

Relationship between the ICC and UNSC - Prosecuting International Crimes

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Abstract

The International Criminal Court shares a 'complex' relationship with the United Nations Security Council especially with respect to fulfilling its role as the principal judicial organ responsible for prosecuting international crimes and maintaining international peace and security. Much of the debate largely focuses around balancing the UNSC's mandate at the international level (often guided by political factors) on one hand and ensuring impartiality of the ICC's proceedings on the other. The current debate on the complexity of the relationship between a political body such as the UNSC and a judicial body like the ICC also has a heavy bearing on the understanding and advancement of International Criminal Law jurisprudence. One of the main issues in the complex relationship between the ICC and the UNSC is of the Security Council's referral practice, which has been criticized for placing a number of limitations on the jurisdiction of the international criminal court and also placed considerable financial strain on the ICC investigations. This has also led to States Parties limiting their cooperation with the international criminal court. This paper, therefore, sheds light on the limitations of the court's jurisdiction resulting from the Security Council's power of referral under the Rome Statute.

Keywords: ICC, UNSC, Referral, International Criminal Law, Rome Statute

Introduction

The International Criminal Court (ICC) is a judicial body that has been created as a politically independent judicial institution to prosecute the most serious international crimes, including genocide, war crimes, crimes against humanity and the crime of aggression.¹ The formation of the two ad hoc criminal tribunals, International Criminal Tribunal for the Former Yugoslavia and International Criminal Tribunal for Rwanda (ICTY and ICTR) by the Security Council (the Council) is said to have paved the way for the establishment of the ICC. The issue concerning the feasibility, the ad hoc nature of the criminal tribunals along with the pressure from the global community to establish a permanent criminal court in order to bring to justice the perpetrators of heinous crimes, facilitated the diplomatic process that led to the adoption of

¹ Rosa Aloisi, A Tale of Two Institutions: The United Nations Security Council and The International Criminal Court (2013) 13 (1) International Criminal Law Review 147, 147.

the Rome Statute of the International Criminal Court in 1998.² Under the Rome Statute, the ICC can exercise its jurisdiction over individuals who have committed crimes (as defined under Article 5 of the Rome Statute) and are also nationals of State Parties to the Statute or on those individuals who carry out such crimes on the territory of State Parties.³ Hence, it is also very well under the power of the ICC to try individuals who belong to a non-State Party but commit crimes on a State that is under the ICC's jurisdiction.⁴ The principle of complementarity, however, places a limitation on the ICC's jurisdiction. Under this principle, if a State having jurisdiction over a particular crime has begun investigations or proceedings in order to prosecute an individual for his alleged crimes then; the ICC will not go ahead and prosecute such an individual.⁵ "As per the principle of complementarity, set out under paragraph 10 of the Preamble and Articles 1 (the Court), 17 (Issue of admissibility) and 18 (Preliminary rulings regarding admissibility), the ICC may only exercise jurisdiction when national legal systems are genuinely unable or unwilling to exercise jurisdiction."⁶ It is also significant to note that, the ICC only takes into consideration crimes that have been committed post July 1, 2002, i.e., after the coming into force of the Rome Statute.⁷ Although, the source of the ICC can be traced all the way to the two ad hoc criminal tribunals, there is a fundamental difference vis a vis the functioning of the ICC when compared to the two criminal tribunals. While the ICTY and the ICTR were established through a principal organ of the United Nations, the Security Council, the ICC is an independent body. In the words of former ICC Chief Prosecutor Luis Moreno Ocampo, "the job of the ICC is to conduct investigations concerning the most serious violations of international humanitarian law fairly, impartially, and present it to the judges."⁸ However, the ICC's independence as a judicial body has lately been questioned mainly because of the relationship the Court shares with the Security Council, which has the power under the Rome Statute to refer or defer situations to the ICC.⁹

Having given a very brief overview of the ICC, this paper focuses primarily on the issue of relationship between the Security Council and ICC by analyzing the influence of Security Council over the ICC's power to investigate crimes through the examples of Darfur and Libya.

