Ruling through the International Criminal Court's rules: legalized hegemony, sovereign (in)equality, and the Al Bashir Case

Luisa Giannini[1]*, *Roberto Vilchez Yamato*[2], *Claudia Alvarenga Marconi*[3]

Abstract

This article investigates sovereign (in)equality as a phenomenon that is manifested in the different levels of international institutions. The analysis is developed from the process against Omar Al Bashir, Sudan's President-in-Office, at the International Criminal Court. Considering that norms and rules have a social role in the multiple relations existing between agents and structures, that is, they transform relations in the international system, the article investigates the dispositions and principles present within the scope of the International Criminal Court that authorize a discrimination between States. This distinction implies the imposition of international rules for some actors and the maintenance of certain sovereign prerogatives for others. More specifically, international criminal justice is characterized by selectivity in judgments, as some countries are given certain authority over the regime. In this sense, it is argued that the sovereign (in)equality that is present in international criminal law is simultaneously a manifestation and condition of possibility for the hierarchy in the social, and therefore institutional normative, and political architecture of the international system.

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* Doctoral candidate at the Institute of International Relations of the Pontifical Catholic University of Rio de Janeiro (IRI / PUC-Rio). Researcher at the Centre for the Studies of International Courts at the University of São Paulo (NETI-USP).

2 Professor at the Institute of International Relations at the Pontifical Catholic University of Rio de Janeiro (IRI/PUC-Rio). Doctoral Student of Law at Birkbeck, University of London. Doctor in International Relations from IRI/PUC-Rio. Master in Social Sciences/International Relations from the Pontifical Catholic University of São Paulo. Master in Human Rights from the London School of Economics and Political Science.

3 Professor of International Relations (undergraduate) and Global Governance and International Policy Formulation (professional masters) at the Pontifical Catholic University of São Paulo (PUC-SP). Researcher at the Observatory of International Relations at PUC-SP. She is the holder of the Jean Monnet Chair in European Studies at the Álvares Penteado School of Commerce Foundation (FECAP). Co-Secretary of the English School Section (ENGSS) of the International Studies Association (ISA).

It is argued that the presence of this sovereign (in)equality can be identified at the different levels of the institutions of international society, insofar as they influence one another.

Keywords: International Criminal Court; Al Bashir Case; Norms; United Nations Security Council; Sovereign (in)equality.

Introduction

During the drafting process of the Rome Statute of the International Criminal Court (ICC), there was a tension between two principles: sovereign autonomy and inequality (SIMPSON, 2004). One of the important topics discussed at the Plenipotentiary Conference in 1998 concerned the role of major powers in the functioning of the ICC. It was intended that the Court's jurisdiction could be triggered in two ways: the first, through a self-referral by sovereign states that autonomously ratified the Rome Statute; and, the second, following the referral of a case by the United Nations Security Council (UNSC). There was, however, a concern that this second triggering mechanism would establish a power prerogative of certain states over the regime of international criminal law. This aspect marks all institutional building enterprise and negotiation internationally, especially because it is intimately connected to a consequent increase in the production of unequal international orders while establishing international institutions and not undermining them as some enthusiasts would advocate.

In the final document of the Rome Statute, Article 13(b) established that the UNSC would have the power to refer cases to the Court due to its authority on matters relating to Chapter VII of the UN Charter. This section of the Charter famously establishes that it is for the UNSC to determine "the existence of any threat to peace, breach of peace or act of aggression" and, in such situations, it must take appropriate measures in order to "maintain or re-establish peace and security" (UNITED NATIONS, 1945, art. 39). Mirroring UN Charter's article 2(6), the prerogative of the UNSC under Article 13(b) authorizes the initiation of a procedure by the ICC against any UN member-State – even if it is a *non*-signatory country of the Rome Statute. In other words, it makes possible for the UNSC to go beyond the sovereign prerogative of States – in voluntarily binding themselves to a treaty (or not) – by giving it the authority to ground universal jurisdiction, and, hence, *internationally* trumping the

non-signatory State's sovereign will and decision to – *not* – ratify the Rome Statute.[4]

Considering the UNSC's institutional architecture and (great) power composition, and, most specially (or exceptionally), the position occupied therein by the five (extra)sovereign states with permanent seats and veto powers, the ICC's jurisdictional (infra)structures institutionally express an – (*un*)equal – order and ordering (LINDAHL, 2013). While some States are structurally (self-)immunizable, the rest – signatories or *not* to the Rome treaty – are *subject*able, that is, *not* (self-)immunizable to the *ad hoc* (or *exceptional*) universal jurisdiction of (the UNSC through) the ICC. This legal-political, institutional arrangement reflects, we argue, what Simpson (2004) calls "legalized hegemony," that is, a condition in which the privileges of certain states are not only legitimized, but also legalized through legal rules and institutions such as the UN Charter and the UN, and the Rome Statute and the ICC.

The UNSC made use of this "hegemonic imperative" for the first time in its referral of the Darfur case to the ICC. After the UNSC referral and the ICCs preliminary investigations, the ICC issued in 2009 an international arrest warrant against Omar Al Bashir, the acting Head of the Sudanese sovereign state. Al Bashir was the first acting Head of State to be indicted by the ICC (and through the UNSC). This case points to two controversial issues in the ICC regime. The first concerns the UNSC's authority to refer or defer a case from the ICC's jurisdiction. The second regards the capacity of the UNSC to waive an acting head of state's immunity.[5] The case against Al Bashir at the ICC is relevant and essential because it points not only

4 The activation of a third-party jurisdiction – meaning that the Court could initiate an investigation over situations involving states that are not party to the Rome Statute – deserves to be mentioned as a complement of our argument. Morris (2000) argues, for instance, that the activation of the powers of ICC towards nationals of States that are not party to the Rome Statute has to do with two main patterns: "There will be cases involving strictly a determination of individual culpability and cases that will focus on the lawfulness of the official acts of states" (MORRIS, 2000, p. 364). This typology allows us to point to the fact that Sudan, our case study, lies in this second category of cases in which States do not opt, at any time, to have their nationals under the individual criminal accountability regime established by the Court.

