



Assessment of the International Criminal Court's Prosecutor Role in Darfur Crisis, Sudan (the case of Omer Al-Bashir)

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Abstract

In various countries throughout the world when rebel groups make an attack on innocent civilian and commit gross human rights violation, it is not punishable by the national courts. However, in 1998 a groundbreaking idea turned into reality, and 50 years of debate ended as the first International Criminal Court was established as a result of the Rome Statute. The Court entertains or investigates different crimes which are committed in its member's states across the world. However, the writers of this paper prefer the situation in Darfur; the case of Al Basher is selected as a context to discuss the role of the ICC Prosecutor. This is mainly preferred because Sudan has been the first situation referred by the Security Council since the ICC was established and the state concerned Sudan is not a party to the Rome Statute, therefore this situation has its particularities compared with others. In spite of this a lot of controversies and misconceptions are being witnessed on the understandings and implementation of international laws in Africa between ICC and African leaders. Basically, the controversy and misconception is not something emanates from the vacuum rather they are generated from various prevailing thoughts. African states accuse ICC as a neo colonialist institution targeting African leaders in addition to alleging ICC as playing double standard role in African and the rest of the world for instance ICC prosecution till now only in Africa in spite of Israel-Palestine and Afghanistan where the western countries have major interest from the conflict. Hence, the analysis of role the International Criminal Court's Prosecutor in Darfur Crisis, Sudan (the case of Omer Al-Bashir) is centered in line with main objective of the establishing Rome Statue in July 2002 which thrives that all member states of UN have to have the same standard in their respective territories.

Keywords: International Criminal Court; Prosecutor; Rome Statue; Sudan

Introduction

In many conflicts around the world, armies or rebel groups attack ordinary people and commit terrible human rights abuses against them (Human Rights Watch, 2007). Often, these crimes are not punished by the national courts. However, in 1998 a groundbreaking idea turned into reality, and 50

years of debate ended as the first International Criminal Court was established as a result of the Rome Statute. It is a responsible organ for trying people accused of the most serious crimes of international concern – genocide, war crimes and crimes against humanity.

It is composed of four organs. These are the Presidency, the Judicial Division, the Office of the Prosecutor and the Registry. Among these organs, the Office of the Prosecutor is responsible for receiving referrals and any authenticated information on crimes within the jurisdiction of the Court, for examining them and for conducting investigations and prosecutions before the Court. The Prosecutor is a crucial figure among those international legal professionals in the Court, each of whose conduct would have long-term global impact, in particularly at the current phase of the Court's whole life.

The International Criminal Court entertains or investigates different crimes which are committed in Africa like Congo, Uganda and Kenya etc. However, the writer of this paper opt the situation in Darfur, the case of Al Basher is selected as a context to discuss the role of the ICC Prosecutor. This is mainly preferred because Sudan has been the first situation referred by the Security Council since the ICC was established and the state concerned Sudan is not a party to the Rome Statute, therefore this situation has its particularities compared with others.

In judicial process of this situation, there are some disagreement on the Prosecutor's investigative strategy and prosecutorial approach. As laid down in the Rome Statute, the Prosecutor's major task is to investigate crimes falling within the jurisdiction of the ICC and to present cases at trial and on appeal if necessary. The prosecutor usually develops his work in outside the courtroom and in the courtroom. The tasks in the two places require different skills, strategies and personal qualities.

For examining and evaluating the role of the ICC Prosecutor, the study would thus be based on such two scenarios. The Prosecutor's task begins outside the courtroom. It walks out of the court for conducting investigation of crimes, identifying suspects and seeking cooperation and support for surrender of the identified suspects. After the surrender of suspects, it will be present in the courtroom to prosecute the accused. The successful prosecution of those perpetrators committing grave international crimes will ultimately serve the object of the ICC establishment.

