

The deferral of investigation or prosecution in the ICC by request of the Security Council of UN organization

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Abstract: Pursuant to Article 16 of the ICC, The Security Council of UN may request a deferral of proceedings for a period of twelve months. It allows the Security Council to block a case from reaching the court. The power of the Security Council Makes some concerns to judicial Independence of the ICC, but this power is based on a number of conditions and limitations, both arising from the UN charter and the Statute of the ICC. This power of Security Council originated from the UN Charter that charge and compel the Security Council to maintain international peace and security.

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1. Introduction

Pursuant to Article 16¹ of the statute, the Security Council may request a deferral of proceedings for a period of twelve months. The subsection regulates to defer investigation or prosecution. Such a request may be renewed under the same conditions by the Security Council. The request must be included in a resolution adopted under chapter VII of the United Nations charter. Pursuant to Article 39 of the charter, the Resolution must include a determination by the council of the existence of a threat to peace, breach of the peace or act of aggression. Thus, the request for deferral amounts to a measure that is outside of using armed force, pursuant to Article 41 of the charter.

The request for deferral found in Article 16 amounts to providing the Security Council with a veto power over the action of the ICC.² (Bergsmo, 1998)

While the Statute suggests that the Security Council's deferral be for 12 months, which runs from the date of the Resolution, The council may decide on a shorter period. Such a request may be renewed under the same conditions, as for the initial deferral. A Security Council's Resolution adopted under chapter VII of the united charter is required. This article

contains no limitation on the number of times that a request for deferral may be renewed which implies that it could be indefinite. Hence, it allows the Security Council to block a case from reaching the court. However, a non renewal of a deferral request automatically allows the ICC to take up an investigation or prosecution where it was left off³. (Bourgon, 1998) It is important that the ICC to be born from the statute is made available to the Security Council acting under chapter VII of the UN charter. Because council's powers for referral of a situation to ICC (Article 13 (b)) and deferral by virtue of Article 16, is subject to a number of conditions and limitations, both arising from the UN charter and the statute. So it is independence of the court in action, even the Security Council can not in any way modify those rules.¹ (Al Habib, Eshaq, 1999, Alaye, Mostafa, 1999)

It could be said that allowing such an Article in statute damages Independence principal of the Court in view of the orical and doubt about existence of the independence court.^{3 2} But keep in mind that by attention to designed negotiations in Rome conference and sensitivity of delegations of some states to extra-ordinary roll of the security in the court , in fact , Article 16 to use of limitation on widespread powers of the Security Council is in better situation, because to the contrary using of the veto power that controversial is applicable by one state that is having such a power, deferral of

¹ - Article 16 : Deferral of investigation or prosecution

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 chapter of the United Nation , has requested the court to that effect , that request may be renewed by the Council under the same conditions.

² - M. Bergsmo, "the jurisdictional Regime of the International Criminal court" , 6 European journal of crime , criminal law and criminal justice (April 1998) 345.

3- Bourgon , Stephan , jurisdiction Ratione Temporis , In the Rome Statute of the International Criminal court , A commentary , Edited by Antonio Cassese , Paola Geata , John R . W. D . Jones, oxford university press, p . 554.

¹ - condorelli , luigi and Santiago Villalpando , Referral and Deferral by the security council , In the Rome Statute of the International , Criminal court , abid , p . 628.

² - Al Habib , Eshaq , the International criminal court in a glance : Emergencies and worries , In the International criminal court and Islamic Republic of Iran , Tehran , foreign affairs ministry press center , first published , 1378 , p . 349.

investigation or prosecution by virtue of Article 16 will need consensus of all nine permanent members of the council.

Anyway, this conversely extra-ordinary Article as compared with the text that was included in first plan of statute that was regulated by International law commission is more advanced. By virtue of the first text, the court was prohibited from prosecuting any case that "the Security Council perceives it as threatening against peace or breach of peace or act of aggression by virtue of chapter VII of the charter, unless the Security Council decides differently."³

This regulation permits a state that is a member of the Security Council to prevent the prosecution, something that may be concealed by decision of the security itself and a decision of the Security may be blocked by using of the veto power by one of the five permanent member (United States of America, England, China, France and Russian Federation) in any time.⁴⁴

