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**The relationship between the UN Security Council and the International Criminal Court
and its challenges to the independence of the Court**

Master's Thesis

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Tallinn

2020

Dedication

This thesis is dedicated to my dearest mother.

Thank you for everything you have done for me and continue to do for me.

I hope I made you proud.

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Introduction

During the drafting of the Rome Statute of the International Criminal Court (ICC), many states especially the permanent members of the UN Security Council were concerned about how the relationship between the Court and the United Nations Security Council (UNSC) would be reflected in the statute. Many envisioned a permanent Court guided by the Security Council and its responsibility for the maintaining international peace and security.¹ Bill Richardson, the U.S Ambassador to the UN, stated during the Plenary Session of the UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court that;

“A permanent Court cannot stand alone. It must be part of the international order, and supported by the international community. The United Nations Security Council remains a vital part of that world order. Because of the Security Council's legal responsibilities for maintaining international peace and security, the United States believes that the Council must play an important role in the work of a permanent Court, including the Court's trigger mechanism.”²

While many States mostly middle powers and developing countries did not believe the Security Council could administer justice fairly. Therefore, they felt it was imperative that the Security Council should not possess powers that could undermine the independence of the ICC.³

Delegations particularly took umbrage with the Security Council's rights related to the jurisdiction of the ICC. Powers that enabled the Security Council to refer cases to the court, and to force the court to defer cases for political reasons, were met with fierce opposition. As such, the drafters of the Rome Statute sought to find a balance. Eventually, the Security Council was granted discretionary authority to refer situations to the ICC, as well as to request the Court to not proceed with an investigation or prosecution for a renewable period of twelve months, much to the chagrin of various States, whose concerns remain to this day.

¹ Schabas, W. (2004). 'United States Hostility to the International Criminal Court: It's All About the Security Council.' *European Journal of International Law*, Vol 15, Issue 4, pp. 701-720 at p.715.

² *Ibid.*, at pp.713-714; see also Statement of Bill Richardson in the plenary session of the UN diplomatic conference 19 June 1998. Available at <https://www.legal-tools.org/doc/c2766e/pdf/>

³ Kirsch, P. and Holmes, J. (1999) 'The Rome Conference on an International Criminal Court: The Negotiating Process.' *American Journal of International Law*, Vol 93, Issue 1, pp 2-12.

The UN Security Council under Article 13(b) of the Rome Statute which under the said article may trigger the jurisdiction of the International Criminal Court, has referred two situations to the ICC, the first was Resolution 1593 (2005) regarding Darfur, Sudan and the second was Resolution 1970 (2011) regarding Libya. However, while the two referrals resolutions regarding Darfur and Libya at that time were considered a milestone and early success for the International Criminal Court as well as an endorsement from the most powerful political body in the international community, they came at a high price; they contained two controversial paragraphs which had a negative impact on the Court. Further, the lack of funding was a major burden to the Court's thin budget and the exclusion of certain individuals from the Court's jurisdiction not only contradicted the Rome Statute and other international treaties but placed the legitimacy, independence and integrity of the International Criminal Court in question.

In addition, the Security Council has failed to act in other situations where mass atrocities have been committed. Because each of the permanent members has the power to veto any Security Council resolution, it is unlikely that any situation that affects any of their political interests will be properly dealt with. The referral of Libya situation,⁴ non-signatories of the Rome Statute, and the non-referral of the situation in Syria⁵ exemplify the selectivity of cases and double standards of referrals by the UN Security Council. According to David Bosco, the referrals have allowed the dominant powers on the Security Council to shape the docket of the Court, which severely lacks resources.⁶ Even the Prosecutor of the International Criminal Court stated that “we are a judicial institution but there have been several attempts to politicize the court and that is wrong. It sends the wrong signals to people that the court is political.”⁷ As a result of the Security Council referrals, questions about whether the Court is merely serving as a tool to further particular political interests have surfaced.⁸

⁴ Security Council resolution 1970 (2011) [on establishment of a Security Council Committee to monitor implementation of the arms embargo against the Libyan Arab Jamahiriya], 26 February 2011, S/RES/1970 (2011), available at: [https://www.undocs.org/S/RES/1970%20\(2011\)](https://www.undocs.org/S/RES/1970%20(2011))

⁵ Security Council, ‘Referral of Syria to International Criminal Court Fails as Negative Votes Prevent Security Council from Adopting Draft Resolution’ (22 May 2014) Press Release SC/11407

⁶ Bosco, D. (2014) *Rough Justice: The International Criminal Court's Battle to Fix the World, One Prosecution at a Time*. Oxford University Press, Oxford, at p. 180.

⁷ ICC will not entertain politics’, *The Star News*, 1 December 2013 (<http://www.legal-tools.org/doc/634d84/>).

⁸ Mistry, H. and Ruiz, D. (2012) ‘The United Nations Security Council and the International Criminal Court.’ Chatham House, at p.3. Available at <https://www.pgaction.org/pdf/activity/Chatham-ICC-SC.pdf>

Moreover, Article 16 of the Rome Statute grants the UN Security Council the power to suspend, for a renewable period of twelve months, any investigation or prosecution initiated, or about to be initiated, by the International Criminal Court if the Security Council believes that such suspension is crucial to maintain or restore international peace and security.

Article 16 was a compromise reached instead of the initial deferral provision in Article 23(3) of the International Law Commission's draft statute that made the Security Council the gatekeeper of the Court.⁹ Article 16 is regarded as a proper balance between judicial independence and political concerns. The adoption of a deferral which pursuant to Article 27(3) of the UN Charter requires "[...]an affirmative vote of nine members including the concurring votes of the permanent members..."¹⁰ considered a safeguard that the deferral power to halt ICC investigations or prosecutions could not be easily abused.¹¹

However, the International Criminal Court was forced to adopt Security Council Resolutions 1422 (2002)¹² and 1487 (2003)¹³ after the United States threatened of using the veto to halt future UN peacekeeping missions. The actions of the United States that reached to blackmail so as to invoke Article 16 as its sees fit had not been foreseen.¹⁴ Security Council Peacekeeping Resolutions 1422 (2002) and 1487 (2003) were a preemptive effort to grant of immunity from criminal prosecution to non-states parties' nationals. This does not conform with the Rome Statute and the principle of non-discrimination in international law, which is the core principle of justice and the rule of law.

The UN Security Council control over the jurisdiction of the International Criminal Court had led to numerous criticisms against the Court for being biased regarding the selection of cases

⁹Article 23(3) of the ILC's draft statute stated, "No prosecution may be commenced under this Statute arising from a situation which is being dealt with by the Security Council as a threat to or breach of the peace or an act of aggression under Chapter VII of the Charter, unless the Security Council otherwise decides." See Report of the Preparatory Committee on the Establishment of an International Criminal Court, Volume II (Compilation of proposals) General Assembly Official Records, Fifty-first Session, Supplement No. 22A (A/51/22), Pages 75-77. Available at <https://www.legal-tools.org/doc/03b284/pdf/>

¹⁰ United Nations Charter, 26 June 1945, Article 27(3).

¹¹ Mistry, H. and Ruiz, D. (2012) 'The United Nations Security Council and the International Criminal Court' Chatham House. P.14, Available at <https://www.pgaction.org/pdf/activity/Chatham-ICC-SC.pdf>

¹² United Nations Security Council resolution 1422 (2002) [on United Nations peacekeeping]. S/RES/1422 (2002) Available at <http://unscr.com/en/resolutions/1422>

¹³ Security Council resolution 1497 (2003) [on the situation in Liberia], 1 August 2003, S/RES/1497 (2003), available at: <https://www.refworld.org/docid/3f45dbec7.html>

¹⁴Schabas, W. (2004). 'United States Hostility to the International Criminal Court: It's All About the Security Council.' *European Journal of International Law*, Vol 15, Issue 4, pp. 701-720 at p. 716.

especially towards African countries even though this is beyond the Court's control. The ICC has also been accused of double standards and being a tool of Western States.

Therefore, the main objective of this thesis is to examine whether the relationship between the International Criminal Court and the UN Security Council has politicized the International Criminal Court and undermined its effectiveness and independence.

In the light of what has been discussed in this introduction, this thesis will aim to address the following research question:

Does the UN Security Council's relationship with the International Criminal Court undermine its independence?

This thesis will aim to examine the relationship between the International Court (ICC) and the UN Security Council (UNSC) in accordance with the Charter of the United Nations and the Rome Statute in order to determine if the Court's relationship with the UN Security Council has encouraged the politicization of the Court by the big powers and has threatened its independence.

To answer the proposed research question, the focus will be on the powers of referral and deferral granted to the UN Security Council by the Rome Statute pursuant to Article 13(b) and Article 16. Since the referring of a situation by the UN Security Council can lead to the selection of cases, especially if it is in the political interests of the five permanent members of the Security Council (United Kingdom, France, United States, Russia and China). While Article 16 gives the UN Security Council the power to interfere with the International Criminal Court's investigations and prosecutions in the name of maintaining international peace and security.

The primary legal method that will be used in this thesis is based on the analytical methods of international instruments such as the Rome Statute of the International Criminal Court, the United Nations Charter, the Negotiated Agreements between the International Criminal Court and the United Nations. The analysis of the Security Council Resolutions 1422 (2002), 1487 (2003), 1597 (2005) and 1970 (2011). However, the historical method will also be present.

This thesis will consist of five chapters.

The first chapter will give a brief historical overview of the international attempts and efforts that eventually led to the drafting of the Rome Statute. It will also highlight the works and achievements of the ICC.

The second chapter will discuss the International Criminal Court's Negotiated Relationship Agreement with the United Nations and the relationship between the International Criminal Court and the UN Security Council in accordance with the Charter of the United Nations and the Rome Statute, through the Security Council Referral, Security Council Deferral and cooperation.

The third chapter will offer legal analysis of the four Security Council Resolutions to the International Criminal Court, Resolutions 1422 (2002), 1487 (2003), 1597 (2005) and 1970 (2011) and highlight the effect of these resolutions on the independence and effectiveness of the International Criminal Court.

The fourth chapter will give an overview of the policies of three of the permanent members of the UN Security Council the United States, China and Russia, none of which is a state party of the Rome Statute of the International Criminal Court. The chapter will also discuss Russia's and China's use of their vetoes in the Syria situation to highlight how the abuse of such power by the permanent members has resulted in the obstruction of international criminal justice and the fight against impunity. Finally, the author of this thesis will include in this chapter a comparison of the Myanmar situation with the situation in Syria in order to find an alternative to help the Syria situation reach the ICC without a referral from the Security Council.

The fifth chapter will offer opinions and suggestions about how the following questions may be resolved:

How can the International Criminal Court engage the Security Council in a way that does not compromise its independence?

What role the States Parties to the Rome Statute and other external actors should play in helping to improve the efficiency and effectiveness of the Court?

Keywords: The International Criminal Court, The Security Council, Rome Statute, UNSC Resolutions, Judicial Independence, International Criminal Justice

1. The International Criminal Court

This chapter give a brief historical overview of the international attempts and efforts that eventually led to the drafting of the Rome Statute.

1.1 The establishment of the International Criminal Court

The creation of the International Criminal Court creation was a result of a series of "atrocities that deeply shock the conscience of humanity,"¹⁵ including war crimes, genocides and crimes against humanity. Systematic torture, extrajudicial executions and enforced disappearances occurred all across the globe during the 20th century, and the majority of the perpetrators of these crimes were not punished.

In 1920, the League of Nations in 1920 formed an Advisory Committee of Jurists to prepare and submit a report to establish a permanent court of international justice,¹⁶ and then continued with the convening of an international conference in Geneva in 1937, where the first convention stating the establishment of a permanent international court for acts of international terrorism was concluded. However, the convention was not ratified and never entered into force.¹⁷ The efforts then resumed under the United Nations on 11 December, 1946 when the General Assembly passed resolution 96 (I) declaring genocide a crime under international law, which lead to the adoption of the Convention for the Prevention and Punishment of the Crime of Genocide on 9 December 1948. The Convention came into effect on 12 January 1951.¹⁸ In 1948, at the request of the General Assembly, the International Law Commission (ILC) drafted a statute for a permanent international criminal court, but the cold war combined with political tension stopped the progress.¹⁹

¹⁵ Rome Statute of the International Criminal Court, Rome 17 July 1998, A/CONF.183/9 (entered into force 1 July 2002), Preamble, paragraph 2 "Mindful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity."

¹⁶ Statute of the International Court of Justice, adopted by the General Assembly on 17 December 1963 and came into force on 31 August 1965. Available at <https://legal.un.org/avl/ha/sicj/sicj.html>

¹⁷ Historical survey of the question of international criminal jurisdiction: memorandum submitted by the Secretary-General. UN. Secretary-General. 1949. Available at https://legal.un.org/ilc/documentation/english/a_cn4_7_rev1.pdf

¹⁸ The Convention on the Prevention and Punishment of the Crime of Genocide adopted by the United Nations General Assembly on 9 December 1948 as General Assembly Resolution 260. The Convention entered into force on 12 January 1951. Available at <https://treaties.un.org/doc/publication/unts/volume%2078/volume-78-i-1021-english.pdf>

¹⁹ Couture, A. (2015) 'The Politics of International Justice: the Security Council's Impact on the Independence, Effectiveness and Legitimacy of the International Criminal Court' McGill Centre for Human Rights and Legal Pluralism, Vol. 3, No. 2, pp. 1-35 at p.7.

In the wake of World War II, the allies established two international military tribunals in Nuremberg and Tokyo. The Nuremberg Trial and the Tokyo War Crimes Trials (1945–1948) have shed the light on the responsibility of individuals in international law, and this has increased following the armed conflict in Bosnia and Herzegovina, and the spread of atrocities and tragedies committed by Serbs against unarmed Muslim civilians. International criminal justice has emerged at the UN level to punish these criminals, and a special international criminal tribunal has been established to prosecute criminal leaders in the former Yugoslavia for violating the rules of international humanitarian law by virtue of Security Council Resolution 808 (1993).²⁰

Under Security Council Resolution 955 (1994), another international criminal tribunal, the Rwanda Tribunal, was established to prosecute persons responsible for genocide and other serious violations of international humanitarian law committed between 1 January and 31 December 1994.²¹ The Yugoslavia and Rwanda tribunals inspired States, which felt the need for a permanent international criminal court to deal with serious international crimes and punish the perpetrators and be a major step towards ending impunity. It would also deter those who are prone to commit serious crimes under international law.

In 1994 the General Assembly mandated the International Law Commission ILC to draft once again a statute for a permanent international criminal court. That same year the ILC submitted the final draft statute to the General Assembly,²² The Commission listed the crimes that will be subject to the jurisdiction of the court; aggression, genocide, crimes against humanity, and war crimes. Based on the ILC's draft statute the General Assembly decided in its 1995 session to establish a Preparatory Committee to prepare a formal diplomatic conference.²³

The most prominent development when the Diplomatic Conference of Plenipotentiaries on the Establishment of the International Criminal Court held on June 1998 in Rome. The Conference was attended by delegations representing 160 countries as well as international and non-governmental organizations. The Rome Conference witnessed negotiations on the draft of the

²⁰ Security Council resolution 808 (1993) [international Criminal Tribunal for the former Yugoslavia (ICTY)]. Available at <https://www.refworld.org/docid/3b00f15d30.html>

²¹ Security Council resolution 955 (1994) [Establishment of the International Criminal Tribunal for Rwanda], 8 November 1994, S/RES/955 (1994), available at: <https://www.refworld.org/docid/3b00f2742c.html>

²² ILC, 'Draft Statute for an International Criminal Court' (1994) UN Doc A/49/10 Available at https://legal.un.org/ilc/texts/instruments/english/commentaries/7_4_1994.pdf

²³ Rome Statute of the International Criminal Court, Rome 17 July 1998, A/CONF.183/9 (entered into force 1 July 2002).

statute.²⁴ On 17 July of 1998, 120 countries voted in favor of the Rome Statute, 21 countries abstained from voting, and seven voted against, including Israel, China and the United States. Also, a Preparatory Commission by the UN General Assembly was established for a variety of tasks including drafting a relationship agreement between the United Nations and the Court.²⁵

The Rome Statute entered into force on 1 July, 2002, establishing the first permanent international criminal court. “The creation of the Rome Statute in 1998 was in itself a historic event, marking a milestone in humankind's efforts towards a more just world.”²⁶ 122 countries are parties to the Rome Statute (effective as of 17 March 2019). Of these, 33 are from Africa, 18 from the Asia Pacific, 18 from Eastern Europe, 28 from Latin America and the Caribbean, as well as 25 from Western Europe and North America.²⁷

The Rome Statute consists of 128 Articles. The preamble of the Rome Statute states “that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity.”²⁸ and have threatened international peace and security, and confirm that these crimes must not go unpunished and that their perpetrators must be prosecuted through measures taken at the national level as well as by strengthening international cooperation. The States parties to the Rome Statute reaffirmed their intention to achieve these goals for the benefit of present and future generations.²⁹

The Secretary-General at that time Kofi Annan, after the Rome Statute entered into force stated: “By establishing the International Criminal Court, the international community proved its determination to put an end to impunity for the perpetrators of egregious violations of human rights and humanitarian law, and thus to contribute to the prevention of such crimes. Only a permanent court with universal jurisdiction can finally lay to rest the charge that the international community

²⁴ United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court. Available at https://legal.un.org/icc/rome/proceedings/E/Rome%20Proceedings_v1_e.pdf

²⁵ Schabas, W. (2007). Creation of the Court. In *An Introduction to the International Criminal Court*. Cambridge: Cambridge University Press. (pp. 1-21)

²⁶ Website of the International Criminal Court (ICC), <https://www.icc-cpi.int/about>

²⁷ The International Criminal Court, The Court Today Factsheet. Available at <https://www.icccpi.int/iccdocs/PIDS/publications/TheCourtTodayEng.pdf>

²⁸ Rome Statute of the International Criminal Court, Rome 17 July 1998, A/CONF.183/9 (entered into force 1 July 2002), Preamble.

