

LONG ROAD TO JUSTICE: OMAR AL-BASHIR AND THE ISSUE OF HEINOUS CRIMES IN DARFUR

James E Archibong, University of Calabar
Chidi Julius Lloyd, University of Nigeria

ABSTRACT

The International Criminal Court (ICC) in 2009 ordered the arrest of Omar al-Bashir, at that time president of Sudan, after his indictment for heinous crimes in Darfur, Sudan. The warrant was not at any time enforced. The Sudanese government argued that he enjoyed immunity as Head of State, and that Sudan was not a party to the Rome Statute. This assertion was supported by the African Union (AU). On 11 April, 2019 Omar al-Bashir was toppled by the armed forces of Sudan and replaced by a Sovereign Council. The stance of the transitional government with regard to crimes committed in Darfur is mixed and obscure. Its options include domestic trial; prosecution outside Sudan through a regional arrangement; and extradition to the ICC. It is doubtful if any domestic trial will succeed or secure justice for the multitudinous victims of the conflict. This paper suggests that the most credible way forward is for al-Bashir to be delivered to the ICC based on the subsisting indictment and warrant of arrest.

Keywords: International Criminal Court, Omar Al-Bashir, Darfur, Heinous Crimes, Justice, Accountability.

INTRODUCTION

Sudan's civil war is often associated with its colonial past (Kebbede, 1997) and divided into two phases. The first phase of the conflict occurred from 1955 to 1972, while the second took place from 1983 to 2005 (Momodu, 2018). The crises set the northern part of the country, dominated by Arabs against the southern region which is home to black Africans (Poggo, 2009). The conflicts were triggered by southern Sudanese complaints of economic and political emasculation and underdevelopment (International Crisis Group, 2004); and demand for fair representation, just apportionment of resources and regional autonomy (Sikainga, 2009).

While negotiations were in top gear to resolve the strife between north and south Sudan, hostility flared up in the western region known as Darfur in 2003 (Flint, 2010). The fighting was largely inflamed by a wider conflict which had been ongoing since 1983 between the Arab-dominated government in the north and the mainly black Africans in the south (Johnson, 2016). It was further fuelled by alleged systematic and enduring discrimination (Sedman, 2009) as well as partisan and unjust distribution of resources to the disadvantage of the Darfur people (Kahn, 2009).

In 1989, Lieutenant-General Omar Hassan Ahmad al-Bashir seized power from the civilian administration of Sadiq al-Mahdi and established the Revolutionary Command Council of National Salvation to rule the country. In the course of time he transformed himself from an army officer to a civilian president through the National Congress Party (NCP) which he founded in 1992 (Burke & Salih, 2019). The new military helmsman had some ideas on how to bring the civil conflict to an end (BBC, 2019). This was not the case as the government responded to the

grievances with extreme brutality by mobilizing the armed forces, paramilitary groups and Arab militias to crush the rebellion (Sikainga, 2009). Soon he was denounced for ruling “with an iron fist” (BBC, 2019), and his regime soon acquired notoriety for violence, oppression and gross human rights abuses (Kebbede, 1997).

The conflict in Darfur had been characterized by widespread and serious infringement on human rights and international humanitarian law (Sikainga, 2009). The horrendous crimes perpetrated principally by the Sudanese government forces and their allies attracted the attention of the UN Security Council in 2004 (United Nations, 2005b). The situation was eventually forwarded to the ICC in 2005 by the Security Council. In March 2009, the ICC indicted Mr. Bashir and directed his arrest. This marked the beginning of the ousted president’s nightmare, and Sudan government’s legal and political quagmire.

Darfur Conflict and Grave Breaches of Human Rights

The hostilities which took a huge toll on civilians (Prunier, 2008) had been inundated by despicable acts of sexual violence (Amnesty International, 2004); shrinkage of basic freedoms, prolonged and arbitrary detention without charge and without access to family members and lawyers; mass killings; destruction of villages; pillaging; alleged use of chemical weapons (Amnesty International, 2016); and scorched earth tactics (Sengupta, 2016). Detainees were tortured and ill-treated, occasionally resulting in casualties (Human Rights Watch, 2018). The Bashir administration stated that it carried out a limited operation to quell the revolt (*Economist*, 2020). In the evaluation of the UN between 300,000 and 400,000 people died in the conflict, and another three million were dislocated from their homes and villages (Simons, 2010).

