

Research Paper

Challenges Facing the International Criminal in Trying to Accomplish its Mission Focusing on Omar Al Bashir's Prosecution

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Article History

Received:
11.10.2022

Revised:
20.01.2023

Accepted:
29.01.2023

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Abstract: The prosecution of former Sudanese President Omar Al Bashir has attracted great attention in the legal and academic spheres. At the center of the debate are pertinent issues surrounding the challenges and prospects that the International Criminal Court (ICC) is facing in prosecuting former Sudanese President Omar Al Bashir for crimes against humanity and war crimes. Ideally, a leader of a country should be arrested if he or she commits international crimes. However, in the case of Sudan and former President Al Bashir, it was difficult to get cooperation from the government. This article will unpack the role of the ICC in dealing with crimes against humanity and war crimes in Sudan committed by Al Bashir. This research relies documentary search/desk research. The major finding of this study include that there is a legal basis for the presence of ICC in Sudan since the Sudanese case was referred to the ICC by the United Nations Security Council (UNSC). The researcher discovered that the ICC faced a lot of hurdles in exercising its mandate and roles in prosecuting former Sudanese President Al Bashir, one the major challenge was the issue of non-cooperation by the African Union (AU) and African states, this is a challenge because the ICC relies on state cooperation to arrest Al Bashir. Another relevant finding is that there are prospects that Al Bashir will be arrested, this is due to unfolding events in Sudan. The researcher discovered that the new military government in Sudan, is showing signs of cooperation which would likely affect some African countries and the AU to cooperate with the ICC in arresting Al Bashir and surrendering him for trial in the ICC. In line with the conclusion, this study recommends that African states and the AU should consider contributing and cooperating with the ICC so that it can effectively operate in prosecuting perpetrators of international crimes.

Keywords: African Union, International Criminal Court, United Nations Security Council.



1. Introduction

The roles of the International Criminal Court (ICC) in prosecuting Omar Al Bashir has been compromised and presented challenges and prospects. Ideally, a leader of a country should be arrested if he or she commits international crimes such as war crimes and crimes against humanity. However, in the case of Sudan and former President Al Bashir, it was difficult to get cooperation from the government. Though the road was smooth the ICC has faced many challenges due to the fact that efficiency of the ICC is heavily compromised. This is because the ICC enforcement mechanism is paralysed. The Sudanese government under Al Bashir rejected the jurisdiction of the ICC arguing that Sudan was not a signatory to the Rome Statute and that Sudan's judiciary had the sole jurisdiction over crimes in Darfur, and was thus qualified and ready to try those accused of any violations there [1]. This created a major hurdle since ICC was chasing the shadows due to the fact that the principle of complementarity was at play as a rational actor Sudan decided that local courts might have a better interpretation of the issue than the ICC. Another challenge was non-cooperation from the African Union, including a resolution that instructed member states of the AU not to co-operate with the ICC in arresting Al Bashir and surrendering him for trial in the ICC. African states regard the ICC as a kangaroo court. However, the new military government in Sudan is showing signs of cooperation which is likely to affect some African countries and the AU to cooperate with the ICC in arresting Al Bashir and surrendering him for trial in the ICC.

2. Literature Review

On 4 March 2009, a pre-trial chamber of the International Criminal Court (ICC) issued a warrant for the arrest of former Sudanese President, Omar Al Bashir to stand trial at the ICC on several charges based on crimes against humanity and war crimes [2]. Article 13 (b) of the ICC Statute states that "the Court may exercise its jurisdiction for a crime referred to in article 5 of the Statute if a situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations. The situation in the Darfur region in Sudan was referred to the ICC by the United Nations Security Council (UNSC) in 2005. Since then, the ICC has been facing difficulties in prosecuting Al Bashir.

According to Bassiouni [3] the phrase 'crimes against humanity' suggests offenses that aggrieve not only the victims and their communities, but all human beings, regardless of their community. The commission of a crime against humanities by individuals who control the state machinery has a long history. According to [3], Peter von Hagenbach a knight and Military Governor of the Upper Rhine was in 1474 tried by an ad hoc tribunal of judges from the Holy Roman Empire for murder, rape, perjury and other crimes same as corruption [4]. The allegation was not that he had himself committed these acts, but that they had been committed by soldiers under his command and that he, as a knight, was bound to stop them (Ibid).

Despite the early use of the term crimes against humanity, the first prosecutions for crimes against humanity which affected the modern state system took place after the Second World War in 1945 before the International Military Tribunal (IMT) at Nuremberg. The Charter establishing the IMT of Nuremberg defined crimes against humanity to include murder, extermination, enslavement, deportation, and other inhumane acts that are committed against any civilian population, before or during the war (Article 2 (1) of the IMT).

The Sudan crisis in Darfur revolves around the commission of war crimes and crimes against humanity under Article 5 (1) (b) and (c) of the Rome Statute. Darfur has been a marginalised region of Sudan which was starved of vital resources and prospects since its incorporation into the British Empire, this state of affairs was not altered in any substantial way in the post-independence era. This state of affairs provided the incentive for two Darfurian rebel movements namely the Sudan Liberation Movement Army (SLMA) and the Justice and equality Movement (JeM) to take up arms against the Government of Sudan in 2002 with the objective of radical reform of the national government (ibid). Faced with a revolt that outran its military capacity, the Government of Sudan under former President Al Bashir started to provide local militias with arms [5]. Out of selectivity the SLMA and JeM were not targeted by the ICC creating a major problem for the ICC to accomplish its mission, the false start costed it a lot.

