Assessing the African Union Concerns about Article 16 of the Rome Statute of the International Criminal Court

Charles C. Jalloh,^{a,*} Dapo Akande^{b,**} and Max du Plessis^{c,***}

^a Assistant Professor, University of Pittsburgh School of Law, Pittsburgh, PA, USA

^b University Lecturer in Public International Law, Yamani Fellow, St. Peter's College,
University of Oxford, Oxford, UK

^c Associate Professor, Faculty of Law, University of KwaZulu-Natal, South Africa
Senior Research Associate, Institute for Security Studies, Pretoria, South Africa

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Abstract

This article assesses the African Union's (AU) concerns about Article 16 of the Rome Statute of the International Criminal Court (ICC). It seeks to articulate a clearer picture of the law and politics of deferrals within the context of the AU's repeated calls to the United Nations Security Council (UNSC, or the Council) to invoke Article 16 to suspend the processes initiated by the ICC against President Omar Al Bashir of Sudan. The Council's failure to accede to the AU request led African States to formally withhold cooperation from the ICC in respect to the arrest and surrender of the Sudanese leader. Given the AU's continued concerns, and the current impasse, fundamental questions have arisen about the Council's authority to exercise, or not exercise, its deferral power. This culminated into a November 2009 African proposal for an amendment to the Rome Statute to empower the UN General Assembly to act should the UNSC fail to act on a deferral request after six months. Although ICC States Parties have so far shown limited public support for the AU's proposed amendment to the deferral provision, this article examines its merits because a failure to engage the "Article 16 problem" could impact international accountability efforts in the Sudan, and further damage the ICC's credibility in Africa. This unresolved issue also has wider significance given that the matters underlying the tension – how ICC prosecutions may be reconciled with peacemaking initiatives and the role and power of the Council in ICC business – will likely arise in future situations from around the world.

Keywords

African Union (AU); International Criminal Court (ICC); Security Council power to defer ICC situations and investigations, Article 16 Rome Statute, AU concerns about ICC, AU proposal to amend Art. 16, peace versus justice in Sudan, Article 53 Rome Statute, President Omar Al Bashir

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**) E-mail: dapo.akande@law.ox.ac.uk.

***) E-mail: maxduplessis@mac.com.

1. Introduction

On March 31, 2005, the United Nations Security Council (UNSC, or the Council) adopted Resolution 1593 in which it referred the conflict in Darfur to the International Criminal Court (ICC, or the Court).¹ That decision marked the first time that the UNSC invoked its extraordinary power, under Article 13(b) of the Rome Statute of the International Criminal Court (Rome Statute), to refer a particular situation to the ICC Prosecutor for investigation and possible prosecutions of genocide, crimes against humanity and war crimes.²

This exceptional jurisdiction was predicated on the Council's determination that the situation in Sudan constituted a threat to international peace and security under Article 39 of the United Nations Charter.³ It also reflected the conviction that trials of persons responsible for the gross human rights violations in Darfur will help restore peace and stability to the country and the region.⁴ Thus, unlike the three "self-referrals" by Uganda, the Democratic Republic of Congo (DRC) and the Central African Republic (CAR), and the recent ICC Pre-Trial Chamber approved *proprio motu* prosecutorial action in respect of Kenya,⁵ Sudan stands as the only non-party to the Rome Statute that is currently subject to the Court's jurisdiction.⁶

¹ S. Con. Res. 1593, UN Doc. S/RES/1593 (Mar. 31, 2005).

² Rome Statute, Art. 13(b), "The Court may exercise its jurisdiction with respect to a crime referred to in Article 5 in accordance with the provisions of this Statute if: ... (b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the UNSC acting under Chapter VII of the Charter of the United Nations."

³ UN Charter, Art. 39, "The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security."

⁴ *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General*, 572, 648, pursuant to Security Council Resolution 1564 of 18 September 2004, Jan. 24, 2005 (noting that the ICC was established specifically with this purpose, to deal with crimes which threaten peace and security, and "be conducive or contribute to, peace and stability in Darfur, by removing serious obstacles to national reconciliation and the restoration of peaceful relations").

⁵ In spite of Kenya's now vocal objection to the investigation and wariness of the ICC generally, best evidenced, perhaps, by a December 22, 2010 resolution of its Parliament calling for a withdrawal from the Rome Statute. As of February 11, the instruments of withdrawal have not been deposited pursuant to Article 127 of the Rome Statute, and neither the President Mwai Kibaki nor Prime Minister Raila Odinga have indicated plans to do so.

⁶ Uganda: Press Release, President of Uganda refers situation concerning the Lord's Resistance Army (LRA) to the ICC, International Criminal Court (Jan. 29, 2004); Press Release, Prosecutor of the International Criminal Court opens an investigation into Northern Uganda, Office of the Prosecutor, International Criminal Court (July 29, 2004). DRC: Press Release, Prosecutor receives referral of the situation in the Democratic Republic of Congo, Office of the Prosecutor, International Criminal Court (Apr. 19, 2004); Press Release, The Office of the Prosecutor of the International Criminal Court opens its first investigation, Office of the Prosecutor, International Criminal Court (June 23, 2004). CAR: Press Release, Prosecutor receives referral concerning Central African Republic, Office of the Prosecutor, International Criminal Court (Jan. 7, 2005); Press Release, Prosecutor opens investigation into the Central African Republic, Office of the Prosecutor, International Criminal Court (May 22, 2007). Kenya: Situation in the Republic of Kenya, ICC-01/09-3, Request for authorization of an investigation pursuant to

Acting with respect to the UNSC's referral and at the request of the ICC Prosecutor, the Pre-Trial Chamber has issued arrest warrants or summonses for four Sudanese officials.⁷ Among these, the most controversial has been that for Sudan's President Omar Al Bashir, whose initial warrant contained five counts of crimes against humanity and war crimes but has since been supplemented with genocide charges.⁸

The Government of Sudan, under Al Bashir, has objected to this exercise of jurisdiction in relation to Sudan. It has argued that Sudanese sovereignty is being violated – both by the Council, which referred the matter, and the ICC, which was charged with implementing the decision.⁹ Sudan's objections have predictably resulted in a tense relationship and limited cooperation with the Court.¹⁰ Consequently, in May 2010, following a prosecutorial request for a finding of non-cooperation, the Pre-Trial Chamber issued a decision holding that Sudan had failed to comply with its obligations to cooperate with the Court and invited the Council to take any action it deems appropriate.¹¹ It thereafter directed the ICC Registrar to inform the UNSC and Sudanese authorities of that decision. While the Council has not so far cajoled Sudan to cooperate with the Court, it

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Article 15, Office of the Prosecutor, International Criminal Court (Nov. 26, 2009). Sudan: Press Release, Secretary-General welcomes adoption of Security Council Resolution referring situation in Darfur, Sudan, to International Criminal Court prosecutor, UN Doc. SG/SM/9797 AFR/1132 (Mar. 31, 2005); Press Release, The prosecution of the ICC opens investigation in Darfur, Office of the Prosecutor, International Criminal Court (June 6, 2005).

⁷ *Prosecutor v. Ahmad Harun and Ali Kushayb*, Case No. ICC-02/05-01/07-2, Warrant of arrest for Ahmad Harun, Apr. 27, 2007; *Prosecutor v. Ahmad Harun and Ali Kushayb*, Case No. ICC-02/05-01/07-3, Warrant of arrest for Ali Kushayb, Apr. 27, 2007; *Prosecutor v. Bahr Idriss Abu Garda*, Case No. ICC-02/05-02/09-15-AnxA, Decision on the Prosecutor's Application under Article 58, July 29, 2009.

⁸ *Prosecutor v. Omar Al Bashir*, Case No. ICC-02/05-01/09-1, Warrant of arrest for Omar Hassan Ahmad Al Bashir, Mar. 4, 2009; *Prosecutor v. Omar Al Bashir*, Case No. ICC-02/05-01/09-1, Warrant of arrest for Omar Hassan Ahmad Al Bashir, Mar. 4, 2009; *Prosecutor v. Omar Al Bashir*, Case No. ICC-02/05-01/09-1, Second warrant of arrest for Omar Hassan Ahmad Al Bashir, July 12, 2010.

⁹ UN SCOR, 64th Sess., 6096th meeting, UN Doc. S/PV.6096, 3–4, 15 (Mar. 20, 2009) (Mr. Abdelmannan, of Sudan, suggesting that the focus on Darfur “is an open attempt to divert the international community's attention from the broad international and regional rejection of the legally and politically flawed approach adopted by the so-called International Criminal Court (ICC) against the Sudanese State, Government and people” and justifying expulsion of certain humanitarian organizations as a “legitimate sovereign decision.” He also noted the violation of the sovereignty of Sudan, a country, “not a failed state,” and that the international organizations “crossed the line.”); UN SCOR, 60th Sess., 5158th meeting, UN Doc. S/PV.5158 (Mar. 31, 2005) (Mr. Erwa, of Sudan, speaking of a “new hegemony” and the ICC's use as a “tool for the exercise of the culture of superiority and to impose cultural superiority.”).

¹⁰ Luis Moreno-Ocampo, *Tenth report of the prosecutor of the International Criminal Court to the United Nations Security Council Pursuant to UNSCR 1593* (2005), Dec. 4, 2009, para. 105; Luis Moreno-Ocampo, *Ninth report of the prosecutor of the International Criminal Court to the United Nations Security Council Pursuant to UNSCR 1593* (2005), June 5, 2009, paras. 32, 39; Luis Moreno-Ocampo, *Fifth report of the prosecutor of the International Criminal Court to the UN Security Council Pursuant to UNSCR 1593* (2005), June 7, 2006, 10 (noting that despite some cooperation by Sudan, a number of outstanding requests remain).

¹¹ *Prosecutor v. Ahmad Harun and Ali Kushayb*, Case No. ICC-02/05-01/02, Decision informing the Security Council about the lack of cooperation by the Republic of Sudan, May 25, 2010.

could impose sanctions or other punitive measures – though that power has not yet been invoked in favor of international criminal tribunals.

For its part, the African Union (AU), which has over the years been engaged with Sudanese authorities in a mediation process aimed at finding a political solution to the Darfur conflict, called on the Council to invoke Article 16 of the Rome Statute to suspend the processes initiated by the Court against Al Bashir.¹² In brief, under that provision, no investigation or prosecution may be commenced or continued for a year once the UNSC has so requested the Court. The AU worried that a prosecution of the incumbent Sudanese President in the current climate could impede the prospects for peace.¹³ It also agonized over the potential unraveling of the fragile political gains already made towards peaceful resolution of the Darfur crisis. The Council considered the AU request only briefly and failed to act on it.

In response, in a decision adopted at its Thirteenth Summit in July 2009 at Sirte, Libya, the Assembly of Heads of States, the AU's highest decision-making organ, directed all AU Member States to withhold cooperation from the ICC in respect of the arrest and surrender of President Al Bashir.¹⁴ While apparently animated by concern over the timing of prosecutions vis-à-vis the Darfur peace process, the immediate justification was AU frustration with the UNSC over the failure to properly consider the deferral request.¹⁵ At its subsequent meetings, including most recently the Sixteenth Summit held in Addis Ababa, Ethiopia in January 2011, the AU leadership has reiterated this decision, as well as raised a number of other concerns about the Court's work in Africa and the uneven landscape and trajectory of international criminal justice more broadly.

In light of the AU's continued concerns about the ICC's action against the incumbent Sudanese leader, and the impasse that has resulted, there is a growing fear within the international criminal justice community in Africa and elsewhere about the ability of the Court to achieve its mandate under the referral and in other situations. Indeed, the AU's recent endorsement of Kenya's effort to defer proceedings under that provision underscores just that.¹⁶ Thus, against this back-

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¹² Decision of the Meeting of African States Parties to the Rome Statute of the International Criminal Court, Doc. Assembly/AU/13 (XIII), Addis Ababa, July 1-3, 2009, 8; Communiqué of the 207th Meeting of the Peace and Security Council at the Level of the Heads of State and Government, Doc. PSC/AHG/COMM.1(CC VII), Oct. 29, 2009, at 5.

¹³ Decision of the Meeting of African States Parties, at 3.

¹⁴ *Id.* at 10.

¹⁵ Press Release, Decision on the Meeting of African State Parties to the Rome Statute of the International Criminal Court (ICC), Commission of the African Union (July 14, 2009).

¹⁶ For the African Union's position on Kenya's deferral campaign, see, Decision on the Implementation of the Decisions of the International Criminal Court. AU Doc. No. Assembly/AU/Dec.334(XVI), 1–2. The UNSC is not yet seized of the matter, although paragraph 6 of that declaration

drop, increasing attention is being given to the question of the nature, scope and criteria that should govern the Council's exercise, or non-exercise, of the controversial deferral power contained in Article 16 of the Rome Statute.

This matter gained particular urgency after the AU presented a proposal for amendment to that provision to the Eighth Session of the ICC Assembly of States Parties (ASP) in November 2009. Essentially, as will be seen fully later, African States submitted that Article 16 should be modified to empower the UN General Assembly to act should the UNSC fail to decide on a deferral request after six months. Although the states parties declined to include the proposed amendment on the agenda for the first ICC Review Conference in Kampala, Uganda in May–June 2010, an ASP working group was established to consider, from its Ninth Session in 2010, other amendments to the Rome Statute.

Although many, including the AU, anticipated a substantive discussion of the proposed changes to Article 16 at the Ninth ASP,¹⁷ the Assembly ultimately opted to schedule inter-sessional meetings in New York and The Hague before the Tenth Session in December 2011, “during which delegations would have the opportunity to present amendments already submitted and views could be expressed on the substance of proposed amendments as well as on the advisability of proceeding with further amendments regarding crimes within the jurisdiction of the Court at this stage of its existence.”¹⁸ These inter-sessional meetings may, like those during the negotiation of the Rome Statute itself, serve to answer procedural questions about future consideration of amendments as well as to resolve substantive matters of law, including Article 16.

Be that as it may, today, from the perspective of many African leaders, the ICC's involvement in Sudan has come to reflect their central concern about the UN – the skewed nature of power distribution within the UNSC and global politics. Because of the Council's legitimacy deficit, many African and other

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REQUESTS the UN Security Council to accede to this request in support of the ongoing peace building and national reconciliation processes, in order to prevent the resumption of conflict and violence; and **REQUESTS** the African members of the UN Security Council to place the matter on the agenda of the Council. . . .

¹⁷ It was decided at the 8th Session of the ASP in The Hague from 16–26 November 2009 that there would be no formal discussion of the AU proposal regarding an amendment to Article 16, and that the African and other proposals would be discussed at the 9th Session of the ASP in New York in December 2010. However, even in the New York 2010 meeting, the issue was not discussed with states preferring to first develop the procedures that would guide discussions of substantive amendments.