5 If the state has signed the Rome Statute, the Court itself has the capacity to overthrow the immunity of the Head of State. According to Article 27(1) and 27(2) that official capacity is irrelevant when it comes to the individual criminal accountability established the Court and consent to the Rome Statute formally affirms this irrelevance of official capacity.

to disputes within the framework of international criminal law, but also to constitutive tensions or aporias of the modern international order more broadly. In this case, questions about the power of the UNSC to submit a non-signatory state to the Court's jurisdiction and the prerogative to remove the immunity of an incumbent head of state touches upon the sovereign (in)equality between the state actors in this international regime.

It is meaningful the fact that the Al Bashir Case has already been set as a precedent for a subsequent situation in Libya, involving the referral of Mr. Muammar al-Gadaffi by the same UNSC to the Office of the Prosecutor (OTP) at ICC's headquarters. As a sort of path-dependent trajectory, Libya is also not a State Party to the Rome Statute and Muammar al-Gadaffi was also a serving head of state when targeted by the Court.

From this, it is understood that the political matters of the Al Bashir Case are associated not only with the more immediate issues of the regime, but also with the fundamental institutions and the political-legal order and ordering of international society. In order to establish such a relationship, the model of hierarchy of international institutions developed by Christian Reus-Smit (1999), which divides international institutions into three groups, is used as a theoretical framework. In general, the hierarchy to which the author refers recognizes the constitutional structure as the deepest level of values that constitute the international society. It conditions the fundamental institutions that, in turn, influence specific regimes. A study of the sovereign inequality manifested in the ICC regime is therefore necessary. The same goes to its manifestations in two other instances: the fundamental institutions and constitutional structure of the international order. Through the study of the Al Bashir Case, this paper questions the legalized hegemony crystallized in the rules of the ICC's institutional framework. In addition to the specific problems of the institutions, these controversies present in international criminal law point to other more fundamental questions of international relations, in the sense that it shows how justice can be used as a mechanism for ordering the international society.

If this is true, there would not be necessary to deal with the ICC framework in terms of a permanent *trade-off* between order and justice, sovereignty and (the enforcement of) human rights (YAMATO, 2014). For justice would be subordinated to the interests of those who claim the responsibility for the maintenance of international society and its (or their) 'law and order': the great powers. Agreeing with Cui and Buzan (2016, p. 183), who have recently affirmed, "We are particularly interested in uncovering whether and how particular conditions in international systems/societies facilitate or obstruct the operation of GPM [Great Power

Management]", our contribution does not maintain ICC as a judicialized international institution that entails a universal justice and constrains international order, but as a secondary institution that kept a primary international society institution untouched, that is: the great power management.[6]

In this sense, the Al Bashir Case is important because it raises questions about the authority exercised by the five permanent UNSC members and their capacity to act on issues concerning international criminal law. Cases such as these, which point to problematic issues in the structure of international criminal law, allow for discussions about the very foundations underlying international society. In this sense, it can be seen that broader problems, often identified with the architecture of international relations, such as inequality among states, are also manifested in specific structures, such as the international criminal justice system. However, these are not a mere expression of a global phenomenon. The more specific international institutional practices and arrangements are embedded in a context of mutual constitution in which, in addition to reproducing a hierarchical logic that is manifested in the structure of international society, they also allow this structure to be maintained and reproduced. From this arises the need for problematization of the normative-institutional apparatus within which these situations are inserted.

In order to analyse these problems, we can also draw on Nicholas Onuf's proposal to think of social arrangements as indissociably related to the (re)production of three conditions of rule: hierarchy, hegemony, and heteronomy. Hence, the theoretical positioning adopted is, in some sense, plural, seeking to depart from the thought of Reus-Smit and Onuf, with influences of certain critical readings not only from International Relations, but also from International Law. In this sense, this paper seeks to establish a dialogue between the International Relations and International Law literatures, especially because it seeks to study the institutions of international law and international criminal law. Such interdisciplinary enterprise allows raising questions concerning international institutions that would otherwise not be possible.

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6 The concepts of primary and secondary institutions are connected to an English School theoretical tradition of IR (see, for instance, BULL, 2002; BUZAN, 2004; HOLSTI, 2004). While the former are connected to patterned international behaviours of states, the latter are a deliberate choice of states which design these formal institutions in a coherent manner, since they would allow for the maintenance and even naturalization of previously installed behaviours.

Moreover, it is worth saying that there are different positions in the literature on the implementation of interdisciplinarity between International Law and International Relations. It includes debates on whether or not it is possible to establish a relationship between the two disciplines, the problems and advantages of adopting an interdisciplinary methodology, the boundaries established in each discipline, and the constant (re)definition of each discipline's identities that result from these efforts (LEANDER; WERNER, 2016; YAMATO; HOFFMANN, 2018).

Therefore, this paper seeks to engage with the critical literature of International Law and International Relations in order to analyse the problem of sovereign (in)equality in the regime of international criminal law and its relationship with the architecture of international society.[7] For this, we begin with the conceptual basis of the paper, with the formulations of Christian Reus-Smit and Nicholas Onuf about the working of rules and institutions in international society. Then, we go into the case study,[8] explaining the most important aspects of the Al Bashir Case that help to point out the manifestation of sovereign inequality in the ICC's regime. In the following section, we focus on the literature that point this problem – sovereign inequality -exemplified by the case in the previous section. Finally, we draw our concluding notes, pointing to how the sovereign inequality highlighted in the Al Bashir Case can be seen, at the same time, as a manifestation and a condition of possibility of a phenomenon that is entrenched in the social architecture of international society.

From international rules to the ruling of the international

Christian Reus-Smit (1999) draws a distinction between the institutions that compose the international order in three sets, which would be, from top to bottom, respectively: specific regimes; fundamental institutions;

7 This paper is heavily influenced by certain critical literature in both fields of International Relations and International Law, even though it does no engages directly with it. The paper pays significantly attention to an IR literature, but we have been paying attention specially to TWAIL scholars and critical readings of International Law, such as Martti Koskenniemi. In particular, see Koskenniemi (2011), mainly chapter 7, which speaks directly with the topic addressed in this paper.