These militias which subsequently became known as Janjaweed did not only fight the rebels but also targeted civilians (ibid). According to Akande [6], the delegation of counterinsurgency to local militias turned Darfur into an 'ethics-free zone' in which the Government of Sudan 'told the soldiers and militiamen to do what they could get away with and not report back.' Despite the large-scale

human rights abuses that took place in Darfur, the international community was slow to respond to the conflict (ibid). The US and the UK allegedly actively tried to keep the Darfur conflict from being discussed during negotiations aimed at ending the north-south Sudan war, out of a fear that this could undermine the north-south peace process [7].

On 7 October 2004 the former Secretary-General of the United Nations Kofi Annan decided to establish a Commission of Inquiry [8]. The Commission concluded that the acts that were committed in the Darfur region were conducted on a widespread and systematic basis, and therefore could amount to crimes against humanity (ibid). Having introduced the general background on charges of crimes against humanity and war crimes, this article analysed the background between the ICC and Al Bashir's prosecution since 2005.

The Sudanese Government under former President Bashir was requested in 2004 by the international community to address the situation in Darfur many times to put an end to the atrocities and to combat impunity by bringing the perpetrators to justice. In May 2004, President Al-Bashir established the National Commission of Inquiry to investigate crimes committed in the Darfur conflict (ibid). The Commission concluded that the crimes committed in Darfur were due to tribal conflicts and rebel activities, and were not as grave or widespread and systematic as the crimes covered by the Rome Statute (ibid). The National Commission of Inquiry identified the following rebel groups, the Sudan Liberation Movement Army (SLMA) and the Justice and equality Movement (JeM), and also the Commission identified tribes from the non-Arab population [9].

As such, in September 2004 the ICC asserted that the Report of the National Commission lacked impartiality because the Commission was working under great pressure to approve the Sudanese Government's claims [10]. The ICC arrived at this assessment because the Sudanese Government under former President Bashir was not willing to provide a clear picture of the crisis in the Darfur region (ibid). The United Nations Security Council issued many resolutions in 2004 calling on the Sudanese Government to take steps to end the violence and human rights violations in Darfur and bring to justice to janjaweed militia leaders and their associates who were accused of violating human rights and international humanitarian law violations as well as other atrocities [11]. By June 2005, between 180,000 to 300,000 people had been killed and a further 2.4 million made homeless in Darfur (ibid).

The Government however did not make any noteworthy steps to stop the violence or protect the lives and property of the victims [10]. It demonstrated an unwillingness to end the violence or bring perpetrators to justice even after the involvement of the ICC in the Darfur region (ibid). On July 30, 2004, the UNSC acting under Chapter VII of the UN Charter adopted Resolution 1556 (UN 2004). The UNSC demanded that the Sudanese Government "disarm the Janjaweed militias" and bring those responsible for atrocities to justice (ibid). Two months later, the UNSC adopted Resolution 1574 demanding that all the parties to the conflict cease all violence. Under Resolution 1564, former UN Secretary-General Kofi Annan, established the International Commission of Inquiry on Darfur led by ICC Prosecutor Moreno Ocampo, the Commission was mandated to scrutinise and investigate the situation in Sudan (ibid).

According to Minhas and Abbas [12], the situation in Darfur deteriorated since hundreds of thousands of people were killed and millions were made homeless, the situation was then referred by the UNSC to the ICC in March 2005. Sudan is however not a party to the Rome Statute which established the ICC and did not provide its consent for the exercise of jurisdiction on Al Bashir [13]. According to Haas [14], the situation in Darfur has improved since the ouster of Al Bashir from power. The arrest warrant for Al-Bashir was issued by ICC for crimes against humanity and war crimes allegedly committed in Darfur on the 4th of March 2009 (ibid). a brief history of how Al Bashir came to power highlights that he led a successful coup against the country's leadership in 1989 and he became the chairman of the Revolutionary Command Council for National Salvation which ruled the country. In 1991, together with Hasan al Turabi, a Muslim extremist, and leader of the National Islamic Front (NIF) began to Islamize the country and they introduced Islamic Shariah law in 1991 (ibid).

According to Minhas and Abbas [12], in 2002, al-Bashir was elected President of Sudan. In 2003, rebel black African groups in Darfur launched an attack on al-Bashir's government (Ibid). To combat the uprising, President al-Bashir enlisted the aid of the Arab militia known as the Janjaweed whose brutal methods terrorized civilians, prevented international aid organizations from delivering food and medical supplies, and displaced more than two million people. "The Sudanese government under Al Bashir was accused of being biased and oppressive to the non-Arab population, thus the non-Arab

population reacted in the form of fighting back this led to ethnic cleansing by Al Bashir's government" [12]. From December 2018, large protests which demanded the overthrow of Al Bashir from power began and on the 11th of April 2019, Al Bashir was ousted from power through a military coup [12]. This was an unconstitutional change of government and a violation of Chapter 8 of the African Charter on Democracy which deals with Elections and Governance Sanctions in Cases of Unconstitutional Changes of Government. However, the AU was reluctant in sanctioning Sudan.

Some of the reasons for the failure of ICC on arresting Omar al Bashir include non-cooperation by South Africa, SADC and African Union (AU). However, the recent move by the Sudanese government to hand over Al Bashir to the ICC for prosecution provides hope in dealing with crimes against humanity committed in Sudan [14].

