Deferrals of Investigations and Prosecutions in the International Criminal Court

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Abstract
In its efforts to stifle the prosecution of Sudanese President Omar al-Bashir from prosecution in the ICC, the AU has appealed to the Security Council of the United Nations to order the deferral of proceedings against the accused within the confines of Article 16 of the ICC Statute. The AU has also submitted a proposal for the amendment of Article 16 of the ICC Statute. The proposed amendment would: (a) authorise states with jurisdiction in a particular situation to request the Security Council to use its Article 16 powers; and (b) grant the power to defer proceedings in the ICC to the General Assembly in cases where the Security Council, within a period of six months, fails to take action under Article 16. The fact, though, is that Article 16 was inserted into the ICC Statute to avoid a conflict of interest between the Security Council and the ICC in cases where both institutions are seized with investigations into the same situation. The Security Council could not use its Article 16 powers in the case against al-Bashir because it was not engaged in an investigation into the situation in Darfur. The proposed amendment of the ICC Statute is in total conflict with the true meaning of Article 16 as reflected in the history and purpose of its creation.

INTRODUCTION

On 4 March 2009, a pre-trial chamber of the International Criminal Court (ICC) issued a warrant for the arrest of President Omar Hassan Ahmad al-Bashir of Sudan, to stand trial in the ICC on several charges. These charges were based on crimes he allegedly committed against humanity (murder, extermination, rape, torture, and forcible transfer) and war crimes (intentionally directing attacks against the civilian population or individual civilians, and pillage) in the Sudanese province of Darfur.[1] Charges based on the crime of genocide were subsequently included in the warrant for

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1 *Prosecutor v Omar al-Bashir (Decision on the Prosecutor's Application for a Warrant of Arrest against Omar Hassan Ahmad al-Bashir*) Case No ICC-02/05-01/09-3 (4 March 2009).

his arrest.[2] The situation in Darfur was referred to the ICC by the Security Council of the United Nations.[3] On 6 March 2009, a pre-trial chamber of the ICC requested all states parties to the Rome Statute of the International Criminal Court (the ICC Statute) to arrest and surrender the Sudanese president for trial in the ICC.[4]

The indictment of President al-Bashir triggered negative responses from the African Union (AU). At a meeting held in July 2009, the AU endorsed a decision of the African states parties to the Rome Statute of the ICC, which proclaimed that, 'AU Member States shall not cooperate pursuant to the provisions of Article 98 of the Rome Statute of the ICC relating to immunities,[5] for the arrest and surrender of President Omar El Bashir [*sic*] of The Sudan.'[6] In response to the indictments of African heads of state, on 1 February 2017 the AU issued a resolution based on a decision of 31 January 2017 encouraging its members to withdraw from the ICC.[7]

This article responds to the somewhat distorted comment of Pavlopoulos on the judgment of the Supreme Court of Appeal (SCA) relating to the failure of South Africa to execute the warrant for the arrest of President al-Bashir, and instead safeguarding his safe departure from the country in contempt of an order of court.[8] In essence, Pavlopoulos'[9] comment supported decisions of the AU that its member states are obliged to respect the immunities of heads of state and should therefore decline to execute the warrant issued by the ICC for the arrest of the Sudanese President. This response does not deal

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2 *Prosecutor v Omar Hassan Ahmad al-Bashir (Second Warrant of Arrest for Omar Hassan Ahmad al-Bashir)*, Case No ICC-02/05-01/09-59 (21 July 2009).

3 SC Res 1593 (2005) of 31 March 2005, UN Doc S/RES/1593 (2005).

4 *Prosecutor v Omar Hassan Ahmad al-Bashir* (*Request to All States Parties to the Rome Statute for the Arrest and Surrender of Omar al-Bashir*) Case No ICC-02/05-01/09-7 (6 March 2009); and see also *Prosecutor v Omar Hassan Ahmad al-Bashir* (*Supplementary Request to All States Parties to the Rome Statute for the Arrest and Surrender of Omar Hassan Ahmad al-Bashir*) Case No ICC-02/05-01/09-96 (21 July 2010).

5 Statute of the International Criminal Court, Art 98(1), UN Doc A/CONF 183/9 (17 July 1998) as corrected by *procès-verbaux* of 10 November 1998, 12 July 1999, 30 November 1999, 8 May 2000, 17 January 2001 and 16 January 2002 (hereinafter ICC Statute) further stating that: 'The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.'

6 *Decision of the Meeting of African States Parties to the Rome Statute of the International Criminal Court* (*ICC*) para 10 UN Doc Assembly/AU/13(XIII) (3 July 2009).

7 Withdrawal Strategy Document (12 January 2017) <https://www.hrw.org/sites/default/files/supporting_resources/icc-withdrawal-strategy-jan.-2017.pdf.> access 24 April 2018.

8 *Democratic Alliance v Minister of International Relations and Cooperation & Others* (*Council for the Advancement of the South African Constitution and Sovereignty Intervening*), 2017 (3) SA 212 (GP); [2017] 2 All SA 123 (GP) (22 February 2017).

9 Nikolaos Pavlopoulos, 'South Africa's Failure to Arrest President al-Bashir: An Analysis of the Supreme Court of Appeal's Decision and its Implications' (2016) XLIX (2) CILSA 164.

with the ongoing disputes regarding al-Bashir's immunity from arrest.[10] It focuses on the power of the Security Council of the UN to instruct the office of the prosecutor of the ICC to defer an investigation or prosecution for a renewable period of twelve months as provided for in Article 16 of the ICC Statute.

