Omar al-Bashir: The International Criminal Court’s Folly in Pursuing a Genocidaire

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On July 14, 2008, the Chief Prosecutor of the International Criminal Court filed an application with the tribunal’s Pre-Trial Chamber I for a warrant for the arrest of incumbent Sudanese President Omar Hassan Ahmad al-Bashir. The move came after years of struggle on the part of Prosecutor Luis Moreno Ocampo in his attempts to bring the perpetrators of crimes against humanity in Darfur to international justice. Yet even after securing an international indictment for a myriad of crimes against humanity and finally genocide in mid-2010, the prosecutor has had little success in bringing Sudanese nationals to trial before the international tribunal. The warrant itself, though intended to prosecute the most serious of human rights violations, was received amid extreme controversy by the international community. Given the currently volatile state of Sudan, many political analysts and leaders doubt the true viability of arresting the sitting Head of State. Though President Omar al-Bashir of the Republic of Sudan is indisputably guilty of the numerous crimes against humanity for which the International Criminal Court has indicted him, the impotence of the warrant and al-Bashir’s political position as the leader of a nation constantly on the edge of devastating civil war create a unique case for delaying his detention until the nation’s overall security can be achieved.

The current conflicts in Sudan arise from a lengthy history of division between the country’s numerous regions and ethnic groups. Beginning in the 17th century, northern Sudan converted increasingly to Islam and was subject to ceaseless inter-tribal warfare. Muslim tribes from the north would incessantly raid southern settlements for slaves to sell to the Ottoman Empire. Sudan was conquered by the Turks in 1820 and unified for the first time by the Ottoman armies.1 In the late 19th century, Sudan was transferred to British control, where imperialist doctrines sowed the seeds for future division. The British treated northern and southern Sudan as essentially separate nations. After 1922, movement between the north and south even required a permit. Southern children were educated as Christians, clashing with the entirely Muslim education offered to students in the north.2 In 1953, southerners won only 9 out of 99 seats on the transitional parliament, despite the fact

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1 Diana Childress, *Omar al-Bashir’s Sudan* (Minneapolis: Twenty-First Century, 2010), 18-19.
2 Ibid., 24-27.
that a quarter of the population resided there.³ On January 1, 1956, the British government, under pressure from the newly freed Egyptian regime, finally declared independence for the Sudanese people, allowing them to build their own representative government. Even in this supposed democracy, however, the southern sections of the country continued to be grossly underrepresented. Following a series of military coups d'état that imposed harsh Muslim Sharia law even in the south, guerilla groups such as the Anya-Nya began to resist the northern regime.

In 1983, under the rule of Gafaar Nimeiri, the Southern People’s Liberation Movement/Army (SPLM/A) arose as an organized force against the northern military and soon began to gain territory and support.⁴ Nimeiri’s successor, Sadiq al-Mahdi, only escalated the violence, arming large groups of herdersmen against a specific tribe, the Dinkas. In order to pay these militias, Sadiq allowed wide-spread looting and pillaging, a tactic that al-Bashir would employ two decades later.⁵

By the late 1980s, Sudan was on the brink of chaos. Nimeiri’s economy had all but collapsed, and unrest could be felt throughout the country. On the night of June 31, 1989, Omar al-Bashir, then a brigadier general, took control of the capital with his military forces, effectively staging his own coup d'état under the pretext of saving the country from Sadiq and “rotten political parties.”⁶ Al-Bashir immediately arrested his political opposition and dissolved the sitting parliament and political parties. Dissent was rampant, and the war with southern Sudan raged on for over a decade. By late 1999, both sides were growing weary of conflict. The military chewed up over 40% of the country’s budget, most of which came from oil mined in the South.⁷ The SPLM/A was losing, and the southern people, many of them now refugees, were ready for peace. Finally in 2000, both sides were brought to peace talks in Nairobi by the Intergovernmental Authority for Development (IGAD).

