

The Security Council and the International Criminal Court: When Can the Security Council Defer a Case?

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The first principle of the applicable law is this: that all discretionary powers of lawful decision making are necessarily derived from the law, and are therefore governed and qualified by the law.... It is not logically possible to claim to represent the power and authority of the law, and at the same time, claim to be above the law.¹

Abstract

This paper discusses the deferral power of the Security Council under Article 16 of the Rome Statute. It analyses the drafting history, provision and practice of Article 16 with a view to identifying the requirements that a situation should meet before the article may be invoked by the Security Council. The purpose is to provide guidance on the legal terrain within which the Security Council is authorised to act under Article 16, especially in light of its inconsistent invocation of the deferral power. The paper argues: firstly, that, being a creature of the law, the Security Council is governed and qualified by the law; and secondly, that Article 16 has unambiguously provided the parameters within which the Security Council should exercise its deferral power.

¹ Judge *ad hoc* Sir Robert Jennings dissenting opinion in *Lockerbie Case (Preliminary Objections)* ICJ 1998.

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Introduction

The United Nations Security Council (Security Council) is empowered by article 16 of the Rome Statute² to defer investigations and prosecutions of cases brought before the International Criminal Court (ICC) for a renewable period of 12 months if it determines that an investigation or prosecution would interfere with efforts to resolve a threat to peace, breach of peace, or act of aggression under Chapter VII of the Charter of the United Nations (UN).³ So far, the Security Council has been ambivalent in its use of this provision.⁴ It pre-emptively invoked the provision in favour of UN-peacekeepers from the ICC's non-party states,⁵ but out-rightly refused to accede to the request on behalf of Omar al-Bashir of Sudan,⁶ demurred over Kenya's request,⁷ and ignored Uganda's Lord Resistance Army's demand.⁸ Which raises the question: under what circumstances should Article 16 be invoked? This paper attempts to answer this question by analysing the legal terrain within which the Security Council is authorised to act under Article 16.

The paper is divided into seven sections. The first section provides an introduction to the paper and highlights the structure of discussion. The second section gives a brief overview of the Security Council and the ICC. The third section describes the general relationship between the Security Council and the ICC in the area of peace and security. The fourth section focuses on the deferral power of the Security Council under Article 16 of the ICC Statute. It analyses Article 16's drafting history and the manner of framing to determine its scope of operation. The fifth section discusses the jurisprudence of the Security Council on what amounts to threat to peace, breach of peace and aggression, elements that must exist in a situation before Article 16 can be invoked. The sixth section analyses some of the cases where the Security Council has been petitioned to use

² Statute of the International Criminal Court, 17 July 1998 [Rome Statute].

³ Article 16, Rome Statute.

⁴ For a discussion of the Security Council's deferral record, see generally Falligant J, 'The prosecution of Sudanese President Al Bashir: Why Security Council deferral would harm the legitimacy of the International Criminal Court' 27 *Wisconsin International Law Journal* (2010), 727.

⁵ See Security Council Press Release 'Security Council requests International Criminal Court not to bring cases against peacekeeping personnel from states not party to Statute' 7 December 2002 <http://www.un.org/News/Press/docs/2002/sc7450.doc.htm> on 21 May 2015.

⁶ See British Broadcasting Corporation, 'Sudan: African-Arab delegation fails to convince UNSC on deferring ICC issue', 13 February 2009.

⁷ See 'UN refuses to defer Kenya hearing', 9 April 2011 <http://news.uk.msn.com/world/articles.aspx?cp-documentid=156942638> on 30 May 2011.

⁸ See Schabas W, *An introduction to the International Criminal Court* Cambridge University Press, 2007, 41

its deferral power. The aim is to expose the practice and understanding of the Security Council on the scope of its deferral power. The seventh and last section concludes from the study on the requirements that should be met by a situation before Article 16 may be invoked.

An Overview of the Security Council and the ICC

The Security Council

The Security Council is one of the six principal organs of the UN.⁹ It is established by Chapter V of the UN Charter¹⁰ and operates as the executive organ of the UN.¹¹ It is composed of 15 members.¹² Ten of these members are elected to two-year terms from the UN's general membership.¹³ The remaining five seats are reserved for the five permanent members - China, France, Russia, the United Kingdom, and the United States.¹⁴

The Security Council has the “primary responsibility for the maintenance of international peace and security”.¹⁵ However, the Council also performs other secondary functions.¹⁶ In exercising its mandate, the Council has a wide margin

⁹ The others are General Assembly, Economic and Social Council, Trusteeship Council, International Court of Justice and Secretariat. Article 7, *Charter of the United Nations*.

¹⁰ *Charter of the United Nations* 24 October 1945, 1 UNTS XVI, ch V specifically Article 23.

¹¹ See Bricambaut MC, ‘The role of the United Nations Security Council in the international legal system’ in M Byers *The role of law in international politics: Essays in international relations and international law*, Oxford University Press, 2000, 269, 270 (“When making use of [its] powers, the Security Council acts as an organ that implements the Charter and not as an organ that creates legal norms”).

¹² Article 23(1), *Charter of the United Nations*.

¹³ Article 23(2), *Charter of the United Nations*. It is agreed that of these 10 seats, 5 is for Afro-Asian states, 1 for Eastern Europe, 2 for Latin America and 2 for Western European and other powers. See General Assembly Resolution 1991 (XVIII).

¹⁴ See “UN Sec. Council, Members” <http://www.un.org/sc/members.asp> on 4 March 2011 (pointing out that China replaced Taiwan while Russia replaced USSR from the initial list). The list comprises the victors of World War II. It does not follow, however, that the five current permanent members will continue to hold their status. However, the complicated amendment procedure of the UN Charter makes their removal unlikely. For a discussion see *Report of the open-ended working group on the question of equitable representation on and increase in the membership of the Security Council and other matters related to the Security Council*, U.N. GAOR, 57th Sess., U.N. Doc. A/57/47 (2003).

¹⁵ Article 24(1), *Charter of the United Nations*. The word “primary responsibility” according to the ICJ, does not mean “exclusive responsibility”. See *Nicaragua Case (Jurisdiction and Admissibility)* ICJ Reports 1984, 432.

¹⁶ These include: recommending the admission, suspension and expulsion of member states to the General Assembly (Articles 4, 5 and 6, UN Charter); restoring the rights and privileges of a suspended member (Articles 5 UN Charter); Amendments to the UN Charter require the ratification

of discretion.¹⁷ This discretion is exercised through the voting process.¹⁸ Each Security Council member has one vote.¹⁹ Procedural matters require an affirmative vote of nine out of the fifteen members, while substantive matters require a vote of nine of the fifteen members as well as the “concurring votes of the permanent members”.²⁰ This means that permanent members have the power to veto the substantive resolutions of the Council but not the procedural ones.²¹ A decision on what amounts to a procedural matter is itself subject to a veto.²² However, under the Security Council’s Rules of Procedure,²³ it is possible for the President of the Security Council,²⁴ to rule that an issue is procedural and if the ruling is supported by nine members the matter is resolved.²⁵

of all the permanent members of the Council (Article 108, *UN Charter*); in the case of trusteeship territories, for example, designated strategic areas fall within the authority of the Security Council (Article 82 and 83, *UN Charter*); together with the General Assembly elect Judges of the ICJ (ICJ Statute, Art 4).

¹⁷ The ICJ has, however, emphasised that “[t]he political character of an organ cannot release it from the observance of the treaty provisions established by the Charter when they constitute limitations on its power or criteria for its judgment.” *Conditions of Admission of a State to Membership in the United Nations*, ICJ Reports, 1948, 64; See also Judge Bedjaoui, *Lockerbie case*, ICJ Reports, 1992, 45. For scholarly comment, see Herdegen M ‘The “constitutionalisation” of the UN Security Council’ 90 *American Journal of International Law* (1996) 1 at 158 (arguing that where there is “a manifest contradiction with the principles and purposes of the Charter” the international community can challenge such SC action); Cf Kelsen H, *The law of the United Nations. A critical analysis of its fundamental problems*, Stevens, London 1950, 295 (arguing that the Council has the power to enforce a decision it considers just even if it is not in conformity with existing law).

