

Chapter 12

Africa, the United Nations Security Council and the International Criminal Court: The Question of Deferrals

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12.1 Introduction

Africa's current relationship with the International Criminal Court has deteriorated considerably. Africa seems to have turned from being the Court's greatest supporter to one of the Court's biggest opponents.¹ All situations presently before the International Criminal Court relate to Africa.² One would think of this as being something good given the continent's long history of atrocities being committed but in respect of which none or very few perpetrators have been held accountable. Instead, the Court has been branded, at least by African leaders, as an enemy of the African people. One issue that has put the continent's leaders at crossroads with not only the Court but also the UN Security Council is the question of deferring cases under Article 16 of the ICC Statute. This is reflected in the bitter statements

¹ African States played a central role in negotiating and accelerating the entry into force of the Rome Statute that establishes the International Criminal Court. See Jalloh et al. 2011, pp. 13–15.

² The situations are in: Uganda, Democratic Republic of the Congo, Darfur/Sudan, Central African Republic, Kenya, Libya, Cote d'Ivoire, and Mali.

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that followed the most recent failed attempt to defer cases before the International Criminal Court in respect to the Kenyan situation. Kenya's Ministry of Foreign Affairs sharply criticized this outcome and accused certain important members of the Security Council of abdicating global leadership and humiliating the African continent and its leadership.³

The African Union has been discontent for a while now with the UN Security Council's manner of handling its requests for deferrals. This discontentment was first triggered by the failure of the Security Council to consider the African Union's request to defer proceedings in respect of *Al Bashir*, the President of Sudan.⁴ This calls for a closer look into whether Africa's contention with the way the issue of deferrals has so far been handled is genuine or rather an attempt to prevent justice for the many victims of international crimes on the continent.

This chapter will begin by giving a chronology of the events that have contributed to the AU's dissatisfaction with the use of Article 16 of the Rome Statute. It then looks at the legal framework of Article 16, giving a brief background of its drafting history and its rationale. It will then look into the practice that has been grounded by the law in Article 16 and finally give an analysis of the merits of the AU's contention on the use of this Article.

12.2 Genesis of the Problem

In 2005 the UN Security Council adopted Resolution 1593 which referred the Darfur conflict to the International Criminal Court for investigation.⁵ This resulted in the summoning of, among others, the President of Sudan, *Al Bashir*, and subsequently the issuance of two warrants for his arrest in relation to the crimes of genocide and crimes against humanity committed in the Darfur region.⁶ This course of events did not please both the government of Sudan and the African Union. The African Union was of the view that the ICC process would jeopardize the delicate peace process that it was spearheading in respect of the Darfur conflict. The African Union thus requested the UN Security Council to suspend the ICC process in respect of the Darfur conflict, using its powers under Article 16 of the ICC Statute.⁷ The UN Security Council has consistently failed to act on this request. In response to the UN Security Council's failure to consider its request,

³ Kenyan Ministry of Foreign Affairs (2013).

⁴ Assembly of the African Union, Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC), Assembly/AU/Dec.245 (XIII), Sirte, July 3, 2009.

⁵ S.C. Res. 1593, 31 March 2005, 5158th mtg., U.N. Doc. S/RES/1593 (2005).

⁶ *Prosecutor v. Omar Hassan Ahmed Al Bashir*, first warrant of arrest issued on 4 March 2009, second warrant of arrest issued on 12 July 2010.

⁷ African Union Peace and Security Council communiqué, PSC/PR/COMM.(CLXXV), 5 March 2009.

the African Union directed all its Member States not to cooperate with the International Criminal Court in the arrest and surrender of *Al Bashir*, citing Article 98 of the ICC Statute as the legal basis of its decision.⁸ As a result, several African states, even States Parties to the Rome Statute of the International Criminal Court, have hosted *Al Bashir* thus failing to execute the Court's request for arrest and surrender.⁹ The consequence of this was the AU's proposal seeking to amend Article 16 to allow the UN General Assembly to decide on the question of deferrals should the UN Security Council turn down the proposal.¹⁰ This proposal did not, however, materialize and the African Union seems to have since stopped pursuing the issue.