Under Article 13(b) of the Rome Statute, the Security Council acting under Chapter VII of the Charter of the United Nations has the power to refer a situation to the ICC wherein crimes that fall within the Court's jurisdiction have taken place.¹⁰ In relation to the referral power, the Security Council through exercising its powers under the Statute empowers the ICC by extending its jurisdiction over non-member States but, in reality, the referral power of the Security Council has created problems for the Court in the dispensation of justice.¹¹ Issues like, the Security Council's political composition, selective approach in referring of matters and the lack of financial support for the ICC to conduct investigations have raised questions over the Court's role in the last decade.¹² Also, under Article 13(b), when the Security Council refers a situation of a non-member State to the ICC, the Court has no power to enforce cooperation on

² David P. Forsythe, *The UN Security Council and Response to Atrocities: International Criminal Law and the P-5* (2012) 34 (3) *Human Rights Quarterly* 840, 849.

³ William A. Schabas, *The International Criminal Court A Commentary on the Rome Statute* (1st edn, Oxford University Press 2010) 300.

⁴ Elizabeth C Minogue, *Increasing the Effectiveness of the Security Council's Chapter VII Authority in the Current Situations Before the International Criminal Court* (2008) 61 (2) *Vanderbilt Law Review* 647, 654.

⁵ *ibid.*

⁶ Gideon Boas, *Comparing the ICTY and the ICC: Some Procedural and Substantive Issues* (2000) 47 (3) *Netherlands International Law Review* 267, 269.

⁷ Schabas, *The International Criminal Court A Commentary on the Rome Statute* (n 3) 298.

⁸ Aloisi, *A Tale of Two Institutions: The United Nations Security Council and The International Criminal Court* (n 1) 147.

⁹ Forsythe, *The UN Security Council and Response to Atrocities: International Criminal Law and the P-5* (n 2) 843.

¹⁰ Rome Statute of the International Criminal Court 1998, art 13 (b).

¹¹ [Jennifer Trahan](#), *The Relationship Between the International Criminal Court and the U.N. Security Council: Parameters and Best Practices* (2013) 24 (4) *Criminal Law Forum* 417, 449.

¹² *ibid.*

that State under the Statute and has to depend upon the Council.¹³ The following section will outline the Security Council's involvement in the situation in Darfur and Libya thereby, assessing its role in the backdrop of some of the issues that have arisen which pose a threat to the authority of the ICC.

Security Council referral of the crimes in Darfur

For the first time, while exercising its powers under Article 13(b) of the Rome Statute, the Security Council passed Resolution 1593 and referred the situation in Darfur to the ICC in March 2005. This referral by the Security Council was seen as a big achievement by the international community considering the opposition to the ICC, mainly by the United States, a permanent member of the Security Council.¹⁴ Before going into the details of Resolution 1593, it is necessary to reflect further on the United States position in relation to the ICC. The United States major concern as regards the ICC is the likelihood of American soldiers being brought before it.¹⁵ The United States also objects to the ICC making a determination of whether a State is capable of carrying out investigation or prosecution impartially or not. As per United States, such decisions of the Court can often be the outcome of influence by political forces rather than an impartial review by the Court's mechanism.¹⁶

An opposition by one of the most powerful nations on the Security Council is a cause for major concern for the ICC because in order for the ICC to act efficiently i.e., conducting its investigations with minimum of State interference, enforcing its arrest warrants etc, the full support (technical and financial) of the United States is required.¹⁷ The United States, however, as a move against the ICC, has signed bilateral treaties (Article 98 agreements) which forbid its signatories from referring a matter related to a member of the United States army placed in the jurisdiction of ICC States Parties.¹⁸ Coming back to the Security Council's referral to the ICC, Resolution 1593 gave the ICC jurisdiction over crimes that were committed in Darfur as far back as July 1, 2002. By virtue of the Security Council, the ICC was now in a position to initiate proceedings that would bring to justice individuals responsible for the death of thousands resulting from a civil war in Sudan.¹⁹ It is to be noted that, as Sudan was not a State party to the Rome Statute, it is was only after a referral by the Security Council that the ICC gained jurisdiction to investigate and prosecute individuals in Sudan for international crimes.²⁰ The Security Council took note of the ethnic violence in Darfur only in May 2004 whereas violence had erupted in early 2003. The Council through its Resolution 1566 demanded that the Sudanese government immediately take action to stop the violence but, as a result of non-compliance by the Sudanese government in relation to Resolution 1566, the U.N. Secretary General had to establish a Commission of Inquiry to investigate the crimes in Darfur.²¹ Subsequently, the Commission in its report, made a recommendation that the Security Council

¹³ Gabriel H. Oosthuizen, Some Preliminary Remarks on the Relationship Between the Envisaged International Criminal Court and the UN Security Council (1999) 46 (3) Netherlands International Law Review 312, 339.

