request for surrender without, (at that stage) considering the immunity question. Consequently, questions of procedure have only been raised at the time when a state is asked to arrest the person concerned. By that stage there is significant time pressure as the person concerned is already in the country.

This led Akande to consider the Article 97 Working Group Report and its proposed solution which he felt was unsatisfactory as the questions of immunity would still be addressed in the heat of the moment or after the situation has already gone awry, as was

the case in South Africa in June 2015. He advised that it would be better to resolve the issues in advance before a state is under pressure to arrest.

Dire Tladi, (Professor of International Law, University of Pretoria; Special Adviser to the Minister of International Relations and Co-operation and Member of the UN International Law Commission) began by making it clear that he had nothing to do with the government of South Africa's decision to remind the attendants of the 16th Session of the ASP that it remains determined to leave the Rome Statute.

He added that this reminder was unremarkable given that it had been the government's position from the moment they were legally compelled to revoke their notice of withdrawal in March 2017. Tladi's personal opinion was that the only event that may have swayed the government of South Africa against withdrawal was a favourable decision in South Africa's ICC non-cooperation hearing. He said that the decision having gone the way it did, left him unsurprised that the South African government remains determined to withdraw.

With regard to the 6 July decision, Tladi expressed that it is problematic aesthetically and substantively.

Aesthetically, Tladi noted that the ICC judges have had several opportunities to adequately address the issue and each time they have come to the same conclusion but with different reasons. The South African government approached the matter during its ICC non-cooperation hearing by presenting the Court's conflicting reasoning and addressing why such reasoning was incorrect. According to Tladi, the Court's response was simply to find another reason to reach the same conclusion namely, that there is a duty to arrest Bashir. Tladi called this an "a la carte menu approach" or a "shifting sands approach" which he found worrisome.

Tladi's second aesthetic point related to procedural aspects that preceded in the decision. Tladi said that although the South African government was invited to make oral representations, the Court failed to engage as they did not ask a single substantive question or challenge the government's position. The Court merely listened with no interaction. Tladi said that the Court should have given an indication as to which way it was leaning and then given the South African government an opportunity to respond directly to that.

Substantively, Tladi stated that he did not agree with the approach taken by the Chamber in its 6 July decision. His preferred approach makes the ICC's jurisdiction broader than the ICC itself has, thus far, allowed it to be. Under the DRC and South Africa decision the reach of the ICC and of state parties when it comes to arrest is limited to those cases of non-state parties that are referred by the UNSC only. In all other non-state party cases, there is no duty to arrest and the ICC does not have jurisdiction. Tladi indicated that this was incorrect as it does not correlate with the Rome Statute, which, in terms of article 27, is not based on nationality. According to Tladi, the Court has jurisdiction over all nationals and as long as the jurisdictional requirements are met- there is no immunity. He indicated that the Court had limited its own jurisdiction and that its determination to arrest one man- Bashir, was similar to cutting of its nose to spite its face.

Tladi agreed with Akande that the problem remains unresolved as some States will continue to find themselves in a position where they have to host Bashir.

Tladi indicated that the AU Commission remains concerned about the immunity question as it renders many African states (who are state parties to the Rome Statute), unable to host an AU Summit creating great political difficulty. The AU Commission has been searching for a compromise and is discussing a useful concept document. Tladi admitted that he was unaware of the status of the concept document but revealed that it proposes the following: in cases where there is a UNSC referral, in principle, it should be possible for immunity to be waived.

He noted that if this was ever adopted by the AU it would be a big step because thus far, it has been difficult for the AU to accept that the UNSC, in referring a situation, can waive immunity. However, the document also states that the waiver of immunity or placement of obligation to cooperate despite customary international law rules, must be explicit. Tladi indicated that such a compromise was fairly consistent with his own approach to the matter and that it warrants consideration. Tladi went on to discuss the avenues by which the above-mentioned compromise could be reached.

Firstly, substantive agreement that this is the appropriate interpretation from a doctrinal or normative perspective is required. One of the ways that can be done is if there is a final ruling from the Appeals Chamber in this direction. Tladi confessed that this would be easier said than done as South Africa had declined to appeal the 6 July decision.

He pointed out that an opportunity could present itself, firstly if the Kingdom of Jordan is found non-compliant for failure to arrest Bashir during his visit in March 2017, and secondly if they decide to appeal. However, he felt it was unlikely that Jordan would be found non-compliant due to the existence of a host country agreement.

