

# INTERNATIONAL CRIMINAL COURTS AND TRIBUNALS

## ‘Contested Collisions’: Conditions for a Successful Collision Management – The Example of Article 16 of the Rome Statute\*

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### Abstract

This article examines the problem of colliding international regimes by reference to the International Criminal Court (ICC) and the UN Security Council. Given the different logics or rationalities of these institutions – the Security Council is first and foremost a (power) political organ, while the ICC is in charge of legal assessments – the collision potential is high. A collision rule was therefore introduced into the Rome Statute in the form of Article 16; however, all instances of its application so far have been highly controversial. While norm application is always controversial to some extent, we argue – in reference to Thomas Franck’s work on the legitimacy of international norms – that regime responsiveness, secondary rules or a neutral application control of Article 16 could contribute to successful collision management.

### Key words

international regimes; UN Security Council; International Criminal Court; legitimacy; collision management

## I. INTRODUCTION

Increasingly, formerly domestic policy areas have been absorbed into issue-area specific, sectorally-limited regimes beyond the nation state, representing the fragmentation of social systems at the international level.<sup>1</sup> Stephen Krasner understood

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1 Final Report of the Study Group of the International Law Commission: Fragmentation of International Law: Difficulties arising from the diversification and expansion of international law (ILC A/CN.4/L.682, 13

international regimes as ‘a set of implicit or explicit principles, norms, rules, and decision-making procedures around which actors’ expectations converge in a given area of international relations’.<sup>2</sup> More specifically, they constitute ‘a union of rules laying down particular rights, duties and powers and rules having to do with the administration of such rules, including in particular rules for reacting to breaches’.<sup>3</sup> Areas of competence between such regimes are usually not clearly delineated, resulting in overlaps. This can produce parallel action, mutual blockade, or even clashing decisions by the respective institutions.<sup>4</sup> Because of the absence of a hierarchy of legal norms or courts in the international arena such conflicting competences or ‘regime collisions’ are not being systematically resolved. Given the resulting issues for the effectiveness and legitimacy of regimes involved, theoretical approaches from different disciplines share the assumption that such overlaps constitute a problem calling for a solution (Section 2).

This article examines ‘collision rules’ as a solution for the issues caused by overlapping normative regimes. Ideally a collision rule would either resolve the collision in substance, or it would prescribe the conditions for prioritizing one regime’s solution over the other. However, as regimes represent different logics and sets of interests,<sup>5</sup> such a rule would have to be considered legitimate by the parties involved in order to provide for a successful collision management. In this paper, we build on Thomas Franck’s work on the legitimacy of international norms to develop criteria for legitimate collision rules (Section 3).

We exemplify the problem by reference to collisions between the International Criminal Court (ICC) and the UN Security Council (Section 4). The ICC is competent to prosecute ‘the most serious crimes of concern to the international community as a whole’ (Art. 5 of the Rome Statute) even in ongoing situations of armed conflict or crisis that are being dealt with by the Security Council. A collision rule was, therefore, introduced into the Rome Statute (RS) in the form of Article 16, which provides for a (temporally limited) priority of the security logic over the (criminal) justice logic (Section 4.1). However, although the norm production process – the Rome Conference – has been praised as an approximation of rational discourse (Section 4.2),<sup>6</sup> all instances of the application of Article 16 so far have been highly controversial

April 2006). See also, M. Koskenniemi, ‘Legal Fragmentation(s) – An Essay on Fluidity and Form’, in G.-P. Calliess et al. (eds.), *Soziologische Jurisprudenz: Festschrift für Gunther Teubner zum 65. Geburtstag* (2009), 795; M. Koskenniemi and P. Leino, ‘Fragmentation of International Law? Postmodern Anxieties’, (2002) 15 LJIL 553.

2 S. Krasner, ‘Structural Causes and Regime Consequences: Regimes as Intervening Variables’, (1982) 36 IO 185, at 185.

3 Outline of the Chairman of the ILC Study Group on Fragmentation of International Law: The Function and Scope of the *Lex Specialis* Rule and the Question of ‘Self-contained Regimes’ (2003), available at [www.legal.un.org/ilc/sessions/55/pdfs/fragmentation\\_outline.pdf](http://www.legal.un.org/ilc/sessions/55/pdfs/fragmentation_outline.pdf). This definition includes non-state regimes such as the *lex mercatoria* or the *lex digitalis*. See, A. Fischer-Lescano and G. Teubner, ‘Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law’, (2004) 25 MJIL 999, at 1010.

4 This result can be intended, see D. Pulkowski, *The Law and Politics of International Regime Conflict* (2014), at 90–5.

5 See for example, M. Koskenniemi, ‘Hegemonic Regimes’, in M.A. Young (ed.), *Regime Interaction in International Law: Facing Fragmentation* (2012), 305.

6 See for example, N. Deitelhoff, ‘The Discursive Power of Legalization: Charting Islands of Persuasion in the ICC Case’, (2009) 63 IO 33; and C. Fehl ‘Explaining the International Criminal Court: A “Practice Test” for Rationalist and Constructivist Approaches’, (2004) 10 EJIR 357.

(Section 4.3). Indeed, conflict may intensify once the new Articles on the crime of aggression enter into force, since this has to be considered the core competence of the Security Council.<sup>7</sup> While norm application is always controversial to some extent, (external) application control of Article 16 could contribute to its legitimacy (Section 5). In light of this example, we propose criteria for a ‘good’ collision rule that could avoid some of the problems that Article 16 faces (Section 6).

## 2. REGIME COLLISIONS – AN INTERDISCIPLINARY APPROACH

The problem of an unco-ordinated plurality of competences of different international institutions has been discussed both in the sub-discipline of international relations as well as in international law. The crucial aspects of the phenomenon will be highlighted by summarizing the main arguments of one relevant approach from each discipline.

### 2.1. Regime theory: overlaps and interplay management

In political science, the ever growing number of international institutions with area-specific, often overlapping competences has been a topic especially of regime theory, a neo-institutionalist theory of international relations, using terms such as ‘institutional linkage’,<sup>8</sup> ‘institutional interaction’,<sup>9</sup> ‘regime overlap’,<sup>10</sup> ‘regime interplay’,<sup>11</sup> or ‘regime complexes’.<sup>12</sup> Starting from the assumption that international institutions influence each other, rather than simply compete for power (as realists would have it), these approaches focus on identifying different types of interaction and their respective positive (synergetic) or negative effects on the efficiency of the interacting institutions.<sup>13</sup>

The ‘interaction’ type of overlapping regimes is one where ‘the functional scope of one regime protrudes into the functional scope of others’.<sup>14</sup> In cases where the overarching goals and norms of the regimes or the concrete rules on the attainment of these goals diverge or are even mutually exclusive, this tends to lead to conflicts:<sup>15</sup>

Environmentally motivated trade restrictions will be considered as undesired interference with international trade from the perspective of the WTO, which aims at liberalizing international trade and seeks to abolish trade obstacles. The same measures are appreciated as effective means for enforcing international environmental standards from the perspective of international environmental regimes. . . .<sup>16</sup>

7 See for example, C. Kreß and L. von Holtendorff, ‘The Kampala Compromise on the Crime of Aggression’, (2010) 8 *JICL* 1179; A. Paulus, ‘Second Thoughts on the Crime of Aggression’, (2009) 20 *EJIL* 1117.

8 O.R. Young, ‘Institutional Linkages in International Society: Polar Perspectives’, (1996) 2 *GG* 1.

9 T. Gehring and S. Oberthür, ‘The Causal Mechanisms of Interaction between International Institutions’, (2009) 15 *EJIR* 125.

10 G.K. Rosendal, ‘Impacts of Overlapping International Regimes: The Case of Biodiversity’, (2001) 7 *GG* 95.

11 O.S. Stokke, ‘The Interplay of International Regimes: Putting Effectiveness Theory to Work’, (2001) 14 *Fridtjof Nansen Institute Report*.

12 T. Gehring and B. Faude, ‘The Dynamics of Regime Complexes: Microfoundations and Systemic Effects’, (2013) 19 *GG* 119.

13 See for example, Gehring and Oberthür, *supra* note 9, at 135 et seq.

14 Rosendal, *supra* note 10, at 96, following Oran Young.

15 *Ibid.*, at 100–1.

16 Gehring and Oberthür, *supra* note 9, at 137; Similarly, Gehring and Faude, *supra* note 12, at 125.

This kind of ‘normative interplay’<sup>17</sup> does not necessarily favour the interests of powerful actors since it also creates opportunities for strategic action for less powerful actors.<sup>18</sup> What is clear, however, is that it poses a potential risk for the *legitimacy* of international norms as well as for norm compliance, i.e., their *effectiveness*.<sup>19</sup> From the point of view of regime theory, such a conflict therefore requires a conscious ‘interplay management’, understood as ‘deliberate efforts by participants in tributary or recipient regimes to prevent, encourage, or shape the way one regime affects problem solving under another’.<sup>20</sup> Regime theorists primarily see this as the task of political decision-makers,<sup>21</sup> by an exchange of information between decision-making institutions, common programme planning, co-ordination of substantive decision-making activities, etc. Others also advocate co-operation between the regimes’ administrative or judicial bodies, e.g., by negotiating division of labour arrangements, or by drafting common guidelines.<sup>22</sup>

In order to enhance legitimacy, regime theorists also emphasize that norms should be determinate and coherent.<sup>23</sup> In the area of normative interplay, what matters is ‘whether states, when unable to apply the rule consistently in all contexts, can justify the deviation in terms of principles that are capable of generalization’.<sup>24</sup> Since such generalizable exception principles are often vague and open to different interpretations, a proactive interplay management is required, e.g., through the communal development of codes of conduct<sup>25</sup> or saving clauses.<sup>26</sup>

## 2.2. Systems theory: collisions and heterarchic networks

International lawyers often approach the issue of overlapping regimes as a challenge to the presumed unity of law,<sup>27</sup> resulting from a problematic absence of a hierarchy of norms<sup>28</sup> and courts at the international level. Others question this technical view, in

17 Stokke, *supra* note 11, at 16.

18 Such strategies include forum shopping, i.e., choosing the most favourable forum for a specific conflict, and regime shifting, a long-term strategy of relocating rulemaking processes to other regimes. See Gehring and Faude, *supra* note 12, at 126; K.J. Alter and S. Meunier, ‘The Politics of International Regime Complexity’, (2009) 7 *Perspectives on Politics* 13, at 14; Pulkowski, *supra* note 4, at 95. For an overview in the area of trade and investment, see, Puig, ‘International Regime Complexity and Economic Law Enforcement’, (2014) 17 *JIEL* 491, at 500–15.