The barbarity in Darfur caused an outrage within the international community and elicited a strong response. Amnesty International reported the violations in July, 2003, (Amnesty International, 2003) and many other groups followed suit (Human Rights Watch, 2004). In September, 2004, the UN Security Council set up an International Commission of Inquiry on Darfur (Res. 1564 of 2004) to inquire into the mass killings in the region (Bangamwabo, 2008). At the end of its inquest, the Commission’s report was submitted to the UN Secretary-General (United Nations, 2005a). Acting under Chapter VII of the UN Charter and its power under the Rome Statute, the report formed the basis of Sudan’s referral (Res. 1593 of 2005) to the ICC (United Nations, 2005b).

ICC Indicts Al-Bashir Amid Protests by African Leaders

The ICC was created to help combat impunity as well as foster a culture of respect for the law (Mutua, 2010). Following the referral and preliminary investigation by the prosecutor and in consonance with the foundation of individual criminal responsibility enshrined in the Rome Statute – article 25(3)(a), the Court indicted Mr. al-Bashir. The charges against him include five counts of crimes against humanity: murder, extermination, forcible transfer, torture and rape; two counts of war crimes: deliberately overseeing attacks against civilian population or against individual civilians not involved in fighting and pillaging; and three counts of genocide by killing, inducing serious bodily or mental harm, and intentionally imposing on each target group conditions of life intended to engender its physical destruction (ICC, 2009).

The charges related to incidents that occurred between March, 2003 and July, 2008. Pre-Trial Chamber I found that there was a sustained armed conflict of non-international nature involving the government of Sudan and some organized armed groups (ICC, 2009). It also

determined that an essential feature of the offensive was the decimation of members of the Fur, Masalit and Zaghawa ethnic groups regarded as adversaries of the government (ICC, 2009). Pre-Trial Chamber I also made findings as regards individuals most responsible for the crimes in Darfur. It found that al-Bashir and his military and political top brass designed a common strategy to confront the armed groups with the president playing a critical role in its coordination and implementation (ICC, 2009).

An application for arrest warrant was presented to the Pre-Trial Chamber by the prosecutor on 14 July, 2008 (ICC, 2009). The Court published the first warrant of arrest for al-Bashir on 4 March, 2009 (ICC, 2009) for war crimes and crimes against humanity (*The Prosecutor v Omar Hassan Ahmad al-Bashir* ICC-02/05-01/09). The accusation of genocide was not included in the charge sheet prompting the prosecutor to appeal against its exclusion. The appeal succeeded and the charge of genocide was included, culminating in the issuance of the second arrest warrant on 12 July, 2010 (ICC, 2009). He became the first serving Head of State to be charged by the Court, a development which wreaked havoc on the cozy relations between the AU and the ICC (Tladi, 2009). However, the warrant was never enforced (Barness, 2011) and Mr. Bashir continued to globe-trot freely (White, 2018), carrying on business as usual until he was toppled in April, 2019 following anti-government protests.

Will Bashir Ever Stand Trial for Darfur Crimes?

The change of administration in Sudan clearly signaled the dawn of a new era and brought to the apex the issue of accountability for crimes inflicted in the protracted civil war. Just after al-Bashir was dethroned, his departure triggered a new wave of agitations for accountability and justice (Dabanga, 2020). The transitional government has been grappling with a plethora of demands to send him to the ICC for trial (Bashir, 2019). The Attorney General of Sudan remarked that the authorities would probe allegations of monstrosity inflicted on the people of Darfur from 2003 (Dahir, 2019). In an interim peace deal, the government and opposition armed groups agreed to create a special court to investigate and prosecute perpetrators of crimes in Darfur, along with those examined by the ICC (Abdelaziz & Dumo, 2020). They also agreed that individuals wanted by the ICC should be surrendered for trial (Aljazeera, 2020).

