

# THE RELATIONSHIP BETWEEN THE INTERNATIONAL CRIMINAL COURT AND THE UNITED NATIONS



WAR CRIMES RESEARCH OFFICE  
International Criminal Court  
Legal Analysis and Education Project  
August 2009

## ACKNOWLEDGMENTS

Susana SáCouto, WCRO Director, and Katherine Cleary, WCRO Assistant Director prepared this report, with contributions from Washington College of Law (WCL) J.D. students Jennifer Norako and Ricardo Ampudia and University of Ottawa LL.B. candidate Patricia Kheirallah. We are grateful for the generous support of the John D. and Catherine T. MacArthur Foundation, the Open Society Institute, the Oak Foundation and the WCL, without which this report would not have been possible. We also wish to thank all those who gave generously of their time to this project, including WCL Professor Robert Goldman and the members of the WCRO's ICC Advisory Committee: Mary McGowan Davis, former Acting New York State Supreme Court Judge and Member of the International Judicial Academy and of the American Association for the International Commission of Jurists; Siri Frigaard, Chief Public Prosecutor for the Norwegian National Authority for Prosecution of Organized and Other Serious Crimes and former Deputy General Prosecutor for Serious Crimes in East Timor; Justice Richard Goldstone, former Chief Prosecutor of the International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR); Judge Florence Mumba, former Justice of the Supreme Court of Zambia and former Judge of the ICTY; and Diane Orentlicher, WCL Professor and former United Nations Independent Expert on Combating Impunity.

## ABOUT THE WAR CRIMES RESEARCH OFFICE

The core mandate of the War Crimes Research Office is to promote the development and enforcement of international criminal and humanitarian law, primarily through the provision of specialized legal assistance to international criminal courts and tribunals. The Office was established by the Washington College of Law in 1995 in response to a request for assistance from the Prosecutor of the International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR), established by the United Nations Security Council in 1993 and 1994 respectively. Since then, several new internationalized or “hybrid” war crimes tribunals—comprising both international and national personnel and applying a blend of domestic and international law—have been established under the auspices or with the support of the United Nations, each raising novel legal issues. This, in turn, has generated growing demands for the expert assistance of the WCRO. As a result, in addition to the ICTY and ICTR, the WCRO has provided in-depth research support to the Special Panels for Serious Crimes in East Timor (Special Panels), the Special Court for Sierra Leone (SCSL) and the Extraordinary Chambers in the Courts of Cambodia (ECCC).

The WCRO has also conducted legal research projects on behalf of the Office of the Prosecutor (OTP) of the International Criminal Court (ICC). However, in view of how significant the impact of the Court's early decisions are likely to be on the ICC's future and in recognition of the urgent need for analytical critique at this stage of the Court's development, in 2007 the WCRO launched a new initiative, the ICC Legal Analysis and Education Project, aimed at producing public, impartial, legal analyses of critical issues raised by the Court's early decisions. With this initiative, the WCRO is taking on a new role in relation to the ICC. While past projects were carried out in support of the OTP, the WCRO is committed to analyzing and commenting on the ICC's early activities in an impartial and independent manner. In order to avoid any conflict of interest, the WCRO did not engage in legal research for any organ of the ICC while producing this report, nor will the WCRO conduct research for any organ of the ICC prior to the conclusion of the ICC Legal Analysis and Education Project. Additionally, in order to ensure the objectivity of its analyses, the WCRO created an Advisory Committee comprised of the experts in international criminal and humanitarian law named in the acknowledgments above.

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### COVER PHOTOGRAPHS (from left)

*A Darfuri rebel fighter sets aside his prosthetic legs. Abeche, Chad, 2007, courtesy Shane Bauer*

*The International Criminal Court building in The Hague, courtesy Aurora Hartwig De Heer*

*A village elder meets with people from the surrounding area. Narkaida, Darfur, Sudan, 2007, courtesy Shane Bauer*

*Archbishop Desmond Tutu and Minister Simone Veil at the second annual meeting of the Trust Fund for Victims, courtesy ICC Press Office*

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## **EXECUTIVE SUMMARY**

Although work on the establishment of a permanent international criminal court predates the creation of the United Nations (UN), the ideal relationship between the UN and the envisioned court remained unclear well into the drafting of the Rome Statute governing the International Criminal Court (ICC). Those states that worked on the creation of the Court understood that the ICC needed to maintain judicial independence from the political workings of the UN, but also realized that, to be effective, the Court would need the active support of the United Nations. Ultimately, the ICC was created as a separate institution, placed outside of the UN framework, and was established by a multilateral treaty rather than a UN General Assembly or Security Council resolution. Nevertheless, Article 2 of the Rome Statute mandated that the ICC enter into a cooperation agreement with the United Nations, which was adopted as the Negotiated Relationship Agreement Between the International Criminal Court and the United Nations (Relationship Agreement) in October 2004.

In addition to Article 2, the Rome Statute contains a number of more specific provisions relating to the relationship between the United Nations and the ICC. The remainder of this report will focus on two of those provisions – namely Article 16 and Article 54(3)(e) – each of which has been the subject of some controversy in recent months. Yet it is important to stress that two primary themes that were apparent throughout the drafting history of Article 2 of the Rome Statute are also reflected in the Relationship Agreement agreed upon between the UN and the ICC. The first of these themes is that, while the two institutions have a strong complementary relationship, the ICC is an independent judicial institution. The second theme is that there exists an obligation on the part of the United Nations to cooperate with and provide support to the International Criminal Court. These two themes are also reflected in, and inform the proper understanding of, the more specific aspects of the UN-ICC relationship discussed in detail below.

## **THE UNITED NATIONS SECURITY COUNCIL'S POWER TO DEFER INVESTIGATIONS AND PROSECUTIONS UNDERTAKEN BY THE INTERNATIONAL CRIMINAL COURT**

The first aspect of the relationship between the UN and the ICC that has been the subject of recent debate relates specifically to the relationship between a particular organ of the UN – namely, the fifteen-member United Nations Security Council – and the Court. This relationship is governed, in part, by Article 16 of the Rome Statute, which gives the UN Security Council the right to request that the ICC suspend, for a renewable period of twelve months, any investigation or prosecution commenced, or about to be commenced, by the ICC if the Security Council believes the suspension is necessary to maintain or restore international peace and security. Questions regarding the appropriate exercise by the Security Council of this authority have arisen in the context of the July 2008 request by the ICC Prosecutor for the issuance of an arrest warrant for the Sudanese President, Omar Hassan al-Bashir, and the Court's decision issuing the requested warrant in March 2009.

### **THE COMMENCEMENT OF ICC PROCEEDINGS IN DARFUR AND THE POLICY DEBATE REGARDING THE SECURITY COUNCIL'S ARTICLE 16 DEFERRAL POWER**

One notable aspect of the current debate over Article 16 is that the Security Council is itself responsible for vesting the ICC with jurisdiction over the situation in Darfur, Sudan. Indeed, under the Rome Statute, because Sudan is not a party to the Rome Statute, the only way the ICC could exercise jurisdiction is pursuant to a Security Council referral of the Darfur situation to the Court or if Sudan had consented to the jurisdiction of the Court on an *ad hoc* basis, which it did not. The Darfur situation was referred to the Court by the Security Council in March 2005. After conducting its own assessment of the situation, the Prosecution of the ICC decided to formally open an investigation in Darfur in June 2005. As the ICC investigation proceeded, the conflict in Darfur, which began in 2003, showed no sign of ending.

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Against this backdrop, on 14 July 2008, the Prosecutor asked Pre-Trial Chamber I to issue an arrest warrant for President al-Bashir based on allegations of war crimes, crimes against humanity, and genocide. In response, the government of Sudan, supported by Russia, China, Libya, the African Union (AU), and the League of Arab States, argued that the Security Council should exercise its authority under Article 16 to request the suspension of the proceedings in Darfur, claiming that the issuance of an arrest warrant against al-Bashir would undermine ongoing efforts to find a peaceful resolution to the conflict in Darfur. By contrast, a number of states, including the United Kingdom, the United States, and Croatia, as well as some non-governmental organizations, opposed any action by the Security Council on the ground that, *inter alia*, intervention by the Security Council would be contrary to the rule of law. In addition to the international disagreement over the effect of the arrest warrant on peace and security in Sudan, domestic groups within Sudan are reportedly divided on the issue.

Since the issuance of the arrest warrant in March 2009, al-Bashir has continued his longstanding and vocal opposition to the Court, making clear he will not cooperate with the warrant. In addition, shortly after the warrant was announced, the Sudanese government moved to expel international relief workers from Darfur on the grounds that the groups were sharing information with the Court.

#### THE APPROPRIATE EXERCISE OF ARTICLE 16 BY THE UN SECURITY COUNCIL

The debate over whether the Security Council should invoke Article 16 to request deferral of the prosecution of Mr. al-Bashir has at least two components: (i) whether the Rome Statute permits the Security Council to request that the ICC defer ongoing investigations or prosecutions where the Security Council has itself referred them to the ICC; and (ii) assuming an affirmative answer to the first question, whether the Security Council, as a matter of policy, should request the deferral of the situation in Darfur to the ICC. Our analysis concludes that: (i) although Article 16 permits the Security Council to act in this context, (ii) the situation in Darfur does not present the appropriate circumstances for the Security Council to exercise this deferral power.

While both of these conclusions are addressed in detail below, we limit our summary here to the latter point.

*Article 16 Should Be Reserved for Exceptional Circumstances*

Our conclusion that the Security Council should not intervene in the ICC's prosecution of al-Bashir rests, as an initial matter, on the notion that the Security Council should exercise its Article 16 authority only in exceptional circumstances. This notion is most obviously supported by the fact that Article 16 requires that any resolution by the Security Council seeking a deferral of ICC proceedings be taken pursuant to Chapter VII of the UN Charter, meaning that the Security Council must be acting to maintain or restore international peace and security. Thus, as commentators have observed, the Security Council must be able to justify its decision to intervene after balancing peace and justice interests, and should act only where the Security Council's members conclude that the Court's proceedings would harm the Council's efforts in maintaining or restoring peace and security.

It is important to note in this context that nothing prevents the Security Council from taking measures unrelated to the work of the Court in support of the restoration or maintenance of peace and security in a region while the ICC is conducting proceedings in that region. In other words, the Security Council need not divest the Court of jurisdiction over a situation in order for the Security Council to itself adopt measures relating to that situation. Thus, for example, if the institution of proceedings by the ICC led to threats of retaliation by a nation's government, nothing would prevent the Security Council from dealing with those threats through, for instance, an increased peacekeeping presence in that country.

Finally, the notion that Article 16 should be reserved for truly exceptional circumstances is supported by the drafting history of that article. Significantly, the draft treaty that formed the basis of negotiations for the Rome Statute had a provision giving the Security Council general precedence over the Court in dealing with international matters where peace and security were in jeopardy, allowing the Court to act in a situation being dealt with by the Security Council only if the Council passed a resolution *in favor* of ICC action.

However, many states objected to this approach on the ground that the workings of the Court should not be subject to political decisions. Indeed, some states favored excluding any role for the Security Council in the operation of the Court. While the negotiators also rejected this proposal, the final version of Article 16 leaves the Court the right to act independently of the Security Council, unless the Council adopts a resolution under Chapter VII of the UN Charter, i.e., without a veto by any of the permanent five members. Thus, the drafters of the Rome Statute made Security Council intervention the exception, rather than the rule.

*Exceptional Circumstances Warranting Security Council Action Do Not Exist in this Case*

Given the exceptional nature of an Article 16 deferral, it is difficult to make the case that the Security Council should request the deferral of proceedings against President al-Bashir. Prior to the request for the arrest warrant, all promises of ceasefires and peace negotiations had been broken. Deferral of the proceedings against al-Bashir could not, therefore, be seen as a means to *maintain* peace. Additionally, Sudan has given no indication that a deferral would assist in *restoring* peace. Indeed, during the seven months between the ICC Prosecutor's request for an arrest warrant against al-Bashir and the Pre-Trial Chamber's issuance of the warrant, the Sudanese president took no steps to demonstrate he was committed to peace. Instead, while the AU tried to make the case for an Article 16 deferral by arguing that al-Bashir's continued leadership of Sudan was necessary for peace, the Sudanese government did nothing but promise that violence would escalate if the arrest warrant were issued. Hence, even if a request for deferral could be justified based on a mere promise of peace, Sudan has made no such promise, which minimally would entail disarming the Janjaweed militia or ceasing hostilities in the event of a deferral.

Moreover, even if there were a genuine promise or prospect of peace in the near future, it does not necessarily follow that the proceedings against al-Bashir should be deferred. As recent examples in Sierra Leone and the former Yugoslavia demonstrate, the prosecution of senior leaders suspected of international crimes can in fact *encourage* efforts to reconcile. Finally, deferral of the proceedings against al-

Bashir would effectively undermine not only the ICC's mandate to put an end to impunity, which the United Nations is obligated to support under the terms of the UN-ICC Relationship Agreement, but also the work of the Security Council, which itself made a determination in 2005 that a referral of the Darfur situation to the ICC would contribute to the restoration or maintenance of international peace and security.

### **UNITED NATIONS' CONFIDENTIAL DOCUMENTS AND THE INTERNATIONAL CRIMINAL COURT PROSECUTION'S DUTIES TO SEARCH FOR AND DISCLOSE EXCULPATORY EVIDENCE**

Another aspect of the relationship between the United Nations and the International Criminal Court that deserves consideration is the UN's power under Article 18 of the Relationship Agreement to provide information to the Prosecution on a confidential basis. Article 54(3)(e) of the Rome Statute permits the Prosecution to enter into such confidentiality agreements for the purpose of generating "lead evidence." However, as highlighted by the first case to proceed to trial at the ICC, these agreements have come into conflict with the Prosecution's duty under Article 67(2) of the Rome Statute to disclose exculpatory information to the Defense.

#### **POTENTIALLY EXCULPATORY, YET CONFIDENTIAL DOCUMENTS, IN THE *LUBANGA* CASE**

Throughout the investigation of the situation in the Democratic Republic of Congo (DRC), the ICC Prosecution entered into numerous agreements under Article 54(3)(e) of the Rome Statute, with the United Nations and other so-called "information providers," such that approximately fifty percent of the evidence gathered in the DRC was obtained under an obligation of confidentiality. While there was some indication in the early stages of the trial against suspected Congolese rebel leader Thomas Lubanga Dyilo that certain of these documents were potentially exculpatory, the volume of these documents was unknown until well into the pre-trial stages of the case against Mr. Lubanga. Specifically, in September 2007 – more than a year and a half after the *Lubanga* case began – the Prosecution informed the Court that it had identified approximately 740 potentially exculpatory documents covered by an Article 54(3)(e) agreement, but that it had

only received permission to disclose 120 of them. The Prosecution stressed that it had been actively seeking the lifting of restrictions, but negotiations had proven incredibly lengthy and could take months to complete.