19 Stokke, *supra* note 11, at 16–17; see also, Gehring and Faude, *supra* note 12, at 119.

20 *Ibid.*, at 11.

21 According to Sebastian Oberthür, interplay management ‘denotes political efforts to purposefully shape and improve institutional interaction’. S. Oberthür, ‘Interplay Management: Enhancing Environmental Policy Integration among International Institutions’, (2009) 9 *Int Environ Agreements* 371, at 373.

22 Gehring and Faude, *supra* note 12, at 128.

23 Stokke, *supra* note 11, at 16–17.

24 *Ibid.*, at 18.

25 Stokke demonstrates this using the example of a code for the implementation of trade measures relating to environmental protection, developed by proponents of WTO and of environmental regimes. *Ibid.* at 19.

26 K. Raustiala and D.G. Victor, ‘The Regime Complex for Plant Generic Resources’, (2004) 58 *IO* 277, at 297.

27 In eloquent defence of such unity, see C. Tomuschat, ‘International Law as a Coherent System’, in M.H. Arsanjani et al. (eds), *Looking to the Future: Essays on International Law in Honour of W. Michael Reisman* (2011), 323. For an extensive discussion of unitarist vs. pluralist views, see Pulkowski, *supra* note 4, at 192–235.

28 On the unhelpfulness of *jus cogens* as a mechanism of hierarchy, see, B. Simma and D. Pulkowski, ‘Of Planets and the Universe: Self-contained Regimes in International Law’, (2006) 17 *EJIL* 483, at 496–7; A. Paulus, ‘*Jus Cogens* Between Hegemony and Fragmentation: An Attempt at a Re-appraisal’, (2005) 74 *Nordic Journal of International Law* 297.

particular legal scholars of systems theory, an overarching theory of society founded by the German sociologist Niklas Luhmann.<sup>29</sup>

Systems theory describes the global society as differentiated into 'autonomous social systems' such as the political or the economic system, each with their own logic. Where the legal system interacts with such other systems, it forms legal regimes built around their logics, translating them into legal terms. This also comprises autonomous private regimes such as the *lex mercatoria* or the *lex digitalis*.<sup>30</sup> As a result, global law is necessarily and irreversibly fragmented into different legal regimes which follow different normative logics, such as trade, security, environmental protection, etc. The competences of these diverse regimes tend to overlap and collide, as each seeks to universalize its own logic (*Eigenrationalität*)<sup>31</sup> at the expense of the others. The proliferation of international courts, tribunals and quasi-judicial bodies increases the risk of contradictions between individual decisions.<sup>32</sup> The main problem with such 'regime collisions' is the fact that it is not only normative orders that collide but also underlying conflicting societal goals and interests:<sup>33</sup> 'At core, the fragmentation of global law is not simply about legal norm collisions or policy-conflicts, but rather has its origin in contradictions between society-wide institutionalized rationalities, which law cannot solve . . .'<sup>34</sup> This means that overlapping legal regimes are not a mere technical consistency problem, and that 'one-dimensional solutions', either legal or political, would underestimate the *legitimacy* and *effectiveness* problems caused by the fragmentation of law.<sup>35</sup> Indeed, the hope for a normative unity of law is seen as illusory – a paradise lost.<sup>36</sup>

From a systems theory point of view, collisions can only be resolved via 'heterarchical forms of law that limit themselves to creating loose relationships between the fragments of law'.<sup>37</sup> Such network structures function by means of mutual observation and mutual irritation as systems interact and react to one another, each in their own logic but responding to the other's logic, in order to establish compatibility.<sup>38</sup> What is required to resolve regime collisions is therefore a legal form for autonomous regimes to reflect other regimes' interests, e.g., in terms of a duty to consider or deference clauses.<sup>39</sup> Given the democratic deficit of such network structures, procedural safeguards are needed to ensure transparency and mutual

29 See N. Luhmann, *Law as a Social System* (2004) and *id.*, *Social Systems* (1995).

30 Fischer-Lescano and Teubner, *supra* note 3, at 1007 et seq.

31 *Ibid.*, at 1006–7.

32 *Ibid.*, at 1000–1.

33 *Ibid.*, at 1017.

34 *Ibid.*, at 1004.

35 *Ibid.*, at 1003–4.

36 *Ibid.*, at 1007.

37 *Ibid.*, at 1017.

38 *Ibid.*, at 1018, 1024, 1030 et seq.

39 On default deference as a collision rule, see L. Viellechner, 'Responsive Legal Pluralism: The Emergence of Transnational Conflicts Law', in Blome et al, *supra* note \*, and in (2015) 16 *Transnational Legal Theory* (published online, 29 October 2015). However, systems theorists also consider the solutions of other social systems as equally valid; see A. Fischer-Lescano and G. Teubner, *Regime-Kollisionen. Zur Fragmentierung des globalen Rechts* (2006), 130.

accessibility, as well as participation and deliberation, alterity orientation,<sup>40</sup> a fair balance of interests and the neutralization of power.<sup>41</sup>

### 2.3. Regime collisions: common insights

Despite differing basic assumptions, both approaches discussed share a common starting point: the fragmentation of the international system into issue-area specific regimes with sectorially limited authority. Following this, *regime collisions* can be defined as conflicts that arise from overlapping competences of two or more regimes with divergent goals and norms or rationalities. Such collisions can involve both state and non-state regimes. They are not just technical, legal problems; they point to a conflict of goals and interests that are being articulated in the language and logic of the respective regime. It is this very clash of logics that makes the resolution of such collisions difficult. In addition, the colliding regimes are brought into being and supported by overlapping or even identical arrangements of more or less powerful actors with different interests, whose options for action are driven by each regime's specific momentum.<sup>42</sup>

Another point of consensus between the approaches discussed is the fact that such collisions may pose a problem both for the legitimacy and the effectiveness of the regimes in play. Neither regime theory nor systems theory consider it a desirable or even feasible solution to establish a hierarchy of norms and institutions modelled on the nation state. This leaves only heterarchical co-ordination efforts between regimes as a means to reduce collisions, for which different mechanisms are discussed. From the point of view of regime theorists, solutions range from division of labour arrangements between competing institutions<sup>43</sup> to conscious political action,<sup>44</sup> for example by devising an overarching framework for the interacting institutions, e.g., in the form of 'principled priority' of matters such as the environment or human rights, or through joint management by means of creating horizontal structures for coordination.<sup>45</sup> Systems theorists focus on network structures between regimes and horizontal co-ordination mechanisms such as default deference.<sup>46</sup>

The third point of consensus is that such efforts, whether legal or political, should meet several requirements, such as transparency, participation rights and a fair balance of interests, in order to be able to preserve the legitimacy and efficiency of both regimes.

This paper will examine collisions between the UN security regime, embodied in the Security Council, and the ICC's international criminal justice regime and focus

40 Of course, no common good exists *a priori* under the conditions of a fragmented global society. But the autonomous regimes can build on the fictitious assumption of common reference points and formulate a common good in the specific terms and norms of each regime. Fischer-Lescano and Teubner, *supra* note 3, at 1033 et seq., and G. Teubner and P. Korth, 'Two Kinds of Legal Pluralism: Collision of Transnational Regimes in the Double Fragmentation of World Society', in M.A. Young (ed.), *Regime Interaction in International Law: Facing Fragmentation* (2012), 23 at 37.

41 Fischer-Lescano and Teubner, *supra* note 3, at 1019; Fischer-Lescano and Teubner, *supra* note 39, at 132.

42 Koskenniemi, *supra* note 5, at 310 et seq.; Simma and Pulkowski, *supra* note 28, at 489.

43 Gehring and Faude, *supra* note 12.

44 Oberthür, *supra* note 21.

45 *Ibid.*, at 374 et seq.

46 Fischer-Lescano and Teubner, *supra* note 3, at 1017–45.

on a particular type of ex-ante co-ordination, namely *collision rules*. Such rules serve to avoid or resolve collisions by way of co-ordination and assignment of competence. In the case of the Security Council and the ICC, such a rule can be found in Article 16 of the RS. The following sections will further develop the requirements for successful collision management (Section 3) and then apply them to Article 16 of the RS (Section 4).

### 3. IDEAL CONDITIONS FOR A SUCCESSFUL COLLISION MANAGEMENT: THOMAS FRANCK RECONSIDERED

In light of our definition of a regime collision, collision rules can be seen as successful if they sustainably resolve the collision problem, i.e., the threat to the legitimacy and effectiveness of the regimes in play. Therefore, they have to couple each regime to the other regime's logic and find an optimal balance between the colliding regime logics.

Since collision rules have to be considered legitimate in order to successfully resolve collisions – in particular when they prescribe conditions for prioritizing one regime logic over the other – we refer to Thomas Franck's work on the legitimacy of international norms<sup>47</sup> and adapt it to the particular context of collision management.

#### 3.1. Adapting Thomas Franck's legitimacy model to the particular context of collision rules

Following Weber, Franck considers a norm's *legitimacy* to be central to its prospect of compliance, defined as 'that quality of a rule which derives from a perception on the part of those to whom it is addressed that it has come into being in accordance with right process'.<sup>48</sup> The quality of a rule itself, but also the process of rule production and its application are crucial.

According to Franck, first, a norm's legitimacy depends on its *determinacy*,<sup>49</sup> it has to 'convey a clear message'<sup>50</sup> that limits both its flexibility and its potential for manipulation.<sup>51</sup> The clearer the instructions of a norm to its addressees, the smaller the room for conflict. Transferred to the regime collision context, this means striking a balance between the regime logics or prioritizing one over the other in clearly defined situations, for specific reasons. Moreover, the collision rule should prescribe the responsiveness between the two regimes as a reflection of the interests and goals pursued by the other regime.

