



# **THE INTERNATIONAL CRIMINAL COURT IN SEARCH OF A DEFENDANT: THE CASE OF OMAR AL-BASHIR**

Alice Pease

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**The International Criminal Court in search of a defendant: the case of Omar al-Bashir**

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This paper focuses on the political impact of the indictment of the Sudanese president, Omar al-Bashir, by the International Criminal Court (ICC). The paper analyses the effect that the two arrest warrants had on politics in Sudan, and the reactions and actions that the indictment sparked around the world. At a local level, the arrest warrant has done little to introduce a culture of accountability or to bring peace to Darfur. Regionally, the al-Bashir indictments have strengthened anti-ICC sentiment and sparked an aggressive backlash by the African Union. Finally, on the world stage, Arab states have strongly supported the Sudanese government's position against the ICC whilst developing nations have prioritised economic affairs over human rights and Western powers have shown passivity in wanting to implement the warrant. All in all, the indictment of al-Bashir has damaged the credibility of the court at a global level and failed to bring justice to the people of Darfur.

*Keywords:* International Criminal Court (ICC), Omar al-Bashir, Individual criminal accountability

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**La Corte penale internazionale alla ricerca di un imputato: Il caso di Omar al-Bashir**

Alice Pease\*

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Questo articolo analizza l'impatto politico, sia sul fronte interno, sia su quello internazionale della messa in stato di accusa e dei due mandati di arresto emessi dalla Corte Penale Internazionale (CPI) ai danni del presidente del Sudan, Omar Al-Bashir. A livello locale, l'incriminazione non sembra aver prodotto alcun risultato di rilievo nel promuovere la cultura della responsabilità, né tantomeno nel processo di pacificazione in Sudan. Al contrario, l'imputazione di Omar al-Bashir ha rafforzato il sentimento anti CPI e ha scatenato una reazione violenta da parte dell'Unione africana. Sulla scena mondiale, al sostegno degli stati arabi alla posizione del governo sudanese si accompagna la sostanziale indifferenza al problema da parte dei paesi in via di sviluppo, più sensibili al sostegno economico che agli interventi a difesa dei diritti umani da parte della comunità internazionale; mentre le potenze occidentali temporeggiano e tardano a rendere effettivo il mandato di arresto. Da questo quadro emerge chiaramente quanto la credibilità della Corte Penale Internazionale, lungi dall'aver portato giustizia al popolo del Darfur, ne risulti danneggiata.

*Parole chiave:* Corte penale internazionale, Omar al-Bashir, Responsabilità penale individuale.

(\*) Research assistant at the Institute for Research on Population and Social Policies (CNR-IRPPS). The paper is part of a project on the emerging criminal justice system carried out at IRPPS-CNR.

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## Introduction

The signing of the Rome Statute on 17 July 1998 marked a watershed in the history of global justice, laying out the legal framework for the world's first permanent international criminal court. The idea of creating a tribunal that would try individuals for heinous crimes, including crimes against humanity, genocide and war crimes had been floated in the wake of World War II but it was not until the end of the Cold War that the project took on a concrete expression. The 1990s proved to be a fertile decade for international justice during which the global community was receptive to the idea of the institutionalisation of a permanent court. Clearly not all States embraced the idea enthusiastically; on the contrary, a number of countries, including three permanent members of the UN Security Council, showed serious reservations about the threat that such an institution might pose to national sovereignty. But in a particular moment in history, in which the bipolar order of the Cold War had dissolved, and the world was not yet paralysed by post-9/11 security concerns, a number of 'smaller' unified states, led by Canada, Germany and Italy, succeeded in pushing the project forward, while the powers most concerned about the project failed to create a strong opposing front to block the birth of the International Criminal Court (ICC) (Bosco, 2014).

As the ICC, with its seat in The Hague, became an established feature of the global institutional architecture, a key question was which criminals should be brought before the Court. With limited resources, and in a world riddled with violence and conflict, the Court could hear just a sprinkling of cases against a few perpetrators of the worst crimes against humanity committed around the globe. But precisely because of its nature, there were no obvious candidates to be the first indicted by the ICC. Omar al-Bashir, the Sudanese president, was one of the unlucky few to fall under the scrutiny of the ICC prosecution office in the Court's early days.

To date, nine situations, all in Africa, have been brought before the ICC. The investigation into the civil war in Darfur, in Western Sudan, was not the opening case, but it has proven to be one of the most controversial given that for the first time, the ICC issued an arrest warrant against a sitting head of State. Many questioned the wisdom of indicting al-Bashir for the political chaos that it might bring to Sudan, and to Africa more generally. Amongst the issues raised were: Can the Court legitimately interfere with a country's domestic political process by indicting an incumbent head of State? Do indictments facilitate peace negotiations in areas of on-going conflict, or does it simply aggravate the situation? And what is the effect of an indictment on accountability mechanisms in the targeted country?

The ICC's involvement in areas of on-going conflict goes to the heart of the contentious peace versus justice debate; does justice pave the way for peace or vice-versa? Benjamin Ferencz (1983), the youngest prosecutor of the Nuremberg trials and one of the most vocal advocates of the need for a permanent tribunal, argued that 'that there can be no peace without justice, no justice without law and no meaningful law without a Court to decide what is just and lawful under any given circumstance'. But the decision by the ICC to get involved in areas of conflict has been hotly debated, as it has consistently failed to demonstrate how peace will be brought about.