The AU submitted repeated commendations for the implementation of Article 16 to prevent the prosecution of President al-Bashir in the ICC. However, it will be demonstrated that the AU misinterpreted Article 16 by failing to understand its meaning and purpose within the context of its legislative history. Being a treaty provision, in terms of the Vienna Convention on the Law of Treaties, Article 16 of the ICC Statute must 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 the light of its object and purpose.'[11] Recourse may be had to 'the preparatory work of a treaty and the circumstances of its conclusion' in order to confirm the meaning resulting from giving effect to the wording of a provision in the treaty in its proper context and in light of its object and purpose.[12]

HISTORICAL PERSPECTIVE

Article 16 of the ICC Statute provides that

> [n]o 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.[13]

It might be noted that a request of the Security Council under its Article 16 powers is a binding instruction. It is important to also emphasise that Article 16 is derived from efforts of the United States of America (the US) to protect American nationals (and those of some other states) from prosecution in the ICC.

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10 See in this regard Johan van der Vyver, 'Prosecuting the President of Sudan: A Dispute between the African Union and the International Criminal Court' (2011) 11(2) AHRLJ 683; Johan van der Vyver, 'The Al Bashir Debacle' (2015) 15(2) AHRLJ 559; Johan van der Vyver, 'The Threat of African Countries to Withdraw from the International Criminal Court' (forthcoming). Arguments similar to those advanced by Pavlopoulos were rejected by the ICC in *Prosecutor v Omar Hassan Ahmad al-Bashir* (*Decision under Article 87(7) of the Rome Statute on the Non-Compliance by South Africa with the Request by the Court for the Arrest and Surrender of Omar Al-Bashir*) Case No. ICC-02/05-01/09-302 (6 July 2017).

11 Vienna Convention on the Law of Treaties 1969, Art 31(1) UN Doc A/Conf 39/27 (23 May 1969), 1155 UNTS 331, reprinted in 8 ILM 679 (1969).

12 Id Art 32.

13 ICC Statute (n 5) Art 16.

It has been argued that the US approached the establishment of an international criminal court with preconceived notions that can best be described as 'cautious and indifferent'.[14] This was perhaps in conformity with the historical assessment of John Cerone, who concluded:

> [t]he US has tended to support international criminal courts where the US government has (or is perceived by US officials to have) a significant degree of control over the court, or where the possibility of prosecuting US nationals is either expressly precluded or otherwise remote.[15]

Over time the US has seemingly become supportive of an international criminal tribunal.[16] In 1989 Trinidad and Tobago proposed to the United Nations (UN) General Assembly that an international criminal court be established in order to prosecute persons engaged in international drug trafficking.[17] In response, the UN General Assembly decided 'to consider the question of establishing an international criminal court or other international criminal mechanism'.[18] This decision eventually culminated in the creation of the ICC by the Rome Conference of Diplomatic Plenipotentiaries in 1998. Even before Trinidad and Tobago revived the UN-involvement in the creation of an international criminal court, the US senate noted:

> [i]t is the sense of the Senate that the President should begin discussions with foreign governments to investigate the feasibility and advisability of establishing an international criminal court to expedite cases regarding the

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14 Timothy Evered, 'An International Criminal Court: Recent Proposals and American Concerns', (1994) 6 Pace Intl LR 157.

15 John Cerone, 'Dynamic Equilibrium: The Evolution of US Attitudes toward International Criminal Courts and Tribunals' (2007) 18 European J Intl L 315.

16 See Benjamin Ferencz 'International Criminal Courts: The Legacy of Nuremberg' (1998) 10 Pace Intl LR 226–227, referring to statements of President Bill Clinton and US Ambassador to the UN Bill Richardson in support of the ICC; David Stoelting, 'Status Report on the International Criminal Court' (1999) 3 Hofstra Law and Policy Symposium 276–282.

17 See Herman von Hebel, 'An International Criminal Court: A Historical Perspective' in Herman von Hebel, Johan Lammers and Julian Schukking (eds), *Reflections on the International Criminal Court*: *Essays in Honour of Adriaan Bos* (TMC Asser 1999) 27; Gabriella Venturini, 'War Crimes' in Flavia Lattanzi and William Schabas (eds), *Essays on the Rome Statute of the International Criminal Court* (Vol 1, Il Sirente 1999) 180; Patrick Robinson, 'The Missing Crimes' in Antonio Cassese, Paola Gaeta and John Jones (eds), *The Rome Statute of the International Criminal Court*: *A Commentary* (Vol 1, OUP 2002) 499–500; Dominic McGoldrick, 'Criminal Trials before International Tribunals, Legacy and Legitimacy' in Dominic McGoldrick, Peter Rowe and Eric Donnelly (eds), *The Permanent International Criminal Court*: *Legal and Policy Issues* (Hart 2004) 14–20; Thomas Smith, 'Moral Hazard and Humanitarian Law*:* The International Criminal Court and the Limits of Legalism' (June 2002) 39 International Politics 180; Cerone (n 16) 279–90.

18 GA Res 44/39 of 4 December 1989, 44 GAOR Supp No (49) 311 UN Doc A/44/39 (1989).

> prosecution of persons accused of having engaged in international drug trafficking or having committed international crimes.[19]

The US senate instructed the President to see to it that 'such a court shall not have jurisdiction over the extradition of United States citizens', and that 'the rights and privileges guaranteed by the United States Constitution to United States citizens under the United States Constitution', shall remain intact.[20]

On 30 July 1997, the House of Representatives introduced a joint resolution of congress. This resolution proclaimed that '[t]he time is right for the creation of a permanent international criminal court.'[21] It also called on the President to 'continue to support and fully participate in negotiations at the United Nations and especially in the preparatory committee to establish an international criminal court with jurisdiction over serious international crimes, including war crimes, genocide, and crimes against humanity.'[22] The House of Representatives' joint resolution was referred to the Committee on International Relations, where it seemingly died a natural death. This perhaps, was a clear indication of what was to come.