On 15 February 2011, demonstrations against the administration of the late *Muammar Gaddafi* broke out in Libya. In an attempt to quell these demonstrations state hardware was used, resulting into the deaths of several civilians. This situation prompted the UN Security Council, under its mandate of maintaining peace and security, to unanimously adopt Resolution 1970 which referred the situation in Libya to the International Criminal Court.¹¹ This resulted in, among others, a warrant of arrest issued against the then Head of State *Gaddafi*.¹² Once again the concerns of the African Union in the *Al Bashir* case were raised with regard to the *Gaddafi* case. The African Union was deeply concerned that *Gaddafi's* warrant of arrest undermined its efforts in facilitating negotiations that would lead to a peaceful solution. The African Union took a similar position to the one in the case of *Al Bashir* and decided not to cooperate with the International Criminal Court, noting that the warrant of arrest "seriously complicates the efforts aimed at finding a negotiated political solution to the crisis in Libya".¹³ The African Union, in its decision, also requested the "UN Security Council to activate the provisions of Article 16 of the Rome Statute with a view to deferring the ICC process on Libya, in the interest of justice as well as peace in the country".¹⁴ This request was never considered and eventually the *Gaddafi* regime was overthrown.

On 12 October 2013, Kenya rallied the rest of Africa to support its bid to defer the cases before the International Criminal Court in respect to its President *Uhuru*

⁸ Assembly of the African Union, Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC), Assembly/AU/Dec.245 (XIII), Sirte, July 3, 2009, paras 9–10.

⁹ Among the nations that *Al Bashir* has visited are Kenya and Chad which are States Parties to the ICC Statute.

¹⁰ For a detailed discussion on the proposal see Jalloh et al. 2011, pp. 5–50.

¹¹ S.C. Res. 1970, 26 February 2011, 6491st mtg., U.N. Doc. S/RES/1970 (2011).

¹² Situation in Libya, Warrant of Arrest for Muammar Mohammed Abu Minyar Gaddafi, 27 June 2011.

¹³ African Union Assembly, Decision on the implementation of the assembly decisions on the International Criminal Court, Assembly/AU/Dec. 366 (XVII), Doc.EX.CL/670 (XIX), 30 June–1 July 2011, para 6.

¹⁴ *Ibid.*

Kenyatta, and his deputy, *William Ruto*.¹⁵ The two are charged before the Court with crimes against humanity that were allegedly committed during the post-election violence that occurred in Kenya after the contested 2007 presidential elections.¹⁶ The AU's main concern in this case was that the continued prosecution of the President and his deputy undermined the sovereignty, stability and peace of the people of Kenya, and that it also compromises their ability to spearhead the fight against terrorism in the East African region.¹⁷ The UN Security Council failed to adopt a draft resolution to defer these proceedings.¹⁸ Although this was the first time the issue was formally considered by the UN Security Council, Kenya had previously made unsuccessful attempts to have the Court's jurisdiction deferred in respect of cases relating to its citizens.¹⁹ The failure to adopt the resolution for a deferral elicited sharp criticism from the African representatives. The Kenyan representative, while expressing his disappointment, stated that the Security Council is "[...] no institutional destination for serving complex and fluid international security and political problems".²⁰ The sentiments of the Kenyan representative were followed by a letter from the Kenyan Ministry of Foreign Affairs which accused certain members of the Security Council who held veto powers of not appreciating issues concerning peace and security.²¹ The Ministry criticized the Security Council for failing to take note of the African Union Resolution, which emphasized that no sitting Head of State or Government should appear before the International Criminal Court.

