The Perils of an Article 16 Deferral for Bashir

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Leaders from the African Union (AU) have assembled a delegation to argue for a deferral of the ICC arrest warrant for Sudanese president Omar al-Bashir on the basis of Article 16 of the Rome Statute. Previously, China, Egypt and other members of the Arab League had failed to successfully delay the investigation of crimes in Sudan. While Article 16 does allow the UN Security Council (UNSC) the option of delaying an ICC investigation for twelve months, the issue of deferral is both unprecedented and highly contentious.

Article 16 states, “No investigation or prosecution may 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.”

To invoke Article 16, nine members of the fifteen-member UNSC must vote for the delay. Furthermore, the five permanent members of the UNSC must all either assent to the resolution or abstain from the vote. In addition to the five permanent members of the UNSC, Austria, Burkina Faso, Costa Rica, Croatia, Japan, Libya, Mexico, Turkey, Uganda and Vietnam currently serve as non-permanent members. The current makeup of the UNSC raises doubts over whether Sudan could garner the necessary nine affirmative votes for a deferral; earlier attempts by China and Egypt to invoke Article 16 in the Bashir case have thus far all failed. Austria, Burkina Faso, Costa Rica, Croatia, Japan, Mexico, Uganda, the UK and France have all ratified the Rome Statute. Assuming that ratification implies a serious political commitment to ending international impunity, these states are less likely to vote for delaying its investigations except in the most extreme circumstances covered under Chapter VII of the UN Charter. A successful Article 16 deferral is even less likely given that political pressure from domestic constituencies in the US, UK, and France will make it exceedingly difficult for those three permanent members of the Council to either abstain or vote in favour of a deferral. The Obama administration will find it particularly difficult to support a deferral given the public statements by high-ranking officials, especially UN Ambassador Susan Rice and Vice President Joe Biden, arguing for the necessity of accountability for violence in Darfur.

Despite the political obstacles facing the AU in trying to implement Article 16, there will no doubt be intense debate and great diplomatic energy exerted to delay the ICC investigation. Given the willingness of AU, Arab League and Chinese leaders to rally in support of Sudan, a pause to the proceedings against Bashir is not impossible.

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Article 16 deferrals grant the UNSC the ability to act in accordance with Chapter VII provisions of the UN Charter. Chapter VII empowers the UNSC to act to “maintain or restore international peace and security” when it has found “the existence of any threat to peace, breach of peace or act of aggression.” Human rights groups have thus argued that Article 16 should be used only in the most extreme conditions in order to avoid the collapse of international peace and stability.²

Sudan has responded to the ICC indictment by so far expelling 13 international NGOs operating in the country. Some could argue that the loss of services provided by these organisations and possible escalation of violence against civilians in Darfur constitute precisely the type of exceptional circumstance Article 16 was designed to address. Human Rights Watch and others have described the expulsion of groups as an additional war crime. Still, those who advocate for a deferral on such grounds will have to contend with the argument that Sudan’s action would effectively have cowed the ICC and set a dangerous precedent of impunity for regimes committing mass atrocities. It is deeply unsettling that Bashir might gain an Article 16 deferral as a result of committing new war crimes; such a precedent could establish a perverse incentive structure whereby those indicted by the ICC might have reason to commit additional atrocities in order to avoid prosecution. This would greatly undermine the authority and efficacy of the ICC.

The potential loss of life that Sudan’s policies might inflict, however, makes the peace versus justice debate palpable in this case. While a deferral at this point does seem an unconscionable action for those who are seriously committed to strengthening the authority of international criminal law and establishing international norms that challenge impunity, it is also naïve to deny that the ICC effort to prosecute Bashir may result in an increase in violence and suffering in the short term. Those committed to advancing the goals of the Court will have to consider the full range of consequences of the Court’s decisions regarding both the future legitimacy of international criminal justice and the future well-being and security of those communities suffering from mass atrocities. In the Bashir case, however, the stakes may simply be too high for the Court’s future to risk a deferral. In order for the ICC to establish itself as a legitimate and independent actor on the international stage it must avoid being manipulated by particular political interests. Should the AU, Arab League and China manage to delay Bashir’s indictment it will, in this case, undoubtedly represent a victory for impunity and political power over accountability and judicial independence.

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