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Introduction

National courts and tribunals investigate domestic and international crimes under their jurisdictions; but, the sentence of criminals perpetrating international crimes at national level is not possible as the suspected persons are considered as hero in their own countries. Ad hoc tribunals created after Second World War (The Nuremberg and the Tokyo Tribunals) were the initial point to investigate war criminals. At that time, the establishment of ad hoc tribunals for Rwanda and for the Former Yugoslavia was the main leading reason which made easier the creation of an international criminal court in the last decade of the twentieth century.

International organizations have been produced because of the requirement and necessity. It is important to say that these organizations have need of global support and willingness for their creation. A lot of challenges experienced by the universal society have led to the development of intercontinental organizations and the acts of the members of the society have replied these challenges.[1] As a result of the negative outcome of the both World War 1 and World War 2, global community needed the international peace and safety. United Nations (UN) and the Security Council, political organ of the UN, which has almost complete power, were developed due to this purpose. In addition, it can be with no trouble stated that the International Criminal Court (ICC) was produced due to the same purpose. Up to now, 139 states have signed and 124 states have confirmed the Rome Statute of the International Criminal Court (Rome Statute)[2]. The Rome Statute guarantees the goals and rules of the Charter of the United Nations (the UN Charter)[3], establishes the ICC as a lasting body self-governing of the UN organizations in its preamble.[4] Also, the Rome Statute gives some authorities about the legal power of the ICC to the Security Council. This

[1] Jarin Neha, "A Separate Law for Peacekeepers: The Clash between the Security Council and the International Criminal Court", *The European Journal of International Law* (2005), Vol: 16 No: 2, at 239.

[2] *Rome Statute of the International Criminal Court*, UN Doc, No. A/CONF.183/9 (July 17,1998), reprinted in 37 International Legal Materials (1998) [*Rome* Statute].

[3] Preambular Paragraph 7 of the Rome Statute of the International Criminal Court, 1998,37 ILM (1999) 999 (hereinafter Rome Statute).

[4] Preambular Paragraph 9 read with Article 1 of the Rome Statute.

thesis, after presenting the purposes of the ICC and the Security Council, will critically evaluate the relationship among these institutions.

The International Criminal Court (ICC) was established as a first permanent international court for investigating and prosecuting the crime of genocide, crimes against humanity, war crimes and the crime of aggression. Under Chapter VII of the United Nations (UN) Charter[5], the UN Security Council has obligation to keep or return international peace and security. In light of its responsibility, the relationship between the Security Council and the International Criminal Court (ICC) was set up on the basis of the Rome Statute and it was talk over through the preliminary work of the Statute. Even though of the Security Council produced 'ad hoc criminal tribunals for Rwanda and for the Former Yugoslavia' as subsidiary organs to the UN, the ICC is an independent, permanent conventional international institution, and it has particular relations with the Security Council. As the ICC has jurisdiction only over individuals, it is different from the International Court of Justice, which has jurisdiction over states. The purpose of the thesis is to examine the two roles of the Security Council, namely referral and deferral mechanisms, and some debatable matters on this subject.

Two types of influences form the relationship between the Council and the Court. **First**, the law, norms, rules, and policies of the institutions themselves shape the connection between the two. Under Chapter VII of the UN Charter, the Security Council carry main responsibility for the keeping or rebuilding of international peace and security. Many Council members, for that reason, view the ICC through the lens of this specific authority, asking whether accountability methods can support the Council's Chapter VII responsibilities. The ICC, by difference, is worried with implementation of the Rome Statute, which delivers for an independent court pursuing accountability for war crimes, crimes against humanity, and genocide. Court officials and supporters may see a strong link between peace and security, on the one hand, and justice, on the other, but the Court's mandate relates only to accountability, as Fatou Bensouda, the ICC prosecutor, recently

[5] *Charter of the United Nations,* 26 June 1945, Can TS 1945 No 7 [Charter].

made clear.[6] That said, both organizations see that the other can advance its own objectives in certain situations. Events force the two institutions to cooperate, and their interactions are governed in part by the UN Charter, the Rome Statute, and, to smaller point, the Relationship Agreement between the UN and the ICC. So far no permanent important instrument is in place to help succeed the relationship between the two. **Second**, key actors on the Council and inside the UN strongly impact day-to-day policies with respect to the Court. The permanent five members of the Security Council, the P-5, function as the crucial actors in this dynamic, with the United Kingdom and France serving a largely supportive role. The United States also has taken on the role as Court supporter, but its freedom of action is partial by American law, particularly the American Servicememebrs Protection Act. China and Russia have adopted the ICC in particular. On the other hand they also guard the privileges of the Council with respect to peace and security. Other actors can play important roles, as well, such as the non-permanent members of the Council, parties and non-parties to the Rome Statute, other active participants in UN politics in New York, the Court itself, and leading non-governmental organizations (NGOs).

Chapter I will lay out the legal basis of the Security Council's powers and address how they have led to the pollicisation of the Court. Chapter II will present the Security Council's two roles, which are the referral and deferral mechanisms under the Rome Statute. Also, it will be argued about the political role of the Security Council and the threat to the independence of the Court. Chapter III will provide factors that animate the Council's relationship with the Court, laying out legal, political, and diplomatic dynamics that shape support for the Court on the Security Council. It then turns to the principles that should govern the Council-Court relationship, steps the Council and others may adopt to improve the Council's support of the Court, and the need to ensure that China and Russia are meaningfully engaged in developing a sustainable relationship between the institutions of security and justice. Chapter IV will present a critical review of the relationship between the UN Security Council and International Criminal Jurisdictions in the Light of the Principle of Judicial Independence.

[6] Fatou Bensouda, International Justice and Diplomacy, *International Herald Tribune*, March 19, 2013, available at: http://www.nytimes.com/2013/03/20/opinion/global/the-role-of-the-icc-in-international-justice-and-diplomacy.html.

Chapter I

The UNSC and the ICC: Practice and Challenges

This Chapter will first deal with introducing the institutional and legal instruments of the ICC-UNSC relation. Furthermore, this part will be made of how it's come to politicization of the Court and how Security Council shake the Courts independence, effectiveness and legitimacy. Finally, it will be presented, the lack of political cooperation and the challenges of institutions.

1. The legal basis for the UNSC-ICC relationship

The International Criminal Court it's not created from UN, more precisely, it is not UN institution. However, there is a connection between these two institutions.[7] Their relationship actually has a legal basis. That basis lies in *the Rome Statute of the International Criminal Court*[8] *and in the Negotiated Relationship Agreement between the International Criminal Court and the United Nations.*[9] In this section, will be examined the powers possessed by the Security Council in these two legal instruments.

a. UNSC Powers under the Rome Statute

Council through their powers of the Rome Statute it can refer specific situations to the Court or to defer certain preliminary investigation or examination that is in progress. With Articles 12 to 14 of the Rome Statute, UNSC through referrals It is one of four mechanisms that trigger the jurisdiction of the Court. First, if one of the member States relate to the situation, then the Court may use its jurisdiction.[10] Second, by filing a declaration with the Registrar under Article 12.3 may accept the jurisdiction a non-member

[7] Amal Alamuddin, "The Role of the Security Council in Starting and Stopping at the International Criminal Court: Problems of Principle and Practice" in Adrazh Zidar & Olympia Bekou, eds, *Contemporary Challenges for the International Criminal Court* (London: British Institute of International and Comparative Law, 2014) 103 at 103 [Alamuddin]

[8] Rome Statute, *supra* note 2.

[9] *Negotiate Relationship Agreement between the International Criminal Court and the United Nations*, 10 April 2004 (entered into force 4 October 2004) [Relationship Agreement].

[10] Rome Statute, *supra* note 2, art 13a.

country.[11] Thirdly, the prosecutor of the ICC may initiate an investigation proprio motu[12] (on his impulse). The last mechanism is under Article 13.[13]

Security Council has discretionary power under Article 13 to increase the jurisdiction of the Court. The Council may extend the jurisdiction on citizens of countries or to the territory of country that are not part of the Statute. When it discovers a situation that initiates a threat to peace and security,[14] Council may act to expand the jurisdiction under Chapter 7 of UN Charter. Referrals however have to be done within the framework of the Rome Statute,[15] somehow forcing the Councils discretion. This cannot apply to a situation where the Rome Statute has not yet entered into force.[16] Therefore, referral power is not entire.

If there are reasonable grounds to proceed with a particular investigation is on the Prosecutior's authority to decide.[17] If it went against the interests of justice, the prosecutor may refuse to initiate an investigation of the situation addressed by the UNSC.[18]

Two situations Council has referred to the Court, which have resulted with two investigations. The first situation is in March 2005 for the circumstances in Darfur. The first investigation was initiated by the referral in a resolution 1593.[19] Second situation was through resolution 1970 in 2011, for the situation in Libya.[20] As a result of this referral, the court launched the a trial of Saif Al-Islam Gaddafi.[21]

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[11] *Ibid*, art 12.3.

[12] *Ibid,* art 13c.

[13] *Ibid,* art 13b.

[14] Charter, *supra* note 14, chapter VII.

[15] William A Schabas, *An Introduction to the International Criminal Court,* 4th ed (Cambridge; New York: Cambridge University Press, 2011) at 169 [Schabas].

[16] *Rome Statute, supra* note 2, art 11 (the requirements of temporality laid out in article 11preclude the Court from investigating a situation that occurred before the entry into force of the Statute).

[17] *Ibid,* art 53.

[18] *Ibid,* art 53(2).

[19] SC Res 1593, UNSCOR, 5158th meeting, S/RES/1593, (2005); Schabas, *supra* note 15 at 170.

[20] SC Res 1970, UNSCOR, 6491st meeting, S/RES/1970, (2011).

[21] "Lybia," online: International Criminal Court https://www.icc-cpi.int/libya/gaddafi.

Also, despite the UNSC refers situations to the Court, It may also request to the Court to defer certain prosecution or investigation. This power is prescribed in the Rome Statue under article 16. Deferring the prosecution or investigation may be in a period of 12 months, where the Council is acting under Chapter 7 of the UN Charter.[22] With this kind of action, the Council prevents in implementing the Court's jurisdiction according to a particular country which estimates that this would endanger peace and security according to Article 39 of the Charter.[23] As it may seem as controversial provision, this provision progressed from ILC draft statute where the Council may block prosecutions just by putting the situation under question in his agenda.[24]

Throughout history, no investigation or prosecution has been deferred. Only two times is invoked Article 16. First situation when this article is invoked is in 2002, when US wants to protect their citizens in the UN personnel from prosecution by the ICC, it threatened to block (veto) all future peacekeeping missions of the UN.[25] US requested from the Council to invoke article 16. In the resolution 1422, UNSC invoke article 16 as a result of insisting of US, with aim to postpone eventual prosecutions in the next 12 months.[26]

Up until 2008, Article 16 was not mentioned. On the occasion of the issuance of an arrest warrant for the Saudi head of state Al-Bashir, African Union has recommended to the Council to invoke on this article. African Union strongly opposed on such arrest, claiming that it would endanger peace. Also stated that this article should be used in cases where justice risks peace. Despite these recommendations, the Council did not take action in this case, which disrupt the opinion of the African Union of the international justice system.

[22] Rome Statute, *supra* note 2, art 16.

[23] Charter, *supra* note 5, art 39.

[24] Schabas, *supra* note 15 at 183.

[25] *Ibid* at 184.

[26] SC Res 1422, UNSCOR, 4572nd meeting, S/RES/1422, (2002); SC Res 1487, UNSCOR, 4772nd meeting, S/RES/1487, (2003) (1422 was renewed with 1487 where article 16 was mentioned again).

b. The Relationship Agreement

The relationship between ICC-UNSC is also governed by a Negotiated Relationship Agreement from 2004.[27] The agreement is concluded to improve the cooperation between these two institutions. The agreement is signed by the former UN Secretary General – Kofi Annan and the President of the Court – Philippe Kirsch.[28] It "recognizes the mandates and independence of both institutions, defines the scope of their relationship and outlines the conditions under which the UN and the ICC will cooperate. This relationship, as elaborated in the Agreement, deals with both institutional issues and matters pertaining to judicial assistance and cooperation."[29] The agreement also applies to the communication between the various organs of the ICC and the UNSC.[30] Finally, the agreement obliges both institutions constantly to cooperate.[31] But it may be noted that cooperation and the implementation of UNSC resolutions does not work perfectly, despite all the efforts.

2. The Politicization of the ICC through the Security Council

a. Issues of judicial independence

Rule of law at the domestic level requires maintaining the separation of powers of the judicial, legislative and executive. In the international order, it is also important the rule of law as at the domestic level. But the lack of international governance with powers over sovereign states in the international order leads to redefinition of the rule of law.[32] For international rule of law most important elements are legitimacy and accountability.[33] Accountability applies to those which have international authority to be responsible for it.[34]

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[27] Schabas, *supra* note 15 at 186.

[28] "Cooperation with the United Nations," Online: Coalition for the International Criminal Court http://www.iccnow.org/?mod=agreementsun.

[29] *Ibi.*

[30] Relationship Agreement, *supra* note 9, art 4.3, 7.

[31] *Ibid* art 17.

[32] Hisashi Owada, "The Rule of Law in Globalising World", in Francis Neate, *The Rule of Law: Perspectives from Around the Globe"* (London: LexsisNexis Butterworths, 2009) 155 at para 17.1 [Owada].

[33] Spencer Zifcak, "Globalizing the Rule of Law: Rethinking Values and Reforming Institutions" In Spencer Zifcak, *Globalisation and the Rule of Law* (London: Routledge, 2004) 36 [Zifcak].

[34] *Ibid*.

According to Zifcak, "the doctrine of separation of powers is no less important globally than nationally. A fundamental commitment to the creation and maintenance of independent judicial bodies." is vital to the principles of international law.[35] Nevertheless, intersection of judicial and executive powers in UN institutions happens, because were created in such way.[36] Significant separation of powers is needed for long-term domination of the rule of law.

Council's interference in investigations of the ICC brings independence and impartiality of the Court under threat. Thereby Security Council's powers hurt the Courts legitimacy. When the Court's jurisdiction is activated under Article 13(b), the Council commands the Court, in which direction to lead the investigation.[37] Fortunately, the last word belongs to the prosecutor who initiated the proceedings, that partly preserves the independence.[38] In case of Council referrals, interference in the investigation becomes more complicated. Certain investigation or prosecution may be stopped from the Council, but it is necessary form the State parties. The Council under Article 16 may delay the justice on the price for peace promotion. In this respect to this article and the authority of the council, sounds good.[39] But, it can be seen that with this article, the Council is provided with full interference over pursue of justice.

The imbalance in the international system is indicated by the problem of insufficient separation of powers. Although, the ICC and UNSC, in theory recognize the importance of peace and justice,[40] in practice the things are bit different, peace and security have been allowed to win. Referral and deferral powers by the Council they prove to be harmful for Courts legitimacy despite the established theoretical independence.

[35] *Ibid* at 37.

[36] Alamuddin, *supra* note 7 at 109.

[37] *Ibid.*

[38] Rome Statute, *supra* note 2, art 53.

[39] Alamuddin, *supra* note 7 at 111.

[40] See e.g. Relationship Agreement, *supra* note 9; Rome Statute, *supra* note 2, preamble.

b. Big powers' control through referrals

To case selectivity and limitations to the Courts jurisdiction comes when Article 13(b) is used, when UNSC use its referrals powers. However, good thing about that is the expansion of Courts jurisdiction to non-State parties. It is undisputed that referrals are far more effective then establishing new tribunals.[41] But, despite all this, we must pay attention that this exercise is political interference.

c. Case selectivity

Certain member states of the Security Council have the power to decide what situations where a crime is committed will face Courts justice. But, despite this, the permanent members of the Security Council, through the veto power, have the possibility to decide, for certain situation not to enforce international justice.

