



## ISS Seminar Report

**Title:** President Al-Bashir on Trial? The Legal and Political Implications of the Pending ICC Arrest Warrant for Sudan  
**Place:** ISS Conference Room, Pretoria  
**Date:** Wednesday, 25 February 2009

### Speakers and topics:

1. **Godfrey Musila**, Senior Researcher, International Crime in Africa Programme (ISS)  
The Legal Implications of Arrest Warrant in the al-Bashir's Case
2. **Paula Roque**, Researcher, African Security Analysis Programme (ISS)  
The Political Implications of al-Bashir's Arrest Warrant

**Chair:** Richard Cornwell, African Security Analysis Programme, ISS.  
**Rapporteur:** Ottilia Maunganidze, Intern, African Security Analysis Programme, ISS.

In July 2008, Luis Moreno Ocampo, the chief ICC prosecutor asked the court's judges to indict President Omar Hassan al-Bashir for genocide, war crimes and crimes against humanity committed in Darfur. UN officials have put the death toll at being around 300 000 and say that approximately 2.7 million have been left homeless since 2003. Al-Bashir has rejected the charges, rejecting particularly the use of the term "genocide", arguing that approximately 10 000 people died in the conflict in 2003. If formally charged, al-Bashir would become the first sitting head of state charged with genocide.

On 12 February, it was reported that the International Criminal Court (ICC) had decided to indict the Sudanese president, Omar Hassan al-Bashir, and that a warrant for his arrest had been issued. The indictment is reportedly for the commission of war crimes in the Western Sudanese region of Darfur. It was reported that some United Nations officials had said that the decision had been widely anticipated and that it would be made public later this month. The ICC denied having indicted or issuing a warrant for the arrest of al-Bashir. On 23 February 2009 the ICC issued a statement that the decision on whether to indict al-Bashir would be made on 4 March 2009. The possibility of this indictment raises legal and political questions.

On 25 February, the International Crime in Africa and the African Security Analysis Programmes of the ISS hosted a seminar that focused on the legal and political impact of the indictment. The aim of the seminar was to clarify misperceptions relating to this indictment that have been fuelled by the media. In doing so, the seminar ultimately sought to highlight the legal and political implications of the ICC indictment of al-Bashir. Richard Cornwell, in his introductory remarks, noted that the seminar was happening a week before the indictment is expected to come through and that as a result will help in ensuring that people are well informed. Cornwell pointed out that Sudan remains in a state of turmoil and that while the indictment of al-Bashir is significant, the internal dynamics of the country are the ones that will determine Sudan's future not merely the indictment of its president. He ended his introduction by noting that the indictment has implications on international law, as well as national and regional politics.

The first speaker, Mr. Godfrey Musila of ICAP, discussed the legal aspects of the indictment. In doing so he examined the legal history of the matter, matters of jurisdiction and immunity, and obligations that this indictment can impose.

Musila stressed the necessity of understanding the legal history, as it provides the source of the ICC's authority to indict al-Bashir.

On 18 September 2004, the UN Security Council passed Resolution 1564 on the establishment of the International Commission of Inquiry on Darfur (ICID). In October of the same year the UN Secretary-General appointed members to the ICID. The members of the ICID rendered a report to the ICID on 25 January 2005 relating to the situation in Darfur. Following this report the UNSC passed Resolution 1593 on 31 March 2005. This latter resolution was passed to refer the situation in Darfur to the International Criminal Court. It is on this premise that the ICC has authority to indict and have Sudanese President al-Bashir arrested and tried.

Musila then turned to the issues of jurisdiction and immunity. According to Musila, the legal obligations for states are derived from two key legal instruments:

- 1) •UNSC 1593
- 2) •Rome Statute of the ICC and its Rules

The ICC has jurisdiction over crimes in Darfur by virtue of these two instruments. Resolution 1593 was expressly passed to deal with cases arising out of the situation in Darfur. In terms of the Rome Statute, crimes that can be tried at the ICC are, genocide, war crimes, crimes against humanity, and at a later date, the crime of aggression. Articles 13, 14, 15 and 16 of the Rome Statute are relevant to the case being made against al-Bashir. Musila noted that there had been debates over whether al-Bashir could be tried while still in office. He pointed out that the Rome Statute, in article 27, expressly states that the official capacity of a party to appear before the court is irrelevant. However, Musila noted that the position under customary international law is different. Customary international law has implications for what states can or cannot do.

Musila then turned to focus closely on Resolution 1593. He noted the importance of Article 16 of the Resolution, which deals with the deferring of cases by the ICC. In this regard he argued that the interests of peace, especially given that the ruling Sudanese NCP and one of the major rebel movements (Justice and Equality Movement) are currently holding peace talks, may require that al-Bashir's trial be deferred by at least a year. Calls for the indictment and/or trial to be deferred have come across the political sphere, with African countries being the most vocal.