The causation of drawing of this negotiation in the course of Rome conference was to set a connection between duty of the court for prosecution and trial of crimes included in Article 5 of statute and the duty of the Security Council to set reservation or restoration of peace and international security (Articles 39, 41 and 42 of charter). (Condorelli, Luigi) After abundant negotiation, in the end, to be dissolved by proposal state of Singapore based on giving permission for deferral of investigation and prosecution in one year period and the possibility of renewal.¹

By approval of Article 16 in current situation, the Security Council's powers which are included in the original ILC Draft be limited considerably, because to use this power from the Security, it is necessary conditions and limitations as follows:

- 1- Issuing of resolution and request of deferral investigation or prosecution from the court.
- 2- Agreement of five permanent members with this resolution.
- 3- Temporal time limit of 12 months, while it is renewed under those conditions.
- 4- Comparing of resolution with Article 39 of United Nations Charter.²⁵

These safeguards have attenuated some of the concerns expressed in Rome that the previous

provisions considerably undermined the independence of the court by allowing for extensive control by a political organ. Yet as was clearly stated by several delegations on a number of occasions, the Statute itself cannot affect the powers of the council under the Charter. By virtue of the operation of Article 103 of the charter, the Council, were it to adopt a mandatory resolution under chapter could still bypass existing treaty mechanisms for the prosecution of individuals in the sense that Member states obligations under charter would have to prevail over those under the ICC were to conflict.³⁶

It seems if we believe to prevent the Security Council from using veto power for preventing the proceeding of the court, we will see an amendment in The United organization. (Gowlland, Debbas Vera, 2001) While cannot ratify regulations of charter by statute and ratification of charter is tied to definition conditions that set in Article 108. this question Arise that does the court has the situation that proceed in from of possibility of sabotage measures by the Security Council which is aimed at international peace and security?

Anticipation of this privilege for the Security Council, while any state or international institution has not this privilege, indicates the special place of the Security Council in international relations and needs special attention from of Rome conference members.¹⁷

The two principal questions in this essay are: 1- what are the conditions and limitation for the Security Council for applying deferral power of investigation or prosecution of a case in the ICC?

2- Can the ICC seek refuge of proceeding deferral by the security?

Hypothesis:

1- Under Article 16, the deferral by the Security Council should thus respect the conditions set up by the UN charter, but also deriving from the system of the ICC Statute. The conditions of the Security Council for applying, This power is inserted in Articles 24, 39, 41 and 42 of the UN Charter.

2- The ICC itself is the only authority for interpretation from the Article 16 that the court has the right to seek refuge the request of deferral by the Security Council.

2. Source and Condition of deferral power

The more important condition to use power of deferral by the Council is that when a case is proceeding in the court and the Security Council by virtue of Article 16 of statute and the charter of

3- The Report of the International Law Commission about act of 46th session, 2 may to 22 july 1994, A/49/10 document of UN, Article 23 (3).

4- Schebas, William A, an Introduction to the International Criminal court, translated to Persian by Baqer Mirabasi and Hamid Alohveyi Nazari, 1384, jungle publication, first published, Tehran, p. 88.

2- Gowlland, Debbas, Vera, the Relationship between the Security Council and international criminal court, WWW. Global Policy.Org / int / justice / icc / crisis / 2001 relationship htm – 25k, p. 3.

³ - Ibid, p. 3.

¹ - Khatami Far, Abdolah, the Relationship between International Criminal Court and the Security Council with emphasis on darfur case of Sudan, thesis for master, faculty of law of Azad university, central Tehran, 1385, p. 42 – 43.

United Nations perceive continuation of proceeding in the court as threat or breach of international peace and security.

The power of deferral of investigation or prosecution that is negative topic and require issuing of a resolution by the Security Council, do not cause spoil in act of the court because possibility of issuing of this resolution which needs a consensus of decision of all permanent members of the Security Council is rarely and even it conceals with using veto power by one of permanent members of the Security and using of veto power in this conditions is benefit for the court Secondly, by removing conditions of issuing of deferrals resolution, remove obstacle for proceeding by the Court.¹⁸ Under Article 16, the source of the power by the security Council to defer proceedings before the court, clearly stems from chapter VII of the UN charter and is to be connected with its responsibility for the maintenance of international peace and security. (Ebrahimi, Sayed Nasroolah) The deferral by the Security Council should thus respect the conditions set up by the UN charter, but also those deriving from the system of the ICC statute. In this sense, the power of the Security Council should be interpreted restrictively, as absolutely exceptional in the relations between political organs and the jurisdictional function.²⁹