It can be noted that there is selectivity of cases, through examples of situations in Libya and in Syria. The comparison of these two cases perfectly describes it case selectivity. Referrals for Libya were accepted, while for Syria were rejected, because China and Russia vetoed the draft resolution for a referral.[42] The veto on the resolution was put on May 22, 2014. Not even a letter sent to the Council signed by 57 countries in favour of the referral helped,[43] the letter was also supported from France and the US. There was no legal instrument that could confront the veto put by Russia and China. Deputy Secretary General Jan Eliasson, following this breakdown of the Council, stated that, "states that are members of both the Security Council and the Human Rights Council have a particular duty to end the bloodshed and to ensure justice for the victims of unspeakable crimes".[44] The Security Council must not allow itself to only respond to situations of personal interest, and in

[41] Alamuddin, *supra* note 7 at 124.

[42] See SC Draft Res 348, UNSCOR, S/2014/348. (2014).

[43] Thomas Gurber, "Letter to his H.E. Mr. Mohammad Masood Khan. President of the Security Council in the month of January 2013" (14 January 2013), online: Confederation Suisse http://www.news.admin.ch/NSBSubscriber/message/attachments/29293.pdf [Gurber].

[44] Kristen Boon, "Implications of Security Council Veto on ICC Referral on Syrian Situation" (23 May 2014), online: Opinio Juris http://opiniojuris.org/2014/05/23/implications-security-council-veto-icc-referral-syrian-situation/ [Boon].

situations where it is clearly committed international crime to refuse to intervene.[45] Also the example of Gaza, shows that there is no political interest to the permanent 5 that situation to be prosecuted. Indeed, in addition to the UN's indictment on finding commissions for international crimes, the UNSC has not yet considered the situation. More concisely said, double standards of the UNSC should not be used due to the personal political interests of the permanent members of the Council.

d. Limitations of jurisdiction

The Security Council through limitations of jurisdiction influences the investigation. According to Alamuddin "The Council has sought, through referrals, to limit the Court's power to investigate not only on the basis of geography and time but – more worryingly – on the basis of potential suspects' nationality"[46].

Resolution 1593 for Darfur and resolution 1970 for Libya to referring their situations to ICC contained restrictions.[47] These restrictions were for time and place. Resolution 1593, contained restrictions for place, Courts jurisdiction to apply to Darfur rather than Sudan. While resolution 1970 contained time restriction, limit the Courts jurisdiction to crimes perpetrated since 15 February 2011.[48]

In the resolutions, the UNSC also included nationality limitations. So that, for the situations in Sudan and Libya, in resolutions 1953 and 1970, it was excluded jurisdiction over nationals of non-State parties.[49] In the opinion of Schabas, such provisions bring to doubt the legality, which appear to be opposite to the Roman Statute.[50] Purpose of the Article 13(b) is to put boundary on the referral power.[51] The instruments for assessing the legality of the Council resolutions remain unclear. Despite this potential illegality, neither

[45] United Nations Fact-Finding Mission on the Gaza Conflict, *Human Rights in Palestine and other Occupied Arab Territories,* HRCOR, 12th session, A/HRC/12/48, (2009).

[46] Alamuddin, *supra* note 7 at 113.

[47] SC Res 1593, *supra* note 19; SC Res 1970, *supra* note 20.

[48] *Ibid* at para 4.

[49] Schabas, *supra* note 15, at 172; SC Res 1593, *supra* note 19, at para 6; SC Res 1970, *supra* note 20 at para 6.

[50] Schabas, *supra* note 15, at 173.

[51] *Ibid* at 174; Alamuddin, *supra* note 7, at 117.

International Court of Justice has power to review the Councils resolutions for their legality.[52] For now only judicial review remains key institutional instrument for international rule of law.[53] Therefore, resolving this issue is the most important.

It can be summarized that, the good side from the referral powers is that it expands the Courts jurisdiction on the non-State parties,[54] while the bad side is that this referral powers however become acts of control by the P5.

e. A biased use of deferrals

The purpose of Article 16 makes sense, delaying the justice in order to preserve peace is a good idea. But, UNSC is abusing that Article for its own goals. The Council uses this article to ban prosecution over nationals of non-Sate parties working for peacekeeping missions. Without any real elements to a breach of article 39 of the UN Charter, the Council invokes Article 16,[55] it represents a real danger to peace and security.[56] Former UN Secretary General, Kofi Annan, said that Article 16 had been used to provide cover for citizens of certain States, not for its real purpose to preserve peace and promote security.[57]

Big powers exercise their political interest through Article 16. In cases where it is not clear whether there is a threat to peace and security, Article 16 was invoked. While, for a situation where African states requested the UNSC to invoke Article 16 to veto arrest warrant against Al Bashir, the Council remained passive and never really looked at the issue in a case.[58] Article 16 with that contributed to illegitimacy of the ICC in the eyes of the

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[52] Schabas, *supra* note 15 at 174.

[53] Zifcak, *supra* note 33 at 38.

[54] David Scheffer, "Blueprint for Legal Reforms at the United Nations and the International Criminal Court" (2004-2005) 36 *Geo. J. Int'l L* 683 at 696 [Scheffer].

[55] *Charter*, *supra* note 5, art 39.

[56] Chris Gallavin, "The Security Council and the ICC: Delineating the Scope of the Security Council Referrals and Deferrals" (2005) *5NZ Armed F L Rev* 19 at 32, 34 [Gallavin].

[57] Kofi Annan quoted in Alamuddin, *supra* note 7 at 122.

[58] Phoebe Murungi, "10 Years of the International Criminal Court: The Court, Africa, the United Nations Security Council and Article 16 of the Rome Statute", online: (2012) SSRN https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2169819 at 2 [Murungi].

African states, especially less powerful countries. At the cost of international justice, practice has shown that there is bias, to the personal interest of the great powers.

3. An impaired effectiveness through practical relational challenges

The efficiency and effectiveness of the Court is weakened by the lack of practical cooperation, in addition to the Council's political influence in the ICC investigation. The Court does not have the full powers to go through effective investigation, for situations referred from the Council, because the obligations for arrest and surrender only apply to State members.[59] So the cooperation between these two institutions is needed. In such situations the Council has been shown in the past as not being sufficiently dedicated.[60] For example, for the situation in Darfur, which was referred to the Court in 2005, the first warrant against Al-Bashir was issued in 2009.[61] But, Al-Bashir, Sudanese head of State, has not yet been brought to Court.

To improve cooperation, a solution had to be found between these two institutions. So the co-operation problem was sent to the Open Debate on the Working Methods of the Security Council. ICC's Chief Prosecutor, Fatou Bensouda, highlighted two major problems at the Open Debate on the Working Methods of the Security Council. The first problem was that there was a lack of follow up on referrals and the second that there is a problem with the cooperation between the institutions.[62] At the ICC's Chief Prosecutor call for problems, Several States joined her, and the goal was to solve and bring more effective, efficient and responsive follow ups.[63] The Security Council decided that concerned countries authorities had to work together completely with the Court and the Prosecutor.[64] But there is a

[59] Tiina Intelmann, "The International Criminal Court and the United Nations Security Council: Perceptions and Politics" (28 May 2013), online: The World Post http://www.huffingtonpost.com/tiina-intelmann/icc-un-security-council_b_3334006.html [Intelmann].

[60] David L Bosco, *Rough Justice*: *The International Criminal Court in a World of Power Politics* (Oxford: New York: Oxford University Press, 2014) at 180 [Bosco].

[61] "Darfur, Sudan" (2014), online: International Criminal Court https://www.icc-cpi.int/darfur?ln=en

[62] UNSCOR, 7285th meeting, S/PV.7285 (2014) [S/PV.7258].

[63] *Ibid.*

[64] Letter dated 8 October 2014 from the Permanent Representative from Argentina to the United Nations addressed to the Secretary – General, SC Concept Paper, UNSCOR, S/2014/725, (2014) [SC Concept Paper].

problem about it, the ICC does not have any enforcement mechanisms. It is expected that appropriate measures will be taken in order to carry out full cooperation, when Council refers a situation under Chapter VII, between the authorities of the country in which the situation is and ICC with the prosecutor.[65] "If there is no follow-up action on the part of the Security Council, any referral by the Council to the ICC under Chapter VII of the UN Charter would never achieve its ultimate goal, namely, to put an end to impunity. Accordingly, any such referral would become futile."[66] The Council, on the other hand, may impose sanctions if it determines that there is a lack of cooperation that constitutes a threat to peace and security.[67] The Council has this power under Article 39.[68] However, it can be seen and concluded that the lack of cooperation between these two institutions seriously damages the efficiency and effectiveness at the ICC. Therefore, rapid implementation of reforms is necessary.

4. Conclusions: politicization and legitimacy

With the existence of more than a decade, ICC has 124 Member States[69] and 10 cases under investigation.[70] ICC has made great progress. But, criticism towards the Court is becoming more common, because his legitimacy, impartiality and independence are questionable. Legitimacy is very important, it depends on the will of the member states, on how much they are willing to cooperate and comply with the requirements of the court.[71] "In order to secure the Court's existence, strengthen its support amongst States Parties and increase its appeal to non-States Parties, it is vital to protect its image as an independent institution whose sole purpose is to uphold international criminal justice for all. This is not possible if the legitimacy,

[65] *Ibid.*

[66] *Ibid.*

[67] Murungi, *supra* note 58 at 21.

[68] *Charter, supra* note 5, art 39.

[69] "The States Parties to the Rome Statute" (2017), online: International Criminal Court https://asp.icc-cpi.int/en_menus/asp/states%20parties/pages/the%20states%20parties%20to%20the%20rome%20statute.aspx

[70] "Situations and cases" (2017), online: International Criminal Court https://www.icc-cpi.int/pages/situations.aspx

[71] Michael J Struett, "The Legitimacy of the International Criminal Court" in *The Politics of Constructing the International Criminal Court: NGO's, Discourse, and Agency* (New York: Palgrave Macmillan, 2008) 151 at 153.

impartiality and independence of the ICC is considered questionable."[72] Legitimacy is specifically undermined by the Security Council with the influence of the great powers that govern that body and are not even members of the ICC.[73]

In this Chapter was explained how the UN Security Council affects the International Criminal Court and its independence and effectiveness. The Council through Articles 13(b) and 16 of the Roman Statute interferes in the Courts independence and leads to his impartiality. Also, the Council is responsible for case selectivity, limiting courts jurisdiction and protecting some individuals from prosecution. Finally, the lack of cooperation by the Council "constitute a serious weakness of the system, produce a delay in delivering justice and ultimately a feeling of abandonment, desperation and continued injustice in affected communities."[74] The Council's interference in the Court's work is one of the main reasons for jeopardizing the legitimacy of the ICC. Two major issues need to be addressed. The personal interest of the members of the UNSC and the Council's structure to have balance of power. Reforms in the area of cooperation and deep structural reforms are needed to solve these problems.

[72] Murungi, *supra* note 58, at 16.

[73] 3 of the 5 permanent members of the UNSC are non-parties to the Rome Statute.

[74] Intelmann, *supra* note 59.

Chapter II

Referral and Deferral Mechanism (Lessons from Darfur and Libya Situations)

The Security Council is the most important and influential body of the United Nations for execution of the UN's main purpose of ensuring international peace and security[75]. Article 1 of the UN Charter stipulates that "*The Purposes of the United Nations are; to maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace..*" and Article 24 of the Charter describes the role of the Security Council as "*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, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf..*". In view of its purpose (maintenance of peace and security in the world) and political body, the relationship between the Security Council and the ICC needs stability in terms of the role of the Security Council and independence of the Court. This stability is stated in Article 2 of the Relationship Agreement between the United Nations and the International Criminal Court which entered into force on 4 October 2004 as "*(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 responsibility of the United Nations under the Charter. (3) The United Nations and the Court respect each other's status and mandate.*"

[75] Lawrance Moss, 'The UN Security Council and the International Criminal Court', (2012) Friedrich Ebert Stiftung; Carsten Stahn and Goran Sluiter (editors), *The Emerging Practice of the International Criminal Court* (Martinus Nijhoff Publishers 2009) xiv [Moss].

The Security Council is arranged two roles named as "referral" and "deferral" by the Rome Statute of the ICC[76]. The Council can refer a "situation" in which one or more crimes (specified in Article 5 of the Statute) seems to have been committed in any state, regardless of whether the state is the party of the Statute of the ICC. In agreement with the principle of "Presumption of innocence" stated in Article 66 of the Statute, the Council can refer a "situation" rather than a specific crime or a criminal in any state. Regarding deferral power of the Council, it requests the ICC to defer an investigation or prosecution and it may be re-established a period of twelve months.

1. The Referral Mechanism

The first method of the relationship between the UN Security Council and the ICC, indicated in Article 13 (2) of the Rome Statute, is the referral of a circumstances which one or more crimes seems to have been committed in a state (even if a state has not ratified the Rome Statute) by the Security Council under Chapter VII of the UN Charter. This part of the article will point out the worries regarding the referral power of the Security Council after stating the process of the referral.

The Security Council concludes international peace and security being threatened when it decides to refer a situation to the ICC[77]. Article 39 of the Charter pronounces 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".* Its choices about referral are taken by an affirmative vote of nine members and the permanent members (China, France, Russian Federation, the United Kingdom, and the United States) which have veto power should have compatible votes[78]. In other words, if

[76] Ibid., Article 13 (2) and Article 16.

[77] The Resolution 1593 (2005) of the UN Security Council stated "*The Security Council, determining that the situation in Sudan continues to constitute a threat to international peace and security, decides to refer the situation in Darfur since 1 July 2002 to the Prosecutor of the International Criminal Court."* and the Resolution 1973 (2011) of the UN Security Council stated *"The Security Council, determining that the situation in the Libyan Arab Jamahiriya continues to constitute a threat to international peace and security…"*

[78] Article 27 (3) of the UN Charter states that *"Decisions of the Security Council on all other matters shall be made by an affirmative vote of nine members including the concurring votes of the permanent members".*

any permanent member of the Council votes in contradiction of a referral, it cannot be brought to the Court by the Council. In addition, the Security Council even if decides to refer a situation to the Court, the Prosecutor of the ICC may not proceed an investigation related the situation because of absence of judicious basis to continue[79]. The Prosecutor must inform the Pre-Trial Chamber of his or her own judgment. If the Security Council wishes the Chamber to review the decision of the Prosecutor, it may review it[80]. When the Security Council chooses to refer a condition to the Prosecutor, the decision together with other relevant documents is sent to the Prosecutor[81].

The Council, until now, referred the situation in Darfur in 2005 and in Libya in 2011 to the Court. The situations in Darfur and Libya were referred with the UN Security Council Resolution 1593 (2005) and the Resolution 1970 (2011), respectively.

In overall, the referral power of the Security Council weakens the legitimacy and independence of the International Criminal Court. The first worry is regarding the role of the permanent members of the Security Council which have the power of veto and its impacts on the referral decisions. Three permanent members of the Security Council (China, Russian Federation and the United States) are not states parties to the Rome Statute, but these states are able to refer situations in states which are not parties to the Statute. In addition to it, the permanent members of the Council can tend to avoid the ICC's jurisdiction over themselves[82]. Also, Nuremberg and Tokyo Tribunals are criticized due to imposing "Allies' justice"; however similar crimes of Allies States had not been tried by these Courts[83].

Furthermore, in thought of the veto power of each permanent member of the Security Council, it is recommended that each permanent member of the Council should not

[79] Moss, *supra* note 75; Article 53 of the Rome Statute.

[80] Karin N. Calvo-Goller, *The Trial Proceedings of the International Criminal Court,* (Martinus Nijhoff Publishers 2006) 159

[81] Relationship Agreement, *supra* note 9, at Article 27 (1).

[82] Chatham House, International Law Meeting Summary with Parliamentarians for Global Action, The UN Security Council and the International Criminal Court, (16 Mart 2012) 3 [Chatham House].

[83] Kirsten Sellars, *"*Imperfect Justice at Nuremberg and Tokyo*"* (2011) *The European Journal of International Law* 1090; Michael J. Struett, *The Politics of Constructing the International Criminal Court* (first published 2008, Palgrave) 158 [Sellars][Struett].

destabilize a referral process regarding the most serious international crimes by using of tis veto power[84].