Historically, the creation of the ICC can be traced to the year 1872 when Gustav Moynier, one of the founders of the International Committee of the Red Cross, proposed a permanent court in response to the crimes committed in the Franco-Prussian war [3]. The establishment of the court was mainly based on dealing with international crimes.

In modern society, [15] traced the roots of the ICC to the UN diplomatic conference held in Rome, Italy, in 1998 to finalise what became known as the Rome Statute that laid the foundation for a permanent ICC that became operational in 2002. The ICC is a permanent court established in terms of Article 1 of the Rome Statute" [16]. Article 1 of the Rome Statute states that

An International Criminal Court is hereby established. It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be complementary to national criminal jurisdictions. The jurisdiction and functioning of the Court shall be governed by the provisions of this Statute.

At present, 123 countries are States Parties to the Rome Statute. Minhas and Abbas [12] state that "the International Criminal Court (ICC) was established as a consequence of the Rome Statute in 1998 with a purpose of prosecution of persons who committed war crimes, crimes against humanity and genocide". Against such a cursory background, this research is concerned with the role of the ICC in prosecuting former Sudanese President Omar Al Bashir for crimes against humanity and war crimes.

3. Methodology

This research relies documentary search/desk research and was based on a qualitative approach. The paper relied on secondary data. Secondary data comprises of data which is not obtained from original or primary sources. Secondary data was collected through the review of literature from books, journals, publications and newspaper articles.

4. Finding and Discussion

4.1. Africa and International Criminal Court

The relationship between ICC and Africa is important in understanding the reaction of the two in critical issues. Africa's relationship with the International Criminal Court (ICC) has been strained over the past few years [16]. Threats by many African states to withdraw from the ICC's jurisdiction have marked a crescendo in the strained relationship (ibid). According to Apiko and Aggad [14] the AU member states such as Senegal, Niger, and the Republic of Congo played an instrumental role in the establishment of the ICC. Uganda referred the first African case to the ICC (ibid). Notes that in its first strategic plan, the AU encouraged its member states to ratify the Rome Statute and as a result, the AU became the largest continental bloc to ratify the ICC's Rome Statute. The AU was not even opposed to the work of the ICC in Africa; but disagreed with the supranational court on the cases involving Sudanese President Omar al-Bashir and Kenyan President Uhuru Kenyatta (ibid). This explains the reality of the north-south dilemma in which African leaders view the ICC as a tool for regime change agenda hence making the relationship sour. The sour relationship makes the ICC unpopular in Africa [17].

According to Vyver [2], the indictment of the President of Sudan had provoked negative responses from the African Union, including a resolution that instructed member states of the AU not to cooperate with the ICC in arresting former Sudanese President Al Bashir and surrendering him for trial in the ICC. The AU relied on article 98 (1) and (2) of the ICC Statute which deals with immunity. However, the ICC maintained that under the rules of international law, sovereign immunity applies only to prosecutions in national courts and not to prosecutions in an international tribunal hence

validated its indictment of former Sudanese President Al Bashir. The ICC based its argument on provisions under article 27 (2) of the ICC Statute.

This is correct because if sovereign immunity can be used to bar the ICC from exercising its jurisdiction then it will be difficult to address human rights and international humanitarian law violations by heads of state. The African Union (AU) did not take kindly to the indictment of former Sudanese President Al Bashir. In July 2009 the AU held a meeting and endorsed a decision that AU member states would not co-operate with the ICC, for the arrest and surrender of former Sudanese President Al Bashir [2]. At the Review Conference of the ICC held in Kampala, Uganda, from 31 May to 11 June 2010, Malawi, speaking in its capacity as chair of the AU, stated that the indictment of heads of state could jeopardize effective co-operation with the ICC [6]. This resulted to the AU to call for a mass withdrawal from the ICC because of the anger and frustration of continuous persecution of African leaders.

4.2. International Criminal Court and United Nations Security Council

It is always important to understand the relationship between, the ICC and the United Nations Security Council, especially when dealing with the Sudanese case. This is because the Sudanese crisis was referred to the ICC by the UNSC. Mistry and Verduzco [18] describe the ICC as being “shaped as much by crude politics as by philosopher kings”. The relationship between the ICC and the Security Council is complex, not at least in light of the ability of the Council to refer situations to the Court over which the Court would not otherwise have jurisdiction, and the ability of the Council to suspend investigations and prosecution at the ICC (ibid). If truth is anything to go by most African states have suspicion that the ICC is a toothless bulldog or a car without a gearbox it mostly reacts when issues are referred to by the United Nations Security Council (UNSC) particularly the P5. It is important to note that with its limited enforcement powers, the ICC is reliant upon the cooperation and assistance of states, which can be enhanced through the intervention of the Security Council [18].

The ICC loomed the issue of Al Bashir from a legal perspective and failed to look at political realities this led to a false start in dealing with the matter, although they had valid legal basis they were too utopian than practical. It remains day dreaming for the ICC because laws follows politics. At the Rome Conference in July 1998, the majority of delegations confirmed the need to include in the Statute a text which allows the Security Council to refer ‘the case of’ under Chapter VII of the UN Charter [19]. Article 13 (b) of the Rome Statute states that

The Court may exercise its jurisdiction with respect to a crime referred to in article 5 under the provisions of this Statute if: (b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations;

This section is concerned about the Security Council Referral of the Situation in Darfur to the ICC. On the 7th of October 2004, the then UN Secretary-General Kofi Annan decided to establish a Commission of Inquiry to investigate the situation in Sudan. The Commission concluded that the acts committed in Sudan constituted crimes against humanity and war crimes (UN Report 2005). In the light of the above, the Security Council in its Resolution number 1593 adopted on 31 March 2005, and acting under Chapter VII of the UN Charter (UN report 2005).