¹⁸ Doc. No. ICC-ASP/9/20, Official Records, vol. I, Ninth Assembly of States Parties to the Rome Statute of the International Criminal Court, ¶¶ 41, Dec. 6–10, 2010. For its part, the AU Assembly has since taken note of the ICC State Parties' call for informal consultations on proposed amendments to the Rome Statute. It called, inter alia, for all African States that have not yet done so to speak with one voice and co-sponsor the proposal for the Article 16 to ensure it is properly discussed during forthcoming meetings in The Hague and in New York. See Decision on the Implementation of the Decisions of the International Criminal Court. AU Doc. No. Assembly/AU/Dec.334(XVI), 1–2 (Jan. 31, 2011).

developing countries see its work as “a cynical exercise of authority by great powers,”¹⁹ in particular, the five permanent members. The UNSC’s (dis)engagement with Article 16 since the Rome Statute became operative will have exacerbated rather than softened those impressions.²⁰ And the result for the world’s first permanent international penal court? The result is that the uneven political landscape of the post-World War II collective security regime has become a central problem of the ICC.

Against this backdrop, the need for careful analysis of the merits of the AU’s criticisms and its proposal for amendment of Article 16 should be obvious. In the particular context of the *Al Bashir* case, the imperative to further consider the issue is heightened by an alignment of three separate factors. First, the fact that in July 2010 the ICC Pre-Trial Chamber (following an Appeals Chamber decision directing reconsideration of the genocide charge) issued a second warrant of arrest charging Al Bashir with genocide, the “crime of crimes,”²¹ in addition to crimes against humanity and war crimes.²² Second, the reality that the April 2010 presidential elections concluded with approximately 70 percent of Sudanese voters re-electing Al Bashir.²³ Third, and finally, the recent (January 2011) referendum on self-determination for southern Sudan, in respect of which there was initial delay,²⁴ but whose outcome now appears to be the peaceful separation of that region to form a separate state.

Perhaps more significantly, it is important to pay attention to the AU’s concerns and its Article 16 proposal because the matters underlying the tension – how ICC prosecutions may be reconciled with peacemaking initiatives and the role and power of the Council in matters relating to the Court – are likely to arise in the future with respect to other situations. Indeed, one of the most controver-

¹⁹ William Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 333 (Oxford University Press, 2010).

²⁰ *Id.*

²¹ *Prosecutor v. Kambanda*, Case No. ICTR-97-23-S, Judgment and Sentence, Sept. 14, 1998, 16.

²² *Prosecutor v. Al Bashir*, Case No. ICC-02/05-01/09, Second Decision on the Prosecutor’s application for a warrant of arrest, July 12, 2010. In March 2009, Sudan’s president became the first sitting head of state to be indicted by the ICC. In their original ruling, the judges of the ICC’s Pre-Trial Chamber issued an arrest warrant against Bashir for a total of five counts of war crimes and crimes against humanity, but the panel dismissed charges of genocide that had also been requested by the ICC Prosecutor. The Prosecutor appealed this decision and on February 3, 2010 the Appeals Chamber rendered its judgment, reversing, by unanimous decision, Pre-Trial Chamber I’s decision of March 4, 2009, to the extent that Pre-Trial Chamber I decided not to issue a warrant of arrest in respect of the charge of genocide. The Appeals Chamber directed the Pre-Trial Chamber to decide anew whether or not the arrest warrant should be extended to cover the charge of genocide. *Prosecutor v. Al Bashir*, Case No. ICC-02/05-01/09-73, Judgment on the appeal of the Prosecutor against the “Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir,” Feb. 3, 2010.

²³ Press Release, Basheer and Kiir emerge winners, National Election Commission Republic of Sudan, <http://www.nec.org.sd/new/english/details.php?rsnType=1&id=58>; see also James Copnall, ‘Dream election result for Sudan’s President Bashir’, *BBC News*, Apr. 27, 2010, <http://news.bbc.co.uk/2/hi/africa/8645661.stm> (accessed Feb. 15, 2011).

²⁴ See ‘Sudan’s coming elections: How did it come to this?’, *Economist*, Jan. 14, 2010.

sial issues in international criminal justice is the debate surrounding the relationship between the search for peace and the demands for justice.

The questions regarding the sequencing of peace and justice are often posed in terms of the relationship between international criminal tribunals, which are charged with the latter, and the political organs of the international community, which are charged with the former. Throughout the negotiations of the Rome Statute, sorting out the respective roles of the judicial and political organs of the international community proved to be a particularly thorny issue. The drafters of the ICC statute chose to regulate this relationship by, firstly, permitting the UNSC to refer situations – in which international crimes appear to have been committed – to the Court.²⁵

Secondly, the relationship between the ICC and the political organs of the international community is regulated by Article 16 of the Rome Statute.²⁶ Thus, that provision which enables deferrals represents one way in which the tension between the search for peace and the demands for justice may be mediated. There is an acceptance in that article that there might be circumstances where the demands of peace, at least temporarily, require or permit suspension of an investigation or prosecution by the ICC.

However, the provisions of Article 16 have not, thus far, ended the perennial debates about peace and justice. For one thing, Article 16 gives the Council the exclusive power to request deferral of Court investigations and prosecutions. This in turn raises questions about the role, the composition and the functioning of the UNSC. These questions centre on the legitimacy of a Council in which five states have permanent membership and the power to individually veto resolutions which may be agreed to by the other members. On the other hand, some take the view that since the ICC is an independent judicial body, there ought not to be interference in its work by a political body such as the UNSC. It follows that we must seek solutions to the problems that may arise in working out the relationship between the Council and the Court.

Reports from the Eighth and Ninth ASP sessions suggest that, at best, there was a tepid response to the AU proposal from other ICC states parties, including individual African States parties.²⁷ An endorsement of the proposed Article 16 amendment therefore appears unlikely at this stage. In addition, there are legal problems associated with the current proposal. Furthermore, since it calls for an amendment to the Rome Statute, the success of the proposal will require the support of the vast majority of the Court's 114 Member States.²⁸ Even assuming that all 31 African States parties (who are also AU members) voted in favor of the

²⁵ Rome Statute of the International Criminal Court, Rome, 1998, Art. 13(b).

²⁶ Rome Statute, Art. 16.

²⁷ It is reported that only Senegal and Namibia supported the proposed amendment.

²⁸ Rome Statute, Art. 21(4) (requiring seven-eighths of the states parties for an amendment to enter into force).

amendment, there would also need to be support from some powerful UNSC members whose interests may not coincide with those of the 31 African States parties.

On the other hand, a failure to engage and assuage the African government concerns about the deferral provision could further damage the credibility of the ICC in Africa – a continent that has historically been among the most supportive of it.²⁹ Perhaps more significantly, it could also lead to political action that may prove detrimental for the fledgling ICC's success in current and future cases. Worse yet, adverse political reactions over Darfur could spill over to affect the four other African situations constituting the rest of the Court's current caseload.

It is against the backdrop that this article aims seeks to articulate a clearer picture of the law and politics of Article 16 deferrals, in light of the AU's concerns. It is intended to stimulate a fuller and nuanced consideration of the AU proposal within and outside Africa. Perhaps more significantly, it offers some initial practical suggestions on how the international community might address the issues raised within certain African government circles and other developing nations and blocs about the ICC's recent work in the Sudan. The spirit underlying the article is that a strong, independent and successful ICC is, ultimately, in Africa's best interest as the continent works to face down the beast of impunity. By the same token, we maintain that it is equally in the long-term interest of the Court to show greater sensitivity towards the specific interests and views of African States.

Section 2 of this article sets the stage for the subsequent analysis by setting out Africa's long-standing enthusiasm for and contributions to the international criminal justice project. Section 3 examines the law and politics of deferrals under Article 16 of the Rome Statute. In Section 4, we show how the U.S. successfully invoked the deferral power in the early days of the ICC, and how that has since come to fuel the African perception that the Council – by bowing to the demands of its influential members even in the face of serious opposition by many other states – is guilty of double-standards given its refusal to endorse the AU's deferral request.

In Section 5, we examine the politics of deferral in the Sudan situation and the AU reaction to it. In Section 6, we turn to the AU proposal to amend Article 16, which was a direct consequence of the African States parties' dissatisfaction with

²⁹ For more on the African role, see Charles C. Jalloh, 'Regionalizing International Criminal Law?', 9 *Int'l Crim. L. Rev.* 446–47, 445–99 (2009); Hassan Jallow and Fatou Bensouda, *International criminal law in an African context*, in Max du Plessis (ed.), *African Guide to International Criminal Justice*, 41 (Pretoria: Institute for Security Studies 2008). See also Phakiso Mochochoko, 'Africa and the International Criminal Court', in Evelyn A. Ankumah and Edward Kwakwa (eds.), *African Perspectives on the International Criminal Court, Ghana: Africa Legal Aid* (2005); and Sivu Maqungo, 'The establishment of the International Criminal Court: SADC's participation in the negotiations', *Afr. Sec. Rev.* 9 (2000).

the UNSC's handling of the Al Bashir matter. Section 7 steps back and attempts to reflect how the peace-justice debate has played out in relation to the ICC and the Sudan situation. We argue that African efforts to prioritize accountability for serious crimes suggest the need for AU states to be more deliberate in advancing their goals but that they should operate within, instead of outside, the international criminal justice system anchored by the Court.³⁰

Finally, while we have elsewhere more fully explored options for consideration on how to resolve the Article 16 controversy, in the conclusion to this article, we highlight four initial recommendations that will hopefully spark further discussion among states and civil society of possible solutions to the Article 16 problem.

2. Background: A Long History of African Support for International Criminal Justice

Modern Africa is said to have experienced the effects of devastating conflicts more than any other region of the world.³¹ Partly as a reaction to this, with the end of the Cold War and the decision to replace the Organization of African Unity with an activist AU, African States have shown increasing enthusiasm to prosecute individuals involved in the commission of egregious international crimes such as genocide and crimes against humanity.³² Despite serious resource shortages, trials have been held – and continue to be held – within certain national courts as well as internationally supported tribunals on the continent. For example, with the assistance of the international community, Rwanda and Sierra Leone have come to occupy a special place in the transitional justice discourse. Those two nations pressured the UN and the international community – which far too often ignored

³⁰ For the African Union's position on Kenya's deferral campaign, see, Decision on the Implementation of the Decisions of the International Criminal Court. AU Doc. No. Assembly/AU/Dec.334(XVI), 1–2 (Jan. 31, 2011). The UNSC is not yet seized of the matter, although paragraph 6 of that declaration "Requests the UN Security Council to accede to this request in support of the ongoing peace building and national reconciliation processes, in order to prevent the resumption of conflict and violence; and Requests the African members of the UN Security Council to place the matter on the agenda of the Council..."

³¹ The UN estimates that 9,210, 000 deaths have resulted from Sub Saharan Africa conflicts from 1994–2003. See UN Department of Public Information [UN DPI], The millennium development goals report, DPI/2390, May 2005, 9. See also Henk-Jan Brinkma, *Preventing civil strife: An important role for economic policy*, Discussion Paper No. 20, ST/ESA/2001/DP.20, UN Department of Economic and Social Affairs, Sept. 2001 tbl. 1; *contra* Ifeonu Eberachi, 'Armed Conflicts in Africa and Western Complicity: A Disincentive for African Union's Cooperation with the ICC', 3 *Afr. J. Legal Stud.* 53 (2009) (noting out Paul Zeleza's disagreement with such assertions; instead, according to Eberachi, Zeleza argues that the Africa's share of deaths during the last century was modest).

³² See, for example, Constitutive Act of the African Union, Art. 4(h), 2158 UNTS 3, July 11, 2000; Protocol Relating to the Establishment of the Peace and Security Council of the African Union, AU Assembly, 1st Ordinary Session, July 9, 2002; Jalloh, *Regionalizing International Criminal Law?*, *supra* note 29, at 456.

Africa's problems – to support the creation of special ad hoc tribunals.³³ The sole purpose was to enable the prosecution of those deemed to bear the greatest responsibility for the atrocities experienced on their respective territories during the nineties.

Regarding the ICC, it is by now settled that African countries played an important role before and during the Rome Statute negotiations which led to its establishment.³⁴ African nations early on advocated for a strong and independent court. They also generally advanced progressive positions, both within and outside the influential “Like-Minded Group,” on highly controversial issues.³⁵ Some of those issues threatened to derail the negotiations towards a permanent penal court, for example, the question of whether to empower the Prosecutor to initiate cases on his own motion. Ironically, those same issues are now resurfacing in the context of the practice in the region thereby compelling continental leaders to start revisiting their positions on those issues.

Once the Rome treaty was adopted, many African States also contributed to the speedy achievement of the 60 ratifications required for the treaty to enter into force on July 1, 2002.³⁶ This was much sooner than anyone could have anticipated.³⁷ Indeed, reflective of the continent's deep commitment to the idea of international criminal justice, Senegal was the first of 120 signatories to ratify the unprecedented Rome Statute on February 2, 1999, only seven months after the treaty's adoption. In this way, that West African country symbolically captured the significance of the ICC for the war-weary people of the continent.³⁸

Since then, African States have continued to support the budding court. Currently, the continent, with 31 States Parties, is one of the most well represented regions of the world in the so-called “Rome system of justice.”³⁹ Moreover, as is widely known, three countries in the Great Lakes region of Africa (i.e. CAR,

³³) Letter from Manzi Bakuramutsa, Permanent Representative of Rwanda, to the President of the UNSC, UN Doc. S/1994/1115, Sept. 29, 1994; Letter from Alhaji Ahmad Tejan Kabbah, President of the Republic of Sierra Leone, to the President of the UNSC, June 12, 2000 (annex to Letter from Ibrahim M. Kamara, Ambassador and Permanent Representative of Sierra Leone to the President of the UNSC, UN Doc. S/2000/786, Aug. 10, 2000).

³⁴) See Jalloh, *Regionalizing International Criminal Law?*, *supra* note 29, at 447; Jalloh and Bensouda, *International Criminal Law in an African context*, *supra* note 29, at 41.

³⁵) The so-called “Like-Minded States” were over 60 in number. Among them were the following African members: Algeria, Benin, Burkina Faso, Burundi, Congo (Brazzaville), Egypt, Gabon, Ghana, Lesotho, Malawi, Namibia, Senegal, Sierra Leone, South Africa, Swaziland and Zambia.

³⁶) By July 1, 2002, 27 African States had signed onto the Rome Statute and 18 had deposited ratifications. UN Treaty Collection, http://treaties.un.org/Pages/ViewDetails.aspx?src=UNTSOnline&tabid=2&mtdsg_no=XVIII-10&chapter=18&lang=en#Participants (accessed Feb. 14, 2011).

³⁷) William A. Schabas, *An Introduction to the International Criminal Court* 19 (Cambridge: Cambridge University Press, 3d ed. 2007).

³⁸) Jalloh, *Regionalizing International Criminal Law?*, *supra* note 29, at 446–47.

³⁹) William Burke-White, ‘Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of Justice’, 53 *Harv. Int'l L.J.* 49 (2008).

