

Position Paper

# An African expert study on the African Union concerns about article 16 of the Rome Statute of the ICC



Dapo Akande, Max du Plessis and Charles Chernor Jalloh

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# Contents

<b>About the authors</b> .....	2
<b>About this study</b> .....	3
<b>Introduction: A challenge for international criminal justice in Africa</b> .....	5
<b>A long history of African support for international criminal justice</b> .....	7
<b>The law and politics of deferrals under article 16 of the Rome Statute</b> .....	7
Article 16: The law and a (political) compromise .....	7
The politics (and double-standards) start early: United States invocation of article 16 .....	8
The politics of deferral in the Sudan situation and AU reaction .....	10
<b>The AU proposal for the amendment of article 16</b> .....	12
<b>The peace and justice debate in relation to the ICC in the Sudan situation</b> .....	18
Giving peace a chance in Sudan .....	19
The ICC process in light of calls for peace .....	21
<b>Recommendations of the expert working group</b> .....	22
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 .....	22
Recommendation 2: Affected states and intergovernmental organisations seeking a deferral under article 16 should make a reasoned case for such a deferral using all relevant UN procedures .....	23
Recommendation 3: Where credible alternative justice mechanisms exist, affected states and relevant intergovernmental organisations should call for appropriate use of relevant aspects of article 53 to ensure that the broader interests of justice are upheld .....	24
Recommendation 4: States should expand the use of domestic prosecutions of those accused of ICC crimes .....	24
<b>Notes</b> .....	24

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International Criminal Tribunal for Rwanda in Arusha, Tanzania from where he moved to academe. His recent publications focus on how to bridge the tension between Africa and the International Criminal Court.

# About this study

This African expert study on the African Union's (AU) concerns about article 16 of the Rome Statute of the International Criminal Court (ICC) seeks to articulate a clearer picture of the law and politics of article 16 deferrals within the context of the AU's repeated calls to the United Nations Security Council (UNSC) to invoke article 16 to suspend the processes initiated by the ICC against President Omar al-Bashir of Sudan. The lack of a formal reply by the UNSC to the AU request has resulted in AU member states deciding to withhold cooperation from the ICC in respect of the arrest and surrender of Bashir. In light of the AU's continued concerns, questions have arisen about the UNSC's exercise of the controversial deferral power contained in article 16. This culminated in the AU proposing that article 16 be amended to empower the UN General Assembly to act should the UNSC fail to decide on a deferral request after six months.

Although states parties to the Rome Statute have shown little support for the AU's proposed amendment to article 16, the merits of the AU proposal must be considered. A failure to engage with African government concerns about the deferral provision could further damage the ICC's credibility in Africa. Constructive suggestions about the 'article 16 problem' must be developed in order to contribute towards resolving the negative stance that some African countries have taken towards the ICC. The challenge is to devise both legally sound and politically palatable options. For many Africans, the ICC's involvement in Sudan has come to reflect the skewed nature of power distribution within the UNSC and global politics. 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.

It is also important to pay attention to the AU's concerns and its request for an article 16 deferral of the Bashir indictment because the matters underlying the tension – how ICC prosecutions may be reconciled with peacemaking initiatives and the role and power of the UNSC in ICC business – are likely to arise in the future with respect to other situations. Solutions must be found to problems that may arise in working out the relationship between the UNSC and the ICC. The study therefore makes practical suggestions about how to resolve the concerns raised within certain African government circles and other developing nations about the relationship between the UNSC and the ICC, and the relationship between the ICC and peacemaking initiatives of governments and regional organisations.

The spirit underlying the study is that a strong, independent and successful ICC is ultimately in Africa's best interest as the continent works to tackle impunity. By the same token, it is equally in the ICC's long-term interest to show greater sensitivity towards the specific interests and views of African states. It is for this reason that the position paper includes proposals for possible amendment of article 16, despite agreement among the experts of the project's working group that such an amendment is unlikely considering the amount of support that would be required from states parties to enable the passing of an amendment.

The International Crime in Africa Programme (ICAP) at the Institute for Security Studies (ISS) in Pretoria and Charles Chernor Jalloh, assistant professor of international criminal law at the University of Pittsburgh School of Law, initiated the expert study in early 2010. The study is part of ICAP's work on 'the ICC that Africa wants' which aims to constructively shape the ICC from an African perspective. For Charles Jalloh, this project is a continuation of his contribution to the growing body of scholarship on Africa and the future of international criminal justice.

The expert study began with the writing of a draft position paper on the article 16 issue. The draft was then circulated to a group of African and international experts from civil society and government, who provided written comments and participated in a two-day meeting in Addis Ababa in June 2010 to discuss the draft paper. The experts participated in their personal capacities and their views do not reflect the views of their organisations. Although the final position paper reflects the outcomes of the inputs and discussions among the expert group members, the contents of this paper must be attributed to the three authors rather than to members of the expert group. The members of the expert group were:

- Dapo Akande, university lecturer in public international law, co-director, Oxford Institute for Ethics, Law and Armed Conflict (ELAC), University of Oxford
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- Anton du Plessis, head, International Crime in Africa Programme, ISS
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- John Dugard, emeritus professor of international law, University of Leiden and honorary professor of law, Centre for Human Rights, University of Pretoria
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- Bill Schabas, director, Irish Centre for Human Rights, National University of Ireland
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ICAP and Charles Jalloh would like to thank each member of the expert working group for contributing freely of their time to participate in this complex project. ICAP also acknowledges the support of the Open Society Foundation for South Africa (OSF-SA) and the Government of the Netherlands which has made this project possible. Special thanks go to Amy DiBella for assisting with the endnotes.



## INTRODUCTION: A CHALLENGE FOR INTERNATIONAL CRIMINAL JUSTICE IN AFRICA

One of the most controversial 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 of the ICC, 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 Rome Statute chose to regulate this relationship by first of all permitting the UNSC to refer situations – in which international crimes appear to have been committed – to the ICC.<sup>1</sup> Secondly, the relationship between the ICC and the political organs of the international community is regulated by article 16 of the Rome Statute. That provision requires the ICC to refrain from commencing or proceeding with an investigation or prosecution, for a period of 12 months, if the UNSC so requests in a resolution adopted under chapter VII of the United Nations (UN) Charter.<sup>2</sup>

Article 16 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 UNSC the exclusive power to request deferral of ICC 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 UNSC 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.

These matters, within the context of the UNSC's relationship with the ICC, have recently come to a head with respect to the work of the court in Darfur. As described below, the UNSC's referral of the situation regarding Darfur to the ICC; the indictment by the ICC of Sudanese president Omar al-Bashir; the failure of the UNSC to properly consider the request of the AU for a

deferral of the Bashir prosecution under article 16; and the AU response to the lack of action by the UNSC on the deferral request, has led to tension between African states, the UNSC and the ICC. This tension has focused on the Bashir case in particular.<sup>3</sup> However, there remains a danger that dissatisfaction with issues related to the Bashir case may affect other areas of cooperation between the ICC, the AU, and African states parties to the Rome Statute.