The impact of the referral of the Security Council for the non-member states; is to create a jurisdiction or a court mandate in case of crimes committed on the territory of the non-party state or by one of its nationals [20]. This means that the Security Council referral of the situation in the Darfur region to the ICC provided the legal basis for the Court to exercise its jurisdiction the on Sudanese case, and to prosecute perpetrators of crimes which took place in the Darfur region, even though Sudan is not a party to the Rome Statute (ibid).

According to Aljazy and Aljaghoub [19] since Articles 24 and 25 of the UN Charter establish a legal obligation on all states members of the United Nations to accept the decisions of the Security Council, as it had entrusted it with primary responsibility for the maintenance of international peace and security, by doing so, Sudan in principle was bound by the referral decision and the consequent of legal effects to accept the UN Security Council referral of the situation in Darfur to the ICC. However one of the strongest criticisms of the relationship between the ICC and the Security Council is the ability of the members of the Security Council, of which three of the five permanent members are not parties to the Rome Statute, to refer situations involving states not parties to the Court [16]. This makes it interesting because it makes others to be the untouchables and mini gods while others are targets.

Too many questions have been asked about the ICC capacity to investigate cases. This researcher maintain that the ICC's role in the prosecution of former Sudanese President Al Bashir has been a mixture of ineffectiveness and inability. This has thoughtful consequences for the ICC as it casts doubts over the trustworthiness of its prosecution.

4.3. Involvement of the International Criminal Court in Sudan

This section focuses on the ICC and Sudan so that the researchers provides arguments on why the ICC is dealing with crimes committed in Sudan in the Darfur region. Al-Bashir's regime in Sudan signed the Rome Statute on the 8th of September in the year 2000; but has not yet ratified it. Based on that, when there was a commission of crimes against humanity and war crimes in Sudan, the Sudanese government under former President Al Bashir rejected the jurisdiction of the ICC arguing that Sudan is not a signatory to the Rome Statute and that Sudan's judiciary has sole jurisdiction over crimes committed in the Darfur region, and is qualified and ready to try those accused of any violations. However, the ICC rejected that argument, basing on a legal position that the ICC jurisdiction on the Sudanese case is based on provisions under Article 13 (b) of the Rome Statute.

Tracing the involvement of the ICC in Sudan, literature provides that after a 20 months investigation into crimes allegedly committed in Darfur since 1 July 2002, the Prosecutor has presented evidence to the judges, and requested the Pre-Trial Chamber to issue summons to Ahmad Muhammad Harun and Ali Muhammad Ali Abd-Al-Rahman (also known as Ali Kushayb) to appear before the ICC. Having examined the request and the evidence submitted by the Prosecutor on 27 February 2007, the Pre-Trial Chamber issued warrants of arrest against Ahmad Harun and Ali Kushayb, for crimes against humanity and war crimes allegedly committed by Ahmad Harun in his former capacity as a former Minister of State for the Interior of the Government of Sudan and by Ali Kushayb in his capacity as leader of the Janjaweed militia. These warrants of arrest were made public on 2 May 2007 (ibid).

Additionally, on the 14th of July 2008, the ICC's Chief Prosecutor, Luis Moreno Ocampo, handed over evidence towards an arrest warrant application for former Sudanese President, Al Bashir [6]. The Prosecutor alleged that his investigation had resulted in the availability of reasonable grounds to believe that the former Sudanese President Al Bashir was criminally liable for committing crimes against humanity, and war crimes (ibid). However, the Pre-Trial Chamber issued a warrant for the arrest of Al Bashir, for war crimes, and crimes against humanity only. On 4 March 2009, the warrant was approved by the pre-Trial Chamber at the ICC (ibid).

In The Prosecutor v Omar Hassan Ahmad Al Bashir's case, the ICC indicated that Al Bashir must be prosecuted on charges of being responsible for committing crimes against humanity and war crimes in Sudan. In resolution 1593, the Security Council states that the Government of Sudan and all other parties to the Darfur conflict shall co-operate fully with and provide any necessary assistance to the Court. The relationship between the ICC and Sudan deteriorated and became a typical 'cat and mouse game'. The Sudanese government maintained that national courts would bring the perpetrators of crimes committed in Sudan to justice. Despite providing that argument in practical the Sudanese authorities have not investigated or prosecuted the specific case of crimes against humanity and war crimes which were taking place in Sudan.

Although the ICC has attempted to build a strong legal case based on procedural matters of law, it has not managed to translate its judicial proceedings into changing the way the international community thinks about and acts upon the crimes committed in Darfur [6].

4.4. The African Union, African states and the International Criminal Court

This researcher found out that one of the main challenges that the ICC faced in arresting former Sudanese President Al Bashir was the issue of non-cooperation by the AU and African states. The question of head of state immunity particularly in the context of state cooperation obligations under the legal regime of the International Criminal Court has been a contentious issue that contributed to the deteriorating relationship between the ICC and the African Union". "The issue lies at the heart of the Al-Bashir case and had resulted in the AU adopting decisions on non-cooperation with the ICC in the arrest and surrender of former Sudanese President Al Bashir" (ibid). The AU decided that AU member states shall not cooperate with the ICC, concerning the execution of the arrest warrant issued by the ICC against former Sudanese President Omar Al-Bashir.

