Cour Pénale Internationale
International Criminal Court

Question and Answers

The Prosecutor v. Omar Hassan Ahmad Al Bashir

ICC-02/05-01/09

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Q&A REGARDING APPEALS CHAMBER'S 6 MAY 2019 JUDGMENT IN THE JORDAN REFERRAL RE AL-BASHIR APPEAL

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WHAT WERE THE PRINCIPAL ISSUES ON APPEAL?

The appeal which resulted in the judgment of the Appeals Chamber on 6 May 2019 arose from a decision of one of the ICC's Pre-Trial Chambers, issued in December 2017, which found that Jordan, a State Party to the Rome Statute, had failed to comply with its obligations under the Statute because it had not arrested Mr Omar Al-Bashir and surrendered him to the ICC when Mr Al-Bashir was on Jordanian territory on 29 March 2017 on the occasion of a summit of the Arab League. The ICC had previously issued two warrants for the arrest of Mr Al-Bashir in connection with international crimes allegedly committed in Dafur, Sudan. The ICC may exercise its jurisdiction over the situation in Darfur, Sudan, on the basis of UN Security Council resolution 1593 (2005), which had referred that situation to the ICC Prosecutor.

States Parties to the Rome Statute are under an obligation to cooperate with the ICC, including by executing warrants for the arrest and surrender of suspects. The principal issue that the Appeals Chamber had to decide in the appeal was whether Mr Al-Bashir, who was Sudan's president at all relevant points in time, enjoyed immunity as a Head of State that would have prevented Jordan from executing the ICC's arrest warrant against him, unless Sudan had waived the immunity. The Pre-Trial Chamber found that article 27(2) of the Rome Statute has the effect of preventing States Parties to the Rome Statute from invoking Head of State immunity and that, as a result of the UN Security Council resolution 1593, this provision equally applied to Sudan. Therefore, according to the Pre-Trial Chamber, Sudan could not invoke any Head of State immunity in respect of Mr Al-Bashir, and Jordan should have arrested him.

The Pre-Trial Chamber also decided to refer Jordan's non-cooperation with the ICC to the Assembly of States Parties and to UN Security Council. Such a power of referral is specifically provided for in article 87(7) of the Rome Statute. Another issue on appeal was whether the Pre-Trial Chamber's decision to do so was correct.

WHAT DID THE APPEALS CHAMBER DECIDE?

The Appeals Chamber decided that the Pre-Trial Chamber's finding that Jordan had failed to comply with its obligation to cooperate with the Court was correct: Jordan should have arrested Mr Al-Bashir when he was on Jordanian territory and surrendered him to the ICC. The Appeals Chamber essentially confirmed the Pre-Trial Chamber's interpretation of articles 27(2) of the Rome Statute as well as of the effect of UN Security Council resolution 1593 (2005) on Sudan's position *vis-à-vis* the Court, which had led the Pre-Trial Chamber to this conclusion.

However, the Appeals Chamber made an important addition: it clarified that, in any event, Mr Al-Bashir did not enjoy immunity as a Head of State *vis-à-vis* the ICC under customary international law, including in respect of an arrest by a State Party to the Rome Statute at the request of the ICC. Thus, the Appeals Chamber added an additional pillar on which the conclusion that Jordan should have arrested Mr Al-Bashir rested. The Appeals Chamber's decision in this regard was unanimous.

As to the question of whether Jordan's non-cooperation with the ICC should be referred to the Assembly of States Parties and the UN Security Council, the Appeals Chamber found that the Pre-Trial Chamber had erred in the exercise of its discretion. The Appeals Chamber therefore reversed this part of the Pre-Trial Chamber's decision. This decision was taken by majority, with two of the five Judges dissenting.

How does the judgement relate to previous decisions of the ICC concerning alleged non-cooperation of States in the Al-Bashir case and the question of immunities?

Prior to the Appeals Chamber's judgment of 6 May 2019, the Pre-Trial Chambers of the ICC had issued several decisions that addressed the failure of States Parties to the Rome Statute to arrest and surrender Mr Al-Bashir while he was present on their territories. All of these decision came to the same conclusion, namely that the fact that Mr Al-Bashir was the Head of State of Sudan did not prevent his arrest and surrender by a State. However, the Pre-Trial Chambers' reasoning in support of this conclusion varied to some extent: notably, some decisions relied on the fact that there was no immunity under customary international law *vis-à-vis* the ICC, while other decisions put the emphasis on article 27(2) of the Statute and the effect of UN Security Council resolution 1593 (2005).

The importance of the Appeals Chamber's judgment of 6 May 2019 lies in the fact that it confirms the Pre-Trial Chambers' conclusions, while adding to and clarifying the reasons therefor. In particular, the Appeals Chamber's judgment explains in detail why customary international law does not provide for immunity for Mr Al-Bashir. Thus, a very important question relevant to the ICC's exercise of jurisdiction has now been settled conclusively by the highest Chamber of the ICC.