The second worry is whether the Security Council should have constant standards when it refers a situation to the ICC. In other words, in which situations the Council can refer a situation to the Court, even if it may be problematic to implement in practice. As a matter of fact, the situations in Darfur, Libya, Chechnya, Gaza or Syria are almost similar to each other. But, the problem then arises as to why were only some situations referred by the Security Council?[85] In consideration of political body of the Security Council, referral instruments without principles may be concerned as politicising the mandate of the ICC. Moss noted that "*In using its power of referrals, the Council should apply criteria and processes that are as objective and consistent as possible 'to minimize danger to the independence and legitimacy of the ICC,' so that Council decisions are not seen as politically motivated"*[86]. In difference to "determining consistent standards", some recommended an alternative. Costa Rica, Jordan, Liechtenstein, Singapore and Switzerland suggested a measure that the permanent members of the Security Council should escape to use of the veto power to block the Council action aimed at stopping the most serious international crimes[87].

Yet, the reports of the UN Office of the High Commissioner on Human Rights (OHCHR) have important effects on decisions of the Security Council with respect to referral process. Libya resolution (2011) was adopted in similar to the report of the OHCHR. Also, even though two permanents of the Council (Russia and China) vetoed the draft resolution regarding Syria war, thirteen members of the Council vetoed in favour of it. By November 2004, thousands of people had been killed in Darfur and 1.65 millions of people had been displaced[88]. On the subject of the situation in Syria, by mid of 2014, more than 191,000

[84] Jennifer Trahan, "The Relationship between the International Criminal Court and the UN Security Council: Parameters and Best Practices" (*Criminal Law Forum* 2003) 428 [Trahan].

[85] Chatham House, *supra* note 82, at 4.

[86] Moss, *supra* note 75.

[87] Revised Draft Resolution of Costa Rica, Jordan, Liechtenstein, Singapore and Switzerland, A/66/L.42/Rev.1 (May 3, 2012).

[88] Moss, *supra* note 75.

people killed and as of March, 2015, 7.6 millions of people had been displaced[89]. Unluckily, the international crimes committed around the world have not been studied objectivity and justly. So, if the aim of the international community is to fight against impunity constantly, a set of impartial standards must be determined and accepted by the Security Council regarding when and in which conditions a situation should been referred to the ICC. This guarantees the legitimacy and independence of the ICC and the integrity of the Council.

Third contentious problem is immunity of some categorized groups from the ICC jurisdiction by the Security Council. In Resolution 1593 (2005) with respect to Darfur, the Council decided 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.*" This decision stated that nationals and personnel (including US aid workers and peacekeepers) apportioned by non-states parties to the Rome Statute operating under an UN or African Union mandate in Sudan were discharged from the ICC jurisdiction[90]. The Resolution 1973 (2011), likewise the Darfur referral, released non-states parties of the ICC. Giving exclusion from ICC jurisdiction to a broad group of people exceeded the power granted to the Council in Article 16 of the Rome Statute[91].

Another challenging matter is who has the financial duty when the Security Council refers a situation to the ICC[92]. Article 115 of the Rome Statute stipulates that "*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.*" But, the Security Council rejected to assign the UN funds to the ICC

[89] The UN News Centre; The United Nations Office for the Coordination of Humanitarian Affairs (OCHA).

[90] Parliamentarians for Global Action (Regrets exemptions included in Resolution 1593 (2005)

[91] Moss, *supra* note 75.

[92] Carsten Stahn and Goran Sluiter (editors), *The Emerging Practice of the International Criminal Court* (Martinus Nijhoff Publishers 2009) 193

prosecution and jurisdiction in the Darfur Resolution[93]. While the Rome Statute does not specify founding accompanying referral, insufficient funding can leave the Court not to maintain an investigation. Schabas, nevertheless, noted that "*In the case of tribunals formally created by the Council, it is normal that they be financed out of United Nations resources. The International Criminal Court is not a United Nations organ, and it seems unreasonable that its facilities be offered to the United Nations free of charge, so to speak."*[94] Under Article 115 of the Rome Statue, the UN General Assembly is authorized to resolve about costs of referrals. That's way the Security Council should abstain from financing decision on its referrals and leave the financial decision to the General Assembly.

2. The Deferral Mechanism

Article 16 of the Rome Statute gives power to the Security Council to defer investigations or prosecutions from the ICC, under Chapter VII of the UN Charter, for renewable twelve months period[95]. The referral power contains two important features: *i) the Security Council must decide under Chapter VII of the UN Charter*[96]*, ii) After referral, no investigation or prosecution may be commenced or proceeded with.* Performing under Chapter VII of the UN Charter means that there must be danger to the peace, breach of the peace, or act of aggression[97]. Secondly, the polemic is whether the Council can defer either an ongoing investigation (or a prosecution) or possible judicial proceeding. Article 16, yet, does not obviously stipulate that in which conditions the Council can defer an investigation or prosecution.

The Council has used the power of deferral once to date, in Resolution 1422 in 2002, by giving immunity from ICC jurisdiction to 'current or former officials or personnel from a

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[93] Resolution 1593, para. 7 (*"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")*

[94] Schabas, *supra* note 15, at 174.

[95] Rome Statute, *supra* note 2, at Article 16.

[96] Igor Pavlovich Blishchenko (edited by Jose Doria Hans-Peter Gasser M. Cherif Bossiouni), The Legal Regime of the International Criminal Court (1st edn, Martinus Nijhoff Publishers 2009) 438; Jo Stigen, *The Relationship Between the International Criminal Court and National Jurisdiction* (1st edn, Martinus Nijhoff Publishers 2008) 427 [Blishchenko].

[97] Trahan, *supra* note 84, at 435.

contributing state not a party to the Rome Statute regarding UN-authorized operations'[98] and it was renewed by Resolution 1487 in 2003. On the subject of this referral, a problem that arises is whether there was an acceptable risk to the peace. Before the Resolution, the ICC jurisdiction over the armed forces organized in UN Mission in Bosnia-Herzegovina was raised as a problem by the US. As a product of the US diplomatic efforts, this Resolution was adopted by the Council. Some writers, still, have claimed that there was not a legitimate threat to justify the Resolution[99]. Furthermore, the Government of Kenya with authorization of the African Union requested the Security Council to defer the investigation about the situation in Kenya, yet; the Council confidently declined this proposal[100].

Article 27 of the Rome Statute clearly states that *"This Statute shall apply equally to all persons without any distinction based on official capacity"* and *"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."* In thought of this Article, deferring a prosecution without determination of a danger to the peace or providing immunity from ICC jurisdiction to a certain person or group breakdowns this provision.

[98] Resolution 1422 para. 1; Dominic Mcgoldrick Peter Rowe and Eric Donnelly (Editors), *The Permanent International Criminal Court* (Hart Publishing 2004) 116 [Mcgoldrick].

[99] Ibid., 438; Roberto Lavalle, "A Vicious Storm in a Teacup: The Action by the United Nations Security Council to Narrow the Jurisdiction of the International Criminal Court" *Criminal Law Forum* (2003) 14 [Laballe].

[100] Moss, *supra* note 75.

Chapter III

Key Actors in the Council-Court Relationship

This Chapter will be dedicated to governmental and non-governmental organizations. On the key players who form the Security Council's position towards the International Criminal Court. On the five permanent members – the so-called P-5 with a veto power in the Council, as well as the ten states non-permanent elected members serving two-year terms. All play a key role in the relationship between these two institutions. Therefore, their views, policies and interests will be elaborated in detail.

1. The P-3

In the Council, the main role is played by the member states with permanent mandate. But, to adopt a resolution it's just not their support that is needed, also must have support from non-permanent members. The resolutions are most often proposed by the P3 – United Kingdom, France and the United States. In few cases, resolutions reach veto. The influence of the P3 is huge, so through the Council they play a role in the ICC.

ICC regularly receives support from the governments of **France** and the **United Kingdom**, as parties to the Rome Statute. They are committed to improving cooperation between ICC and UNSC. They regularly speak in support of the Court in the Council discussions. While both governments have pressed for a stronger relationship between the Council and the Court, some spectators believe that they can do more, especially in Courts reports of non-cooperation.[101] French delegation in UN is active and advocates the problems in the ICC.

The **United States** has overcome the hostility that ruled between them and the Court. The second term of the George W. Bush administration has improved the relations and warmed up the co-operation with the Court. While the administration of President Obama offerd close cooperation and support to the Court. Since then, the United States has

[101] See, e.g., Bruno Stagno Ugarte, Enhancing P-3 Cooperation with the International Criminal Court, draft of November 22, 2012, *available at* http://councilandcourt.org/files/2012/11/P3-Paper-by-Bruno-Stagno.pdf.

supported the court and has close cooperation. The United States now engages in as a spectator state at meetings of the Assembly of States Parties to the Rome Statute and play a role in actively in the Rome Statute Review Conference in 2010. The administration's deployment of military advisers to Uganda to help with the search for leaders of the Lord's Resistance Army highlighted that commitment, even though it obtain from domestic concerns as much as ones related to the ICC.[102] The commitment to transfer ICC indictee Bosco Ntaganda, who surrendered himself to the U.S. Embassy in Kigali, Rwanda, to The Hague elevated that support another level.[103]

The American responsibility to the Court is forced from many different factors, both legal and political, that frame U.S. behaviour on the Council. Under legal restrictions of the American commitment to the Court, includes the American Sevicemembers Protection Act (ASPA). ASPA aims to prevent American funding of and cooperation with the ICC while also protecting American nationals from the jurisdiction of the Court.[104] ASPA constrains have motivated the U.S. position with respect to the cooperation, exemption, and funding provisions of the Sudan and Libya referrals. Not all these positions are legally mandated, and where they are, the administration will need to seek modification of ASPA in order to deepen cooperation with the Court. The ICC remains a theoretically fraught problem in Congress, demanding the government to thread wisely in increasing ICC positions. ICC commitment in a state such as Israel and Palestine, for example, would nearly surely weaken U.S. commitment in a condition such as Israel and Palestine, for example, would almost certainly weaken U.S. moves to better care of the Court.

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[102] See Tom Shanker and Rick Gladstone, *Armed U.S. Advisers to Help Fight Renegade African Group,* The New York Times, October 14, 2011, *available at* http://www.nytimes.com/2011/10/15/world/africa/barack-obama-sending-100-armed-advisers-to-africa-to-help-fight-lords-resistance-army.html.

[103] See Jeffrey Gettleman, *Rebel Leader in Congo is Flown to The Hague,* The New York Times, March 22, 2013, *available at* http://www.nytimes.com/2013/03/23/world/africa/war-crimes-suspect-bosco-ntaganda-leaves-congo-for-the-hague.html?_r=0 . *See also* David Kaye, America's Honeymoon with the ICC, Foreign Affairs, April 17, 2013, *available at* http://www.foreignaffairs.com/articles/139170/david-kaye/americas-honeymoon-with-the-icc.

[104] See American Servicemembers Protection Act ("ASPA"), Public Law 107-206, as amended, *available at* https://www.amicc.org/docs/ASPA_2008.pdf.

2. China and Russia

Chinese and Russian strategies are not as well-understood as those of the P-3 and value more debate than they typically get. Representatives of both governments express worries about the Court. In private meetings, Chinese bureaucrats and experts, for instance, expressed disappointment that the Court supplied arrest warrants against a sitting head of state, President Bashir of Sudan. China went so far as to welcome Bashir on an official visit to Beijing in 2011.[105] Administrators of both nations are said to harbour worries about a potential ICC focus on their own national conflicts, even though such worries rise genuinely only upon ratification of the Rome Statute, a remote possibility for each. Both are doubtful about ICC authority over the crime of aggression, but their disbelief may not vary meaningfully from the other P-5 governments. One of the principal features of both countries' attitudes, yet, is that very few individuals in the policymaking and academic groups in Beijing and Moscow pay attention to or have considerable knowledge about the Court.

On the positive side of the record book, China and Russia have often joined as spectators in ICC assemblies. Russia supported for referrals of both Sudan and Libya, while China desisted on the first and voted in favour on the second. They have joined Council resolutions and reports stating support for the Court's effort. Russian Foreign Ministry legal representatives and some diplomatic representatives are exceptionally up-to-date and sophisticated about the Court and its jurisprudence, while Chinese Foreign Ministry legal representatives enjoy outstanding wide-ranging understanding of the Court and deep awareness in its work. Even though both have stood strong-willed against Council engagement in Syria, their situations seem determined by Syria-specific approaches, not animus toward the Court. In short, China and Russia should not be treated as certain obstacles to a solid Council-Court connection. Their positions on precise circumstances are driven more by consideration of how the Court fits into other national objectives than by principled stands against the Court.

[105] Michael Wines, *Sudanese Leader is Welcomed in Visit to China,* The New York Times, June 29, 2011, *available at* http://www.nytimes.com/2011/06/30/world/asia/30china.html.

China's permanent representative to the UN has referred to the ICC as "an integral part of the international system of the rule of law," but he also stated worry about the Court "impeding the work of the Security Council."[106] Also, its declaration of support and votes in favour of the Libya referral and other ICC-supportive resolutions are balanced by the warm welcome to Beijing of Bashir. Chinese experts advise the government is mainly influenced by the attitudes of developing states, local organizations, and other P-5, as well as worries over the Court's precedent-setting influence on China in the upcoming. According to academics and representatives in Beijing, attention in the ICC exists but information of the Court does not spread much beyond a community of legal intellectuals and divisions of the Ministry of Foreign Affairs.

At the same period, Chinese thinking about international matters is experiencing transformation. For instance, non-interference and independence fears may be less important than they once were, giving way to the challenging elements of nationalism on one hand and pragmatism on the other. Autonomy may be background worry but Chinese benefits will also reveal others, particularly regional strength. Public opinion has a increasing impact on strategy, and its numerous indicators – the widely-read *Global Times*, the growing role of Weibo (China's powerful twitter-like microblogging site), and so onward considered on experts and politicians. Mainly at a moment when Chinese foreign policy institutions have new management, there may be some chances for reconsideration of the ICC.

The long-term strength of the Council-Court connection will require that China become a party to the discussions about international justice. Court supporters looking for China's contribution must take into account four features of Chinese plan:

First, supporters should know that Chinese confrontation to the ICC, to the some degree it happens, is fixed in traditional but progressing thinking about multilateral institutions, non-interference, and sovereignty. Official Chinese proclamations will remain to highlight the principle on non-interference, but to some level, these principles seem to be placeholders, points that resonate with politicians but do not define totally Chinese

[106] Statement of Ambassador Li Baodong, October 17th Debate.

activities in particular circumstances.[107] Non-interference may continue important; Chinese representatives resist foreigners' criticisms about, for instance, Tibet and freedom of expression and information. Human rights stay problematic to involve in Beijing. In deliberating ICC issues in Beijing, mostly separate of the MFA and legal academic groups, emphasis should be located on the ICC's overlap with international peace and security – Security Council equities – rather than overall human rights matters beyond the scope of the Rome Statute.

Second, Court supports must acknowledge the stated Chinese preference for national and regional answers to difficulties of peace and security. The Chinese look to local and state performers as they grow their ICC philosophy in particular circumstances, a point raised repeatedly in conversations about Chinese support for Resolution 1970. Concentrating on the African Union and Arab League will remain to be vital to produce support from China.

Third, Chinese experts become more calm with the knowledge of the ICC when it acts on a state's self-referral or in the territory or against a national of a Rome Statute state party. These circumstances share a common thread: the occurrence of state agreement. Discussions with Chinese politicians should focus that these types of cases – all of the non-referral cases at the moment, that is – should not involve any hidden fears of sovereignty and non-interference.