The case of Darfur constituted a precedent for indicting a sitting head of State, but it marked a first in another way: never before had the Security Council referred a situation to the Court. This is one of three ways in which, according to Article 13 of the Rome Statute, a case may be brought to the ICC. The other two avenues involve either a referral by a State Party into crimes committed in its jurisdiction or the opening of an investigation by the Court's chief prosecutor. Critics of the ICC have argued that the Security Council's power of referral opens the possibility for politics to become enmeshed with justice as permanent members may choose to veto a deferral to the ICC depending on political allegiances; the opposing view sees this mechanism as crucial to the international body's efforts to maintain peace and international order.

As one of the first and most controversial cases, the indictment of al-Bashir has been significant in shaping attitudes to the nascent Court. The case has exposed some of the ICC's greatest shortcomings; most notably, the lack of enforcement mechanisms at its disposal.<sup>1</sup> At best, states have threatened to arrest the Sudanese president if he enters their country, at worst, ICC members have actively invited him to their territory, ignoring their obligations under the Rome Statute which establishes that all Member States have the duty to cooperate with all the Court's warrants. If members states themselves defy ICC orders, then how does this impact on the credibility of the Court? Even those states most ideologically committed to the idea of international justice have acted passively on the issue of enacting the Court's warrants, as other issues have overtaken on the international agenda.

This paper analyses the political impact, both in Sudan and internationally, of the two arrest warrants issued by the ICC against al-Bashir. Whereas the legal consequences for the indictee have, so far, been minimal, the political effects of the indictments are more discernable. The discussion will begin with a description of how and why al-Bashir came to attention of prosecutors in The Hague. The paper will then look at how the Sudanese government reacted to the arrest warrant against its president, before in turn considering the various responses of the international community.

The indictments against al-Bashir have undoubtedly contributed to bolstering anti-ICC sentiment. There has been a fervent political backlash by the African Union (AU) and the Arab League with many accusing the ICC of acting as an instrument of 'neo-colonial' justice. The fact that the Court has only prosecuted African leaders has reinforced the perception of a system of global justice which is highly selective and the persuasive critique which asserts that a dual system of global justice has been created with one set of rules for the globe's most powerful, and another for the weakest (Köchler, 2003; Zolo, 2009). Omar al-Bashir has become a standard-bearer for these imbalances in global prosecutions and his indictment, far from having the effect of withdrawing him from political life, has brought him into the spotlight.

## **1. Darfur: A case for the International Criminal Court**

The Rome Statute came into force on 1 July 2002. As the young Court began to take shape and leading experts in international law were appointed to lead its work, the prosecutor's office

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<sup>1</sup> For a more in-depth discussion, see Barnes, 2011.

considered which cases to investigate. But in its state of infancy, the ICC's foundations had to be consolidated upon carefully, and overly contentious cases which might upset major-power interests avoided (Bosco, 2014). The initial situations investigated by the Court's first chief prosecutor, the Argentine Luis Moreno-Ocampo, stemmed from a referral made by two Member States, Uganda and the Democratic Republic of the Congo (DRC), against the activities of insurgent groups. The first case concerned the violence in Northern Uganda inflicted by the armed rebel group, Lord's Resistance Army (LRA), between 2002 and 2004. A number of LRA leaders, most prominently Joseph Kony and Vincent Otti, were investigated for crimes against humanity including forced child enlistment and mass murder and indicted in July 2005. The second case focused on the war crimes committed by Thomas Lubanga, leader of the insurgency group Union Patriotic Congolais (UPC), and a number of his collaborators in the Ituri region of the DRC. Lubanga would later become, in 2012, the first individual ever to be sentenced by the ICC.<sup>2</sup>

As the prosecutor's office was busy investigating its first two cases, the on-going conflict in Darfur, in Western Sudan, became the focus of international attention. Bloodshed had erupted in Darfur in early 2003 when two rebel groups, the Sudanese Liberation Movement/Army (SLM/A) and the Justice and Equality Movement (JEM) attacked El Fasher airport. The rebels were primarily from non-Arab communities, including the Fur, Zaghawa and Masalit groups, and were protesting against long-standing marginalisation of their communities. The government retaliated brutally to the attack, sending the infamous Janjaweed militia groups and government forces to Darfur to stamp out the rebellion. What ensued was a terrific scorched earth policy implemented by pro-government militias, destroying hundreds of non-Arab communities across the region. Rape, torture, murder and pillaging were systematic, and millions lost their lives and livelihoods. The Sudanese government justified the violence on the grounds of 'counter-insurgency', but vast swaths of the victims appeared to be ordinary civilians. The exact number of dead and displaced has been the subject of controversy; by early 2005, the United Nations estimated that more than 200,000 Darfurians, mostly originating from non-Arab tribes, had been killed by both sides, and just under 2 million displaced.<sup>3</sup> The Sudanese government's estimate is, unsurprisingly, much lower.

The spiralling bloodshed did not go unnoticed by spectators abroad, in part due to an energetic campaign by transnational advocacy networks. In 2004, the US Congress declared that the violence in Darfur amounted to genocide.<sup>4</sup> The International Commission on Inquiry on Darfur, appointed by the United Nations Security Council to investigate the violence committed by all sides,<sup>5</sup> did not coincide with this view, however. When it produced its final report, the conclusion was that 'the policy of attacking, killing and forcibly displacing members of some tribes does not evince a specific intent to annihilate, in whole or in part, a group distinguished

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<sup>2</sup> See *The Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-91/06.