The Judgment has generated animated discussion in blogosphere. What is the Court's view on that?

There is nothing new, extra-ordinary or wrong about judgments of courts of law generating discussion among those who have a view. In this case, as in many cases where courts decide controversial subjects, it is evident that there are some commentators who are persuaded by the Appeals Chambers judgment, while other have expressed disagreement with the judgement, or parts of it, based on their own views.

In the era of social media, it is hoped that observers would properly study the Court's judgments and decisions before rushing to comment on them. Hastily made comments, particularly when made before the commentator has even read the judgment in question, will fail to appreciate the totality and nuances of the Court's reasoning, and may wholly misrepresent the decision or judgment. At the same time, those first comments appearing on social media frequently tend to dominate the ensuing discussion as they are tweeted and retweeted, regardless of their accuracy.

Lawyers engaging in public commentary should exercise particular caution and remain mindful of the cardinal principles that guide the conduct of lawyers, including that of honesty, integrity and fairness.[1] This principle adequately covers the need to be fair when criticising courts and judges. Notably, the rules of professional ethics in most legal systems impose special caution on criticism of judges and courts, not because it is wrong to criticise them, but because they are generally not in a position to respond to specific criticisms. It does not mean that judges and courts may not be criticised. It only means that they be criticised fairly. There is an ethical obligation to reflect facts and circumstances accurately and fairly. It is not enough to engage in convenient repeat of the commentaries of others, who may not have been fair to begin with.

Did the Chamber take into account views of international law experts in its judgement?

Yes. Serious scholars who expressed interest in participating in the debate were given the opportunity to share their views, so that such views may be properly examined and taken into account.

In that regard, the Chamber issued a call for expressions of interest to participate in the proceedings. That call was made to the UN, to regional organisations in all parts of the world, to Rome Statute States Parties, to Sudan - and very importantly - to legal scholars who have done research and writing on the subject. Many scholars expressed interest on either side of the issue. The Chamber invited the most senior among them to participate in the oral hearings. At the hearings, one of the central questions posed was precisely on whether customary international law afforded immunity that would bar the ICC from exercising proper jurisdiction. Some of the participants chose to avoid the question put in that way (though they still argued or implied it in their other arguments), some scholars argued that there was immunity in customary international law, others argued that there was no such immunity.

[1] This is expressed as follows in the International Bar Association's International Principles on the Standards for the Legal Profession: 'A lawyer shall at all times maintain the highest standards of honesty, integrity and fairness towards the lawyer's clients, the court, colleagues and all those with whom the lawyer comes into professional contact.'

ONE OF THE CONCERNS EXPRESSED BY COMMENTATORS IS THAT BY HOLDING THAT CUSTOMARY INTERNATIONAL LAW DOES NOT RECOGNISE IMMUNITY BEFORE AN INTERNATIONAL COURT IN THE EXERCISE OF IT PROPER JURISDICTION, THE APPEALS CHAMBER JUDGMENT APPEARS TO STAND FOR THE PROPOSITION THAT A LIMITED NUMBER OF STATES MAY ESTABLISH AN 'INTERNATIONAL COURT' TO PROSECUTE THE HEAD OF STATE OF A STATE NOT PARTY TO THAT COURT. THE COMMENTATORS ARGUE THAT JURISPRUDENCE LIKE THAT IS EVEN DANGEROUS FOR THE ICC, BECAUSE IT WILL STIFFEN RESISTANCE AGAINST THE COURT. ARE THEY RIGHT?

This is an erroneous understanding of the Appeals Chamber's judgment. It was specifically recognised in the Joint Concurring Opinion of four out of the five judges (incorporated by reference in the main judgment) that immunity and jurisdiction are not the same thing. The judges wrote that there is no immunity before an international criminal court in its exercise of 'proper jurisdiction' does not mean the court in question has that 'proper jurisdiction' to begin with. The existence of jurisdiction depends on its own source. Since customary international law is not known to confer jurisdiction on international courts, it means that the jurisdiction of an international court is prescribed in a written instrument. If that instrument is a treaty, then that treaty binds only those that are party to it. The Rome Statute is a treaty that binds the parties to it. But the written instrument that prescribes the jurisdiction of an international court can also be a Security Council resolution adopted under Chapter VII of the UN Charter, such as was the case here. In conclusion, it was made clear that in the absence of applicability of the Rome Statute or the presence of Security Council resolution, the ICC would have no jurisdiction. All this was actually made very plain in the Joint Concurring Opinion.

So, if there is no jurisdiction to begin with, the question of immunity from that jurisdiction does not engage. But, when there is jurisdiction - as in this case, through a combination of Security Council resolution and the Rome Statute - and there is claim of immunity from it, then it becomes necessary to examine the basis or source of that claim of immunity.