²⁹ *Ibid.*,

is being selective or applying double standards in deciding which crimes to investigate and punish.”³⁰

1.2 Work and achievements of the International Criminal Court

The International Criminal Court has jurisdiction over the crime of genocide, crimes against humanity, war crimes, and the crime of aggression. According to Article 5 of the Rome Statute “The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The International Criminal Court has jurisdiction in accordance with this Statute with respect to the following crimes: (a) The crime of genocide; (b) Crimes against humanity; (c) War crimes; (d) The crime of aggression.”

A very important aspect of the International Criminal Court is that its jurisdiction applies to all. Heads of state and government are not exempt from the jurisdiction of the Court, Article 27 (2) of the Rome Statute provides that: “Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.”

According to jurisdiction *ratione temporis* in Article 11, the International Criminal Court can only investigate crimes committed after the Rome Statute came into force. Also, the ICC does not have a universal jurisdiction, but complementary to national jurisdiction(s) if the State is “unwilling” or “unable” to carry out its responsibilities (Article 17). The International Criminal Court has conducted criminal investigations into 12 situations: The Democratic Republic of the Congo, Uganda, the Central African Republic I, Sudan, Kenya, Libya, Côte d'Ivoire, Mali, the Central African Republic II, Georgia, Bangladesh/Myanmar and Burundi. The Court indicted 44 individuals so far, and issued 36 arrest warrants, proceedings against 22 have been completed, the followings are famous convictions issued by the Court:

- On 14 March 2012, Thomas Lubanga Dyilo of the Democratic Republic of the Congo ‘found guilty of the war crimes of enlisting and conscripting child soldiers under the age of 15 years and using them to participate actively in hostilities. On 10 July 2012, he was sentenced to a

³⁰ Lentner, G. (2014) ‘The Role of the UN Security Council vis-à-vis the International Criminal Court – Resolution 1970 (2011) and its challenges to International Criminal Justice’ *International and Comparative Law Review*, Vol.14., No. 2, pp. 7–23, at p.23.

total of 14 years of imprisonment. He was the first person to be convicted by the International Criminal Court.³¹

- On 7 March 2014, Germain Katanga, the former leader of the Patriotic Resistance Force in Ituri, the Democratic Republic of the Congo, ‘found guilty of being an accessory to crime against humanity and war crimes committed on 24 February 2003 in the DRC. He was sentenced to a total of 12 years imprisonment.’³²
- On 8 July 2019, ICC Trial Chamber VI found, Bosco Ntaganda, the former military chief of staff of the National Congress for the Defense of the People, ‘guilty beyond reasonable doubt, of war crimes and crimes against humanity, committed in Ituri, DRC, in 2002-2003. On 7 November 2019, he was sentenced to a total of 30 years of imprisonment.’³³
- On 27 September 2016, Trial Chamber VIII found Ahmad Al Faqi Al Mahdi a member of Ansar Dine, a Tuareg Islamist militia in North Africa, ‘guilty of war crime for intentionally directing attacks against religious and historic buildings in Timbuktu, Mali, in June and July 2012 and sentenced him to nine years’ imprisonment.’³⁴

Despite the positive developments, the International Criminal Court still faces a number of significant challenges. According to Judge O-Gon Kwon, “We are still witnessing mass atrocities worldwide. In many cases the perpetrators of these crimes are beyond the court’s reach, due to the limited jurisdiction of the court, non-cooperation of states, or lack of political will. Ending of impunity seems to remain a remote goal, even two decades after the inception of the court.”³⁵

³¹ The Prosecutor v. Thomas Lubanga Dyilo. Available at <https://www.icc-cpi.int/CaseInformationSheets/lubangaEng.pdf>

³² The Prosecutor v. Germain Katanga. Available at <https://www.icc-cpi.int/drc/katanga>

³³ The Prosecutor v. Bosco Ntaganda. ICC-01/04-02/06. Available at <https://www.icc-cpi.int/drc/ntaganda>

³⁴ ‘Ahmad Al Faqi Al Mahdi transferred to UK prison facility to serve sentence.’ Website of the International Criminal Court (ICC), Available at <https://www.icc-cpi.int/Pages/item.aspx?name=pr1451>

³⁵ Tessler, M. “Despite recent achievements, many challenges ahead for the International Criminal Court” OpenCanada.org, January 26, 2018. Available at <https://www.opencanada.org/features/despite-recent-achievements-many-challenges-ahead-international-criminal-court/>

2. Examining the relation between the International Criminal Court and the Security Council

This chapter discusses the Court's Negotiated Relationship Agreement with the United Nations and the relationship between the ICC and the UN Security Council in accordance with the Charter of the United Nations and the Rome Statute, through the Security Council Referral, Security Council Deferral and cooperation.

2.1. The Negotiated Relationship Agreement between the United Nations and the International Criminal Court

According to Article 2 of the Rome Statute (Relationship of the Court with the United Nations) "The Court shall be brought into relationship with the United Nations through an agreement to be approved by the Assembly of States Parties to this Statute and thereafter concluded by the President of the Court on its behalf." On 4 October 2004, "at the United Nations Headquarters in New York, Judge Philippe Kirsch, President of the International Criminal Court (ICC) and Kofi Annan, Secretary-General of the United Nations (UN), signed an agreement that provides a framework for the relationship between both institutions. The Agreement recognizes the role and mandates of both institutions and defines the terms on which the United Nations and the Court will be brought into relationship."³⁶

While, The International Criminal Court is independent in relationship with the UN as stipulated in Article 2 of the Relationship Agreement "The United Nations recognizes the Court as an independent permanent judicial institution which, in accordance with articles 1 and 4 of the Statute, has international legal personality and such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes." it is still obliged to respect the purposes and principles of the UN Charter as stipulated in the Rome Statute's preamble in paragraph 7 "Reaffirming the Purposes and Principles of the Charter of the United Nations, and in particular that all States shall refrain from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations." and paragraph 9 "Determined to these ends and for the sake of present and future

³⁶ The Relationship Agreement between the United Nations and the International Criminal Court (ICC) was approved by the General Assembly in its resolution 58/318 of 13 September 2004, and entered into force on 4 October 2004. ICC-ASP/3/Res.1, available at: <https://www.refworld.org/docid/51b080fa4.html>

generations, to establish an independent permanent International Criminal Court in relationship with the United Nations system, with jurisdiction over the most serious crimes of concern to the international community as a whole.”

Thus, the United Nations and the International Criminal Court both share the same values. This reassertion in the Rome Statute of the Charter principles, confirms the opinion that the Statute is a supplement to the UN Charter. Moreover, the Preamble of the Statute acknowledges in paragraph 3 that there is a link between the crimes fall under the jurisdiction of the International Criminal Court and threats to international peace and security.³⁷ The President of the ICC Sang-Hyun Song stated during a debate in the Security Council that “While the ICC's contribution is through justice, not peacemaking, its mandate is highly relevant to peace as well. The Rome Statute is based on the recognition that the grave crimes with which it deals threaten the peace, security and well-being of the world. The Statute's objective is laying the foundation for a sustainable peace”³⁸.

It is worth noting that Article 103 of the UN Charter which states “In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.” may conflicts with the Rome Statute; the UN Charter is supreme to other international treaties, so when a conflict arises between the UN Charter and the Rome Statute, the Member States of the UN will have to favor the Charter over the Rome Statute.

2.2. The relationship between the Security Council and the International Criminal Court

The primary responsibility of the Security Council is defined in Article 24 of the Charter of the United Nations; “In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security.”³⁹

³⁷ Rome Statute of the International Criminal Court, Rome 17 July 1998, A/CONF.183/9 (entered into force 1 July 2002), Preamble, para 3 “Recognizing that such grave crimes threaten the peace, security and well-being of the world.” Available at https://legal.un.org/icc/statute/99_corr/preamble.htm

³⁸ Security Council Meeting Record on the promotion and strengthening of the rule of law, with a focus on the ICC. UN Doc. S/PV.6849, at p. 4. Available at <https://www.securitycouncilreport.org/un-documents/document/spv6849.php>

³⁹ Charter of the United Nations, signed at San Francisco on 26 June 1945, Article 24, available at <https://www.un.org/en/sections/un-charter/chapter-vii/>

Based on Chapter VII of the Charter of the United Nations, the Security Council established the Ad Hoc International Criminal Tribunals for Rwanda and the Former Yugoslavia.⁴⁰ Though UNSC Members actively took part in the negotiations at the final Diplomatic Conference in Rome in 1998, the Council itself did not participate in the establishment of the ICC.⁴¹ The Negotiated Relationship Agreement between the International Criminal Court and the Security Council is pursuant to Chapter VII of the Charter of the United Nations. Chapter VII of the Charter Article 39 provides that “The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.”⁴² Under the Rome Statute the Security Council has the powers pursuant to Article 13(b) of the Rome Statute to refer a situation to the ICC and by doing so it expands the Court’s jurisdiction to the territory and nationals of non-states parties to the Rome Statute. The Security Council when acting under Chapter VII of the UN Charter can refer a situation to the ICC,⁴³ after determining that any of the crimes enumerated in Article 5 of the Rome Statute have been committed. Meaning that the situation, according to the Security Council constitutes a threat to international peace and security.

Also, pursuant to Article 16 of the Rome Statute, the Security Council, acting under Chapter VII of the UN Charter can defer an investigation or prosecution for a renewable period of 12 months, if the Security Council determines that the investigation or prosecution carried out by the ICC would undermine international peace and security within the meaning of Article 39 of the Charter.

2.3. Referral to the International Criminal Court

The referral system of the Rome Statute is one of the fundamental safeguards to end impunity. A situation can be referred to the court for suspected crimes committed within its jurisdiction. By a

⁴⁰ UN Security Council, Security Council resolution 827 (1993) [International Criminal Tribunal for the former Yugoslavia (ICTY)], 25 May 1993, S/RES/827 (1993); UN Security Council, Security Council resolution 955 (1994) [Establishment of the International Criminal Tribunal for Rwanda], 8 November 1994, S/RES/955 (1994)

⁴¹ Moss, L. “The UN Security Council and the International Criminal Court: Towards More Principled Relationship,” Friedrich Ebert Stiftung, March 2012, at p.3.

⁴² Charter of the United Nations, signed at San Francisco on 26 June 1945, Chapter VII, Article 39, available at <https://www.un.org/en/sections/un-charter/chapter-vii/>

⁴³ Chapter VII of the UN Charter, Article 41 “The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures....”

State Party or non-State Party. The second type of referral is through the Security Council when it acts under Chapter VII of the Charter of the United Nations. According to Article 13 of the Rome Statute (Exercise of jurisdiction): “The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if:”

(a) “A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14;”

(b) “A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; or”

(c) “The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15.”

Therefore, the Prosecutor of the ICC cannot proceed with an investigation into a situation unless one of the aforementioned requirements has been fulfilled. In order to protect the prosecutor’s power to select suspects objectively and to protect the Court’s reputation, the referrals by both States and the Security Council are referenced as “situations” and not “cases.”⁴⁴

2.4.State Party Referral

States Parties can trigger the Court’s jurisdiction over a particular situation. This entails an ability to direct the Court’s attention to events at a particular time and place, possibly involving criminal acts, with a view to initiate an exercise of jurisdiction over those acts. Five situations have been referred to the ICC through State referrals (Uganda, Democratic Republic of Congo, Central African Republic I and II and Mali).

Article 14 of the Rome Statute provided the requirements for referral of a situation by a State Party:

1. “A State Party may refer to the Prosecutor a situation in which one or more crimes within the jurisdiction of the Court appear to have been committed requesting the Prosecutor to investigate the situation for the purpose of determining whether one or more specific persons should be charged with the commission of such crimes.”

⁴⁴Schabas, W. (2017). Triggering the jurisdiction. In *An Introduction to the International Criminal Court*. Cambridge: Cambridge University Press. (pp. 141-170).

2. “As far as possible, a referral shall specify the relevant circumstances and be accompanied by such supporting documentation as is available to the State referring the situation.”

2.5. Security Council Referral

There was a disagreement during the Rome Conference regarding granting the Security Council the power to trigger the jurisdiction of the International Criminal Court on the grounds that granting the Security Council referral authority could lead to confusion between political disputes and legal disputes, and impact the independence of the International Criminal Court a judicial body under the authority of the Security Council a political body. This disagreement represented two opposing trends, one led by the United States, which “sought a referral power extended to encompass situations involving the exercise of any powers of the Security Council (and not just those under Chapter VII).”⁴⁵ and the other comprised mostly of middle powers and developing countries, which objected, to giving the Security Council any role that would affect the independence and credibility of the Court.⁴⁶ The States at the Rome Conference ultimately reached a consensus in granting the Security Council the power of referral by virtue of the provisions of Article 13 (b) of the Rome Statute.⁴⁷

Security Council referral is governed by Article 13 (b) of the Rome Statute that stipulates “the Court may exercise its jurisdiction with respect to a crime referred to in Article 5 in accordance with the provisions of this Statute if: (b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations;”

The Security Council under Article 13(b) not only trigger the Court’s jurisdiction, but also create jurisdiction, in the case of crimes committed on the territory of non-States Parties. This is an acknowledgement of the fundamental role of the Security Council to confront situations of threats to the peace, breaches of the peace and acts of aggression. According to Rod Rastan, “when the security council makes a referral, it enables the exercise of existing jurisdictional bases to be

⁴⁵ Schabas, W. (2017). Triggering the jurisdiction. In *An Introduction to the International Criminal Court*. Cambridge: Cambridge University Press. (pp. 141-170).

⁴⁶ Kirsch, P. and Holmes, J. (1999) ‘The Rome Conference on an International Criminal Court: The Negotiating Process.’ *American Journal of International Law*, Vol 93, Issue 1, pp 2-12.

⁴⁷ United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court. (Rome, 15 June — 17 July 1998). Available at https://legal.un.org/icc/rome/proceedings/E/Rome%20Proceedings_v1_e.pdf

extended to the territory and/or nationals of other states; it is not changing the statutory jurisdictional framework itself.”⁴⁸ This means that the Security Council cannot refer any situation to the ICC, it has to be done within the framework of the Rome Statute.

According to Article 53 of the Statute the Prosecutor may refuse to initiate an investigation if he or she determines that there is no reasonable basis to proceed. So far, the Security Council has referred two situations to the Court. Under Article 13 (b) the Security Council referred the situation in Darfur, Sudan to the ICC, (Resolution No. 1593 on 31 March 2005). While Sudan is not a party to the Rome Statute, according to the Security Council the situation in Darfur constitutes a continuous threat to international peace and security and it was the first situation in the history of the Court to be referred by the Security Council. In addition, the Security Council referred the situation in Libya through (Resolution No. 1970 on 26 February 2011).