<sup>3</sup> Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General Pursuant to Security Council Resolution 1564 of 18 September 2004, 25 January 2005, Geneva.

<sup>4</sup> 'US House calls 'Darfur' genocide', BBC, 23 July 2004, at <http://news.bbc.co.uk/1/hi/world/africa/3918765.stm>.

<sup>5</sup> S.C.Res.1564, U.N. doc. S/RES/1564 (18 September 2004).

on racial, ethnic, national or religious grounds'.<sup>6</sup> Although the report, headed by Antonio Cassese, refuted the claim of genocide, it recommended that in light of the inadequacies of the judicial criminal system in Sudan, the Security Council should refer the situation to the ICC. It argued that the involvement by the ICC was 'the only credible way of bringing alleged perpetrators to justice' and pointed to six major merits of a referral including the positive impact that it could have on peace and security in Darfur.

On 31 March 2005, the Security Council followed the recommendations laid out in the report by voting to refer the Darfur situation to the ICC. Eleven council members approved Resolution 1593,<sup>7</sup> while four – United States, China, Brazil and Algeria – abstained from the vote. Since Sudan had not ratified the Rome Statute, and Sudanese nationals had committed the alleged crimes against fellow citizens, a Security Council referral was the only avenue open for the ICC to investigate the case. The decision by the United States not to exercise its veto powers to block such a referral was surprising given its fervent opposition to the ICC; the fact that the decision was presented as a choice between facilitating impunity or granting justice may have been the swaying motive behind its abstention (Bosco, 2014).

With the go-ahead from the Security Council and the violence still ragging on in Darfur, the prosecutor's office began to investigate the conflict in the Sudanese region in mid-2005. It decided not to send investigators into Darfur itself, judging that adequate protection could not be guaranteed to the witnesses, and instead chose to focus on testimonies from victims who had fled to neighbouring regions as well as on documentation from NGOs. Initially, the Sudanese government was fairly cooperative, complying with requests by ICC delegates for interviews with officials.

The Court produced its first two indictments against Sudanese nationals in April 2007. Ahmed Haroun, a senior government minister and Ali Kushayb, a Janjaweed militia leader, were both accused of war crimes and crimes against humanity. Both were convicted on 51 counts including the murder of civilians, primarily belonging to the Fur ethnic group, and forced displacement amongst other charges. Unsurprisingly, the calls to hand over the two indicted individuals to the ICC were met on deaf ears by Sudanese authorities. But the Court did not stop there and went even further up the chain of command. In July 2008, the chief prosecutor presented the case against President al-Bashir who had come to power some twenty years earlier in the midst of a civil war that had torn the country apart. In 1989, he led a military coup and in the early 1990s fast consolidated a repressive regime intolerant of dissent; his government clamped down on opposition, civil society and the media.

Omar al-Bashir was indicted on 4 March 2009 on five counts of crimes against humanity and two counts of war crimes. The following year, in July 2010, issued a second warrant for President al-Bashir, this time on three counts of genocide. The decision to issue a second set of charges was criticised by a number of experts given that no international consensus had been found on whether the violence perpetrated against members of the Fur, Masalit and Zaghawa did in fact constituted 'genocide'. It was argued that an additional set of charges would only

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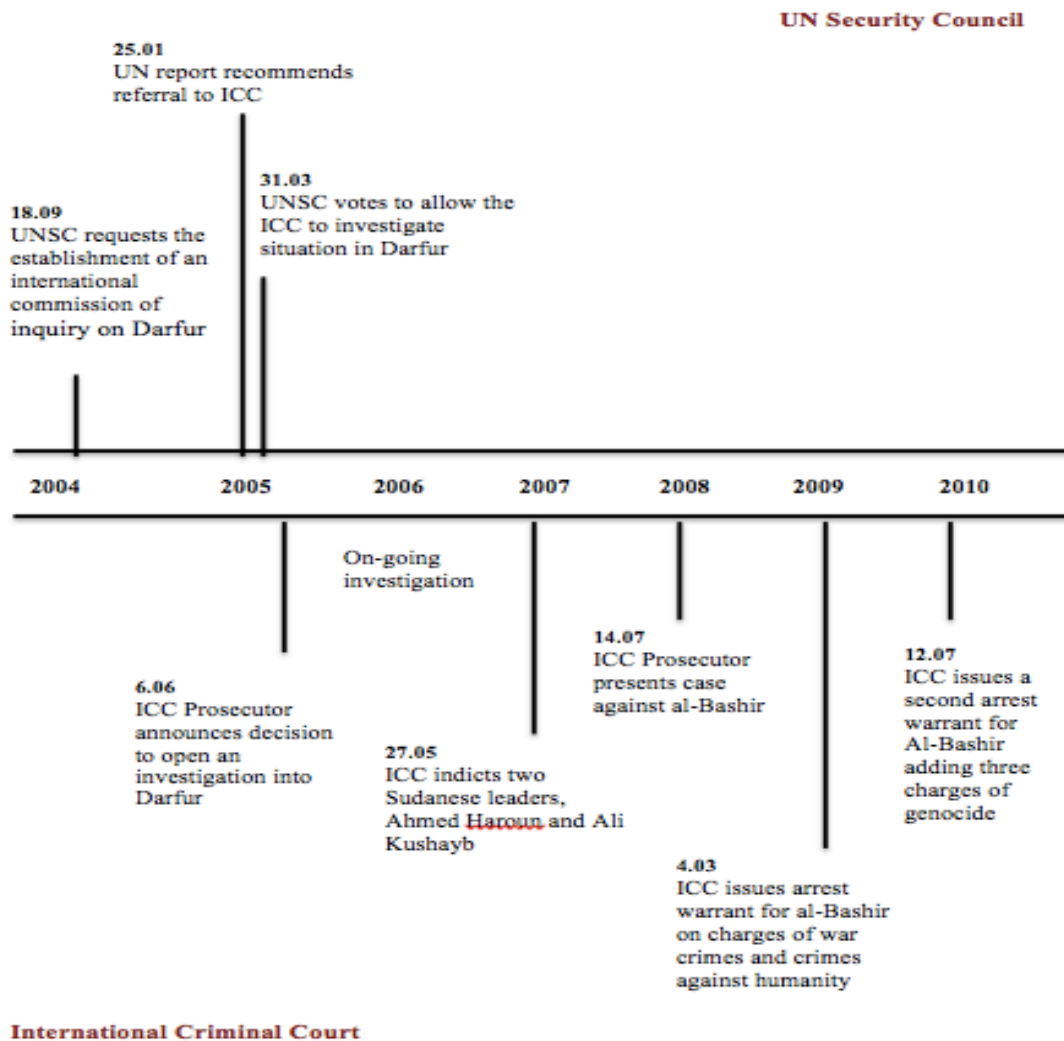
<sup>6</sup> Report of the International Commission of Inquiry on Darfur.