Fourth, those who involve with Beijing should realize that the Chinese foreign policy apparatus spreads through government and party structures. As with any government, Beijing has its own specific method of establishing its policymaking community, which, for many foreigners, is quite opaque depending on the matter.[108] Traditional Chinese actors with attention in the ICC-related matters are in the Party apparatus, the government (such as the Ministry of Foreign Affairs), and the military, but where they stand on any specific

[107] But *see* Ian Bremmer, *Xi dreamed a dream of China's rise . . .,* March 20, 2013, http://blogs.reuters.com/ian-bremmer/2013/03/20/xi-dreamed-a-dream-of-chinas-rise/ (arguing that, "in the near future you'll see China's formal renunciation of its policy of non-intervention in the affairs of other countries.").

[108] A useful review of Chinese foreign policy institutions may be found at Linda Jakobson and Dean Know, *New Foreign Policy Actors in China,* SIPRI Policy Paper 26, September 2010.

matter or how they are included into decision-making is problematic to determine. Outside actors should make a certain effort to realize policymaking in Beijing and to involve with those in key universities and research organizations to include Chinese academics in efforts to increase contribution in ICC dialogues.

Russian philosophy about the ICC was said through the October 17th Security Council discussion, when Russia's Permanent Representative, Ambassador Vitaly Churkin, delivered an summary of the official Russian attitude toward the Court.[109] Despite the fact that Russia has not ratified the Rome Statute, one can read in Ambassador Churkin's announcement some important settlements with the purposes of the Court and the international justice more normally. "It is clear," he said, "those persons guilty of particularly serious crimes under international law must be brought before the Court." The Council "has a serious new tool with which to achieve that goal" of fighting impunity, and the two entities "must interact within the framework of their respective mandates and with mutual respect."

Nevertheless, Ambassador Churkin also spoke of Russian worries about the Court and the Council-Court link. First, Ambassador Churkin underlined the balance between peace and justice. He documented the significance of the Court's judicial independence, yet he recommended that its "activities must be carried out in the light of common efforts to settle crisis situations." The referral experience, he claimed, shows that "serious political and legal consequences" sometimes follow Court engagement. He seemed troubled that referrals made "either too fast or too slowly" can weaken stability and the search for peace. Churkin's final remark questioning "the extent to which the Court can work in a mature and balanced way and find its own place in the international system" suggests a worry that the Court not affect with the peace-and-security mandate of the Council.

Second, Ambassador Churkin claimed that referral resolutions "do not abrogate the norms of general international law on the immunity of heads of State in office." His recommendation that only "a direct instruction" from the Council may repeal immunity provides a indication of disapproval that the Court seeks the arrest of those for whom immunity usually would attach.

[109] Statement of Ambassador Vitaly Churkin, Permanent Representative of the Russian Federation, October 17th Debate, pp. 19-20.

The Russian position, as stated by Ambassador Churkin, strongly submits concern that the Court risk undermining what is seen as the established roles of the Council. Churkin's emphasis on how the Court must carry out its actions highlights a case-by-case method in which Russian politicians will focus on Council equities and security, stability, and peace-making as much as, if not more than, principles of accountability and justice.

In some respects, the Russian approach matches the vision from Beijing. Yet, as a matter of policymaking, while Beijing academics and experts, in and out of government and party organizations, express curiosity but not necessarily deep knowledge with the Court, it is problematic to categorize many Russians who focus on or express curiosity in the ICC. The community of Russian researchers who make study of international justice a principal item on the research agenda is partial in size. Think tank specialists on the ICC seem non-existent. While official conversation of the ICC in the West extends to policy and legal entities, informed debate in the Russian government appears limited to a very small number of specialists in the Ministry of Foreign Affairs. Many local spectators believe that Russian ICC policymaking is focused in the Kremlin and thus highly non-transparent. Even some activists in Moscow express the view that the ICC in not high among their main concern; but they also tended to express frustration that early interest in the Court among officials, parliamentarians, academics, and activists dissipated over the course of the first era of the Courts existence.

In this aspect, it is necessary for ICC supporters to begin to set the groundwork for long-term Russian engagement with the Court. Given the fears and the Syria incident, in which Russia has different Council engagement constantly, some Russian professors claimed in conferences in favour of setting the groundwork for long-term Russian engagement with the Court and care of the Court through the Council. They advised the need for university and law school programming that educates student about international courts and tribunals, including through the use of conferences and academic interactions. They also recommended a need for policy-oriented education today, highlighting that a shorter-term target audience would not be lawyers or students but officials, think-tank specialists, and others who focus on Russian security and foreign policy.

3. Other Key UN Member State Influences

Even with the privileged place of the P-5, other countries and organizations impact Council results and can help form the relationship amongst the Council and the Court.[110] Between the key non-P-5 actors are those Council members, elected on a two-year basis, that play an significant and important role either on the Council itself or throughout the UN in New York. Now, for example, the delegation of Guatemala plays a strong role on the Council. During its term as President of the Council, Guatemala organized the effort to hold the open Council meeting in October 2012, producing an idea paper highlighting key collaboration issues and producing the most important and supportive statements for the Court on the Council since the Rome Statute's entry into force.[111] Other current Council members playing an important role are Argentina, Australia, Korea, Luxemburg, and non-party Togo. Morocco, an ICC-friendly Council member that has not ratified the Rome Statute, may play a mainly useful role with the ICC members Jordan and Tunisia (not on the Council presently) in building support within the Middle East/North Africa region. By contrast, Rwanda, which joined the Council in 2013, has expressed hostility toward the ICC that resulted in the omission of a reference to the Court in an April 2013 Council Presidential Statement.[112] During 2011 and 2012, three non-permanent but influential members that are no longer on the Council – India, Brazil, and South Africa – sought to shape Council discussions touching on justice and accountability. This so-called IBSA grouping can, when united, present a strong position favouring or opposing certain action in the Council, weighting mainly on Chinese considerations.[113]

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[110] *See, e.g.,* Baldur Thorhallsson, Small States in the UN Security Council: Means of Influence? *The Hague Journal of Dipomacy* 7 (2012), 135, 152-160.

[111] Letter dated 1 October 2012 from the Permanent Representative of Guatemala to the United Nations addressed to the Secretary-General, and annexed Concept Note, U.N. Doc. S/2012/731 (October 1, 2012), *available at* http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_2012_731.pdf.

[112] AFP, *Rwanda slams West's 'wagging finger' on justice at UN,* April 15, 2013.

[113] India was the reluctant delegation compared to the support offered by South Africa and Brazil. *SEE* U.N. SCOR, 66th Sess., 6491st mtg., U.N. Doc. S/PV/6491 (Feb. 26, 2011) (statements of India and Brazil). *See also* Statement of Mr. Mashabane (South Africa), October 17th Debate at 16

Others on and off the Council can be critical in building support for the Court. Three member states in precise have played roles that go outside their economic or military control: Jordan, Costa Rica, and Liechtenstein, whose permanent representative have also served as presidents of the Rome Statute's Assembly of States Parties and continue active opinion leaders in New York. To give one illustration, when Costa Rica held a seat on the Council in 2008, its delegation successfully pressed the Council to adopt a Presidential Statement noting the work of the ICC in Sudan and influence all parties to the conflict to unite with the Court "to put an end to impunity for the crimes committed in Darfur." Till this point, and for some time later, the Council did not express any measure of support for the Court's efforts under Resolution 1593. Organized with Singapore and Switzerland, the delegations produced the so-called S-5 states to press for changes in the Council, including how it treats ICC-related issues.[114] The examples set by these delegations highlight not only the way in which small states may affect policy debates on the Council and more generally at the UN. They also reveal that individuals, those who take a specific attention in the Court, may have substantial room to impact thinking in New York on ICC matters even when not representing the usually influential states.

Regional organizations may also play an important part in framing discussion and results on the Council, as the approval of Resolution 1970 highlighted. Some point to the letter sent to the Council by the Libyan permanent representative in February, 2011, influencing the Council to refer the worsening condition in Libya to the Court.[115] As significant as that uncommon letter was to producing support, interviews with Russian and Chinese politicians and other spectators suggest that African Union and Arab League support for the resolution was contributory in leading toward unanimous adoption. The Chinese Permanent Representative spoked this publicly when nothing that his government took into consideration the "concerns and views of the Arab and African countries."[116] Of course, the role of regional actors will differ according to the condition. The African Union's position on the Sudan referral and the Kenya condition, for example, has damaged Council

[114] *See, e.g., Revised Draft Resolution: Enhancing the Accountability, Transparency, and Effectiveness of the Secority Council,* A/66/L.42/Rev.1 (May 3, 2012).

[115] Resolution 1970 makes reference to this letter, highlighting its significance.

[116] Statement of Ambassador Li Baodong, October 17th Debate, at 11-12.

engagement on these matters and helped generate a widespread if wrong perception that the Court is influenced against Africa.[117]

4. The Court's Interactions with the Council

Ever since the acceptance of Resolution 1593, the ICC has grown into a familiar presence at the Council through the prosecutor's reports on referred situation republics. With the adding of Resolution 1970, the prosecutor now reports to the Council four times yearly, twice each year on Sudan and Libya. These reports review the work of the Court and the level of collaboration by governments and other actors. The prosecutor has not used the reporting to seek specific steps from the Council, so as to uphold a degree of independence and not take on a political part. Nevertheless, there may be chances – mainly if structural change creates regular professional dialogue between the two organizations- for Court officials to be more specific about Council steps that could be helpful.

Apart from the briefings, the Court has cooperated with the Council in other features. The Court established a connection office in New York in order to follow important subjects at the UN and serve as a principal point for interaction between the organizations. The President of the Court and a senior member of the Office of the Prosecutor joined in the October 17th Council discussion. Court officials cooperate with representatives of Council members in bilateral discussions, in New York and in capitals, and often connect with them at seminars and workshops that take place in research institutes and academic institutions globally. These kinds of communication, mostly among the P-3 and the Court officials, create a kind of comfort zone that permits collaboration and information-sharing to proceed on a bilateral level even if not at the level of Council decision making.

Even with such communication, the Council has never formally spoken its support for the Court activity under Resolutions 1593 and 1970, though individual members have done so. In the Darfur framework, pre-trial chamber 1 of the Court has reported to the Council the non-cooperation of the governments of Sudan, Malawi, and Chad, the last two

[117] An excellent overview of the African Union-Court-Council relationship may be found at Tendayi Achiume, *The African Union, the International Criminal Court, and the United Nations Security Council,* Background Paper, November 2012, *available at* http://www.councilandcourt.org/files/2013/04/ICC-AU-UNSC-Position-Paper-FINAL.pdf .

because of their fiasco to arrest Omar al-Bashir during visits to those republics.[118] The Council has not replied to any of these choices, perhaps in part because of the rough condition into which this may put China, which has also welcomed Bashir to Beijing.

The Court itself is cautious of getting drawn into the politics of the Council. During his appearance to the Council on October 17th, the President of the Court, Judge Sang-Hyun Song, emphasized the judicial independence of the Court. "But I must be clear," he said, "that, as a judicial institution, the ICC can work only on the basis of the law."[119] The prosecutor's representative echoed this theme, noting in a pointed remark, "It is important to underscore the need to respect the Office's mandate would only serve to undermine the legitimacy and credibility of the judicial process, thus giving credence to allegations of politicization of the process."[120]

The converse is also true. Conclusions made by the prosecutor or judgements accepted by chambers effect perceptions of the Court and the point to which Council members want to extend support to it. In conferences, delegations in New York and in capitals referred to such matters as he pace and length of proceedings; a docket in which more than half of the accused are escapees from justice (ironically so, as the Council has not provided support in such circumstances); choices to follow or not to follow investigations in specific cases; approvals for arrest warrants of senior officials such as Bashir; the Court's pursuit, or non-pursuit, of alleged perpetrators on all sides of a conflict; and the Court's selection of crimes to charge in a given situation (for instance, not charging sexual violence cases early in the DRC situation). The Court jealously guards its independence, as it must

[118] *See* Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir, The Prosecutor v. Omar Hassan Ahmad Al Bashir, Case No. ICC-02/05-01/09, December 12, 2011, *available at* https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-02/05-01/09-139&ln=en; and Decision pursuant to article 87(7) of the Rome Statute on the refusal of the Republic of Chad to comply with the cooperation requests issued by the Court with respect to the arrest and surrender of Omar Hassan Ahmad Al Bashir, The Prosecutor v. Omar Hassan Ahmad Al Bashir, Case No. ICC-02/05-01/09, December 13, 2011, *available at* https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-02/05-01/09-140&ln=en.

[119] Statement of Judge Song, October 17th Debate, at 4.

[120] Statement of Phakiso Mochochoko, Office of the Prosecutor, October 17th Debate, at 6.

under the Rome Statute, but its decisions and working methods are observed by the actors whose provision it needs.

5. Non-Governmental Organizations

NGOs have played a special role in Court actions since the earliest days of the discussions that led to the adoption of the Rome Statute in the summer of 1998. They remain to enjoy a privileged place. Some have taken on roles as convener, bringing together officials of governments, the Court, international organizations, and other NGOs. Organizations such as Open Society, the International Centre for Transitional Justice, Chatham House, and Parliamentarians for Global Action have supported efforts focused building the Council's support of the Court. Some have occupied on an advisory role, especially where the organization enjoys expertise and contact at both the Court and the Council. For example, Human Rights Watch, with an important presence at the UN and a profound long-term commitment to the Court and the international justice, enjoys a special kind of access in New York and The Hague; according to many interviewees, it played an important role in producing support for the referral of Libya to the ICC. To conclude, several NGO's, including those already said, play an significant educational role, monitoring proceedings, examining the inner workings of the Court, conduction fact-finding in situation (and potential situation) countries. Many of these organizations partner with academic institutions in order to translate academic and other kinds of studies into policy recommendations for the Court and the Council.

Chapter IV

A Critical Review of the Relationship between the UN Security Council and International Criminal Jurisdiction in the Light of the Principle of Judicial Independence

The Council advertising of a role for international judges and prosecutors in responding to new security threats may be described in the light of several post-Cold changes. Certainly, already during the eighties, a remarkable decline of inter-State conflict was detected while internal or transitional conflicts have been increasing.[121] The main actors in the latter type of conflicts are not limited to State representatives, but extend to various non-State actors, among them, armed forces, paramilitaries, terrorist groups, etc.[122] Additionally, the highest number of deaths caused by conflict and reported in recent situations are not soldiers, but civilians who today amount to between 30 and 60 per cent of the violent deaths in such circumstances.[123]

The idea that massive crime, or a given condition of massive crime, may amount to a security threat reflects the central suggestions of what a new collective security planning must focus on and which were brought to the front in the UN reform process. The first major report that was launched in this procedure set forth the claim that the international community is opposing several new international security threats. Not discarding the classical accepting of inter-State conflict as prone to undermining the international order, the UN High-Level Panel on Threats, Challenges and Change underscored the need to widen the understanding of international security threats to include internal conflict, civil war, genocide and other large-scale atrocities, terrorism, and transnational organized crime.[124]

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[121] See also *Prosecutor v. Dusko Tadic. Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction,* ICTY, 2 October 1995, para. 29. The ICTY Chamber refers to the fact that the Council has recognized on several occasions internal armed conflict as constituting threat to the peace and acted under Chapter VII of the UN Charter.

[122] See Paul Williams (2ed), *Security Studies: An Introduction* (Routledge, 2008), p. 161.

[123] See *ibid,* at p.162.

[124] Other new threats include nuclear, radiological, chemical and biological weapons as well as economic and social threats, including poverty, infectious disease and environmental degradation. See *A More Secure World:*

Only a few months later, the UN Secretary-General exposed his own report supporting the vision of 'new threats' and gave pride of place to criminal justice as a measure for responding to them.[125] The *World Summit Outcome,*[126] adopted in September 2005, may nevertheless reveal the absence of a broad moral and political agreement on the role of international criminal justice: while confirming the need to revise the UN security agenda to accommodate new threats, hardly any mention is made to criminal justice as a means of opposing them.[127]

The Council's alternative to criminal justice and criminal sanctions to confront new threats could be seen as encouraged by growing evidence that the more classical measures under Chapter VII, notably, the use of economic sanctions, are not effective. However, it could also be seen as reflecting the relative success of the international human rights system over the last twenty years in its ambition to function as a 'gentle civilizer' of actions within the collective security agenda.[128] To the degree that the policy containing of the 'individualization' of sanctions (including asset freeze) involves an effort to avoid the unselective and collectivist impact of the more classical economic sanctions, it means an improvement of the Council's human rights record,[129] at the same time, asset freeze has still

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Our Shared Responsibility. Report of the Secretary-General's High-Level Panel on Threats, Challenges and Change (A/59/565), 2 December 2004.