The rationale for giving the Security Council, the power to refer a situation to the Prosecutor of the International Criminal Court is based on the following considerations:

- Extending the jurisdiction of the International Criminal Court: The Security Council would extend a comprehensive jurisdiction of the Court to all States, whether they are party to the Rome Statute or non-party, as it has done with Libya and Sudan.
- Reducing the possibility of the UN Security Council to establish ad hoc criminal tribunals: since the Rome Statute entered into force, the Security Council no longer has any justification for the establishment of special or temporary ad hoc tribunals, since the justification for the establishment of such tribunals has negated the existence of a permanent international criminal court.
- Considering the fact that the International Criminal Court was newly established, a referral from the Security Council is considered an endorsement by powerful global multilateral body which translates success for the Court.

⁴⁸ Schabas, W. (2017). Triggering the jurisdiction. In *An Introduction to the International Criminal Court*. Cambridge: Cambridge University Press. pp. 141-170, at 161.

2.6. Security Council Deferral

One of the most controversial issues in the negotiations of the Rome Statute was the power of the Security Council to influence proceedings at the International Criminal Court. The ability of a political body of the UN whose main responsibility is maintaining international peace and security to interfere with the procedures of an independent judicial body was a point of disagreement between the States.⁴⁹

Article 16 was a compromise reached between two factions concerning the authority of the Security Council to interfere with the proceedings of the International Criminal Court when a matter falls within the Security Council's Chapter VII mandate. During the drafting of the Rome Statute, the permanent members of the Security Council have expressed concerns that the work of the ICC may hinder its Chapter VII powers, under which the Security Council is charged with maintaining international peace and security. The United States in particular has said that the Court should consult with the Security Council before proceeding with work regarding any situation under the Security Council's preview. Conversely, India, Iran and other members of the Non-Aligned movement have opposed any Security Council powers that would give it the right to impede Court proceedings. Specifically, they have cited fluctuating political circumstances within the Council, as well as the limited scope of its global representation, as grounds for their objection.⁵⁰ The initial deferral provision at Article 23(3) of the International Law Commission's draft statute stated, "No prosecution may be commenced under this Statute arising from a situation which is being dealt with by the Security Council as a threat to or breach of the peace or an act of aggression under Chapter VII of the Charter, unless the Security Council otherwise decides." This gives the Security Council the right to halt ICC prosecution without a need for a resolution under Chapter VII of the Charter.⁵¹

The Singapore compromise was proposed in an effort to seek a middle ground in this dispute. The compromise allows the Court to continue with its proceedings amid any Council objection until

⁴⁹ United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court. (Rome, 15 June — 17 July 1998). Available at https://legal.un.org/icc/rome/proceedings/E/Rome%20Proceedings_v1_e.pdf

⁵⁰ Broomhall B. (2004). *International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law*. Oxford University Press, at p.82.

⁵¹ The Preparatory Committee on the Establishment of an International Criminal Court, Volume II (Compilation of proposals) General Assembly Official Records, Fifty-first Session, Supplement No. 22A (A/51/22), at pp. 75-77. Available at <https://www.legal-tools.org/doc/03b284/pdf/>

its permanent members pass a resolution calling for the Court's work to be halted. In this vein, no resolution could be passed if any of the permanent members objects.⁵² The Singapore compromise stated that Article 16 required a positive action by the Security Council.⁵³ Accordingly, Article 16 of the Rome Statute stipulates: "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."

While Article 16 does not mention that the Security Council cannot defer its own referral. Following the Security Council referral of Resolution 1593 (2005) regarding Darfur which the preamble of the said resolution made reference to Article 16, there has been a disagreement regarding the Security Council invoking Article 16 by requesting to halt an investigation or a prosecution resulting from its own referral. According to Heikelina Verriijn Stuart "It has certainly never been imagined that Article 16 will be a tool in the hands of the UN Security Council to suspend an investigation or prosecution based on a referral by the UN Security Council itself."⁵⁴ An additional condition of a deferral request under Article 16 relates to Chapter VII of the UN Charter. It requires a deferral resolution to be adopted under Chapter VII of the Charter which requires that the Security Council has determined that a particular situation constitutes a threat to a peace, breach of the peace or an act of aggression under Article 39 of the Charter.

Article 16 also states that a deferral request may be renewed under the same conditions. In theory, this could result in an indefinite deferral since the article contains no limitation on the number of times a request for deferral may be renewed.

In practice, there have been no deferral of investigation or prosecution so far. However, Article 16 was invoked few times, most notably; Security Council Resolution 1422 (2002) after the United States threatened to veto all future UN peacekeeping missions unless the Security Council grants immunity before the Court for individuals from non-ICC states parties involved in UN

⁵² Supra note 50 at 17; see also Singapore Proposal on Article 23 of the ILC Draft Statute, Non-Paper/WG.3/No.16 (8 August 1997).

⁵³ The Preparatory Committee on the Establishment of an International Criminal Court, Decisions taken by the Preparatory Committee at its session held from 4 to 15 August 1997.

⁵⁴ Stuart, H. V. "UN and ICC: Not the Easiest Relationship" Global Policy Forum, 21 September 2008, available at www.globalpolicy.org/component/content/article/164-icc/28591.html

operations.⁵⁵ And when the Peace and Security Council of the African Union requested the UN Security Council to defer the prosecution and arrest warrant against then President of Sudan Omar Al Bashir for 12 months pursuant to Article 16 of the Rome Statute,⁵⁶ but the Security Council decided not to move forward with the PSC's request. Even the United States threatened to veto any resolution which deferred the ICC's arrest warrant for Al Bashir.⁵⁷ These actions put a strain on the relationship between the International Criminal Court and the African Union.

2.7 Cooperation

Unlike national criminal courts, the International Criminal Court has no enforcement agencies at its disposal. Therefore, States cooperation is crucial. The International Criminal Court relies on the States to execute warrants of arrest, to transfer the accused and to conduct investigations on their territory. Article 86 of the Rome Statute obliges States Parties to cooperate fully with an investigation and prosecution "States Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court." However, the Court established special cooperation with States non-party to the Rome Statute as stipulated in Article 87 5(a) "The Court may invite any State not party to this Statute to provide assistance under this Part on the basis of an ad hoc arrangement, an agreement with such State or any other appropriate basis."

Non-party states cannot cooperate without their consent. They are governed by Article 34 of the Vienna Convention on the Law of Treaties: "A treaty does not create either obligations or rights for a third State without its consent."⁵⁸ The States non-party to the Rome Statute can also be required to cooperate with the International Criminal Court pursuant to a Security Council resolution.

Cooperation is needed to carry out investigations in a non-state party where the ICC cannot ask for judicial assistance request from the competent national authorities. Cooperation is also needed

⁵⁵ Controversial resolutions proposed by the United States seeking immunity from the International Criminal Court. the Coalition for the International Criminal Court, May 2004, Available at <http://www.iccnw.org/documents/1422DocumentCompilation.pdf>

⁵⁶ Communique of the 142nd Meeting of the Peace and Security Council. 2008-07-21.

⁵⁷ Darfur I: Media Coverage Commencement of General Debate at the UN on Sudan. Coalition for the ICC, 25 Sept 2008. Available at <http://iccnw.org/?mod=newsdetail&news=3113>

⁵⁸ Article 34, Vienna Convention on the Law of Treaties 1969. Done at Vienna on 23 May 1969. Entered into force on 27 January 1980, Available at https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf

for the execution of warrants of arrest because without it there will be no progress in the proceedings which as a result affect the work of the Court.

The Security Council, when it acts under Chapter VII of the United Nations Charter, has the power to enforce binding obligations upon all of the UN's Member States, regardless of their affiliation to the Rome Statute.⁵⁹ Article 25 of the UN Charter stipulates "The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter." The International Criminal Court depends on the Security Council to have access to situations in which it does not have jurisdiction. Also, with its limited powers of implementation, the International Criminal Court depends on cooperation and assistance from States, which can be strengthened through Security Council intervention.

In practice, however, the Court suffers from lack of cooperation from States and the Security Council. The case against Omar Al Bashir, the former president of Sudan, demonstrates the lack of cooperation by States and UN Security Council especially regarding arrest warrants.

The case can be summarized as follows: By virtue of the UN Security Council Resolution 1593 regarding the situation in Darfur, Sudan. The Prosecutor of the ICC investigated the situation in Darfur and requested the arrest of 6 Sudanese people, including Omar Al Bashir, who was president of Sudan at that time. Al Bashir was the first sitting Head of State to be indicted by the International Criminal Court and the first such leader to have an arrest warrant to be issued against him.

In fact, two arrest warrants were issued for Al Bashir. The first was on 4 March, 2009 and the second was on 12 July, 2010. The arrest warrants came after the Pre-Trial Chamber I charged "Al Bashir, as the de jure and de facto President of the State of Sudan and Commander-in-Chief of the Sudanese Armed Forces"⁶⁰ and declared that between 2003 and 2008 in Darfur, Sudan he allegedly committed "five counts of crimes against humanity: murder, extermination, forcible transfer, torture and rape; two counts of war crimes: intentionally directing attacks against civilians not taking part in hostilities, and pillaging; three counts of genocide: by killing, by causing serious

⁵⁹ Mistry, H. and Ruiz, D. (2012) 'The United Nations Security Council and the International Criminal Court.' Chatham House, at p.8.

⁶⁰ The Prosecutor v. Omar Hassan Ahmad Al Bashir, Alleged crimes (non-exhaustive list), Available at <https://www.icc-cpi.int/darfur/albashir/pages/alleged-crimes.aspx>

bodily or mental harm, and by deliberately inflicting on each target group conditions of life calculated to bring about the group's physical destruction."⁶¹

On 5 March, 2009, the Court requested that Sudan arrest and surrender Al Bashir and asked for States Parties to help in the implementation of the arrest warrant in accordance with Article 89(1) of the Rome Statute. The Sudanese government refused to deal with the International Criminal Court and even removed international humanitarian aid workers from Darfur arguing that they were cooperating with the Court.⁶² The Peace and Security Council of the African Union (PSC) requested that the UN Security Council defer the arrest warrant and the prosecution against Al Bashir for 12 months pursuant to Article 16 of the Rome Statute, claiming that the warrant would threaten continuing efforts to find a peaceful settlement to the conflict in Darfur.⁶³ But the Security Council decided to deny the PSC's request; as a result the African Union demanded its Member States not to cooperate with the ICC regarding the arrest and surrender of Al Bashir.⁶⁴

Therefore, despite being wanted by the International Criminal Court, Al Bashir managed to visit many countries in his official capacity undisturbed, including Member States of the Rome Statute such as Chad and Kenya. Both countries refused to comply with the Court's request to arrest and surrender Al Bashir despite their obligations under Article 86 of the Rome Statute. Because the ICC lacks an effective mechanism to compel States to cooperate and to bring perpetrators to justice, the Court had to resort to asking the Security Council to take an action but without success.⁶⁵ As a result of lack of cooperation by Member states and the Security Council, Omar Al Bashir is still at large.

⁶¹ The Prosecutor v. Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09, Available at <https://www.icc-cpi.int/darfur/albashir>

⁶² War Crimes Research Office, 'The Relationship Between the International Criminal Court and the United Nations' (2009) American University Washington College of Law, at p.3.

⁶³ Tladi, D. (2009) 'The African Union and the International Criminal Court: The Battle for the Soul of International Law.' South African Yearbook of International Law 34 (1), pp. 57-69; see also Barnes, G. P. (2011) 'The International Criminal Court's ineffective enforcement mechanisms: The indictment of president Omar Al Bashir' Fordham International Law Journal, Vol. 34, No. 6, pp. 1584-1619.

⁶⁴ African Union, AU Doc. Assembly/AU/13(XIII), 'Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC)', adopted 3 July 2009, AU Assembly 13th Ord. Session.

⁶⁵ Barnes, G. P. (2011) 'The International Criminal Court's ineffective enforcement mechanisms: The indictment of president Omar Al Bashir' Fordham International Law Journal, Vol. 34, No. 6, pp. 1584-1619; see also Prosecutor v Omar Hassan Ahmad Al Bashir, Decision informing the United Nations Security Council and the Assembly of States Parties to the Rome Statute about Omar Al-Bashir's recent visit to the Republic of Chad, Pre-Trial Chamber I, 27 August 2010, ICC-02/05-01/09-109; Prosecutor v Omar Hassan Ahmad Al Bashir, Decision Informing the United Nations Security Council and the Assembly of States Parties to the Rome Statute about Omar Al- Bashir's Presence in the Territory of the Republic of Kenya, Pre-Trial Chamber I, 27 August 2010, ICC-02/05-01/09-107

3. Legal analysis of the UN Security Council Resolutions

This chapter offers legal analysis of the four Security Council Resolutions to the International Criminal Court, Resolutions 1422 (2002), 1487 (2003), 1597 (2005) and 1970 (2011) and highlight the effect of these resolutions on the independence and effectiveness of the International Criminal Court.

3.1. Security Council Resolution 1422 (2002)

Resolution 1422 (2002) is one of the most controversial resolutions of the United Nations Security Council. As soon as the Statute came into force. In June 2002, the United States declared that unless the UNSC invoked Article 16, which protected United Nations-authorized missions from International Criminal Court prosecutions, it would exercise its Security Council veto power over all peacekeeping missions in the future.⁶⁶ In response, the other Security Council members in order to avoid the United States from future blocking of UN peacekeeping missions, voted in favor of a resolution that requires the ICC to refrain from initiating investigations or proceedings related to peacekeepers of non-states parties to the Statute for a 12-month period. On 12 July, 2002 the Security Council unanimously adopted Resolution 1422.⁶⁷ Acting under Chapter VII of the Charter of the United Nations, the Security Council Resolution 1422 stipulates:

1. “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;”
2. “Expresses the intention to renew the request in paragraph 1 under the same conditions each 1 July for further 12-month periods for as long as may be necessary;”

Security Council Resolution 1422 (2002) contradicts Rome Statute and interferes with the Court’s prosecutorial independence by directing the prosecution of specific individuals. The resolution shows that peacekeepers from non-states parties to the Statute have more legal equality than

⁶⁶ Schabas, W. (2017) ‘Triggering the Jurisdiction. In An Introduction to the International Criminal Court.’ Cambridge: Cambridge University Press, (pp. 141-168.)

⁶⁷ United Nations Security Council resolution 1422 (2002) [on United Nations peacekeeping]. S/RES/1422 (2002). Available at <http://unscr.com/en/resolutions/1422>

peacekeepers from States parties. Because they benefit from a yearlong exemption from war crimes and other charges under the Rome Statute. This kind of exception contradicts the non-discriminatory character of international law, and it is not in line with the treaty regime of the International Criminal Court, which has jurisdiction over citizens of non-party nations of ICC.⁶⁸ In addition, Resolution 1422 seeks to implement Article 16 as not intended by those who drafted the Rome Statute. Article 16 was not intended to be a foundation on which certain individuals would be granted immunity from prosecution for their future acts.⁶⁹ Those who drafted the Rome Statute have intentionally specified the conditions in which the Security Council can request the postponement of investigation or prosecution of a situation on the condition that it is acting pursuant to Chapter VII of the United Nations Charter, i.e. to counter a threat to international peace and security.

Not all United Nations authorized missions were created under Chapter VII of the Charter. Accordingly, the Security Council cannot invoke Article 16 in order to impose general exemption to the jurisdiction of the International Criminal Court since, it is clear from the date of drafting, that Article 16 requires the Security Council to make the request on the basis that such a request is necessary to help restore international peace or security. However, Resolution 1422 is a preemptive measure granting immunity for particular individuals from criminal prosecution. The threat to international peace and security in accordance with Article 39 of the UN Charter, which is a condition for the application of Chapter VII. does not apply to a situation where the peacekeepers are being prosecuted before the International Criminal Court nor it is in the interests of international peace and security.

According to Luigi Condorelli and Annalisa Ciampi “one fails to see why the exercise of jurisdiction by the ICC in relation to crimes eventually committed by members of a force established or authorized by the United Nations in relation thereto would pose a threat to international peace or security or, vice versa, why preventing the Court from exercising its jurisdiction is a means of restoring international peace and security.”⁷⁰

⁶⁸ Stahn, C. (2003) “The Ambiguities of Security Council Resolution 1422 (2002).” *European Journal of International Law*. Vol. 14, No. 1, pp. 85–104.