Thus, this paper is intended to assess the role of the ICC Prosecutor how it carries out its mission and fulfills its mandate; to what extent it exercises its power and discretion for the pursuit of international criminal justice and the impact of its performance in relation with Darfur crisis, the case of al-Bashir. Furthermore, the writers also focus on demystifying some of the criticisms levied against the Court in the exercise of its mandate particularly in the African situation countries.

1. General Overview on International Criminal Court

1.1. What is International Criminal Court?

The ICC is a permanent international institution with its headquarters in Hague, Netherlands. The ICC is a criminal court with a very precise mandate that gives it the possibility to try individuals accused of certain crimes and if found guilty, to sentence them accordingly. It employs specialized investigators, prosecutors and judges, amongst others, to fulfill its responsibilities.

Its purpose is to investigate the most serious crimes of world nations that goes against international law which is committed by men, not by abstract entities, and only by punishing individuals who commit such crimes ensure the provision of international law can be enforced. States have an

obligation to respect human rights and to ensure that their laws and their institutions afford adequate protections to individuals. Any individual is responsible for crimes such as genocide, crimes against humanity or war crimes no matter what his or her official position, even if he or she is a Head of State or high level government or army official. The ICC has a role in ensuring that this happens, with the Prosecutor focusing on those who bear the greatest responsibility (Accountability and Justice for International Crimes in Sudan, 2007).

In March 2005, the UN Security Council referred the situation in Darfur to the ICC and investigations began in June 2005. In March 2009, the Court issued an arrest warrant for Sudanese President Omar al- Bashir, charging him with multiple counts of war crimes and crimes against humanity (www.worldwithoutgenocide.org/ICCandDarfur).

The allegations against Bashir accuse the leader of directing and causing the atrocities committed in Darfur by his government and by government-backed militias (ICC pre –trial chamber I, 2009). Though Bashir remains at large, the arrest warrants from the ICC prevent him from traveling to countries that are State Parties to the Rome Statute and added scrutiny and pressure to curb atrocities committed on behalf of the Sudanese government.

The surprising thing is that although, the Security Council referred the Darfur situation to the ICC, the Council itself has not been prepared to authorize military intervention to stop the killing, suggesting that as in Rwanda and the Balkans, international courts are being used in the aftermath of violence in circumstances where the international community is not prepared to act to stop the violence while it is occur (www.worldwithoutgenocide.org/ICCandDarfur).

2. The Jurisdiction of the International Criminal Court

Though the International Criminal Court has a mandate to investigate serious international crimes like genocide, war crimes and crime against humanity etc. that take place on or after 2002, the court doesn't intervene on the internal affairs of other states arbitrarily unless a national system is unable or unwilling genuinely to investigate or prosecute fully and other requirements are fulfilled. In a nut shell, there are different parameters or criteria's that should be fulfill to settle the serious intentional crimes that goes against international law i.e. serious international crimes that violate the fundamental human rights and peace and security of the globe.

Even if one of the afro-mentioned crimes is said to have taken place on or after 1 July 2002, the Court will only be in a position to act if the following further criteria are met: The Court will have jurisdiction over the crime if it is said to have been committed within the territory of a country that has agreed to be bound by the ICC Statute ; or the crime is said to have been committed by a person who is a national (citizen) of a 'State Party ' i.e. the Court will have jurisdiction over the crime if it was committed by someone who is a citizen of a country that has agreed to be bound by the ICC Statute ; or the case is referred by the UN Security Council i.e. the Court will have jurisdiction where the United Nations Security Council decides to refer the case to the ICC, such as what has occurred with the situation in Darfur; or when State voluntarily submits to the jurisdiction of the ICC ;the Court will have jurisdiction where a country that is not a 'State Party' to the ICC Statute submits voluntarily to the Statute (ICC(Art.5),2002).The International Criminal Court can investigate the case occur throughout the globe when one of the above criteria is met.