DRC and Uganda) were the first to lift the veil of impunity through self-referrals⁴⁰ of their respective situations to the Court Prosecutor for investigations and possible prosecutions. Furthermore, Cote d'Ivoire, a non-party to the statute has lodged a declaration accepting the ICC's jurisdiction.⁴¹ More recently, Kenya – an East African nation – signaled its intention to make the fourth African self-referral to the ICC (though Prosecutor Luis Moreno-Ocampo instead chose to seek Pre-Trial Chamber authorization for his first *proprio motu* investigation of a situation, which authorization has now been granted).⁴²

Before Kenya, Sudan was the last situation to be triggered. However, unlike the self-referrals, it was the Council, acting under its Chapter VII authority, which submitted the situation in that nation to the ICC Prosecutor. Sudan is a party to the UN Charter, but not to the Rome Statute.⁴³ As such, in a treaty-based consensual international judicial institution like the ICC, the Sudanese referral constitutes a coercive and exceptional measure. Thus, it is only justifiable from the perspective of international treaty law if it is a measure aimed at the maintenance or restoration of international peace and security under Article 39 of the UN Charter.⁴⁴

3. The Law and Politics of Article 16 of the Rome Statute

Article 16 of the Rome Statute, which is entitled “Deferral of investigation or prosecution,” provides as follows:

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

⁴⁰ Payam Akhavan, ‘Self-Referrals Before the International Criminal Court: Are States the Villains or the Victims of Atrocities?’, 21 *Crim. L. F.* 1046 (2010); Mohamed M. El Zeidy, ‘Critical Thoughts on Article 59(2) of the ICC Statute’, 4 *J. Int'l Crim. Just.* 448 (2006); Claus Kress, ‘Self-referrals’ and ‘Waivers of Complementarity’: Some Considerations in Law and Policy, 2 *Int'l Crim. Just.* 944 (2004).

⁴¹ Press Release, Registrar confirms that the Republic of Côte d'Ivoire has accepted the jurisdiction of the Court, Registrar, ICC, Feb. 15, 2005.

⁴² Press Release, Kenyan high-level delegation meets ICC prosecutor, Office of the Prosecutor, ICC, July 3, 2009; Situation in the Republic of Kenya, Case No. ICC-01/09-19, Decision pursuant to Article 15 of the Rome Statute on the authorization of an investigation into the situation in the Republic of Kenya, Mar. 31, 2010.

⁴³ Sudan was admitted to the UN on December 4, 1975. United Nations Member States, <http://www.un.org/en/members/index.shtml> (accessed Feb. 21, 2011). Sudan signed the Rome Statute on September 8, 2000, but sent a communication on August 26, 2008 informing the secretary-general that Sudan no longer intends to be party to the Rome Statute and has no legal obligation arising from the signature.

⁴⁴ UN Charter, Art. 39 (“The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security”).

Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.⁴⁵

By Article 16 the UNSC is accordingly entrusted with a power of “negative” intervention in the exercise of the ICC’s jurisdiction. The Council’s power to defer, and indeed its broader relationship with the Court, had been one of the thorniest issues in the negotiations leading to adoption of the Rome Statute.⁴⁶ Indeed, as initially envisaged, Article 23(3) of the International Law Commission (ILC) draft of 1994 provided that:

3. No prosecution may be commenced under this Statute arising from a situation which is being dealt with by the Security Council as a threat to or breach of the peace or an act of aggression under Chapter VII of the Charter, unless the Security Council otherwise decides.⁴⁷

Thus, under the ILC proposal, the ICC would not have been able to proceed in many matters without prior Council authorization. This was particularly so in circumstances where the issue fell within the contours of Chapter VII of the UN Charter. Although supported by the Permanent Five (i.e. China, France, Russia, United Kingdom, United States), this ILC suggestion was heavily criticized by other countries. In the main, many states were concerned that it unacceptably subordinated the ICC’s judicial functions to the whims and caprices of a quintessentially political body.⁴⁸ Fears were also expressed that this could reduce the credibility and moral authority of the court; limit its role; undermine its independence, impartiality and autonomy; introduce inappropriate political influence into the judicial equation; and, ultimately, render its work ineffective. The compromise reflected in the final version of Article 16, but one with which many countries still seemed displeased, effectively diminished the authority of the UNSC by requiring it to act to *prevent* a prosecution rather than to act to *authorize* one.

In other words, Article 16 requires the Council to take preventive action through a resolution under Chapter VII requesting that no investigation or prosecution be commenced for a renewable period of 12 months. In practical terms,

⁴⁵ Rome Statute, Art. 16.

⁴⁶ Morten Bergsmo and Jelena Pejic, ‘Article 16 deferral of investigation or prosecution’, in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, 595, 598 (Oxford: Hart Publishing, 2d ed. 2008); Luigi Condorelli and Santiago Vallalpando, ‘Referral and Deferral by the Security Council’, in Paolo Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford: Oxford University Press, 2002) 645.

⁴⁷ *Report of the International Law Commission on the work of its forty-sixth session, Draft Statute for an International Criminal Court*, UN GAOR Supp. (No. 10), reprinted in 1994, 2 Y.B. Int’l L. Comm’n 49, UN Doc. A/49/10, 27.

⁴⁸ Condorelli and Vallalpando, *Referral and Deferral by the Security Council*, *supra* note 46.

this means that a deferral will require the approval of nine of 15 Council members and the lack of a contrary vote by any of the five permanent members.⁴⁹

4. The Politics (and Double-standards) Start Early: United States Invocation of Article 16

To understand the AU frustration over the UNSC's failure to consider its deferral request, a brief history is necessary. Less than two weeks after the Rome Statute entered into force on 1 July 2002, and before the ICC itself had opened its doors, Article 16 of the Rome Statute was controversially invoked at the behest of the United States. In Resolution 1422,⁵⁰ which the Council adopted at its 4572nd meeting on July 12, 2002 using Chapter VII of the UN Charter, paragraph 1 referred to Article 16 of the Rome Statute:⁵¹

Requests, consistent with the provisions of Article 16 of the Rome Statute, that the ICC, if a case arises involving current or former officials or personnel from a contributing State not a Party to the Rome Statute over acts or omissions relating to a United Nations established or authorized operation, shall for a twelve-month period starting 1 July 2002 not commence or proceed with investigation or prosecution of any such case, unless the Security Council decides otherwise...

This language was included in the resolution after the United States threatened, in early June 2002, to veto renewal of the mandate of the UN mission in Bosnia and Herzegovina (as well as all other future peacekeeping operations).⁵²

Resolution 1422 would expire after 12 months, and on June 12, 2003, at its 4772nd meeting, it was renewed for a further year by the UNSC's adoption of Resolution 1487.⁵³ The latter was essentially identical to Resolution 1422. In that decision, the Council expressed its intention, as it had done the previous year, to renew the resolutions "under the same conditions each July 1 for further 12-month periods for as long as may be necessary."⁵⁴ Twelve states voted in favor of the resolution, while Germany, France and Syria all abstained.⁵⁵

⁴⁹ *Id.* 646.

⁵⁰ S. Con. Res. 1422, UN Doc. S/RES/1422, 1 (July 12, 2002).

⁵¹ *Id.*

⁵² Sean D. Murphy, 'Efforts to Obtain Immunity from ICC for US Peacekeepers', 96 *Am. J. Int'l L.* 725, 725–27 (2002). See also the statement by the United States' representative at the UNSC's meeting of July 10, 2002 (UN Doc. S/PV/4568, at 9–10). For academic comment on the subject, see, *inter alia*, Carsten Stahn, 'The ambiguities of Security Council Resolution 1422', 14 *Eur. J. Int'l L.* 85 (2003); and Roberto Lavalle, 'A Vicious Storm in a Teacup: The Action by the United Nations Security Council to Narrow the Jurisdiction of the International Criminal Court', 14 *Crim. LF* 195 (2003).

⁵³ S. Con. Res. 1487, UN Doc. S/RES/1487 (June 12, 2003).

⁵⁴ *Id.*

⁵⁵ UN SCOR, 58th Sess., 4772nd meeting, UN Doc. S/PV.4772, 11 (June 12, 2003).

Many governments regarded these controversial resolutions as problematic. Some of them cited the “deep injustice”⁵⁶ of discriminating between peacekeeping forces from sending states that are parties to the Rome Statute and those that are not.⁵⁷ Others suggested that the resolutions effectively sought to modify the terms of the Rome Statute indirectly, without amendment of the treaty.⁵⁸ The implication that automatic unlimited renewals will follow was also roundly rejected.⁵⁹

Those statements demonstrate the politicized nature of Article 16 and the UNSC’s invocation thereof at the behest of – and under threat by – a veto-wielding superpower. As some respected international criminal lawyers have since observed:

The purpose of [Article 16] was to allow the Council, under its primary responsibility for the maintenance of peace and security, to set aside the demands of justice at a time when it considered the demands of peace to be overriding; if the suspension of legal proceedings against a leader will allow a peace treaty to be concluded, precedence should be given to peace. The suspension of the proceedings would be only temporary. The subsequent practice of the Council quoting Article 16 would however have surprised those drafting the Statute.⁶⁰

If any positives may be drawn from the United States’ reliance on Article 16 to protect its presumed national interests, they are the clear statements by other countries of their legal interpretation of the meaning of Article 16.⁶¹ For example, during the Council debate on Resolution 1487, the Netherlands referred to the *travaux préparatoires* to lay bare the original intent of the drafters of the provision:

Article 16 reads that “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.” From both the text and the *travaux préparatoires* of this Article follow that this Article allows deferrals – only on a case by case basis; – only for a limited period of time; – and only when a threat to or breach of peace and security has been established by the Council under Chapter VII of the UN Charter. In our view, Article 16 does not sanction blanket immunity in relation to unknown future events.⁶²

⁵⁶ *Id.* (Felipe Paolillo of Uruguay sees discrimination among peacekeepers as a deep injustice; all peacekeepers, he argued, “must be subject to the same rules and work under the same Statute.”).

⁵⁷ *Id.*

⁵⁸ Letter from the Ambassadors to the UN of Canada, Brazil, New Zealand and South Africa to the President of the UNSC in relation to the draft resolution 2.2002.747 currently under consideration by the UNSC under the agenda item Bosnia-Herzegovina, UN Doc. S/2002/754, July 12, 2002.

⁵⁹ UN SCOR, 58th Sess., 8–9.

⁶⁰ See Robert Cryer, Hakan Friman, Darryl Robinson and Elizabeth Wilmshurst, *An Introduction to International Criminal Law and Procedure*, 138 (Cambridge: Cambridge University Press, 2007).

⁶¹ Vienna Convention on the Law of Treaties, Art. 31(1), 1155 UNTS 331, Jan. 27, 1980 (stating that a “treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose”).

⁶² UN SCOR, 58th Sess., 20.

Germany also joined the Netherlands in opposing the adoption of Resolution 1422. In the public debate on July 10, 2002, it explained:

Chapter VII of the United Nations Charter requires the existence of a threat to the peace, a breach of peace or an act of aggression – none of which, in our view, is present in this case. The Security Council would thus be running the risk of undermining its own authority and credibility [by adopting the draft Resolution].⁶³

Canada also underscored that Article 16 was the product of delicate negotiations and that the provision was intended to be available to the UNSC only on a limited case-by-case basis. In the words of its representative, who correctly summed up the legislative history of the provision, “Most states were opposed to any Security Council interference in ICC action, regarding it as inappropriate political interference in a judicial process.”⁶⁴

Syria, on behalf of Arab countries, echoed Canada’s sentiments, and appealed “to the Security Council to assume its responsibility and not accept these exemptions because that might damage the credibility of the Court before it is born.”⁶⁵ Further, during the debate on Resolution 1487, it warned that “the adoption of this resolution would result in the gradual weakening of the Court’s role in prosecuting those who have perpetrated the most heinous crimes that come under its jurisdiction,” concluding that “we have full confidence in international criminal justice...”⁶⁶

The same theme was picked up by the heads of state of the over 100-Member State Non-Aligned Movement, who expressed their view that the Council’s actions “are not consistent with the provision of the Rome Statute and severely damage the Court’s credibility and independence.”⁶⁷ It is worth noting that with the adoption of Resolution 1422, all African States on the UNSC at the time supported the resolution as did other non-aligned members.

The UN Secretary-General also weighed in on the debate, explaining in simple terms what Article 16 was intended for:

⁶³ UN SCOR, 57th Sess., 4568th meeting, UN Doc. S/PV.4568 (Resumption 1), July 10, 2002, 9. See Pressemitteilung, Erklärung von Bundesaußenminister Joschka Fischer zur Entscheidung des VN-Sicherheitsrates vom 12.07. 2002, July 15, 2002, http://www.news-monitoring.org/new/standard/result_main.cfm?pfach=1&n_firmanr_=109207&ssektor=pm&detail=1&r=99654&sid=&aktion=jour_pm&quelle=0&profisuche=1 (accessed Feb. 15, 2011).

⁶⁴ HE Mr. Paul Heinbecker, Ambassador and Permanent Representative of Canada to the UN, remarks at the Tenth Session of the Preparatory Commission for the ICC, July 3, 2002, <http://www.iccnw.org/documents/CanadaICCPlenary3July02.pdf>.

⁶⁵ Coalition for the ICC, Excerpts from the Special Plenary of the 10th PrepCom on the ICC, July 3, 2002, http://www.coalitionfortheicc.org/documents/Excerpts_from_3July02.pdf.

⁶⁶ UN SCOR, 58th Sess., 25–26.

⁶⁷ XIII Conference of Heads of State or Government of the Non-Aligned Movement, Doc. NAM XIII/ Summit/Final Document (Rev. 1), Kuala Lumpur, Feb. 20–25, 2003, <http://www.un.int/malaysia/NAM/finaldoc.html> (Feb. 15, 2011; Oct. 5, 2010).

In making this decision, you will again rely on Article 16 of the Rome Statute. I believe that that Article was not intended to cover such a sweeping request, but only a more specific request relating to particular situation...⁶⁸

The next time that the Council expressly referred to Article 16 was in the context of the Darfur referral.⁶⁹ When it referred the Sudan situation to the ICC in 2005 in Resolution 1593, there was a reference to Article 16 in the second preambular paragraph:

Recalling Article 16 of the Rome Statute under which no investigation or prosecution may be commenced or proceeded with by the International Criminal Court for a period of 12 months after a Security Council request to that effect.” Moreover, operative paragraph 6 provides that the UNSC:

Decides that nationals, current or former officials or personnel from a contributing State outside Sudan which is not a party to the Rome Statute of the International Criminal Court shall be subject to the exclusive jurisdiction of that contributing State for all alleged acts or omissions arising out of or related to operations in Sudan established or authorized by the Council or the African Union, unless such exclusive jurisdiction has been expressly waived by that contributing State.⁷⁰

It is undisputed that the reference was included to mollify the concerns of the United States, which informally agreed to abstain from vetoing the resolution in return. The American Ambassador to the UN at the time explained the section’s objectives as follows:

This resolution provides clear protections for United States persons. No United States persons supporting the operations in the Sudan will be subjected to investigation or prosecution because of this resolution.⁷¹

At least two important observations may be drawn from the above review of the Council practice regarding Article 16. First, in addition to its plain meaning, Article 16 is understood by many states as being limited to deferrals of investigations or prosecutions on a case-by-case basis. Second, although the provision allows the UNSC a limited power of intervention in the workings of the ICC, it was not intended as a means by which the Council can undermine or usurp the

⁶⁸) Secretary-General Kofi Annan, Statement to the Security Council on the renewal of a resolution regarding the International Criminal Court and peacekeeping (June 12, 2003), <http://www.un.org/apps/sg/sgstats.asp?nid=389> (accessed Feb. 15, 2011).

