

Head of State Immunity and the ICC: Can Bashir be Prosecuted?

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The ICC Prosecutor's request for an arrest warrant for the President of Sudan, Omar al Bashir, raises important issues for transitional justice scholars and practitioners. One important issue concerns the extent to which the ICC should operate strictly in the interests of justice to the detriment of the interests of peace. The view of the ICC Prosecutor, as stated in his office's policy paper on the interests of justice, is that the ICC is not concerned with the interests of peace but justice.¹ However, my main concern here is not whether the case actually will take place and nothing will happen, as adequately addressed by Phil Clark. Rather, I explore here what might happen if the ICC judges grant the arrest warrant and the trial proceeds.

In the first instance, the ICC must determine whether the immunity of a head of state constitutes a defence at all. Article 27 of the Rome Statute establishing the ICC holds that neither the immunity of a head of state nor the official position of a suspected international criminal will bar the Court from exercising its jurisdiction. Even though this position is laudable, it can face practical and pragmatic difficulties, as highlighted in the Sudan situation. This position also differs significantly from the traditional international legal position on immunity. Customary law on the immunity of heads of state and government stipulates that a head of state has immunity, which includes personal inviolability, special protection for his or her dignity, immunity from criminal and civil jurisdiction, and from arrest and/or prosecution in a foreign state on charges concerning all crimes, including international crimes. The Rome Statute therefore constitutes a break from traditional international law.

The *Arrest Warrants* case at the International Court of Justice (ICJ), as well as the *Tachiona* case in the US courts, are informative on this. In the *Arrest Warrants* case, the ICJ held that Foreign Affairs Ministers enjoy full immunity from criminal jurisdiction and inviolability while in office since this immunity is important for the exercise of their duties. This immunity ensures that Foreign Affairs Ministers can travel without hindrance in the performance of their duties. Heads of state are by nature of their office representatives of the state wherever they are and also enjoy this immunity. Even though the case being dealt with in the *Arrest Warrants* case concerned a Foreign Affairs Minister, the same immunities would be accorded heads of state. This immunity is only functional, since it accords heads of states free exercise of their duties in representing

¹ International Criminal Court-Office of The Prosecutor, *Policy Paper on the Interests of Justice*, September 2007

their state. The *Tachiona* case in the US courts dealt with torture and civil action against the Mugabe regime for having tortured Tachiona's family in Zimbabwe. Following the precedent in the *Arrest Warrants* case, the US courts held that a sitting head of state has immunity from criminal and civil proceedings abroad. However, the *Arrest Warrants* case dealt with criminal or civil prosecution in a national court, not an international one.

Should the same principles apply to an international court? On any reasonable interpretation of the Rome Statute, the same principles do not apply to the ICC. What are the consequences therefore of such a policy of prosecuting even sitting heads of state and government and stripping them of their immunity, which is regarded as important for the exercise of their duties? If the ICC Prosecutor had sought the arrest warrants when Bashir had left office, that would have been a different issue. But right now Bashir is still in office, and notwithstanding the repercussions for the Darfur peace process, is such a gamble likely to succeed even if the warrants are issued and Bashir is taken to the ICC?

Many practical difficulties exist. It is doubtful whether any state can arrest Bashir without violating the international law on immunity, which means that the support of other states in arresting Bashir will be unlikely. The ICC relies on states to enforce and implement its warrants. The failures in arresting the Lord's Resistance Army leader Joseph Kony are instructive here. The ICC has not been able to bring Kony to The Hague because of the failure to physically arrest him. One wonders if it would be easier to arrest Bashir. It seems the ICC has learnt little from its experiences in the Uganda situation. The ICC itself is based in the territory of another state. Whether The Netherlands, where the ICC is housed, would violate its international legal obligations by allowing the ICC to go ahead and prosecute a sitting president who has immunity within its territory is also yet to be seen. Even though scholars and commentators have challenged this position on immunity, in terms of law and the precedent set by the *Arrest Warrants* case, for the time being the position stands that a sitting head of state is immune from prosecution and/or arrest in the territory of another state. The ICC often overlooks that, even though it is an independent court, it operates within the comity of states, which have rules that pre-date the ICC.

Most likely, the ICC Prosecutor did consider all of these eventualities. If so, then, why did he seek the warrant for Bashir's arrest and also publicise the fact? One is tempted to arrive at the conclusion that the ICC Prosecutor is playing politics rather than law - in an attempt to intimidate Bashir into faster negotiation of a peace deal and resolution of the Darfur conflict and possibly handing over the other two suspects from Sudan. The ICC is also playing politics by trying to force the Security Council into engaging fully in Sudan to end the conflict. The Security Council has so far exhibited very little political will to involve itself wholeheartedly in resolving conflict in Sudan - hence, the referral to the ICC, the mere support role played by the UN in assisting the African Union force, and the continued debate over whether the violence in Darfur constitutes genocide. This is a gamble by the Prosecutor, and whether it will trigger the Security Council's full

engagement remains unclear. It is instructive that while the ICC includes genocide on its list of crimes allegedly committed in Darfur, the UN has not considered the crimes as genocide on the grounds that there is no genocidal "intent". Even though some members of the UN, particularly the US, have publicly referred to the crimes committed in Sudan as genocide, there has not been in the UN Security Council or General Assembly a response worthy of the crime of genocide. The Security Council has not invoked its powers under Chapter VII of the UN Charter to protect a people in danger from its own government and to maintain peace and security in Sudan. There has not been the sense of urgency that a response to genocide necessitates.

Clark is right in saying that nothing will happen, if “nothing” refers to “nothing judicial”. If the ICC Prosecutor’s gamble is to yield results, then something political will have to happen. Bashir will have to seek a quick end to the conflict by expediting the peace process, and the Security Council will have to move faster than it has so far. That is hoping that both Bashir and the Security Council take the Prosecutor seriously – otherwise, one can conclude that nothing political will happen either.

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