In 2002, procedures for ensuring peace were established, and in July both aggressors ratified the Machakos Protocol, calling for a lasting ceasefire.⁸ In January 2005, the Government of Sudan signed the Comprehensive Peace Agreement (CPA) with the SPLM/A, providing for joint rule under the transitional Government of National Unity, secular law in the south, and the option for southern Sudan to vote for its own independence in

³ Ibid., 32.
⁵ Diana Childress, *Omar al-Bashir’s Sudan*, 8.
⁶ Ibid., 52.
January 2011.\(^9\)

While the situation in the southern regions of the country was improving under al-Bashir’s leadership, new fighting was erupting in the western states, an area known as Darfur. Since his rise to power, al-Bashir had always favored western tribes such as the Missiriyya and Beni Halba over the Fur, Zaghawa, and Masalit as a result of historically-ingrained, inter-tribal tensions.\(^{10}\) He intentionally disenfranchised them by cutting his new state borders through the Fur homelands, creating two minorities instead of a majority. The tribes also strongly opposed the strict Sharia law imposed by al-Bashir’s government. In 2002, members of these tribes, among others, formed the Sudanese Liberation Movement/Army (SLM/A), a group notably separate in goals and organization from the SPLM/A.\(^{11}\) Another group with a different political agenda created the Justice and Equality Movement (JEM) to fight the Sudanese government.\(^1\) Both of these militias began raiding army garrisons and together in 2003 assaulted the Sudanese air force base at al-Fasher.\(^{12}\) Al-Bashir’s military was already weakened from direct war within the south, so he opted for a different strategy. Instead of targeting the rebels, he attacked the civilians. He recruited groups of young Arab herdsmen into a newly-created Popular Defense Force. Most of the men joined not out of loyalty to the government, but rather from the promise of gaining property from those they defeated.\(^{13}\) These militias came to be known as the *janjaweed*, or “devil riders.”\(^{14}\) They used a scorched earth policy, burning through villages as they came upon them. By 2006, the Sudanese government came under intense pressure from the African Union (AU) to end aggressive action in Darfur, and in May of that year the Darfur Peace Agreement was signed. The AU deployed a peacekeeping force, yet it found that it was too small to quell the violence. It requested assistance from the United Nations, and in 2008 the joint AU/UN Hybrid Operation in Darfur (UNAMID) was created to bring a more stable peace to the area.\(^{15}\)

Despite the apparent pull towards peace, the United Nations was not finished with Darfur. In 2004 the UN Security Council had created a Commission of Inquiry on Darfur.\(^{16}\) The Commission reported that large human rights violations had occurred in the region, but it had failed to find enough evidence to suggest that genocide had taken place. Nevertheless, the Commission recommended referral of the case to the International

\(^{9}\) Ibid., 3.
\(^{10}\) Diana Childress, *Omar al-Bashir’s Sudan*, 71.
\(^{11}\) Ibid., 71.
\(^{12}\) Ibid, 72.
\(^{15}\) Diana Childress, *Omar al-Bashir’s Sudan*, 76.
\(^{16}\) Lucas Buzzard, 908.
Criminal Court (ICC) under Chapter VII of the UN Charter. On March 31, 2005, the United Nations Security Council referred the “situation in Darfur” to the Prosecutor of the International Criminal Court. In early 2007, Luis Moreno Ocampo had arrest warrants issued for both Ahmad Harun, a Sudanese minister, and Ali Kushayb, a leader of the government-supported janjaweed militias. Both were indicted in connection with acts of genocide in Darfur. The Sudanese government outright refused to surrender the two men, with one high-ranking official promising to “slit the throats” of anyone who attempted to extradite his fellow citizens to the ICC, prohibiting any possibility of apprehending the accused. Following this and other acts of defiance, Ocampo opened an investigation on Omar al-Bashir, the sitting President of Sudan.