8 Although we work with a case study, as was highlighted in a comment by one of the anonymous referees – which we are very grateful for – it is important to clarify that this article follows a more theoretical-interpretive line of argument instead of an empirical one.

and constitutional structures. These institutions would be hierarchically ordered, in a way that a higher level would be influenced by that which represents its basis.

At the first level, are regimes dealing with specific areas. Under this category are the arrangements of rules built directly by the actors. The specific regimes are based on fundamental institutions which, in turn, are "the elementary rules of practice that states formulate to solve the co-ordination and collaboration problems associated with coexistence under anarchy" (REUS-SMIT, 1999, p. 14). They make up what Reus-Smit (1999) calls the "basic framework" for cooperation between states. Their existence is fundamental so that the regimes can be established, because they are the fundamental institutions. These institutions, unlike specific regimes, are not altered simply by a change in actor's interests and they transcend changes in the balance of power in the international system. In the society of states, we can identify a series of fundamental institutions, among them diplomacy, international (criminal) law, multilateralism etc.

Finally, the basis is the constitutional structure, which influence the nature of fundamental institutions. These are "foundational institutions," the deepest socio-normative level (REUS-SMIT, 1999). They represent

> [C]oherent ensembles of intersubjective beliefs, principles, and norms that perform two functions in ordering international societies: they define what constitutes a legitimate actor, entitles to all the rights and privileges of statehood; and they define the basic parameters of rightful state action (REUS-SMIT, 1999, p. 30).

Constitutional structures, therefore, are so named because they incorporate the basic principles that, in turn, will produce and shape practices within international society. Thus, they restrict actors' actions by establishing guidelines for conduct. Three normative components allow constitutional structures to play this role: (1) a hegemonic idea about the moral purpose of the state; (2) the ordering principle of sovereignty; and (3) a rule of procedural justice (REUS-SMIT, 1999).

These elements operate in a way that the moral purpose represents the central part of this normative complex, since it provides the basis to justify the other components. The moral purpose of the state represents the reason to ensure the ordering of political life in communities that have autonomy in relation to the others and a centralized authority. It is characterized as moral by the fact that it establishes rules from a conception of what would be the best form of organization for political units. In addition, the existence of a hegemonic notion of a moral purpose of the state does not mean that this is the only one, but that this belief was

socially approved to dictate the political principles of political life. This foundation establishes the rules of entry and for institutional practices. The ordering principle defines how the differentiation of units will be made. In the society of states, it is the principle of sovereignty that plays this role. However, it must be pointed out that the claims of sovereign authority in international society can take various forms. The norms of procedural justice are the last element that composes this complex. They determine the proper conduct taken by legitimate actors. However, they do not prescribe principles, just precepts about what would be right or fair behaviour within the international environment (REUS-SMIT, 1999).

However, this model is only partially of use in this paper. Reus-Smit (1999) attributes to the constitutional structure the function of conditioning the other international institutions. In this sense, he establishes a hierarchy between them according to their character of influence and consolidates the normative foundations of international society in the constitutional structure, attributing to it a character of foundational institution of the international order. His reading is, however, restricted, since it does not consider the social character of norms and rules in international society. The key to this understanding lies in the idea that these are neither situated in the agents nor in the structure.

Nicholas Onuf's (1998a, 1998b, 2002, 2013a, 2013b, 2016) reading allows us to escape from the foundational character present in Reus-Smit's formulation, through an understanding of the international as a social order. In this conception, the rules receive the status of a third element that lies amidst agents and structure. From this place, rules participate in the process of constitution of both, while it is also constructed in the process. Thus, "[t]hrough rules people constitute the multiple structures of society, and societies constitute people the agents" (ONUF, 1998b, p. 172), that is, the definition of agents by rules is made in relation to institutional arrangements and the same applies to institutions, which are defined by the rules in relation to agents. Many institutions play the role of agents, made possible by their rules.

With this understanding, it cannot be said that the conditioning of other institutions happens in only one sense, as proposed by Reus-Smit's scheme. As much as there are rules that have a distinct status, such as the ability to give some actors the power to introduce or end certain rules, Onuf's approach does not have a hierarchically superior rule structure. The author's reading points to a scenario in which the most important rules would not be crystallized in a structure, but would be determined by the agents themselves in the process of interaction.

In addition to helping to overcome some problems in Reus-Smit's approach to international institutions, Onuf's reading also makes it possible to understand the manifestation of sovereign inequality in the rules and institutions of international society. For Onuf, "[e]very society is saturated in rules" (ONUF, 2016, p. 4) and "where there are rules (and thus institutions) there is rule – a condition where agents use rules to exercise control and obtain advantages over other agents" (ONUF, 1998a, p. 63).

Rules, once they allow this unequal political and social interaction, possibly result in three conditions of rule, classified according to their function. The hegemonic rule would correspond to the use of assertive discourses that inform the state of something and determine the agent's action in relation to it. A second form would be the hierarchy, which is associated with rules of direction, that is, imperative norms in which orders are implicit and results in its obedience and acceptance. Finally, the third type of rule is heteronomy, which is associated with the notion of an absence of (absolute, complete) autonomy. This form of rule is related to the rules of commitment which are carried out in the form of an agreement (ONUF, 1998b, 2013b; NOGUEIRA; MESSARI, 2005).

Even though agents are constituted from these forms of rule, they also participate in their constitution, since they have the capacity to act and change their social reality. Thereby, taking social arrangements as constituted from social relations allows us to understand the process of co-constitution between agents-society-rules. From this, we can understand that the analysis of social relations should take rules as its departing point.

Onuf's formulation of rules allows us to overcome the problem identified in Reus-Smit's model of crystallization of the meta-values of the constitutional structure:

> With the concept of rules, Onuf doesn't admit anything as previously determined and provides instruments endogenous to his own theoretical contribution to analyse the diversity of social events. In this sense, the permanent construction and reconstruction of social life in general – and of international relations in particular – opens the door, indefinitely, for transformation, change or continuity. The world is truly 'a world that we make' (NOGUEIRA; MESSARI, 2005, p. 174, our translation[9]).