[125] *In Larger Freedom: Towards Development, Security and Human Rights for All.* Report of the Secretary-General (A/59/2005), 21 March 2005, para. 78. See also *Rule of law and transitional justice in conflict and post-conflict societies.* Report of the Secretary-General (S/2004/616), 23 August 2004.

[126] *World Summit Outcome,* adopted by UNGA Res 60/1 (A/RES/60/1), 16 September 2005.

[127] The need for States to strengthen their criminal justice systems is affirmed in relation to organized crime and corruption (para. 113).

[128] For a consideration of international law as potentially having such impact, see Martti Koskenniemi. *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1969* (Cambridge, Cambridge University Press, 2001).

[129] See e.g. Iain Cameron, 'UN Targeted Sanctions, Legal Safeguards and the European Convention on Human Rights', 72(3) *Nordic Journal Of International Law* 159 (2003); Bardo Fassbender, 'Targeted Sanctions Imposed by the UN Security Council and Due Process Rights', 3 *International Organizations Law Review* 427 (2006); Michael Reisman & Douglas Stevick, 'The Applicability of International Law Standards to United Nations Economic Sanctions Programmes', 9(1) *European Journal of International Law* (1998); August Reinisch, 'Developing Human Rights and Humanitarian Law Accountability of the Security Council for the Imposition of

now been targeted by the sanctions regime. From this perspective, the imposition of a criminal sanction following a fair trial of perpetrators of grave crime-the measure in focus in this paper-seems to be a better way of complying with the basic supplies of international human rights law.

That being said, or so this paper will recommend, it remains unsure the type of Council initiatives in focus are actually in agreement with an obligation to ensure respect for human rights and the range of goods or values that are inseparably connected to this view, especially the Rule of Law. Instead of promoting these goals, the considerable political engagement with criminal justice may be better understood as reflecting a deliberate effort by the Council to create a new collective security plan in which it seeks to harden and unite its rule and supremacy on the international stage, not mostly or only through the danger of resorting to armed forces and the employment of targeted sanctions, but also with the assistance of international judicial institutes that serve the interests and purposes of its members. Of special fear in this paper is that even if it can be said that the Council's option to criminal justice is in agreement with human rights in the sense that it respects the right of the suspect to defend herself, to examine the evidence mounted against her, etc., the Council's engagement in the field of international criminal jurisdictions increases a different worry that in value is of identical position from the position of human rights, but which up until now has not gained the attention it actually deserves from human rights lawyers and advocates, namely whether the international or hybrid criminal tribunals and courts that have been set up to examine and prosecute massive crime can be said to meet threshold set by the principle of judicial independence as defined in international law.

1. The Degree of Political Engagement with International Criminal Justice

In addressing this problem, the first thing to note is that the Council's usage of its powers under Chapter VII to adopt international criminal justice actions as a means of replying to new security threats has not been controlled to the creation of judicial organs. Particularly in the early stages of this procedure (ICTY and ICTR), the Council also contributed in the activities of international judges and prosecutors, the shaping of general

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Economic Sanction', 95(4*) American Journal of International Law* 851 (2001); Arne Tostensen & Beate Bull, 'Are Smart Sanctions Feasible? 54(3) *World Politics* 373 (2002).

operational policies (duration), and their funding. And, even if the Council's wish to control such sizes of international criminal justice has clearly reduced over time, a review of the statutes of the tribunals in focus exposes that one interest of the Council has remained remarkably continuous since 1993 and that is its interest in determining and, as the case often is, limiting significantly the capabilities of the tribunals and courts in focus.

Of exceptional meaning in this situation is the ever-growing tendency of the Council to define and control the personal, material, territorial and temporal scope of international criminal jurisdiction in such a way that the possible crimes of members of international peace-keeping forces and other foreign actions cannot be brought before any of the international judicial organs that have been set up to investigate and prosecute grave crime (if such action has been official by the Council). Still, when approving the statute of its first *ad hoc* tribunal (ICTY), the Council wan not so careful. While heavily limiting the territorial scope of jurisdiction of this Tribunal and imposing a temporal limit on the crimes to be investigated and prosecuted in terms of specifying a starting date, it did not provide an end date and neither did it place any limitations on its personal jurisdiction.[130] Clever from the uncomfortable experience resulting from the investigation into the question as to whether the NATO bombings of Serbia constituted a grave crime that fell inside the capability of the ICTY, the Council become extremely cautious of the significance of the scope of jurisdiction of its tribunals and started to define it in very exacting terms.[131]

Therefore, the competence of the Special Court for Sierra Leone is limited to "leaders who, in committing (serious violations of international humanitarian law) have threatened the establishment of and implementation of the peace process in Sierra Leone". Also, its Statute supports that any wrongdoings by peacekeepers and connected personnel existing in Sierra Leone shall be within the main jurisdiction of the sending State and that the Court may exercise jurisdiction over such persons only if the sending State is unwilling or incapable genuinely to carry out an examination or prosecution and provided that the

[130] ICTY Statute, art 7.

[131] Paolo Benvenuti, 'The ICTY Prosecutor and the Review of the NATO Campaign against the Federal Republic of Yugoslavia', *European Journal of International Law,* vol. 2, no. 3 (2001) 503-529.

Security Council has authorized such exercise.[132] In other words, the investigation or prosecution by this Court of alleged crimes of other persons who are not national parties in a given conflict condition need the prior approval of the Council. Also the jurisdiction of the Special Tribunal for Lebanon has been seriously restricted by the Council up to the point that the latter maintains nearly complete control over who will stand trial before it,[133] a fact that was assessed by the UN Secretary-General in the drafting of the Statute of this Tribunal: "In establishing the temporal jurisdiction of any UN-based tribunal, the Organization strives to strike a balance between a temporal jurisdiction comprehensive enough to include the most serious crimes committed by those most responsible throughout the relevant period and a jurisdiction reasonably limited as not to overburden the prosecutor's office and the tribunal as a whole … In the present circumstances, singling out for prosecution the assassination of Rafiq Hariri, while disregarding a score of other

[132] Statute of the Special Court for Sierra Leone, art. 1, reads in full: "1. The Special Court shall, except as provided in subparagraph (2), have the power to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996, including those leaders who, in committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone. 2. Any transgressions by peacekeepers and related personnel present in Sierra Leone pursuant to the Status of Mission Agreement in force between the United Nations and the Government of Sierra Leone or agreements between Sierra Leone and other Governments or regional organizations, or, in the absence of such agreement, provided that the peacekeeping operations were undertaken with the consent of the Government of Sierra Leone, shall be within the primary jurisdiction of the sending State. 3. In the event the sending State is unwilling or unable genuinely to carry out an investigation or prosecution, the Court may, if authorized by the Security Council on the proposal of any State, exercise jurisdiction over such persons."

[133] The competence of this tribunal is established in article 1 of the Statute of the Special Tribunal for Lebanon. According to this provision: "The Special Tribunal shall have jurisdiction over persons responsible for the attack of 14 February 2005 resulting in the death of former Lebanese Prime Minister Rafiq Hariri and in the death or injury of other persons. If the Tribunal finds that other attacks that occurred in Lebanon between 1 October 2004 and 12 December 2005, or any later date decided by the Parties and with the consent of the Security Council, are connected in accordance with the principles of criminal justice and are of a nature and gravity similar to the attack of 14 February 2005, it shall also have jurisdiction over persons responsible for such attacks. This connection includes but is not limited to a combination of the following elements: criminal intent (motive), the purpose behind the attacks, the nature of the victims targeted the pattern of the attacks (modus operandi) and the perpetrators".

connected attacks could cast a serious doubt on the objectivity and impartiality of the tribunal and lead to the perception of selective justice."[134]

Yet, this criticism was ignored and the limits that had been firstly imposed came to remain intact in the final version of the Statute of the Lebanese-based Tribunal. Therefore, its capability is incomplete to the investigation and prosecution of the persons accountable for "the attack of 14 February 2005 resulting in the death of former Lebanese Prime Minister Rafiq Hariri and in the death or injury of other persons". Moreover, its Statute specifies that: "If the Tribunal finds that other attacks that occurred in Lebanon between 1 October and 12 December 2005, or any later date decided by the Parties and with the consent of the Security Council are connected in accordance with the principles of criminal justice and are of a nature and gravity similar to the attach of 14 February 2005, it shall also have jurisdiction over persons responsible for such attacks."

Also, still in principle a sovereign organ, institutionally speaking, the Council has achieved to secure for itself some extraordinary legal titles allowing it to effect the choice of cases and circumstances by the ICC. More concretely, according to article 13 of the *Rome Statute*, the Council, acting under Chapter VII of the UN Charter, may state "a situation in which one or more of such crimes appears to have been committed" to the ICC Prosecutor. Till now, it has used this right in relation to the circumstances of Darfur and Libya and in both cases the ICC has replied positively to the Council requests.[135] Also, article 16 of the *Rome Statute* identifies a right of the Council to deferrals. Accordingly: "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."

[134] Report of the Security-General on the establishment of a special tribunal for Lebanon (S/2006/893), 15 November 2006.

[135] The Security Council referred the Darfur situation to the ICC Prosecutor on 31 March 2005 and on 6 June 2005 the Prosecutor decided to open an investigation into this situation. On 26 February 2011, the Council referred to the Libya situation and on 3 March this year the ICC Prosecutor announced that his Office had opened an investigation into that situation.

Therefore, the Council has used its right to deferral twice. First, on 1 July 2002, it requested the ICC to abstain from initiating investigations or prosecutions of peacekeepers of non-State Parties to the Statute as well as confirming its aim to "renew… under same conditions each 1 July for further 12 months periods."[136] It is notable that this request was made before the Court even had been established and was afterwards repeated the following year in the same terms.[137] It is equally remarkable that the request was made in the lack of any international security threat and that the provision in question in reality is limited to investigations and proceedings that have already been opened.[138] Second, on 1 August 2003, the Council adopted a resolution linked to Liberia specifying 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."[139]

A similar clause is also found in Security Council resolution 1593 (2005) that refers the Darfur situation to the ICC Prosecutor[140] and in resolution 1970 (2011) referring the situation in the Libyan Arab Jamahiriya since 15 February 2011.[141]

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[136] Carsten Stahn, The Ambiguities of UN Security Council 1244 (2002), *14 European Journal of International Law* 85 (2003).

[137] UNSC Res 1487 of 12 June 2003, para. 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 12-month period starting 1 July 2003 not commence or proceed with investigation or prosecution of any such case, unless the Security Council decides otherwise".

[138] Antonio Remiro Brotons, et. al, *Derecho International* (Tirant Lo Blanch, Valencia), pp. 812-813.

[139] UNSC Res. 1947 of 1 August 2003, para. 7.

[140] UNSC Res 1593 of 31 March 2005, para. 6, reads in full: "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". For a general comment on the resolutions concerning the exclusion of peacekeepers, see Neha Jain, "A

The Permanent members of the Council not parties to the Rome Statute are Russia, China, and U.S. though only the letter is a key funder to peacekeeping processes. Many researchers confirm that the rejection of peacekeepers from the ambit of international criminal justice is simply a reproduction of the keen opposition of the U.S. to the ICC as an international institution,[142] but others also point out that this phenomenon is appearance of how international organizations actually work.[143] But quite regardless of what clarification we may give for the development in focus, the nibbling away on the reach of international criminal jurisdictions is important.

To the degree that the assortment of cases and situations by the international criminal justice is a task for the international prosecutor and not the judge, if and when such choices appear to be influenced to the interests of the Security Council, most scholarly disapproval has obviously been mounted against the former rather that the latter.[144] Indeed, the ICC Prosecutor has come to be especially criticized for confessing situations and cases that associate (all too) neatly with the benefits of the Council and their permanent members, particularly, his initial effort on cases amounting to claims of crimes committed

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Separate law for Peacekeepers: The Clash between the Security Council and the International Criminal Court", 14(2) *European Journal of International Law* 239 (2005).

[141] UNSC Res 1970 of 26 Feb 2011, para 5: "Decides 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 o 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 waited by the State".

[142] There is a wealth of literature on the US opposition to the ICC and the importance of the latter to gain the support of the former. See e.g. Jack Goldsmith, The Self-Defeating International Criminal Court, 70 *University of Chicago Law Review* 89 (2003); William Schabas, "United States Hostility to the International Criminal Court: It's All About the UN Security Council", *15 European Journal of International Law* 701 (2004); and M. Cherif Bassiouni, "The Perennial Conflict between International Criminal Justice and Realpolitik", 22 *Georgetown State University Law Review 541* (2006).

[143] Stiven R. Ratner, "The International Criminal Court and the Limits of Global Judicialization", 38 *Texas International Law Journal 445* (2003).

[144] Theodor Meron, "Judicial Independence and Impartiality in International Criminal Tribunals", 99 *The American Journal of International Law* 359 (2005).

against peacekeepers[145] and the use of child soldiers in armed conflict[146] (themes that rank high on the Council agenda)[147] together with its non-admission of criticisms related to crimes of UK soldiers in Iraq (a theme that does not rank high)[148] as well as the slow speed by which its initial investigations into the alleged crimes committed in Afghanistan are shown.[149] But even if international prosecutors and their offices are independent in relation to the judges' chambers, from the outside, both are still parts of the same judiciary; and given this, the acts of international prosecutors must be said to have an influence on the image of the judicial organ as a whole.

2. A Human Rights Approach to the Principle of Judicial Independence

The response to the question posed in the opening of this paper as to whether the judicial organs in focus meet the threshold of judicial independence obviously depends on what is intended by this principle and what can rationally be required and expected as a result of a obligation to protecting it when establishing the relationship between international organs. Up until now, the more accurate meaning of this principle has been

[145] *The Prosecutor v. Bahar Idriss Abu Garda* (ICC-02/05-02/09). Rebel leader Bahr Abu Garda, President of the United Resistance Front, was the first person to appear in Court in relation to Darfur crimes. ICC Prosecutor alleges that he is responsible for killing and injuring peacekeepers from Botswana, Senegal, Mali, Nigeria and the Gambia in the September 2007 attack of a camp of the African Union Mission in Sudan, AMIS, in Haskanita. The focus was stressed in the ICC Prosecutor's Statement to the United Nations Security Council on the Situation in Darfur, the Sudan, pursuant to UNSCR 1593 (2005) in New York on 4 December 2009. On 1 February 2010, however, Pre-Trial Chamber 1 refused issued a decision rejecting the Prosecutor's application to appeal the decision. Also note in this context crimes by peacekeepers. See e.g. Anthony J. Miller, "Legal Aspects of Stopping Sexual Exploitation and Abuse in U.N. Peacekeeping Operations", 39 *Cornell International Law Journal 71* (2006).

[146] *The Prosecutor v. Thomas Lubanga Dyilo* (ICC-01/04/06). Lubanga is charged with the crime of using child soldiers. The Prosecution applied for an arrest order on 12 January 2006. The trial, which is the first to be held by the ICC, started in January 2009.

[147] The Security Council Working Group on Children and Armed Conflict was established in July 2005 pursuant to the Security Council resolution 1612 of 26 July 2005. It is composed of the fifteen Council members.

[148] See ICC Prosecutor communication concerning the situation in Iraq, 9 February 2006.

[149] The ICC has been conducting preliminary investigations and analysis in Afghanistan since 9 September 2009. See also William Schabas, "Prosecutorial Discretion v. Judicial Activism at the International Criminal Court", 6 *Journal of International Criminal Justice* 731 (2008).

advanced in the domain of international human rights law, but expressed with the internal organization of States in mind, still, for our purposes, it will serve as a valuable fact of departure for our debates.

