

## Maintaining the Independence of the International Criminal Court: The Legal and Procedural Implications of an Article 16 Deferral Request

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### Introduction

The International Criminal Court (ICC) and the United Nations (UN) are independent international institutions with overlapping interests in the field of international peace and security. The ICC and the UN have a mutually cooperative yet independently functioning relationship, even though the ICC was originally conceived as a judicial body closely related to the UN and working in association with the UN Security Council.<sup>1</sup> The interrelationship between the ICC and the Security Council was an issue of rigorous debate in the negotiation processes and preparatory commission of the ICC Statute. The *travaux préparatoires* of the ICC Statute show that the drafters acknowledged the primary role of the Security Council in determining threats or breaches of the peace and acts of aggression. This is reflected in the ICC Statute where the Security Council maintains two distinct powers in the functioning of the ICC. First, under Article 13(b) the Security Council may, acting under Chapter VII of the UN Charter, refer a situation to the ICC. The referral power of the Security Council is unique in that it allows the ICC to bypass the territory and nationality bases for jurisdiction required for a State party referral or the Prosecutor acting in *proprio motu*. Second, under Article 16 the Security Council may, acting under Chapter VII, request the ICC to defer a situation or prosecution for a period of twelve months, with the possibility of renewal.

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<sup>1</sup> CONDORELLI, Luigi & Santiago VILLALPANDO. "Referral and Deferral by the Security Council". In Antonio Cassese, Paola Gaeta & John R.W.D. Jones (eds.). *The Rome Statute of the International Criminal Court*. Volume I. Oxford: Oxford University Press, 2002, p. 627; see also Article 24 and Article 39, UN Charter, 1 U.N.T.S. XVI (1945).

The potential deferral power granted to the Security Council via Article 16 of the ICC Statute raises new and interesting questions about the legal and procedural implications of such a deferral. Bearing in mind the relationship between the UN and the ICC as laid out in the ICC Statute and the Relationship Agreement between the UN, this thesis illuminates the critical conflict inherent in the interrelationship between a political body, the Security Council, and an independent judicial body, the ICC. Although the Security Council is granted two important functions in the ICC — the powers of referral and deferral — the ICC must maintain its independence from political influence in order to effectively carry out its functions, namely to provide international justice for perpetrators of core international crimes.

Section one of the thesis presents the requirements needed for a valid deferral of a situation or prosecution under Article 16 in conformity with the underlying rationale behind Article 16. Section two examines the relationship between the ICC and the Security Council and reviews specific instances when Article 16 has been invoked in prior Security Council resolutions. Through comparing and contrasting the actual use of Article 16 in these Security Council resolutions with the original intended purpose of Article 16, it shows that actual practice and intended purpose are divergent. Section three analyzes the ICC power of judicial review over an Article 16 request by examining the powers of the UN Security Council vis-à-vis the organs of the ICC. Section four presents the legal and procedural implications of an Article 16 deferral including the legal basis for such a deferral and its impact on the investigation and prosecution stage. Finally, Section five looks at the impact of a deferral on a multiplicity of components in ICC proceedings.

By highlighting the legal and procedural implications arising out of an Article 16 deferral, this thesis takes the debate further by showing that the ICC needs to maintain its independence by limiting the unique role of the Security Council in deferring investigations or prosecutions. The power of deferral should only be applied in special situations where the proceedings at the ICC interfere with or impede the restoration of international peace and security. The Security Council, in making an Article 16 deferral request, should identify the specific proceedings that must be temporarily suspended in order to create peace in a situation. Further, the mandate of the Prosecutor, the rights of the defense, and interests of victims and witnesses affected by a deferral must be taken into account when reviewing the Article 16 request. The creation of the ICC was a highly lauded achievement. Nevertheless, in order to continue the effective functioning of a permanent international criminal court, the independence of the Court must be strengthened and supported.

## 1. Security Council deferral under Article 16 of the ICC Statute

One of the most contentious issues in the negotiations of the ICC Statute was the power of the Security Council to influence proceedings at the ICC. The ability of a political organ of the UN tasked with the primary, but not exclusive, responsibility of maintaining international peace and security to interfere with the procedures of an independent judicial body was a point of contention among the States.<sup>2</sup> This was a new issue facing states as the previous international criminal tribunals, the *ad hoc* tribunals of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) were created by the Security Council under Chapter VII. However, the ICC was a separate, permanent, and independent judiciary created through the voluntary consent of State parties. Of which, a positive result was the role of the Security Council in ICC proceedings was limited but not completely excluded.

One of the unique powers of the Security Council to influence and direct proceedings at the ICC includes the power to stop impending or ongoing investigations or prosecutions under Article 16, which states,

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

The proposal of a Security Council deferral was one of the most contentious issues during the negotiation process of the ICC.<sup>3</sup> As explained in the following section, the final text of Article 16 was a compromise solution reached between various states with differing ideas about the capacity of the Security Council to interfere with proceedings at the ICC. The following sections present an analysis of the original rationale for including Article 16 and then highlights how, in practice, the Security Council resolutions invoking Article 16 have been inconsistent with the original purpose of the Article.

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<sup>2</sup> See SCHABAS, William A. *The International Criminal Court: A Commentary on the Rome Statute*. Oxford: Oxford University Press, 2010, p. 325 (“One of the most difficult political issues in the *Rome Statute* is the relationship with the United Nations Security Council.”); see also YEE, Lionel. “The International Criminal Court and the Security Council: Articles 13(b) and 16”. In Roy S. Lee (ed.). *The International Criminal Court: The Making of the Rome Statute*. The Hague: Kluwer Law International, 1999, p. 150 (stating delegates opposed the original ILC draft for reasons of political interference in the Court by the Security Council).

<sup>3</sup> See Report of the Ad Hoc Committee on the Establishment of an International Criminal Court, UN GAOR, 50th Session, Supplement No. 22, UN Doc. A/50/22 (1995) ¶¶ 124-125; see also Report of the Preparatory Committee on the Establishment of an International Criminal Court, Volume I (Proceedings of the Preparatory Committee during March-April and August 1996), UN GAOR, 51st Session, Supplement No. 22, UN Doc. A/51/22 (1996) ¶¶ 140-144.

### 1.1. Rationale for allowing Security Council deferral under Article 16

The initial International Law Commission's (ILC) draft envisioned the Security Council deferral power very differently. The 1994 ILC draft statute stated in article 23(3),

No prosecution may be commenced under this Statute arising from a situation which is being dealt with by the Security Council as a threat to or a breach of the peace or an act of aggression under Chapter VII of the Charter, unless the Security Council otherwise decides.<sup>4</sup>

Draft article 23(3) differs from the final Article 16 in that it gives the ICC the responsibility of monitoring situations actively on the Security Council's agenda and requires the ICC to exercise self-restraint with respect to prosecuting the case.<sup>5</sup> Under the rubric of draft article 23(3), when the Security Council is dealing with a situation under Chapter VII, the ICC must not simultaneously be seized of the matter, unless the Security Council gives authorization to the ICC. This is analogous to the relationship between the Security Council and the General Assembly in Article 12(1) of the UN Charter, which provides that while the Security Council is dealing with a situation, the General Assembly should not make any recommendations with regard to that dispute or situation, unless the Security Council gives its request. However, in the *Wall* Advisory Opinion, the International Court of Justice (ICJ) confirmed that the prohibition of simultaneous action has been superseded by practice.<sup>6</sup> It remains, however, that the exclusive powers of the Security Council are confined to the realm of coercive and enforcement actions. The ILC draft article imagined that the ability of the ICC to prosecute would be secondary to a primary determination by the Security Council to establish peace.

By maintaining that the Security Council, under Chapter VII, had the authority to determine matters pertaining to threats or breaches of the peace, or acts of aggression for the purposes of the ICC, the ILC draft article reaffirmed the primary role of the Security Council in maintaining peace and security. However, draft article 23(3) was controversial among many delegates who thought it gave the Security Council the power to interfere with the independence of the ICC.<sup>7</sup> Given that the Security

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<sup>4</sup> Draft Statute for an International Criminal Court Prepared by the International Law Commission, in Report of the International Law Commission on the Work of its Forty-Sixth Session, UN GAOR, 49th Session, Supp. No. 10, UN Doc. A/49/10 (1994), at 84.

<sup>5</sup> BERGSMO, Morten & Jelena PEJIC. "Article 16: Deferral of Investigation or Prosecution". In Otto Triffterer (ed.). *Commentary on the Rome Statute of the International Criminal Court*. 2nd edition. München/Oxford/Baden-Baden: C.H. Beck/Hart/Nomos, 2008, pp. 595-596.

<sup>6</sup> Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004, ¶¶ 27-28.

<sup>7</sup> See YEE, *supra* note 2, at 150.

Council is a political body, delegates expressed concern that just one veto of the permanent five members could effectively block action on the part of the ICC. This, the delegates feared, would interfere with the independent functioning of the Court and give undue influence to the Security Council over matters at the ICC. In addition, the delegates imagined a situation where the Security Council would seize itself of a matter for an indefinite period of time, due to political reasons, thereby foreclosing the ICC from taking up the situation and obstructing international criminal justice.

Given the concerns expressed by various delegates, the delegation from Singapore proposed a compromise solution during the August 1997 Preparatory Committee session.<sup>8</sup> The “Singaporean Compromise” stated that Article 16 required a positive action by the Security Council requesting that,

No investigation or prosecution be commenced or proceeded with under this Statute where the Security Council has acting under Chapter VII of the Charter of the United Nations, given a direction to that effect.<sup>9</sup>

This compromise recognized the role of the UN Security Council in the maintenance of international peace and security but avoided unnecessary interference by the Security Council in ICC proceedings by requiring a positive step by the Security Council to seek a deferral. It also quelled fears that the permanent five members of the Security Council might wield a disproportionate amount of power by requiring the suspension of proceedings to be approved by nine members of the Security Council with no veto by a permanent five member. The Singaporean proposal, however, did broaden the scope of the deferral by allowing the Security Council to stop an investigation or prosecution before it was initiated and *after* it was underway; whereas the ILC draft article only allowed for deferrals prior to commencement of ICC action. This raises interesting questions as to whether there are limits as to what stage of the investigation or prosecution the deferral may be requested, as the drafters did not limit the “commenced or proceeded with” language to a certain stage in the investigation or prosecution. These limits will be further analyzed in Section 3.3 *infra*.

The Canadian delegation added a temporal scope to the proposal deferral request from Singapore by requiring the deferral be limited to a twelve-month period. The deferral was renewable, if the Security Council took another formal decision under Chapter VII to renew it.<sup>10</sup> In the end, the United Kingdom consolidated these

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<sup>8</sup> Decisions taken by the Preparatory Committee, 4 to 15 August 1997, UN Doc. A/AC.249/L.8/Rev.1 (1997).

<sup>9</sup> UN Doc. Non-Paper/WG.3/N.16 (8 August 1997); see also BERGSMO & PEJIC, *supra* note 5.

<sup>10</sup> The Canada proposal state, “No Investigation or Prosecution may be commenced or proceeded with under this Statute for a period of twelve months where the Security Council has, acting under Chapter VII of the Charter of the United Nations, notified the Court to that effect. Notification that the Security Council

proposals and the submitted the draft that became the basis for the final wording of Article 16.<sup>11</sup>

David Scheffer, the United States delegate to the Rome Conference, stated that the original intent of Article 16 was to grant the Security Council the power to suspend an investigation or prosecution of situations *before* either is launched and only if the priorities of international peace and security compelled such a delay.<sup>12</sup> Accordingly, an Article 16 deferral was only to be used at the beginning of situation triggering ICC jurisdiction and not after an investigation had commenced or arrest warrants had been issued. Scheffer argued the intent of Article 16 was to grant the Security Council a means by which it could preemptively delay a situation possibly coming under ICC jurisdiction in order to “focus exclusively on performing the Council’s mandated responsibilities for international peace and security objectives”.<sup>13</sup> However, given the actual wording of Article 16, it is clear that the power of deferral may be invoked to suspend an investigation or prosecution both before and after it has started. In addition, the language of Article 16 even allows the Security Council to suspend the on-going prosecution of an individual before the ICC, by allowing the deferral to be invoked after a prosecution has proceeded.