On 31 March 2005, the UNSC adopted resolution 1593 in which it referred the conflict in Darfur to the ICC.<sup>4</sup> That decision was the first time that the UNSC invoked its extraordinary power, under article 13(b) of the Rome Statute, to refer a particular situation to the ICC prosecutor for investigation and possible prosecutions of genocide, crimes against humanity and war crimes.<sup>5</sup>

This exceptional jurisdiction was predicated on the UNSC's determination that the situation in Sudan constituted a threat to international peace and security under article 39 of the UN Charter.<sup>6</sup> It also reflected the conviction that trials of persons responsible for the human rights violations in Darfur will help restore peace and stability to the country and the region.<sup>7</sup> Thus, unlike the three 'self-referrals' by Uganda, the Democratic Republic of the Congo (DRC) and the Central African Republic (CAR), and the recent ICC pre-trial chamber approved *proprio motu* prosecutorial action in respect of Kenya, Sudan stands as the only non-party to the Rome Statute that is currently subject to ICC jurisdiction.<sup>8</sup>

Acting with respect to the UNSC's referral and at the request of the ICC prosecutor, the ICC pre-trial chamber has issued arrest warrants or summonses for four Sudanese officials.<sup>9</sup> Among these, the most controversial has been its approval of a warrant of arrest for Sudan's President Bashir – which warrant has recently been reissued to add genocide charges.<sup>10</sup> The Government of Sudan, under Bashir, has objected to this exercise of jurisdiction in relation to Sudan. It has argued that Sudanese sovereignty is being violated – both by the UNSC, which referred the matter, and the ICC, which was charged with implementing the decision.<sup>11</sup> Sudan's objections have predictably resulted in a tense relationship and limited cooperation with the ICC.<sup>12</sup> In May 2010, the pre-trial chamber issued a decision holding that Sudan had failed to comply with its obligations to cooperate with the ICC. It therefore directed the ICC registrar to inform the UNSC of this fact.<sup>13</sup> It is unclear what will happen next.

For its part, the 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 UNSC to invoke article 16 of the

Rome Statute to suspend the processes initiated by the ICC against Bashir.<sup>14</sup> Under that provision, no investigation or prosecution may be commenced or continued for a year once the UNSC has so requested the ICC. The AU worried that a prosecution of the incumbent Sudanese president could impede the prospects for peace.<sup>15</sup> It also agonised over the potential unraveling of the fragile political gains that had already been made towards resolution of the crisis in Darfur. The UNSC considered the AU request only briefly and failed to act on it.

In response, in a decision adopted at its July 2009 13th summit in 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 Bashir.<sup>16</sup> While apparently animated by concern over the timing of prosecutions vis-à-vis the peace process in Darfur, the immediate justification was AU frustration with the UNSC over the failure to properly consider the deferral request.<sup>17</sup> At its most recent 15th summit in Kampala, Uganda in July 2010, AU heads of state reiterated this decision, and raised a number of other concerns about the ICC and 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 ICC's ability to achieve its mandate under the referral. Thus, increasing attention is being given to the question of the nature, scope and criteria that should govern the UNSC'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 8th session of the ICC Assembly of States Parties (ASP) in November 2009. Essentially, 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 8th ASP declined to include the proposed amendment on the upcoming ICC review conference agenda, a working group of the ASP will be established at its 9th session in 2010, to consider other amendments to the Rome Statute. These will most likely include the article 16 issue.<sup>18</sup>

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 UNSC's legitimacy deficit, many African and other developing countries see its work as 'a cynical exercise of authority by great powers',<sup>19</sup> 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.<sup>20</sup> 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 is obvious. In the particular context of the Bashir case, the need for further consideration of 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 Bashir with genocide, the 'crime of crimes',<sup>21</sup> in addition to crimes against humanity and war crimes.<sup>22</sup> Second, the reality that the April 2010 presidential elections concluded with approximately 70 per cent of Sudanese voters re-electing Bashir.<sup>23</sup> Third, and finally, the pending (January 2011) independence referendum on the future of Southern Sudan, which the government in Khartoum now wants to delay.<sup>24</sup>

But more significantly, it is important to pay attention to the AU's concerns and its proposal because the matters underlying the tension – how ICC prosecutions may be reconciled with peacemaking initiatives and the role and power of the UNSC in matters relating to the ICC – are likely to arise in the future with respect to other situations. Therefore, it is important to seek solutions with regard to problems that may arise in working out the relationship between the UNSC and the ICC.

Both formal and informal reports from the 8th ASP session suggest that, at best, there was a tepid response to the AU proposal from other ICC states parties, including African states parties.<sup>25</sup> An endorsement of the African article 16 proposed amendment therefore appears unlikely at this stage. In any event, there are legal problems with the proposal. Furthermore, since the proposal 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 113 member states.<sup>26</sup> Even assuming that all 31 African states parties (who are also AU members) voted in favour of the 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.<sup>27</sup> 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, adverse political reactions over Darfur could spill over to affect the four other African situations constituting the rest of the ICC's current caseload.

## 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.<sup>28</sup> Partly as a reaction to this, with the end of the Cold War and the decision to replace the Organisation 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.<sup>29</sup> 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 Africa's problems – to support the creation of special ad hoc tribunals.<sup>30</sup> 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.<sup>31</sup> 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.<sup>32</sup> 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 emerging ICC practice in the region thereby compelling continental leaders to start revisiting their positions on those questions.

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 1 July 2002.<sup>33</sup> This was much sooner than anyone could have anticipated.<sup>34</sup> 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 2 February 1999, only seven months after the treaty's adoption. In this way, that country symbolically captured the significance of the ICC for the war-weary people of the continent.<sup>35</sup>

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'.<sup>36</sup> Moreover, as is widely known, three countries in the Great Lakes region of Africa (i.e. CAR, DRC and Uganda) were the first to lift the veil of impunity through self-referrals of their respective situations to the ICC prosecutor for investigations and possible prosecutions.<sup>37</sup> Furthermore, Côte d'Ivoire, a non-party to the statute has lodged a declaration accepting the ICC's jurisdiction.<sup>38</sup> More recently, Kenya – an East African nation – signaled its intention to make the fourth African self-referral to the ICC (although the prosecutor instead chose to seek pre-trial chamber authorisation for his first *proprio motu* investigation of a situation, which authorisation has now been granted).<sup>39</sup>

Before Kenya, Sudan was the last situation to be triggered. However, unlike the self-referrals, it was the UNSC, 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.<sup>40</sup> 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.<sup>41</sup>

## THE LAW AND POLITICS OF DEFERRALS UNDER ARTICLE 16 OF THE ROME STATUTE

### Article 16: The law and a (political) compromise

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 Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.<sup>42</sup>

By article 16 the UNSC is accordingly entrusted with a power of 'negative' intervention in the exercise of the

ICC's jurisdiction. The UNSC's power to defer, and indeed its broader relationship with the ICC, had been one of the thorniest issues in the negotiations leading to adoption of the Rome Statute.<sup>43</sup> 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.<sup>44</sup>

Thus, under the ILC proposal, the ICC would not have been able to proceed in many matters without prior UNSC authorisation. 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 criticised 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.<sup>45</sup> Fears were also expressed that this would 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 *authorise* one.