3. *The Case against al-Bashir*

The roots of the ICC arrest warrant can be traced back to Chapter VII of the UN Charter, which prescribes a number of measures that may be taken in response to threats to the peace, breaches of the peace, and acts of aggression. In this regard, Article 39 of the Charter entrusts the Security Council with the power to determine the existence of any threat to the peace, breach of the peace, or act of aggression and to make recommendations, or decide what measures are appropriate to maintain or restore international peace and security (Ntoubandi, 2009:128).

Depend on this provision, on March 4, 2009; ICC judges issued an arrest warrant for Sudanese President Omar Hassan al-Bashir (Worsnip, 2009). The warrant holds that there are “reasonable grounds” to believe Bashir is criminally responsible for five counts of crimes against humanity and two counts of war crimes, referring to alleged attacks by Sudanese security forces and pro-government militia in the Darfur region of Sudan during the government’s six-year counter-insurgency campaign(ibid).

The ICC warrant states that there are reasonable grounds to believe attacks against civilians in Darfur were a core component of the Sudanese government’s military strategy, that such attacks were widespread and systematic, and that Bashir acted “as an indirect perpetrator, or as an indirect co-perpetrator (ICC Pre-Trial Chamber I,2009).In his application for an arrest warrant, filed in July 2008, the ICC Prosecutor affirmed that while Bashir did not “physically or directly” carry out abuses, “he committed these crimes through members of the state apparatus, the army, and the Militia as president and commander-in-chief of the Sudanese armed forces(ibid).

However, in the application for an arrest warrant in July 2008, the ICC Prosecutor accused Bashir of three counts of genocide, making the Sudanese president the first individual to be accused of this crime before the Court. The Prosecutor alleged that Bashir “intends to destroy in substantial part the Fur, Masalit and Zaghawa ethnic groups as such” through coordinated attacks by government troops and Janjaweed militia (Brauman, 2010).

The ICC advocated that all States, whether party or not to the Rome Statute, as well as international and regional organizations should cooperate fully with the warrant (ibid). However, most observers agree that there is little chance of Bashir being arrested in Sudan. One analysis noted that while Bashir may risk arrest if he travels overseas, “no one expects Sudan to hand over Bashir, who has been executive ruler of the country for more than 15 years, absent major political changes in the country (Worsnip, 2009).

Many human rights advocates welcomed the attempt to bring genocide charges. However, the formulation of the Prosecutor’s accusation has drawn some criticism. The U.N. Commission of Inquiry concluded in its January 2005 report that the violence in Darfur did not amount to genocide, although “international offences such as the crimes against humanity and war crimes that have been committed in Darfur may be no less serious and shocking than genocide (Report of the International Commission of Inquiry on Darfur,2005) However; some critics contend that the Prosecutor’s application concerning genocide did not sufficiently establish intent or Bashir’s alleged role.

The Sudanese government signed the Rome Statute on September 8, 2000, but did not ratify it. On August 26, 2008, Sudan notified the Secretary-General of the United Nations, as depositary of Rome Statute of the International Criminal Court that Sudan does not intend to become a party to the Rome Statute. Accordingly, Sudan has no legal obligation arising from its signature on 8 September 2000(Congressional Research Service Report, 2011).

The Bashir Administration has rejected ICC jurisdiction over Darfur as a violation of its sovereignty and an instrument of Western pressure for regime change, and accused the Court of being part of a neocolonialist plot against a sovereign African and Muslim state though the prosecutor warrant for arresting him (ibid).

4. Why Would Bashir Be Responsible for Crimes Committed during the Conflict in Darfur?

Over the last five years, Bashir has been the President of the Republic of Sudan, Commander in Chief of the Armed Forces, and head of the National Congress party. He has also headed the recruitment and arming of Janjaweed militias from this position (International Human Rights Federation, 2009). Thus, Bashir has been in complete control of state institutions in Sudan. For five years, he has denied the existence of crimes in Darfur. As the ICC Prosecutor has pointed out, the denial of crimes and cover up, as well as shifting responsibility to others, are characteristics of planning and perpetrating this type of crimes.