## 1.2. Prior examples of Security Council resolutions invoking Article 16

To date, Article 16 has not been used to prevent the initiation of or to cease the continuation of proceedings at the ICC in a manner envisioned by the drafters of the ICC Statute. Instead, it has been used to preemptively grant a broad-based immunity to a group of people, namely nationals who are part of a UN peacekeeping contingent.<sup>14</sup> The three instances where either Article 16 has specifically been invoked or comparable language was included in a Security Council resolution demonstrate that the original purpose and intent of including Article 16 is at odds with the current practice of invoking the deferral. Security Council Resolutions 1422 (2002), 1497 (2003), and 1593 (2005) granted immunity to nationals of non-state parties to the ICC Statute, protecting them from the reaches of the ICC’s jurisdiction or criminal

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is continuing to act may be renewed at twelve months intervals,” UN Doc.A/CONF.183/C.1/L.20; see also YEE, *supra* note 2, at 151.

<sup>11</sup> Draft Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, art. 10 at 46, UN Doc. A/CONF.183/10 (July 17, 1998).

<sup>12</sup> SCHEFFER, David. *The Security Council’s Struggle over Darfur and International Justice*, Jurist Forum, Aug. 20, 2008, <http://jurist.law.pitt.edu/forumy/2008/08/security-councils-struggle-over-darfur.php>

<sup>13</sup> *Id.*

<sup>14</sup> See JAIN, Neha. “A Separate Law for Peacekeepers: The Clash Between the Security Council and the International Criminal Court”. 16 *Eur. J. Int’l L.* (2005), 239, 247 (arguing the drafting history of Article 16 clearly shows it was not meant to be used as a blanket provision exempting a class of persons from jurisdiction of the ICC).

courts of other states with jurisdiction.<sup>15</sup> Far from being a valid deferral for reasons of international peace and security, the Security Council's grant of immunity for certain members of a peacekeeping force is the embodiment of political interference with the ICC that is undesirable given the principles of non-discrimination in international criminal law.<sup>16</sup>

### *1.2.1. Security Council Resolution 1422 (2002)*

Security Council Resolution 1422 (2002) is an example of objectionable political maneuvering on the part of one permanent five member, the United States, in successfully manipulating the Security Council to further its opposition to the ICC. Knowing the ICC Statute would enter into force on July 1, 2002, starting in May 2002, the US announced it would oppose the renewal of all UN Security Council mandates for peacekeeping unless the Council granted immunity from prosecution by the ICC for all US peacekeeping personnel.

On June 30, 2002, the renewal of the Bosnia and Herzegovina peacekeeping mission was on the Security Council's agenda and the US threatened to veto it, as well as all future UN peacekeeping operations, unless their demands were met. Against the backdrop of intense opposition to the US position, including a statement from then-Secretary-General Kofi Annan calling the US proposal a dangerous and irresponsible threat to peacekeeping and a violation of the UN Charter, the Security Council unanimously adopted Resolution 1422 on July 12, 2002.

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

While the language of the resolution states it is "consistent with the provisions of Article 16", it is clear that the operation of this preemptive blanket immunity is not consistent with the legal understanding of how Article 16 should apply in practice. First, Article 16 was not intended as a preemptive grant of immunity from criminal prosecution, it was intended to suspend a situation pending at the ICC

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<sup>15</sup> *Id.* at 240. Security Council Resolutions 1422, 1487, and 1497 were the result of concerted opposition by the United States against the ICC exercising jurisdiction over peacekeepers.

<sup>16</sup> See STAHN, Carsten. "The Ambiguities of Security Council Resolution 1422 (2002)". 14 *Eur. J. Int'l L.* (2003), pp. 85, 86.

only in the case it would endanger international peace and security. Second, Article 16 could only be operational after the ICC Prosecutor had identified a situation, after conducting a preliminary examination, or after an individual was charged thus commencing the prosecution.<sup>17</sup>

In June 2003, when the resolution was placed on the agenda for renewal, the debate centered on this operative paragraph. Secretary-General Kofi Annan went on the record to state that Article 16 never intended to grant such sweeping immunity and such a request for immunity was not necessary.<sup>18</sup> Canada reiterated its concern over the intention of the resolution at securing exemptions for some nationals from ICC jurisdiction and stated this went against the principle of fair and equal application of the law.<sup>19</sup> New Zealand expressed its serious concern about the use of Article 16 to provide a generic immunity for certain personnel, thus creating a double standard for peacekeeping personnel.<sup>20</sup> Many states expressed similar concerns as those voiced by Canada and New Zealand.<sup>21</sup> However, the resolution was renewed for an additional twelve-month period as Resolution 1487, with twelve states voting in favor and France, Germany, and Syria abstaining.

### *1.2.2. Security Council Resolution 1497 (2003)*

In August 2003, the Security Council acting under Chapter VII passed Resolution 1497 establishing a multinational force in Liberia tasked with supporting the implementation of the ceasefire agreement.<sup>22</sup> Again, at the insistence of the US, the resolution contained language that granted immunity from ICC jurisdiction for peacekeeping personnel who were nationals of non-state parties to the ICC Statute. Operative paragraph 7 stated, *Decides* that current or former officials or personnel from a contributing State, which is not a party to the Rome Statute of the International Criminal Court, shall be subject to the exclusive jurisdiction of that contributing State for all alleged acts or omissions arising out of or related to the Multinational Force or United Nations stabilization force in Liberia, unless such exclusive jurisdiction has been expressly waived by that contributing State.

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<sup>17</sup> See STAHN, *supra* note 16, at 90 (arguing that the systematic interpretation of Article 16 lends support to the view that the deferral was meant to be assessed on a case-by-case basis and did not provide for extensive preventative action).

<sup>18</sup> Statement of the Secretary-General, UN Security Council 4472nd meeting, at 2-3, UN Doc. S/PV.4772 (June 12, 2003).

<sup>19</sup> Statement of Canada, *id.* at 4.

<sup>20</sup> Statement of New Zealand, *id.* at 5-6.

<sup>21</sup> See Statements of Jordan, Switzerland, Liechtenstein, Greece (on behalf of the European Union), Iran, Uruguay, Malawi, Brazil, Peru (on behalf of the Rio Group), South Africa, Nigeria, and Netherlands, UN Security Council 4472nd meeting, UN Doc. S/PV.4772 (June 12, 2003).

<sup>22</sup> Security Council Resolution 1497, UN Soc. S/RES/1497 (Aug. 1, 2003).

Mexico, in abstaining from the vote, voiced opposition to the inclusion of operative paragraph seven, stating that its inclusion was irrelevant to the objective of restoring peace and security in Liberia.<sup>23</sup> Further, Mexico stated that inclusion of this paragraph would set a serious precedent that undermined States' own national legislation providing for the exercise of criminal jurisdiction in cases where crimes are committed against their nationals abroad.

Germany and France, also abstaining from the vote, opposed operative paragraph 7, stating it went beyond its limits in restricting the jurisdiction of the ICC, as well as limiting the national jurisdiction of third countries with respect to crimes committed by nationals of non-State parties to the ICC Statute.<sup>24</sup> Whether Resolution 1497 meant to invoke Article 16 without expressly referencing it is unclear. The statements in the Security Council show that the abstaining States were considering the ICC Statute and the impact of operative paragraph 7 in their vote.<sup>25</sup> However, the absence of a temporal scope in operative paragraph 7 and a plain meaning interpretation of the wording allow the immunity granted to last indefinitely. Again, this is inconsistent with the requirement of Article 16, which did not envision an indefinite deferral. Further, Article 16 is only relevant in the context of ICC proceedings, whereas operative paragraph 7 also excludes all other states from exercising jurisdiction over UN peacekeeping personnel under traditional bases of jurisdiction, such as territorial jurisdiction or passive personality.<sup>26</sup>

Given that Liberia is not a state party to the ICC Statute, the concern that the ICC would exercise jurisdiction over nationals of non-state parties for acts committed in Liberia seems unfounded. All this lends heavily to the argument that the Council acted *ultra vires* by including operative paragraph 7 because there is no link between the situation warranting the exercise of Chapter VII powers (the civil war in Liberia) and the justification for providing criminal immunity for certain peacekeepers.<sup>27</sup> In the event of the Security Council acting *ultra vires*, the effect would be that this operative paragraph 7 is void.

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<sup>23</sup> UN Security Council 4803rd meeting, at 2-3, UN Doc. S/PV.4803 (Aug. 1, 2003).

<sup>24</sup> *Id.* at 4-7.

<sup>25</sup> See Statements by Mexico, Germany and France, UN Doc. S/PV.4803 (Aug. 1, 2003).

<sup>26</sup> See ZAPPALA, Salvatore. "Are Some Peacekeepers Better Than Others? UN Security Council Resolution 1497 (2003) and the ICC". 1 *J. Int'l Crim. J.* (2003), pp. 671, 673.

<sup>27</sup> *Id.* at 674-675.

### 1.2.3. Security Council Resolution 1593 (2005)

In 2005, following the recommendations contained in the Report to the Secretary-General by the International Commission of Inquiry on Darfur<sup>28</sup>, the Security Council passed Resolution 1593.<sup>29</sup> Acting under Chapter VII, the Security Council determined that the situation in Sudan constituted a threat to international peace and marked the first time the Security Council referred a situation to the ICC pursuant to Article 13(b) of the ICC Statute.

It was an important message to the international community that the interests of peace and interests of justice could be pursued simultaneously.<sup>30</sup> The preamble of the Resolution referred to Article 16, “*Recalling* article 16 of the ICC Statute under which no investigation or prosecution may be commenced or proceeded with by the International Criminal Court for a period of 12 months after a Security Council request to that effect”. However, there was no explicit mention of Article 16 in the controversial operative paragraph 6, *Decides* that nationals, current or former officials or personnel from a contributing State outside Sudan which is not a party to the Rome Statute of the

International Criminal Court shall be subject to the exclusive jurisdiction of that contributing State for all alleged acts or omissions arising out of or related to operations in Sudan established or authorized by the Council or the African Union, unless such exclusive jurisdiction has been expressly waived by that contributing State.

In the Security Council session, the US voiced its fundamental objections to the ICC Statute including the fear that the ICC could exercise jurisdiction over national or non-State parties to the ICC Statute. The US claimed that non-State parties should be able to opt out of the Court’s jurisdiction.<sup>31</sup> The US abstention from the vote was the key compromise reached with other members of the Security Council in passing the resolution but with the compromise of including operative paragraph 6.

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<sup>28</sup> Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General Pursuant to Security Council Resolution 1564 of 18 September 2004 (Jan. 25, 2005). Available at [http://www.un.org/news/dh/sudan/com\\_inq\\_darfur.pdf](http://www.un.org/news/dh/sudan/com_inq_darfur.pdf).

<sup>29</sup> UN Security Council Resolution 1593 passed with eleven votes in favor, none against and four abstentions (Algeria, Brazil, China and USA), UN Doc. S/RES/1593 (2005).

<sup>30</sup> See Statements by the United Kingdom, Greece and the Russian Federation. Abstaining states, China and Algeria, stressed the importance of addressing impunity and bringing perpetrators of international crimes to justice. 5158th meeting of the UN Security Council, Reports of the Secretary-General on the Sudan, UN Doc. S/PV.5158 (March 31, 2005).

<sup>31</sup> Statement of United States, *id.* at 3.

Denmark, in opposition to the US statements, interpreted operative paragraph 6 as having no effect on universal jurisdiction and the ability of Member States to exercise jurisdiction over war crimes, torture, and terrorism.<sup>32</sup> The Philippines, in a strongly worded criticism stated, “Operative paragraph 6 of the resolution is killing its [ICC] credibility – softly, perhaps, but killing it nonetheless . . . Operative paragraph 6 subtly subsumed the independence of the ICC into the political and diplomatic vagaries of the Security Council.”<sup>33</sup> Brazil did not support the resolution due to operative paragraph 6, “through which the Council recognizes the existence of exclusive jurisdiction, a legal exception that is inconsistent in international law”.<sup>34</sup>

Moreover, this resolution preemptively gave sweeping immunity to certain UN peacekeepers from the criminal jurisdiction of the ICC. The Permanent Representatives from Brazil, Canada, New Zealand and South Africa drafted a letter challenging the legitimacy of the Resolution stating, the Security Council’s pursuit of this matter, despite the opposition of the international community, was “damaging international efforts to combat impunity, the system of international justice, and the collective ability to use these systems in the pursuit of international peace and security.”<sup>35</sup> The resolution made no connection between maintaining peace and security in Darfur and granting preemptive immunity to peacekeepers. Further, the operative paragraph did not provide for a time limit as required under Article 16, which arguably rendered the paragraph void.<sup>36</sup>

Following the Security Council referral of the situation in Darfur, the ICC proceedings did not mention operative paragraph 6 of the Resolution. The ICC Pre-Trial Chamber did not address or analyze the legality of operative paragraph 6 in its decisions regarding the situation in Sudan; it only stated that the referral of the situation to the ICC came from the Security Council acting pursuant to Article 13(b) of the ICC Statute.<sup>37</sup> Unfortunately, neither the Pre-Trial Chamber nor the Appeals Chamber took the opportunity to give judicial review to the substance of operative paragraph 6, which directly affects the jurisdiction of the ICC.