The crucial issue unarguably remains whether Mr. Bashir will ever stand trial for the atrocities in Darfur (Lynch, 2020). The fear appears to be well-founded and predicated on a number of factors, essentially the fact that some of his most trusted associates, ruling party members and former ministers are serving in the transitional government (Aljazeera, 2019). A civilian member of the government said that anyone facing an arrest warrant issued by the ICC would face trial in The Hague (Pilling, 2020). However, there are no details as to how or when this might take place. The Information Minister, Faisal Salih, hinted that any decision to send him to The Hague would need the approval of military and civilian rulers (Japan Times, 2020). He outlined some options procurable by the government, namely, to invite the ICC to Sudan to conduct trials; extradite the culprit to The Hague; or establish a hybrid court to try him (Japan Times, 2020).

Accountability for Darfur Crimes: Options for Sudan

The ousting of Omar al-Bashir has afforded Sudan the avenue to achieve genuine peace through criminal prosecution. It is however not clear the nature of prosecution the country intends to pursue. While the government alludes to the fact that it can prosecute him in Sudan,

many especially in the protest movement think he and other persons wanted by the Court should be extradited. Three options are open to the government namely prosecution in a Sudanese court; trial in a regional court; or extradition to face the ICC.

Prosecution in Sudanese Court

International law vests in States primary responsibility to try perpetrators of heinous crimes. Sudanese officials have vehemently argued that they have the capacity to try al-Bashir in their courts. The Prime Minister said that Sudanese court will try al-Bashir for the heinous crimes in Darfur. The notion of domestic trial is a welcome development for reasons of national pride and prestige. It is also indicative of Sudan's capacity to manage its affairs and assert its sovereignty. Domestic trial brings justice nearer to the people and allows victims come face to face and confront their abusers in court. However such trials are usually fraught with difficulties.

The capacity of a Sudanese court may be called into question. In the Bashir scenario, domestic trial is not feasible or advisable. Domestic trials in the context of transitional justice often fall short of internationally acceptable standard. Generally, a domestic high profile trial of Bashir's kind would be a sham (Malik, 2019). National judicial process usually compromise or are too lenient or sympathetic to their former leaders. An example is the soft punishment of two years meted out to Mr. al-Bashir for corruption (Aljazeera, 2019). National trials in most cases have failed to address impunity in armed conflicts. In the post First World War Leipzig Trials, German war criminals were given ridiculously light sentences by the highest German court (Hankel, 2016). In most cases, national systems cannot guarantee fair trials and Bashir's case would not be an exception.

An option to prosecute al-Bashir in Sudan may suffer a backlash. Followers and allies of the former president may foment trouble, hinder trial and destabilize the country (Amin, 2019). Already, there are protestations by his supporters against proposals to extradite him (Pilling, 2020). This shows the former president still has many supporters who are ready to pursue his cause and defend his interests. His supporters have already spurned the suggestion of overseas judicial process being applied to matters in Sudan (africanews, 2019). A member of al-Bashir's NCP called on the interim government not to extradite him to ICC as that will discredit the judicial system in Sudan, noting that their judiciary has endured for ages and the people have faith in its professionalism and ability to deliver justice (africanews, 2019). The defence team of Mr. Bashir has mounted a strong opposition to his extradition (Amin, 2020), and this may also provoke a debilitating and subversive effect. His loyalists in the military have already staged an armed mutiny (Kukarni, 2020).

Military influence in Sudanese politics is mind-boggling and still hunting the transitional government (Allen & Grewal, 2019). The establishment which had expressed strong opposition to any plan of surrendering the former president to The Hague is still very powerful and in the saddle (Hudson, 2019). Skaar (2019) opines that while the army remains relevant, forceful and in charge of weapons, prosecution will not be achievable. The army officers who toppled him at first said it would not release him to the ICC (Carlson, 2020).

Unbroken connection between the transitional administration and defunct Bashir regime remains a hindrance to successful domestic trial. The Sovereign Council governing Sudan is unable to detach itself from the previous regime, as many of al-Bashir's loyalists are still serving in the transitional administration (Dahir, 2019). One of them is Mohamed Hamdan Daglo commander of the pro-government militia, Janjaweed, responsible for atrocities in Darfur (Mc

Ferran, 2007). Skaar (2019) suggests that while the powerful connection subsists between the transitional administration and its predecessor accused of atrocities, prosecution will be averted.