¹⁴ Matthew Happold, Darfur, the Security Council, and the International Criminal Court (2006) 55 (1) The International and Comparative Law Quarterly 226, 226.

¹⁵ William A. Schabas, United States Hostility to the International Criminal Court: It's All about the Security Council (2004) 15 (4) European Journal of International Law 701, 710.

¹⁶ *ibid.*

¹⁷ Minogue, Increasing the Effectiveness of the Security Council's Chapter VII Authority in the Current Situations Before the International Criminal Court (n 4) 649.

¹⁸ Corrina Heyder, The U.N. Security Council's Referral of the Crimes in Darfur to the International Criminal Court in Light of U.S. Opposition to the Court: Implications for the International Criminal Court's Functions and Status (2006) 24 (2) Berkeley Journal of International Law 650, 661.

¹⁹ Happold, Darfur, the Security Council, and the International Criminal Court (n 14) 226.

²⁰ *ibid.* 230.

²¹ Heyder, The U.N. Security Council's Referral of the Crimes in Darfur to the International Criminal Court in Light of U.S. Opposition to the Court (n 18) 651.

should refer the situation to the ICC, as serious war crimes and crimes against humanity had been committed in Darfur.²² In accordance with its powers under Chapter VII of the Charter, the Security Council under Resolution 1593 demanded “the Government of Sudan and all other parties to the conflict in Darfur to cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to the resolution.”²³

The Resolution, however, was also subject to criticism because of its wording which appeared to limit the ICC’s power in ensuring justice to the people. While the Resolution under paragraph 2, demanded the full cooperation of the Sudanese government as well as other parties to the conflict, States not party to the Statute were excluded from such an obligation.²⁴ Considering the large scale violation of human rights and the urgent need for the international community to come to aid to the affected people in the region, the Council could have imposed similar obligations on Member States of the United Nations.²⁵ The reference to Article 98 agreements in the beginning of the Resolution was also not necessary as it did not give a good impression with regard to the ICC’s jurisdiction and its overall effectiveness.²⁶ Nonetheless, as per a statement by the representative of Denmark, the mention of Article 98 agreements was purely based on fact and it did not hamper the ICC’s validity in any manner.²⁷ Furthermore, the exemption provided under paragraph 6 of the Resolution was problematic as it raised a question over the jurisdiction of the ICC.²⁸ The Resolution, in paragraph 7 mentioned that, none of the expenses will be incurred by the United Nations in relation to the referral, which was contrary to the wordings of Article 115 of the Rome Statute.²⁹ Under Article 115 of the Statute, the General Assembly is the deciding authority when it comes to providing funds in order to meet the costs of the referral.³⁰ Therefore, was the Security Council right under Resolution 1593 in deciding not to provide funding to the ICC when the authority to do so lies with the General Assembly?³¹ Considering the above problems associated with Resolution 1593, it can be concluded that, the Security Council’s concern for the rights of the affected people of Darfur was not reflected in the right spirit through the wordings of its resolution.

Security Council referral of the crimes in Libya

Condemning the violence and the use of force to silence protestors in the Libyan Arab Jamahiriya, the Security Council adopted Resolution 1970 on February 26, 2011.³² This was only the second time after the Darfur referral that the Security Council had referred a situation to the ICC prosecutor for an investigation. In less than a week within the referral by the Council, the Prosecutor after having done a preliminary examination reached a conclusion that an investigation into the situation in Libya was necessary.³³ “In a span of only three months, the Pre-Trial Chamber I issued arrest warrants against Muammar Mohamed Abu Minyar Gaddafi, Saif al-Islam Gaddafi, and Abdullah Senussi stating that there were reasonable grounds to

²² *ibid* 652.

²³ ‘United Nations Security Council Resolution 1593’ <<http://www.icc-cpi.int/NR/rdonlyres/85FEBD1A-29F8-4EC4-9566-48EDF55CC587/283244/N0529273.pdf>> accessed 13 February 2023.

²⁴ Happold, Darfur, the Security Council, and the International Criminal Court (n 14) 230.

²⁵ *ibid*.

²⁶ ‘United Nations Security Council Resolution 1593’ <<http://www.icc-cpi.int/NR/rdonlyres/85FEBD1A-29F8-4EC4-9566-48EDF55CC587/283244/N0529273.pdf>> accessed 13 February 2023.

²⁷ Happold, Darfur, the Security Council, and the International Criminal Court (n 14) 231.