¹⁸ Article 27, *UN Charter*. See also Goodrich L *et al*, *Charter of the United Nations: Commentary and documents* UN, New York, 1969, 295-300 (discussing Security Council responses to various situations).

¹⁹ Article 27, *UN Charter*.

²⁰ Article 27(3) *UN Charter*. Subsequent practice of the Security Council has interpreted the phrase “concurring votes of the permanent members” in Article 27 to permit abstentions. Therefore, an abstention by a permanent member would not be deemed as exercise of veto power. See Stavropoulos C, ‘The practice of voluntary abstentions by permanent members of the Security Council under Article 27(3) of the Charter’ 61 *American Journal of International Law* (1967) 737. See also *Namibia Case*, ICJ Reports, 1971, 16, 22 (recognising this practice as lawful).

²¹ The veto power is exercised through a negative vote. Article 27(3) *UN Charter*. It was written into the Charter on account of exigencies of power, especially to placate the USSR who felt threatened by Western bias of the UN at the time. See Nicholas H, *The United Nations as a political institution* Oxford University Press, 1975, 10-13.

²² See UN, *Repertory of practice of UN Organs* (1955) Supplement No 1 (1954 - 1955), vol 2, 104 (pointing to the statement of sponsoring powers during adoption of *UN Charter*).

²³ Provisional Rules of Procedure of the Security Council, 21 December 1982 S/96/Rev.7. The rules are made pursuant to Article 30 of the UN Charter.

²⁴ The Presidency rotates monthly among the members in alphabetical order of the members states’ official UN English names. Rules 18-20, Rules of Procedure.

²⁵ See Sands P, Klein P, *Bonett’s law of international institution*, Sweet & Maxwell, 2009, 30; Shaw M *International Law*, Cambridge University Press, 2010, 1237.

The ICC

The ICC is a permanent court with an independent international legal personality.²⁶ It is not an organ of the UN.²⁷ Administratively, it is structured into four organs: the Presidency; Judicial Divisions; Office of the Prosecutor; Registry; and Other Offices.²⁸ The Court has jurisdiction to try individuals not states.²⁹ Its subject matter jurisdiction extends to genocide, crimes against humanity, war crimes, and, pending agreement on its definition, crimes of aggression.³⁰ In exercising its jurisdiction, the ICC complements the jurisdiction of national courts.³¹ This means that it only acts in instances where national courts are unwilling or unable to prosecute.³² Its jurisdiction is triggered through either: a referral to the prosecutor by a party to the Rome Statute;³³ a referral by the Security Council acting under Chapter VII of the UN Charter;³⁴ or a referral by the Prosecutor himself acting *proprio motu* (on his/her own initiative).³⁵

Each situation investigated by the Prosecutor is assigned to a pre-trial chamber of the Judicial Divisions.³⁶ The pre-trial chamber has authority to issue an arrest warrant for the accused if there are reasonable grounds for the charge.³⁷ Once the accused is surrendered or voluntarily appears before the ICC, the pre-

²⁶ Article 4, *Rome Statute*. On ICC's history, see Kim Y, *The law of the International Criminal Court*, William Hein & Company, 2007, 11; Schiff B, *Building the International Criminal Court*, Cambridge University Press, 2008, 201.

²⁷ Preamble 9, *Rome Statute*, (describing ICC as independent from UN).

²⁸ Article 34, *Rome Statute*.

²⁹ This is unlike the ICJ, which has jurisdiction only over states. See Abizadeh, A 'Introduction to the Rome Statute of the International Criminal Court' 34(2) *World Order* (2002-2003) 19, 20 (concluding that the ICC "is the first permanent international court that recognises the individual as a subject of international criminal law").

³⁰ Article 5, *Rome Statute*. The ICC will gain jurisdiction over the crime of aggression only if it is defined through an amendment to the statute. Articles 5(2), 121 and 123, *Rome Statute*.

³¹ Articles 17, 18, *Rome Statute*. On complementarity see Newton MA, 'Comparative complementarity: Domestic jurisdiction consistent with the Rome Statute of the International Criminal Court' 167 *Military Law Review* (2001) 20.

³² A country may be determined to be "unwilling" if it is clearly shielding someone from responsibility for ICC crimes, there is undue delay in prosecution, or proceedings are not independent or impartial. A country may be "unable" when its legal system has collapsed. Article 17, *Rome Statute*. For further discussion, see Holmes J, 'Complementarity: National courts *versus* the ICC' in Cassese A *et al*, *The Rome Statute of the International Criminal Court: A commentary*, Oxford University Press, 2002, 260, 674-678; Struett M, *The politics of constructing the International Criminal Court*, Palgrave Macmillan, 2008, 8, 95.

³³ Article 12, *Rome Statute*.

³⁴ Article 13, *Rome Statute*.

³⁵ Article 15, *Rome Statute*.

³⁶ The judicial division has eighteen judges organised into the pre-trial division, the trial division, and the appeals division.

³⁷ Article 58, *Rome Statute*.

trial chamber holds a hearing to confirm which charges will be the basis of the criminal trial.³⁸ After the confirmation of charges, each case is assigned to a trial chamber of three judges.³⁹ At the conclusion of the trial, the trial chamber may acquit or convict and issue a sentence of up to thirty years or life imprisonment, if justified by the extreme gravity of the crime.⁴⁰ During and after the pre-trial and trial phases, the accused, the Prosecutor, or a concerned State may appeal decisions of the Chambers to the Appeals Chamber.⁴¹

The Relationship between the Security Council and the ICC

Even though the ICC has its own independent treaty basis, it nevertheless has a formal relationship with the Security Council through a negotiated relationship agreement with the UN.⁴² The Agreement sets out the mode of cooperation between the ICC and the Security Council and allows the ICC to seek assistance from the Council in procuring the cooperation of both state and non-state parties to the Rome Statute.⁴³ In addition to the Agreement, the Rome Statute also gives the Security Council powers of referral and deferral, as well as a potential role in the determination of the crime of aggression.⁴⁴

This involvement of the Security Council in the ICC process was borne out of the recognition that the functions of the ICC and the Council are complementary as they both affect international peace and security.⁴⁵ The inclusion of the Security Council in the Rome Statute was, however, not without contestation.⁴⁶ It was a product of hard-fought compromise between those who wanted

³⁸ Article 61, *Rome Statute*.

³⁹ Article 61(11), *Rome Statute*.

⁴⁰ Article 76, 77 & 78, *Rome Statute*.

⁴¹ Article 81 & 82, *Rome Statute*.

⁴² See *Negotiated relationship agreement between the International Criminal Court and the United Nations* 4 October 2004 ASP/UN.

⁴³ Article 17, *Negotiated Agreement*. The Council can sanction states if they fail to cooperate. Article 17(3), *Negotiated Agreement*.

⁴⁴ For a discussion, see Berman F, 'The relationship between the International Criminal Court and the Security Council' in Hebel V *et al* (eds), *Reflections on the International Criminal Court: Essays in honour of Adriaan Bos*, TMC Asser Press, 1999, 173-80.

⁴⁵ See Gowland-Debbas V, 'The relationship between the Security Council and the International Criminal Court' 3 *Journal of the Armed Conflict Law* (1998) 97 at 99 (pointing out that situations which present the most compelling case for ICC prosecution are almost inevitably the ones with which the Security Council is concerned because they affect international peace and security).

⁴⁶ See Akande D *et al*, 'Position paper: an African expert study on the African Union concerns about Article 16 of the Rome Statute of the ICC' (2010) http://www.iss.co.za/uploads/PositionPaper_

a politically-controlled court⁴⁷ and those who demanded an independent justice institution;⁴⁸ between those who valued peace over justice⁴⁹ and those who saw justice as a precondition for peace.⁵⁰ In the end, the Security Council was given the referral power to allow it ensure peace through justice⁵¹ and the deferral right to allow it delay justice as it seeks peace.⁵² This paper focuses on the deferral provision.

The Deferral Provision under Article 16

The drafting history

The drafting history of the Rome Statute shows that Article 16 was one of the most contested provisions and was allowed only after several other proposals were considered and rejected.⁵³ An earlier proposal presented by the Interna-

ICC.pdf on 12 June 2014 at 8 (calling it the “thorniest issue”).