<sup>7</sup> S.C.Res.1593, U.N. doc. S/RES/1593 (31 March 2005).



cause further retaliation by the Sudanese government and endanger the already fragile search for peace in Darfur (Flint and de Waal, 2009).

Table 1: Timeline: The indictment of Omar al-Bashir



Source: Author's elaboration

## 2. Domestic impact of the indictments

The issuing of an arrest warrant for al-Bashir attracted strong criticism for its potential impact on the situation in Sudan and for the failure of the ICC to explain exactly how the indictment would improve the situation in Darfur. Was it really wise to indict a sitting head of State? Would it produce tangible benefits? Few disagreed with the need to introduce a culture of accountability in Sudan, but many argued that only once peace had been obtained, could justice

be sought.<sup>8</sup> Among the concerns raised was the possibility that the Sudanese government would respond to an ICC warrant with fierce reprisals, which would affect the already-dire conditions of the millions of war-afflicted Sudanese. An indictment would only make the regime more intransigent and less willing to compromise. There were fears of the potential unravelling of the Comprehensive Peace Agreement (CPA) – an accord which paved the way for a referendum on the independence of South Sudan – and the collapse of which could cause civil war. A premeditated move to arrest al-Bashir might leave a power vacuum in Sudan which could be filled by destabilising forces, including by terrorist groups such as al-Qaeda.<sup>9</sup> The worst prophecies that the CPA would disintegrate with the issuing of an ICC warrant did not materialise, however; South Sudan successfully seceded in July 2011. But neither has the ICC's intervention radically modified government conduct in Darfur, nor has it led to the adoption of meaningful domestic remedies to address the lack of accountability in Sudan or to serve the interests of justice of the Sudanese people. It has certainly not provided peace between pro-government and rebel groups.

The impact of the ICC's involvement in Sudan can be broken down into several phases. The Sudanese government's relationship with the Court changed overtime from one of modest compliance to outright rejection as it became clear that it would not succeed in persuading the international community to suspend the investigations into Darfur (Nouwen, 2013). During the first stage, when the president had not yet been indicted, the Sudanese government tried to curry favour with the Security Council to use its power to defer an investigation, through Article 16 of the Rome Statute. The article confers power to the Security Council to suspend ICC investigations for one year, on a renewable basis, although it has never been used to date. To try to win over the good will of the Security Council, therefore, the governing National Congress Party (NCP) implemented a series of domestic reforms. In parallel, the government exerted diplomatic muscle on African and Arab states to pressure the international community into deferring the proceedings. Al-Bashir's government believed that by showing a commitment to finding a peaceful resolution to the conflict in Darfur, at the same time as appearing to bolster domestic accountability mechanisms, external actors would be satisfied and drop charges against Sudanese nationals. But these reforms were more style than substance and once it became clear that no referral would be gained and above all, once the Sudanese president himself had been indicted, then the Sudanese government adopted a more belligerent attitude towards the ICC, and ceased to cooperate entirely with the Court.

Among the political measures introduced to placate the prosecutor's office was the Sudan's People Initiative, a national consultation that invited an array of different groups to join in a dialogue on the future of Darfur in August 2008. The government presented it as a long-term political solution to the conflict but political opponents and victims of the conflict were not so

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<sup>8</sup> See critiques by Sudan experts Julie Flint and Alex De Waal, 'Justice Off Course in Darfur', *Washington Post*, 28 June 2008; and by former US envoy Andre Natsios, 'Waltz with Bashir, Why Arrest Warrant Against Sudan's President Will Serve Neither Peace nor Justice', *Foreign Affairs*, 23 March 2009.