Under Article 34 of charter "the security council may investigate any dispute, or any situation that might lead to international friction or give rise to a dispute, in order to determine whether the continuance of the dispute or situation is likely to endanger the maintenance of international peace and security." So it is possible that security receive continuance of proceeding a case before the court to endanger international peace and security. Under Article 39 of charter, obtain existence of any threat against peace, breach of peace or aggression will be on the Security Council. In addition to that the Security can receive continuance of proceeding as breach or threat against peace; it is possible that causation of deferral of investigation or prosecution be that the Security finds the previous situation of threat or breach of peace which the court by that causation to proceed is concealed. it gives reasons for necessity of existence of this Article in the statute of ICC that is as recognition of original role of the Security council to maintain international peace and security and as well as for the sake of harmony between two state

elements, existence of this Article in the Statute is necessary.¹¹⁰

It could be asked whether the resolution of deferral should be accompanied (or followed) by effective action by the Security Council to maintain or restore international peace and security. Though present in previous drafts and often placed at the core of the rationale of this provision, such a condition is not explicitly required by the final version of Article 16. Its deletion appears to be in accordance with the wide discretion that characterizes the exercise of the Security Councils powers under chapter VII: accordingly, the Security Council could consider that the deferral per se constitutes an appropriate and sufficient means to maintain international peace and security, it could also decide upon the adoption of further measures for this end. The only real condition for the Security Council appears to be the general obligation to give reasons for its decision in keeping with the purposes and principles of the UN charter and the objectives established under chapter VII.²¹¹

The Security Council's power to block the exercise of jurisdiction by the ICC is difficult to understand and somewhat paradoxical. While, on the one hand, it is argued that the ICC is being set up to try crimes of the gravest magnitude for the sake of humanity, on the other, it is argued that the maintenance of international peace and security might require that those alleged to have committed these crimes – be permitted to escape from justice if the Security Council so decides. For this reason, the support of the Security Council would be difficult to justify in the eyes of the international community.

3. Studding of Article 16 of the court statute

The Security Council is called to intervene in the exercise of the ICCs jurisdiction in a, negative way. By virtue of Article 16, this UN organization is entitled to defer investigation or prosecutions before the court for a limited (though renewable) period of twelve months. This provision thus acknowledges the Security Councils primary responsibility for the maintenance of international peace and security, allowing it to coordinate – even in terms of time – the prosecution of international crimes with the other measures which it undertakes for the fulfillment of its mission.¹¹²

By virtue of Article 16, the deferral by the Security Council will have limited temporal effects: the stay in the proceedings should not exceed twelve months. This condition does not arise from the UN charter

¹ -I abib, p. 43.

² - Condorelli, Luigi and Satiago Villalpando, Referral and Deferral by the Security Council, In the Rome statute of the International criminal court, op. cit, p. 646.

¹ - United Nations Department of public Information, Analysis of Issues in the Draft Statute, may 1998, p. 4. <http://www.un.org/icc/dstatute.htm>.

² - Condorelli, Luigi, op. cit, p. 648.

² - Condorelli, Luigi, op. cit, p. 628.

and is rather directly imposed by the statute it self, limiting the interference of the Security Council with the judicial activity of the court. It does not result in a restriction of the powers of the Security Council under chapter VII, since the renewal of the deferral is possible every twelve months, but it is subject to certain conditions. In fact, the Security Council will have to vote and to be justified by reference to the persistence of a threat to the peace, breach of the peace, or act of aggression and to the fact that the deferral of the activity of the court constitutes an appropriate means to maintain or restore international peace and security. The mechanism thus encourages a renewed debate within the Security Council and creates accountability on the part of this UN body.¹¹³