The above chronology of events gives the background to the AU's dissatisfaction with the manner in which the UN Security Council has dealt with the question of deferrals. The African Union considers Article 16 of the ICC Statute as essential, especially when the question of peace is at stake. The AU's request for a deferral in the Sudan situation was motivated by its concerns that the arrest warrant against *Al Bashir* would have a negative impact on the peace process in Sudan. Similar sentiments were expressed by the African Union in reference to the conflict in Libya and the arrest warrant issued against *Gaddafi*. In the Kenya situation, the concern was that the continued prosecution of a Head of State and his Deputy undermined Kenya's capability to carry out its constitutional mandate and to deal with serious issues relating to peace and security in the region. The AU's

¹⁵ African Union Assembly, Decision on Africa's relationship with the International Criminal Court (ICC), Ext/Assembly/AU/Dec. 1, October 2013.

¹⁶ See *Prosecutor v. William Samoei Ruto and Joshua Arap Sang; Prosecutor v. Uhuru Muigai Kenyatta*.

¹⁷ African Union Assembly, Decision on Africa's relationship with the International Criminal Court (ICC), Ext/Assembly/AU/Dec. 1, October 2013.

¹⁸ UNSC, 7060th Meeting, S/PV.7060 "Peace and security in Africa", 15 Nov 2013.

¹⁹ See Security Council Report, "Chronology of Events, Kenya". Other attempts had been in April 2011 and May 2013. In both instances council members had advised Kenya that its requests would be best pursued before the International Criminal Court itself.

²⁰ UNSC, 7060th Meeting, S/PV.7060 "Peace and security in Africa", 15 Nov 2013.

²¹ Kenyan Ministry of Foreign Affairs (2013).

requests on the use of Article 16 show its preference for the adoption of a political solution where the question of peace prevails over the question of justice. This position was confirmed during its 21st ordinary session when the African Union reaffirmed that “the search for justice should be pursued in a way that does not impede or jeopardize efforts aimed at promoting lasting peace”.²² Although the question of peace has always been cited in AU’s requests for deferrals, an issue that has greatly displeased it is the prosecution of its leaders before the International Criminal Court, and this, perhaps, to a great extent informed its motive for the requests for deferrals.²³ This motive could be deciphered from the decision made on its extraordinary session in October 2013, when the African Union reiterated its “concern on the politicization and misuse of indictments against African Union leaders”.²⁴ The African Union has thus lamented the failure of the UN Security Council to use Article 16 for purposes that suit African leaders. This makes it important to look into the merits of the AU’s expectations in light of the law that informs Article 16 of the Rome Statute.

12.3 The Legal Foundation of Deferrals

Article 16 of the ICC Statute allows the UN Security Council, through a resolution under Chapter VII of the UN Charter, to suspend an ICC investigation or prosecution for a renewable period of 12 months. Article 16 specifically provides:

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.

The UN Security Council is authorized under Chapter VII of its Charter to take measures to maintain or restore international peace and security in the case where it has been established that there is a threat to the peace, breach of peace or act of aggression. Thus Article 16 provides an instance in which the UN Security Council may interfere with the work of the Court if it considers the Court’s intervention as threatening peace and security.

During the drafting of the ICC Statute negotiations on Article 16 was among the most contentious issues.²⁵ There was a great concern that the Article would allow the UN Security Council to interfere with the independent functioning of the

²² African Union Assembly, Decision on International Jurisdiction, Justice and the International Criminal Court, Doc. Assembly/AU/13 (XXI), 26–27 May 2013, para 4.

²³ Tladi 2009, p. 61.

²⁴ See African Union Assembly, Decision on Africa’s relationship with the International Criminal Court (ICC), Ext/Assembly/AU/Dec. 1, October 2013, para 4.

²⁵ Jalloh et al. 2011, p. 15; Abass 2005, p. 269.

Court.²⁶ The initial draft of the Article automatically prevented the Court from taking action in a situation that was being dealt with by the Security Council under the Chapter VII of the UN Charter, unless the UN Security Council decided otherwise. The draft Article stated:

No prosecution may be commenced under this Statute from a situation which is being dealt with by the Security Council as a threat to or a breach of the peace or an act of aggression under Chapter VII of the Charter, unless the Security Council otherwise decides.²⁷

One concern raised with this draft was that it made the Court's intervention inferior to the Security Council's responsibility to maintain peace and security.²⁸ Another challenge that the draft proposal presented was the possibility of the Security Council dealing with a matter indefinitely, thus preventing any intervention from the Court.²⁹ There was need to adopt a proposal that checked the extent to which the Security Council could interfere with the independent functioning of the Court. This led to further negotiations that eventually culminated in the final draft that now forms the wording of Article 16.³⁰

When considering a matter under Article 16, the Security Council is called to perform a balancing act between the issues of peace and justice, which makes this Article inherently very controversial.³¹ Nonetheless, Article 16 clearly articulates that the only situation that would justify a deferral must be one that poses a threat to peace and security.