The first thing to bear in mind is that, from a human rights position, the principle of judicial independence is showed as inseparably connected to fair trial guarantees. In pursuance with article 14(1) of the *UN International Covenant on Civil and Political Rights* (1966): "In the determination of any criminal charge against him, or his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."

Article 10 of the Universal Declaration of Human Rights (1948),[150] article 6 of the European Convention of Human Rights (1950),[151] and article 8(1) of the Inter-American Convention on Human Rights[152] all set forth a similar formulation of this right.

What is then intended by the notion of "independent" tribunal in this situation? In 2007, the UN Human Rights Committee published a *General Comment* that affected upon the problem. In this view: "The notion of tribunal in article 14, paragraph 1 designates a body, regardless of its denomination, that is established by law, is independent of the executive and legislative branches of government or enjoys in specific cases judicial independence in deciding legal matters in proceedings that are judicial in nature."[153]

[150] *Universal Declaration of Human Rights* (1948), art. 10 reads in full: "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any charge against him".

[151] *European Convention on Human Rights* (1950), art. 6 reads in full: "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law".

[152] *Inter-American Convention on Human Rights* (1969), art. 8(1) reads in full: "Every person has the right to hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labour, fiscal, or any other nature".

[153] UN Human Rights Committee, *General Comment no.* 32: *The right to equality before courts and tribunals and to a fair trial* (CCPR/C/GC/32), 23 Aug 2007, para. 18.

Thus, according to this Committee, a tribunal is considered as "independent" provided it: "(a) has been established by law; (b) is independent from the executive (and legislative) branches of government; and/or (c) enjoys in specific cases judicial independence in deciding matters that are judicial in nature."

In the UN-based determination to elaborate on the more exact meaning of this notion of judicial independence, many references have been made, as well as by the UN Special Rapporteur on the Independence of Judges and Lawyers (Leandro Despouy)[154] and the UN Human Rights Committee, to relevant findings of the former European Commission of Human Rights. According to that Commission, the necessary in question refers to "the whole organizational set-up, including… the establishment of the individual courts and the determination of their local jurisdiction".[155] Still, it also summaries that, "it is the object and purpose of the clause in Article 6(1)… that the judicial organization of a democratic society must not depend on the discretion of the executive, but that it should be regulated by law emanating from a legislative body, such as the Parliament".[156] Therefore, in the European domain, the requisite suggests that a tribunal-to be seen as achieving the first requisite-must have been formed on the base of a democratically adopted law. Compared to the background, the former European Commission has stated that national courts, such as the French *Conseil d'Etat*, having been set up under the Constitution, meet this condition.[157]

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[154] In 1994, the Commission on Human Rights, in resolution 1994/41, noting the increasing frequency of attacks on the independence of judges, lawyers and court officials, and the link which exists between the weakening of safeguards for the judiciary and lawyers and the gravity and frequency of violations of human rights, decided to appoint, for a period of three years, a Special Rapporteur on the independence of judges and lawyers. This mandate was assumed by the Human Rights Council and extended for one year, subject to the review to be undertaken by the Council (Human Rights Council decision 2006/102. The current mandate is formulated in UN Human Rights Council res 8/6 of 18 June 2008 and includes the identification and recording of "not only attacks on the independence of the judiciary, lawyers and courts officials but also progress achieved in protecting and enhancing their independence, and make concrete recommendations, including the provision of advisory services or technical assistance when they are requested by the Stated concerned".

[155] *Zand v. Austria,* European Commission on Human Rights, Rep, 70, 80, 12 October 1978.

[156] *Ibid.*

[157] See e.g. *Pierzack v Belgium,* European Court of Human Rights, Judgement on 1 October 1982; and *Le Compte, Van Leuven and De Meyere*, European Court of Human Rights, Judgement on 23 June 1981.

In elaborating on the second requisite, the UN Human Rights Committee notes that all tribunals must also appreciate *actual independence from the political interference* from the executive branch and the legislature.[158] As article 3 of the *UN Basic Principles on the Independence of the Judiciary* (1985) puts forth, "the judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether and issue submitted for its decision is within its competence as defined by law". Remarkably, "a situation where the functions and competences of the judiciary and the executive are not clearly distinguishable or where the latter is able to control or direct the former is incompatible with the notion of an independent tribunal".[159] Over time, we have become adapted to take the need to decide between independent judges and independent judiciaries when assessing matters of judicial independence. As pointed out by the UN Special Rapporteur on the Independence of Judges and Lawyers, we now think of the latter's sort of independence, i.e. the institutional independence of the judicial function from the other branches of government, as a basic requisite for judges to be able to administrate justice. In the words of Leandro Despouy: "It is the principle of the separation of powers, together with the rule of law that opens the way to an administration of justice that provides guarantees of independence, impartiality and transparency."[160]

Thirdly, and lastly, it is equally vital that a tribunal enjoys judicial independence in particular cases when deciding legal matters in proceedings that are judicial in nature.[161] This third requisite suggests a right of judges to be free from non-interference when

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[158] UN Human Rights Committee, *General Comment no. 32: Equality before the courts and the right to a fair and public hearing by an independent court established by law (Art. 14),* 13 Apr 1984, para. 3. See *General Comment no. 32: Article 14: Right of equality before courts and tribunals and to a fair trial* (CCPR/C/GC/32), 23 August 2007, para. 19: "The requirement of independence refers, in particular, to the procedure and qualifications for the appointment of judges, and guarantees relating to their security of tenure until a mandatory age or the expiry of their term of office, where such exist, the conditions governing promotion, transfer, suspension and cessation of their functions, and *the actual independence of the judiciary from political interference by the executive branch and legislature …".*

[159] *Ibid,* para. 19.

[160] *Report of the UN Special Rapporteur on the Independence of judges and lawyers* (A/HRC/11/41), 24 March 2009, p. 6 (citing E/CN.4/2004/60), para. 28.

[161] *General Comment no. 32: Right to Equality before the Courts and Tribunals and to a Fair Trial*, UN Human Rights Committee (CCPR/C/GC/32) 23 August 2007, para. 18.

carrying out their judicial functions, including from attacks but also from the application of other methods of pressure from political organs. The protection of judges against conflicts of interests and pressure has come to be addressed in this context.[162]

Reviewing the relationship of international criminal justice with the Council against the backdrop of the human rights-understanding of what judicial independence means and requires would lead to negative outcomes. In particular, while those tribunals, which have been fabricate by international treaty, whether multilateral (Rome Statute) or bilateral (SCSL), would indeed meet the first requisite "established by law", others, such as the ICTY and the ICTR, having been produced as a result of the adoption of a Council resolution, would not. Even if some critics have begun to describe certain Council decisions under Chapter VII as amounting to "legislative actions" or "international legislation",[163] strictly speaking and seeing that the Security Council is an executive organ, from the position of constitutional legal philosophy, its conclusions seem more similar to "decrees with the force of law".

In contract, with respect to the second and third requisites, it is valuable to evoke what has been pointed out by Ruth MacKenzie and Philippe Sands that examples of direct conflict or interference in deciding legal matters in international proceedings may well be uncommon, on the other hand, "the degree of control exercised by political organs over judicial bodies through financial and procedural mechanisms may be significant".[164] Their explanations direct attention to an elementary problem of the "international judiciary"

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[162] UN Human Rights Committee, *General Comment no.* 32: *Right to Equality before the Courts and Tribunals and to a Fair Trial* (CCPR/C/GC/32) of 23 August 2007, para. 19.

[163] See e.g. Paul C. Szasz, "The UN Security Council Starts Legislating", *American Journal of International Law,* vol. 96, no 2 (2002) 901-909; and Stefan Talmon, "The UN Security Council as a World Legislature", 99 *American Journal of International Law 175* (2005). But note that both articles refer to UNSC resolutions adopted in response to international terrorism although Talmon also refers to UNSC Res 1422 (2000) and UNSC Res 1487 (2003) related to the International Criminal Court. Martti Koskenniemi, "The Police in the Temple: Order, Justice and the UN: A Dialectic View", 6 *European Journal of International Law* (1995), p. 2: "The setting up of two ad hoc war crimes tribunals to issue binding judgements seems already precariously close to international legislation".

[164] Ruth Mackenzie and Philippe Sands, "International Courts and Tribunals and the Independence of the International Judge", 44 *Harvard International Law Journal 275* (2003).

resulting from an absence of division of powers prevailing in the international setting. In the land of criminal justice, particularly worrying are the variety of procedural instruments that have been formed so as to permit the Council to influence the focus and outcome of international criminal proceeding, in precise the right to refer situations to the ICC Prosecutor while also suspending on-going ones. Yet, as also noted in this paper, the political control applied by the Council is particularly accentuated in the constitutive moment of these tribunals. In the light of these findings, is it actually possible to uphold that the international tribunals and courts are sufficiently independent from the Security Council?

3. Judicial Independence: An International Criminal Law Perspective

To be sure, all the statutes of the international criminal tribunals in focus support an obligation to the principle of judicial independence.[165] At the same time, a closer analysis of these statutes exposes that the meaning of the principle in focus has been reduced to fundamentally denote a quality of international judges and prosecutors. In specific, all statutes build upon an understanding that the principle generates, on the one hand, a obligation of appointed international judges and prosecutors to safeguard their independence in performing their judicial functions[166] and, on the other hand, a responsibility of the electorate to guarantee that only persons who are known to be of high moral character, impartiality and integrity, may get to work for on the bench as a judge or as a prosecutor.[167] The Statute of the Special Tribunal of Lebanon (2007), which is the detailed one, identifies an obligation of judges to be "independent in the performance in their functions" and "not accept or seek instructions from any Government or any other

[165] For a general account of judicial independence as defined in international law, see Chester Brown, "Evolution and Application of Rules concerning Independence of the International Judiciary", 2 *The Law and Practice of International Courts and Tribunals 63* (2003); and Dinah Shelton, "Legal Norms to Promote the Independence and Accountability of International Tribunals", 2 *The Law and Practice of International Courts and Tribunals 27* (2003).

[166] ICTR Statute, art. 11 (composition of the chambers); art. 12 (qualification and election of judges); art. 15(2) (the prosecutor). But note also ICTY and ICTR Prosecutor's Regulation no.2 (1999) on Standards of Professional Conduct; East Timor UNTAET Regulation no 2000/11, art. 2.1 ('judges shall perform their duties independently').

[167] ICTR Statute, art 12. (qualification and election of judges).

source".[168] On the other hand, within the background of international criminal justice, the principle in focus has little if no bearing upon institutional circumstances and relationships between courts and tribunals (on the one hand) and international executive or political organs (on the other).

Also, the international criminal tribunals themselves have permitted the uncertain interpretation of what judicial independence means and requires in the international situation. True, the judges of the ICTY and the ICTR, which must be seen as the least independent ones, institutionally speaking, by no means deny the significance of the more institutionally-oriented requisites ("established by law" and "actual division of powers") all together. Still, when addressing the problem, both tribunals have wanted to offer a reinterpretation of these two requisites, which in their view must control to the institutional particularities and conditions relating in the international setting.

One of the first tests set forth by an accused before the ICTY was that the tribunal failed to be independent as it had not been established by law.[169] In the Tadic case, the accused claimed that the right to have a criminal charge determined by a tribunal "established by law" must be respected as it must be considered as a "general principle of law recognized by civilized nations" (and, thus, is a source of international law according to article 38 of the Statute of the International Court of Justice). Replying to this charge, however, the ICTY Appeals Chamber unanimously excluded this understanding of the international legal scope of this requisite and, to this end, preserved that judicial independence is a general principle of law imposing an international obligation, which only applies to the administration of criminal justice in a municipal setting.[170] It then expressed a more specific argument about the basis for its position on this substance. In their view, the basic dilemma challenged in the international context has to do with the lack of a legislature, at least in the technical sense, with competence to establish international tribunals by law.[171] Because of this absence, the divisions of powers between the executive,

[168] Statute of the Special Tribunal for Lebanon, art. 9(1).

[169] *Prosecutor v. Dusko Tadic. Decision on the Defence Motion for Interlocutory Appeal in Jurisdiction,* ICTY, 2 October 1995.

[170] *Ibid.,* para. 42.

[171] *Ibid.,* para. 43.

legislative and judicial competences between the different international organs of the UN are not well defined.

A second disagreement related to "established by law" and set forth by the Chamber focused on the UN Charter-based wide competences of the Security Council. According to the judges, the Council is an organ, which though not a Parliament "has a limited power to take binding decisions." Really, when the Council acts under Chapter VII of the UN Charter, it decisions are binding by virtue of article 25 of this Charter.[172] In their view, what eventually matters is that the Council acts in compliance with the authority conferred in it under the Charter. And seeing the very broad discretionary power gave to it under Chapter VII, it must be concluded that it has done so. Also, it is not without significance that the UN General Assembly, which is a more characteristic organ then the Council, has contributed, approved and permitted its creation. Against this contextual, the Chamber set out what it held to be the most practical and likely interpretation of the requisite "established by law" in the international context. Thus, what ultimately matters is that: "The establishment of an international court ought to be rooted in the rule of law and offer all guarantees embodied in the relevant international instruments."[173]

In specific, an international tribunal "must be established in accordance with proper international standards; it must provide all the guarantees of fairness, justice and even-handedness, in full conformity with the internationally recognized human rights instruments". Also, "what is important is that it be set up by a competent organ in keeping with the relevant procedures, and… that it observes the requirements of procedural fairness". Finally, as held by the Chamber, the most important fear is that the ad hoc tribunals afford to the individuals before them basic fair trail guarantees in the sense of securing the rights to defence and to inspect the evidence, etc. In the light of these influences, the Chamber found that the ICTY had been set up in agreement with the appropriate procedures under the Charter and provides all the necessary protections of a fair trial.

[172] *Ibid.,* para. 44.

[173] *Ibid.,* para. 42.

A similar challenge was to be set forth before the ICTR that provided a similar reply to that of the ICTY[174] furthermore stressing that: "There was a need for an effective and expeditious implementation of the decision to establish the Tribunal and, hence the treaty approach would have been ineffective because of the considerable time required for the establishment of an instrument and for its entry into force."[175]

In answer to the charge that the ICTR was "just another appendage of an international organ of policing and coercion, devoid of independence", its Trial Chamber underscored that "the Tribunal of Rwanda is a separate Tribunal from the Council with its own Statute, its own sphere of jurisdiction and its own rules off operation and as such it has legal independence". Furthermore, it pointed out that "criminal courts worldwide are the creation of legislatures which are eminently political bodies" and referred to the case *Effect of Awards of Compensation made by the United Nations Administrative Tribunal* (1954) in which the International Court of Justice specially held that a political organ of the UN, in that case, the General Assembly, could and had created "an independent and truly judicial body".[176] And, it also directed devotion to the related duties of ICTR judges: "The judges of the Tribunal exercise their judicial duties independently and freely and are under oath to act honourably, faithfully, impartially and conscientiously as stipulated in rule 14 of the Rules of Procedure and Evidence Judges do not account to the Security Council for their judicial functions".[177]

The line of legal reasoning accepted by the two ad hoc tribunals regarding the fact of being incapable of exchange of national standards and the need to advance a different version of judicial independence to be applied in the international setting finds some significance in more general international legal thinking. For instance, in his article dedicated to judicial independence of international courts and tribunals, Chester Brown efforts on their configurations, including the way in which their judges are appointed, and which tribunals and courts allow the appointment of ad hoc judges. Also under attention are

[174] *The Prosecutor v. Joseph Kanyabashi,* Case No. ICTR-95-15-T. Decision on the Defence Motion on Jurisdiction (18 June 1997).

[175] *Ibid.* para. 10.