47 See T.M. Franck, 'Legitimacy in the International System', (1988) 82 AJIL 705. Franck later developed this into a whole book: T.M. Franck, *The Power of Legitimacy among Nations* (1990), but in this paper we will refer to the briefer article version.

48 *Ibid.*, at 706. Here, Franck refers to one particular aspect of legitimacy: procedural legitimacy. For the different dimensions of the term legitimacy see for instance: A. Cassese, 'The Legitimacy of International Criminal Tribunals and the Current Prospects of International Criminal Justice', (2012) 25 LJIL 491.

49 Franck, *supra* note 47, at 716.

50 *Ibid.*, at 713.

51 *Ibid.*, at 713 et seq.

Second, what is important to the legitimacy of a norm is its *symbolic validation*, which, among others, depends on its *pedigree*.<sup>52</sup> Thus, a rule may derive authority from its historical origins or its cultural deep-rootedness.<sup>53</sup> The pedigree of the rule-making institution and process is also relevant, since in the complex and dynamic process of socialization that leads to compliance, how norms are produced, interpreted and applied is equally important.<sup>54</sup> In a regime collision context, this would imply involving both regimes equally in developing the collision rule and guaranteeing that the different interests or regime logics are taken into account in the norm production process.

Since the determinacy of a norm is limited, not least by the degree of complexity of the issue it regulates, it follows thirdly that the *norm application* must be assigned to a forum that balances the remaining substantive elasticity of the norm by making its application predictable by way of process determinacy.<sup>55</sup> This does not necessarily have to be a court; what matters is that the institution is considered legitimate by those to whom it applies the norm. This is the case if the institution has a clear and coherent mandate, is itself legitimately established (pedigree), and makes decisions based on general fairness principles instead of its own interests.<sup>56</sup> In a regime collision context, this means in particular that the institution deciding on the application of the collision rule must not unilaterally represent or favour one regime logic, but rather has to be accepted by the participants of both regimes.

Furthermore, following Dworkin's integrity principle, *norm application* requires that the norms of a system must form a logically *coherent* body and guarantee the equal treatment of similar cases.<sup>57</sup> Exceptions and compromise have to be rationally justified by appealing to generally recognized principles. Procedural secondary rules can promote this.<sup>58</sup> In a regime collision context too, this means establishing clear criteria for the application of a collision rule as well as procedural secondary rules for implementation control.

### 3.2. Semantic struggles over norm application

Franck himself points out that norm determinacy is an ideal rather than a concrete objective, given the dilemma that 'clarity is far from simplicity':<sup>59</sup> 'A rule finely calibrated to reflect complex considerations, embodying a textured system of regulatory and exculpatory principles, may suffer legitimacy costs because it invites disputes as to its applicability in any particular case.'<sup>60</sup>

Of course, it will be hardly possible to anticipate all possible constellations of regime collisions and resolve them once and for all through a collision rule that

52 Ibid., at 725 et seq.

53 Ibid., at 726.

54 Ibid., at 712–13.

55 Ibid., at 724.

56 Ibid., at 725.

57 Ibid., at 735 et seq.

58 Ibid., at 752. In this context, Franck emphasizes the importance of *adherence*, i.e., the nexus between a 'primary rule of obligation' and 'secondary rules of process': rules about how rules are made, interpreted and applied. He argues that the adherence to a set of secondary rules increases the legitimacy of primary rules.

59 Ibid. at 721.

60 Ibid. at 724.



leaves no room for interpretatory struggles. Such struggles around norm application are not, as such, an indicator of a lack of legitimacy. They arise because regimes are not the neutral problem-solvers they pretend to be, but stand for political choices<sup>61</sup> – choices that are also in play where collision rules are applied.

While the norm production process engages justification discourses (*Begründungsdiskurse*) that address the reasons for having the norm, its validity and shape in the abstract, application discourses (*Anwendungsdiskurse*) pertain to the norm's appropriateness in a concrete situation.<sup>62</sup> Inevitably, norms will remain unsaturated with respect to the need for interpretation arising from specific constellations of application,<sup>63</sup> which means that they can continuously be challenged by different interpretations.<sup>64</sup> Even legitimate norms will therefore engender interest-driven application discourses, in which '[s]uccessful interpretations, that is, interpretations that find acceptance, can . . . be conceived as expressions of power.'<sup>65</sup> Law becomes the 'battleground' for semantic struggles between actors trying 'to implement the use of a particular expression and conception in relation to specific facts that suits their interests or normative convictions'.<sup>66</sup> Law thus provides a normative framework, the material infrastructure for political debate.<sup>67</sup>

However, legal discourse subjects all participants – strong and weak alike – to its particular logic. All interpretative claims have to take a 'particular argumentative form'.<sup>68</sup> Disqualifying arguments based on power alone by requiring a normative justification capable of universalization,<sup>69</sup> legal discourse opens up opportunities for marginal actors to inscribe meanings furthering their interests, too. While only states can adopt international treaties, interpretations of particular legal rules by non-state actors such as NGOs may lead to directions not intended by the states. Franck's neutral monitoring instances, such as judicial bodies applying generally recognized fairness criteria, can provide a framework for such 'interpretative struggles'. They can thereby contribute to the mobilization of legitimacy resources by less powerful actors, adding to the legitimacy of the outcome.

The following sections will analyse Article 16 of the RS as an example of a collision rule between a security and a justice regime in light of these criteria.

#### 4. PEACE VERSUS (CRIMINAL) JUSTICE – REGIME COLLISIONS BETWEEN THE UN SECURITY COUNCIL AND THE ICC

Established in 2002, the ICC constitutes the first permanent international organ to deal with the four crimes of the Nuremberg tradition: war crimes, crimes against

61 Koskenniemi, *supra* note 5, at 324 and *passim*.

62 K. Günther, *Der Sinn für Angemessenheit. Anwendungsdiskurse in Moral und Recht* (1988), at 37 et seq.

63 A. Engländer, *Diskurs als Rechtsquelle* (2002), 36.

64 I. Venzke, 'Legal Contestation about "Enemy Combatants": On the Exercise of Power in Legal Interpretation', (2009) 5(1) JILIR 155, at 158 et seq.

65 *Ibid.* at 162, referring to the concept of power introduced by Barnett and Duvall.

66 *Ibid.* at 163.

67 Deitelhoff, *supra* note 6, at 34; See also Pulkowski, *supra* note 4, at 238 et seq.

68 Venzke, *supra* note 64, at 180; Pulkowski, *supra* note 4, at 243.

69 Deitelhoff, *supra* note 6, at 35.

humanity, genocide, and – presumably from 2017 onwards<sup>70</sup> – the crime of aggression (Arts. 1 and 5 of the RS). These crimes usually take place in the context of a threat to or a breach of international peace and security, placing them under the concurrent competence of the Security Council. According to Article 24(1) of the UN Charter (the Charter), this organ bears the main responsibility for the maintenance or restoration of international peace and security,<sup>71</sup> and has the power to take measures in this respect (Art. 39 of the Charter).<sup>72</sup> Both institutions can therefore be tackling the same conflict.<sup>73</sup> For example, the Security Council has passed a great number of resolutions on the situation in Darfur, ordering measures for the restoration of peace and security.<sup>74</sup> At the same time, the ICC is investigating the criminal responsibility of several individuals, in this case upon referral from the Security Council itself.<sup>75</sup>

In such cases, given the different logics or rationalities of these institutions, the collision potential is high. The Security Council is first and foremost a (power) *political* organ that addresses conflict with political or even military measures, while the ICC is in charge of *legal* assessments. In short, it is ‘peace v. justice’<sup>76</sup> – although this juxtaposition relies on ideal types that do not fully reflect the complexity of either institution.<sup>77</sup> While the maintenance of international peace and security is primarily a political matter, it can also involve legal assessments, for example in determining whether an act of aggression has been committed (Art. 39 of the Charter). The Security Council, often characterized as the ‘executive’ of the international order,<sup>78</sup> has also recently taken to passing abstract and general ‘thematic’ resolutions under Chapter VII of the Charter, for example on terrorism or on the proliferation

70 The definition of the crime of aggression and its ‘trigger mechanism’ were adopted by consensus at the first Review Conference in Kampala in 2010 and cannot enter into force before 2017; ICC Res. RC/Res.6 of 11 June 2010.

71 The Security Council has extended this concept to non-international armed conflicts, acknowledging their possible cross-border effects, threatening the stability of the region, e.g., The Situation in Darfur (Sudan), UN Doc. S/RES/1564 (2004).

72 Since the 1990s, this power has included the authority to create international criminal tribunals such as the ICTY. See, *Prosecutor v. Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-I-AR72, 2 October 1995, paras. 30–9.

73 This constitutes an ‘evident overlap’ between the competences of the Security Council and the ICC; W. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (2010), 325.

74 See for example, UN Security Council, Security Council Resolution (1591) (2005) on Sudan, 29 March 2005, UN Doc. S/RES/1591(2005); See also, UN Security Council, Security Council Resolution 1769 (2007) on Establishment of AU/UN Hybrid Operation in Darfur (UNAMID), 31 July 2007, UN Doc. S/RES/1769 (2007).

75 UN Security Council, Security Council Resolution 1593 (2005) on Violations of International Humanitarian Law and International Human Rights Law in Darfur, Sudan, 31 March 2005, UN Doc. S/RES/1593 (2005); see, L. Condorelli and A. Ciampi, ‘Comments on the Security Council Referral of the Situation in Darfur to the ICC’, (2005) 3 JICJ 590.

76 See for example, M.H. Arsanjani et al., ‘Peace v. Justice: Contradictory or Complementary’, (2006) 100 ASIL Proceedings 361.

77 On the OTP, see S.M.H. Nouwen and W.G. Werner, ‘Doing Justice to the Political: The International Criminal Court in Uganda and Sudan’, 21 EJIL 941; for a more general analysis of the political role of international criminal tribunals, see, T. Krever, ‘Unveiling (and Veiling) Politics in International Criminal Trials’, in C. Schwöbel (ed.), *Critical Approaches to International Criminal Law. An Introduction* (2014), 117.