Over the course of the next nine months, Mr. Lubanga's trial was repeatedly delayed due to challenges created by problems of disclosure. During this time, the Prosecution secured permission to disclose a significant proportion of the documents, but as of early June 2008, there was still a large amount of potentially exculpatory material that remained confidential. With regard to these documents, the Prosecution argued that it could effectively comply with its disclosure obligations by providing evidence "analogous" to that contained in the relevant confidential documents. However, because the Prosecution had agreed with the UN and others that it would not show the relevant documents to the Trial Chamber, let alone the Defense, there was no way the judges could ensure that the alternative material would provide the Defense with information equivalent to that contained in the confidential documents. Finally, on 13 June 2008, the Trial Chamber stayed the proceedings against Mr. Lubanga, holding that the trial process had been ruptured to such a degree that it was impossible to guarantee a fair trial to the Defense. The Trial Chamber's decision was subsequently upheld by the Appeals Chamber, which stressed that, under the language of the Rome Statute, Article 54(3)(e), confidentiality agreements should only be made for the purpose of gathering lead evidence. Furthermore, the Appeals Chamber held that the Prosecutor must use Article 54(3)(e) in such a manner that will allow *the Court*, rather than the Prosecutor, to resolve the potential tension between confidentiality and the demands of a fair trial.

Within less than one month of the Appeals Chamber's decision, the Prosecution was able to secure permission from the UN and other information providers to share all of the remaining undisclosed potentially exculpatory documents with the Trial Chamber. The Trial Chamber, in turn, assessed each of the documents, as well as the Prosecution's proposed alternative forms of disclosure – such as redacted or summary versions of the relevant documents – and determined that the stay of proceedings in the *Lubanga* trial could be lifted.

## FUTURE CONSIDERATIONS REGARDING ARTICLE 54(3)(E)

The decisions of the Trial Chamber and the Appeals Chamber cited above are well-reasoned and should certainly be adhered to in the future, particularly to the extent that they guarantee that the Trial Chamber has ultimate authority to determine whether the fair trial rights of the accused are being appropriately safeguarded. However, it is critical that the Prosecution's duty to share potentially exculpatory evidence with the Trial Chambers not interfere with its duties under Article 54(1)(a), which requires that the Prosecution investigate both incriminating and exonerating circumstances equally. The challenge for the Prosecution is that a great deal of the exonerating evidence it has been able to collect, at least in the context of the DRC situation, has been subject to confidentiality restrictions under Article 54(3)(e). In fact, the Prosecution has stated that without guarantees of confidentiality to the UN and other information providers, it never would have had access to the huge quantity of the evidence gathered, including much of the potentially exculpatory information.

The Prosecution's duty under the Rome Statute to search for both incriminating and exonerating evidence is key to ensuring fair trials at the ICC, as an accused being tried in The Hague for crimes allegedly committed in the context of an armed conflict or other widespread atrocities may not be in a position to adequately conduct his or her own investigation. At the same time, the UN and other organizations with relevant information have an obvious interest in ensuring that the disclosure of the information does not endanger staff members who remain on the ground under insecure conditions. Yet it is clear from both the Rome Statute and the Relationship Agreement that a general privilege does not exist for UN material. Instead, there appears to be a presumption in favor of disclosure throughout the Relationship Agreement that, combined with the UN's general obligation under the agreement to cooperate with the ICC, suggests that the *Lubanga* decisions on Article 54(3)(e) should *not* result in a general reluctance on the part of the United Nations to withhold information from the ICC Prosecutor.

Importantly, there is no reason to believe that sources of information mentioned or otherwise implicated by UN documents would be treated

any differently by the Court from persons who provide information directly to the ICC Prosecution. The Rome Statute is clear that the Court has a duty to take appropriate measures to protect the safety, physical and psychological well-being, dignity, and privacy of victims and witnesses, and this obligation is in no way limited to witnesses who have or had direct contact with the Prosecution or another organ of the ICC. To the contrary, the Appeals Chamber has expressly held that the protective provisions of the Rome Statute and ICC Rules of Procedure and Evidence are *not* limited to the protection of witnesses and victims. Thus, in the event that the disclosure of potentially exculpatory evidence provided to the Prosecution by the UN could pose a danger to any person, the Court has a number of tools available to protect that person, including redacting the person's name and other identifying information from the document prior to disclosing it to the Defense, disclosing only a summary of the exculpatory evidence, or even placing the person in the Court's witness protection program. Accordingly, the UN and other information providers should be able to avail themselves of the same protections made available to witnesses, who are often themselves victims of the very crimes being prosecuted by the Court. Ideally, these provisions will encourage organizations to cooperate in the Prosecution's duty to search for both incriminating and exculpatory information to the greatest extent possible given their security concerns, while still allowing the Trial Chambers to maintain their power to ensure that any evidence necessary to ensure a fair trial for the accused is disclosed in the appropriate format.

## I. INTRODUCTION

Although work on the establishment of a permanent international criminal court predates the creation of the United Nations (UN), the ideal relationship between the UN and the envisioned court remained unclear well into the drafting of the Rome Statute governing the International Criminal Court (ICC). As explained in the commentary to the 1994 draft version of the statute, which was prepared by the International Law Commission (ILC) and became the foundation upon which the final Rome Statute was negotiated, “[d]ivergent views” existed regarding the “relationship of the court to the United Nations.”<sup>1</sup> The commentary continues:

Several members of the Commission favoured the court becoming a subsidiary organ of the United Nations by way of resolutions of the Security Council and General Assembly, without the need for any treaty. Others strongly preferred that it be created as an organ of the United Nations by amendment to the Charter of the United Nations. Still others thought such an amendment unrealistic and even undesirable at this stage, and advocated another kind of link with the United Nations such as the Agreement governing the relationship between the United Nations and the International Atomic Energy Agency.<sup>2</sup>

Ultimately, the ILC “concluded that it would be extremely difficult to establish the court by a resolution of an organ of the United Nations, without the support of a treaty,” as such “resolutions can be readily amended or even removed: that would scarcely be consistent with the

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<sup>1</sup> Draft Statute for an International Criminal Court, Report of the ILC on the work of its forty-sixth session (2 May-22 July 1994), vol. II, 2 May - 22 July 1994, A/CN.4/SER.A/1994/Add.I (Part 2), Commentary to Art. 2, ¶ 1.

<sup>2</sup> *Id.*

concept of a permanent judicial body.”<sup>3</sup> Nevertheless, “it was agreed that the court could only operate effectively if it were brought into a close relationship with the United Nations, both for administrative purposes, in order to enhance its universality, authority and permanence, and because in part the exercise of the court’s jurisdiction could be consequential upon decision by the Security Council.”<sup>4</sup>

Thus, Article 2 of the 1994 draft statute provided that the President of the Court “may conclude an agreement establishing an appropriate relationship between the Court and the United Nations,”<sup>5</sup> reflecting the ILC’s view that the Court be a separate institution, created by treaty, but one that should have a close relationship with the UN. While future negotiations yielded some minor changes to draft Article 2, the *travaux préparatoires* suggest that the drafters were satisfied with the balance struck by the ILC. For example, according to the 1995 Report of the *Ad Hoc* Committee for the Establishment of an International Criminal Court, “[t]he conclusion of a special agreement between the court and the United Nations... was considered by a number of delegations to be an appropriate way of establishing the required links of functional cooperation between the two institutions, while at the same time preserving the court’s independence as a judicial organ.”<sup>6</sup> The 1996 Report of the Preparatory Committee contained similar sentiments regarding the importance of the relationship between the UN and an independent ICC,<sup>7</sup> and also included a proposal that language be added to the statute specifying that the Court “shall, as soon as possible, be brought into relationship

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<sup>3</sup> *Id.* Commentary to Art. 2, ¶ 3.

<sup>4</sup> *Id.* Commentary to Art. 2, ¶ 7.

<sup>5</sup> *Id.* Art. 2.

<sup>6</sup> *Ad Hoc* Committee on the Establishment of an International Criminal Court, *Report of the Ad Hoc Committee on the Establishment of an International Criminal Court*, U.N. Doc. A/50/22, ¶ 17, 6 September 1995.

<sup>7</sup> Preparatory Committee on the Establishment of an International Criminal Court, *Draft Report of the Preparatory Committee*, U.N. Doc. A/AC.249/L.15, vol. I, ¶ 29, 23 August 1996.

with the United Nations.”<sup>8</sup> While this language was never adopted, draft Article 2 was ultimately amended to provide that the Court “shall” – as opposed to “may” – conclude a relationship agreement with the United Nations.<sup>9</sup> Specifically, as adopted, Article 2 of the Rome Statute provides that the “Court shall be brought into relationship with the United Nations through an agreement to be approved by the Assembly of States Parties to this Statute and thereafter concluded by the President of the Court on its behalf.”<sup>10</sup> The agreement envisioned by Article 2 of the Rome Statute, the Negotiated Relationship Agreement Between the International Criminal Court and the United Nations (Relationship Agreement), entered into force in October 2004.<sup>11</sup>

In addition to Article 2, the Rome Statute contains a number of more specific provisions relating to the relationship between the United Nations and the ICC. While this report will focus on two of those provisions – namely, Article 16 and Article 54(3)(e) – it is important to stress that two primary themes that were apparent throughout the drafting history of Article 2 of the Rome Statute are also reflected in the Relationship Agreement agreed between the UN and the ICC. The first is that, while the two institutions have a strong complementary relationship, the ICC is an independent judicial institution.<sup>12</sup> The second theme is that there exists an obligation on the part of the United

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<sup>8</sup> *Id.* vol. II, at 4.

<sup>9</sup> Rome Statute of the International Criminal Court, adopted on 17 July 1998 by the U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *entered into force* 1 July 2002, Art. 2, U.N. Doc. A/CONF.183/9 (1998).

<sup>10</sup> *Id.*

<sup>11</sup> Negotiated Relationship Agreement Between the International Criminal Court and the United Nations, *entered into force* 4 October 2004.

<sup>12</sup> *See, e.g., id.* Pmb. ¶ 4 (stressing that the ICC “is established as an independent permanent institution.”); *id.* Art. 2 (“The United Nations recognizes the Court as an independent permanent judicial institution which... has international legal personality and such legal capacity as may be necessary for the exercise of its functions and the fulfillment of its purposes.”).

Nations to cooperate with and provide support to the International Criminal Court.<sup>13</sup> These two themes are also reflected in, and inform the proper understanding of, the more specific aspects of the UN-ICC relationship discussed below.

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<sup>13</sup> See, e.g., *id.* Pmbl. ¶ 3 (acknowledging the complementary nature of the two institutions by noting the “important role assigned to the [ICC] in dealing with the most serious crimes of concern to the international community as a whole... which threaten the peace, security and well-being of the world.”); *id.* Pmbl. ¶ 7 (noting the parties’ desire to make “make provision for a mutually beneficial relationship whereby the discharge of the respective responsibilities of the United Nations and the International Criminal Court may be facilitated.”); *id.* Art. 3 (providing that, “with a view to facilitating the effective discharge of their respective responsibilities, [the UN and the ICC] shall cooperate closely, whenever appropriate, with each other...”).

## II. THE UNITED NATIONS SECURITY COUNCIL'S POWER TO DEFER INVESTIGATIONS AND PROSECUTIONS UNDERTAKEN BY THE INTERNATIONAL CRIMINAL COURT

The first aspect of the relationship between the UN and the ICC that has been the subject of considerable debate in recent months relates specifically to the relationship between a particular organ of the UN – namely, the fifteen-member United Nations Security Council – and the Court. This relationship is governed, in part, by Article 16 of the Rome Statute, which in effect authorizes the UN Security Council to suspend, for a renewable period of twelve months, any investigation or prosecution commenced, or about to be commenced, by the International Criminal Court if the Security Council believes the suspension is necessary for the maintenance or restoration of international peace and security.<sup>14</sup> To do so, the Security Council must adopt a resolution under Chapter VII of the UN Charter, which operates under the terms of Article 16 to prevent the ICC from proceeding with the matter.<sup>15</sup> Specifically, Article 16 reads:

No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.<sup>16</sup>

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<sup>14</sup> See Rome Statute, *supra* n. 9, Art. 16. See generally Morten Bergsmo & Jelena Pejić, *Article 16 Deferral of investigation or prosecution*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 373-82 (Otto Triffterer ed., 1999).

<sup>15</sup> See Rome Statute *supra* n. 9, Art. 16; Bergsmo & Pejić, *supra* n. 14, at 373.

<sup>16</sup> Rome Statute, *supra* n. 9, Art. 16.

Although the adoption of Article 16 was ultimately supported by the majority of States that participated in drafting the Rome Statute, the drafting history of the provision demonstrates that there was real disagreement among the negotiating states as to how to strike the appropriate balance between ensuring that the Security Council could exercise its functions regarding the maintenance of international peace and security on the one hand, while avoiding political interference with the workings of the ICC on the other. These themes have arisen again in the context of the March 2009 issuance by Pre-Trial Chamber I of the ICC of an arrest warrant for the Sudanese President, Omar Hassan al-Bashir. In light of the ongoing debate surrounding whether the Security Council should intervene to request the ICC to defer the prosecution of al-Bashir, it is important to understand, at least broadly, the circumstances under which the Security Council was envisioned to exercise its power to request deferral.

A. THE COMMENCEMENT OF ICC PROCEEDINGS IN DARFUR AND THE POLICY DEBATE REGARDING THE SECURITY COUNCIL'S ARTICLE 16 DEFERRAL POWER

On 14 July 2008, the ICC Prosecutor requested that Pre-Trial Chamber I issue an arrest warrant against Sudanese President Omar Hassan al-Bashir for allegations of genocide, crimes against humanity, and war crimes.<sup>17</sup> Several months later, on 4 March 2009, the Chamber partially approved the Prosecutor's request, issuing an arrest warrant

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<sup>17</sup> See *Situation in Darfur, Sudan*, Summary of the Prosecutor's Application under Article 58, ICC-02/05 at 1 (Pre-Trial Chamber I, 14 July 2008) (concluding that there are reasonable grounds to believe that al-Bashir "bears criminal responsibility for the crime of genocide under Article 6(a) of the Rome Statute, [the acts of (a)] killing members of the Fur, Masalit and Zaghawa ethnic groups (also referred to as "target groups"); (b) causing serious bodily or mental harm to members of those groups; and (c) deliberately inflicting on those groups conditions of life calculated to bring about their physical destruction in part; for crimes against humanity under Article 7 (1) of the Statute, committed as part of a widespread and systematic attack directed against the civilian population of Darfur with knowledge of the attack, the acts of (a) murder, (b) extermination, (d) forcible transfer of the population, (f) torture, and (g) rapes; and for war crimes under Article 8 (2)(e)(i) of the Statute, for intentionally directing attacks against the civilian population as such, and (v) pillaging a town or place").

for war crimes and crimes against humanity, but not genocide.<sup>18</sup> Both prior to and since the issuance of the warrant, states and commentators have debated whether the UN Security Council should invoke Article 16 and request that the ICC defer the prosecution of al-Bashir.