⁶⁹ *Ibid.*,

⁷⁰ Condorelli, L. and Ciampi, A. (2005) ‘Comments on the Security Council Referral of the Situation in Darfur to the ICC.’ *Journal of International Criminal Justice*, Volume 3, Issue 3, pp. 590-599, at p.596.

Moreover, this exemption contradicts the goal and purpose of the Rome Statute to put an end to impunity for the crime of genocide, crimes against humanity and war crimes, and, it constitutes a violation of other international treaties, including the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture)⁷¹ and the four Geneva Conventions of 1949,⁷² both of which oblige States to bring the perpetrators of these crimes to justice. Therefore, the legality of the resolution at that time could be challenged in proceedings before the Court.

The resolution has received numerous criticisms from the permanent representatives.⁷³ The permanent representative of Canada to the United Nations Mr. Paul Heinbecker stated: “My Government is deeply worried by the discussions that have been taking place in the Security Council concerning sweeping exemptions for peace keepers from prosecution from the most serious crimes known to humanity. First, the issue at stake is larger than the International Criminal Court; fundamental principles of international law are in question. Secondly, the Council has not been empowered to rewrite treaties; the draft resolutions that are circulating contain elements that exceed the Council's mandate, and passage of them would undermine the credibility of the Council.”⁷⁴

Resolution 1422 (2002) expired after 12 months but was renewed for another year by the Security Council's adoption of Resolution 1487 (2003).

3.2. Security Council Resolution 1497 (2003)

Resolution No. 1497 2003 was issued two months after the issuance of Resolution No. 1487 (2003), under Chapter VII of the United Nations Charter, regarding the conflict in Liberia, which included the establishment of a multinational force in this country to support the implementation

⁷¹ The United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture) was adopted in 1984 and entered into force in 1987. Available at <https://www.ohchr.org/en/professionalinterest/pages/cat.aspx>

⁷² The Geneva Conventions of 1949 and their Two Additional Protocols of 1977. Available at <https://www.icrc.org/en/doc/war-and-law/treaties-customary-law/geneva-conventions/overview-geneva-conventions.htm>

⁷³ Statements of Representatives of Fiji, Ukraine, Canada, Colombia, Samoa, Malaysia, Germany, Syrian Arab Republic, Argentina, Cuba, (UNSC's meeting of 10 July 2002 UN Doc. S/PV/4568).

⁷⁴ Statement by the representative of Canada to the UN. (UNSC's meeting of 10 July 2002 UN Doc. S/PV/4568), at p.2.

of the ceasefire agreement between the parties to the conflict.⁷⁵ The Resolution gives broad immunity to citizens of countries that are not parties to the Rome Statute, because they cannot be tried before a court other than the court in their own country, and this is confirmed by paragraph 7 of the Resolution which states “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;”

The United States took advantage of the difficult conditions prevailing in Liberia, which required rapid international intervention, by imposing the said paragraph on the Security Council to give its soldiers immunity from the International Criminal Court in the event they commit crimes fall within its jurisdiction. Hence, States had to choose between allowing broad immunity for citizens of non-party states or remaining powerless in the face of the atrocities being committed in Liberia in the event that the UN forces did not interfere. Finally, the United States succeeded in imposing peace and protection in Liberia after forcing the Security Council to pass the Resolution under its own conditions.

The Resolution was criticized by many countries because paragraph 7 of Resolution No. 1497 (2003) raises several legal issues that negatively affect the International Criminal Court and hinder its activity.⁷⁶ This is because the Security Council has exceeded the powers conferred upon it, under Chapter VII of the Charter of the United Nations by granting immunity to personnel of the United Nations peacekeeping forces in Liberia for an unlimited period of time.⁷⁷

Moreover, the Resolution contradicts the provision of Article (16), due to the lack of a time limit for this immunity, as the investigation procedures were not postponed, but rather ended the jurisdiction of the ICC regarding acts committed by nationals of third-party states in Liberia. The

⁷⁵ Security Council resolution 1497 (2003) [on the situation in Liberia], 1 August 2003, S/RES/1497 (2003), available at: <https://www.refworld.org/docid/3f45dbec7.html>

⁷⁶Statement of the Secretary General, Argentina, Brazil, France, Greece, Islamic Republic of Iran, Jordan, Liechtenstein, Malawi, Netherlands, New Zealand, Nigeria, Pakistan, South Africa, Switzerland, Syrian Arab Republic, Trinidad and Tobago, Uruguay. (UN Docs S/PV.4772), 12 June 2003.

⁷⁷ Galand, A. (2019) ‘UN Security Council Referrals to the International Criminal Court’ Leiden, The Netherlands: Brill | Nijhoff, at pp. 203 – 204.

Resolution also did not make reference to Article (16) of the Rome Statute as a basis for paragraph 7 thereof, contrary to Resolution No. 1422 (2002) and Resolution No. 1487 (2003), and this is considered a violation of Article (16), in particular, and the Rome Statute in general. Therefore, the independence and impartiality of the Court was undermined.

The Bush administration did not pursue another renewal or third resolution in 2004 because of embarrassment from the reports of torture and abuse of prisoners by US soldiers in Abu Ghraib prison in Iraq and Guantanamo Bay detention camp in Cuba.⁷⁸

3.3. Security Council Resolution 1593 (2005)

After the tough negotiated abstentions from the veto of the U.S. and China, and the abstentions of nations including Algeria and Brazil, the United Nations Security Council finally decided on 31 March 2005 in Resolution 1593 to refer the situation in Darfur, Sudan to the ICC.⁷⁹

Acting under Chapter VII, the Security Council referred the situation in Darfur, Sudan to the International Criminal Court. While Sudan is not a party to the Rome Statute, the Security Council determined that the situation in Sudan continues to constitute a threat to international peace and security. It was the first situation in the history of the Court to be referred by the UN Security Council pursuant to Article 13 (b) of the Rome Statute. The Resolution was considered by many as a victory for international criminal justice. The preamble of the resolution made reference to Article 16 of the Rome Statute “*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.” Also “the existence of agreements referred to in Article 98-2 of the Rome Statute.” The reason for the preamble contained a reference to Article 98-2 was to placate the United States to avoid its use of veto power, because the United States was unlikely to refer the situation to the ICC.⁸⁰ As can be inferred from the statement of the representative of the United States during the adoption of Resolution 1593:

⁷⁸ Bosco, D. (2014), *Rough Justice: The International Criminal Court's Battle to Fix the World, One Prosecution at a Time*, (Oxford University Press, Oxford) at p.179.

⁷⁹ Security Council resolution 1593 (2005) on Violations of International Humanitarian Law and Human Rights Law in Darfur, Sudan, 31 March 2005, S/RES/1593 (2005), available at: <https://www.refworld.org/docid/42bc16434.html>

⁸⁰ Cryer, R. (2006) 'Sudan, Resolution 1593 and International Criminal Justice', *Leiden Journal of International Law*, Vol. 19, No. 1, pp. 195-222 at p.204.

“Although we abstained on this Security Council Resolution referral to the ICC, we have not dropped, and indeed continue to maintain our long-standing and firm objections and concerns regarding the ICC. We believe that the Rome Statute is flawed and does not have sufficient protections from the possibility of politicized prosecutions. We reiterate our fundamental objection to the Rome Statute’s assertions that the ICC has jurisdiction over the nationals, including government officials, of States that have not become parties to the Rome Statute.”⁸¹

The following highly controversial paragraphs, 6 and 7 of Resolution 1593, were also required by the United States:

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;”

The provision is similar to operative paragraph 7 of Resolution 1497(2003) regarding the situation in Liberia, which was also included at the insistence of the United States, and opposed by many States for being incompatible with the Rome Statute.

The same is true for operative paragraph 6 of Resolution 1593. John Bolton, who was then the US Ambassador to the United Nations, was responsible for its inclusion, though it contradicts treaty provisions that all UN members, including the US, are bound by. Despite the fact that the four Geneva Conventions compel State parties to seek out international criminals and bring them to trial, Resolution 1593 instructs them to do the opposite.⁸²

The statements by the permanent representatives varied regarding paragraph 6, but most of them expressed concern. The Philippines’s representative, stated that “Operative paragraph 6 of the resolution is killing its credibility — softly, perhaps, but killing it nevertheless. We may ask whether the Security Council has the prerogative to mandate the limitation of the jurisdiction of

⁸¹ Ibid.; see also Statement of representative of the United States to the United Nations, UN Doc. S/PV.5158. at p.3.

⁸² Schabas, W. (2017). *Triggering the Jurisdiction*. In *An Introduction to the International Criminal Court*. Cambridge: Cambridge University Press. (pp. 141-168.)

the ICC under the Rome Statute once the exercise of its jurisdiction has advanced. Operative paragraph 6 subtly subsumed the independence of the ICC into the political and diplomatic vagaries of the Security Council.”⁸³

Whereas, the permanent representative of Brazil, explained his state’s abstention on Resolution 1593 on the basis that the preamble referred to such agreements, “My delegation has difficulty in supporting a reference that not only does not favour the fight against impunity but also stresses a provision whose application has been a highly controversial issue. We understand that it would be a contradiction to mention, in the very text of a referral by the Council to the ICC, measures that limit the jurisdictional activity of the Court.”⁸⁴

The representative of Denmark stated that exclusive jurisdiction as outline in paragraph 6 has no bearing on the jurisdiction of member States in regards to war crimes, torture, terrorism and other similar offenses.⁸⁵

Such an exemption contradicts the preamble of the Rome Statute which states “that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes.” In addition, it diverges from the territorial principle of criminal jurisdiction and conflicts with the principle of equality before the law. It is also at variance to the principle of universal jurisdiction, which allow all States to exercise their jurisdiction over the most serious crimes which affect the entire international community.⁸⁶

As for Paragraph 7. “Recognizes that none of the expenses incurred in connection with the referral including expenses related to investigations or prosecutions in connection with that referral, shall be borne by the United Nations and that such costs shall be borne by the parties to the Rome Statute and those States that wish to contribute voluntarily;”

The above paragraph is contradictory to both the Rome Statute and the negotiated agreement between the ICC and the UN.

⁸³ Statement of The Philippines’s representative, UN Doc. S/PV.5158. at p.6.

⁸⁴ Statement of the representative of Brazil, UN Doc. S/PV.5158., at p.11.

⁸⁵ Statement of the representative of Denmark to the United Nations. UN Doc. S/PV.5158., at p.6.

⁸⁶ Condorelli, L., Ciampi, A. (2005) ‘Comments on the Security Council Referral of the Situation in Darfur to the ICC.’ *Journal of International Criminal Justice*, Vol 3, Issue 3, 590-599, at p. 597.

Article 115 (b) of the Rome Statute stipulates; “The expenses of the Court and the Assembly of States Parties, including its Bureau and subsidiary bodies, as provided for in the budget decided by the Assembly of States Parties, shall be provided by the following sources: (b) “Funds provided by the United Nations, subject to the approval of the General Assembly, in particular in relation to the expenses incurred due to referrals by the Security Council.”

Article 13 of the Negotiated Agreement between the International Criminal Court and the United Nations provides; “The United Nations and the Court agree that the conditions under which any funds may be provided to the Court by a decision of the General Assembly of the United Nations pursuant to article 115 of the Statute shall be subject to separate arrangements. The Registrar shall inform the Assembly of the making of such arrangements.”⁸⁷

Accordingly, not only is paragraph 7 contradictory to the Rome Statute and the Negotiated Agreement between the International Criminal Court and the United Nations, it also surpasses the authority of the Security Council under the United Nations Charter.⁸⁸ as it is the General Assembly, who makes the decisions regarding approval of funding, not the Security Council. The General Assembly as per Article 17 of the UN Charter has the exclusive authority over the UN funding.⁸⁹ The General Assembly is an independent body and has no obligation to comply with the Security Council Resolutions unlike UN Member States.

Moreover, such provision creates a major financial burden for the Court. Jennifer Trahan suggests that the Prosecutor of the ICC should refuse to open an investigation regarding a situation referred by the Security Council if she lacks funding, by invoking Article 53.1(c) of the Statute:⁹⁰ “Taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.” In other words, the prosecutor could argue that an investigation would not serve the interests of justice if it could not be conducted efficiently due to lack of adequate funds.

⁸⁷ UN General Assembly, Relationship Agreement between the United Nations and the International Criminal Court (August 20, 2004), entered into force on the same date. UN Doc. A/58/874. Annex, Article 13(2). Available at https://www.icc-cpi.int/nr/rdonlyres/916fc6a2-7846-4177-a5ea-5aa9b6d1e96c/0/iccasp3res1_english.pdf

⁸⁸ Schabas, W. (2017). Triggering the Jurisdiction. In *An Introduction to the International Criminal Court*. Cambridge: Cambridge University Press. (pp. 141-168).

⁸⁹ Article 17 of the UN Charter “The General Assembly shall consider and approve the budget of the Organization...”

⁹⁰ Trahan, J. (2013) “The Relationship between the International Criminal court and the UN Security Council: Parameters and Best Practices.” *Criminal Law Forum*. Vol. 24, No. 4, pp. 417–473, at 423–424.

The reason the U.S. was so adamant about the inclusion of paragraph 7 is unclear, but it can be concluded from the American Service-Members' Protection Act; which prohibits the use of appropriated funds to assist the International Criminal Court, that since the United States is the biggest contributor to the United Nations budget, the U.S. may be consider the UN's funding of the referral as an indirect funding for the International Criminal Court.

Consequently, paragraphs 6 and 7 are considered expensive concessions to persuade the United States to abstain from vetoing the resolution.

By virtue of Resolution 1593 the International Criminal Court issued arrest warrants between the time period April 2007 until March 2009 for four Sudanese people accused of serious crimes including the then Sudan's president, Omar Al Bashir. On 19 April, 2010 after three years of Sudan failure to cooperate in extraditing the suspects, which is a violation of its obligation under Article 25 of the UN Charter,⁹¹ the Prosecutor asked the Pre-Trial Chamber to issue a report of non-cooperation in implementing arrest warrants for two suspects, under Article 87 of the Rome Statute.⁹² On 25 May, 2010 the ICC Pre-Trial Chamber decided to send a report of non-cooperation in implementing arrest warrants to the Security Council.⁹³

To this day, the Security Council has made no effort to pressure Sudan to fulfill its obligations imposed upon it by Resolution 1593, even though the Security Council has committed itself to ensuring that justice is provided to victims of the most severe human rights violations that have occurred in Darfur, and to ending impunity for those crimes.

In the Security Council meeting on 9 June, 2016 The Prosecutor of the International Criminal Court criticized the Security Council's failure over the course of a decade to help bring indicted individuals to justice for committing atrocity crimes in Darfur. She stated: "Sadly, my Office's countless appeals to you for action to address the persistent failure of Sudan to comply with its international obligations have not been heeded. How many more such findings must be rendered

⁹¹Article 25 of the UN Charter "The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter."

⁹² Under Article 87 (5) (b) and (7) of the Rome Statute "Where a State Party fails to comply with a request to cooperate by the Court contrary to the provisions of this Statute, thereby preventing the Court from exercising its functions and powers under this Statute, the Court may make a finding to that effect and refer the matter to the Assembly of States Parties or, where the Security Council referred the matter to the Court, to the Security Council."

⁹³ Decision informing the United Nations Security Council about the lack of cooperation by the Republic of the Sudan, ICC-02/05-01/07-57. Available at <https://www.icc-cpi.int/pages/record.aspx?uri=868180>

by the Court to spur this Council to action? the Council had also been conspicuously silent about Sudan's non-compliance with Council resolutions."⁹⁴

The Security Council has the authority to oblige UN Member States to cooperate with the International Criminal Court. However, the language of resolution 1593 did not compel but rather urged cooperation which is not enough to guarantee full cooperation by States. Further, the Security Council could, pursuant to Article 41 of the Charter of the United Nations adopt a resolution compelling all UN Member States to fully cooperate with the ICC.

While Security Council Resolution 1593 (2005) was considered a victory for the International Criminal Court, the same cannot be said for the people of Darfur who are still waiting for justice to be served. The lack of cooperation and follow up by the Security Council resulted in a failure to arrest those indicted by the Court including the then Sudanese President Omar Al Bashir, which led the Prosecutor to halt the investigations in 2014.