Trial in A Regional Court

Sudan also mulls the prospect of deploying a regional court to prosecute al-Bashir for crimes committed in Darfur. This view is also embraced by human rights advocates (Dahir, 2019). It may be a good proposal worth exploring, though its nature and functionality is not clear. A regional arrangement to prosecute Mr. al-Bashir is a feasible option. In this regard, the AU can take the lead as it did with regard to the former Chadian dictator, Hissen Habre, where it championed the creation of special court to conduct the trial. That model of regional court can be packaged by the AU to handle Bashir's case (Burke, 2016). The notion of a special court for Sudan is not new. In 2009, the AU established a High-Level Panel on Darfur, superintended by erstwhile South African President, Thabo Mbeki. The body advocated the creation of a hybrid court for Darfur crimes (Kritz & Wilson, 2011).

In another respect, the AU has introduced International Criminal Law section dealing with individual criminal responsibility into the apparatus of the African Court of Justice and Human Rights (ACJHR), in line with its mandate of promoting human rights in the continent. The amended Protocol endows the ACJHR with jurisdiction to try war crimes (African Union, 2014). However, the instrument has not yet secured appropriate ratifications, and has not come into force.

A regional court will satisfy the AU, which has consistently professed "African solution to African problems" (Glas, 2018). A regional trial has the potential of stemming the rift between the AU and ICC and well as dispel the former's perception of bias, racism and double standard against the ICC (Laing, 2013). From the standpoint of victims, witnesses, and concerned citizens, a regional court would be nearer and easily accessible, as against the ICC located very far away from Africa (Owiso, 2016). But the uphill task will be source of funding as neither Sudan nor the AU might be able to shoulder the financial burden.

Extradition to ICC for Trial

The third option is to surrender Mr. Bashir to the ICC based on existing indictment and warrant of arrest (Abdelaziz & Dumo, 2020). It is more than a year since he was toppled and investigation into Darfur crimes has not yet commenced as promised by the government. This can be ascribed to a number of factors among them incompetence and lack of independence of the judiciary in Sudan; absence of political will to prosecute; and influence of his associates in the corridors of power;

The argument in support of ICC is fortified by incompetence and lack of judicial independence in Sudan. The courts in Sudan must have some level of independence and competence to be able to administer justice without fear or favour. The judicial system in Sudan is in disarray and lacks capacity for fair trial (Skaar, 2019). The legal system has been described by Amnesty International's regional director, Joan Nyanyuki, as "*notoriously dysfunctional*" (Bashir, 2019). The justice sector needs rebuilding, and for the time being justice can best be obtained "*if Bashir faces a fair trial at the ICC*" (Bashir, 2019).

A critical factor that can make or mar the course of justice in Sudan is the absence of political will to prosecute al-Bashir. For the moment, there is no prospect that the government will prosecute him. The interim administration is aware that sending him to The Hague would be

regarded as a national disgrace for their onetime powerful president (International Crisis Group, 2009).

The apprehension as to whether Mr. Bashir will be prosecuted in Sudan is also predicated on the influence of officials in the transitional administration who served under him. The critical point therefore is that many of his loyalists are not ready to take a hard-line position against their former boss. Bashir also belongs to a very powerful establishment, the military, which is in a position to disrupt the trial or influence its outcome should it proceed in Sudan. Sudan military would want to shield him, and this is corroborated by speculations that the military will not respect any agreement to surrender him to the ICC (Carlson, 2020).

Trial at the ICC is most favoured considering the pitfalls associated with such exercise in national or regional court. Other arguments in support of ICC include guarantee of fair trial, witness protection mechanism; and compensation for the victims. In a high profile case of this kind, the ICC is better placed to ensure fair trial, as the Court has capacity to meet international standards.

Unlike anything obtainable under the Sudanese judicial system, the ICC offers restorative justice (Garbett, 2017). The ICC is victim-centered, according them rights not available under municipal and regional systems (Megret, 2017). Trial at ICC will afford victims and witnesses some degree of protection. The Court has devised mechanisms to protect the identity and whereabouts of victims and witnesses in the course of their testimonies (ICC, 2010). The restorative basis also provides reparations to victims (Bottomley & Pryse, 2013). Trial at the ICC will not be compromised or influenced by political, social or other extraneous factors as would be the case in a Sudanese court.