*1. The Security Council's Referral of the Situation in Darfur to the ICC*

One notable aspect of the current debate over Article 16 is that the Security Council is itself responsible for vesting the ICC with jurisdiction over the situation in Darfur.<sup>19</sup> Indeed, under the Rome Statute, because Sudan is not a party to the Rome Statute, the only way the ICC could exercise jurisdiction is pursuant to a Security Council referral of the Darfur situation to the Court<sup>20</sup> or if Sudan had consented to the jurisdiction of the Court on an *ad hoc* basis, which it did not.<sup>21</sup> The process ultimately leading the Security Council to refer the situation in Darfur to the ICC began in June 2004,<sup>22</sup> when the Security Council expressly stated in a resolution that the situation in Sudan “constitutes a threat to international peace and security and to stability in the region.”<sup>23</sup> The Security Council noted the extent of the humanitarian and refugee crisis, as well as the numerous ceasefire

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<sup>18</sup> See *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, Warrant of Arrest for Omar Hassan Ahmad al-Bashir, ICC-02/05-01/09-1, at 7-8 (Pre-Trial Chamber I, 4 March 2009) (indicating that there are reasonable grounds to believe to al-Bashir is criminally responsible on seven counts of war crimes and crimes against humanity).

<sup>19</sup> See Security Council Resolution 1593, U.N. Doc. S/RES/1593, at 1 (31 March 2005).

<sup>20</sup> Rome Statute, *supra* n. 9, Art. 13(b).

<sup>21</sup> See *id.* Art. 12(3).

<sup>22</sup> See Security Council Resolution 1547, U.N. Doc. S/RES/1547, ¶¶ 7-8 (11 June 2004).

<sup>23</sup> See Security Council Resolution 1556, U.N. Doc. S/RES/1556, Pmb. ¶ 19 (30 July 2004) (highlighting that “over one million people are in need of humanitarian assistance” and that “up to 200,000 refugees have fled to the neighboring State of Chad”).

violations between Darfuri rebel groups, the government, and militias.<sup>24</sup>

In September 2004, the Security Council requested that the Secretary General create an international commission to investigate violations of international criminal law in Darfur.<sup>25</sup> Four months later, on 31 January 2005, the five-member commission delivered a lengthy report discussing, *inter alia*, the historical and social background to the conflict in Darfur, the commission's findings regarding violations of international human rights law and humanitarian law in Darfur, and possible mechanisms to ensure accountability for the crimes committed.<sup>26</sup> As the commission's report described, Sudan has experienced several periods of conflict since gaining independence in 1956, including the twenty-plus year war between the central government in the north and rebels in the south, a war that was formally concluded in 2005 with the signing of a Comprehensive Peace Agreement.<sup>27</sup> The fighting in Darfur, which is in the western region of the country, began in 2003, just as the government of President al-Bashir, who has been in power since a military coup in 1989, entered into peace talks with the rebels in the south.<sup>28</sup> While the roots of the Darfur conflict are complex,<sup>29</sup> the commission's report tied the origin of the fighting to the organization of two Darfurian rebel groups, the Sudan Liberation Movement/Army (SLM/A) and the Justice and Equality Movement (JEM), in 2001 and 2002.<sup>30</sup> These

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<sup>24</sup> *Id.* Pmb. ¶ 18, ¶ 5.

<sup>25</sup> See Security Council Resolution 1564, U.N. Doc. S/RES/1564, ¶ 12 (18 September 2004) (also calling on all parties to the conflict to cooperate fully with the commission's investigation).

<sup>26</sup> See Report of the International Commission of Inquiry on Darfur to the Secretary-General, U.N. Doc S/2005/60 (1 February 2005).

<sup>27</sup> *Id.* ¶¶ 43-50.

<sup>28</sup> *Id.* ¶¶ 47-53, 61-69.

<sup>29</sup> *Id.* ¶ 61.

<sup>30</sup> *Id.* ¶¶ 62-63.

groups, “[w]hile only loosely connected,” cited “similar reasons for the rebellion, including the socio-economic and political marginalization of Darfur and its people.”<sup>31</sup> Following several attacks by the Darfur rebels against government property in 2002 and 2003, the al-Bashir government organized a counter-insurgency, drawing largely upon “Arab nomadic tribes,” who became known as the “Janjaweed.”<sup>32</sup>

The commission’s report went on to describe massive violations of international human rights law and humanitarian law by all parties to the conflict, including the government forces, the Janjaweed, and the rebel groups.<sup>33</sup> At the same time, the report observed that “the parties have not been able to overcome their differences and identify a comprehensive solution to the [Darfur] conflict”<sup>34</sup> and that the government and the rebels had both failed to “prosecute and try those allegedly responsible for the far too numerous crimes committed in Darfur.”<sup>35</sup> Accordingly, the commission concluded its report by “strongly recommending that the Security Council refer the situation in Darfur to the International Criminal Court pursuant to article 13(b) of its Statute.”<sup>36</sup>

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<sup>31</sup> *Id.* ¶ 62.

<sup>32</sup> *Id.* ¶¶ 67-69.

<sup>33</sup> *See generally id.* ¶¶ 182-487.

<sup>34</sup> *Id.* ¶ 70.

<sup>35</sup> *Id.* ¶ 567.

<sup>36</sup> *Id.* ¶¶ 647-48 (recommending that the Security Council refer the situation in Darfur to the ICC, and listing six “major merits” for doing so: “First, the International Court was established with an eye to crimes likely to threaten peace and security. This is the main reason why the Security Council may trigger the Court’s jurisdiction under Article 13 (b). The investigation and prosecution of crimes perpetrated in Darfur would have an impact on peace and security. More particularly, it would be conducive, or contribute to, peace and stability in Darfur, by removing serious obstacles to national reconciliation and the restoration of peaceful relations. Second, as the investigation and prosecution in the Sudan of persons enjoying authority and prestige in the country and wielding control over the State apparatus[ ] is difficult or even impossible, resort to the ICC, the only truly international

On 31 March 2005, the Security Council acted on the commission's recommendation and referred the situation in Darfur to the ICC in Resolution 1593.<sup>37</sup> The resolution referred "the situation in Darfur since 1 July 2002" to the Court and decided that "the Government in Sudan and all other parties to the conflict in Darfur, shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor."<sup>38</sup>

## 2. *Developments Between March 2005 and July 2008*

Following the Security Council's referral, the ICC Prosecutor assessed the admissibility of the situation to the Court, and on 6 June 2005, decided to open an investigation into Darfur.<sup>39</sup> As the ICC investigation proceeded, the conflict in Darfur showed no sign of ending. While the government did conclude the Darfur Peace Agreement (DPA) with the SLA/MM, a faction of the SLA led by Minni Minawi, in May 2006, the agreement was widely viewed as dead on arrival, as it did not attract the support of critical parties to the

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institution of criminal justice... would ensure that justice be done. The fact that [trial] proceedings would be conducted in The Hague, the seat of the ICC, far away from the community over which those persons still wield authority and where their followers live, might ensure a neutral atmosphere and prevent the trials from stirring up political, ideological or other passions. Third, only the authority of the ICC, backed up by that of the United Nations Security Council, might impel both leading personalities in the Sudanese Government and the heads of rebels to submit to investigation and possibly criminal proceedings. Fourth, the Court, with an entirely international composition and a set of well-defined rules of procedure and evidence, is the best suited organ for ensuring a veritably fair trial of those indicted by the Court Prosecutor. Fifth, the ICC could be activated immediately, without any delay (which would [not] be the case if one were to establish ad hoc tribunals or so called mixed or internationalized courts). Sixth, the institution of criminal proceedings before the ICC, at the request of the Security Council, would not necessarily involve a significant financial burden for the international community.").

<sup>37</sup> See Resolution 1593, *supra* n. 19, Pmb. ¶ 1, ¶ 1.

<sup>38</sup> *Id.* ¶¶ 1-2.

<sup>39</sup> See International Criminal Court Press Release, *Decision to Open an Investigation in Darfur*, 6 June 2005, <http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/2005/the%20prosecutor%20of%20the%20icc%20opens%20investigation%20in%20darfur?lan=en-GB>.

conflict like the JEM, and both signatories were reported to have violated the agreement within days of its conclusion.<sup>40</sup>

Against this backdrop, on 2 May 2007, the ICC's Pretrial Chamber I issued its first two arrest warrants relating to the situation in Darfur.<sup>41</sup> The arrest warrants were directed against Ahmad Harun, who was appointed head of the government's "Darfur Security desk" in early 2003, and Ali Kushayb, the alleged leader of the Janjaweed, and included charges of war crimes and crimes against humanity.<sup>42</sup> The response of the Sudanese government was to announce the suspension of all cooperation with the ICC and to publicly refuse to surrender either Ahmad Harun or Ali Kushayb.<sup>43</sup> At present, Harun serves as the government's Minister of State for Humanitarian Affairs, a position he received *after* the issuance of the ICC arrest warrant.<sup>44</sup>

Despite Sudan's refusal to cooperate with the Court, the Prosecution continued its investigations into Darfur and, on 14 July 2008, the Prosecutor asked Pre-Trial Chamber I for an arrest warrant for President al-Bashir based on allegations of war crimes, crimes against

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<sup>40</sup> See Darfur Peace Agreement (5 May 2006), <http://www.isuk.org/1/wp-content/uploads/2007/12/DarfurPeaceagreement.pdf>. See also International Crisis Group, *Darfur's Fragile Peace Agreement*, Africa Briefing N°39 (20 June 2006), <http://www.crisisgroup.org/home/index.cfm?id=4179>; Letter dated 10 August 2006 from the Secretary-General addressed to the President of the Security Council, S/2006/645, at 2 (14 August 2006).

<sup>41</sup> See *The Prosecutor v. Ahmad Muhammad Harun ("Ahmad Harun") and Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb")*, Warrant of Arrest for Ahmad Harun, ICC-02/05-01/07-2, at 6-16 (Pre-Trial Chamber I, 27 April 2007); *The Prosecutor v. Ahmad Muhammad Harun ("Ahmad Harun") and Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb")*, Warrant of Arrest for Ali Kushayb, ICC-02/05-01/07-3, at 6-16 (Pre-Trial Chamber I, 27 April 2007).

<sup>42</sup> See Warrant of Arrest for Ahmad Harun, *supra* n. 41; Warrant of Arrest for Ali Kushayb, *supra* n. 41.

<sup>43</sup> See, e.g., Amnesty International, *Arrest Now! Darfur, the Sudan: Ahmad Harun and Ali Kushayb*, AI Index: AFR 54/027/2007, 17 July 2007, <http://www.amnestyusa.org/document.php?id=ENGAFR540272007&rss=darfur>.

<sup>44</sup> Warrant of Arrest for Ahmad Harun, *supra* n. 41, at 16.

humanity, and genocide.<sup>45</sup> Additionally, in November 2008 the ICC Prosecutor sought arrest warrants for three unnamed rebel leaders.<sup>46</sup> Finally, on 4 March 2009, the ICC issued an arrest warrant for President al-Bashir for seven counts including war crimes and crimes against humanity, but not genocide.<sup>47</sup> The request for warrants against two of the three rebel leaders remains outstanding at the time of this writing; one of the rebels voluntarily appeared before the Court in May 2009. While Sudanese rebel leaders have signaled they will cooperate with the ICC if the Court decides to issue warrants against any rebel or government leaders,<sup>48</sup> the Sudanese government continues to refuse to assist the Court with execution of any outstanding arrest warrants.

### 3. *The Policy Debate in the International Community*

The Prosecutor's request for an arrest warrant for President al-Bashir provoked a debate over the circumstances under which Article 16 of the Rome Statute should be invoked by the Security Council. Although this debate has, at times, referred to the situation in Darfur generally, it has focused mostly on the arrest warrant against Sudan's president.<sup>49</sup> Among the first statements opposing the request for the

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<sup>45</sup> Summary of the Prosecutor's Application under Article 58, *supra* n. 17

<sup>46</sup> *Id.* at 3.

<sup>47</sup> See Warrant of Arrest for Omar Hassan Ahmad Al Bashir, *supra* n. 18, at 7. The Prosecutor has submitted a request to Pre-Trial Chamber I seeking leave to appeal the Chamber's decision that the Prosecutor had failed to present reasonable grounds to believe that al-Bashir is responsible for genocide. See *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, Prosecution's Application for Leave to Appeal the "Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir," ICC-02/05-01/09-12 (Office of the Prosecutor, 13 March 2009). The application for leave to appeal remains outstanding at the time of this writing.

<sup>48</sup> See Mariette le Roux, *ICC Seeks Warrants for Sudan Rebel Heads*, Spring Morning Herald, 21 November 2008, <http://news.smh.com.au/world/icc-seeks-warrants-for-sudan-rebel-heads-20081121-6cyd.html> (containing statements by leaders of both JEM and SLA to the AFP that indicate that they will cooperate with the ICC in relation to the alleged attack on AU peacekeepers).

<sup>49</sup> See, e.g., Communiqué of the 142<sup>nd</sup> meeting of the Peace and Security Council, *annexed to* Letter dated 21 July 2008 from the Permanent Observer of the African

arrest warrant for al-Bashir was an African Union communiqué criticizing the warrant request.<sup>50</sup> The communiqué asserted that:

approval by the Pre-Trial Chamber of the [warrant] application by the ICC Prosecutor could seriously undermine the ongoing efforts aimed at facilitating the early resolution of the conflict in Darfur and... the Sudan as a whole and, as a result, may lead to... far-reaching consequences for the country and the region.<sup>51</sup>

Consequently, the AU requested that the Security Council invoke Article 16 to “defer the process initiated by the ICC,” referring to the Prosecutor’s request that the Pre-Trial Chamber issue an arrest warrant.<sup>52</sup>

During the months that followed the Prosecutor’s request for an arrest warrant, the Security Council met in July 2008<sup>53</sup> and in December 2008.<sup>54</sup> At the request of the Sudanese government, the Security Council allowed the Sudanese Ambassador to the UN, Abdalmahmood Abdalhaleem Mohamad, to participate in the July meeting without the right to vote.<sup>55</sup> There, the ambassador asked that Article 16 be used to suspend all measures taken against President al-Bashir, stating that the

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Union to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2008/481, at 9, 23 July 2008 (discussing the potential consequences of approval of the ICC prosecutor’s application to Pre-Trial Chamber I of an arrest warrant for al-Bashir); Security Council Meeting Record, 6028<sup>th</sup> Meeting, S/PV.6028, 3 December 2008 (discussing the deferral and the situation in Darfur generally, but frequently referencing the arrest warrant application for al-Bashir).