In addition to the non-cooperation decision, in January 2017, the AU adopted the ICC Withdrawal Strategy, which calls for the collective withdrawal of African states from the Rome Statute a call that was influenced by, inter alia, the Al-Bashir's case. According, to Chenwi and Sucker [22] "some

African states have individually indicated their intention to withdraw from the Rome Statute". For example, Burundi, South Africa, and the Gambia had submitted withdrawal notifications. This non-cooperation stance by the AU, "had resulted in a situation in which, some African states parties to the ICC statute had failed to cooperate with the ICC in the arrest and surrender of former Sudanese President Al-Bashir when he was in their territory" [16]. This researcher maintains that the non-cooperation stance by the AU and its member states presented a challenge for the ICC to arrest former Sudanese President Al Bashir.

Against such a cursory background of non-cooperation, the researchers utilises the following paragraphs to provide examples and situations in which African states created the ground for challenges of the ICC in arresting former Sudanese President Al Bashir. "In 2010, Al-Bashir visited Kenya which is a state party to the ICC Statute, but former Sudanese President Al Bashir was not arrested" [10]. The Kenyan government stated that it had to balance its obligations towards the AU with those towards the ICC and gave preference to complying with AU obligations, failing to arrest former Sudanese President Al-Bashir. Indeed, this researcher argues that the effectiveness of the ICC and its quest to arrest Al Bashir was compromised by the non-cooperation of state parties to the ICC Statute.

In the same vein, in 2011, former Sudanese President Al-Bashir visited Malawi. The Government of Malawi failed to arrest and surrender former Sudanese President because; it stated that the former Sudanese President Al-Bashir enjoyed immunities and privileges which Malawi recognised and Malawi fully aligned itself with the position adopted by the African Union concerning the indictment of the sitting Heads of State and Government of countries that are not parties to the Rome Statute. However, the ICC concluded that Malawi failed to cooperate with the Court by failing to arrest and surrender Omar Al Bashir to the Court, thus preventing the Court from exercising its functions and powers under the Statute [12].

Also, in 2011, Al-Bashir visited Chad without being arrested [13] The Government of Chad's rationale for its non-cooperation with the ICC was similar to that of Malawi and other African states, as an AU member, it claimed to be unable to comply with the ICC's request due to the common position adopted by the African Union in respect of the international warrant of arrest issued by the Prosecutor against former Sudanese President Al-Bashir Omar Al Bashir. This researcher found out that in 2013 when Al-Bashir again visited Chad, the country once more failed to comply with its obligations to cooperate with and to consult the ICC.

Non-cooperation by AU and African states presented a complicated situation for the effective operation of the ICC and its bid to arrest former Sudanese President Al Bashir. This can be noticed by the DRC accident. Following notification that former Sudanese President Al-Bashir was to visit the Democratic Republic of Congo (DRC) in 2014 to attend the Common Market for Eastern and Southern Africa (COMESA) summit, the ICC 'requested the DRC to immediately arrest and surrender Omar Al Bashir to the Court' [11]. However, the visit took place and former Sudanese President Al-Bashir was not arrested.

The government of the DRC stated that it received the list of the COMESA summit delegates late with no time to consult with the ICC and that as a state party to the Rome Statute and AU member, it was placed in a complex, ambiguous and major situation as the arrest and surrender of former Sudanese President Al Bashir would have had heavy consequences and legal, diplomatic and security implications. While acknowledging its cooperation obligation, the government of the DRC was of the view that such an international obligation was subject to the application of article 98 (1) of the Rome Statute.

Basing on the above, the Government of DRC further cited Al-Bashir's visit to Chad, Djibouti, Kenya, and Nigeria and their governments' non-cooperation being influenced by former Sudanese President Al-Bashir's immunity. In 2015, Al-Bashir visited South Africa. The government did not arrest him, despite being reminded by the ICC before he visited its obligation to arrest and surrender him and to consult the ICC in case of any difficulties in complying with the request (Prosecutor v Al Bashir case). South Africa's rationale for non-cooperation was primarily based on its obligations towards the AU. However, South African domestic courts, the High Court, and the Supreme Court of Appeal found the failure to arrest former Sudanese President Al-Bashir to be in contravention of the country's domestic and international obligations.

This researcher discovered that non-cooperation by the AU and its member states was a major hurdle for the ICC in arresting former Sudanese President Al Bashir; since the ICC relied on the cooperation of state parties to the Rome Statute. In 2016, former Sudanese President Al-Bashir was

not arrested during a visit to Uganda to attend the inauguration ceremony of President Yoweri Museveni. Before his visit, the ICC reminded Ugandan authorities of Uganda's obligations, as a State Party to the Rome Statute, to cooperate with the Court for the immediate arrest and surrender of former Sudanese President Al Bashir to the Court, under Article 89(1) of the Rome Statute, if he attended the inauguration ceremony in Uganda. However, the Ugandan government failed to cooperate with ICC. The rationale for Uganda's non-cooperation in the arrest and surrender of Al-Bashir as follows:

- (i) The invitation of former Sudanese President Al-Bashir was informed by the standpoint that good relations with all countries in the region is essential to the maintenance of peace and security and that continuous engagement of all the leaders, Al-Bashir included, is both important and unavoidable'; and
- (ii) The African Union Assembly of Heads of State and Government had decided that the African Union member states, in accordance with article 98 of the Statute concerning immunities, shall not cooperate with the Court's request for arrest and surrender of Omar Al-Bashir to the Court.