²⁸ ‘United Nations Security Council Resolution 1593’ <<http://www.icc-cpi.int/NR/rdonlyres/85FEBD1A-29F8-4EC4-9566-48EDF55CC587/283244/N0529273.pdf>> accessed 13 February 2023.

²⁹ *ibid*.

³⁰ Rome Statute of the International Criminal Court 1998, art 115.

³¹ Happold, Darfur, the Security Council, and the International Criminal Court (n 14) 231.

³² ‘United Nations Security Council Resolution 1970’ <<http://www.icc-cpi.int/NR/rdonlyres/081A9013-B03D-4859-9D61-5DOB0F2F5EFA/0/1970Eng.pdf>> accessed 13 February 2023.

³³ Harry Orr Hobbs, The Security Council and the Complementary Regime of the International Criminal Court Lessons From Libya (2012) 9 (1) Eyes on the International Criminal Court 19, 20.

believe that crimes against humanity had been committed throughout Libya.”³⁴ Coming to the structure of Resolution 1970, it contained most of the deficiencies of the Sudan referral. Most importantly, the swiftness with which it was approved created a problem of absence of enough information regarding the facts for the ICC to adjudicate upon.³⁵ Similar to Resolution 1593, the Libya resolution, under paragraph 5, did not impose any obligation to cooperate on States not party to the Statute.³⁶ Under paragraph 6, the Security Council excluded non parties to the Statute from the jurisdiction of the ICC.³⁷ Resolution 1970, under paragraph 4 even limited the time period from which the ICC could investigate the crimes, i.e. 15 February 2011, thereby, raising questions regarding the intentions of the Security Council behind imposing such a limitation.³⁸ It can be argued that, like the Darfur resolution, Resolution 1970 was more political in nature. Note that, often the ICC has been criticized as an institution favoring the west and the limitations imposed by the Security Council through its resolution protecting member States of the United Nations from investigation by the ICC, clearly gave strength to that line of argument.³⁹

Enforcement of Arrest Warrants and the Issue of Non-Referral

Similar to the ICTY, the ICC also needs to rely on States for assistance and support, more importantly, in the matter of arresting suspects of international crimes.⁴⁰ The situation in Darfur is used as an example here, to reflect upon the importance of State compliance in this particular area, when it comes to enforcing the Court’s mandate.⁴¹ Subsequent to the Security Council’s referral of the Darfur situation, the ICC’s pre trial chamber issued an arrest warrant against the Sudanese President Omar Hassan Ahmad al-Bashir in 2009; however, the Sudanese government refused to cooperate with the Court and has remained defiant over the ICC’s approach since then.⁴² In light of non cooperation by the Sudanese government, it is up to the Security Council to force Sudan to comply with its obligation (Article 87(7) of the Rome Statute), but, the Sudanese government has in the aftermath of the arrest warrant tried to convince the Security Council to invoke Article 16 of the Statute, in order to halt the ICC’s case.⁴³ Through Article 16 of the Statute (deferral of investigation or prosecution), the Security Council is in a position to exercise some control over the ICC’s jurisdiction.⁴⁴ Although, the attempt of Sudan to persuade the Security Council to consider invoking Article 16 is not going to happen in the backdrop of strong opposition by the United States, however, a more pressing issue than Article 16, for the ICC is the loose approach of the Council to the situation after its 2005 referral.⁴⁵ The Security Council post 2009 has failed to take any strong action against the defiant Sudanese government even after condemning Sudan’s action openly. The lack of determination on part of the Council to take a strong measure on the issue has therefore been linked to the constant push and pull between political interests on one hand and justice on the

³⁴ *ibid.*

³⁵ Trahan, *The Relationship Between the International Criminal Court and the U.N. Security Council* (n 11) 449.

³⁶ ‘United Nations Security Council Resolution 1970’ <<http://www.icc-cpi.int/NR/rdonlyres/081A9013-B03D-4859-9D61-5D0B0F2F5EFA/0/1970Eng.pdf>> accessed 13 February 2023.

³⁷ *ibid.*

³⁸ *ibid.*

³⁹ Aloisi, *A Tale of Two Institutions: The United Nations Security Council and The International Criminal Court* (n 1) 164.

⁴⁰ Han-Ru Zhou, *The Enforcement of Arrest Warrants by International Forces: From the ICTY to the ICC* (2006) 4 (2) *Journal of International Criminal Justice* 202, 211.

