

Jordan's Appeal in the Bashir Transfer Case: A Critical Analysis of International Criminal Justice and State Sovereignty

Yuchen Wu^{1,a,*}

¹*School of International Law, East China University of Political Science and Law, Shanghai, 201620, China*

a. 15059559238@163.com

Abstract: The obligations imposed on States Parties under the Rome Statute are directed towards ensuring the International Criminal Court (ICC) exercises its criminal jurisdiction over the most serious crimes. However, in practice, the conflict between the practice of ICC and state sovereignty is still a controversial issue, often considered as a factor in international politics. This paper analyzes the Jordan appeal in the Bashir transfer case, examining its background, legal disputes, and the positions of various parties to probe into the intricate connection between international criminal justice and state sovereignty. Through a study of relevant literature, this research reveals that the handling of this case highlights issues such as inconsistent application of laws and difficulties in balancing the court's authority and state sovereignty within the international criminal justice system. This research provides valuable insights for improving the international criminal justice system and offers suggestions for better handling of similar cases in the future.

Keywords: ICC, Bashir case, Jordan's appeal, State sovereignty, International criminal justice system

1. Introduction

The Darfur conflict in Sudan, which broke out in 2003, exemplifies the complex issues within the international criminal justice framework. Triggered by ethnic, political, and economic contradictions, this conflict led to a severe humanitarian crisis, accompanied by widespread violence and grave human rights violations. In 2009 and 2010, the ICC issued arrest warrants for Sudanese President Omar Al-Bashir, accusing him of war crimes and crimes against humanity. However, this move was strongly opposed by the Sudanese government, which regarded it as an infringement of its sovereignty. The actions of the ICC often conflict with the fundamental principle of state sovereignty in international law. In 2017, when Bashir visited Jordan for the 28th Arab League Summit, Jordan, as a state party to the Rome Statute, did not execute the ICC's arrest warrant for Bashir. This act triggered a legal dispute between Jordan and the ICC. This incident not only raised doubts about Jordan's compliance with its international obligations but also brought to light the common challenges faced in the implementation of international criminal justice.

Numerous scholars have explored the relationship between the ICC and state sovereignty from different perspectives. For example, Sarah Nouwen argues that the ICC's efforts to enforce

international criminal law frequently encounter obstacles due to states' concerns over sovereignty. She emphasizes that the court needs to find a more effective way to balance its jurisdiction with state sovereignty to gain broader acceptance and cooperation [1]. Another relevant research is Kai Ambos's comprehensive commentary that offers in-depth analysis of the provisions of the Rome Statute, including those related to state cooperation and the exercise of the ICC's jurisdiction [2]. It serves as a valuable resource for understanding the legal basis and potential disputes in cases like the Bashir case [3].

This paper adopts a qualitative research approach. By collecting and analyzing relevant legal documents, academic papers, and official statements, this study explores the context, disputes, and implications of Jordan's appeal in the Bashir transfer case. This research offers practical references for the ICC to optimize its operational mechanisms, for states to better fulfill their obligations, and for the international community to strengthen cooperation in combating international crimes.

2. Overview of Jordan's Appeal in the Bashir Transfer Case

2.1. The Darfur Conflict, ICC's Involvement and Jordan's Role

The Darfur region in western Sudan has long suffered political and economic marginalization, along with conflicts between Arabs and black Africans. Since the 1970s, desertification forced northern Arab nomads to move south, intensifying resource-based conflicts with black African farmers. In 2003, armed conflict erupted between Sudanese government forces, the Arab militia "Janjaweed", and rebel groups such as Sudan Liberation Movement (SLM) and the Justice and Equality Movement (JEM). The rebels accused the Bashir government of favoring Arabs and neglecting southern blacks, demanding regional autonomy [4]. The Sudanese government then launched large-scale bombing and militia-suppressing operations. Over 800,000 were displaced, 110,000 fled to Chad. The displaced endured violence like murder, rape, and looting by the militia in shelters. In July 2004, the UN Security Council adopted Resolution 1556, expressing grave concerns over the Darfur humanitarian crisis and human rights abuses.

In 2009 and 2010, the ICC issued arrest warrants for Sudanese President Omar Al-Bashir, accusing him of war crimes and crimes against humanity in the Darfur conflict. The first arrest warrant charged him with coordinating, designing, and implementing counter-insurgency operations that targeted civilian groups from the Fur, Masalit, and Zaghawa ethnic groups. The second arrest warrant further alleged that the Sudanese government and its supported armed forces carried out large-scale, racially-targeted violence against non-Arab tribes in Darfur [4]. However, the Sudanese government firmly refused to recognize the ICC's jurisdiction. It regarded the ICC's actions as an interference by Western forces and a violation of its sovereignty. Bashir emphasized that the Sudanese army's actions were aimed at combating anti-government rebels and maintaining national peace and stability, not at committing genocide.