The above mentioned are compelling arguments of challenges faced by the ICC in arresting Al Bashir. Indeed, these researchers discovered that the ICC faced difficulties in getting cooperation from the AU and its member states. This explains why the former Sudanese President is still scout free.

After all has been said it is important to note that all African countries who decided for non-cooperation with the ICC have something to hide on. For instance South Africa hides behind her obligation to the AU despite the High Court and Appellate Court finding her in violation of her obligation as a state part to cooperate with the ICC. Uganda, Kenya and DRC were no better they all played politics in a fashion that the costs outweighed the benefits hence not cooperated with ICC. It is important to note that by no chance the ICC was going to be successful in arresting a fugitive when the countries in that continent are not cooperating instead are they are supporting the fugitive and are willing to withdraw from the ICC to protect the culprit, this situation created hard times for the ICC.

4.5. Sudanese government response to the International Criminal Court

The ongoing debate on the challenges faced by the ICC in arresting former Sudanese President Al Bashir had been pointed on the non-cooperation by the Sudanese Government. "To conduct investigations and proceedings, the OTP must have access to the territory of the state in question" [13]. According to Haas (2020), initially, the Sudanese authorities cooperated with the ICC and authorized the OTP to carry missions in Khartoum to determine whether national proceedings had been undertaken, however, when the ICC issued its first warrants of arrest against Ahmad Harun, Assistant Minister in Charge of the Interior, and Ali Kushayb, the head of security and militia leader, all cooperation ceased and the access to the territory was denied.

This researchers found out that non-cooperation by the Sudanese Government presented a major challenge for the ICC to arrest former Sudanese President Al Bashir this is because the ICC was denied access to Sudan. Worse still, after the ICC issued a warrant of arrest against former Sudanese President Al Bashir, he ordered the expulsion of international organisations working to improve the living conditions of the local population in refugee camps [17]. The Sudanese Government expelled any organisation collecting information on the occurrence of sexual violence in Sudan, expelled 13 international NGOs (INGOs), and closed down three national NGOs. This researcher discovered that it was very difficult for the ICC to arrest fugitives without cooperation from the Sudanese Government. The most famous among these fugitives was the former President of Sudan, Omar Al Bashir.

The source of the Sudanese non-cooperation originated from the fact that the Bashir Administration had rejected the ICC jurisdiction over Darfur since it claimed that it is a violation of its sovereignty and an instrument of Western pressure for regime change, and accused the Court of being part of a neo-colonialist plot against a sovereign African and Muslim state. The Bashir administration repeatedly accused the Prosecutor of basing his investigation on testimony by rebel leaders and "spies" posing as humanitarian workers (ibid). Since then the ICC faced challenges to arrest former Sudanese President Al Bashir because the then Sudanese government was skeptical about the operations of the ICC. This study discovered that the Sudanese government under former

President Al Bashir barred the ICC personnel from speaking to Sudanese officials, and authorities [21]. This complicated the whole operational aspect of the ICC and presented operational challenges.

4.6. The International Criminal Court Enforcements

Almost a decade had passed since the ICC issued a warrant for the arrest of former Sudanese President Al Bashir, for war crimes and crimes against humanity. Convincing arguments are being raised by scholars about the challenges being faced by the Court for its effectiveness to arrest former Sudanese President Al Bashir. Minhas and Abbas [12] states that the ICC had been snowed under the problems of enforcement since its inception". There have been attempts at rectifying this problem; however, the efforts were futile. One of the challenges faced by ICC in arresting former Sudanese President Al Bashir is that the "ICC depended on the fact that state parties to the Rome Statute are duty-bound to take de rigueur steps to implement the decisions of the ICC under the Rome Statute". However, based on the case of Sudan and former President Al Bashir most African countries which are state parties to the ICC failed to enforce ICC's decision to arrest former President Al Bashir.

It is important to note that "the UN Security Council Resolution 1593 has often been cited as one of the failures of enforcement of ICC's decision due to its political nature" [22]. As a consequence, governments have been reluctant to move forward on implementation of the arrest warrants of the ICC which was issued to former Sudanese President Al Bashir (ibid). "The Security Council has also failed to force the member states of the UN to put into effect the ICC's prosecution" [12]. These researchers discovered that since the ICC does not have an enforcing body of its own, it relied on state cooperation. However, it had been widely seen that despite being state parties to the Rome Statute, states have failed to cooperate with the judicial body for one reason or another. Such a line of thinking is very important in the Al Bashir's case since he travelled to those countries, which are signatories of the ICC, but the countries did not arrest him. The inability of the ICC to pressurize those states to arrest former Sudanese President Al Bashir presented one of the challenges the ICC faced in arresting Al Bashir.

There are several instances where; the ICC had failed to enforce its decision on arresting former Sudanese President Al Bashir. The most spectacular expression of the 'reality deficit' of international criminal law has been the staging of the 'Great Escape' by former Sudanese President Omar Al Bashir, from Johannesburg, South Africa, in June 2015, during an African Union Summit. This study considered that the inability of the ICC to persuade other state parties to the Rome Statute, third party states, the Security Council and even high ranking officials of the United Nations to apply consistent, sustained international pressure to execute the arrest of former Sudanese President Al Bashir as a handicap for the ICC to effectively arrest Al Bashir. Another weakening feature is that the ICC lacks extradition powers to bring offenders of the core crimes for trial. It is important to note that the ICC lacks an effective enforcement mechanism, it is difficult to arrest someone when you will be relying on someone's help and police force. The ICC reliance on states as part of its enforcers has been a challenge since it has failed to convince state parties to arrest former Sudanese President Al Bashir. There are several instances; where, the ICC had failed to enforce its decision on arresting former Sudanese President Al Bashir as analysed above.