<sup>50</sup> See AU Communiqué, *supra* n. 49.

<sup>51</sup> *Id.* ¶ 9.

<sup>52</sup> *Id.* ¶ 11.

<sup>53</sup> Security Council Meeting Record, 5947<sup>th</sup> Meeting, S/PV.5947, 31 July 2008.

<sup>54</sup> 6028<sup>th</sup> Meeting Record, *supra* n. 49.

<sup>55</sup> 5947<sup>th</sup> Meeting Record, *supra* n. 53, at 2.

Security Council should “give highest priority to the peace process; and allay all threats to the process, such as the measure undertaken by the Chief Prosecutor of the International Criminal Court.”<sup>56</sup>

Subsequently, officials in the Sudanese government including National Security and Intelligence Service head Sala Gosh and Presidential Adviser Bona Malwal also warned that, following an indictment of al-Bashir, they “cannot be responsible for the well-being of foreign forces in Darfur” and that they “cannot predict what will happen, but [the Sudanese government] will work on securing the country.”<sup>57</sup>

Assistant UN Secretary General for Peacekeeping Edmond Mulet echoed these fears, saying that the United Nations generally is worried about “suggestions of an uncontrolled reaction to an indictment by the population against UNMIS [United Nations Mission in Sudan].”<sup>58</sup>

Three members of the UN Security Council, including Russia and China, as well as Libya, which holds a non-permanent seat on the Security Council through the end of 2009, have publicly supported Sudan’s request. In addition, a number of countries not presently represented on the Security Council have expressed support for a deferral; these include Indonesia, South Africa, and Vietnam, as well as members of the African Union, the League of Arab States, the Organization of the Islamic Conference, and the Non-Aligned Movement.<sup>59</sup> These countries maintain that the potential repercussions of the arrest warrant for the Sudanese president could be irreparable for the civilian population as well as for the foreign humanitarian workers on the ground.<sup>60</sup> They stated that the peace process is at an

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<sup>56</sup> *Id.* at 12.

<sup>57</sup> See, e.g., 6028<sup>th</sup> Meeting Record, *supra* n. 49, at 3; *Westerners Could Be Targets Post ICC Warrant: Sudan*, Sudan Tribune, 11 January 2009, <http://www.sudantribune.com/spip.php?article29829>.

<sup>58</sup> BBC News, *UN Fears Over Warrant for Bashir*, 6 November 2008, <http://news.bbc.co.uk/2/hi/africa/7712616.stm>.

<sup>59</sup> 6028<sup>th</sup> Meeting Record, *supra* n. 49, at 14; 5947<sup>th</sup> Meeting Record, *supra*, n. 53.

<sup>60</sup> See generally 6028<sup>th</sup> Meeting Record, *supra* n. 49; 5947<sup>th</sup> Meeting Record, *supra*, n. 53.

“extremely sensitive time” and that an arrest warrant for President al-Bashir would jeopardize the negotiations for a cease-fire and an end to the conflict.<sup>61</sup> The Libyan Arab Jamahiriya also added: “We believe that judicial justice can be achieved only in an environment of security and political stability. The establishment of peace and security is thus an objective prerequisite for upholding justice.”<sup>62</sup>

By contrast, three Security Council members – the United Kingdom, the United States, and Croatia (a non-permanent seat holder) – fully support continuing with the investigation and prosecution against al-Bashir, as do non-Security Council members Italy and Belgium.<sup>63</sup> For instance, the government of the United Kingdom has proclaimed that it does not see any justification for the suspension of the proceedings and that the “onus is on the government of the Sudan to take much more ambitious, bold and concrete action to cooperate with the ICC and to achieve peace in Darfur.”<sup>64</sup> For the United Kingdom, the solution for peace lies in the ICC’s capacity to fully complete its work.<sup>65</sup> Similarly, the United States has declared that it “remains steadfastly committed to promoting the rule of law and helping to bring violators of international humanitarian law to justice.”<sup>66</sup> The United States further showed its support for the ICC’s action in Sudan by abstaining on a Security Council resolution aimed at extending the United Nations-AU mission in Sudan because its wording contained a reference to a possible deferral of the Darfur situation.<sup>67</sup> More

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<sup>61</sup> 6028<sup>th</sup> Meeting Record, *supra* n. 49, at 6.

<sup>62</sup> *Id.* at 5.

<sup>63</sup> *Id.* at 7-11, 15, 18-19; 5947<sup>th</sup> Meeting Record, *supra* n. 53, at 4-5.

<sup>64</sup> 6028<sup>th</sup> Meeting Record, *supra* n. 49, at 18.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 15.

<sup>67</sup> See Security Council Resolution 1828, U.N. Doc. S/RES/1828 (31 July 2008). The resolution stated that the Security Council was considering the AU communiqué, referenced above, and the “concerns raised by members of the Council regarding potential developments subsequent to the application by the Prosecutor of the International Criminal Court of 14 July 2008.” *Id.* at PmbI. ¶9. The United

recently, Richard Holbrooke, an adviser to US President Barack Obama and former representative of the US to the United Nations, added that a “suspension may seem a safer course to follow in the short run, but it will embolden [President al-Bashir] and other future suspected war criminals.”<sup>68</sup> For its part, the delegation from Croatia pointed out that “impunity for war crimes does not bring stability to any conflict, but rather prolongs the realization of political settlements. If anything, we have learned that the best foundation for real and sustainable peace based on reconciliation is justice and justice alone.”<sup>69</sup> Finally, certain non-governmental organizations have weighed in against Security Council intervention, including Human Rights Watch<sup>70</sup> and the International Crisis Group.<sup>71</sup>

France, seemingly adopting a compromise approach, has supported the proceedings of the ICC but has said it would consider supporting a deferral of the prosecution of al-Bashir if Sudan met certain conditions: that Sudan turn over to the ICC two other indicted

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States stated that it “abstained in the voting because the language added to the resolution would send the wrong signal to Sudanese President al-Bashir and undermine efforts to bring him and others to justice.” 5947<sup>th</sup> Meeting Record, *supra* n. 53, at 8.

<sup>68</sup> BBC News, *ICC Fending off Darfur Challenge*, 20 November 2008, <http://news.bbc.co.uk/2/hi/africa/7739577.stm>.

<sup>69</sup> 5947<sup>th</sup> Meeting Record, *supra* n. 53, at 4-5.

<sup>70</sup> Human Rights Watch, *Article 16*, 15 August 2008, <http://www.hrw.org/en/news/2008/08/15/q-article-16> (opposing a deferral on the ground that it “risks legitimizing political interference with the work of a judicial institution and could set a dangerous precedent for the accused in other situations”).

<sup>71</sup> See Nick Grono, *Deterring Future Darfurs*, International Crisis Group, <http://www.crisisgroup.org/home/index.cfm?id=3060&l=1#C5> (arguing that although Sudan’s internal peace prospects post-warrant are important, a more important question is whether the warrant will deter future leaders from committing war crimes); Nick Grono, *Sudan’s False Dawn*, International Crisis Group, <http://www.crisisgroup.org/home/index.cfm?id=5969&l=1> (noting that two potential additional benefits of al-Bashir’s indictment are the legal recognition of the crimes committed against Darfurians and the possibility that the warrant will help Sudanese politicians realize that the government’s policies are ineffective in promoting security).

officials, Ali Kushayb and Ahmed Harun; that it stop interfering with the United Nations Mission in Darfur (UNAMID); that it agree to participate fully in the peace dialogue; and that it improve its relationship with Chad.<sup>72</sup> If those conditions were met, the French delegation suggested that it would support the use of Article 16.<sup>73</sup>

In addition to the international disagreement over the impact of the arrest warrant on peace and security in Darfur, domestic groups within Sudan reportedly are divided on the issue. On the one hand, two pro-government groups filed a motion with the ICC seeking to present their views that a prosecution of al-Bashir is not in the interest of justice.<sup>74</sup> While the Pre-Trial Chamber declined to accept the filing on procedural grounds, the filing was released publicly, and sets forth the groups' views that, *inter alia*, issuing an arrest warrant against al-Bashir "would have grave implications for the peace building process in Sudan and that deference must be given to considerations of national interest and security."<sup>75</sup> On the other hand, a report released shortly after the arrest warrant against the president had been issued indicated that Darfuris in refugee camps within Darfur and in Chad widely welcomed the warrant, and were disappointed only that the charges did not include genocide.<sup>76</sup> Perhaps unsurprisingly, one of the major rebel groups in Darfur, JEM, has also expressed support for the

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<sup>72</sup> Gerard Prunier, *Sudan's Omar al-Bashir: a Useful War Criminal*, Open Democracy, 16 October 2008.

<sup>73</sup> *Id.*

<sup>74</sup> See *Situation in Darfur, Sudan*, Application on Behalf of Citizens' Organisations of the Sudan in Relation to the Prosecutor's Applications for Arrest Warrants of 14 July 2008 and 20 November 2008, ICC-02/05-170, at 4-5 (11 January 2009).

<sup>75</sup> *Id.* ¶ 8.

<sup>76</sup> Katy Glassborow & Tajeldin Abdhalla Adam, *Darfuris' Mixed Feelings Over Bashir Warrant*, Institute for War and Peace Reporting, AR No. 207, 25 March 2009, [http://www.iwpr.net/index.php?m=p&o=351286&s=f&apc\\_state=hENfacr351286](http://www.iwpr.net/index.php?m=p&o=351286&s=f&apc_state=hENfacr351286).

warrant and has promised full cooperation with the ICC in bringing al-Bashir to justice.<sup>77</sup>

Lastly, in the lead up to the issuance of the arrest warrant, some commentators expressed concern regarding the Sudanese government's potential reaction, which they feared could include the declaration of a state of emergency, a coup d'état, or increased attacks against foreigners, which may have led to further support for a Security Council deferral.<sup>78</sup> While none of these predicted scenarios has come to pass, al-Bashir did take the drastic move of expelling international relief workers from Darfur shortly after the arrest warrant was issued, and he has condemned the Court as politically motivated.<sup>79</sup>

#### B. THE APPROPRIATE EXERCISE OF ARTICLE 16 BY THE UN SECURITY COUNCIL

The debate over whether the Security Council should invoke Article 16 to request that the ICC defer the prosecution of Mr. al-Bashir and other top Sudanese officials and rebel leaders has at least two components: (i) whether the Rome Statute permits the Security Council to request the deferral of ongoing investigations or prosecutions where the Security Council has itself referred them to the ICC; and (ii) assuming an affirmative answer to the first question, whether the Security Council, as a matter of policy, should request the Court to defer its own referral of the situation in Darfur to the ICC. Our analysis concludes that although Article 16 permits the Security Council to seek to defer its own referrals, the situation in Darfur does not present the appropriate circumstances for the Security Council to exercise its Article 16 power.

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<sup>77</sup> IRIN News, *Sudan: "Anything is possible" if ICC Indicts President*, 22 January 2009, <http://www.irinnews.org/Report.aspx?ReportId=82508>.

<sup>78</sup> *Id.*

<sup>79</sup> See, e.g., *Obama condemns Darfur expulsions*, BBC, 11 March 2009, <http://news.bbc.co.uk/2/hi/africa/7936354.stm>.

*1. Nothing in Article 16 Suggests that the Security Council Cannot Defer Its Own Referral, or That It Is Limited to Doing So at Any Particular Time*

Although it is widely acknowledged that the Security Council can invoke Article 16 to preclude the ICC from launching an investigation originating from a State Party's referral or the exercise of the Prosecutor's *proprio motu* powers, there is some disagreement among commentators over whether Article 16 allows the Security Council to request that the ICC halt an ongoing investigation or prosecution originating from its own referral.<sup>80</sup> In particular, David Scheffer, who headed the United States delegation during the negotiations for the Rome Statute, has argued that the drafters of the treaty did *not* intend to allow Article 16 to be exercised: (i) after an investigation or prosecution had already been launched by the ICC, or (ii) in relation to situations that the Security Council itself had referred to the ICC.<sup>81</sup> While Scheffer's arguments in support of these claims are well-reasoned, and very well may reflect the mindset of the Rome Statute's drafters at the time Article 16 was written, the plain text of the treaty, as well as certain other factors, weigh against a conclusion that, as a legal matter, the Security Council is prohibited from requesting the deferral of the al-Bashir prosecution.

Looking first to the argument that Article 16 was intended to be exercised only *prior to* the launch of an investigation, it is significant that nothing in Article 16 suggests that the Security Council is limited to requesting a deferral of investigations or prosecutions at a particular time.<sup>82</sup> Indeed, the text of the provision states that "[n]o investigation or prosecution may be *commenced or proceeded with*" where the

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<sup>80</sup> Compare David Scheffer, *The Security Council's Struggle over Darfur and International Justice*, JURIST, 20 August 2008, <http://jurist.law.pitt.edu/forumy/2008/08/security-councils-struggle-over-darfur.php>; with Robert Cryer, *The Security Council, Article 16 and Darfur*, Oxford Transitional Justice Working Paper Series, 2-3 (29 October 2008), <http://www.csls.ox.ac.uk/documents/CryerFi.pdf>.

<sup>81</sup> Scheffer, *supra* n. 80.

<sup>82</sup> Rome Statute, *supra* n. 9, Art. 16.

Security Council passes a Chapter VII resolution deferring the matter.<sup>83</sup> Notably, the initial draft limited the relevant language to: “[n]o prosecution may be *commenced*.”<sup>84</sup> Although it is unclear from the drafting history of the Rome Statute why the words “or proceeded with” were added to the final version of Article 16, the addition of these words renders the argument that the Security Council cannot act to defer proceedings once an arrest warrant has been issued difficult to sustain. Furthermore, although Scheffer raises the interesting point that, if negotiators had considered giving the Security Council the power to seek to defer a situation after an investigation or prosecution had been launched, “there would have been exhaustive discussions over many months to determine how [specifically] to handle well-developed cases and investigatory matters during the suspension period,”<sup>85</sup> at least one commentary to the drafting history suggests that such discussions did in fact take place.<sup>86</sup> While no language was ultimately included in the Rome Statute to deal with such issues as preserving evidence and protecting witnesses in the case of a deferral, the fact that the drafters appeared to have contemplated such language lends further support to the notion that there are no *temporal* limits to the Security Council’s authority under Article 16.