12.4 A False Start?

On 12 July 2002 the UN Security Council adopted Resolution 1422.³² This Resolution exempted from the ICC jurisdiction personnel from states that are not party to the ICC Statute and that are involved in an operation authorized by the UN Security Council for a period of 12 months. The United States had prompted this Resolution with the sole motive of protecting its troops participating in UN operations from the possibility of being prosecuted before the Court.³³ The Resolution was made by the Security Council acting under Chapter VII of the UN Charter and invoking Article 16 of the ICC Statute. It partly stated:

²⁶ Kim 2011, p. 178; Abass 2005, p. 269.

²⁷ Draft Statute for an International Criminal Court, Report of the International Law Commission, UN GAOR, Supp. No. 10, UN Doc. A/49/10, Article 23 (3).

²⁸ Neuner 2012, p. 299; Jalloh et al. 2011, p. 16.

²⁹ Neuner 2012, p. 300; Kim 2011, p. 179.

³⁰ Kim 2011, pp. 179–180; Abass 2005, pp. 269–271.

³¹ Krzan 2009, p. 77.

³² S.C. Res. 1422, U.N. SCOR, 57th Sess., 4572d mtg., U.N. Doc. S/RES/1422 (2002).

³³ Jalloh et al. 2011, p. 17; Krzan 2009, p. 80; Jain 2005, p. 240; Zappala 2003, p. 117.

Requests, consistent with the provisions of Article 16 of the Rome Statute, that the ICC, if a case arises involving current or former officials or personnel from a contributing State not a Party to the Rome Statute over acts or omissions relating to a United Nations established or authorized operation, shall for a twelve-month period starting 1 July 2002 not commence or proceed with investigation or prosecution of any such case, unless the Security Council decides otherwise.³⁴

On 12 June 2003 this Resolution was renewed through resolution 1487, extending the same *status quo* for a further 12 months.³⁵ Resolutions 1422 and 1487 were not popular with the proponents of the Court and fuelled the controversy around the question as to what extent the UN Security Council should influence the work of the International Criminal Court.³⁶ The tension arising from this debate led to the withdrawal by the United States of a further attempt to renew Resolution 1487 and instead the more controversial Resolution 1497 was adopted.³⁷ This Resolution provided that states contributing troops for the UN operation in Liberia would have exclusive jurisdiction for crimes committed by their troops unless that jurisdiction is expressly waived. Resolution 1497 thus expressly shut out the possibility of an ICC intervention and also locked out the possibility of other third states, who may otherwise have jurisdiction for crimes committed against their nationals or in their territory, from exercising jurisdiction.³⁸

The opponents of Resolutions 1422 and 1487 argued that they discriminated against officials from States Parties of the International Criminal Court. They further contended that they attempted to modify the Rome Statute indirectly without seeking an amendment, and that they were vehemently opposed to the clauses that seemed to imply that the Resolutions would be automatically renewable, regardless of whether the circumstances that led to the initial deferral had changed.³⁹ The next Security Council Resolutions that cited Article 16 are Resolutions 1593 and 1970 that referred the Darfur and the Libya situation respectively to the International Criminal Court.⁴⁰ The Resolutions, although recalling the particulars of Article 16, did not specifically indicate what part of the Resolutions Article 16 would apply to. It can only be presumed that in light of Resolutions 1422 and 1487, Article 16 was cited in reference to Para 6 of both Resolutions, in which the Security Council decided to exempt officials from non-States Parties from the jurisdiction of the International Criminal Court (this

³⁴ U.N. Doc. S/RES/1422 (2002), para 1.