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<sup>32</sup> Statement of Denmark, *id.* at 6.

<sup>33</sup> Statement of Philippines, 5158th meeting of the UN Security Council, Reports of the Secretary-General on the Sudan, UN Doc. S/PV.5158, at 6 (March 31, 2005).

<sup>34</sup> Statement of Brazil, *id.* at 11.

<sup>35</sup> Press Release, UN Security Council 4572nd Meeting, *Security Council Requests International Criminal Court Not to Bring Cases Against Peacekeeping Personnel From States Not Party to Statute*, UN Doc. SC/7450 (July 12, 2002). Available at <http://www.un.org/News/Press/docs/2002/sc7450.doc.htm>

<sup>36</sup> See *e.g.*, WILLIAMS, Sharon & William SCHABAS. “Article 17”. In Triffterer (ed.). *Ob. cit.*, pp. 572-573.

<sup>37</sup> There is no mention of Article 16 in arrest warrants for Harun, Kushayb or Al Bashir. See Prosecutor v. Ahmad Muhammad Harun and Ali Muhammad Al Abd-Al-Rahman, ICC-02/05-01/07, Warrant of Arrest for Ahmad Harun and Warrant of Arrest for Ali Kushayb (Pre-Trial Chamber I, April 27, 2007); Prosecutor v. Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09, Warrant of Arrest (Pre-Trial Chamber I, March 4, 2009).

Perhaps this was because the Resolution 1593 was specifically referring a situation to the Court and did not invoke Article 16 explicitly to defer a situation or prosecution. However, analysis by the Court would have been a welcome insight into how the Court viewed an Article 16-like deferral in the context of a broader Security Council referral.

## 2. Relationship between the ICC and the Security Council

The establishment of the ICC as a permanent and independent international criminal court is inherently different from the origins of the *ad hoc* tribunals of the ICTY and ICTR, which were established under Security Council resolutions. Despite being an independent criminal court with separate legal personality, the Security Council may still be involved in a substantive manner with the proceedings at the ICC. The UN Security Council has three specific roles in the operation of the ICC. First, it has the power to refer a situation to the Court, thus constituting one of the triggering mechanisms for the Court's jurisdiction.<sup>38</sup>

Second, the Security Council may play an enforcement role. Where a state party refuses to cooperate with the Court, the Court may refer the situation to the Security Council for action.<sup>39</sup> Lastly, the Security Council has the power of deferral under Article 16. The relationship between the ICC and the Security Council was contentious in the Rome Preparatory Conference with Article 16 representing a compromise that did not please all States concerned. In addition, non-governmental organizations viewed Article 16 as a political encroachment upon the independence of the ICC.<sup>40</sup>

Some commentators argue that the unique power of the Security Council to refer a situation to the court and to defer an investigation or prosecution results in "two courts in one" allowing the bypass of certain procedural steps due to the nature of the Security Council involvement.<sup>41</sup> However, in order to maintain independence, the ICC should handle referrals and deferrals by the Security Council only in a manner consistent with what is provided for in the ICC Statute and the Rules of Procedure and Evidence. In other words, the Prosecutor and the Chambers should examine Security Council referral and deferral requests with the same level of scrutiny as

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<sup>38</sup> Article 13(b), Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9 (July 17, 1998) [hereinafter ICC Statute].

<sup>39</sup> ICC Statute, *supra* note 38, Article 87(7).

<sup>40</sup> SCHABAS, *supra* note 2, at 328.

<sup>41</sup> FLETCHER, George P. & Jens David OHLIN. "The ICC – Two Courts in One?". 4 *J. Int'l Crim. Just.* (2006), p. 428.

would be applied to a State party referral or the Prosecutor acting in *proprio motu*, to the extent possible. As stated in *Tadic*, the Security Council may have the power to create a judicial organ but it does not have the power to interfere with the technical and legal functions of that judicial body.<sup>42</sup> Similarly, in order to maintain independence and autonomy of the ICC, the Security Council and the ICC have a division of labor: the Security Council should deal with matters of collective justice, while the ICC should deal with matters of individual justice.<sup>43</sup>

The independence of the ICC with respect to the Security Council was reaffirmed in the Kampala Review Conference in June 2010, particularly with respect to the crime of aggression. Under the new amendments for the crime of aggression, the Prosecutor may open an investigation into the crime of aggression after the Court's jurisdiction has been triggered by a State party referral or by the Prosecutor acting in *proprio motu*.<sup>44</sup> This new scheme provides that a Security Council determination on an act of aggression, while helpful, is not determinative. The Security Council may make a determination that an act of aggression has occurred and thus the Prosecutor may proceed. However, absent a determination by the Security Council within six months, the Prosecutor may proceed after obtaining authorization from the Pre-Trial Chamber.<sup>45</sup> The possibility of an Article 16 deferral remains in place under this scheme, which has the potential to block effectively the Prosecutor proceeding with the investigation. The new amendments from the Kampala Review Conference strengthen the independence and power of the ICC to make its own judicial determination on whether the crime of aggression has been committed for the purposes of an ICC investigation. It reinforces the independence of the Court to conduct its own judicial review. Further, the "determination of an act of aggression by an organ outside the Court shall be without prejudice to the Court's own findings

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<sup>42</sup> See *Prosecutor v. Tadic*, "The establishment of the International Tribunal by the Security Council does not signify, however, ... that the Security Council was usurping for itself part of a judicial function which does not belong to it but to other organs of the UN according to the Charter", as cited by Mohamed El Zeidy, "The United States Dropped the Atomic Bomb of Article 16 of the ICC Statute: Security Council Power of Deferrals and Resolution 1422". *Vand. J. Transnat'l. L.*, 35, 2002, pp. 1503, 1529.

<sup>43</sup> OHLIN, Jens David. "Chapter 11: Peace, Security, and Prosecutorial Discretion". In Carsten Stahn & Göran Sluiter (eds.). *The emerging practice of the International Criminal Court*. Leiden/Boston: Martinus Nijhoff, 2009, p. 196.

<sup>44</sup> See Article 15 *bis*, paragraph 6, stating, "Where the Prosecutor concludes that there is a reasonable basis to proceed with an investigation in respect of a crime of aggression, he or she shall first ascertain whether the Security Council has made a determination of an act of aggression committed by the State concerned. The Prosecutor shall notify the Secretary-General of the United Nations of the situation before the Court, including any relevant information and documents." Article 15 *bis*, Exercise of jurisdiction over the crime of aggression (State referral, *proprio motu*), Resolution RC/Res.6, Adopted at the 13th plenary meeting, ICC Review Conference (June 11, 2010).

<sup>45</sup> *Id.* at ¶ 7-8.

under this Statute” is a powerful statement about the independence of the Court. Therefore, the Court is not bound by a determination of the Security Council. This conclusion reached in Kampala shows that the intent of the State parties is to move the Court in a direction of independence and strengthen its powers vis-à-vis the UN or Security Council.

## 2.1. Judicial Review of a Security Council request under Article 16

Whether or not an Article 16 deferral request by the Security Council is automatically binding on the ICC, an interesting question arises about the scope of judicial review the ICC possesses over the Article 16 request. As stated previously, Pre-Trial Chamber I did not engage in judicial review over operative paragraph 6 of Security Council Resolution 1593, which referred the situation in Darfur to the Court. Despite this, the ICC has the inherent power to conduct judicial review over Article 16 deferral requests as part of their implied powers and to the extent that it is necessary to carry out the purpose and functions of the Court.<sup>46</sup> The following section analyzes the contours and limits of the legality of an Article 16 request and the scope of judicial review.

### 2.1.1. Legality and Competence

A Security Council Resolution passed under Chapter VII has the presumption of legality and the specifics of the resolution must abide by the requirements under Chapter VII and the purposes of the UN Charter.<sup>47</sup> A resolution by the Security Council that is *ultra vires* makes the resolution null and void. The presumption of validity does not preclude judicial review, although the ICJ has been reluctant to review directly the legality of Security Council resolutions.<sup>48</sup> This reluctance is

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<sup>46</sup> See *Reparations for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 1948 I.C.J. 174 (April 11) (arguing for a broad interpretation of implied powers).

<sup>47</sup> *Certain Expenses of the United Nations*, Advisory Opinion, 1962 I.C.J. 151 (June 20), at 221-224. See also Separate Opinion of Judge Morelli favoring a very strong presumption of legality of actions of UN organs, in the interest of legal certainty and efficiency of organization.

<sup>48</sup> *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v United Kingdom)*, 1999 I.C.J. Reports 975 (June 29) [hereinafter *Lockerbie case*]. Other Courts have indirectly reviewed the legality of Security Council resolutions. The European Court of Justice indirectly reviewed the legality of a Security Council Resolution in the *Kadi* case where it reviewed a European Community regulation implementing a Security Council resolution with regards to fundamental rights as protected by Community law. See *Joined cases of Yassin Abdullah Kadi and Al-Barakaat International Foundation v. Council of the European Union and Commission of the European Communities*, European Court of Justice, Case Nos. C-402/05 P, C-415/05-P (Sept. 3, 2008). The European Court of Human Rights also indirectly reviewed the human rights impact of an EC Regulation which gave effect to a UN Security Council resolution in *Bosphorous Airways v. Ireland*, Application No. 45036/98, Eur. Ct. H.R. (June 10, 2005).

understandable given the powers and competences of both the ICJ and the Security Council: two organs of the UN that have the same standing, *i.e.*, one is not more powerful than the other. This may also have to do with the fact that the ICJ and Security Council are the only two organs with the power of compulsory and binding orders on Members States as per Articles 25 and 94 of the UN Charter. However, this relationship does not apply to the ICC and the Security Council.

In order to pass a resolution under Chapter VII, the Security Council must first make a determination that the given situation is a threat to or breach of international peace and security, or an act of aggression. Under Article 16, the Security Council must make this primary determination about a given situation, *i.e.*, it is a threat to international peace and security, and then the Security Council must decide that an ICC deferral is a means of restoring or maintaining the peace and security. In other words, there must be a nexus between the situation threatening international peace and security and the suspension of ICC proceedings in facilitating a successful resolution of the peace and security situation. The request must be limited to a twelve-month period, with the possibility of renewal. These basic guidelines govern an Article 16 deferral request. The ICC has the authority to review a Security Council resolution *de novo* based on its own *la compétence de la compétence* and in order to maintain the Court's independence.

Article 4 of the Rome Statute states the Court has international legal personality and legal capacity as necessary for the exercise of its functions and fulfillment of its purposes. The ICTY in *Tadic* found that in order to address the issue of whether the Security Council had the power to create an *ad hoc* tribunal, the court itself had the power and authority implicit in reviewing this question.<sup>49</sup> This same reasoning applies to the ICC: it has the jurisdiction to determine its own jurisdiction and since an Article 16 deferral affects the jurisdiction of the Court over a proceeding, the ICC has judicial review over this deferral request. Therefore, the ICC has the inherent power of judicial review in determining the legality of the Security Council request in relation to the Court's own purpose, mission, interests of justice and independence.<sup>50</sup>

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<sup>49</sup> See Prosecutor v. Tadic, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 18 (Appeal Chamber, Oct. 2, 1995).

<sup>50</sup> William Schabas asserts that as far as the ICC is not an organ of the UN, the extent to which a Security Council resolution was an abuse of power, citing Resolution 1422, the ICC could theoretically review a challenge to the legality of the resolution. SCHABAS, William. *An introduction to the International Criminal Court*. 3rd edition. Cambridge: Cambridge University Press, 2007, p. 169.

