

The Bashir Indictment: Are Serving Heads of State Immune from ICC Prosecution?

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If the Sudanese President Omar al-Bashir is indicted by the International Criminal Court, it will not be the first time that an international tribunal has indicted and issued an arrest warrant for a serving head of State. The International Criminal Tribunal for the former Yugoslavia (ICTY) indicted Slobodan Milosevic whilst he was still the head of State of the Federal Republic of Yugoslavia. Likewise, the Special Court for Sierra Leone (SCSL) indicted and issued an arrest warrant for Charles Taylor while he was President of neighbouring Liberia. However, in both of these cases, custody of the accused was only secured after they had been removed or stepped down from power. Thus their trials commenced when they were former heads of State.

The question arises whether an international criminal tribunal can indict, issue arrest warrants for, or prosecute a serving head of State. It is generally accepted that under international law, serving heads of State are immune from the jurisdiction of other States. Therefore, they are not subject to arrest or the criminal processes *of other States*. This immunity for serving heads of State is a right which accrues not to the individual but to his or her State. The reason for the immunity is that the effective conduct of international relations requires that those senior officials charged with the conducting of those relations be able to travel freely and without other States' harassment. The International Court of Justice (ICJ) has ruled that this immunity is absolute and that serving heads of State, heads of Government and foreign ministers may not be prosecuted in foreign national courts or arrested abroad even when charged with international crimes. This was the decision in the *Arrest Warrant case* (2002) which concerned whether Belgium could issue an arrest warrant for the then foreign minister of the Democratic Republic of Congo with respect to war crimes and crimes against humanity. However, in that same case, the ICJ went on to say that immunity does not mean impunity and suggested that serving heads of States may be prosecuted before "*certain international tribunals*", referring to the ICC as well as other tribunals. In particular, the ICJ referred to Article 27(2) of the ICC Statute which provides that:

Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.

Whether or not a serving head of State has immunity with respect to prosecution by the ICC has significance for the Bashir case at two levels. First, the competence of the ICC to issue the arrest warrant and to actually prosecute depends on a finding that Bashir is not immune before the ICC. Second, and perhaps as importantly, whether or not Bashir is immune affects the obligations of States parties to the ICC to arrest him and surrender him to the ICC if he were to come within their territory. If Bashir retains his immunities under international law then other States are not entitled to arrest him if he is on their territory. Indeed Article 98(1) of the ICC Statute provides that:

The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the

State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.

However, one may not read too much into the decision of the ICJ in the *Arrest Warrant case* when it spoke of prosecutions before certain international tribunals. There is no general principle that serving heads of States possess immunity only before national courts and that they do not have immunity before international tribunals. The statement that international law immunities do not apply before *international tribunals* must be read subject to the following conditions. (i) The instruments creating or conferring jurisdiction on the tribunal must expressly or implicitly remove the immunity of the head of State or other official. (ii) The State concerned must be bound by that instrument removing the immunity. The argument that as a general matter international law immunities only apply before national courts and not before international tribunals is unpersuasive. It suggests that two States may combine to create, by treaty, an international tribunal to prosecute the head of State of another State. That would be regarded as untenable as those States would simply be getting around a constraint that would exist if they acted individually, in order to override rights conferred on a third State. It is difficult to see why it makes a difference if there are 60 States (as required for the entry into force of the ICC Statute) or 106 (as are currently parties to the Statute). The Appeals Chamber of the ICTY (in *Prosecutor v. Blaskic* case) accepted that international law immunities can be pleaded before an international tribunal. The Chamber was not talking about immunity from the criminal charges in question but rather about production of documents and other official acts. Nonetheless, the point is that they accepted that individuals can be immune from the jurisdiction of international tribunals; hence the immunity issue arises there.

The second condition stipulated above suggests that Article 27 of the ICC Statute which removes immunity of serving heads of States is only effective regarding heads of States that are parties to the Statute. Non-parties remain entitled to the immunities that they would possess under customary international law. This is because the immunity is a right of the State and not that of the individual. Other States cannot remove that immunity or affect the right of that non-party by a treaty to which the State possessing the immunity is not a party. Sudan is not a party to the ICC Statute and the Court has jurisdiction over the situation regarding Darfur by virtue of a Security Council resolution (SC Res 1593).

Does all this mean that Bashir is immune from ICC jurisdiction? No, it only suggests that there is a serious issue to be discussed. Under customary international law as well as under Article 98 of the ICC Statute, the immunity of non-party States is to be respected both by the ICC and by ICC States parties seeking to carry out arrests. However, the question is what happens when the head of State of that non-party is sought by the Court as a result of a Security Council referral. Neither the ICC Statute nor the particular resolution by which the Security Council referred the situation in Darfur to the ICC explicitly deals with this question.

It is generally accepted that the Security Council in the exercise of its powers under Chapter VII of the UN Charter is competent to remove the immunity of serving heads of State. This follows from the fact that the Security Council may affect the rights of States when taking measures under Chapter VII which it deems to be necessary for the maintenance of international peace and security. Ultimately that removal of immunity is based on being a party to the UN Charter and accepting the binding authority of the Security Council under Chapter VII. The question is whether the Security Council has removed the immunity in the

Bashir case. When Milosevic was indicted it was assumed that the Security Council resolutions which embodied the Statute of the ICTY and which required cooperation by the Federal Republic of Yugoslavia had removed any immunities.

There are three possible ways of arguing that Bashir is not immune despite the fact that Sudan is not a party to the Statute of the ICC.

(i) There is a good argument to be made that whenever the Security Council refers a situation to the ICC, the State concerned is bound by the provisions of the Statute as if it were a party to the Statute. This argument suggests that the provisions of the Statute (including Article 27) operate in the same way regardless of how the Court acquires jurisdiction over the case;

(ii) It may be argued that when the Security Council decided in Resolution 1593 (operative para. 2) that the Government of Sudan must cooperate with the Court that this provision includes a lifting of the immunity.

(iii) It could be argued that in cases where an accused before the ICC is charged with genocide (as Bashir is) and the case comes by referral from the Security Council, the Genocide Convention 1948 lifts immunity. This argument draws on Articles IV and VI of the Genocide Convention. The former provision says that persons committing genocide shall be punished even if they are constitutionally responsible rulers. The latter provides that such prosecutions are to take place either before the national courts of the country where the genocide occurred or before an international penal tribunal with respect to which the State has accepted jurisdiction. Although Sudan has not accepted ICC jurisdiction, the ICJ has held in the *Genocide Convention case (Bosnia v. Serbia)* that the ICTY (which was created by Security Council resolution and not by treaty) falls within the scope of Article VI of the Genocide Convention because of the obligations that States have accepted under the UN Charter. Precisely the same argument could be made regarding the ICC in cases where the Security Council has referred the situation to the Court.

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