



A Wild Goose Chase? Prosecuting Al Bashir at the ICC

Carolina Cwajg

In March 2009 and July 2010, the International Criminal Court (“ICC”) issued arrest warrants for the then Sudanese President Omar Al-Bashir on charges of war crimes, crimes against humanity and genocide (ICC, 2018). From 2003 to at least 2008, Al-Bashir’s government carried out a counter-insurgency campaign in Darfur using the country’s security apparatus. However, since his arrest depended on other state parties’ cooperation, Al-Bashir travelled freely for more than ten years. The tide turned when Sudan’s Sovereign Council announced they ‘would allow those indicted by the ICC to appear before the court’, giving rise to renewed hopes of international accountability (Lynch, 2020). After years of stalemate, the possibility emerged that Al-Bashir would be tried in the Hague. However, the extent to which the Sovereign Council is committed to international accountability remains ambiguous. Additionally, another layer of uncertainty exists as to whether appearing before the court means extraditing Al-Bashir to the Hague, establishing a hybrid court (Lynch, 2020), or even installing an ICC court in Sudan (The

Economist, 2020). Even if Al-Bashir ends up at the ICC, his prosecution could prove considerably difficult.

This article aims to shed light onto the greatest challenges the Office of the Prosecutor has already faced and will be facing if Al-Bashir is tried in Hague. It will explore the issue regarding Darfur's referral to the ICC; Head of State immunity; non-cooperation by state parties to the ICC; Sudan's commitment to complementarity; and the difficulty in linking the commission of genocide to Al-Bashir. Ultimately, it will explain how enforcing the rule of law in Sudan may be a long road ahead.

Issue 1: Darfur's Referral to the ICC

The Security Council's referral of the Situation in Darfur turned the ICC on its head. Unlike earlier self-referrals by the DRC, Uganda, CAR and Mali, the Court was exercising its jurisdiction over a non-state party to the Rome Statute (Naldi and Magliveras, 2017). The African Union criticized the Court's expansive jurisdiction against non-state parties for its violation of Sudanese sovereignty (Mills, 2012). However, it is important to distinguish the legal and political arguments. Legally, the Security Council's powers are incontrovertible. Its referrals are governed by Article 13 (b) of the Rome Statute. Politically, the controversy is clear. Not all Security Council permanent members are state parties to the ICC, but they were nevertheless referring other non-state parties (Fehl, 2014). This double standard was reinforced when the US, a non-state party, agreed not to veto the referral in exchange for a blanket ban on the investigation of *other* ICC non-members – a move driven by self-interest (LeBor, 2008).

Al-Bashir's arrest warrants worsened the already delicate relationship between the African Union and ICC. The African Union argued that since Sudan was not a state party to the Rome Statute, it was under no legal

duty to surrender Al-Bashir (Naldi and Magliveras, 2017). In the meantime, in the Hague, the Court was busy dealing with cases regarding the non-cooperation of state parties. It employed different methods of legal analyses for each case but concluded that all parties were under a duty to refer the then Sudanese President. The Court rejected all arguments for non-cooperation. In different cases, it ruled that Al-Bashir was not entitled to immunity before the ICC (Al Bashir, Dec 2011), the Security Council's Resolution implicitly waived immunities through its referral (Al Bashir, Apr 2014), and the Resolution created analogous duties to that of a state party for Sudan (Al Bashir, July 2017).

Lastly, if Sudan decides to hand over Al-Bashir, a parallel question emerges of whether the case will remain a Security Council referral, or whether it will have morphed into a self-referral. Legally speaking the Security Council resolution is still valid. However, following the 2014 announcement by the Prosecutor that she would discontinue proceedings against Al-Bashir given Security Council inaction in Darfur (UN News, 2014), some uncertainty arises as to the nature of the referral.

Issue 2: Head of State Immunity

Al-Bashir was the first sitting president indicted by the Court (Coalition for the ICC, n.d). This immediately triggered questions over Head of State immunity. Even though Al-Bashir was ousted and arguably no longer covered by immunities, Defence Counsel might raise this issue.

The principle of Head of State immunity exists in customary international law but has been modified by the recent jurisprudence of ad hoc tribunals (Nwosu, 2011). Milošević stood trial in the International Criminal Tribunal for the former Yugoslavia (Bohlen, 2010). Liberian

President Charles Taylor was convicted and sentenced to 50 years in the Special Court for Sierra Leone (SCSL, n.d).

Head of State immunity also features in Article 27 of the Rome Statute. Article 27 (1) establishes the irrelevance of an individual's status in government to the question of individual criminal responsibility. Article 27 (2) specifically refers to how immunities do not affect the Court's ability to exercise its jurisdiction. More fundamentally, since the underlying principle behind the Rome Statute is to prosecute the perpetrators of the gravest crimes, having a ceiling determined by governmental status would defeat the ethos of the International Criminal Law project. The ICC endeavours to pierce the thick layer of impunity shielding those in the upper echelons. Granting them immunity through the Statute would significantly hamper the Court's functionality.