<sup>9</sup> Hamza Hendawi, 'Indictment is Biggest Test for Sudanese leader', *Associated Press*, 20 July 2008.

sold; they dismissed the initiative as ‘dead in the water and a cynical attempt to keep the regime in power’.<sup>10</sup> The scepticism was well founded; the initiative achieved little.

In addition, the government set up a number of special criminal courts to handle Darfur prosecutions locally. These turned out to be very limited in scope, however, and tried only a handful of individuals on charges totally unrelated to international crimes. The ICC’s involvement in Sudan also prompted national legislators to incorporate international crimes into Sudanese legislation. In late 2007, an amendment was introduced to the Criminal Procedural Act, criminalising genocide and crimes against humanity at a domestic level. Again, this was a cosmetic change, which was politically inexpensive (Nouwen, 2013). Ultimately the reforms did very little to defy the culture of impunity in Sudan or to make legal authorities any less deferent to the executive.

The relationship between the Sudanese government and the ICC had already deteriorated when Khartoum refused to hand over Ahmed Haroun and Ali Kushayb, but it went into complete melt down after the Court issued the arrest warrant for al-Bashir in 2009. Immediately following the indictment, the government announced the expulsion from Sudan of thirteen international non-governmental organisations and the dissolution of three local groups for supposedly collaborating with the ICC and unnamed ‘foreign powers’.<sup>11</sup> This seriously endangered the international humanitarian effort and ultimately the survival of many victims, as 70% of the 4.7 million conflict-affected Darfuris were dependent on external aid (Flint, de Waal, 2009). The safety of peacekeepers and relief workers was put into jeopardy, with an increase on incidents involving against these groups including raids on refugee camps, and the kidnapping of several foreign health workers.

Another visible impact of al-Bashir’s indictment was the intensification of the vociferous anti-ICC campaign by the Sudanese government. National media outlets portrayed the ICC’s actions as part of a Western and Zionist plot to destroy Sudan and warned that anyone who supported its work was a traitor to the nation. The government organised rallies, mobilised tribal allies and affiliates, reinforced key economic sites such as oil fields and cracked down on organisations supportive of the Court’s decision. The stakes of supporting the Court’s indictment of al-Bashir became so high that most political parties, even those who fiercely opposed the Bashir regime, condemned the interference by the ICC in domestic affairs. For example, the People’s Liberation Movement (SPLM), the main opposition party involved in the negotiations for the succession of South Sudan, was warned that supporting the ICC would put the agreement at risk and as a result, the party avoided openly welcoming international justice in Sudan.

The anti-ICC campaign was not just conducted internally but vigorous diplomatic efforts were made by the Sudanese government to gain the support of African, Arab and Islamic states against what it had called the instrument of ‘neo-colonial’ justice. Al-Bashir made sure to travel

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<sup>10</sup> ‘Darfuris say Sudan initiative dead in the water’, *Sudan Tribune*, 17 October 2008 at <http://www.sudantribune.com/spip.php?article2,8953>.

<sup>11</sup> ‘Aid groups’ expulsion still reverberating within Darfur’, UN News Centre, 11 June 2009 at <http://www.un.org/apps/news/story.asp?NewsID=31108>.

abroad- including to Eritrea, Egypt and Libya within three weeks of the indictment- to show that Sudan did not stand alone in its defiance of the ICC. In an interview with TIME magazine shortly after his indictment was issued, al-Bashir stated: ‘I have not felt [any] restrictions of movement, [...] I have travelled all necessary travels. [...] [the Court] is a tool to terrorize countries that the West thinks are disobedient’.<sup>12</sup>

But despite outward defiance, the indictment did cause unease within the National Congress Party (International Crisis Group, 2009). There had been disagreements within the governing party about how to best handle the Darfur crisis, and the indictments of Haroun and Kushayb, followed by that of al-Bashir, affected internal dynamics. According to senior party members, there was talk of sacrificing al-Bashir for the sake of the party’s political survival, but the army firmly stood by the president. In the long run, al-Bashir’s power had not been significantly dented as he enjoyed a further two electoral successes in 2010 and in 2015. Paradoxically, the ICC warrant has diminished the possibility of Omar al-Bashir standing down, as if he were to relinquish his presidency, his case for impunity would be severely weakened and the club of supporters prepared to defend him on the international stage would no doubt shrink as he faded into history.

And what can be said of the effect of the ICC indictment on the various peace processes underway in Sudan? The international warrant had little impact in bringing a peace deal on Darfur. It had the immediate effect of taking accountability of the negotiating agenda and encouraging opposition parties and rebel groups to harden their negotiating stance. But in the long term, it has had little visible effect. Peace negotiations on Darfur, such as the Doha Document for Peace in Darfur in 2011, between the Sudanese government and the Liberation and Justice Movement (LJM), failed. A recent report by the International Crisis Group (2015) apportiones the failure not only to domestic actors, both the Sudanese governments and rebel groups, but also highlights the inability of the international community, especially the Security Council, to develop consensus about the best path to peace. Other issues have taken over on the international agenda, and as will be discussed subsequently, both the search for peace and accountability in Darfur have dropped down the priorities list and a humanitarian disaster looms in the region.<sup>13</sup> The conflict in Darfur continues to rage on, with some 450,000 persons displaced in 2014 and another 100,000 in January 2015 alone, adding to the million long-term internally displaced persons who have fled since fighting erupted in 2003.<sup>14</sup>

Meanwhile, the Sudanese government continues its policy of non-recognition and of total non-cooperation with the Court. Over the past five years, it has steadfastly refused to facilitate investigations or to comply with the now five arrests warrants issued by the international body against Sudanese nationals. It continues to prioritise its international crusade against the ICC

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<sup>12</sup> Sam Dealey, ‘Omar al-Bashir: Sudan’s Wanted Man,’ *TIME*, 13 August 2009 at <http://content.time.com/time/world/article/0,8599,1916107,00.html>.