9 Translated from the original: Com o conceito de regras, Onuf não admite nada como previamente determinado e providencia instrumentos endógenos à sua própria contribuição teórica para. analisar a diversidade dos eventos sociais. Nesse sentido, a permanente construção e reconstrução da vida social em geral – e das relações

Moreover, with this conception, it becomes possible to account for the presence of sovereign inequality in the institutions of international society. Once it is understood that the power arrangement in the system has an impact on the formulation of new rules, this model allows us to study the phenomenon of sovereign inequality, and even legalized hegemony, a situation in which great powers use their position of superiority in resources to transform privileges – often already existing – into norms.

The Al Bashir Case: (re)reading the relationship between the ICC and the UNSC

The Al Bashir Case is revealing as it was the first case of the ICC in which its jurisdiction was based on article 13 of the Rome Statute – and, as previously stated, served as precedent for the Libyan situation. In other words, the UNSC made unprecedented use of its prerogative under Chapter VII of the United Nations' Charter to initiate an investigation by the ICC. This case points to a central problem that is present in different spheres of international relations: the existence of rules that affirm *sovereign inequality*. The term describes the condition of a society of states in which some of them, in addition to their sovereign prerogatives, enjoy exclusive rights. From this privileged position, they have the capacity to restrict the sovereign rights of other states (SIMPSON, 2004).

The Al Bashir Case[10] began as of Security Council Resolution 1593 and is held by some authors as a milestone for international justice, for

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internacionais em particular – abre a porta, de maneira indeterminada, para. a transformação, a mudança ou continuidade. O mundo é verdadeiramente 'um mundo que nós fazemos.'.

10 In the face of continued reports of massive human rights violations in the Darfur region, UNSC Resolution 1564 of 18 September 2004, made the following requests: (1) that an international commission be established by the UNSC to investigate allegations of violations of international humanitarian and human rights law in Darfur; (2) to ascertain whether acts of genocide had been perpetrated; and (3) that the perpetrators of these violations were identified in order to be held accountable (UNITED NATIONS SECURITY COUNCIL, 2004, para. 12).
In accordance with Resolution 1564, the then UN Secretary General, Kofi Annan, established the International Commission of Inquiry on Darfur (ICID). The ICID report, which visited the country at the end of 2004, alluded to the practices employed by the Janjaweed militias, the Sudanese government and, to a lesser extent, by the rebels who, according to the rapporteurs, constituted crimes against humanity and war crimes (INTERNATIONAL COMMISSION OF INQUIRY ON DARFUR, 2005; OETTE, 2010, p. 374). In addition, it was stated that there were no indications of genocide, although acts of individuals with intent to

being the first time the UNSC triggered its jurisdiction over the ICC (BÖCKENFÖRD, 2010). However, the authority conferred on the UNSC by the Rome Statute is still a controversial topic, since the independence of the Court is considered to be an important institutional aspect that distinguishes ICC from its predecessor courts.

Since the establishment of the Al Bashir Case at the ICC, two arrest warrants have been issued against the acting head of state: the first on 4 March 2009 and the second on 3 February 2010.[11] The first warrant was sent to all States Parties to the ICC and to UNSC members who are not signatories to the Statute of the Court (AKANDE, 2009a, 2009b). Although the request for the arrest and surrender of Al Bashir was addressed to each of the States mentioned, Resolution 1593 made a request for States and regional organizations to cooperate with the Court's requests (UNITED NATIONS SECURITY COUNCIL, 2005). In face of this situation, the Sudanese government refuses to cooperate with the ICC. Officials in the country claim that the Sudanese judicial system has already dealt with the crimes committed on its territory against the civilian population.[12] On the basis of the principle of complementarity,[13] provided for in the

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genocide have been identified. Finally, the document further recommended that the UNSC refer the case to the ICC (OETTE, 2010, p. 347).
The UNSC accepted the recommendation of ICID, in accordance with its prerogative based on article 13 of the Rome Statute, and indicated that the case of Darfur should be investigated by the Office of the Prosecutor (OTP) of the ICC, through Resolution 1593, on 31 March 2005.

11 Despite the issuance of arrest warrants, Omar Al Bashir remains at large, since he did not surrender – and was neither arrested nor surrendered – to the Court.

12 In response to the indictment of Darfur's situation with the ICC, the Sudanese government established the Special Criminal Court for Darfur (SCCD) in June 2005. However, the defendants brought to SCCD were few and far from the country's high political leadership. In addition, crimes covered by internal trials were restricted, and cases of common offenses committed in isolated incidents were often brought to court (OETTE, 2010, p. 347).

13 The principle of complementarity regulates the relationship between domestic and international criminal jurisdictions. It is provided for in the Rome Statute both in its tenth preambular paragraph and in Article 1. In the latter, it is defined that the jurisdiction of the ICC "shall be complementary to national criminal jurisdictions" (ROME STATUTE, 1998, art. 1). This means that the Court functions as a supplementary mechanism and should not overlap with investigations and prosecutions of domestic crimes as long as they are in accordance with international law. The ICC must therefore operate in a way that complements those judgments, being an "additional concurrent jurisdictional layer that can intervene if and when domestic jurisdictions fail to bring genuinely to justice those suspected of having committed **genocide, crimes against humanity, war**

Rome Statute, this would remove the competence of the ICC –, which means, therefore, that it is not necessary for the case to be addressed in international bodies. In addition, Sudan claims that it has no obligation to the ICC since it is not a State Party to the Court's constitutive instrument (OETTE, 2010).

The Sudanese President, since the issuance of the first arrest warrant by the ICC, has carried out more than 60 official trips. Among the countries that have received Al Bashir, there are members and non-members of the ICC. In many cases, the failure to surrender Al Bashir to the Court resulted from a deliberate choice of those States.