3.4. Security Council Resolution 1970 (2011)

The Security Council issued a Resolution on February 26, 2011 pursuant to Chapter VII of the Charter, to refer the situation in Libya to the International Criminal Court. The resolution required the Libyan authorities to cooperate with the International Criminal Court and its prosecutor, in addition to issuing a travel ban on Libyan leaders and freezing their assets.⁹⁵

This was the second time the Security Council referred a situation to the ICC pursuant to Article 13(b) of the Rome Statute, after Resolution 1593 (2005) regarding the situation in Darfur. But unlike Darfur, this time the Security Council acted swiftly.

It took months of discussion and years of extensive violations of human rights before the Security Council referred the situation in Darfur to the International Criminal Court, leading the international community to act. In the case of Libya, however, the referral was made within weeks of the first reports of the attacks by state forces, and the Security Council acted unanimously. It was the first time that neither the United States nor China had rejected a referral to the International

⁹⁴ International Criminal Court's Chief Prosecutor, Briefing Security Council, Criticizes Failure to Address Sudan's 'Persistent Failure' on Darfur. SC/12393 9 JUNE 2016. UN Meetings Coverage, Available at <https://www.un.org/press/en/2016/sc12393.doc.htm>

⁹⁵ Security Council resolution 1970 (2011) [on establishment of a Security Council Committee to monitor implementation of the arms embargo against the Libyan Arab Jamahiriya], 26 February 2011, S/RES/1970 (2011), available at: [https://www.undocs.org/S/RES/1970%20\(2011\)](https://www.undocs.org/S/RES/1970%20(2011))

Criminal Court. However, unlike Resolution 1593 (2005), Resolution 1970 did not receive the same criticism from the permanent representatives despite the Resolution including the same controversial two paragraphs that were contained in Resolution 1593 (2005).

Whereas, operative para. 6 stated “Decide[d] that nationals, current or former officials or personnel from a State outside the Libyan Arab Jamahiriya which is not a party to the Rome Statute of the International Criminal Court shall be subject to the exclusive jurisdiction of that State for all alleged acts or omissions arising out of or related to operations in the Libyan Arab Jamahiriya established or authorized by the Council, unless such exclusive jurisdiction has been expressly waived by the State.”

The paragraph limits the individuals who can be covered by the ICC’s jurisdiction, thereby limiting the Court’s jurisdiction and contradicting Article 13(b) of the Rome Statute which stipulates: “The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if: (b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations;”

During the Third Report to the Security Council pursuant to Resolution 1970 on 16 May 2012. The Prosecutor of the International Criminal Court stated that “the Office does have a mandate, however, to investigate allegations of crimes by all actors. This includes allegations of crimes against humanity (article 7 of the Statute) and of war crimes, in particular when committed as part of a plan or policy or as part of large scale commission of such crimes (article 8 of the Statute).”⁹⁶ Moreover, it could be argued that the Rome Statutes can only be activated in their entirety, not partially, by Security Council referrals.⁹⁷ Article 13(b) which grants the Security Council the power to refer a situation to the Court does not restrict the Court’s jurisdiction in any way. Hence, the Prosecutor is not obliged to adhere to such restrictions.

⁹⁶ Prosecutor of the International Criminal Court, ‘Third Report of the Prosecutor of the International Criminal Court to the UN Security Council pursuant to UNSCR 1970 (2011)’ 16 May 2012. At para 55. Available at <https://www.icc-cpi.int/NR/rdonlyres/D313B617-6A86-4D64-88AD-A89375C18FB9/0/UNSCreportLibyaMay2012Eng.pdf>.

⁹⁷ ‘The Relationship Between the ICC and the Security Council: Challenges and Opportunities’ International Peace Institute. November 8, 2012, at p.3. Available at http://www1.regierung.li/uploads/media/IPI_E-Pub-Relationship_Bet_ICC_and_SC_2_02.pdf

Due to the doubtful legality and despite being encompassed in the resolution, Article 6 would not withstand judicial review in the proceedings of the International Criminal Court.⁹⁸ According to Article 19(1) of the Rome Statute “The Court shall satisfy itself that it has jurisdiction in any case brought before it. The Court may, on its own motion, determine the admissibility of a case in accordance with article 17.” Also, Article 40 of the Statute grants independence to the judges when reviewing situations “The judges shall be independent in the performance of their functions.”

Resolution 1970 (2011) ordered the Libyan Government only to “cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to [this] resolution.” While only urged other States to cooperate fully with the ICC.

On 27 June 2011, by virtue of Resolution 1970 (2011) the International Criminal Court issued three warrants of arrest for crimes against humanity against Muammar al-Gaddafi (terminated following his death on 20 October 2011), Muammar Gaddafi's son Saif al-Islam Gaddafi,⁹⁹ and Libyan intelligence chief Abdullah Al-Senussi.¹⁰⁰

The case against the former Libyan intelligence chief Abdullah Al-Senussi was ruled inadmissible on 11 October 2013.¹⁰¹ While, Saif al-Islam Gaddafi to this day remains at large.¹⁰²

⁹⁸‘The Relationship Between the ICC and the Security Council: Challenges and Opportunities’ November 8, 2012, International Peace Institute, at p.4. Available at http://www1.regierung.li/uploads/media/IPI_E-Pub-Relationship_Bet_ICC_and_SC_2_02.pdf

⁹⁹ Warrant of Arrest for Saif Al-Islam Gaddafi, Situation in the Libyan Arab Jamahiriya, No. ICC-01/11, Pre-Trial Chamber, 27 June, 2011; see also The Prosecutor v. Saif Al-Islam Gaddafi, ICC-01/11-01/1. Available at <https://www.icc-cpi.int/CaseInformationSheets/GaddafiEng.pdf>

¹⁰⁰ Warrant of Arrest for Abdullah Al-Senussi, Situation in the Libyan Arab Jamahiriya, No. ICC-01/11, Pre-Trial Chamber, 27 June, 2011.

¹⁰¹ Gaddafi Case, The Prosecutor v. Saif Al-Islam Gaddafi

¹⁰² Ibid.,

4. The policies of the Security Council permanent members regarding the International Criminal Court

Of the five permanent members of the United Nations Security Council, only the United Kingdom and France ratified the Rome Statute. It is questioned how those non-State parties can justify subjecting a non-state party to the ICC's jurisdiction if they don't recognize the Court's jurisdiction over themselves.¹⁰³ In addition, the United States not only opposed the Rome Statute, but undertook hostile actions against the Court, including waging a malicious anti-ICC campaign. Moreover, the Security Council's permanent members have refused to refer situations that do not serve their political interests.

This chapter gives an overview of the policies that three of the Council's permanent members — United States, China and Russia — have enacted in regards to the International Criminal Court, using Syria as an example to highlight the problem of abusing the veto power that these countries possess, which has resulted in the obstruction of international criminal justice and of the fight against impunity. This chapter will also compare Myanmar situation with the situation in Syria in an effort to find an alternative for the Syria situation to reach the International Criminal Court without a referral from the Security Council.

4.1. U.S. policy towards the International Criminal Court

The United States was one of the seven States that voted against the International Criminal Court treaty on 17 July, 1998 along with China, Iraq, Israel, Libya, Qatar, and Yemen. The US claimed the International Criminal Court would challenge its authority at the Security Council as it will not be able to exercise its Council veto to protect its overseas interests. The US was also concerned that its military operations overseas will be under threat by the Court, and by not joining the International Criminal Court it would be protecting its own national interests. The United States explained that it opposed the Rome Statute because it “did not accept the concept of universal jurisdiction as reflected in the Statute of the International Criminal Court, or the application of the treaty to non-parties, their nationals or officials, or to acts committed on their territories. The only way to bring non-parties within the scope of the regime was through the mandatory powers of the

¹⁰³Mistry, H. and Ruiz, D. (2012) ‘The United Nations Security Council and the International Criminal Court.’ Chatham House, at p.3. Available at <https://www.pgaction.org/pdf/activity/Chatham-ICC-SC.pdf>

Security Council under the Charter of the United Nations.”¹⁰⁴ Following the adoption of the Rome Statute, the lead United States negotiator, Ambassador David Scheffer stated to the U.S. Congress that the Court will have jurisdiction over Multinational peacekeeping forces that are serving in a country that is a party to the treaty, regardless of whether the country of a particular peacekeeping force has joined the treaty or not. The treaty thus looks to function as a check against US, making it so that its armed forces could be prosecuted by the ICC even if the US is not a party to the treaty. This could hinder the US’s ability, to mobilize its military to fulfill alliance obligations or to take part in global efforts such as humanitarian crises.¹⁰⁵

President Bill Clinton signed the Rome Statute on 31 December, 2000, but did not submit it to the U.S. Senate for ratification.¹⁰⁶ President George W. Bush's administration opposed the U.S. ratification of the Rome Statute and stated that it would not join the International Criminal Court in 2002. In fact, the Bush administration developed a hostile policy towards the ICC.¹⁰⁷ John Bolton described the International Criminal Court as “an organization that runs contrary to fundamental American precepts and basic Constitutional principles of popular sovereignty, checks and balances, and national independence.”¹⁰⁸

As a result, the U.S. has undertaken several actions on both the domestic and international level in order to exempt its nationals from the jurisdiction of the International Criminal Court. These actions can be summarized as follows:

4.1.1 American Service-Members' Protection Act (ASPA)

The American Service-Members’ Protection Act, enacted 2 August, 2002, it is designed to provide protections for members of the U.S. armed forces and certain other individuals from being subjected to the jurisdictions of the International Criminal Court. It contains provisions (sections

¹⁰⁴ United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court in Rome from 15 June to 17 July 1998. UN Doc. A/CONF.183/SR.9 at para. 28, p.123. Available at https://legal.un.org/icc/rome/proceedings/E/Rome%20Proceedings_v2_e.pdf

¹⁰⁵ Statement of Ambassador David Scheffer before the U.S. Congress following the adoption of the Rome Statute, American Servicemembers Protection Act of 2002, Public Law 107–206; Enacted August 2, 2002. Available at <https://www.govinfo.gov/app/collection/comps/>

¹⁰⁶ President Clinton, Statement on the Rome Treaty on the International Criminal Court (Dec. 31, 2000). Available at <https://www.govinfo.gov/content/pkg/WCPD-2001-01-08/pdf/WCPD-2001-01-08-Pg4.pdf>

¹⁰⁷ Kaye, D. and Raustiala, K. (2016) ‘The Council and the Court: Law and Politics in the Rise of the International Criminal Court’ Texas Law Review, Vol. 94, Issue 4, pp. 713-741, at p.722.

¹⁰⁸ John Bolton, “American Justice and the International Criminal Court”. Remarks at the American Enterprise Institute. November 3, 2003. Available at <https://2001-2009.state.gov/t/us/rm/25818.htm>

2004 to 2007) that prohibit the International Criminal Court from exercising jurisdiction over U.S. nationals or covered allied persons. Prohibits cooperation with the International Criminal Court regarding investigation, prosecution or responding to request for judicial assistance submitted by the ICC. It also prohibits the extradition or transfer of American nationals to the ICC, providing financial assistance to the ICC and transfer of any information to the ICC. Also grant the U.S. President to use any means necessary to release U.S. citizens being tried before the ICC.¹⁰⁹

4.1.2. The Nethercutt Amendment

The Congress adopted the Nethercutt Amendment, in December 2004 as part of the U.S. Foreign Operations Appropriations Bill. It contained funding prohibitions for Economic Support Funds (ESF) to the International Criminal Court States Parties that refused to sign the Bilateral Immunity Agreements with the U.S. and as a result 35 of those States Parties were deprived of U.S. military aid even though some of them are U.S. allies.¹¹⁰

4.1.3 Bilateral Immunity Agreements (BIAs)/ Article 98 Agreements

According to Article 98 of the Rome Statute “Cooperation with respect to waiver of immunity and consent to surrender”

1. “The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.”
2. “The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.”

¹⁰⁹ American Servicemembers Protection Act of 2002, Public Law 107–206; Enacted August 2, 2002. Available at <https://www.govinfo.gov/app/collection/comps/>

¹¹⁰ The Nethercutt Amendment was first signed into law in December 2004, and required annual renewal. Available at <http://iccnow.org/?mod=nethercutt&idudctp=20&order=dateasc>

Based on Article 98 of the Statute the United States has interpreted it to mean that U.S nationals cannot be surrendered to the International Criminal Court by any country that has concluded a bilateral agreement with the U.S. prohibiting such a surrender, even if that country is a State Party of the Rome Statute. Thus, the Bush administration concluded Bilateral Immunity Agreements (BIAs) with as many countries as possible in an effort to prevent the International Criminal Court from exercising its jurisdiction over U.S. military and civilian personnel.

Between 2002 and 2006, the U.S. concluded at least 100 Bilateral Immunity Agreements.¹¹¹ The Agreements have received numerous criticisms from some States, NGO'S and international organizations. According to Human Rights Watch, Article 98(2) of the Rome Statute was meant to serve as a guide for States that support the ICC in regards to the handling of suspects. It was not intended to allow non-cooperative States to negotiate deals for exemptions for its citizens or undermine the Court.¹¹² If the interpretation of Article 98 by the U.S. is correct, then there is no need for Article 27 in the Rome Statute, which states:

1. "This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence."

2. "Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person."

Moreover, the U.S. interpretation of Article 98 is contrary to the purpose and objective of the ICC, and it is considered incompatible with Article 31 of the Vienna Convention on the law of Treaties in 1969, which stipulates that "A treaty shall be interpreted in good faith in accordance with the

¹¹¹ Status of U.S. Bilateral Immunity Agreements by region. Coalition for the International Criminal Court. 14 Dec 2006. Available at <http://iccnow.org/?mod=bia&idudctp=21&order=dateasc&show=all>

¹¹² 'United States Efforts to Undermine the International Criminal Court.' Human Rights Watch. Available at <https://www.hrw.org/legacy/campaigns/icc/docs/art98analysis.htm>

ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”¹¹³

Article 98(2) can be interpreted in many ways:

- The Article covers only agreements existing before the ratification of the Rome Statute.
- The Article only covers specific agreements such as Status of Forces Agreements (SOFAs).
- The Article covers agreements that assure investigation or prosecution.

Therefore, States Parties to the Rome Statute who sign BIAs with the US oppose the objective of the Rome Statute. The Council of the European Union agrees that the proposed U.S. non-surrender agreement would be illegal for the States Parties to sign because it does not fall under Article 98 of the Rome Statute.¹¹⁴

The Parliamentary Assembly of the Council of Europe passed Resolution 1300 on September 25, 2002, which oppose Bilateral Immunity Agreements. “The EU issued guidelines for member countries for the acceptable terms of Article 98 agreements, specifying that coverage would be limited to government representatives on official business, the United States would expressly pledge to prosecute any war crimes committed by Americans, and the agreements would not contain a reciprocal promise to prevent the surrender of European citizens to the ICC.”¹¹⁵ None of the EU member states has signed a Bilateral Immunity agreement with the United States.¹¹⁶

4.1.4 Security Council Peacekeeping Resolutions 1422 (2002) and 1487 (2003)

As aforementioned, despite strong international opposition the United States successfully secured blanket immunity before the ICC for personnel from non-ICC states parties involved in U.N. operations. The US achieved this through Security Council Resolution 1422 (2002) by threatening to veto the renewal of a peacekeeping operation in Bosnia and Herzegovina. Resolutions 1422 was

¹¹³Vienna Convention on the Law of Treaties, Signed at Vienna 23 May 1969, Entry into Force: 27 January 1980, available at https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf

¹¹⁴Signature Suspension To Immunity Agreements To Darfur’ Coalition for the International Criminal Court, 23 October, 2006, available at http://www.iccnw.org/documents/FS_AMICC_US_ChronologyOct2006.pdf

¹¹⁵Elsa, J. K. (2006). “U.S. Policy Regarding the International Criminal Court” Congressional Research: The Library of Congress, at p. 27. Available at <https://fas.org/sgp/crs/misc/RL31495.pdf> ; see also Council of the European Union: Council Conclusions and EU Guiding Principles, 42 I.L.M. 240 (2003); Council of the European Union, Threats to the International Criminal Court, Resolution 1336 (2003).