Musila highlighted the importance of article 98 of the Rome Statute. A combined reading of Article 98 and Resolution 1593 establishes that the head of state (al-Bashir) and all other parties to the conflict in Darfur shall cooperate fully with and provide any necessary assistance to the ICC and the Prosecutor. He reiterated that Sudan was bound. However, he noted that the Statute does not bind regional organizations, like the African Union, though it invites the AU to work with the court and the prosecutor. He pointed out that the AU charter recognizes the fight against impunity and that by implication; the AU is obligated to cooperate and assist the court in its work in Darfur.

With regards to the obligations that the Rome Statute places on state parties, Musila highlighted that the Rome Statute has been ratified by 108 states, 30 of who are African. These states have agreed to cooperate with the ICC through offering necessary assistance, particularly with regards to the arrest and surrender of those indicted. However, in terms of Article 98 (1) of the Rome Statute, respect must be afforded to diplomatic immunity. He pointed out that apart from the obligations on states parties to cooperate and assist the court (art 86, 93 Rome Statute), states also have preexisting obligations under doctrines of customary international law (Vienna Convention on Diplomatic Relations) regarding to state and diplomatic immunity. In terms customary international law heads of state have material and personal immunity. According to Musila, while al-Bashir as head of state is protected by diplomatic immunity, this does not mean he is immune to prosecution for crimes against humanity and genocide as these do not fall within the ambit of his office. As of today, a head of state, material immunity having been excluded in respect of ICC crimes, can claim only personal immunity.

Musila noted that while governments are obliged to arrest and surrender, article 98(1) on diplomatic immunity creates a competing obligation in respect of a sitting head of state. States can legitimately decline to act on account that they would be acting in breach of their obligations under international law. This apparent conflict between norms of equal normative character in the Rome Statute will have to be resolved. The practicalities of apprehending a sitting head of state will most likely play a role in determining in favour of which norm that conflict is resolved.. With regards to Sudan, it is al-Bashir – as president of the country – who would have to issue the directive. Musila concluded by saying that other than the fairly remote *possibility* of arrest, there are no direct sanctions on al-Bashir such as an asset

freeze. He is currently not prohibited from traveling outside of Sudan. and states can still legally conduct diplomatic relations with him. Some states may, because of negative perceptions choose not to do so for political reasons. In view of fairly entrenched norms of customary law, it is improbable that the Security Council would make such an order (travel) while al-Bashir remains head of state and the face of Sudan in foreign relations. However, he would have to be careful where he travels due to uncertainty over whether he could be grabbed and sent to the Hague irrespective of state obligations contained in article 98(1) of the Statute as discussed.

The second presenter, Paula Roque (ASAP) discussed the political implications of the indictment. She noted that, due to the dynamic nature of politics and the situation in Sudan, the implications she would discuss would be mainly speculative. She stated that the political costs to Sudan of al-Bashir's indictment in the short-run could be very serious but if justice is denied in the medium and long-term the costs for peace and stability in Sudan be even higher. Her main concern being that the peace process would be compromised. However, it was highlighted that by inserting the element of accountability in the democratic/political transformation of Sudan will not only counter the pervasive culture of impunity but it will also indirectly provide the narrative to reverse and acknowledge historic injustices and all the other root causes of Sudan's conflicts.

She noted that in two other cases when heads of state of were indicted, i.e. Slobodan Milosevic (Serbia/Kosovo) and Charles Taylor (Liberia); while there had been fears of peace being compromised, that was not the case and in fact progress was made. She was, however, quick to point out that the circumstances were different but that lessons could still be learnt.

In her discussion about peace and stability in Darfur, Roque noted that the UNSC and the Office of the Prosecutor will have to consider if the prosecution could threaten the life of the nation by helping create a situation in which further serious crimes are committed. She pointed out that the implementation of the 2005 Comprehensive Peace Agreement signed by the ruling NCP and the SPLM could potentially be compromised if the indictment comes through. Key political actors within Sudan, northern opposition parties, and even the Sudan People's Liberation Movement (SPLM), have declared their preference for constitutional stability over justice. She also pointed out that Sudan needs to transform itself into multi-party democracy and that al-Bashir's indictment could adversely affect the common national project of the CPA. Concerns were raised that if the 2009 general elections do not proceed due to internal instability the possibility for a peaceful exchange of power in Sudan will disappear.

Roque went on to discuss how the pursuit of justice during ongoing conflicts has been criticized and cautioned by many as an impediment to peace and stability. This is how the current debate regarding the ICC's actions in Sudan is being framed. Diplomats and analysts point to the implosion of Sudan, to the collapse of the North-

South Peace Agreement (CPA2005), to an escalation of violence in Darfur, to palace coups, to the expulsion of the humanitarian community from the country, of UNAMID and UNMIS.