4.7. Political realities of International Organisations

The ubiquity of politics is highly complicated and is now the order of the day on how international organisations operate. Alvarez [22] states that in "contemporary literature on international institutions, the tale of Frankenstein stands as a cautionary tale of how the agent does not always heed the call of the principal and may eventually overreach the principal through deeds, which are inimical to the interests of the principal". Logically, this means that once international institutions are imbued with legal personality, their interests and those of their creators' member states diverge. With reference, to the International Criminal Court while it was acting basing on legal grounds to arrest former Sudanese President Omar Al Bashir harsh political realities presented the major challenge. The work of the ICC continued to be affected by "adverse political winds or indeed political reproach of every colour and we have seen this in particular in the Darfur situation" [13]. Another weakness is that the ICC can be manipulated by powerful states. The fear of manipulation is aptly confirmed by Kaul (ibid) who notes seminally that "powerful states and permanent members of the Security Council somehow instrumentalise the Court to use it for their political purposes and interests".

At the heart of the challenges that are being faced by the ICC in arresting Al Bashir, the issue of deep-seated mistrust among African countries towards the ICC is an area of consideration when

explaining why the ICC is facing challenges in arresting former Sudanese President Al Bashir. Mistrust can be evidenced by the recent move by the USA to impose sanctions on the ICC after the Court opened war crimes investigation of alleged war crimes committed by the US and its allies in Afghanistan [23]. The US Attorney General, William Barr said that “the press conference held on the 11th of June at White House was the beginning of a sustained campaign against the ICC for exceeding its mandate and violating the sovereignty of the United States of America”. These researchers found out that this situation has a direct impact on African states perception on the ICC and Sudan will use the US case to deny cooperation and to hand over former Sudanese President Omar Al Bashir to the ICC [24].

Arieff et al [21] observe that the ICC's investigations in Africa have evoked concern over countries' sovereignty partly due to a history of foreign intervention in the continent and that the court's prosecutors are compromised on one front by limited capacity to investigate and on the other bend to the wishes of Western foreign policy. This researcher discovered that deep-seated mistrust among African countries towards the ICC has made the ICC hit a brick wall while trying to arrest former Sudanese President Al Bashir. This is because African countries have maintained a non-cooperation stance on the matter hence complicating the ICC's efforts to arrest former Sudanese President Al Bashir.

4.8. International Criminal Court prospects in Sudan

Essentially, there are prospects that Al Bashir will be arrested. This study discovered that the new military government in Sudan; is showing signs of cooperation which is likely to affect some African countries and the AU to cooperate with the ICC in arresting Al Bashir and surrendering him for trial in the ICC. The Sudanese delegation negotiating with rebels in Darfur has made a key concession to victims of the Darfur conflict by agreeing that all those wanted by the ICC should be handed over to the court to stand trial. The surrender of former Sudanese President Al Bashir is something that the Sudanese top Military General Abdel Fattah Al-Burhan alluded to at a meeting in December 2019 with victims of the conflict (ibid). However, one of former Sudanese President's lawyer told Reuter's news agency on the 11th of February 2020 that former Sudanese President Al Bashir would continue to refuse to deal with the ICC, describing it as a 'political court'.

Khartoum's willingness to engage with the ICC marks a new opportunity for the world court which has been hamstrung by numerous flouted arrest warrants and failed prosecutions. BBC News 11 February 2020 that “after Bashir was removed from power in April 2019, the ICC Prosecutors requested that he must stand trial over the Darfur killings, the Sudanese army generals who had seized power initially refused to comply, but Sudan's umbrella protest movement which now has significant representation in the country's sovereign council said it would not object his extradition” [16].

Another source of hope is that although the AU has called upon the AU Member States to speak with one voice to ensure that the concerns of the AU are met with regards to the ICC, Botswana entered a reservation to the entire AU Decision Assembly. Among other things, the AU Decision stated that the AU deeply regretted that the UNSC had at the time not acted upon the request by the AU to defer the prosecution of former Sudanese President Omar al-Bashir (ibid). These researchers found out that “Botswana's reservation showed that not all AU members are opposed to the jurisdiction of the ICC”. Botswana has maintained its stance on its support for the work of the ICC. On the 29th to the 30th of October 2015, the ICC held a High-level ICC Regional Seminar in Botswana, on cooperation between the ICC and states, as well as the connection between cooperation and regional and national capacity building [14]. At the meeting, Botswana's Foreign Minister Dr. Ponomi Venson-Moitoi (nominee for the AU Commission Chair) called upon states to 'strengthen relations between the African States and the Court by engaging and identifying critical measures that will improve African States communication channels with the Court (ibid).

Other AU member states that support cooperation with the ICC includes Nigeria, Ghana, Cote d'Ivoire, and Mali. For example, Cote d'Ivoire cooperated in the arrest warrants and surrendered Laurent Gbagbo and Charles Ble Goude to the ICC. Niger handed over Ahmad Al Faqi Al Mahdi who was accused of the war crime of intentionally directing attacks against historic monuments and buildings dedicated to religion, including nine mausoleums and one mosque in Timbuktu, Mali, in June and July 2012 [14]. The above examples show that some African countries still consider the ICC as a relevant judicial body, thus basing on the above there is hope that if former Sudanese President Omar al-Bashir visits one of the above African countries he will be arrested. On the 22nd of January 2020, the Court of Appeal of Kenya ruled that 'Kenya was and is bound by its international

obligations to cooperate with the ICC to execute the original warrant issued by the ICC for the arrest of former President Al Bashir when he visited Kenya on 27th of August, 2010 and in future should he return to Kenya if the warrants are still in force”.