¹¹⁶ Groenleer, M. (2016) ‘The United States, the European Union, and the International Criminal Court: Similar values, different interests?’ International Journal of Constitutional Law, Vol 13, Issue 4, pp. 923–944, at p.931.

renewed for another year by the Security Council's adoption of Resolution 1487 (2003).¹¹⁷ The United States did not pursue another renewal or third resolution in 2004 because of the embarrassment it endured from the reports of torture and abuse of prisoners by American soldiers in Abu Ghraib prison in Iraq and at the Guantanamo Bay detention camp in Cuba.¹¹⁸

4.1.5 U.S. threats against the International Criminal Court

The United States has threatened to take a tough stance on the International Criminal Court if it begins to investigate American nationals in connection with allegations of war crimes committed during the war in Afghanistan. John Bolton, the U.S. National Security Adviser at that time threatened the ICC with sanctions during his speech in front of the conservative Federalist Society "We will not cooperate with the ICC," he said "We will provide no assistance to the ICC. We will let the ICC die on its own. After all, for all intents and purposes, the ICC is already dead to us."¹¹⁹ Further, US Secretary of State, Michael Pompeo declared that the US would act to protect its sovereignty as well as its allies from unjust investigation and prosecution by the ICC. Pompeo also added that based on a new US policy announced on March 15, the issuance of visas for any ICC official directly involved in any investigation of US personnel, or allied personnel without the ally's permission, would be restricted.¹²⁰

The author of this thesis believes that the actions that have been taken by the United States against the International Criminal Court are unjustified because the ICC does not constitute a threat. Under Article 17 of the Statute the ICC has a complementarity principle, under which it has no right to investigate a U.S. national if the U.S. carried out its own investigation of the same alleged crimes. The International Criminal Court will only investigate or prosecute if the State is unwilling or unable to do so.

¹¹⁷ 'Controversial resolutions proposed by the United States seeking immunity from the International Criminal Court' Coalition for the International Criminal Court, May 2004, Available at <http://www.iccnw.org/documents/1422DocumentCompilation.pdf>

¹¹⁸ Bosco, D. (2014) *Rough Justice: 'The International Criminal Court's Battle to Fix the World, One Prosecution at a Time'* Oxford University Press, Oxford, at p.179.

¹¹⁹ John Bolton. Address to the Federalist Society on the International Criminal Court. 10 September, 2018. Available at <https://americanrhetoric.com/speeches/johnboltonfederalistsociety2018.htm>

¹²⁰ Statement of Michael Pompeo, Secretary of State. 'U.S. Policy on the International Criminal Court Remains Unchanged' Press Statement. 9 October, 2019. Available at <https://www.state.gov/u-s-policy-on-the-international-criminal-court-remains-unchanged/>

Also, pursuant to Article 18 of the Rome Statute “a State may inform the Court that it is investigating or has investigated its nationals or others within its jurisdiction with respect to criminal acts which may constitute crimes referred to in article 5 and which relate to the information provided in the notification to States.”

International law under the principle of universal jurisdiction allows States to prosecute perpetrators of genocide, war crimes and crimes against humanity. According to Article 8 (2) of the Rome Statute “For the purpose of this Statute, "war crimes" means: (a) Grave breaches of the Geneva Conventions of 12 August 1949[...]" this means that regarding war crimes there is a link between the Rome Statute and the Geneva Conventions, and since the United States ratified the four 1949 Conventions it shall in accordance with Article 1 “The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.” ensure respect for the Geneva Conventions and the same applies to Russia, and China. While they are not States Parties to the Rome Statute, they still have obligations and responsibilities under international law that must be respected. Moreover, the United States as the leader of the free world should support the fight against impunity for war crimes, crimes against humanity and genocide as it did before when it played a leading role in the establishment of the Nuremberg and Tokyo trials after the World War II and the ad hoc tribunals for the former Yugoslavia and Rwanda, as well as the tribunals for the prosecution of serious crimes committed in Cambodia, East Timor, and Sierra Leone.

4.2. China policy towards the International Criminal Court

China is not a state party to the Rome Statute of the International Criminal Court. During the vote on the statute, the Chinese delegation said they voted against it because they were concerned about the characteristics of International Criminal Court jurisdiction and its effect on state sovereignty. They also expressed concerns about the prosecutor (proprio motu) power to initiate investigation, in addition to issues regarding the crimes that fall under the jurisdiction of the Court.¹²¹

As a permanent member of the Security Council China has the power to veto referrals to the ICC. China has vetoed draft resolution to refer the situation in Syria to the International Criminal Court,

¹²¹ Junping, W. and Mingxuan, G. (2007) ‘Issues of Concern to China Regarding the International Criminal Court’ International Centre for Criminal Law Reform and Criminal Justice Policy. pp.3-13 Available at <https://icclr.org/wp-content/uploads/2019/06/IssueofConcern.pdf?x79172>

in addition to other Security Council resolutions regarding, among other things, humanitarian access and chemical weapons in Syria.¹²² Due to its close economic ties with Sudan, China was in favor of a deferral concerning the ICC warrant of arrest against then Sudanese President Omar Al Bashir. However, the resolution was not adopted. So, despite the standing international warrant of arrest against Al Bashir, the Chinese Government invited him to visit China in 2011 and he did in June 2011.

In addition, the Chinese delegation voted in favor of the controversial Security Council Peacekeeping Resolutions 1422 (2002) and 1487 (2003). “China has consistently opposed the possible jurisdiction of the ICC over a non-State Party.[...]China has taken the position that the exercise of jurisdiction by the ICC over non-States Parties would conflict with the treaty law principle of *pacta tertiis nec nocent nec prosunt*.”¹²³

4.3. Russia policy towards the International Criminal Court

During the vote on the Rome Statute the Russian delegation stated that 17 July 1998, “marks the end of an important effort to reconcile different legal systems. It was a reason for satisfaction that a compromise package has been crafted that the Russian Federation has been able to support”¹²⁴ The treaty was signed by Russia on 13 September 2000 but not ratified.

Similar to China, Russia was in favor of a deferral concerning the ICC warrant of arrest against then the Sudanese President Omar Al Bashir, according to the Russian MFA Spokesman Andrei Nesterenko “We are convinced that the Darfur conflict can only be settled politically.”¹²⁵

The annexation of Crimea has also been a point of contention between the ICC and Russia. Following the Report on Preliminary Examination Activities on 14 November 2016, by the Office of the Prosecutor, during which the situation was discussed, the Prosecutor stated that the events that led to the annexation constituted an armed conflict launched by Russia against Ukraine, and

¹²²Global Centre for the Responsibility to Protect, Syria, 15 January 2020, available at <https://www.globalr2p.org/countries/syria/>

¹²³ Ru, X. (2014) “China's Policy Towards the ICC Seen Through the Lens of the UN Security Council”, FICHL Policy Brief Series No. 27, TOAEP, at p.3. Available at <http://www.legal-tools.org/doc/dee821/>.

¹²⁴ “UN Diplomatic Conference Concludes in Rome with Decision to Establish Permanent International Criminal Court,” Press Release L/2889, 20 July 1998 - <https://www.un.org/press/en/1998/19980720.12889.html>

¹²⁵ Statement by Russian MFA Spokesman Andrei Nesterenko Regarding the Issuance by International Criminal Court of an Arrest Warrant against Sudanese President Omar al-Bashir, 5 March 2009, http://www.mid.ru/web/guest/maps/sd//asset_publisher/Xen9fAIVS0x7/content/id/303238?p_p_id=101_INSTANCE_E_Xen9fAIVS0x7&_101_INSTANCE_Xen9fAIVS0x7_languageId=en_GB

that the ICC is working hard to determine whether Russia controls armed groups in southeast Ukraine.¹²⁶

Two days later, Russia announced its intention not to become a party to the Rome Statute of the ICC by virtue of bylaw № 361-rp issued by the president of the Russian Federation and its effect the withdrawal of Russia's signature under the Rome Statute.¹²⁷ In a statement by the Ministry of Foreign Affairs explaining the reason for the decision; it accused the International Criminal Court of being bias, inefficiency and lack of independence. The ministry said that the ICC had failed to become a truly independent, authoritative tribunal and that its work had proved ineffective, citing as an example that the Court had spent over \$1 billion over the past 14 years despite having passed four sentences.¹²⁸ Although Russia did not state that the real reason of its withdrawal from the Rome Statute is due to the investigation of the situations in Georgia and Ukraine by the International Criminal Court, the timing between the release of the report by the Office of the Prosecutor (OTP) and the issuance of the presidential Executive Order could lead to such conclusion.¹²⁹

4.4. The Security Council and the situation in Syria

Since 2011, the war in Syria has killed thousands and left millions of people, mostly women and children in desperate need of humanitarian assistance. This bloody conflict has destroyed entire cities, displaced 6.6 million people internally and 5.6 million refugees worldwide, according to the UN High Commissioner for Refugees.

Between 2013 and 2018, Human Rights Watch and 7 independent international organizations investigated at least 85 chemical attacks, most of which were committed by Syrian regime forces and the actual number of chemical attacks may be greater.¹³⁰ The attacks are considered war crimes

¹²⁶ Report on Preliminary Examination Activities 2016, The Office of the Prosecutor, pp. 33-42, available at https://www.icc-cpi.int/iccdocs/otp/161114-otp-rep-PE_ENG.pdf

¹²⁷ Sayapin, S. "Russia's Withdrawal of Signature from the Rome Statute Would not Shield its Nationals from Potential Prosecution at the ICC", 21 November, 2016, Blog of the European Journal of International Law, Available at <https://www.ejiltalk.org/russias-withdrawal-of-signature-from-the-rome-statute-would-not-shield-its-nationals-from-potential-prosecution-at-the-icc/>

¹²⁸ Statement by the Russian Foreign Ministry, 16 November 2016 http://www.mid.ru/ru/press_service/spokesman/official_statement//asset_publisher/t2GCdmD8RNlR/content/id/2523566?p_p_id=101_INSTANCE_t2GCdmD8RNlR&_101_INSTANCE_t2GCdmD8RNlR_languageId=en_GB

¹²⁹ Supra note 127

¹³⁰ Human Rights Watch, Syria events of 2018, Available at <https://www.hrw.org/world-report/2019/country-chapters/syria>

according to Article 8 of the Rome Statute which, defines “war crimes” as grave breaches of the Geneva Conventions “Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities.”

In addition to the arbitrary detention and enforced disappearance of thousands of Syrians.¹³¹ The Human Rights Council established through resolution S-17/1 adopted at its 17th special session an independent international commission of inquiry with a mandate to investigate all alleged violations of international human rights law since March 2011 in the Syrian Arab Republic.¹³² The Report of the said commission in 16 August 2012 has established that President Bashar Al Assad and his regime committed war crimes and crimes against humanity in Syria all of which fall within the jurisdiction of the International Criminal Court.¹³³ Hence, the perpetrators should be persecuted before it, but unfortunately Syria is not a member state of the Rome Statute. Therefore, the ICC cannot prosecute Syrian nationals, unless it receives a referral from the UN Security Council. However, the Security Council is paralyzed when it comes to issuing a resolution regarding the situation in Syria because of the veto power held by its five permanent members. Switzerland spoke on behalf of fifty member States, including permanent members UK and France, when on 14 January, 2013, it asked the Security Council to refer the situation in Syria to the ICC. France proposed a resolution several months later to follow through with that referral, in accordance with Article 13(b). While 13 States voted in favor, Russia and China used their veto power against the issuance of the resolution.¹³⁴ In fact, Russia has used its veto power 13 times to block Security Council action in Syria since the conflict began in 2011. In accordance with a UN Security Council Report on the veto; since 2011, Russia and China have wielded the veto power considerably more than in the past. Russia has used its veto 18 times, consisting of 13 to block Security Council action in Syria; two in relation to Ukraine; one related to the 20th anniversary of the genocide in

¹³¹ Ibid.,

¹³² UN Doc A/HRC/21/50

¹³³ United Nations Human Rights Council, Report of the Independent International Commission of Inquiry on the Syrian Arab Republic (16 August 2012) UN Doc A/HRC/21/50, United Nations Human Rights Council; see also United Nations Human Rights Council, ‘Report of the Independent International Commission of Inquiry on the Syrian Arab Republic’ (5 February 2013) UN Doc A/HRC/22/59

¹³⁴ Schabas, W. (2017). Triggering the Jurisdiction. In *An Introduction to the International Criminal Court*. Cambridge: Cambridge University Press. (pp. 141-168); See also Security Council Meeting Record of the veto by China and Russia of draft resolution S/2014/348 referring Syria to the ICC. UN Doc. S/PV.7180 (2014), at p.4; Security Council, ‘Referral of Syria to International Criminal Court Fails as Negative Votes Prevent Security Council from Adopting Draft Resolution’ (22 May 2014) Press Release SC/11407

Srebrenica; one related to Venezuela; and one related to Yemen. For its part, China has cast 8 vetoes; seven related to Syria and one on Venezuela.¹³⁵

The Russian U.N. ambassador Vitaly Churkin referred to the ICC's troubles in relation to Libya during a meeting of the Security Council, dated 22 May, 2014. Churkin said in that case, which was referred to the ICC by the UN Security Council through Resolution 1970 (2011), the Court actually contributed to the conflict and failed to contribute to justice in Libya or its return to normalcy once hostilities ended. He further noted that the Court refused to acknowledge bombardment by NATO that left many civilians dead.¹³⁶

However, the Russian military intervention in Syria in 2015 proved that the only reason Russia vetoed the resolution is because it is backing Al Assad and his regime for political gains and expanding its presence and influence in the Middle East. According to Human Rights Watch, Russia used cluster and incendiary weapons in Syria, constituting the war crime of indiscriminate attacks in a civilian populated area.¹³⁷ Thus, if it was not for the veto by Russia or China, which usually abuse their powers, a resolution against Syria would have been issued and maybe thousands of innocent lives would have been saved. That is why the UN Security Council power of veto is a major problem within the United Nations; any of the five permanent members (P5) – United Kingdom, France, United States, Russia and China can prevent the adoption of any UN Security Council draft resolution not to their liking and, as a result, it often prevents the Council from acting when mass atrocities are committed. This is certainly true in regards to the situation in Syria, which needs international intervention as soon as possible to save millions of lives and any delay makes matter worse. According to Jennifer Trahan “The delay in making a Syria referral harms any deterrent value that might be derived from referral.”¹³⁸ The Security Council appears to be inconsistent in regards to its referrals and the Council is failing to meet its obligations to take

¹³⁵ Security Council Report, UN Security Council Working Methods, “The Veto” 30 September 2019. Available at <https://www.securitycouncilreport.org/un-security-council-working-methods/the-veto.php>

¹³⁶ Security Council Meeting Record of the veto by China and Russia of draft resolution S/2014/348 referring Syria to the ICC. UN Doc. S/PV.7180 (2014), at p.13.

¹³⁷ ‘Russia/Syria: Flurry of Prohibited Weapons Attacks.’ Human Rights Watch, June 3, 2019. Available at <https://www.hrw.org/news/2019/06/03/russia/syria-flurry-prohibited-weapons-attacks>

¹³⁸ Trahan, J. (2013). “The Relationship between the International Criminal court and the UN Security Council: Parameters and Best Practices.” Criminal Law Forum, Vol. 24, No. 4, pp. 417–473, at p. 470.

action against large-scale atrocities. This is exemplified by the contrast of the Council's relatively speedy Libya referral and its delay in its Syria referral.¹³⁹

Which brings us to the question of reform of the UN Security Council especially, veto reform. However, any reform of the veto will be difficult to achieve. In accordance with Article 108 of the UN Charter any reform of the Security Council would require an amendment to the Charter and that requires the ratification of at least two-thirds of UN Member States including the P5. Resistance is strong from the Security Council permanent members, except United Kingdom and France, who are more open to reform.

In 2013, France proposed a regulation which “the five permanent members of the Security Council would voluntarily and collectively undertake not to use the veto where a mass atrocity has been ascertained. Being a voluntary measure, it would not require a revision of the United Nations Charter.”¹⁴⁰ However, United Kingdom has been the only P5 member to support this proposal.

Any reform to the veto is unlikely to happen in the near future. Therefore, the situation in which international justice is applied remains uneven, as leaders from powerful states, or states that are backed-by powerful states are unlikely to be prosecuted by international criminal tribunals if they commit war crimes, crimes against humanity, or genocide.