[176] *Ibid.*

[177] *Ibid,* para. 41.

the proscription of any incompatibility roles and the possibility of challenging and disqualifying judges. At the same time, no direct attention is paid to the relationship between the international judiciary, on the one hand, and the Security Council, on the other.[178] Writing in 2003, Ruth Mackenzie and Philippe Sands, obviously very aware of the problem of reducing the notion of judicial independence, formulate their concern as a question: "Is it appropriate to treat the independence of the international judiciary as one would that of national judges, or is there something qualitatively different about international law and courts (i.e. the popular refrain that international justice is merely international politics writ larger) such that different standards should apply in the international setting?[179]

The Burgh House Principles of the Independence of the Judiciary (2003), which was established by the ILA Study Group on the Practice and Procedures of International Courts and Tribunals (2003), are not limited to a consideration of the independence of judges alone but spread a consideration, although in general terms, of the institutional aspect of judicial independence. The *Burgh House Principles* set forth that: "where a court is established as an organ or under the auspices of an international organization, the court and judges shall exercise their judicial functions free from interference from other organs or authorities of that organization. This freedom shall apply both to the judicial process in pending cases, including the assignment of cases to particular judges, and to the operation of the court and its registry".[180]

Regarding at the case in focus of this paper in the light of this provision, it is probable to conclude that insofar as the Council refrains from interfering into the judicial function and process in pending cases, in the assignment of cases to particular judges, and in the process of the court, its relation with the international criminal tribunals seems to be acceptable. There is no direct reference of the institutionally focused on human rights-based requite that we take for granted as appropriate to the national setting, i.e. Furthermore, from the

[178] Chester Brown, 'The Evolution and Application of Rules concerning Independence and the "International Judiciary"', *The Law and Practice of International Courts and Tribunals,* vol. 2 (2003), 63-96.

[179] Ruth Mackenzie and Philippe Sands, "International Courts and Tribunals and he Independence of the International Judge", 44(1) *Harvard International Law Journal* 275, 276 (2003).

[180] Burgh House Principles on the Independence of the International Judiciary, art. 1.2.

perspective of these principles, the problem related to the 'separation of powers' will eventually depend on what counts as 'interference' into the judicial function.[181]

4. The Independent Judiciary and Freedom from Non-interference

From the position of international human rights law, the international legal duty to set up and uphold an independent judiciary is inseparably related to fair trial guarantees. A tribunal is independent if it has been 'established by law'. Is independent from the executive and legislative branches of government, and enjoys in particular cases independence when deciding matters that are judicial in nature. But while this understanding of the principle is generally cherished in international human rights law as an essential prerequisite for judges to be able to manage justice in national settings, it has come to be regarded by international law researchers and judges as insufficient as a standard for evaluating the independence of international criminal tribunals. Certainly, the statutes and jurisprudence of the judicial organs in focus expose an acceptance of the narrow meaning of judicial independence as mainly referring to an attribute of international judges and not to the nature of the institutional setting in which international judging takes place. At this time, then, there is no clear international legal basis for measuring, or criticizing, the considerable degree of political engagement with criminal justice in the international setting and which this paper has attempted to discover.

This may nevertheless be a to some extent hurried conclusion that would obstruct us from complaining to what may still be regarded as unfortunate implications of the current state of affairs. If nothing else, such a stance prevents us from appreciating the principle of judicial independence in its ambition to function as a critical standard of evaluation, not merely of judicial conduct of persons (judges and prosecutors), but also of the features of the judicial organs in which judging takes place.[182] When reflecting upon the notion of judicial independence, John Ferejohn notes that, historically attempts to secure judicial independence have often adopted a perspective of the individual judge and stressed her

[181] But also note principle 8.2 according to which "judges shall not exercise any political function".

[182] But note that there is little (scholarly) agreement on what is meant by judicial independence. See C. Neal Tate and Linda Camp Keith, "Conceptualizing and Operationalizing Judicial Independence Globally". Paper presented at the Annual Meeting of APSA in Dallas (2006).

right to be free from interference when performing judicial functions. However, in modern legal though, judicial independence is taken to have two dimensions: one that is personal (internal) and one that is institutional (external) so that it makes sense to distinguish between independent judges and an independent judiciary.[183]

Now, it is imperative to find out why we would need to consider the latter the dimension when thinking about and addressing matters related to judicial independence in and international setting. The first aspect to be recalled is that "judicial independence is a complex value in that it really cannot be sun as something valuable in itself. Rather, it is instrumental to the pursuit of other values, such as the rule of law or constitutional values".[184] Thus, in an imperative sense, judicial independence may not be a value to be valued for its own sake, but only insofar as it is an essential condition for protecting the Rule of Law and fundamental or human rights. That being said, there is sizable disagreement whether the Rule of Law and human rights protection are values that are actually best realized through the promotion of a judiciary that enjoys a high amount of institutional independence.[185] As Ferejohn remind as, dependence is not necessarily and always a bad thing. For one thing, all courts are rather dependent on the executive for getting cases to hear and carrying out judicial orders and this is obviously true also for international criminal tribunals. In this setting, a reference should be made to the finding of Eric Posner and John Yoo that international tribunals are least effective when they are independent.[186]

Not every effort to limit juris diction can sensibly be seen as amounting to an objectionable interruption on judicial independence. For instance, some restrictions forced

[183] John Ferejohn, "Independent Judges, Dependent Judiciary: Explaining Judicial Independence", 72 *Californian Law Review* 353 (1998-1999), at 356. See also Sandra Day O'Connor, "Vindicating the Rule of Law: The Role of the Judiciary", *Chinese Journal of International Law 1* (2003), at p. 3.

[184] John Ferejohn, "Independent Judges, Dependent Judiciary: Explaining Judicial Independence", 72 *Californian Law Review* 353 (1998-1999), at 353. See also Sandra Day O'Connor, "Vindicating the Rule of Law: The Role of the Judiciary", *Chinese Journal of International Law 1* (2003).

[185] See e.g. Lorenzo Gradoni, "International Criminal Courts and Tribunals: Bound by Human Rights Norms… or Tied Down?", 19 *Lieden Journal of International Law* 847 (2006).

[186] Ericl Posner & John Yoo, "Judicial Independence in International Tribunals", 93 *Californian Law Review* 1 (2005). For a response, see Laurence Helfer & Anne-Marie Slaughter, "Why States Create International Tribunals: A Response to Professors Posner and Yoo", 93 *Californian Law Review* 899 (2005).

on jurisdiction, including international ones, are simply aimed at increasing the effectiveness of international criminal tribunals by removing insignificant cases to national courts.[187] While not an uncontroversial argument, it may be possible to consider alleged crimes of peacekeeping operations as falling into this category of cases, too, in the sense that they may be more successfully dealt with by the sending States. Moreover, it might also be possible to defend the high level of directing of international investigations and prosecutions onto particular crimes or categories of persons on similar rational grounds. In this light, the targeted prosecutions of the crimes of terrorism in Lebanon, the crimes of national leaders in Sierra Leone would not amount to objectionable limitations of international criminal justice, but are only ways of maximizing the effectiveness of this measure.

Moreover and especially important when judging the group of judicial organs in focus is that their ability to investigate into alleged crimes when committed in conflict situations depend to a significant degree upon the willingness of the Security Council and its peacekeeping operations to provide security and protection to the investigation teams in the field. In fact, in order to secure effectiveness of these judicial organs in practice, the Council and the tribunals must work side-by-side with one another, organize their actions, exchange information, and collaborate with one another. This reality specifies the need to move away from an exclusive focus on negative definition of the institutional aspect of judicial independence as meaning an actual division of powers to a consideration of a positive definition of this notion that takes seriously the benefits that flow from the fact of mutual interdependencies and relationships, including overlapping international political and judicial functions in conflict situations that extent to a security threat.[188]

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[187] John Ferejohn, "Independent Judges, Dependent Judiciary: Explaining Judicial Independence", 72 *Californina Law Review* 353 (1998-1999), at 361.

[188] For a consideration of the need for a positive definition of judicial independence, see Pamela S. Karlan, "Two Concepts of Judicial Independence", 72 *Californian Law Review* 535 (1998-1999). Here I have in mind the possibility of understanding of the relationship between the UN Security Council and international criminal justice in the light of how Vera Gowland-Debbas defines the relationship between the Security Council and the International Court of Justice in the light of their complementary and overlapping functions. See Vera Gowland-Debbas, "The Relationship between the UN Security Council in the Light of the Lockerbie Case", 88 *American Journal of International Law* 643 (1994). But also note in this context her consideration of the UN

That being said, even if judicial dependence on political organs is not always a bad thing and that the possibility of jurisdiction may legitimately be limited by the latter for reasons related to effectiveness, in my view, it is still of essence to be wary of the risks of encouragement a overall attitude of agreement towards the remarkable degree of political engagement and control over the possibility of jurisdiction in the international setting. As Ferejohn points out: "The more genuine threats to judicial independence if we interpret it as providing a broad guarantee that people can have their disputes decided in front of independent judges are not really the sporadic attacks on individual judges, but instead are attempts to diminish or regulate the powers of the judiciary as a whole".[189]

It is obvious that the connection between political power and judicial organs are complex and delicate and whose stability in the end depends on the fostering of social rules of mutual recognition, trust and respect. In the national setting, the independence of the judiciary depend on upon the 'willingness' of political branches of government to abstain from using their constitutional powers to breach on judicial authority, but that the variety and heterogeneity of political parties makes it difficult to form constitutional majorities proficient of infringing on judicial powers.[190] In the international setting, on the other hand, only the variety of interests of the Permanent Five and their veto powers would delay them form forming the agreement to adopt a resolution not only to create a new judicial organ, but also to regulate its jurisdiction and this sense control its ability to select situations and cases in a way that serve not just to counter the security threat, but also their specific interests. So far, it seems to have been mainly easy to agree on exactly these matters.

5. Concluding Remarks

It appears rational to presume that the narrowing down of the meaning of judicial independence when gaining the institutional conditions and relationships of international criminal tribunals is the consequence of a fragile balancing act among competing goods and

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Security Council and the ICC: Vera Gowland-Debbas, "The Relationship between the UN Security Council and the Projected International Criminal Court", 3 *Journal of Conflict and Security Law* 97 (1998).

[189] John Ferejohn, "Independent Judges, Dependent Judiciary: Explaining Judicial Independence", 72 *Californian Law Review 353* (1998-1999) at 360.

[190] *Ibid.* at 382.

standards at stake which has been undertaken by ever so skilfully lawyers and scholars who are very conscious of the actual challenges of politicization of international criminal justice and of this amount as changing itself into nothing but a only international political instrument in the hands of the most influential members of the Council. Yet, even if it appears vital not to seek to block the fight against impunity in situations of massive crime with high arguments about judicial independence and the Rule of Law, and that it is likely to protect the understanding now supported as reflecting at the very least a set of organizations that are as "just as it is reasonable to expect them to be in the circumstances",[191] such conclusion nonetheless falls short of pointing to what is clearly challenging with the recent institutional plan.

To be certain, judicial independence is a complex that it is not an end in itself but only active to the chase of other goods, as stated in the UN Basic Principles on the Independence of the Judiciary, those goods contain "the principles of equality before the law, of the presumption of innocence and of the right to a fair and public hearing by a competent, independent and impartial tribunals established by law".[192] Though, as this paper has showed, in international legal research, there is still no established agreement on just how independent a judicial organ must really be in order to be able to understand these goods in a real way or how to approach the reality of mutual willingness and interdependence. At the same time, it stands clear, or so I will conclude, that the ability of the Council to defend its members' nationals from having to distress that their names will one day come on the tag of international criminal tribunals, rather regardless of the gravity of their activities and even if really never carried before trial at home, means that the recent system is at sword's point with the Rule of Law and equality before the law. If this is the actual state, and if equality, at least formal equality, is an essential assessment of human right, the value of judicial independence must be observed as a dangerous fear when

[191] John Rawls, *A Theory of Justice,* Harvard University Press, Cambridge, Massachusetts, 1999, p. 99. Rawls defines the natural duty of justice as a duty that requires us to support and to comply with just institutions that exist and apply to us. If the basic structure is just, or as just as it is reasonable to expect in the circumstance, everyone has a natural duty to do his part in the existing scheme.

[192] Basic Principles on the Indepence of the Judiciary, adopted by 7th UN Congress on the Prevention of Crime and the Treatment of Offenders, Milan between 26 August to 6 September 2017 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

assessing the direct impact of the role of the Security Council in the field of international criminal justice not only on its ability to secure fair trial guarantees, but also as a vehicle to the founding of the Rule of Law as a supporter of lasting peace in international relations.

Recommendations

Transformations to the ICC-Security Council relationship will be essential to ensure the Court's sustainability. As a first step, short-term practical reform will help advance the Court's efficiency. Yet, the legitimacy crisis can only be resolved by deep structural reforms in the Security Council's structure and controls.

Before addressing those real changes that are necessary, it is worth stating general attitudes to improvement, which truly symbolize the debate between realism and idealism in international relations. On the one hand, "pessimist" realists are likely to see States has only do well based on their self-interest. Since the ICC's functioning is largely reliant on on big powers, and realists would say that big powers will never settle to change,[193] then reform predictions would be miserable. Influential nations like China, Russia and the US have always been different to the ICC, an institutional perceived as threatening to their sovereignty. They have in fact not ratified the Rome Statute. As Lauri Malksoo, an Estonian legal professor would say, "it is not cynical but responsible to ask: Why would the Security Council change? If its existence is ruled by the primacy of the political, why not intellectually recognize that double standards and inconsistencies are constant in the politics of the Security Council?"[194] Are we just going to say, like Jurdi, that the ICC is a victim of the world order?[195]

Today's international system unquestionably reproduces limited victories of collective action. Regardless of their self-interest, States have agreed to gladly join it even in examples in which, hypothetically, they had no inducement to do so, except the advancement of the public interest and the greater good. While the international balance of power has an influence, and bounds the ICC's potential, the existence of the Court itself reflects how collective action can prosper. As such, I will argue that a series of practical, advanced reforms should be pursued. Structural reforms are in the long term essential, if we

[193] Interview of Nidal Jurdi, visiting scholar at McGill University's Faculty of Law (29 October 2014) [Jurdi].

[194] Lauri Malksoo, "Great powers then and now: Security Council reform and responses to threats to peace and security" in Peter G Danchin & Horst Fischer, eds, *United Nations Reform and the New Collective Security* (Cambridge: New York: Cambridge University Press, 2010) 94 at 100 [Malksoo]

[195] Juridi, *supra* note 193.

want to our international system to survive the 21st century. However, it seems more rational and realistic to aim at short term reforms with the goal of improving cooperation between the Court and the Council, clarifying the use of Security Council powers, and improving the Court's general legitimacy, a step necessary as a requirement for long term structural reforms.

1. Short Term Reforms

a. Improve ICC-UNSC Cooperation

The requirement for better cooperation between the ICC and the UNSC was underlined during the recent October 23rd Open Debate on the Working Methods of the Security Council. The absence of cooperation and follow-ups on referrals were recognized as major weaknesses to the Court's efficiency.[196] Reforms in this deference are therefore essential.

Numerous ideas of reforms were bought up at the October 23rd Open Debate. The lack of an actual instrument for follow-ups was the main problem. Several States insisted on the creation of such processes.[197] Also, the Council also does not have a specific policy with respect to non-compliance. Particular methods need to be established for when States fail to obey with a referral resolution.[198] Lastly, several States questioned the absence of communication between the two organs. Improving the frequency of communication from the current occasional briefings could be a helpful step.[199]

During her involvement, Fatou Bensouda, ICC Chief Prosecutor, also underline some key reforms to assume. She highlighted the need for a working group for international tribunals, which would be in charge of securing the necessary resources form the Secretariat, States and other actors to address follow-up challenges on a case-by-case basis.[200] David Scheffer had also made similar suggestion in his 2005 Georgetown Journal of

[196] UNSCOR, 7285th meeting, S/PV.7285 (2014) [S/PV.7285].