In 2008 Ocampo argued his case before a chamber of the ICC and an arrest warrant was issued. The tribunal stated quite confidently that “there are reasonable grounds to believe that Omar Al Bashir is criminally responsible under article 25(3)(a) of the Statute as an indirect perpetrator, or as an indirect co-perpetrator, for war crimes and crimes against humanity and that his arrest appears to be necessary under article 58(1) (b) of the Rome Statute.” It was demonstrated that the Sudanese government had issued a “general call for the mobilization of the Janjaweed Militia” and had continued to direct this group throughout its military campaign. The court continued to describe the ways in which these groups engaged in acts of pillaging, “widespread” and “systematic” violence against civilians as described under article 8(2)(e) of the Rome Statute, “murder, extermination, forcible transfer, torture and rape, within the meaning of articles 7(1)(a), (b), (d), (f) and (g) respectively of the Statute, throughout the Darfur region.” Finally, noting that he was the de jure and de facto leader of Sudan and was in “full control of all branches…of the State of Sudan,” the Chamber placed responsibility for the illegal counter-insurgency plan on Omar al-Bashir. However, the Chamber concluded that the Prosecutor had provided an insufficient and “erroneous standard of proof” for genocide and advised him to return with more solid evidence, though public documents do not state exactly what was missing from the application. On February 3, 2010, after collecting more depositions, Ocampo returned to Pre-Trial Chamber.
I with a new application for a warrant with the charge of genocide. Ocampo presented enough evidence to satisfy the judges that forces under al-Bashir’s control had “committed the crimes of genocide by killing, genocide by causing serious bodily or mental harm and genocide by deliberately inflicting conditions of life calculated to bring about physical destruction.” These acts fall under the definition of genocide as stipulated by the Convention on the Prevention and Punishment of the Crime of Genocide and the Rome Statute, two documents widely ratified and accepted as international law. The Prosecution again followed the argument that, as acting head of the Sudanese armed forces, Omar al-Bashir was responsible for the acts of genocide committed by his troops.

Al-Bashir is not the first sitting Head of State to be indicted by an international court, and, in analyzing the viability of his warrant, one must consider the precedents for such judicial decisions. One of the most prominent cases is that of Yugoslavian President Slobodan Milošević, who was the sitting President during the Yugoslav Wars and Bosnian Conflict. As part of its response to the situation in Bosnia, the UN Security Council created an ad hoc tribunal, the International Criminal Tribunal for the former Yugoslavia (ICTY), which was mandated to investigate and prosecute crimes against humanity committed in Yugoslavia since 1991. The ICTY formally indicted Milošević in 1999 on charges of war crimes (the additional charge of genocide was not added until after Milošević was apprehended). In 2001 he was arrested by security forces, and, when attempts to prosecute him within Yugoslavia failed, he was extradited to The Hague for prosecution by the ICTY. Milošević died from a heart attack while he was on trial; yet the attempt to prosecute him for crimes committed while he was acting Head of State shows a strong push for criminal accountability in the context of political leaders. However, one will notice a large difference between the case in Yugoslavia and the current situation in Sudan. In the Yugoslavian conflict, NATO had effectively neutralized aggressive components of Milošević’s military, and, once he fell out of power, security forces could quite easily and forcefully arrest him. Unfortunately, this is not the case in Sudan; al-Bashir is still firmly in power, and any attempts to forcibly remove him from his post would unquestionably lead to war.

The case against Charles Taylor is another example where an arrest warrant was issued for a sitting

26 Ibid., 9.
29 Payam Akhavan, 626.
head of state. Following the Sierra Leone Civil War, the UN Security Council gave a Chapter VII mandate to establish the Special Court for Sierra Leone (SCSL) to investigate alleged war crimes committed during the conflict.\textsuperscript{30} In 2003, the Court found reasonable grounds to indict the President of Liberia, Charles Taylor, for his role in human rights violations and aid to the Revolutionary United Front, a rebel group active in Sierra Leone. Taylor was arrested in Nigeria in 2006 and soon extradited to Liberia for trial, where he will likely be convicted by the end of 2011.\textsuperscript{31} Here, the Head of State was again placed on trial for crimes committed during his term in office, yet he was not forcibly apprehended by security forces while in his own country. In addition, Taylor had already left office by the time he was placed into custody.\textsuperscript{32}

There is significant controversy among international critics as to whether or not Heads of State should be immune from prosecution. The tenets of conventional diplomatic immunity are outlined in the 1961 Vienna Convention on Diplomatic Relations; however, the convention is moot on the point of immunities for a Head of State.\textsuperscript{33} There are traditionally two forms of immunity that can be applied to a Head of State. The most important to common affairs is immunity \textit{ratione personae}, which dictates that a sitting Head of State is inviolable and immune from prosecution by foreign courts even if suspected of crimes against humanity; al-Bashir would currently be subject to this immunity. A second form is immunity \textit{ratione materiae}, which protects former Heads of State from prosecution even after they have left office. This is to alleviate individuals from responsibility for state actions and to prevent states from influencing one another by prosecuting those who act on their behalf.\textsuperscript{34} This doctrine, if allowed to dictate international law, could permanently prevent the prosecution of Heads of State for crimes against humanity.