### 2.1.2. Legal Analysis of the Article 16 request by the ICC

There are two levels of legal analysis that the ICC must engage with upon granting judicial review to an Article 16 request: Constitutionality and Legality. Constitutionality examines the powers of the Security Council under the UN Charter. First, the ICC should analyze whether the deferral request was in accordance with Chapter VII of the UN Charter and general principles of international law. Legality examines the rules and limits set forth in the ICC Statute. Under this second line of inquiry, the ICC should analyze whether the deferral request was made in accordance with the ICC Statute. These are two independent lines of inquiry and a holding in one is not binding upon the outcome of the other.

Under Constitutionality, the first level of analysis, the ICC would engage in an examination of whether the deferral request complied with the requirements of the UN Charter and general principles of international law. Any act by the Security Council must be made in accordance with the principles laid out in Article 1 of the UN Charter, namely to maintain international peace and security, to promote international co-operation, strengthen universal peace, and to promote human rights.<sup>51</sup> The deferral request must be made under a Chapter VII action; therefore, the Security Council must make a determination that there was a threat to or breach of the peace, or an act of aggression in a particular situation. Following this determination, the Council should find that deferring this particular investigation or prosecution at the ICC is an appropriate means of maintaining international peace and security. The Security Council is required to identify the specific situation that is under investigation or identify the particular person or persons implicated in the prosecution. The Court must be satisfied that the investigation or prosecution was part of the specific situation addressed by the Security Council in its findings.

For the Constitutional inquiry, analogous questions may be drawn as those asked in the *Tadic* decision determining jurisdiction.<sup>52</sup> The following questions, modified from the *Tadic* decision for the purposes of Article 16, may be asked by the ICC:

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<sup>51</sup> See generally, Article 24(2) UN Charter; see also, CONDORELLI, Luigi & Santiago VILLALPANDO. "Can the Security Council Extend the ICC's Jurisdiction?" In Cassese, Gaeta & Jones (eds.). *Op. cit.*, pp. 571, 579.

<sup>52</sup> The questions in *Tadic* were regarding the establishment of the ICTY by the Security Council under a Chapter VII resolution. The questions were as follows: "(1) Was there really a threat to the peace justifying the invocation of Chapter VII as a legal basis for the establishment of the International Tribunal? (2) Assuming such a threat existed, was the Security Council authorized, with a view to restoring or maintaining peace, to take any measures at its own discretion, or was it bound to choose among those expressly provided for in Articles 41 and 42 (and possibly Article 40 as well)? (3) In the latter case, how can the establishment of an international criminal tribunal be justified, as it does not figure among the ones mentioned in those Articles, and is of a different nature?" See Prosecutor v. Tadic, *supra* note 49, ¶ 27.

1. Was there a threat to the peace justifying invocation of Chapter VII as a legal basis for the deferral request under Article 16 of the ICC Statute?
2. Assuming such a threat existed, was the Security Council authorized, with a view to restoring or maintaining peace, to invoke the deferral request?
3. Is the deferral request justified given the other options available to the Security Council under Articles 41 and 42 (and possibly Article 40 as well)?

In order to answer these questions, the Court must examine the particulars of the situation that prompted the Article 16 deferral request. The Court must keep in mind the obligations of the Security Council with respect to the UN Charter, the Relationship Agreement with the ICC and the extent to which a political body may interfere with an independent legal entity.

Legality is the second level of inquiry for the ICC to engage in its judicial review. Analysis will include whether the Article 16 request was in accordance with the ICC Statute, the purpose and mission of the ICC and follows the parameters of the Relationship Agreement between the UN and the ICC. The purpose and mission of the ICC is to end impunity for international crimes, to enforce international justice, to support complementarity, and to support the principles of the UN Charter.<sup>53</sup> The UN and the ICC have a close working relationship but maintain independence.<sup>54</sup> Bearing in mind the judges of the ICC must remain independent in their decisions; a political decision by the Security Council must be scrutinized with the utmost care.<sup>55</sup> Political interference affecting the independence and impartiality of the court would also be incompatible with internationally recognized human rights standards and under Article 21(3) it states that the application and interpretation of law by the Court must be consistent with internationally recognized human rights.<sup>56</sup> Even though the Security Council has the power, under Chapter VII, to create binding

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<sup>53</sup> ICC Statute, *supra* note 38, Preamble.

<sup>54</sup> Article 2, Relationship Agreement between the International Criminal Court and the United Nations, UN Doc. A/58/874, 20 August 2004.

<sup>55</sup> See Article 40(1), ICC Statute; Gilbert Bitti argues that allowing a political body such as the Security Council to interfere with prosecutions at the ICC would be a breach of Article 6 of the European Convention of Human Rights requirement of an independent tribunal. BITTI, Gilbert. Article 21 of the Statute of the International Criminal Court and the treatment of sources of law in the jurisprudence of the ICC. In Carsten Stahn & Göran Sluiter (eds.). *The emerging practice of the International Criminal Court*. Leiden/Boston: Martinus Nijhoff, 2009, p. 304.

<sup>56</sup> See Article 14(1), International Covenant on Civil and Political Rights, UN Doc. A/6315, 999 U.N.T.S. 171 (1966) [hereinafter ICCPR]; see also Article 6(1), European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 222 (1950) [hereinafter ECHR].

obligations, it must not go beyond its mandate to extend the deferral request on the ICC into general and abstract terms.<sup>57</sup>

Each Chamber of the ICC is tasked with different areas of judicial review. In assessing an Article 16 deferral, each Chamber has a slightly different set of inquiries. The Pre-Trial Chamber resolves all matters prior to the commencement of trial. For the purposes of an Article 16 deferral request, this means any request to stop the commencement or continuation of an investigation. In addition, Article 58 states that at any time after the initiation of an investigation, the Pre-Trial Chamber may, at the request of the Prosecutor, issue an arrest warrant for a person if there are reasonable grounds to believe the person committed a crime within the jurisdiction of the Court. Therefore, the deferral request may also impact the issuance of the arrest warrant. The Pre-Trial Chamber is tasked with guaranteeing the interests of justice in the investigative phase. The Pre-Trial Chamber also has judicial review over a decision by the Prosecutor not to proceed with an investigation.<sup>58</sup>

A prosecution starts when an individual formally charged. Prior to the commencement of trial, the individual is brought to appear before the Pre-Trial Chamber to confirm the charges upon which the Prosecutor intends to seek trial.<sup>59</sup> The Trial Chamber is then constituted after the confirmation of charges hearing.<sup>60</sup> An important role of the Trial Chamber is to ensure a fair and expeditious trial, ensure respect for full rights of the accused and give due regard for protection of victims and witnesses.<sup>61</sup> The Appeals Chamber has two main appellate functions. First, it handles all the appeals of decisions of the Trial Chamber.<sup>62</sup> The decisions of the Trial Chamber may be appealed by the Prosecutor or the convicted person for errors of procedure, law, or fact.<sup>63</sup> The convicted person may also appeal on any other grounds that affect the fairness or reliability of the proceedings or decision.<sup>64</sup> The Appeals Chamber also handles interlocutory appeals.<sup>65</sup>

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<sup>57</sup> An analogy may be drawn to deferrals by examining the extent to which the Security Council can extend the jurisdiction of the ICC. Condorelli & Villalpando argue that the Security Council may not extend the jurisdiction of the Court in general and abstract terms and if it were to do so on an *ad hoc* basis, it must be in order to deal with a specific situation. See CONDORELLI & VILLALPANDO, *supra* note 51, at 576.

<sup>58</sup> ICC Statute, *supra* note 38, Article 53(3).

<sup>59</sup> *Id.* at Article 61(1).

<sup>60</sup> *Id.* at Article 61(11).

<sup>61</sup> *Id.* at Article 64(2).

<sup>62</sup> ICC Statute, *supra* note 38, Article 74.

<sup>63</sup> *Id.* at Article 81.

<sup>64</sup> *Id.* at Article 81(1)(b).

<sup>65</sup> *Id.* at Article 82.

Either party may appeal any decision with respect to jurisdiction or admissibility, among other issues, or since a deferral request would invoke the jurisdiction of the Court, this would be a valid basis for an interlocutory appeal. In addition, any decision that would affect the fair and expeditious conduct of the proceedings or affect the outcome of the trial.

### *2.1.3. Challenging an Article 16 deferral*

An Article 16 deferral impacts the jurisdiction of the ICC by halting an investigation or a prosecution and in doing so interferes with the primary jurisdiction of the Court. Therefore, those allowed to challenge the jurisdiction of the Court under Article 19 should also be allowed to challenge the legality of an Article 16 deferral.<sup>66</sup> Challenges to the jurisdiction of the Court may be made by: (1) the accused or a person for whom the warrant of arrest or summons to appear has been issued, (2) the State that has jurisdiction over the case, and (3) the Prosecutor. Victims should also be allowed to submit observations to the Court as far as the deferral request affects their interests. Although challenges to jurisdiction are only to be made prior to the commencement of trial under Article 19(4), since Article 16 allows a deferral request to halt a prosecution, this limitation should not be applied to challenges to the deferral request.

Once an arrest warrant or summons to appear has been issued against an individual, and the Security Council requests a deferral of this prosecution, the individual should be able to challenge the deferral request because it interferes with their due process. By halting the prosecution at this stage, it would place the prosecution in limbo for a one-year period. An accused person has the obvious right to challenge the deferral of the prosecution as it impacts his fair trial rights. The specific rights implicated by this deferral request are discussed in detail in Section 4.2.

A State that has jurisdiction over the case may challenge the jurisdiction of the Court under Article 19(1)(b) on the basis that it is investigating or prosecuting the case domestically. This is the core principle of complementarity and the ICC must give deference to a State that is genuinely investigating or prosecuting. If a State with jurisdiction over the case had itself referred the situation to the ICC, by doing so, the State acknowledged that it was not able or willing to investigate or prosecute it themselves. Therefore, it would be contrary to the interest of the State for the proceeding to be deferred. This is especially the case if the State referred the situation to the Court via an Article 12(3) declaration granting the ICC jurisdiction over the situation without being a State party to the ICC Statute. This brings up the issue

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<sup>66</sup> See CONDORELLI & VILLALPANDO, *supra* note 1, at 651.

of whether the Security Council has the power to interfere in a sovereign State's granting of jurisdiction to the ICC since the deferral would interfere with this jurisdictional matter.

The Prosecutor may also seek a ruling from the Court regarding jurisdiction or admissibility.<sup>67</sup> In addition, the party who made the referral of the situation under Article 13, as well as victims, may also submit observations to the Court regarding jurisdiction. While the decision is pending before the appropriate chamber, the Prosecutor is not prohibited from ceasing all investigative activities. If the Court grants the Prosecutor leave to continue, then the Prosecutor may continue the investigation, take statements or testimony from witnesses, and preserve evidence that would be useful for the future proceedings.<sup>68</sup> Since the request is for a deferral, and not a termination, the Prosecutor should be able to finish his investigative tasks and preserve evidence as necessary, while keeping in mind it might be used in the future.

The Office of the Prosecutor is a separate and independent organ of the Court.<sup>69</sup> It is tasked with the function of establishing the truth and ensuring an effective investigation and prosecution.<sup>70</sup> The purpose and power of the Prosecutor are independent from the political pressures of the Security Council and exist in a separate legal sphere as an independent organ of the ICC. Thus, the Prosecutor's primary job is to seek criminal justice in the form of individual prosecutions. This may conflict with the needs of the Security Council in a specific situation under Article 16, but the request of the Security Council is not automatically binding on the Office of the Prosecutor. Therefore, the Prosecutor should implement any specific Article 16 request as a temporal deferral of an investigation or prosecution, but with the view of eventually completing the investigation or prosecution. Due to the practice reality of a suspension of the investigation or prosecution by an Article 16 deferral request, any challenges to this should be made as soon as practical, *i.e.*, as soon as the deferral request is submitted to the Court and transmitted to all affected persons.

### 3. Legal and procedural implications of an Article 16 deferral

The ICC Rules of Procedure and Evidence are silent with respect to rules governing Article 16. Reference to Article 16, as far as implementation and judicial review,

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<sup>67</sup> ICC Statute, *supra* note 38, Article 19(3).