78 See for example, M. Fremuth and J. Griebel, ‘On the Security Council as a Legislator: A Blessing or a Curse for the International Community’, (2007) 76 NJIL 358. S. Chesterman, ‘The UN Security Council and the Rule of Law’ (2008), available at [www.geneva-academy.ch/RULAC/pdf/FINAL-Report-The-UN-Security-Council-and-the-Rule-of-Law.pdf](http://www.geneva-academy.ch/RULAC/pdf/FINAL-Report-The-UN-Security-Council-and-the-Rule-of-Law.pdf) likens the Security Council to a police officer.

of weapons of mass destruction,<sup>79</sup> which have been likened to international legislation.<sup>80</sup> On the other hand, prosecuting 'the most serious crimes of international concern' (Art. 1 of the RS) can involve strategic choices that have little to do with simply applying the law, both when it comes to securing the support of the state parties the ICC so dearly relies on<sup>81</sup> and in managing its institutional relationship with other international bodies, such as the Security Council.

Still, in their relationship with one another, it is the ideal-typical 'peace v. justice' that can lead to collisions. Thus, an intervention by the Security Council into ICC matters for political reasons can threaten the Court's independence and hence the good 'justice'. By contrast, international criminal justice has usually been considered to serve the good 'peace',<sup>82</sup> the rule of law being part of a positive concept of peace.<sup>83</sup> In exceptional cases, however, criminal investigations against key actors of an ongoing conflict can threaten the peace process by reducing the incentive for negotiations. In such situations, where the goals of one regime can only be realized at the expense of the other's, mere co-ordination as in the Relationship Agreement<sup>84</sup> between the UN and the ICC is not enough. There, both parties recognize each other's mandate and responsibilities – the ICC's independence as well as the UN's responsibility for world peace – but establish only general co-operation duties.

A *collision rule* can be found in Article 16 of the RS, since its aim is to balance the two rationalities. Ideally, such a rule would couple the highly judicialized area of competence of the ICC with the political rationality of the Security Council, while also tying the politically motivated Security Council to the logic of law enforcement by prosecution. However, analysis shows that Article 16 serves as a one-way street for the Security Council to assert its political interests (albeit temporarily) instead of establishing a mechanism for mutual responsiveness. Our analysis will first address deficits in the norm production process and in norm determinacy (Sections 4.1. and 4.2.) and then focus on the first instances of norm application (Section 4.3.), to finally propose avenues for reform, both for an internal and for an external stabilization of its application (Section 5).

79 UN Security Council, Security Council Resolution 1373 (2001) on Threats to International Peace and Security Caused by Terrorist Acts, 28 September 2001, UN Doc. S/RES/1373 (2001); UN Security Council, Security Council Resolution 1540 (2004) Concerning Weapons of Mass Destruction, 28 April 2004, UN Doc. S/RES/1540 (2004).

80 See for example, S. Talmon, 'The Security Council as World Legislature', (2005) 99 AJIL 175; V. Popovski and T. Fraser (eds.), *The Security Council as Global Legislator* (2014); Fremuth and Griebel, *supra* note 78; for the opposite assessment, see, E. Rosand, 'The Security Council as "Global Legislator": Ultra Vires or Ultra Innovative?', (2004) 28 *Fordham Int'l L.J.* 542.

81 See the account in V. Peskin, 'Caution and Confrontation in the International Criminal Court's Pursuit of Accountability in Uganda and Sudan', (2009) 31 HRQ 655.

82 See for example, UN Security Council, Security Council Resolution 808(1993), 22 February 1993, UN Doc. S/RES/808(1993) establishing the ICTY: '[C]onvinced that in the particular circumstances of the former Yugoslavia the establishment of an international tribunal would enable this aim to be achieved and would contribute to the restoration and maintenance of peace . . .'

83 See, J. Galtung, 'Violence, Peace and Peace Research', (1969) 6 JPR 167.

84 Relationship Agreement between the United Nations and the International Criminal Court, New York, 4 October 2004, UNTS Vol. 2283, II-1272. Since the Court is its own international organization and not a subsidiary of the Council, unlike the ad-hoc tribunals established under Chapter VII, its relationship with the UN requires spelling out.

#### 4.1. The Rome Statute's collision rule: Article 16

The Security Council has not only the power to *refer* cases to the ICC in the interest of international peace and security under Chapter VII of the UN Charter, thereby conferring jurisdiction even over non-state parties (Art. 13(b) of the RS). It can also temporarily *defer* investigations and prosecution under Article 16 of the RS. This latter power takes the form of a 'request' to the ICC, also passed as a resolution under Chapter VII of the UN Charter. Where such a request is made to the ICC, '[n]o investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months . . .' (Art. 16 of the RS). Such a request is binding upon the ICC and can be renewed under the same conditions.

This collision rule takes account of the fact that, in exceptional cases, criminal prosecution may not serve but threaten international peace and security, whose maintenance is the Security Council's prime task. Under specific conditions, it thus subjects the activity of the ICC to that of the Security Council, establishing a – temporary – priority of the Security Council and its 'peace logic' over the ICC and its 'justice logic'. At first sight, this norm appears to fulfil the *determinacy* requirement, as it contains clear criteria and consequences. However, the justification controversies of Article 16's norm production process (Section 4.2.) have resurged with force in the first application cases (Section 4.3.) and point to specific deficits of Article 16 that go beyond the usual semantic struggles.

#### 4.2. Contested collisions I: norm production process

Leading up to the Rome Conference, the relationship between the Security Council and the ICC was one of the most controversial issues. The opposing arguments mainly referred to these institutions' respective logics: the Court's judicial independence as opposed to the Security Council's responsibility for the maintenance of international peace and security.

The original draft of the Statute<sup>85</sup> provided that the ICC's jurisdiction would only be engaged by Security Council referrals under Chapter VII. It also barred any ICC activity on cases that the Security Council was dealing with itself under that Chapter. This would have put the ICC entirely at the disposal of the Security Council. Some delegates argued that this reflected the Security Council's responsibility to maintain international peace and security.<sup>86</sup> Others voiced strong concerns,<sup>87</sup> arguing that the judicial function of a court should not be subjected to the actions of a political organ and warned of possible instrumentalization.<sup>88</sup> Moreover, the need for such a rule was questioned, given that there was none in the Statute of the International Court of Justice (ICJ) either.<sup>89</sup> Progress was finally made by 'turning' the rule 'around' into an

85 Yearbook of the International Law Commission, 1994, Vol. II, Draft Statute for an International Criminal Court, Article 23(1) and (3).

86 UN General Assembly, General Report of the Ad Hoc Committee on the Establishment of an International Criminal Court, Official Records, Fiftieth Session, Supplement No. 22 (A/50/22), 1995, para. 120.

87 Ibid. para. 121.

88 Ibid. para. 125. See also, Paulus, *supra* note 7, at 1125.

89 On the relationship between the Security Council and ICJ, cf. Section 5.3, *infra*.

optional request for a deferral.<sup>90</sup> However, the controversy remained alive, mainly due to the limited legitimacy of the Security Council. Several alternatives were proposed, including a referral power for the UN Human Rights Commission (now Human Rights Council),<sup>91</sup> or a subsidiary referral power for the General Assembly.<sup>92</sup> None of these proposals was accepted, and the final text of Article 16 was agreed on the last day of the Conference.

Ideally, a norm production procedure should be considered legitimate by the affected parties. For a collision rule context, this not only requires a good pedigree of the *norm producing institution* but also taking the different regime logics into account during the *production process*. It appears that the conditions in Rome were quite auspicious in this respect. The Rome Conference was attended by more than 160 governments from all regions of the world and approximately 200 representatives of civil society organizations. Not only were both regime logics represented, but also, instead of mere cost-benefit calculations, a real persuasion process took place,<sup>93</sup> superseding the 'political reality frame' of the Draft Statute with a 'public interest frame' focused on an independent and impartial Court, in an approximation of the ideal of Habermasian rational discourse.<sup>94</sup>

However, an unresolved concern remained: entrusting the *application* of the collision rule to the Security Council, whose actions many states saw not as a legitimate representation of the interests of all UN member states, but as power-driven, 'cynical exercises of authority by great powers'.<sup>95</sup> Moreover, this organ one-sidedly represents the security interests of one regime (or rather, the interests of the most powerful members of this regime), without having to take the justice interests of the other regime into account. Whether or not the ICC's interests will be considered depends entirely on the political choices of the members of the RS represented in the Security Council. Therefore, shortfalls in Article 16's *norm content* spill over into *norm implementation*, as the following sections demonstrate.

### 4.3. Contested collisions II: norm application

#### 4.3.1. Norm application exercised: peacekeepers

The first Article 16 case arose in 2002, the very year the RS came into force. Resolution 1422 (2002) of the Security Council contained a blanket deferral request for 12 months for members of UN peace missions whose home states had not ratified the RS. The US had pushed this through by threatening to discontinue its participation in such missions (the United Nations Mission in Bosnia Herzegovina (UNMIBH),

90 The amendments, proposed by Singapore, Costa Rica and Canada were finally supported by the United Kingdom and France. See Schabas, *supra* note 72, at 326–7.

91 This was a demand from Jordan. New Zealand suggested establishing a general connection between the UN human rights organs and the Court, Afghanistan advocated a referral right for the Red Cross. United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 15 June–17 July 1998, Official Records, Volume II, at 114 and 193 et seq.

92 *Ibid.* at 127 et seq. This was a request from Sudan (representing the group of Arabic States) and Syria.

93 See Deitelhoff, *supra* note 6.

94 *Ibid.*, at 51–3; Fehl, *supra* note 6.