<sup>13</sup> See Eric Reeves, ‘Don’t Forget Darfur’, *The New York Times*, 11 February 2016, at <http://www.nytimes.com/2016/02/12/opinion/dont-forget-darfur.html>.

<sup>14</sup> See figures by the International Crisis Group, 2015.

over accountability; following an initial appearance of reform to woe the ICC into dropping charges, Sudanese authorities have shown little concern for bringing war criminals to account.

### **3. Africa's response to the indictments**

More than any other case, the indictment of al-Bashir has galvanised anti-ICC sentiment on the African continent. In the first decade of the ICC's existence, one of the harshest and most persistent criticisms has been its bias in indicting African leaders. The Court's decision to target sitting heads of state, not just Omar al-Bashir, but also Kenyan president Uhuru Kenyatta in 2011 for his alleged role in post-election violence in 2007-2008,<sup>15</sup> has been particularly controversial. Why should external actors intervene in deposing democratically elected African leader? Does this not set a dangerous precedent for sweeping African heads of State out of power when they no longer curry favour with influential powers? Regional discontent originally centred on the potential damage that al-Bashir's indictment would have for the peace and stability of Sudan with neighbouring states fearing the spill over effect. But also embedded in the controversy is the current status quo of world geopolitics, with Africa frustrated that its interests are constantly subordinated on international questions (Mills, 2012). In theory, most African states are not necessarily opposed to the idea of global justice, but in practice a number object to the way in which it is being administered with predominantly Western interests at heart.

Since 2008, the African Union, an inter-governmental body made up of 54 Member States, has taken a strong stand against the indictment of al-Bashir, and more widely against the ICC's focus on African leaders as well as the selective use of universal jurisdiction in Europe to bring African leaders to justice. The African Union has issued a number of resolutions critical of the ICC and called on Africa to unify against the arrest warrant against al-Bashir's arrest warrant. It has adopted a multi-pronged response to the indictment; firstly by calling on African states, whether members of the ICC or not, to avoid cooperating with the arrest warrant, secondly, by proposing a number of reforms regarding ICC referral procedures, in particular with regard to the power granted to the Security Council, and thirdly, by trying to develop alternative mechanisms at a regional level to overcome challenges regarding peace and justice on the continent.

The African Union has, from the start, opposed the arrest of Omar al-Bashir. Just a week after the chief prosecution filed for an arrest warrant for the President's arrest, the African Union Peace and Security Council called on the UN Security Council to defer the ICC's investigation through Article 16 of the Rome Statute, for the risk that it posed to the stability of the country. The African Union requested a deferral on a number of occasions between 2008 and 2009 but the call was repeatedly ignored.<sup>16</sup> In a regional meeting in July 2009, the African Union went one step further by declaring that Member States would not cooperate with the

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<sup>15</sup> Charges were withdrawn due to insufficient evidence.

<sup>16</sup> See Communiqués of the 142nd and 151st Meetings of the Peace and Security Council, 21 July 2008 and 22 September 2008 respectively, AU Doc. PSC/MIN/Comm(CXLII) Rev.1 and AU Doc. PSC /MIN /Comm.1(CLI).

arrest and surrender of al-Bashir.<sup>17</sup> In calling for non-cooperation, the African Union was openly asking the 33 African countries who at the time were party to the ICC to defy their obligations to the Court. The call has had some practical effect in facilitating al-Bashir's movements in Africa, and instead of becoming a pariah state, the plight of Sudan has attracted regional sympathy. He has travelled to fourteen African countries including ICC Member States, including Chad, Malawi and Kenya. South Africa's refusal to arrest al-Bashir when the head of State attended a regional summit in June 2015 was a serious blow to the ICC and is symptomatic of many African states' dwindling commitment to the current system of international justice. South Africa had, for a long time, been one the African nations most committed to the ICC but like many other states, not just in Africa, it decided that letting al-Bashir go free was a more convenient option, both from a political and economic perspective. However, it would be an error to assume that African is a monolithic voice when it comes to its commitment, or lack of, to the ICC (Mills, 2012); some countries, such as Botswana, Ivory Coast and Gambia, have rejected the AU's call for non-cooperation and have threatened to arrest him. But these are not the dominant voices in the African Union.

Beyond attempts to block the progress of the Court's case against al-Bashir, the African Union has sought alternatives to the question of peace and accountability in Sudan, on the one hand, and the reform of international criminal justice, on the other hand. Shortly after the indictment against the Sudanese president, it resolved to create a commission, the African Union High-Level Panel on Darfur, to look into the situation of Darfur. The commission produced a report in which it suggested the creation of a hybrid domestic-international criminal court to try perpetrators of gross human rights abuses in Sudan.<sup>18</sup> Unsurprisingly, the Sudanese government did not take up the recommendations. With regard to global justice, the African Union has repeatedly called for reforms to the ICC, including changes in procedure and a clarification on the immunities of officials, in an attempt to exert greater influence in the institution. One of the suggestions, which it reiterates at regular intervals, is the transfer of the power of deferral under Article 16 from the Security Council to UN General Assembly. Frustrated at the unwillingness of other countries to reform the ICC and above all, in light of the preponderance of African cases investigated by the Court, the African Union has promoted an alternative arena for future war crimes trials, with the creation of a criminal chamber in the African Court of Justice and Human Rights, with jurisdiction for crimes against humanity, war crimes and genocide.<sup>19</sup> It is a carefully crafted tribunal to safeguard the top leadership; the African Union adopted an additional amendment to the protocol to grant immunity to serving African leaders.

