

Prosecuting Sudanese President Al-Bashir before the International Criminal Court: A Risky Venture?

**British Institute of International and Comparative Law
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The British Institute of International and Comparative Law gathered a panel of experts to discuss the recent request by the Prosecutor of the International Criminal Court, Luis Moreno-Ocampo, for an arrest warrant for Sudanese President, Omar Hassan Ahmad Al-Bashir, for crimes of genocide, crimes against humanity and war crimes. The panel was chaired by **Ms Elizabeth Wilmshurst** of Chatham House.

Dr Alex de Waal of the Social Science Research Council and Justice Africa opened the debate by commenting on the Prosecutor's press conference and his surprise at the account of the Sudanese situation given. He indicated that this was not in line with how experts on Sudan would define the context, in particular noting that Bashir exercises power in a diffuse and de-centralised manner. Dr de Waal outlined the events leading to the exercise of ICC jurisdiction in Sudan, in particular the background to Security Council Resolution 1593 and the referral of the Darfur crisis to the ICC. He stressed the peculiarity of the situation in Sudan, which has witnessed a number of diverging efforts to attain peace and the lack of a long-term coordinated strategy. Referral of the situation in Darfur to the ICC had effectively sidelined justice issues in the peace process.

Dr de Waal considered the inclusion of genocide as inappropriate, noting that the situation is complex with many different aspects. Many people died from the humanitarian crisis rather than from the direct result of violence. Thus he regrets the political stance of including this charge. He noted that those in favour of the arrest warrant appreciate its symbolism, calling for 'no peace without justice'. However, 'no justice without peace' is also true. This is particularly relevant in Sudan where the purpose is not to bring about regime change but to negotiate a process of transition to peace. Dr. de Waal also noted that while the Prosecutor believes that those responsible of genocide should not stay in power, such statement constitutes a fundamental challenge to the Security Council from the Prosecutor. Finally, he reflected on the lack of reaction from the President, the support for the President within Sudan as a result of the action and the balance between stability and accountability.

Professor William Schabas of the Irish Centre for Human Rights at the National University of Ireland, Galway, described this request as the most spectacular move to date by the ICC. He wondered if this is Moreno-Ocampo's third blunder after having already failed with the first trial and facing labour relations problems. While Professor Schabas had no problem with the investigation of Al-Bashir, he stated his frustration with the slow pace of the process, noting that the Cassese Commission took only three months to produce a high quality 100+ page report and that producing an arrest warrant is not a lengthy process. He also considered inclusion of the crime of genocide most troubling given the fact that the Cassese Commission did not classify the events of 2003-4 as genocide and that it was therefore unlikely that more recent events would qualify as such,

as only very particular circumstances may amount to a count of 'genocide'. While inclusion of crimes against humanity is acceptable, Professor Schabas believes that the counts of genocide may have been raised to please the public and the US, as the US have so far not been supportive of the ICC.

Mr Dapo Akande of the University of Oxford discussed the immunity of heads of States, noting that this is not the first time a leader has faced an arrest warrant (Milosevic, Charles Taylor). However, this is the first time that the subject of the warrant is still in office. International law does provide for immunity from criminal prosecution as long as the individual remains in office and the international courts agree that such immunity is absolute. However, the ICJ arrest warrant case also suggests that there is no immunity for international crimes before international courts. Mr Akande argued that this statement is not always correct, and depends on the legal basis of the court in question. Where an international court is formed by treaty, as is the ICC, the treaty cannot modify the immunity of a non-party state such as Sudan. However, he questioned what happens when there is a referral to the Court by the Security Council. The Security Council should be able to remove immunities of heads of States. There was not an express removal of immunity in resolution 1593; however, while this situation was not tested in the Milosevic case (as he was a former head of State), the assumption was that the Security Council can remove an immunity implicitly. There are three arguments supporting implicit removal: (1) if there is a referral even States not party to the Rome Statute are bound by it (art 27 of the Rome Statute); (2) any obligation addressed to states to cooperate with the ICC could require states not to give effect to immunities; and (3) arguments based on the Genocide Convention and the ICC being an international criminal court with jurisdiction for the crime. The issue of immunity will be of concern for states, particularly those who are party to the ICC Statute, as what will happen when Al-Bashir goes to Addis Ababa for the next African Union meeting? Are states under an obligation to execute the warrant? Or must states respect international immunities?

The Chair indicated her belief that this request was not a sudden move. Rather, the Prosecutor had been signalling his intent for several months. Perhaps if more States had assisted the ICC at an earlier stage (for example with earlier warrants) the ICC would not have had to intervene in such way. The Chair also commented on the possible role of Article 16 of the Rome Statute, stating it may be preferable to have a debate before any action is taken on the request.

The floor was opened for questions and participants raised many interesting issues including: the role of the ICC prosecutor and prosecutorial discretion; the likely use of Article 16; the relationship between the Security Council and the ICC; other possible means for achieving accountability in Darfur; the link between peace and justice; and the notion of complementarity in the ICC Statute.

The evening's discussion was lively and informed. It provided an excellent analysis of the political and legal issues raised by the Prosecutor's request and made a significant contribution to current debate. The Institute will continue to monitor progress and will hold follow-up events at a later date.