Though ICC trial is favoured, the court also has its setbacks. Cases brought before the court has dragged for too long and speedy trial or quick dispensation of justice cannot be guaranteed. In its 18 years of adjudication it has only convicted five persons. It has also suffered the problem of bringing witnesses to court to testify. In recent times also, prosecution of some high profile cases has suffered a major setback. The case against President Uhuru Kenyatta and his Deputy collapsed miserably (Holligan, 2014). Former Ivorian President, Laurent Gbagbo, was acquitted (Ellis, 2016) and Jean-Pierre Bemba won the appeal against his conviction. The ICC is said to have a patchy record in the prosecution of heinous crimes and needs to build a watertight case against Mr. Bashir (Pilling, 2019). Until Sudan comes up with a clear-cut and internationally acceptable policy on accountability for the Darfur crimes, the only credible option is to surrender him to the ICC.

Trial at ICC: Implications for Sudan

Sudan is a country undergoing a critical transition (Roth, 2020) and requires justice, peace, reconciliation, trust, stability and economic rejuvenation. The Sudanese society has been fractured and fragmented over the years by religious and ethnic bigotry. A country emerging from such monumental conflict requires a credible medium of accountability to atone for past atrocities in order make progress. The quest for justice is critical as it helps individuals and groups to come to terms with crimes, abuses and other violations inflicted on them by the gladiators (Vinjamuri, 2014). This is what transitional justice entails.

Trial of al-Bashir at The Hague is significant and serves a number of political, social and economic purposes. It will disentangle the country from political solitude and economic doldrums. Sudan has been a pariah, shunned internationally and notorious for rights abuses and

alleged support for terrorism. Trial at ICC will heal the wounds and assuage bad feelings, hatred and mistrust among Sudanese. It will liberate the country from the dark cloud which had enveloped it for years as well as promote rapprochement among minority groups and neglected populations who have endured Bashir's monstrous crimes (Elshekh, 2020). Ensuring al-Bashir appears before the ICC is significant while the country rebuilds its legal and judicial system to meet international standards and the dictates of international law.

Smooth transition to a peaceful, prosperous and democratic society is not realizable if the demand of the armed groups and victims is not fulfilled. Transfer of al-Bashir to the ICC will enhance comprehensive peace agreements and prop up negotiations with opposition groups which have made his arrest and extradition to The Hague a principal demand and condition precedent for peace and reconciliation. Victims have also argued that his extradition to The Hague is the assured path to peace in the region. The yearning for national cohesion cannot be achieved if justice for the victims remains a distant dream.

From an economic dimension, the goals of economic prosperity cannot be actualized without accountability by the erstwhile president and enthronement of justice for the victims. Sudan's economy has diminished greatly over the years owing to conflicts and sanctions (BBC, 2018). The US berated Sudan as sponsor of terrorism and imposed excruciating sanctions (Werr, 2019). Trial at ICC might lead to dismantling of sanctions, financial assistance, debt relief (BBC, 2018), and an end to diplomatic isolation (Dahir, 2019). Refusing to surrender him to the ICC could have a debilitating effect on the peace process and stall further political and economic progression.

CONCLUSION

The demise of the Bashir regime has provided a respite for the people of Darfur, and an opportunity to redress the human rights abuses of the past. Justice for thousands of victims of atrocity crimes remains a dominant and controversial item on the agenda of the transitional administration. An official of the government has indicated that al-Bashir could be tried in Sudan or outside the country, inclusive of the possibility of extradition to The Hague. Since that declaration, no explicit action has been initiated to investigate or prosecute perpetrators of those crimes. Mere public pronouncement meant to pacify rebel groups or assuage high tempers does not mean that the interim administration seriously wants to put him on trial.

Of the three options discussed above, sending him to the ICC would best serve the demands of justice. Trying him in Sudan or in a regional court would be problematic and disruptive. What is required for him to be brought before the ICC is sustained and relentless pressure externally and from within on the transitional government. Unfortunately, the issue is not a priority to the UN Security Council or the African Union. The horrendous crimes perpetrated in Darfur cannot be swept under the carpet or be appeased by a contrived national trial. The road to justice for the victims of Darfur crimes has indeed been long and enduring. Sudan must be ready to come to terms with its past in order to achieve genuine peace and reconciliation, as well as step into a secure and stable future. Anything short of this is a mere window dressing and ticking time-bomb waiting to trigger the 'third phase' of the endless conflict.

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