From the outset, the US insisted that American nationals must under no circumstances be subject to the jurisdiction of the ICC. It initially sought to retain the control of prosecution of American nationals in the ICC by subordinating the exercise of jurisdiction by the ICC to the control of the Security Council,[23] with its veto powers in the Security Council as the ultimate trump card. The paradox of submitting, on the one hand, that the ICC will inevitably (or may) become politicised,[24] or might not act impartially,[25] and then on the other hand, proposing that the Security

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19 International Narcotics Control Act of 1988, PL 100-690 sec 4108(a) 102 Stat 4261, 4267 (1988).

20 ibid para 4108(b).

21 HJ Res 89 sec 1 cl (24) 105th Congress, 1st Session (30 July 1997).

22 Id sec 1 cl (2).

23 William Schabas, 'The International Criminal Court: The Secret of Its Success' (2001) 12 Criminal L Forum 421–424.

24 Cara Levy Rodriquez, 'Slaying the Monster: Why the United States Should Not Support the Rome Treaty' (1999) 14 American University Intl LR 833; James Blount Griffin, 'A Predictive Framework for the Effectiveness of International Criminal Tribunals' (2001) 34 Vanderbilt J Transnational L 451–453, stating that the lack of checks on the ICC Prosecutor 'create opportunities for prosecutorial abuse' and likening it to the US office of independent counsel, with the added assessment that the ICC Prosecutor's powers are broader than those of the independent counsel; Smith (n 17) 179, maintains that 'to believe that the Court will be free of political taint' would be to deny history; see John Bolton, 'Courting Danger: What's Wrong With the International Criminal Court' (Winter 1998/99) 54 The National Interest 66 n 8, depicts, somewhat squeamishly, that insertion in the ICC Statute of Art 8(2)(b)(viii)—pertaining to population resettlements in occupied territories—as 'an excellent example of the politicization of what is masquerading as a purely legal process.'

25 Rodriquez (n 24) 837.

Council veto of ICC actions as an appropriate remedy,[26] should not pass unnoticed.

In marketing its preference for Security Council authorisation of all prosecutions in the ICC, the US subjected its proposal to several preconditions. For example, it proposed that the Security Council will not submit a 'complaint' to the ICC but will simply refer 'a situation' to the ICC, leaving the prosecuting office fully autonomous to decide whether to prosecute, whom to prosecute, and for what crime. Although, for obvious reasons, the US could not convince the international community that approval of all prosecutions in the ICC by the Security Council was acceptable, a substantial number of participating states thought that referring a situation instead of submitting a complaint was a good idea.[27] This was ultimately included in the ICC Statute in the case of state party and Security Council referrals.[28]

The US also maintained that an investigation by the office of the prosecutor might come into conflict with an inquiry conducted by the Security Council under its Chapter VII powers to determine whether a situation constitutes a threat to the peace, a breach of the peace, or an act of aggression. The drafters of the ICC Statute also conceded to this, which eventually culminated in the inclusion of Article 16. The Draft Statute for an International Criminal Court forwarded to Rome by the International Law Commission consequently contained a provision proclaiming that

> [n]o 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 [UN] Charter, unless the Security Council otherwise decides.[29]

This provision had the support of the US and others but was unacceptable to a vast majority of delegations. It meant, for example, that any one of the five permanent members of the Security Council could veto the decision authorising the prosecution to proceed with an investigation. The matter

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26 ibid 841–842.

27 The Draft Statute for an ICC prepared by the International Law Commission referred to investigations and prosecutions being triggered by 'a complaint'. The Draft Statute for an ICC, contained in *Report of the International Law Commission on the Work of its Forty-Ninth Session 2 May–22 July 1994*, 49 UN GAOR Supp (No 10) UN Doc A/49/10 (1994).

28 ICC Statute (n 5) Art 13(a) and (b).

29 The Draft Statute for an ICC (n 27) Art 23(3).

was finally resolved through a compromise proposed by Singapore,[30] which would reverse the power of the Security Council to suspend proceedings pending in the ICC. If the Security Council is seized with the particular matter under its Chapter VII powers, this will not automatically suspend the proceedings in the ICC, but the Security Council can request the ICC to defer an investigation or prosecution deriving from a situation with which the Security Council is seized. The effect of the Singapore proposal was that a majority in the Security Council, including all five Permanent Members, would have to consent to the deferral of proceedings in the ICC (each Permanent Member would have the power to veto a decision to defer).[31]

Even before the Rome Conference, the Singapore compromise had gained wide support among a cross-section of the delegations. There were even indications that the US would be willing to abandon its position on the Security Council's control of all prosecutions. This was subject to the condition that the suspension of proceedings by the Security Council would not be subjected to a time limit, and that state consent for the prosecution of its citizens in the ICC (except in cases where the investigation originated from a Security Council referral) would be included in the Statute. However, on 11 August 1997, Canada took the lead by proposing that a deferral of proceedings in the ICC pursuant to a Security Council decision must be

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30 The Singapore Compromise emerged from discussions in the Preparatory Committee at its session of 4–15 August 1997 and was contained in Non-Paper WG 3/No 16 (8 August 1997) and reflected in *Decisions Taken by the Preparatory Committee at Its Sessions Held from 4 to 15 August 1997*, Art 23 para 3 option 2, UN Doc A/AC 249/1997/L8/Rev 1 (1997). It was reflected as a bracketed option in the Draft Statute that constituted the basis of the proceedings of the Rome Conference. *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, Art 10, UN Doc A/CONF 183/2/Add.1 (14 April 1998).