Tladi presented another avenue which included the Appeals Chamber deciding to mero motu address the issue and reach a final conclusion.

Other suggestions from Tladi included seeking an advisory opinion from the ICJ. He is of the view that the ICJ would be best placed to rule on the matter because it has "no stake in the issue". If the ICJ ruled that there is a duty to arrest it would be the only circumstance under which he would accept that there is indeed a duty to arrest Bashir.

The last avenue offered by Tladi was that the ASP could adopt a resolution or interpretation. At this level, he noted with regret the ASP's reluctance to discuss the merits of the immunity question. He concluded by saying that a discussion within the ASP would be of great value and could lead to a potential resolution.

Elise Keppler (Associate Director of the Human Rights Watch International Criminal Justice Programme) began by noting that while the issue of immunity seems to have become a major point of debate in recent years in relation to the prospect of the arrest and surrender of Bashir to the ICC, in many respects it should be far less controversial. Beginning with and continuing since Nuremberg, international tribunals have consistently

provided that official capacity is not a bar to investigation and prosecution meaning that sitting officials cannot use their status to evade the reach of the law. This includes ad hoc tribunals—the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), the Special Court for Sierra Leone (SCSL), and the Extraordinary African Chambers within the courts of Senegal. Keppler stated that indeed, to date no international or hybrid tribunal that provides individual criminal liability for serious crimes allows such immunity.

At the domestic level Keppler pointed out that immunity of sitting heads of state, government and foreign ministers before foreign domestic courts has been a traditional principle of international law. Many states also allow immunity of sitting high-level officials before their own courts and some officials have suggested that this is part of why such immunity should be recognised at the ICC. But the reality of acceptance of immunity before national courts is part of why international courts are in fact so important – they enable the possibility to extend the reach of justice when the most serious crimes have been committed.

At the same time a growing number of states also reject immunity based on official capacity when it comes to serious crimes. This includes Benin, Burkina Faso, Kenya, the DRC, and South Africa.

Keppler indicated that much has been said about the fact that Bashir is a sitting official from a non-state party and thus, the argument goes that the ICC rules should not apply. But for the purposes of the ICC, the judges – while not always basing their conclusions on the same rationale – have reached consistent conclusions –Bashir's status as a sitting official from a non-state party does not carve out an exception and states must still arrest him. Keppler pointed out that the more recent decisions have based their conclusion on the fact that as Darfur was a situation referred by the UNSC, that referral essentially makes Sudan a state party for the purposes of the Rome Statute. Keppler is of the opinion that this is sensible because if the referral did not have this effect, what would the purpose of the referral be? The ICC can be expected to reach high level sitting officials given its mandate to deal with crimes of greatest concern and its focus on those who bear the greatest responsibility.

Keppler stated that while accepting judicial decisions that governments disagree with may be a bitter pill to swallow, it is the foundation upon which a judicial institution

must exist. Being part of a court means respecting judicial decisions. Keppler emphasised that it is not for states or individuals to accept those decisions only if they agree with them and that this seems to be lost in some of the debates.

Moreover, while some suggest that this is an issue that should be addressed by the ICJ, Keppler felt that the Rome Statute clearly states that it is the arbiter of disputes regarding its provisions.

Beyond the legal issues, there are important policy reasons as to why immunity for sitting officials is totally inconsistent with advancing justice for atrocities. Such immunity would limit justice and would create a two-tiered system of justice where those at the top are exempted from the reach of the law. This is wholly inconsistent with rejecting impunity. Keppler reminded the audience that the rejection of impunity is a principle that many international conventions and the AU Constitutive Act commit to.

Keppler added that immunity for sitting officials for the most serious crimes creates a perverse incentive for those who are the worst abusers of human rights in official positions to cling to power indefinitely. This puts populations at major risk of being further victimised. For all of these reasons, HRW and many other international and African civil society organisations, have taken a firm stance against immunity for sitting officials.

On several occasions organisations have come together to issue joint declarations against welcoming Bashir without arresting him. HRW and other civil society organisations have together campaigned for Bashir to be surrendered to the ICC. At the Court Bashir will benefit from protection afforded in terms of the rights of the accused, but he needs to appear before the Court and respond to the charges against him.

Keppler pointed out that several organisations have successfully secured domestic court orders for Bashir's arrest, for example in South Africa, and Kenya. Litigation on this issue has been raised in Uganda, Nigeria, and the DRC.