⁶⁹) See generally Annalisa Ciampi, ‘The Proceedings against President Al Bashir and the Prospects of Their Suspension under Article 16 ICC Statute’, 6 *Int’l Crim. Just.* 885 (2008). In Security Council Resolution 1497, para. 7, the UNSC “*Decide[d]* that current or former officials or personnel from a contributing State, which is not a party to the Rome Statute of the International Criminal Court, shall be subject to the exclusive jurisdiction of that contributing State for all alleged acts or omissions arising out of or related to the Multinational Force or United Nations stabilization force in Liberia, unless such exclusive jurisdiction has been expressly waived by that contributing State.” However there was no reference to Article 16 of the Rome Statute.

⁷⁰) S. Con. Res. 1593, UN Doc. S/RES/1593 (Mar. 31, 2005).

⁷¹) UN SCOR, 60th Sess., 5158th meeting, UN Doc. S/PV.5158, Mar. 31, 2005, 4.

functions of the nascent court. In principle, the UNSC possesses a wide margin of discretion in the exercise of its duties to ensure the maintenance of international peace and security.⁷² However, it was understood, at least among certain states that may constitute a majority, that Article 16 would be used sparingly and only when a specific threat to international peace and security could be identified under Chapter VII of the UN Charter and when action against such a specific threat would be exacerbated by proceedings pending before or contemplated by the Court.

These points follow expressly from the text and history of Article 16 as read with Chapter VII of the UN Charter.⁷³ They also follow from a proper appreciation of the (limited) role that the Council was intended to enjoy in relation to the Court – an independent multilateral treaty based body. This limited role was well articulated by the ILA ICC committee in its first report:⁷⁴

With recent developments in international criminal law, it may be argued that the powers of the Security Council to interfere with international justice are implicitly limited, by virtue of a form of “separation of powers” doctrine. In the past, when there was no prospect of international prosecution, the only real basis for intervention by the international community was political. The Council adopted measures under Chapter VII that were essentially political because there was no alternative. But international law and international institutions have evolved considerably in recent years. *The previously almost unlimited power of the Security Council ought now to be balanced with other prerogatives, such as the need to preserve the independence and integrity of international criminal justice initiatives.* Although the concept had been afloat for several years, the delegates to the San Francisco Conference did not contemplate a permanent international criminal court as an operative part of the post-war international system, and it is therefore not surprising that the problem is not addressed expressly in the Charter. *But the landscape has evolved, and with the existence of the International Criminal Court it is absolutely essential that international political and legislative bodies ensure that they do not encroach upon international justice.* The Security Council must now apply its mandate in such a way as to enhance and promote newer institutions, even if they have been established outside the framework of the Charter itself.”⁷⁵ [Emphasis added]

5. The Politics of Deferral in the Sudan Situation and AU Reaction

The AU concern about the Court’s activities in the Sudan situation has been articulated by various (and important) organs of the regional body. For instance, in addition to the AU Assembly, the Peace and Security Council of the AU (PSC), which has primary responsibility for the management and resolution of conflicts in Africa, has, since the Prosecutor’s request for a warrant for the arrest of Al Bashir, repeatedly called on the UNSC to apply Article 16 to “defer the process

⁷²) *Prosecutor v. Tadic*, Case No. It-94-1-I, Decision on the defence motion for interlocutory appeal on jurisdiction 29, Oct. 2, 1995.

⁷³) See Ciampi, *supra* note 69, at 888–90.

⁷⁴) International Law Association Committee on the ICC, Berlin Conference, 2004, <http://www.ila-hq.org/en/committees/index.cfm/cid/1011> (accessed Feb. 15, 2011).

⁷⁵) *Id.* at 8–9.

initiated by the ICC.⁷⁶ To the chagrin of AU Member States, the repeated request was only considered and debated by the Council once; and even that instance was within the context of discussions on the extension of the mandate of UNAMID, the AU-UN hybrid operation in Darfur established by Resolution 1769,⁷⁷ for a further 12 months to July 31, 2009.

The UNSC's failure to meaningfully engage the AU request for a deferral of the proceedings against Al Bashir may be a function of various factors. In the first place, it is not clear that African States used all the means at their disposal to ensure that the Council actively considered the matter. Despite the repeated formal requests by organs of the AU at the regional level, the various African States holding a seat in the UNSC at the relevant time seemed unprepared to take the lead in authoring and sponsoring a draft resolution of the Council by which a decision on the deferral matter would be taken.

That said, it must be stressed that the three African countries on the UNSC (Burkina Faso, Libya and South Africa), with Libya in the lead, did propose important amendments on Article 16 to the United Kingdom draft resolution regarding the renewal of UNAMID.⁷⁸ Libya explicitly stated that their motivation was to advance the AU deferral request.⁷⁹ However, the African proposals were not supported by certain Council members and were ultimately left out from the final resolution.⁸⁰ Nevertheless, the African States voted for the UNAMID renewal resolution. They clarified this was because of the importance that they attached to the timely renewal of the peacekeeping mission's mandate to ensure its continuity and effectiveness, as well as the compromise reached with 14 other UNSC members that the AU's Article 16 deferral request would be considered at a later stage.⁸¹

Secondly, the Permanent Five as well as the ten non-permanent members were divided over how to proceed on the AU request. For example, China, Indonesia, Libya and Russia openly endorsed the AU request while Croatia, Belgium and France essentially opposed it. Of the supporters not including the three African States, China made the strongest statement in favor of a deferral. It took the view that a comprehensive political solution is required in Sudan and that the overall interests of peace and security should not be compromised. In so arguing, China considered the AU request reasonable and reasoned that the chances of resolving the Darfur crisis through a political solution would be slim or nonexistent without the full cooperation of the Sudanese government. It argued that the ICC's

⁷⁶ See *id.* 2–3; Communiqué of the 142nd meeting, PSC/MIN/Comm(CXLII) 2, 5, 9, 11(i); Communiqué of the 175th meeting, PSC/PR/Comm. (CLXXV), 4–6.

⁷⁷ S. Con. Res. 1769, UN Doc. S/RES/1769 (July 31, 2007).

⁷⁸ S. Con. Res. 1828, UN Doc. S/RES/1828 (July 31, 2008).

⁷⁹ UN SCOR, 63rd Sess., 5947th meeting, UN Doc. S/PV.5947, 7 (July 31, 2008).

⁸⁰ *Ibid.*

⁸¹ *Id.* at 7–8.

involvement and indictment of Al Bashir would derail the peace process, fuel the arrogance of the unwilling rebel groups and harm the fragile and turbulent security situation in Darfur. On the other hand, by characterizing the indictment as “an inappropriate decision taken at an inappropriate time,” China appeared to infer that it had an open mind for a prosecution at a later stage.⁸² Much like the AU, it suggested that the issue was not so much about the *propriety* as much as it is about the *timing* of any prosecutions.

Alongside China, the delegate of the Russian Federation observed that various regional and sub-regional bodies had supported the AU deferral request which should have been given serious weight. These included the Non-Aligned Movement, the Organization of Islamic Conference and the League of Arab States. Together, those groups constituted about two thirds of the international community. The Russian delegate therefore regretted the omission to address the deferral request in the final resolution due to the opposition of *some* Council members.⁸³

Coming from the opposite side, the United States, which ultimately abstained from the vote, opposed a draft UNAMID renewal resolution that would grant a Sudan deferral. It insisted that the language regarding the ICC, which Burkina Faso and Libya had inserted into the U.K.’s draft resolution, would send the wrong message to the Sudanese president.⁸⁴ It would also undermine efforts to bring him and others to justice.⁸⁵ This suggested that, after many years of direct opposition to its work, the world’s only superpower had had a favorable change of heart towards the ICC. This news was widely welcomed by supporters of the Court, and had the curious effect of drowning out the African Article 16 concerns.

The UNSC’s ultimate position on the AU request was merely to “*note*,”⁸⁶ in the preamble, the AU’s calls, and to express its intention to consider the matter further. In Resolution 1828, adopted on July 31, 2008 with 14 votes in favor (with the United States abstaining), the Council:

“[e]mphasiz[es] the need to bring to justice the perpetrators of... crimes and urg[es] the Government of Sudan to comply with its obligations in this respect.”⁸⁷ In the absence of agreement on a common position, the Council effectively postponed a final decision on the African Article 16 request to another time. In operative paragraph 9, a compromise was crafted to the effect that an inclusive political settlement of the Darfur crisis was indispensable since no “military solution” was

⁸² Press Release, Security Council decides to extend mandate of African Union-United Nations Hybrid Operation in Darfur by 14 votes in favor, 1 abstention, UN Doc. SC/9412 (July 31, 2008).

⁸³ *Id.*

⁸⁴ UN SCOR, 63rd Sess., 5947th meeting, UN Doc. S/PV.5947, 8–9 (July 31, 2008).

⁸⁵ *Id.*

⁸⁶ S. Con. Res. 1828, UN Doc. S/RES/1828 (July 31, 2008) (noting the communiqué and “*having in mind* concerns raised by members of the Council...”).

⁸⁷ *Id.*

possible to restore peace to Sudan. The preamble had cited the AU communiqué of July 21, 2008 as follows: “having in mind concerns raised by members of the UNSC regarding potential developments subsequent to the application by the Prosecutor of the International Criminal Court of July 14, 2008, and taking note of their intention to consider these matters further.”⁸⁸ Regrettably, the Council, despite the urging of the African members in their statements explaining their understanding of the resolution, failed to consider the deferral request as soon as possible thereafter.

This outcome has drawn the ire of some African countries. At a meeting of African States parties to the Rome Statute between June 8 and 9, 2009, AU Member States adopted the view that:

Another formal resolution should be presented by the Assembly of Heads of State and Government to the [UNSC] to invoke Article 16 of the Rome Statute by deferring the Proceedings against President Bashir of The Sudan as well as expressing *grave concern* that a request made by fifty-three Member States of the United Nations has been *ignored*.⁸⁹ (Emphasis added.)

The peak of its response was the decision of the AU Assembly taken at Sirte, Libya in July 2009, and reiterated a year later at the AU Assembly in Kampala, Uganda in July 2010. In the 2009 decision, the regional body observed that because its request to the Council “has never been acted upon,” all AU Member States “shall not cooperate” with the ICC, pursuant to the provisions of Article 98 of the Rome Statute relating to immunities, in the arrest and surrender of Bashir.⁹⁰ It also expressed “deep regret” that the African request to defer the proceedings against the Sudanese president in accordance with Article 16 has “neither been heard nor acted upon, and in this regard, REITERATES ITS REQUEST to the UN Security Council.”⁹¹

In an explanatory press release following the July 3, 2009 decision on non-cooperation with the Court, the AU stated that its decision “bears testimony to the glaring reality that the situation in Darfur is too serious and complex an issue to be resolved without recourse to an harmonized approach to justice and peace, neither of which should be pursued at the expense of the other.”⁹² Accordingly, it continued, the July 3, decision “should be received as a very significant pronouncement by the supreme AU decision-making body and a balanced expression of willingness to promote both peace and justice in Darfur and in The Sudan

⁸⁸) *Id.*

⁸⁹) See Recommendation 6, *Report of the Meeting of African States Parties to the Rome Statute of the International Criminal Court*, Min/ICC/Rpt, June 8–9, 2009, 6.

⁹⁰) Decision on the meeting of African states parties to the Rome Statute of the International Criminal Court (ICC), Doc. Assembly/AU/13(XIII), 13th Ordinary Session of the Assembly of the AU, Sirte, July 1–3, 2009; Decision on the progress report of the Commission on the implementation of decision Assembly/AU/Dec.270(XIV) on the second ministerial meeting on the Rome Statute of the International Criminal Court (ICC), Doc. Assembly/AU/10(XV), 15th Ordinary Session of the Assembly of the AU, Kampala, July 25–27, 2010.

⁹¹) *Id.*

⁹²) Press Release, Decision on the meeting of African states parties to the Rome Statute of the International Criminal Court (ICC), African Union, Addis Ababa, July 14, 2009.

as a whole” and “[i]t is now incumbent upon the [UNSC] to seriously consider the request by the AU for the deferral of the process initiated by the ICC, in accordance with Article 16 of the Rome Statute.”⁹³

The legal basis of the AU decision not to cooperate with the ICC in relation to the *Al Bashir* case was predicated on Article 98 of the Rome Statute.⁹⁴ Under that provision, the Court may not request the surrender of a person in a manner that would require a state to act inconsistently with its obligations under international law in respect of the immunity of that person. While this paper will not consider that issue, which raises separate questions about the interplay between immunity under the Rome Statute and customary international law, from a treaty law perspective, it seems problematic that the AU decision to no longer cooperate with the Court in arresting Al Bashir was directed at all 53 AU Member States rather than only the African States that also happen to be parties or signatories to the Rome Statute.⁹⁵

While the AU clearly aimed to bind all its members, the question arises regarding the possible conflict of obligations for the 31 members of the AU that are also states parties to the Rome Statute. A similar question follows regarding whether obligations may accrue for African signatories, but not parties to the Rome Statute, which may have a general customary law obligation to not undertake steps that could defeat the object and purpose of that treaty. Perhaps, as a partial acknowledgement of these difficulties, the AU’s July 2010 Kampala decision requested its Member States “to balance, where applicable, their obligations to the AU with their obligations to the ICC.”⁹⁶ More broadly, however, AU Member States are not necessarily bound to cooperate with the Court under the UNSC Resolution 1593 which referred the Darfur situation as the Council only explicitly required the Government of Sudan to cooperate.

In any event, it is clear from recent statements, including most recently from the Sixteenth Summit in January 2011, that the AU wants its call for a Council deferral of the Al Bashir prosecution to be taken seriously, indeed acceded to. This call may ultimately be animated by its preference for African solutions to African problems, a preference further bolstered by its recent declaration regarding the ICC’s nascent investigation in Kenya. There is nothing wrong with such a position, assuming that such “solutions” are consistent with the general and specific obligations of African States under international law. At the same time, the validity of the AU concern that comprehensive regional and political efforts

⁹³ *Id.*

⁹⁴ Decision on the Meeting of African states parties to the Rome Statute, 8(v).

⁹⁵ Paola Gaeta, ‘Does President Al Bashir enjoy immunity from arrest?’, 7 *J. Int’l Crim. Just.* 315, *contra* Dapo Akande, ‘The legal nature of Security Council referrals to the ICC and its impact on Al Bashir’s immunities’, 7 *J. Int’l Crim. Just.* 333 (2009).

⁹⁶ Decision on the progress report of the Commission on the implementation of decision Assembly/AU/Dec.270(xiv).

for long-term peace on the continent should not to be undermined by the ICC's interest in short-term prosecutions remains undisputable.⁹⁷ This is particularly so considering the serious commitment that African States have shown in resolving the crisis in the Sudan, including through deployment of peacekeepers in Darfur.

6. The African Union Proposal for the Amendment of Article 16 of the Rome Statute

At meetings of African States parties convened by the AU in June and November 2009, the problematic role of the UNSC was one of the few issues around which there was consensus. The role of the Council was the main concern at the AU experts meeting (November 3–5, 2009) with the subsequent AU ministerial meeting (November 6, 2009) recommending that Article 16 be amended to allow the UN General Assembly to take a decision within a specified time frame in the face of the UNSC's failure to act.