31 See Bruce Broomhall, *International Justice and the International Criminal Court*: *Between Sovereignty and the Rule of Law* (OUP 2003) 82; Franklin Berman, 'The Relationship between the International Criminal Court and the Security Council' in Von Hebel and others (n 17) 177–178; Andreas Zimmermann, 'Die Schaffung eines ständigen Internationalen Strafgerichtshofes: Perspektiven und Probleme vor der Staatenkonferenz in Rom' (1998) 58 Zeitschrift Für Ausländisches Öffentlisches Recht Und Völkerrecht 96; Kai Ambos, 'The International Criminal Court and the Traditional Principles of International Cooperation in Criminal Matters' (1998) 9 Finnish Yearbook of Intl L 416; Bolton (n 24) 67–68; Marten Zwanenburg, 'The Statute for an International Criminal Court and the United States: Peacekeeping Under Fire?' (1999) 10 European J Intl L 137–138; Lionel Yee, 'The International Criminal Court and the Security Council: Articles 13(b) and 16' in Roy Lee (ed), *The International Criminal Court*: *The Making of the Rome Statute*: *Issues, Negotiations, Results* (Kluwer Law 1999) 150–151; Pietro Gargiulo, 'The Controversial Relationship between the International Criminal Court and the Security Council' in Lattanzi and others (n 17) 88–90; Vesselin Popovski, 'International Criminal Court: A Necessary Step towards Global Justice' (2000) 31(4) Security Dialogue 410; Luigi Condorelli and Santiago Villalpando, 'Referral and Deferral by the Security Council' in Cassese and others (n 17) 644–646; Juan Antonio Yáñez-Barnuevo and Concepción Escobar Hernández, 'The International Criminal Court and the United Nations: A Complex and Vital Relationship' in Flavia Lattanzi and William Schabas (eds), *Essays on the Rome Statute of the International Criminal Court* (Vol 2, Il Serente 2004) 53.

subject to a time limit of twelve months.[32] At the Rome Conference, a Spanish proposal, in turn, included a passage that rendered the twelve months deferral renewable for a further period of twelve months.[33] Belgium added its influence to the issue with a proposal, which afforded the prosecutor a right to take necessary measures to preserve evidence that might go astray during the deferral of proceedings.[34]

The competence of the Security Council to defer an investigation or prosecution in the ICC was finally addressed in Article 16 of the ICC Statute—that in its present form derived from a proposal of the UK on procedural issues submitted to the Preparatory Committee in its final session before the Rome Conference.[35]

For purposes of the present survey, it is important to note that the purpose of Article 16 is to ensure that the competence of the Security Council to determine the existence of and to act upon a threat to the peace, a breach of the peace, or an act of aggression, will not be stifled or prejudiced by

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32 See Gargiulo (n 31) 88 n 53.

33 *Proposal for Article 10 submitted by Spain*, UN Doc A/CONF183/C1/L20 (25 June 1998). A Report of the Trigger Mechanisms and Admissibility Team of the CICC, dated 10 June 1998, revealed the following country positions in regard to the proposed power of the Security Council to defer investigations and prosecutions in the ICC in cases where the Security Council is seized with the situation from which the investigation stems under its Chapter VII powers: the first option, requiring a decision of the Security Council authorising the investigation or prosecution to proceed (with the power of any of the Permanent Members to veto that authorisation, which in effect means that any one of the Permanent Members can through its veto prevent the investigation or prosecution from going ahead) was supported by only one delegation (Malawi); option two (the Singapore proposal) vests in the Security Council the power to decide that the investigation or prosecution may not go ahead (with the power of any of the Permanent Members to veto that decision, which in effect means that all the Permanent Members must support the deferral of the investigation or prosecution) was supported by thirty-two delegations, with differences of opinion within their ranks as to whether the deferral should be subject to a time limit, and further differences of opinion as to whether the deferral should be renewable; and the third option, affording no role to the Security Council at all, was endorsed by eleven delegations (Egypt, Iraq, Libya, Nigeria, Oman, Pakistan, Senegal, Sudan, Syria, Tunisia, and Venezuela). See Gerhard Hafner and others, 'A Response to the American View as Represented by Ruth Wedgwood' (1999) 10 European J Intl L 114–115.

34 *Proposal submitted by Belgium* UN Doc A/CONF 183/C1/L7 (19 June 1998).

35 *Proposal submitted by the United Kingdom* UN Doc A/AC 249/1998/WG 3/DP 1 (25 March 1998); and see Morten Bergsmo, 'The Jurisdictional Régime of the International Criminal Court (Part II, Articles 11-19)' (1998) European J Crime, Criminal L and Criminal Justice 358 n 39.

ICC action;[36] or, as stated by Bergsmo and Pejić, to serve as 'the vehicle for resolving conflicts between the requirements of peace and justice where the Council assess that the peace efforts need to be given priority over international criminal justice.'[37] Given this incentive for the provision, it makes sense that the Security Council may only exercise its power to defer an investigation or prosecution in the ICC if it (the Security Council) is seized with the situation concerned. It must be emphasised that the Security Council's power of deferral should be interpreted restrictively.[38]

The AU evidently lost sight of the notion of *travaux préparatoires* and the essential meaning of Article 16.

PERCEPTIONS OF THE AFRICAN UNION

At the Review Conference of the Assembly of States Parties of the ICC, held in Kampala, Uganda from 31 May to 11 June 2010, speaking in its capacity as Chair of the AU, Malawi stated that the indictment of heads of state could jeopardise the effective cooperation of African states with the ICC. It should be noted, though, that sovereign immunity of heads of state is a component of state sovereignty and therefore only applies to prosecutions in a national court and not to prosecutions in international tribunals.[39] The AU consequently sought to invoke Article 16 of the ICC Statute as a

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[36] See Berman (n 31) 176; Roy Lee, 'Introduction' in Roy Lee (ed), *The International Criminal Court*: *The Making of the Rome Statute*: *Issues, Negotiations, Results* (Kluwer Law 1999) 36; see Rosalyn Higgins, 'The Relationship between the International Criminal Court and the International Court of Justice' in Von Hebel and others (n 17) 165–167, noting, by contrast, that the exercise of jurisdiction by the International Court of Justice is not suspended by the Security Council being seized with the same matter; Frederik Harhoff, 'The Role of the Parties Before International Criminal Courts in Light of the International Criminal Tribunal for Rwanda' in Horst Fischer, Klaus Kreß and Sascha Rolf Lüder (eds), *International and National Prosecution of Crimes Under International Law*: *Current Developments* (Arno Spits GmfH 2001) 647, noting that the purpose of Article 16 is 'to provide sufficient time and opportunity for the Council to solve the conflict and maintain or restore international peace and security without having to endure any further complications to this process arising out of the Prosecutor's indictments against Government or military leaders in the conflict State.'