Head of State immunity does not pose issues for the exercise of the Court's jurisdiction. Yet, when it comes to whether Sudan, a non-state party, is under a legal obligation to surrender their president to the Hague, it might.

Issue 3: Non-Cooperation by State Parties

Interestingly, the life of Al-Bashir's case has been marked by multiple instances of the ICC chasing after state parties for their refusal to hand him over. Judgements on non-cooperation were issued against Malawi, the DRC and South Africa, among others. In these cases, the 'battle over immunities' arises at the ICC (Stahn, 2019). Here, the Court had to decide the extent to which Al-Bashir's immunity as head of state of a non-state party prevented his arrest by state parties (Stahn, 2019).

In 2019, the most recent non-cooperation decision was issued against Jordan. Proceedings began in 2017, prompted by Al-Bashir's presence at an Arab League summit in the country (Al Bashir, May 2019). As a state party to the Rome Statute, Jordan was under the obligation to arrest and surrender Al-Bashir yet failed to do so. The Appeals Chamber reasoned as follows. Firstly, Article 27 (2) is not confined to the Court's adjudicatory powers but extends to the Court's 'enforcement jurisdiction' (Al Bashir, May 2019). The Court expressed that any contrary interpretation would void Article 27 (2) of any practical application. Secondly, it stated that Resolution 1593 created an obligation for Sudan to 'fully cooperate' with the ICC (Al Bashir, May 2019). This meant that if Al-Bashir were to benefit from Head of State immunity, Sudan would not be complying with the Resolution (Al Bashir, May 2019). Third, the Appeals Chamber moved to an analysis of Article 98 (1), which states the ICC cannot continue with a request for surrender or assistance if it would mean the requested state would have to act incompatibly with its obligations regarding another state or the diplomatic immunity of those from a third state - unless the third state renounces such immunity. The Appeals Chamber contended that Article 98 (1) is a procedural rule, triggered by an existing immunity, which could, in the presence of such immunity, obstruct a request for cooperation (Al Bashir, May 2019). Since Sudan was not in a position to invoke immunities, there was no need for them to be waived as per Article 98 (1). Article 98 (1) was thus inapplicable to Al-Bashir's case (Al Bashir, May 2019).

Two further issues stemming from the decision must be unpacked: whether a tension exists between Articles 27 (2) and 98 (1), and how Al-Bashir's eventual defence could attack the Court's reasoning.

If there was a tension between both Articles, it has most likely been harmonized within the Rome Statute. Dr William Schabas argues there is no incompatibility since they operate in different contexts (Schabas,

2016). Article 27 ‘governs the exercise of jurisdiction over an accused before the court’, and Article 98 ‘applies solely to obligations of cooperation’ (Schabas, 2016). Regarding the Jordan Appeals decision, the Court argues the ruling does not deprive Article 98 (1) of meaning because it is a ‘conflict-avoidance rule’ and not a stipulator or guarantor of immunities (Al Bashir, May 2019). Conversely, Dr Dov Jacobs, academic and practitioner at the ICC, suggests this decision deprives Article 98 (1) of any value (Jacobs, 2019). Although Article 98 (1) does not list the immunities that are to be respected by cooperating countries, Dr Jacobs contends that if the drafters of the Rome Statute truly believed Article 27 eliminated all immunities, why have Article 98 in the first place? (Jacobs, 2019). This argument could reasonably be invoked by Al-Bashir’s defence. Yet it is certainly not indisputable. The Court’s understanding that Resolution 1593 binds Sudan is supported by international law. The (*South West Africa*) Advisory Opinion, where the ICJ held that Security Council decisions are binding on all UN members, reinforces the existence of this obligation (South West Africa, 1971).

Whether the Court will further embrace its reasoning in the Jordan Appeal, or whether Articles 27 (2) and 98 (1) will be reconsidered in a new light remains to be seen.

Issue 4: Complementarity

As a founding principle of the ICC, complementarity must be considered. Stated in Article 1 and implicit in Article 17 of the Rome Statute, complementarity dictates that the ICC can only exercise its jurisdiction if a case is not, has not, or cannot be investigated genuinely or prosecuted by a given state (Nouwen, 2013). In other words, national judicial systems retain primary responsibility for holding perpetrators accountable. The ICC steps in when a state fails to do so.