³⁵ S.C. Res. 1487, U.N. SCOR, 58th Sess., 4772d mtg., U.N. DOC. S/RES/1487 (2003).

³⁶ Jalloh et al. 2011, p. 17; Abass 2005, p. 272.

³⁷ S.C. Res. 1497, U.N. SCOR, 58th Sess., 4803d mtg., U.N. Doc. S/RES/1497 (2003).

³⁸ For further analysis on Resolution 1497, see Abass 2005, pp. 263–297; Jain 2005, pp. 239–254.

³⁹ Jalloh et al. 2011, p. 17; Abass 2005, p. 272.

⁴⁰ U.N. Doc. S/RES/1593 (2005), preamble para 2; U.N. Doc. S/RES/1970 (2011), Preamble para 12.

exemption did not apply to officials from the Sudan and Libya), and instead to give exclusive jurisdiction to the contributing states.⁴¹

Both Resolutions 1422 and 1487 made reference to Article 16 of the ICC Statute. The legality of these Resolutions has been the subject of much debate.⁴² A deferral under Article 16 requires that the criteria set out in it are met. There has to be a threat to international peace and security under Chapter VII of the UN Charter, and any deferral adopted is for a renewable period of 12 months. The circumstances under which these Resolutions were made could not be characterized as situations that threatened international peace and security. Article 16 was intended to operate once the Court is seized of a situation, that is once the ICC prosecutor starts investigations or after an individual has been charged before the Court, marking the beginning of prosecution.⁴³ Resolutions 1422 and 1487 instead used Article 16 to preemptively grant immunity under the ICC Statute to troops belonging to states not party to the International Criminal Court.⁴⁴ It is difficult to see how the hypothetical future possibility of the International Criminal Court carrying out investigations or prosecuting a peace keeper from a country not party to the Court would threaten the peace and security of the country.⁴⁵

In the case of Resolutions 1593 (Darfur situation) and 1970 (Libya situation),⁴⁶ Para 6 effectively terminates the jurisdiction of the International Criminal Court. Article 16 was only intended to suspend the Court's jurisdiction for a renewable period of 12 months. It is also questionable that preventing the Court from exercising jurisdiction as envisaged by these Resolutions can be considered to restore international peace and justice. This makes it difficult to support the legal basis of Para 6 of both Resolutions under Article 16 of the ICC Statute.⁴⁷

Resolutions 1422, 1487, 1593 and 1970 show that the initial applications of Article 16 by the Security Council were inconsistent with the express wording and original purpose of this Article. The *travaux préparatoires* of Article 16 and the sentiments of the states that opposed Resolutions 1422 and 1487 reveal that the understanding of most states at the time of adopting Article 16 was that the power of the Security Council to defer investigations or prosecutions would be used only in exceptional cases where there was a threat to peace and security and for a limited period of time.⁴⁸ In this respect the Security Council abused its power under Article 16, thus undermining the credibility of the Court.

⁴¹ Jalloh et al. 2011, p. 20.

⁴² See Kim 2011, pp. 180–186; Abass 2005, pp. 271–273; Jain 2005, pp. 239–254.

⁴³ Kim 2011, p. 182.

⁴⁴ Kim 2011, pp. 180–181.

⁴⁵ Jain 2005, p. 302.

⁴⁶ Both Resolutions can be found in the Annex to this volume.

⁴⁷ Cf. Jain 2005, pp. 244–245.

⁴⁸ Jalloh et al. 2011, pp. 18–21.

12.5 The AU Deferral Requests: An Analysis of Their Merits Under Article 16

The AU's contention with the UN Security Council, the International Criminal Court and the use of Article 16 has been with the failure to adopt its request to defer proceedings relating in particular to its Heads of State. When the African Union forwarded the request of deferral of proceedings in respect of *Al Bashir*, it contended that this was essential to facilitate the negotiation of a peace deal in the Darfur crisis. The same reasoning was given for the deferral request in the situation of Libya when arrest warrants were issued against *Gaddafi*. The reasoning of the African Union in the two situations was that the demands of peace dictated that the prosecution of the two leaders be set aside. The demands of the African Union cannot be considered as far-fetched because this very reasoning informed the inclusion of Article 16 in the Rome Statute. When the Security Council is of the view that the needs of peace dictate that the question of justice be set aside at least temporarily, Article 16 allows for a deferral to be adopted if it would be the best solution in the circumstances.