⁴⁷ The US in particular wanted a much larger control of the UN Security Council over the ICC’s actions. See Schabas W, ‘United States hostility to the International Criminal Court: It’s all about the Security Council’ 15 *European Journal of International Law* (2004) 701.

⁴⁸ See Kirsch P and Holmes J, ‘The birth of the International Criminal Court: The 1998 Rome Conference’ in Bekou O and Cryer R, *The International Criminal Court*, Ashgate Dartmouth, 2004, 10 (pointing out that many of the battles were “between those who wanted as independent a court as possible” and those who wanted to avoid jurisdiction over their nationals).

⁴⁹ See Schabas, ‘United States hostility to the International Criminal Court’, 701.

⁵⁰ See Scheffer D, ‘The United States and the International Criminal Court’ 93 *American Journal of International Law* (1999), 12. See also Scharf M, ‘The amnesty exception to the jurisdiction of the International Criminal Court’ 32 *Cornell International Law Journal* (1999), 507.

⁵¹ For discussion of the referral power see Heyder C, ‘The UN Security Council’s referral of the crimes in Darfur to the International Criminal Court in light of US opposition to the Court: Implications for the International Criminal Court’s functions and status’ 24 *Berkeley Journal of International Law* (2006), 650.

⁵² See Sarooshi D, ‘Aspects of the relationship between the International Criminal Court and the United Nations’ 32 *Netherlands Yearbook of International Law* (2001), 27, 38-39 (Pointing out that the deferral power was inserted to allow the Security Council, acting under Chapter VII, to demand that the requirements of peace and security take precedence over the immediate demands of justice); Akande D, ‘The jurisdiction of the International Criminal Court over nationals of non-parties: Legal basis and limits’ *Journal of International Criminal Justice* (2003) 618, 646 (Pointing out that the adoption of the deferral provision acknowledged that there are “circumstances where the exercise of jurisdiction by the Court would interfere with the resolution of an ongoing conflict by the SC”).

⁵³ See Report of the International Law Commission on the Works of its Forty-Sixth Session, 1994 YB *International Law Commission* UN Doc. A/CN.4/SER.A/1977 (ILC Report) 43-45; Report of the Ad Hoc Committee on the Establishment of an International Criminal Court, UN GAOR, 50th Sess., Su No. 22 UN Doc. A/50/22 (1995) (Ad Hoc Committee Report) para 124; Report of the Preparatory Committee on the Establishment of an International Criminal Court, UN GAOR, 51st Sess., Su No. 22 UN Doc. A/51/22 (1996) para. 141.

tional Law Commission (ILC) which would have seen the ICC working at the behest of the Security Council was considered and rejected.⁵⁴ Article 23(3) of the ILC draft of 1994 provided:

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.⁵⁵

Under this proposal, an investigation or prosecution arising from a situation “being dealt with” by the Security Council under Chapter VII of the UN Charter would not have been initiated or continued unless authorised by the Council or unless the Council was through with the matter, whichever came first.⁵⁶ The Security Council would thus have had the power to approve ICC’s investigations and prosecutions, and a veto by a permanent member would have been enough to prevent the ICC from working.⁵⁷

This position was supported mostly by the permanent members of the Security Council⁵⁸ who asserted that since the Council had the primary responsibility for the maintenance of international peace and security, the ICC should automatically accede jurisdiction to the Council in situations where the investigation or prosecution of a particular case by the ICC could interfere with the resolution of an ongoing conflict by the Security Council.⁵⁹

Many states, while not opposing the role of Council in the ICC process,⁶⁰ however, found the ILC proposal too sweeping.⁶¹ They were concerned that the

⁵⁴ For a discussion on ILC and its drafting procedure, see Shaw M, *International law*, 112.

⁵⁵ ILC Report, 27.

⁵⁶ See Gargiulo P ‘The controversial relationship between the International Criminal Court and the Security Council’ in Schabas W and Lattanzi F (eds) *Essays on the Rome Statute of the International Criminal Court*, Fagnano Alto, 1999, 86.

⁵⁷ See Bergsmo M, ‘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’ 69 *Nordic Journal of International Law* (2000) 87, 107 (pointing out that “the permanent five members of the Council would have had an effective veto power over the Court, also as non-parties”).

⁵⁸ These members included the United States, China and France. See Hall C, “The first and second session of the UN Preparatory Committee on the establishment of an International Criminal Court” *American Journal of International Law* (1997) 91, 182.

⁵⁹ See Condorelli L and Villalpando S, ‘Referral and deferral by the Security Council’ in Cassese A, *The Rome Statute of International Criminal Court* 644, 645; Ad Hoc Committee on the Establishment of an International Criminal Court Report.

⁶⁰ See Kirsch and Holmes, ‘The birth of the International Criminal Court’, 26 (pointing out that “[o]nly a few delegations opposed a role for the Security Council in relation to the court (referrals and deferrals), but they showed great persistence”).

⁶¹ See Statement of Hann Suchova, Minister of Justice of Poland, 17 June 1998, <http://www.un.org/>

Council, being a quintessentially political body, might abuse its power and obstruct the functioning of the Court.⁶² The phrase “being dealt with” was attacked on the ground that it could easily be construed as preventing ICC jurisdiction, even where the Security Council had merely placed a matter on its agenda.⁶³ On the whole, it was feared that the proposal if adopted would introduce inappropriate political influence into the judicial function of the court; undermine its independence and impartiality; and ultimately render its work ineffective.⁶⁴

Given these concerns, the delegates to the Rome Conference had, therefore, to craft a provision that would guarantee the Security Council’s overarching responsibility for peace and security when acting under the Rome Statute without affecting the independence of the Court.⁶⁵ A compromise formula was finally reached, which provided that the Security Council, acting under Chapter VII of the UN Charter, could adopt a resolution requesting deferral of an investigation or prosecution for a renewable period of twelve months.⁶⁶ The wording of this

icc/index.htm; Statement of Javan Zarif, Deputy Foreign Minister to the Islamic Republic of Iran, 17 June 1998, <http://www.un.org/icc/index.htm>; Statement of Ivan Raig, Deputy Head of the Delegation of the Republic of Estonia, 17 June 1998, <http://www.un.org/icc/index.htm>; Statement of Pavel Telicka, Deputy Minister for Foreign Affairs for the Czech Republic, available at <http://www.un.org/icc/index.htm>; Statement of Ramesh Lawrence Maharaj, Attorney General of the Republic of Trinidad and Tobago, <http://www.un.org/icc/index.htm>; Statement of Laila Freivalds, Minister of Justice of Sweden, 15 June 1998, <http://www.un.org/icc/index.htm>; Statement of Lloyd Axworthy, Minister of Foreign Affairs of Canada, 15 June 1998, <http://www.un.org/icc/index.htm> all on 2 October 2014.

⁶² See Bergsmo M and Pejic J, ‘Article 16: Deferral of investigation or prosecution’ in Triffterer O (ed) *Commentary on the Rome Statute of the International Criminal Court: Observers notes, article by article*, Baden-Baden, 1999, 373 (pointing out that delegates feared that the Security Council would perpetually hold the ICC hostage to its veto power).

⁶³ The states were apprehensive that if adopted, the provision would have been thrown into similar interpretative chaos that Article 12(1) of the UN Charter finds itself in today. Article 12(1) which forbids the General Assembly from considering any matter over which the Security Council can be said to be “exercising” its power has been given varied interpretation by different commentators to date. See Kelsen, *The law of the United Nations*, 198.

⁶⁴ See Yee L, ‘The International Criminal Court and the Security Council: Articles 13(b) and 16’ in Lee R (ed) *The International Criminal Court: The making of the Rome Statute, issues, negotiations, results*, Kluwer Law International, 1999, 150 (pointing out the fear that the Council may disrupt the ICC’s ability to function independently); Kirsch P and Holmes J, ‘The Rome Conference on an International Criminal Court: The negotiating process’ 93(1) *The American Journal of International Law* (1999) 2, 4 (pointing out the fear of politics within the Council).

⁶⁵ See Condorelli and Villalpando, ‘Referral and deferral by the Security Council’ 644; Akande *et al*, ‘Position paper’.