Likewise, the plain language of Article 16 fails to support Scheffer’s assertion that the Security Council cannot act to defer proceedings that the ICC undertakes pursuant to a Security Council referral. Indeed,

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<sup>83</sup> *Id.* (emphasis added).

<sup>84</sup> See 1994 Draft Statute *supra* n. 1, Art. 23(3) (emphasis added)

<sup>85</sup> Scheffer, *supra* n. 80. In other words, Mr. Scheffer argues that Article 16 was not intended to defer cases already under investigation or prosecution because the negotiators did not consider critical details, such as outstanding arrest warrants, preservation of evidence, witness tracking and protection, and the effect of deferral on other cases involving security risks during the suspension period. *Id.*

<sup>86</sup> See Bergsmo & Pejić, *supra* n. 14, at 380-81 (explaining that “the drafters of the Statute knew of the implications of a request aimed at deferring an ongoing proceeding... a *nota bene* was incorporated in the last draft of [A]rticle 10... pointing to the need for ‘further discussion’ of preservation of evidence. The discussion did not lead to the inclusion of relevant language in [A]rticle 16.”).

nothing in Article 16 limits deferral to situations undertaken by the Court pursuant to a particular means of exercising jurisdiction.<sup>87</sup> Again, this is not to deny the possibility that the Rome Statute's drafters failed to contemplate Security Council intervention in a situation the Council had itself referred to the ICC, but to the extent this is true, it is not documented in the publicly available drafting history, and, as noted, is not supported by the plain language of the Rome Statute.<sup>88</sup> Additionally, as a matter of policy, if Article 16 did not allow the Security Council to defer ICC proceedings resulting from Security Council referrals, this "no going back" approach might discourage the Security Council from ever referring situations to the ICC.<sup>89</sup> Such a construction might prevent situations like Darfur from ever falling within the Court's jurisdiction.

2. *While the Security Council May Legally Have the Power to Request the Deferral of the Prosecution of President al-Bashir, the Current Conditions in Sudan Do Not Present an Appropriate Situation for Such a Deferral*

a) Article 16 Should Be Reserved for Exceptional Circumstances

While it appears that the Security Council *can* request a deferral of an investigation or prosecution under Article 16 stemming from a situation that it referred under Article 13, limits nevertheless exist as to when the Security Council *should* request any deferral. As an initial matter, Article 16 requires that any resolution by the Security Council requesting a deferral of ICC proceedings be adopted pursuant to

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<sup>87</sup> Rome Statute, *supra* n. 9, Art. 13; *id.* Art. 16.

<sup>88</sup> *Id.* Art. 16; *supra* n. 83-84 *et seq.* and accompanying text.

<sup>89</sup> In other words, under a "no going back" approach, a Security Council referral to the ICC would in effect mean that the Security Council is *permanently transferring oversight* of a security situation to the ICC. This complete loss in oversight would make the Security Council reluctant to refer cases to the ICC because conditions on the ground may unexpectedly change after a referral. For example, a peace deal may be close to being finalized between a head of state and a rebel group, a situation where the Security Council might consider deferral an appropriate option.

Chapter VII of the UN Charter, meaning that the Security Council must be acting “to maintain or restore international peace and security.”<sup>90</sup> Thus, as commentators have observed, the Security Council must be able to justify its decision to intervene after balancing peace and justice interests,<sup>91</sup> and should act only in exceptional circumstances,<sup>92</sup> in which the Security Council concludes that the Court’s proceedings would harm the Council’s efforts in maintaining or restoring peace and security.<sup>93</sup> Thus, for example, it has been

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<sup>90</sup> Charter of the United Nations, June 26, 1945, 59 Stat. 1031, T.S. 993, 3 Bevans 1153, *entered into force* Oct. 24, 1945, Art. 39; *see also* Luigi Condorelli and Santiago Villalpando, *Referral and Deferral by the Security Council*, in 1 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 627, 647 (Antonio Cassese *et al.*, eds., 2002).

<sup>91</sup> *See* Condorelli & Villalpando, *supra* n. 90, at 647 (noting that the Security Council “should give reasons for its decision by demonstrating that the suspension of the investigations or the prosecutions will contribute to the objective provided for in Chapter VII of the Charter”); Dan Sarooshi, *The Peace and Justice Paradox: The International Criminal Court and the UN Security Council*, in THE PERMANENT INTERNATIONAL CRIMINAL COURT: LEGAL AND POLICY ISSUES 95, 105-06 (Dominic McGoldrick *et al.*, eds., 2004) (quoting Morten Bergsmo, a participant in the Rome Conference, describing Article 16 as the “proper forum” for balancing “interests of international peace and justice mandates).

<sup>92</sup> *See, e.g.*, Condorelli & Villalpando, *supra* n. 90, at 646-47 (arguing that the Security Council’s power under Article 16 should be “interpreted restrictively, as absolutely exceptional in the relations between political organs and the jurisdictional function”); *see also* Alexander K.A. Greenawalt, *Justice Without Politics?: Prosecutorial Discretion and the International Criminal Court*, 39 N.Y.U. J. Int’l L. & Pol. 583, 665 (2007) (explaining that Article 16 “has the character of a temporary emergency measure that views Security Council involvement as a kind of extraordinary intervention in the Court’s work”); Linda M. Keller, *Achieving Peace With Justice: The International Criminal Court and Ugandan Alternative Justice Mechanisms*, 23 Conn. J. Int’l L. 209, 243 (2008) (“[T]he Security Council deferral power should be used sparingly, only in circumstances where ICC investigation or prosecution fatally threatens a peace deal effecting international peace and security.”).

<sup>93</sup> Sarooshi, *supra* n. 91, at 105-06 (“The article can be used by the Council to postpone ICC investigations and prosecutions when the Council ‘assesses that the peace efforts need to be given priority over international criminal justice’, in the interest of international peace and security. It recognizes a Council power to ‘request the Court not to investigate or prosecute when the requisite majority of its members conclude that judicial action – or the threat of it – might harm the Council’s efforts to maintain international peace and security pursuant to the Charter.’”).

argued that the exercise of Article 16 might be appropriate in a situation where a precarious, but realistic, peace has been achieved and proceeding with an immediate investigation or prosecution by the ICC would threaten such conditions.<sup>94</sup> By contrast, it would appear inconsistent with the purpose of Article 16 to request a suspension of ICC proceedings in a case where a government is attempting to coerce a deferral (or a complete amnesty from prosecution) in exchange for disarming or even engaging in peace negotiations.<sup>95</sup>

Furthermore, nothing in the Rome Statute prevents the Security Council from dealing with a peace and security situation in ways that do not involve requesting an Article 16 deferral while the ICC is conducting proceedings related to the same situation. Hence, if the institution of proceedings by the ICC led to threats of retaliation by a nation's government, nothing would prevent the Security Council from dealing with those threats through, for instance, an increased peacekeeping presence in that country.

Finally, the notion that Article 16 should be reserved for exceptional circumstances is supported by the drafting history of the article. It is important to recall that the authority of the Security Council to request deferral of proceedings of the ICC originates with the Rome Statute, not the UN Charter. Thus the expectations of the Rome Statute's

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<sup>94</sup> See, e.g., Keller, *supra* n. 92, at 243 (observing that the Security Council should only request a deferral when an ICC prosecution would present a "genuine obstacle to peace"); H.R.H. Prince Zeid Ra'ad Zeid Al Hussein, *Peace v. Justice: Contradictory or Complementary*, 100 Am. Soc'y Int'l L. Proc. 362, 364 (American Society of International Law Proceedings, 29 March – 1 April 2006) (explaining that any discussion about achieving peace at the expense of justice arises in a post-conflict situation where "there would have to exist some form of formal or informal ceasefire or better still, a cessation of hostilities... It also presupposes... that some form of contact between the parties has already occurred to settle on, or affirm, a ceasefire and then possibly a cessation of hostilities.").

<sup>95</sup> Kenneth Roth, *Workshop: The International Criminal Court Five Years On: Process or Stagnation?*, 6 J. Int'l Crim. Just. 763, 767 (2008) (arguing that allowing individuals indicted by the ICC to threaten a refusal to enter into peace negotiations or to escalate an ongoing conflict if the Security Council does not defer the Prosecution's proceedings would only encourage other groups to engage in the same practice).

drafters in creating Article 16 should be relevant to the Security Council's interpretation of the provision.

From the beginning of active negotiations on the ILC draft statute in 1994, the relationship between the Security Council and the ICC was difficult to define because states articulated divergent views about the degree of involvement the Security Council should have in the work of the ICC.<sup>96</sup> The initial formulation of the relationship, found at Article 23(3) of the ILC draft statute, 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*.<sup>97</sup>

Thus, the draft provision gave the Security Council general precedence over the Court in dealing with international matters where peace and security were at issue because the Court would first have to ensure that the Security Council was not examining a situation before commencing any prosecution or investigation of that situation.<sup>98</sup> According to this draft, the Security Council would not have to pass a Chapter VII resolution to restrict the Court from proceeding; instead, as long as the matter was being “dealt with” by the Security Council, the Court could not move forward with its work without Security Council permission.<sup>99</sup> This position was supported by states that maintained that the draft article rightfully gave the Security Council the responsibility to handle delicate situations.<sup>100</sup> These countries,

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<sup>96</sup> See Bergsmo & Pejić, *supra* n. 14, 373-74.

<sup>97</sup> 1994 Draft Statute, *supra* n. 1, Art. 23(3) (emphasis added).

<sup>98</sup> See 1994 Draft Statute, *supra* n. 1, Art. 23(3); see also Bergsmo & Pejić, *supra* n. 14, 374.

<sup>99</sup> See Bergsmo & Pejić, *supra* n. 14, 374.

<sup>100</sup> See Role of Security Council in Triggering Prosecution Discussed in Preparatory Committee for International Criminal Court, *adopted* on 4 April 1996 by the Preparatory Committee in the Establishment of an International Criminal Court at the

including the United States, the United Kingdom, the Russian Federation, France, and Hungary, did not believe that the ICC should take any action without consulting with the Security Council first, as this could hinder international peace and security.<sup>101</sup> Other states, which otherwise were supportive of the approach outlined in draft Article 23(3), considered the text too vague and called for clear criteria that would allow the Court to determine when the Security Council was seized of a situation, and how to proceed if an investigation by the Court had already commenced and the Security Council later began to deal with the situation related to the same investigation.<sup>102</sup>

At the same time, a number of states, including Mexico, Italy, the Netherlands, Germany, Austria, Tunisia, Denmark, Slovenia, Greece, Egypt, and Thailand, were concerned about the proposed article on the ground that, to remain independent and impartial, the ICC should not be politicized and should be given the right to proceed freely.<sup>103</sup> Thus, as the commentary to the draft statute notes, certain delegations described the provision as “undesirable, on the basis that the process of the statute should not be prevented from operating through political decisions taken in other forums.”<sup>104</sup> These critics believed the Security Council would be interfering in the judicial process and depriving the Court of its jurisdiction “by the mere placement of a situation on the agenda of the Council, where it could remain under consideration for a potentially indefinite period of time.”<sup>105</sup> Indeed,

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First Session, 16<sup>th</sup> Meeting (note that no page numbers are available for this document).

<sup>101</sup> *Id.*

<sup>102</sup> *Ad Hoc* Committee on the Establishment of an International Criminal Court, Draft Report of the Ad Hoc Committee, Resumed Session, A/AC.244/CRP.7/Add.2, ¶ 7, 23 August 1995.

<sup>103</sup> *Id.*

<sup>104</sup> *See* 1994 Draft Statute, *supra* n. 1, Commentary to Art. 23, ¶ 13.

<sup>105</sup> Lionel Yee, *The International Criminal Court and the Security Council: Articles 13(b) and 16*, in *THE MAKING OF THE ROME STATUTE* 148, 150 (Roy S. Lee, ed. 1999).

Mexico, Italy, Germany, Austria, Greece, and Thailand, advocated for the deletion of Article 23(3) altogether.<sup>106</sup>

Ultimately, the negotiators agreed that the ICC should be able to initiate investigations without approval by the Security Council.<sup>107</sup> Nevertheless, the Security Council's specific role in ICC investigations remained a hotly debated issue into 1997,<sup>108</sup> when the delegation from Singapore drafted a new version of Article 23(3) for the Preparatory Committee on the Establishment of an International Criminal Court.<sup>109</sup> The new draft read as follows: "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."<sup>110</sup> Generally, this proposal would have left the Court free to pursue investigations and prosecutions unless it was specifically prohibited from doing so by a Security Council decision.<sup>111</sup> In the end, with the subsequent addition of a few amendments, such as a Canadian proposal to impose a renewable time limit of twelve months on the deferral,<sup>112</sup> and the substitution of the words "given a direction to that

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<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at 150.

<sup>108</sup> See, e.g., United States Delegation to the Preparatory Committee on ICC, *Proposed Amendments Pertaining to the Trigger Mechanism*, April 1996, [http://74.125.93.104/search?q=cache:OOLnS9hQVCUJ:www.iccnw.org/documents/USTriggerMechanisms.pdf+Proposed+Amendments+Pertaining+to+the+Trigger+Mechanism&cd=1&hl=en&ct=clnk&gl=us&lr=lang\\_en|lang\\_fr](http://74.125.93.104/search?q=cache:OOLnS9hQVCUJ:www.iccnw.org/documents/USTriggerMechanisms.pdf+Proposed+Amendments+Pertaining+to+the+Trigger+Mechanism&cd=1&hl=en&ct=clnk&gl=us&lr=lang_en|lang_fr); France, *Proposal by France on Article 23*, Non-Paper/WG.3/No.15, 8 August 1997.

<sup>109</sup> Bergsmo & Pejić, *supra*, n. 14, at 375.

<sup>110</sup> Singapore, *Proposed Amendments To Article 23, Paragraph 3*, Non-Paper/WG.3/No.16, 8 August 1997, [http://74.125.93.104/search?q=cache:LAMoOR3xjNQJ:www.iccnw.org/documents/SingaporeSecurityCouncil.pdf+Proposed+Amendments+To+Article+23,+Paragraph+3&cd=1&hl=en&ct=clnk&gl=us&lr=lang\\_en|lang\\_fr](http://74.125.93.104/search?q=cache:LAMoOR3xjNQJ:www.iccnw.org/documents/SingaporeSecurityCouncil.pdf+Proposed+Amendments+To+Article+23,+Paragraph+3&cd=1&hl=en&ct=clnk&gl=us&lr=lang_en|lang_fr).