95 Schabas, *supra* note 73, at 333.

in particular).<sup>96</sup> In the course of the Security Council debate, in which numerous delegations participated, several state representatives argued that the request was *ultra vires*,<sup>97</sup> and that the Security Council was abusing Article 16, which was meant to address concrete individual cases of threats to international peace and security, as a blanket *ex ante* immunity clause.<sup>98</sup> Some saw this in substance as a reform of the RS, for which the Security Council had no authority.<sup>99</sup> Such double standards would undermine the legitimacy and effectiveness not only of the ICC, but also of the Security Council and of the UN as a whole.<sup>100</sup> In the end, Resolution 1422 was passed unanimously in order to protect the UNMIBH, but without the automatic renewal the US had proposed.

The renewal by Resolution 1487 (2003) was no less contentious.<sup>101</sup> Critics could advance a new argument: By now, the Court's staff had started working, whose high moral character, integrity, qualifications and competence many delegates emphasized was the best protection against possible politically motivated trials, as feared particularly by the US.<sup>102</sup> This time three Security Council members abstained from the vote: France, Germany and Syria.

The following year the US withdrew a third draft request, possibly because of the accusations relating to Abu Ghraib,<sup>103</sup> and embarked upon an alternative strategy: Resolution 1497 (2004), not citing Article 16, places peacekeeping staff in Liberia under the exclusive jurisdiction of their respective home states.<sup>104</sup> The Security Council has now extended this practice to cases it has explicitly referred to the ICC,<sup>105</sup> albeit with an explicit reference to the possibility of an Article 16 deferral.

96 See N. Jain, 'A Separate Law for Peacekeepers: The Clash between the Security Council and the International Criminal Court', (2005) 16 EJIR 239, at 240–1. A similar advance for the mission in East Timor failed in May 2002. Stahn points out that, at that time, there was no mission which could have led to a threat of prosecution for US troops: C. Stahn, 'The Ambiguities of Security Council Resolution 1422 (2002)', (2003) 14 EJIL 85, at 87; see also, M.E. Kurth, *Das Verhältnis des Internationalen Strafgerichtshofes zum UN-Sicherheitsrat. Unter besonderer Berücksichtigung von Sicherheitsratsresolution 1422 (2002)* (2006).

97 Canada, New Zealand, South Africa (for the AU), Costa Rica (for the Rio Group), Jordan and Brazil shared this view; Security Council, Meeting Record S/PV.4568, 10 July 2002.

98 Stahn, *supra* note 96, at 88–9, adding that peacekeeper immunity was already a topic at Rome and contradicts Art. 27 of the RS; *ibid.*, at 95.

99 *Ibid.* Jain, *supra* note 96, at 250–1; see also Talmon, *supra* note 80, at 185–6.

100 Security Council Meeting Record 4568, *supra* note 97. Canada, New Zealand and Brazil, as well as the (non-permanent) Security Council members Mauritius and Mexico, were among the Resolution's most avid critics.

101 Security Council, Meeting Record S/PV.4772, 12 June 2003, at 23–4.

102 Canada, Greece, Uruguay, Argentina, Nigeria, France, Germany, Syria. *Ibid.*

103 See B. Krzan, 'Frieden und Gerechtigkeit nach der Kampala-Konferenz: Einige Überlegungen zur Rolle des Sicherheitsrates in der Völkerstrafgerichtsbarkeit', (2010) 48 *Archiv des Völkerrechts* 467, at 471–2.

104 Such a practice existed already in the form of Status of Forces Agreements (SOFAs) between the sending state and the UN or the UN and the mission state. This practice, mainly used by the US, is incorporated in Art. 98(2) of the RS, which relieves member states of the obligation to extradite in contravention of international agreements, however, this does not affect the ICC's jurisdiction. See Jain, *supra* note 96, at 245; Condorelli and Ciampi, *supra* note 75, at 598; M. Happold, 'Darfur, the Security Council, and the International Criminal Court', (2006) 55 ICLQ 226, at 235 (on Res. 1593). These scholars call this a political victory for the US.

105 UN Security Council, Security Council Resolution 1593 (2005) on Violations of International Humanitarian Law and International Human Rights Law in Darfur, Sudan, 31 March 2005, UN Doc. S/RES/1593 (2005); UN Security Council, Security Council Resolution 1970 (2011) on the Situation in Libyan Arab Jamahiriya, 17 March 2011, UN Doc. S/RES/1970 (2011).

#### 4.3.2. Norm application rejected: Al-Bashir

The Security Council was also sharply criticized for a refusal to request a deferral. After an unsuccessful period of appeasement following the Security Council referral of the situation in Darfur in 2005,<sup>106</sup> the Office of the Prosecutor (OTP) had, in 2008, extended its investigations to acting Sudanese President Omar Al-Bashir and requested an arrest warrant.<sup>107</sup> The Council of the Arab League criticized this the following day, and was joined by the African Union (AU) within a week.<sup>108</sup> The AU demanded a deferral request under Article 16, arguing that criminal proceedings at this point in time would not be in the interest of the victims and of justice, but would threaten the peace process.<sup>109</sup> Similar arguments were advanced by the Organization of the Islamic Conference and by the Non-Aligned Movement.<sup>110</sup>

The UN Security Council considered this ten days later when discussing the extension of the United Nations African Mission in Darfur (UNAMID) mandate in Darfur. Some states, surprisingly including the US, criticized the opposition created between peace and justice<sup>111</sup> and emphasized the need for trials given the scale of the crimes,<sup>112</sup> while others, such as Russia and China, voiced concern for the detrimental effect on the peace process.<sup>113</sup> No decision was taken: The Security Council passed the mandate in Resolution 1828 (2008), only briefly ‘taking note of the AU’s position and of ‘concerns raised by members of the Council regarding potential developments subsequent to the application of the Prosecutor’, and stating its intention to ‘consider these matters further.’<sup>114</sup> Despite repeated ‘requests for a request’, no further action was taken.

President Al-Bashir reacted by expelling aid organizations from Darfur, thereby gravely exacerbating the humanitarian crisis.<sup>115</sup> Frustrated by its repeated appeals to the UN, the AU, at its summit at Sirte, decided to ask its members to deny co-operation to the ICC in this case.<sup>116</sup> Al-Bashir has since been able to travel to several

106 UN Security Council Resolution 1593, *supra* note 75.

107 The warrant was issued in March 2009 for crimes against humanity and war crimes, a second warrant was issued for genocide in 2010. *Prosecutor v. Omar Hassan Ahmad Al Bashir*, Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir, Case No. ICC-02/05-01/09, 12 July 2010. Critical of the timing: M. Ssenyonjo, ‘The International Criminal Court and the Warrant of Arrest for Sudan’s President al-Bashir: A Crucial Step Towards Challenging Impunity or a Political Decision?’, (2009) 78 NJIL 379, at 427–30; A. Ciampi, ‘The Proceedings against President Al Bashir and the Prospects of their Suspension under Article 16 ICC Statute’, (2008) 6 JICJ 885, at 891–3; while Cassese pushed the matter: A. Cassese, ‘Is the ICC Still Having Teething Problems?’, (2006) 4 JICJ 434; see also, Nouwen and Werner, *supra* note 77, at 954 et seq.

108 AU Peace and Security Council, Communiqué PSC/MIN/Comm(CXLII), Rev. 1, 21 July 2008; Reports on the Arab League Council’s Statement of 19 July 2008 available at [www.iccnw.org/?mod=newsdetail&news=2783](http://www.iccnw.org/?mod=newsdetail&news=2783).

109 AU Peace and Security Council, *supra* note 108.

110 Ciampi, *supra* note 107, at 886.

111 UN Security Council Meeting Record S/PV.5947, 31 July 2008, at 4–5. Costa Rica, Belgium, and Italy advanced similar arguments.

112 *Ibid.* at 8.

113 *Ibid.* at 3, 6.

114 UN Security Council, Security Council Resolution 1828 (2008) on Extending the Mandate of UNAMID in Darfur, Sudan, 31 July 2008, UN Doc. S/RES/1828 (2008).

115 Ssenyonjo, *supra* note 107, at 422–3.

116 Assembly of the AU, 13th Ordinary Session, 1–3 July 2009, Sirte (Assembly/AU/Dec. 243–267 (XIII) Rev. 1 / Decision 245).

African ICC member states who failed to comply with their obligation to extradite him to the ICC.<sup>117</sup>

The conflict also led to demands for a reform of Article 16. In reference to debates in Rome, the AU suggested empowering the General Assembly to request deferrals ‘in cases where the Security Council has failed to take a decision within a specified time frame, in conformity with UN General Assembly Resolution 377(V)/1950 known as “Uniting for Peace Resolution” . . .’.<sup>118</sup> This proposal did not make it onto the agenda of the 2010 Review Conference at Kampala, but is being discussed by a working group of the Assembly of State Parties.<sup>119</sup> Alternative proposals suggested taking away ICC jurisdiction by establishing a hybrid tribunal for Darfur.<sup>120</sup>

Despite these experiences, and concerns in the Security Council about sequencing peace and justice,<sup>121</sup> the referral to the ICC of the on-going conflict in Libya passed unanimously in February 2011.<sup>122</sup> Again, the AU called for a deferral request,<sup>123</sup> but no move was made in the Security Council. Whether this affected the chances of a peaceful resolution is unclear; in any case, Gadhafi was killed in late 2011, his aides captured. Libya subsequently raised complementarity objections under Article 17 of the RS, and while the ICC rejected these in the case of Saif Al-Islam,<sup>124</sup> it upheld them in the case against Mohammad Al-Senussi, permitting a trial in Libya.<sup>125</sup>

Meanwhile, the critique by African governments and the AU of peace-threatening actions by the ICC became more entrenched when the ICC brought charges against six Kenyan suspects, including two sitting cabinet members, in its first *proprio motu* case in 2012.<sup>126</sup> When the two cabinet members won the elections in April 2013, the

117 A study conducted by an African Expert Group argued that the concerns of the African States should be taken seriously, but to also consider that Sudan had not been making serious efforts for a domestic prosecution, and that the peace process was essentially stagnating. This suggests a reverse instrumentalization of Art. 16, and a concurrent danger of de-legalizing the ICC system. D. Akande, M. du Plessis and C. C. Jalloh, ‘Position Paper. An African Expert Study on the African Union Concerns about Article 16 of the Rome Statute of the ICC’ (2010), at 20 et seq., available at [www.issafrica.org/anicj/uploads/ISS\\_Position\\_Paper\\_Article\\_16.pdf](http://www.issafrica.org/anicj/uploads/ISS_Position_Paper_Article_16.pdf); see also, C. Ero, ‘Understanding Africa’s Position on the International Criminal Court’ (2010), *Oxford Transitional Justice Research Working Paper Series*, available at [www.csls.ox.ac.uk/documents/Ero\\_Africas\\_PositionFinalOTJR.pdf](http://www.csls.ox.ac.uk/documents/Ero_Africas_PositionFinalOTJR.pdf).