<sup>68</sup> *Id.* at Article 19(8), which allows the Prosecutor to continue investigating, taking witness statements and collecting evidence pending a ruling by the Court on an Article 19 challenge.

<sup>69</sup> *Id.* at Article 42(1).

<sup>70</sup> *Id.* at Article 54(1).

is also absent in the ICC Statute. However, an Article 16 deferral raises numerous legal and procedural questions. First, an inquiry into the legal basis for the Security Council deferral is necessary, including an evaluation of the requirements that must be met in order to make the deferral request valid. Second, the question arises whether a Security Council request under Article 16 is automatically binding on the ICC or whether the Court has discretion to take up the request or not. Third, there are parties and procedure that will be affected by a deferral, it is important to highlight the implications of the deferral on all those concerned.

### **3.1. Legal basis for Security Council deferral**

Article 16 stipulates that for the Security Council to request a deferral, it must do so under Chapter VII. The legal basis for a Security Council request is thus rooted in Article 39 of the UN Charter. As a preliminary step, the Security Council must find a threat to the peace, breach of the peace, or an act of aggression. Then, it must make a determination that the proceedings at the ICC, either an investigation or a prosecution, has some negative impact on the maintenance of peace and security by directly increasing the threat to the peace or by impeding the peace process or contributing to an act of aggression. In other words, the suspension of the investigation or prosecution must be necessary to maintaining international peace and security. Further, the wording of Article 16 specifies that an investigation or prosecution be identified by the Security Council in order to request the deferral.

The deferral has a limited temporal scope; it may be invoked only for a one-year period. If the Security Council deems it necessary to continue the deferral, then it must pass another resolution under Chapter VII renewing the deferral for another one-year period. This would require the Security Council to make a positive determination that the deferral of the investigation or prosecution by the ICC would be an appropriate means of maintaining or restoring international peace and security.

### **3.2. Is an Article 16 request binding on the ICC?**

The primacy of the UN Charter in international law as stated in Article 103 of the UN Charter brings up potential conflicts with the ICC in dealing with an Article 16 deferral request. In the hierarchy of international law, the UN Charter is supreme; multilateral treaties and other international instruments take their place below the UN Charter.<sup>71</sup> When a conflict arises between the UN Charter and an international

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<sup>71</sup> See *Lockerbie* case, *supra* note 48, (holding obligations arising out of Article 25 and Chapter VII from Security Council resolutions supercede obligations arising out of the Montreal Convention, a subsequent treaty).

treaty, the treaty must be interpreted consistently with the UN Charter.<sup>72</sup> This applies to the ICC Statute and its relationship with the UN Charter. Accordingly, Security Council resolutions passed under Chapter VII are binding on all member states of the UN by virtue of Article 25 of the UN Charter. The resolutions are not automatically binding on the ICC per se, which is an autonomous entity and not a party to the UN Charter.<sup>73</sup> The ICC has international legal personality as stated in Article 4 and may work as necessary to fulfill its functions. Further, the ICC as an international organization is not a member of the UN. Additionally, not all member states of the UN are state parties to the ICC Statute. The separate, independent legal personality of the ICC makes its obligations under the UN Charter fundamentally different from those of Member States of the UN. Under normal circumstances, the ICC will lean in favor of following the resolutions of the Security Council, however this does not mean the resolutions are automatically binding and it certainly does not preclude judicial review.

The nature of the deferral request, passed by the Security Council acting under Chapter VII brings certain implications. Some commentators argue that an Article 16 deferral request is binding upon the organs of the Court, unlike the referral power in Article 13(b), which may be subject to assessment by the Prosecutor and potential review by the Pre-Trial Chamber.<sup>74</sup> While others take a more encompassing approach to the Security Council's power and argue that, even an Article 13(b) referral is a "mandatory and binding expression of international law" and in doing so, the Security Council restricts prosecutorial discretion for cases initiated in *proprio motu* or via State referral.<sup>75</sup> These arguments fail, however, to take into account the explicit provisions in the ICC Statute that grant the Prosecution discretion in deciding not to proceed in accordance with Article 53. It also overlooks the independent nature of the ICC and its inherent power to determine its own jurisdiction.

The Security Council's authority to restore international peace and security is one of its most important powers. When the Security Council requests a deferral under Chapter VII, it should have already determined that the suspension of proceedings at the ICC will play a role in restoring international peace and security and will be in the interests of the victims and the interests of justice. However, this is not always the case and the ICC reserves the right to examine each deferral request insofar as it impacts the proceedings at the Court.

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<sup>72</sup> See OHLIN, *supra* note 43, at 190.

<sup>73</sup> CONDORELLI & VILLALPANDO, *supra* note 51, at 578.

<sup>74</sup> See CONDORELLI & VILLALPANDO, *supra* note 1, at 647; *see also* EL ZEIDY, *supra* note 42, at 1516.

<sup>75</sup> See OHLIN, *supra* note 43, at 189.

### 3.3. Scope of the deferral request on the «investigation or prosecution»

Once the Security Council has passed a resolution under Chapter VII requesting an Article 16 deferral, the Prosecutor and the President of the ICC should be notified.<sup>76</sup> The Prosecutor must be notified of the deferral because this impacts the work of the OTP in the investigation or prosecution. The Presidency is notified because it is the organ tasked with the responsibility of administering the functions of the Court. The Presidency should then identify the specific investigation or prosecution to which the deferral applies and then also notify the appropriate organs or parties. If applicable, the suspects or the accused will also be notified.

The ICC Statute does not define the terms “investigation” or “prosecution” but does refer to various stages of the proceedings in different terminology. Prior to a formal investigation, a preliminary examination is conducted by the Prosecutor and based on his findings, he might ask the Pre-Trial Chamber to authorize a formal investigation.<sup>77</sup> An investigation may be undertaken in the context of a given situation or even in relation to a specific individual. Once the investigation is over and the suspects are identified, the prosecution involves actions directed against a specific individual.

#### 3.3.1. Investigation

Article 16 stipulates that, “no investigation or prosecution may be commenced or proceeded with” after the Security Council passes a binding resolution under Chapter VII. Reading the plain meaning of the text, it may be adduced that ‘no investigation may be commenced or proceeded with’ and ‘no prosecution may be commenced or proceeded with’ after such a resolution is passed.<sup>78</sup> This gives the Security Council power to interfere with the proceedings of the ICC in two stages.

First, the commencement of an investigation begins after a situation has been referred to the Prosecutor under Article 13. There are three triggering procedures of the ICC: a State party may refer a situation to the Prosecutor, the Security Council acting under Chapter VII may refer a situation to the Prosecutor, and the Prosecutor may act on his own initiative to open an investigation.<sup>79</sup> The initiation of an investigation begins after the Prosecutor decides there is a reasonable basis to believe that a crime within

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<sup>76</sup> Article 17(2), Cooperation between the Security Council of the United Nations and the Court, Relationship Agreement between the International Criminal Court and the United Nations, Volume 2283, II-1272, available at [http://untreaty.un.org/unts/144078\\_158780/7/5/14358.pdf](http://untreaty.un.org/unts/144078_158780/7/5/14358.pdf); see also Article 38(3)(a) The Presidency shall be responsible for the proper administration of the Court, CONDORELLI & VILLALPANDO, *supra* note 1, at 649.

<sup>77</sup> ICC Statute, *supra* note 38, Articles 15, 53.

<sup>78</sup> According to Article 31 of the Vienna Convention on the Law of Treaties, interpretation shall be in accordance with ordinary meaning, context, the object and purpose, and any relevant rules of international law. Vienna Convention on the Law of Treaties, UN Doc. A/CONF.39/26 (May 23, 1969).

<sup>79</sup> ICC Statute, *supra* note 38, Articles 13(a), (b), and (c), respectively.

the jurisdiction of the ICC has been or is being committed.<sup>80</sup> After evaluating the information in a given situation, the Prosecutor must also take into account admissibility issues under Article 17, such as complementarity, *ne bis in idem*, and gravity.

The investigation consists of identifying crimes that may have occurred in a given territory or within a certain time. A situation may not be limited *ratione personae* therefore, an Article 16 deferral request of a given investigation may not be tailored to include or exclude certain individuals. This is the main argument as to why the prior Security Council Resolutions 1422, 1497, and 1593 invoking Article 16 or similar language to Article 16 may be held invalid. Those resolutions gave a broad immunity to a certain class of people and this may not be invoked in the investigation stage. Individuals are only identified at the prosecution stage. An analogy may be drawn with referral of a situation under Article 13. In the case of Uganda, which invoked Article 13(a) to refer the situation of the Lord's Resistance Army (LRA) in northern Uganda to the ICC, the Prosecutor opened an investigation into the northern Uganda generally and did not limit the investigative scope solely to crimes committed by the LRA.<sup>81</sup>

### 3.3.2. Prosecution

Commencement of a prosecution begins after the Prosecutor has concluded there is a sufficient legal or factual basis to seek an arrest warrant or summons to appear following the investigation.<sup>82</sup> Recalling that the Prosecutor may decide not to continue to the prosecution stage after the investigation because the case is inadmissible under Article 17 (due to complementarity, the principle of *ne bis in idem*, and gravity) or due to the interests of justice.<sup>83</sup> However, if the Prosecutor decides not to proceed, the decision is subject to review by the Pre-Trial Chamber.<sup>84</sup> In addition, the Prosecutor has the discretion to re-open the case at any time based on new facts or information.<sup>85</sup> Since technically, a prosecution begins once there is a positive identification of a person or persons sufficient to seek an arrest warrant or summons to appear, an Article 16 deferral seeking to suspend the commencement of a prosecution must be narrowly tailored to identify specifically person(s) named in the prosecution. Requesting the commencement of a prosecution be deferred is analogous to the Prosecutor seeking not to proceed with a prosecution under Article 53(2) because in both scenarios,

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<sup>80</sup> ICC Statute, *supra* note 38, at Article 53(a).

<sup>81</sup> ICC Press Release, ICC-OTP-20040729-65 (July 29, 2004).

<sup>82</sup> Article 53(2) gives guidelines of when the Prosecutor concludes there is not a sufficient basis for a prosecution. ICC Statute, *supra* note 38.

<sup>83</sup> *Id.* at Article 53(2)(a), (b), (c).

<sup>84</sup> *Id.* at Article 53(2)(c) and Article 53(3).

<sup>85</sup> *Id.* at Article 53(4).

the investigation has been conducted but the prosecution will not commence. In this situation, the Pre-Trial Chamber should, as per Article 53(3), be able to review this decision. The Article 16 deferral request should include specific reasons why the commencement of a prosecution will negatively impact the peace and security of a given situation.

Suspending the proceeding of a prosecution under Article 16 raises more complex legal and procedural issues than suspending the commencement of a prosecution. It was argued that Article 16 only meant to suspend the beginning of an investigation or case; however, the wording clearly allows the deferral to impact any period of the prosecution. Generally, the prosecution can be classified into three stages: pre-trial, trial, and appeals. The Pre-Trial Chamber issues an arrest warrant or a summons to appear against a specific individual or individuals and then conducts the formal confirmation of charges hearing.

These steps constitute the triggering of the formal proceedings in the prosecution. An Article 16 request might ask the ICC to suspend the prosecution at the arrest warrant stage, as the African Union advocated in the arrest warrant of the President of Sudan, Al Bashir.<sup>86</sup> If genuine issues of peace and security would be negatively impacted by the arrest of an individual, then it might provide a valid legal basis for the Security Council request. In the case of the African Union request and Al Bashir, the basis for their Article 16 request was based not on peace and security reasons, but on political motivations. There was no evidence that Al Bashir was genuinely involved in any peace process to stop the crimes occurring in Darfur and there was evidence that the Sudanese government was sponsoring a militia group that systematically carried out war crimes and crimes against humanity.<sup>87</sup>

While the deferral of the prosecution at the arrest warrant or confirmation of charges stage may be controversial, it is more legally and procedurally sound than a deferral request impacting the trial or the appeals process. Once the trial commences, it should not be interrupted unless exceptional circumstances warrant a brief recess. Suspending a trial for one year would be legally objectionable for a variety of reasons, not the least of which is the violation of the right of the accused to be tried without undue delay.<sup>88</sup> Suspending the trial once it has commenced would also result in

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<sup>86</sup> African Union Communiqué of the 142nd meeting of the Peace and Security Council, Letter dated 21 July 2008 from the Permanent Observer of the African Union to the United Nations addressed to the President of the Security Council, UN Doc. S/2008/481, ¶¶ 11 (iii), 12 (July 23, 2008).