⁶⁶ Arsanjani M, ‘The Rome Statute of the International Criminal Court’ 93 *American Journal of International Law* (1999) 22, 26-27; Condorelli and Villalpando ‘Referral and deferral by the Security Council’, 645; Bergsmo and Pejic ‘Article 16’, 598.

final formula was based on the proposals put forth by Singapore,⁶⁷ Costa Rica,⁶⁸ Canada,⁶⁹ and Britain.⁷⁰ This formula, reflected in the final version of Article 16, effectively diminished the authority of the Council by requiring it to act to prevent an investigation or prosecution rather than to act to authorise one.⁷¹

The provision

Article 16 provides in full:

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.⁷²

The provision gives the Security Council the right to defer any investigation or prosecution by the ICC for one year, with the possibility of renewing the deferral.⁷³ Unlike the ILC proposal, the Security Council must now act positively on the basis of a resolution requesting the Court to defer its investigation.⁷⁴ For this to happen, there must be a prior determination by the Security Council that there exists a threat to the peace, breach of the peace, or act of aggression.⁷⁵ Such a determination would require an affirmative vote of 9 members, including the concurring votes of all the permanent members.⁷⁶ A negative vote by any of

⁶⁷ The Singaporean proposal stated that “no investigation or prosecution may be commenced or proceeded with under this Statute where the Security Council has, acting under Chapter VII of the Charter of the United Nations, given a direction to that effect.” Non-Paper/WG.3/No.16 (8 August 1997).

⁶⁸ Costa Rica proposed a clause requiring a “formal and specific decision” of the Security Council. Non-Paper/WG.3/No.23 (11 August 1997).

⁶⁹ Canada suggested a temporal qualification of twelve months. See Yee, ‘The International Criminal Court and the Security Council’, 151 (citing the Canada’s suggestion).

⁷⁰ British delegation suggested substituting the word “direction” with “request.” Bergsmo and Pejic ‘Article 16’, 376.

⁷¹ See Bergsmo and Pejic ‘Article 16’, 375.

⁷² Article 16, *Rome Statute*.

⁷³ Ad Hoc Committee Report.

⁷⁴ See Bergsmo and Pejic ‘Article 16’, 598.

⁷⁵ But see Gowland-Debbas V, ‘The functions of the United Nations Security Council in the international legal system’ in Byers M *The role of law in international politics: Essays in international relations and international law*, Oxford University Press, 2000, 277, 298 (wondering whether it is the situation itself or the courts commencement of an investigation into the commission of a crime that would constitute a threat to or breach to peace).

⁷⁶ Matters treated by the Security Council as substantive matter requiring “concurring votes of the permanent members” have included, *inter alia*, those relating to the discharge of its responsibility for the maintenance of international peace and security. See Hambro E *et al*, *Charter of the United Nations: Commentary and documents*, Columbia University Press, 1969, 215.

the permanent members is, therefore, sufficient to veto any such determination by the Council.⁷⁷ This requirement of unanimity among permanent members effectively means that ICC's proceedings can only be deferred by a "concerted effort" of the Council members.⁷⁸

Furthermore, the Security Council will have to specify that any investigation or prosecution commenced or continued by the ICC does interfere with its mandate of maintaining international peace and security.⁷⁹ This means that it has to show that in the absence of its decision to suspend all investigations and prosecutions under Article 16, international peace and security would be threatened.⁸⁰ This of necessity requires the Security Council to specify the particular situation or case whose investigation or prosecution would undermine the maintenance of international peace and security.⁸¹

There is also a temporal limit of one year which can only be renewed by a new resolution of the Security Council, again acting under Chapter VII of the UN Charter.⁸² This means that the Security Council must again make a positive statement in the form of a resolution that, should the ICC recommence or proceed with an investigation or prosecution, such action would interfere with

⁷⁷ Theoretically, an ICC proceeding cannot be impeded even if all five permanent Council members joined to block the proceeding; nine positive votes are required to inhibit the block, including those from the five permanent members. Article 27(3) *UN Charter*.

⁷⁸ See Schabas W, 'International Criminal Court: The secret of its success' 12(4) *Criminal Law Forum* (2001) 415, 422 (arguing that this requirement of unanimity "means that deferral will only be conceivable in the clearest and most exceptional of circumstances"). See also Pogany I, 'The Security Council Resolution of November 22 1967 – its legal nature and implications' 4 *Israel Law Review* (1969) 229, 229 (noting that Council decisions are highly regarded because of "consensus of opinion amongst its members, and more particularly amongst its permanent members").

⁷⁹ Yee, 'The International Criminal Court and the Security Council', 150; Saroshi, 'Aspects of the relationship between the International Criminal Court and the United Nations', 27; Akande, 'The jurisdiction of the International Criminal Court over nationals of non-parties', 618.

⁸⁰ See Bergsmo and Pejic, 'Article 16', 378 (arguing that Article 16 recognises a Council power to "request the Court not to investigate or prosecute when the requisite majority of its members conclude that judicial action – or threat to it – might harm the Council's effort to maintain international peace and security pursuant to the Charter"). See also Cassese A, 'The Statute of the International Criminal Court: Some preliminary reflections' 10 *European Journal of International Law* (1999) 144, 146, 163. For a different view see Condorelli and Villalpando, 'Referral and deferral by the Security Council', 647.

⁸¹ See, for example, Nolte G, 'The limits of the Security Council's powers and its functions in the international legal system: Some reflections' in Byers M, *The role of law in international politics: Essays in international relations and international law* Oxford University Press, 2000, 315, 321 (arguing that Security Council action "must remain preliminary and situation specific").

⁸² See Human Rights Watch, 'Article 16' <http://www.hrw.org/en/news/2008/08/15/q-article-16> ("To trigger any further suspension, the Security Council must once more consider whether or not to invoke Article 16.").

the maintenance of international peace and security under Chapter VII.⁸³ Consequently, the ICC can recommence exercising its jurisdiction once the 12 months period lapses unless it is requested again not to do so by a resolution of the Council under Chapter VII of the UN Charter.⁸⁴

The effect of a deferral

The language of Article 16 allows the Security Council to request a suspension of an “investigation or prosecution”.⁸⁵ However, the use of the permissive word “may” in Article 16 reserves the Court the right to accept or decline the request.⁸⁶ This means that a request from the Council does not automatically compel the ICC to defer a case.⁸⁷ Where the Court accepts such a request, the ICC - including all of its organs - is to halt all investigations or prosecutions of that situation or case.⁸⁸ This does not, however, preclude the Prosecutor from conducting or continuing “preliminary examinations.”⁸⁹ But a deferral does pose a challenge to the protection of witnesses, victims and evidence, and the guaranteeing of the rights of the accused, especially where an accused is in custody

⁸³ But see Wedgwood R, ‘The International Criminal Court: An American view’ 10(1) *European Journal of International Law* (1999) 93, 97 (calling such an argument a “palace revolution”).

⁸⁴ Yee, ‘The International Criminal Court and the Security Council’, 151.

⁸⁵ Article 16, *Rome Statute*.

⁸⁶ The *Tadic* case suggests that the ICC can assert authority to independently assess whether the requirements under Article 16 have been met as part of its incidental power to determine the propriety of its own jurisdiction. *Prosecutor v Tadic*, Case Number IT-94-1-AR72 (Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (2 October 1995), 6. For a comment on this case, see Alvarez J, ‘Nuremberg revisited: The *Tadic* Case’ 7 *European Journal of International Law* (1996), 245.

⁸⁷ But see Keller L, ‘The false dichotomy of peace versus justice and the International Criminal Court’ 3 *Hague Justice Journal* (2008)12, 19 (pointing out that a desire to avoid conflict with the Security Council might prompt the ICC to honour an Article 16 deferral request). Compare with Nolte G, ‘The limits of the Security Council’s powers and its functions in the international legal system’ 316 (arguing that where majority of Council members pass a resolution with a view that it does not meet the requirements of Article 39 then such a resolution would be a clear example of *ultra vires* act that is not enforceable).

⁸⁸ See Martenczuk B, ‘The Security Council, the International Court and judicial review: What lessons from *Lockerbie*?’ 10 (3) *European Journal of International Law* (1999) 517, 545.