118 AU Executive Council, 16th Ordinary Session, 25–29 January 2010, Report on the Ministerial Meeting on the Rome Statute (EX.CL/568 (XVI) Annex 1).

119 ICC Assembly of State Parties Eighth Plenary Meeting, Res. ICC-ASP/8/Res. 6, para. 4, UN Doc. ICC-ASP/8/20, 18–26 November 2009, Vol. I, 70 (Appendix VI).

120 AU Peace and Security Council, 207<sup>th</sup> Meeting at the Level of the Heads of State and Government, 29 October 2009, Report of the African Union High Level Panel on Darfur (AUPD) (PSC/AHG/2(CCVII)). (Ext/Assembly/AU/Dec.1., Oct. 2013).

121 ‘UNSC Refers Situation in Libya to ICC, Sanctions Gaddafi & Aides’, *Sudan Tribune*, 27 February 2011.

122 UN Security Council, Security Council Resolution 1970 (2011) on the Establishment of a Security Council Committee to Monitor Implementation of the Arms Embargo Against the Libyan Arab Jamahiriya, 26 February 2011, UN Doc. S/RES/1970 (2011).

123 AU Heads of State and Government meeting, 17th Ordinary Session, 23 June–1 July 2011, Decisions Adopted during the 17th African Union Summit, 1 July 2011, at 3.

124 *Prosecutor v. Saif Al-Islam Gadhafi and Abdullah Al-Senussi*, Decision on the Admissibility of the Case Against Saif Al-Islam Gadhafi, Case no. ICC-01/11–01/11, Pre-trial Chamber I, 31 May 2013.

125 *Prosecutor v. Saif Al-Islam Gadhafi and Abdullah Al-Senussi*, Decision on the Admissibility of the Case Against Abdullah Al-Senussi, Case no. ICC-01/11–01/11, Pre-trial Chamber I, 11 October 2013.

126 See, *Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, Case No. ICC-01/09–01/11, Pre-Trial Chamber II, 23 January 2012; *Prosecutor v. Frances Kirmi Mathaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, Case No. ICC-01/09–02/11, Pre-Trial Chamber II, 23 January 2012. The Kenyan government first called for a



AU Assembly decided that no charges should be commenced or continued before any international court or tribunal against any serving AU head of state or government.<sup>127</sup> Moreover, it condemned the politicization and misuse of indictments against African leaders by the ICC and demanded that the trials of now President Kenyatta and Deputy President Ruto be suspended until they complete their terms of office.<sup>128</sup> The Security Council declined in November with only seven votes in favour; all of the ICC parties as well as the US abstained.<sup>129</sup> A parallel AU initiative in the ICC's Assembly of State Parties to preclude prosecutions against sitting heads of states and governments failed as well.<sup>130</sup>

Meanwhile, the ICC has had a hard time accomplishing its work; in December 2014, the OTP had to drop the charges against Kenyatta due to lack of evidence.<sup>131</sup> Moreover, the Security Council appears to find it easier to refer cases and prevent deferrals than to support the actual investigations. Just days after throwing in the towel in the Kenyatta case, Prosecutor Bensouda announced to the Security Council that, given its lack of back-up for her work in Darfur, she will 'hibernate' investigations there and shift resources to more promising cases.<sup>132</sup>

#### 4.3.3. *Application of Article 16 of the RS in light of the ideal type*

These first application cases prove that the concerns articulated in the norm production process are playing out in practice.

First, Article 16's *determinacy* is diminished by the fact that the Security Council has wide discretion in determining the existence of a Chapter VII situation. Indeed, given the extraordinary powers of its permanent members, decisions are often selective, driven by their partial interests. Such an institution cannot provide stable procedural expectations, as it does not oblige its members to act *coherently* and rationally or to follow generally recognized fairness principles. For want of secondary rules, the implementation of Article 16 has remained a matter of discretion to the Security Council, lacking adherence to general principles.

Moreover, the *pedigree* of the Security Council is in bad shape, claims for reform are widespread. The Security Council has seen its *legitimacy* wane since the Second World War, as the veto power of the P-5 increasingly fails to reflect their actual power

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deferral when the suspects were summoned to The Hague; on the prior failure of domestic investigations, see, T.O. Hansen, 'The International Criminal Court in Kenya: Three Defining Features of a Contested Accountability Process and their Implications for the Future of International Justice', (2012) 18 AJHR 187, at 191-4.

127 Extraordinary Session of the Assembly of the African Union, Decision on Africa's Relationship with the ICC (Ext/Assembly/AU/Dec.I., Oct. 2013), 12 October 2013.

128 Ibid.

129 UN Security Council, Security Council Draft Res. UN Doc. S/2013/660, brought by several African states; voting record in UN Doc. S/PV.7060, 15 November 2013.

130 ICC Assembly of State Parties, 12th Plenary Meeting, Res. ICC-ASP/12/Res. 7, UN Doc. ICC-ASP/12/Res.7, 27 November 2013. A reform of the Rules of Procedure passed, among others concerning the requirement of presence during the proceedings.

131 Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the withdrawal of charges against Mr. Uhuru Muigai Kenyatta, 5 December 2014; *Prosecutor v. Uhuru Muigai Kenyatta*, Notice of Withdrawal of the Charges Against Uhuru Muigai Kenyatta, OTP, ICC-01/09-02/11-983, 5 December 2014.

132 OTP, Statement to the United Nations Security Council on the Situation in Darfur, pursuant to UN Security Council Resolution 1593 (2005), 12 December 2014.

and influence. Article 16 thus allows for possible instrumentalization by an organ with little legitimacy, threatening the independence of the ICC.

Third, the *application* of Article 16 of the RS was not entrusted to a neutral institution. On the contrary, the Security Council is biased insofar as it is the prime proponent of the security logic. It is free to impose its rationale on the ICC, undermining the legitimacy of the ICC by making it appear as a pawn of the Security Council and not as an independent and impartial institution.<sup>133</sup> Since Article 16 does not require *responsiveness*, there is no mechanism securing the consideration of the criminal law regime's justice interests. Although ICC members France and the UK have the power to veto a deferral request that they feel may damage the Court, this is a matter of political choices, as Resolution 1422 (2002) demonstrates.<sup>134</sup> In otherwise allowing one regime to supersede the other's logic at will, Article 16 does not warrant an optimal balance of the colliding regime logics – as the first application cases prove. The fact that the US finally refrained from calling for an extension of Resolution 1422 (2002) was owed to specific circumstances and is no guarantee against future deferral requests that may harm the ICC's legitimacy.

Moreover, while the priority of the security logic can only be established by the Security Council, it has no obligation to exercise this power. In fact, the Security Council is even free to leave some collisions unresolved by refusing to apply Article 16. If it fails to do so, although on-going criminal investigations present a threat to international peace and security – as it was claimed in several cases – the ICC has no power to desist: A discretion of the OTP exists only 'in the interests of justice', not of peace (Art. 53 of the RS). Thus, there is *no mutual responsiveness* making up for each regime's 'tunnel vision'.<sup>135</sup> While, arguably, Security Council referrals under Article 13(b) of the RS can be seen as bolstering the ICC's legitimacy and possibly balancing out Article 16, they have proved to be quite a mixed blessing, as the Darfur case shows.

Due to these shortcomings, Article 16 has not been able to contribute to an effective and sustainable collision management. On the contrary, the semantic struggles in the cases so far have undermined both the ICC's and the Security Council's legitimacy. Although the application and non-application cases are driven by quite different interests, the types of arguments used and the conflict lines are actually quite similar.

This raises the question of how to improve the collision management. Since a reform of Article 16 is unlikely in the near future, particular attention should be devoted to the *application control*. As mentioned above (at Section 3.2.), neutral institutions such as courts could provide a stable framework for semantic struggles over norm application. Therefore, the following sections analyse whether responsiveness and consistency can be established by the ICC itself, or whether Article 16 requires external stabilization by other actors.

133 These concerns also apply to the selective referral practice of the Security Council. See, V. Popovski, 'The Security Council and the International Criminal Court', in Popovski and Fraser (eds.), *The Security Council as Global Legislator* (2014), 266.

134 In the Kenyan case, it was enough to abstain. UN Security Council Draft Resolution, *supra* note 129.

135 Teubner and Korth, *supra* note 40, at 37.

## 5. PATROLLING THE BORDER BETWEEN PEACE AND JUSTICE: APPLICATION CONTROL OF ARTICLE 16?

When asked whether he was becoming a politician at the ICC, Prosecutor Luis Moreno Ocampo answered:

On the contrary. I am putting a legal limit to the politicians. That's my job. I police the borderline and say, if you cross this you're no longer on the political side, you are on the criminal side. I am the border control.<sup>136</sup>

Adopting this metaphor, is the Security Council alone in policing the border between its regime and the ICC's? We argue that, based on the normative requirements for a deferral request (Section 5.1.), the ICC has the power to determine whether a deferral request is in line with Article 16, a power which it has yet to use, and which is not entirely satisfactory (Section 5.2.). Other 'border patrols' are also possible: the ICJ's power to supervise the Security Council has been widely discussed in other contexts,<sup>137</sup> and the General Assembly can both parallel Security Council action and step in where it fails to act (Section 5.3).

