

# Will Syria go to the ICC?

Syria is the Security Council's biggest challenge. Why not refer the situation to the ICC?



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The UN Security Council (UNSC) kick-started international criminal justice in the 1990s by creating courts to try those suspected of international crimes in the former Yugoslavia and Rwanda. When the International Criminal Court (ICC) opened its doors in 2002, it became the world's first permanent international criminal court, covering crimes across the world. But it was not created by the UN. It was set up by treaty – the Rome Statute – meaning the court only has jurisdiction over states that have signed up.

With one exception. Under article 13 of the ICC's statute, the UNSC can "refer" a situation in a state to the court, even if that state has not ratified the statute. The UNSC also has the power under article 16 to "defer" a case, meaning it can pause an ICC prosecution against an individual for a renewable one-year period. Decisions under articles 13 and 16 must be adopted under chapter VII of the UN Charter, which means, in theory, that they are taken when the interests of "international peace and security" require it.

The UNSC's ability to trigger or stunt the ICC's work means justice may become political and selective. In the ICC's 10 years of practice, the UNSC's deferral power has never been used to pause an imminent or ongoing case. The UNSC has used its referral power to send two files to the court – Darfur and Libya – allowing ICC judges to issue arrest warrants against presidents Bashir and Gaddafi. These referrals filled a jurisdictional gap, because Sudan and Libya had not voluntarily signed up to become ICC members. But two main problems emerge from the practice.

First, in both referral-resolutions, the UNSC excluded the actions of nationals of some non-state parties from the ICC's reach. This exclusion, pushed by the US, effectively gave immunity to potential suspects from about 70 countries that are not members of the ICC, and in doing so potentially compromised the independence of the judicial process. The second problem with the referrals is that there have not been more. When the UNSC referred Libya to the ICC, about 300 people had been killed. But with more than 20,000 already killed in Syria and no referral, can the system be credible?

In October the UNSC held its first debate on the ICC. Several states highlighted that referrals should be based objectively on the severity of crimes, and should not include exemptions for certain nationals. This is in line with the statute, which only allows the UNSC to refer "situations" to the Court, not "cases" against specific persons or excluding others. It is up to the prosecutor to decide who to charge and what with, if they decide to proceed at all. As a member of the prosecutor's office stated during the debate:

"once the Security Council decides to refer a situation... the judicial process has been triggered and the matter is fully in the hands of the prosecutor and the judges".

As for referrals that never happen (or possible future deferrals), many states highlighted during the debate that peace can trump justice. Japan stated that the UNSC should consider ICC justice "from the viewpoint of contributing to a peaceful solution [of] a particular situation [and] also as a deterrent of future crimes". New Zealand argued that when a conflict is ongoing, the question is whether the ICC would be an "incentive or a disincentive" for more violence. Russia announced that the ICC's activities "must be carried out in the light of common efforts to settle crisis situations". And for China, "justice cannot be pursued at the expense of peaceful processes".

The UNSC is the body best-placed to determine questions of international peace and security. But in doing so it should remember that both peace and justice are UN values. Justice can be delayed but not forgotten in the name of peace – indeed a sustainable peace is not possible without it.

During the recent UN debate, the elephant in the room was Syria. Russia and China – which oppose a referral – did not mention it. A handful of states supported a referral or highlighted the need for accountability generally. Only a few states took a stronger stance. France argued that the UNSC's non-referral is "an incitement to the Syrian authorities to pursue the path of violence". Switzerland agreed, adding that it "falls to the Council to find a political solution that brings lasting peace... accountability is [however] a necessary precondition of such a solution".

When Kofi Annan resigned as UN and Arab League peace envoy for Syria he blamed "finger-pointing and name-calling" in the UNSC. Last month's debate shows that divisions still run deep. And while states continue to argue about the priority to give to peace versus justice, the Syrian people have neither.