During the ministerial meeting on 6 November 2009, prior to the Eight ASP in The Hague, ministers from African countries – both states parties and non-state parties – adopted seven recommendations to guide their position at the Eight ASP and the review conference in Kampala in May/June 2010.⁹⁸ Those recommendations are important because they highlight governmental views on vexing questions regarding international criminal justice generally and the Court's ongoing work in Africa in particular. For instance, the tension and interplay between peace and justice; the conflicting obligations for states parties to the Rome Statute arising from the substance of Articles 27 and 98; the role of the Council; the question of determining an act of aggression for the purposes of prosecution under the statute, etc.⁹⁹

Although certain of those recommendations were clearly inspired by the Sudan situation, it would be a mistake to characterize them as relating only to it. Rather, they should be understood as reflecting African leaders' valid concerns about the still emerging ICC practice in Africa. Furthermore, to the extent that it could be argued that the AU had previously failed to properly articulate its objections, the recommendations set forth a legal character to their important objections.

⁹⁷ *Report of the African Union High-Level Panel on Darfur (AUPD)*, AU Doc. No. PSC/AHG/2(CCVII), Oct. 29, 2009, 241–43.

⁹⁸ *Report of the 2nd Ministerial Meeting on the Rome Statute of the International Criminal Court (ICC)*, AU Doc. No. Min/ICC/Legal/Rpt. (II), Nov. 6, 2009.

⁹⁹ *Id.* at R3 (regarding “deferral of cases: Article 16 of the Rome Statute”) as endorsed by the AU Assembly; Decision on the Report of the Second Meeting of States Parties to the Rome Statute of the International Criminal Court (ICC) Doc. Assembly/AU/8(XIV), 2, 16th Ordinary Session, Addis Ababa, Jan. 25–29, 2010.

The relevant recommendation for the purposes of this paper reads as follows:

Recommendation 3: Deferral of Cases: Article 16 of the Rome Statute

Article 16 of the Rome Statute granting power to the [UNSC] to defer cases for one (1) year should be amended to allow the General Assembly of the United Nations to exercise such power in cases where the Security Council has failed to take a decision within a specified time frame, in conformity with UN General Assembly Resolution 377(v)/1950 known as “Uniting for Peace Resolution,” as reflected in Annex A.

At the Eight ASP, South Africa presented this proposal on behalf of the continent.¹⁰⁰ It argued that Article 16 ought to be amended to allow for the UN General Assembly to defer cases before the Court in the event that the UNSC fails to act. As presented, the recommendation reads as follows:

Article 16: Deferral of Investigation or Prosecution

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.

A State with jurisdiction over a situation before the Court may request the UN Security Council to defer a matter before the Court as provided for in (i) above.

Where the UN Security Council fails to decide on the request by the state concerned within six (6) months of receipt of the request, the requesting Party may request the UN General Assembly to assume the Security Council's responsibility under para. 1 consistent with Resolution 377(v) of the UN General Assembly.

Although the general response of other ICC states parties to the AU proposal appears non-committal at best, the issue was again raised at the March and December 2010 sessions of the ASP.¹⁰¹ South Africa's Article 16 amendment proposal – a joint position of African State parties – may thus be read, cynically, as the upshot of the spirited yet ultimately unsuccessful attempts by African States to cajole the UNSC into exercising its power of deferral in favor of Al Bashir. On closer observation it is apparent that such an interpretation would be simplistic. For one thing, it greatly diminishes the extent and depth of the AU's anxiety over the interplay between peace and justice, and the proper sequencing of the two in the Sudan situation. Indeed, a careful and contextual reading of the relevant AU Assembly and PSC resolutions over the matter since July 2008 underscores this point. Taken as a whole, the proposal must also be read within the context of the numerous other African government initiatives,¹⁰² in particular the Abuja peace

¹⁰⁰ Statement by HE Peter Goosen, Ambassador of the Republic of South Africa to the Kingdom of the Netherlands, ICC ASP, 8th Sess. (Nov. 2009).

¹⁰¹ ICC ASP, 8th Sess. (Resumption), ICC-ASP/8/20/Add.1 (Mar. 22–25, 2010).

¹⁰² See for example Comprehensive Peace Agreement between the Government of the Republic of The Sudan and The Sudan People's Liberation Movement/Sudan People's Liberation Army, Jan. 9, 2005,

process, aimed at reaching a viable and holistic political solution to the crisis in Darfur and Sudan.

Furthermore, African concerns about the Council's deferral role ultimately go back to the uneasy political compromise crafted into the provision that became Article 16. As one respected international law scholar has emphasized, most States were opposed to the deferral idea at Rome because of their trepidations over UNSC involvement in its use. Professor William Schabas therefore wondered whether such a deferral power might not have been more politically acceptable for many States had it instead been conferred on the UN General Assembly (rather than the Council).¹⁰³ The few instances of UNSC reliance or non-reliance on Article 16 since the entry into force of the Rome Statute have done little, if anything, to temper those longstanding concerns for African States and other developing regions of the world.

That the AU will be pushing its Article 16 proposal is apparent from the AU summit decision in January 2010.¹⁰⁴ The AU Assembly, *inter alia*, took note “of the Report of the Ministerial Preparatory Meeting on the Rome Statute of the International Criminal Court held in Addis Ababa, Ethiopia on November 6, 2009 in conformity with the Sirte Decision, to prepare for the Review Conference of States Parties scheduled for Kampala, Uganda in May-June 2010, and endorsed the recommendations contained therein, and in particular the following: “I) Proposal for amendment to Article 16 of the Rome Statute; II) Proposal for retention of Article 13 as is.”

In that document the AU Assembly welcomed

the submission by the Republic of South Africa, on behalf of the African States Parties to the Rome Statute of the ICC of a proposal which consisted of an amendment to Article 16 of the Rome Statute in order to allow the UN General Assembly to defer cases for one (1) year in cases where the UN Security Council would have failed to take a decision within a specified time frame', and underscored “the need for African States Parties to speak with one voice to ensure that the interests of Africa are safeguarded”.¹⁰⁵

The AU Assembly further in that document expressed its “deep regret” at the fact that:

... the request by the African Union to the UN Security Council to defer the proceedings initiated against President Bashir of The Sudan in accordance with Article 16 of the Rome Statute of ICC on

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<http://www.reliefweb.int/rw/RWB.NSF/db900SID/EVTU-6AZBDB?OpenDocument> (accessed Feb. 15, 2011); Darfur Peace Agreement, May 5, 2006, <http://allafrica.com/peaceafrica/resources/view/00010926.pdf>.

¹⁰³ Schabas, *The International Criminal Court*, *supra* note 19, at 333.

¹⁰⁴ Decision on the Report of the Second Meeting of States Parties.

¹⁰⁵ *Id.* at 5.

deferral of cases by the UN Security Council, has not been acted upon, and in this regard, REITERATES its request to the UN Security Council.¹⁰⁶

The view of the AU Assembly in this regard essentially remains unchanged, as evidenced in its decision from Fifteenth Summit held in July 2010:

[the Assembly] expresses its disappointment that the United Nations Security Council (UNSC) has not acted upon the request by the African Union to defer the proceedings initiated against President Omar Hassan El-Bashir of the Republic of The Sudan in accordance with Article 16 of the Rome Statute of ICC which allows the UNSC to defer cases for one (1) year and REITERATES its request in this regard.¹⁰⁷

DEEPLY REGRETS that the request by the African Union (AU) to the United Nations (UN) Security Council to defer the proceedings initiated against President Al Bashir of The Sudan, in accordance with Article 16 of the Rome Statute of ICC on deferral of cases by the UN Security Council, has not been acted upon, and in this regard, **REITERATES** its request to the UN Security Council; and **REQUESTS** the African members of the UN Security Council to place the matter on its agenda of the Council;

The AU Assembly's most recent decision on the point as well as its related solemn declaration, adopted at Addis Ababa in January 2011, essentially repeated the same language.¹⁰⁸ However, there are important legal questions and potential political problems raised by the AU proposal to amend Article 16. The primary legal question that arises from the proposed amendment is whether it purports to confer on the UN General Assembly a power which that organ does not have under its own constituent instrument: the UN Charter. In a nutshell, the proposed amendment implicates the relationship not only of the UN and the ICC, but also that between two important UN organs: the UNSC and the General Assembly.

The Rome Statute is a multilateral treaty. It is distinct from the UN Charter and cannot be used to amend it. If the proposed amendment to Article 16 were to confer a power on the General Assembly that it does not have, and if the

¹⁰⁶ *Id.* at 10.

¹⁰⁷ Decision on the progress report of the Commission on the implementation of decision Assembly/AU/Dec.270(xiv).

¹⁰⁸ Decision on the implementation of the Decisions on the International Criminal Court Assembly/AU/Doc. EX.CL/639 (XVIII) (Jan. 31, 2011); Solemn Declaration of the Assembly of the Union on Sudan, AU/Decl.3/(XVI) (Jan. 31, 2011). In the latter, the African leadership discussed implications of the southern Sudan referendum and then discussed President Bashir in the following terms:

...noting the personal and unwavering commitment of President Al Bashir to sustaining peace between northern and southern Sudan and do all he can for the early resolution of the crisis in Darfur, we, once again, call upon the United Nations Security Council immediately to invoke Article 16 of the Rome Statute and suspend any actions against President Al Bashir by the International Criminal Court. In responding to this call, the Security Council would be acting in accordance with its responsibilities for the maintenance of international peace and security and would greatly facilitate the ongoing efforts by the AU to help the Sudanese parties achieve lasting peace, security, justice and reconciliation.

proposal attempted to modify the relationship between the General Assembly and the Council, that conferral of power would have to be done by amending the UN Charter. This is because the General Assembly would be debarred by its own constituent instrument from exercising the power which the (amended) Rome Statute would seek to confer on it.

We deal first with two issues which might, at first glance, suggest that the General Assembly may not be empowered with decision-making regarding deferrals of investigations and prosecutions by the ICC. These are that, first, the General Assembly does not, under the UN Charter, have a power to make binding decisions while the decision to defer is intended to bind (and can only be meaningful if it binds) the Court organs (the Prosecutor and the Chambers). Second, the request for deferral should only be made when the situation in question is a threat to peace and security and it is the UNSC that is given competence to act on peace and security issues. Although these two issues might at first blush imply that the General Assembly may not be given the deferral power, as will be seen shortly, deeper consideration of the matter suggests that these reasons may not in themselves bar the General Assembly from being endowed with competence to make decision on deferrals.

In the first place, the fact that the General Assembly does not, as a general matter, have the power to make binding decisions (while the Council does) would not prevent it from being granted the power to request deferrals. This is because the power to make a request for deferrals is nothing more than that: a request – as far as the requesting body is concerned. However, that request is made binding on the ICC by the Rome Statute under Article 16. The request is not a decision which is binding on the Court because of the power of the UNSC to take binding decisions. The ICC and its organs are not organs of the UN, nor members of it. The Court is an independent institution with its own international legal personality. Therefore, the Council has no power under the UN Charter to make decisions that are legally binding on it. Nevertheless, Article 16 takes a decision (or request) of the UNSC and makes it binding on the ICC as a matter of the Court's own constituent instrument – the Rome Statute. There is also arguably no legal bar on the Rome Statute to make General Assembly resolutions binding on the ICC. This would not be a unique situation since “a separate international treaty may contain an obligation to have regard to (and possibly to comply with) non-binding decisions of an international organization.”¹⁰⁹

Secondly, the fact that requests for deferrals are to be adopted under Chapter VII of the UN Charter, thereby implying that such a request should only be adopted where the situation in question constitutes a threat or breach of the peace, would not block the General Assembly from acting. Although the UNSC

¹⁰⁹ See Dapo Akande, ‘International Organisations’, in Malcolm Evans (ed.), *International Law* 291 (Oxford, Oxford University Press, 2d ed. 2006).

has “primary responsibility”¹¹⁰ for the maintenance of international peace and security, the General Assembly also has some competence in this regard. This is evident from Articles 10 to 14 of the UN Charter which specifically list some of the competence of the General Assembly in the area of peace and security. Indeed Article 12 of the UN Charter would not make sense if the General Assembly had absolutely no competence with regard to international peace and security. It is only because it has a concurrent (though admittedly subsidiary role) in the area that Article 12 seeks to regulate and co-ordinate its actions with that of the Council. Furthermore, as the International Court of Justice (ICJ) has recognized in the *Certain Expenses* case, the General Assembly has the power to play a role in matters respecting peace and security.¹¹¹

A third reason why there might be concern that the proposed amendment to Article 16 may be problematic as a matter of UN Charter law is that the proposed amendment would require the General Assembly to make a recommendation or determination with respect to an issue which is already being dealt with by the Council. Under the proposal, requests for deferral of court investigations and prosecutions would first go to the UNSC as is currently required by Article 16. It is only when the Council *fails to decide* on the request for the deferral within *six* months that the General Assembly would then become competent to make a decision on the request for the deferral. One might argue that, faced with such a scenario in practice, the UNSC will always be impelled or compelled to act within the time period of *six* months rather than lose its ability to make the deferral decision to the General Assembly. But even such a practice would not resolve the concern.

The potential constitutional problem with the proposed amendment is that it may run contrary to Article 12 of the UN Charter, which regulates the relationship of the Council and the General Assembly. That provision states that:

While the Security Council is exercising in respect of any dispute or situation functions assigned to it in the present Charter, the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests.¹¹²

The reason for the position set out in Article 12 of the UN Charter is to emphasize that it is the UNSC which has “primary responsibility” for dealing with situations relating to the maintenance of international peace and security, with other organs having a subsidiary role.¹¹³ Since the proposed amendment requires that a

¹¹⁰ UN Charter, Arts. 24, 26, 33–34, 37, 39, 42; see also Bruno Simma, Hermann Mosler, Albrecht Randelzhofer, Christian Tomuschat and Rudiger Wolfrum (eds.) *The Charter of the United Nations: A Commentary*, 717 (Oxford, Oxford University Press, 2nd ed. 2002).

¹¹¹ *Certain expenses of the United Nations*, Advisory opinion, International Court of Justice 151 (July 20, 1962).

¹¹² UN Charter, Art. 12(1).

¹¹³ UN Charter, Art. 24.

request for deferral go first to the Council before the General Assembly can take it up later, it is clear that the matter would in a general sense be before the UNSC. However, the question that arises with regard to the compatibility of the proposed amendment with Article 12 is whether the General Assembly would be making a recommendation (i.e., a request for a deferral) “while the Security Council is exercising” the functions assigned to it by the Charter with regard to the situation or dispute at issue.

The question whether the Council would be exercising its functions with respect to a deferral request *at the time* when the General Assembly is called to act on it is crucial. Nevertheless, the drafting history of Article 12 and UN practice suggest that the fact that a situation is on the UNSC’s agenda does not necessarily mean that it would be a violation of Article 12 of the UN Charter for the General Assembly to act with respect to the same situation.¹¹⁴ Although the very early practice of the UN was for the General Assembly to refrain from making recommendations on issues on the agenda of the Council, that practice later changed to allow the General Assembly to act even on matters placed on the agenda of the UNSC.¹¹⁵ Part of the reason for this change is because matters often remain on the agenda of the Council indefinitely though the UNSC may not be actively considering the issue for long periods.