In March 2017, Jordan hosted the 28th Arab League Summit, and Bashir attended. Jordan's failure to execute the ICC's arrest warrant for Bashir during this period attracted widespread international attention and led to a legal conflict with the ICC. Jordan's decision not to arrest and transfer Bashir was a significant event that challenged the ICC's authority and raised questions about the implementation of international criminal justice.

2.2. The Pre-Trial Chamber's Decision and the Controversy

In December 2017, the ICC's Pre-Trial Chamber found Jordan had not complied with the court's cooperation request, impeding the court's normal functions. Thus, it decided to refer Jordan's non-compliance to the Assembly of States Parties and the UN Security Council. The basis for this decision

was that Jordan did not proactively address the cooperation challenges, clearly refused to execute the arrest warrant, and failed to seek assistance from the court.

This decision sparked a controversy. Jordan appealed, arguing the decision had factual errors, deviated from legal positions and notification obligations, and that the Pre-Trial Chamber abused its discretionary power. The prosecution, however, supported the decision, seeing it as an effective way to promote Jordan's cooperation and uphold the authority of the law.

3. Controversies in Jordan's Appeal Case

3.1. Factual Disputes

A key factual dispute in this case is whether Jordan sought consultations with the ICC. Jordan claimed that its diplomatic note on March 28, 2017, constituted a request for consultation with the court in accordance with Article 97 of the Rome Statute, demonstrating its positive attitude towards resolving the issue [5]. However, the Pre-Trial Chamber considered this diplomatic note not to be a genuine request for advice but rather an advance notice of non-implementation of the court's request. The Pre-Trial Chamber's reasoning was that the note lacked specific questions and calls for action and was sent shortly before Bashir's arrival in Jordan, which seemed like an intentional evasion.

The Appeals Chamber, after analysis, held a different view. Its members believed the diplomatic note's statement indicated that Jordan is hereby consults with the International Criminal Court in accordance with Article 97 of the Rome Statute, which clearly showed Jordan's intention to seek consultations [6]. Lacking clear consultation procedures, it was wrong to deny the note's advisory nature by its form or sending time. So, the Appeals Chamber ruled the Pre-Trial Chamber made a factual error.

Jordan also claimed its obligations under the Rome Statute for Bashir's arrest and transfer were unclear. This was mainly due to the different legal interpretations and precedents of different Pre-Trial Chambers on related issue on Articles 86, 89, 97, 98, and 27 [5].

Most interpretations aimed to safeguard the ICC's jurisdiction and justice. For example, Article 86 obliges states parties to cooperate with the court, and Article 27 clearly excludes immunity claims within the court's jurisdiction, ensuring the effective prosecution of suspects. However, some views emphasized considering state sovereignty, treaty coordination, and international law system [7]. Regarding Article 98, there were disputes over its relation to other articles and application scenarios. Due to such differences in legal interpretations, it was hard to simply label Jordan's actions during Bashir's visit as intentional non-cooperation.

3.2. Discretionary Power Disputes

Jordan pointed out that the Pre-Trial Chamber's exercise of discretionary power was unreasonable, especially when compared with the treatment of South Africa. South Africa, in a similar situation, also did not execute the request to arrest Bashir. However, because South Africa actively consulted with the court, it was not referred to the Assembly of States Parties and the United Nations Security Council, while Jordan was. This differential treatment, according to Jordan, was unfair and constituted an abuse of discretionary power.

Jordan further argued that the Pre-Trial Chamber's decision to refer the matter to the relevant bodies solely based on its failure to execute the arrest warrant was hasty and unreasonable. The Pre-Trial Chamber did not fully consider various factors in the case, including the practical difficulties Jordan might encounter, the existence of alternative ways to promote cooperation, and whether the referral would genuinely aid in resolving the issue.[8]. Such a decision, Jordan believed, might damage the relationship between Jordan and the court instead of promoting cooperation.

4. The Appeals Chamber's Resolution and Its Implications

4.1. Review of Statutory Prerequisites

The Appeals Chamber firstly reviewed the statutory requirements for referring a state to relevant institutions as set out in Article 87(7) of the Rome Statute. It determined that Jordan had indeed failed to comply with the court's cooperation request, which met the first condition for referral. Additionally, Jordan's non-compliance had hindered the court's ability to exercise its power to ensure the suspect's appearance in court, as underlined in Article 58(1) of the Rome Statute, thereby meeting the second condition regarding the seriousness of non-compliance [5].