⁸⁹ See De Gurmendi F, ‘The role of the international prosecutor’ in Lee, *The International Criminal Court*, 175-189 (retracing the negotiating history of the role of the Prosecutor and concluding that the intention of the parties was that an investigation by the Prosecutor only begins after the authorisation of the Pre-trial Chamber before that the Prosecutor only engages in preliminary inquiry). But see Wagner M, ‘The ICC and its jurisdiction – myths, misperceptions and realities’ in Von Bogdandy A and Wolfrum R (eds) *Max Planck Yearbook of the United Nations Law Volume 7*, The Netherlands, Koninklijke Brill N.V, 2003, 409, 498 (arguing that where a preliminary examination constitutes a threat to international peace and security it is also suspended).

when such a request is made.⁹⁰ How this challenge is to be handled is yet to be resolved.⁹¹

Meaning of Threat to Peace, Breach of Peace and Act of Aggression

Article 16 requires that the Security Council acts under Chapter VII of the UN Charter.⁹² Actions by the Security Council under Chapter VII are triggered by a determination under Article 39 that there is either a threat to peace, breach of peace, or an act of aggression.⁹³ What these terms mean is, however, not settled as Security Council's practice shows that its determinations depend upon the circumstances of each case and the political (rarely legal) considerations at play.⁹⁴ Nevertheless, from these past determinations one can find guidance as to the meaning of these terms, even though subsequent determinations by the Security Council are not bound by precedence.⁹⁵

Threat to peace

The practice of the Security Council shows an expansion in the meaning of threat to peace.⁹⁶ In its Summit Declaration of 31 January 1991, it acknowledged

⁹⁰ Considering the potential indefinite time period for which deferrals can be made, such a situation would pose serious problems, as fundamental judicial guarantees, such as the right not to be subjected to arbitrary arrest or detention under Article 9 (1) of the International Covenant on Civil and Political Rights (ICCPR) could be infringed. Delays in litigation hamper the interests of justice. Documents may be lost. Witnesses may disappear. Memories of witnesses may fade.

⁹¹ For further discussion, see El Zeddy M, 'United States dropped the atomic bomb of Article 16 of the ICC Statute: Security Council's power of deferrals and Resolution 1422' 35 *Vanderbilt Journal of Transnational Law* (2002) 1503, 1512-1517.

⁹² See discussion under "The Provision" above.

⁹³ Article 39, *UN Charter*. But see Harris D, *Cases and materials on international law* Sweet & Maxwell, 1983, 676 (noting that "more often than not, the Security Council acts under Chapter VII without discussing the question of jurisdiction under Article 39 at all, let alone deciding under which part of Article 39 ... its jurisdiction is founded").

⁹⁴ See Goodrich *et al*, *Charter of the United Nations*, 295-300 (Concluding that the Council's determinations are situational and political). See also Gowland-Debbas, 'The functions of the United Nations Security Council in the international legal system' 287 (Pointing out that Security Council determinations "does not have to insist on the production of evidence, cross-examine witnesses, or examine legal considerations in any depth"). However, the Council has sometimes resorted to or called for fact finding (e.g. in the case of Iraq (Res. 674 (1990), Yugoslavia (Res. 780 (1992), and Rwanda (Res.935 (1994)). In addition, under Article 32 of the UN Charter, the Council is required to invite States parties to the dispute if these are not members of the Council.

⁹⁵ See Nolte, 'The limits of the Security Council's powers and its functions in the international legal system', 323 ("when the Council states, for example, that violations of humanitarian law or excessive or indiscriminate uses of force have occurred, this is not a statement that is meant to be determinative").

⁹⁶ See Gray C, *International law and use of force: Foundations of international law*, Oxford University Press, 2004, 197.

that threats to international peace and security can come from “...sources of instability in the economic, social, humanitarian and ecological field”.⁹⁷ In reaction to India and Pakistan’s nuclear tests it reiterated that “the proliferation of all weapons of mass destruction constitutes a threat to international peace and security”.⁹⁸ In creating the international criminal tribunal for former Yugoslavia and Rwanda on the basis of Chapter VII, it demonstrated that lack of punishment for individuals who are responsible for violations of international humanitarian law could also represent a threat to peace.⁹⁹ On Libya’s refusal to hand over the Lockerbie suspects to US and Sudan’s refusal to hand over suspects wanted in connection with an assassination attempt against the President of Egypt to Ethiopia, it determined that failure of countries to extradite perpetrators of international crimes amounted to threat to peace.¹⁰⁰

On the white minority regime in Rhodesia it found that widespread racial discrimination constituted a threat to peace.¹⁰¹ On the Middle East War, it held that a country entering into the territory of another country to conduct hostilities constituted a threat to peace.¹⁰² On the conflicts in Liberia,¹⁰³ Rwanda,¹⁰⁴ former Yugoslavia,¹⁰⁵ Sierra Leone,¹⁰⁶ Sudan,¹⁰⁷ and Democratic Republic of Congo,¹⁰⁸ it found that civil war situations leading to widespread violations of international humanitarian law also constituted a threat to international peace.¹⁰⁹ On Iraq government’s mistreatment of the Kurds, it determined that repressions of civilian populations leading to considerable refugee flows were a threat to peace.¹¹⁰ On the Somali conflict it found that obstacles to distribution of humanitarian assistance constituted a threat to international peace.¹¹¹ Similarly, on the ouster of President Aristide of Haiti, the Council determined that coups leading to

⁹⁷ UN Doc. S/24111 (1992).

⁹⁸ Res 1172 (1998). See also Res 1540 (2004).

⁹⁹ Res 827 (1993) and Res 955 (1994) respectively.

¹⁰⁰ Res 748 (1992) and Res 1070 (1996) respectively.

¹⁰¹ Res 216 (1965), 217 (1965) & 221 (1966).

¹⁰² Res 54 (1948).

¹⁰³ Res 788 (1992).

¹⁰⁴ Res 955 (1994).

¹⁰⁵ Res 713 (1991), 743 (1992), 757 (1992), 787 (1992) & 827(1993).

¹⁰⁶ Res 1315 (2000).

¹⁰⁷ Res 1593 (2005).

¹⁰⁸ Res 161 (1961).

¹⁰⁹ See White N, *Keeping the peace: the United Nations and the maintenance of international peace and security* Manchester University Press, 1993, 940 (stating that internal conflict threatens international peace because “the civil war could suck in outside forces including the superpowers”).

¹¹⁰ Res 688 (1991).

¹¹¹ Res 794 (1992); See also Res 751 (1992).

“incidence of humanitarian crises, including mass displacement of population” were threats to international peace.¹¹² In the same case, it also held that failure to respect peace agreements amounted to threat to peace and security.¹¹³

In summary, the practice of the Security Council shows that threat to peace is a wide concept that can arise from unlimited number of situations. However, as the resolutions on the creation of international criminal tribunals for former Yugoslavia and Rwanda demonstrate, threat to peace can also arise from failure to punish violations of international crimes. In this regard, one can safely argue that any request for deferral of ICC’s mandate under the Rome Statute on the basis of threat to peace must demonstrate that the threat from ICC’s action outweighs the threat that would arise from failure to prosecute the said crimes.

Breach of peace

The Security Council has determined that a situation amounts to breach of the peace in at least four situations: In the 1950 North Korean invasion of South Korea;¹¹⁴ in the 1982 Argentine Invasion of the Falkland Islands;¹¹⁵ in the 1987 Iran-Iraq war;¹¹⁶ and in the 1990 Iraqi invasion of Kuwait.¹¹⁷ In all these cases there was the actual invasion of one country by another leading to armed conflict, meaning that actual invasion of one country by another would amount to breach of peace.¹¹⁸

Acts of aggression

In 1974 the UN General Assembly passed a resolution defining aggression.¹¹⁹ Article 1 of the said resolution defines aggression as the use of armed force by a state against the sovereignty, territorial integrity or political independence of another state, or in any other manner inconsistent with the United Nations Charter.¹²⁰ At Article 3, the resolution gives a number of examples of acts of aggression including the use of weapons by a state against the territory of

¹¹² Res 841 (1993).

¹¹³ Res 873 (1993).

¹¹⁴ Res S/1501 (1950).

¹¹⁵ Res 502 (1982).

¹¹⁶ Res 598 (1987).

¹¹⁷ Res 660 (1990).

¹¹⁸ On “war” and “armed conflict” see Meng W, ‘War’ 4 *Encyclopaedia of Public International Law* (1982) 282; Partsch K, ‘Armed conflict’ 1 *Encyclopaedia of Public International Law* (1992) 249.