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<sup>17</sup> Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC), adopted 3 July 2009, AU Doc. Assembly/AU/13(XIII).

<sup>18</sup> Report of the African Union High-Level Panel on Darfur, Darfur: The Quest for Peace, Justice and Reconciliation, 29 October 2009, AU Doc. PSC/AHG/2(CC VII).

<sup>19</sup> For a more in-depth discussion on the problems associated with this development, see Murungu, 2011, and Otiero, 2014. For the document, see Protocol on the Statute of the African Court of Justice and Human Rights, adopted on 1 July 2008.

The ratification of the Rome Statute by the majority of African states at the turn of the century signalled enthusiasm for consolidating a system of global punishment, but today it seems that the continent is at war with the ICC. So what explains the backlash against the institution? Perhaps African leaders, on joining the institution, hoped that it would be an indispensable weapon to use against their own incumbents; now that they have seen the ICC reach out its claws against politicians in power, they are not so sure they welcome the intrusion. Timing is illustrative; whereas African states continued to support the institution in its early years as the Court targeted outcast militia leaders from Uganda and the DRC, there was a brusque change in attitude when the ICC began to look into the crimes of al-Bashir. The African backlash has continued to gain momentum with African leaders fearing that they could be the next targets of an institution focused disproportionately on their continent. Faced with this realisation, it is unsurprising that there has been a push in the region for alternative, African-controlled justice mechanisms, that is, an institution which can be designed by African heads of States on their own terms.

#### **4. Global responses to the indictments of al-Bashir**

On the whole, the international community has shown limited enthusiasm for implementing the arrest warrant; capturing al-Bashir is low down on the list of priorities of many governments, including Western ones, vehemently opposed by African and Arab states and treated with indifference by the likes of Russia and China.

The Arab League has joined in Africa's protest against the selectivity of the ICC and repudiated the move to indict al-Bashir. Historically, Arab countries have not been the most enthusiastic proponents of an international system of criminal justice; in fact, only three countries – Jordan, Djibouti and Comoros – are party to the Rome Statute, while seven Arab states voted against it in 1998. Added to this, some of Sudan's most steadfast allies, including Saudi Arabia and Qatar, are to be found in the region. It is no surprise therefore that this corner of the globe has sat on Sudan's side of the fence in the on-going battle between the ICC and the northeastern African country. Soon after the first arrest warrant was issued against al-Bashir, in March 2009, the Sudanese president attended the Arab League's conference in Doha. At this meeting, Member States drafted a resolution stating that they 'reject attempts to politicise the principles of international justice and using them to undermine the sovereignty, unity and stability of Sudan', and promised to 'halt the implementation of the warrant'.<sup>20</sup> Since then, al-Bashir has been a frequent visitor to the Gulf region, most regularly to Qatar and Saudi Arabia, making trips for bilateral meetings, medical check-ups and regional summits.

Public opinion in this part of the globe on the whole saw the indictment of al-Bashir as a continuation of Western strategy aimed at undermining the Arab world. A YouGov poll indicates that 78% of the Arab world opposed the ICC's decision to prosecute the Sudanese

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<sup>20</sup> M. Slackman and F. Worth, 'Often Split, Arab Leaders Unite for Sudan's Chief,' *New York Times*, 30 March 2009.

president for war crimes and crimes against humanity in Darfur.<sup>21</sup> Almost three-quarters believed that such a move would destabilise the country. In contrast, when respondents were asked who should stand trial at the ICC, 80% nominated G.W. Bush, 73% Ehud Olmert, and 53% Donald Rumsfeld. With regard to Arab leaders, 35% opted for Hosni Mubarak.

Even governments committed to the idea of global justice, such as France and Germany, have shied away from implementing the ICC warrant. They have made it clear that al-Bashir is not welcome on their turf, but beyond that, no concrete strategy for arresting the Sudanese president has been elucidated. Al-Bashir has refrained from visiting ICC Member States outside Africa, but he has called on countries outside the ICC club on numerous occasions, and not just Gulf region. Although China blighted Sudan by not vetoing the UN resolution in 2005, the arrest warrant has not greatly modified Sino-Sudanese relations, with al-Bashir making visits to China in 2011 and 2015. China has, for a number of decades, provided cash and weapons to Sudan in exchange for vast reserves of oil, and these ties have not been severed on account of the ICC warrant. For other countries, economic interests have also trumped human rights. With Sudan rich in oil, making the country a friend rather than an enemy has been the priority. For example, in late 2015, India invited al-Bashir to attend the India-Africa Forum, which he duly did. The decision by the Indian government sparked criticism from a number of NGOs, including Human Rights Watch,<sup>22</sup> but the pressure of civil organizations was insufficient to make the Indian government rescind its invitation.