However, justice must not be prevented just because there are political obstacles. Hence, finding an alternative for the situation in Syria to reach the ICC without a referral from the Security Council is the only solution for the time being. The author of this thesis will examine next if the Myanmar case regarding the Rohingya Muslims can set a precedent that could be used to bring the situation in Syria before the International Criminal Court.

4.4.1 Comparison between the situation in Syria and Myanmar situation

(Deportation from non-Member State to Member State)

The Myanmar case can be summarized as follows: The ICC Prosecutor submitted a request to the Court to open an investigation into alleged crimes committed against Rohingya Muslims from

¹³⁹Ibid.,

¹⁴⁰ ‘Why France wishes to regulate use of the veto in the United Nations Security Council.’ France Diplomatie, Website of the French Ministry for Europe and Foreign Affairs. Available at <https://www.diplomatie.gouv.fr/en/french-foreign-policy/united-nations/france-and-the-united-nations-security-council/article/why-france-wishes-to-regulate-use>

Myanmar who were fleeing to Bangladesh. Pre-Trial Chamber III drew the conclusion that the Court could exercise jurisdiction over this crime because though Myanmar is not a State Party to the Rome Statute, Bangladesh is. The forced deportation of the Rohingya to Bangladesh essentially brought the crime to a State Party, and therefore, the Court was determined to have jurisdiction. Satisfied Pre-Trial Chamber III ultimately authorized the Prosecutor to proceed.¹⁴¹

After examination, the Chamber determined that systematic acts of violence and forced deportation may have been committed against the Rohingya people, and that such acts qualify as crimes against humanity. The Chamber confirmed that such acts led to the forcible displacement of between 600,000 and 1 million Rohingya people from Myanmar to Bangladesh.¹⁴²

The situation of the Rohingya Muslims from Myanmar is similar to the situation of the Syrian people in certain respects. While Syria is not a party to the Rome Statute, the elements of two crimes: deportation and forced transfer of the Syrian people have occurred in a country that is party to the Rome Statute Jordan, which has direct borders with Syria. The number of Syrians deported and forcibly displaced in Jordan has reached two million people.

According to Article 7 (1d) “For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack [...] (d) Deportation or forcible transfer of population.” In addition to Article 12 (2 a) “In the case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3: (a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;”

Consequently, the ICC has jurisdiction to investigate the situation in Syria if:

- Jordan a State Party to the Rome Statute which shares a border with Syria and is hosting millions of forcibly displaced Syrians, referred the situation to the ICC. According to Article 13 (a) “The Court may exercise its jurisdiction with respect to a crime referred to in article 5

¹⁴¹ ‘ICC judges authorise opening of an investigation into the situation in Bangladesh/Myanmar.’ Website of the International Criminal Court (ICC). 14 November 2019. Available at <https://www.icc-cpi.int/Pages/item.aspx?name=pr1495>

¹⁴² Ibid.,

in accordance with the provisions of this Statute if: A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14;”

- Turkey, which is not a state party, but also shares a border with Syria and is also hosting millions of deported Syrians, referred the situation to the ICC as well. According to Article 12 (3) “If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9.”
- The ICC’s Office of the Prosecutor (*proprio motu*) acted in accordance with Article 13 (c): “The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if: The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15.”

Despite the failure of the UN Security Council to adopt a resolution regarding the situation in Syria, there is still hope that it will reach the ICC through one of the above methods, but hopefully it will occur, through the Prosecutor initiating an investigation, after getting the approval from the Pre-Trial Chamber, since it would be in the interests of justice due to the gravity of the situation, the large-scale of the crimes committed and the number of victims, and also because Jordan or Turkey are unlikely to refer the situation to the International Criminal Court for political reasons.

The crimes of deportation and forced displacement of the Syrian people are well documented, and Article 69 (6) of the Rome Statute applies “The Court shall not require proof of facts of common knowledge but may take judicial notice of them.” However, according to Kevin Heller that while the *actus reus* of deportation has been established; the forceable displacement of Syrians, which, according to Article 7(2)(d) “were lawfully present in the area from which they were so deported or transferred.” The *mens rea* of forcible displacement across the Jordanian–Syrian border will be difficult to prove before the Court.¹⁴³

Another problem that might arise, if the Prosecutor decides to open an investigation for the alleged crimes within the ICC's jurisdiction in the situation in Syria, and Russia or China proposes a UNSC

¹⁴³ Heller, K. “The ICC and the Deportation of Civilians from Syria to Jordan.” *Opinio Juris*, 25 March 2019. Available at <http://opiniojuris.org/2019/03/25/the-icc-and-the-deportation-of-civilians-from-syria-to-jordan/>

resolution invoking Article 16 of the Statute. It will be interesting if such a resolution receives the nine affirmative votes necessary for its adoption, because when Rwanda proposed a Security Council resolution in 2013 invoking Article 16 to the investigation and prosecution of President Uhuru Muigai Kenyatta and Deputy President William Samoei Ruto of Kenya, it was not adopted. “Seven Council members voted in favour of the text (Azerbaijan, China, Morocco, Pakistan, Russian Federation, Rwanda, Togo), none voted against, and 8 abstained (Argentina, Australia, France, Guatemala, Luxembourg, Republic of Korea, United Kingdom, United States). The draft was, therefore, not adopted.[...]The United Kingdom’s representative stressed that the sponsors had failed to establish the Charter VII threshold beyond which the Court’s proceedings against the Kenyan leaders would pose a threat to international peace and security.”¹⁴⁴

But even if the resolution did receive the nine affirmative votes necessary for its adoption, is the Court under obligation to comply with such resolution? This brings us to another question regarding the legality of the ICC to assess a Security Council Article 16 deferral. Unlike the International Court of Justice, the International Criminal Court is not a principle organ of the United Nations. It is independent with a separate legal personality and, part of its implied power, is the inherent power to assess any resolution referred to it by the Security Council. According to Article 4 (1) “The Court shall have international legal personality. It shall also have such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes.” Thus, the Pre-Trial Chamber can give judicial review to Security Council Article 16 deferral especially, if the Security Council was acting *ultra vires*.

To do so, the Court should determine first whether the deferral request is in accordance with Chapter VII of the UN Charter and the Rome Statute. The Security Council should only make such a deferral under those conditions once it has determined that there is a threat to international peace and security in a particular situation and that the suspension of the investigation or prosecution conducted by the International Criminal Court is crucial for maintaining or restoring international peace and security.

¹⁴⁴Security Council Resolution Seeking Deferral of Kenyan Leaders’ Trial Fails to Win Adoption, with 7 Voting in Favour, 8 Abstaining. SC/11176. 15 November 2013. Available at <https://www.un.org/press/en/2013/sc11176.doc.htm>

The Court also has to be satisfied that the Security Council is not obstructing international justice and that there is in fact a threat to international peace and security and such deferral is justified.

By examining the situation in Syria, we see that investigating the unthinkable war crimes and crimes against humanity committed by the Syrian regime, and holding the perpetrators responsible through prosecution does not constitute a threat. In fact, by not doing anything about it, it will continue to be a threat to international peace and security because the ongoing chaos is only benefiting terrorist groups, while neighboring countries and Europe have to deal with one of the largest refugee migrations in recent history and one of the worst humanitarian crises of our time. Therefore, such a deferral would be considered void, and the Court can challenge it.

While, the International Criminal Court has not done this with past Security Council resolutions, this does not mean that it would not do so in the future. That is why the International Criminal Court needs a strategy for dealing with Security Council's referrals and deferrals and to protect itself from being politicized by the Security Council, because it is crucial for the International Criminal Court to preserve its integrity and image as an independent institution.

5. Enhancing the International Criminal Court 's efficiency and effectiveness

Based on the above, the actions of the Security Council have been an impediment to the Court's independence. However, the Security Council's support is still important to the ICC. But how can the Court engage the Security Council in a way that does not compromise its independence? And what role the States Parties to the Rome Statute and other external actors should play in helping to improve the efficiency and effectiveness of the Court? This chapter offers opinions and suggestions about how these questions may be resolved.

5.1. Strengthening the relationship between the International Criminal Court and the Security Council

5.1.1 Cooperation

The United Nations Security Council's lack of cooperation and follow ups on referrals are an obstacle to the International Criminal Court. More than a quarter of those charged by the Court remain at large. According to the Prosecutor of the International Criminal Court: when the Security Council, acting under Chapter VII of the UN Charter, refers a situation involving a perceived threat to international peace and security to the Court, the Council is expected to take appropriate measures if a State party to the Rome Statute fails to fulfill the Court's mandate. If the Security Council does not, then a referral would be essentially useless because it would fail to meet its ultimate goal — ending impunity.¹⁴⁵ Therefore, there is a need to enhance cooperation between the ICC and the Security Council.

Future referral resolutions should contain a strong language compelling all Member states to cooperate with the ICC, similar to the resolutions establishing the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). In paragraph 2 of Resolution 955 (1994) regarding ICTR and paragraph 4 of Resolution 827 (1993) regarding ICTY the Security Council decided that "All States shall cooperate fully with the International Tribunal and its organs in accordance with the present resolution and the Statute of the International Tribunal and that consequently all States shall take any measures necessary under their domestic law to implement the provisions of the present resolution and the Statute, including

¹⁴⁵ Prosecutor of the International Criminal Court. Statement to the United Nations Security Council on the Situation in Darfur, pursuant to UNSCR 1593 (2005). New York 11 December 2013. Available at <https://www.icc-cpi.int/iccdocs/otp/OTP-UNSC-Darfur-Speech-Dec-2013-Eng.pdf>

the obligation of States to comply with requests for assistance or orders issued by a Trial Chamber under Article 28 of the Statute[...]"

The UN Security Council should impose similar obligations to all UN Member States regardless of whether they are party to the Rome Statute and they should apply not only in case of referrals of situations by the Security Council but also in situations referred by States or those initiated by the Prosecutor. A State that receives an ICC warrant of arrest and transfer order is obliged to implement the order effectively and promptly. There should be consequences for the State that fail to comply with that obligations such as suspension of membership, monetary sanctions or other political and economic pressures. In addition, the Council's follow up on referrals and its enforcement by States should be mandatory. The Security Council should have an interest in its own referrals. If ICC prosecutions are not the result of the Security Council's referrals, that will compromise both the Security Council's credibility, and the effectiveness of the referral process.

5.1.2 Funding

Following the UN Security Council two referral resolutions, the cost of the International Criminal Court's investigations consumed the Court's resources and strained its budget, leaving it with a financial challenge. According to the 'Report of the Registry on the approximate costs allocated so far within the Court in relation to referrals by the Security Council;' the Court allocated between the year 2006 till 2016 an amount up to approximately €55 million for Darfur and Libya.¹⁴⁶ This means that there will not be enough resources left for investigations of other situations. Further, it is not fair for the Security Council to ask the ICC to investigate a situation and then refuse to fund it.

Therefore, future referral resolutions should leave funding matters to the General Assembly to decide not the Security Council pursuant to Article 115 (b) of the Rome Statute, which states "funds provided by the United Nations, subject to the approval of the General Assembly, in particular in relation to the expenses incurred due to referrals by the Security Council." Moreover, a separate agreement has to be concluded for the UN General Assembly to allocate funds from the United Nations budget to pay for the investigations carried out by the International Criminal Court

¹⁴⁶ Report of the Registry on the approximate costs allocated so far within the Court in relation to referrals by the Security Council, ICC-ASP 15th Session, 01.11.2016. Available at https://asp.icc-cpi.int/iccdocs/asp_docs/ASP15/ICC-ASP-15-30-ENG.pdf

due to referrals by the Security Council pursuant to Article 13 'Financial matters' of the Negotiated Relationship Agreement between the International Criminal Court and the United Nations, which stipulates "The United Nations and the Court agree that the conditions under which any funds may be provided to the Court by a decision of the General Assembly of the United Nations pursuant to article 115 of the Statute shall be subject to separate arrangements. The Registrar shall inform the Assembly of the making of such arrangements."

5.1.3 Elimination of limitation of jurisdiction

UN Security Council Resolutions 1970 (2011) concerning the referral of the situation in Libya and 1593 (2005) concerning the referral of the situation in Darfur exemplify the limitations of the Court's jurisdiction by the Security Council. The exemption of individuals from non-ICC states parties from the International Criminal Court's jurisdiction not only violates the rule of law principles but it is also incompatible with the Rome Statute of the International Criminal Court, because it ignores Article 1 of the Rome Statute, which states: "The jurisdiction and functioning of the Court shall be governed by the provisions of this Statute." And Article 27 (1) "This Statute shall apply equally to all persons without any distinction..."

This is threatening the independence of the Court that is recognized and respected by the UN under Article 2 of the Negotiated Relationship Agreement between the International Criminal Court and the United Nations which stipulates: "1. The United Nations recognizes the Court as an independent permanent judicial institution which, in accordance with articles 1 and 4 of the Statute, has international legal personality and such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes. 2. The Court recognizes the responsibilities of the United Nations under the Charter. 3. The United Nations and the Court respect each other's status and mandate."

Thus, the Security Council has to be consistent in future resolutions and end blanket immunity and the normalization of exemptions from the jurisdiction of the International Criminal Court, which bolsters impunity and send a wrong message to the perpetrators.

5.1.4. Invoking Article 16 in case of actual threat

The Rome Statute pursuant to Article 16 grants the Security Council the power to defer an International Criminal Court's investigation or prosecution for a period of 12 months in a

resolution adopted under Chapter VII of the Charter of the United Nations. The Security Council, therefore, has to establish first that there is a threat to international peace and security as stipulated in Article 39 of the UN Charter. In other words, the Security Council has to determine that the investigation or prosecution carried out by the ICC constitutes a threat to international peace and security and that the deferral is the means of restoring it. This is a contrast from Security Council Peacekeeping Resolutions 1422 (2002) and 1487 (2003) which lacked a demonstration of an actual threat to international peace and security within the meaning of Article 39 and were a preemptive grant of immunity from criminal prosecution for non-states parties' nationals which does not conform with the principle of non-discrimination in international law, the core principle of justice and the rule of law.

Therefore, the UNSC should only intervene when its members have determined that ICC proceedings would be detrimental to maintaining or restoring international peace and security. Nothing stops the Security Council from considering other alternatives concerning the restoration or maintenance of peace and security that have nothing to do with Court's work, even while the Court is conducting proceedings in that region. Put another way, the Council can adopt its own measures related to a situation without infringing on the Court's jurisdiction.¹⁴⁷ The prosecutor or judges of the ICC should challenge the legal validity of a deferral if they find it inconsistent with the Rome Statute, since the Statute granted them the power to do so.

5.1.5. Prevention of the abuse of veto power by Russia and China

The abuse use of vetoes by Russia and China is a threat to international peace and security and disregard for the lives of people suffering from large-scale atrocities. Russia has used its veto right 13 times on draft resolutions concerning Syria since the start of the crisis in 2011 to protect its interests and its ally, the Syrian regime from repercussions for committing crimes against humanity and war crimes. Such a behavior by Russia or China affects the credibility of the Security Council and turns it into a tool in the hands of the big powers rather than a council responsible for the maintenance of international peace and security.

¹⁴⁷War Crimes Research Office, 'The Relationship Between the International Criminal Court and the United Nations' (2009) American University Washington College of Law, at p.4. Available at <https://www.wcl.american.edu/impact/initiatives-programs/warcrimes/our-projects/icc-legal-analysis-and-education-project/reports/report-8-the-relationship-between-the-international-criminal-court-and-the-united-nations/>

It should be highlighted that the composition of the Security Council permanent members does not represent the new world and its realities. Being the product of the aftermath of the World War II, the Security Council was mainly composed of victors of the war. However, currently the inclusion of new powers, such as Germany and Japan as permanent members would positively impact the organization and help to prevent the abuses. The current members, such as United Kingdom and France also need to reach a compromise with the rest of the permanent members to not use their vetoes in situations involving a mass atrocity and humanitarian crisis threatening the lives of millions.

It would be efficient to create mechanisms to react adequately and promptly to the grave breaches of the international law, especially human rights law. The current veto mechanism is ineffective and acts as a political tool to protect the wrongdoers.

5.1.6. Use of prosecutorial discretionary power regarding Security Council referrals

The Prosecutor can refuse to initiate investigations or prosecutions if he/she determined that it is not in the interest of justice pursuant to Article 53.1(c) of the Rome Statute, which states; “The Prosecutor shall, having evaluated the information made available to him or her, initiate an investigation unless he or she determines that there is no reasonable basis to proceed under this Statute. In deciding whether to initiate an investigation, the Prosecutor shall consider whether:” “Taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.”