In other words, article 16 requires the UNSC 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 practice, this effectively means that a deferral will require the approval of nine of 15 UNSC members and the lack of a contrary vote by any of the five permanent members.<sup>46</sup>

### **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,<sup>47</sup> which the UNSC adopted at

its 4572nd meeting on 12 July 2002 using chapter VII, paragraph 1 referred to article 16 of the Rome Statute:<sup>48</sup>

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 authorised 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).<sup>49</sup>

Resolution 1422 would expire after 12 months, and on 12 June 2003, at its 4772nd meeting, it was renewed for a further year by the UNSC's adoption of resolution 1487.<sup>50</sup> The latter was essentially identical to resolution 1422. In that decision, the UNSC expressed its intention, as it had done the previous year, to renew the resolutions 'under the same conditions each 1 July for further 12-month periods for as long as may be necessary'.<sup>51</sup> Twelve states voted in favour of the resolution, while Germany, France and Syria all abstained.<sup>52</sup>

Many governments regarded these controversial resolutions as problematic. Some of them cited the 'deep injustice'<sup>53</sup> of discriminating between peacekeeping forces from sending states that are parties to the Rome Statute and those that are not.<sup>54</sup> Others suggested that the resolutions effectively sought to modify the terms of the Rome Statute indirectly, without amendment of the treaty.<sup>55</sup> The implication that automatic unlimited renewals will follow was also roundly rejected.<sup>56</sup>

Those statements demonstrate the politicised 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.<sup>57</sup>

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.<sup>58</sup> For example, during the UNSC debate on resolution 1487, the Netherlands referred to the *travaux préparatoires* to lay bare the real/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.<sup>59</sup>

Germany also joined the Netherlands in opposing the adoption of resolution 1422. In the public debate on 10 July 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].<sup>60</sup>

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.'<sup>61</sup>

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.'<sup>62</sup> Further, during debate on resolution 1487, it stated 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...'<sup>63</sup>

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 UNSC's actions 'are not consistent with the provision of the Rome Statute and severely damage the Court's credibility and independence.'<sup>64</sup> It is important to note 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:

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....<sup>65</sup>

The next time that the UNSC expressly referred to article 16 was in the context of the Darfur referral.<sup>66</sup> 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 authorised by the Council or the African Union, unless such exclusive jurisdiction has been expressly waived by that contributing State.'<sup>67</sup>

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.<sup>68</sup>

Two important observations may be drawn from the above review of the UNSC practice regarding article 16. First, 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 UNSC can undermine 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.<sup>69</sup> However, it was understood, at least among certain states, 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 ICC.

These points follow expressly from the text and history of article 16 as read with chapter VII of the UN Charter.<sup>70</sup> They also follow from a proper appreciation of the (limited) role that the UNSC was intended to enjoy in relation to the ICC – an independent multilateral treaty based body. This limited role was well articulated by the ILA ICC committee in its first report.<sup>71</sup>

## The politics of deferral in the Sudan situation and AU reaction

The AU concern about the ICC'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 Bashir, repeatedly called on the UNSC to apply article 16 to 'defer the process initiated by the ICC.'<sup>72</sup> To the chagrin of AU member states, the repeated request was only considered and debated by the UNSC 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 UNSC resolution 1769,<sup>73</sup> for a further 12 months to 31 July 2009.

The UNSC's failure to meaningfully engage the AU request for a deferral of the proceedings against 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 UNSC actively considered the matter. Despite the repeated formal requests by organs of the AU, the 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 UNSC 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 resolution regarding the renewal of UNAMID.<sup>74</sup> Libya's proposals were not supported by the other UNSC members and were ultimately left out of the final resolution.<sup>75</sup> Nevertheless, the African states voted for the UNAMID renewal resolution because of the importance that they attached to the peacekeeping mission and on the understanding that the UNSC will consider the AU's article 16 deferral request at a later stage.<sup>76</sup>

Secondly, the Permanent Five as well as the 10 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 favour of a deferral. It took the view that the overall interests of peace and security should not be compromised. In so arguing, China 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 involvement would undermine the peace process, harden the position of rebel groups and harm the fragile security situation. On the other hand, by characterising 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.<sup>77</sup>

Alongside China, the delegate of the Russian Federation observed that various regional and sub-regional bodies supported the AU deferral request. These included the Non-Aligned Movement, the Organisation 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 UNSC members.<sup>78</sup>

Coming from the opposite side, the United States, which ultimately abstained from the vote, opposed the draft United Kingdom 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 draft resolution, would send the wrong message to the Sudanese president.<sup>79</sup> It would also undermine efforts to bring him and others to justice.<sup>80</sup> This suggested that, after many years of direct opposition to its work, the world's only superpower had had a favourable change of heart towards the ICC.

The UNSC's ultimate position on the AU request was merely to 'note',<sup>81</sup> in the preamble, the AU's calls, and to express its intention to consider the matter further. In resolution 1828, adopted on 31 July 2008 with 14 votes in favour (with the United States abstaining), the UNSC:

[e]mphasis[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.<sup>82</sup>

In the absence of agreement on a common position, the UNSC effectively postponed a final decision on the African article 16 request to another time. Though the three African non-permanent members on the UNSC at the time proposed amendments to the draft resolution presented by the United Kingdom, the UNSC could not agree on its inclusion. Consequently, it did not explicitly endorse or deny the AU request. In operative paragraph 9, a compromise was crafted stating that the UNSC considered that an inclusive political settlement of the Darfur crisis was indispensable since no 'military solution' was possible to restore peace to Sudan. In fact, all the resolution did was to cite the AU communiqué of 21 July 2008 as follows: 'having in mind concerns raised by members of the Council regarding potential developments subsequent to the application by the Prosecutor of the International Criminal Court of 14 July 2008, and taking note of their intention to consider these matters further'.<sup>83</sup> Regrettably, the UNSC, 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 8 and 9 June 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*.<sup>84</sup> (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 AU observed that because its request to the UNSC '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.<sup>85</sup> 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'.<sup>86</sup>

In an explanatory press release following the 3 July 2009 decision on non-cooperation with the ICC, 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 harmonised approach to justice and peace, neither of which should be pursued at the expense of the other'.<sup>87</sup> Accordingly, it continued, the 3 July 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 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'.<sup>88</sup>

The legal basis of the AU decision not to cooperate with the ICC in relation to the Bashir case was predicated on article 98 of the Rome Statute. Under that provision, the ICC 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, from a treaty law perspective, it is striking that the AU decision to no longer cooperate with the ICC in arresting Bashir was directed at all 53 AU member states rather than only the 31 states that also happen to be parties to the Rome Statute.<sup>90</sup>

While the AU clearly aimed to bind all its members, from a treaty law perspective, 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. Perhaps, as an acknowledgement of that difficulty, the AU Assembly's July 2010 Kampala decision requested its member states 'to balance, where applicable, their obligations to the AU with their obligations to the ICC'.<sup>91</sup> In addition to their clear international treaty obligations with respect to the Rome Statute, AU member states are arguably also bound by the UNSC resolution 1593 which referred the Darfur situation to the ICC.