International judgments themselves are conflicting and indecisive. The \textit{Arrest Warrant Case} of 2000 adjudicated by the International Court of Justice asserted that an arrest warrant issued by Belgium for the incumbent Foreign Minister of the Congo on crimes against humanity was illegal because it “failed to respect the immunity from criminal jurisdiction” that arises from political office.\textsuperscript{35} In contrast, the Special Court for Sierra Leone found that it could fully disregard Taylor’s customary immunities because it was “part of the machineries of international justice” and was given a Chapter VII mandate over all crimes committed in Sierra

\begin{thebibliography}{9}
\bibitem{31} Ibid., 409.
\bibitem{32} Manisuli Ssenyonjo, 408-409.
\bibitem{33} Lucas Buzzard, 913.
\bibitem{34} Ibid., 915.
\bibitem{35} Ibid., 915.
\end{thebibliography}
Leone. In the first case, Belgium’s right to prosecute was denied on the grounds of *ratione personae*, yet Taylor’s similar immunity was overcome by the SCSL. The difference is presumably the fact that Sierra Leone, similarly to the ICTY, was given Chapter VII authorization by the UNSC to pursue any case within the confines of the civil war. Therefore, it becomes clear that definite and special jurisdiction must be established in order to pursue cases against Heads of State.

Article 27 of the Rome Statute, the ICC’s charter, states that it “shall apply equally to all persons without any distinction based on official capacity, [particularly] official capacity as a Head of State or Government.”

However, Sudan has never ratified the Statute and is therefore customarily not subject to it in any way, shape, or form. The Vienna Convention on the Law of Treaties prevents requirements for states and third parties to adhere to treaties they have not ratified. In fact, in 2008 the Sudanese government sent a cable to the UN Secretary General stating its intention to never accede to the Rome Statute. In order to pursue al-Bashir and others in Sudan, the ICC would need additional legal support, and in 2005 it was found.

On March 31 of that year, the UN Security Council passed Resolution 1593, which referred the situation in Darfur to the International Criminal Court as a Chapter VII mandate. Similar resolutions had created ad hoc tribunals such as the SCSL, ICTY, and Rwandan ICTR. Chapter VII of the United Nations Charter acts as an effective elastic clause for use by the Security Council and asserts that decisions made by the body act as international law and are binding for all UN member states. By receiving a referral from the Council, the ICC had obtained jurisdiction equivalent in force to that of the earlier ad hoc tribunals and could assert its powers under the Rome Statute over Sudan. This includes Article 27 of the Rome Statute, which eliminates Head of State exemptions. From that point on, President al-Bashir was within the court’s reach.

Although the ICC has the ability to prosecute al-Bashir for his crimes relating to Darfur, many continue to doubt the sagacity of such a course of action. Previous cases had resolved with positive effects, yet it is unsure whether they could be applied to al-Bashir’s situation. In the former Yugoslavia, the ICTY had served to create a certain element of deterrence for those involved in human rights violations. Indictments of leaders such as Radovan Karadžić and Ratko Mladić served to distance them from the political sphere and dramatically lower their abilities to continue committing crimes. In these cases, indictments stabilized the country. However, indicting a sitting Head of State without clear means to apprehend him has resulted in the opposite effect in

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36 Ibid., 916.
38 Lucas Buzzard, 920.
39 Resolution 1593, 1.
40 Payam Akhavan, 634.
Sudan. Immediately following the arrest warrant, al-Bashir expelled over a dozen aid agencies from the country, leaving more than one million people without access to food, water, and healthcare services and catastrophically worsening the country’s humanitarian situation.\footnote{Ibid., 648.} The warrant caused a strong “turtling” effect on the part of the Sudanese government, which was attempting to protect itself from a massive confrontation by the international community.