¹¹⁹ GA Res 3314 (XXIX).

¹²⁰ Article 1, GA Res 3314.

another state, and attack by the armed forces of a state on the land, sea or air forces of another state and sending by, or on behalf of, a state of armed bands to carry out acts of armed force against another state.¹²¹ This clarification of some of the features of the concept of aggression might prove of some use to the Security Council in determining an act of aggression for purposes of Article 16.¹²² However, under the Resolution, the Security Council retains the right to examine all relevant circumstances before determining that an act amounts to aggression.¹²³ Already, the Council has made some determinations.¹²⁴ It condemned as acts of aggression: the 1976 South African action against Angola;¹²⁵ the 1977 Rhodesian action against Mozambique;¹²⁶ the 1985 Israeli action against PLO headquarters in Tunisia;¹²⁷ and the 1990 Iraqi action against diplomatic premises and personnel in Kuwait.¹²⁸

A Review of Security Council Practice under Article 16

The practice of the Council with regard to Article 16 is so far inconclusive.¹²⁹ The emerging trend, however, is that a decision under Article 16 would depend upon the circumstances of each case and the relationship of the five permanent members of the Council to the issue under consideration.¹³⁰ This section highlights some of the decisions of the Security Council under Article 16.

Security Council Resolution 1422 (2002)

On 12 July 2002, less than two weeks after the Rome Statute entered into force on 1 July 2002, the Security Council unanimously approved Resolution 1422.¹³¹ The Resolution pre-emptively suspended the investigation or prosecu-

¹²¹ Article 3, Res 3314.

¹²² Article 16, *Rome Statute*.

¹²³ Article 4, GA Res 3314.

¹²⁴ For a discussion, see Shaw M, *International law*, 1237.

¹²⁵ Res 387 (1976).

¹²⁶ Res 411 (1977).

¹²⁷ Res 573 (1985).

¹²⁸ Res 667 (1990).

¹²⁹ The Council has only dealt formally with one case involving UN peacekeepers. See Murphy S, 'Efforts to obtain immunity from ICC for US peacekeepers' 96 *American Journal of International law* (2002) 725.

¹³⁰ This is because a negative vote by any of the permanent members is sufficient to block all but procedural resolutions of the Council, Article 27, *UN Charter*.

¹³¹ Security Council Resolution 1422, UN Doc S/RES/1422, 12 July 2002 (Res 1422).

tion by ICC of cases 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.”¹³² The resolution was passed at the insistence of the United States (US) who threatened to veto renewal of existing UN peacekeeping missions or approval of any future peacekeeping operations.¹³³ The US made it clear that the reason for its demand was its concern about the exposure of its citizens who work as UN peacekeepers throughout the world to the ICC jurisdiction.¹³⁴

Many states were, however, not comfortable with the resolution.¹³⁵ Some of them argued that the resolution, by providing for automatic unlimited renewals, effectively modified the terms of the Rome Statute without amendment of the treaty.¹³⁶ Others pointed to the ‘deep injustice’¹³⁷ of discriminating between peacekeepers sent from state parties to the Rome Statute and those sent from non-state parties.¹³⁸ The same theme was picked up by the civil society who expressed the view that the Security Council’s actions were incompatible with the Rome Statute and if unchallenged would irredeemably dent the image, impartiality and credibility of the Court.¹³⁹

However, in spite of these concerns, the resolution was renewed on 12 June 2003 under the same condition for a further period of 12 months by the Security Council’s adoption of Resolution 1487.¹⁴⁰ In the new Resolution, the Security Council expressed its intention, as it had done in Resolution 1422, to renew the suspension ‘under the same conditions each 1 July for further 12-month periods for as long as may be necessary’.¹⁴¹ The renewal demonstrated the politicised nature of Article 16 and the ability of a veto-wielding superpower to arm-twist other

¹³² Res 1422, para 1.

¹³³ See statement by the United States’ representative at the Security Council’s meeting of 10 July 2002. UN Doc S/PV/4568, at 9-10.

¹³⁴ US Statement, 9. This was despite the fact that, as the Secretary-General noted in a letter to Colin Powell on 3 July 2002, such persons were already subject to the jurisdiction of the ICTY.

¹³⁵ See, for example, the statement of the over 100-member state Non-Aligned Movement. XIII Conference of Heads of State or Government of the Non-Aligned Movement, Doc NAM XIII/Summit/Final Document.

¹³⁶ See Letter from the Ambassadors to the UN of Canada, Brazil, New Zealand and South Africa to the President of the Security Council. UN Doc S/2002/754, 12 July 2002.

¹³⁷ UN SCOR, 58th Session, 8-9 (Quoting Felipe Paolillo of Uruguay).

¹³⁸ UN SCOR, 8-9.

¹³⁹ See, for example, Coalition for the ICC ‘Excerpts from the Special Plenary of the Prep Com on the ICC’ 3 July 2002 http://www.coalitionfortheicc.org/documents/Excerpts_from_3July02.pdf (on 20 October 2014).

¹⁴⁰ Security Council Resolution 1487, UN Doc S/RES/1487, 12 June 2003.

¹⁴¹ Res 1487.

states in voting for its presumed national interests.¹⁴² Nevertheless, unlike Resolution 1422 which was passed unanimously, Resolution 1487 was approved by only 12 votes with Germany, France and Syria all abstaining.¹⁴³ These abstentions must have emboldened other Security Council members to come out and openly oppose the resolution¹⁴⁴ because when the US attempted to renew the resolution again in 2004, it was not able to secure enough votes forcing it to unceremoniously withdraw the resolution from the agenda of the Security Council.¹⁴⁵

The case of Sudan

In March 2005, the Security Council, acting under its authority in Article 39 of the UN Charter and Article 13 of the Rome Statute, referred the situation in the western region of Sudan (Darfur) to the ICC Prosecutor.¹⁴⁶ The referral followed a UN Commission recommendation that the Security Council refer the situation to the ICC.¹⁴⁷ The Prosecutor opened the case for investigation on 6 June 2005.¹⁴⁸ Three years later, in July 2008, the Prosecutor requested an arrest warrant for Sudanese President Omar Hassan Ahmad Al Bashir, based on evidence that he committed war crimes, crimes against humanity and genocide.¹⁴⁹ On 12 February 2009, a joint delegation of the African Union and Arab League in New York made a failed attempt to convince Security Council members of the

¹⁴² See Cryer R *et al* *An introduction to international criminal law and procedure* Cambridge University Press, 2007, 138.

¹⁴³ UN SCOR, 58th Session, 4772nd meeting, UN Doc S/PV.4772, 12 June 2003, 11.

¹⁴⁴ See the statement of Netherlands during the debate on resolution 1487 (UN SCOR, 58th Session, 8-9) and statement of Syria on behalf of Arab Countries (UN SCOR, 58th Session, 25-26).

¹⁴⁵ See Coalition for the ICC 'Chronology of the adoption of Security Council Resolutions 1422/1487 and withdrawal of the proposed renewal in 2004' http://www.coalitionfortheicc.org/documents/FS-1422and1487Chronology_26March2008.pdf on 14 June 2014 (Quoting US Withdrawal statement: "The United States has decided not to proceed with further consideration and action on the draft at this time to avoid a prolonged and divisive debate").

¹⁴⁶ SC Res. 1593, UN Doc. S/RES/1593 (31 March 2005).

¹⁴⁷ The Commission of Inquiry was established by the UN Secretary General upon direction by the Security Council (See SC Res. 1564, para 12, UN Doc. S/RES/1564 (18 September 2004)). In its January 2005 report, the Commission concluded that serious war crimes and crimes against humanity had been clearly committed in Darfur and recommended that the Security Council immediately refer jurisdiction over the crimes to the ICC. See Report of the International Commission for Inquiry on Darfur to the United Nations Secretary-General U.N. Doc. S/2005/60 (25 January 2005), para 569.

¹⁴⁸ Coalition for the International Criminal Court, 'Cases & Situations: Darfur' <http://www.iccnw.org/?mod=darfur> on 5 March 2014.