As President and Commander in Chief of the Sudanese armed forces, Bashir is accused of having ordered, and encouraged the perpetration of the most heinous crimes. The Pre-trial Chamber decided that there are reasonable grounds to believe that Al-Bashir is responsible for crimes against humanity and war crimes, including murder, extermination, forced displacement, torture, rape, attacks against civilian's population and pillage. The Pre-Trial Chamber concluded that the Prosecutor failed to provide reasonable ground proving the intent to destroy in whole or in part the ethnic groups, constituting the crime of genocide (ICC Pre-Trial Chamber I, 2009).

5. Why is ICC Interested in Darfur and Bashir and not in the Israel-Palestine conflict or in Acts Committed by the United States during the War in Iraq?

The Court has currently no jurisdiction to investigate the Israel-Palestine conflict or the war in Iraq, since Israel and the United States have not ratified the ICC Statute. It is true that Sudan is not a State Party either, but the Court has jurisdiction there through Security Council Resolution 1593, adopted under Chapter VII of the UN Charter, on the basis that this conflict constitutes a threat to international peace and security (International Human Rights Federation, 2009). NGOs, especially those which are part of the international Coalition for the ICC, have criticized this situation and have conducted campaigns for the ICC Statute to be ratified by as many states as possible.

Other states and international institutions should also push to make sure that the ICC becomes truly universal. The ICC Prosecutor's decision to initiate legal proceedings against Sudanese President al-Bashir did however increase the sense of bias of this institution. It has been said that the ICC would be "going after Africa", "against the poorest countries in the South", and would therefore be partial (ibid).

However, all these arguments fall short of an objective assessment of the matter. Firstly, it is important to underline that African States currently constitute one-third of the States Parties to the Statute. They have recognized and accepted the ICC jurisdiction over their territory and their nationals. Secondly, it is because they had ratified the ICC Statute and, therefore, accepted its jurisdiction, that three out of four States currently under investigation have themselves referred the situation to the ICC. Of utmost interest in Africa's relationship with the ICC are the self-referrals that have been made by African State Parties to the Rome Statute.

This mechanism has its bearings in Article 14 of the Rome Statute which provides that a State Party to the Rome Statute may refer to the Prosecutor a situation in which one or more crimes within the

jurisdiction of the Court appear to have been committed, requesting the Prosecutor to investigate the situation for the purpose of determining whether one or more specific persons should be charged with the commission of such crimes (Africa and the International Criminal Court, 2012).

Thus, the self referral mechanism also facilitates access to witnesses and evidence, the arrest of suspects as well as protection for the team of the Prosecutor and other involved parties. They have themselves requested that the Prosecutor opened an investigation into the crimes perpetrated on their territory, thus recognizing their lack of capacity to carry out investigations and prosecutions for those crimes. As far as the situation in Darfur is concerned, the Security Council's involvement was justified by the gravity of the situation in the Western region of the Sudan since 2003.

A conflict which has brought about the displacement of over two million people and has made thousands of millions of victims of international crimes constitutes a threat to international peace and security in the region. Finally, the seriousness of the crimes is a crucial criterion for open investigations at the ICC level.

6. Enforcement Mechanism of International Criminal Court

Thought there are various international treaties that govern the international communities, its enforcement is not as such effective since there are no international police forces that execute the decision of international courts. Thus, it is up to State Parties to the ICC Statute to execute the arrest warrants issued by the Court. As explained above, the Sudan has an obligation to cooperate with the Court, including through execution of warrants of arrests related to the ICC investigation in Darfur. Hence, in the case of the Darfur situation, all United Nations' Member States must cooperate with the ICC so that it can carry out its investigations and prosecutions because the Security Council decided to refer the situation to the ICC by a resolution under Chapter VII of the United Nations Charter.