<sup>111</sup> *Id.*

<sup>112</sup> Yee, *supra* n. 105, at 151 (citing Preparatory Committee Draft Statute, Article 10(7), option 2, para.2).

effect” with the words “has requested the Court to that effect,” the parties accepted what became Article 16 of the Rome Statute as constituting a good compromise between all the divergent points of view.<sup>113</sup> Thus, while the negotiators of the Rome Statute did finally agree to provide a role for the Security Council in the working of the Court, that role was drastically limited over the course of negotiations, suggesting that Security Council intervention was expected to be a rare phenomenon.

b) Exceptional Circumstances Warranting Security Council Action Do Not Exist in this Case

Given the exceptional nature of an Article 16 resolution, it is difficult to make the case that the Security Council should request that the ICC defer the proceedings against President al-Bashir. While Sudan and its supporters have argued that President al-Bashir is necessary to achieve peace in the region, all promises of ceasefires and peace negotiations made by the government of Sudan to date have been broken.<sup>114</sup> In fact, as the International Federation of Human Rights (FIDH) explains, “the peace process in Darfur has been significantly slow for reasons unrelated to the ICC.”<sup>115</sup> Thus, while the African Union and Security Council members who have voiced support for deferring the proceedings have based those arguments on the premise that there was a peace to maintain,<sup>116</sup> given the Sudanese government’s track record,

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<sup>113</sup> *Id.* at 151.

<sup>114</sup> 6028<sup>th</sup> Meeting Record, *supra* n. 49, at 4 (describing the numerous promises made by the Sudanese government to disarm, ensure a cease-fire, and bring to justice all those responsible for the atrocities in Darfur, only for those promises to be followed by attacks and aerial bombardments on civilians, the failure to disarm the Janjaweed, and the arrest and torture of human rights defenders and ICC information providers).

<sup>115</sup> International Federation for Human Rights, *The International Criminal Court and Darfur: Questions and Answers*, 14 July 2008, [http://www.iccnw.org/documents/FIDH\\_QA\\_Darfur\\_ENG.pdf](http://www.iccnw.org/documents/FIDH_QA_Darfur_ENG.pdf).

<sup>116</sup> *See, e.g.*, AU Communiqué, *supra* n. 49, at 2-3 (arguing that a “search for justice should be pursued in a way that does not impede or jeopardize efforts aimed at promoting lasting peace” and that an arrest warrant for al-Bashir could undermine the efforts to bring peace and reconciliation to Sudan); Security Council Meeting Record, 5947<sup>th</sup> Meeting, S/PV.5947, at 6, 31 July 2008 (quoting the representative

it is unlikely that a deferral of proceedings against al-Bashir could contribute to this goal. Additionally, Sudan has given no indication that a deferral would assist in *restoring* peace. Indeed, during the seven months between the ICC Prosecutor's request for an arrest warrant against al-Bashir and the Pre-Trial Chamber's issuance of the warrant, the Sudanese president took no steps to demonstrate he was committed to peace.<sup>117</sup> Instead, while the African Union tried to make the case for Article 16 by arguing that al-Bashir was necessary for peace, the Sudanese government did nothing but promise that violence would escalate if the arrest warrant were issued.<sup>118</sup> Hence, even if deferral could be justified based on a mere promise of peace, Sudan has not promised to disarm government forces or to cease hostilities in the event of a deferral.

Furthermore, even if there were a genuine promise of peace in the near future, it does not necessarily follow that the proceedings against al-Bashir should be deferred. To the contrary, in the view of FIDH, the arrest of al-Bashir "could potentially help reestablish peace in Darfur, by revealing the criminal responsibility of and punishing those who have committed the crimes... Additionally, an arrest warrant could

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from the People's Republic of China as stating that any indictment of al-Bashir "would undermine the atmosphere of mutual political trust and cooperation between the United Nations and the Sudanese Government,... and [would] harm the fragile and turbulent security situation in Darfur").

<sup>117</sup> Jan Eliasson, the United Nations Secretary-General's Special Envoy to Darfur and former UN Under-Secretary-General for Humanitarian Affairs, recently stated in remarks to the United States Institute of Peace that there was a general sense of hope that the Prosecutor's request for an arrest warrant would in fact spur the Sudanese government towards peace, but that this hope quickly proved to be unwarranted. See *Jan Eliasson on Prospects for Peace in Sudan*, Public Event at the United States Institute for Peace, Washington, D.C., 6 April 2009.

<sup>118</sup> 6028<sup>th</sup> Meeting Report, *supra* n. 49, at 3. Statements from the Sudanese Government include the following: Presidential Adviser Bona Malwal on 25 July 2008 announced, "We are telling the world that, with the indictment of our President al-Bashir, we cannot be responsible for the well-being of foreign forces in Darfur;" Adam Hamid Musa, recent Governor of South Sudan, threatened that there would be "more genocide such as has never been seen by anyone" if the arrest warrant is issued; and President al-Bashir stated, "We are not looking for problems, but if they come to use, then we will teach them a lesson that they will not forget." *Id.* at 3.

help separate Bashir from the peace process, which would, in turn, facilitate the long-term enactment of peace agreements...”<sup>119</sup> As recent examples in Sierra Leone and the former Yugoslavia demonstrate,<sup>120</sup> the prosecution of senior leaders suspected of international crimes can in fact encourage opposing parties to reconcile.<sup>121</sup> For instance, although the indictment issued by the Special Court for Sierra Leone (SCSL) of the former President of Liberia, Charles Taylor, was unsealed when Taylor entered Ghana for peace negotiations, this ultimately facilitated a peaceful resolution of the Liberian conflict.<sup>122</sup> Notably, the indictment initially derailed the peace talks and resulted in a two-month continuation of hostilities, causing West African leaders to criticize the SCSL prosecutor for “scuttling the peace talks that had finally brought Liberia’s warring factions together.”<sup>123</sup> Yet Taylor was eventually persuaded to resign and flee to Nigeria, where he remained in exile until he was handed over to the Special Court.<sup>124</sup> In his absence, preparations began for

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<sup>119</sup> International Federation for Human Rights, *supra* n. 115.

<sup>120</sup> Darryl Robinson, *Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court*, 14 Eur. J. Int’l L. 481, 496 (2003).

<sup>121</sup> *Id.* at 489 (noting that prosecution “can help expose violent extremists for what they are – criminals – thereby stigmatizing them, diminishing their influence and removing them from power and society” and also, “by providing survivors with a sense that justice has been done, it can help end cycles of revenge and vigilante justice, a precondition for real reconciliation”); *see also* Kenneth Roth, *Workshop: The International Criminal Court Five Years On: Process or Stagnation?*, 6 J. Int’l Crim. Just. 763, 766 (2008) (describing that an indictment of a senior leader can delegitimize and marginalize abusive figures and make it more likely that they will be willing to negotiate).

<sup>122</sup> J. Peter Pham, *A Viable Model for International Criminal Justice: The Special Court for Sierra Leone*, 19 N. Y. Int’l L. Rev. 37, 98 (2006) (explaining that Taylor’s indictment was unsealed “precisely because Taylor was in a country where there was a prospect of arresting him.”).

<sup>123</sup> *Id.* at 99.)

<sup>124</sup> *See* Human Rights Watch, *Bringing Justice: The Special Court for Sierra Leone* (8 September 2004), available at <http://www.hrw.org/en/node/11983/section/2> (describing Taylor’s escape to Nigeria after being forced from power in Liberia and noting Nigeria’s grant of asylum in August 2003 to Taylor); Milena Sterio, *Seeking the Best Forum to Prosecute International War Crimes: Proposed Paradigms and*

democratic elections in Liberia and Ellen Johnson-Sirleaf was eventually elected president.

In the case of the former Yugoslavia, on 24 April 1995, Richard Goldstone, the Chief Prosecutor for the International Criminal Tribunal for the former Yugoslavia (ICTY) at the time, announced that he would be investigating Radovan Karadžić and Ratko Mladić.<sup>125</sup> This announcement was followed by indictments of both individuals, shortly before the Dayton Peace Accords, effectively ensuring that they would not attend.<sup>126</sup> These actions by the ICTY came at a time when a cessation of hostilities agreement in Bosnia and Herzegovina, brokered three months earlier, appeared incredibly precarious.<sup>127</sup> Additionally, negotiations with the Bosnian Serbs had grown increasingly difficult, and many negotiators questioned how they could continue to work towards a resolution of the conflict in Bosnia and Herzegovina since they would no longer have any direct contact with either Karadžić or Mladić.<sup>128</sup> Despite these concerns, the parties concluded the Dayton Peace Accords.<sup>129</sup> Indeed, Goldstone has argued that the absence of Karadžić and Mladić was *necessary* for a peace agreement to be reached, since Bosnia's Muslim-led government would not have participated if the Bosnian Serb leaders had been present, particularly in the "aftermath of Srebrenica."<sup>130</sup>

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*Solutions*, 18 Fla. J. Int'l L. 887, 898 (2006) (recounting that Taylor lived in exile in Nigeria for several years, until Nigeria finally agreed to extradite him to the SCSL in 2006 after receiving tremendous international pressure).

<sup>125</sup> William A. Schabas, *United States Hostility to the International Criminal Court: It's All About the Security Council*, 15 Eur. J. Int'l L. 701, 715 (2004) (indicating that the prosecutor issued an indictment against the Bosnian Serb leaders).

<sup>126</sup> *Id.* at 715.

<sup>127</sup> H.R.H. Prince Zeid Ra'ad Zeid Al Hussein, *supra* n. 94, at 362.

<sup>128</sup> *Id.* at 362-63.

<sup>129</sup> See Richard Goldstone, *The United Nations' War Crimes Tribunals: An Assessment*, 12 Conn. J. Int'l L. 227, 233 (1997).

<sup>130</sup> *Id.*

Richard Holbrooke, the then-US Assistant Secretary for European and Canadian Affairs and primary architect of the Dayton Peace Accords, has also said that the ICTY proved to be a “valuable instrument” in the effort to peacefully end the conflict in the former Yugoslavia.<sup>131</sup>

Similarly, Slobodan Milošević was indicted on 27 May 1999, as the North Atlantic Treaty Organization (NATO) was nearing the final stages of its bombardment of Serbia and organizing negotiations with Milošević.<sup>132</sup> Critics of the indictment argued that it would hinder those efforts to end the war and bring peace to the region, but NATO and the Federal Republic of Yugoslavia entered into a peace agreement on 9 June 1999, just days after the indictment was publicly released.<sup>133</sup> These examples illustrate that, even in a situation where a precarious peace is in place or the possibility of negotiations exists in the near future, investigations and prosecutions of senior leaders need not automatically cease. Instead, the continuation of such proceedings can, in fact, support efforts to restore peace to a region by removing those alleged to bear the greatest responsibility for atrocities committed during the conflict.

Finally, deferral of the proceedings against al-Bashir would likely undermine not only the ICC’s mandate to put an end to impunity, which the United Nations is obligated to support under the terms of the

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<sup>131</sup> Richard Holbrooke, *TO END A WAR*, 190 (Random House, 1998).

<sup>132</sup> Richard J. Goldstone, *Peace Versus Justice, Symposium: Barriers to Peace in the Middle East*, 6 Nev. L. J. 421, 422 (2005-06).

<sup>133</sup> Robinson, *supra* n. 120, at 496; *see also* *NATO’s Role in Relation to the Conflict in Kosovo*, 15 July 1999, <http://www.nato.int/kosovo/history.htm> (chronicling the NATO aerial bombardments on the former Yugoslavia, which began on 23 March 1999 after Milošević refused to halt attacks on Kosovar Albanians, and continued until NATO and the Federal Republic of Yugoslavia signed the Military-Technical Agreement on 9 June 1999). Milošević subsequently lost re-election in 2000 to Vojislav Kostunica, who finally ordered the arrest and transfer of Milošević to the ICTY in 2001 after receiving pressure from the international community. *See* Annie Wartanian, *The ICC Prosecutor’s Battlefield: Combating Atrocities While Fighting For States’ Cooperation Lessons from the U.N. Tribunals Applied to the Case of Uganda*, 36 Geo. J. Int’l L. 1289, 1305-06 (2005).

Relationship Agreement,<sup>134</sup> but also the integrity and credibility of the Security Council, which itself made a determination in 2005 that a referral of the Darfur situation to the ICC would contribute to the restoration or maintenance of international peace and security. As explained above, this determination was itself supported by the recommendation of a five-member group of experts who not only concluded that al-Bashir's government was responsible for massive violations of international human rights law and humanitarian law, but also that the government had repeatedly failed to prosecute and try those allegedly responsible for these violations.<sup>135</sup> The situation is no different today, as displayed by the Sudanese government's refusal to apprehend either Ahmad Harun or Ali Kushayb,<sup>136</sup> its lack of commitment to securing peace in Darfur,<sup>137</sup> and, most recently, its decision to expel foreign aid agencies from the Darfur region.<sup>138</sup> Indeed, a Security Council request to the ICC to defer the proceedings against al-Bashir, under the present circumstances, would appear to do nothing more than reward President al-Bashir for his general defiance of the UN Security Council and the rule of law.

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<sup>134</sup> See, e.g., Relationship Agreement, *supra* n. 11, Pmbl. ¶ 3 (acknowledging the complementary nature of the two institutions by noting the “important role assigned to the [ICC] in dealing with the most serious crimes of concern to the international community as a whole... which threaten the peace, security and well-being of the world.”); *id.* Pmbl. ¶ 8 (noting the parties’ desire to “make provision for a mutually beneficial relationship whereby the discharge of the respective responsibilities of the United Nations and the International Criminal Court may be facilitated.”); *id.* Art. 3 (providing that, “with a view to facilitating the effective discharge of their respective responsibilities, [the UN and the ICC] shall cooperate closely, whenever appropriate, with each other...”).

<sup>135</sup> See *supra* n. 25 *et seq.* and accompanying text.

<sup>136</sup> See *supra* n. 43 *et seq.* and accompanying text.

<sup>137</sup> See *supra* n. 115 *et seq.* and accompanying text.

<sup>138</sup> See *supra* n. 79 and accompanying text.

Overall, therefore, exercise by the Security Council of its Article 16 authority should be reserved for exceptional circumstances and is unwarranted in the case of al-Bashir.