The challenge perhaps with the Darfur and Libya crisis was that both situations were referred to the International Criminal Court by the Security Council under Article 13 (b) of the Rome Statute. Such referrals are made only if the situation in question is considered to be a threat to peace and security under Chapter VII of the UN Charter.⁴⁹ In such circumstances, it would be difficult to envisage a situation that has been referred to the Court by the Security Council as qualifying for deferral under Article 16.⁵⁰ A deferral request under such instances would require proof that the Court's interventions has further contributed to a deterioration of the situation, which can almost be an impossible task. The African Union failed to show that the ICC intervention in Darfur and Libya in fact constituted a threat to peace and that the suspension of the ICC process would effectively contribute to restoration of peace. By referring both situations in Darfur and Libya to the International Criminal Court, the Security Council confirmed that issues of peace and justice can be pursued simultaneously. A humanitarian crisis still looms in the Darfur region but in the meanwhile the Government of Sudan has set up courts in the region to prosecute perpetrators of international crimes.⁵¹ Although no high profile person has been prosecuted by these courts, particularly those being pursued by the International Criminal Court, there is an attempt to hold some perpetrators accountable and this process can most likely be attributable to the ICC

⁴⁹ Article 13(b) ICC Statute allows the Court to exercise its jurisdiction in respect of international crimes if a situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations.

⁵⁰ Tladi 2009, p. 68.

⁵¹ The latest report from the UN indicates that the security situation in Darfur over the course of 2013 deteriorated and remains volatile, see UN News Centre 2014.

intervention.⁵² The crisis in Libya culminated in a regime change and the death of its former leader *Muammar Gaddafi*.⁵³

In the case of Kenya, the AU's view was that the ICC proceedings undermined the capabilities of the recently elected President and his Deputy in performing their constitutional duties, and as such, they also undermined the sovereignty of the people of Kenya. To satisfy the peace and security requirement, Kenya and the African Union asserted that there was the problem of terrorism that plagued the country and the East Africa region, and the President's and Deputy's role in fighting terrorism were being compromised by the cases before the International Criminal Court. The question that arises here is whether the Security Council can invoke Article 16, citing the official capacity of the accused person. This argument is not supported by the threat to peace and security criteria set out in Article 16. The argument can also not be supported by virtue of Article 27(2) of the ICC Statute which overrides the immunity of state officials. The President of Kenya and his deputy had long been indicted by the International Criminal Court before they decided to seek the highest elective offices of the land. They were fully aware of the charges and their implications should they win the presidential elections.⁵⁴ The attempt thereafter to seek suspension of the proceedings can only be interpreted as ill-motivated. If the Security Council had adopted a deferral resolution founded on this ground, it would not only contradict the purpose of Article 16, but would also set a dangerous precedent. This would encourage any suspected perpetrators who are before the International Criminal Court to seek elective office, and thereafter frustrate the ICC proceedings through the deferral process hence, encourage impunity.

Another interesting dimension emerged in the request for a deferral in the Kenya situation. Kenya is a country that has been seriously affected by the crime of terrorism.⁵⁵ This problem has since been heightened since Kenya joined in the war against *Al Shaabab*, a terrorist group based in Somalia.⁵⁶ This dimension was introduced by Kenya in its request for deferral following the *Al Shaabab*'s most recent attack in the country.⁵⁷ The problem that then emerges is whether the

⁵² Sterling 2006.

⁵³ The circumstances that led to the overthrow of *Gaddafi's* regime, and eventually to his death, were criticized as an opportunistic construction of UNSC Res 1973 (2011), which introduced active measures, including no-fly zone, by the NATO to engineer a regime change. See Mbeki (2012).