However, as for the key fact of whether Jordan sought consultation, the Appeals Chamber meticulously analyzed the content and background of Jordan's diplomatic note. It reached the conclusion that the Pre-Trial Chamber had made an error in determining that Jordan did not seek consultation. The Appeals Chamber's finding corrected the factual error in the Pre-Trial Chamber's decision-making process.

4.2. Comparison with South Africa and Overall Discretion Rationality

When comparing the situations of Jordan and South Africa, the Appeals Chamber noted that although both countries did not execute the arrest warrant, South Africa's active consultation with the court was a significant factor. While Jordan had also conducted consultations, the Pre-Trial Chamber wrongly judged otherwise. The Appeals Chamber further considered that Jordan had shown a certain degree of cooperation during the process, such as actively participating in the appeal procedure. Considering these factors, the Appeals Chamber determined that the Pre-Trial Chamber had not comprehensively weighed all circumstances when making the referral decision, thus misusing its discretionary power.

4.3. Conclusion and Remedial Measures

Based on the above analysis, the Appeals Chamber concluded that the Pre-Trial Chamber had made a mistake in determining that Jordan did not seek consultation. This error led to an incorrect judgment of Jordan's position during the exercise of discretionary power, resulting in an unreasonable differential treatment compared with South Africa and ultimately constituting an abuse of discretionary power.

Consequently, the Appeals Chamber decided to partially revoke the controversial decision of the Pre-Trial Chamber, specifically reversing the part of referring Jordan to the Assembly of States Parties and the United Nations Security Council. This ruling aimed to correct the Pre-Trial Chamber's mistakes, ensure judicial fairness, and safeguard the authority and impartiality of the ICC in international judicial cooperation.

5. Legal and Practical Considerations in the Case

5.1. Interpretation of the Rome Statute

The interpretation of the Rome Statute plays a crucial role in this case. Article 27(2) of the Rome Statute clearly states that immunity under international or domestic law cannot prevent the court from exercising jurisdiction over a person [5]. This provision fundamentally negates the validity of a head of state's immunity before the ICC, extending the court's jurisdiction to include "enforcement jurisdiction" for states parties. In the context of the Bashir case, this means that Sudan, even though not a party to the Rome Statute but obliged to cooperate under Security Council Resolution 1593, cannot use the head of state's immunity to obstruct the court's jurisdiction over Bashir [9].

Article 98(1) of the Rome Statute is not a provision for immunity but a procedural rule. It clarifies the actions the court should take when facing situations where immunity may hinder cooperation requests. In the Bashir case, this article becomes relevant when considering the relationship between the ICC's requests, state immunity, and international agreements. The different interpretations of these articles by various parties contribute to the complexity of the legal disputes in this case [10].

5.2. International Criminal Justice Practice

Jordan's appeal in the Bashir case also reflects the complexity of international criminal justice practice. Comparing the actions of Jordan and South Africa, it is evident that different countries have different approaches and considerations when dealing with the ICC's arrest requests. South Africa actively consulted with the court, while Jordan's consultation efforts were misjudged. South Africa's domestic courts also determined that the government's failure to arrest Bashir violated domestic law and obligations under the Rome Statute, while Jordan's situation was more complex, with its own concerns about international relations and legal uncertainties.

This case shows that in international criminal justice practice, the ICC needs to be more cautious when handling cases, taking into account the specific circumstances and efforts of each country. Inconsistent treatment of similar cases can undermine the credibility and authority of the international criminal justice system.

6. Challenges and Improvement

6.1. Challenges to the International Criminal Justice System

The handling of Jordan's appeal in the Bashir case reveals multiple challenges confronting the international criminal justice system [11]. A crucial challenge is ensuring state cooperation. Some states, due to domestic legal clashes, political motives, or sovereignty concerns, are reluctant to cooperate with the ICC. This non-cooperation, as seen in Jordan and Sudan's resistance in this case, can severely hamper international criminal justice progress.

Another challenge is the absence of a unified, clear mechanism for interpreting the Rome Statute. Varying interpretations of treaty provisions cause disputes and inconsistent case handling, eroding the fairness and predictability of the international criminal justice system.

International political factors significantly impact the Bashir case. The Sudanese government's rejection of the ICC's jurisdiction is influenced by geopolitical interests, foreign relations, and state sovereignty preservation. Regional groups like the African Union and Arab League have taken stances, supporting Sudan to some degree and stressing the importance of respecting state sovereignty in international criminal justice. This indicates that international criminal justice is often entangled with international politics, making pure judicial fairness harder to achieve.