In any event, it is clear from recent statements that the AU wants its call for a UNSC deferral of the Bashir prosecution to be taken seriously, indeed acceded to. This call may ultimately be animated by its preference for 'African solutions to African problems'. 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 regional efforts for long-term peace on the continent should not be undermined by the ICC's interest in short-term prosecutions remains undisputable.<sup>92</sup> This is particularly so considering the serious commitment that African states have shown in resolving the Darfur crisis, including through deployment of peacekeepers in Darfur.

## THE AU PROPOSAL FOR THE AMENDMENT OF ARTICLE 16

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 UNSC was the main concern at the AU experts meeting (3–5 November 2009) with the subsequent AU ministerial meeting (6 November 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.

At the ministerial meeting on 6 November 2009, prior to the 8th ASP in The Hague, ministers from African countries – both states parties and non-state parties – adopted seven recommendations to guide their position at the 8th ASP and the review conference in Kampala in May/June 2010.<sup>93</sup> Those recommendations are important because they highlight governmental views on vexing questions regarding international criminal justice generally and the ICC'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 UNSC; the question of determining an act of aggression for the purposes of prosecution under the statute, etc.<sup>94</sup>

Although certain of those recommendations were clearly inspired by the Sudan situation, it would be a mistake to characterise 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.

The relevant recommendation for the purposes of this study 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 8th ASP, South Africa presented this proposal on behalf of the continent.<sup>95</sup> It argued that article 16 ought to be amended to allow for the UN General Assembly to

defer cases before the ICC 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 states parties to the AU proposal was non-committal at best, the issue was again raised at the March 2010 resumed session of the ASP – the precursor to the ICC's first review conference in Kampala in mid-2010.<sup>96</sup>

South Africa's article 16 amendment proposal – a joint position of African state parties – may 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 favour of 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. 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,<sup>97</sup> in particular the Abuja peace process, aimed at reaching a viable political solution to the crisis in Darfur and Sudan.

Furthermore, African concerns about the UNSC'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 emphasised, most states were opposed to the deferral idea at Rome because of their trepidations over UNSC involvement in its use. 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 (instead of the UNSC).<sup>98</sup> 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.<sup>99</sup> The AU Assembly, *inter alia*, took note 'of the Report of the Ministerial Preparatory Meeting on the Rome Statute of the International Criminal Court (ICC) held in Addis Ababa, Ethiopia on 6 November 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'.<sup>100</sup> 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 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.<sup>101</sup>

The view of the AU Assembly in this regard remains unchanged, as evidenced in the recent decision taken at the AU's 15th summit 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.<sup>102</sup>

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 with regard to 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. The proposed amendment speaks to the relationship not only of the UN and the ICC, but also to the relationship between two important UN organs: the UNSC and the General Assembly. The latter relationship is framed by the UN Charter, and the Rome Statute cannot modify it in a manner which would be contrary to what is set out in the UN Charter.

The Rome Statute is a multilateral treaty. It is separate 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 proposal attempted to modify the relationship between the General Assembly and the UNSC, that conferral of power would have to be done by amending the UN Charter. This is because the General Assembly would be debarred from 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 decisionmaking 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 ICC 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 glance suggest that the General Assembly may not be given the deferral power, 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 UNSC 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.

However, the request is not a decision which is binding on the ICC 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 ICC is an

independent institution with its own international legal personality. Therefore, the UNSC has no power under the UN Charter to make decisions that are legally binding on the ICC. However, article 16 takes a decision (or request) of the UNSC and makes it binding on the ICC as a matter of the ICC'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 organisation.'<sup>103</sup>

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 bar the General Assembly from acting. Although the UNSC has 'primary responsibility'<sup>104</sup> 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 UNSC. Furthermore, as the International Court of Justice (ICJ) has recognised in the *Certain Expenses* case, the General Assembly has the power to play a role in matters respecting peace and security.<sup>105</sup>

A third reason why there might be concern that the proposed amendment to article 16 may be problematic as a matter of the law of the UN Charter 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 UNSC. Under the proposal, requests for deferral of ICC investigations and prosecutions would first go to the UNSC as is currently required by article 16. It is only when the UNSC *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 UNSC 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.<sup>106</sup>

The reason for the position set out in article 12 of the UN Charter is to emphasise 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.<sup>107</sup> Since the proposed amendment requires that a request for deferral go first to the UNSC 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 UNSC would be exercising its functions with request to a deferral request at the time when the General Assembly is called to act on it is crucial. However, 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.<sup>108</sup> 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 UNSC, that practice later changed to allow the General Assembly to act even on matters placed on the agenda of the UNSC.<sup>109</sup> Part of the reason for this change is because matters often remain on the agenda of the UNSC indefinitely though the UNSC may not be actively considering the matter 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 UNSC. In a legal opinion issued in 1964, the UN Legal Counsel was of the view that this practice, though contrary to the text of article 12, reflected a changed understanding of the meaning of article 12.<sup>110</sup> 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'.<sup>111</sup>

The practice of the General Assembly with regard to article 12 was reviewed by the ICJ in the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory Advisory Opinion*<sup>112</sup> ('Israeli Wall Advisory Opinion'). The ICJ stated that it 'considers that the accepted practice of the General Assembly, as it has evolved, is consistent with Article 12, paragraph 1, of the Charter'.<sup>113</sup> 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 UNSC.

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, the General Assembly can only act when it is clear that the UNSC is no longer actively considering the deferral request. The General Assembly 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 UNSC 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 UNSC 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 UNSC 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.<sup>114</sup>

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'.<sup>115</sup>

The resolution assumes that the fact that the UNSC 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 UNSC at first fails to pass a resolution it is later able to do so.<sup>116</sup> 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.<sup>117</sup>

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 UNSC itself to decide – as well as contrary to the general structure of the UN Charter.<sup>118</sup>

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.<sup>119</sup> In the *Israeli*

*Wall Advisory Opinion*,<sup>120</sup> 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 seized of the matter at issue two months after a veto by a permanent member had terminated discussion in the UNSC. The judges took into account the fact that 'the Council neither discussed the construction of the wall nor adopted any resolution in that connection'<sup>121</sup> 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 UNSC 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 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 UNSC 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.

However 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 in the case of the AU proposal.