[197] *Ibid.*

[198] *Ibid.*

[199] *Ibid.*

[200] *Ibid.*

International Law article. Indeed, he suggested that Security Council established a Liaison Group with International Courts to make sure peace and security objectives are well understood by the Courts and to guarantee cooperation.[201] Such a Group could counsel the Council as to when and under what circumstances referral and deferrals should be made to limit allegations of interference.[202]

In addition, according to Bensouda, the Council and the Court need to form situation-specific activities to measure progress as well as identify challenges and areas in need of development. This would in turn facilitate enhanced coordination among relevant actors.[203] With respect to practical help, more operational arrest strategies have to be planned, and there has to be better management among the UN, the ICC, the Assembly of States Parties and individual States to track and document the activities and travels of accused persons. More detailed information is necessary to improve follow-up capabilities.[204]

Lastly, the doubt of language used in referral resolutions have made unclear States' obligation to cooperate.[205] The OTP therefore believes stronger language has to be used by the Security Council to clarify States' obligations.[206] The Security Council needs to call on non-States parties for help, as they have been creating safe havens for individuals against whom arrest warrants have been issued.[207] Council needs to adopt a safer stance on this matter, and put in place the suitable sanctions for non-compliance under Chapter VII of the UN Charter.[208] The Netherlands further highlighted the need for the Council to emphasize

[201] David Scheffer, "Blueprint for Legal Reforms at the United Nations and the International Criminal Court" (2004-2005) 36 Geo. J. Int'l L 683 at 693 [Scheffer].

[202] *Ibid* at 694, 697

[203] S/P. 7285, *supra* note 196.

[204] *Ibid.*

[205] *Ibid.*

[206] *Ibid.*

[207] *Ibid.*

[208] Charter, *supra* note 5, at Chapter VII.

States' *erga omnes* responsibilities under international law to fight impunity for international crimes.[209]

b. Clarify parameters for the use of deferral/referral powers

Founding clearer guidelines for the use of referral and deferral powers would also be a vital short-term step to reduce political interference.[210] More consensually regulated behaviour in this regard could improve Security Council resolutions' legitimacy.[211]

Limitations to ICC jurisdiction and selectivity are at this time the referrals' main problems. First, the Security Council should stop excusing categories of nationals. Alamuddin claims that they should instead be based on the crime's severity.[212] "In order to reduce the suspicion that the Court is a tool for selective justice, the Council should in future referrals not include language exempting certain nationals from the Court's jurisdiction."[213] In addition, referral strategies should control when the Council decides to refer a situation. For example, findings of an UN-established that international crimes have been committed might mechanically activate a referral discussion at the Council.[214] As a final point, referral guidelines should also be designed considering the P5's use of the veto. The case of Syria has shown that the veto has been used to defend the P5's political interests. Many researchers, experts and civil society organizations have claimed for the adoption of a code of conduct prohibiting the use of veto in cases of mass atrocities.[215] Really, following Russia and China's veto of the referral of Syria to the ICC, several NGO's issued a statement influence the Council to restrain its use.[216]

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[209] S/PV. 7285, *supra* note 196.

[210] Several scholars has stressed this need for regulation of Security Council behaviour. See e.g. Alamuddin, *supra* note 7; Boon, *supra* note 44; Gallavin, *supra* note 56; Murungi, *supra* note 58.

[211] Gallavin, *supra* note 56, at 32.

[212] Alamuddin, *supra* note 7 at 127.

[213] *Ibid.*

[214] *Ibid* at 128.

[215] Boon, *supra* note 44.

[216] "Joint NGO Statement on the Use of the Veto" (2014), online: Global Centre for the Responsibility to Protect http://www.globalr2p.org/media/files/joint-ngo-statement-on-the-use-of-the-veto.pdf .

Of course, keeping realistic expectations as to the P5's agreement to limit their powers is essential. However, France has recently organized an initiative to limit the use of the veto. French diplomats made an announcement in this regard at the October 23rd Open Meeting on the Working Methods of the Security Council, and got support from several countries.[217] Such an initiative from a permanent member leaves some hope as to the P5's will to see their behaviour regulated for the sake of international justice.

Strategies for deferrals should limit abusive practice, and stop diplomats from using them to allow complete exclusions.[218] Researchers have planned different alternative requirements. Luigi Condorelli and Santiago Villalpando suggested that the UNSC should only use deferrals after a fast determination of violation had been made under article 39 of the Charter.[219] Murungi only spoke of creating a "high threshold" for the threat to peace.[220] Antonio Cassese however reasoned that the precise interpretation of article 16 required that the Security Council only used deferrals when action of the ICC itself started threats to peace and security under article 39.[221] The only sure thing is, guidelines have to guarantee deferrals are only used where ICC investigations and prosecutions actually constitute threats to peace and security under article 39 of the UN Charter.

2. Long Term Reforms

The use of veto to stop referrals and the Council's composition not representative of the world's balance of powers have been the two important features leading to political biased results of the Councils with respect to the ICC. Changes will have to address those problems. The Following segment will challenge such necessary changes.

a. Full removal of the Security Council from the Rome Statute?

When thinking of improving the ICC-UNSC relationship, the alternative of completely eliminating Security Council's deferral and referral powers has to be considered.

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[217] S/PV. 7258, *supra* note 196.

[218] Alamuddin, *supra* note 7, at 129.

[219] Gallavin, *supra* note 56, at 32

[220] Murungi, *supra* note 58, at 15.

[221] Cassese quoted in Gallavin, *supra* note 56 at 32.

While it has been realized that referral and deferral powers have been used by the Security Council to effect to direction of prosecutions, if used correctly, Security Council's powers can have a positive result. Referrals can allow for circumstances that would otherwise collapse outside of the Court's jurisdiction to be investigated. Deferrals, if used suitably, can be really essential to maintain peace and security. As much, removing the Council's role overall would not make sense, and, realistically would never be agreed upon. As an alternative, addressing the issues posed by article 13 and article 16 through reforms should be privileged. The 2004 report of the Secretary General's High Level Panel on Threats, Challenges and Change indeed decided that the Security Council was still the best organ to answer to crises.[222] "Thus, the challenge for any reform is to increase both the effectiveness and the credibility of the Security Council and, most importantly, to enhance its capacity and willingness to act in the face of threats."[223]

b. Reforming the Security Council's Composition and Veto Power

The dispute surrounding Security Council reorganisation has occurred since its creation. In 1950, Hans Kelsen had already predicted that veto power would be the greatest likely source of upcoming challenges of the Council's legitimacy.[224] To date, the only reform happened in 1965 when the number of non-permanent members rose from 6 to 10.[225] The question of Security Council was brought back to the GA's agenda after the Cold War.[226] A Working Group in control of negotiations was created in parallel. As of then, the issue of reforming the Security Council learned importance at the UN.[227] Even though major debates at the GA, particularly in the framework of the 2005 World Summit, no agreement has been

[222] *A more secure world: Our shared responsibility – Report of the High-level Panel on Threats, Challenges and Change,* UNDPIOR, (2004) at para 247 [A more secure world].

[223] *Ibid* at para 248.

[224] Malksoo, *supra* note 194, at 94.

[225] Serge Sur, "La debat sur la reforme du Conseil de Securite" in *Le Conseil de securite dans l'apres 11 septembre* (Paris: Libraire Generale de Droit et de Jurisprudence, 2004) 135 at 135 [Sur].

[226] In 1992, the GA passed a resolution officially putting the question of Security Council from 1945 to September 2013" (September 2013), online: Center for UN Reform Education http://centerforunreform.org/sites/default/files/SC%20Reform%20Sept%202013%20publication.pdf .

[227] *Ibid* at 4.

realized. SC Reform has recently been relegated to a new forum: the Intergovernmental Negotiations.[228] An Advisory Group on Security Council was also created in 2012.

Any modification to Security Council structure or powers would require an amendment to the UN Charter. Doing so would require a vote in favour by the two thirds of the GA, and all UNSC permanent members.[229] Getting the P5 to agree to reforms will therefore be the biggest test.

Council structure and veto power are the main challenges of Security Council reform. To being with, realizing a better image of today's balance of powers is the main objective of Security Council enlargement. Certainly, a more representative Council would lead to more democratic results, and so less claims of bias with respect to referrals and deferrals to the Court. The Secretary General's High Level Panel suggested broadening UNSC membership to be more representative of UN membership, particularly opening up the Council to developing countries.[230] The Panel even presented enlargement as a necessity.[231] There is a general agreement on the need for permanent seats for Germany and Japan, the idea of enlargement to new permanent members from underrepresented continents, and the idea of adding of non-permanent members.[232] Developing economic powers such as Brazil, India and South Africa have repeatedly expressed their aspiration to join, particularly in light of their important financial input to the UN. The identity of new permanent members, the number of new non-permanent members, and the correlative changes in voting procedure still need to be agreed upon.[233] All in all, reducing the possibility for States to make self-interested decisions has to be such organizational changes' purpose.

While the use of the veto has permitted the P5 to effect which situations were referred to the ICC, it is also hard to consider full removal of veto power.[234] The P5 perhaps would not agree to such measure, and either way the Panel in fact did not deem it

[228] *Ibid at 23.*

[229] *Charter, supra* note 5, art 108.

[230] A more secure world*, supra* note 222, at para 249.

[231] *Ibid* at paras 250-251.

[232] Sur, *supra* note 225, at 136-137.

[233] *Ibid* at 137.

[234] Sur, *supra* note 225, at 136-137.

advisable.[235] As an alternative, regulating the use of the veto appears more a more practical step. There have been numerous initiatives to limit the use of the veto in cases of humanitarian crises.[236] The French suggestion for a code of conduct previously discussed or the "Responsibility not to veto" project[237] are good samples. To conclude, a form of indirect veto could appear if the number of non-permanent members is suitably increased to allow the possibility for a majority of States to face the P5's decisions.[238] In short, regulating the use of veto when dealing with international crimes would prevent the Council from limiting the advancement of justice for purely political reasons.

c. Increasing the General Assembly's role

Some have claimed that a bigger role for the GA could help democratize referrals and deferrals. Under article 11 of the UN Charter, the GA can make recommendations to the Security Council, and may call to it attention to situations that endanger peace and security.[239] It however cannot make recommendations with respect to a situation already on the Council's agenda.[240] Increasing the GA's role would necessitate amendments to the Rome Statute.[241] It would be based on the principle that came out of the Uniting for Peace resolution[242] that "where the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security, the General Assembly shall seize itself of the matter.[243]" The AU in fact suggested an amendment to article 16 that would allow the UNGA to act

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[235] Malksoo, *supra* note 194, at 96.

[236] Sur, *supra* note 225, at 143.

[237] See "The Responsibility Not to Veto: A Way Forward" (2012), online: Citizens for Global Solutions https://globalsolutions.org/files/public/documents/RN2V_White_Paper_CGS.pdf.

[238] Sur, *supra* note 225, at 144.

[239] Charter, *supra* note 5, art 11.

[240] *Ibid* art 12.1.

[241] Schabas quoted in Sharam Dana, "Law, Justice & Politics: A Reckoning of the International Criminal Court" (2009-2010) 43 J Marshall L Rev xxiii Foreword.

[242] Christian Tomuschat, "Uniting for Peace General Assembly Resolution 377(V)," online: UN Office of Legal Affairs http://legal.un.org/avl/ha/ufp/ufp.html .

[243] *Ibid.*

where the UNSC would have failed to do so within a certain period of time.[244] Of course, putting the procedure in the hands of the GA would not remove the political part. However, it is undeniable that the GA is more typical of global opinion than the Security Council. Democratization should be the aim of organizational change.[245] As such, imaging a role for the GA in referrals and deferrals could possibly partly address the not as much powerful countries' claims of bias.

[244] Murungi, *supra* note 58, at 8.

[245] Zifcak, *supra* note 33, at 42.

Conclusion

The Security Council has a vital responsibility to take actions to keep international peace and safety. The ICC has jurisdiction over four categories of international crimes which are genocide, crimes against humanity, war crimes and aggression that are risk to international friendship and protection. It can be noted that these two self-governing institutions have nearly same aim. The relationship between the Security Council and the ICC is debatable because many believe that the involvements including referral and deferral of the Security Council weaken the ICC's independence and impartiality. Some matters related to Syria, peacekeepers, and funding can be given examples to show the Security Council act with political interest.

I strongly think that the Prosecutor can begin an investigation about situation where one or more of the criminal acts are committed in the area of a state which has not established the Rome Statute or are hurt by the citizens of similar nation subject to judicial approval instead of the Security Council referral. The Security Council should direct that all UN member nations completely cooperate with the ICC in at all investigation, and should support the ICC with its enforcement powers pursuant to Chapter VII of UN Charter. In my opinion, the Security Council deferral is interference with the independence and impartiality of the ICC and like authority is never give to political organ.

The International Criminal Court as a permanent international court has mainly pleased the international community and mainly the victims of the most serious international crimes all around the world. The ICC which is an independent and impartial court can fight impunity more strongly compared with 'ad hoc tribunals'. The Rome Statute formed a relationship between the ICC and the Security Council that is the main organ of the UN and has duty to uphold international peace and security. Still, this connection between them should not weaken the judicial structure of the ICC, since the Security Council is a political body and covers permanent members which have political, economic and military power.

The deferral power of the Council has more harmful effects on the mandate and independence of the ICC, compared with the referral mechanism, because after the Council makes a referral, the Prosecutor may not start an investigation about it. Furthermore, the

referral power as an activating factor can deliver more international support to the ICC. The deferral power which can suspend a current investigation or prosecution should be removed from the Statute, because it clearly interferes in judicial order and independence. In addition to that, the Security Council should abstain from referral resolutions which contain similar results to deferral mechanism (immunity of some groups from ICC jurisdiction), such as Darfur and Libya Resolutions. As a consequence, the Council should every time to consider the judicial body of the ICC in order to fight against impunity efficiently and keep international security and peace.

International politics affect the International Criminal Court's work, and weaken its independence, effectiveness and legitimacy. In this thesis, I have exposed that the Security Council, through its referral and deferral powers, has interfered with the Court's investigations and prosecutions to work for its members' political benefits. Certainly, while referrals should be used to end impunity in non-State parties, and referrals to stimulate peace and security, they have instead led to case selectivity, limitations of jurisdictions, and political interference. In addition, through its absence of collaboration, the Council has also damaged the Court's effectiveness. This politicization has in turn lead to a legitimacy crisis, particularly in the eyes of developing countries.

To turn around this condition, serious action is required. Some will say we simply need to accept the international system with its defects and weaknesses, and admit that power will always rule. However, effective, legitimate and accountable international organizations, particularly international tribunals are vital to international rule of law. There is now a general agreement that the international community has a duty to stop mass atrocities worldwide and address international crimes. To do so, we must aim to an international system based on the rule of law.

As I have claimed, the simple existence of the UN and the ICC show the growing motivation of States to mutually join to further the public good and advance international human rights. As such, aiming to realistic and practical reforms to the UNSC-ICC connection seems not only wanted, but also reasonable.

This thesis has consequently suggested a series of reforms. In the short term, the Court and the Council should work to improved cooperation and improved follow-ups on

referrals. Potentials to do so contain developing a precise mechanism for follow-ups, creating non-compliance measures, improving communication, producing a working group for International Tribunals, improving situation-specific assessment of progress, or using purer language in deferral/referral resolutions. In addition, particular guidelines clarifying the use of referral and deferral powers should also be produced.

In the long term, it has been claimed that a full removal of the Security Council from the Rome Statute was neither possible nor wanted. In its place, reforms should address Council arrangement and veto power. Council structure should be adapted to better reflect the world's recent balance of power, by giving a voice to developing countries, as well as the economically powerful. This could in turn lead to more democratic results, and improved legitimacy. Veto power should also be controlled in cases where the Security Council is dealing with mass atrocities. Lastly, imagining a complementary role for the General Assembly in cases of UNSC failure to act can also be considered.

Despite those possible reforms, they cannot be taken as a magical solution. Sustainable change to the ICC-UNSC relationship will need chief efforts from States, the Court, the UN and civil society. They will also need mass scale consensus building. In the case of the ICC, international civil society has had a incredible influence at producing widespread support for the Court, and push for ratifications following the Rome Statute's entry into force. The Coalition for the International Criminal Court's mission is therefore far from being realized.

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