Contrary to the early UN practice, the view that is reflected in more recent General Assembly practice (which has not been opposed by the UNSC) is that Article 12 would only be breached if the General Assembly were to make a recommendation on a matter that was actively being considered by the Council. In a legal opinion issued in 1964, the UN Legal Counsel was of the view that this practice, though apparently contrary to the text of Article 12, reflected a changed understanding of the meaning of Article 12.¹¹⁶ In a further consideration of the same matter in 1968, the UN Legal Counsel stated that “the Assembly had interpreted the words ‘is exercising’ as meaning ‘is exercising at this moment’; consequently it had made recommendations on other matters which the Security Council was also considering.”¹¹⁷

The practice of the General Assembly with regard to Article 12 was reviewed by the ICJ in the *Construction of the Israeli Wall in the Occupied Palestinian Territories Advisory Opinion* (“*Israeli Wall Advisory Opinion*”).¹¹⁸ The ICJ stated that it

¹¹⁴) See Kay Hailbronner and Eckart Klein, ‘Article 12’, in Bruno Simma, Hermann Mosler, Albrecht Randelzhofer, Christian Tomuschat and Rudiger Wolfrum (eds.), *The Charter of the United Nations: A Commentary*, 290 (Oxford, Oxford University Press, 2nd ed. 2002); Yehudva Zvi Blum, *Eroding the United Nations Charter*, Chapter 3, ‘Who Killed Article 12 of the United Nations Charter?’ (Dordrecht, Martinus Nijhoff Publishers, 1993).

¹¹⁵) *Id.*

¹¹⁶) 1964 U.N. Jurid. Y.B. 228, UN Doc. ST/LEG/SER.C/2.

¹¹⁷) 1968 U.N. Jurid. Y.B. 185, UN Doc. ST/LEG/SER.C/6.

¹¹⁸) *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory Advisory Opinion*, International Court of Justice, 2004, <http://www.icj-cij.org/docket/index.php?p1=3&p2=4&k=5a&case=131&code=mwp&p3=5> (accessed Feb. 15, 2011).

“considers that the accepted practice of the General Assembly, as it has evolved, is consistent with Article 12, paragraph 1, of the Charter”.¹¹⁹ Thus, although it is not precisely clear what it means to say that the UNSC is exercising its functions “at this moment,” the general rule appears to be that the General Assembly is only debarred from making recommendations on matters under active consideration by the Council.

The overall implication of this analysis is that it would not be contrary to the UN Charter for the General Assembly to be given *some* power to make a request for deferral of an ICC investigation or prosecution. However, because the General Assembly is bound to respect the UNSC’s primary competence, it can only act when it is clear that the Council is no longer actively considering the deferral request. The former could thus be said to be able to act on the basis of a secondary responsibility to ensure the maintenance of international peace and security.

At the same time, the fact that *six* months has elapsed between the request to the UNSC and the subsequent action of the General Assembly does not necessarily mean that the Council is no longer actively considering the matter. There are many occasions where the active work of the UNSC on a matter takes many months. It is not the role of the General Assembly to prescribe time limits within which the Council is to reach a decision. Nor is it the role of the General Assembly to reverse decisions made by the UNSC. Therefore, the six months time limit in the AU’s amendment proposal may be regarded as necessary passage of time (within which the Council may hopefully act) but one which may not be sufficient to trigger General Assembly action.

In an attempt to circumvent some of the problems caused by Article 12 of the UN Charter, the AU’s proposed amendment relies on the General Assembly’s Uniting for Peace Resolution adopted in 1950 as the basis for the General Assembly’s competence to act. However, reference to Uniting for Peace exacerbates, rather than ameliorates, the problems and potential conflict with Article 12. This is because the constitutional validity of that resolution is questionable. Paragraph 1 of that resolution states that:

...if the Security Council because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace, or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures, including in the case of a breach of the peace or act of aggression the use of armed force when necessary, to maintain or restore international peace and security. If not in session at the time, the General Assembly may meet in emergency special session with twenty-four hours of the request therefore. Such emergency special session shall be called if requested by the Security Council on the vote of any seven [now nine] members, or by a majority of the Members of the United Nations.¹²⁰

¹¹⁹) *Id.* at 150, ¶ 28.

¹²⁰) General Assembly Res. 377(V), UN Doc. A/RES/5/377, 1 (Nov. 3, 1950).

The resolution assumes that the fact that the Council is unable to pass a resolution through the lack of unanimity of the permanent members means that the UNSC is no longer exercising its functions with regard to a particular matter. It is possible, and in fact happens, that while the Council at first fails to pass a resolution it is later able to do so.¹²¹ The resolution also implies that the exercise of the veto means that the UNSC is not exercising its functions. The veto is expressly granted to the permanent members who may choose to exercise it precisely because they believe that the matter in question should not be decided in the way in which the majority wishes. The exercise of the veto:

... may well be based on the conviction that there is no threat to the peace or that a State is wrongly accused of having committed an act of aggression (Art. 39). In such a case, the blocking of the coercive measures against a (member) State can just be a reasonable exercise of the functions assigned to the SC. So the decisive question concerns who has the power to assess the matter.¹²²

To grant such a power to the General Assembly would appear to be contrary to the intention of the negotiators – which was to leave it to the Council itself to decide – as well as contrary to the general structure of the UN Charter.¹²³ As a leading UNSC scholar has persuasively argued, “even if one accepts that Charter law can be amended by practice, the very particular contexts in which the Uniting for Peace was used, makes it an unsuitable vehicle – from a legal perspective – for changing the roles of the General Assembly and the Security Council in relation to the ICC.”¹²⁴

Despite the concerns discussed above, the ICJ has recently approved the use by the General Assembly of the Uniting for Peace Resolution as a means of moving debate from the UNSC to the General Assembly.¹²⁵ In the *Israeli Wall Advisory Opinion*,¹²⁶ the ICJ did not cast doubt on the validity of the Uniting for Peace Resolution and held that the General Assembly was duly convened and seised of the matter at issue two months after a veto by a permanent member had terminated discussion in the Council. The judges took into account the fact that “the Council neither discussed the construction of the wall nor adopted any reso-

¹²¹) See Blum, *supra* note 14, at 129.

¹²²) Hailbronner and Klein, *supra* note 114, Art. 12, 291.

¹²³) *Id.*

¹²⁴) Erika de Wet, ‘Africa and international justice: Participant or target’, Speaking notes on the AU’s proposed amendment of Article 16 of the Rome Statute at the conference on the Al Bashir warrant, Apr. 26, 2010 (notes on file with authors).

¹²⁵) *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, International Court of Justice, 2010, para. 42, <http://www.icj-cij.org/docket/index.php?p1=3&p2=4&ck=21&case=141&code=kos&p3=4&PHPSESSID=6e4e47e6d1ba245ce8c19a712a9432ce> (accessed Feb. 15, 2011).

¹²⁶) *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory Advisory Opinion*, para. 31.

lution in that connection”¹²⁷ during the period preceding the convening of the General Assembly, in Emergency Special Session, to discuss the matter. This authority would therefore support the view that the General Assembly may determine that the UNSC is no longer exercising its functions with regard to a request for a deferral with the consequence that the General Assembly may take up the matter.

Even if the Uniting for Peace Resolution is valid, as the ICJ has assumed, it may not cover all the cases contemplated by the AU. On its face, that resolution is only confined to cases where the Council takes no action because of a veto or threatened veto by a permanent member. It does not deal with a situation where the resolution fails because of a lack of majority support in the UNSC or cases where it simply fails to put a matter to the vote. Therefore, the reference to the Uniting for Peace Resolution does not cover all the circumstances that the proposed AU amendment is directed at. For example, the resolution would not have covered the scenario that existed with regard to the AU request for a deferral of the Al Bashir prosecution. Therefore, the reference to the Uniting for Peace Resolution is more likely to constrain the option sought by the AU than leaving out reference to that resolution.

Based on the legal questions raised above, the proposed AU amendment to Article 16 is not as problematic as first appears. The proposal does not necessarily require the General Assembly to act in a manner contrary to the UN Charter, as long as the Council is not exercising its functions on the matter (within the narrow sense indicated by UN practice) at the very moment when the General Assembly acts upon the request for deferral. However, the reference, in the proposal, to the Uniting for Peace Resolution might mean that the General Assembly is unable to act if the reason for an unsuccessful request for deferral is anything other than the use of the veto by a permanent member of the UNSC. In short, the proposal would be more legally palatable if reference to the Uniting for Peace Resolution were omitted altogether.

That said, there exists a more intractable problem with the AU’s proposed amendment to Article 16. Under Article 121(4) of the Rome Statute, amendments to provisions other than Articles 5, 6, 7 and 8 require ratification by *seven-eighths* of the States Parties to the statute. This is a very high threshold which means that any proposal for an amendment to Article 16 would need to reflect nearly the universal views of the ICC States Parties – a scenario which seems unlikely, though not insurmountable, in the case of the AU proposal. The reason is that even countries sympathetic to the African argument may prove hesitant to give a role to yet another political body in the work of the Court.

Returning to the divided views of states during the Rome negotiations, some would argue that there are pragmatic reasons for keeping the politics of the

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¹²⁷) *Id.*

General Assembly out of ICC proceedings. Indeed, those same states might also be quick to suggest that the AU proposal, as currently framed, appears to replace one form of politics (within the Council) with another type of politics (within the General Assembly). Both bodies are of course political organs. However, a different kind of politics (and balance of power and decision making) may result – depending on which of them are involved, keeping in mind their respective memberships.

That said, a leading authority has questioned the assumption about politicization underlying this argument heard from Rome to now. Professor Schabas has quarreled with the suggestion that political considerations, such as peacemaking objectives, have no place in assessments of the timing and propriety of deploying the deferral power and international criminal justice. He observed that, as a general proposition, national systems acknowledge a role for politics in decisions about criminal processes. For example, rarely may one find a municipal justice system that does not provide for some form of pardon or amnesty. Article 16, though an imperfect analogy in the absence of a world government and given the UNSC's legitimacy deficit, is "in some sense an approximation of a relationship that is familiar in national criminal justice systems".¹²⁸ On this view, it may be that we need to broaden our horizons regarding the need for certain decisions, like deferrals to delay criminal prosecutions in favor of peace, to permit the vesting of some form of political oversight over the Court in a more democratic and representative political body like the General Assembly. This is all the more so considering that good common sense judgment on this issue is often hijacked by distracting perceptions or concerns about the legitimacy, or illegitimacy, of the Council.

Except if states consciously accounted for the experiences with Article 16 since the Rome Statute entered into force in July 2002, and its potential utility in resolving questions regarding the interplay between peace and justice, the AU proposal could lead to a repeat of the divide during the Rome negotiations whereby the Permanent Five States and their supporters took positions favoring a strong if not exclusive role for the UNSC in the ICC (including triggering prosecutions), and the rest of the world opting to instead have a limited role for the Council. Either way, the risk for the current African proposal is that it could be seen by some States as increasing the chances for politicizing the work of the nascent court, rather than diminishing it. If such a contention is correct, it will beg the question whether, in the long run, such politicization would be a good thing for the ICC.

The potential lack of support for giving a role to other external bodies in the work of the ICC was clearly reflected in the debate and decision on the crime of aggression in the lead up to, and at, the 2010 ICC Review Conference in

¹²⁸) Schabas, *The International Criminal Court*, *supra* note 19, at 333.

Kampala. It had been proposed by some that the ICC should only be able to exercise jurisdiction over aggression where the UNSC, the General Assembly or the ICJ had determined that an act of aggression had been committed.¹²⁹ This proposal met with little support at Kampala and was not adopted.¹³⁰

It can be cogently argued that vesting the General Assembly with some competence in this area is legitimate as it is a more democratic and representative political body than the Council. However, it appears difficult to remove the role of the Council in this area, given its primary responsibility for international peace and security and given that UNSC decisions impose obligations, which under Article 103 of the UN Charter, would prevail over obligations under other treaties, including the Rome Statute. Since the Council's power of deferral would, even under the AU's proposal, remain in place, the question is whether another political body like the General Assembly ought to be given *additional* power to interfere in matters with respect to the Court. Given the documented views of ICC States Parties in Rome and in Kampala, it does not appear likely – at least based on the initial public indications given by States Parties at the recent discussions of the African Article 16 proposal – that a seven-eighths majority can be reached for this position.

In conclusion to this issue, the fact that the proposed amendment to Article 16 requires a very high threshold for adoption and entry into force, and that it currently seems unlikely that there will be sufficient support from other States to reach this threshold, suggests that it may be more profitable for the AU and the international community to make the procedure set out in the current Article 16 work better. Furthermore, it would be worthwhile for the international community to seek out other ways, both within and outside the Rome Statute, of addressing the perennial tension between peace-making initiatives and the search for justice – a tension which underlies the AU's request for a deferral of the *Al Bashir* case.

7. The Peace and Justice Debate in Relation to the ICC in the Sudan Situation

The debate about peace and justice and how the two are to be reconciled is an old one and beyond the scope of this paper. However, certain points are worth stressing in relation to that debate insofar as it relates to the deferral procedure within Article 16 as it currently exists (and as it would exist under the AU's proposed amendment).

¹²⁹ See Draft Art. 15*bis*, *Report of the Special Working Group on the Crime of Aggression*, ICC-ASP/7/20/Add.1, Annex II, Feb. 2009.

¹³⁰ See Art. 15*bis* adopted by consensus at the Kampala review conference, Res. RC/Res. 6, June 11, 2010.

First, it may be noted that the ICC prosecutions in Africa are consistent with an expressed agreement in a variety of important African documents that international crimes should not be met with impunity. No less than the AU Constitutive Act (Article 4(h))¹³¹ stresses this principle. The African Commission on Human and Peoples' Rights (the precursor to the African Court on Human and Peoples' Rights) has also affirmed this commitment as an African ideal.¹³² Clearly, in the face of those specific treaty provisions and numerous statements by continental officials, the AU's Constitutive Act expresses a strong desire to address impunity if not – at least arguably – a presumption in favor of prosecution for international crimes.

Second, striving for justice in respect of these crimes is a principle that is supported by widespread state practice on the African continent. It is significant that more than half of Africa's States have ratified the Rome Statute (with African States being the second largest regional grouping among parties to the statute), thereby unequivocally expressing that they consider themselves legally committed to the principle that there ought to be prosecutions in circumstances where serious crimes of concern to the international community have been committed.¹³³ At the same time, though many African States parties have made this commitment by ratifying the ICC statute, only a few have transformed relevant parts of it into domestic law.¹³⁴

Apart from the dissension generated by the *Al Bashir* case, African States have shown strong support for the work of the Court. It is worth recalling that three African States have referred situations in their own countries to the ICC. Further, these countries have argued that the cases brought with respect to these situations are admissible before the Court. In addition, the Kenyan government, which now seems intent on conducting domestic prosecutions to oust ICC involvement, has pledged to continue to work with international prosecutors with regard to their investigations. Cote d'Ivoire – a non-party – has made a declaration accepting the competence of the ICC with regard to crimes within that country. Even with respect to Sudan, it should be recalled that the relevant resolution of the Council

¹³¹) Constitutive Act, Art. 4(h).

