Instrumentalizing International Justice: Don't Halt the Bashir Case

JURIST Guest Columnist Saira Mohamed of Columbia Law School says any decision by the UN Security Council to stop the International Criminal Court's proceedings against Sudanese President Omar Hassan al-Bashir by using its power under Article 16 of the Rome Statute would render the ICC a mere bargaining chip and would only worsen the situation in Darfur...

On March 4, 2009, the International Criminal Court (ICC) issued an arrest warrant against Omar Hassan al-Bashir, the President of Sudan. Bashir, the first sitting head of state indicted by the Court, is accused of war crimes and crimes against humanity in Darfur, the western region of Sudan where an estimated 300,000 people have been killed and more than 2.7 million have been forced from their homes as a result of six years of violence.

The issuance of the warrant has inspired intense debate about whether criminal proceedings against Bashir would bring even more violence and conflict to Darfur and destroy any hope of peace. Faced with the prospect of heightened suffering in Darfur and throughout Sudan, advocates, nongovernmental organizations, and policymakers — including both allies and opponents of the Government of Sudan — have called for the UN Security Council to stop the Court by using its power under Article 16 of the Rome Statute, which allows the Council to order the suspension of ICC proceedings in a case for up to one year, with the option to renew the suspension an unlimited number of times.

Using this option to suspend proceedings in the case of Bashir may well fall within the authority of the Security Council, but it would be an inadvisable use of its power. Employing Article 16 in this manner would render the ICC a mere bargaining chip, which not only would worsen the situation in Darfur, but also would vitiate any power the fledgling Court might have to secure accountability and deter future crimes.
The ICC's Darfur Proceedings

The history of ICC involvement in Sudan is one of inaction and defiance on the part of Khartoum. Following the Security Council's initial referral of the situation in Darfur to the Court in 2005, ICC Prosecutor Luis Moreno-Ocampo launched a case against Ahmad Mohammed Haroun, the Sudanese Minister of State for the Interior, and Ali Kushayb, a leader of the janjaweed militia. Neither individual has yet been turned over to the Court; instead, the Government of Sudan brazenly promoted Haroun, who by then had taken on a new position blocking the delivery of humanitarian aid to displaced Darfuris as State Minister for Humanitarian Affairs, to lead a national committee to investigate human rights abuses in Darfur.

Last July, when Moreno-Ocampo announced his pursuit of Bashir, Khartoum predictably stepped up its defiance. Playing to the fears held by many Sudan watchers, Sudanese officials began to make explicit and implicit threats regarding the dangers peacekeepers, humanitarian workers, and civilians both in Darfur and throughout the country would face if the warrant was issued.

At the same time, the Government of Sudan rallied its allies to pressure the Security Council to exercise its power under Article 16. Within days, the Arab League, African Union, Organization of the Islamic Conference, and Non-Aligned Movement were all warning of the threat to peace posed by the Bashir case and calling for immediate suspension of proceedings. The pleas for Security Council action have only escalated now that the warrant has been issued and the “warnings” have started to come true: The same day that Bashir became a fugitive from justice in the eyes of the ICC, the Government of Sudan expelled thirteen humanitarian groups that provide food, clean water, and health care to the people of Darfur.

The History and Purpose of Article 16

The Security Council's power to defer ICC proceedings was one of the most controversial issues during the negotiation of the Rome Statute. The drafters struggled to find a balance between recognition of the Security Council's primacy over international peace and security and the Court's independence. Initially, the International Law Commission (ILC) proposed that jurisdiction over any matter already before the Security Council should be eliminated unless the Council agreed otherwise. This would have given the Security Council complete control over the Court's jurisdiction; to prevent the ICC from addressing a situation, a Permanent Member would need only add it to the Council's agenda and then veto any resolution to permit the Court to investigate it.
The drafters rejected this formulation and chose instead to structure the Court-Council relationship so that it would be difficult for the Council to defer a prosecution or investigation. Instead of requiring Council permission for the Court to act, the drafters opted to require Council action to stop the Court from acting. In the final version of Article 16, the Security Council must adopt a resolution, with nine votes in favor and no vetoes, to defer ICC proceedings. Moreover, it must act under Chapter VII, which requires the Council to determine that it is taking steps to “maintain or restore international peace and security” in the face of a “threat to the peace” or a “breach of the peace.” The drafters of the Rome Statute thus turned the original ILC proposal on its head and set up a system in which Council intervention in ICC cases would be the exception, not the default.

**Instrumentalizing International Justice**

Based on the text, it would be difficult to argue that an exercise of Article 16 by the Security Council would be unlawful. Although the existence in Darfur of any peace to be threatened is debatable, the Council conceivably could make a determination that ICC proceedings against Bashir constitute a threat to peace and that deferral of those proceedings would maintain or restore it. Nonetheless, such a use of Article 16 would fail to make any progress toward actual peace in Darfur. It would only entrench the climate of impunity that has pervaded Sudan for decades and do damage to the Court in the process.

Article 16 should be reserved to protect the fragile moves of warring parties toward peace and stability” not to convince a government to comply with the obligations it already has. While commentators and diplomats urge that an Article 16 suspension would not be a free pass for Bashir because the Council could condition the suspension on any array of requirements, they fail to recognize that Khartoum is already legally required to cooperate with the ICC and to comply with its obligations under international human rights and humanitarian law. Putting an Article 16 suspension on the table merely allows Khartoum to treat these legal obligations as bargaining chips. The Government of Sudan's intransigence and violence do not change this situation into one that the drafters of Article 16 envisioned.

Moreover, deferral of ICC proceedings against Bashir risks reducing the fledgling court itself to a tool used to secure political concessions. The ICC occupies a unique position in the scheme of international governance. Unlike the ad hoc tribunals for the former Yugoslavia and Rwanda, the ICC has an open-ended mandate over crimes committed in conflicts that are ongoing, not merely those in which the fighting has ended. As a result, the Court operates amid political peace processes and on-the-ground crisis management. To see these tracks as competing, rather than coordinating, is to see justice as the enemy of peace.
But in fact, justice is an integral part of peace; without accountability, atrocities continue without cost, and peace becomes more remote. Before the Government of Sudan waged war in Darfur, it honed its techniques of burning villages and killing civilians in southern Sudan, where the land and people were ravaged without one condemnation by the Security Council throughout the 1990s. At that time, there was no international court to try the perpetrators of those crimes, and Khartoum was left to redeploy its brutal tactics in Darfur. The same mistake must not be made again — and now that the ICC can hold perpetrators of international crimes accountable, the same mistake need not be made again.

Using Article 16 to convince the Government of Sudan to stop attacking its people will reward Khartoum for its criminal policies. This poses not only a danger to the people of Darfur, who will continue to suffer, but also to the ICC and to all efforts at international justice, which will be seen as nothing more than political tools to convince criminal leaders to come to the negotiating table. And once it becomes clear that justice is merely political, its power to compel any action at all will evaporate.

But the costs of instrumentalizing international justice are far greater than simply milking the threat of prosecution of all effectiveness. Justice is more than a tool; it is distinct from economic sanctions or diplomatic isolation. Justice is an end in itself. To suspend ICC action at this time, when the threat to peace triggered by the warrant results solely from the deliberate actions of the defendant, when there is no peace process to protect, and when Bashir continues to orchestrate attacks against civilians, would serve only to strengthen the climate of impunity that has reigned in Darfur, to ignore the suffering of victims, and to further erode the rule of law in Sudan.

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