### 5.1. The normative framework for deferral requests

Article 16 contains some explicit criteria for deferral requests. As a limited exceptional power, a request has to comply with both the RS and the UN Charter.<sup>138</sup> Just like an Article 13 referral, a deferral request requires a Chapter VII resolution, which in turn presupposes a threat to international peace and security in accordance with Article 39 of the Charter.<sup>139</sup> In this respect, it is consented that the Security Council enjoys a wide margin of discretion in order to be able to properly execute its political function.<sup>140</sup> This, however, does not place it above the law:

It is clear from this text [the text of Article 39 of the UN Charter] that the Security Council plays a pivotal role and exercises a very wide discretion under this Article. But this does not mean that its powers are unlimited. The Security Council is an organ of an international organization, established by a treaty which serves as a constitutional framework for that organization. The Security Council is thus subjected to certain constitutional limitations, however broad its powers under the constitution may be. Those powers cannot, in any case, go beyond the limits of the jurisdiction of the Organization at large, not to mention other specific limitations or those which may

<sup>136</sup> Remarks at a Conference on the ICC in Cairo, 15 January 2009, cited in Nouwen and Werner, *supra* note 77, at 962.

<sup>137</sup> See for example, D. Akande, 'The International Court of Justice and the Security Council: Is There Room for Judicial Control of Decisions of the Political Organs of the United Nations?', (1997) 46 ICLQ 309; K.R. Cronin-Furman, 'The International Court of Justice and the United Nations Security Council: Rethinking a Complicated Relationship', (2006) 106 CLR 435.

<sup>138</sup> L. Condorelli and S. Villalpando, 'Referral and Deferral by the Security Council', in A. Cassese, P. Gaeta, J.R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (2002) 627, at 646.

<sup>139</sup> Krzan, *supra* note 103, at 480. He argues that the decision has to clearly show that the Security Council found a Chapter VII situation and is not just providing information under Art. 15 of the RS.

<sup>140</sup> Thus, in the case of Libya, the non-extradition of two terrorism suspects (*Lockerbie* case) was enough to constitute a threat to international peace and security. UN Security Council, Security Council Resolution 731 (1992), 21 January 1992, UN Doc. S/RES/731 (1992); UN Security Council, Security Council Resolution 748 (1992), 31 March 1992, UN Doc. S/RES/749 (1992); UN Security Council, Security Council Resolution 883 (1993), 11 November 1993, UN Doc. S/RES/883 (1993).

derive from the internal division of power within the Organization. In any case, neither the text nor the spirit of the Charter conceives of the Security Council as *legibus solutus* (unbound by law).<sup>141</sup>

Just as any other UN organ, the Security Council is bound by the UN Charter as well as by *jus cogens* and general principles of international law.<sup>142</sup> Article 24 of the Charter obliges all UN organs to act in accordance with the goals and principles of the United Nations. Council decisions are binding on UN member states under Article 25 of the Charter only if they are passed ‘in accordance with the Charter’.<sup>143</sup>

With regard to the RS, the requirement of a Chapter VII resolution in Article 16 suggests that the Security Council has to *justify* the request as a measure serving the maintenance or restoration of international peace and security.<sup>144</sup> Its systematic position in relation to Articles 13–15 of the RS shows that Article 16 is meant to cover scenarios where an investigation or prosecution or preparatory measures are already underway.<sup>145</sup> This also means that there must be a reference to an actual ‘situation’<sup>146</sup> that would be or is being investigated, as this is what measures under Articles 13–15 would refer to. Therefore, a request must address a *specific* situation, as it is or would be subject to investigation or prosecution, and can neither be made in an abstract manner<sup>147</sup> nor in relation to certain individuals or groups of individuals only.<sup>148</sup> The reasons given must therefore specifically address the effects of a commencement or proceeding of particular (future) investigation or prosecution measures into a concrete situation.

## 5.2. Responsiveness through application control by the ICC?

Given that the Security Council has license to impose its regime logic unilaterally, involvement of the ICC in the application of Article 16 might be able to introduce an element of responsiveness, or at least to counteract the Security Council’s apparent arbitrariness by subjecting its requests to legal verification.

It is true that Article 16 does not accord discretion to the ICC: in the case of a request passed under Chapter VII, ‘no investigation or prosecution may be commenced or

141 *Prosecutor v. Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94–1-AR72, A.Ch., 2 October 1995, para. 28.

142 Jain, *supra* note 96, at 253; Tomuschat, *supra* note 27, at 343.

143 Jain, *supra* note 96, at 253. Therefore, *ultra vires* decisions of the Security Council are considered neither binding, nor as superseding international treaties such as the Rome Statute in accordance with Art 103 of the Charter.

144 Condorelli and Ciampi, *supra* note 75, at 507; see also, Ciampi, *supra* note 107, at 891. Condorelli and Ciampi argue that, if the Security Council referred the situation to the ICC – as in the Darfur case – there needs to be a change in circumstances to warrant subsequent deferral.

145 Stahn, *supra* note 96, at 90.

146 *Ibid.*

147 Condorelli and Villalpando, *supra* note 138, at 647; Jain, *supra* note 96, at 247; Stahn, *supra* note 96. On whether Art 16 can exclusively apply to a specific situation, see also, Z. Deen-Racsmany, ‘The ICC, Peacekeepers and Resolution 1422: Will the Court Defer to the Council?’, (2002) 49 NILR 353; J. Pichon, *Internationaler Strafgerichtshof und Sicherheitsrat der Vereinten Nationen. Zur Rolle des Sicherheitsrats bei der Verfolgung völkerrechtlicher Verbrechen durch den IStGH* (2011), at 39 et seq.

148 Condorelli and Villalpando, *supra* note 138, at 647; Stahn, *supra* note 96; see also, E. Hoven, ‘Frieden versus Gerechtigkeit? Zur Aussetzung der Ermittlungen gegen Omar Hassan al-Bashir nach Art. 16 IStGH-Statut’, (2011) 6 ZIS 230, at 236. Hoven considers individualized deferrals legitimate.

proceeded with'. However, some argue that the ICC's organs<sup>149</sup> can verify whether the criteria contained in Article 16 (as described in the previous section) have been met.<sup>150</sup> While Security Council decisions are binding upon UN members, deferrals are *requests*, since the Charter claims no binding power in relation to international organizations such as the ICC.<sup>151</sup> Such binding force can only arise from the ICC's own Statute. If the RS establishes criteria for binding requests, the ICC must be able to verify whether they have been fulfilled.<sup>152</sup> This is obvious for the requirements that the request be limited to a maximum of 12 months, and its reference to a 'situation'.

Moreover, Article 16 requires that the Security Council act under Chapter VII. Of course, the Security Council enjoys a wide margin of discretion, and it is not for the Court to pass judgment on how it exercises its discretion.<sup>153</sup> This discretion, however, can only exist within the limits of the Security Council's powers under the Charter. The ICC must therefore be able to determine whether these *legal* limits have been overstepped.<sup>154</sup> This means that the ICC can not only examine whether the Security Council has established a threat to international peace and security, but also whether it was entitled to do so, i.e., whether the conditions for such a determination were met – within the Security Council's margin of discretion.<sup>155</sup>

Article 16, therefore, does not leave the ICC entirely at the disposal of the (permanent) Security Council members' interests. The ICC is able to reject a request for deferral which is *ultra vires* or otherwise not in accordance with Article 16, however, the potential of this power to enhance the resolution of regime collisions is limited.

First, the ICC may be loath to exercise this power – it actually failed to do so in the peacekeeper cases although arguably the conditions of Article 16 were not met. Of course, no ongoing or planned investigations were actually affected. The question remains whether the ICC would be willing to take it up with the Security Council at all. In practice, it is entirely dependent on the co-operation of its state parties; they alone have the power to arrest and surrender a suspect. The Security Council is an important ally in this; its resolutions have the power to oblige non-member states to co-operate with the ICC. While the OTP has become more confrontational as its conciliatory strategy failed to yield results,<sup>156</sup> it is doubtful whether this will also play out in relation to the Security Council and its members.

Second, this power is unhelpful where the Security Council *declines* to request a deferral. Should its investigations or prosecution really threaten international peace

149 Condorelli and Villalpando, *supra* note 138, at 650; on the OTP, see, Schabas, *supra* note 72, at 332.

150 Condorelli and Villalpando, *supra* note 138, at 648; Stahn, *supra* note 96, at 102.

151 For an adverse opinion, see Pichon, *supra* note 147, at 217 et seq.

152 'It is a general principle of law that judicial organs themselves can decide whether they are competent to exercise jurisdiction in a specific case. . . . In this context, the ICC would, in light of concerns expressed about the legality of the Resolution, have to examine whether it should consider Resolution 1422 as binding on itself.' Deen-Racsmány, *supra* note 147, at 381–2.

153 Condorelli and Villalpando, *supra* note 138, at 641 et seq.

154 *Ibid.*, at 648–9; disagreeing, Tomuschat, *supra* note 27, at 343.

155 Condorelli and Villalpando, *supra* note 138, at 641; R. Frau, *Das Verhältnis zwischen dem ständigen Internationalen Strafgerichtshof und dem Sicherheitsrat der Vereinten Nationen: Art. 13 lit. b) IStGH-Statut und der Darfur-Konflikt vor dem Gerichtshof* (2010), at 282 et seq; for a denial of a reviewing power in relation to Security Council referrals, see for example, Deen-Racsmány, *supra* note 147, at 383; Pichon, *supra* note 147, at 335.

156 See, Peskin, *supra* note 81.

and security, the ICC would be unable to resolve the collision itself. The OTP is not supposed to discontinue relevant investigations unless '[a] prosecution is not in the interests of *justice*' (Art. 53(3)(c) of the RS);<sup>157</sup> the interests of international peace and security are not elements of its discretion. Once the case has reached the trial stage and the charges have been confirmed, there is no stopping it for reasons external to the trial.

Third, the ICC would also be unable to resolve a *strategic blockade* where the Security Council legitimately exercises its Article 16 power but does not address the threat itself, so that it is subjected neither to a political nor to a legal solution.

### 5.3. Application control by third parties?

Given the deficits of Article 16 and the limited use of the ICC's reviewing power, neutral third parties may be able to stabilize the norm and heighten its legitimacy, as well as make up for the Security Council's 'tunnel vision'.<sup>158</sup> Within the UN system, the General Assembly and the ICJ have become well-known candidates for second opinions, albeit very different ones: while the ICJ is a highly juridified forum for dispute resolution, the General Assembly is no less a political organ than the Security Council, but without veto powers.