However, the enforcement of the international criminal court prosecutor decision is not put into effect in the case of al-Beshir. A court is like traffic light, it stipulates prohibition of an act or omission and impose penalty when one violates, but they do not themselves catch the suspect or the violator or stop the violation (Mehari, 2007).

This is mainly because the enforcement is based on the cooperation of international community and the commitment of member state of the international criminal court due to the absence of an independent international police force. But to do this, first and for most, the most powerful state of the world like china and USA are not cooperate with the International Criminal Court.

China opposition and lack of cooperation emanates from its interest of oil imports from Sudan and also the sole superpower, USA, has entered bilateral agreements with several countries that aim to exempt its officials from being prosecuted under ICC (ibid). Moreover, the member state is not committed to cooperate with international criminal court, for instance, South Africa is the members of international criminal court but she cannot and handover al-Beshir to the court recently. Beside this, to think the people of Sudan give their leader to the court is not as such satisfactory because of different internal and external factors.

Conclusion

Throughout the history and evolution of an international criminal court from World War II on, the need has never been a debatable topic. The need, due to the inevitability of humans acting inhumane

towards their fellow man, especially in conflict areas, will always be present. It is an adolescent institution that must function in an international system without full global support and especially lacking in support from major global powers on serious international crimes like genocide, war crimes, aggression and crime against humanity that challenges international peace and security of the globe. When this occurs, major powers such as the U.S. and China can ill afford to ignore the criminal court.

Though, the court accused the Sudanese leader who is responsible for the killing of many people in Darfur via the UN security council referral of the case, it is not effective to warrant him due to the absence of international police force, lack of international cooperation and absence of authentic commitment from its member states.

Its ineffectiveness may be generated due to its biased and selective measurement in the weak state particularly it imposes high burden on African states, though, there are different international crimes occurred in recently in different parts of the world in which the international criminal court remains deaf ear to entertain the cases. It seems like agents that execute the foreign policy of the west so as to accomplish or make successfully their concealed agenda.

If the Security Council and ICC stand for mitigating international crimes and to save the life of Sudanese people why not they ask the hands of international community and take an effective measure to save the life of so many civilians killed in Sudan than rushing to warrant a single individual. In a nutshell, beyond the above things, the court also doesn't properly apply the principle of complementarity and reasonability (articulating the reasonable evidence from the ill-founded one because as we have discussed even there is a doubt whether there is the act of genocide or not and whether the al Beshir intentionally resorted to take the life of civilians in Darfur or not.

Recommendations

The writer of this paper forwards the following suggestion to ICC so as to perform its objective effectively:

- ❖ The international criminal court should establish its own international police force to execute its decision.
- ❖ The Court should uphold an apolitical role in the fight against impunity so as to keep its reliability among African state leaders and the victim communities. In line with this, the Court should take independent investigation in all jurisdictions where severe crimes are suspected to have been committed.
- ❖ The most powerful states of the world are not the members of international criminal courts, thus, it should request them to become the members of the court.
- ❖ Take the proper measure on those member states that have neglected or failed to discharge their commitment via handover of the criminal.
- ❖ The courts should follow the exhaustion principle and investigate the case based on concrete evidence, in other words, not accept ill-founded reasons. It must be articulated really that person reasonably be suspected of being involved in the commission of a crime or not.

- ❖ The International Criminal Court also needs to demonstrate authentic support to the principle of exhaustion by assisting States and regional bodies in building domestic initiatives that can exercise mandate over perpetrators of international crimes. Currently, it appears that the Court has not proactively taken on the role of assisting national courts to develop strong domestic systems to foster accountability.
- ❖ The ICC needs to continue playing an impartial role in the fight against impunity in Africa and the rest of the world and proactively follow up situations in other jurisdictions where crimes have been committed.
- ❖ The Court should be proactively communicate and interact with different African leadership structures and to further strengthen its outreach information to the victim communities.

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