With regard to the Rome Statute signatories that received the Sudanese President – as Chad, Djibouti, Malawi, Kenya, DRC and South Africa, for example – the Court requested the presence of their representatives, demanding explanations for non-cooperation in prison and handing over Al Bashir to the ICC (CRYER, 2015). Nevertheless, no concrete action was taken by the ICC against those States. This has to do with the fact that only the Assembly of States Parties of the ICC (ASP) and the UNSC (in cases initiated by UNSC resolutions) have the power to implement decisions in the event of non-compliance with arrest warrants.

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crimes and – once the ICC may exercise its jurisdiction in this respect – the crimes of **aggression**" (NERLICH, 2009, p. 346, emphasis in original). In theory, the ICC should give priority to the trial in a national forum, as established in article 17 (1) of the Rome Statute. It establishes that the Court must render inadmissible to try a case before the ICC in the following situations: (1) whether the case is being investigated or judged by the State that has jurisdiction over it (ROME STATUTE, 1998). However, in order to be considered inadmissible, there should be tried in the domestic proceedings the same individuals and crimes as in the ICC situation/case (PTC, 2006, para. 31). Moreover, it is possible that a case is admissible to the ICC once it considers that it is not being genuinely investigated and tried by the State; (2) if the State having jurisdiction over the case decides, after investigation, not to judge the individual, unless it is considered that the decision was taken by the inability or unwillingness of the State to judge; (3) if the individual has already been tried for the conduct for which he is accused in the complaint (ROME STATUTE, 1998, article 17). However, the principle *non bis in idem* – which establishes that an individual will not be tried more than once for the same fact – will not be applied, as stated in article 20 (3) of the Rome Statute, in cases in which the domestic trial happened "for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court" or when the proceeding is not considered impartial or independent in accordance with the rules of international law, so that there is no intention to bring the individual tried the Justice; and (4) if the seriousness of the case does not justify interference by the ICC, even in the absence of a domestic proceeding (ROME STATUTE, 1998, art. 17).

In July 2009, at a regular meeting of the African States Parties to the Rome Statute of the International Criminal Court, which took place within the framework of the African Union (AU), members expressed great concern about the implications of the arrest warrant issued by PTC against Omar Al Bashir for the ongoing peace process in the country (AFRICAN UNION, 2009, para. 2). The Decision called for a number of issues to be discussed at the ASP meeting in Kampala, Uganda, in May 2010, of which the most relevant were: (1) the existence of Articles 13 and 16 in the Rome Statute, which provides the UNSC with the ability to initiate or discontinue cases at the ICC; (2) a need for clarification by the Court the question of immunities of officers whose States are not parties to the Rome Statute; and (3) the implications of the practical application of articles 27 and 98 of the Rome Statute (AFRICAN UNION, 2009, para. 8).

In addition, the Decision expressed the frustration of African States with the fact that the request of the AU to the UNSC – asking it to defer proceedings against Omar Al Bashir in the ICC – in line with the prerogative conferred on that body by article 16 of Rome Statute – had not been even heard. The request was thus reiterated. Lastly, the most striking aspect in the decision of the African States Parties to the Rome Statute was the request for its signatories to not cooperate with the ICC regarding the Al Bashir Case – a possibility provided for in article 98 of the Rome Statute (AFRICAN UNION, 2009, para. 9 and 10).

This situation led to the debate regarding the obligation to arrest Al Bashir when in the territory of a state party of the ICC, considering his status as head of state and the consequent prerogative of immunity based on international law.

The question of Al Bashir's immunity, which stems from his status as acting head of state, is controversial. For the first time the ICC has a case against an acting head of state. There are precedents of judgments of former heads of state who did not have immunity rights because they were nationals of Rome Statute member countries, which implies the waiver of their immunities.[14] Before the question of whether, under international law, incumbent heads of state would enjoy the right to immunity from criminal jurisdiction and from orders of arrest in foreign states, many authors consider that Al Bashir is entitled to absolute immunity, even though he is accused of committing international crimes (AKANDE, 2009a).

14 Even the trial of heads of state in other international criminal tribunals created after the 1990s is different, since the ICC was created based on a treaty.

The immunity of state officials was addressed in the ruling of the International Court of Justice (ICJ) in the Case of the Arrest Warrant of 11 April 2000. In this case, which concerned, however, an individual who exercised the position of Minister of Foreign Affairs, the ICJ judged itself:

> [U]nable to deduce […] that there exists under customary international law any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers for Foreign Affairs, where they are suspected of having committed war crimes or crimes against humanity (ICJ, 2002).

The ICJ understood that the mere issuance of the arrest warrant by Belgium against an interim member of the Democratic Republic of Congo's government constituted a violation of international law's customary rules concerning the personal immunities enjoyed by foreign officials (*author*). The same reasoning can be applied to heads of state. There are, however, some differences: the arrest warrant against the Sudanese president was not issued by a foreign court and circulated in an international environment. It comes from an international court, being an international warrant for the arrest and surrender of Al Bashir (GAETA, 2009).[15]

After arguing that the immunity of heads of state is an impediment to the exercise of criminal jurisdiction by national courts, the ICJ sought to clarify the issue with regard to international criminal courts, ruling that immunity does not apply the same way. The ICJ decision referred to judgments in the International Criminal Tribunal for the former Yugoslavia (ICTY), in the International Criminal Tribunal for Rwanda (ICTR) and in the ICC. Regarding the ICC, it emphasized Article 27(2) of the Rome Statute, according to which immunities recognized under domestic or international law do not prevent the ICC from exercising jurisdiction over an individual (ICJ, 2002). However, the ICJ's assessment of immunity from international criminal tribunals did not go further, as it was unnecessary for the *sub judice* case. As a result, a number of questions remain regarding the observation of the immunity of government officials before international criminal tribunals.

The ICJ's assessment of the invalidity of immunities before international criminal tribunals is widely criticized, mainly because it mentions the

15 The issue of immunity of heads of state was also discussed in two other situations: in the Pinochet Case, before the House of Lords, in the United Kingdom; and in the Belgium v. Senegal, at the ICJ. However, both cases concerned trials of former heads of state before national courts, claiming universal jurisdiction due to the crimes perpetrated.