Even countries sympathetic to the African argument are unlikely to give a role to yet another political body in the work of the ICC. Going back to the views of states during the Rome negotiations, some would argue that there are pragmatic reasons for keeping the politics of the General Assembly out of ICC proceedings. Indeed, some will be quick to argue that the AU proposal, as currently worded, appears to replace one form of politics (within the UNSC) 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 could lead to a repeat of the divide at Rome whereby the Permanent Five states and their supporters took positions favouring 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 UNSC. Either way, the proposal will be seen by some as increasing the chances for politicising the work of the ICC, rather than diminishing it. If such a contention is correct, it begs the question whether, in the long run, such politicisation would be good for the ICC.

The 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 Kampala. It had been proposed by some that the ICC should only be able to exercise jurisdiction over aggression where either the UNSC, the General Assembly or the ICJ had determined that an act of aggression had been committed.<sup>122</sup> This proposal met with little support at Kampala and was not adopted.<sup>123</sup>

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 UNSC. However, it appears difficult to remove the role of the UNSC 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. Given that the UNSC'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 ICC. Given the documented views of ICC states parties in Rome and in Kampala, it does not appear likely that a seven-eighths majority can be reached for this position.

Considering that the 15th AU summit decision on the ICC reiterated the call for an amendment to article 16, it is clear that amending article 16 remains a priority for AU member states despite the threshold challenges described above. Although not part of the recommendations of this project's expert working group presented below (pages 22–24), the authors believe that the proposals in the text box that follows could be considered in the unlikely event that sufficient states parties support an amendment to article 16.

#### Options for possible amendment of article 16

##### **Option 1: Amendment to allow for a dual mechanism for deferrals whereby either the UNSC or the General Assembly may act (as per the AU proposal).**

**Feasibility:** The feasibility of this option has been extensively discussed above. In a nutshell, it may be noted that there are both legal and practical difficulties with the current AU proposal. This is particularly so when considered against the specific and general role of the UNSC on matters relating to the ICC (and international peace and security more generally) and in light of the law of the UN Charter as well as international treaty law.

Furthermore, considering the cool response received from non-African states parties following South Africa's presentation of the proposal at the 8th ASP, and the limited formal support shown by African states parties themselves, it appears that the required political backing to effect such an amendment (seven-eighths of the 113 states parties) is not likely at this stage. The situation is exacerbated by the concrete possibility that, in the absence of broader state acceptance of the Uniting for Peace resolution, UN Charter amendment could be required to balance the roles of the UNSC and the General Assembly. This is not to suggest that African states should not push for this option to be studied further, in particular within the context of an ICC expert working group, and in that way gain an opportunity to build consensus around this issue over the coming years.

##### **Option 2: Amendment to allow for dual mechanisms for deferrals that avoid difficulties arising from UNSC politics and the divisive Uniting for Peace resolution. Such an amendment could preserve the function of the UNSC in the deferral process, but would also allow for the involvement of a second deferral mechanism within the process. This might take various forms, for example, requiring adoption of a General Assembly resolution combined with a vote in favour of deferral by the ASP.**

**Feasibility:** This option would seek to introduce each of the primary political organs of the UN (the UNSC – the most powerful; and the General Assembly – the most democratic) into the deferral decision process, while preserving the UNSC's autonomy and acknowledging its special role under the UN Charter. It would also provide a role for the ASP. Besides the latter's role, some states might find it odd if two external organs of another international organisation (the UN) are empowered to

make such a potentially important decision for the ICC without involving the main oversight body envisaged by the Rome Statute itself.

As a result of such an amendment, article 16 would read as follows: '(1) No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the 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. (2) No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months if the General Assembly, in a resolution, has requested the Court to that effect, [AND][OR] the Assembly of States Parties has voted in favour of the General Assembly resolution by a two-thirds majority as a substantive issue. That request may be renewed by the Assembly of States Parties, [acting together with] the General Assembly, [and [or] by the Council.'

Part 1 of the revision simply restates article 16, and part 2 inserts the secondary mechanism of deferral. The proposal would allow states in the General Assembly and the ASP a voice in the deferral process. In the ASP, the issue must be considered substantive in nature, which would dictate the voting majority as two-thirds in accordance with Rome Statute article 112(7)(a). Additionally, the vote in the General Assembly under UN Charter article 18(2), would also require a two-thirds majority.

This option may satisfy the concerns about the legitimacy of UNSC action, or inaction, and may attract the support of the greatest number of states parties. This option would play on the democratic nature of the General Assembly and the unique power of the ASP to check the authority of the prosecutor and adopt policies to enhance the legal and strategic character of the ICC, while permitting the UNSC, depending on the option chosen, to either be checked by the other two or to maintain its autonomy in the deferral and renewal processes.

While some ICC parties may find it attractive to have deferral decisions taken by an ICC body, others may balk at the prospect of three essentially political bodies being involved in decisions regarding investigations and prosecutions. Therefore, there are likely to be significant obstacles in achieving the necessary ratifications for this option.

**Option 3: If there is concern about vesting the deferral power in the General Assembly (as per the previous option), another approach might be to provide for an advisory role for the ASP that is integral to the deferral decision by the UNSC. That role could be discharged by an ASP working group, the results of which could be taken to the UNSC on behalf of the group by a state or a group of states. The advantage of such a mechanism is that it provides an outlet for considerations of justice to be taken into account in the ICC's processes without leaving such a sensitive issue exclusively to the UNSC, which may be handicapped by concerns about its legitimacy. Under this option, AU member states may consider introducing an amendment proposal for the establishment of an independent ASP ad hoc working**

**group or legal committee to advise and assist the UNSC on all questions related to the deferral of a case or situation before the ICC.**

**Feasibility:** Establishing such a working group or committee will reduce the chances of deferral requests in future being held hostage by the political controversies regarding the role of the UNSC. This option could also prove practically feasible since the Rome Statute allows the ASP to establish subsidiary organs that may be necessary for the functioning of the ICC (article 112(4)).

From a strategic perspective of gaining support, the fact that Africa has the second largest number of states parties from any single region in the ICC system (after Europe), plus the fact that Africa is so far the only source of casework for the prosecutor, could bolster the chances of gaining wider non-African state party support. In this regard it may be noted that in relation to the deferral request to the UNSC, the AU was able to generate support from about two-thirds of the world's states as represented by the membership of the Non-Aligned Movement, the League of Arab States, and the organisation of Islamic Conference.

The membership in the working group or advisory committee could be drawn solely from the representatives of states at the ASP. Another advantage of such an ad hoc committee, constituted only as the need may arise, is that it would be attached to a body that has a statutory responsibility of oversight over the operations of the ICC, and provides a direct means for information sharing with the UNSC.