The International Court of Justice has already said that in the *Arrest Warrant Case*. There, the ICJ made a defining pronouncement about the absence of immunity before 'certain international criminal courts, *where they have jurisdiction*'. Those who read that judgment do not always pay sufficient attention to what is meant by 'where they have jurisdiction', when we speak of absence of immunity before an international criminal court. What was done in the *Jordan* Referral appeal judgment was to elaborate on this question in the context of the jurisdiction of the ICC - as discussed above.

SOME COMMENTATORS HAVE ARGUED THAT THE APPEALS CHAMBER'S DISCUSSION OF IMMUNITY IN CUSTOMARY INTERNATIONAL LAW WAS A CONTROVERSIAL DISCUSSION THAT WAS NOT NECESSARY IN THE APPEAL. WAS THAT DISCUSSION NECESSARY?

The discussion was unavoidable. It fell naturally into the stride of the case in a number of ways. One way in which the question arose naturally is because it is not easy to see how the Appeals Chamber could sensibly discuss immunities at the ICC, without discussing article 27 which forbids immunity. That is particularly so in this appeal which centrally engages the question about how article 27 is to be reconciled with article 98. And that makes it necessary to discuss what article 27 represents. Is it only a norm of treaty law represented in the Rome Statute? Or was it a codification of customary international law? The Chamber's research indicated that it was the latter, and it said so.

Another way in which the discussion arose naturally was because immunity was said to exist to protect Mr Al-Bashir. But the Rome Statute does not provide that immunity: quite the contrary, it denounces immunity in article 27. Also, the UN Security Council resolution 1593 (2005) does not say that Sudan's President enjoys immunity. Notably, the resolution is entirely silent on that question of immunity. The question then arises, if neither the Rome Statute nor the Security Council resolution expressly provides for immunity, where then must we look for that immunity? The natural place to look is in customary international law: hence, the need to discuss customary international, to see whether indeed it supports the idea of immunity from the jurisdiction of the ICC.

The discussion was also made necessary because two differently composed Pre-Trial Chambers - in Malawi Referral and in South Africa Referral - had made opposite pronouncements on that important question. It fell to the Appeals Chamber to resolve that conflict of pronouncements in the Court's jurisprudence.

SOME FRUSTRATION HAS BEEN EXPRESSED ABOUT THE FACT THAT THREE DOCUMENTS WERE ISSUED AS PART OF THE JUDGMENT: THE MAIN JUDGEMENT, THE JOINT CONCURRING OPINION OF FOUR OUT OF THE FIVE JUDGES, AND THE JOINT DISSENTING OPINION OF TWO OUT OF THE FIVE JUDGES. IS THIS NORMAL IN THE PROCESS OF ADJUDICATION?

This is not unusual either at the ICC or at other international and national courts. Concurring and dissenting opinions appended to a judgment or a decision allow judges to elaborate on their reasons for agreeing or disagreeing with their colleagues, enabling them put forward their precise views on the legal questions involved. At the International Court of Justice, it is the rare case in which there are

not separate concurring opinions and dissenting opinions. The same phenomenon is common in many supreme courts around the world. In fact, in some systems judges on a panel are required to render judgments separately.

In some instances, judges writing severally are known to make cross-references to opinions of their colleagues expressing agreement in whole or in part. In the *Jordan Referral* appeal judgment, the main judgment made cross-references to the Joint Concurring Opinion. And although the Joint Dissenting Opinion is an expression of disagreement with the majority on the question of referral of Jordan's non-cooperation to the Assembly of States Parties and the United Nations Security Council, it nevertheless expressed general approval of the Joint Concurring Opinion in other aspects and restated in different words the essential message of the Joint Concurring Opinion in relation to customary international law.

VIEWS HAVE BEEN EXPRESSED TO THE EFFECT THAT THE AFRICAN UNION SHOULD REFER THE ISSUE OF HEAD OF STATE IMMUNITY TO THE ICJ THROUGH A REQUEST FOR ADVISORY OPINION FROM THE UN GENERAL ASSEMBLY. SHOULD THAT HAPPEN?

Article 119(1) of the Rome Statute requires that any dispute concerning the judicial functions of the ICC is to be settled by a decision of the ICC, and not be referred to any other body. That provision is consistent with the international law principle known as *kompetenz-kompetenz*: meaning that it is for each court to pronounce on the limits of its own jurisdiction. No international court may purport to circumscribe the jurisdiction of another international court.

Ultimately, the fact remains that the ICJ is not bound by ICC jurisprudence; nor is the ICC bound by the jurisprudence of the ICJ. All that international law could expect is that the body of jurisprudence that serves its purposes is a complement of persuasive case law to which each international court must do its best to contribute from its own perspective - generated from each court's exercise of its own specific jurisdiction.

The authoritative pronouncements of the judges of the Appeals Chamber will be found in the following documents:

- The Judgment of the Appeals Chamber
- Joint Concurring Opinion of Judges Eboe-Osuji, Morrison, Hofmanski and Bossa
- Joint Partial Dissenting Opinion of Judge Ibanez and Judge Bossa