ICTY, the ICTR and the ICC, without considering the differences between these courts. These distinctions are central to the discussion of the (in)applicability of the principle of immunity of heads of state. Although the ICTY and ICTR are international courts, they are *ad hoc* tribunals, different from the ICC, which is a permanent court. The two courts were created from UNSC resolutions, so they are vested with the authority of a measure adopted under Chapter VII of the UN Charter. The ICC, as explained above, was created on the basis of a treaty, so it is founded on the direct consent of the contracting states.

This distinction is fundamental because it has an impact on the obligations of states to execute the arrest and surrender warrants issued by those courts against individuals who enjoy personal immunities based on international law (GAETA, 2009). When the ICTY and ICTR were created, the UNSC imposed obligations on all UN members to cooperate with these tribunals (UNSC, 1993, 1994). Therefore, although the ICTY Statute – or the UNSC Resolution establishing it – does not contain provisions on the breach of immunity, the issuance of the arrest warrant by the ICTY against Slobodan Milosević has been little questioned,[16] since it is considered that the UNSC is able to remove the immunities of officials and governments' representatives of UN Member States by virtue of their acceptance of Articles 25 and 103 of its Charter. In the case of the ICC, because it's based on a treaty, it cannot do the same, since the Vienna Convention on the Law of Treaties states in article 34 that treaties cannot create obligations and rights to third states without their consent (INTERNATIONAL LAW COMMISSION, 1969). In that sense, the Court only has authority to require the execution of an arrest warrant to its members.

The Al Bashir Case presents a difference from the situations referred to the Court by states themselves or by the Office of the Prosecutor: the fact that Sudan is not part of the Rome Statute. This implies that Sudan has not waived its rights to immunity. On the other hand, since the Al Bashir Case stems from a UNSC resolution, it is argued that only the Security Council has authority to remove the immunity from Al Bashir.

Although not a state party to the Rome Statute, Sudan would be obliged to cooperate with the ICC because of Resolution 1593, which stated that "the Government of Sudan and all other parties to the conflict in Darfur, shall cooperate fully with and provide any necessary assistance

16 The questions raised indicate that the existence of jurisdiction does not imply absence of immunities, a position that is in line with the decision of the ICJ in the Arrest Warrant Case (ICJ, 2002).

to the Court and the Prosecutor pursuant to this resolution" (UNSC, 2005). Resolution 1593, therefore, establishes an explicit obligation under international law for Sudan, which includes the duty to arrest and surrender any individual requested by the ICC. This case raises questions about the violation of Sudan's sovereign autonomy by a rule of the ICC, which authorizes the UNSC to bind that state to the statutory provisions of the Court, and consequently imposing obligations that were not adopted voluntarily. In sum, the Al Bashir case is questioned in this article because of these traces of sovereign inequality, not only found in the ICC, but also in other instances of international society.

As noted, the Al Bashir Case raises the discussion about the prerogatives given to some states by the Rome Statute over the ICC. By investing in large powers the ability to initiate an investigation against a state – which may or may not be a member of the Court – and to order that an investigation or trial under way in the ICC be discontinued, the Rome Statute crystallizes the condition of a select group of states as possessor of powers over the sovereignty of others. The signing of an international treaty is considered an expression of the sovereign will/autonomy of states. However, since this group – the five permanent members of the UNSC – has an express authorization to submit any State – with the exception of themselves, since the objection of one means the non-progress of the proposal – to that treaty, there is a trail of hierarchy and inequality to be followed.

The Case highlights precisely this issue. As the UNSC indicated that the ICC should investigate the situation in Darfur, Sudan was subject to the standards established by the Rome Statute. Provisions such as these establish differences between state sovereignties: while some have their sovereign rights violated, others not only maintain their prerogatives, but are also allowed to infringe upon those of others. The Al Bashir Case thus exemplifies the expression of a legalized hegemony.

It is worth mentioning that the UNSC process of negotiation around the issue finished with the adoption of a resolution without any vote against it and eleven states in favour. To some literature, extreme influential on the ICC functioning, but that do not engage critically with our argument,

> [...] the resolution was an international **vote of confidence in the ICC**. The US, which had been campaigning against the ICC since its creation precisely because of the Court's potential jurisdiction over nationals of states not parties to its Statute, had initially lobbied to other Security Council members to refer the situation in Darfur to another

> jurisdiction, for instance a joint African Union/United Nations Special Court for Darfur. But ultimately the US and even China, Sudan's largest trading partner, did not veto the Council's first referral to the ICC (NOUWEN, 2013, p. 248–249).

The veto power, being used or abstained by great powers, undoubtedly manifests the crystallization of a legalized hegemony within the United Nations. Nonetheless, the Al Bashir case makes evident that this transcends UN and both disseminate and articulate hegemony beyond it. Under any hypothesis – using or not the veto power – the Al Bashir case would be defined by the discretionary power of great powers and not by equal sovereign power of states.

The Al Bashir Case, Sovereign (In)equality, and Ruling through Rules

The Al Bashir Case in the ICC, as shown, is inserted in a very controversial context. The objective is not of investigating whether or not Al Bashir should be tried for the perpetration of international core crimes. The work sought to problematize the manifestation of sovereign inequality in the ICC, using the case study to elucidate how this hierarchization of sovereignties is expressed in the relationship between the Court and the UNSC. This section, then, builds on discussions on how the relationship of mutual constitution between different levels of institutions related to the ICC has an impact on the expression of sovereign inequality in each of them. The Al Bashir Case provides the opening to begin the discussion on the manifestation of sovereign inequality in the institutions of international society. It points to an aspect around which various questions can be posed: the authority of some states – the five permanent members of the UNSC – under the ICC regime. While some have their sovereign capabilities preserved, others do not enjoy this privilege. There is a hierarchy in international society that separates the great powers (and other developed states) from those whose sovereignty is vulnerable to violations.