Table 2 shows the visits that al-Bashir has made to countries outside of Africa. The numerous trips that he has made abroad indicate that the ICC's arrest warrants have not served to truly isolate the Sudanese leader on the world stage. True, there are some parts of the world which he is unable to visit freely, but he has trusted allies who have helped him to bolster his position against the Court in The Hague. The Sudanese president has become a living symbol of the movement to defy global justice, and with each visit he makes abroad, he strikes a further blow to the work of the ICC.

*Table 2. Al-Bashir's travels: visits outside of Africa*

<i>Country</i>	<i>ICC Member?</i>	<i>Number of visits</i>	<i>Motive for visit</i>	<i>Year</i>
China	No	2	Peace talks Military commemoration	2011 2015
India	Yes	1	India-Africa Forum	2015
Iran	No	1	Non-Aligned Movement summit	2012
Iraq	No	1	Arab summit	2012

<sup>21</sup> YouGov measures public opinion on a wide-range of issues. See 'Sudanese President al-Bashir and the ICC', YouGov Siraj, 14 May 2009.

<sup>22</sup> 'India: Do Not Welcome Bashir', *Human Rights Watch*, 19 October 2015.



Kuwait	No	2	Africa-Asia summit	2013 2014
Qatar	No	8	Arab League Summit Bilateral talks Medical visit International conference	2009/13 2011/13/14/15 2012 2012
Saudi Arabia	No	9	Bilateral talks, Haji Pilgrimage, Medical visit	2009/15 2009/13/14 2012/13

Source: Author's elaboration based on data from BashirWatch.org.

## Conclusion

The indictment of Omar al-Bashir has certainly provided publicity of the work of the ICC. Alas, it has been publicity of the wrong sort for global justice. The issuing of two arrest warrants by the ICC has sparked all kinds of political action, from the issuing of resolutions by regional bodies to sympathetic states welcoming the Sudanese president with open arms. It has certainly won support for the growing anti-ICC movement. What it has not resulted in, however, is a concerted effort by the international community to make this justice effective, or to provide an alternative settlement for the people of Darfur. As the past years have shown, even those states most keen about international justice are reluctant to go out the whole way to implementing the orders of a court which ultimately threatens to make incursions into their own national sovereignty. And given that the Security Council has never authorized the use of force to implement the warrant, nor is there is an international police force to carry out the task of capturing al-Bashir, the possibilities of a collaborative push to do so are remote.

Faced with the current situation, who should take the lead? In a somewhat desperate proposition in *The New York Times* in August 2015, former ICC prosecutor Moreno-Ocampo suggested that the United States should grant al-Bashir a visa to attend the UN General Assembly in New York, and once on US soil, arrest and surrender him to the Court.<sup>23</sup> Far from the ideal solution, an arrest by the world's most powerful country that has itself turned its back on ICC membership would simply bolster the claim of Western hypocrisy and a dual system of justice with two sets of law for the powerful and the weak. On the other hand, had South Africa upheld its commitment to international punishment when al-Bashir made visited the country in June 2015, the move could have provided renewed confidence in the ICC.

However, engaging in a counterfactual exercise of history will do nothing to dispel the belief that the ICC disburses selective, rather than universal justice. The statistics only help to bolster the claim; with only African leaders at the bar, it seems that skin colour and nationality are crucial determinants for a prosecution by the ICC. Is it a question of time? Do we need to be patient and wait for the ICC to become more embedded into the international institutional framework so that it can pursue a wider range of cases in diverse geographical areas? After all,

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<sup>23</sup> 'Let Sudan's President Come to New York. Then Arrest Him', *The New York Times*, 24 August 2015.

the Court is a relatively young institution and past examples such as that of Radovan Karadzic show that perseverance is key in international criminal justice.<sup>24</sup> The Court has already begun preliminary investigations into situations in Afghanistan, Colombia and Iraq amongst others, but there is still a long way to go, and significant political hurdles to jump, before these materialise into a sentence.

Only time will tell what both al-Bashir and the ICC's future will hold, but in the short term, the indictment of al-Bashir has damaged the credibility of the Court. It has shown that it lacks the muscle to do the job that it promised, which in part comes down to the reluctance of states to commit to making the project successful, especially when indictments touch so closely on questions of national sovereignty as is the case when a sitting head of state is targeted. The realisation that a global court is not only an instrument to tackle the crimes of incumbents, but may also scrutinise a government's own actions, has hit hard in Africa and has led to waning support for the international tribunal.

Beyond tarnishing the reputation of the Court, however, the ICC, and more widely the international community, the ICC has not met the expectations of peace or justice for the millions of victims in Sudan which the indictment against al-Bashir was designed to serve. The indictment of al-Bashir has brought few, if any, tangible benefits to the victims of the conflict in Darfur; there has been no change in leadership, no meaningful reforms to address the issue of accountability in Darfur, no peace, and no justice. Al-Bashir continues his tirade against global justice as the people of Darfur endlessly suffer. In the end, al-Bashir has proved to be right when he declared that the indictment of the ICC was 'not worth the ink it was written with'.<sup>25</sup>

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<sup>24</sup> 'Justice Delayed', *The Economist*, 20 June 2015.

<sup>25</sup> M. Pflanz, 'Sudan's Omar al-Bashir says ICC can 'eat' his arrest warrant', *The Telegraph*, 4 March 2009, at <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/sudan/4933329/Sudans-Omar-al-Bashir-says-ICC-can-eat-his-arrest-warrant.html>.

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