It cannot ignore that ICC is regulated on the present world discipline and logically will operate on the basis of international accepted rule and influence of big powers. The Article 16 is the reason of creation of the situation and relationship between overruling rule and judicial proceeding of the court.²¹⁴ While political tendencies and probably tyrannical of the Security Council for the sake of third countries namely south countries is not hidden for any one, but in fact mentioned Article take a veto right to the Security Council and this matter will be a crowbar to pressure the court in the future and it creates serious problem for the court in the way of criminal justice process.³¹⁵ The demanded deferral by the Security Council might conform with the UN charter. In the first place under Article 39 of the UN charter, the Security Council should, as a preliminary step, determine the existence of a threat to the peace, breach of the peace, or act of aggression. This situation does not need necessarily to find its direct case in the investigation or prosecution per se: the Security Council could refer to a larger factual or political background, related to the proceedings before the court and placed in one of the categories described in Article 39, on the contrary, the Security Council shall indeed justify its decision of deferral as a means to maintain or restore international peace and security: it should give reasons for its decision by demonstrating that the suspension of the investigation or the prosecutions will contribute to

the objective provided for in the chapter VII of the charter.

It is also confirmed by the words of Article 16, which specifically refer to investigation or prosecution, before the court, as opposed to a general term such as proceedings.¹

4. Issuing of resolution and announcing of that to the court

The first condition for applying of Article 16 for the Security Council and request of deferral of investigation or prosecution in the court is that as the case is proceeding in the court and a resolution is issued from the Security for deferral of investigation and or prosecution and is announced to the court. According to Article 27 of the United Nations Charter, the resolution which is bearer of deferral of investigation or prosecution must be decided by positive vote²⁻¹⁶ of all nine permanent members. Consequently none of the Security Council members is not capable to prevent the court alone from continuance of investigation or prosecution in the definite case, because demand of deferral of investigation or prosecution must be decided by the Security Council members that is included all permanent members.³¹⁷ According to Article (2) 17, relations agreement between the International Criminal Court and the United Nations organization "when the Security Council, in using of the chapter VII of UN charter, adopts a resolution and request from the court which by virtue of Article 16, no engage any investigation or prosecution or continue, the request immediately will transmit by the General Secretary to the president and the prosecutor. The court will announce reception of the request by the General Secretary, and in the case of need", so that will inform the Security Council, from the measures that adopt in this regard.

So, after issuing of resolution, it must be announced by the General Secretary of UN to the president of the International Criminal Court for action.

The practical current of the Security Council shows that consensus of the permanent members of the Security Council about threat against peace, breach of peace or act of aggression is difficult. This situation can conceive as hope full for independence of the court for prosecution of international criminals.

5. The Conformity of deferral with chapter VII of the charter

1- condorelli, op . cit, p . 647.

² - The impossible vote of permanent member, according to current policy, does not account applying of veto.

³ - p.30. <http://www.un.org/icc4> – Declaration of the Hague.

¹ - Condorelli, Luigi, op . cit, pp . 648 - 649.

² - Alaye, Mostafa, International Criminal Court, Human Right and studying of matter of joining In the International Criminal Court and the Islamic Republic of Iran, foreign state press, Tehran, 1378, p . 412.

³ - Ebrahimi, Sayed Nasroulah, the preface on establishment of International Criminal Court and studying of its Statute, In the International Criminal Court and Islamic Republic of Iran, op . cit, p . 386.

Article 16 of statute by expression "...in a resolution adopted under chapter VII of the charter of the United Nation, has directed the court to that effect (deferral of investigation or prosecution) compel the Security to rely on chapter VII of UN charter for deferral. This means that the Security must obtain against peace, breach of peace or act of aggression according to Article 39 of the UN charter. This problem is possible that the court can study the conformity of action of the security. In the past, international courts dislikes severely from prediction of this role for the Security Council.¹¹⁸ But in the place of the court, its statute, take this power (deferral of investigation or prosecution) to the Security Council. This is arised from the charter that the Security is the first responsible for reservation of international peace and security and the court is an independent institution outside from the UN organization. It is possible that in some instances, the court preceding is entered to the domain of international peace and security, so, it was necessary to make a relationship between two institutions. The court should have been the power to review the Security Council decision for deferral, according to the competence de la competence. This is like to review by the past Yugoslavia International criminal court about legitimacy of the Security Council resolution in safeguarding of the independence in the case of tadic.¹

6. The objections of the Article 16 of the statute

Some believe that the Article 16 is unacceptable logically, because it is caused the judicial function of the court to be tied to decision of a political organization while it should point out that this analogous power about priority of decision of political organ on function of judicial institution, this is not about function of ICJ and the Security Council. Because they owe organs of the UN and it subject to the charter.