Following a reaction such as this, one must consider the heavy cost-benefit ratio of pursuing accountability in human rights cases. As Professor Payam Akhavan states, there are two sides to this debate: “the ‘judicial romantic’ blindly pursuing justice in contrast with the cynical ‘political realist.’”\footnote{Ibid., 652.} Each side has its own goals and outcomes that must be carefully considered. The former wishes to create a world in which the threat of prosecution by an international tribunal would indefinitely deter crimes against humanity (i.e., leaders would understand that acts such as ethnic cleansing unequivocally lead to arrest and trial). Yet, in many cases, searching for this form of justice comes at a cost. Threats of prosecution that arise in the midst of a conflict can lead those in power to prolong hostilities if only to hold onto office and remain out of reach. The path to immediate pacification and a timely end to conflicts lies in offering immunity. This strategy provides significant incentives to bring about peace and allows leaders a comfortable way out. Reconciliation commissions, especially those used in post-war Rwanda, proved to be incredibly effective in rebuilding relations within the country, something that tribunals alone could never accomplish. However, these bodies were used mostly to placate the general population, not those who incited and led the mass killings of 1994 Rwanda. To many, impunity for a sitting Head of State responsible for mass ethnic cleansing is simply unacceptable.

On this note, one must consider the positive effects that have arisen from al-Bashir’s indictment. Since the warrant was issued, observers have noticed a significant squeeze upon the Sudanese government’s actions. Elements of the government began to see “accountability” as a large factor in decision-making, understanding that the international spotlight was on them.\footnote{Ibid., 648.} From the attempts to place blame, serious divisions between government forces and the \textit{janjaweed} militias arose, lessening their effectiveness at targeting civilians. Many also see the 2008 ceasefire in Darfur as a direct result of this increased international attention, though it is impossible to say whether or not it would have happened in the absence of al-Bashir’s indictment. A month after the warrant, President al-Bashir also promised that his government would pursue its own investigations and prosecutions regarding atrocities in Darfur, though this was quite likely a move made to please the international
community and to allow the Sudanese government the ability to place blame where it saw fit.\textsuperscript{44} While the ICC’s action may have lessened al-Bashir’s inclination to cause conflict, it proved to be too strong. These benefits cannot outweigh the resulting removal of humanitarian support for over a million refugees.

In 2008, the International Criminal Court had several other options to pursue. In many cases, the simple threat of prosecution can have the desired effect of prohibiting violence. By mid-2004, Côte d’Ivoire was on the brink of ethnic conflict. Radio and television broadcasts spread hate messages, and genocide could have broken out at any point. In November of 2004, the UN Security Council passed Resolution 1572, condemning any incitement to violence and threatening prosecution by the ICC.\textsuperscript{45} This move effectively halted escalation of the conflict and promoted peace without having to appeal to international courts for assistance. Although this example occurred before any violence had broken out, its basic principle can be applied to the case of al-Bashir. By seriously threatening a warrant for al-Bashir, the UN and ICC could have reached their desired effect without causing the expulsion of non-governmental organizations from the country. The Sudanese government would have then become aware that it was being watched by the international community and would likely have taken action to appease international observers, giving all the positive benefits of an actual warrant without al-Bashir’s deleterious closed-door response.

The ICC also neglected to consider the basic enforceability of the warrant it issued. There are essentially four ways for someone to be apprehended and brought before the Court. The first and most simple path is for the accused to turn himself in. This event is rather unlikely to occur in the case of Omar al-Bashir. The second is for al-Bashir to be arrested by Sudanese officials and extradited. Given his currently solid position of power, this option does not appear viable. The third possibility is for a UNAMID or other internationally mandated body to forcibly arrest him. This path would unquestionably lead to war and would unacceptably destabilize the nation; the African Union would also prohibitively oppose this course due to its initial stance against al-Bashir’s warrant. The final and most practicable option is to arrest al-Bashir while he is in another country that is party to the Rome Statute before sending him to the ICC for trial, yet even this option would prove difficult.\textsuperscript{46}

The Rome Statute, the document that defines and limits the ICC’s powers, creates a difficult case for arresting Heads of State while abroad. Article 27 of the Statute states quite clearly that “[the] Statute shall apply equally to all persons without any distinction based on official capacity.”\textsuperscript{47} This clause effectively eliminates

\textsuperscript{44} Richard Cockett, \textit{Sudan: Darfur and the Failure of an African State} (New Haven: Yale University, 2010), 245.
\textsuperscript{45} Payam Akhavan, 639.
\textsuperscript{46} Lucas Buzzard, 931.
any assumed immunities given to Heads of State. However, the ICC has no executive branch with which to carry out its own arrests and therefore relies on member states to act on its behalf. The Rome Statute naturally includes limitations on the requirements placed upon states by the Court. One such limitation is outlined in Article 98(1) of the Statute, stating, “The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State.”