⁵⁴ During one of the presidential election debates *Uhuru Kenyatta* was asked how he would be able to govern the country with his case pending before the International Criminal Court. He clearly indicated that this was a personal challenge that would not affect his duties as the President of Kenya.

⁵⁵ East African Centre for Law and Justice 2013.

⁵⁶ Blanchard 2013.

⁵⁷ On 21 September 2013, unknown gunmen attacked the Westgate shopping mall in Nairobi, causing the death of at least 72 people and over 200 casualties. The *Al Shabaab* terrorist group claimed responsibility for the attack.

question of threat to peace and security under Article 16 must relate directly to the situation that led to the Court's intervention, or may as be extended to any other situation of peace and security. The situation of Kenya before the International Criminal Court relates to the post-2007 election violence. At the time of the deferral request there was no indication that the violence that occurred in Kenya in 2007–2008 threatened to reoccur. In fact, there is no evidence that since the Court has intervened there has been an increased threat to peace and security in the country. The peaceful presidential elections in 2013 can mostly be attributed to the ICC process. An assessment of the *travaux préparatoires* of Article 16 shows that its drafters could not have intended that the question of peace and security be extended to situations that do not relate directly to the question of justice before the International Criminal Court. This may be debatable, but it is difficult to cite the terrorism threat in Kenya as a reason that would justify an Article 16 intervention in the proceedings against its leaders.

The AU's main problem with the International Criminal Court began when the Court started to initiate proceedings against the AU Heads of State. The African Union contends that the Rome Statute cannot override the personal immunity of a serving Head of State.⁵⁸ Article 27(2) makes official capacity irrelevant in the Court's exercise of its jurisdiction. Thus the question of immunity cannot be raised to oppose the ICC proceedings. This applies especially to States Parties such as Kenya. As for non-State parties like Sudan and Libya, a referral by the Security Council to the International Criminal Court makes them subject to the provisions of the ICC Statute, making Article 27 also applicable to them.⁵⁹

The issue of deferral under Article 16 also has a temporal aspect. A deferral is valid for only 12 months and although renewable, such renewal cannot be automatic. At the time of the request for a renewal it must be shown that the circumstances that led to the deferral still prevail. This means that the ICC process cannot be suspended indefinitely. The AU's requests for deferral in respect of Kenya and Sudan have taken issue with proceedings in the International Criminal Court against constitutionally elected Heads of State. The implication of this is that if any deferral would be adopted on account of an accused's official capacity, it would have to take into account the elective term of such official. In the case of Kenya an electoral cycle is every five years, therefore, any deferral would have to last for this period, and in case the President would be re-elected a further five years.⁶⁰ Such a deferral would clearly contravene the express terms of Article 16.

⁵⁸ See African Union Assembly, Decision on Africa's relationship with the International Criminal Court (ICC), Ext/Assembly/AU/Dec. 1, October 2013, para 10, where the AU decided, "[t]hat to safeguard the constitutional order, stability and integrity of Member States, no charges shall be commenced or continued before any International Court or Tribunal against any serving Head of State or Government or anybody acting or entitled to act in such capacity during their term of office".

⁵⁹ Ciampi 2008, p. 895.

⁶⁰ The Constitution of Kenya allows for a two-term presidency, Section 142 of the Constitution of Kenya, 2010.

Article 16 allows political considerations to be measured against the question of justice. A deferral under Article 16 can have serious consequences for a situation before the Court. It can interfere with the collection and preservation of evidence, complicate the protection of witnesses, affect the right of the accused to a fair and expeditious trial, and also affect the rights of the victims.⁶¹ Thus when considering a request for a deferral, its potential consequences need to be taken into account. It is necessary that any request should be for the sole purpose of enhancing peace and security and not to shield certain individuals and encourage impunity by derailing judicial proceedings.