Accordingly, the Court of Appeal of Kenya, concluded that the government's failure to arrest former Sudanese President Al Bashir was inconsistent with applicable international and domestic instruments. A similar position was also reached by the South Africa High Court. These recent developments provides an opportunity for the ICC to arrest Al Bashir.

Despite convincing arguments on the ineffectiveness of the role of the ICC in the prosecution of Al Bashir, this researcher maintained that although the ICC is not a perfect institution, it is the only alternative court of last resort that can deal with human rights and international humanitarian law violations as well as impunity in the continent.

4.9. Way Forward

Basing on the development at the ICC where the ICC Prosecutor is now given powers more powers after the Afghanistan case. The researchers discovered that the decision by the ICC to authorize the Prosecutor to investigate US forces clearly show that the ICC is committed to prosecute perpetrators of international crimes and to seek justice for victims of war crimes and crimes against humanity, even including the untouchables of the world. From a legal perspective, this will affect the new Sudanese government in its quest to be a good international citizen, if it continues to violate international law. Thus, the Sudanese Government should be ready to cooperate with ICC on the Al Bashir's case since Sudan is by bound by the Geneva Conventions, which require perpetrators of war crimes to be prosecuted.

The new Government in Sudan is likely to put too much trust in the ICC since local courts have failed to deal with individuals who have committed crimes against humanity and war crimes including arrest of former Sudanese President. Thus, the ICC's jurisdiction in Sudan is justifiable and this have implications to the new Sudanese government to show commitment and respect of international law. The researcher discovered that on 9th of June 2020, one suspect who committed war crimes and crimes against humanity in Sudan, Ali Kushayb who was the leader of the Janjaweed militia surrendered himself to the ICC in the Central Africa Republic. This development is important in the case that it shows prospects of the arrest of former Sudanese President Omar Al Bashir.

This researcher also discovered that the decision by the ICC to authorize the Prosecutor to investigate US forces is important to the ICC focusing on the US standpoint that the US Government will not cooperate with ICC or to join the ICC or to assist the ICC. It remained unclear how the ICC would further investigations without the cooperation of the then Trump administration or Afghan government, since the Afghan officials have objected to the inquiry arguing that they had set up their special unit to deal with the issues raised by the ICC. Thus, this situation act as a litmus test on the enforcement mechanism of the ICC.

This researcher discovered that the main challenge faced by of non-cooperation by African states and Sudan. However the non-cooperation stance by African countries is not uniform, some states Botswana, Nigeria, Ghana, and recent court decisions in Kenya have expressed their willingness to cooperate with the ICC on arresting Al Bashir hence creating possibilities that former Sudanese President Al-Bashir will be prosecuted.

5. Conclusion

From the foregoing, this study concludes that former President Al Bashir will be arrested although the ICC has been facing a lot of challenges. The main challenge is that of non-cooperation by African states and Sudan. The non-cooperation stance by African countries is not uniform, some states Botswana, Nigeria, Ghana, and recent court decisions in Kenya have expressed their willingness to cooperate with the ICC on arresting Al Bashir. This study concludes that liberal institutionalism is at play on the role of the ICC in Sudan and there is a need for cooperation by states to realise the effectiveness of the ICC in dealing with crimes against humanity in Sudan committed by Al Bashir.

This study concludes that without African countries' cooperation, the arrest of former Sudanese President Al Bashir was hard to come by. This was worsened by continuous boycott by African states to cooperate with the ICC and the move by African countries to set up a continental criminal court to deal with crimes against humanity. This researcher led to the call for the operationalisation of the African Charter on Human and People's Rights and proposals by African states to pull out of the ICC.

This study concludes that the ICC's practice of selective prosecution based on geopolitical considerations, has been one of the issues why African countries have been skeptical about the role of the ICC in prosecuting former Sudanese President Omar Al Bashir for crimes against humanity and war crimes.

This researcher recommends that African states and the AU should consider contributing and cooperate with the ICC about the arrest of former Sudanese President Al Bashir. There is a need for the African countries which are states parties to the Rome Statute to understand that they have an international responsibility in the Rome Statute to collaborate and cooperate with the ICC.

Because the conclusion in this research focused on non-cooperation by the Sudanese government as of the challenges faced by the ICC in arresting former Sudanese President Al Bashir. This study recommends that there need for commitment by the new government in Sudan to surrender Al Bashir to the ICC. If the government is willing to deal with the Al Bashir case there is also a need for the new government to restate its commitment to fight impunity. This commitment encompasses the fight against war crimes and crimes against humanity.

This study recommends that the ICC should come up with treaties forcing nations to surrender offenders either to the ICC or those countries that can try the culprits for crimes against humanity and war crimes among other crimes within the Rome Statute. There is a need to revisit the issue of subsidiarity and consider what could be improved at the country level, strengthening the link between national, regional, and international courts. The ICC should also take into consideration atrocities committed by the USA and its allies in Syria, Iraq and Afghanistan, and leaders such as Syrian President Assad who has been accused of using chemical weapons in the Syrian civil war. This will solve the issue that ICC is only targeting Africa.

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