



# BULLETIN

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## Problems with Enforcing ICC Arrest Warrant for Sudan's President

by Rafał Kownacki

*Despite the International Criminal Court's arrest warrant of 4 March 2009, issued in connection with crimes committed in Darfur, Sudanese President Omar al-Bashir remains at large and nothing seems to suggest he might be held responsible anytime soon. The arrest warrant for a sitting head of state was expected to prove that all perpetrators of the most serious crimes against international humanitarian law fall, without exception, under the jurisdiction of the International Criminal Court (ICC), but problems with enforcement of the Court's ruling provoke reflections about the effectiveness of its proceedings.*

**Problems with ICC Statute Ratification.** The consent given by ICC judges to Prosecutor Luis Moreno-Ocampo's request for an arrest warrant for Sudan's president was to set a precedent, mapping out the future lines of ICC proceedings. If governments of the states-signatories to the Rome Statute of the International Criminal Court of 17 July 1998<sup>1</sup> were to undertake to fulfill their obligations to capture President al-Bashir whenever he entered their respective territories (Part 9 of the Rome Statute), that would have represented the attainment of the Court's purpose. Faced with the scale of the crimes committed in the 1990s in former Yugoslavia and Rwanda, the ICC's promoters—especially European governments—saw it as a “conscience of the world,” a tribunal before which everybody, including heads of state (Article 27 of the Statute), would be equal in shouldering responsibility for genocide, crimes against humanity, war crimes or the crime of aggression (Article 5 of the Statute). But critics of the ICC point to its lack of universal jurisdiction. Although as many as 110 states are bound by the ICC Statute, those remaining outside include three members of the UN Security Council (China, Russia, the U.S.), India, Israel, etc. For some governments, the motive behind refusing to accept the Court's jurisdiction has been the apprehension that it would diminish the protection of members of their armed forces: through participation in various kinds of military activities (in and out of their native country), servicemen could be exposed to criminal responsibility for executing orders given to them. This interpretation seems to be strengthened by the fear on the part of decision-makers that they themselves might be indicted, since the ICC Statute speaks of the criminal responsibility not only of direct perpetrators, but also of those ordering, soliciting or inducing the commission of the crimes (Article 25 of the Statute).

**Personal Immunity.** The problems encountered with capturing Omar al-Bashir, who is accused of war crimes and crimes against humanity in Darfur after 1 July 2002, demonstrate that ICC proceedings are contingent primarily on the political will of the signatory states. With the ICC having no police-type service to apprehend those prosecuted, its effectiveness depends on individual states, which, citing the Sudanese president's immunity, may refuse to arrest him or may warn him about possible arrest after crossing their borders. Personal immunity of the head of state is part of customary international law, and it provides protection against criminal proceedings while he or she stays in office. The force of head-of-state, head-of-government and foreign-minister immunity was confirmed by the International Court of Justice (ICJ) in its *Congo v. Belgium* ruling of 14 February 2002. The ICJ found it unacceptable for the Belgian government to have issued an international arrest warrant for Congo's Foreign Minister Abdoulaye Yerodia Ndombasi—and that, despite charges of his having committed war crimes and crimes against humanity. In the ICJ's opinion, the very issuance of the arrest warrant violated his personal immunity and disturbed the process of international cooperation

<sup>1</sup> [http://www.icc-cpi.int/NR/rdonlyres/EA9AEFF7-5752-4F84-BE94-0A655EB30E16/0/Rome\\_Statute\\_English.pdf](http://www.icc-cpi.int/NR/rdonlyres/EA9AEFF7-5752-4F84-BE94-0A655EB30E16/0/Rome_Statute_English.pdf).

by hampering an effective discharge of state duties. At the same time, however, the ICJ ruled that personal immunity could be removed before international criminal courts if such jurisdiction were clearly stated in these courts' statutes. When the Rome Statute took effect on 1 July 2002, it already included provisions for removing the immunities and privileges attached to the official capacity under national or international law (Article 27.2 of the Statute). But state parties to the Statute may argue that while the ICC is not bound by al-Bashir's personal immunity in discharging its jurisdiction, Article 27 of the Rome Statute does not specify in a sufficiently clear manner these states' obligation in this respect and, consequently, does not free them from the customary requirement to respect head-of-state immunity.

**Controversial Grounds for Prosecution.** President al-Bashir may freely travel to the states which have not acceded to the ICC and are not bound by limitations of his immunity. Since March 2009 he has visited Eritrea, Egypt, Ethiopia, Libya and Saudi Arabia, but when last July he was on his way to an economic conference in Kampala, the Ugandan government notified him he would be arrested and handed over to the ICC. The warning testifies to the Ugandan government's intention to avoid a precedent-setting arrest of a foreign head of state. Uganda was the first state party to the Rome Statute which Sudan's president had been planning to visit after the issuance of the arrest warrant. He subsequently cancelled the visit, but he may still travel to 29 other African states which are not parties to the Statute, and which on 4 July 2009 registered their opposition to the arrest warrant in the forum of the African Union and refused to cooperate with the ICC, citing lack of ICC legitimacy to prosecute the Sudanese president. As they pointed out, Sudan has not ratified the Rome Statute and, in accordance with the 1969 Vienna Convention on the Law of Treaties, does not fall under its jurisdiction. In respect of ICC-prosecuted crimes committed by citizens of states other than parties to the Rome Statute, these citizens may be held criminally responsible before the ICC only whenever the crimes have been committed on the territory of a signatory state or the prosecution has been requested by the UN Security Council. Therefore, the ICC prosecutor's reference to Security Council Resolution 1593 of 31 March 2005 as the basis for the arrest warrant has provoked a great deal of controversy, given that the resolution does not specify the name or official capacity of any particular person. It only requests the ICC prosecutor to take up cases of violation of customary international law in Darfur. Critics of the al-Bashir arrest warrant argue that the general wording of the resolution must not provide a basis for prosecuting a serving head of state, especially where this poses a threat to an international custom, such as personal immunity. In their opinion, such a threat is not posed by the apprehension of direct perpetrators of the crime or lower-level functionaries. For this reason, they have not disputed the prosecution of the Sudanese minister for humanitarian affairs, Ahmed Haroun, or Janjaweed leader Ali Kushayb, who since 2007 have been—equally ineffectively—sought under ICC arrest warrants.

**Conclusions.** In a situation where chances for bringing al-Bashir to the ICC have since the very outset been merely theoretical, with him being a sitting head of state, the decision to issue the arrest warrant could well come under fire. But given that the crimes for which he is prosecuted are not subject to any statute of limitations (Article 29 of the Rome Statute), it cannot be ruled out that he will elude justice only while remaining an influential figure in Sudan's government. Just as with Slobodan Milošević, handed over by Serbia to the International Criminal Tribunal for the former Yugoslavia, al-Bashir's extradition may be arranged by a future government in Khartoum, seeking to normalize relations with the West.

The problems involved in the enforcement of the arrest warrant for Omar al-Bashir should prompt ICC members, including Poland, to hold a review conference that would formulate proposals for necessary revisions to the Rome Statute and for implementing conventions to strengthen the ICC's effectiveness, especially in respect of arresting the accused and bringing them to the Court. Otherwise, the continuing impotence of the ICC, coupled with limitations on its universality, may add weight to its perception as a facade institution dependent on governments, and as such ineffective and superfluous.