<sup>87</sup> Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General Pursuant to Security Council Resolution 1564 of 18 September 2004, ¶¶ 630, 644-645 (Jan. 25, 2005), available at [http://www.un.org/news/dh/sudan/com\\_inq\\_darfur.pdf](http://www.un.org/news/dh/sudan/com_inq_darfur.pdf).

<sup>88</sup> ICC Statute, *supra* note 38, Article 67(1)(c): Rights of the accused.

innumerable procedural obstacles, including the difficulties of preserving evidence, protecting witnesses, and impacting the interests of victims. Therefore, it is highly unlikely that an Article 16 request to suspend a trial underway would have any valid legal basis, unless that particular person was crucial to a peace process but exceptionally persuasive arguments must be made to allow a trial to discontinue for such a length of time. Moreover, the interests of peace and the interests of justice would be in conflict and those must be critically evaluated by the Court.

At the appeals level, it seems most unlikely that an Article 16 request would stand legal scrutiny. The right of a convicted person to appeal his conviction is regarded as fundamental human right and forms part of the body of fair trial rights. The right of a Prosecutor to appeal a decision of the Trial Chamber is based on the protection of the public interest and preserving the institution of criminal justice. Under basic principles of criminal law, there are only two parties to the proceedings: the Prosecutor and the defendant. Following this logic, the right of appeal is also limited to these two parties. The right to appeal in criminal proceedings has been recognized in a variety of international conventions and in the statutes of the ICTY and ICTR.<sup>89</sup> Under the ICC framework, after a conviction, acquittal, or other decision of the Trial Chamber, either party may appeal the decision on the grounds of procedural error or error of law or fact.<sup>90</sup> This right to appeal is explicitly granted to either party and should not be obstructed by the Security Council. The victims who participate in the proceedings are not granted this right to appeal a conviction.<sup>91</sup> States may not appeal against a judgment either.<sup>92</sup> Thus, the right of appeal is strictly limited to the parties to the case: the Prosecutor and Defence and the Security Council or any other outside body should not be allowed to interfere with either party's right of appeal. An Article 16 deferral request at the appeals stage would be incompatible with the basic principles of criminal law.

#### 4. Impact of an Article 16 Deferral

The effect of an Article 16 deferral request is complex and far-reaching if it is accepted and implemented by the ICC for a particular situation or prosecution. Deferment of an investigation or prosecution is not a termination it is merely a temporary suspension.

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<sup>89</sup> See ROTH, Robert & Marc HENZELIN. "The Appeal Procedure of the ICC, commentary of the Rome Statute of articles 85-87". In Cassese, Gaeta & Jones (eds.). *Ob. cit.*, p. 1536 (citing the right to appeal in the ICCPR, American Convention on Human Rights, and the European Convention on Human Rights).

<sup>90</sup> ICC Statute, *supra* note 38, at Article 81(1).

<sup>91</sup> *Id.* at Article 81: Appeal against decision of acquittal or conviction or against sentence. The two parties that may appeal convictions are the Prosecutor and the convicted person. Victims and States are not listed in the right to appeal a conviction.

<sup>92</sup> *Id.*

The organs of the ICC are free to continue with the investigation or prosecution after the deferral period terminates. However, the deferral will have a significant impact on many crucial aspects of an investigation or prosecution. The following section examines the issues raised by an Article 16 deferral on specific areas of an investigation or prosecution. First, a deferral will necessarily impact the collection and preservation of the evidence to be used in the proceedings. Second, the rights of the accused are affected when the prosecution is delayed for a one-year period. Third, the interests of victims in participating in the proceedings and protection of their interests, as well as the protection of witnesses must be considered by a deferral. Fourth, whether a deferral request by a political body can supersede the interests of justice sought by the ICC and the international community will be addressed. Lastly, the scope of obligations of State parties to the ICC Statute will be discussed with respect to potentially conflicting obligations under a Security Council deferral request.

#### 4.1. Collection and Preservation of Evidence

Evidence broadly refers to all evidence gathered during the prosecutor's preliminary examination, evidence collected during the investigation, and evidence to be presented at trial. The defence also has the right to gather its own evidence to be used at the confirmation hearing and at trial. This includes both testimonial and documentary evidence. Testimonial evidence comes in the form of live witnesses physically present to testify at trial or in some cases; the witnesses may give live testimony via video or audio link, as long as the Prosecutor, the defense and the Chambers has the opportunity to examine the witness.<sup>93</sup>

Testimonial evidence may be previously recorded, as long as both parties have the opportunity to examine the witness.<sup>94</sup> An Article 16 deferral impacts the collection and preservation of evidence in the investigation and prosecution. First, the protection or securing of witnesses is an essential component to the investigation or prosecution. If a victim or witness feels it is necessary to have protective measures because of the testimony he or she will provide<sup>95</sup>, the Court may order both protective measures and special measures.<sup>96</sup> It is the task of the Victims and Witnesses Unit to provide these protective and security measures, including the long- and short-term plans for their protection. This logistical support, in cooperation with other international organizations, aims to provide protection at both the local level where victims and

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<sup>93</sup> ICC Statute, *supra* note 38, at Article 69(2); ICC Rules of Procedure and Evidence, ICC-ASP/1/3 (Sept. 9, 2002) [hereinafter ICC RPE], Rule 67.

<sup>94</sup> ICC RPE, *supra* note 93, Rule 68(a).

<sup>95</sup> *Id.* at Rule 87(1).

<sup>96</sup> ICC Statute, *supra* note 38, Article 68(1); ICC RPE, *supra* note 93, Rule 87, 88.

witnesses originally reside and protection in The Hague when they appear in the proceedings.<sup>97</sup> The deferral period of one-year would necessarily require that the Victims and Witnesses Unit provide all victims and witnesses requiring protective or security services are maintained safely by for the period of the deferral which requires monetary and other resources.

As far as the right to access evidence, both parties should be able to exercise this right throughout the deferral period. Both parties have the right to access documentary evidence in either party's possession: the defense may inspect evidence in the possession of the Prosecutor that would be material to the preparation of the defence or is intended to be used by the Prosecutor in the confirmation hearing or at trial. Similarly, the Prosecutor may inspect the evidence of the defence that is intended to be use in the confirmation hearing or at trial.<sup>98</sup> The Prosecutor has the broad power to collect and examine evidence.<sup>99</sup> In doing so, the Prosecutor may ask States to cooperate in evidence collection, make requests on persons being investigated or interviewed, and enter into cooperation agreements with other States or intergovernmental organizations.<sup>100</sup> The question then arises whether the Prosecutor must cease gathering evidence during the deferral period and whether the cooperation arrangements will also be subject to a temporary suspension under the deferral request. If the evidence is difficult to obtain, necessary for the case and there is a risk that a one-year deferral will have a negative impact on quality or integrity of the evidence, then the Prosecutor should be able to collect the evidence, even in the deferral period, for use in the future. The defence may raise similar arguments to maintain their investigation and evidence collection must continue through the deferral period.

The ICC Statute provides that the judges of the Trial Chamber have the right to order the production of documents and other evidence.<sup>101</sup> The Trial Chamber also has the authority to request the submission of all evidence that it considers necessary for the determination of the truth.<sup>102</sup> The Trial Chamber must protect confidential information and assist with the protection of the accused, witnesses, and victims.<sup>103</sup>

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<sup>97</sup> See Summary Report on the Round Table on the Protection of Victims and Witnesses Appearing Before the International Criminal Court, Victims and Witnesses Unit (January 2009), available at [http://www.icc-cpi.int/NR/rdonlyres/19869519-923D-4F67-A61F-35F78E424C68/280579/Report\\_ENG.pdf](http://www.icc-cpi.int/NR/rdonlyres/19869519-923D-4F67-A61F-35F78E424C68/280579/Report_ENG.pdf).

<sup>98</sup> ICC RPE, *supra* note 93, Rules 77, 78.

<sup>99</sup> ICC Statute, *supra* note 38, Article 54(3)(a).

<sup>100</sup> BERGSMO, Morten & Pieter KRUGER. "Article 54: Duties and powers of the Prosecutor with respect to investigations". In Otto Triffterer (ed.). *Commentary on the Rome Statute of the International Criminal Court*. Baden-Baden: Nomos, p. 723.

<sup>101</sup> ICC Statute, *supra* note 38, Article 64(6)(b).

<sup>102</sup> *Id.* at Article 69(3).

<sup>103</sup> *Id.* at Article 64(6)(c) and Article 64(6)(e).

Finally, the Trial Chamber may decide on any other relevant issue.<sup>104</sup> Given these broad powers of the Trial Chamber with respect to the trial proceedings and evidence, it would be within the purview of the Trial Chamber to ensure that the evidence is securely held and preserved for the duration of the deferral period.

If necessity demands, the Trial Chamber should order the production of evidence that would be difficult to obtain after a one-year delay. The Trial Chamber could hold the evidence confidentially and then after the deferral period allow either party to inspect it. The Trial Chamber could also order the recording of witness testimony if there is a chance the witness will not appear for trial in the future. The Trial Chamber should keep in mind the types of evidence that will be used at trial and try to preserve the evidence as much as possible.

#### 4.2. Rights of the Accused

The rights of the accused are enshrined in Article 67 of the ICC Statute and include, the right to a fair and impartial public hearing conducted without undue delay. An Article 16 deferral would negatively impact the right to a fair and expeditious trial, not only by delaying the proceedings for a one-year period, but also by keeping the accused in a state of limbo as far as the status of the proceedings.

If the accused is in detention, questions arise as to whether the ICC could detain the accused during the length of the deferral or whether there is the possibility of provisional release. According to the ICC Statute, a person may be detained either by a State or by the ICC. First, under Article 59, the person may be arrested in the custodial State and detained there. In this scenario, the person shall apply to the authority in the custodial State for interim release and the obligations of provisional release that apply to the custodial State would be governed by national law and international human rights obligations.<sup>105</sup> Second, under Article 60, if the person appears before the ICC and he is subject to detention in the ICC detention facilities. In this scenario, the accused has the right to apply for interim release pending the trial

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<sup>104</sup> *Id.* at Article 64(6)(f).

<sup>105</sup> The international human rights obligations of the custodial State will not be discussed here. However, there exists the potential for conflicting obligations for the State if it is a State Party to the ICC Statute. On the one hand, if the State ratified the ICCPR or is a party to the ECHR, then its standards governing provisional release (where provisional release tends to be the general rule) the might be in conflict with the ICC Statute that provides provisional release is the exception. See KNOOPS, Geertjan Alexander. *Theory and Practice of International and Internationalized Criminal Proceedings*. The Hague: Kluwer Law International, 2005, p. 149. The rule at the ICTY was amended in 1999 to allow for a lower threshold than the previous 'exceptional circumstances' standard, and if the Trial Chamber has given the receiving country an opportunity to be heard and is satisfied that the accused will appear for trial and not pose a danger to a victim, witness or other person, the provisional release may be granted. See ZAHAR, Alexander & Göran SLUITER, *International Criminal Law*. The Hague: Brill, 2008, p. 340.

as per Article 60(2) of the ICC Statute. However, the Pre-Trial Chamber may deny provisional release if it satisfied with the requirements of Article 58(1): reasonable grounds to believe the person has committed the crime and detention was necessary to ensure appearance at trial, prevent obstruction of the investigation or proceedings, or prevent the commission of more crimes. The Pre-Trial Chamber must periodically review, every 120 days, decisions on release or detention at the request of the Prosecutor or the accused.<sup>106</sup> It is the task of the Pre-Trial Chamber to ensure that the accused is not detained for an unreasonable period of time prior to trial, due to an inexcusable delay by the Prosecutor.<sup>107</sup> However, this is a very high burden to meet and Chambers has wide discretion in determining the necessity of detention.