Assessing the general practice on Article 16, the AU's assertion that the UN Security Council applies double standards on questions of international criminal justice perhaps has merit in light of the initial deferral requests, which granted immunity from the ICC jurisdiction to troops of states not party to the ICC Statute. Comparing these earlier Resolutions to the AU's requests for deferral, the AU situations would in fact make better cases for the application of Article 16. This practice by the UN Security Council unfortunately justifies the sentiments of the Rwandan representative, following the recent failed attempt to adopt a deferral request in the case of Kenya, when he stated that international mechanisms only serve the interests of a few select and that Article 16 was never intended to be used by an African State.⁶²

The cases that the African Union have presented for deferral indicate a motive to shield its leaders from humiliation by being subjected to international justice mechanisms as opposed to genuine situations that would merit an Article 16 intervention. The Security Council, when exercising its powers under the ICC Statute, should do so with the purpose of supporting the Court in its goal of ending impunity. The standard adopted by the UN Security Council in rejecting AU requests for deferral should be the standard in all future situations. It would avoid political interference in the working of the International Criminal Court, thus enhancing its independence and credibility.

12.6 Conclusion

The instances in which the UN Security Council has used its power under Article 16 have proved to be controversial. Reconciling the interests of peace and security on the one hand and the interests of justice and the fight against impunity on the other is a delicate and complicated task. Article 16 of the Rome Statute is one tool that attempts to achieve this reconciliation. A deferral of prosecutions or investigations under Article 16 should not simply be there for the asking. It is necessary that any request for a deferral meets the conditions provided for in Article 16.

⁶¹ Neuner 2012, p. 306; Kim 2011, pp. 200–209.

⁶² UNSC, 7060th Meeting, S/PV.7060 “Peace and security in Africa”, 15 November 2013.

A convincing case for deferral must be made clearly, indicating to what extent the ICC intervention affects the interests of peace and security. It is also important to take into account the far reaching consequences that a deferral may have in the ICC process as regards the collection and preservation of evidence and the rights of the victims and the accused. Any deferral adopted as a result must be for 12 months only, and any further attempts to renew must clearly show that conditions that justified the deferral in the first place still prevail. Deferrals should not be made with the aim of shielding certain individuals from prosecution.

Although the African Union is dissatisfied with the UN Security Council and its manner of handling its requests under Article 16, the reasons it has presented for deferral for the various cases have not been very convincing. When the Security Council refers a matter to the International Criminal Court on the ground that it is a threat to world peace and security, it must be convinced that the ICC intervention is necessary to facilitate the peace process. To suspend this process again under the ICC Statute would need very compelling reasons. A strong case would have to be made out to show that the ICC process has otherwise become complicated, making the peace process impossible. Article 16 should not be allowed to give perpetrators of international crimes the opportunity to foster impunity by threatening violence in exchange for immunity, under the guise of pursuing peace and political stability. The AU's calls for deferrals have been politically motivated, being attempts to secure immunity for high ranking state officials. Under the ICC official capacity is irrelevant when the person is suspected of having committed international crimes. Article 16 cannot, therefore, be used to pursue immunity for Heads of State. A deferral because of official capacity would set a dangerous precedent. It would encourage future suspects who are before the International Criminal Court, and who are most likely to be high-profile political figures in their respective countries, to vie for elective posts, thus making it difficult for their cases before the Court to proceed.

The AU's requests for deferral have not been at variance with the initial application of Article 16, where the UN Security Council preemptively granted certain officials, from non-States Parties to the International Criminal Court, immunity from the ICC jurisdiction. The practice initially adopted by the UN Security Council on deferrals was clearly inconsistent with the purpose of Article 16. Unfortunately, when looking at the practice on deferrals one would be justified to say that the principle of fair and equal application of the law has not been observed, which provides sound reasons for the AU's concerns that the UN Security Council applies double standards. This practice seriously undermines the credibility and authority of the Court. By rejecting the AU requests for deferral, the UN Security Council has clearly set up a high threshold to satisfy the threat to peace and security criteria under Article 16. This represents the correct direction that the Security Council should take when looking into Article 16. Any power exercised under Article 16 should be to support the goal of the Court to end impunity. The AU's calls for deferral should be to pursue the concerns for peace genuinely and not to shield its Heads of State from prosecution by the International Criminal Court.

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