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### III. UNITED NATIONS' CONFIDENTIAL DOCUMENTS AND THE INTERNATIONAL CRIMINAL COURT PROSECUTION'S DUTIES TO SEARCH FOR AND DISCLOSE EXCULPATORY EVIDENCE

The second aspect of the relationship between the United Nations and the International Criminal Court that has generated significant concern is the UN's agreement to cooperate with the ICC Prosecutor in the investigation of crimes within the jurisdiction of the Rome Statute. This obligation is governed by Article 18 of the Relationship Agreement, which provides, in part:

[T]he United Nations undertakes to cooperate with the Prosecutor and to enter with the Prosecutor into such arrangements or, as appropriate, agreements as may be necessary to facilitate such cooperation, in particular when the Prosecutor exercises, under article 54 of the Statute, his or her duties and powers with respect to investigation and seeks the cooperation of the United Nations in accordance with that article.<sup>139</sup>

Article 18 further stipulates that the UN and the Prosecutor may agree that the former will provide documents to the Prosecutor "on condition of confidentiality and solely for the purpose of generating new evidence," and that the documents "shall not be disclosed to other organs of the Court or to third parties... without the consent of the United Nations."<sup>140</sup> The Prosecutor is expressly authorized to enter into such confidentiality agreements by Article 54(3)(e) of the Rome Statute, which authorizes the Prosecutor to "(a)gree not to disclose, at any stage of the proceedings, documents or information that the Prosecutor obtains on the condition of confidentiality and solely for the purpose of generating new evidence, unless the provider of the

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<sup>139</sup> Relationship Agreement, *supra* n. 11, Art. 18(1).

<sup>140</sup> *Id.* Art. 18(3).

information actually consents...”<sup>141</sup> At the same time, however, the Prosecutor is required under Article 67(2) of the Rome Statute to “disclose to the defence evidence in the Prosecutor’s possession or control which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence.”<sup>142</sup> The Prosecution is also obligated, under Rule 77 of the Rules of Procedure and Evidence, to “permit the defence to inspect any books, documents, photographs and other tangible objects in the possession or control of the Prosecutor, which are,” *inter alia*, “material to the preparation of the defence.”<sup>143</sup>

Thus, there exists a tension between these provisions of the Rome Statute and the Rules, which allow the Prosecution to collect “lead” evidence on condition of confidentiality, on the one hand, and require the Prosecution to disclose or allow access to any potentially exonerating evidence, on the other. This tension came to a head in June 2008, when Trial Chamber I halted the trial against Thomas Lubanga Dyilo due to the Prosecution’s failure to disclose potentially exculpatory documents obtained from the UN and other organizations on condition of confidentiality.<sup>144</sup> As will be discussed in further detail below, the problem was ultimately resolved for purposes of the *Lubanga* trial, which commenced in late January 2009. However, given the fact that the Prosecution has admitted to relying heavily on confidential lead evidence obtained from the UN and various non-governmental organizations in its investigations in the Democratic Republic of Congo, and has potentially done the same in other

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<sup>141</sup> Rome Statute, *supra* n. 9, Art. 54(3)(e).

<sup>142</sup> *Id.* Art. 67(2).

<sup>143</sup> International Criminal Court, Rules of Procedure and Evidence, ICC-ASP/1/3, *entered into force* 9 September 2002, R. 77.

<sup>144</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008, ICC-01/04-01-06/1401 (Trial Chamber I, 13 June 2008).

situations under investigation by the ICC, it is likely that the tension between Articles 54(3)(e) and 67(2) of the Rome Statute will become an issue before the Court again.<sup>145</sup> Thus, it is useful to explore in further detail: (i) what precisely occurred in the context of the *Lubanga* case; and (ii) how the Court's resolution of the situation in that case may affect the Prosecution's ability to obtain information – in particular, *exculpatory* information – from the United Nations in the future.

A. POTENTIALLY EXCULPATORY, YET CONFIDENTIAL DOCUMENTS, IN THE *LUBANGA* CASE

Throughout the investigation of the situation in the Democratic Republic of Congo, the ICC Prosecution entered into numerous agreements under Article 54(3)(e) of the Rome Statute with the United Nations and other so-called “information providers,” such that approximately 50 percent of the evidence gathered in the DRC was obtained under an obligation of confidentiality.<sup>146</sup> While there was some indication in the early stages of the *Lubanga* trial that certain of these documents contained potentially exculpatory evidence,<sup>147</sup> it was not until September 2007 – several months *after* Pre-Trial Chamber I confirmed the charges against Mr. Lubanga – that the Prosecution announced that a “comparatively high proportion of the materials that comprise the DRC collection were obtained on the condition of confidentiality pursuant to Article 54(3)(e),” including evidence of a potentially exculpatory nature.<sup>148</sup> The Prosecution said that it would

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<sup>145</sup> Indeed, issues similar to those that arose in the *Lubanga* trial have come to light in the case against Mathieu Ngudjolo Chui and Germain Katanga. *See, e.g., The Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui*, Decision on Article 54(3)(e) Documents Identified as Potentially Exculpatory or Otherwise Material for the Defence's Preparation for the Confirmation Hearing, ICC-01/04-01/07-621 (Pre-Trial Chamber I, 23 June 2008).

<sup>146</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Transcript of Hearing (Open Session), ICC-0104-0106-T-52-ENG, 13: 12-22 (Transcript, 1 October 2007).

<sup>147</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Confirmation of Charges, ICC-01/04-01/06-803, ¶ 154 (Pre-Trial Chamber I, 29 January 2007).

<sup>148</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Prosecution's Submission Regarding

“seek the lifting of the restrictions for any of these items which it must disclose or provide for inspection in a timely manner,” but also stated that the granting of such requests and their timing were “largely beyond the Prosecution’s control.”<sup>149</sup> A few weeks later, the Prosecution clarified that it had identified approximately 740 potentially exculpatory documents covered by an Article 54(3)(e) agreement but that it had only received permission to disclose 120 of them.<sup>150</sup> The Prosecution stressed that it had been actively seeking the lifting of restrictions, but said that negotiations had proven incredibly lengthy and could take months to complete.<sup>151</sup>

Despite these assertions, the Trial Chamber ordered the Prosecution to disclose all required evidence by 14 December 2007, and scheduled the trial to begin on 31 March 2008.<sup>152</sup> However, the Prosecution was unable to meet the disclosure deadline,<sup>153</sup> Mr. Lubanga’s trial was postponed,<sup>154</sup> and the Chamber spent the first half of 2008 wrangling with the Prosecution over its inability to disclose necessary evidence without violating the confidentiality agreements the Prosecution had signed with the UN and other information providers.<sup>155</sup> During this

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the Subjects that Require Early Determination: Trial Date, Languages to Be Used in the Proceedings, Disclosure, and E-Court Protocol, ICC-01/04-01/06-951, ¶¶ 22-25 (Trial Chamber I, 11 September 2007).

<sup>149</sup> *Id.* ¶ 25.

<sup>150</sup> *Lubanga*, ICC-0104-0106-T-52-ENG, *supra* 146, 14: 2-3.

<sup>151</sup> *Id.* at 17: 2.

<sup>152</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Decision Regarding the Timing and Manner of Disclosure and the Date of Trial, ICC-01/04-01/06-1019, ¶¶ 25-29 (Trial Chamber I, 9 November 2007).

<sup>153</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Prosecution’s Application for Extension of Time Limit for Disclosure, ICC-01/04-01/06-1073, ¶¶ 6-7 (Trial Chamber I, 10 December 2007).

<sup>154</sup> *Lubanga*, Decision Regarding the Timing and Manner of Disclosure and the Date of Trial, *supra* n. 152, ¶ 29.

<sup>155</sup> *See, e.g., The Prosecutor v. Thomas Lubanga Dyilo*, Transcript of Hearing (Open Session), ICC-01/04-01/06-T-78, 89:15-23 (Transcript, 12 March 2008); *The*

time, the Prosecution secured permission from the UN and other information providers to disclose a large proportion of the documents, but as of mid-June 2008, there were still a large number of documents that could not be disclosed.<sup>156</sup> With regard to these documents, the Prosecution argued that it could effectively comply with its disclosure obligations by providing evidence “analogous” to that contained in the relevant confidential documents.<sup>157</sup> However, because the Prosecution had agreed with the UN and other confidential sources that it would not show the relevant documents to the Trial Chamber, let alone the Defense, there was no way that the judges could independently ensure that the alternative material would provide the Defense with information equivalent to that contained in the confidential documents. Indeed, the Trial Chamber strongly objected to the Prosecutor’s position that he should be trusted to adequately communicate the necessary exculpatory information to the Defense, reasoning that:

[W]hat underpins the whole of [the] procedure [under Article 67(2)] is that the Chamber retains not only the opportunity but also the obligation of ensuring that any exculpatory evidence or potentially exculpatory evidence over which there’s a doubt is viewed by it so it makes a decision as to what is fair for the accused in

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*Prosecutor v. Thomas Lubanga Dyilo*, Prosecution’s Submission on Undisclosed Documents Containing Potentially Exculpatory Information, ICC-01/04-01/06-1248, ¶ 3 (Trial Chamber I, 28 March 2008); *The Prosecutor v. Thomas Lubanga Dyilo*, Order on the “Prosecution’s Submission on Undisclosed Documents Containing Potentially Exculpatory Information,” ICC-01/04-01/06-1259, ¶ 3 (Trial Chamber I, 3 April 2008); *The Prosecutor v. Thomas Lubanga Dyilo*, Prosecution’s Additional Information on the Undisclosed Evidence, ICC-01/04-01/06-1281, ¶ 5 (Trial Chamber I, 15 April 2008); *The Prosecutor v. Thomas Lubanga Dyilo*, Prosecution’s Information on Documents that Were Obtained by the Office of the Prosecutor from the United Nations Pursuant to Article 54(3)(e) on the Condition of Confidentiality and Solely for the Purpose of Generating New Evidence and that Potentially Contain Evidence that Falls Under Article 67(2), ICC-01/04-01/06-1364, ¶ 4 (Trial Chamber I, 2 June 2008).

<sup>156</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Transcript of Hearing (Open Session), ICC-01/04-01/06-T-89-ENG, 5: 7 – 6: 23 (Transcript, 10 June 2008).

<sup>157</sup> *Id.*

the trial. The difference between that and what is being proposed here is that the Chamber, under the proposals [the Prosecution is] making, is being entirely excluded from the process.<sup>158</sup>

A few days after making these statements, the Trial Chamber stayed the proceedings against Mr. Lubanga, finding that the “trial process ha[d] been ruptured to such a degree that it [was] impossible to piece together the constituent elements of a fair trial.”<sup>159</sup> In its decision, the Chamber observed that Article 54(3)(e) was only intended to be used in “highly restricted circumstances” with the sole purpose of “generating new evidence,”<sup>160</sup> but that the Prosecution had used the Article extensively and, thus, inappropriately.<sup>161</sup> While the Court recognized that there is a potential conflict between Article 54(3)(e) and Article 67(2), the Court believed that if the Prosecution entered into Article 54(3)(e) agreements only in appropriate circumstances, the tension between the two articles would be “negligible.”<sup>162</sup>

The Prosecution promptly applied for leave to obtain interlocutory appeal of the decision,<sup>163</sup> which was granted by the Trial Chamber.<sup>164</sup>

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<sup>158</sup> *Id.* at 8:22 – 9: 5.

<sup>159</sup> *Lubanga*, Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008, *supra* n. 144, ¶¶ 91-93.

<sup>160</sup> *Id.* ¶ 71.

<sup>161</sup> *Id.* ¶ 72 (noting that the Prosecution has admitted using Article 54(3)(e) to gather evidence as quickly as possible and not merely as a means of gathering lead evidence).

<sup>162</sup> *Id.* ¶ 76.

<sup>163</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Prosecution’s Application for Leave to Appeal “Decision on the Consequences of Non-Disclosure of Exculpatory Materials Covered by Article 54(3)(e) Agreements and the Application to Stay the Prosecution of the Accused, Together with Certain Other Issues Raised at the Status Conference on 10 June 2008,” ICC-01/04-01/06-1407 (Office of the Prosecutor, 23 June 2008).

<sup>164</sup> *Lubanga*, Decision on the consequences of non-disclosure of exculpatory

The Appeals Chamber issued its decision in October 2008, upholding the Trial Chamber's decision to stay the *Lubanga* proceedings.<sup>165</sup> The Chamber acknowledged that the Prosecutor, "when receiving material on the condition of confidentiality, may not be able to predict with certainty how this material can be used," but nevertheless stressed that the use of Article 54(3)(e) "must not lead to breaches of the obligations of the Prosecutor vis-à-vis the suspect or accused person."<sup>166</sup> Thus, the Chamber continued, "whenever the Prosecutor relies on [A]rticle 54(3)(e) of the Statute he must bear in mind his obligations under the Statute and apply that provision in a manner that will allow the Court to resolve the potential tension between the confidentiality to which the Prosecutor has agreed and the requirements of a fair trial."<sup>167</sup> The Appeals Chamber expressed particular concern that "when accepting large amounts of material from the United Nations, the relevance of which for future cases he could not appreciate at that time, the Prosecutor agreed that he would not disclose the material even to the Chambers of the Court without the consent of the information providers," thereby preventing the Chambers from "assessing whether a fair trial could be held in spite of the non-disclosure to the defence of certain documents, a role that the Chamber has to fulfil pursuant to [Article 67(2)]."<sup>168</sup>

The Appeals Chamber also rejected the Prosecution's argument that "the provision of purported alternative exculpatory evidence by the

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materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008, *supra* n. 144.

<sup>165</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled "Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008," ICC-01/04-01/06-1486 (Appeals Chamber, 21 October 2008).

<sup>166</sup> *Id.* ¶ 42.

<sup>167</sup> *Id.* ¶ 44.

<sup>168</sup> *Id.* ¶ 45.

Prosecutor to the defence was sufficient to ensure the fairness of the trial.”<sup>169</sup> The Appeals Chamber acknowledged that the Prosecution might in fact be able to satisfy its disclosure obligations through the provision of alternative evidence, but held that it must be the Trial Chamber – not the Prosecutor – that determines whether the alternative evidence is sufficient.<sup>170</sup>

Fortunately, within less than a month of the Appeals Chamber’s decision, the Prosecution was able to secure permission from the UN and other information providers to share all of the remaining undisclosed exculpatory documents with the Trial Chamber.<sup>171</sup> The Trial Chamber, in turn, assessed each of the documents, as well as the Prosecution’s proposed alternative forms of disclosure – such as redacted or summary versions of the relevant documents – and determined that the stay of proceedings could be lifted.<sup>172</sup>

#### B. FUTURE CONSIDERATIONS REGARDING ARTICLE 54(3)(E)

The decisions of the Trial Chamber and the Appeals Chamber cited above are well-reasoned and should certainly be adhered to in the future, as they guarantee that the Trial Chamber has ultimate authority to determine whether the fair trial rights of the accused are being appropriately safeguarded. However, it is critical that the Prosecution’s duty to share potentially exculpatory evidence with the Trial Chambers not interfere with its duties under Article 54(1)(a), which requires that the Prosecution investigate both incriminating *and exonerating* circumstances equally. The challenge arises from the fact that, according to the Prosecution, a great deal of the exonerating evidence the Prosecution has been able to collect, at least in the

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<sup>169</sup> *Id.* ¶ 95.