Trial Chamber I in the *Lubanga* case held that the period of two years in pre-trial detention was not an unreasonable delay under Article 60(4).<sup>108</sup> Trial Chamber II in the *Bemba* case held similarly that almost two years in pre-trial detention was not unreasonable.<sup>109</sup> The Chamber stated that under the periodic review of detention, there must be a “change in some or all of the facts underlying the previous decision on detention or a new fact satisfying the Chamber that a modification of the Pre-Trial Chamber’s last decision ordering the detention of the accused is necessary”.<sup>110</sup> The standard of material change in circumstances necessary for granting provisional release is set quite high by this *Bemba* decision. The Trial Chamber concluded that continued detention was necessary to ensure the accused’s appearance at trial.

A Security Council deferral may constitute a material change in circumstances that meets the threshold for granting provisional release. Factors cited by the Defence in *Bemba* to argue that the accused would appear for trial included a low risk of absconding, little risk of interfering with the investigation or safety of witnesses, possibility of host states willing to receive the accused, change in political circumstances of the accused, and change in financial situation of the accused.<sup>111</sup> The Trial Chamber, stating this did not guarantee the accused would be present at trial, rejected these factors. However, a Security Council deferral of the prosecution materially affects the circumstances because it is a determination that the proceedings are interfering with

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<sup>106</sup> ICC Statute, *supra* note 38, Article 60(3); ICC RPE, *supra* note 93, Rule 118(2).

<sup>107</sup> ICC Statute, *supra* note 38, Article 60(4).

<sup>108</sup> Prosecutor v. Thomas Lubanga Dyilo, Situation in the Democratic Republic of the Congo, ICC-01/04-01/06, Decision reviewing the Trial Chamber’s ruling on the detention of Thomas Lubanga Dyilo in accordance with Rule 118(2) of the Rules of Procedure and Evidence, ¶ 12 (Trial Chamber I, Feb. 1, 2008).

<sup>109</sup> Prosecutor v. Jean-Pierre Bemba Gombo, Situation in the Central African Republic, ICC-01/05-01/08, Decision on the review of the detention of Mr. Jean-Pierre Bemba Gombo pursuant to Rule 118(2) of the Rules of Procedure and Evidence (Trial Chamber II, April 1, 2010) [hereinafter *Bemba* case].

<sup>110</sup> *Id.*, at ¶ 26.

<sup>111</sup> *Id.* at ¶ 16.

international peace and security. If the Security Council deferral request included a request for the provisional release of the accused for the one-year period because it would aid the peace process. This is a situation the Chambers would have to examine with great scrutiny. It brings up the conflict between the interests of peace and the interests of justice.<sup>112</sup> The Chambers might decide that in the interests of peace, the accused may be provisionally released, conditioned on a guarantee that he is returned to the ICC following the deferral period. The deferral request is not a termination of the proceedings or a request for amnesty from criminal prosecution, therefore the Court should request assurances from the Security Council, the accused, and any States involved that the accused be returned after the provisional release.

Whether or not the Court grants provisional release of the accused during the deferral period, the defence should be given the right to continue to prepare their case during the deferral period. A one-year delay of the proceedings may be contrary to most human rights standards.<sup>113</sup> Once the person is formally indicted or charged, the clock is tolled and the period of delay is measured from this moment until the commencement of trial.<sup>114</sup> Factors to consider in assessing the reasonableness of the length of delay include reason for the delay, the prejudice to the defendant, the complexity of the case, the conduct of the defendant and the conduct of the judicial authorities.<sup>115</sup> The most important factor in an Article 16 deferral being the reason for the deferral. Here, the reason is a political one and this political interference into the proceedings of the Court should raise the level of scrutiny in assessing length of delay with respect to the rights of the accused. While, there is no bright line rule of when the length of delay becomes unreasonable delay because the analysis is done on a case-by-case basis,<sup>116</sup> it may be argued that if the deferral period results

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<sup>112</sup> The public interest in preventing undue delay in criminal proceedings is also impacted by a delay of the proceedings. This can also impact restorative justice aims, including post-conflict rebuilding and victims interests. See generally, TRECHSEL, Stefan. *Human Rights in Criminal Proceedings*. Oxford/New York: Oxford University Press, 2005, p. 136; see also, The U.S. Supreme Court stating that the right of a speedy trial does not preclude the rights of public justice. See *Beavers v. Haubert*, 198 U.S. 77, 87 (1905).

<sup>113</sup> Article 9(3) of the ICCPR states it shall not be the general rule that persons awaiting trial shall be detained in custody and Article 14(3)(c) guarantees the right to be tried without undue delay. ICCPR, *supra* note 56; see also Article 5(3) and Article 6(1) of the ECHR guarantees trial within reasonable time. ECHR, *supra* note 56.

<sup>114</sup> See *Eckle v. Germany*, Application No. 8130/78, Eur. Ct. H.R. ¶ 73 (July 15, 1982) (holding the appropriate date for the commencement of the proceedings was the date of service of the warrant issued).

<sup>115</sup> Factors are taken from both European Court of Human Rights jurisprudence, see *Eckle v. Germany*, *supra* note 75, ¶ 80; and U.S. Supreme Court jurisprudence, see also *Barker v. Wingo*, 407 U.S. 514, 530 (1972).

<sup>116</sup> The European Court of Human Rights has held that a four-year period of pre-trial detention was not in breach of Article 5(3) as it was necessary to prevent the defendant from absconding, the risk of collusion and the need to prevent the accused from committing further offenses. *W v. Switzerland*, Application No. 14379/88, Eur. Ct. H. R., ¶ 31 (Jan. 26, 1993). The Court has also held that a detention on remand period of five years did not violate Article 5(3) due to the complexity of the investigation and serious offenses of international terrorism. *Chraidi v. Germany*, Application No. 65655/01, Eur. Ct. H. R. ¶ 47-49 (Jan. 26, 2007).

in complete inactivity in the proceedings, then this raise a potential human rights violation of the accused. The only way to mitigate the potential violation of fair and expeditious trial would be to allow the defence to continue building its case during the deferral period, which includes gathering its own evidence, preparing witnesses and having full access to exculpatory evidence from the prosecution.

### 4.3. Interests of Victims

The ICC Statute, Rules of Procedure and Evidence, and ICC Regulations of the Court gives victims the right to participate in the proceedings in innovative ways.<sup>117</sup> Victims may participate in triggering mechanisms by making representations to the Pre-Trial Chambers during the Prosecutor's request to open an investigation.<sup>118</sup> Victims may participate in the investigation stage by submitting their views, as appropriate, and must be notified when the Prosecutor decides not to investigate.<sup>119</sup> Most importantly, under Article 68(3) victims, whose personal interests are affected, may participate in the proceedings once the case arises and make representations in the reparations proceedings under Article 75.

Given this unique role of victim participation in the ICC, an Article 16 deferral can impact the interests of the victims in numerous ways. First, the very definition of a victim means the person has suffered harm because of the commission of the crime.<sup>120</sup> Therefore, victims' interests are at stake in various phases of the proceedings. The Prosecutor must notify victims when he decides to open an investigation, thus enabling the victims to make representations.<sup>121</sup> The victims' interests are vested once they have been identified and notified. Thus, a deferral at the commencement of an

<sup>117</sup> ICC RPE, *supra* note 93, Rules 89-99; see also OLASOLO, Hector. "Systematic and Casuistic Approaches to the Role of Victims in Criminal Proceedings before the International Criminal Court". 12 *New Crim. L. Rev.* (2009), p. 513 citing Gilbert Bitti & Hakan Friman. "Participation of Victims in the Proceedings". In Roy S. Lee & Hakan Friman (eds.). *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*. Ardsley, NY: Transnational Publishers, 2001, pp. 456, 471.

<sup>118</sup> ICC Statute, *supra* note 38, Article 15(3); ICC RPE, *supra* note 93, Rules 50, 93(3), 93, 107, and 109.

<sup>119</sup> ICC Statute, *supra* note 38, Article 19(3), 68(3); ICC RPE, *supra* note 93, Rules 92(2), 93, 107 and 109; see also Situation in Democratic Republic of the Congo, ICC-01/04-101-tEN, Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5, and VPRS 6 (Pre-Trial Chamber I, July 17, 2006) (granting victims a procedural right to participate in the investigation if their personal interests are affected according to Article 68(3)); *cf.* Situation in the Democratic Republic of Congo, ICC-01/04 OA4 OA5 OA6, Judgment on victim participation in the investigative stage of the proceedings in the appeal of the OPCD against the decision of the Pre-Trial Chamber I of 7 December 2007 and in the appeals of the OPCD and the Prosecutor against the decision of Pre-Trial Chamber I of 24 December 2007 (Appeals Chamber, Dec. 19, 2008) (holding the Pre-Trial Chamber may not grant the procedural status of victim giving a general right to participate in the investigative stage).

<sup>120</sup> ICC RPE, *supra* note 93, Rule 85: Definition of a Victim.

<sup>121</sup> *Id.* at Rules 50.

investigation will necessarily impact the victims' rights to make representations if they are barred from doing so because of the deferral. Victims have the right to see that the crimes committed do not go unpunished and the deferral would only delay the realization of this right.

Protection of victims is another issue that arises in the context of an Article 16 deferral. The Court is obligated to take measures that protect the safety, physical and psychological well-being, dignity, and privacy of victims and witnesses.<sup>122</sup> The Victims and Witnesses Unit handles the logistic of protective and security measures, in the event of a deferral, the Unit would need to have adequate resources and assistance to continue to protect victims and witnesses for the duration of the deferral. This would require substantial resources, the brunt of which is incurred by States Parties. However, since this is a Security Council request, the Court should receive financial assistance from the UN for expenses incurred during the deferral period.<sup>123</sup>

#### 4.4. Interests of Justice

The phrase, the 'interests of justice' appears in the ICC Statute and the Rules of Procedure and Evidence in a number of places but is never clearly defined.<sup>124</sup> At the Rome Conference, consensus was not reached as to the meaning of this phrase.<sup>125</sup> However, national truth commissions, amnesties, traditional reconciliation methods, or peace talks might fall into this broad category of the 'interests of justice'.<sup>126</sup> Article 16 may be used to resolve conflicts between the requirements of peace and the requirements of justice when these are in conflict.<sup>127</sup> Both justice and peace are values of the UN and the ICC. The interests of justice should not be conflated with political proceedings, such as amnesties or national commissions, because the duty of the international community to prosecute people criminally for serious international crimes is found

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<sup>122</sup> ICC Statute, *supra* note 38, Article 68(1).

<sup>123</sup> Article 115(b) allows for the payment of funds from the UN, subject to the approval of the General Assembly, in cases where the expenses are incurred by a Security Council referral. ICC Statute, *supra* note 38. *An analogous request for payment by the UN should be made in cases of an Article 16 deferral since the expenses will be incurred due to an act of the Security Council.*

<sup>124</sup> See ICC Statute, Articles 55(2)(c), 53, 65(4) and 67(1)(d), and ICC RPE, Rules 69, 73, 82, 100, 136, and 185, as cited by the Office of the Prosecutor in his *Policy Paper on the Interests of Justice*, [hereinafter OTP Interests of Justice], Ref-ICC-OTP-InterestsOfJustice, September 2007, available at <http://www.icc-cpi.int/NR/rdonlyres/772C95C9-F54D-4321-BF09-73422BB23528/143640/ICCOTPInterestsOfJustice.pdf>

<sup>125</sup> See Human Rights Watch Policy Paper, *The Meaning of the "Interests of Justice" in Article 53 of the Rome Statute*, at 3-4 (June 2005), available at [www.hrw.org/campaigns/icc/docs/ij070505.pdf](http://www.hrw.org/campaigns/icc/docs/ij070505.pdf).

<sup>126</sup> The best known Truth and Reconciliation Commissions are those established for Chile, Argentina, El Salvador, South Africa, and Guatemala. DUGARD, John. "Possible Conflicts of Jurisdiction with Truth Commissions". In Cassese, Gaeta & Jones (eds.). *Ob. cit.*, p. 694 (citing, N. J. Kritz, (ed.). *Transitional justice: how emerging democracies reckon with former regimes*. 3 volumes [Washington, D. C: United States Institute for Peace, 1995]).