The key point of the manifestation of sovereign inequality in the Al Bashir Case is in the subjugation of Sudan to the Rome Statute. In other words, once a state is forced to comply with the norms of a treaty that it has not ratified, it directly touches upon the principle of state sovereignty. Sudan neither signed nor ratified the Statute of the Court. There are rules within the framework of norms of international law, such as Article 34 of the Vienna Convention on the Law of Treaties, which prohibits the creation of obligations by a treaty to a state that has not given its consent

– through ratification. However, the Statute of the Tribunal, and other instruments such as the UN Charter, of which Sudan is a part, go in another direction. According to these documents, the UNSC has the competence to violate the sovereign prerogatives of a state.

This discussion points to the relationship between two types of institutions of international society, the specific regimes and the fundamental institutions, respectively the UNSC/ICC and international law/sovereignty/immunity of heads of state. One sees, therefore, how sovereign inequality is implied in the relation of mutual constitution. The establishment, by means of rules, of the relationship between the UNSC and ICC regimes, in the same way as the use of these rules by the Security Council to indicate a case to the Court – which, according to Onuf (2013b) also changes the rule, once it strengthens it – provokes changes in other fundamental institutions related to them. The adoption of a provision stating that the UNSC can enforce the Rome Statute's rules for a non-signatory state alters and even manipulates the content of key institutions. In international law, this has an impact because it creates variations on the rule in its framework, according to which the creation, through a treaty, of obligations to third parties without their consent is not allowed. In other words, state non-parties, which have not expressed their agreement, are not subject to conventional rules that provide for obligations. The circumstances of the case seem to show that the third-party obligations rule has another meaning. The original notion that the third state must express its agreement continues to prevail, except in situations in which the UNSC decides to create obligations, submitting it to the ICC regime.

Regarding the principle of sovereignty, it is modified, gaining greater flexibility. Sovereignty is (re)signified so that its preservation is tied to a series of conditions. There is also a redefinition of who has the capacity to transgress this principle. The same is true about the immunity of heads of state. Those who voluntarily join the Rome Statute are considered to waive their immunity rights. In the case of those who are not members of the Court, but which become states treated as parties, it is considered that immunity is also lost. In this case, there is the influence of another fundamental institution: human rights. Increased concern about serious violations of human rights and the consequent growth of norms dealing with these issues lead to changes in some principles. Once the superiority of rules of that institution is established, the conflicting principles become more flexible. Regarding the principle of immunity of heads of state, the ICJ decision confirmed the existence of immunity of a government official before the jurisdiction of a national court. However, it was affirmed that, in the case of an international criminal court, that immunity is overturned.

It was decided, therefore, that in the event of a case involving the perpetration of grave human rights violations, immunities will not be maintained, thereby bringing about a change in this fundamental institution.

So far, with the Al Bashir Case, it was shown how there is a process of interaction between specific regimes and fundamental institutions. In regimes, place of the most basic practices, decisions, actions and speech acts represent changes in the already existing fundamental institutions and, at the same time, these institutions have certain rules that limit the scope of action of the actors. Thus, the sovereign inequality affirmed in the Al Bashir Case, based on the rules established by the Rome Statute, is also present in the fundamental institutions, since these principles begin to express an unequal pattern, as is the case of sovereignty, which is (re)understood to encompass the notion that there are situations in which it can be violated.

These rules, such as those conferring authority to the UNSC over the ICC, also have an impact on the architecture of the international system. The crystallization of such rules would result in the condition that Onuf (2013b) calls heteronomy (which occurs in conjunction with the conditions of hierarchy and hegemony, but their characteristics prevail). This condition is reached once there is a significant set of commitment rules, which are standards that inform the actors of their rights and duties (ONUF, 2013b). These rules, therefore, define certain prerogatives of certain agents and guarantee for others that their rights will not be violated. However, in this scheme, this reaffirmation for the actors of their autonomy is nothing more than an illusion. Agents are never completely autonomous. Their decisions are always linked to social reality.

Under this condition of heteronomy is that much of the institutions of international society are formed. More specifically in the situation of the ICC, adherence to its constituent instrument, the Rome Statute, by ratification also creates such an illusion. The establishment of an international criminal court through a treaty, in contrast to the previous war crimes trials, was seen as a reaffirmation of the sovereignty of states, since the Court would exercise its jurisdiction only over those whom adhered to its statute. However, the idea of state autonomy was contrasted by a provision of the Rome Statute that established a mechanism through which the UNSC is given the capacity to indicate a case to be investigated and tried by the ICC. Hence, as already mentioned, the Council is empowered with the capacity to submit a state to a treaty to which it has not bound itself by its will.

The sovereign inequality that manifests itself in the regime of the ICC, as it has been emphasized, is not an isolated phenomenon. Although this

institution is not directly associated with the UN system, once it defines that the UNSC has competence to act on all issues involving the theme of international peace and security, the ICC regime becomes closely intertwined with it. Thus, sovereign inequality in the UN is a condition for its expression in the ICC. And because Sudan is a member of the UN Charter, it is under the authority of the UNSC. In this sense, the Al Bashir case points to this phenomenon in both regimes in the Court and the UN.

In this interaction of different levels of international institutions, there is a second form of relationship – beyond the one among regimes and fundamental institutions – between the fundamental institutions and the architecture of the international system. The rules, insofar as they crystallize an inequality of resources existing between states, begin to express the disparities of the system. They establish a framework of legalized hegemony that gives the illusion that there is autonomy/equality between states, but also constitute a series of prerogatives for some. The establishment of such rules, marked by these two values – autonomy/equality and sovereign inequality – such as those present in the Rome Statute and the UN Charter, in turn, influence the architecture of the system. Thus, there is a relationship between the three levels of institutions of international society. Therefore, one can see that there is a clear relation between the sovereign inequalities that are manifested in the different levels of institutions that compose the international order. And rules are the central piece in this scheme, being the ones responsible for producing the condition of heteronomy.