[37] Morten Bergsmo and Jelena Pejić, 'Deferral of Investigation or Prosecution' in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court* (Nomos Verlagsgesellschaft 1999) 378; see Mahnoush H Arsanjani, 'Reflections on the Jurisdiction and Trigger Mechanism of the International Criminal Court' in Von Hebel and others (n 17) 71–72; Morten Bergsmo, 'Occasional Remarks on Certain State Concerns about the Jurisdictional Reach of the International Criminal Court, and Their Possible Implications for the Relationship between the Court and the Security Council' (2000) 69 Nordic J Intl L 112–113; Dan Sarooshi, 'The Peace and Justice Paradox: The International Criminal Court and the UN Security Council International Tribunals' in McGoldrick and others (n 17)105–106.

[38] Condorelli and Villalpando (n 31) 646–647.

[39] See *Prosecutor v Omar Hassan Ahmad al-Bashir* (*Decision Pursuant to Article 87(7) of the Rome Statute on the Failure of Malawi to Comply with the Co-operation Request Issued by the Court with respect to the Arrest and Surrender of Omar Hassan Ahmad al-Bashir*) Case No ICC-02/05-01/09-139 para 18 (12 December 2011); *Prosecutor v Charles Taylor* 128 LR 289 para 42, 51 (31 May 2004); Van der Vyver, 'The Al Bashir Debacle' (n 10) 570–573.

mechanism to delay further action against President al-Bashir and to amend that provision to make it more amenable for future use by African states.

The AU initially requested the Security Council to defer the proceedings against President al-Bashir under its Article 16 powers. However, this request could not be met because the Security Council was not seized with the situation in Darfur pursuant to its Chapter VII powers as required by Article 16. Furthermore, since the Security Council referred the situation in Darfur to the ICC, it would be inconceivable for the Security Council to instruct the ICC to defer its proceedings emanating from that very same referral.

Proponents of invoking an Article 16 deferral of proceedings against President al-Bashir also maintained that the pending case against the Sudanese President obstructed the peace efforts orchestrated by the AU in Darfur. However, worth noting is that the AU commenced peace talks in Darfur only after the indictment of President al-Bashir.[40] The conflict that might arise between retributive justice (prosecution) and restorative justice (establishing peace) is indeed compelling and was the theme of one of the stocktaking subjects at the Review Conference of 2010. Whereas the earlier debates emphasised the dichotomy between retributive justice and restorative justice, the Review Conference endorsed the view that peace presupposes justice. There can be no peace without justice, or as stated by UN Secretary-General Ban Ki-moon in his address at the Review Conference on 'an [the] age of accountability', having to choose between peace and justice 'is a false choice'.[41] In a similar vein, the ICC President, Sang-Hyun Song, stated that 'if peace and justice are not pursued "hand-in-hand", we risk losing both'.[42] According to former UN Secretary-General Kofi Annan,

> [t]he choice between justice and peace is no longer an option. We must be ambitious enough to pursue both, and wise enough to recognize, respect and protect the independence of justice.[43]

Existing ICC jurisprudence would prevents the Office of the Prosecutor from withdrawing existing charges in order to promote peace efforts. Following

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40 See Juan E Méndez, 'The Importance of Justice and Security' para 16, ICC Doc RC/ST/PJ/INF 3 (30 May 2010).

41 The Secretary-General, 'An Age of Accountability' Address to the Review Conference of the International Criminal Court (Kampala, 31 May 2010) <http://www.icc-cpi.int/iccdocs/asp_docs/RC2010/Statements/ICC-RC-statements-BanKi-moon-ENG.pdf> access 24 April 2018.

42 Judge Sang-Hyun Song, 'Opening Remarks to the Review Conference' <http://www.icc-cpi.int/iccdocs/asp_docs/RC2010/Statements/ICC-RC-statements-JudgeSong-ENG.pdf.> access 24 April 2018.

43 Address by HE Mr Kofi Annan (31 May 2010) <http://www.icc=cpi.int/iccdocs/asp_docs/RC2010/Statements/ICC-RC-statements-KofiAnnan-ENG.pdf.> access 24 April 2018.

the indictment of high-ranking officials of the Lord's Liberation Army for atrocities committed in Uganda, the leader of the group, Joseph Kony, offered to engage in peace talks with the Ugandan authorities on condition that charges against him in the ICC be dropped. However, following a decision of the ICC to issue warrants of arrest, the matter was no longer in the hands of the Ugandan Government. In his report of 12 October 2006, the prosecutor of the ICC commented as follows on the stalemate that had emerged in this regard:

> [t]he interplay between conflict resolution initiatives and justice has been most evident in the situation of Northern Uganda but the Office [of the Prosecutor] expects this to arise in most of the situations under investigation and thus to present an on-going challenge. As investigations will often take place within an on-going conflict, the Office will be investigating and prosecuting at the same time that other actors are working to address the conflict and restore civilian livelihoods. Broadly, these conflict resolution initiatives might include efforts to provide security, humanitarian relief, peace building, as well as justice. The mandate of the Office is to secure accountability for those who bear the greatest responsibility alongside national proceedings and other community initiatives. The Office recognises that, while each actor needs to pursue its respective initiatives, efforts to build long-standing stability require harmonization of these efforts. However, in order to preserve its impartiality, the Office cannot be a component of these initiatives. The Office policy is to maintain its own independence and pursue its mandate to investigate and prosecute, and do so in a manner that respects the mandates of others and attempts to maximise the positive impact of the joint efforts of all actors.[44]

The AU finally proposed an amendment of Article 16 for consideration by the Kampala Review Conference, which was submitted by the Republic of South Africa on behalf of the AU states parties to the ICC Statute.[45] The proposal calling for an amendment of Article 16 was drafted at the AU's ministerial meeting on the Rome Statute of the International Court held in

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[44] 'The Office of the Prosecutor, 'Report on the Activities Performed during the First Three Years (June 2003–June 2006)' (The Hague, 12 September 2006) para 32.