<sup>127</sup> See BERGSMO & PEJIC, *supra* note 5, at 378.

in customary international law.<sup>128</sup> There exists a duty, *aut dedere aut judicare*, for the crimes covered by the ICC Statute and the interests of justice must be upheld for such crimes. The special circumstances of a particular society might endorse the use of truth and reconciliation commissions over criminal prosecution, but this does not abrogate the duty of the ICC to pursue criminal justice. Further, the duty to prosecute violations of the core international crimes necessarily mandates the prohibition of granting amnesty to individuals and the absence of a statute of limitations.<sup>129</sup>

The Office of the Prosecutor (OTP), in his Policy Paper on the Interests of Justice, stated that an Article 16 deferral request does not displace the obligations of the Prosecutor to consider the interests of justice under Article 53.<sup>130</sup> The OTP will consider issues of crime prevention, security, and the duty to protect victims and witnesses but seemed to indicate it will not be automatically bound by a deferral request. The OTP has a presumption in favor of investigation or prosecution and the decision not to proceed under Article 53 will require exceptional circumstances. Therefore, it is clear that the interests of justice must be extraordinary and overrides a determination that the situation met the gravity threshold or the interests of the victims in favor of prosecution. Further, the investigation or prosecution by the ICC is complementary to domestic prosecutions but not necessarily to other alternative methods of reconciliation, including truth and reconciliation commission, reparations programs, and traditional justice mechanisms. International prosecution and domestic remedies should work in parallel to ensure justice. It would be a rare case where an Article 16 deferral actually served the interests of justice.

One potentially compelling reason why an Article 16 deferral might override the interest of justice in criminal prosecution is during a peace process. An Article 16 deferral might be an appropriate remedy if applied in a narrow circumstance where there could be a temporary separation between peace and justice, *i.e.*, when stopping an armed conflict was the first step in achieving peace and justice.<sup>131</sup> The OPT has stated, “The broader matter of international peace and security is not the responsibility of the Prosecutor; it falls within the mandate of other institutions”<sup>132</sup> thus acknowledging the UN Security Council’s primary role in maintaining international peace and security. The ICC also has a vested interest in creating international peace and a deferral might

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<sup>128</sup> Human Rights Watch Policy Paper, *supra* note 125, at 9-10.

<sup>129</sup> See DUGARD, *supra* note 126, at 697; *see also* ICC Statute, *supra* note 38, Article 29: Nonapplicability of statute of limitations.

<sup>130</sup> See OTP Interests of Justice, *supra* note 124, at 8-9.

<sup>131</sup> CRYER, Robert & Nigel D. WHITE. “The Security Council and the International Criminal Court: Who’s Feeling Threatened?”. 8 *Yearbook of International Peace Operations* (2002), pp. 143, 153.

<sup>132</sup> See OTP Interests of Justice, *supra* note 124, at 9.

be valid only in the particular circumstance where a proceeding at the Court was inhibiting or impeding the peace process. However, the Secretary-General of the UN stated that, “justice, peace, and democracy are not mutually exclusive objectives, but rather mutually reinforcing imperatives.”<sup>133</sup> The OTP will work with the Security Council to respect its mandates of addressing humanitarian or security crises but it shall also retain the right to pursue its judicial mandate independently.<sup>134</sup> The OTP shall, rightly so, remain independent of the political influence of the Security Council in pursuing investigations or prosecutions. If the Prosecutor considers the decision not to proceed due to the interests of justice an exceptional circumstance, then a deferral by the Security Council should present an even higher threshold of exceptionality than the interests of justice, because this is a purely political determination that infringes on the independence of the OTP. Bearing in mind that the exceptional circumstance of an ICC proceeding having a detrimental affect on an ongoing peace agreement might warrant an Article 16 deferral, this does not preclude future prosecution. The deferral has a temporal limit of one-year and there is no statute of limitations on grave international crimes. The responsibility of the ICC to investigate and prosecute serious violations of crimes within its jurisdiction is not displaced simply because there are peace negotiations. It is not definitively agreed upon that peace processes or alternative mechanisms satisfy the requirements of complementarity. The mandate of a judicial body tasked with international prosecutions remains but a part of the overall interests of achieving international peace and security.

#### 4.5. Scope of Obligations on States

States parties to the ICC Statute may have conflicting obligations in the case of an Article 16 deferral request. First, States have obligations under Articles 25 and 28 of the UN Charter that require compliance with a Security Council resolution passed under Chapter VII. However, if the Article 16 deferral conflicts with the interests of justice, for example by granting broad immunity to a class of peacekeepers as shown in Security Council Resolutions 1422 and 1487, then the States parties obligations under the ICC Statute conflict with their obligations under Chapter VII. States parties to the Rome Statute are under an obligation to work in cooperation with the ICC to end impunity and see that international crimes are prosecuted.<sup>135</sup> For the *ad hoc* tribunals, the relationship and obligations of cooperation between States and the tribunals were viewed as ‘vertical’ in nature due to the tribunals’ creation under

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<sup>133</sup> *Id.* at 8, citing Report of the Secretary-General on the Rule of Law and Transitional Justice, UNDoc. S/2004/616, 23 August 2004.

<sup>134</sup> See OTP Interests of Justice, *supra* note 124, at 8.

<sup>135</sup> ICC Statute, *supra* note 38, Article 86 states the general obligation on State parties to cooperate with the Court.

Chapter VII.<sup>136</sup> The relationship between States parties to the ICC Statute and the ICC is more complex. State parties to the ICC Statute are obligated to act in a manner that does not undermine their obligations under the ICC Statute. Specifically, state parties to a treaty shall not act in a manner that undermines the spirit of the treaty or is inconsistent with its objects and purpose.<sup>137</sup> States that are not parties to the ICC Statute are under no general obligation to cooperate.<sup>138</sup> However, a Chapter VII decision by the Security Council would place both State parties and non-State parties on an equal level as far as their obligations to cooperate.

A strong argument can be made that State parties to the ICC Statute are under a cooperation regime similar to those of the *ad hoc* tribunal and States.<sup>139</sup> When the State parties voluntarily acceded to the ICC Statute, they accepted the cooperation regime as such. Part 9 of the ICC Statute lists, in details, the scope of obligations on State parties. In addition, non-State parties may voluntarily cooperate and provide assistance on an *ad hoc* basis with the Court. Bearing in mind that State parties intended to establish a permanent international criminal court tasked with investigating and prosecuting certain international crimes, it would go against the object and purpose of the ICC Statute if their obligations to cooperate with the Court were in conflict with a Security Council resolution. However, the counter-argument remains that Member States of the UN must give priority to decisions of the Security Council over those of the ICC.<sup>140</sup>

Because the ICC cooperation regime is treaty-based, the ICC has weak enforcement mechanisms to ensure full cooperation. In this respect, the ICC relies on States voluntarily actions with respect to their obligations under the ICC Statute. The ICC Statutes uses the term ‘requests’ on specific points of cooperation, utilizing diplomatic channels and even the International Criminal Police Organization or regional arrangements.<sup>141</sup> If States find themselves in conflict between a request to

<sup>136</sup> See Prosecutor v. Tihomir Blackic, IT-99-14-AR 108 *bis*, ¶¶47, 54 (Appeals Chamber, Oct. 29, 1997) (Appeals Chamber remarked that inter-State cooperation in criminal matters is based on a ‘horizontal’ relationship, respecting State sovereignty, equality and reciprocity. Whereas cooperation between the ICTY and a State is ‘vertical’ in nature due to the nature of the tribunal’s creation under Chapter VII.)

<sup>137</sup> See Jain, *supra* note 14, at 249. Citing Article 30(5), Vienna Convention on the Law of Treaties and Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States), I.C.J. Reports 14, 138 (1986).

<sup>138</sup> KRESS, Claus, General obligation to cooperate. In Triffterer (ed.). *Ob. cit.*, 1999, p. 1051.

<sup>139</sup> SWART, Bert, International “Cooperation and Assistance: General Problems”. In Cassese, Gaeta & Jones (eds.). *Ob. cit.*, Volume I & II, p. 1594 (arguing the only material difference between the ICC regime and the *ad hoc* tribunals is the ICC does not need to proceed via a mandate from the Security Council).

<sup>140</sup> BOHLANDER, Michael. “Possible Conflicts of Jurisdiction with the Ad Hoc International Tribunals”. In Cassese, Gaeta & Jones (eds.). *Ob. cit.*, Volume I & II, p. 688 (stating that all members of the UN are bound by their obligations under the UN Charter, Article 103 to give precedence to their obligations under the Charter).

<sup>141</sup> ICC Statute, *supra* note 38, Article 87(1)(a).

cooperate by the ICC and an obligation arising out of a Security Council resolution, the State should consult the Court to come up with the best solution in a manner similar to that provided for in Article 97(c), which provides for consultations to be taken with the Court and specifically in a situation where the obligations of the State party are on conflict with pre-existing treaty obligation between this State and a non-State party. If the ICC makes the determination that the Article 16 deferral is not in keeping with maintaining or restoring international peace and security, the Court may refer the matter of non-cooperation to the Assembly of State Parties. The Assembly of State Parties may then resort to any remedies available under international law, even delving into the realm of State responsibility. There are numerous and complex issues raised by conflicting obligations of States in this manner. However, it is important to keep in mind the underlying object and purpose of the ICC Statute, namely the investigation and prosecution for international crimes and the States parties' obligations to uphold these principles.

## **Conclusion**

The long journey of the international community in working together towards ending impunity for grave international crimes culminated in the historic creation of the International Criminal Court in 2002. Eight years after the creation of the ICC, the situations under investigation and the prosecutions underway have proven that the Court is a robust and independently functioning judicial body. The majority of situations at the ICC were referred by State parties, showing the commitment of states in utilizing the ICC to achieve justice. To date, the Security Council has only referred one situation, the conflict in Darfur. At the heart of the Court's mandate is the commitment that the ICC will remain independent from outside political pressures and this independence is a cornerstone of the legitimacy of the Court. The delicate relationship between the ICC and the UN Security Council in a cooperating to uphold shared values, while simultaneously respecting each institution's autonomy, is and will continue to be the subject of debate. An Article 16 deferral request by the Security Council has the potential to be the most politically charged interference with the proper functioning of the Court. As exemplified by prior Security Council resolutions invoking Article 16 or similar language, the political maneuvering by the Security Council was at odds with the original intended purpose of Article 16.

An Article 16 deferral request implicates a variety of procedural and substantive rights by delaying an investigation of a situation or prosecution of a case. The only valid basis for such a deferral request should be made when the Security Council determines that a particular investigation or prosecution at the ICC will have a negative impact on the

restoration or maintenance of international peace and security. Without this legal basis, the Court should hold the Security Council request is not automatically binding on the organs of the ICC. The Security Council, in making this Article 16 request, must identify the specific situation or prosecution it seeks to defer. This deferral request will always be an inherently political decision, given the nature of the Security Council, however the intention behind the deferral request should not be to obstruct justice.

The ICC and the Security Council occupy separate and often overlapping spheres in the international commitment to peace and security. The primary role of the Security Council in restoring or maintaining peace utilizes political and diplomatic channels in attaining that goal. The ICC is a separate and independent judicial body and in this separation of powers scheme, maintains the right to make its own determinations with respect to issues that affect its jurisdiction and functioning. The purpose of a criminal court is to provide prompt prosecutions for violations of crimes and the ICC has a mandate as the world's international criminal court to provide such prosecution for grave international crimes. Article 16 raises new and interesting questions about the interrelationship between a political body and a criminal court. The extent of the deferral request has a potentially negative impact on the rights of the accused to have a fair and expeditious trial, the interests of the victims in seeing justice served, the collection and preservation of evidence to be used in the proceedings, and the obligations of States parties. The ICC Statute and the Rules of Procedure and Evidence provide no direct guidance as to how the organs of the Court should proceed upon an Article 16 request. Therefore, it is up to the Court itself to define and determine how the deferral request will operate and impact the proceedings at the Court.

While the ICC has not specifically dealt with an Article 16 deferral request as of yet, it is imaginable that there will come a time when the interests of peace (as determined by the Security Council) are in conflict with the interests of justice (as determined by the ICC). This is a foreseeable conflict when the Security Council and ICC both operate in the realm of preserving the peace. When this time comes, the Court should not hesitate to give full judicial review to the Article 16 request and take into account the multitude of factors implicated by such a request. The Court has the inherent power to do so and to determine the legal and procedural implications of the request on proceedings at the Court. True judicial independence can only come from the Court itself in upholding its values, free from political interference, and only then will it truly be "resolved to guarantee lasting respect for and the enforcement of international justice."<sup>142</sup>

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<sup>142</sup> ICC Statute, *supra* note 38, Preamble.