Emerging Voices: The Use of the 'Proxy Argument' in the Al-Bashir Case–A Riddle for the Law of International Organizations

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One of the complex legal issues arising from the Al-Bashir case concerns the international relevance of the conduct of a member state in the context of its international organization: how to qualify the conduct of an ICC member state acting, or omitting to act, in response to an ICC arrest warrant? Is it acting on behalf of the organization or as an independent subject of international law?

In this blogpost I will evaluate an argument that was put forward during the proceedings, according to which member states would act as "agents", "organs" or "proxies" of the ICC. I will contend that the argument is based on the unclear conceptualization of the ICC as a supranational international organization. I will contest this thesis, but I will also contend that the law of international organizations does not provide a clear answer to this dilemma.

The Proxy argument

On the 14th of August 2018, the ICC Office of the Prosecutor replied to the observations of the African Union and the League of Arab States elaborating a novel theory to corroborate the existence of an obligation binding ICC's member states to arrest Al-Bashir. The Office of the Prosecutor developed the Proxy argument in paragraph 11, claiming that a request to execute an ICC Arrest Warrant does not amount to a request to exercise state jurisdiction: "the requested State is nothing more than the Court's agent in executing the Court's arrest warrant—and, consequently, the enforcement jurisdiction being exercised is that of the Court, and not that of the requested State." From the Jordanian point of view, the reason why the Prosecutor sustained this argument is that if states are "agents, organs or proxies" they would not breach their obligations under customary international law when giving effects to an arrest warrant issued against a sitting head of state of a non-member state (p. 4 and 5).

During the hearings, the Office of the Prosecutor developed further on the nature of the ICC jurisdiction, contending that "this Court is not the jurisdiction of another State; it is supra-national both institutionally and in its application of relevant norms" (p. 72). Professor O'Keefe, *amicus curiae*, replied contending that "[t]o say that in surrendering the official to the ICC the requested State is acting as the ICC's agent or jurisdictional proxy is, with respect, legally meaningless. It is also, I would point out, an inaccurate metaphor since it is the States Parties which have conferred jurisdiction on the Court, not the other way around" (p. 4). He asked "how can the arrest of a person by a State Party's own police and surrender proceedings against that person by a State Party's own courts not amount to the exercise by that State Party of its only criminal jurisdiction?" (p. 52). Jordan upheld O'Keefe's view, stressing that member states are independent and sovereign actors of international law and they always exercise their own jurisdiction (p. 89).

In its judgment, the Appeal Chamber did not explicitly rely on the proxy argument, even if the ICC is clearly conceptualized as a supranational entity, under which it acts "on behalf of the international community as a whole" (para. 115). This argument is better explained in the joint concurring opinion, contending that the Court "exercises the jurisdiction of all the concerned sovereigns inter se, for their overall benefit" (para. 59). Among the conspicuous commentaries on the case, a recent blogpost contends that under this view requested states are "surrogates" of the ICC.

The value of the argument under the law of international organizations

Under the law of international organizations, there are no reasons to exclude that a state can act as an agent of an international organization in certain circumstances. A literal reading of the International Law Commission's articles on the responsibility of international organizations does not eliminate this possibility. Article 2(c) defines "Agent" as including "officials and other persons or entities through whom the organization acts." Moreover, article 6(2) states that "[t]he rules of the organization shall apply in the determination of the functions of its organs and agents". During the

Al-Bashir hearings, the President of the Court asked whether article 59, together with article 4(2) of the Rome Statute have the effect to turn member states into ICC agents (p. 43).

However, the fact that states can act as agents of an organization as a matter of attribution of conduct does not automatically imply that they lose their independent personality as sovereign subjects of international law. For instance, it makes perfect sense to sustain that "when an organ of a State is placed at the disposal of an international organization, the organ may be fully seconded to that organization. In this case the organ's conduct would clearly be attributable only to the receiving organization" (p. 56, commentary to article 7), but this is limited to particular circumstances, that definitely do not concern the case at hand. In sum, being an agent is not enough to consider that member states are "surrogate" of the ICC when giving effects to an arrest warrant. The only direct consequence of considering member states as agents is that their conduct would also be attributable to the ICC and would trigger its international responsibility in case of the violation of an international obligation (also article 7 might be applicable in this case).

In this context, Professor Robinson, *amicus curiae*, suggested to examine the notion of "dédoublement fonctionnel": "Sometimes State agents are doing things, and that's attributable both to their State, but they are also acting on behalf of an international organisation" (p. 59). Sir Michael Wood rejected this idea claiming that the effects on immunity are not clear: "Would the Head of State be perhaps half immune in such circumstances?" (p. 91). He probably meant that a state would be obliged to respect the immunity as an international actor and, at the same time, obliged to waive the immunity as an institutional agent. However, the execution by member states of the arrest warrant as dual actors is not directly concerned with the primary obligation concerning Al-Bashir immunity, but only with the secondary rules on the attribution of conduct.

Why the law of international organizations does not provide a clear answer

In order to trigger the effects intended by the Prosecutor, member states need to be considered as organs of the ICC, under which their international personality "disappears" under the ICC institutional veil. This theory is also connected with the claim that the ICC's "statutory framework" should be applied "as a whole" to Sudan (para. 45 of the 2009 decision) and it definitely has effects on the primary obligation.

In the context of international responsibility, the idea that member states act as quasi-organs is used to escape courts' jurisdiction. As mentioned by Jordan (p. 90), the ECtHR would be lacking jurisdiction *ratione personae* (on the lines of the *Behrami and Saramati* case). All in all, states could set up international organizations to circumvent their international obligations. This theory is based on a particular concept of international organizations, under which they are supranational entities and the relationship between member states and organizations is not based on international law but on the internal law of the particular legal system of the organization.

The reason for this outstanding effect is that international law is lacking an agreed concept of international organizations. They are generally perceived as two-faced entities, under which they are created by an international treaty, but, at the same time, they develop internal orders. One concept of organization is applied by the Prosecutor, implying that the ICC is an organization that possesses an internal order under which its rules are internal in nature. Under this constitutional unity, member states act as organs. The other concept is applied by Jordan, implying that the ICC is an organization that possesses a transparent institutional veil under which its rules are international in nature. Under this functionalist theory, it is actually the organization that acts as an agent.

The rules of the organization are the key concept that can turn an independent state into an organ. Indeed, the core of the controversy concerns the nature of the arrest warrant as a rule of an international organization. If the arrest warrant is international law, the ICC is a functional entity of which member states are independent sovereign entities. They remain responsible for the action taken while implementing ICC law. Conversely, if the arrest warrant is internal law, the ICC is a supra-national, constitutional, entity under which member states appear as organs. They would not be responsible for their conduct which merely implements an ICC obligation. From the Prosecutor's point of view, the internal nature defuses the conflict between the rules of customary international law obliging member states to respect the immunity of sitting heads of states and the internal ICC obligation binding a member states to execute the arrest warrant. From Jordan's point of view, it is the international nature that is relevant to stress out the existence of the conflict. Both ideas do not expose the full picture, but the law of international organizations does not have a clear answer.