Beyond scepticism of the Sudanese judiciary's capacity to deliver justice, Sudan's 1991 penal system lacks provisions addressing crimes against humanity and genocide (Al Jazeera, 2020), meaning domestic prosecutions cannot fully encapsulate what transpired in Darfur. Despite efforts to amend the Armed Forces Act 1986 by incorporating genocide and crimes against humanity, the amendment did not refer to the categories of crimes explicitly, nor their international legal sources (Nouwen, 2013). The provisions are even more worrying for their exclusion of important *actus rei* for crimes against humanity, the addition of adultery and fornication to the list, and the omission of sexual violence as a war crime (Nouwen, 2013).

Questions regarding Sudan's commitment to complementarity are amplified by the precedent it set in the establishment of a Special Criminal Court to deal with the crisis in Darfur *the day* after the Office of the Prosecutor opened investigations, followed by another court after the first arrest warrant was issued against Al-Bashir - a potential ploy to satisfy the criteria for complementarity and get the ICC to stand down (Naldi and Magliveras, 2017). The Prosecutor saw right through this. The tactic of giving the appearance of genuine proceedings whilst shielding perpetrators from the ICC's jurisdiction is the oldest trick in the book (Naldi and Magliveras, 2017).

Issue 5: The Difficulty with Genocide

Although academics have long debated the difficulty in proving the specific intent element of genocide, the intent to destroy, this has been somewhat demystified with the shift in jurisprudence from a purpose-based approach to the less stringent inquiry based on inferences (Stahn, 2019). Following the purpose-based approach, for a genocidal intent to be established, the perpetrator must act with the purpose or goal to

destroy a protected group (Kress, 2006). The inference-based approach allows circumstantial evidence to be used to prove a genocidal intent (Stahn, 2019). The latter approach is less onerous than the former. This shift is not immune to criticisms, as the response to the *Krstic* and *Karadzic* judgements demonstrate (Stahn, 2019).

The real uphill battle for the Office of the Prosecutor will be linking the commission of genocide to Al-Bashir. His position as President and Commander-in-Chief of the Sudanese Armed Forces requires dissecting the principles of command responsibility to examine whether attribution is possible. However, it may be difficult to predict the outcome of this hypothetical inquiry. The issue of attribution for genocide is intimately linked with whether an evil intent alone, absent an institutional policy, can amount to genocide (Stahn, 2019) Although tribunals have explained this is not a strict requirement, Dr. Schabas argues that no one has ever been convicted of genocide in the absence of evidence of such policy or plan (Schabas, 2012). A final verdict from the ICC still awaits.

In the interest of speculation, it is useful to look at the approach taken by the ICJ in the *Bosnian Genocide* case (*Bosnia and Herzegovina v Serbia*, 2007) where the Court inquired into whether an organized policy existed to decide upon the question of attribution. A similar approach was taken by the Darfur Commission (UN, 2005). Whether or not that is crucial for a genocide conviction, Dr Schabas advances that looking for evidence of a state policy better articulates the nexus between state responsibility and individual criminal responsibility (Schabas, 2012). Once again, whether the ICC will clarify this conundrum is still to be seen. Nevertheless, Al-Bashir's case is the ultimate testing ground for the ICC's approach to genocide.

Conclusion

Enforcing the rule of law in Sudan has long been a political challenge. Although the Sovereign Council presents an image of progress, its members were *also* implicated in crimes in Darfur and the massacre of peaceful protesters in Khartoum, among other crimes (Burke and Salih, 2019). Even if Al-Bashir is prosecuted, it is arguable that the Sovereign Council's military limb and the overthrown President are two peas in a pod. Given the ample field that exists for the Defence's case, it will also prove to be a legal challenge. Yet it is by exhausting all legal and factual tools available that the role of the ICC will be clarified, and the rule of law will operate at its full capacity.

References

- Al Jazeera. (2020) Will Sudan's Former Leader Omar Al-Bashir Face Trial At The ICC?. *Inside Story* (podcast). Available at: <https://podcasts.apple.com/dk/podcast/will-south-sudans-latest-peace-deal-last/id499841198?i=1000466440448&l=da> (Accessed: 27 February 2020).
- Bohlen, R. (2010) 'Questioning Authority: A Case for the International Criminal Court's Prosecution of the Current Sudanese President, Omar Al-Bashir', *George Washington International Law Review*, 42(3), pp. 687-712.
- Bosnia and Herzegovina v Serbia and Montenegro* (2007) ICJ 2.
- Burke, J. and Salih, M. (2019) 'Sudanese Protesters Demand Justice Following Mass Killings', *The Guardian*. Available at: <https://www.theguardian.com/world/2019/jul/13/sudanese-protesters-demand-justice-after-mass-killings> (Accessed: 15 February 2020).

Coalition for The International Criminal Court. *Omar Al-Bashir*. Available at: <<http://www.coalitionfortheicc.org/cases/omar-albashir>> (Accessed 13 February 2020).