[45] 'African Union States Parties to the Rome Statute', in 'Report of the Working Group on the Review Conference', *Assembly of States Parties to the Rome Statute of the International Criminal Court, Eighth Session, The Hague, 18–26 November 2009*, Annex II, Appendix VI at 70. The proposal was submitted to the Secretary General of the United Nations in a verbal note (18 November 2009). See 'Report [to the Executive Council of the African Union] of the Commission on the Outcome of the 8th Session of the Assembly of States Parties to the Rome Statute of the ICC held at The Hague, Netherlands from 16 to 26 November 2009', Doc EX/CL/568(XVI) Annex 2.

Addis Ababa, Ethiopia on 6 November 2009,[46] and was endorsed by the AU at its summit meeting in Addis Ababa from 31 January to 2 February 2010.[47] The proposal, which was clearly informed by the negative reaction of the AU to the indictment of President al-Bashir,[48] was introduced by Sudan and other non-party states. It requested two additions to Article 16, namely

- that a state with jurisdiction of a situation before the Court must be granted the competence to request the Security Council to defer investigations or prosecutions under its Article 16 powers; and
- if within a period of six months after it received such a request, the Security Council fails to take a decision to suspend proceedings in the ICC, the state concerned may then request the General Assembly 'to assume the Security Council's responsibility', to suspend the proceedings as provided for in Article 16 'consistent with Resolution 377(V) of the UN General Assembly.'[49]

Noteworthy is that Resolution 377(V) is the Uniting for Peace Resolution of 1950, which afforded the General Assembly the power to assume the responsibilities of the Security Council under Chapter VII of the UN Charter. This is in case where the Security Council has been immobilised by the veto power of its Permanent Members, and more in particular, for the General Assembly to 'consider the matter immediately with a view to making appropriate recommendations to its members for collective measures, including in the case of a breach of the peace or an act of aggression, the use of armed force when necessary, to maintain or restore international peace and security.'[50]

However, the Assembly of States Parties decided to confine the agenda of the Review Conference to matters relating to the crime of aggression and a limited number of uncontroversial proposals. It thus accepted the view of

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46 'Report of the 2nd Ministerial Meeting on the Rome Statute of the International Criminal Court', Doc Min/ICC/Legal/Rpt (II) para 13, R3 and Annex A (6 November 2009). The matter was referred to the meeting pursuant to a decision taken at the Thirteenth Ordinary Session of the Assembly of the African Union (Sirte, Libya 3 July 2009). 'Decision on the Report of the Commission on the Meeting of African States Parties to the Rome Statute of the International Criminal Tribunal (ICC)' Doc Assembly/AU/13 (XIII) (3 July 2009).

47 'Decision on Report of the Second Meeting of States Parties to the Rome Statute of the International Criminal Court (ICC)', Doc Assembly/AU/Dec 270(XIV) para 2 (2 February 2010).

48 Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC) para 10 Doc Assembly/AU/13(XIII) (3 July 2009). It was decided that 'the AU Member States shall not cooperate pursuant to the provisions of Article 98 of the Rome Statute of the ICC relating to immunities, for the arrest and surrender of President Omar El Bashir of The Sudan'[*sic*].

49 'African Union States Parties to the Rome Statute' (n 45) 70.

50 *Uniting for Peace Resolution*, GA Res 377 (V) (A) of 3 November 1950, 5 UN GAOR Supp (No 20) at 10, UN Doc A/1775 (1950).

delegations who maintained that 'only those amendments which attained consensus or would carry very broad support should be forwarded for consideration by the Review Conference.'[51] It was decided that proposals for the amendment of the ICC Statute would be scrutinised by a working group to be established at the next session of the Assembly of States Parties in December 2010, as it indeed was, but thus far, as far as the amendment of Article 16 is concerned, without any positive outcome.[52] It is argued that the proposal to amend Article 16 is clearly flawed in every respect. Firstly, as noted above, Article 16 was inserted into the ICC Statute to address possible conflicts of interest between the Security Council and the ICC in instances where both institutions are seized with the same situation. Secondly, Article 16 can only be invoked if the situation constitutes a threat to the peace, a breach of the peace, or an act of aggression. It is the exclusive prerogative of the Security Council to establish a threat of the peace, a breach of the peace, or an act of aggression. Lastly, the Uniting for Peace Resolution was designed to deal with prevailing crisis situations, and not to stifle criminal prosecutions. One might add that if Sudan were to be afforded the right to request the suspension of proceedings in the ICC, it would effectively mean that President al-Bashir would be competent to request the suspension of his own trial.

In my opinion, the proposal of the AU has no chance whatsoever of being accepted by the Assembly of States Parties.