An intervention by the ICJ in disputes over Article 16 would likely contribute to the norm's legitimacy, given that the Court is largely considered independent, neutral and legitimate. Moreover, the Security Council has no power to keep it from pursuing a case. Starting with the *Nicaragua case*,<sup>159</sup> the ICJ has repeatedly been active parallel to the Security Council in matters relating to international peace and security, arguing that there was no separation of powers between it and the Security Council, whose main responsibility was not exclusive but complementary.<sup>160</sup> Its power to *examine the legality* of Security Council actions has been widely discussed.<sup>161</sup> The ICJ is competent to rule on 'any question of international law' in disputes between states under Article 36(2) of the ICJ Statute, not excluding ones that the Council has already dealt with (possibly differently). Moreover, the General Assembly and other UN organs can request an Opinion 'on any legal question' under Article 65 of the ICJ Statute and Article 96 of the Charter, e.g., whether there is an act of aggression. In principle, the ICJ could also examine whether the requirements of an Article 16 request are fulfilled. As indicated above, despite its discretion under Chapter VII, the Security Council is not above the law.

In practice, though, the ICJ has consistently avoided any material disagreement with the Security Council,<sup>162</sup> emphasizing the priority role of the Council in armed

157 OTP Policy Paper on the Interests of Justice, 2007, available at [www.icc-cpi.int/iccdocs/asp\\_docs/library/organs/otp/ICC-OTP-InterestsOfJustice.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/library/organs/otp/ICC-OTP-InterestsOfJustice.pdf) (emphasis added).

158 Teubner and Korth, *supra* note 40, at 37.

159 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. USA)*, Judgment of 27 June 1986, [1986] ICJ Rep. 14. Nicaragua brought the case after the US had vetoed a Security Council resolution.

160 C. Gray, 'The Use and Abuse of the International Court of Justice: Cases concerning the Use of Force after Nicaragua', (2003) 14 EJIL 867. She discusses the arguments advanced in depth.

161 See *supra* note 137.

162 *Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom)*, Judgment of 27 February 1998, [1998] ICJ Rep.

conflict.<sup>163</sup> Moreover, it is not easy to seize; UN member states can only bring a case if both sides have accepted its jurisdiction (Art. 36(2) of the ICJ Statute). Among the 66 states that have issued a general declaration to this effect – many with reservations relating to armed conflict<sup>164</sup> – the United Kingdom is the only veto power, after the US revoked theirs in the aftermath of *Nicaragua*.<sup>165</sup> A General Assembly request for an Opinion under Article 96 of the Charter requires a majority vote, i.e., substantial backing from the international community. Finally, it would take the ICJ a long time to come to a decision, whereas Article 16 situations typically have an emergency character.

The General Assembly, a political institution like the Security Council, has repeatedly been proposed as a ‘border patrol’ itself because it is considered more ‘democratic’ than the exclusive forum of the Security Council. While the Assembly’s resolutions are non-binding, it can be a forum for ‘counter-politicization’ *sans* veto power.<sup>166</sup> It can ‘discuss all matters relating to the maintenance of international peace and security’ and issue recommendations, or refer matters to the Security Council for further measures (Art. 11 of the Charter). While Article 12(1) of the Charter suspends the Assembly’s recommendation powers while the Security Council deals with a matter, the Assembly has asserted them in situations where the Council fails to address a threat due to a disagreement between its permanent members.<sup>167</sup> It could, therefore, step in in cases of *blockade* following a legitimate Article 16 request without further Security Council action. Due to the absence of veto powers, the General Assembly may come to *disagree* with the Security Council on matters of international law or declare its actions not in accordance with the law. It remains that this, too, requires a majority vote within the Assembly in accordance with Article 18(3) of the Charter.

While putting third parties such as the ICJ or the General Assembly in charge of overseeing the application of the collision rule may contribute to externally stabilizing the collision management, at the same time the potential for collisions increases. It would be difficult – and possibly not desirable – to come up with explicit collision rules for each and every potential collision. Instead, it would be desirable and necessary – in all cases where explicit collision norms are lacking or deficient – that the institutions involved apply the principle of *default deference*, i.e., respecting the decision of another institution or organ unless there are weighty reasons to differ. This principle is already being applied between courts in the area of fundamental

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115; *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina v. Serbia and Montenegro)* Judgment of 26 February 2007, [2007] ICJ Rep. 43. In these cases, the ICJ would have been able to incidentally examine the legality of Security Council resolutions but avoided this in both instances; see, B. Martenczuk, ‘The Security Council, the International Court and Judicial Review: What Lessons from Lockerbie?’, (1999) 10 EJIL 517.

163 Gray, *supra* note 160, at 901–5; see also, for the crime of aggression, Paulus, *supra* note 7, at 1125–6.

164 All declarations are available at [www.icj-cij.org/jurisdiction/](http://www.icj-cij.org/jurisdiction/).

165 US Department of State, Letter and Statement Concerning Termination of Acceptance of the Compulsory Jurisdiction, 7 October 1985, (1985) 24 ILM 1742.

166 Krzan, *supra* note 103, at 475.

167 UN General Assembly, Resolution for Uniting for Peace, 3 November 1950, UN Doc. A/RES/377. This power is now also recognized where the Security Council does act; see also, *Certain Expenses of the United Nations*, Advisory Opinion of 20 July 1962, [1962] ICJ Rep. 151.

rights in Europe.<sup>168</sup> Between the different domestic and European courts there is no consented hierarchy – horizontal co-ordination has been working rather well so far.<sup>169</sup> Such a ‘duty to consider’ would be difficult to codify in the UN system, even more so because there are political bodies involved, however, it can be developed by way of continuous practice and jurisprudence. Even between regimes with different rationales, such network structures are beginning to develop,<sup>170</sup> however, the practice of the ICJ in relation to the Security Council shows that much is left to be desired. Improving Article 16 of the RS could, therefore, pave the way to a more general culture of deference that goes both ways.

## 6. ARTICLE 16’S POTENTIAL TO BE DEVELOPED INTO A ‘GOOD’ COLLISION RULE

The examples discussed demonstrate that Article 16 does not manage to secure both the maintenance of international peace and security by the Security Council and the criminal prosecution of the gravest international crimes by the ICC, while resolving goal conflicts in each individual case in a consistent and balanced way. The semantic struggles over norm application threaten to affect the legitimacy and effectiveness of both the Court and the Security Council. It is to be expected that the proposed crime of aggression will only exacerbate the problem, given that this is part of the core responsibility of the Security Council. While Article 16 has not been applied since Resolutions 1422 (2002) and 1487 (2003), possibly because of its problematic nature, calls for its application, and frustration over the Security Council’s disregard or inaction, continue.

The first application cases show that the arrangement in Article 16, unilaterally putting the Security Council in charge of suspending ICC activities if they interfere with the Council’s tasks, does not play out satisfactorily. First, the Security Council’s broad discretion in matters of peace and security undermines norm determinacy. Second, the Security Council is a body that, due to the veto powers of the ‘P-5’, is considered an exclusive forum of power players who can flout the law if they wish, and not an institution with good pedigree in the sense of Franck’s theory. In terms of the application of Article 16 of the RS, it is neither guaranteed that like cases are treated alike, nor is the Security Council required to base its decisions on generally accepted principles. Third, as one of the parties involved, the Security Council promotes only its own regime logic without having to take that of the ICC into account. Moreover, the Security Council may strategically fail to request a deferral despite threats to international peace and security, e.g., if a permanent

<sup>168</sup> The German Federal Constitutional Court, for instance, leaves the protection of fundamental rights up to the Court of Justice of the European Union in its area of competence, as long as a comparable standard of protection is generally observed within the EU. BVerfGE 73, 339. It also takes into consideration the jurisprudence of the European Court of Human Rights, which itself relies on the CJEU, bound as it is by primary law to the observation of the ECHR. BVerfGE 111, 307.

<sup>169</sup> Viellechner, *supra* note 39.

<sup>170</sup> Tomuschat, *supra* note 27, describes further practice examples.



member vetoes such a request. The prosecutor, however, is not able to react, since she is required to act in the interests of justice alone.

Currently, the possibilities of application control as a possible solution to collision (mis-)management are also not entirely satisfying. The ICC's power to review deferral requests does not cover all problematic situations, and it may not be exercised in practice. These problems can partially be resolved by third-party involvement: the ICJ and the General Assembly are able, to some extent, to step in where the ICC's powers in relation to the Security Council are concerned. However, their 'external stabilization function' comes at the price of further collision potential.

Summarizing the lessons learned from the previous remarks, it appears that a 'good' collision rule, i.e., one that successfully prevents or resolves threats to the legitimacy and effectiveness of the regimes concerned, would not put one of the regimes in charge of 'patrolling the border' unilaterally without demanding that the other regime's logic be taken into account. It is essential that *responsiveness* is secured, either by installing a neutral institution which is responsible for the application of the collision rule – an institution that does not unilaterally favour one logic – or at least by conferring on the other regime's institution (here, the ICC) an explicit and comprehensive reviewing power.

*Coherence* is another important element warranted by a collision rule; a code of conduct with more specific criteria can contribute to this. In struggles over the power of interpretation, such codes or secondary rules force actors to articulate their interests in legal terms, limiting the opportunity for power politics manipulation, as in the case of Resolutions 1422 and 1487. In the context of the application of Article 16 of the RS, this could be a *code of conduct* stipulating the requirement for the Security Council to justify its decision under Chapter VII of the Charter or to specify what exactly constitutes a threat to peace in a particular situation. It would also be helpful to require that requests under Article 16 of the RS be justified by reference to generally recognized principles to guarantee that similar cases are treated equally.

However, at the moment, the main potential to improve collision management via Article 16 of the RS rests with those institutions provided with the authority to control its application. So far, the ICJ and the General Assembly have not exhausted their – albeit limited – competences in this respect. Both institutions should use their respective powers courageously in order to stabilize and legitimate the application of the norm and should not leave the stage to the Security Council alone.