All of these actions are with a view to ensuring that victims of the worst forms of brutality have access to redress and that serious crimes are no longer tolerated.

Keppler concluded by saying that that is presumably why states came together to create the ICC in the first place, and they should support the Court's ability to hold anyone who commits grave abuses to account.

Max du Plessis, (Honorary Research Associate, University of KwaZulu-Natal; Senior Researcher, Institute for Security Studies; Advocate of the High Court of South Africa; Associate, Doughty Street Chambers, London) began by stating that one needs to draw lessons from the immunity and withdrawal debate particularly in light of South Africa's statement at the 16th ASP where they reminded the Assembly that they still intend to withdraw. Du Plessis highlighted two major lessons: it is vital that one accepts the limits of the ICC in terms of it resolving the problems affecting its functions and credibility and; one should take the failings and limits of the UNSC into account.

Du Plessis then moved to highlight that the combination of the immunity debate and the difficulty of arresting Bashir has effectively underscored the vital role of national judges, and domestic courts often backed by strong civil society organisations. Du Plessis indicated that he had had the fortune of being involved with all of the South African international criminal law cases including: the Zimbabwe Torture Case; the attempt to arrest Bashir during his time in South Africa; and the legal challenge to prevent South Africa's withdrawal from the ICC, briefed, commendably by Angela Mudukuti. Du Plessis stressed that thus far it has been the domestic courts that have shone the spotlight on: failure to arrest Bashir; the government's duty to do so under complementarity and; on unlawful attempts by South Africa to remove itself from the Rome Statute.

As welcome as it was for domestic judges to do "heavy lifting" on each of those occasions, Du Plessis is of the opinion that it is shameful that the UNSC has done so little (by comparison) to clarify its own resolutions. He emphasised that it was particularly shameful that the resolutions were so poorly worded in the first place.

Moving to address the ICC's role he noted that it is also shameful that the ICC judges have rendered a number of conflicting, poorly reasoned decisions. As a result, it has been left to domestic courts to do the real work. Domestic courts have done so commendably in the absence of proper guidance from the UNSC and the ICC.

Despite the glaring failures of the UNSC and the ICC, Du Plessis indicated that the situation provides an opportunity for South Africa, alongside other African states, to be constructive about their problems with the ICC and the immunity question. Instead South Africa has elected to withdraw, a move Du Plessis regarded as "remarkable" due to the fact that it represents a failure by one of the leading countries on the continent and one of the champions of the Court to show constructive leadership in the face of a very important debate.

Du Plessis cautiously yet optimistically reminded the audience that the decision to withdraw still needs to play itself out in South Africa which includes public hearings and lobbying by civil society organisations in support of South Africa remaining within the system.

Du Plessis expressed further optimism (based on having been involved in every other piece of litigation against President Jacob Zuma's government where the courts have, thus far, found that Zuma has acted unlawfully) that the attempt to withdraw from the ICC may be deemed unlawful.

South Africa is on the cusp of a leadership change and Du Plessis speculated that similar to the change of leadership in The Gambia resulting in a change of attitude towards the Rome Statute, South Africa could experience a similar change of attitude with its new leadership. Du Plessis hoped that a leadership change would ignite a different understanding of South Africa's relationship with the ICC. He expressed that the most commendable thing for a new government to do would be to immediately demonstrate a

commitment to domestic and international rule of law which includes re-embracing the ICC.

Du Plessis hoped that South Africa would behave as a reinvigorated insider rather than a petulant spoiler and would constructively engage with the vital issues affecting the Court's legitimacy and functionality. Du Plessis highlighted that there are at least two issues that are seriously and gravely affecting the Court's work. The infection of the ICC's work by the UNSC was raised as the first issue and on this point Du Plessis recommend that South Africa engage with other state parties to reform the process by which deferrals and referrals occur. The second issue raised by Du Plessis was the question around proper negotiations, proper processes and transparency with respect to requests made to the UNSC.

Du Plessis also pointed out that reform of the UNSC's approach to immunity is required. If immunity is to be removed by a UNSC referral it should be done emphatically and must be reflected in the wording and language of the resolution. It must be unambiguous. Had this been done in the Bashir case it would have saved a lot of time and effort for all concerned.

Another area that could benefit from sustained and constructive pressure is the overly selective way in which the ICC's Office of the Prosecutor (OTP) accepts and declines cases. The "fig leaf" of using preliminary examinations to show that the OTP is concerned with cases outside Africa is wearing thin as the preliminary examinations are left to simmer away and because there are clearly more obvious and deserving cases.