In the case of Omar al-Bashir, individual nations still respect his immunity *ratione personae* and in most cases refuse to apprehend him under Article 98(1).

Since the 2008 warrant, al-Bashir has enjoyed a surprising ability to travel outside of Sudan. In 2009 he visited Egypt with impunity in an apparent act of defiance against the warrant. Later in the year, he also visited Libya without any consequences. From these instances, it would appear that the ICC’s conventional methods of bringing the accused to trial are wholly ineffective for al-Bashir. Western nations are also loath to invoke traditional universal jurisdiction and forcibly apprehend al-Bashir. The United States sees Sudan as a “strong partner in the War on Terror” and would not support exceedingly strong action against its government. Chinese investors are increasingly active in the Sudanese economy, and Russia relies on the Sudanese army as a market for military equipment. Altogether, these nations’ interests in continuing positive relations with the government of Sudan rule out the possibility of any supported international action against al-Bashir.

It would appear that the International Criminal Court has issued an unenforceable warrant. Together with the Court’s lack of a strong arm to pursue al-Bashir, his current stability within his own country, and the refusal of other nations to take al-Bashir into custody, bringing him to trial would be nearly impossible. Yet even if al-Bashir were to be arrested, the effects would be unlikely to resolve the violence in Sudan. In fact, it would likely lead to a drastic increase in hostilities.

In 2005, the Sudanese government signed the Comprehensive Peace Agreement with the SPLM/A, effectively ending over ten years of civil war. The Agreement specifically allowed for southern Sudan to vote for its independence in January 2011. However, since 2005 tensions have continued between northern and southern Sudan, particularly in the oil-rich region of Abyei. In May of 2008, violence again broke out in this

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48 Ibid., 69.
50 Payam Akhavan, 647.
area between northern and southern forces. The clashes killed 89 people and displaced 50,000.\(^5\) Many see Abyei as a potential flash point to reignite war within Sudan, and any instability could easily lead to resumed conflict. Another point of concern is wealth-sharing between the two newly-shaped states. Significant oil resources lie in the south, yet most refineries are in northern Sudan.\(^5\) Disagreements on where funding and wealth should be allocated have also caused issues. President al-Bashir has stated his concerns regarding stability within the south.\(^5\) However, he swears to respect southern Sudan's decision, a promise that another leader in his place may be less likely to make. Instability lies even within the north itself. Al-Bashir rests atop an increasingly fragmented and separated body politic, one that would quickly implode without significant leadership. Given the current state of his own country, simply removing al-Bashir from his government would have enormously destructive effects upon its stability and would unquestionably cause a power struggle and eventual war.

Once one has considered the entire picture surrounding the situation in Sudan, it becomes clear that the ICC has made a mistake in issuing a warrant for President Omar al-Bashir. The Sudanese government's initial reaction proved disastrous to the humanitarian goals within Sudan and backfired on the ICC. The Court’s profound inability to apprehend al-Bashir and bring him to trial shows the warrant’s overall futility and foolishness. Additionally, the effects of a successful execution of said warrant would without doubt destroy the tenuous peace Sudan is currently enjoying. Such a result would be entirely unacceptable. However, as previously stated, it would be difficult to allow al-Bashir to escape with impunity. In order to achieve its goals of accountability and further the deterrent international atmosphere it hopes to create, the ICC could have initially threatened prosecution in order to cool off hostilities within Sudan, restraining itself from more provocative action. Once al-Bashir stepped down from power, it would be much easier to circumvent his immunity \textit{ratione personae}. However, there is little that can be done to alleviate the current situation. Retraction of the ICC warrant would be deleterious to any sense of deterrence already present among Heads of State, especially within Africa. At this time, the best route that can be pursued is a Security Council deferral under the Rome Statute, which would postpone the warrant’s effect for at least a year. However, no recourse will be able to fully relieve the current situation of the International Criminal Court and the international community. While accountability for human rights violations must be pursued wherever and whenever practical, it is in many cases much more propitious to uphold the status quo as opposed to seeking idealized and costly international justice.

\(^5\) Ibid., 19.