Furthermore, the legal committee or working group could be given responsibility for establishing the criteria that would have to be met for full consideration of a proposed deferment of a situation before the ICC. The working group or committee would also be well positioned to inform states parties, as well as relevant ICC organs such as the prosecutor about such criteria. Under the UN and the ICC's relationship agreement, the ICC may request that items be placed on the agenda of the various organs of the UN, including the UNSC. That provision could be used by the legal committee or working group to ensure that the UNSC will have an independent source of information about deferral requests. It could thus forward proposals of agenda items for deferrals for the UNSC's consideration. Though this process would not necessarily bind the UNSC to take a particular decision, it could help it to reach a more informed decision whether to grant an article 16 deferral request. Finally, such a move will significantly enhance the transparency and therefore legitimacy of the legal procedures of the ICC.

A potential disadvantage of such a working group or committee is that the membership could probably not be as extensive as desired. Having every member of the ASP represented on the committee or working group would not be feasible. While strictly rotating membership would provide equal access, there is a risk that an affected state or states may not have access at the relevant time (which would in any event be the case if the situation in question involved the territory of a non-state party). Whatever voting or appointment mechanism is ultimately agreed upon, it will accordingly

be necessary to ensure that a representative of the affected state or region is assured appointment to the working group or legal committee, or at the very least that the views of such affected state or region are adequately presented/represented in the group or committee.

In conclusion, the fact that the proposed amendment to article 16 requires a very high threshold for adoption and entry into force, and that it seems unlikely that there will be sufficient support from states parties to reach this threshold, suggests that it would be more profitable for the AU and African states to make the procedure set out in the current article 16 work better. Furthermore, it would be worthwhile to seek out other ways 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 Bashir case.

## **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).

In the first place, 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))<sup>124</sup> 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.<sup>125</sup> 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 a presumption in favour of prosecution for international crimes.

Secondly, 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.<sup>126</sup> At the same time, though many African states parties have made this commitment by ratifying the Rome Statute, only a few have transformed relevant parts of it into domestic law.<sup>127</sup>

Apart from the dissension generated by the Bashir case, African states have shown strong support for the work of the ICC. 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 ICC. In addition, the Kenyan government has pledged to work with the court with regard to investigations by the ICC in that country. 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 UNSC 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).<sup>128</sup>

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. Arguably, therefore, African states parties to the ICC have already expressed a preference for a criminal justice response to international crimes.

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 a particular peace process on the continent. The Rome Statute itself recognises that the pursuit of prosecutions is not an absolute or blind commitment. While the negotiations leading to the creation of the ICC 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 in the first place, there should be credible national measures to address such crimes.<sup>129</sup>

## 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 favour 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 dispute:

- Regardless of their accurate characterisation (including whether genocide can be shown) grave international crimes have been committed in Sudan and continue to this day.
- 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.<sup>130</sup>
- 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 UNSC refer the situation in Darfur to the ICC 'to protect the civilians of Darfur and end the rampant impunity currently prevailing there',<sup>131</sup> the commission endorsed the ICC as the 'only credible way of bringing alleged perpetrators to justice'.<sup>132</sup> That assessment arguably remains true today, given Sudan's inaction with regard to the perpetrators.

It is furthermore 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 UNSC 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'.<sup>133</sup>

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.<sup>134</sup> It has – to use the words of the AU – had every opportunity to give effect to an 'harmonised approach to justice and peace'.<sup>135</sup>

It is by now well known throughout the world that the ICC is expected to act in what is described as a 'complementary' relationship with states. The preamble to the Rome Statute underscores the intent to make the ICC's jurisdiction complementary to that of national jurisdictions. The starting point 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 the national level that the ICC may then be properly seized with jurisdiction.<sup>136</sup> The ICC's jurisdiction to act will only kick in where no good faith 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 ICC prosecutor notify all states parties and states with jurisdiction over a particular case, before beginning an investigation,<sup>137</sup> and the prosecutor cannot begin an investigation on his own initiative without first receiving the approval of a chamber of three pre-trial judges.<sup>138</sup> Vitaly 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 ICC would be obliged to suspend its investigation.<sup>139</sup> 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.<sup>140</sup> The thrust of the principle of complementarity is that the system effectively creates a presumption in favour of action to address mass crimes at the national level of the state.<sup>141</sup>

What about states – like Sudan – that are not party to the Rome Statute? Article 17, which sets out the complementarity regime, provides that the ICC 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 ICC 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.<sup>142</sup>

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.'<sup>143</sup> 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 ICC 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 Bashir must be assessed in the following light:

- First, any suggestion that the ICC's involvement should be displaced in favour 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, 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 Sudan.
- Second, the Darfur crisis came before the ICC for the right reason. That is because – as the UNSC recognised – 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 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 UNSC that the ICC'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 calibre 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 UNSC) 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 security in the region.<sup>144</sup> 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.<sup>145</sup> At the end of the day, it would be sensible to insist that any grant of deferral requested by the AU be predicated on a clear undertaking by Sudan that is morally guaranteed by the senior African leadership for implementation within a specific timetable.

## The ICC process in light of calls for peace

Should the AU and African states remain concerned about a prosecution or investigation by the ICC, it must be highlighted that there are mechanisms internal to the Rome Statute which provide a means for constructively raising those concerns.

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 by 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'.<sup>146</sup> The question then is what would qualify as a basis for declining to initiate an investigation 'in the interests of justice'. The term '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 favour prosecution. The Office of the Prosecutor (OTP) has indicated that there is a presumption in favour of prosecuting where the criteria stipulated in articles 53(1)(c) and 53(2)(c) have been met.<sup>147</sup> The OTP's policy paper on the interests of justice emphasises 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'.<sup>148</sup>

However, a state or a particular suspect may 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 the 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).<sup>149</sup> 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 ICC. Without a track record, it is not possible to predict with any accuracy whether such an interpretation would be adopted by the current or 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 ICC 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. However, for that to occur requires the approval of nine of the UNSC members and the lack of a contrary vote by any of the five permanent members. In those circumstances one can appreciate that the power of deferral – at a political level – will probably seldom be used and the independence of the judicial activity of the ICC will be effectively guaranteed.<sup>150</sup>

No doubt there are political criticisms that might be levelled at the UNSC being empowered to make such a decision, given its current composition. That concern will not be dealt with *in extenso* here. For our purposes, it suffices to note that the chapter VII (UN Charter) criteria will in any event have to be met. When the UNSC

referred the matter of 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 authorising 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 ICC process is a greater threat to peace and security than deferring altogether.<sup>151</sup>

According to this argument, the second appropriate process for (African) states to call for deferral of a prosecution is by continuing to engage with the UNSC to see how best to address its concerns. One way it could do so is to articulate clearly what the AU expects will be achieved by the relevant parties to the conflict if the 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.<sup>152</sup> The report stresses the need for prosecutions while at the same time underscoring the need for a broader and deeper understanding of the meaning of justice. Justice means more than only prosecuting those responsible for the worst abuses committed in Darfur – potentially including the creation of a hybrid court to try international crimes in conjunction with national and ICC prosecutions.<sup>153</sup>

The panel's work was given serious consideration by the UNSC on 21 December 2009. While it emphasised a more holistic approach to justice and peace in Sudan, seeing the two as complementary instead of being in opposition, it is clear that the panel took no position on the proposed hybrid court's relationship with the ICC in particular in relation to the Bashir case.<sup>154</sup> 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, the AU.