She noted, however, that at this stage all these scenarios are purely speculative and difficult to sustain based on the unpredictability of Khartoum's reaction to the indictment of al-Bashir, to external reactions from the African Union, the Arab League, neighboring countries and the larger international community, and the ability of the Government of National Unity to rise above this and continue with the implementation of the CPA – and prepare for upcoming general elections (July 2009).

Roque, then presented several possible scenarios and ramifications that have emerged within the research community of what could arise if al-Bashir is indicted and an arrest warrant issued. These are:

1. *Internal Coup and split within ruling NCP*

Roque argued that the news of indictment has already shaken both the presidency and the ruling party. She argues that there may be a split within the party with one camp supporting al-Bashir and the other regarding him as a liability. She pointed out, however, that at the moment al-Bashir still enjoys the loyalty of the armed forces. A different variation of this scenario would see the President step down and seek exile in a country like Saudi Arabia that is not a signatory to the Rome Statute.

2. *Imposition of Martial Law*

This would entail a dissolution of parliament and declaring a state of emergency, with the government being compelled to express outrage by internally mobilizing its bases of support on the grounds that this is an external attack on the nation's sovereignty. The detention of further opposition leaders and supporters could follow as part of additional repressive measures aimed at regime survival.

3. *Attack on strategic locations by Rebels*

In this scenario the indictment of al-Bashir could see rebel movements, claiming that the international community supports their cause, continue fighting government forces and militias, and pushing for military gains in strategic locations. However, Roque argued that this was an unlikely scenario given the present negotiations with the Justice and Equality Movement (JEM) in Doha, and the fact that since the attack on Omdurman in May 2008 changes have been made to the security apparatus not to allow for a rebel advance to reach the capital.

4. *Breakdown of the CPA*

The indictment is likely to slow the implementation of the CPA and the political process attached to it. As one of the only two co-signatories of the Agreement, any instability within the NCP could erase the political will to continue the process. If there is a collapse of the CPA – a resumption of war is

a possibility as is a unilateral declaration of independence by the government of Southern Sudan.

5. *Defiance and Business as Usual*

Roque noted that the African Union and the Arab League are in support of a deferral of the indictment to allow for elections and the possibility of peace. She suggested that as a result one likely scenario is that nothing substantial will change in Sudan or in its relations within the region, and that elements of the international community could ignore the warrant and continue to cooperate with Khartoum.

The following are more ramifications of the indictment and warrant than scenarios:

6. *Challenges to Diplomacy*

The indictment will change the rules of engagement with regards to how the UN and signatories to the Rome Statute will cooperate officially with a government whose Head of State they have an obligation to arrest. The Government of Sudan has stated that it will honor all its agreements with the international community and allow for the continued presence of UNMIS and UNAMID. However, with an indictment and arrest warrant the regime in Khartoum will feel undermined and perhaps reluctant to honor these commitments. The contradiction then arises of how to deal with a partner that is considered illegitimate. How can the international community expect Khartoum to implement peace processes and at the same time be supportive of actions that are perceived to undermine the Presidency.

7. *Shrinking Humanitarian space*

Roque lamented the humanitarian crisis in Sudan and noted that there are an estimated 2.5 million internally displaced persons (IDPs) in Darfur alone. She also pointed out that hundreds of thousands are in need of immediate humanitarian aid and she argued that the indictment of al-Bashir could see a government crackdown on humanitarian workers. If the UN and NGO's were forced to leave the country, the humanitarian crisis would worsen with an increase in these figures and this could impact the region even further due to large flows of refugees.

8. *Opportunity for Peace*

The last scenario suggests that there is a real possibility that the indictment could forge a way for peace, as was the case in Kosovo following Milosevic's indictment and Liberia following Taylor's, by changing the dynamics of conflict in Sudan. The warrant would also provide a powerful leverage tool to change the calculations of the political actors, many of which may find themselves on the list of 51 individuals potentially facing indictments and arrest warrants.

To conclude, Paula Roque finished by stating that although justice would begin to be served with al-Bashir's trial, the remaining obstacles to peace and stability would still need to be addressed. These would include other elements in Khartoum, within the rebel movements in Darfur, the militias and others involved in sustaining the

war and responsible for conducting atrocities against the civilian population in the country that would continue to support an apparatus and war strategy even after the President is removed.

Peace and justice in Sudan goes beyond the scope of criminal justice, however important that element is, and must be looked upon through the prism of governance, social inclusion, political representation, economic justice, the compensation of victims and the restitution of property, the issue of land rights, sustainable development, the need for domestic accountability mechanisms, among others. Although the extraction of President al-Bashir from the national equation might change the political dynamics in Sudan, any form of substantive reform will depend on the political and economic transformation of the state.