The Statute did not elaborate on what is considered “in the interests of justice” and left it to the discretion of the Prosecutor but subject to review by the Pre-Trial Chamber. Accordingly, the Prosecutor may consider not to initiate an investigation regarding situations referred by the Security Council if there is lack of adequate funds to carry out the investigation and full cooperation guarantee from the UN Security Council especially with regard to warrants of arrest. As aforementioned, the prosecutor could argue that an investigation would not serve the interests of justice if it could not be conducted efficiently due to lack of adequate funding.¹⁴⁸

¹⁴⁸ supra note 90 at 29

5.2. Cooperation by States Parties

Cooperation is important for an efficient International Criminal Court. The States Parties to the Rome Statute therefore must act in accordance with its provisions of the Rome Statute, and the rulings of the ICC by fully cooperating with the Court, regarding judicial assistance requests, warrants of arrest, the surrender of persons and transfer them to the Hague because the ICC cannot carry out in absentia trials pursuant to Article 63(1) of the Statute, assistance in collecting evidence, protection of witnesses, support for victims, and implementation of sentences and rulings given by the Court.

5.3. Incorporation of the Rome Statute into domestic law

All states parties to the Rome Statute of the International Criminal Court have to show more commitment to the Statute by working to integrate it into their domestic law. To do so they need to incorporate the crimes that fall within the jurisdiction of the Court which are genocide, crimes against humanity, war crimes and general principles of law stated in the Rome Statute. This requires the modification of their domestic laws and legislation to enable effective investigation and prosecution at the national level that are fully in line with the principle of complementarity stated in the Statute.

The Statute does not explicitly require states to establish internal laws that include the crimes stipulated in it, but it requires States parties to take necessary measures to fulfill their obligations under the statute. Yet most States parties have not taken the necessary measures to adapt their national legislation in accordance with the Rome Statute system. This is because, amending existing constitutional systems and overcoming existing structural, political and legal obstacles is a real challenge to national legislation. That is why it may not be feasible for all states to establish these laws especially developing countries that lack sufficient financial resources and legal expertise.

Therefore, the least any state can do is to conduct an in-depth study, identifying areas in which national laws may be inconsistent with the Rome Statute and prepare legal tools to eliminate differences. This will also require training of lawyers and judges to enhance their understanding of the ICC's mandate. The pillar of the Rome Statute is its principle of complementarity. As more States investigate and prosecute their own criminals based on criteria stipulated in the Statute

instead of relying on the ICC, the system will flourish. For this to work, though, the States must incorporate such crimes into their own statutes.

5.4. Universal ratification of the Rome Statute

Universal ratification of the Rome Statute is critical in the effort to fight impunity for war crimes, crimes against humanity and genocide. According to then UN Secretary General Ban Ki-Moon, “Only once the Rome Statute has been universally accepted can the Court be as effective as we would wish it to be, with a truly global reach.”¹⁴⁹ The universal ratification of the Rome Statute grants jurisdiction to all countries in order to prosecute the perpetrators of international serious crimes, regardless of their nationality or the place where they committed the crime. The principle of universal jurisdiction aims to achieve criminal justice for victims of the worst crimes known to mankind.

5.5. EU a model example of cooperation with the International Criminal Court

Since the establishment of the International Criminal Court the European Union has played a remarkable role in its development. The EU Member States were among the first to ratify the Rome Statute. Moreover, the EU has adopted common positions, action plans and concluded cooperation and offer assistance agreement with the Court. Several EU countries have enacted new legislation to enable cooperation with and assistance to the ICC, while a number of other countries have adopted special laws criminalizing the crimes that fall under the jurisdiction of the Court in their national law in order to enable their national courts to exercise jurisdiction over such crimes. EU Member States also assist the Court in terms of financial contributions, investigations and trials, and execution of orders and sentences issued by the Court.¹⁵⁰ Therefore, the EU Member States cooperation with the ICC constitutes a model example for others to follow.

5.6. Improve dialogue between the International Criminal Court and the African Union

The International Criminal Court has faced constant criticism from the African Union. While 47 delegations from African countries attended the draft of the Rome Statute, at the Rome Conference

¹⁴⁹Lentner, G. (2014) ‘The Role of the UN Security Council vis-à-vis the International Criminal Court – Resolution 1970 (2011) and its challenges to International Criminal Justice.’ *International and Comparative Law Review*, Vol.14., No. 2, pp. 7–23, at p. 23; see also ‘Ban calls for universal ratification of Rome Statute of the International Criminal Court,’ 20 November 2013, UN News. Available at <https://news.un.org/en/story/2013/11/455952>

¹⁵⁰Groenleer, M. (2016). ‘The United States, the European Union, and the International Criminal Court: Similar values, different interests?’ *International Journal of Constitutional Law*, Vol 13, Issue 4, pp. 923–944.

in July 1998 and most of the attended African countries' delegations signed and later ratified the Statute. The same enthusiasm that accompanied the establishment of the Court by those countries was replaced by discontent. The relationship between the International Criminal Court and the African nations came to a crossroads following the issuing of the ICC's arrest warrant for the then Sudanese President Omar Al Bashir for crimes against humanity and war crimes, as aforementioned the African Union issued successive resolutions stipulating the non-cooperation with the Court. The African Union (AU) also accused the International Criminal Court of double standards, of being a tool of Western States and showing bias towards Africa for only targeting African nations, three of which – Burundi, the Gambia, and South Africa – also threatened to withdraw from the International Criminal Court.¹⁵¹

The criticisms of the International Criminal Court being biased regarding the selection of cases for investigation is entirely devoid of truth and could be argued; according to the former President of the International Criminal Court Judge Sang-Hyun Song; the Office of the Prosecutor (OTP) needs the approval of the Pre-Trial Chamber before opening a formal investigation, and after an independent judicial review by the Pre-Trial Chamber it may or may not authorize the initiation of the investigation, in order to prevent politically motivated investigations that are groundless.¹⁵² In addition, from the 122 countries that have ratified the Rome Statute, the largest memberships are from African states. Further, 5 out of 12 situations have been referred to the ICC by African governments referrals (Uganda, Democratic Republic of Congo, Central African Republic I and II and Mali) and two by the UN Security Council (Darfur and Libya). Meanwhile, the Office of the Prosecutor is investigating situations in non-African countries, including Myanmar, Afghanistan, Georgia and Colombia.

Accordingly, accusations of bias by the African Union against the International Criminal Court are baseless and the African Union should be more consistent in its stance regarding the Court; it has not shown any opposition against the ICC when situations are referred by African governments

¹⁵¹ Ssenyonjo, M. (2018) 'State Withdrawal Notifications from the Rome Statute of the International Criminal Court: South Africa, Burundi and the Gambia.' *Criminal Law Forum* 29, pp. 63–119.

¹⁵² Judge Sang-Hyun Song, remarks at the Assembly of States Parties to the Rome Statute of the International Criminal Court and Commonwealth Secretariat, at p. 9. Available at https://asp.icc-cpi.int/iccdocs/asp_docs/Publications/ASP-PUB-Cmw-Sem2009-ENG.pdf

such as Uganda, Democratic Republic of Congo, Central African Republic and Mali. The African Union only criticizes the ICC when its decisions are not in the self-interest of African leaders.

The two different positions that the African Union adopts regarding the ICC demonstrates double standards, the very thing it accuses the International Criminal Court of. After Omar Al Bashir was overthrown and arrested by coup d'etat in 2019 following months of protests by the Sudanese people,¹⁵³ it is time for the African Union to start working with the International Criminal Court not against it. If the African countries want to fight impunity and improve the quality of governance, they need to fully cooperate with the ICC.

Further, the Office of the Prosecutor (OTP) also needs to open a dialogue with the African Union and the situations' countries in Africa by inviting their representatives to the Hague, addressing their concerns and discussing ways to develop cooperation. The NGOs and proponents of the International Criminal Court can play a major role in enhancing the Court's image in African countries by launching campaigns educating people about the International Criminal Court, its mandate, and its achievements and refuting the accusations against it.

¹⁵³Lynch, J., Gramer, R. and O'Donnell, J. 'Military Factions Vie for Power After Coup in Sudan' 12 April, 2019, Foreign Policy. Available at <https://foreignpolicy.com/2019/04/12/military-factions-vie-for-power-after-coup-in-sudan-africa-bashir-protests/>

Conclusion

The International Criminal Court's relationship with the United Nations Security Council can be described as domineering, with a political body overpowering a judiciary body. Though the International Criminal Court enjoys broad powers under the Rome Statute, its relationship with the Security Council is challenging because of the Council's broad powers conferred upon it under Chapter VII of the UN Charter, which inevitably affect the independence of the Court.

The Court's founders hoped the relationship with the Security Council would provide the International Criminal Court with universal jurisdiction by extending it to territories and nationals of non-State parties to the Rome Statute, which would therefore help the Court prosecute the most serious crimes on behalf of the entire international community. In practice, its relationship with the Security Council has negatively impacted the Court's independence and effectiveness.

The Security Council did refer two situations to the International Criminal Court under Article 13(b); Resolution 1593 (2005) concerning the referral of the situation in Darfur, Sudan, and Resolution 1970 (2011) concerning the referral of the situation in Libya. However, the two referral resolutions contained controversial provisions at the insistence of the United States that limited the Court's jurisdiction *ratione personae* by exempting nationals of non-State parties from the jurisdiction of the Court, which is incompatible with the Rome Statute and other principles of the international law. Further, a lack of funding for the investigations carried out by the International Criminal Court put a significant strain on its tight budget and contradicted Article 13 of the Negotiated Relationship Agreement between the United Nations and the International Criminal Court as well as Article 115 of the Rome Statute.

Whereas, the International Criminal Court has no police forces under its disposal, it strongly depends on the cooperation and support provided by the States, the lack of cooperation by States and the Security Council has undermined the credibility of the Court's decisions. After referring the two Resolutions regarding Darfur and Libya non-State parties, the Council failed to provide the International Criminal Court with the support it needs. It did not push for full cooperation of all UN member States and taking action against the States that refused to cooperate or execute the Court's judicial assistance requests and arrest warrants. As a result, the suspects are still at large, and the Prosecutor had to halt the investigation concerning Darfur in 2014.

In addition, the referral of Darfur and Libya and the non-referral of Syria—where war crimes and crimes against humanity have been committed and were well-documented in reports—resulted in the International Criminal Court being accused of double standards and bias in regards with the selectivity of cases, though this is beyond the Court’s control and is instead steered by the political interests of the permanent members of the Security Council.

The fact that three of the permanent members of the Security Council are not states parties to the Rome Statute and are responsible for referring situations to the International Criminal Court compromises the Court’s credibility. Further, actions taken by the United States, Russia and China have blunted the effectiveness and independence of the International Criminal Court, including the Bilateral Immunity Agreements with other nations initiated by the US to guarantee that these nations will not surrender Americans to the International Criminal Court.

The American Service-Members' Protection Act includes provisions prohibiting all forms of cooperation with the International Criminal Court and allows the US President to use any means necessary to release American citizens being tried before the International Criminal Court. The United States also threatened to halt humanitarian missions by vetoing UN peacekeeping missions in Bosnia and Herzegovina and in Liberia if the Court did not adopt Security Council Resolutions 1422 (2002) and 1487 (2003), which grant immunity to nationals of non-State parties from criminal prosecution by Court. The US also lodged threats against the International Criminal Court for investigating alleged US war crimes in Afghanistan. Moreover, the abuse of veto power by Russia and China not only affects the credibility of the Security Council but also causes delays in the deliverance of justice and leaves affected communities with feelings of abandonment.

Therefore, the Security Council’s powers under Article 13(b) and Article 16 of the Rome Statute have infringed on the International Criminal Court’s jurisdiction by shielding some individuals from the Court’s prosecution. In addition, selectivity of cases and the Security Council’s lack of cooperation illustrate serious weaknesses in the system.

However, the problem is not with the provision of Article 13(b) and Article 16 per se, but the way the Security Council uses its referral and deferral powers. The Council tailored Article 13(b) and Article 16 to its political interests; Resolutions 1422 (2002), 1487 (2003), 1593 (2005) and 1970 (2011) exemplify this claim. Further, though the Rome Statute set forth the conditions for the Security Council’s right to defer a Court’s investigation or prosecution for a renewable period of

12 month—which requires the Security Council to act pursuant to Chapter VII of the UN Charter to counter threats to international peace and security—Resolutions 1422 (2002) and 1487 (2003) lacked a demonstration of such a threat. Moreover, Article 13(b) which grants the Security Council the power to refer a situation to the International Criminal Court, does not restrict the Court’s jurisdiction in any way; yet, Resolutions 1593 (2005) and 1970 contained exemption provisions that limit the individuals who can be covered by the International Criminal Court’s jurisdiction. Thus, the Security Council was acting *ultra vires* and contrary to the provisions of the Rome Statute of the ICC. As a result, the independence of the International Criminal Court has been significantly undermined.

The Security Council’s relationship with the International Criminal Court is bound by the Rome Statute and the UN Charter. Hence, the Security Council cannot alter the Rome Statute and use it as it deems fit for its permanent members, and it cannot expect the Court’s to ignore its obligations under the Rome Statute. In addition, the International Criminal Court, pursuant to the Rome Statute, is an independent judicial body and should act accordingly by developing a strategy to deal with the Security Council’s referrals and deferrals and to protect itself from being politicized and undermined, because it is essential for the International Criminal Court to preserve its integrity and credibility as an independent and impartial judicial institution.

The Security Council cannot be forced to adopt a specific mechanism when referring situations to the International Criminal Court. However, the Security Council, due to its primary responsibility under the UN Charter to maintain or restore international peace and security and for the sake of its own institutional integrity and credibility, should develop consistency in its actions, especially regarding the referral of situations to the Court and the selectivity of cases.

When there are large-scale crimes being committed in violation of international laws and those crimes fall within the jurisdiction of the International Criminal Court, the Security Council is expected—under Chapter VII of the UN Charter, after it has determined that such atrocities constitute a threat to international peace and security within the meaning of Article 38—to refer the situation to the International Criminal Court without political considerations. Moreover, the United Kingdom and France need to reach a compromise with the other permanent members not to use the veto when such atrocities threaten the lives of millions of people.

It is also of utmost importance that the Security Council allocates adequate funds for the International Criminal Court to carry out investigations and prosecutions for the Council's referral and imposes binding obligations on all UN member States to fully cooperate with the Court. The Security Council must also follow up on the enforcement of the Court's arrest warrants and implementation of the Court's decisions. Finally, it should impose sanctions on States that refuse to cooperate with the International Criminal Court, regardless of their affiliation to the Rome Statute.

In addition to developing consistency regarding referrals of situations to the International Criminal Court, the Security Council should invoke Article 16 of the Rome Statute to defer an investigation or prosecution carried out by the Office of the Prosecutor after determining that the proceedings would actually threaten its efforts to restore peace and security.

The Prosecutor and the judges of the International Criminal Court also have responsibility to exercise the power granted to them by the Rome Statute to review the validity of a Security Council referral resolution and whether it is consistent with the provisions of the Statute.

The relationship between the International Criminal Court and the Security Council is still essential because the Court cannot prevent impunity by itself. That requires immense efforts from the Court, the Security Council, States, and civil societies. The International Criminal Court can play an effective role in helping the Security Council achieve its primary purpose of maintaining or restoring international peace and security, and the Security Council while taking into consideration that the Court is an independent judicial institution and that independence must be respected, may support the International Criminal Court to bring perpetrators of the most serious crimes of concern to the international community to justice.

According to Justice Richard Goldstone "If there were no ICC in existence today, many people in many countries would be agitating for and demanding one. That we have one is a singular achievement. It behooves us to make it the best possible and to assist it, as States, civil society, and individuals, in the best and most productive way possible."¹⁵⁴

¹⁵⁴ Goldstone, R. 'Acquittals by the International Criminal Court' Blog of the European Journal of International Law, 18 January 2019. <https://www.ejiltalk.org/acquittals-by-the-international-criminal-court/>

Therefore, the international community as a whole should work to ensure that the International Criminal Court develops into an impartial, effective, and independent Court that establishes global standards, evades political influences and provides genuine justice for victims under its jurisdiction worldwide.

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