South Africa could lead a group of states that genuinely want the Court to be liberated from its political shackles so that war criminals are prosecuted regardless of their nationality and the political friendships they might enjoy with powerful states.

Du Plessis concluded by saying that it is time for all mature and rational actors (the ICC, the UNSC, the ASP, and the future South African government) to have a serious debate about commitment to the international criminal justice project. Proper reform of the UNSC's relationship with the ICC is required as well as sober reflection on how to resolve tension between the AU and the ICC.

Questions and Answers

A lively question and answer session followed the presentations. One member of the audience indicated that it was sad to listen to the ongoing immunity debate as it reminded her of the American position after the First World War when they made it clear that head of states could not be held accountable to anyone other than their own governments.

She indicated that it is, perhaps, more of a political problem as opposed to a legal problem and used the example set in France. When France elected to ratify the Rome Statute, it amended its own constitution to remove immunity for heads of state in order to ratify. Many states did something similar and thus South Africa's position on the matter came as quite a surprise. She asked- why, all of a sudden, there is this question about immunity when 20 years ago it was clear? Is there a new understanding of what immunities mean because at the time of ratification the position was clear?

Du Plessis responded by saying that in South Africa's case it was a combination of regional and domestic politics: regionally- South Africa is pandering to the powerful elites within the AU; domestically -President Zuma is allergic to accountability by his nature.

Akande responded by pointing out that as a result of the UNSC referral Bashir is not immune but generally speaking he takes the view that the position on immunity has not changed. Akande said that he was of the view, that "heads of state of non-state parties,

generally speaking are immune from the jurisdiction of international tribunals". Akande stated that suggesting that heads of non-state parties are not immune from the jurisdiction of international tribunals is a difficult position to sustain because effectively it means that states are entitled to create an international tribunal in order to prosecute the heads of other states, a proposition he disagreed with. Akande stated that he was not sure that that has ever been the position of international customary law and that is why the UNSC argumentation is particularly important.

Another member of the audience made the following three remarks. He indicated that the most worrying aspect of the conflicting judgments from the ICC judges is that it reveals a lack of engagement with previously expressed judgments which is a reflection of the immaturity of the ICC's judicial culture. For example, in the 6 July decision there is only one line where the Chamber refers to previous rulings and this was viewed as a lack of respect for previous rulings by the audience member.

The second point expressed was that the development of a judicial culture is necessary and that it is indeed high time that the Appeals Chamber gave a full and reasoned ruling. In relation to the opinion that the UNSC should be clearer in its resolutions, the audience member added that immunities should be waived as a matter of course as anything else would be unprincipled given that the principle of equality before the law was at stake.

The third and final point made by the audience member was that nothing in the Rome Statute precludes the ICJ from weighing in when jurisdiction is properly triggered. He stated that it is unimaginable that the ICC Appeals Chamber would fail to take an ICJ advisory opinion into consideration. The ICC should be mature and sovereign enough to take an opinion from a fundamentally important judiciary into consideration.

Acknowledging the comments from the audience, Keppler joined the conversation by expressing concern about the idea that when states disagree with the ICC judgments they simply opt to petition the ICJ. She reiterated that states had signed up and had agreed to be bound by ICC rulings.

Keppler also noted that in 2009 the question of whether states would arrest Bashir was thought of as a political issue but that there was no legal disagreement at the time.

For quite some time states were clear about this, including South Africa. In 2009 South Africa indicated that Bashir risked arrest should he enter South Africa.

HRW conducted research on the issue of competing obligations and whilst there is an arguable point that there are competing obligations, this does not negate the obligations of states as ICC members. The situation can also be managed. For example, states do not have to welcome Bashir. They can avoid hosting and avoid the conflict. States can also be more genuine in their engagements with the Court, for example South Africa's article 97 consultations were done 48 hours before Bashir's arrival, and Keppler indicated that this did not look like a meaningful attempt to consult and engage on the issue.

Tladi agreed that South Africa could have raised the issue much earlier. He noted that the AU raised the issue as early as 2008 in a communiqué.

Picking up on Keppler's article 97 remark Akande indicated that he would go even further and place the blame on the Court. Procedure is important and a decision is never going to be better if the Court does not get arguments presented before it. No decision is enhanced by lack of arguments. This is why procedure is critical because this issue always arises when it is impossible for one to have proper argumentation. It arises when the ICC

is asking a state to arrest a suspect immediately. It is important for the ICC to have a procedure to resolve issues in advance.