The same preparatory works, comes into existence about conformity of the Security Council for reservation of international peace and security under Article 24 the UN charter.²¹⁹

As it was felt, the Article 16 takes abuse only some day after that Rome statute put into force. It takes

¹ - pradel , jean , droit penal compare , paris : Dalloz , 1995 , p . 251.

1- - Seils, paul and Marieke Wierda , the international criminal court and conflict mediation , June 2005 , at: 9. www.ictj.org/images/content/1/1/119, p.

² - See VILC (1994) Vol. II, part 2, at 43 – 45, Report of the ad hoc committee (1995), supra note 28, at para. 124, Report of the preparatory committee (13 September 1996), supra note, para 141.

place at the time that as the commission the UN organization officials in the Bosnia and Herzegovina (UNMBH) came into effect. The untied states, which was largest participator in the commission in view of human and things sources, threats if nations of that country that apply as official or is applied in the past, for commission of any act that be commit negligent in relation to their commissions, were not immune from prosecution of the International Criminal Court, it will cut it's aids. The rest of the Security Council members consent to the Security Council demand and issue resolution 1422 dated 12 July 2002 and refer it Article 16, while this resolution is deviation from regulation of Article 16 of the statute and the UN charter.

Without doubt, the United States for Reaching to its goals, take play the UN and with means of UN payment of its debts for obtain its demands take pressure on it.¹²⁰

In the mentioned case, United States by threat to veto of all commission of peace reservation official of the UN organization obtained its demand. While in the final, this resolution in 2004 disapproved. America , in the recent years , see Article 39 of charter for reservation of national benefits and its reaction to international premise have been conformity with its national benefits , Not reservation of international peace and security.

The Security Council can use Article 16 from two views in hand that continuance of investigation or prosecution of a situation in the court , threat international peace and security and on the other hand that the situation which was a threat to international peace and security is canceled. Of course, the second situation will be a bread interpretation from Article 16 that we may see the Security how will act in the future. Because according to this Article in the view of the security, continuance of proceeding in the court will be a threat to international peace and security, it has the right of deferral of proceeding and cease of the threatening situation of international peace and security. Because duty of the court is prosecution and trial of international criminal any way and in the time that this premise is not a threat for international peace and security, the court has the right of proceeding and the security can not prevent it. Anyway, there is the principal criticism that how does fulfillment of international justice can receive threat to international peace and security. (Schebas, 2005) The Rwanda court give attention to this topic that halt of commit

¹ - Saed , Edward , and now the Last day (1387) , In the last day of unruly states , Translated to farsi by masood khirkhah , philosophy publication Institution , first edition , p . 33.

of crimes in the Rwanda quarrels, is not necessary means restore international peace and security to this country "because until the time that the justice is not fulfill about criminals cannot claim that the peace and security completely settled again."²¹

For the same reason one can say that deferral of investigation or prosecution in the court, is not necessary means reservation or restore international peace and security and the Security cannot receive in any time only this affective measure include in the Article 41 of the as charter and maybe it is necessary that surplus deferral, resort to another measures for obtain this aim.

Another object of this Article, namely deferral of proceeding is related to guarantee of accused right. Since deferral is causes delay of proceeding for a long time whichever can continue for one year this delay is inconsistent with accused right for trial without undue delay. (Khatami far, 2006) In addition one can ask, does contamination of detention for deferral period about accused during in infinite time is in control of the court? So that we know according Article 58 of the statute, "at any time after the initiation of an investigation, the pre trial chamber shall, on applying the prosecutor, issue a warrant of arrest of the person if, having examined the application and the evidence or other information submitted by the prosecutor, it is satisfied that :

- (a) There are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the court.
- (b) The arrest of the person would be necessary
- (i) To ensure that the persons appears at the trials
- (ii) To ensure that the person does not obstruct or endanger the investigation or the court proceedings, or
- (iii) Where applicable, to prevent the person from continuing with the commission of that crime or a related crimes which is within the jurisdiction of the court and which arises out of the same circumstances ..."

So according to above instances, deferral of investigation and prosecution as a whole and with prohibition of the prosecutor from doing any work is incompatibility of the criminal justice.