⁴¹ Victor Peskin, *The International Criminal Court, the Security Council, and the Politics of Impunity in Darfur* (2009) 4 (3) *Genocide Studies and Prevention* 304, 304.

⁴² *ibid.*

⁴³ William A. Schabas, *An Introduction to the International Criminal Court* (4th edn, Cambridge University Press 2011) 186. Also see, Jennifer Falligant, *The Prosecution of Sudanese President Al Bashir: Why a Security Council deferral would harm the legitimacy of the International Criminal Court* (2010) 27 (4) *Wisconsin International Law Journal* 727, 744.

⁴⁴ Trahan, *The Relationship Between the International Criminal Court and the U.N. Security Council* (n 11) 435.

⁴⁵ Peskin, *The International Criminal Court, the Security Council, and the Politics of Impunity in Darfur* (n 41) 319.

other.⁴⁶ The examination of the Security Council's referral to the ICC gives us an understanding of the relationship between these two institutions, similarly, the study of situations that have not been referred by the Council to the ICC, highlights the conflict between politics and justice in these institutions.⁴⁷ One such example of a non referral by the Council to the ICC is the situation in Syria. A referral of the Syrian situation to the ICC has come to a halt because of the fear of an escalation in the ongoing violence since 2011 (Syrian government forces have conducted numerous military operations and carried out mass killings of its population).⁴⁸ It is to be noted that, despite the reports of the Human Rights Council and the Office of the High Commissioner for Human Rights, the Security Council is not able to adopt a resolution that will refer the situation in Syria to the [ICC](#), due to the apprehension of a veto by permanent members like, Russia and China.⁴⁹ The standstill vis a vis a referral to the ICC, is undoubtedly the result of political interests of certain members of the Council, which prevents the Council as a whole to agree upon a set of measures that could end the sufferings of the Syrian population by placing some accountability for the ongoing crimes.⁵⁰

Conclusion

In light of the above analysis, it would not be wrong to conclude that, in recent years, the Security Council has shown a mixed reaction in responding to humanitarian crisis, which in turn, has made the ICC's task of administering justice, difficult. Even though, under the Rome Statute, there is a strict separation of powers between the Court and the Council, it cannot be denied that, despite the strict wordings under the Statute, there is and perhaps always will remain a political element to international criminal justice. As stated earlier, the ICC does not have its own enforcement mechanism, which by far is its biggest structural drawback. So far, an attempt to bring together, two fundamentally different institutions to work towards a common goal, has not been very successful. However, the limitations within which the ICC is currently functioning, has to be understood, in terms of the concerns and the interests of the international community, during the drafting of the Rome Statute. Only in the backdrop of events/circumstances during the drafting period of the Rome Statute, it is possible to either appreciate/critique the working of the ICC.

One common concern during the drafting stage was that the legal functions of the ICC might interfere with the political functions of the Security Council, for example, an investigation by the prosecutor might create hindrance in the efforts of the Council to resolve conflict between States at its own level.⁵¹ As a result, the complementarity regime under the Rome Statute was brought forth as a compromise, to ease any direct conflict. It may also be argued that, this compromise has in recent times, slowed down the speed of the ICC's work. Also, in relation to Security Council's referral of situations to the ICC, a major concern of late is to prevent the abuse of veto power by the permanent members of the Council and most importantly, avoid framing of Security Council resolutions in a manner which favours few States over others. Issues like these which result in a direct conflict between the two institutions can only be resolved through cooperation but, this would also depend on how each of these institutions perceive any humanitarian crisis. Certainly, there is a need for the United Nations member States and especially the Security Council to re-work their approach towards

⁴⁶ *ibid* 316.

⁴⁷ Aloisi, A Tale of Two Institutions: The United Nations Security Council and The International Criminal Court (n 1) 164.

⁴⁸ 'Russia, China block Security Council referral of Syria to International Criminal Court' <<http://www.un.org/apps/news/story.asp?NewsID=47860#.VQxBCfmsW50>> accessed 13 February 2023.

⁴⁹ *ibid*.

⁵⁰ *ibid*.

⁵¹ Steven C. Roach, Humanitarian Emergencies and the International Criminal Court (ICC): Toward a [Cooperative Arrangement between the ICC and UN Security Council](#) (2005) 6 (4) *International Studies Perspectives* 431, 435.

humanitarian problems within the framework of the Rome Statute, in a way, which addresses the issues like, abuse of veto power etc., in order to have an effective response to humanitarian emergencies.

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