## RECOMMENDATIONS OF THE EXPERT WORKING GROUP

This expert study began with the writing of a draft position paper on the article 16 issue. The draft was then circulated to a group of African and international experts from civil society and government, who provided written comments and participated in a two-day meeting in Addis Ababa in June 2010 to discuss the draft paper. The recommendations in this section reflect the views of the expert group members. In contrast, proposals presented

elsewhere in this paper on options for amending article 16 were not agreed upon by members of the expert working group and were introduced by the three authors in light of the 15th AU summit decision in July 2010 on article 16.<sup>155</sup>

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 considered 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, the following recommendations are made 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.<sup>156</sup>

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 proposal at the 8th ASP. This apparently led to limited endorsement of the proposal by individual African states at the 8th 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.

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 favour 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 peace and security, since article 16 deferrals are only legally possible when chapter VII of the UN Charter is engaged. Furthermore, it is incumbent on those states and organisations seeking a deferral to timeously use all existing UNSC 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 UNSC, relevant regional organisations like the AU (which may be involved in peacemaking endeavours 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 ICC and African states.

Therefore, continental leaders should call for 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 ICC as that decision is not a general call for non-cooperation; it only calls for non-cooperation with respect to the arrest and surrender of Bashir.<sup>157</sup> 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 liaison office of the ICC to the AU. The letter, dated 3 June 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 15th 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'.<sup>15</sup>

African ICC states parties may also consider calling on the AU to extend an invitation to the ICC 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 organisations seeking a deferral under article 16 should make a reasoned case for such a deferral using all relevant UN procedures

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 UNSC, African states parties should remind the AU that the ICC 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 ICC 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 organisations to make out a reasoned case for deferral under article 16 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 ICC 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 organisations 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 UNSC.

**Recommendation 3:** Where credible alternative justice mechanisms exist, affected states and relevant intergovernmental organisations 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 organisations to consider whether the continuation of investigations or prosecutions before the ICC 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 Office of the Prosecutor 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 reconsideration by the Office of the Prosecutor of its 2007 Policy Paper on the Interests of Justice. 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 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 ICC 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.

Engaging the ICC on matters of admissibility has its merits. It makes it clear that the state concerned is not in favour 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 ICC 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.

## NOTES

- 1 Rome Statute of the International Criminal Court, Rome, 1998, art. 13(b).
- 2 Rome Statute, art. 16.
- 3 Dapo Akande, Africa and the International Criminal Court, EJIL Talk!, June 2009, <http://www.ejiltalk.org/africa-and-the-international-criminal-court/> (accessed 5 October 2010); Dapo Akande, Is the rift between Africa and the ICC deepening? Heads of states decide not to cooperate with the ICC on the Bashir case, EJIL Talk!, July 2009, <http://www.ejiltalk.org/is-the-rift-between-africa-and-the-icc-deepening-heads-of-states-decide-not-to-cooperate-with-icc-on-the-bashir-case/> (accessed 5 October 2010).
- 4 Security Council Resolution 1593, UN Doc S/RES/1593, 31 March 2005.
- 5 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'.
- 6 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’.

- 7 *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, 24 January 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’).
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- 9 Prosecutor v Ahmad Harun and Ali Kushayb, Case No ICC-02/05-01/07-2, Warrant of arrest for Ahmad Harun, 27 April 2007. Prosecutor v Ahmad Harun and Ali Kushayb, Case No ICC-02/05-01/07-3, Warrant of arrest for Ali Kushayb, 27 April 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, 29 July 2009.
- 10 Prosecutor v Omar Al Bashir, Case No ICC-02/05-01/09-1, Warrant of arrest for Omar Hassan Ahmad Al Bashir, 4 March 2009; Prosecutor v Omar Al Bashir, Case No ICC-02/05-01/09-1, Warrant of arrest for Omar Hassan Ahmad Al Bashir, 4 March 2009; Prosecutor v Omar Al Bashir, Case No ICC-02/05-01/09-1, Second warrant of arrest for Omar Hassan Ahmad Al Bashir, 12 July 2010.
- 11 UN SCOR, 64th Session, 6096th meeting, UN Doc S/PV.6096, 20 March 2009, 3–4, 15. (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 organisations 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 organisations ‘crossed the line’); UN SCOR, 60th Session, 5158th meeting, UN Doc S/PV.5158, 31 March 2005, 12-13. (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’).
- 12 Luis Moreno-Ocampo, Tenth report of the prosecutor of the International Criminal Court to the United Nations Security Council Pursuant to UNSCR 1593 (2005), 4 December 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), 5 June 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), 7 June 2006, 10 (noting that despite some cooperation by Sudan, a number of outstanding requests remain).
- 13 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, 25 May 2010.
- 14 Decision of the Meeting of African States Parties to the Rome Statute of the International Criminal Court, Doc Assembly/AU/13 (XIII), Addis Ababa, 1–3 July 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(CCVII), 29 October 2009, 5.
- 15 Decision of the Meeting of African States Parties, 3.
- 16 Ibid, 10.
- 17 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, 14 July 2009.
- 18 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 that and other proposals would be discussed at the 9th Session of the ASP in New York in December 2010. However, it was decided at the 8th ASP that the review conference will conduct a stocktaking of international criminal justice focusing on four topics: complementarity, cooperation, the impact of the Rome Statute system on victims and affected communities, and peace and justice.
- 19 William Schabas, *The International Criminal Court: A commentary on the Rome Statute*, Oxford: Oxford University Press, 2010, 333.
- 20 Ibid.
- 21 Prosecutor v Kambanda, Case No ICTR-97-23-S, Judgment and sentence, 14 September 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, 12 July 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 threw out charges of genocide that had also been requested by the ICC prosecutor. The prosecutor appealed this decision and on 3 February 2010 the appeals chamber rendered its judgment, reversing, by unanimous decision, Pre-Trial Chamber I's decision of 4 March 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', 3 February 2010.
- 23 Press release, Basheer and Kiir emerge winners, National Election Commission Republic of Sudan, <http://www.nec.org.sd/new/new/english/move.php?all=1&ct=1> (accessed 17 October 2010); see also James Copnall, Dream election result for Sudan's President Bashir, *BBC News*, 27 April 2010, <http://news.bbc.co.uk/2/hi/africa/8645661.stm> (accessed 6 October 2010).
- 24 See Sudan's coming elections: How did it come to this?, *Economist*, 14 January 2010.
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- 27 For more on the African role, see for example, Charles C Jalloh, Regionalising international criminal law?, *International Criminal Law Review* 9 (2009), 446–447, 445–499; Hassan Jallow and Fatou Bensouda, International criminal law in an African context, in Max du Plessis (ed), *African Guide to International Criminal Justice*, Pretoria: Institute for Security Studies, 2008, 41. 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, *African Security Review* 9, 2000.
- 28 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, September 2001, table 1; Contra Ifeonu Eberachi, Armed conflicts in Africa and Western complicity: A disincentive for African Union's cooperation with the ICC, *African Journal of Legal Studies* 3 2009, 53 (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).
- 29 See for example, Constitutive Act of the African Union, 2158 UNTS, 11 July 2000, 3; Protocol Relating to the Establishment of the Peace and Security Council of the African Union, AU Assembly, 1st Ordinary Session, 9 July 2002; Jalloh, Regionalising international criminal law?, 456.
- 30 Letter from Manzi Bakuramutsa, Permanent Representative of Rwanda, to the President of the UNSC, UN Doc S/1994/1115, 29 September 1994; Letter from Alhaji Ahmad Tejan Kabbah, President of the Republic of Sierra Leone, to the President of the UNSC, 12 June 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, 10 August 2000.
- 31 See Jalloh, Regionalising international criminal law?, 447; Jallow and Bensouda, International criminal law in an African context, 41.
- 32 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.
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- 34 William A Schabas, *An introduction to the International Criminal Court*, 3rd ed, Cambridge: Cambridge University Press, 2007, 19.
- 35 Jalloh, Regionalising international criminal law?, 446–447.
- 36 William Burke-White, Proactive complementarity: The International Criminal Court and national courts in the Rome System of justice, *Harvard International Law Journal* 53 (2008), 49.
- 37 Payam Akhavan, Self-referrals before the International Criminal Court: Are states the villains or the victims of atrocities? *Criminal Law Forum* 1046 (2010), 21; Mohamed M El Zeidy, Critical thoughts on article 59(2) of the ICC statute, *Journal of International Criminal Justice* 448 (2006), 4; Claus Kress, 'Self-referrals' and 'waivers of complementarity': Some considerations in law and policy, *International Criminal Justice* 944 (2004), 2.
- 38 Press release, Registrar confirms that the Republic of Côte d'Ivoire has accepted the jurisdiction of the Court, Registrar, ICC, 15 February 2005.
- 39 Press release, Kenyan high-level delegation meets ICC prosecutor, Office of the Prosecutor, ICC, 3 July 2009; Situation in the Republic of Kenya, Case No ICC-01/09-19, Decision pursuant to article 15 of the Rome Statute on the authorisation of an investigation into the situation in the Republic of Kenya, 31 March 2010.