THE ABUSE OF ARTICLE 16

It is perhaps a cold comfort to the African countries that support the amendment of Article 16 with a view to promoting the immunity from prosecution of President al-Bashir, that, on occasion, Article 16 has been abused by the Security Council itself. In June 2002, shortly after the ICC Statute entered into force, the required annual renewal of the Security Council mandate for peacekeeping operation in Bosnia-Herzegovina came onto the Security Council's agenda. The US introduced a proposal in the Security Council proclaiming that

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51 'Report of the Working Group on the Review Conference' in *Assembly of States Parties to the Rome Statute of the International Criminal Court, Eighth Session, The Hague, 18–26 November 2009*, Annex II para 22.

52 South Africa accepted the responsibility to promote the adoption of the proposed amendment to Article 16. In 2014, it requested the Security Council to circulate the proposed amendment. 'Report of the Working Group on Amendments' Doc ICC-ASP/13/31, Annex I para V.2 (7 December 2014). In its report of 2015, the Working Group noted that '[n]o further updates were provided by South Africa concerning its proposal during the inter-sessional period'. 'Report of the Working Group on Amendments', Doc ICC-ASP/14/34, Annex II para D.17 (16 November 2015). In its report of 2016, the Assembly of States Parties noted that '[t]he discussions on the Rome Statute amendments will continue in 2017', *Report of the Assembly of States Parties 15, The Hague, 16–24 November 2016*, para 9 at 36.

> persons from contributing States acting in connection with such operations shall enjoy in the territory of all Member States, other than the contributing States, immunity from arrest, detention and prosecution with respect to all acts arising out of the operation and that this immunity shall continue after the termination of their participation in the operation for all such acts.[53]

According to the proposal, the contributing state or the Security Council itself could waive such immunity.[54] At the same time, the US made a proposal to afford immunity from arrest, detention and prosecution in all member states of the UN, save the one of their own nationality, to persons participating in all UN peacekeeping operations.[55] This proposal was based on the assumption 'that it is in the interest of international peace and security to facilitate Member States' ability to contribute to operations established or authorised by the United Nations Security Council', and was therefore to be a 'decision' of the Security Council acting under Chapter VII of the UN Charter.[56]

On 21 June 2002, the Security Council adopted Resolution 1418 to extend the UN peacekeeping mission in Bosnia-Herzegovina until 30 June. This was to negotiate a settlement with the US, following an announcement by US Ambassador John Negroponte that the US intended to veto Security Council resolutions authorising peacekeeping missions, unless US citizens were excluded from the jurisdiction of the ICC.

No settlement was forthcoming for the simple reason that the US proposals would constitute an amendment of the ICC Statute, which in itself was not within the power of the Security Council. The US proposals were therefore defeated in the Security Council. For that reason, on 30 June 2002 the US vetoed the Security Council resolution that would have extended the UN peacekeeping mission in Bosnia-Herzegovina, including the International Police Task Force, for a period of twelve months.[57] In a letter to both Houses of Congress, President Bush admitted that

> the United States vetoed the UN Security Council Resolution authorizing Member States to continue SFOR [the NATO-led Stabilization Force] for a period of 12 months because it did not provide protection for US forces

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53 Draft proposal by the US, 19 June 2002, para 2, in Security Council 4568th meeting, 10 July 2002, para 3.

54 Id para 3 and 4.

55 Draft proposal by the US, 27 June 2002, para 4, in Security Council 4568th meeting, 10 July 2002, para 5.

56 Id Preamble para 3.

57 See Dominic McGoldrick, 'Political and Legal Responses to the ICC', in McGoldrick and others (n 17) 416–422.

> participating in SFOR from the purported jurisdiction of the International Criminal Court (ICC).[58]

The US veto was motivated by the futile insistence of the US to exclude American nationals from the jurisdiction of the ICC, and had nothing to do with the need for peacekeeping in Bosnia-Herzegovina. William Pace, the Chair of the International Coalition for an International Criminal Court, described the rather repulsive act of the US as 'one of the most shameful lows in global US leadership.'[59] Sir Lloyd Axworthy, Minister of Foreign Affairs of Canada in the period 1996 to 2000, spoke of 'their tactic of holding hostage the renewal of a peacekeeping mission in the Balkans and subverting the role of the Security Council', and 'the use of blackmail on peacekeeping to achieve the purely self-interested objective' of the US.[60] At the opening of the final session of the Preparatory Commission on 1 July 2002, speaking on behalf of the European Union, Ambassador Ellen Margrethe Loj (Denmark), said that

> [t]he EU deeply regrets that the US veto … of a resolution extending the mandate of the UN mission in Bosnia-Herzegovina has placed the Security Council members in a difficult situation with regard to support for UN-peacekeeping and adherence to their commitment to the ICC statute. The EU hopes that members of the Security Council will adhere to the Secretary General's strong appeal within the coming days. The EU would accept any solution that respects the Statute and does not undermine the effective functioning of the Court.[61]

On 10 July 2002, the Secretary-General convened a public meeting at the Security Council, open to all UN member states, to discuss the US proposals to exclude participants of UN peacekeeping operations from the jurisdiction of the ICC (a) in the context of the UN mission in Bosnia-Herzegovina; and (b) in connection with all UN peacekeeping operations. On that occasion, the US received the support of only one state, namely India.[62] Opposition

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58 Text of a letter from the President to the Speaker of the House of Representatives and the President Pro Tempore of the Senate (22 July 2002) in 38 (30) *Weekly Compilation of Presidential Documents* 1243 (29 July 2002).

59 Cited in Associated Press report under the heading 'US Ends UN Mission in Bosnia over New Global Court' (30 June 2002) <http//www.nytimes.com/2003/06/13/world/un-us-peacekeeprs-exemption-from-prosecution.html> access 24 April 2018.

60 Lloyd Axworthy, 'Stop the US Foul Play' *Globe and Mail* (Toronto, 17 July 2002) A13; see also Lloyd Axworthy, *Navigating a New World*: *Canada's Global Future* (A Knopf 2003) 211.