According to notes of 4, 5, 6 and 7 the mentioned Article the order of arrest while does not issue an order that be contrary with that, will be creditable and in the deferral time does not specify this situation in the statute that this subject is incompatible with

² - Prosecutor V. Kanyabashi, case No. ICTR – 96 – 15 – T, ICTRT. ch, Decision on the Defense Motion on jurisdiction, para. 26.

accused right. In addition the prosecutor can de mind the amendment of arrest order for decrease or increase from pre trial of the court or demand to summon order of a person from pre trial chamber. If the pre trial chamber is satisfied that there is sufficient reasons Will issue summon? With deferral by the Security Council all of above mentioned are contrary with a fair Trial.

Surplus, for the Security Council, for issuing of deferral resolution, what is most priority is reservation of international peace and security, but it does not mean that obtaining this priority can ignore guarantees for a fair Trial. The court should attain that does the resolution is caused that accused stay in detention, in the under way and without trial or not? If it is so, the act of the Security Council is inconsistent with the charter, because it is deviance from the goals of chapter VII. Studying of existence of specified conditions in the chapter VII of UN charter and the statute of the court about demanded deferral by the security, is the sufficient judicial guarantee for the accused right.

The Security is bound to observance of the purported of the court statute, because by ratification the relation agreement inserted in Article 12 of the Statute, the obligation is enjoyed legal aspect. These two institutions by preamble and Article 2, recognize responsibility of each other and the UN organization recognize the court as independence permanent judicial institution that according to Article 1 and 4 of the statute has international legal personality and UN organization and the court are obliged reciprocally to respect each other situation and commission. So the Security Council cannot intentionally to the court commissions and focus only on international peace and security.

7. The procedure in case of deferral

Probably due to its turbulent history of drafting, Article 16 is a totally isolated provision in the procedural system of the ICC statute; it contains no regulation of the mechanisms to put the deferral into effect and no other article refers to it. Moreover, the Rules of procedure and Evidence have failed to confront and deal appropriately with this issue. In the absence of any adequate regulation, we will identify hereinafter the general principles that should guide the procedure before the court in case of deferral.

The request of deferral by the Security Council should be addressed to the president of the ICC, which has the responsibility for the proper administration of the court. By interpreting *prima facie* the resolution of the Security Council, the presidency shall identify those cases currently proceeding to which the deferral should apply and

communicate the request to the competent chambers. In any event, the presidency shall also notify the request to the prosecutor – as it is pertinent to the future conduct of his or her investigation. If applicable, the interested suspects or accused, should also be has informed. (Security Council, 2005) Although, under Article 16, the court appears to have no discretionary power in deciding whether to abide by the request of deferral, the decision by the Security Council is subject to such formal and substantial conditions as to require review by the jurisdictional organs, This the interests of justice and in order to safeguard the independence of the judiciary. (Prosecutor V.) Consequently, the decision to suspend current proceeding should pertain to: (a) the pre – Trial chamber – guarantor of the interests of justice in the investigation phase – if the prosecutor is examining the case, (b) the Trial chamber – that shall ensure a fair and expeditious trial as well as full respect of the rights of the accused – once the Trial has begun, or (c) the Appeals court, if the case is under appeal. In addition, since the prosecutor should exercise his or her functions in full respect of the statute, he or she shall abstain from initiating, or continuing with, investigation on the situation at stake. (Lione yee) To the contrary, since Article 16 refers only to "investigations" and "prosecutions", There for nothing prevents the prosecutor from continuing to gather information that would prove useful in future proceedings, once the deferral period has expired.¹²²

Of course, the prosecutor also according to Article 19 (3) of the statute can demand judgment from the court about the subject of acceptance capability. So, the principal question is, can the ICC refuse the request of proceeding deferral by the security? Some believe that it does not appear, existence of the expression at the Article 16 of the Statute that say: "No investigation or prosecution may commenced or proceed after the security council ... has requested the court ..." invest with the prosecutor a power about commencing or proceeding of prosecution before the court after the request of the Security council rely on the chapter VII. (United Nations, 1998) But the important subject is that the court itself is the only authority for interpretation of the Article 16 As such the court has the right to deny the request of deferral by the Security council.¹²³ The ICC is not bound by the request of the security council (for

deferral). Because be bounding may be receive as acceding from limit of Article 16 of the statute.²²⁴

8. Consequences of the Deferral

The main consequence of deferral is expressly provided for by Article 16: "no investigation or prosecution may commence or proceed." It stems from the broad language used by this provision that the deferral entails the suspension of any judicial proceeding before the court, from the investigations of the prosecutor to trials themselves (either in the first instance, in appeal or revision).