¹³²) See, for example, Resolution on Ending Impunity in Africa and on the Domestication and Implementation of the Rome Statute of the International Criminal Court, ACHPR/Res.87(XXXVIII)05 (Dec. 5, 2005).

¹³³) As of Aug. 18, 2010, 31 African States have ratified the Rome Statute. See International Criminal Court, The States Parties to the Rome Statute, <http://www.icc-cpi.int/Menus/ASP/states+parties/> (accessed Feb. 15, 2011).

¹³⁴) To our knowledge, six States in Africa – Burkina Faso, Central African Republic, Kenya, Senegal, South Africa and Uganda – have passed ICC implementing legislation. See Civil society declaration on Africa and the review conference of the Rome Statute of the International Criminal Court, May 24, 2010, 2, <http://www.issafrica.org/pgcontent.php?UID=18893> (accessed Feb. 15, 2011); Ban Ki-moon congratulates Uganda on enacting ICC law, WeInformers, May 30, 2010, <http://www.weinformers.net/2010/05/30/ban-ki-moon-congratulates-uganda-enacting-icc-law/> (accessed Feb. 15, 2011).

referring the situation to the ICC was adopted with the support of two of the three African States then on the UNSC (Benin and Tanzania, with Algeria abstaining).¹³⁵

Accordingly, there are significant manifestations of support by African States, at the regional and international levels, to confirm their commitment to the idea that lasting peace requires justice. Naturally, that is not to say that immediate prosecutions must be pursued *at all costs* or without regard to other important considerations, in particular, the timing or progress of particular peace processes on the continent. In fact, the Rome Statute itself recognizes that the pursuit of prosecutions is not an absolute or blind commitment. While the negotiations leading to the creation of the Court did not conclusively settle the question of the interplay between justice and peace, various provisions, especially Article 17, underscore that, in principle, impunity with respect to international crimes is not acceptable, and that in the first place, there should be credible national measures to address such crimes.¹³⁶

7.1. *Giving Peace a Chance in Sudan*

Though at a broad level the ICC's criminal accountability model seeks to ensure justice for perpetrators of genocide, crimes against humanity and war crimes, there is no irrebuttable presumption in favor of prosecutions under the Rome Statute. By the same token, a deferral of prosecutions should not be there simply for the asking. It may therefore be argued that African States parties, who by their voluntary membership of the Rome Statute system arguably added their weight to a prosecution preference, have a duty to make out a convincing case for a deferral, whether that request is made by those countries individually or collectively as part of a larger regional grouping such as the AU. At the very least, States Parties, who in the preamble to the Rome Statute have expressed a determination to work hard to prevent or address impunity, have a good faith obligation to make their claims for deferral with proper consideration for the publicly available evidence, and relevant provisions of the treaty.

Considering the publicly available evidence in relation to the Sudan situation, the following facts appear to be beyond reasonable dispute:

- Regardless of their accurate characterization (including whether genocide can be shown) grave international crimes have been committed in Sudan and continue to this day.

¹³⁵ UN SCOR, 60th Sess., 5158th meeting, UN Doc. S/PV.5158 (Mar. 31, 2005).

¹³⁶ Jalloh, *Regionalizing International Criminal Law?*, *supra* note 29, at 452 (arguing for rooting of legal argument in Rome Statute mandate).

- An independent body of experts (including a number of African and Arab individuals) has concluded that Sudan is not willing to act against the perpetrators by prosecuting them for war crimes and/or crimes against humanity.¹³⁷
- To date the Sudanese government has failed to hand over suspects to the ICC for prosecution, and has failed domestically to act against the perpetrators of international crimes.

It is noteworthy that when the International Commission of Inquiry on Darfur recommended that the Council refer the situation in Darfur to the ICC “to protect the civilians of Darfur and end the rampant impunity currently prevailing there,”¹³⁸ the commission endorsed the Court as the “only credible way of bringing alleged perpetrators to justice.”¹³⁹ That assessment arguably remains true today, given Sudan’s inaction to address the perpetrators.

Furthermore, it is important to recall that in advocating for the UNSC’s referral of the situation in Darfur, the commission observed that the situation meets the requirement of Chapter VII in that it constitutes a “threat to peace and security,” as was acknowledged by the Council in its Resolutions 1556 and 1564. Moreover, the commission also underscored the UNSC’s emphasis in these resolutions of the “need to put a stop to impunity in Darfur, for the end of such impunity would contribute to restoring security in the region.”¹⁴⁰

But most importantly, Sudan has had an opening since February 2005 to demonstrate its willingness to act against perpetrators of violence and thereby not only to contribute towards peace, but also to oust the ICC’s involvement under the principle of complementarity.¹⁴¹ It has – to use the words of the AU – had every opportunity to give effect to an “harmonized approach to justice and peace.”¹⁴²

It is well known that the Court is expected to act in what is described as a “complementary” relationship with states. The preamble to the Rome Statute underscores the common sense position that the ICC’s jurisdiction should be complementary to that of national jurisdictions. The starting point of that principle is that national systems should always be the first to act. It is only if a state has failed to act in accordance with its responsibilities under the Rome Statute at

¹³⁷⁾ See *Report of the International Commission of Inquiry on Darfur*, 568; *Report of the African Union High-Level Panel on Darfur*, *supra* note 97, at 47–48 (listing impunity amongst the major obstacles to justice and reconciliation in Darfur).

¹³⁸⁾ See *id.* at 569.

¹³⁹⁾ *Id.* at 573.

¹⁴⁰⁾ *Id.* at 590.

¹⁴¹⁾ *Report of the African Union High-Level Panel on Darfur*, *supra* note 97, at 254–55.

¹⁴²⁾ Press Release, Decision on the Meeting of African State Parties to the Rome Statute, 5 (including the AU Commission’s response to the NGO statements regarding the Decision on the Meeting).

the national level that the Court may then be properly seised with jurisdiction.¹⁴³ The ICC's jurisdiction to act will only kick in where no serious measures are taken at the municipal level, and in respect of criminal prosecutions, if the concerned state can be shown to be “unwilling or unable” to genuinely investigate and prosecute international crimes committed by its nationals or on its territory.

For this reason, to underscore the principle of complementarity, Article 18 of the Rome Statute requires that the Court Prosecutor notify all States Parties and states with jurisdiction over a particular case, before beginning an investigation,¹⁴⁴ and the Prosecutor cannot begin an investigation on his own initiative without first receiving the approval of a chamber of three pre-trial judges.¹⁴⁵ Vitally important in respect of Sudan's conduct is that at this stage of the proceedings, it is open to states to insist that they will investigate allegations against their own nationals themselves: under these circumstances, the ICC would have to inquire whether the requirements of complementarity have been met, and if so, the Court would be obliged to suspend its investigation.¹⁴⁶ If the alleged perpetrator's state investigates the matter and then refuses to initiate a prosecution, the ICC may only proceed if it concludes that that decision of the state not to prosecute was motivated purely by a desire to shield the individual concerned.¹⁴⁷ The thrust of the principle of complementarity is that the system effectively creates a presumption in favor of action to address mass crimes at the national level of the state.¹⁴⁸

What about states – like Sudan – that are not party to the Rome Statute? Article 17, which sets out the complementarity regime, provides that the Court must defer to the investigation or prosecution of a “State which has jurisdiction over” the case. Sudan, though a non-party, can frustrate the ICC's exercise of jurisdiction by insisting that it is willing and able to prosecute the offenders allegedly guilty of war crimes and crimes against humanity in the Darfur region. The Prosecutor, pursuant to the referral and in terms of Article 53(1) of the Rome Statute, has gathered and assessed relevant information in order to determine whether there is a reasonable basis to initiate an investigation into the crimes committed in Sudan. Article 53(1) enunciates three considerations that inform his decision regarding whether or not to initiate an investigation: these relate to whether a crime has been or is being committed within the ICC's jurisdiction; whether complementarity precludes admissibility, and; whether or not the interests of justice militate against initiating an investigation.¹⁴⁹

¹⁴³) Rome Statute, Art. 17(1).

¹⁴⁴) *Id.* Art. 18(1).

¹⁴⁵) *Id.* Art. 15.

¹⁴⁶) *Id.* Art. 18(2).

¹⁴⁷) *Id.* Art. 17(2)(a).

¹⁴⁸) Darryl Robinson, ‘The Mysterious Mysteriousness of Complementarity’, 21 *Crim. L.F.* 67, 70–72 (2010) (clarifying the meaning of the complementarity principle and its requirements and conditions).

¹⁴⁹) Rome Statute, Art. 53(1).

The Prosecutor has been clear: “In making this assessment the OTP will respect any independent and impartial proceedings that meet the standards required by the Rome Statute.”¹⁵⁰ Accordingly, in considering whether ICC prosecutions best serve the interests of the domestic and international community, the first thing to consider is whether or not there have been relevant domestic prosecutions. Where such investigations or prosecutions have taken place, then not only is the Court barred from acting in those specific cases, but the general willingness of the domestic society to deal with the matter might be a factor which suggests that it is right that institutions of international criminal justice should take a back seat with respect to that situation. The short point is that to date Sudan has provided no evidence that any of its domestic proceedings are worthy of such respect.

Accordingly, regarding the Sudan situation in particular, the call for a deferral of the ICC prosecution of Al Bashir must be assessed in the following light:

- First, any suggestion that the ICC’s involvement should be displaced in favor of domestic prosecutions must take account of the reality that Sudan has to date shown limited willingness and ability to prosecute those guilty of war crimes and crimes against humanity. Thus, without more good faith efforts, it is difficult to see how a deferral will serve the interests of justice to the extent that those interests might have been secured by *domestic prosecutions* of those deemed to be most responsible for atrocities in Darfur.
- Second, the Darfur crisis came before the Court for the right reason. That is because – as the UNSC recognized – the kinds of human rights violations involved demanded an international response in the interests of justice and peace. While this is not to preclude other non-prosecutorial measures under the twin track approach preferred by AU States and the international community, the Sudan situation should only be removed from the ICC for the right reason. It will be hard, in the absence of compelling evidence showing that the current peace process in Sudan is making considerable progress, for the AU to convince the Council that the Court’s involvement is not one of the few means by which to potentially secure both the interests of long-term peace and justice. This is particularly so considering the caliber of those that have so far been alleged to be most responsible for the atrocities that took place in Darfur.
- Third, because it is apparent that Sudan has not, at least since February 2005 (when the commission presented its report to the Council) taken meaningful steps to combat the impunity that has followed massive and ongoing crimes on its territory, it has failed to contribute towards the restoration of

¹⁵⁰ Luis Moreno Ocampo, *Report of the prosecutor of the International Criminal Court to the Security Council pursuant to UNSCR 1593 (2005)*, Office of the Prosecutor, ICC, June 29, 2005, at 4.

security in the region.¹⁵¹ Furthermore, while some in the AU may be inclined to give Sudan the benefit of the doubt, recent post-April 2010 events suggest that the extent of the Sudanese government's commitment to peace and justice is far from certain.¹⁵² At the end of the day, it maybe that any grant of deferral requested by the AU should be predicated on a clear undertaking by Sudan that is morally guaranteed by the senior African leadership for implementation within a specific timetable.

7.2. *Maintaining the Integrity of the ICC Process in Light of Calls for Peace*

As the AU and African States remain concerned about the ICC's current work in the Sudan, we wish to highlight the main mechanisms internal to the Rome Statute which provide some means to continue raising those concerns. Specifically, the Rome Statute itself envisages that investigations and prosecutions by or before the ICC may in certain circumstances be set aside, despite compelling evidence that crimes within the jurisdiction of the ICC have been committed. This suppression of the imperative to prosecute may occur through a legal assessment of the Prosecutor during the investigation or prosecution stage; or by the political intervention of the UNSC. The two relevant statutory provisions are Article 53 and Article 16 of the Rome Statute.

Article 53 provides that the Prosecutor may decline to initiate an investigation or proceed with a prosecution if that would “serve the interests of justice.”¹⁵³ The question then is what would qualify as a basis for declining to initiate an investigation “in the interests of justice.” The phrase “interests of justice” is not defined in the statute. What is clear is that it is an exceptional basis on which a decision not to investigate may be made. Indeed, the wording of Article 53(1)(c) suggests that gravity and the interests of victims would tend to favor prosecution. The Office of the Prosecutor (OTP) has indicated that there is a presumption in favor of prosecuting where the criteria stipulated in Articles 53(1)(c) and 53(2)(c) have been met.¹⁵⁴ The OTP's policy paper on the interests of justice emphasizes that the criteria for the exercise of the Prosecutor's discretion in relation to this issue “will naturally be guided by the objects and purposes of the Statute – namely the prevention of serious crimes of concern to the international community through ending impunity.”¹⁵⁵

¹⁵¹ See, e.g., Human Rights Watch, *Sudan: Entrenching impunity, government responsibility for international crimes in Darfur*, HRW 17, 17(A), Dec. 8, 2005, at 67 (noting that the government has failed to deal with the impunity).

¹⁵² ‘Darfur JEM leader Khalil Ibrahim stopped in Chad’, *BBC News*, May 19, 2010; ‘JEM Darfur rebels threaten to resume Sudan War’, *BBC News*, May 11, 2010.

¹⁵³ Rome Statute, Art. 53(1)(c).

¹⁵⁴ Office of the Prosecutor, *Policy paper on the interests of justice*, 3 ICC, Sept. 2007, <http://www.icc-cpi.int/NR/rdonlyres/772C95C9-F54D-4321-BF09-73422BB23528/143640/ICCOTPIInterestsOfJustice.pdf> (accessed Feb. 12, 2011).

¹⁵⁵ *Id.* at 1.

However, because the interests of justice are presumably equally important, it is open for an African State or a particular suspect to argue that the Prosecutor should consider alternative justice approaches where they exist (other than traditional criminal prosecutions) when reaching a decision to prosecute under Article 53. So, although this is unlikely to occur in relation to the Sudan situation until the current impasse is broken, one could imagine a future prosecutor declining to prosecute if the suspect was subject to alternative accountability mechanisms (like the South African amnesty process which provided some level of accountability or an alternative dispute resolution mechanism like the *gacaca* process in Rwanda).¹⁵⁶ As the very name “truth and reconciliation” commission suggests, such mechanisms are often directed at achieving the twin goals of restorative justice and the goal of peaceful reconciliation.

A decision by the Prosecutor not to initiate or continue ICC proceedings in deference to such restorative mechanisms which are legitimately constituted may be one way in which the goals of peace and justice can be reconciled. While such an interpretation seems highly plausible, these are still early years for the Court given the current prosecutorial view that the interests of justice ought to only be mediated by the political organs of the international community through Article 16. Without a track record, it is not possible to predict with any accuracy whether this position would be revisited by the current Prosecutor before his term expires in 2012 or by other future prosecutors and approved by the ICC. In any case, central to such a determination would be whether the alternative mechanism adopted by the country provides some measure of justice and accountability. In sum, one appropriate process for (African) States to claim that investigations or prosecutions are not in the interests of justice could be convincing the Prosecutor to apply Article 53 of the Rome Statute on the basis of the existence of legitimate alternative justice mechanisms.