6.2. Improvement

This case reveals the need for improvement in the international criminal justice system. Pressingly, the cooperation between the state and the ICC must be enhanced. This can be achieved by providing states with technical and financial aid. For example, implementing capacity-building in legal reform, law-enforcement training, and strengthening domestic judicial institutions can help states better meet ICC requests. Also, improving the ICC's communication and coordination with states is crucial. Setting up regular dialogue platforms, giving clear, timely legal guidance, and actively addressing states' concerns can build trust, key for effective cooperation [12].

Moreover, it's essential to better balance international criminal justice and state sovereignty. This may involve re-evaluating the ICC's jurisdiction scope, considering each state's unique situation and

sovereignty respect. Using more flexible, context-sensitive approaches to handling cases, instead of a one-size-fits-all model, can also help resolve the conflicts between them more effectively.

7. Conclusion

In conclusion, Jordan's appeal in the Bashir transfer case is a complex and significant event in international criminal justice. It involves aspects like the Darfur conflict, ICC jurisdiction, Jordan's non-compliance, and Rome Statute interpretation. Controversies, such as factual and discretionary power disputes, show the challenges of the international criminal justice system. The Appeals Chamber's partial revocation of the Pre-Trial Chamber's decision is crucial for judicial fairness and rational discretionary power.

However, this paper lacks a comparative analysis of other similar cases in the international criminal justice system, making it hard to fully show the Bashir case's uniqueness and universality. Future research should increase such comparisons to deepen the study.

Future research could focus on effective strategies to boost state cooperation. This includes exploring incentives for states to cooperate with the ICC, like technical assistance, financial support, or improved international standing. Also, efforts should be made to enhance the ICC's communication and coordination with states, such as setting up efficient information-sharing channels and clearer cooperation guidelines. Moreover, research on reconciling international criminal justice and state sovereignty should continue, aiming for innovative solutions respecting both justice and state sovereignty. By addressing these, the international community can move towards a more just and effective international criminal justice system, vital for world peace and security.

References

- [1] Nouwen, S. (2013). *The importance of frames: The diverging conflict analyses of the United Nations and the African Union. Proceedings of the ASIL Annual Meeting*, 107, 330-335. <https://doi.org/10.5305/procanmeetasil.107.0330>
- [2] Ambos, K. (2021). *Attempt as a special form of individual criminal responsibility. In Treatise on International Criminal Law: Volume I: Foundations and General Part (2nd ed.)*. Oxford Academic. <https://doi.org/10.1093/law/9780192844262.003.0006>
- [3] International Criminal Court. (2019). *Prosecutor v. Al-Bashir, ICC-02/05-01/09-397, Judgment in the Jordan Referral re Al-Bashir Appeal*. <https://www.icc-cpi.int/court-record/icc-02/05-01/09-397-0>
- [4] Embassy of the Republic of Sudan. (n.d.). *Brief history of the Sudan*. Retrieved May 30, 2020, from <https://web.archive.org/web/20081120035130/http://sudan-embassy.co.uk/en/content/blogcategory/28/37>
- [5] International Criminal Court. (1998). *Rome Statute of the International Criminal Court, Art. 27(2)*. July 17, 1998, 2187 UNTS 3. Retrieved from <https://www.legal-tools.org/doc/7b9af9/>
- [6] International Criminal Court. (2017). *Note verbale of 28 March 2017, Registry pagination p. 2*. Retrieved from <https://www.legal-tools.org/doc/05f5a2-1/>
- [7] Cassese, A. (2008). *The statute of the International Criminal Court: Some preliminary reflections*. In P. Gaeta & S. Zappalà (Eds.), *The human dimension of international law: Selected papers of Antonio Cassese*. Oxford Academic. <https://doi.org/10.1093/acprof:oso/9780199232918.003.0025>
- [8] International Criminal Court. (2018). *Transcript of hearing, 13 September 2018, ICC-02/05-01/09-T-7-ENG*. Retrieved from <https://www.legal-tools.org/doc/826788/>
- [9] Wang, X. (2020). *Research on the issue of head of state immunity in the Al-Bashir case [D]*. <https://doi.org/10.27209/d.cnki.glniu.2020.001167>
- [10] Zhang, L. (2014). *Research on the jurisdiction of the International Criminal Court [D]*.
- [11] Jennings, R. (2002). *Sovereignty and international law*. In G. Kreijen et al. (Eds.), *State, sovereignty, and international governance*. Oxford Academic. <https://doi.org/10.1093/acprof:oso/9780199245383.003.0002>
- [12] Zhang, T. (2013). *Discussion on the jurisdiction of the International Criminal Court in the Al-Bashir case [D]*.