The deferral, however, should not mean the complete paralysis of the ICC with regard to the situation: the wording of Article 16 clearly refers, and limits its consequences exclusively, to the investigations and prosecutions before the court. The prosecutor should then be entitled to conduct those examinations that precede the actual initiation of the investigation following an authorization by a pre trial chamber³²⁵: he or she could, in particular, steps to analyze seriousness. Moreover, the administrative duties of the court linked with the deferred cases should be completed. It could be asked whether some exceptional judicial activities can still be pursued after the deferral. Councils burden to take the necessary measures to secure confidentiality in the interests of justice and to return the relevant documents at the end of the period of deferral. (YILc, 1994) A more initiate issue concerns the guarantee of the right of the accused, since the deferral will entail a delay in the proceeding for a long period. Doubts can be expressed as to the compatibility of the Security Council's request of deferral with the right of the accused to be tried without undue delay. (Seils, 2005) Moreover, it could be asked whether the continued detention for the period of deferral of those accused that were kept under custody of the court pending trial is not to be considered arbitrary.¹²⁶ (Stan, Karestan, 2002)

That should certainly be the case for those measures considered appropriate by the court for the protection of witnesses and victims, since it would be unacceptable for their safety and well being to be affected by the deferral of the Security Council. On the other hand, Article 56 of the Statute, as presently worded, does not allow the court to proceed in such cases where the prosecutor, though not actively investigating a case, finds himself or herself confronted with a unique opportunity to take testimony or a statement from a witness or to examine, collect or test evidence, which may not be

¹ - condorelli, Luigi and Santiago Villalpando, op. cit, p. 650.

¹² - Stan, Karestan (2002), the exemption of the forces of the peace keeper of the non member states of the ICC statute from judicial jurisdiction of the ICC, the ambiguous of 1422 resolution of the security council (1384), Translated to farsi log Sayed Hessomoldin Lesani, law magazine, No. 32, p. 253.

² - abid, p. 257.

³ - Article 15 (1), (2) of the statute.

¹ - Condorelli, Luigi and Santiago Villalpando, op. Cit, pp. 651 – 652.

available subsequently for the purposes of a trial. The exercise of the power of deferral by the Security Council causes a number of further problems, related to the preservation of the interests of justice. They should be solved, appropriately in accordance with the judicial system established by the Statute as a whole and in respect of the function attributed to the Security Council under the UN charter. Hereinafter, we will limit ourselves to some examples of the complications that may arise as a consequence of a deferral and their possible solutions. (M. Bergsmo, 1998)

In case of deferral of proceedings before the court, the prosecutor will find himself or herself in possession of documentation related to a situation being dealt with by the Security Council under chapter VII. (Saed, Edward, 2008) The question then arises whether he or she has the obligation to deliver the information to the Security Council for a better evaluation of the situation, taking into account that it may reveal the identity of witness in danger or the contents of sealed documents: confidentiality may then be essential for the continuation of the judicial proceedings after the period of deferral. The problem is not contemplated by the Statute. It should be duly considered in the Relationship Agreement between the court and the UN under Article 2: the agreement should, in particular, provide for the possible obligation for the prosecutor to cooperate with the Security Council, conversely, so shall the Security Council.

Conclusion

Deferral of investigation or prosecution by the Security Council rely on Article 16 of the statute acknowledges the Security Council's primary responsibility for the maintenance of international peace and security. The Security Council responsibility arises from Chapter VII of the UN chapter.

The ICC may prosecute crimes inside its jurisdiction is related to international peace and security.

Nevertheless, the provision was strongly criticized and concerning the possibility of a deferral, which amounts to providing the Security Council with a veto power as it relate to the courts activity, the strict conditions of application it is subject to, as a measure pursuant to Chapter VII of the United Nations Charter will make it very difficult to use. (Pradel, 1995) The Security Council showed that it has a broad interpretation of the Article 16 and the statute. Therefore the urgent necessity is amendment of Article 16 to restrain the Security Council from abusing its power.

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