¹⁴⁹ ICC Press Release, 'ICC Prosecutor presents case against Sudanese President, Hassan Ahmad Al Bashir, For genocide, crimes against humanity and war crimes in Darfur' 14 July 2008, <http://www2.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/press%20releases%20%282008%29/a> on 5 March 2014.

need to defer the case against Al Bashir.¹⁵⁰ In the same month the Sudanese government entered into a declaration of goodwill with the Darfur rebels expressing their willingness to engage in a peace process in an attempt to convince the ICC not to issue the arrest warrant.¹⁵¹

Despite these efforts, on 4 March 2009, the ICC pre-trial chamber granted the Prosecutor's request and issued a warrant for Al Bashir's arrest.¹⁵² Following the arrest warrant, several regional organisations¹⁵³ and personalities¹⁵⁴ called on the Security Council members to defer the prosecution of Al Bashir.¹⁵⁵ They argued that prosecution of President Al Bashir would negatively affect the peace efforts in Darfur.¹⁵⁶ This position got the support of two Security Council permanent members, China and Russia, but was rejected by the United Kingdom, France and the US in favour of the prosecution of Al Bashir.¹⁵⁷ Because of this lack of unanimity, a motion on the deferral of Al Bashir case was not moved within the Security Council¹⁵⁸ forcing the AU in August 2009 to instruct its members not to cooperate with the ICC in executing the warrant.¹⁵⁹

However, the threats of the AU seem not to have worked as a formal debate on the deferral is yet to take place within the Security Council.¹⁶⁰ Even if

¹⁵⁰ British Broadcasting Corporation, 'Sudan: African-Arab delegation fails to convince UNSC on deferring ICC issue' 13 February 2009.

¹⁵¹ This agreement was described as a possible "kick-start" to peace and a "confidence-building agreement." See Baldauf S, 'Why did Sudan make a deal with Darfur rebels?' *Christian Science Monitor*, 18 February 2009.

¹⁵² ICC Press Release, 'ICC issues a warrant of arrest for Omar Al Bashir, President of Sudan' 3 April 2009 <http://www.icc-cpi.int/NR/exeres/0EF62173-05ED-403A-80C8-F15EE1D25BB3.htm> on 10/5/2014).

¹⁵³ These included the African Union, Arab League, Non-Aligned Movement, and Organisation of Islamic Conference.

¹⁵⁴ For example, current president of South Sudan, Salva Kiir, warned of a return to civil war. 'Sudan VP warns of return to civil war', *Voice of America News*, 15 January 2009, <http://www.voanews.com/english/archive/2009-01/2009-01-15-voa38.cfm?CFID=126181033&CFTOKEN=15892117&jsessionid=88305dfa1d6f404e4cb62654e505bc5c75d5> on 20 July 2014.

¹⁵⁵ See Coalition for the International Criminal Court 'Darfur: possibility of Article 16 deferral of ICC's investigation in Darfur, debate at the 63rd UNGA and related deliberations by the UN Security Council' Sept. 22, 2008 <http://www.iccnw.org/?mod=newsdetail&news=3093> on 6 May 2014.

¹⁵⁶ Heavens A, 'China urges deferral of Bashir war crimes case' *Reuters* 7 January 2009 <http://www.reuters.com/article/latestCrisis/idUSL7563091> on 20 May 2014.

¹⁵⁷ Security Council, 'Update Report No 4: Sudan' 28 July 2008 at 6.

¹⁵⁸ 'China urges African UNSC members to request ICC deferral for Bashir' 8 January 2009, available <http://www.sudantribune.com/spip.php?article29799> on 5 March 2014.

¹⁵⁹ However, some AU countries, including Botswana, Chad, Uganda, and South Africa, later recommitted to the ICC. See BBC, 'South Africa reverses decision on arrest of Sudan's Al Bashir' 3 August 2009.

¹⁶⁰ Margesson R *et al*, "International Criminal Court cases in Africa: Status and policy issues" *Congressional*

a motion for deferral were to be brought, it seems unlikely that a resolution for a deferral would pass, given the continued division among the Security Council members on how to deal with the Darfur conflict.¹⁶¹

The case of Uganda

On 16 December 2003, Uganda's President Yoweri Museveni referred the situation concerning the Lord Resistance Army (LRA) in Northern Uganda to the ICC for investigation and possible prosecution.¹⁶² In June 2004, the ICC commenced its investigations.¹⁶³ One year later, on 8 July 2005, the ICC prosecutor applied for and obtained arrest warrants for five top leaders of the LRA.¹⁶⁴ The warrants were issued under seal to protect the victims, but were subsequently unsealed on 13 October 2005.¹⁶⁵

The indictments brought the LRA leaders to the negotiating table, but they insisted that the warrants be lifted as a condition of peace.¹⁶⁶ Many Ugandan peace organisations also argued that ICC involvement would harm peace progress in the region.¹⁶⁷ Article 16 was suggested as a solution to allow for the promotion of peace and security.¹⁶⁸ However, no state was willing to take the case up for consideration at the Security Council.¹⁶⁹ On 10 March 2008, a delegation of the LRA went to The Hague allegedly to lobby the ICC to drop its arrest war-

Research Service, 7 March 2011 <http://fpc.state.gov/documents/organization/158489.pdf> on 10 May 2014.

¹⁶¹ Security Council Report, 5.

¹⁶² ICC Press Release, 'President of Uganda refers situation concerning the Lord's Resistance Army (LRA) to the ICC', ICC20040129-44-En, 29 February 2004. For background to the conflict, see Allen T, *Trial justice: the International Criminal Court and the Lord's Resistance Army*, Zed books, 2006; Apuuli P, 'The International Criminal Court (ICC) and the Lord's Resistance Army (LRA) insurgency in Northern Uganda' 15 *Criminal Law Forum* (2004) 391, 392-94.

¹⁶³ ICC Press Release 'Warrant of arrest unsealed against five LRA commanders' 14 October 2005 <http://www.icc-cpi.int/press/pressreleases/114.html> on 10 May 2014.

¹⁶⁴ See ICC 'Arrest warrants for Joseph Kony, Vincent Otti, Okot Odhiambo, Raska Lukwiya, Dominic Ongwen' http://www.icc-cpi.int/cases/UGD/c0105/c0105_docAll1.html on 10 May 2014.

¹⁶⁵ *Situation in Uganda: Decision on the Prosecutor's application for unsealing of the warrants of arrest*, Case No. ICC-02/04-01/05 (13 October, 2005) para 4-27. The warrants are yet to be executed with reports indicating that some of the indictees could already be dead. See ICC Press Release 'LRA warrants now outstanding for four years' ICC-OTP-20090708-PR434 08 July 2009; See also, Hague Justice Portal, 'LRA delegation meets ICC Registry officials' 10 March 2008.

¹⁶⁶ Schabas, *An introduction to the International Criminal Court*, 39-40.

¹⁶⁷ Schiff, *Building the International Criminal Court*, 201.

¹⁶⁸ Schabas, *An introduction to the International Criminal Court*, 41-42 (referring to a remark made by the head of the International Crisis Group at a symposium organised by the Office of the Prosecutor).

¹⁶⁹ Security Council 'Update Report Number 2: Uganda' 20 March 2007.

rants.¹⁷⁰ They were snubbed by the Prosecutor.¹⁷¹ To date, LRA's plea has largely been ignored despite constant reiteration by the Security Council of the need to bring the Ugandan conflict to a closure.¹⁷²

The case of Kenya

On 5 November 2009, the Prosecutor of the ICC acting *proprio motu* notified the President of the Court of his intention to begin investigation into the post 2007 election violence in Kenya.¹⁷³ On 31 March 2010, Pre-trial Chamber II of the Court authorised the investigation.¹⁷⁴ Nine months later, on 15 December 2010, the prosecutor submitted to Pre-trial Chamber two applications to summon five senior Kenyan officials and one journalist.¹⁷⁵ Immediately thereafter, Kenya began to pursue a deferral of the ICC proceedings.¹⁷⁶ On 31 January 2011, Kenya got support from the AU who asked its members on the Security Council to place the issue on the Council's agenda.¹⁷⁷ Despite these efforts, on 8 March 2011, the Pre-trial Chamber granted the request of the Prosecutor and issued summonses to appear for the six individuals.¹⁷⁸

Ten days later, on 18 March 2011 the Security Council held an informal interactive dialogue with representatives of Kenya and AU to discuss Kenya's

¹⁷⁰ See ICC 'ICC Registry officials meet with LRA Delegation' The Hague, 10 March 2008 <http://www.icc-cpi.int/press/pressreleases/344.html> on 15 March 2014.