The second way in which investigations and prosecutions by or before the ICC may be (temporarily) set-aside is through the deferral provision. As we have already seen, under Article 16, the UNSC can use its Chapter VII power to stop an investigation or prosecution for a year at a time. The approval of nine of the Council members and the lack of a contrary vote by any of the five permanent members will be required. In those circumstances, at a political level, it would

¹⁵⁶ See Ronald Slye, ‘Immunities and Amnesties’, in Max du Plessis (ed.), *African Guide to International Criminal Justice* (Pretoria: Institute for Security Studies 2008); D. Robinson, ‘Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court’, 14 *Eur. J. Int’l L.* 481 (2003); M.P. Scharf, ‘The Amnesty Exception to the Jurisdiction of the International Criminal Court’, 32 *Cornell Int’l L.J.* 507 (1999). By contrast, note that the Human Rights Watch has argued in a policy paper that the phrase “interests of justice” should be interpreted narrowly, and should not be used to decline an investigation or prosecution in the face of a national amnesty, truth commission, or other alternative justice system or process of reconciliation. Human Rights Watch, *The Meaning of “The Interests of Justice” in Article 53 of the Rome Statute*, Policy Paper, HRW, June 1, 2005, at 13–14, <http://www.hrw.org/node/83018> (accessed Feb. 15, 2011).

seem that the power of deferral will probably seldom be used and may thus help to ensure the independence of the judicial activity of the Court.¹⁵⁷

8. Conclusions and Recommendations

Undoubtedly, considering its current composition, political criticisms may be leveled at the UNSC being the sole political body empowered to make deferral decisions. That concern will not be dealt with *in extenso* here. For our purposes, it suffices to note that the involvement of that UN body is predicated on its primary role for the maintenance of international peace and security, which as a threshold matter, requires that the criteria under Chapter VII of the UN Charter be met for the deployment of Article 16. When the Council referred the Darfur situation to the ICC, it found that the situation in Darfur constituted a threat to international peace and security. The same criteria will presumably be applied by the UNSC in making any deferral decision; that is, the UNSC – in authorizing a deferral – must be acting in order to respond to a threat to international peace and security, or must take the view that continuing the Court process is an equal or greater threat to peace and security than deferring altogether.¹⁵⁸ On this view, the prospects for the AU endorsed deferral of Kenya's request seem quite dim. That being the case, the Council, or anyone for that matter, would from this perspective be hard-pressed to characterize the 2007 post-election violence in Kenya as a current threat to international peace and security.

In the Sudan situation, considering the two possibilities highlighted immediately above, one way the African States could proceed is to articulate clearly what the AU expects will be achieved by the relevant parties to the conflict if the Article 16 deferral is granted. Towards that end, it is notable that the report of the AU High-Level Panel on Darfur issued in November 2009 outlines concrete proposals for achieving both justice and peace in the region.¹⁵⁹ The report stresses the need for accountability while at the same time underscoring the need for a broader and deeper understanding of the meaning of justice. Justice, in this sense, means more than only prosecuting those responsible for the worst abuses committed in Darfur; it would potentially include the creation of a hybrid court to try international crimes in conjunction with domestic and ICC prosecutions as well as the use of other alternative mechanisms such as a truth commission.¹⁶⁰

The panel's work was given serious consideration by the PSC on December 21, 2009. While it emphasized a more holistic approach to justice and peace in Sudan, rightly characterizing the two as complementary instead of oppositional, the panel ultimately took no position on the proposed hybrid court's relationship

¹⁵⁷ See Condorelli and Villalpando, *Referral and Deferral by the Security Council*, *supra* note 46, at 646.

¹⁵⁸ See Godfrey Musila, 'Beyond the Al-Bashir Arrest Warrant', *The African*, June/July 2009, at 25.

¹⁵⁹ *Report of the African Union High-Level Panel on Darfur*, *supra* note 97, at 280–377.

¹⁶⁰ *Id.* 246–51.

with the Court in particular in relation to the *Al Bashir* case.¹⁶¹ The panel, which heard Sudanese and Darfuri views on the justice question, was unequivocal that it was incumbent on Khartoum to demonstrate that it was acting domestically in a concerted and effective manner to deal with the perpetrators of crimes. It is perhaps telling that, to date, no formal announcements of the creation of prosecution mechanisms, and or even a truth commission, have been made by Sudanese authorities or, for that matter, solely by or in conjunction with the AU.

As we have set out more fully elsewhere, several interests must be taken into account by African and other governments when evaluating the merits and feasibility of any future proposals to reform the deferral process, namely:

- Which option best suits the preexisting structures and procedures of both the Rome Statute and the UN Charter?
- Which is most likely to garner broad political buy-in?
- What are the existing time constraints relating to amendments and promulgation?
- Which proposal best addresses the underlying concerns of African States and other concerned parties?

Each of these factors must be addressed and weighed against one another, among African States parties to the ICC, AU Member States, all ICC States Parties and other UN members. Keeping the above in mind, as discussions of Article 16 continue in Africa and elsewhere, we highlight the following four policy recommendations for consideration by all concerned parties.

Recommendation 1: ICC States Parties (especially from Africa) should work towards increased and deeper engagement between the AU, the UNSC, and the ICC, including at the ASP.

As recent events make clear, concerns about the role of the UNSC are unlikely to diminish in importance for African leaders and governments in relation to the Sudan situation. Moreover, as long as these concerns remain unattended, they will likely continue to undermine full achievement of a mutually beneficial relationship between the ICC and African States.¹⁶²

While the AU seems hard pressed to present its position as based on consensus among the leadership of the continent, informal reports suggest that some African governments did not support the tabling of the AU's Article 16 amendment

¹⁶¹) *Id.*

¹⁶²) 8th ASP, Resolution ICC-ASP/8/Res.6 (Nov. 26, 2009) (deciding to forward topics to the review conference for consideration in “stocktaking of international criminal justice, taking into account the need to include aspects regarding universality, implementation, and lessons learned, in order to enhance the work of the Court”).

proposal at the Eight ASP. This apparently led to limited endorsement of the proposal by individual African States at the Eight ASP where South Africa formally presented the proposal. If this is true, it shows the necessity for greater dialogue and consensus building among African States Parties (within and outside the forum of the AU) on the issue. That dialogue should proceed on the basis of a proper understanding of the law. It should also be held with an appreciation of the possibilities, and limits – at least currently – regarding the challenges of achieving Article 16 reform. Support of a legally problematic deferral campaign by Kenya is not a constructive way to advance that aim, however politically expedient it may be. This will surely be an issue if Article 16 is substantively reviewed at inter-sessional meetings of the Working Group on Amendments in advance of the Tenth ASP. Indeed, in that situation, the case is stronger for that country to rely on Article 17 – the complementarity provision – which is the cornerstone of the Rome Statute, in addition to using the admissibility clauses (Articles 18 and 19) to contest the ICC's authority to proceed with prosecutions in the face of genuine national efforts to prosecute those bearing greatest responsibility.

Furthermore, even in future cases in which there appears to be sufficiently strong support for a request for deferral under Article 16, those states supporting the deferral need to clearly set out those factors which in their opinion weigh in favor of a deferral. Those factors may include the possibility of disrupting existing peace processes. In making the case, it should be shown how a deferral of a prosecution would advance the cause of maintenance of international peace and security, since Article 16 deferrals are only legally possible when Chapter VII of the UN Charter is engaged. Moreover, it is incumbent on those states and organizations seeking a deferral to timeously use all existing Council procedures so as to ensure that the arguments regarding deferrals are heard and considered.

It is unlikely that a request to the UNSC for deferral will be successful in the absence of meaningful consultations with interested stakeholders. Therefore, it can only advance the mutual interests of all parties that when a request for deferral is being considered, thorough consultations are undertaken between the states making the request, members of the Council, relevant regional organizations like the AU (which may be involved in peace making endeavors in the affected country), the ICC Prosecutor, and the affected state. Such consultations are essential for the sharing of information and in order to allow all parties to be exposed to the full range of arguments that may be made by those with a stake in the outcome and decision about the situation.

When undertaking these consultations, states parties should take advantage of all available procedures to clearly make their case for a deferral or otherwise. Beyond the legal requirements and processes, this will require carefully planned and proactive lobbying well in advance of relevant meetings and intergovernmental processes to build support for their request among UNSC countries. Such meetings and processes might include ASPs, AU summits and other continental meetings. Better

coordination will also be required between officials in Addis Ababa, New York, capitals of states parties, and The Hague. In the case of African concerns, such lobbying should also include targeted internal consultations to enhance the coordination and coherence of Africa's position on the relevant issues.

Consultation and dialogue between African States, the AU and the ICC will be enhanced by the opening of the proposed ICC-AU liaison office in Addis Ababa. Such dialogue will not only improve understanding on all sides of the position of other actors, it will also enhance cooperation between the Court and African States. Therefore, continental leaders should urge the establishment of the liaison office and the conclusion of a formal cooperation agreement between the AU and the ICC. These steps would not conflict with the AU Assembly's decision on non-cooperation with the Court as that decision only calls for non-cooperation with respect to the arrest and surrender of Al Bashir.¹⁶³ The AU decision is not a general call for non-cooperation with the ICC.

This sentiment was endorsed in the letter by the group of African States parties to the chairperson of the AU Commission supporting the opening of the Court's liaison office at the AU headquarters. The letter, dated June 3, 2010, was prepared in the margins of the ICC review conference in Kampala. Despite this expression of support for the liaison office by African States parties, less than a month later at the Fifteenth AU summit, AU Member States resolved "to reject for now, the request by ICC to open a Liaison Officer (sic) to the AU in Addis Ababa, Ethiopia."¹⁶⁴ For its part, the Court has since expressed disappointment in this outcome and reiterated that the opening of the office will promote dialogue between, on the one hand, the AU collective and individual African States, and on the other, the ICC.¹⁶⁵ The recent Declaration by the AU in support of Kenyan deferral may, however, be more disruptive given the tenuous legal basis for this request and the emerging tension between some of the Kenyan leadership and the Court.

African ICC states parties may also consider calling on the AU to extend an invitation to the Court to attend sessions of the AU Assembly. This can help promote more effective cooperation, but also understanding and discussion of concerns between the AU and the ICC.

Recommendation 2: Affected states and intergovernmental organizations seeking a deferral under Article 16 should make a reasoned case for such a deferral using all relevant UN procedures

¹⁶³) Decision on the Meeting of African States Parties to the Rome Statute.

¹⁶⁴) Decision on the progress report of the Commission on the implementation of decision Assembly/AU/Dec.270(xiv).

¹⁶⁵) Doc. No. ICC-ASP/9/20, Official Records vol. I, Ninth Assembly of States Parties to the Rome Statute of the International Criminal Court, ¶¶ 20–21, Dec. 2010.

African States are entitled to call for the ICC to be cautious when becoming involved in conflict situations that could undermine peace processes. However, until such time as the Rome Statute is amended, the 31 African States Parties should only make calls for deferral of investigations and/or prosecution on the basis of a proper assessment of the publicly available evidence in a manner that respects the internal processes of the Rome Statute to which they are a party. At a more general level it is also incumbent on these states parties to encourage the AU to respect those processes, given the commitment in the AU's Constitutive Act to combating impunity for international crimes, and because a majority of AU Member States are treaty members of the Rome Statute. Notwithstanding the problems with the composition of the Council, in particular in respect to concerns about the Sudan situation, African States Parties should remind the AU that the Court is not responsible for the Sudan referral coming to it – but now that the referral has been made, the ICC has a legal duty to act independently under the Rome Statute to respond thereto.

In cases where an investigation or prosecution has been commenced and it is considered that investigation or prosecution by the Court would be prejudicial to the peace and security of a state or region as a whole, it will be incumbent on states and/or intergovernmental organizations to make out a reasoned case for deferral under Article 16, most importantly that the situation poses a threat to international peace and security, and to make full use of the appropriate UN procedures to achieve such a deferral.

In this regard, any calls for deferrals under Article 16 of proceedings initiated by the ICC need to demonstrate that continuing Court investigations and prosecutions will constitute a bigger impediment or threat to peace and security than deferring the proceedings. Therefore it is imperative that such a case be set out clearly and carefully. For such a case to be made effectively, the states or organizations concerned will need to engage fully with key actors within the UN. Credible evidence will need to be presented to the UNSC in a timely manner in accordance with the rules of procedure and other relevant protocols of the Council. All the diplomatic tools available to African States should be brought to bear, ideally in a coordinated fashion, at both the sub-regional, regional and international levels.

Recommendation 3: Where credible alternative justice mechanisms exist, affected states and relevant intergovernmental organizations should call for appropriate use of relevant aspects of Article 53 of the Rome Statute to ensure that the broader interests of justice are upheld.

Where a state in transition from conflict has established credible alternative mechanisms aimed at achieving the twin goals of restorative justice and reconciliation (e.g. a truth and reconciliation process), the ICC Prosecutor should be invited by relevant states and intergovernmental organizations to consider whether

the continuation of investigations or prosecutions before the Court would be in the interests of justice.

Under Article 53(1)(c) and 53(2)(c) of the Rome Statute, the Prosecutor (subject to approval by the ICC's Pre-Trial Chamber) may decide not to proceed with an investigation or prosecution where such action would not serve the "interests of justice". Although the OTP has thus far construed the meaning of that phrase quite narrowly, the concept is wide enough to include considerations of whether the alleged perpetrator of the crime has been the subject of justice mechanisms other than a criminal prosecution. The provision in question should be interpreted as allowing for a deferral to an alternative process like a broadly accepted and credible truth and reconciliation process. The adoption of this policy would not require amendment of treaty provisions but would require a review and reconsideration by the Office of the Prosecutor of its 2007 Policy Paper on the Interests of Justice. More specifically, such amendment would require some rethinking about the current interpretation of the phrase "interests of justice."

Recommendation 4: States should expand the use of domestic prosecutions of those suspected/accused of ICC crimes

In circumstances where states regard the ICC investigation or prosecution as undesirable, steps should, in the first instance, be taken to seek domestic prosecution of those allegedly guilty of genocide, crimes against humanity and war crimes. Article 17 of the Rome Statute embodies the principle of complementarity which permits a state that has jurisdiction over a crime that is the subject of proceedings before the Court to raise an objection to the admissibility of a case on the grounds that the state is willing and able to prosecute the crime. Such an objection to admissibility can be made even by a non-party to the Rome Statute and where it is upheld the ICC would not be entitled to continue with an investigation or prosecution. This is a more appropriate statutory vehicle than Article 16 for Kenya to voice its opposition to Court involvement in its post-election violence.

Engaging the ICC on matters of admissibility has its merits. It makes it clear that the state concerned is not in favor of impunity. The state will have to show that it has taken appropriate domestic measures and is willing and able to prosecute the international crimes that are at issue. Furthermore, since arguments based on admissibility and complementarity are made to a judicial body, the Court has an obligation to reach a reasoned decision on those questions, unlike the UNSC – in the case of a deferral – which may not issue a decision and which, in any event, will not give a reasoned decision.