- 40 Sudan was admitted to the UN on 4 December 1975. United Nations Member States, <http://www.un.org/en/members/index.shtml> (accessed 21 May 2010). Sudan signed the Rome Statute on 8 September 2000, but sent a communication on 26 August 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. UN Treaty Collection, [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mt\\_dsg\\_no=XVIII-10&chapter=18&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mt_dsg_no=XVIII-10&chapter=18&lang=en) (accessed 17 October 2010).
- 41 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').
- 42 Rome Statute, art. 16.
- 43 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*, 2nd ed, Baden Baden: Nomos Verlagsgesellschaft, 2008, 595, 598; Luigi Condorelli and Santiago Villalpando, Referral and deferral by the Security Council, in Antonio Cassese, Paolo Gaeta and John RWD Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford: Oxford University Press, 2002, 645.
- 44 *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, 49. 2 Year Book, International Law Commission, UN Doc A/49/10, 27.
- 45 Condorelli and Villalpando, Referral and deferral by the Security Council, 645.
- 46 *Ibid.*, 646.
- 47 Security Council Resolution 1422, UN Doc S/RES/1422, 12 July 2002, 1.
- 48 *Ibid.*
- 49 Sean D Murphy, Efforts to obtain immunity from ICC for US peacekeepers, *American Journal of International Law* 96 (2002), 725, 725–727. See also the statement by the United States' representative at the UNSC's meeting of 10 July 2002 (UN Doc S/PV/4568, pp 9–10). For academic comment on the subject, see inter alia Carsten Stahn, The ambiguities of Security Council Resolution 1422, *European Journal of International Law* 85 (2003), 14; 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, *Criminal Law Forum* 195 (2003), 14.
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- 51 *Ibid.*
- 52 UN SCOR, 58th Session, 4772nd meeting, UN Doc S/PV.4772, 12 June 2003, 11.
- 53 *Ibid.* (Felipe Paolillo of Uruguay sees discriminations among peacekeepers as a deep injustice; all peacekeepers, he argued, 'must be subject to the same rules and work under the same Statute').
- 54 *Ibid.*
- 55 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, 12 July 2002.
- 56 UN SCOR, 58th Session, 8–9.
- 57 See Robert Cryer, Hakan Friman, Darryl Robinson, and Elizabeth Wilmshurst, *An Introduction to International Criminal Law and Procedure*, Cambridge: Cambridge University Press, 2007, 138.
- 58 Vienna Convention on the Law of Treaties, art. 31(1), 1155 UNTS 33127, January 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').
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- 60 UN SCOR, 57th Session, 4568th meeting, UN Doc S/PV.4568 (Resumption 1), 10 July 2002, 9. See Pressemitteilung, Erklärung von Bundesaußenminister Joschka Fischer zur Entscheidung des VN-Sicherheitsrates vom 12.07. 2002, 15 July 2002, [http://www.news-monitoring.org/new/standard/result\\_main.cfm?fach=1&n\\_firman\\_=109207&sektor=pm&detail=1&r=99654&sid=&aktion=jour\\_pm&quelle=0&profisuche=1](http://www.news-monitoring.org/new/standard/result_main.cfm?fach=1&n_firman_=109207&sektor=pm&detail=1&r=99654&sid=&aktion=jour_pm&quelle=0&profisuche=1) (accessed 5 October 2010).
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- 66 See generally, Annalisa Ciampi, The proceedings against President Al Bashir and the prospects of their suspension under article 16 ICC Statute, *International Criminal Justice* 885 (2008), 6. 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 stabilisation 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.
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- 68 UN SCOR, 60th Session, 5158th meeting, UN Doc S/PV.5158, 31 March 2005, 4.
- 69 Prosecutor v Tadic, Case No It-94-1-I, Decision on the defence motion for interlocutory appeal on jurisdiction, 2 October 1995, 29.
- 70 See Ciampi, The proceedings against President Al Bashir, 888–890.
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- 72 See Ibid, 2–3; Communiqué of the 142nd meeting, 2, 5, 9, 11(i); Communiqué of the 175th meeting, 4–6.
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- 89 Decision on the Meeting of African states parties to the Rome Statute, 8(v).
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- 99 Decision on the Report of the Second Meeting of States Parties.
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- 105 Certain expenses of the United Nations, Advisory opinion, International Court of Justice, July 20 1962, 151.
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