61 The International Criminal Court 10th Meeting of the Preparatory Commission, Statement by H.E. Ambassador Ellen Margarethe Løj (New York 1 July 2003) <iccnow.org/documents/EUDenmarkPlenary1July02.pdf> access 24 April 2018.

62 McGoldrick (n 17) 421.

to the US position was mainly based on the truism that it was not within the power of the Security Council to amend the ICC Statute.

The Permanent Members of the Security Council eventually gave in to the US blackmail, albeit on the basis that the Security Council could not secure blanket immunity from prosecution in the ICC of participants in UN peacekeeping operations as initially insisted upon by the US. With the UK playing a leading role in the negotiations, a compromise resolution was brokered, founded on Article 16 of the ICC Statute.

On 12 July 2002, acting under Chapter VII of the UN Charter, the Security Council unanimously adopted Resolution 1422.[63] This resolution stated that 'it is in the interest of international peace and security to facilitate Member States' ability to contribute to operations established or authorized by the United Nations'. Furthermore, the ICC was requested, in terms of Article 16 of the ICC Statute, to refrain from proceeding with an investigation or prosecution of any cases for a period of twelve months from 1 July 2002, involving current or former officials or personnel from a contributing state which is not a party to the ICC Statute, in connection with acts or omissions relating to an operation established or authorised by the UN. The resolution furthermore recorded the intention of the Security Council to renew the request under the same conditions on each first day of July 'for further 12-months periods for as long as may be necessary.' Resolution 1423 of 12 July 2002 thereupon authorised member states to continue with the peacekeeping mission in Bosnia-Herzegovina for a further twelve months period.[64]

In June 2003, Resolution 1422 was renewed for a further twelve months.[65] However, France, Germany, and Syria abstained. Commenting on the resolution, Prince Zeid Raad al-Hussein, the Jordanian Ambassador, bluntly proclaimed that 'we are still concerned over how this resolution has attempted to elevate an entire category of people to a point above the law, a feeling sharpened still further when thought is given to the revolting nature by the Court's jurisdiction.'[66] Secretary-General, Kofi Annan, was less than enthusiastic about the renewal of Resolution 1422, noting that if such renewals were to become an annual routine, they would 'undermine

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63 SC Res 1422 (2002) of 12 July 2002 UN SCOR (Res & Dec) 1 January 2001–31 July 2002 at 316, UN Doc S/INF/57; and see Broomhall (n 31) 180; McGoldrick (n 17) 418–422; Jackson Nyamuya Maogoto, *War Crimes and Realpolitik*; *International Justice from World War I to the 21st Century* (Lynne Rienner 2004) 220.

64 SC Res 1423 (2002) of 12 July 2002 UN SCOR (Res & Dec) 1 January 2001–31 July 2002 at 46, UN Doc S/INF/57.

65 SC Res 1487 (2003) of 12 June 2003 UN SCOR (Res & Dec) 1 August 2002–31 July 2003 at 202, UN Doc S/INF/58.

66 Cited in Felicity Barringer, 'UN Peacekeepers' Exemption from Prosecution' *The New York Times* (New York, 13 June 2003) <http//www.nytimes.com/2003/06/13/world/en-us-peacekeepers-exemption-from-prosecution.html> access 24 April 2018.

not only the authority of the ICC but also the authority of this Council and the legitimacy of United Nations peacekeeping'.[67]

In June 2004, the US again sought to renew the immunity resolution, but following the abuse of Iraqi prisoners in the Abu Ghraib prison by US soldiers, several Security Council member states (Benin, Brazil, Chile, China, France, Germany, and Spain; with Algeria and Pakistan undecided) made it known that they would not again support its renewal. Realising that it would not get the necessary support for the resolution to be adopted by the Security Council, the US decided to withdraw its proposal for the renewal.

Applying Article 16 to avoid a US veto of Security Council resolutions for the renewal of the peacekeeping mission in Bosnia-Herzegvina clearly flew in the face of the objectives of this provision. This also applies to the decision to renew the deferral of ICC proceedings in the future, simply because the renewal of an Article 16 request should be based on the situation that prevails at the time of the decision to renew. The Parliamentary Assembly of the EU quite rightly noted 'that Article 16 does not cover blanket immunity to unknown, future situations', and accordingly described the Security Council resolutions as 'a legally questionable and politically damaging interference with the functioning of the International Criminal Court'.[68]

CONCLUSION

It is worth noting that the crimes committed in Darfur were allegedly prompted by efforts of the Sudanese president to create *ein Herrenvolk* consisting exclusively of Africans of Arab descent. The selected victims of genocide were, therefore, confined to members of black African tribes in the province of Darfur who were not of Arab extraction. According to the Sudanese government, the violence in Darfur resulted in the deaths of about 10 000 people. However, other estimates set the death toll between 200 000 and 400 000. It caused the displacement of approximately 2.5 million people of the total 6.2 million population of Darfur. It is important to note that the issuing of a warrant of arrest is based on the finding of a Pre-Trial Chamber of the ICC that there are 'reasonable grounds to believe' that the accused has committed the offences stipulated in the indictment.[69] The fact that the AU should bend backwards to protect President al-Bashir from going to trial is therefore difficult to digest.

The ICC was established based on the affirmation 'that the most serious crimes of concern to the international community as a whole must not go

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67 ibid.

68 Parliamentary Assembly Res 1336 (2003)[1] of 26 June 2003 para 7; and see in general, Johan van der Vyver, *The International Criminal Court—American Responses to the Rome Conference and the Role of the European Union* (Rechtspolitisches Forum No 19, Institut für Rechtspolitik an der Universität Trier 2003) 17–22.

69 ICC Statute (n 5) Art 58(1)(a).

unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation.'[70] Efforts by the AU to undermine this noble objective through distortions of provisions such as Article 16 which were established at the Rome Conference by general agreement, is incomprehensible.

70 ibid, Preamble para 4.