The Security Council, Article 16 and Darfur

Robert Cryer

29 October 2008

In mid 2004, the issue of the humanitarian crisis in Darfur was expressly linked to international peace and security by United Nations Security Council Resolution 1556 (30 July 2004). This paved the way for the Security Council to decide, in Resolution 1593, that the situation in Darfur should be referred to the International Criminal Court (ICC). Hence, the link was made between international peace and security and the prosecution of crimes in Darfur. However, there have recently been suggestions that to encourage peace in Sudan the Security Council should request, under Article 16 of the ICC’s Statute, deferral of the prosecution of Sudanese government officials for one year. Prominent commentators such as Professor David Scheffer believe this would be unlawful, and unwise. This piece seeks to show that, while it may be ill-advised, it would be lawful for the Security Council to make such a request.

Under Article 13(b) of the Rome Statute of the ICC, the Court is entitled to receive referrals of situations from the Security Council, irrespective of whether or not they involve the territory or nationals of a State Party to the Statute. The ICC did this in the case of Security Council Resolution 1593. Nonetheless, predictably, the Sudanese government reacted furiously, calling the referral part of an imperialist agenda. The government’s concerns aside, some aspects of Resolution 1593 were certainly discomforting, in particular its exemption of peacekeepers from the referral and the refusal of funding for the investigation. However, it has been generally accepted that owing to the referral, the ICC may lawfully invoke its jurisdiction over Sudanese nationals acting in Darfur.

The issue of the referral has continued to unfold, with Sudan periodically denouncing the Court, refusing to co-operate with it, and at times seemingly acting contemptuously towards it (for example, by naming Ahmed Haroun as Minister for Humanitarian Affairs after his indictment for crimes against humanity). The question of the referral flared again in July 2008 when the ICC Prosecutor asked a Pre-Trial Chamber to confirm charges (including genocide) against the Sudanese President, Omar Hassan al-Bashir, and to issue an arrest warrant against him. The response of the Sudanese government was multifaceted, but included a thinly veiled threat to peace processes throughout the country. Sudan argued that the Comprehensive Peace Agreement (CPA), as well as peace in Darfur, rested on a knife edge, and that any warrant would undermine those processes.

As a result, there have been suggestions that the Security Council should, at least, defer any further action against al-Bashir. These suggestions have come from various parties, including the African Union. The Security Council initially responded to these calls, in Resolution 1828 (31 July 2008), with language that had all the clarity of a compromise,

*Taking note of the African Union Communiqué of the 142nd Peace and Security Council…[which asked the Security Council to issue a deferral request compliant*
with Article 16 of the Rome Statute]...having in mind concerns raised by members of the Council regarding potential developments subsequent to the application of the Prosecutor of the International Criminal Court of 14 July 2008, and taking note of their intention to consider these matters further...

This language led the US, rarely the ICC’s greatest supporter, to abstain from the vote on this resolution and to express displeasure at the possibility of the Council deferring any proceedings by virtue of Article 16 of the ICC Statute, which reads

No investigation or prosecution can be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a Resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.

One of the most well-known contributors to the debate over the ICC and Darfur is David Scheffer, previously the lead US delegate at the Rome Conference that adopted the ICC Statute. Scheffer opines in a carefully-worded piece in *Jurist* that “the original intent underpinning Article 16 was to grant the Security Council power to suspend investigations or prosecutions of situations before either is launched if priorities of peace and security compelled a delay of international justice.”¹ Scheffer argues that, since Article 16 was based around a jurisdictional compromise over the US position at Rome that no investigation or prosecution should occur in the absence of Security Council consent, it should also have no relevance to a situation referred by the Council itself. Scheffer is deeply concerned that seeking to defer proceedings against al-Bashir “is...rolling the dice with an individual whose track record is deplorable”, and might lead to abuse of Article 16, by using it beyond the purpose for which it was drafted.

Scheffer concedes that Article 16 might be read as giving the Council the authority to request an ICC deferral at this stage, and perhaps even when an arrest warrant is issued. However, in his view this would amount to a “technically manipulative” reading of Article 16, similar to the one adopted in Resolutions 1422 and 1487, which were deeply controversial and, in my view, inconsistent with that Article.²

Contrary to Scheffer, on the basis of the language of Article 16 (which is perhaps the best indicator of the intention of the drafters), I believe that, at least before an arrest warrant is issued, and perhaps beyond, the Security Council can intervene by virtue of that Article. If the drafters had intended Article 16 to apply only to State referrals or to investigations initiated by the Prosecutor under his *proprio motu* powers, it was open to them to say so. The fact that they did not at least gives reason to believe that they did not seek to limit the authority in Article 16 to those referrals.

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² The controversies over both resolutions related particularly to the fact that the Security Council did not determine a threat to international peace and security, as is required for Chapter VII action. Furthermore, the Resolutions were both advance, blanket, requests for deferral of all possible cases against peacekeepers from non-State parties to the ICC Statute, rather than one based on a specific case or investigation.
This view is bolstered by the fact that, although a referral can relate only to a “situation”, the ICC Prosecutor can prosecute only a case. As Morten Bergsmo and Jelena Pejić explain, “an investigation involves action that may be taken with respect to a situation and/or an individual, whereas a prosecution involves only actions taken with respect to a specific person.” The language of Article 16 (referring to an investigation or prosecution), and the change that reflects from the wording of Article 13 was not accidental. The drafters of Article 13(b) intended the term “situation” to exclude individual cases being sent to the Court. Article 16, on the other hand, was intended precisely to permit the Security Council to, if required, defer prosecutions that relate to one person. Hence, it is not necessarily inconsistent for the Security Council to determine that the referral of a situation is in the interests of international peace and security, and later take the view that those interests require a temporary deferral of a particular case.

Turning to the question of whether the Security Council’s authority under Article 16 extends only to the period before an investigation or prosecution has begun, it is important to note that Article 16 states that “no investigation or prosecution can be commenced or proceeded with [emphasis added]” for a year when the Council has made an Article 16 request. It seems difficult, given the reference to proceeding with an investigation or prosecution, to maintain that Article 16 is thus limited to stopping either before it has begun.

It is possible, on examining the facts, to agree with Scheffer that the Security Council should not defer the case against al-Bashir, while accepting that it might be lawful to do so. The fact that the situation in Darfur has been ongoing for around five years and peace seems a long way off might imply that a request to defer action by the ICC is ill-advised. It is also questionable whether a body such as the Security Council is an appropriately objective forum for determining such sensitive matters (although it might also be questioned if there is any other body that could do so wholly objectively. The UN General Assembly, for example, is hardly apolitical). However, the Council is the body that has been legally entrusted with such a decision. Therefore, at least until an arrest warrant is issued (a decision that has been put off, for the moment, by virtue of the decision of the Pre-Trial Chamber dealing with the matter, to request more information from the Prosecutor) the Security Council may lawfully issue a deferral request to the ICC under Article 16.

Robert Cryer is Professor of International and Criminal Law at the University of Birmingham. He is the author of various books and articles on international criminal law, including *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime* (Cambridge: CUP, 2008) and (with Håkan Friman, Darryl Robinson and Elizabeth Wilmshurst) *An Introduction to International Criminal Law and Procedure* (Cambridge: CUP, 2007):

r.cryer@bham.ac.uk

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