Reiterating his dissatisfaction with article 97, he stated that he did not think that article 97 is the answer as a proper judicial procedure is necessary. For example, in the Bashir case, from the moment the arrest warrant was issued in March 2009 everyone was aware that the immunity question was the "elephant in the room" and that there were serious legal questions that needed to be immediately addressed.

The current procedure is that the Prosecutor issues a request to the Court for an arrest warrant and there is nobody to argue on the other side. In the Bashir matter this was the case even though both the Prosecutor and the judges must have known that this would present significant challenges.

The wording of article 98, as confirmed by the Court in the recent 6 July decision, states that, "the Court shall not proceed with a request for arrest and surrender", meaning that it is up to the Court. But it needs a procedure by which this will be ventilated before the issues actually arise. Tladi agreed that currently there is no adequate procedure but stated that it need not be a judicial procedure.

Tladi stated that he personally does not like immunity but if states wish to have immunity then they must live with the consequences of such a decision. In Tladi's view, the UNSC resolution referring the situation in Sudan to the ICC shows that the UNSC wanted to retain immunity hence why there is only an obligation placed on one state. In his capacity as a member of the International Law Commission he has previously been in favour of exceptions to head of state immunity particularly in the context of the Commission's adoption of an article that provides an exception for immunity ratione materiae for war crimes, genocide and crimes against humanity. States have responded to this exception stating that it is unacceptable.

Given that he had the floor, Tladi took the opportunity to respond to earlier comments made by fellow panellists. Tladi reiterated that the issue is not whether or not Bashir has immunity before the ICC, there is no immunity before the ICC. The issue is whether Bashir has immunity from the authority of national jurisdictions which is a different question and different set of relationships. In response to Keppler's point about other tribunals such as the ICTY, Tladi stated that the duty to cooperate exists in that case

because there was an express UNSC requirement for states to co-operate in terms of article 103.

Tladi also pointed out that the ICC has indicted 46 people and only 2 of them were heads of state. The Malawi /Chad ruling made the argument that the ICC would be rendered useless if it could not prosecute heads of state. Tladi was of the opinion that this is not empirically accurate. The ICC has done a lot of work that has not related to do heads of state. Heads of state are the exception.

He went on to say that the 6 July decision provides that Bashir does not have immunity before the ICC but it also says that under any other circumstance, an official of a non-state party will be immune from the ICC's jurisdiction. In Tladi's opinion this is problematic as some of ICC's preliminary examinations are "useless". For example, if the ICC starts an investigation in Afghanistan- Tladi asked who the ICC would prosecute? Under the 6 July decision the ICC can only prosecute a state party official. It is no longer a question of the duty to cooperate. The ICC cannot pursue US actors as they are immune.

Tladi pointed to the situation in Palestine, and again stated that the OTP cannot prosecute anyone if they open an investigation. Tladi indicated that the fixation to arrest Bashir has resulted in a failure to fully recognise the implications of the 6 July decision.

Tladi responded to Keppler's earlier statement regarding the role of the ICJ as per the Rome Statute and pointed out that article 119 of the Rome Statute allows for the involvement of the ICJ.

Another member of the audience asked if judges have made a ruling can states just reject a decision simply because they do not like the reasoning?

All the participants agreed that it is vital that state parties respect court decisions. However, Akande added that in this instance it is not as simple as that given the issue of potentially competing obligations. It was in this light that Akande felt an ICJ opinion could be an advantage as the ICJ could decide on those questions by looking at all the relevant factors and legislation not just the Rome Statute. Akande referred to the South African government's argument that it has AU obligations and Rome Statute obligations, as an example, and said that the ICJ could move outside the Rome Statute and look at everything in its broader context.

The audience member also asked if the ICJ ruled that there was no immunity would the concerns around peace and security disappear? For example, would one go ahead and arrest a sitting head of state regardless of the impact it would have on peace and security?

Tladi tackled this point and stated that this is a political question and his approach has always been purely legal. To the extent that one of the political reasons is peace and security it may help legal arguments but that is not his legal argument. His legal argument is that article 98 is intended to carve out an exception in terms of customary international law and unless there is something that takes that away, the legal position is that there is no duty to arrest. However, if the UNSC were to explicitly waive immunity then there is a duty to arrest. This will put states in a difficult position but they must bear the consequences of their decisions as states determine the law.

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