Fehl, C. (2014) 'Growing Up Rough: The Changing Politics Of Justice At The International Criminal Court', *Peace Research Institute Frankfurt*. Available at: https://www.hsfk.de/fileadmin/HSFK/hsfk_downloads/prif127.pdf (Accessed 3 March 2020).

International Court of Justice. (1971) 'Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276, Advisory Opinion' (ICJ, Jun. 21, 1971). Available at: <https://www.icj-cij.org/en/case/53>.

International Criminal Court. (2011) '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' (ICC-02/05-01/09-139). Available at: https://www.icc-cpi.int/CourtRecords/CR2011_21722.PDF.

International Criminal Court. (2014) 'Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court' (ICC-02/05-01/09). Available at: https://www.icc-cpi.int/CourtRecords/CR2014_03452.PDF.

International Criminal Court. (2017). 'Decision under art. 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' (ICC-02/05-01/09). Available at: https://www.icc-cpi.int/CourtRecords/CR2017_04402.PDF.

International Criminal Court. (2018) 'Al Bashir Case: The Prosecutor v Omar Hassan Ahmad Al Bashir'. Available at: <<https://www.icc->

[cpi.int/CaseInformationSheets/AlBashirEng.pdf](http://www.icc-cpi.int/CaseInformationSheets/AlBashirEng.pdf)> (Accessed: 21 February 2020).

International Criminal Court. (2019) 'Prosecutor v Al Bashir, Judgment in the Jordan Referral re Al-Bashir Appeal' (ICC-02/05-01/09 OA2). Available at: https://www.icc-cpi.int/CourtRecords/CR2019_02856.PDF.

Jacobs, D. (2019) 'You have just entered Narnia: ICC Appeals Chamber adopts the worst possible solution on immunities in the Bashir case', *Spreading the Jam*. Available at: <<https://dovjacobs.com/2019/05/06/you-have-just-entered-narnia-icc-appeals-chamber-adopts-the-worst-possible-solution-on-immunities-in-the-bashir-case/>> (Accessed: 3 March 2020).

Kress, C. (2006) 'The Crime of Genocide under International Law', *International Criminal Law Review*, 6(4), pp. 461-502.

LeBor, A. (2008) *Complicity With Evil*. New Haven, Conn.: Yale University Press.

Lynch, J. (2020) 'Will Sudan's Bashir Be Handed To The ICC At Last?', *Foreign Policy*. Available at: <<https://foreignpolicy.com/2020/02/12/sudan-omar-al-bashir-icc-darfur/>> (Accessed: 12 February 2020).

Mills, K. (2012) 'Bashir is Dividing Us: African and the International Criminal Court', *Human Rights Quarterly*, 34(2), pp. 404-447.

Naldi, G. and Magliveras, K. (2017) 'The International Criminal Court and the African Union. In: C. Chernor Jalloh and I. Bantekas', eds., *The International Criminal Court and Africa*. Oxford University Press.

Nouwen, S. (2013) *Complementarity In The Line Of Fire: The Catalysing Effect Of The International Criminal Court In Uganda And Sudan*. Cambridge University Press.

Nwosu, U. (2011) *Head Of State Immunity In International Law*. Ph.D. London School of Economics and Political Science.

Rastan, R. (2009) 'The Responsibility to Enforce: Connecting Justice with Unity', in: C. Stahn and G. Sluiter, eds., *The Emerging Practice of the International Criminal Court*. Martinus Nijhoff Publishers.

Schabas, W. (2012) *Unimaginable Atrocities: Justice, Politics, And Rights At The War Crimes Tribunals*. Oxford University Press.

Schabas, W. (2016) *The International Criminal Court*. 2nd ed. Oxford University Press.

Stahn, C. (2019) *A Critical Introduction To International Criminal Law*. Cambridge University Press.

The Economist Podcast. (2020) 'The Snails Of Justice: The International Criminal Court'. Available at: <https://www.economist.com/podcasts/2020/02/17/if-they-just-get-him-into-court-it-would-do-wonders-for-the-iccs-reputation-trying-omar-al-bashir> (Accessed: 19 February 2020).

The Residual Special Court For Sierra Leone. *The Prosecutor v Charles Ghankay Taylor*. Available at: <http://www.rscsl.org/Taylor.html> (Accessed: 27 February 2020).

UN News. (2014) 'Security Council Inaction On Darfur 'Can Only Embolden Perpetrators' – ICC Prosecutor'. Available at: <https://news.un.org/en/story/2014/12/486172-security-council-inaction-darfur-can-only-embolden-perpetrators-icc-prosecutor> (Accessed: 4 March 2020).

United Nations. (2005) 'Report Of The International Commission Of Inquiry On Darfur To The United Nations Secretary-General'. Available at:

https://www.un.org/ruleoflaw/files/com_inq_darfur.pdf (Accessed: 3 March 2020).