<sup>170</sup> *Id.* ¶ 96.

<sup>171</sup> See *The Prosecutor v. Thomas Lubanga Dyilo*, Reasons for Oral Decision lifting the stay of proceedings, ICC-01/04-01/06-1644 (Trial Chamber I, 23 January 2009).

<sup>172</sup> *Id.* (note that the initial decision to lift the stay was an oral decision delivered on 18 November 2008).

context of the DRC situation, has been subject to confidentiality restrictions under Article 54(3)(e). In fact, the Prosecution has stated that without guarantees of confidentiality to the UN and other information providers, the Prosecution would never would have had access to a “huge quantity of evidence,” including “huge quantities of the potentially exculpatory information and information that... is material to the Defence case.”<sup>173</sup>

It is important in this context to stress the significance of the Prosecution’s duty to *search for* both incriminating and exonerating evidence. No such obligation has been placed on the prosecutor of other international criminal bodies, such as the *ad hoc* tribunals for the former Yugoslavia and Rwanda, the procedural rules of which require only that the prosecutor disclose any potentially exculpatory material in its possession, not that the prosecutor *actively investigate* both incriminating and exonerating evidence.<sup>174</sup> Yet this important provision of the Rome Statute may be frustrated if, in light of the *Lubanga* decisions cited above, information providers choose to no longer disclose evidence to the Prosecution out of a fear that the Prosecution will be forced to turn over that information to the Defense.

Notably, the duty ultimately set forth in Article 54(1)(a) of the Rome Statute was not included in early drafts of the ICC’s governing treaty.<sup>175</sup> However, one of the primary criticisms of the 1994 draft statute was the fact that it “did not include any provision directed at

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<sup>173</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Transcript of Hearing (Open Session), ICC-0104-0106-T-52-ENG, 85: 20-25 (Transcript, 1 October 2007).

<sup>174</sup> See International Criminal Tribunal for the former Yugoslavia, Rules of Procedure and Evidence, *entered into force* 14 March 1994, *as amended* 4 November 2008, R. 68(i); International Criminal Tribunal for Rwanda, Rules of Procedure and Evidence, *entered into force* 5 July 1995, *as amended* 14 March 2008, R. 68(A).

<sup>175</sup> Fabricio Guariglia, *Article 56*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 735, 736 (Otto Triffterer ed., 1999). See also See Int’l Law Comm’n, *Draft Statute of an International Criminal Court* in Report of the International Law Commission on the Work of Its Forty-Sixth Session, Art. 26, [1994] 2 Y.B. INT’L COMM’N 26, 46, U.N. Doc. A/CN.4/SER.A/1194/Add.1 (part 2)).

assisting an accused person to collect evidence or intervene in investigative acts performed by the Prosecutor.”<sup>176</sup> As one commentator has explained, there was a “general realization” during the early discussions of the draft statute that “the effectiveness of the investigation and prosecution of the crimes within the jurisdiction of the Court must be balanced with the need to ensure fairness to the accused.”<sup>177</sup> The concern was that, as drafted, the Statute would leave an accused “incapable of effectively collecting evidence and preparing his or her defence.”<sup>178</sup>

In response to this concern, in August 1996, the German delegation to the drafting negotiations proposed that the Prosecution should be responsible not only for investigating incriminating evidence, but rather should be engaged in a larger search for “the truth,” meaning it would be under an obligation to collect both incriminating and exculpatory evidence.<sup>179</sup> Specifically, the German proposal stated:

To establish the truth the prosecutor shall, *ex officio*, extend the investigation to cover all facts and evidence that are relevant to an assessment of the charge and to the legal consequences that may follow. He shall equally investigate incriminating and exonerating circumstances.<sup>180</sup>

Combined with the Prosecution’s obligation to disclose all potentially exculpatory evidence to the Defense, which was already included in

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<sup>176</sup> Guariglia, *Article 56*, *supra* n. 175, at 736. See also Fabricio Guariglia, *Investigation and Prosecution*, in *THE MAKING OF THE ROME STATUTE* 227, 234 (Roy S. Lee, ed. 1999).

<sup>177</sup> Guariglia, *Investigation and Prosecution*, *supra* n. 176, at 234.

<sup>178</sup> Guariglia, *Article 56*, *supra* n. 175, at 736.

<sup>179</sup> See *Proposal Submitted by Germany for Article 26*, Preparatory to Committee on the Establishment of an International Criminal Court, U.N. Doc. A/AC.249/WP.1 (15 August 1996).

<sup>180</sup> *Id.*

the draft statute,<sup>181</sup> this proposal contemplated addressing the imbalance created by the fact that accused persons generally have a material disadvantage in terms of conducting investigations and gathering evidence.<sup>182</sup> As the German proposal explained:

Cases falling within the Court's jurisdiction will necessitate exceptionally time-consuming and difficult investigations. In particular, these investigations will have to be conducted in countries and regions whose structures may have been largely destroyed by armed conflict... It seems hardly conceivable that a suspect – even with the assistance of his defence lawyer – will be in a position to make such investigations, perhaps of an exonerating nature. His financial resources may already be severely limited. In particular, it will be impossible for the suspect to conduct his own investigations for the reason that under the Statute states are merely required to cooperate with the court and its prosecuting authority but not with the suspect and the defence lawyer he has chosen. On these grounds this proposal provides for a duty, incumbent on the prosecutor, to conduct a comprehensive investigation, expressly including those circumstances exonerating the suspect.<sup>183</sup>

The underlying notion of impartiality in the German proposal was supported by the 1996 Preparatory Committee on the Establishment of an International Criminal Court, which issued a report recommending, *inter alia*, that “the Prosecutor’s office should be established to seek the truth rather than merely seek a conviction in a partisan matter.”<sup>184</sup>

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<sup>181</sup> 1994 Draft Statute, *supra* n. 1, Art. 41(2).

<sup>182</sup> *Proposal Submitted by Germany for Article 26, supra* n. 179.

<sup>183</sup> *Id.*

<sup>184</sup> 1996 Preparatory Committee Report, *supra* n. 7, vol. 1, at 14. *See also* Preparatory Committee on the Establishment of an International Criminal Court, *Report of the Informal Group on Procedural Questions, Fair Trial and Rights of the*

Ultimately, the duty of the Prosecutor to search for both incriminating and exculpatory evidence was codified in Article 54(1)(a).

Again, however, this important provision may be frustrated if information providers choose to no longer disclose evidence to the Prosecution out of a fear that the Prosecution will be forced to turn over that information to the Defense. As the Prosecution explained in the context of the *Lubanga* case, the UN and other organizations with relevant information collected that information “under very difficult conditions” and obviously have an interest in ensuring that the disclosure of the information does not endanger staff members who remain on the ground.<sup>185</sup> Indeed, one commentator has noted that the concern might go back one level further: even if the UN were to disclose information to the Prosecution without confidentiality agreements, this could have a “chilling effect” on the UN’s ability to gather information from states, intergovernmental organizations, and other international organizations if it is known that the UN will eventually disclose such information to the ICC Prosecutor.<sup>186</sup> This could result in the Prosecutor not seeing a considerable amount of information that is not only helpful as “lead” evidence, but also could include exculpatory information.

At the same time, it is clear from both the Statute and the Relationship Agreement that a “general privilege” does not exist for UN material.<sup>187</sup> Instead, there appears to be a presumption in favor of disclosure throughout the Relationship Agreement. For example, Article 16 of the agreement provides that the UN, subject to its own rules and procedures, shall waive officials’ obligation of confidentiality if

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*Accused*, A/AC.249/CRP.14, at 7, 27 August 1996 (proposing that the Prosecution be given the duty to “establish the truth” by investigating “equally incriminating and exonerating circumstances”).

<sup>185</sup> *Lubanga*, ICC-0104-0106-T-52-ENG, *supra* 146, 84: 2-19.

<sup>186</sup> Daryl A. Mundis, *The Assembly of States Parties and the Institutional Framework of the International Criminal Court*, 97 Am. J. Int’l L. 132, 135 (2003).

<sup>187</sup> *Id.* at 135-36.

necessary.<sup>188</sup> This provision appears to expedite the process of UN officials' testimony, when necessary, as compared to the *ad hoc*s where the tribunals had to seek permission from the UN on a "case-by-case, witness-by-witness basis."<sup>189</sup> Moreover, Article 5 of the Relationship Agreement provides that the UN and the ICC will exchange information to the "fullest extent possible and practicable."<sup>190</sup> Finally, Article 18(3), reiterating the language of Article 54(3)(e), clearly limits any confidentiality restrictions on disclosure to those documents obtained solely for generating new evidence.<sup>191</sup> These provisions, combined with the UN's general obligation under the Relationship Agreement to cooperate with the ICC to "facilitat[e] the effective discharge" of the Court's responsibilities,<sup>192</sup> suggest that the *Lubanga* decisions quoted above should *not* result in a general reluctance on the part of the United Nations to withhold information from the ICC Prosecutor.

By the same token, the Prosecution of the ICC has a duty to work actively – with the assistance of the Trial Chamber, where appropriate – to allay concerns of the UN or other potential information providers that sufficient precautions will be taken to protect staff members or others who may be put at risk through the disclosure of exculpatory evidence originating with these sources. Indeed, there is no reason to believe that sources of information mentioned or otherwise implicated by information received from the UN would be treated any differently

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<sup>188</sup> Relationship Agreement, *supra* n. 11, Art. 16(1). Demonstrating the difficulty in achieving the right balance in the relationship between the ICC and the UN, one commentator noted the risk that permitting such testimony of UN officials might impact the perceived impartiality of the UN officials, but noted that safeguards exist in the Relationship Agreement, as well as the Statute and Rules, to provide for confidential disclosure of any classified information. Hans-Peter Kaul, *Construction Site for More Justice: The International Criminal Court After Two Years*, 99 Am. J. Int'l Law 370, 382 (2005).

<sup>189</sup> Mundis, *supra* n. 186, at 134.

<sup>190</sup> Relationship Agreement, *supra* n. 11, Art. 5.

<sup>191</sup> *Id.* Art. 18(3).

<sup>192</sup> *Id.* Art. 3.

from persons who provide information directly to the Prosecution. The Rome Statute is clear that the Court has a duty to “take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses,” and this obligation is in no way limited to witnesses who have or had direct contact with the Prosecution or another organ of the ICC.<sup>193</sup> To the contrary, the Appeals Chamber has expressly held that the provisions of the Rome Statute and ICC Rules of Procedure and Evidence that are “aimed at ensuring that persons are not put at risk through the activities of the Court... are *not limited* to the protection of witnesses and victims and members of their families only.”<sup>194</sup> Thus, in the event that the disclosure of potentially exculpatory evidence provided to the Prosecution by the UN could pose a danger to any person, the Court has a number of tools available to protect that person, including redacting the person’s name and other identifying information from the document prior to disclosing it to the Defense, disclosing only a summary of the exculpatory evidence, or even placing the person in the Court’s witness protection program.<sup>195</sup> Accordingly, the UN and other information providers should be able to avail themselves of the same protections made available to witnesses, who are often themselves victims of the very crimes being prosecuted by the Court. Ideally, these provisions will encourage organizations to cooperate in the Prosecution’s duty to search for both incriminating and exculpatory information to the greatest extent possible given their

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<sup>193</sup> Rome Statute, *supra* n. 9, Art. 68(1).

<sup>194</sup> *The Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui*, Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled “First Decision on the Prosecution Request for Authorisation to Redact Witness Statements,” ICC-01/04-01/07-475, ¶ 43 (Appeals Chamber, 13 May 2008) (emphasis added).

<sup>195</sup> *See, e.g., Lubanga*, Reasons for Oral Decision lifting the stay of proceedings, *supra* n. 171, ¶ 43 *et seq.* (explaining that the Trial Chamber has “wide-ranging obligations” to make “all necessary rulings in order to ‘provide for the protection’” of individuals who may be put at risk by the disclosure of exculpatory documents obtained by the Prosecution pursuant to Article 54(3)(e), including through the use of redactions, summaries of the original documents, and admissions by the Prosecution that would render disclosure of the exculpatory material unnecessary).

security concerns, while still allowing the Trial Chambers to maintain their power to ensure that any evidence necessary to ensure a fair trial for the accused is disclosed in the appropriate format.

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## THE RELATIONSHIP BETWEEN THE INTERNATIONAL CRIMINAL COURT AND THE UNITED NATIONS

Although work on the establishment of a permanent international criminal court predates the creation of the United Nations (UN), states did not begin to negotiate in earnest about the appropriate structure of the envisioned court until the 1990s. At that time, some states believed that the court should be an agency of the United Nations, while others felt the court should be an independent body. Ultimately, the International Criminal Court (ICC) was created as a separate institution, placed outside of the UN framework, and established by a multilateral treaty – the Rome Statute – rather than a UN General Assembly or Security Council resolution. At the same time, the drafters of the Rome Statute recognized that the ICC will often need the active support of the UN to be effective, and thus included several provisions in the Rome Statute aimed at governing the relationship between the Court and the UN.

This report focuses on two of those provisions – namely Article 16 and Article 54(3)(e) – each of which has been the subject of some controversy in recent months. The first, Article 16, gives the UN Security Council the right to request that the ICC suspend, for a renewable period of twelve months, any investigation or prosecution commenced, or about to be commenced, by the ICC if the Security Council believes the suspension is necessary to maintain or restore international peace and security. Questions regarding the appropriate exercise by the Security Council of this authority have arisen in the context of the Court's issuance of an arrest warrant for the Sudanese President, Omar Hassan al-Bashir, in March 2009. The second provision, Article 54(3)(e), permits the ICC Prosecutor to enter into confidentiality agreements with information providers – such as the UN – under which the Prosecution may guarantee that it will not disclose any information obtained pursuant to the agreement without the prior permission of the information provider. The ICC Prosecution has in fact entered into such agreements with the UN and others, and a large amount of material has been shared with the Prosecution as a result. However, the agreements have come into conflict with the Prosecution's duty to disclose exculpatory information to the accused, raising questions about the need to simultaneously protect confidential sources of information and the rights of the accused to a fair and impartial trial.

In this report, we review the issues that have arisen in regards to Articles 16 and 54(3)(e) of the Rome Statute and offer recommendations regarding the appropriate approach to resolving such issues in the future.



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