Conclusion

The present article sought to problematize a very common assumption in International Relations: the idea that the anarchy that marks the architecture of international society presupposes sovereign equality. From this assertion, it was argued that there is a sovereign inequality in the international system that is reproduced in the different institutional levels of that order. This hierarchy between sovereignties is legitimized through rules that crystallize inequality in the system. From this, the article sought to understand how this expression of sovereign inequality in the regime of the ICC – through the Al Bashir Case – is related to the manifestation of this phenomenon in other institutions.

The fact that the UNSC is empowered to carry out exceptional measures in international society – such as interventions, or even the indication of a non-member country to the ICC – denotes a hierarchy among states that

grants privileges to some and restricts capacities from others. The article, therefore, questioned the idea of sovereign equality, seeking to understand how, through the Al Bashir Case, the opposite can be verified. The case study paved the way for the problematization of sovereign inequality in international institutions. From this, we inquire about the interaction between the institutions that compose the international society and the relation between the expression of inequality between them and the architecture of the system.

The Al Bashir Case serves as an entrance to the discussion of sovereign inequality in the institutions of international society. This Case marked the first time that the UNSC made use of one of the two prerogatives granted by the Rome Statute: that of requesting an investigation by the Court into a certain situation. In this case, the UNSC did so through Resolution 1593, which established an investigation into the situation in Darfur and held a reservation on the investigation of individuals of other nationalities other than Sudanese. By referring the case to the ICC, the UNSC submitted to an international treaty a state that had not ratified it, thereby violating the sovereign prerogative of binding international treaties by expressing its will. This relation between the ICC and the UNSC is considered a manifestation of sovereign inequality since it authorizes great powers to have interference over the regime of international criminal law. This hierarchy, as stated, is expressed in the ability of the UNSC to violate the sovereign prerogatives of a state through its subjection to a treaty to which it has not adhered.

Based on this situation, the article analyses how the relationship between the different levels of institutions of international society implies the manifestation of sovereign inequality. With the creation – and use – of the norm that allows the UNSC to interfere in the ICC regime, a relationship is also established between these two specific regimes and the fundamental institutions related to them. Thus, the sovereign inequality that is expressed in the first relation is transposed to the second one, since it changes the actors' understanding of these fundamental institutions. The standard that defines the relationship between the ICC and the UNSC also has an impact on the system architecture. As stated, the type of rules that prevails in the international society has an impact on its structure. And, as pointed out, the institutions of the international order are marked by ambiguity, so that they affirm at the same time the autonomy between states and sovereign inequality. The result of this type of rules, as stated by Onuf (2013b), is an environment marked by heteronomy, which is considered by the author as the situation in which actors believe they have autonomy but actually live in a hierarchical environment. In this

sense, the assertion in these institutions of principles that point in different directions constitute international society as heteronomous.

This article, then, represents an effort of disputing the way anarchy in the international system is portrayed. The contribution of the present research, through a case study, to question the characterization of the international system as anarchic and marked by sovereign equality, through the use of theoretical conceptions explaining the interaction between institutions. While, on the one hand, the study of the Al Bashir Case in the ICC raises the discussion over the expressions of sovereign inequality in the international society, it also allows us to witness the material expression in international relations of the theoretical conceptions of the authors on whose ideas the present article was based. With this, it was highlighted how the different levels of institutions of the international society interact in terms of the expression of sovereign inequality. It has therefore been shown that, just as the structure of society has an impact on fundamental institutions and specific regimes, rules and norms are also participating in their construction and, therefore, in the making of a legalized hegemony in the international realm.

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My iCourts experience

The process of writing and researching for a dissertation can be a very lonesome experience in which most of your conversations take place between four walls among your readings and yourself. As a PhD student starting to take my first steps into my research, amongst the literature of relevance for my work, I would find cutting edge and high-quality working papers, published articles and other kinds of writing that resonated a lot with what I was aiming to develop. Some would stand out for bringing debates and literature from other disciplines and non-conventional elements in their research. And surprisingly many came from the same centre. That is when I first learned about iCourts. From there, I knew that this was a place I would want to visit if I had the chance.

A year later, I would process my application to be a student at the 2019 iCourts PhD Summer School. The experience of the Summer School was a great one. Students from various countries and institutions getting together to engage in discussions on their projects amongst themselves and with iCourts professors was a very rich experience. Not to mention the School's great social programme! However, considering that the School only lasted for two weeks, I left with the feeling of wanting more.

That same year, I applied for a scholarship to do a semester of my PhD research at iCourts. In January 2020, I was back for a research stay. The first months were filled with academic encounters, presentations, and a deep dive into my dissertation topics that benefited a lot from the centre's own research projects. I presented my work and had a fantastic engagement and feedback (that I still come back to this day!). The discussions once held in a lonely office were taking place in real-time.

Beginning March, though, we got the news that everyone should stay at home. A global pandemic hit, and Denmark did not escape from it. That was a bucket of cold water to all the expectations that I had for that stay. The result, however, was that I got more from it than I expected, and it is from that time that I have my most fond memories of my time in iCourts. I had people checking on me constantly and providing a sense of being taken care of. Lilli Streymnes would always ask if I was in need of anything and offer a tale or two about her pandemics life. Sarah Scott Ford took me to socially distanced meetings with the PhD students who lived alone in the city, providing a greatly appreciated human company. Thomas Gammeltoft-Hansen would make these harsh and mad times so

much lighter by not only meeting me for face-to-face encounters in open spaces to chat about projects or even political nonsense but also adding two adorable tiny humans to those meetings. And, of course, Salome Addo Ravn, a constant company throughout these times, would phone me to chat for hours about topics that ranged from some cuteness her toddler was up to that day to some academic conundrum that either one of us was struggling to make sense, be that a very practical issue in need of a decision or something deeper into the literature. I will always cherish the kindness they showed me during these challenging times!

As I am now in the final months of my PhD, I know that the time that I stayed in Denmark, even with all the circumstances of the pandemic, were amongst the best in these past years.

By experiencing iCourts, I can say that I found more than the materialization of the discussions once held with written texts. It also brought me fellowship, (lots of) laughter and affects.

Hear, hear, iCourts!

Luisa Giannini
PhD Candidate in International Relations, Pontifical Catholic University of Rio de Janeiro