¹⁷¹ Security Council Report of 13 August 2012 available at <http://www.securitycouncilreport.org/chronology/lra-affected-areas.php?page=3> on 4 September 2014.

¹⁷² See, for example, Security Council 'Statement by the President of the Security Council' 16 November 2006 <http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Uganda%20SPRST200645.pdf> on 20 May 2014.

¹⁷³ ICC Office of the Prosecutor, *Factsheet: Situation in the Republic of Kenya*, 15 December 2010. On Kenyan conflict see, for example, OHCHR, 'Report from the OHCHR Fact-finding Mission to Kenya, 6-28 February 2008' ICC-01/09-3-Anx7.

¹⁷⁴ Pre-Trial Chamber II, "Decision pursuant to Article 15 of the Rome Statute on the Authorization of an investigation into the situation in the Republic of Kenya", ICC-01/09-19-Corr.

¹⁷⁵ *Prosecutor's application pursuant to Article 58 as to William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang* ICC-01/09-30-Conf-Exp, 15 December 2010; *Prosecutor's application pursuant to Article 58 as to Francis Kirimimu Mutaura, Uburu Muigai Kenyatta and Mohamed Hussein Ali* ICC-02/09-30-Conf-Exp, 15 December 2010.

¹⁷⁶ 'Press Statement by Hon. Amos Wako, Hon. Prof. George Saitoti and Hon. Mutula Kilonzo on ICC summons,' Statement, Office of the Government spokesperson, Kenya, 9 March 2011, http://www.communication.go.ke/media.asp?id=1274&media_type=2 on 10 April 2014; But see also "Kenya: Reject Plea for ICC Deferral, ODM Asks UN" by Leftie P and Menya W, *Daily Nation/AllAfrica*, 13 March 2011, <http://allafrica.com/stories/201103140051.html>.

¹⁷⁷ Assembly/AU/Dec.334(XVI).

¹⁷⁸ *Prosecutor v William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang* ICC-01/09-01/11-01 08-03-2011 EO PT; *Prosecutor v Francis Kirimimu Mutaura, Uburu Muigai Kenyatta and Mohamed Hussein Ali* ICC-01/09-02/11-01 08-03-2011 2/25 EO PT.

deferral request.¹⁷⁹ During the interactive dialogue, Kenya argued that a deferral would allow it time to deal with the alleged crimes.¹⁸⁰ Majority of Council members were, however, not persuaded that the plea met the threshold for a deferral under Article 16.¹⁸¹ They suggested that Kenya utilise Article 19 of the Rome Statute to directly challenge the admissibility of the case against its nationals before the ICC.¹⁸² Members' attention was also drawn to fact that the request did not enjoy the support of all parties in Kenya's coalition government.¹⁸³

On 23 March, Kenya wrote a letter to the President of the Security Council requesting for an open debate on Kenya's request for deferral.¹⁸⁴ The request was not granted as not much seemed to have changed among Council members' views since the informal interactive dialogue.¹⁸⁵ On 31 March 2011, Kenya opted to apply directly to the ICC to have the cases deferred to its jurisdiction under Article 19 of the Rome Statute.¹⁸⁶ This application was rejected by the Court on 30 May 2011, on the ground that, despite indications that it would do so, Kenya had failed to seriously investigate the crimes committed in the post-election violence.¹⁸⁷

Conclusion

This paper has shown that in principle, the Security Council possesses a wide margin of appreciation in the exercise of its mandate under the UN Charter.¹⁸⁸ However, with regard to its deferral right under Article 16 of the Rome Statute, the Security Council margin of discretion is clearly circumscribed.¹⁸⁹ As

¹⁷⁹ Security Council 'Update Report: Kenya and the ICC' 6 April 2011 ("Council Update Report").

¹⁸⁰ Council Update Report.

¹⁸¹ Council Update Report; See also "Deferral flop ... what next?" <http://kenyaupdate.blogspot.com/2011/03/deferral-flopwhat-next.html> (reporting that among the permanent members only China supported Kenya's cause).

¹⁸² Council Update Report.

¹⁸³ Council Update Report.

¹⁸⁴ S/2011/201 (23 March 2011).

¹⁸⁵ Council Update Report.

¹⁸⁶ *Application on behalf of the government of the Republic of Kenya pursuant to Article 19 of the ICC Statute* (ICC-01/09-01/11 and ICC-01/09-02/11) (31 March 2011).

¹⁸⁷ See Pre-trial Chamber II, Decision on the application by the government of Kenya challenging the admissibility of the case pursuant to Article 19(2)(b) of the Statute ICC-01/09-02/11-96 (30 May 2011) para. 61; 65.

¹⁸⁸ See discussion on "An overview of the Security Council" above particularly note 17.

¹⁸⁹ See discussion on "The deferral provision under Article 16" above. See also Bolton J, 'The risks and weaknesses of the International Criminal Court from America's perspective' 41 *Virginia Journal of International Law* (2000) 186, 198 (pointing out that Article 16 "shifts the balance of authority from

the drafting history shows, this right was not intended as a means by which the Security Council can undermine the budding Court.¹⁹⁰ Instead it was meant to be used sparingly and only in circumstances where ICC investigation or prosecution can clearly be shown to threaten the resolution of a situation predetermined by the Council as amounting to threat to peace, breach of peace or act of aggression.¹⁹¹ The practice of the Security Council shows that threat to peace could arise from failure to prosecute international crimes, meaning that any request for deferral of ICC's mandate under the Rome Statute on the basis of threat to peace must demonstrate that the threat from ICC's action outweighs the threat that would arise from failure to prosecute the said crimes.¹⁹² The practice of the Council also shows that Article 16 is understood by many states as being limited to deferrals of investigations or prosecutions on a case-by-case basis.¹⁹³ The practice further shows that, while political considerations have a bearing,¹⁹⁴ a case is unlikely to pass or be sustained within the Council if members are not convinced that it meets the threshold of Article 16¹⁹⁵ or if the investigation or prosecution was triggered by a referral from the Security Council or by a referral from a state.¹⁹⁶ Where a case is passed by the Council, the ICC has been given a residual right (indeed a duty) under Article 16 to refuse to comply with a Security Council resolution that is incompatible with the Article's tenets.¹⁹⁷

the Council to the ICC”).

¹⁹⁰ For the drafting history, see discussion on “The drafting history” section above.

¹⁹¹ Such a decision requires the support of at least nine Council members with the concurrence of all permanent members. See “The Security Council” and “The provision” sections above. On what amounts to threat to peace, breach of peace and act of aggression, see relevant discussion above above

¹⁹² See “Threat to peace” section above.

¹⁹³ See the opposition to Resolution 1422 and its attempted renewal discussed in “A review of Security Council practice under Article 16” above.

¹⁹⁴ See Ho S, “China Discusses Darfur Prosecution” *Voice of America News*, 8 January 2009, <http://www.voanews.com/english/2009-01-08-voa14.cfm> on 20 May 2014 (pointing to China's economic ties with Sudan as reason for supporting deferral); See also US Statement (note 133).

¹⁹⁵ See respectively Kenyan case discussed in part 6.4 and the demise of Resolution 1422 discussed.

¹⁹⁶ See respectively sections on Sudan and Ugandan cases, discussed above. The language of Article 16 does not, however, support this practice. See Cryer R, “The Security Council, Article 16 and Darfur” (2008) <http://www.csls.ox.ac.uk/documents/CryerFi.pdf> on 20 June 2014 (pointing out that the drafters did not intend to exclude Security Council and state referrals from the application of Article 16). But see Scheffer D, “The Security Council's struggle over Darfur and international justice” (2008) <http://jurist.law.pitt.edu/forumy/2008/08/security-councils-struggle-over-darfur.php> on 20 May 2014 (arguing that since Article 16 was a compromise to the position that no investigation or prosecution should occur in the absence of Security Council consent, it should also have no relevance to a situation referred by the Council itself).

¹⁹⁷ See relevant discussion above particularly footnote 86 and 87.